Chapter Four: Confessions and Statements

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I. Introduction

Typically, the police interrogate those they have arrested. Statements made by accused persons during police interrogations may be used as evidence of guilt during the trial. However, because of the nature of some mental disabilities, there is a grave risk that individuals with mental disabilities will respond to standard police interrogation methods by making false admissions of guilt. Because these statements may be used as evidence, an accused person who has a mental disability can be placed at risk as a result of making statements in response to police questions.

There are some common law protections regarding confessions, voluntariness and persons in authority. There are also protections under the *Charter of Rights and Freedoms.*[1] The right to remain silent and the right to be informed about one's right to counsel are two rights that impact upon the conduct of interrogations. This chapter discusses some of these protections. It looks at the requirement that capacity and voluntariness must be present before a statement made to a person in authority will be admitted in evidence. Next, it examines the *Charter* rights to counsel and to remain silent in the context of an interrogation. It briefly outlines whether a mentally disabled person may waive these rights. The American approach to confessions by mentally disabled persons, including the waiver of rights, is also considered.

Finally, this chapter discusses the mental disorder provisions of the *Criminal Code* that provide some guidelines as to the admissibility of statements made to medical experts during psychiatric assessments. Although there are some protections built into these provisions, a client must make any statements to authorities with caution.

II. ADMISSIONS, STATEMENTS, THE RIGHT TO REMAIN SILENT AND OTHER *CHARTER* RIGHTS

A. General Overview

There are two points at which an accused may make statements that may cause him/her difficulty in the criminal justice system. First, statements made by an accused before trial may be used against the accused at trial. Such statements include statements made to police during questioning, to other witnesses and to psychiatric experts who examine the accused prior to trial.

[1] Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (hereinafter *Charter of Rights or Charter*).

Second, the accused may make damaging statements while testifying.[2] The accused is entitled to some protections afforded by the criminal justice system under these circumstances.

1. Protections at Trial

In 1982, the advent of the *Charter of Rights* had the effect of entrenching and broadening some common law rights that previously existed. The right to remain silent is affirmed in section 7 of the *Charter*. Section 7 of the *Charter,* which provides that:

> [e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The courts have interpreted this section of the *Charter* as protecting the right of the individual to remain silent. This would include the right to remain silent before trial (e.g., when being questioned by the police as well as the right to choose not to testify.)[3]

Under subsection 11(c) of the *Charter*, an accused has the right not to testify against him/herself during trial. Section 11(c) of the *Charter of Rights* provides:

> 11. Any person charged with an offence has the right
> ...
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

This means that the accused has the right not to take the witness stand. However, should the accused take the stand to testify in his/her own defense, he/she may be cross-examined. She/He cannot then refuse to answer questions that might implicate him/her.[4] The underlying principle is that the accused is entitled to enjoy this protection because the Crown must first present a case for the accused to meet.[5] In other words, in every case the accused will not be punished for refusing to testify, including those cases where the Crown may not be able to prove that the accused has

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[2] For the sake of clarity, when we refer to confessions, we mean statements made to persons such as police officers. When we refer to statements, we refer to any other statement made by the accused (for example, to a witness).

[3] See: *R v Whittle*, [1994] 2 SCR 914 (SCC) (hereinafter *Whittle); R v Broyles* (1991), 9 CR 4th 1 (SCC) (hereinafter *Broyles*); *R v Hebert* (1990), 77 CR (3d) 145 (SCC) (hereinafter *Hebert).*

[4] *R v Gauthier* (1975), 33 CRNS 46 (SCC). Compare this with the situation in the United States, where under the 5th Amendment to the United States Constitution, the accused can refuse to answer particular questions once he/she has taken the witness stand.

[5] *R v Dubois,* [1985] SCJ No 69. (*sub nom Dubois v R*) (hereinafter *Dubois*).

indeed committed the crime.

Section 13 of the *Charter* provides the additional protection of not having incriminating statements from previous proceedings used against an accused at the current trial. Section 13 of the *Charter* provides that incriminating statements made by a witness during one proceeding cannot be introduced at a later proceeding in order to incriminate the witness. However, statements made by a witness when testifying at one proceeding can be introduced in later proceedings for the purpose of impeaching the witness's credibility. For example, statements made in earlier proceedings can be introduced to show a contradiction between what the witness is saying now and what the witness said in previous hearings.[6] In addition, recent caselaw indicates that *Charter* s 13 is not available to protect an accused who chooses to testify at his/her retrial on the same charges.[7] The Supreme Court of Canada (SCC) concluded that the purpose of *Charter* s 13 is to protect individuals from being indirectly compelled to incriminate themselves. When a witness who is compelled to give evidence in a proceeding is exposed to the risk of self-incrimination, the state offers protection of the subsequent use of that evidence against the witness in exchange for that witness's testimony.[8] Further, if the accused testifies freely and their first and second trials, the compulsion is missing, and thus the accused's *Charter* s 13 rights were not violated by the Crown's cross-examination.[9]

Although these protections are very important, the accused is likely to be more affected by statements, declarations or confessions made by her/him before the trial has started.

2. Protections before Trial

An accused's confession to police or others in authority may become important evidence in a trial. In Canada, a confession is any statement made to a person in authority, whether the person admits or denies guilt. A confession may be oral or written. Sometimes, even gestures—such as nodding in agreement to a remark made by someone else may amount to a confession.[10]

At common law, the confessions rule and the right to remain silent evolved to protect

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[6] *R v Kuldip* (1990), 1 CR (4th) 285 (SCC).
[7] *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609 (hereinafter *Henry*).
[8] *Henry*, at para 22.
[9] *Henry*, at paras 42-43. See also: *R v Nedelcu*, [2012] 3 SCR 311, 2012 SCC 59.
[10] PK McWilliams, *Canadian Criminal Evidence*, 3d, Vol 2, (loose-leaf), (Aurora, Ont: Canada Law Book, 1998) at 15-7 (hereinafter McWilliams).

accused from coercion by the state. The confessions rule requires that any statement made to a person in authority must be voluntary. The detained person is also entitled to choose whether or not to make any statement to the authorities. The right to remain silent protects the accused from coercion and preserves the accused's privilege not to incriminate him/herself at trial. Once at trial, the accused has the right not to testify. However, if the accused has not remained silent before trial, he/she may have to testify in order to refute any statement he/she made previously. In that way, if an accused chooses to speak rather than to remain silent before trial, for all practical purposes, he/she thereby gives up his/her right to refuse to testify.

There are other protections that may touch upon the area of confessions outlined in the *Charter.* Section 10 sets out the rights of the accused upon arrest or detention. The accused is to be informed promptly of the reasons for his/her arrest or detention (10(a)); he/she has the right to retain and instruct counsel without delay and to be informed of that right (10(b)); and he/she has the right to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful (10(c)).[11] Further, the right to remain silent has recently been found to be one of the principles of fundamental justice in section 7.[12]

Some authors argue that recent developments in the Supreme Court have resulted in the common law confessions rule being totally absorbed into the *Charter* right to remain silent (s 7).[13] However, because there are different remedies available under the *Charter* than at common law, the confessions rule is discussed separately from the *Charter* right to remain silent (below).

There are some important differences between the practical effects of the confessions rule as opposed to the *Charter* right to remain silent. For example, when the Crown seeks to rely on an accused's confession at trial, the defense may seek to have the statements excluded on the ground that they were taken under conditions that constitute breaches either of the *Charter of Rights,* of the common law rules or of both. Where the defense relies upon the *Charter* to exclude the evidence, it has the burden of proving that there has been a breach. Once the defense proves that there has been a breach of the accused's *Charter* rights, the judge has the discretion to decide whether or not she/he should exclude the evidence under *Charter* subsection 24(2). On the other

[11] A hearing to determine the legality of one's continued detention.
[12] *Whittle*; *Broyles*; *Hebert*.
[13] J. Watson, "Talking About the Right to Remain Silent" (1991) 34 Crim Law Q 106 at 115.

hand, under the confessions rule, the Crown has the burden of proving beyond a reasonable doubt that the statement was made voluntarily. If there has been no breach by the officials in taking the statement then this burden is fulfilled. If the Crown fails to prove that there was no breach of the confessions rule, the evidence is automatically excluded.[14]

Unfortunately, during questioning before trial, a person with a mental disability may make a statement about her/his alleged crime without appropriate legal advice, without understanding the reasons for her/his arrest or without understanding the legal effect of making such a statement. According to A.G. Henderson:

> …it is a matter of common observation that a high proportion of persons apprehended and charged by the police are suffering from some mental incapacity. It is also a matter of common observation that a high proportion of these persons are interviewed by police and provide statements that subsequently become evidence against them".[15]

The *Charter* right to counsel, the right to remain silent, and the confessions rule have implications for the mentally handicapped or mentally ill client. First, a suspect must be able to understand why he/she has been arrested and to consult a lawyer as to the legal effects of any actions he/she might take. Second, the person must be able to choose to exercise his/her rights knowing the implications. Third, if a person decides to waive his/her *Charter* rights, such as the right to retain and instruct counsel, he/she must do so knowingly and voluntarily. Fourth, if a person decides to make a confession, he/she must do so voluntarily. Clearly, mental handicap may impair a person's ability to understand the rights explained by police or other officials. It may also affect his/her ability to understand the consequences of some of the decisions he/she makes about his/her rights. There are some recent developments in the area of the obligation of the authorities to explain *Charter* rights to persons, including those with mental disabilities.[16]

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[14] McWilliams, at 15-6.

[15] AG Henderson, "Mental Incapacity and the Admissibility of Statements" (1980), 23 Crim LQ 62 at 62. See also Canadian Criminal Trial Lawyers Association, "How to demystify the Prosecutions/Crowns Efforts of Minimizing the Severity of your clients Mental Retardation/Intellectual Disability", (1998) Edmonton, Alberta (hereinafter Edwards) where the author William J. Edwards asserts that confessions made by individuals with intellectual disabilities to the police are not likely to be voluntary because of their desire to please authority figures.

[16] For example, see *R v Ly*, [2012] BCJ No 683, 2012 BCSC 504, where the BC Supreme Court found a violation of s10(b) of the *Charter* because of the nine-hour delay to convey the reasons for arrest in a language that an accused who did not speak English could understand.

Unfortunately, the common law principles regarding confessions are not well settled, especially with regard to individuals whose capacity to make a statement is affected by a mental disability. Because in Canada we have focused on whether there was coercion by persons in authority in obtaining confessions, there has been little recognition, until recently, of the basic problems of understanding and lack of choice or volition that may be experienced by the mentally disabled accused. There are two kinds of problems that arise as a result. First, there is a failure to recognize that methods of interrogation that may pass muster for most accused persons may be wholly inappropriate for a person who has disabilities. Second, there is a failure to recognize that an accused may respond poorly to the interrogation process because of the difficulties that arise within his/her own thought processes or emotional state, not because of the conduct of the authorities who question the accused.

McWilliams suggests that before the court examines whether a statement was voluntary, the issue of the accused's capacity to make a statement should be raised by his/her lawyer.[17] Once the accused's capacity has been established, it may be necessary to examine how their mental disability affects their suggestibility or malleability by persons they perceive to be in authority. Unfortunately, the issues of voluntariness and capacity are often confused and are not clearly separated in the case law. However, they will be discussed separately.

B. Interrogation Techniques

1. General

Before embarking on a discussion of the law surrounding the actual confession to a person in authority, it is necessary to examine some basic techniques utilized by police officers and other interrogators in order to elicit confessions or statements. An examination of interrogation techniques may assist in outlining the difficulties encountered by those with mental handicaps or mental illnesses.

Interrogation has been defined as the “formal and official examination of a person by the use of [questioning] and persuasion for the purpose of inducing him/her to reveal intentionally

[17] McWilliams, at 15-29.

concealed information, usually self-incriminatory in nature."[18] Typically, the interrogation process begins with a request or demand that the person cooperate with the police in some way and culminates with a formal written confession.[19] Interrogations are much more formal than interviews and are usually performed at the police station or at some location controlled by the police. They usually involve prolonged questioning. Police usually conduct informal interviews at the beginning stages of an investigation and once a suspect has been identified, he/she will then be interrogated for the purposes of eliciting a confession (or for other purposes).[20]

The primary goals of interrogation are to: ascertain when and how the crime was executed, to find out how many individuals were involved and what part each of them played; obtain the necessary data for future interrogations as needed; and narrow the search for the guilty person by weeding out those who are actually innocent.[21] The secondary goals of interrogation may include: uncovering any pattern of criminal activity that involves the suspect or her/his associates or discovering where any of the proceeds of the criminal behaviour have been stored.[22]

Over time, there have been a number of manuals written about effective techniques for interrogation of suspected criminals.[23] The long-standing manual, referred to as the "Reid Technique", which was in vogue for many years, has received harsh criticism from both courts and academics.[24] The following description is included for the purposes of historical information and so

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[18] R Royal & S Schutt, *The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide* (Englewood Cliffs, NJ: Prentice-Hall Inc, 1976) at 116, as cited in RSM Woods, *Police Interrogation* (Toronto: Carswell, 1990) at 2 (footnote 3) (hereinafter Woods).

[19] Woods, at 2.

[20] Woods, at 2-3.

[21] RJ Wicks, *Applied Psychology for Law Enforcement and Correction Officers* (New York: McGraw-Hill Book Company, 1974) at 136 (hereinafter Wicks).

[22] Wicks, at 137.

[23] The police departments of each Canadian city have confidential procedure manuals. In some cities, such as Edmonton, police lawyers are utilized to write procedural manuals. In addition, there are specific manuals written about effective interrogation, such as F Inbau, J Reid & J Buckley, *Criminal Interrogation and Confessions*, 3d (Baltimore: The Williams and Wilkins Company, 1986) (hereinafter Inbau, Reid and Buckley). Various police departments relied upon this manual. More recently, the PEACE technique has replaced the Reid technique (discussed below).

[24] See: *R v Chapple*, 2012 AJ No 881, 2012 ABPC 229; *R v Thaher*, 2016 ONCJ 113 (CanLII); *R v Visciosi,* [2006] OJ No 3251 (SCJ) at paras 14-15. The technique is inherently coercive and for that reason has been the subject of considerable judicial and academic criticism: *R v Barges,* [2005] OJ No 5595 at paras 86-90; *R v MR,* [2015] OJ No 3885 (CJ) at paras 47-49; *R v CT,* [2015] OJ No. 2905 (CJ) at paras 21-22; *R v S (MJ)* (2000), 32 CR (5th) 378 (Alta Prov Ct) at paras 39-41; T.E. Moore and C.L. Fitzsimmons, "Justice Imperiled: False Confessions and the Reid Technique" (2011), 57 CLQ 509; B. Snook *et al.,* "Reforming Investigative Interviewing in Canada" (2010), 52 *Canadian J. Criminology & Crim. Just*. 215; S.M. Kassim, S.C. Appleby and J. Torkildson Peerillo, "Interviewing Suspects: Practice, Science, and Future Directions" (2009), 15 *Legal and Crimininological Psychology* 39; B. Gallini,

that lawyers may have a tool to challenge an interrogation if the Reid technique has been used. Woods summarizes the advice provided in these manuals into three general categories: preparation, setting and techniques.[25] The manuals recommended several steps for effective preparation—such as visiting the scene of the crime and reading investigative reports.[26] They also recommended that the police interrogate the suspect in a location that is not familiar to him/her. Because people feel more secure in familiar surroundings, removing them deprives them of their sense of security as well as the support of their family and friends.[27] Once at the police station, the manuals recommended that suspects be interviewed in interrogation rooms, which are private and which minimize distractions.[28] This allowed the interrogator to maintain control over the information that was available to the suspect and permitted the interrogators to maintain a level of pressure on the suspect.[29]

Most older interrogation manuals provide two categories of questioning techniques: psychological techniques and tricks. Psychological techniques involved "manipulating the suspect's perception of either himself or his actions or his perception of how others see him, to persuade him to talk to his interrogator".[30] Tricks were used to convince the suspect that she/he did not need to worry about talking or that she/he might as well talk since there was no chance of escaping the consequences in any event.[31]

Interrogators were advised to look at a variety of factors when considering which techniques to use. The factors included the suspect's age, sex, education, social status, previous involvement in the criminal system, type of offence, other suspects and the amount of evidence

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"Police 'Science' in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions" (2010), 61 Hastings L.J. 529; Douglas Quan Postmedia News (11 September 2012) "Alberta judge slams use of 'Reid' interrogation technique in Calgary police investigation", online: < http://www.calgaryherald.com/news/Alberta+judge+slams+Reid+interrogation+technique/7223614/story.html>. But see: *R v Viszlai,* 2015 BCCA 495, where the BCCA refused to intervene to set aside a conviction for historical sexual offences based on the police using the Reid technique. The trial judge had found that the statement was voluntary and there was no evidence of oppression or other basis to find that the accused's will had been overtaken.

[25] At 4 - 6.

[26] Woods, at 4.

[27] Woods, at 5.

[28] Woods, at 5.

[29] Woods, at 5.

[30] Woods, at 6. See also, Wicks, at 142 - 145.

[31] Woods, at 6.

against the suspect.[32] Manuals generally advised that people who responded best to techniques that involved sympathy for the suspect's current situation included people who were inexperienced with the criminal system, people who were suspected of violent crimes, and well-educated people of average or above average social status.[33] On the other hand, older people, those experienced in the criminal justice system, or those who are charged with offences committed for financial gain were usually thought to be more persuaded by techniques that appealed to their common sense (e.g., pointing out the benefits of cooperating with the police).[34] Tricks worked better in the first category than the second.[35]

Woods summarized several psychological interrogation techniques. First, there was the technique of convincing the suspect that he/she should not worry about talking because he/she did nothing wrong. The interrogator might suggest that the offence was an accident (e.g., the victim died when her/his gun went off accidentally). The interrogator might have suggested that because the suspect is so intelligent, he/she must have a good reason for committing the offence and then asks the suspect to explain what happened. The interrogator might have suggested an acceptable explanation for the conduct. The suspect might have been encouraged to talk if the interrogator blamed the victim, someone else or society for the suspect's conduct. Finally, the interrogator might have suggested that everyone is doing the offence, thereby minimizing its importance.[36]

A second psychological technique involved convincing the suspect that she/he would be better off telling the police everything as soon as possible.[37] The police might have pointed out that the first person to speak is the one that is believed. This approach worked only when there were other suspects or witnesses. Some manuals recommended that the interrogator mention that there would be less publicity if the suspect confessed right away, although this may have been considered an inducement and contrary to the confessions rule.[38] Finally, with young or first time offenders, the interrogator might have suggested that it was not too late to reform and that the

[32] Woods, at 6.
[33] Woods, at 7.
[34] Woods, at 7.
[35] Woods, at 7.
[36] Woods, at 7-9.
[37] Woods, at 9.
[38] Woods, at 10.

suspect should start the reform process by confessing.[39]

A third category of psychological technique involved manipulating the ego of the suspect.[40] The interrogator might have attempted to deflate the suspect's ego by suggesting that he/she was not smart enough to have committed the offence. The suspect may have responded by telling the interrogators exactly how she/he did indeed commit the crime. Conversely, the interrogator may have tried to inflate the suspect's ego by flattering him/her for the way she/he carried out the crime.[41] Finally, the interrogator might have appealed to the suspect's conscience or moral code. For example, if the suspect was religious, one could have appealed to his/her religious beliefs.[42]

A fourth psychological technique that also incorporated some trickery was the "Good Cop—Bad Cop" routine.[43] One interrogator assumed the role of the "bad cop" and the other the role of the "good cop". The job of the bad cop was to make the suspect feel uncomfortable, perhaps threatened. After making his/her displeasure with the suspect clear by various techniques, the bad cop left the room. The good cop then came in, looking sympathetic, and apologized for his/her partner's behaviour and asked the suspect whether he/she would like to talk to the good cop before the bad cop returns. Again, the conduct of the bad cop may have come too close to being a threat and therefore infringed the confessions rule.[44]

A fifth psychological technique was called extension.[45] Using this technique, the interrogator started by casually asking the suspect whether he/she ever thought of committing the crime in question. The interrogator continued to subtly question the suspect until she/he admitted to planning the offence and then to the offence itself.[46]

A sixth psychological technique recommended in only one manual involved intense psychological manipulation of the suspect, who was alternatively treated very poorly and very well.

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[39] Woods, at 10.
[40] Woods, at 10.
[41] Woods, at 10.
[42] Woods, at 11. See *Brewer v Williams,* 430 US 387 (1977), where a deeply religious man suspected of sexually assaulting and murdering a young girl on Christmas Eve was convinced to direct the police to her body and to confess by an appeal to his faith ("the little girl should be entitled to a Christian burial").
[43] Woods, at 11.
[44] Woods, at 11 to 12.
[45] Woods, at 12.
[46] Woods, at 12.

This technique may very well have infringed the *Charter* and the confessions rule.[47]

There are four techniques that were under the category of "tricks". First, the interrogator exaggerated the seriousness of the crime. The idea was to persuade the suspect to confess to a less serious charge. Second, the interrogator may have pretended that there was much more evidence against the suspect than was truly the case. Faced with this situation, the suspect may have decided that it would be futile not to confess. Third, if there were other suspects, interrogators would play one against the other by holding them in separate cells and by diminishing their confidence in the other suspect's ability to remain silent. Finally, the police may have used an undercover agent in the accused's cell who gained the suspect's confidence and elicited a confession. In light of the *Hebert* decision, discussed below, this technique likely would have to have been dramatically modified.

2. PEACE Interview Technique

Since the "Reid Technique" has largely been disproven as ineffective, a new interrogation technique, which originates in the United Kingdom and Australia, has gained popularity. It is called the PEACE technique. This technique evolved from the notion that interrogations had been guided by a "get tough" philosophy, such that abuse and manipulative practices were viewed as necessary to seek the truth.[48] In particular, the "Reid Technique" was found to increase the chances of false confessions, especially by vulnerable individuals (e.g., youths, mentally ill, intellectually disabled).[49]

PEACE is an acronym for:

- Preparation and planning
- Engage and Explain
- Account
- Closure and
- Evaluation[50]

The term "interrogation" is replaced with "investigative review" because that is a more

[47] Woods, at 13.
[48] B. Snook, J. Eastwood and W.Todd Barron, "The Next Stage in the Evolution of Interrogations: The PEACE Model" (2014) 18 Crim L Rev 219 at 220 [Snook et al].
[49] Snook et al at 227.
[50] Snook et al at 228.

ethical and humane approach.[51] Reviewers indicate that PEACE is a more ethical and effective way of interviewing detainees.[52]

At the preparation and planning stage, interviewers prepare a written plan that sets out how information obtained from the interviewees will help with the investigation.[53] At the engaging and explaining stage, the interviewer will engage the interviewee in conversation and explain what will happen during the interview.[54] During the account-information gathering stage, the interviewee is first asked whether he or she committed the crime. If the interviewee says "yes", the interviewer asks for an account of the events that transpired. If the answer is "no" interviewees are asked for information about their whereabouts during the material time frame.[55] Next, the interviewer will open, probe and summarize various topics of relevance.[56] Interviewers consider whether the given information is consistent with or contradicts the available evidence.[57] At the closing and evaluating stage, interviewers summarize the main points of the interview, provide the interviewee with the chance to correct or add any information and explain what will happen in the future. At all times, the manner should be professional and courteous.[58]

The Honourable René J. Marin compares the PEACE and Reid Techniques, and notes that "the strict application of the Reid technique will not yield sustained success."[59] He cites the example of a videotaped interview of a person who was "clearly mentally challenged and confused" and who confessed under confrontational tactics, false evidence and fatigue.[60] The accused person was overwhelmed into admitting to a crime. The consequences of using these tactics can mean that evidence will be excluded under *Charter* s 24(2), or compensation may be claimed against the Crown and the police. Further, persons who are wrongfully convicted can appeal for a Ministerial Review under *Criminal Code* s 696.1, even after they have served a full

[51] Snook et al at 228.
[52] Snook et al at 220.
[53] Snook et al at 230.
[54] Snook et al at 230.
[55] Snook et al at 231.
[56] Snook et al at 232.
[57] Snook et al at 232.
[58] Snook et al at 232.
[59] Honourable René J. Marin, "Police Interrogation: The PEACE and Reid Techniques" (Fall 2016) Canadian Police Chief Magazine 14 (hereinafter Honourable René J. Marin).
[60] Honourable René J. Marin, at 14.

sentence, and these cases often result in the receipt of large awards.[61]

Honourable René J. Marin points to the interview of the former Colonel Russell Williams as an example of how police questioning should be conducted—without exaggeration or lies; just the facts.[62] In his mind, it could be said that this questioning resembled the PEACE technique. He concludes that the key to an effective interview is observing the requirements of the *Charter of Rights*, which may be limited when some aspects of the Reid technique are used.[63]

3. Interrogation Techniques, Mentally Disabled Suspects and False Confessions

Because the ultimate purpose of interrogation is to elicit a confession, the techniques that were recommended by various interrogation experts focused on how to go about obtaining a confession that would stand up in court. Not much information was provided in the former techniques about mental disabilities. In fact, Inbau, Reid and Buckley pointed out:

> The fact that a suspect is mentally deficient or mentally ill will not necessarily render him incapable of making a confession that will meet the requirement of admissibility. The same is true of such conditions as intoxication, drug addiction, and other disabilities. The degree and extent to which they have affected the mental processes relevant to a suspect's capacity to understand his present predicament and to relate with reliability the happening of an event will depend upon a court's consideration of the totality of the circumstances rather than upon any particular factor.[64]

Most interrogation manuals were not particularly focused on how to modify interrogation techniques in order to allow for mental handicaps. However, some of the advice to prospective interrogators is instructive because it may illustrate the (then) general attitude of interrogators towards suspects who may have been mentally disabled.

It is quite evident that some interrogation techniques were particularly difficult for persons with mental disabilities. Indeed, Inbau, Reid and Buckley cautioned investigators that mental disabilities may cause a person's behaviour to be distorted or misinterpreted during questioning.[65]

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[61] Honourable René J. Marin, at 14.
[62] Honourable René J. Marin, at 14.
[63] Honourable René J. Marin, at 16.
[64] Inbau, Reid and Buckley, at 324.
[65] Inbau, Reid and Buckley, at 57.

This could affect the interrogator's assessment of the suspect's possible innocence or guilt. They advised that interrogators should be highly sceptical of the behaviour of persons with a psychiatric history or psychopathic traits. A person with a mental disability who has committed a crime may seem to be innocent; an innocent person with psychological difficulties may seem to be guilty.[66] Further, a person's level of intelligence may also affect the interpretation of her behaviour.[67]

The Reid technique literature noted that there was an increased danger of false confessions, either as a result of misuse of interrogation techniques or because the person's mental illness caused him/her to confess.[68] Indeed, even where a suspect did not have a mental disability, there was a danger that certain interrogation techniques elicited false confessions.[69] The unfamiliar isolated setting of most interrogations and the lack of control over what is happening induce stress and even shock in some persons.[70] A Canadian study found that being arrested has a significant impact on people, rendering them docile and willing to do anything they were told to do by the police.[71] Because they are in such a state, people may be willing to agree to anything, including accounts of what happened that are not accurate.[72] The confinement and lack of sleep that often goes with an arrest also contribute to the stress level and the malleability of the suspects.[73]

The psychological atmosphere surrounding interrogation may cause suspects to make false confessions for a variety of reasons. People may feel obligated to confess in order to punish themselves because they feel guilty for other offences or actions. Further, a person's memory of events can be manipulated by carefully constructed questions.[74] If a suspect finds her/himself disagreeing with everyone around her/him, he/she might yield to the majority opinion even if this means misrepresenting what he/she believes.[75] Whether the suspect was in custody, the time of

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[66] Inbau, Reid and Buckley, at 57.
[67] Inbau, Reid and Buckley, at 58.
[68] Inbau, Reid and Buckley, at 197.
[69] Woods, at 15.
[70] Woods, at 16.
[71] Erickson and Baranek, *The Ordering of Justice* (Toronto, Ont: Butterworths, 1982) at 131 - 137, as cited in Woods, at 16, note 53.
[72] Woods, at 16.
[73] Woods, at 16.
[74] Woods, at 17.
[75] Woods, at 17-18.

day, the type of questions and the interrogation techniques employed may all affect confessions.[76] Thus, both the interrogation conditions and certain interrogation techniques can cause false or inaccurate confessions.[77]

The John Howard Society noted that the likelihood of false confession is increased when the person being interrogated has a mental handicap. For example, some mentally handicapped persons, including those with brain injuries such as FASD, are very compliant when confronted with authority. This is particularly the case for those individuals who have been sheltered from society and have relied upon parents or other caretakers to tell them what to do.[78] Research has indicated that some mentally handicapped adults confess to crimes while under interrogation even though they are innocent.[79] Their acquiescent tendencies are compounded by the stress and anxiety of being arrested and interrogated.[80] Further, mentally handicapped persons often have a short-term memory deficit that will put them at a disadvantage when being interrogated about events that may have occurred in the recent past.[81]

Inbau, Reid and Buckley recommended that when interrogating the "unintelligent, uneducated criminal suspect with a low cultural background", the interrogator should question the person like a "child who has committed a wrongful act".[82] The usual indications of deceitful behaviour are not present and therefore this person has the capacity to deceive an inexperienced investigator.[83] The investigator is advised to speak in very simple terms, using lively tones and gestures, to refrain from derogatory remarks about the race of the suspect, and to maintain a very

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[76] Woods, at 19.

[77] The Innocence Project in New York City reports that of the first 130 post-conviction exonerations based on DNA evidence, 35 (27 per cent) involved false confessions. [See: Dwyer, Jim, Peter Neufeld, and Barry Scheck. *Actual Innocence: When Justice Goes Wrong and How to Make It Right*. New York: New American Library, 2003]. The problem may or may not be as extensive in Canada as it is in the United States; however, it is clear that the Canadian commissions of inquiry have focused on the issue and made recommendations concerning the taking of statements from suspects and witnesses: *Report on Prevention of Miscarriages of Justice* by FPT Heads of Prosecutions Committee, 2004, p 58 (hereinafter *Report on Prevention of Miscarriages of Justice*).

[78] The Calgary John Howard Society, *The Mentally Handicapped Offender: A Guide to Understanding,* 1983 at 32 (hereinafter John Howard Society).

[79] CV Bakeman, "The Developmentally Disabled Offender and Community Based Services in Illinois" 1 Offender Rehabilitation 1 (1976 Fall), as cited in John Howard Society, at 42.

[80] John Howard Society, at 42.

[81] John Howard Society, at 42.

[82] Inbau, Reid and Buckley, at 199.

[83] Inbau, Reid and Buckley, at 199.

positive attitude.[84] However, it should be noted that these comments are not calculated to protect against false confessions, but are given in the context of tactics and techniques for eliciting confessions.

Mentally ill individuals would also be affected by (the former) interrogation techniques calculated to elicit confessions. For example, their illness or disability may cause them to be more willing to confess, even if the confession is false.[85] Because of the illness or disability, they may be more vulnerable to the various interrogation techniques or to the setting and this may also cause them to falsely confess.

Inbau, Reid and Buckley suggested that one method of checking the authenticity of a confession that may be the result of a mental illness was to refer to fictitious aspects of the crime and see if the suspect will adopt them as facts relating to the alleged crime.[86] This presupposed, however, that the investigator noticed that a possible mental disability that causes concern about the confession existed. In many cases, individuals are able to hide mental disabilities and may therefore not be recognized as having a difficulty at the time of the confessions.

Clearly, certain interrogation techniques may cause difficulty for persons with mental disabilities. Since the circumstances surrounding the making of confessions are stressful, even people without mental disabilities may make false confessions or be manipulated by certain psychological techniques or tricks. The added circumstance of having a mental disability may render the suspect extremely vulnerable to these techniques.

4. Discrimination and Interrogation Techniques

Mentally disabled persons may require special treatment during interrogation in order not to be treated with discrimination. If they are treated without special consideration, it may be possible to argue that they have been discriminated against under the *Charter of Rights* or under provincial or federal human rights legislation. If a police officer does not alter her/his interrogation style to accommodate for a suspect's mental disabilities, she/he may be discriminating against that person.

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[84] Inbau, Reid and Buckley, at 199.

[85] *American Bar Association Criminal Justice Standards on Mental Health* (ABA, 2016) (hereinafter *ABA Criminal Justice Standards on Mental Health)* Standard 7-5.4.

[86] Inbau, Reid and Buckley, at 198.

Section 15(1) of the *Charter of Rights* reads:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Mental disability is an enumerated ground for protection under this section. "Mental disability" includes a wide range of disorders, injuries, illnesses, conditions and other dysfunctions.

The *Charter of Rights* applies to police officers in their law enforcement activities. Because they are considered to be government officials who exercise government functions, the police are subject to the *Charter of Rights.*[87] "Law" in s 15(1) is not limited to legislation;[88] it includes legislation, the application of laws, the administration of laws, programs and activities of the government. The entitlement to equality "before and under the law" and to "equal protection and benefit of the law" include the manner in which a law is interpreted and enforced by those charged with its operation.[89] Therefore, the manner in which a police officer interrogates an accused in the exercise of his legislative duties may be subject to *Charter* scrutiny.

In order to be successful in a *Charter* subsection 15(1) argument, the claimant must show that he or she has been deprived of a benefit that others are granted, or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of subsection 15(1). The two-part test set out in 2011 by the Supreme Court in *Withler* is:

1. Does the law create a distinction that is based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[90]

The claimant must establish that the law has drawn a formal distinction between the claimant and others based on a personal characteristic or failed to take into account the claimant's

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[87] See: s 32 of the *Charter of Rights, Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 72 DLR (4th) 225 (Ont Gen Div) where the court affirmed the Ontario HC decision with respect to the claim against the police for *Charter* violations; *R v Wilson*, [1982] AJ No 545 (Alta Prov Ct) and *R v Kaiswatum*, [2002] SJ No 46.
[88] *McKinney v University of Guelph* (1991), 2 CRR (2d) 1, at 33 (SCC) (hereinafter *McKinney*).
[89] *Stoffman v Vancouver General Hospital* (1991), 76 DLR (4th) 700 (SCC) at 239.
[90] *Withler v. Canada (Attorney General),* 2011 SCC 12.

disadvantaged position within Canadian society. This results in substantively different treatment between the claimant and others on the basis of one or more personal characteristics.[91] Once the claimant establishes unequal treatment or the differential impact of equal treatment, the court will inquire into whether he/she was subject to differential treatment on the basis of enumerated or analogous grounds. The court will then inquire into whether the differential treatment/distinction amounts to discrimination in a substantive sense, taking into account the purpose of section 15(1), which is concerned with preserving human dignity.[92] In *Andrews,* MacIntyre J. defined "discrimination" as:

> [A] distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[93]

An argument may be made that certain interrogation techniques commonly utilized by police officers would have the effect of imposing a disadvantage on a mentally disabled offender.

Discrimination can be direct discrimination or adverse effect. Adverse effect or impact means that the provision is neutral on its face, but it has an adverse impact on members of one group.[94] Because an individual with a mental disability may have certain characteristics that render her/him more vulnerable to interrogation techniques, it may be argued that standard techniques have an adverse impact on this individual. Thus, although there is no intention to discriminate against mentally disabled persons by utilizing certain practices, they may suffer a disadvantage as a result of the adverse impact of the standard questioning procedures. This disadvantage could have very serious consequences, including eventual incarceration.

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91 *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 297 (hereinafter *Law v Canada*).
92 *Law v Canada.*
93 *Andrews,* at 228. See also: *Vriend v* Alberta (1998), 156 DLR (4th) 385 (SCC); *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Eaton v Brant County Board of* Education (1996), 31 OR (3d) 574 (SCC); *Miron v Trudel,* [1995] 2 SCR 418; *Egan v Canada*, [1995] 2 SCR 513; *Thibaudeau v Canada,* [1995] 2 SCR 627.
94 *McKinney*, at 35.

Once it is established that there has been discrimination under *Charter* subsection 15(1),[95] the government (police) may rely upon section 1 to justify the discrimination. Section 1 reads:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, in order to show that the contravention of the *Charter* is a reasonable limit under s 1, the defender must show that it is "prescribed by law". If the contravention is not prescribed by law, then no amount of justification will save it. Clearly, "prescribed by law" includes statutes and regulations adopted pursuant to statutes.[96] However, policies, practices and memoranda are not "prescribed by law".[97] It may therefore be argued that the police could not rely upon section 1 to save their interrogation techniques from being found discriminatory.

Even if interrogation techniques are prescribed by law, the defender of the practice (the police) would have to show that they are "reasonable limits ... as can be demonstrably justified in a free and democratic society." The *Oakes* test is usually applied to see first, if the government has a legitimate objective for the infringement and second, if the means chosen to achieve the objective are reasonable and demonstrably justified.[98] The three aspects to satisfy under the second requirement are referred to as the proportionality test. The means chosen must be rationally connected to the objective. The rationally connected means must impair the right as little as possible and there must be proportionality between the effects of the measures and the sufficiently important objective.

Although the police have legitimate law enforcement objectives for some of their interrogation techniques, they may have some difficulty arguing that the effects of these techniques are proportional to the objectives. If the results of these techniques are disproportionate numbers of false confessions or suspect convictions, the proportionality test may not be met. Since police could amend their techniques to adapt to those individuals with mental

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[95] The government may also seek to rely on the defence of an affirmative action program in some cases – see *Charter* subsection 15(2).
[96] *Germany (Federal Republic) v Rauca* (1982), 38 OR (2d) 705 (HC), aff'd (1983), 41 OR (2d) 225 (CA).
[97] *Cadieux v Dir of Mountain Institution* (1984), 41 CR (3d) 30 (Fed TD).
[98] *R v Oakes*, [1986] 1 SCR 103; See also: *RJR v MacDonald (Attorney General)* (1995), 100 CCC (3d) 449 (SCC).

disabilities yet still obtain their law enforcement objectives, their practices may not be defensible under section 1 of the *Charter*.

If the police obtained evidence as a result of a *Charter of Rights* violation, a court has the jurisdiction under Charter subsection 24(2) to exclude the evidence if its admission would bring the administration of justice into disrepute.[99] Consequently, the courts may exclude a confession or statement obtained through practices that are contrary to the *Charter of Rights.*

In addition to possible remedies under the *Charter of Rights*, mentally disabled persons may be protected from certain interrogation techniques under provincial or federal (e.g., if the R.C.M.P. are involved) human rights legislation. In Alberta, the *Alberta Human Rights Act* provides that:

> 4...No person shall
>
> (a) deny to any person or class of person any goods, services, accommodation, or facilities that are customarily available to the public, or
>
> (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities customarily available to the public,
>
> because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.[100]

All other equivalent human rights instruments across Canada also prohibit discrimination on the basis of mental disability in the provision of services.

There are several decisions in which police services have been determined to be services customarily available to the public.[101] Therefore, even where the suspect does not want the services, if the police are handling the individual, she/he has the right to be treated without discrimination.

Although the police treat the individual in the same fashion as all individuals who are

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[99] See: s 24(2).

[100] RSA 2000, c A-25.5.

[101] *Gomez v Edmonton (City of)* (1982), 3 CHRR D/882 (Alta Board of Inquiry - John D Hill) with reference to the Court of Queen's Bench attached at D/888; *Akena v Edmonton (City of)* (1982), 3 CHRR D/1096 (Alta Board of Inquiry - John D. Hill); *Hum v Royal Canadian Mounted Police* (1987), 8 CHRR D/600 (Canadian Human Rights Tribunal).

interrogated, this may result in discriminatory treatment of the mentally disabled suspect. Identical treatment does not necessarily mean equal treatment or lack of discrimination. If the unequal treatment has the effect of excluding a person from receiving a public service in a comparable way to others because of mental disability, he/she may be suffering the effects of discrimination. For example, in *Huck v Canadian Odeon Theatres Limited*,[102] Mr. Huck relied upon a wheelchair and was advised by theatre personnel that he could either transfer to a seat or view the movie from the area in front of the first row of seats. He was unable to transfer to a seat and no other space was made available to wheelchair users other than at the front. Mr. Huck alleged that this treatment constituted discrimination because of physical disability. The Saskatchewan Court of Appeal held that it is the consequences of the actions or practices, not the motivations behind them that are important. If acts are neutral on their face and treat individuals in the same way, yet have the effect of continuing discriminatory practices, they are prohibited. The Court of Appeal rejected the argument that because Mr. Huck was given the same treatment as any other member of the public in this situation, no discrimination occurred. Identical treatment does not necessarily mean the lack of discrimination.

If an individual has suffered discrimination at the hands of the police, there are remedies available to the accused under the *Alberta Human Rights Act* which are compensation, lost wages, an order refraining the person from committing the same or any similar contravention in the future and any other action the panel considers appropriate to put the complainant back in the position they would have been in but for the contravention of this *Act.* This may include monies to compensate for hurt dignity or hurt feelings.[103] Thus, a complainant who alleges that he/she was incarcerated as a result of discriminatory police practices (improper interrogation methods) that produced a false confession will no doubt seek substantial compensation to cover lost wages and other expenses. However, even if a complainant does not seek compensation, an order can be made that directs police to refrain from committing these practices in the future.

Therefore, an argument could be made that a mentally disabled individual who was interrogated using standard techniques was treated with discrimination, either under the *Charter*

[102] (1985), 6 CHRR D/432 (Sask CA).
[103] See: s 32.

of Rights or under provincial human rights legislation. This could result in any confession given being discredited or in changes to police practices in the future.

5. Police Responses to Concerns about Interrogating Mentally Disabled Persons

In 1998, in response to concerns about the treatment of the disabled in the criminal justice system, the Calgary Police Service created the (now called) Diversity Resource Team.[104] The initial purpose behind the unit was to consult with disabled people and related professionals in order to develop strategies to prevent crime and violence against people with disabilities; however, according to Constable Martin Cull, the project did more than just that. It had the added effect of educating the police in order that they may deal with disabled individuals in a more appropriate manner. The consultation resulted in the establishment of the "Persons with Disabilities Police Advisory Committee" (PWDPAC), which has further helped the Calgary Police Service and the community to prevent crimes against persons with disabilities and work with persons with disabilities when they become embroiled in the criminal justice system. According to Cull, because of their extensive training in how to deal with the mentally and physically disabled, the police are better able to recognize those suspects who may be suffering from a mental illness or mental handicap and as a result, discrimination of such individuals is becoming less frequent.

Other initiatives include, according to Dr. Terry Coleman and Dr. Dorothy Cotton:[105]

> The Office of the Alberta Solicitor General has developed an exceptional online course. The course — *Policing and Persons with Mental Illness* — which was designed by a psychologist, two curriculum designers, a police officer and a representative from provincial corrections, is intended for all municipal police services and provincial corrections.
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> Further to a seven-hour course during basic training, in-service education and training for the Calgary Police has three levels. At the first level, the Calgary Police use a 24/7 online course constructed in-house and based on the handbook: *The Calgary Police Service Officer's Guide to Dealing with Emotionally Disturbed Behavior* (2008).

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[104] Calgary Police Service, *Personal Safety Guide* for Persons with Disabilities (Government of Alberta, 2001).

[105] Terry Coleman and Dr. Dorothy Cotton, Mental Health Commission, May 2010 *Police Interactions with Persons with a Mental Illness: Police Learning in the Environment of Contemporary Policing* at 12-13 online: http://www.mentalhealthcommission.ca/sites/default/files/Law_Police_Interactions_Mental_Illness_Report_ENG_0_1.pdf (hereinafter Coleman and Cotton).

In addition, at the second level, the Mental Health Interdiction Program extends classroom learning to hands-on community mental health practice. The third level is the PACT program in collaboration between Calgary Police and Alberta Health Services.[106] The Police and Crisis Team (PACT) program is a partnership between Calgary police and mental health clinicians, which is focused on helping those dealing with mental illness to access the services they need.[107]

On a national level, the RCMP's Operational Manual states the following about interviewing and taking statements from suspects, accused persons or witnesses who have reduced mental capacity:[108]

> 19. Reduced Mental Capacity
>
> 19. 1. Where a person is intoxicated, delay questioning and the taking of a statement until the person is sufficiently sober to properly understand, and exercise or waive his/her right to retain and instruct counsel. See Clarkson vs. The Queen, (1986) 1 SCR 383, SCC.
>
> 19. 2. In some cases, a person may require a more comprehensive explanation of his/her rights; or the explanation of those rights should be provided at a time when the person is more likely to understand those rights, e.g. a language barrier, reduced mental capacity, trauma, alcohol, or drug use.
>
> 19. 3. Section 715.2, CC allows for the admission of the video recorded evidence when a witness or complainant is suffering from reduced mental or physical capacity and is experiencing difficulty testifying.
>
> 19. 4. In taking statements, be aware that a person who suffers from neuro-developmental disabilities such as Fetal Alcohol Spectrum Disorders (FASD) may have reduced mental capacity that will have implications for statement taking, testifying or being interviewed. See also information on FASD and review the FASD Guidebook for Police Officers.

C. Admissibility of Confessions Made by Mentally Disabled Persons.[109]

1. Introduction

In many cases, mentally disabled people make inculpatory (incriminatory) statements, not because they are guilty, but because this is the effect of their disability. Hence, defence counsel

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[106] Coleman and Cotton, at 12-13.

[107] Coleman and Cotton, at 12-13.

[108] Royal Canadian Mounted Police Operational Manual Chapter 24.1 Interviews/Statements: Suspect/Accused/Witness (Directive Amended 2016-04-05), online: http://infoweb.rcmp-grc.gc.ca/manuals-manuels/national/om-mo/24/24-1-eng.htm [accessed February 2, 2017].

[109] See generally: F Kaufman, *Admissibility of Confessions in Criminal Matters* (Toronto: Carswell Company Limited, 1979) and the Cumulative Supplement (1979) and R. J. Marin, *Admissibility of Statements,* 7th ed. (Aurora, Ontario: Canada Law Book Inc, 1989) (hereinafter Marin).

might want to make a case that the statement made by the accused should not be admitted into evidence. In the situation where an accused has made a false confession, there are four approaches that counsel could consider. These include:

- A common law confessions rule that provides that no statement made out of court by an accused to a person in authority can be admitted in evidence against him/her unless the Crown proves that it was made freely and voluntarily;

- an argument that the accused lacked the capacity to make a statement, because she/he did not understand the possible consequences of making the statement or that she/he did not possess an operating mind and could not comprehend what she/he was saying;

- the *Charter* s 10(b) right to retain and instruct counsel to advise the accused of his/her rights before he/she makes a statement; and

- the *Charter* s 7 right to remain silent (enshrined in the concept of fundamental justice).

The following section examines these concepts in the context of a mentally disabled person who makes a false confession.

2. Persons in Authority and the Common Law Confessions Rule

Accused persons might make statements to many different individuals. Statements made to other persons (friends, acquaintances, etc.) may be admitted as evidence against the accused at trial.[110] However, under some circumstances, statements made to persons in authority (confessions) may not be used in evidence against the accused. The Supreme Court of Canada has clearly established in *R v Erven*[111] that at common law, no statement made out of court by an accused to a person in authority can be admitted in evidence against her/him unless the Crown proves to the satisfaction of the judge that it was made freely and voluntarily. This rule applies to statements made by the accused after she/he committed the offence and that are sought to be introduced in evidence to incriminate her/him or to contradict her/his testimony. In *R v Oickle*,[112]

[110] However, statements made to one's lawyer may be protected under Lawyer-Client privilege, which is discussed in Chapter Three.
[111] *R v Erven* (1978), 44 CCC (2d) 76 (SCC) at 87 (sub nom *Erven v The Queen*) (hereinafter *Erven*).
[112] *R v Oickle*, [2000] 2 SCR 3 ("*R v Oickle*").

the Supreme Court elaborated on the re-stated Voluntary Confession Rule. Iacobucci, J writing for the majority stated the following:

> …because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Voluntariness is the touchstone of the confessions rule and a useful term to describe the various rationales underlying the rule. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. If the trial judge properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for some palpable and overriding error, which affected the trial judge's assessment of the facts.[113]

Although the Court in *Oickle* was focussed primarily on the improper use of threats or promises by the police to induce a confession, the decision in *Oickle* emphasizes the necessity of proper police questioning in order to ensure a voluntary confession. This includes the proper questioning of persons with mental disabilities.

Ordinarily, the Crown must call as a witness each person in authority who dealt with the accused up to and including the person to whom the statement was given.[114] A *voir dire*[115] will be held to determine if the person to whom the statement was given is a person in authority. However, the question remains as to who will be considered a person in authority.

Clearly, police officers are persons in authority.[116] However, where confessions are received by persons other than police officers, it becomes more complicated to determine if these people possessed authority. For example, a suspect may be sent to a Crown psychiatrist, psychologist, forensic social worker or other mental health expert for evaluation if a police officer suspects that

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[113] *R v Oickle* at para 6.

[114] *Erven,* at 87.

[115] A separate trial held during a trial held by a judge in the absence of the jury. It is usually held to determine if evidence is admissible or for some other matter. It should be noted that an accused (through his or her counsel) may waive the requirement for a *voir dire* and this would result in the automatic determination that the statement was voluntary.

[116] Kaufman, at 80-81.

he is suffering from a mental disorder. What if the suspect confesses to this person?

In *R v Todd*,[117] it was held that a person in authority is "anyone who has authority or control over the accused or over the proceedings or the prosecution against him." The test as to whether a person is in authority is subjective and depends upon the accused's perception.[118] Did the accused think that the person to whom he/she confessed had some degree of power over her/him at the time of the confession? In *R v Paonessa and Paquette*,[119] the Ontario Court of Appeal concluded that a person in authority was someone who was engaged in the arrest, detention, examination or prosecution of the accused. In *R v Newes*,[120] the Court of Appeal of Alberta held that a person in authority is "some person whose promise or threat would be likely to influence the accused and induce him to make a statement." Cory J, writing for the majority of the Supreme Court of Canada in *R v Hodgson*[121] confirmed that a person in authority typically refers to individuals formally engaged in the arrest, detention, examination or prosecution of the accused. Apart form police officers or prison officials or guards, no individual is automatically considered a person in authority solely by reason that he or she may exercise authority over the accused (for example, a teacher, parent or employer.) The courts must determine whether the person receiving the statement was an agent of the police or was acting in close collaboration with the prosecution and therefore could influence the investigation of the crime on a case-by-case basis. In the case of *R v Grandinetti*,[122] two police officers were involved in an undercover investigation of the accused relating to a murder. They posed as members of a criminal organization, and suggested that they could use corrupt police contacts to divert the murder investigation away from Grandinetti. He eventually confessed his involvement in the murder to the undercover officers. At trial, Grandinetti argued that his statements to the officers were inadmissible. The trial judge held that the undercover officers were not persons in authority and that it was unnecessary to hold a *voir dire* on the issue of voluntariness of the statements. The Supreme Court of Canada dismissed the appeal, stating that

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117 *The King v Todd* (1901), 4 CCC 514 (Man CA).
118 *R v Rothman* (1981), 59 CCC (2d) 30 (SCC) (hereinafter *Rothman*).
119 *R v Paonessa and Paquette* (1982), 66 CCC (2d) 300 (Ont CA), aff'd (1983), 3 CCC (3d) 384n (SCC) (hereinafter *Paonessa and Paquette*). See also *R v AB* (1986), 26 CCC (3d) 17 (Ont CA), leave to appeal to SCC refused (1986), 26 CCC (3d) 17n (SCC).
120 *R v Newes* (1934), 61 CCC 316 (Alta SCAD) (hereinafter *Newes*).
121 *R v Hodgson*, [1998] SCJ No. 66.
122 *R v Grandinetti*, [2005] 1 SCR 27 (hereinafter *Grandinetti*).

the accused failed to discharge the burden on him to show that there was a valid issue as to whether he believed that the undercover officers were persons in authority. The Court went on to say that the accused believed that the officers were criminals who could influence the murder investigation against him by enlisting corrupt police officers. As a result, the state's coercive power was not engaged, the statements were not made to a person in authority and a *voir dire* regarding voluntariness was unnecessary.[123]

Because at common law the court looks at whether the accused perceived the person as one in authority (the subjective test), if a person is one in authority, but conceals her/his identity, the accused will not perceive her/him as a person in authority. A statement to her/him will not fall within the confessions rule. Thus, where police officers conceal their identity and pose as fellow prisoners, they have been held not to be persons in authority.[124] However, other arguments for excluding evidence obtained under these circumstances may be available under the *Charter of Rights* (see below under *Charter of Rights* and Statements).[125]

A person who might not usually be considered a person in authority may become one because the accused perceives him/her as an agent of the police. There are many cases that consider the issue of whether a certain category of person is a person in authority[126]—including masters (and servants), civilians aiding police, victims of crime, physicians, psychiatrists, and more recently social workers, teachers, undercover officers, and others.

For persons with mental disabilities, one important issue is whether a psychiatrist or physician is a person in authority. Often the mentally disabled person will discuss her/his case with a professional, either of her/his own volition or because it is ordered. Section 672.21 of the *Criminal Code*[127] outlines how certain statements given to mental health experts under certain circumstances may be used. However, it is necessary to analyze whether physicians or other mental health professionals are persons in authority, because in situations where the *Criminal Code*

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123 *Grandinetti,* at para 34-45.
124 *R v Pettipiece,* [1972] BCJ No 669, 7 CCC (2d) 133 (BCCA); *Rothman*.
125 However, it should be noted that in *United States of America v Burns* (1997), 117 CCC (3d) 454 (BCCA) the court held that statements obtained by undercover agents can be admitted into evidence provided they are not obtained in a way that violates the principles of fundamental justice. In this case the undercover agents conduct was neither shocking nor outrageous, albeit "28 deceitful, persistent and aggressive". Appeal to the SCC was dismissed without reasons.
126 See the cases cited in Kaufman, at 84 to 105.
127 RSC 1985, c C-46.

provisions do not apply, the Crown may seek to use statements made to these individuals against the accused at trial.

Generally, physicians and psychiatrists are not considered persons in authority, but rather as independent experts giving professional advice.[128] There is even some doubt as to whether a Crown psychiatrist who interviews the accused while in custody is a person in authority.[129] However, there are exceptional circumstances in which physicians and psychiatrists may be considered persons in authority.

The issue of whether a psychiatrist is a person in authority was debated after the advent of dangerous offender legislation. The *Criminal Code* required that where the Crown has applied to have an offender found "dangerous", the court must hear the evidence of at least two psychiatrists. The psychiatrist would have to talk to the accused in order to form an opinion about certain requirements for a finding of "dangerousness". If the accused confesses during these interviews, the psychiatrist is considered a person in authority. In the case of *Wilband*, because the accused had already been found guilty of the offence at the time of the psychiatric interview, the Supreme Court of Canada held that the confessions rule had no application to proceedings of this nature. Further, psychiatrists who were making assessments under these provisions were not persons in authority, but were free and independent medical experts.[130] In *R v Vaillancourt*,[131] the accused was interviewed by a psychiatrist at the request of Crown counsel. Although the trial judge was of the view that it would have been better if defence counsel had been advised of the proposed examination, the absence of notification was not in itself a basis for excluding the evidence of the examination. The Supreme Court of Canada affirmed this decision and held that the issue of whether a psychiatrist was a person in authority was irrelevant except in cases where the testimony contained admissions of fact by the accused that the Crown was seeking to rely upon to

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[128] *R v McNamara* (1950), 99 CCC 107 (Ont CA). See also *R v Roadhouse,* (1933) 61 CCC 191 (BCCA) and *R v Gibbons*, [2008] OJ No 3198 where state employed treating psychologist in a penal institution was considered a person in authority, because the accused knew that he would be reporting to the correctional authorities and the offender knew that it would impact on his institutional risk assessment and parole considerations.

[129] *Perras v R* (1973), 11 CCC (2d) 449 (SCC) (hereinafter *Perras*). The majority (4-3) held that *R v Wilband,* [1967] SCR 14 (hereinafter *Wilband*) was authority against an admission by Crown counsel that a Crown psychiatrist was a person in authority.

[130] *Wilband*.

[131] *R v Vaillancourt* (1973), 16 CCC (2d) 137 (Ont CA), aff'd (1975), 21 CCC (2d) 65 (SCC) (hereinafter *Vaillancourt*).

prove guilt. However, where the sole issue is the mental capacity of the accused, the Supreme Court held that the issue of whether the psychiatrist is a person in authority is irrelevant. The Supreme Court referred to *Wilband* in this regard.

There are circumstances where physicians, psychiatrists or related health personnel may be considered persons in authority. For example, in *R v Stewart,*[132] the Chief Coroner for the Province of Alberta was asked to examine the accused in order to determine his fitness to stand trial. In the course of this examination, the coroner told the accused that he was aware of the murder charge against him, that he had seen the body, and that in his capacity as coroner, he "had to do" with the prosecution. The physician also told the accused that anything he said to him was confidential and that he could not give the information in court. The physician honestly believed this was the case, although he was in error. Because of this situation, the Court of Appeal held that the coroner was a person in authority to the mind of the accused. The issue then was whether the statement was involuntary and therefore inadmissible because of the promise of confidentiality. The court held that the promise to keep the information silent was not the type of inducement that would make a statement inadmissible. Therefore, although the physician was a person in authority, the accused's statement was voluntary and admissible.

In *Harrinanan*,[133] the accused was in custody in the forensic unit of a hospital prior to his trial. The accused approached a psychiatric social worker and gave a statement. This worker had access to medical records and prepared reports that were included in the medical records; these reports had an influence on whether privileges were granted to patients. Further, the forensic ward was a custodial unit and the social worker had an official position. The court held that because the social worker had some power over the accused, was in effect the accused's gaoler and dispensed or withheld privileges, he was a person in authority. However, the Crown established the voluntariness of the statement and it was admitted in evidence.

The Newfoundland Court of Appeal, in *R v Fowler,* held that when an accused was sent to a

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[132] *R v Stewart* (1980), 54 CCC (2d) 93 (Alta CA), leave to appeal refused (1980), 54 CCC (2d) 93n (SCC) (hereinafter *Stewart (Alta)).*

[133] See also: *R v Sweryda* (1987), 76 AR 351 (CA) where a social worker who was investigating a complaint of child abuse was held to be a person in authority for the purposes of the accused's assault trial. See also *R v Hawke* (1975), 7 OR (2d) 145 (CA) (hereinafter *Hawke*) where, during the second trial, the trial judge concluded that the accused truly believed that the social worker he dealt with had some degree of power over him and therefore was a person in authority.

mental institution as a result of a court order, doctors, nurses and other hospital staff were persons in authority.[134] They were extensions of the jail system. Thus, the prosecution had to prove that the accused's statements were made voluntarily. Thus, although evidence may be admitted for the purpose of examining the mental condition of the accused,[135] if confession or statements made to medical personnel during court-ordered assessments are sought to be admitted to prove that the accused committed the crime, different considerations will apply.

In *R v Bertrand*,[136] a psychiatrist examined an accused for the purpose of determining whether he should be remanded for psychiatric observation. The Ontario court held that a psychiatrist who acts on a mandate from the Crown's office to examine the accused person with respect to the issue of fitness to stand trial, insanity or for the purpose of dangerous offender proceedings, would not by that fact alone be characterized as a person in authority. It is possible, however, that the doctor may be so characterized if the accused perceives him/her to be a person in authority. It would also depend on what was said to the accused. Also, if the evidence is used towards proving the innocence or guilt of the accused where the accused is incarcerated and the doctor is sent by the Crown or the court, he/she may very well be a person in authority.

In *R v Jones*,[137] the accused, who was appealing a judgement dismissing his appeal from sentence, was examined by psychiatrists and a psychologist during a pre-trial psychiatric examination. The judge admitted their evidence at the sentencing of the appellant and found that the appellant was a dangerous offender. The appellant argued that the evidence was wrongfully admitted because he was not advised that his discussions with the psychiatrists could be used to determine whether or not he was a dangerous offender. His appeal was dismissed on the grounds that the evidence did not incriminate the appellant since he had already been convicted of the offences. Further, the court was of the opinion that the evidence obtained at a pre-trial psychiatric examination should be allowed at the sentencing stage in order to ensure that the court can properly assess the danger posed by the offender. The court held that the appellant's right to

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[134] *R v Fowler* (1981), 27 CR (3d) 232 (Nfld CA) (hereinafter *Fowler*).

[135] See also: *Vaillancourt.*

[136] *R v Bertrand* (1991), 2 OR (3d) 659 (Ont Gen Div), affirmed on other grounds (September 21, 1993) CA 6779 (Ont CA). See also: *R v Carr* (1997), 28 OTC 282 where a *voir dire* was ordered to establish the voluntariness of statements given by an accused to ambulance attendants in the presence of a police officer. The court held that although the attendants were not, in law, persons in authority they were in effect "clothed with that authority".

[137] *R v Jone*s, [1994] SCJ No 42.

counsel was not violated and that the psychiatrists' warning that the discussions could be used against him/her were sufficient.

There are also cases involving other mental health workers that may apply to psychiatrists and physicians. In *R v McNaughton (No 2)*,[138] the accused was charged with sexual assault that occurred over a seven-year period. Before the charges were laid, the accused asked a community mental health worker to assist him in reconciling with his wife. The worker indicated that before he would assist the accused, he would have to have the accused's response to the allegations of sexual assault. Neither party contemplated that anything said by the accused to the social worker would have any bearing on future proceedings against the accused. The social worker took notes during the interview. Because the accused was free to leave at any time and free to say what he wished, the Manitoba Court of Queen's Bench held that the worker was not a person in authority on this occasion. The worker had no power over the accused with respect to his liberty or the charges that were not outstanding at the time.

In *R v Parnerkar (No 2)*,[139] the accused was charged with murder. He pleaded not guilty by reason of insanity, but at trial was found guilty of murder. When the police arrived at the scene of the murder, they found the accused injured and took him to the hospital. The accused's condition was extremely critical. He was in shock and he had multiple internal injuries and burns on his body. Parnerkar was kept in the intensive care unit for several days. He was tended by the same nurse each day. The Crown called the nurse as a witness to give evidence of statements made to her by the accused. His counsel objected to the admission of the evidence on the ground that the nurse was a person in authority. Alternatively, defence counsel argued (among other arguments) that if the nurse was not a person in authority, the statements should not be admitted because of the accused's weakened physical and mental state.

The Saskatchewan Court of Appeal dismissed the appeal and held that the nurse was not a person in authority because she was not engaged in the arrest, detention, examination or prosecution of the accused; nor was she a person who could affect the course of his prosecution.

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[138] *R v McNaughton*, [1989] MJ No 429.

[139] *R v Parnerkar*, [1974] SCR 449. The accused was originally found guilty of manslaughter. The Crown appealed the conviction and the Saskatchewan Court of Appeal (affirmed by the SCC) ordered a new trial on the charge of non-capital murder. After the new trial, the accused was found guilty of non-capital murder. The accused then appealed once again to the Saskatchewan Court of Appeal.

The accused looked at the nurse as a friend and protector, not as a person who had any power over him relative to his prosecution. Second, there was no evidence to justify the conclusion that the accused was so affected by drugs or pain so as to affect his mental processes of reasoning, recollection or concentration.

Thus, at common law, the issue of whether a confession is admissible depends upon whether the accused perceived the individual as a person in authority. Admissibility of statements to Crown psychiatrists and those made to others under court ordered assessments may be subject to the same test (whether they were made to a person in authority) if the Crown is seeking to rely upon them as proof of the accused's guilt. Psychiatrists and psychologists called to examine the accused and to testify as to her mental capacity will not be considered persons in authority.[140]

3. Capacity to Confess

The accused's capacity to make a statement may be an issue, especially if she/he suffers from a mental disability. McWilliams suggests that the accused's capacity to make a statement should be a preliminary consideration before one applies the common law confessions rule. The Supreme Court of Canada in *R v Hebert*[141] has also stated that in deciding whether the accused's right to remain silent has been breached, there is a preliminary issue as to whether the accused had an operating mind. This would mean that there would be a preliminary "screening" of individuals who, for a variety of reasons, are not capable of making a statement. Incapacity may be caused by mental disability and mental illness as well as shock, hysteria, trauma or intoxication.

The issue of capacity is different from voluntariness and from the right to counsel.[142] A person with a rational mind may make a statement that is involuntary for a variety of reasons (e.g., after trickery). Further, a person with a rational mind may not be given the right to counsel. On the other hand, a person lacking capacity may lack the basic ability to understand what he/she is doing or may be in such a condition that any statement made would be totally unreliable. Even though this problem arises frequently, the law is unclear concerning the difference between a person who

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[140] *Criminal Code of Canada,* RSC 1985, c C-46. See *R v Hodgson*, [1998] 2SCR 449 at para 91.

[141] *R v Hebert* (1990), 57 CCC (3d) 1 (SCC), 49 CRR 114 (SCC) (hereinafter *Hebert*). See also: *R v Hodgson*, [1998] 2 SCR 449, a decision turning on the person in authority requirement in which the Supreme Court accepted that the twin rationale of the voluntary confession rule was to avoid the unfairness of a conviction based on a confession that might be unreliable and to have a deterrent effect on the use of coercive tactics.

[142] McWilliams, at 15-24 to15-30.1.

is incapable of making a statement and a person who is more easily influenced by a person in authority—therefore making a statement that is not voluntary. However, in *R v Whittle* the court held that the "operating mind" test, which is an aspect of the confession rule, includes a limited mental component which requires that the accused possess sufficient cognitive capacity to understand a caution, to understand that evidence can be used against her/him, to make an active choice and possess the cognitive capacity required for fitness to stand trial.[143] It is not necessary that the accused have analytical ability.[144]

A slightly different approach was taken by the court in *R v Partridge*.[145] The court determined that personal circumstances and internal pressures may make the statement involuntary, in the same way as external influences do. Mr. Partridge was diagnosed as having paranoid schizophrenia. The learned trial judge found that Mr. Partridge indicated that he did not wish to make a statement. He repeated advice he had been given by counsel. The interrogator continued questioning Mr. Partridge who then blurted out an incriminating statement. The trial judge accepted that as a result of the persistent questioning by the police after he definitively stated he did not want to be questioned further, he genuinely believed the police officer would become forceful with him if he did not tell the police officer what he did.

Mr. Partridge was moved to speak to the authorities by an irrational fear. The fear was directly related to the fact that the accused was being interrogated with respect to his involvement with an alleged offense. Mr. Partridge believed that force would be used against him by the police if he did not speak. This fear may have been induced by his illness. However, the impact of the fear upon the accused's decision to speak was no less dramatic than if the authorities had in fact

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143 [1994] 2 SCR 914 (hereinafter *Whittle)*.

144 See also: *R v Reeves*, [2011] BCJ No 2117, 2011BCSC 1513 where the Court determined that a statement can be admissible despite the fact that the accused is delusional and was in a neurotic state of mind when making the statement. The judges conducted a contextual analysis to determine whether the accused understood that he was speaking to a police officer, what he was saying and the consequences of speaking with police. Also: *R v Fernandes*, [2015] OJ No 3867, where an accused with mental disability admitted that he caused fire motivating his statement by the fear of being homeless and living outside and needed a place to stay, therefore he wanted to go to jail. The accused perceived an advantage to confessing in order to gain protection, shelter, food and acceptance, motivated by what he believed to be his physical injuries, including brain damage, and his lack of acceptance on the "outside", which went as far as him saying that he would be dead if he remained outside. There is no question that he perceived an advantage to confessing, even if not one that would motivate a reasonable person. Accordingly, it could not be said that it is beyond a reasonable doubt that the statement was truly voluntary.

145 *R v Partridge*, [2007] Nu J No. 17 [*Partridge*].

directly threatened him. The result was the same. The accused was moved to co-operate out of a fear of reprisal if he did not give the authorities what they were seeking. The Court noted:[146]

> If the concern underlying the voluntariness requirement is reliability, then the irrational fear held by the accused could well affect the reliability of a statement given to avoid an anticipated consequence. If the voluntariness requirement is intended to guard against the false confession, it should not matter whether the fear underlying the confession was induced by the authorities or caused by some subjective paranoia internal to the accused. The danger to be averted remains the same regardless of what motivated the speaker to speak. The motivation to provide a false confession remains equally cogent in both situations.

Courts are reluctant to admit statements made by those who lacked capacity because the statements may be unreliable as the accused lacked understanding. Further, taking statements from those who lack capacity affects the integrity of the system. Generally, the court presumes that a person is of sufficiently sound mind to be capable of making a statement. The defence must raise the issue of incapacity and rebut the presumption of capacity with some evidence. This may be shown by evidence of the accused's condition at the time of the statement, or the history of his/her condition. It may be obvious from the statement that the accused's mind was so deficient or disordered that the statement is too unreliable to admit.[147]

(a) Two Approaches to Capacity to Confess

There are two lines of authority in capacity cases. The first line of cases, called the operating mind test, holds that the accused had capacity to make a valid statement if he/she was capable of comprehending what he/she was saying. The second line, called the awareness of the consequences test, holds that a person must be aware of the consequences of speaking in order to be capable of making a valid confession.

(b) Capacity and Operating Mind

The seminal case in this line deals with confessions by intoxicated or otherwise incapacitated persons. In *Whittle*, the accused gave statements to the police because the voices in

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[146] *Partridge* at para 28.

[147] McWilliams, at 15-25. The argument that capacity should be considered as a threshold issue would seem to have been approved in *Hebert.*

his head were telling him to unburden himself. The issue before the Supreme Court of Canada was whether the statements given to the police were voluntary and obtained in a manner that did not breach section 7 and subsection 10(b) of the *Charter*. The court held that the accused's "[i]nner compulsion, due to conscience or otherwise, cannot displace the finding of an 'operating mind' unless, in combinations with conduct of a person in authority, a statement is found to be involuntary".[148] In *R v McKenna,*[149] the Supreme Court of Canada held that such statements are admissible unless, "the words used by the accused did not, because of his condition, amount to his statement". One of the first Canadian cases dealing with a confession by an "insane accused" is *R v Santinon,*[150] The accused was found not guilty on account of insanity after being charged with the murder of his brother. The accused appealed the verdict and asked for a new trial on the grounds that a statement made to the police by him should not have been admitted in evidence. His lawyer argued that any statement made by an insane person can never be admissible as being free and voluntary because of his lack of capacity. Bull J.A. disagreed. He held that the question of admissibility of an accused's statement depends on it being established that it was free and voluntary, of not having been induced by fear of prejudice or hope of advantage held out by a person in authority. Further, the rule should be qualified to the extent that if the accused, "…is so devoid of rationality and understanding, or so replete with psychotic delusions, that his uttered words could not fairly be said to be his statement at all, then it should not be held admissible".[151]

In this case, the court held that the appellant was aware of what he was doing and saying to the police officers at the time of the interviews. The reliability of the statement was an issue. When the court analyzes the reliability of a statement, it considers the weight that it should be given, and not its admissibility. The Court said that an insane person is not normally incapacitated from giving sworn evidence as a witness because of insanity *per se* and there is no reason why voluntary statements should always be rendered inadmissible because the person is insane. However, the jury should be specifically warned to consider whether a statement made by such a person should be given any credence. The failure of the judge to charge the jury in this way necessitated a new

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[148] *Whittle,* at para. 54.
[149] *R v Mckenna*, [1961] SCR 660, at 214 (hereinafter *McKenna*).
[150] *R v Santinon* (1973), 11 CCC (2d) 121 (BCCA) (hereinafter *Santinon*).
[151] *Santinon*, at 124.

trial.

In *R v Ward,* the Supreme Court of Canada held that when considering whether a statement was freely and voluntarily made, "…there is a further investigation...even if no hope of advantage or fear of prejudice could be found in consideration of the mental condition of the accused at the time he made the statements, to determine whether or not the statement represented the operating mind of the accused".[152] However, the test propounded by Bull J.A. in *Santinon* was adopted by the Supreme Court of Canada in *R v Nagotcha.*[153] The appellant argued that because the trial judge had not referred to the "operating mind" as mentioned in *Ward*, he had erred. The Supreme Court disagreed. The Court held that a trial judge is not bound to apply any "fixed formula" so long as she/he addresses him/herself to the proper considerations.

In *R v Adams*, an accused's statements were admitted at trial even though he was insane within the meaning of section 16 at the time he made them.[154] The court held that when he made the statement, the accused, "possessed sufficient rationality and understanding of what he was saying that what was said can fairly be said to be his statement." On the other hand, in *R v Dickie (No 1),*[155] a statement was rejected because the accused's mental condition was such that it had affected his operating mind. However, the Crown appealed the acquittal of the accused and the Ontario Court of Appeal allowed the appeal and ordered a new trial.[156]

In *R v Ebsary*,[157] the accused had an alcohol problem and had been previously admitted to a psychiatric unit as being unfit to stand trial in an unrelated matter. Several months later, the police questioned him about a murder that had taken place approximately 11 years earlier. The accused gave an inculpatory taped statement. The trial judge admitted the statement, as he was satisfied that there was no indication of lack of intellect or mental illness. Although the accused had consumed alcohol, there was no degree of impairment that could lead to questioning his capacity

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[152] *R v Ward* (1979), 7 CR (3d) 153 (SCC) (Alta.) (hereinafter *Ward*) at 162; followed in *R v McLeod et al* (1983), 6 CCC (3d) 29 (Ont CA), appeal to SCC dismissed (1986), 66 NR 308 See also *R v Turcotte* (1979), 9 CR (3d) 354 (Que Sup Ct) where the court held that a liberal meaning should be given to the word "voluntary".
[153] (1980), 51 CCC (2d) 353 (SCC).
[154] [1980] BCJ No 2249.
[155] (1981), 63 CCC (2d) 151, 6 WCB 401 (Ont Co Ct reversed in (1982), 67 CCC (2d) 218.
[156] *R v Dickie* (No 2) (1982), 67 CCC (2d) 218.
[157] (1986), 27 CCC (3d) 488 (NSCA), leave to appeal to SCC refused (1986), 27 CCC (3d) 488n. This is the circumstance in which Donald Marshall was originally charged with and convicted of the murder.

to give a statement. The Court of Appeal agreed that the accused had the mental capacity to give a free and voluntary statement.

In *R v Nikiforuk*,[158] the Alberta Court of Queen's Bench ruled inadmissible statements provided by an accused who had been hospitalized for 1.5 days with a concussion and who had been unconscious. Although the statements were voluntary in the sense that they were not obtained by fear of prejudice or hope of advantage held out by a person in authority, the court had grave doubts that the statements were the utterances of an operating mind and excluded them.

In *R v Sawchuk (KP)*,[159] a mentally disabled accused was charged with arson after making statements to the police confessing to setting the fire. The court held that the confession was not voluntarily given because the accused lacked the requisite "operating mind" for the confessions rule, as he did not fully comprehend the caution given by the police, nor did he understand the legal consequences of making a verbal statement to the police.

(c) Awareness of the Consequences

The second line of cases holds that a person must be aware of the consequences of speaking to be capable of making a valid confession. The seminal case in this area is *R v Horvath.*[160] Horvath, age 17, was charged with murder. On the night of his arrest, two officers questioned him for two and a half hours, but his statement did not contain anything that may have shown he was guilty (the first statement). The day after his arrest, Horvath was taken to another officer who was a skilled interrogator and a polygraph operator. This officer was with the accused for four hours except for three brief intervals. The interrogation was tape-recorded as were monologues engaged in by the accused when he was left alone. He was not aware these were being taped. A psychiatrist who listened to the tape felt that the accused was unable to remember the events of the killing but also had a strong desire to unburden himself. Because of his questioning techniques and through his voice, the interrogating officer was able to make the accused remember. The psychiatrist testified that the officer's voice had a hypnotic quality that put the accused into a light hypnotic

[158] (1986), 68 AR 246 (Alta QB), new trial ordered to distinguish between the onus of proof on a defence of automatism and that of insanity (s 16) *R v Nikiforuk*, [1986] AJ No 815.
[159] (1994), 98 Man R (2d) 10 (Man QB). See also *R v L (DP)* (1998), 167 NSR (2d) 302; *R* v *Morrisey* (2000), OJ No 4396.
[160] (1979), 44 CCC (2d) 385 (SCC) (hereinafter *Horvath*).

state. When the officer left the room, the accused confessed to the murder (making the second statement). When the officer returned, the accused repeated the confession. The first two officers were brought in and the accused put the statement to writing (the third statement). The trial judge held that the accused's emotional state of mind was completely disintegrated at the end of the interrogation. The trial judge excluded the second and third statements from evidence on the ground that the element of hypnosis had made them involuntary and inadmissible. The accused was acquitted and the Crown appealed the acquittal to the British Columbia Court of Appeal.

The British Columbia Court of Appeal ordered a new trial on the grounds that the second and third statements should have been admitted. On appeal by the accused, the majority of the Supreme Court of Canada restored the acquittal. Two of the four judges who made up the majority of the Supreme Court, Beetz and Pratte JJ. stressed the importance of being aware of what is at stake when making a statement to a person in authority. Because Horvath's hypnotic state and, "complete emotional disintegration" made him unaware of the consequences of speaking, he lacked the capacity needed to make a valid confession and therefore his statement was not admissible.[161]

In *R v Rocha*,[162] the accused was alleged to have killed his daughter and injured another of his children before being subdued and ultimately hospitalized for his injuries. The accused spoke to the doctor while being administered a general anaesthetic. After regaining consciousness, the accused spoke with several police officers. The court held that all statements made by the accused, except the one made to the doctor, were admissible. Because these statements were made after time had lapsed between the surgical procedures and the questioning, they represented the operating mind of the accused. The statement to the doctor was not admitted because it was given in the course of being injected with anaesthetic. Under these circumstances, there was a very clear question as to whether the accused was in possession of his faculties to the extent that he could fully appreciate the consequences of his statement. "Whether or not the physician is a person in authority, the evidentiary value of a statement given by a person not fully aware of the consequences is such that it could not qualify as being voluntary". Thus, in effect, this statement

[161] *Horvath*, at 400.
[162] (1981), 7 WCB 63 (Ont HC) (unreported, March 16, 1982, CA), leave to appeal to SCC refused (1982), 43 NR 448n.

was rejected because it would be so unreliable that it would be unsafe to admit it. Because the person's mind was so deficient, the statement was not worthy of acceptance at all.[163]

(d) Reconciling the Two Lines of Authority

The test requiring that an accused be aware of the consequences is a more liberal test, in that it would likely result in the exclusion of more confessions. The operating mind test is more stringent, as it would take a high degree of incapacity before a person is shown not to have an operating mind so that her/his statements are not her/his own. On the other hand, a person might be able to understand her words, but not be aware of the consequences of speaking to the police. This person's confessions may be excluded based on the more liberal test for capacity.

On either test, the capacity issue is relevant to the mentally disabled accused who confesses. It may be argued that a person who is mentally disabled lacks the capacity to understand what is occurring or to comprehend the consequences of his/her actions, or both. The mental capacity of the accused affects not only the weight to be given his/her statement, but whether or not the statement should be admitted at all. Generally, both mental illness and mental handicap have been recognized as being potentially so severe that the statement should be excluded from evidence. However, the existence of mental disability does not automatically render a statement inadmissible.

The apparent conflict between the two lines of cases was an issue before the Supreme Court of Canada in *R v Clarkson*.[164] The accused was charged with the murder of her husband. The Crown sought to introduce a statement made by the accused shortly after her arrest. At the time of her arrest, the accused was highly intoxicated and very emotional. She was charged with her husband's murder, given the customary police warning and informed of her right to counsel. She replied that there was "no point" in having counsel, and underwent police questioning while still drunk and very emotional. The trial judge excluded her statements, finding that she did not appreciate the consequences of making them. She was acquitted, and the Crown appealed. The Court of Appeal held that it was an error to focus the test of a statement's admissibility on whether the accused appreciated the consequences of her statement. Rather, the question was whether an

[163] McWilliams, at 15-25.
[164] [1986] SCJ No 20 (hereinafter *Clarkson*).

accused's mind was in sufficiently functional state to give probative value to her words. A new trial was ordered and the accused appealed.

The Supreme Court of Canada addressed the issue of which is the correct test for determining the admissibility of a statement made by an accused to persons in authority—the operating mind test or the knowledge of consequences test. The majority of the Supreme Court of Canada noted that there was a tension between the probative value of evidence and the concern over police conduct and fairness in obtaining the evidence. After reviewing the cases in the area, the majority of the Supreme Court (per Wilson J.) stated:

> The test emerging from this line of reasoning focuses therefore on whether the accused was coherent enough to understand his or her own words, but does not go beyond this since the question of comprehension is the only one that goes to the probative value of the confession. Any further consideration of the accused's state of mind at the time of the confession, such as an assessment as to whether or not he or she appreciated the consequences of making the statement, is not directed to the reliability of the statement as evidence probative of the truth. Indeed, one might say that the likelihood of truthfulness is increased where the accused is unaware the statement will ultimately be utilized by the Crown at his or her trial.[165]

However, the majority of the Supreme Court of Canada did not find it necessary to decide which test was more appropriate, but went on to base its judgment on whether the accused made an adequate waiver of her right to counsel under *Charter* subsection 11(b). An acquittal was entered against the accused.

On the other hand, McIntyre J., also sitting on the Supreme Court, reached the same result without relying upon the *Charter*. He held that the two tests (operating mind and knowledge of the consequences) overlapped. A non-operating mind would not only be unaware of what it was saying but also of the consequences of what it was saying. For either of those reasons, he would have found the confession inadmissible. He also recommended that the two lines of capacity cases be collapsed into a two-pronged test:

> (1) [W]as the accused aware of what he was saying? and

[165] *Clarkson*, at 215.

(2) Was he aware of the consequences of making the statement on the particular occasion in question?

The Supreme Court of Canada has neither adopted nor overruled this two-pronged test and the dual tests of capacity appear to be both available to the accused.

This decision likely applies to all circumstances where capacity is an issue as there is nothing in it to indicate that it only applies to situations of intoxication. Thus, if mental illness or disability causes a person not to understand the legal consequences of making a statement, the statement should probably be excluded.[166]

It should be noted that in *Whittle*, the Supreme Court endorsed the interpretation of Lacourciere J.A. in *R v Lapointe*,[167] which holds that once voluntariness has been established an appreciation of the consequences is irrelevant. However, *Whittle* has been criticised as drawing a false analogy to tests for fitness to stand trial and for ignoring the authority of *Clarkson.* The authority of *Clarkson* was fully restored in *R v Bartle*[168] and *R v Tran*[169] which hold that a waiver of the informational component of the right to counsel will have to be explicit and will require a reasonable belief that the detainee knew about the right to counsel and how to exercise it. These cases appear to supersede the unanimous judgement of the Supreme Court in *Whittle*.

As a matter of practice, the police should not question individuals who appear to lack capacity until they have evidence to show that they are able to appreciate the consequences of speaking.[170]

4. Voluntariness and the Common Law Confessions Rule

Although a suspect may have the capacity to make a statement, that statement may not be voluntary. A *voir dire* (trial within a trial) is usually required in order to determine the voluntariness of a statement given to a person in authority. The judge decides whether a statement is voluntary.

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166 R Rogers & C Mitchell, *Mental Health Experts and the Criminal Courts* (Toronto: Thomson Prof Pub, 1991) at 44 (hereinafter Rogers and Mitchell). *Clarkson* was distinguished on the facts in *R v Jones*, [1994] 2 SCR 229, where the court determined that state of emotional distress or high intoxication was required to trigger the operating mind test or the knowledge of consequences test. The SCC noted (at para 129) that: "Mr. Jones has an accurate knowledge of the charges against him, of the pleas available and of their possible consequences. He is aware of various aspects of the legal process, including the roles of the people in court. He is fully able to communicate with his Counsel."

167 [1987] SCJ No 37.

168 [1994] 3 SCR 173.

169 [1994] SCJ No 16.

170 Woods, at 131.

Once the court determines that the statement is voluntary, the jury (or trier of fact) determines the weight that it should be given.[171] In Canada, it does not matter that the statement is inculpatory (tends to show the accused's guilt) or exculpatory (tends to show that the accused did not commit the crime). In either case, the statement must be voluntary in order to be admitted in evidence.[172]

While the general test is quite clear, the interpretation of "voluntary" has caused some difficulty, even when there is no apparent concern regarding mental disorder. For example, if a person is tricked into thinking that he/she is speaking to a friend rather than to a person in authority, is he/she making a voluntary statement? The lack of clarity in the meaning of "voluntary" has an even greater impact where the accused has a mental disability. In the case of people who are mentally disabled, voluntariness may be affected by an inability to make a free choice. In other words, when the accused has a mental disability, although the conduct of the persons in authority is relevant, it should be examined in light of the mental ability or capacity of the accused.

Until recently, the case law has tended to focus upon the conduct of the persons in authority and whether anything they did affected the voluntariness of the accused's statement, rather than the accused's state of mind. Thus, threats and inducements (promises) by persons in authority could render a statement involuntary and therefore inadmissible in evidence. More recently, the accused's understanding of the situation has become more relevant. As a result, two lines of cases have evolved in Canada, one focusing on the conduct of persons in authority and the other focusing on the accused's "operating mind".[173]

(a) English Roots of Confessions Rule

The Canadian law regarding confessions has its basis in the British jurisprudence. In England, there have been two distinct approaches to the confessions rule.[174] Both versions of the British confessions rule focus on the voluntariness requirement of any statement made to the authorities by a detained person. The person must be entitled to choose whether to make a statement to the authorities or not. The two approaches differ in the way they define voluntariness and choice.[175]

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[171] *R v McLaren* (1949), 93 CCC 296 (Alta CA).
[172] *R v Piche*, [1970] 4 CCC 27 (SCC).
[173] The authorities often confuse the issue of capacity and voluntariness, hence the "operating mind" cases also apply to an analysis of voluntariness.
[174] *Customs and Excise Commissioners v Harz*, [1967] 1 AC 760.
[175] *Hebert,* at 126.

Both versions have been adopted and used in Canadian cases.

In *Hebert* (1990), the Supreme Court of Canada summarized the two versions of the English confessions rule. First, there is the traditional rule as set out in *Ibrahim v The King*.[176] *Ibrahim* states the right in a negative, objective fashion. In order to be voluntary, a statement must not have been obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority. There must be an absence of threats or promises by the authorities inducing the statement (negative) and the court will examine the physical acts and words of the parties (objective). The rationale for the rule is that unreliable statements should be rejected. The awareness of the detained person of her alternatives is not relevant. The mental state of the accused, apart from the fact that he believes that he is speaking to a person in authority, is irrelevant.

The second approach to the determination of voluntariness in England is broader. It starts from the view that the choice to make a statement involves not only an act, but a mental element. The absence of violence, threats or promises by the authorities does not necessarily mean that the resulting statement is voluntary. The mental element of deciding between alternatives is necessary. The fact that the accused may not have realized that he/she had a right to remain silent or the fact that he/she was tricked into making a statement, are relevant to the issue of voluntariness.[177] This is more of a subjective analysis, based on the mental ability of the individual accused.

There remains an uncomfortable relationship between the two very different views of choice. On the one hand, the test for admissibility of statements is whether the confessions were voluntary, which seems to import the idea of the accused making a choice between alternatives. At the same time, voluntariness is defined narrowly and objectively as the absence of threats and promises.

In England, the reconciliation of the narrow legal test for voluntariness with the idea of choice is made by using judicial discretion. Even if statements are voluntary, judges can refuse to admit statements that they feel are unreliable because their admission would be unfair to the accused or would bring the administration of justice into disrepute. Certain rules have been set out

[176] [1914] AC 599 (PC) (hereinafter *Ibrahim*), as adopted in *Boudreau v The King*, [1949] SCR 262 and *R v Fitton*, [1956] SCR 958 (hereinafter *Fitton*).
[177] *Hebert*, at 126 - 7.

as guidelines for judges and police officers. If these rules are not followed, the judge has the discretion to refuse to admit the evidence even if the statements meet the traditional test for voluntariness. These rules were referred to as Judges' Rules and were first laid down in 1912. The Judges' rules were replaced by Codes of Practice under the *Police and Criminal Act, 1984.*[178] The rules set out guidelines for the proper conduct of interrogations. These Rules permitted rejection of statements where the police had not advised the suspect of his right to remain silent or if they obtained the statements through tricks.[179] There is currently a Code of Practice issued by the Secretary of State under section 66 of the *Police and Criminal Evidence Act, 1984*. This Code sets out rules for the treatment and questioning of a person by the police.

(b) Canadian Interpretation of British Rule

In Canada, it was thought that judges had the discretion to exclude statements that were admissible on the *Ibrahim* test (not obtained by threat or promise), but that would bring the administration of justice into disrepute.[180] However, in *R v Wray*, [181] the Supreme Court of Canada held that a court did not have the power to exclude admissible and relevant evidence merely because its admission would bring the administration of justice into disrepute.

This decision seemed to narrow the circumstances under which a judge might exclude a confession to those in which the traditional voluntariness test was not met. Then, two decisions seemed to broaden the confessions rule to say that the suspect must at least possess the mental capacity to make an active choice. In *Horvath,* two Supreme Court of Canada judges (speaking for the majority of the judges) held that the rule in *Ibrahim* was not exhaustive.[182] The rule can be extended to situations where the involuntariness has been caused other than by promises, threats,

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[178] (UK), c 60. See Marin, at 18. Although the Judges' Rules were not law, they were frequently used by Canadian courts to determine whether a statement was voluntary or not.

[179] *Hebert*, at 127.

[180] See: *R v Robichaud* (1938), 70 CCC 365 (NBSCAD); *R v Anderson (*1942), 77 CCC 295 (BCCA) and *R v Dreher* (1952), 103 CCC 321 (Alta SCAD).

[181] [1971] SCR 272 (hereinafter *Wray*); followed in *R v LaFrance* (1972), 19 CRNS 80 (Ont CA), where the Ontario Court of Appeal held that the trial judge was not incorrect when he admitted evidence obtained from an examination of the accused by Crown psychiatrists without notice to defence counsel. Both of these decisions were made before the *Charter of Rights and Freedoms* came into force.

[182] See also: *R v Conkie* (1978), 39 CCC (2d) 408 (Alta CA) (hereinafter *Conkie*), where the Alberta Court of Appeal rejected a confession made to the police following a remand to a psychiatric hospital where the accused was given alcohol and sodium pentothal. See also: *R v Booher* (1928), 50 CCC 271 (Alta SC) where a confession which may have been induced by mental suggestion or hypnotics was found inadmissible.

hope or fear, if it is felt that the other causes are as coercive. Spence J. stated that a statement may not be voluntary if it has been induced by some other motive or for some other reason than hope of advantage or fear of prejudice. The requirement for admissibility of a statement at trial is that it was free and voluntary. He cited the meaning of "voluntary" in the Shorter Oxford English Dictionary as "arising or developing in the mind without external constraint...performed or done of one's own free will, impulse, or choice; not constrained, promoted or suggested by another". In this case, the appellant was 17, he was unstable, he was diagnosed as a sociopath by the Crown psychiatrist, he was "hammered in cross-examination by two impressive police officers" and then questioned by a skilled and proved interrogation specialist and by the time he was finished he was in a state of "complete emotional disintegration". Spence J. found that no statement made by the accused under those circumstances could be considered voluntary.

Beetz J. agreed with Spence J. but based his judgment on the finding that the statements were not voluntary because the accused was hypnotized and was not in control of his faculties. In his opinion, if a mere threat (fear of prejudice) or a mere promise (hope of advantage) is considered to have such an impact on the mind and will as to make the confession of a person not under hypnosis involuntary, a statement made under hypnosis was definitely involuntary even though the cause of the involuntariness was neither threat nor promise.[183] It is interesting to note that under the traditional confessions rule, a person whose state of consciousness has not been altered and who is in full and voluntary control and possession of his faculties may still be found to have made an involuntary confession if it was obtained through a threat or a promise, yet a person whose state of consciousness is altered or who is not in full and voluntary control of his faculties may have more difficulty proving involuntariness.

The extension of the rule in *Horvath* was considered by the Supreme Court of Canada in *Ward*.[184] Ward was in a state of shock when he made his confession shortly after recovering consciousness after being in a car accident. In an unanimous judgment, the Supreme Court of Canada held that a "consideration of the mental condition of the accused at the time he made the

[183] *Horvath*, at 423.

[184] See also: *R v Thauvette* (1938), 70 CCC 364 (Ont SC), where the trial judge held that in determining the admissibility of a confession, the "trial judge must look to all the circumstances connected with the making of it, and should take into consideration the age, experience, intelligence and character of the prisoner and his general susceptibility, and particularly his appreciation of the circumstances in which he was placed at the time the confession was made."

statement to determine whether or not the statements represented the operating mind of the accused" is relevant to the issue of admissibility.[185]

Finally, the advent of the *Charter of Rights* in 1982 caused some judges to suggest that the voluntariness rule should be broadened. In *Hebert*, the Supreme Court of Canada interpreted these undercurrents as suggesting that a suspect should have the right to freely choose whether or not to make a statement to the police.[186] The Supreme Court noted that although the majority of Canadian confessions law had not acknowledged that there is a mental element involved in choice, the broader concept of choice is part of the fundamental notion of procedural fairness. Procedural fairness is a fundamental right under the *Charter of Rights* that, if infringed, may be remedied under subsection 24(2). Further, the Supreme Court reasoned that it would be unfair to receive statements that are involuntary and that might bring the administration of justice into disrepute.[187]

In *Hebert,* the Supreme Court discussed the relationship between the confessions rule and the privilege against self-incrimination (the right to choose whether or not to testify or to remain silent). The privilege against self-incrimination applies at trial rather than during the investigational stage. However, it is related to the confessions rule, both philosophically and practically.[188] Philosophically, the confessions rule and the privilege against self-incrimination are justified by the right of every person not to be required to produce evidence against him/herself. The privilege against self-incrimination and the confession rule also share the notion that an accused person has no obligation to give evidence against him/herself, that he has the right to choose.[189] The practical relationship between the two rules occurs because if the accused were granted immunity from incriminating him/herself at trial, but was not protected when making pre-trial statements, the privilege would be illusory at best. The accused is under no obligation to respond to an accusation until there is an evidentiary case to meet.[190] Therefore, the common law confessions rule and the privilege against self-incrimination both emphasize the right of the individual to choose whether to

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[185] *Ward*, at 162.
[186] *Hebert*, at 132.
[187] *Hebert*, at 127.
[188] *Hebert,* at 132.
[189] *Hebert,* at 133.
[190] E Ratushny, *Self-Incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979) at 253, as cited in *Hebert*, at 133.

make a statement to the authorities or to remain silent.[191]

The Supreme Court of Canada held that the right to remain silent should be given a wider scope than the confessions rule.[192] The fundamental concept is that a detained person must have the right to make a "free and meaningful choice as to whether to speak to the authorities or to remain silent".[193] The Supreme Court also outlined the scope of the right to remain silent. First, the suspect must possess an operating mind. Then, the focus shifts to the conduct of the authorities. Was the suspect given the right to consult a lawyer? Was there other police conduct that "effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?"[194] The Supreme Court also held that the narrow confessions formula should be rejected when considering the right to remain silent. Further, the courts should look at the accused's informed choice, the fairness to the accused and the repute of the administration of justice.[195]

Hebert sets the foundation for considering whether the accused had an operating mind before looking at whether objectively the accused made an informed choice to speak in the context of exercising her right to remain silent.[196]

In another important post-*Charter* decision, *R v Seaboyer*,[197] the court determined that the trial judge has authority to exclude evidence if its probative value is outweighed by the prejudicial effect.[198]

A possible further extension to the *Ibrahim* rule is the recognition in Canada that a suspect who is interrogated under oppressive conditions may feel compelled to make a confession. Oppressive conditions may include such things as the length of time of questioning, the length of time between questioning periods, whether the accused has been given proper refreshments and

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191 See David M Tanovich, "The Charter Right to Silence and the Unchartered Waters of a new Voluntary Confession Rule, 9 CR (4th) 24 where the author suggests that the "informed choice standard" in *Hebert* should consider confessions given as a result of police trickery.

192 *Hebert*, at 134.

193 *Hebert*, at 138.

194 *Hebert*, at 139. This aspect of the decision has been criticized as focusing too much on the objective test. See: T. Quigley and E. Colvin, "Developments in Criminal Law and Procedure: The 1989-90 Term" (1991) Supreme Court Law Rev (2d) 255 at 307 (hereinafter Quigley and Colvin).

195 *Hebert*, at 139 - 140.

196 This test was followed *Whittle.*

197 *R v Seaboyer; R v Gayme,* [1991] SCJ No 62, [1991] 2 SCR 577 (hereinafter *Seaboyer*).

198 *Seaboyer,* at paras 41-42.

the characteristics of the person who makes the confession.[199] The concept of oppression has not yet specifically been stated to be part of Canada's confessions rule, but has been mentioned in some cases.[200]

The leading case in oppression is *R v Serack*,[201] where Serack and two other men were charged with sexual assault. Their clothes were taken for testing at the Crime Laboratory. They were given blankets to cover themselves. Clad only in a blanket, Serack was interviewed by the police officers. The Court was not satisfied that the statements he gave during the interview were voluntary. It held,

> A man's trousers are, in a situation like this, essential to his dignity and his composure. When a man is questioned at a time when he is clad only in a blanket, by a police officer who is properly dressed, the police officer has the advantage and it is a palpable advantage, one that may quite disarm an accused of a wholly independent recollection and separate will (at para 7).

Oppressive conditions may result in the suspect's free will being compromised; thus affecting the voluntariness of her statement. Canadian law recognizes that confessions obtained under oppressive circumstances may be dangerous to admit in evidence because they are not voluntary.[202] The issue of whether a circumstance is oppressive will depend upon the individual because each person has a different psychological makeup. Such factors as the conditions of interrogation and the individual characteristics of the accused may amount to oppressive circumstances.

In *R v McLean*,[203] the accused's initial statement was ruled involuntary at trial because it resulted from an "oppressive interrogation process". The judge described the accused after his questioning by police as "a man who was broken by a verbal beating which was just as effective as

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[199] *R v Priestly* (1965), 51 Cr App R 1.

[200] See: *Horvath*, per Spence and Estey JJ. Leading case in oppression is *R v Serack*, [1973] BCJ No 753.

[201] [1973] BCJ No 753. But see: *R v Veness,* [2007] AJ No 492, where no oppression was found in refusal to allow accused to remove blood stained clothes, or *R v Pena* [Voir dire - Admissibility of statement], [1996] BCJ No 2813, where no oppression was found when accused's clothes were removed for investigation and replaced with overalls for the purpose of the interview.

[202] *Fitton, Boudreau*.

[203] [1989] OJ No 1416 (hereinafter *McLean*).

beating with a truncheon".[204] Further, the Ontario Court of Appeal held that statements provided shortly after the inadmissible statement and that appeared to be voluntary were nevertheless tainted because the threats or inducements that rendered the first statement inadmissible were not dissipated.[205]

On occasion, stratagems and tricks resorted to by police officers may result in a lack of voluntariness. In *R v Clot*,[206] the accused was charged with second-degree murder. The Crown sought to introduce certain statements made by the accused. The accused had been released from a psychiatric ward, was arrested on a charge of arson, appeared in court and was remanded for psychiatric observation. Instead of being taken to a psychiatric institution, the accused was taken to a police station and was questioned for six hours about a death by two police officers impersonating a psychiatrist and a priest. The accused signed a confession and was held overnight in a detention centre. The next day, he was informed of the trick and was asked to make another statement. He was then taken to the psychiatric institution.

The accused was found fit to stand trial on the arson charge and was granted bail. He was immediately arrested for the murder on his release. At trial, the first statement was held inadmissible because the accused believed that the "priest" and the "psychiatrist" had power over him. The "psychiatrist" had offered to help the accused if he confessed. The second statement was also ruled inadmissible because there was continuity between the two days of questioning and the offer of help on the first day continued to apply as an inducement on the second day. The officers knew that the accused was mentally ill and their offer to help in the circumstances was "nothing less than pure trickery".[207]

In *R v Gallant*,[208] the accused was charged with wilfully setting a fire. The Crown attempted to introduce a written statement given by the accused after she was interviewed five times by three different pairs of officers over a 10-hour period. Four of the officers admitted knowing that the accused had emotional or mental problems. A psychiatrist testified that the accused was

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[204] *McLean,* at 336.
[205] *McLean,* at 336.
[206] (1982), 27 CR (3d) 324 (Que Sup Ct). See also *R v Collins*, [1987] 1 SCR 265.
[207] See also *R. v. Oickle,* 2000 SCC 38, [2000] 2 SCR 3.
[208] (1980), 5 Man R (2d) 225 (Co Ct) (hereinafter *Gallant*).

borderline between neurotic and psychotic illnesses. The Manitoba County Court held that the statement was inadmissible because it was not the statement of a person "free in volition from the compulsion or inducements of authority" and the accused was dominated mentally, emotionally and intellectually by the police officers.

The issue of voluntariness is quite complex. It is especially relevant to those who may have mental disorders because the disorders may affect how individuals respond to persons in authority. The apparent lack of coercion on the part of those in authority may not be obvious to a person with a mental disorder. The movement towards a more liberal interpretation of voluntariness at common law would seem to address those who, because of mental or emotional disorder, are susceptible to persons in authority. This would mean that the courts would look at the circumstances surrounding the making of the statement, including the actions of those in authority and the individual circumstances of the accused.

It may be difficult to identify people who are susceptible to persons in authority because of a mental disorder. This is especially so where individuals are malleable or suggestible because they are speaking to persons in authority or those they perceive to be in authority.[209] While several authors and courts have recommended and used video or sound taping of interrogations, it would be even more desirable to include video or sound recording of the activities leading up to the formal interview, so as to have a comprehensive record of the accused's behaviour and that of the persons in authority.[210] This evidence would also address the suspect's capacity to make a statement in the first place. Nowadays, there is little or no excuse for failing to include video or audio taping devices in the interrogation process and its absence may cause some concern.[211]

5. Confessions and Appeals

As is illustrated by these decisions, courts of appeal are frequently asked to set aside a trial judge's ruling as to the admissibility of confessions. In *Fitton,* the Supreme Court of Canada held

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[209] Rogers and Mitchell, at 48.

[210] McWilliams, 15-49. See also *R v Lim (No. 3)* (1990), 1 CRR (2d) 148 (Ont HC) (hereinafter *Lim (No 3)).* Mr. Lim was eventually convicted of the offence. See: (1993), 12 OR (3d) 538 (Ont CA).

[211] McWilliams, at 15-50. As of March, 2006, the Calgary Police Service still does not use video devices in the interrogation process. The police do use taping devices when there is some question as to whether or not the suspect is suffering from a mental illness or mental handicap. This information was provided by Constable Martin Cull, Persons with Disabilities Coordinator with the Calgary Police Service.

that the trial judge is in a special position to determine whether, under all of the circumstances, a confession should be admitted. Unless it is made evident or probable that she/he has not weighed the circumstances in light of the confessions rule or has misconceived the circumstances or the rule, her/his conclusion should not be disturbed.[212]

6. Mental Handicap, Capacity and Voluntariness

While a person with a mental handicap may be faced with many of the same difficulties as a person with a mental illness when questioned about a crime, he/she may face some unique or additional difficulties. First, unlike mentally ill persons who may have at one time possessed the capacity to understand the basic workings of the legal system, mentally handicapped individuals may have led lives totally isolated from the community and may lack basic information about the criminal justice system and its adversarial nature.[213] This lack of information would affect an individual's ability to make an informed decision whether or not to make a statement. Mentally handicapped people may also have some difficulty understanding their *Charter* rights, such as the right to remain silent and the right to retain and instruct a lawyer.[214]

Second, it is sometimes difficult for authorities and counsel to identify whether a person lacks capacity to understand her/his legal rights.[215] This is especially so where the person makes efforts to hide his/her disability.

Third, mentally handicapped suspects may possess characteristics that make them more susceptible to coercion and pressure, and therefore to making involuntary confessions.[216] Even in the absence of coercion, some mentally handicapped individuals are prone to confessing in order to please their interrogators. Mentally handicapped people also may become confused and

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[212] This case was followed in *R v Crook* (1979), 1 Sask R 273 (CA) leave to appeal to SCC refused (1980), 5 Sask R 360n (SCC) (hereinafter *Crook*), where the Saskatchewan Court of Appeal would not disturb the trial judge's finding that statements to the police were admissible. See also: *R v Ewert* (1991), 68 CCC (3d) 207 (BCCA), reversed (1992), 76 CCC (3d) 287 (SCC) where the BC Court of Appeal ordered a new trial because the trial court had made the wrong assessment of the evidence which contained a confession given after the police promised that they would obtain psychiatric help for the accused. The Supreme Court of Canada found that there was no question or error of law and therefore the Court of Appeal had no jurisdiction to overturn the conviction. The Supreme Court of Canada restored the conviction.

[213] J Ellis & R Luckasson, "Mentally Retarded Criminal Defendants" (1985) 53(3-4) George Washington Law Rev. 414 at 450 (hereinafter Ellis and Luckasson).

[214] This issue is discussed below under C. The *Charter of Rights* and Statements.

[215] Ellis and Luckasson, at 449.

[216] Ellis and Luckasson, at 446.

dependent under stressful situations.[217] In order to be able to accommodate these unique characteristics, the suspect's mental capacity must be identified at the time of his/her confession.[218]

Many people who are mentally disabled prefer not to disclose the existence of their disability to others, sometimes because they have been treated badly and stigmatized in the past. A suspect with a mental handicap may consequently continue the same practice of not only not disclosing the handicap, but actively concealing it. In normal circumstances, any individual has the right to keep such matters private.

However, the situation in which a person has been arrested and is facing interrogation by the police is not a normal circumstance. It is appropriate for a police officer to exercise a higher standard of care whenever he/she wishes to question a mentally handicapped suspect. Because of the vulnerability of mentally handicapped persons in the interrogation process, and the grave risk that such a person will make a false confession, a police officer should behave differently toward a handicapped suspect than she/he does toward a suspect without a mental disability. Some commentators have suggested techniques that a police officer can use to attempt to determine whether a person might have a mental handicap. One technique is to ask some questions about the person's schooling. Another is to consider the person's vocabulary, literacy and signature.[219] In fact, several police departments in the United States provide training and specific checklists for the identification of persons with mental disabilities.[220] They include questions about the person's physical appearance, her speech and language, her educational level and social maturity. While it may be highly desirable to have a system in place for checking to see if a person has a mental handicap, it is a rough system at best. Some individuals are bound to be missed using these techniques.

Other countries have addressed the issue of lack of understanding of the legal system and one's legal rights by passing legislation or codes of conduct that require that a third person be

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[217] *Smith v Kemp,* 664 F Supp 500 at 502 (MD Ga 1987), *appeal dismissed,* 849 F 2d 481 (11th Cir) aff'd in part, rev'd in part 855 F 2d 712 (1988), as cited in D Praiss, "Constitutional Protection of Confessions Made by the Mentally Retarded" (1989) 14(4) American Journal of Law and Medicine 431 at 443 (hereinafter Praiss). This is also true of persons with Fetal Alcohol Spectrum Disorder.

[218] Ellis and Luckasson, at 449.

[219] Ellis and Luckasson, at 449 - 50.

[220] A list of questions is provided in Praiss at 452, note 157.

present during police interviews. In Australia, a third person must be present during interviews of intellectually disabled suspects. The role of the third person (a friend, relative or other independent person) is to facilitate communication by providing emotional support and by ensuring that the intellectually disabled person understands his/her rights. The independent third party is not to act as a lawyer for the disabled person, but is to ensure that the person understands his/her right to contact a lawyer.[221] This system is somewhat similar to that in place in Canada under the *Youth Criminal Justice Act.*[222]

Similarly, in the United Kingdom, the Secretary of State has issued rules[223] that govern the treatment and questioning of mentally ill and mentally handicapped persons by the police. If a person is mentally ill or mentally handicapped, or if an officer has a suspicion that the person may be mentally ill or mentally handicapped, an "appropriate adult" must be informed of the persons' detention and her whereabouts.[224] An "appropriate adult" is a relative, guardian, a person who has experience of dealing with mentally ill or mentally handicapped persons, or some other responsible adult but who is not a police officer.[225] Generally, a mentally ill or mentally handicapped person must not be interviewed by police or asked to provide or sign a written statement in the absence of the appropriate adult.[226] The appropriate adult does not act simply as an observer. She/He advises the person being interviewed, observes whether the interview is being conducted properly and fairly, and facilitates communication with the person being interviewed.[227]

In Canada, with the exception of the province of Nova Scotia, as well as in United States, the

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[221] J Bright, "Intellectual Disability and the Criminal Justice System: New Developments" (1989) Law Institute Journal 933 at 933.

[222] *Youth Criminal Justice Act*, SC 2002 C1 S 146.2.

[223] Code of Practice as it Relates to Treatment and Questioning of Persons by the Police, Issued by the Secretary of State pursuant to s 66 of the *Police and Criminal Evidence Act,* (UK), 1984, c 60 (hereinafter Code of Practice). See also: P.W.H. Fennell, "Mentally disordered suspects in the criminal justice system", vol 24 *Journal of Law and Society*, 57-71; Brian Littlechild, "Reassessing the Role of the 'Appropriate Adult'" *Criminal Law Review* (July, 1995) 540-545.

[224] Code of Practice, Annex E, paragraphs 1, 2 and 3. See also: William Edwards, "Defending Clients with Mental Retardation", *Alberta Trial Lawyers Association Seminar*, (May 23, 1998), Edmonton, Alberta. Nova Scotia has introduced an "appropriate adult" system and its legal aid society trains lawyers on how to deal with mentally disabled clients.

[225] Code of Practice, Annex E, paragraph 2.

[226] Code of Practice, paragraph 13.1.

[227] Code of Practice, paragraph 13, note 13C. However, see D Campbell, "Mother Serving Life Sentence is Freed", *Manchester Guardian* (March 8, 1992) 5, where a young mentally handicapped woman jailed for life in 1988 for the murder of her baby was freed after the Court of Appeal decided that her conviction was unsafe and unsatisfactory. She had been convicted after making a confession.

responsibility for ensuring that a disabled suspect understands the proceedings, or for deciding not to question a person who appears to lack capacity, is in the hands of individual police officers. It is considered sufficient to provide police officers with some training on the identification of disabilities; however, a report published by the Commission for Public Complaints Against the RCMP recommends that the police forces in Canada should receive specialized training on how to respond to individuals with mental illnesses and mental handicaps. The report states that the current training programs for the police are inadequate and need updating.[228]

If mentally handicapped individuals are not screened before interrogation, they may make unreliable confessions. As already noted some mentally handicapped individuals have a tendency to seek approval and may assume blame so as to please those in authority. They often have a desire to be accepted and may be easily persuaded.[229] They are very susceptible to the appearance of friendliness. Consequently, a mentally handicapped person may respond to an interrogator's attempts to foster confidence and cooperation by making a confession in an effort to please the authority figure.[230]

Although the medical profession has distinguished mental handicap from mental illness, the legal system has been slower to make this distinction. Thus, with some recent exceptions, where the accused has a mental handicap, the cases focus upon the behaviour of the persons in authority and not upon the capacity of the suspect.

There have been some Canadian and English cases where the accused had a mental handicap that may have affected her capacity to make a confession or affected whether the statement was voluntary. In *R v Stewart,* the accused made a statement to the police concerning several fires.[231] His intelligence was quite low. His mental age was not more than five and a half and his use of language was that of a three and one quarter year old child. It was argued that, although there was no suggestion of any threat, inducement or oppression on the part of the police, the accused's mental disability was so severe that his power of comprehension and understanding was so lacking that the probative value of any admissions he made was small yet their prejudicial effect

[228] Commission for Public Complaints Against the RCMP, Chair's Interim Report. 2004-04-26.
[229] Praiss, at 442.
[230] Ellis and Luckasson, at 446.
[231] (1972), 56 Cr App R 272. This principle was accepted in *obiter* in *R v Isequilla* (1974), 60 Cr App R 52 (CA). It was followed in *R v Kilner*, [1976] Crim LR 740 and *R v Williams,* [1979] Crim LR 47.

would be substantial. The trial judge concluded that in the exceptional circumstances of the case, he should exercise his discretion in favour of the accused and not admit the evidence.

In *R v Priest,* the accused was described in a pre-sentence report as the "village idiot" and a "quiet drunk".[232] The trial judge admitted a statement and the accused was convicted of the attempted rape of a two-year-old girl. The admission of the statement was approved on appeal because the court was satisfied that all of the facts had been taken into consideration by the trial judge before accepting the confession.

In *R v Helpard,* the accused was charged with first-degree murder and was found guilty of second-degree murder by a jury.[233] Expert evidence indicated that the accused, age 31, had an intelligence quotient of 72 and that he had the mental age of an 11-year old. Psychiatric evidence also indicated that the accused would be frightened and panicked by authority figures and would find the questioning: "menacing [and] intimidating". The officers knew that the accused was a slow learner. One officer testified that he told the accused in "pure and simple language" that he did not have to tell him anything if he did not want to do so. Defence counsel argued that in view of Helpard's mental age, precautions should have been taken such as having the accused accompanied to the interview room either with his lawyer or his parents. The trial judge admitted the statement. The jury could take the statement and examine all of the circumstances under which it was given and decide whether or not they believe any of it or put any weight in its contents. The Court of Appeal agreed and dismissed the appeal.

In *R v Sabean*, a confession was received in evidence even though there was testimony that the accused had an intelligence quotient of between 60 and 70, a mental age of 12 and that he likely could not read nor write.[234] Expert testimony indicted that the accused had poor verbal ability and was unusually suggestible and timid. The court held that only conduct by persons in authority can render a statement inadmissible, subject to exceptions for such things as shock, gross intoxication or severe mental handicap. In this case there was no hard evidence that the statement was not given of the accused's free will.

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232 [1974] NSJ No 189.
233 [1979] NSJ No 588, leave to appeal to the SCC dismissed (1979), 49 CCC (2d) 35n.
234 (1979), 4 WCB 78 (NSCA). See Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's LJ 601-659.

In *R v Sawchuk (KP)* a mentally handicapped accused was charged with arson after making statements to the police confessing to setting the fire.[235] A *voir dire* was held to determine the admissibility of the statements. The Manitoba Queen's Bench held that the statements were inadmissible because they were not freely and voluntarily made. In this case, the accused did not understand that the evidence could be used against him, that he was not required to talk with the police. In other words, the accused lacked the "operating mind" required for the confessions rule that the statement be freely and voluntarily given.

In *R v Ciliberto*,[236] the accused's mental disability was known to the police. This fact, combined with inducements and oppression that occurred during the interrogation, made the accused's statements inadmissible, even though the accused would have been considered to have an operating mind under normal circumstances.

Although there are indications in some cases that the courts are looking at the capacity of the mentally handicapped accused rather than the conduct of the authorities when analyzing whether to admit confessions at common law, there is no real consensus in the cases. However, recent developments in cases involving the *Charter of Rights and Freedoms* and persons with mental disabilities may provide other bases for excluding confessions.

7. Capacity, Voluntariness and the Videotaping of Confessions

In some cases, it will be quite evident that a person is not capable of making a statement. Presumably, the persons in authority in such a situation would not pursue the matter any further. If the police pursue the questioning under suspicious circumstances, Scott and Martino advise that the police make careful observations of the condition of the accused and make note of these observations. They further advise that police officers should ask general questions and make note of the answers—presumably to gauge whether the person possesses an operating mind. Then the police will be able to argue that if the accused was responsive to the general questions, he/she was able to respond to the specific questions about the offence.[237]

Under these circumstances, an accused may argue that the statement should be excluded

[235] (1994) 98 Man R (2d) 10 (Man QB).
[236] [2005] BCJ No 3013, 2005 BCSC 1859.
[237] Ian Scott and Joseph Martino, *Salhany's Police Manual of Arrest, Seizure and Interrogation*, 11th (Toronto: Carswell, 2015) at 260.

because he/she was not capable of making it. Of course, the accused will have difficulty proving that he/she was not capable of making a statement, especially if he/she does not really recollect the circumstances of the interrogation or has difficulty relating all these events to others. This is why video or sound tapes of the events prior to and during the interrogation would be valuable, especially to the accused. They would also be valuable to the Crown if the Crown wishes to support a claim that the accused appeared to possess the capacity to make a statement. In fact, in a related decision, the Ontario High Court drew the inference that the failure of the police to record the interrogation of a person suggested that the police did not want an independent electronic record of the questioning process, because the record would not have supported their oral evidence as to the accused's ability to understand and speak English.[238]

In *R v Barrett,* the Ontario Court of Appeal dealt with a situation where there was a discrepancy between the accused and the police as to the manner in which a statement was obtained.[239] The accused alleged that he was assaulted before he signed an accomplice's statement in which he was implicated. The police officers stated that the accused agreed to sign the statements. One police officer had made contemporaneous notes of the statement. While there were video cameras filming the booking procedures, they were not located in the interview room. These videos indicated that the accused requested a lawyer. However, the statements were taken before the accused had consulted a lawyer. The trial judge admitted the statements and the accused was convicted. The Ontario Court of Appeal allowed the appeal and ordered a new trial. The Court held that the procedure followed by the police in this case was not satisfactory. The Court held that a videotape of the crucial events surrounding the making of the statements by the accused would have disposed of most of the issues raised during the appeal. This case was then taken to the Supreme Court of Canada in which the majority held that the failure of the trial judge to give reasons for his ruling on the *voir dire* was not, by itself, a ground for appeal. The Supreme Court allowed the appeal and the convictions were restored.

Videotaping the accused's statements has also been endorsed by the Supreme Court of

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[238] *R v Lim,* [1990] OJ No 940.
[239] (1993), 82 CCC (3d) 266 (Ont CA), rev'd [1995] 1 SCR 752.

Canada.[240] The Supreme Court noted that videotaping statements reveals the tone of voice and the facial expression of the witness. Further, taping may provide a complete and reliable record of the statement and the circumstances in which it was given.[241]

In some cases, it may be more difficult to identify a lack of capacity on the part of the accused. Although police personnel and lawyers have some experience with persons who have mental disabilities, there are individuals who are able to cover their disabilities. Further, although they may receive some instruction on identification, police officers and lawyers are not trained in psychiatry and related professions. Therefore, it may be beyond their scope to identify a lack of capacity to make a statement. If this is the case, the video tape would be invaluable as experts could examine such material to determine if the person lacked capacity.

There will also be cases where persons possess the capacity to make a statement, but who are easily influenced or intimidated by persons in authority because of their mental disabilities. Although they may be capable of making statements, voluntariness may be affected by these difficulties. Again, video or sound tapes, when viewed by experts, may help to show that the suspect was indeed suggestible or intimidated; or conversely, that the suspect did have the capacity to make a voluntary confession.

In 1984, the Law Reform Commission of Canada recommended that wherever feasible, questioning that takes place in a police station or prison should be audio-taped or video-taped. [242] The purpose of this recommendation was to provide procedures that would facilitate the reconstruction of an interrogation. Not only would the taping assist the court, but it would also protect the police against allegations of misconduct.[243] Commentary on these recommendations suggested a concern that the police might take an end run around these measures and rehearse or obtain a statement before actually videotaping it. Because of concerns about the police conducting "preliminary interviews" or "rehearsal of confessions" before taping, some authors suggest that

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[240] *R v B(KG)* (1993), 79 CCC (3d) 257 (SCC).

[241] See note 184.

[242] *Questioning Suspects* (Working Paper No. 32) (Ottawa: Supply and Services Canada, 1984) at 58 - 61 (hereinafter Law Reform Commission of Canada Working Paper No. 32). Video taping can also reveal any difficulties that may arise when an interrogation is conducted in a language other than English, and in determining whether sufficient inducement has been offered in light of cultural differences and idioms that would be used by interviewers: *R v Ng et al*, 2012 BCPC 513.

[243] Law Reform Commission of Canada, Working Paper No 32, at 59.

videotaping equipment should be placed throughout police stations, including the garage and the corridors.[244] Rogers and Mitchell suggest that videotapes should focus on both the accused and the authorities so as to provide a full picture of the nature of the interrogation and the interaction between the detective and the accused.[245]

Following the Law Reform Commission's Working Paper No. 32, the Halton Regional Police Force in Ontario introduced a two-year project involving the electronic recording of police interviews.[246] The Law Reform Commission of Canada reported in 1988 that the program met with "modest success". The success was limited because the use of video was basically confined to property offences and in cases involving offenders who were on average 25 years old or younger.[247]

There are numerous procedural and privacy safeguards that would be required, but the videotaping could be a step forward in assisting those who are mentally disabled.[248] Further, video-taping is preferable to audio-taping because it enables the viewer to consider the facial expressions and non-verbal behaviour of both interrogator and suspect. These could be critical in determining the capacity of a mentally disabled suspect.

In *R v Moore-McFarlane,*[249]the Ontario Court of Appeal held that where a suspect is in custody and recording facilities are readily available, the police must videotape the interrogation. Indeed, if a video recording devise is not used, and there is no satisfactory explanation, the trial judge may presume that a confession was not voluntary.[250]

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[244] See: Marin, at 253 - 254.
[245] Rogers and Mitchell, at 52.
[246] Videotaping confessions has also been done in Vancouver. See: C Ruby, "If All Confessions Were Videotaped, Money Would be Saved and Justice Would be Served" [Toronto] *Globe and Mail* (November 3, 1992) at A20.
[247] Marin, at 254.
[248] See also: A Grant, "Videotaping Police Questioning: A Canadian Experiment", [1987] Crim Law Rev 375; M McConville, "Videotaping Interrogations: Police Behavior On and Off Camera", [1992] Crim LR 532.
[249] (2001), 160 CCC (3d) 493 (Ont CA).
[250] But see: *R v Crockett* (2002), 7 CR (6th) 300 (BCCA) and *R v Ducharme* (2004), 182 (CCC (3d) 243 (Man CA) where the courts refused to accept the idea that the failure of the interrogating officers to use recording equipment where available renders a confession inherently unreliable.

Finally, the *Report on Prevention of Miscarriages of Justice* lists the following recommendations to decrease the number of false confessions by including using videotaping, among other suggestions:[251]

1. Custodial interviews of a suspect at a police facility in investigations involving offences of significant personal violence (e.g., murder, manslaughter, criminal negligence causing death or bodily harm, aggravated assault, aggravated sexual assault, sexual assault of a child, armed robbery, etc.) should be video recorded. Video recording should not be confined to a final statement made by the suspect, but should include the entire interview.

2. Investigation standards should be reviewed to ensure that they include standards for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process and to accurately preserve the contents of the interview.

3. Police investigators and Crown prosecutors should receive training about the existence, causes and psychology of police-induced confessions, including why some people confess to crimes they have not committed, and the proper techniques for the interviewing of suspects (and witnesses) that are designed to enhance the reliability of the product of the interview process.

8. The *Charter of Rights* and Statements

(a) The Right to Retain and Instruct Counsel

Before the advent of the *Charter,* persons in authority (e.g., police officers) were not obligated to advise the person detained or arrested of the reasons for this action or to inform the suspect of her right to remain silent or her right to retain and instruct counsel without delay. However, in practice, most police forces have issued a warning or caution for many years.[252] The cases held that the issuance of a warning was merely one among the circumstances that a judge would assess in determining the voluntariness of a statement.[253] The advent of the *Charter* has served to entrench these rights and therefore places obligations upon the police or other arresting or detaining authorities to ensure that the appropriate caution is provided regarding the right to counsel. Most police officers rely upon issued warning cards that reflect the law's requirements.

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[251] *Report on Prevention of Miscarriages of Justice,* at 74.
[252] Law Reform Commission of Canada, Working Paper 32, at 56.
[253] Boudreau.

Because of the preliminary caution requirements, statements that may have been otherwise admissible may be excluded from evidence if these requirements are not met. Although confessions made to persons in authority that are ruled not voluntary will be automatically excluded at trial, often statements made by mentally disabled suspects are considered admissible. Even if the wider subjective test of voluntariness is used instead of the narrow analysis of the conduct of persons in authority, it may be difficult to show that the statement was not voluntary. However, there are other options open to counsel seeking to exclude otherwise admissible confessions. The *Charter of Rights and Freedoms* guarantees certain rights to individuals who have been arrested or detained.[254] These include the right to retain and instruct a lawyer and the right to be told about that right (subsection 10(b)) and the right to remain silent (section 7). If these rights are infringed, the court has the discretion to exclude the evidence obtained after the infringement (subsection 24(2)).

Although evidence obtained as a result of a *Charter* breach is not automatically excluded as with the confessions rule, defence counsel may be able to argue that the admission of the tainted evidence would bring the administration of justice into disrepute (subsection 24(2)).[255] The onus of establishing that the admission of the statement into evidence would bring the administration of justice into disrepute under subsection 24(2) is on the accused.[256] The accused must prove on a balance of probabilities (with enough evidence to tip the scales in his favour) or by a preponderance of the evidence that the admission of the evidence would bring the administration of justice into disrepute and should therefore be excluded.[257]

Sections 10(b) and 24(2) of the *Charter of Rights and Freedoms* read:

> 10. Everyone has the right on arrest or detention
> ...
> (b) to retain and instruct counsel without delay and to be informed of that right...

[254] A comprehensive body of case law has arisen as to what constitutes an arrest or detention. See, for example: Marin at 84 - 96.

[255] However, since a remedy under s 24(2) is not available at a preliminary inquiry, counsel may wish to argue that the confession should be excluded under the common law confessions rule. See: *R v Grossi* (1992), 133 AR 278 (Prov Ct).

[256] *R v Collins* (1987), 56 CR (3d) 193 (SCC) (hereinafter *Collins*).

[257] *Collins*, at 208.

> 24. (1)...
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The accused must be properly informed of her/his right to counsel and she/he must be given sufficient information to exercise this right. The duty of police to inform a detained person of her/his right to counsel encompasses three subsidiary duties: "(1) the duty to inform the detainee of his right to counsel; (2) the duty to give the detainee who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and (3) the duty to refrain from eliciting evidence from the detainee until the detainee has a reasonable opportunity to retain and instruct counsel".[258]

In *R v Therens*, the Supreme Court of Canada held that *Charter* subsection 10(b) imposes a duty not to call upon a detainee to provide evidence without first informing of her/his subsection 10(b) rights and providing her/him with a reasonable opportunity and time to retain and instruct counsel.[259] The aim of this provision is to "ensure that in certain situations a person is made aware of the right to counsel" where he is detained by the police in a situation that may give rise to a "significant legal consequence".[260]

The case of *R v Grant*[261] distinguished *Therens,* and concluded that not every situation when an individual is questioned by police constitutes detention—particularly in situations where the police are acting in a non-adversarial role and assisting members of the public in circumstances that are commonly accepted as lacking the essential character of a detention. However, the court agreed that where there is a legal obligation to comply with a police demand or direction, this will

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[258] *R v Manninen*, [1987] 1 SCR 1233 (hereinafter *Manninen*); *R v Ross*, [1989] 1 SCR 3; *R v Black*, [1989] 2 SCR 138 (hereinafter *Black*); *R v Evans* (1991), 4 CR (4th) 144, 3 CRR (2d) 315 (SCC).
[259](1985), 18 CCC (3d) 481 (SCC) (hereinafter *Therens)*. See also: G.S. Garneau, "The Application of Charter Rights to the Interrogation Process" (1986) 35 Univ N B Law Journal 35.
[260] *Therens*, at 218.
[261] [2009] 2 SCR 353, 2009 SCC 32 (hereinafter *Grant*).

constitute a detention.[262] The SCC noted that detention under s 10 of the *Charter*:[263]

> [R]efers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
> b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
> c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Grant also discusses the factors that must be considered by the Court when faced with an application to exclude evidence under *Charter* section 24(2):[264]

> When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and

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[262] *Grant,* at para 34.

[263] *Grant*, at para 44.

[264] *Grant*, at paras 71-72. 76-77, 79, 86 and 127. At the first stage, the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

(3) society's interest in the adjudication of the case on its merits.

In *R v Brydges,* the Supreme Court of Canada stated that a person arrested or detained "is in immediate need of legal advice", so as to ensure that the person's right against self-incrimination is protected.[265] The Supreme Court of Canada stated that accused persons should be told in all cases of arrest or detention of the existence and availability of duty counsel and Legal Aid plans.[266] The police departments across the country amended their standard cautions since *Brydges* was decided. For example, in Edmonton, the caution used in 1992 stated:[267]

> You have the right to retain and instruct counsel without delay. This means that you may call your own lawyer or get free legal advice from Duty Counsel immediately. If you are charged with an offence, you may apply to Legal Aid for assistance.
>
> Do you understand?
>
> Do you want to call a lawyer?

In Calgary, the caution reads as follows:

> You have the right to retain and instruct counsel without delay. This means that before we proceed with our investigation you may call any lawyer you wish or get free legal advice from duty counsel immediately. If you want to call duty counsel, we will provide you with a telephone and telephone numbers. If you wish to contact any other lawyer, a telephone and telephone book will be provided. If you are charged with an offence, you may also apply to Legal Aid for assistance. Do you understand? Do you want to call duty counsel or

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[265] [1990] 1 SCR 190, 74 CR (3d) 129 at 142 (hereinafter *Brydges*). Since this case was decided, numerous decisions have dealt with the interpretation and application of *Brydges*. It is beyond the scope of this report to discuss these cases.

[266] In *R v Bartle*, [1994] 3 SCR 173, *R v Prosper*, [1994] 3 SCR 236, *R v Pozniak*, [1994] 3 SCR 310, *R v Harper*, [1994] 3 SCR 343, *R v Matheson*, [1994] 3 SCR 328 the Supreme Court held that the informational component of s 10(b) of the *Charter* included the right of the accused to be informed not only of the existence and availability of free duty counsel , but also of the means of access to duty counsel. This also included being informed of a toll-free telephone number to contact duty counsel and where duty counsel is accessible at that number 24 hours a day.

[267] *R v Cobham* (1992), 124 AR 136 at 137 (QB), reversed (1993), 80 CCC (3d) 449 (Alta CA), leave to appeal to SCC granted [1994] 3 SCR 360 (hereinafter *Cobham*). Joseph Eastwood & Brent Snook, "Comprehending Canadian Police Cautions: Are the Rights to Silence and Legal Counsel Understandable?" (2010) 28 Behavioural Science Law 366.

any other lawyer? [268]

In Vancouver, the caution read:

> You may call any lawyer you want. A Legal Aid duty lawyer is available to provide legal advice to you without charge and can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer, I can provide you with a telephone number. Do you understand? Do you want to call a lawyer? The jail NCO has a list of Legal Aid duty lawyers that may be contacted during normal business hours. After normal business hours and weekends, Legal Aid duty lawyers are available by calling 631-0566; outside the lower mainland, toll-free 1-978-0050.[269]

In Winnipeg, the caution read:

> It is my duty to inform you that you have the right to retain and instruct counsel without delay. Do you understand? If you cannot afford it, you have the right to obtain legal advice without charge from Legal Aid duty counsel. (Legal Aid 24-hour telephone number: 985-8570.) Do you understand? You have the right to apply for legal assistance without charge through the provincial Legal Aid program. (Legal Aid 24-hour telephone number: 985-8570.) Do you understand? Do you wish to call now?[270]

In March 1990, the Legal Aid Society of Alberta initiated a program that provides free telephone advice to accused upon arrest or detention. All police detachments throughout Alberta have been given lists of lawyers available on a 24-hour basis. In *Cobham*, the Alberta Court of Queen's Bench opined (in *obiter*) that the Alberta cautions complied with the minimal requirements of *Brydges,* but made some suggestions as to improvements.[271] First, the court

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[268] Charter Right To Counsel - Adult and Youth Wording. Calgary Police Service (December, 1997).

[269] *Cobham,* at 138 (QB).

[270] *Cobham,* at 139 (QB).

[271] The Court of Appeal reversed the accused's acquittal and held that *Brydges* did not place a constitutional obligation on provinces to arrange for lawyers to offer free telephone advice to detainees everywhere in the country, at all hours. Further, it was not open for the appeal justice to raise the issue of legal aid service. There was no evidence to suggest that there was a plan in place that would have assisted the accused. However, the Court of Appeal stated that in the process of raising the issue of the availability of legal aid in Alberta, the Queen's Bench justice had "offered to police and Crown in Alberta much very good advice about future practice, for which I trust they are grateful."

recommended that the phrase "duty counsel" be replaced by "lawyer" because an unsophisticated detainee or a person who does not speak English might reasonably assume that a duty counsel is not a lawyer.[272] Second, the words "right to retain and instruct counsel" should be changed because an ordinary person might not understand that they mean that he has the right to call a lawyer.[273] The Court of Queen's Bench expressed surprise that the issue of misunderstanding of the wording had not arisen but suggested that the reason was that if a detainee or arrestee indicated lack of understanding, the "police officer, if she is a responsible and conscientious officer, will usually give more specific information. So the problem of lack of understanding is often solved on the spot".[274]

It is interesting to note that this decision was addressing *Charter* cautions provided to the general public, and not those specifically related to mentally disabled persons. Studies conducted in Canada indicate that the Canadian *Charter* cautions appear to require that the person have a grade ten reading level in order to be understood.[275] Research on the Miranda warnings provided in the United States (which are somewhat similar) indicate that individuals with I.Q.s less than 80 are likely to have a poor understanding of what the caution means.[276] While most of these accused appreciate the nature of interrogation, fewer understood the right to counsel or the right to remain silent.[277]

There have been cases in which the accused was at a disadvantage because of an impairment or disability when being informed of her/his right to counsel. In *Clarkson*, the accused was very intoxicated while being given the police warning and being informed of her right to counsel. The accused, accompanied by an aunt, appeared to nod when asked if she understood her rights. The accused, despite suggestions to the contrary by her aunt, stated that there was "no point" in having counsel and was then questioned by the police while still drunk and emotional. The majority of the Supreme Court of Canada held that the accused could not validly waive her

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[272] *Cobham,* at 142 (QB).
[273] *Cobham,* at 143 (QB).
[274] *Cobham,* at 143 (QB).
[275] Rogers and Mitchell, at 47. See also: Simon Verdun Jones, *A Review of Brydges: Duty Counsel Services in Canada* (Legal Aid Research Series: Ottawa, 2005).
[276] Rogers and Mitchell, at 47.
[277] Rogers and Mitchell, at 47-8.

right to counsel in circumstances where she was unaware of the consequences of giving up this right. "Any voluntary waiver in order to be valid and effective must be premised on a true appreciation of the consequences of giving up the right."[278] Since the police infringed the accused's constitutional rights when obtaining her confession and since this was a blatant violation under the circumstances, the evidence was rejected under subsection 24(2) of the *Charter.*

In *R v MacDonald*, a severely hearing impaired person was charged with driving while having excessive blood alcohol content and with impaired driving.[279] The police had given him the standard *Charter* caution and advised him of his right to counsel but had not provided him with an interpreter. The police felt that they had fulfilled their obligations by speaking loudly and gesturing. In finding the accused not guilty, the Nova Scotia Provincial Court found that on balance the accused's *Charter* rights were violated and excluded the evidence under subsection 24(2). The Court could not be certain that the accused had understood his rights in absence of an interpreter, even though the police introduced evidence that he had understood.[280]

In *R v Lim*, the accused was arrested and charged with conspiracy to commit murder. He was advised of his right to retain and instruct counsel, but because of his minimal grasp of English, did not understand that right. The accused could not read or write English. He only understood simple sentences and concepts in English. However, the accused did or said something to the arresting officer that suggested he understood. He had only uttered a few sentences when the police made this judgment. Mr. Lim was held in custody while his apartment was searched, and was not asked if he wanted to call a lawyer. Later, at the police station, the accused was interviewed by two police officers but was not offered the services of an interpreter. He made and signed a formal statement.

The Ontario High Court concluded that the statements would have been admissible at common law and that Lim's inability to understand English would have affected their weight and authenticity. However, because the accused did not understand that he had the right to contact and speak to a lawyer and obtain legal advice before deciding whether to speak to the police, the

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[278] *Clarkson*, at 219. See also: *Black* and *Manninen* where the Supreme Court of Canada held that the fact that the accused answered police questions did not amount to a waiver of their rights.
[279] (August 27, 1992), (NS Prov Ct), as summarized in (October 16, 1992) *The Lawyers Weekly*, at 11 and 16.
[280] (October 16, 1992) *The Lawyers Weekly*, at 11 and 16.

evidence was excluded because it was obtained through a violation of the accused's *Charter* rights. The High Court held that, under the circumstances, the police had a duty to amplify on the words of s 10(b) and to take steps to ensure that the accused understood. In this case, the police did not take steps that would have permitted that to reach the reasonable conclusion that the accused understood and appreciated the nature of his right to counsel. Further, the admission of the statements would bring the administration of justice into disrepute. Consequently, the evidence was excluded.

The Ontario High Court also stated that the process would have been made "immeasurably easier" if there had been a video or audio record of the interview. "A video or audio recording would have provided cogent and trustworthy evidence of Mr. Lim's ability to speak and understand English".[281] Further, the High Court drew the inference that the failure of the police to record the procedure suggested that the police did not want an independent electronic record of the questioning process, because the record would not have supported their oral evidence as to the accused's ability to understand and speak English.[282]

These cases are moving towards ensuring that the accused understands the consequences of waiving the right to counsel. They also indicate that the police have a duty to ensure that the accused understands this right. If an accused is unable to understand his/her legal rights, then how can he/she make a meaningful choice? Rogers and Mitchell suggest that it would be an interesting exercise to test individuals as to their understanding of words that have specialized legal application. For example, words such as *charge, caution* and *counsel* have different meanings depending on their context. Consequently, the first aspect of understanding is whether the accused comprehends the vocabulary used in the cautions.[283]

In addition to understanding one's rights, the accused should be aware of how her/his decision to make a statement (or waive her/his rights) might affect her/him and the consequences of making the statement or not making the statement.[284] The suspect must realize the importance of the criminal charges to her/him. Interrogations could have significant consequences for a person

[281] *R v Lim* at 152.
[282] *R v Lim* at 153.
[283] Rogers and Mitchell, at 48 - 9. These authors recommend that the accused be given intelligence and standardized reading tests to gauge their understanding.
[284] Rogers and Mitchell, at 51.

who is mentally ill because her/his illness may affect the way that she/he interprets the interrogation circumstances and her/his role in them. For example, a person who suffers from delusions of persecution may perceive that she/he is somehow threatened and may therefore make a statement because she/he is afraid.[285]

A very significant *Charter* case dealing with persons with mental handicaps is *Evans*.[286] Evans, a man of subnormal mental capacity due to a brain injury, was convicted of first-degree murder in the killings of two women. At first, the police suspected his brother in the murders and arrested Evans on a marijuana charge in the hopes that Evans would be able to provide evidence against his brother. Upon his arrest, the police informed Evans of his right to counsel, but when asked if he understood his rights, he replied, "No." Evans was interrogated on the marijuana charge and during the course of the questioning became the prime suspect in the murders. The police did not inform Evans that he was then being held for murder, nor did they remind him of his right to counsel when they switched to questioning him about the murders. The Supreme Court of Canada held that the statements should be excluded under subsection 24(2) of the *Charter.*

Evans had been hit by a truck at a crosswalk at the age of nine and suffered brain injuries. At age 11, he suffered third degree burns to the upper part of his body as a result of an accident with a cigarette lighter and was heavily scarred. Evans achieved a grade five or six education and attended rehabilitation for brain-injured victims. A psychiatrist and psychologist who examined Evans after he was charged concluded that he had an I.Q. of 60 to 80 and that he functioned at an emotional level of a 14 year old.

Prior to arresting Evans, the arresting officers had been told of his mental deficiency and were cautioned to ensure that Evans understood the warnings given him. After confessing to the killings, Evans was placed in a cell where two of his conversations with an undercover police officer in the next cell were recorded. During one conversation, Evans was asked why he confessed if he did not do the crime. To this Evans replied, "Well they, they wouldn't give me a rest until I

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[285] Rogers and Mitchell, at 52 - 3.

[286] *R v Evans* (1991), 4 CR (4th) 144, 3 CRR (2d) 315 (SCC) (hereinafter *Evans*). *Evans* has been cited in 721 judgments. Those involving a mental capacity element include: *R v Whittle,* [1994] 2 SCR 914; *R v Latimer* [1997] 1 SCR 217 (SCC); *R v Burlingham*, [1995] 2 SCR 206 (SCC); *R v Borden,* [1994] 3 SCR 145 (SCC); *R v McColeman*, 1991 CanLii 33 (BCCA); and *R v Stringer*, 1992 CanLII 2775 (NLCA).

confessed."[287] Later that day, Evans was asked to provide a written statement in which he again confessed to the two murders.

The Supreme Court of Canada held that the police officers did not comply with s 10(b) when making the original arrest. The court stated:

> It is true that they informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to *communicate* the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding. [288]

Second, when the police failed to reiterate the right to counsel after the nature of the investigation changed and the accused was a suspect in the two killings, Evan's subsection 10(b) rights were again infringed.

Although the Supreme Court appears to limit the requirement to explain the right to obtain counsel when the accused positively indicates that he/she does not understand, there may be room to argue for further inquiries into the accused's understanding in some circumstances, as in the *Lim* case, where the person's lack of understanding is fairly plain. The circumstances might clearly indicate to the officers that the suspect does not understand, even where he/she answers the "understanding" question in the affirmative. There may also be difficulty in situations where the accused's lack of understanding of her/his rights is not blatantly obvious. In these situations, persons who do not comprehend their rights could slip through the cracks. Video taping the interrogations may assist in catching those who do not understand their rights.

(b) The Right to Remain Silent

Another *Charter* right that is closely related to the right to counsel is the right to remain

[287] *Evans*, at 322. This illustrates one of the concerns regarding mentally disabled persons and confessions as stated in some of the literature.
[288] *Evans*, at 329.

silent. While the *Charter of Rights* does not specifically enumerate a right to remain silent, recent cases have held that section 7 accords the right to remain silent. The section reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In *Hebert,* the Supreme Court of Canada held that the right to remain silent should be given a wider scope than the confessions rule.[289] A detained person must have the right to make a "free and meaningful choice as to whether to speak to the authorities or to remain silent."[290] Subsection 10(b) guarantees the right of a detained person to consult counsel. The most important function of legal advice for those being detained is that the accused understand his/her legal rights, the chief right being the right to silence. The state is obligated to allow the suspect to make an informed choice about whether or not to speak to the authorities. First, the suspect must possess an operating mind. Then, the focus shifts to the conduct of the authorities. Was the suspect given the right to consult a lawyer? Was there other police conduct that "effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?"[291] Thus, when looking at the right to remain silent, the courts should look at the accused's informed choice, the fairness to the accused and the reputation of the administration of justice.[292]

The majority of the Supreme Court held that there are several exceptions to the right to remain silent. There is nothing in the rule to prohibit the police from questioning the accused without her/his lawyer present after the accused has retained counsel. Also, the rule applies only after detention. Consequently, statements made during undercover operations before detention would not be protected. Further, the right to silence does not protect voluntary statements made to fellow cellmates. Finally, the right will only be protected when undercover agents actively elicit information and not when they merely observe the suspect.[293]

It should be noted that in a separate concurring judgment, Sopinka J. held that whether or

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[289] *Hebert*, at 134.
[290] *Hebert*, at 138.
[291] *Hebert*, at 139.
[292] *Hebert*, at 139 to 140.
[293] *Evans*, at 140 - 141.

not the accused believes that a police officer is a person in authority is not relevant to the issue of denying his/her right to remain silent. Consequently, if the authorities utilize disguises, they will not be able to rely upon the argument that the accused did not subjectively believe they were persons in authority as required in the confessions rule.[294] Further, the right to remain silent arises when the "coercive power of the state is brought to bear against the individual—either formally (by arrest or charge) or informally—on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual".[295] Once the right to remain silent attaches, any communication between an accused and an agent of the state is subject to the right to remain silent and may proceed only if the accused waives the right.[296]

Although the *Hebert* decision appears to focus upon the behaviour of the authorities when determining whether the suspect was granted his right to remain silent, there is a basic preliminary requirement that the accused possess an operating mind when speaking to the authorities. This issue is relevant to the mentally disabled accused. Presumably the case law will assist in determining what an "operating mind" is (see previous discussion).

If the accused is found to have an operating mind, the two-part test for the right to silence in section 7 will apply. First, there is an initial inquiry as to whether the evidence was obtained by an agent of the state. Second, the court examines whether the manner in which the evidence was acquired infringes the suspect's right to choose to remain silent.[297] Generally, there will be no violation of the right to remain silent if the suspect volunteers the information, knowing he/she is talking to an agent of the state.

The majority in *Hebert* recognizes a constitutional right to remain silent.[298] However, there

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[294] *Hebert,* at 153.

[295] *Hebert,* at 153, per Sopinka J.

[296] *Hebert,* at 153, per Sopinka J.. However, the majority does not agree with this position.

[297] *R v Broyles* (1991), 9 CR (4th) 1 (SCC) (hereinafter *Broyles)*.

[298] The Manitoba Court of Queen's Bench recognized that the Charter right to silence is broad enough to protect an involuntary psychiatric patient from being forced to testify at his own review hearing. See: *W(C) v Manitoba (Mental Health Review Board)* (1992), 11 CPC (3d) 11 (Man QB) (hereinafter *W(C) v Manitoba (Mental Health Review Board))*. An appeal to the Manitoba CA was allowed and the declaration set aside without deciding whether s. 7 Charter applied to these kinds of proceedings. The reasons given by the court were based on insufficient facts to support the declaratory relief granted at QB: *W(C) v Manitoba (Mental Health Review Board)*, 26 CPC (3d) 1 (Man CA). NB. An appeal to the SCC was dismissed without reasons: (1995) SCCA No. 51.

is still no requirement that the police advise the accused of the right to remain silent.[299] Also, because the right to remain silent is based on an objective approach, there is no requirement that the accused understand her/his right to silence.[300]

The issue of who is an agent of the state for the purposes of the right to remain silent may have relevance for the mentally disordered person because he/she will often be ordered to undergo psychiatric assessments. In cases where the statements are made to police officers or prison officials, it is clear that the person to whom the statement was made was an agent of the state. In other cases, such as when the accused speaks to a friend or psychiatrist, it will be less clear whether the person is an agent of the state. This is particularly so if the friend or psychiatrist (the informer) has spoken to the authorities before the conversation takes place. The Supreme Court of Canada has held that in determining whether or not an informer is an agent of the state, it is necessary to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused.[301] If the relationship between the informer and the state affects the circumstances surrounding the making of the statement, the accused's section 7 right to remain silent may be affected. The question remains "would the exchange between the informer and the accused have taken place but for the inducements of the authorities?"[302]

The second part of the test for information acquired in violation of the section 7 right to remain silent requires that the evidence was acquired in a manner that infringed the suspect's right to choose to remain silent. If the suspect volunteers the information (there is no elicitation of the information), knowing she is talking to an agent of the state, there will be no violation of the suspect's right to silence.[303] If however, the agent of the state elicits the information, there may be a violation of the section 7 right.

The Supreme Court of Canada has proposed a list of factors that should be considered when determining whether the agent of the state "elicits" the information. First, did the relevant parts of

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[299] However, see *R v W (WR)* (1992), 75 CCC (3d) 525 (BCCA), where the court held that police who detain accused for interrogation have a responsibility to ensure that the right of the accused to remain silent is respected.
[300] D Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, Ont: Thomson Professional Pub, 1991) at 95.
[301] *Broyles*, at 12.
[302] *Broyles*, at 12.
[303] *Broyles*, at 13.

the conversation function as an interrogation? Second, did the state agent exploit any special characteristics of the relationship to extract the statement? "Was there a relationship of trust between the state agent and the accused? Was the accused obligated or vulnerable to the state agent? Did the state agent manipulate the accused to bring about a mental state in which the accused was more likely to talk?"[304]

On the basis of this test, it would seem that an accused who is examined by a Crown psychiatrist or other professional should be aware of his right to remain silent before he speaks to the professional. Since the Crown is retaining the psychiatrist, presumably to examine the accused and perhaps to obtain information about the circumstances surrounding the alleged crime, it would appear that this person is an agent of the state for the purposes of the right to remain silent. On this analysis, an accused who speaks to a Crown expert without being aware of her right to remain silent or without at least having consulted with a lawyer could argue that any statement or confession made to the professional should be excluded from evidence.[305]

(c) Waiver of Charter Rights

When a person knowingly or intentionally relinquishes a right, he/she is waiving that right. Under the common law confessions rule, once statements were shown to be voluntary, there was no need for the prosecution to prove that the suspect had consciously waived his/her right to retain and instruct counsel or his/her right to remain silent. However, with the advent of the *Charter,* the issue of what constitutes a valid waiver of one's *Charter* rights has come to the fore.

The law surrounding a waiver of the right to counsel is clearer than that for an effective waiver of the right to remain silent. In *R v Clarkson*, the Supreme Court of Canada held that in order to be valid, any alleged waiver of the right to counsel had be premised on a true appreciation of the consequences of giving up that right.[306] Since Clarkson was too intoxicated to understand what she was saying or doing at the time she was questioned, her waiver was not valid and her statements were excluded.

In *Smith,* 1991, the Supreme Court of Canada held that, when waiving subsection 10(b) rights, "common sense" requires that the accused "be possessed of sufficient information [to

[304] *Broyles,* at 31-34.
[305] This issue is discussed below under: Crown Requested Examinations.
[306] [1986] 1 SCR 383. See also: *R v Black* (1989), 47 CHRR 171 (SCC).

understand] the sort of jeopardy he faced when he made the decision to dispense with counsel".[307]

In *Evans*, the Crown argued that the written statement made subsequent to the oral confessions and after the accused was asked in plain terms whether he wanted to speak to a lawyer had the effect of curing the earlier *Charter* subsection 10(b) violations. The Supreme Court of Canada held that such an argument could only succeed if they concluded that the appellant had waived his subsection 10(b) right by making the written confession. The Supreme Court discussed the law in this area. Although a person may implicitly, by words or conduct, waive his/her rights under subsection 10(b), the standard will be very high.[308] For a voluntary waiver to be effective, it must be premised on a true appreciation of the consequences of giving up the right.[309] The Supreme Court held that in view of Evan's subnormal mental capacity and the circumstances surrounding his arrest (his lack of understanding, and the fact that he was subjected to a full day of aggressive and at times deceptive interrogation that left him feeling as if he had no choice but to confess), he did not appreciate the consequences of making the written statement and thereby waiving his right to counsel. Thus, the written statement was also taken in violation of Evan's subsection 10(b) rights.[310]

On the other hand, what will constitute an effective waiver of the section 7 *Charter* right to remain silent is not clear. The Supreme Court of Canada held in *Hebert* that the right to remain silent is not an absolute right that can only be discharged by the accused's waiver of the right. The Court held that the *Clarkson* "subjective" standard relating to waiver of a *Charter* right does not apply to the right to silence. The *Clarkson* approach to waiver is subjective, depending upon the accused's knowing that she/he is speaking to the authorities, and would result in all statements made by the accused to authorities being excluded unless the accused waived the right to remain silent. The majority decided that the scope of the right to silence should not be extended this far.[311]

If an objective approach to the confessions rule is retained, the right to remain silent would be subject to certain exceptions. These include the ability of the police to question an accused after

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[307] *R v Smith*, [1991] SCR 714 (SCC) (hereinafter *Smith,* 1991) at para. 28.
[308] Manninen, at 1244.
[309] Clarkson.
[310] *Evans,* at 331.
[311] Both Wilson J and Sopinka J, who gave separate concurring reasons, would have applied the accepted waiver standard.

counsel has been retained; that the right is only triggered by detention; the fact that the right does not attach to voluntary statement to a cellmate; and that the police may observe or passively elicit information through undercover operatives.

Thus, the approach of the majority of the Supreme Court of Canada would seem to be that the right to remain silent is not an absolute right, which may only be discharged through a waiver where the suspect is aware of the consequences of the waiver. Thus, once it is established that the accused had an operating mind, the focus will shift to an analysis of the conduct of the authorities and whether they accorded the right to counsel or unfairly deprived the suspect of his right to choose whether or not to speak to the authorities. Thus, the doctrine of waiver does not seem to have any application to the s. 7 right to remain silent. Some authors feel that in *Hebert* the majority of the Supreme Court of Canada has indirectly repudiated some aspects of the *Clarkson* decision.[312]

It should be noted that the doctrine of waiver continues to apply to other *Charter* rights, such as the right to counsel, the right to be tried within a reasonable time and the right to a trial by jury.

9. Summary

The following pages contain a chart that summarizes the various defences available regarding confessions made by mentally disabled persons. The chart outlines the arguments, and lists some illustrative cases.

[312] Quigley and Colvin, at 308.

ADMISSIBILITY OF CONFESSIONS BY MENTALLY DISABLED PERSONS

CONCEPTS	ARGUMENTS	CASES
Confessions Rule—Common Law No statement made out of court by an accused to a person in authority can be admitted in evidence against him/her unless the Crown proves to the satisfaction of the judge that it was made freely and voluntarily. **Person in Authority:** Depends upon the accused's perception of whether the person to whom he/she confessed had some degree of power over him/her at the time. **Voluntariness:** The traditional test was an objective test—the statement must not have been obtained by fear or prejudice or hope of advantage exercise or held out by a person in authority. The broader test looks at the subjective mental element also. The subject must at least possess the mental capacity to make an active choice.	**Persons in authority:** **-** argue that they include police officers, psychiatrists, and others (although cases may be against psychiatrists being considered persons in authority) - person perceived as agent of the police may be considered person in authority **Voluntariness:** -argue that a mentally disabled person may not perceive the lack of coercion -argue that the more liberal approach is appropriate for mentally disabled clients because they may be malleable or suggestible or confused and dependent - argue that the person's mental disability affects the accused's comprehension and understanding -argue that an inadmissible confession cannot be introduced indirectly by admitting a statement that was given under questionable circumstances. Although accused can be challenged on a protected statement (s. 672.31(3) (f)) for credibility, the accused's statement made in response to being confronted by the inadmissible statement is also not admissible.	• *Erven v The Queen* (1978), 44 CCC (2d) 76 (SCC) • *Ibrahim v The King,* [1914] AC 599 (PC) • *Boudreau v The King,* [1949] SCR 262 • *R v Fitton,* [1956] SCR 958 • *R v Wray,* [1971] SCR 272 • *Horvath v R* (1979), 44 CCC (2d) 385 (SCC) • *Ward v The Queen* (1979), 7 CR (3d) 153 (SCC) • *R v Oickle,* [2000] 2 SCR 3 • *R v B (G),* [1999] 2 SCR 475

Capacity The preliminary consideration that the accused had the capacity to make a statement. Two tests have evolved: Operating mind and "awareness of the consequences". **Operating Mind Test:** Accused had the capacity to make a valid confession if he was capable of comprehending what he was saying **Awareness of the consequences:** Accused must be aware of the consequences of making a confession	**Operating Mind:** - argue that the accused is devoid of rationality and understanding so that his uttered words could not fairly be said to be his statement at all -argue that the judge is not bound to apply any fixed formula to determine operating mind **Awareness of the Consequences** -argue that the mental disability prevented the accused from understanding the consequences of his confessing	• *McKenna v The Queen,* [1961] SCR 660 • *R v Santinon* (1973), 11 CCC (2d) 121 (BCCA) • *Ward v The Queen* (1979), 7 CR (3d) 153 (SCC) • *R v Horvath* (1979), 44 CCC (2d) 385 (SCC) • *R v Clarkson* (1986), 25 CCC (3d) 207 (SCC) • *R v Whittle*, [1994] 2 SCR 914
Charter s. 10(b): Right to Retain and Instruct Counsel Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right	-argue that a mentally disabled accused may not understand the standard *Charter* caution - argue the police have a duty to amplify on the words of 10(b) and to take steps to ensure that the accused understands this right -argue that in order to make a decision to waive this right the accused must understand how this might affect her and the consequences -argue that a person with a mental disability may not appreciate the consequences of waiving a right	• *R v Therens* (1985), 18 CCC (3d) 481 (SCC) • *R v Manninen,* [1987] 1 SCR 1233 • *R v Evans* (1991), 4 CR (4th) 144 (SCC) • *R v Brydges,* [1990] 1 SCR 190 • *R v Clarkson* (1986), 25 CCC (3d) 207 (SCC)

Charter s. 7: Right to Remain Silent Everyone has the right to life, liberty and security of the person and the right to be deprived thereof except in accordance with the principles of fundamental justice. - s. 7 includes the right to remain silent -the Supreme Court has held that this rule should be given a wider scope than the confessions rule **-in more recent cases, the Supreme Court has ruled that the common law confessions rule can offer protections beyond those guaranteed by the Charter (See *Oickle*).**	-the state is obligated to allow the suspect to make an informed choice about whether or not to speak to the authorities -argue first that the accused did not have an operating mind -argue second that the conduct of the police effectively and unfairly deprived the suspect of the right to choose whether or not to speak to the authorities **-argue that the right to remain silent cannot be used as evidence against the accused to draw an adverse**	• *R v Hebert* (1990), 57 CCC (3d) 1 (SCC) • *R v Broyles* (1991), 9 CR (4th) 1 (SCC) • *R v Chambers* [1990], 2 SCR, 1293 (SCC) • *R v Whittle* [1994], 2 SCR 914 • *R v Prosper,* [1994], 2 SCR 236 • *R v Bartle,* [1994] 3 SCR 173 • *R v Oickle,* [2000] 2 SCR 3

D. American View on Confessions, Voluntariness and Waiver

Various jurisdictions in the United States have approached the issue of confessions by mentally disabled suspects slightly differently. The Fourteenth Amendment to the *Constitution of the United States of America* guarantees due process and has been interpreted to forbid the admission of involuntary confessions.[313] The general rule requires that the prosecution prove that all statements are voluntary whether or not they are made to a person in authority.[314] Thus, involuntary confessions will be excluded from evidence by the courts because they are likely to be unreliable and because certain practices of the police are to be discouraged.[315] The courts will look at the "totality of the circumstances" surrounding the making of the confession in order to determine whether it was voluntary. First, police conduct may influence voluntariness. In addition to police brutality, interrogation tactics such as confinement in small cages, deprivation of food or

[313] US CONST amend XIV.
[314] McCormick, *Handbook on the Law of Evidence,* 2d, 1972, at 315-316, as cited in *Sweryda*, at 355.
[315] *ABA Criminal Justice Standards on Mental Health*, Standard 7-5.4(b).

sleep, and long periods of incommunicado interrogation have been held to affect voluntariness.[316] Second, the individual characteristics of the accused may affect voluntariness. Certain factors may cause the accused's will to be overborne by police tactics. These factors include the accused's age, race, physical and mental capabilities, prior experience with the police and whether or not she was warned of her constitutional rights.[317]

The *ABA Criminal Justice Standards on Mental Health* has devoted a section on how a person's mental disability (competence) can affect a confession or other inculpatory statement made during interrogation. The ABA states that "competence and admissibility issues…arise when people with mental disorder make incriminating statements to the police that are potentially…unreliable, …involuntary…or obtained in violation of *Miranda v. Arizona*…."[318]

The ABA provides the following guidance for use of statements by persons with mental disorder[319] at trial:[320]

> **Standard 7-5.4. Use of statements by people with mental disorder at trial**
> …
> (b) Where the court finds that the reliability of a statement has been significantly impaired by a person's mental disorder, it should exclude the statement from evidence even in the absence of official misconduct. Where the statement has not been excluded, the court should permit evidence to be presented to the trier of fact regarding the effect of the defendant's mental disorder on the reliability of the statement.
> (c) Courts should recognize that official conduct that does not constitute impermissible coercion when persons without mental disorder are interrogated may impair the voluntariness of the statements of persons with mental disorder.

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316 *US v Koch,* 552 F 2d. 1216 (7th Cir 1977); *Robinson v Smith,* 451 F Supp 1278 (WDNY 1978); *People v Anderson,* 396 NYS 2d 625 (1977); *Ashcroft v Tennessee,* 322 US 143 (1944); *Davis v North Carolina,* 384 US 737 (1966), as cited in Woods, at 143, note 114.

317 Woods, at 144.

318 *ABA Criminal Justice Standards on Mental Health,* Standard 7-5.4(a).

319 ABA states that "mental disorder" means: "In the settings addressed by the Standards, mental disorder is most likely to encompass mental illnesses such as schizophrenia, bipolar disorder, and major depressive disorders; developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof." Standard 7-1.1(a).

320 *ABA Criminal Justice Mental Health Standards*, Standard 7-5.4.

> Where such impairment of voluntariness is significant, the court should exclude the statement from evidence. However, in the absence of any such impermissibly coercive official conduct, such statement should not be excluded from evidence solely because it was the product of the person's mental disorder, unless it is found unreliable pursuant to Standard 7-5.4(b).
> (d) Statements made by persons with mental disorder in response to custodial interrogation should be admissible only if the person has a factual and rational understanding of his or her rights and makes a knowing and voluntary waiver of them. A person's mental disability can affect and impair each element of an otherwise valid waiver.
> (d) The court should admit into evidence at both pretrial hearings and trial otherwise admissible expert testimony by qualified mental health professionals bearing on the effect of a person's disorder on the reliability and voluntariness of a statement and the validity of any waiver of rights that preceded such a statement.

The United States Supreme Court has recognized certain interrogation techniques, as applied to the "unique characteristics of a particular suspect, as so offensive to a civilized system of justice that they must be condemned".[321] Further, the U.S. Supreme Court has recognized that certain interrogation techniques that would not constitute unacceptable coercion in cases involving non-disabled accused might affect the voluntariness of a confession of a suspect who is mentally disabled.[322]

In the United States (according to the ABA[323]), voluntariness occurs where there is a lack of coercion by State or government officials. Therefore, although a person may feel compelled by a delusion to confess to a crime, if he was not inappropriately coerced in any way, his statement will not be considered involuntary. However, the statement may still be found inadmissible because of other problems, such as unreliability.

In the United States, statements made by accused may also be excluded for violating the right to counsel or the right to refrain from answering questions.[324] In addition, confessions produced because of mental disability but without official coercion may be ruled inadmissible because the person lacked the capacity to make a legally valid waiver of these rights. Any waiver must be the product of a free and deliberate choice, rather than intimidation, coercion or

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[321] *Miller v Fenton*, 106 S Ct 445 at 449 (1985), *certiorari denied* 107 S.] Ct 585 (1985).
[322] *Colorado v Connelly*, 107 S Ct 515, at 521 (1986).
[323] American Bar Association, *Criminal Justice Mental Health Standards*, ABA 1989 [note this is the former version of the standards].
[324] *Miranda v Arizona*, 384 US 436 (1966).

deception. Further, the waiver will only be valid if it was made with a full awareness of the consequences of the decision to abandon it. [325]

III. Provisions of the *Criminal Code,* Assessments and Statements

A. Court-Ordered Assessments and Statements

There are two or four circumstances in which an accused may make a statement to a psychiatrist or other medical person. First, the accused may be ordered by the court to undergo an assessment; second, she may be sent by her lawyer to undergo a psychiatric examination; third, she may already be under psychiatric or medical care and have provided a statement;[326] and fourth, Crown counsel may ask that the accused be examined by a Crown expert before (or after) the accused has consulted a lawyer. What use may be made of the statements provided under these circumstances?

1. *Criminal Code* Section 672.11

The provisions of the *Criminal Code* provide that a court may order that the accused undergo an assessment of her mental condition if the court has reasonable grounds to believe that the evidence is necessary to determine whether, among other things, the accused is unfit to stand trial or was suffering from a mental disorder at the time of the offence (section 672.11). [The issue of remands for psychiatric assessment is discussed in Chapter 5, Fitness to Stand Trial.] The assessment order may require the medical person to make a written report on the mental condition of the accused and to file the report with the court (section 672.2). At a disposition (sentence) hearing, the author of an assessment report may be cross-examined about the report (subsection 672.5(11)).

Once the court has ordered an assessment under section 672.11, what use may be made of any statement made by the accused to the medical person? For many years, the common law did not provide a privilege for psychiatrist-patient communications.[327] Then, in 1991, the Supreme Court of Canada in *R v Fosty,*[328] indicated that a common law privilege could be accorded the

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[325] *ABA Criminal Justice Standards on Mental Health*, Standard 7-5.4(d).

[326] The issue of testimonial privilege and psychiatric examinations is discussed in Chapter Three, Solicitor and Client Issues (Confidentiality).

[327] This issue is discussed in Chapter Three, under Testimonial Privilege and Mental Health Professionals.

[328] (1991), 67 CCC (3d) 289 (SCC)

priest-penitent relationship based on Wigmore's four criteria.[329] Thus, because the Supreme Court recognized that Wigmore's criteria could apply in Canada to provide testimonial privilege, there was a possibility that a psychiatrist or accused could assert a privilege when asked to testify about the content of a statement given during an assessment.[330]

2. *Criminal Code* Section 672.21

Section 672.21 of the *Criminal Code* provides that "protected statements" are not admissible against the accused except in certain circumstances.[331] "Protected statements" are those made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition. When the court orders a psychiatric assessment (i.e., remand), statements made by the accused to the person specified in the assessment order or anyone acting under that person's direction cannot be used as evidence in court without the consent of the accused (subsection 672.21(2)). Thus, these provisions have specified time, purpose and designated recipient requirements. If statements are made under different circumstances, they will fall outside the scope of section 672.21 and their admissibility will be determined according to general common law principles (e.g., as outlined in *Fosty*).

Tollefson and Starkman point out that the statutory protection set out in section 672.21 is both narrower and wider than that offered by Wigmore's criteria.[332] It is narrower, in their estimation, because the protection only applies to “court-ordered” assessments and it is restricted to statements made during the course and for the purposes of an assessment. Thus, comments unrelated to the purposes of the assessment, or made before or after the assessment, are not covered by section 672.21.[333] However, the protection in this section may be wider than the

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329 The four criteria are: 1. The communication must have originated in a confidence that it will not be disclosed. 2. The element of confidentiality must be essential to the satisfactory maintenance of the relation between the parties. 3. The relation must be one, which in the opinion of the community ought to be sedulously fostered. 4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation. These are discussed in Chapter Three.

330 It should be noted that under s. 672.11 the court in *R v Roussel*, [1996] NBJ No 589 (NBCA) held that the results of a psychiatric report may be admitted at a sentencing hearing, provided the defendant is permitted to challenge the findings. See also: *R v Langlois* (2005), 195 CCC (3d) 152 (BCCA).

331 RSC 1985 c C-46.

332 E Tollefson & B Starkman, *Mental Disorder in Criminal Proceedings* (Toronto: Carswell, 1993) at 72 (hereinafter Tollefson and Starkman).

333 Tollefson and Starkman, at 72.

common law privilege. The statutory protection applies whether the statements were intended to be confidential or not, unlike the protection afforded by Wigmore's principles.[334] Further, unlike with Wigmore's criteria, the *Criminal Code* protection applies to both the statement and any references to it. Finally, the *Criminal Code* protection applies automatically, whereas the accused must prove that Wigmore's principles have been fulfilled before the court will recognize the privilege at common law.[335]

Subsection 672.21(2) of the *Criminal Code* enacts a rule of inadmissibility, which generally bars evidence of a reference to "protected statements" made by the accused during the course and for the purpose of an assessment or treatment directed by a disposition. The protected statement must be made to the person specified in the assessment order or disposition or by another acting under that person's direction. Statements made otherwise fall outside the scope of the admissibility rule enacted by the section and are admitted or not according to general principle.

There are exceptions to the requirement of the accused's consent before admitting protected statements. The exceptions are outlined in subsection 672.21(3):

> 672.21(3) Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of
>
> (a) determining whether the accused is unfit to stand trial;
>
> (b) making a disposition or placement decision respecting the accused;
>
> (c) determining, under section 672.84, whether to refer to the court for review a finding that an accused is a high-risk accused or whether to revoke such a finding;
>
> (d) determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (e) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;

[334] Tollefson and Starkman, at 72.
[335] Tollefson and Starkman, at 72.

> (f) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
>
> (g) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.

Most of these exceptions reflect the previous common law. However, the Canadian Bar Association expressed concern about paragraph (f), which allows a protected statement to be used in challenging the credibility of an accused "where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously". The CBA was concerned that, although the statements are not introduced for the purpose of establishing their truth, the judge (or jury) could be influenced by the information disclosed. In refuting this concern, Tollefson and Starkman rely upon the Supreme Court of Canada decision, *R v Kuldip,* where the Court held that cross-examination on a prior inconsistent statement was not contrary to *Charter* s 13 (the protection against self- incrimination).[336] The Court held that the problem could be overcome with proper direction by the trial judge.[337]

Under paragraph 672.21(3)(f) of the *Criminal* Code, an admission to a psychiatrist may be used to cross-examine the accused on the issue of credibility, provided the statement would be otherwise admissible. In *R v B(G)*,[338] the Supreme Court of Canada stated that a protected statement cannot be used for the purpose prescribed in s 672.21(3) if it was obtained through evidence, such as an out of court statement that was subsequently found to be inadmissible. B(G)'s admission to the psychiatrist resulted directly from the confrontation of the accused with his inadmissible statement to the police. While s 672.21(3)(f) made the protected statement admissible in order to challenge credibility, a purposive approach to the section required it to be interpreted to not permit admissibility of tainted statements.[339] Once it is established that the

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336 (1990), 1 CR (4th) 285.

337 Tollefson and Starkman, at 74.

338 *R v B(G)*, [1999] 2 SCR 475.

339 Section 672.21(2) of the Criminal Code does not apply to review panel proceedings carried out under the *Mental Health Act*. The purpose of the section is to prevent statements obtained in an assessment of fitness to stand trial from being used as incriminating evidence against the patient. That purpose is distinguished from the determination of mental capacity. See *British Columbia (Forensic Psychiatric Services Commission) v British Columbia (Mental Health Act Review Panel)*, [2001] BCJ No 2518 (SC).

recipient is a person in authority, the court examines whether the statement was voluntary.[340]

Although the usual purpose of the court-ordered assessment is to provide evidence for the determination of fitness of the accused to stand trial or for a determination of whether the accused was suffering from a mental disorder at the time of the offence, during the assessment, the accused may provide admissions or confessions as to her guilt. Presumably, this information would fall outside the exceptions, unless it was tendered to illustrate that the accused was suffering from a mental disorder and not as proof that he committed the crime. The accused would likely refuse to consent to the admission of his statement for any other purpose than those enumerated in section 672.21. However, even if the accused consented to admitting the confession for a different purpose, it is difficult to see how such evidence could be admitted as proof that the accused committed the crime without the Crown proving that the evidence was obtained in a manner that satisfies the confessions rule or the accused's *Charter* rights.

Before the 1991 provisions were passed, the Newfoundland Court of Appeal, in *R v Fowler,*[341] held that when an accused was sent to a mental institution as a result of a court order, doctors, nurses and other hospital staff were persons in authority. They were extensions of the jail system. Thus, the prosecution had to prove that the accused's statements were made voluntarily. Although evidence may be admitted for the purpose of examining the mental condition of the accused, if confessions or statements made to medical personnel during court-ordered assessments are sought to be admitted to prove that the accused committed the crime, different considerations will apply.[342]

In *R v Langevin,*[343] the court held that statements made by an accused to medical staff while detained under a court-ordered psychiatric remand do not *per se* violate subsection 11(c) of the *Charter.*[344] Similarly, in *R v Bonds,*[345] the court followed *Langevin* and held that the same conclusion

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[340] Two closely related issues to that of whether psychiatrists and doctors are persons in authority, is that of confidentiality and privilege. If defence counsel cannot successfully argue to exclude statements to these professionals because of the confessions rule, she may be able to have them excluded because they are privileged. This issue is discussed in Chapter Three under Testimonial Privilege and Psychiatric Examinations.

[341] (1981), 27 CR (3d) 232 (Nfld CA) (hereinafter *Fowler*).

[342] See also: *Vaillancourt*.

[343] (1984), 39 CR (3d) 333 (Ont CA).

[344] This section provides that any person charged with an offence is not to be compelled to be a witness in proceedings against that person in respect of the offence.

can be made with respect to section 7 and subsection 11(d) of the *Charter.*[346] In both cases, statements made to doctors during psychiatric remands were admitted into evidence.

Under these *Criminal Code* provisions, there are a fair number of situations where the accused's statement is no longer protected—mostly dealing with fitness, disposition or sentencing decisions. Further, if the accused raises the issue of mental disorder, the statement will no longer be protected. Consequently, it is best to assume that eventually a statement made during a court-ordered assessment will no longer be protected, at least for the purposes listed in the *Criminal Code*.

It should be noted that these provisions of the *Criminal Code* apply only where the accused has attended court-ordered psychiatric assessment. If the accused attends psychiatric assessment outside the court proceedings, the common law and perhaps the *Charter of Rights* would apply.

In a different set of circumstances, the accused's statement may arrive before a jury. Quite often, the issue of the accused's fitness to stand trial may arise.[347] A jury may hear testimony about a statement made by the accused in another situation. If the issue of the accused's fitness to stand trial arises during proceedings before a judge alone, or during a preliminary inquiry, the judge will try the issue of fitness. However, if the accused has elected to be tried by judge and jury, or must have a trial before a judge and jury, the issue of fitness will be decided by a jury. The accused and defence counsel will likely be concerned that the evidence that a jury hears with respect to the accused's fitness to stand trial may affect the outcome of the trial.

If the issue of the accused's fitness to stand trial arises before the jury is charged, then a jury will be selected to hear that issue. The accused may consent to the use of the same jury for the trial (section 672.26). Hence, the accused is allowed to decide whether the jury that determines his fitness to stand trial also serves as the jury to determine guilt or innocence, or whether two separate juries are used.

On the other hand, if the issue of fitness arises after the accused has been "given in charge

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345 [1991] OJ No 1039.

346 Section 7 provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 11 provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

347 This issue is discussed in Chapter 5, Fitness to Stand Trial.

to a jury",[348] the trial jury will hear the fitness issues as well as the other issues (section 672.27). This may have implications for the accused if he has given a protected statement. A protected statement will be admitted in evidence at trial for the purposes of determining whether the accused is fit to stand trial (paragraph 672.21(3)(a)). Therefore, if the fitness issue is tried before the other issues, the protected statement will be before the trial jury. If the accused is found fit to stand trial, the jury will be expected to disregard the statement when determining the other issues. This may cause concern for defence counsel.[349]

B. Crown Requested Examinations

The provisions in the *Criminal Code* that grant the court jurisdiction to order an assessment of an accused all require that the assessment be ordered by a judge on application by the accused, the prosecutor (subject to limitations set out in subsection 672.12(2)) or on the court's motion, after it has determined that such an order is warranted. Although the provisions (section 672.12) specify that the assessment may be ordered at any stage of the proceedings, they do not require the parties to give notice that such an order will be sought. Further, there is no procedure under the *Criminal Code* for the observation or examination of an accused prior to the time he/she appears before the court where an assessment may be ordered.

Crown counsel may wish to arrange for the accused to be examined by psychiatrists immediately after her arrest. This sometimes occurs before the accused has retained counsel and sometimes afterward.[350] Although the accused is probably not obligated to submit to an examination requested by the Crown, he/she may agree to such an examination for a variety of reasons.[351]Even if the accused has obtained a lawyer, counsel may agree to such an examination if he/she is considering the defence that the accused was not criminally responsible on account of mental disorder.

Accused mentally disabled persons who are unrepresented by counsel could be at risk

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[348] During trial.

[349] M Bryant & CD Evans, "'Fitness to Stand Trial' or 'The Politically Correct Criminal Code'", *National Criminal Law Program, Criminal Procedure and Charter Issues* (Saskatoon: University of Saskatchewan, 1992) at 3 - 4.

[350] McWilliams, at 35-40.

[351] Courts have held that where an accused who raises the defense of mental disorder refuses to see a prosecution retained psychiatrist, a jury may be allowed to draw an adverse inference without violating any principle of fundamental justice: *R v Brunczlik* (1995), 103 CCC (3d) 131 (Ont Gen Div). See also: Hersh Wolch, *Alberta Trial Lawyers Association Seminar"*, (May 23, 1998) Edmonton, Alberta; *R v Worth* (1995), 98 CCC (3d) 133 (Ont CA).

during "informal" examinations. They may be disoriented and confused and could have difficulty recognizing the legal importance of the psychiatric examination.

When the accused is examined without a court order, the courts will have to rule on the admissibility of these "informal" examinations. The Supreme Court of Canada considered this question in *Vaillancourt,* a case that occurred before the *Criminal Code* provisions in s 672 were enacted, in which the accused was examined by psychiatrists at Crown's request without a court order.[352] The accused had been interviewed by duty counsel at the time of his arrest, but was not represented by counsel at the time of the Crown's psychiatric examination.

Although the court noted that it would have been preferable for the Crown to seek a court order for the psychiatric examination and for the Crown to advise defence counsel of the application, the Crown's failure to do so was not by itself a basis for excluding the evidence of the examination.[353] The court lamented the lack of provision for obtaining a court order immediately following the arrest of the accused, with appropriate notice to defence counsel. However, the court did not go so far as to rule that the contents of the psychiatric examination were inadmissible at trial.

Since there is a procedure in place for obtaining a court-ordered assessment at any stage of the proceedings, the difficulties encountered by the Crown at the time *Vaillancourt* was decided no longer exist. Consequently, it may be difficult to show why an assessment was necessary without the Crown first obtaining a court order. The *Criminal Code* provisions do not explicitly prevent the Crown from proceeding to obtain an informal evaluation, although they limit when the Crown may obtain a Court ordered evaluation under certain circumstances. For example, the Crown may no longer apply for a psychiatric assessment to determine whether an accused is unfit to stand trial unless the proceedings were by way of indictment, or if the accused raised the issue of fitness, or the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.[354]

There may be room to argue that the accused who is subjected to an informal examination can rely upon her *Charter* rights to argue that the evidence obtained from the examination should

[352] [1976] 1 SCR 13.
[353] *Vaillancourt*, at 17.
[354] *Criminal Code*, s 672.12(2).

be excluded. If the accused undergoes the psychiatric examination at the request of the Crown, it may be argued that such an examination is performed by an agent of the state and therefore the accused should be advised of her *Charter* rights.[355] This is especially so if the accused has not yet consulted a lawyer.

In several pre-*Charter* decisions, the Supreme Court of Canada held that an examining psychiatrist was not a person in authority for the purposes of determining whether the common law confessions rule applied.[356] However, there are few cases in which the court considers whether the examining psychiatrist is an agent of the state for the purposes of determining whether the *Charter* section 7 right to silence applies, especially to informal evaluations.

There have been some cases where the court examined whether a psychiatrist had to grant certain rights to an accused during a court-ordered evaluation.

In *Stevenson,* the accused refused to discuss the circumstances of his alleged crime with the Crown's psychiatrist on advice of his lawyer. The Ontario Court of Appeal was asked to consider whether the evidence of the Crown psychiatrist as to the refusal was inadmissible because the accused was exercising his right to remain silent. The Ontario Court of Appeal held that, since the accused had raised the matter of intent and had called his own expert witnesses to testify on that issue, the jury could properly take into account the effect of the accused's refusal to discuss the homicide with the Crown's expert when comparing his evidence with that of the defence experts. On the other hand, the jury should have been instructed that the accused, in not discussing the circumstances of the homicide with the Crown psychiatrists, was exercising his right to remain silent and that no inference of guilt could be drawn against him on this account.[357] This decision recognizes that there is a right to remain silent when speaking to a Crown psychiatrist.

In *R v Jones*, the British Columbia Court of Appeal was prepared to assume for the purposes of analysis that psychiatrists who examined the accused during remand were agents of the state.[358] However, the Court of Appeal found that section 7 of the *Charter* was not violated in this case.

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[355] See earlier discussion of *Hebert* and *Broyles.*

[356] See, for example: *Wilband, and Perras.*

[357] *Stevenson,* at 496. See also: *R v Chambers*, [1990] 2 SCR 1293 where the Supreme Court of Canada held exercising one's s 7 *Charter* right to remain silent cannot be used as evidence against the accused.

[358] (1992), 75 CCC (3d) 327 (BCCA), aff'd [1994] 2 SCR 229.

IV. Conclusion

Clearly, the area of confessions and statements is fraught with danger for mentally disabled persons. Not only are mentally disabled persons susceptible to various interrogation techniques, but they may also lack the capacity to understand the consequences of making various statements while under interrogation. Interrogations are routinely performed by police officers in trying to obtain evidence and solve cases. Unfortunately, the techniques utilized by police officers may place a mentally disabled person at a distinct disadvantage because of the nature of her/his disability. Videotaping arrestees may be one method of ensuring that confessions are voluntary and that the persons who made them have the requisite mental capacity.

If the confession or statement is made under circumstances that violate the common law or the accused's *Charter* rights, the accused may rely upon legal remedies such as having the confession excluded from evidence at trial. The law in the area of confessions and statements is quite complex. There are some areas of confessions law that are not definite and that contain more than one line of cases. Further, the advent of the *Charter of Rights* has added a new dimension to the protections available to persons who confess.

Additionally, provisions in the *Criminal Code* outline the use that may be made of statements made during court-ordered assessments. However, there still may be circumstances where a mentally disabled person makes an informal statement that may not be subject to these protections.

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