THE CONFESSIONS RULE IN CANADA

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Introduction

Triers-of-fact tend to give significant weight to confession evidence.[1] In response to this reality, the Canadian confessions rule requires the Crown to prove beyond a reasonable doubt that any statement by an accused to a person in authority was made voluntarily before the statement may be used for any purpose at trial.[2] The ultimate aim of the rule is to ensure that only statements that are the product of the accused's own free will or choice to speak are admitted at trial.[3] In this article, I examine the scope and purpose of the confessions rule in Canada, procedural issues relating to admission of confessions, additional concerns, and proposals for reform.

Scope and Purpose of the Confessions Rule

A confession is any oral, written or recorded statement by an accused to a person in authority.[4] In law, therefore, the term "confession" includes more than the popular notion of a statement by an accused admitting his or her guilt on the offence charged—it encompasses both a full admission of all material facts that are necessary to prove each element of the offence and any partial admission of one or more of the material facts that assists in proving the accused's guilt.[5] The confessions rule requires the Crown to prove beyond a reasonable doubt that an accused's confession was made voluntarily before it can use the confession for any purpose at trial.[6] The

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1 Courts have repeatedly acknowledged the persuasive force of confession evidence. See, *e.g.*, *Bigaouette* v. *R.*, 46 (1926) CCC 311 (Que KB), at 320, quoting *R.* v. *Lambe*, 2 (1791) Leach 552, rev'd on other grounds (1927) SCR 112; *R.* v. *Hodgson*, 2 (1998) SCR 449, at 461.

2 *R.* v. *Oickle*, 2 (2000) SCR 3.

3 *Ibid.*, at p. 25.

4 Sopinka, J., Lederman, S.N., and Bryant, A.W., *The Law of Evidence in Canada*, 2nd ed., Toronto, 1999, at p. 381, §8.1; Hill, C., Tanovich, D.M., Strezos, L.P. and Hutchinson, S.C., *McWilliams' Canadian Criminal Evidence*, 4th ed., Toronto, 2007 (looseleaf), at p. 8-11, §8:30. The rule also applies to assertive conduct such as nodding one's head or pointing one's finger. See *R.* v. *J.(J.T.)*, 2 (1990) SCR 755, at 771.

5 *R.* v. *Jones*, 36 (1921) CCC 208 (Alta CA), at 213.

6 *Oickle*, *supra* note 2, at p. 24. The rule does not apply to statements that form all or part of the act requirement of an offence. See *R.* v. *Stapleton*, 66 (1982) CCC (2d) 231 (Ont CA), at 233; *R.* v. *Gough*, 23 (1985) CCC (3d) 279 (NSCA), at 284-285.

confessions rule is a common law rule that was adopted from English law. The rule began to emerge in England in the early 18th century and became settled law by the mid-18th century.[7]

Historically there was debate over whether the confessions rule applied to only incriminatory statements or whether it also applied to apparently exculpatory statements. In *R.* v. *Piche* the Supreme Court of Canada clarified the law by holding that "the admission in evidence of all statements made by an accused to persons in authority, whether inculpatory or exculpatory, is governed by the same rule".[8] No distinction is to be drawn between incriminatory and exculpatory statements given that the Crown is seeking to use both types of statements to help convict the accused.[9] Once admitted a confession is evidence for and against both the accused and the Crown.[10] The trier-of-fact ultimately decides the weight to be given to a confession.[11]

The confessions rule was originally intended to ensure the reliability of confessions.[12] To accomplish this, the rule permitted the admission of only voluntary confessions based on the assumption that such confessions were more likely to be true.[13] However, over time the Supreme Court of Canada gradually recognized a further justification for the rule, namely fundamental fairness and the protection against forced self-incrimination by ensuring that the accused has the choice whether to speak to the authorities.[14] This made volition important for its own sake, and not simply because of its link to reliability. Most recently the court has acknowledged the reality of false confessions and the need to structure the rule to minimize both the risk that

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7 The leading case historically is *R.* v. *Warickshall*, 1 (1783), Leach 263, 168 ER 234 (KB). For a history of the emergence of the rule, see Langbein, J.H., *The Origins of the Adversary Criminal Trial*, Oxford, 2003, at pp. 218-223.

8 *R.* v. *Piche*, (1971) SCR 23, at 36-37.

9 As a general rule only the Crown can tender the accused's statement. The rule against presenting self-serving evidence normally prevents accused persons from tendering their own statements as evidence. See *R.* v. *Simpson*, 1 (1988) SCR 3, at 22.

10 *R.* v. *Hughes*, (1942) SCR 517, at 521, quoting *R.* v. *Higgens*, 3 (1829), C &P 603, at 604. A confession is not evidence against a co-accused. See *R.* v. *Schmidt*, (1945) SCR 438, at 439.

11 *R.* v. *McAloon*, 124 (1959) CCC 182 (Ont CA), at 186-187.

12 See generally *R.* v. *Boudreau*, (1949) SCR 262.

13 *Warickshall*, *supra* note 7, at pp. 263-264 (Leach), pp. 234-235 (ER).

14 See in particular *R.* v. *Fitton*, (1956) SCR 958, at 962-963; *R.* v. *Hebert*, 2 (1990) SCR 151, at 166.

false confessions will occur and if they occur that they will be admitted at trial.[15] However, the court has also recognized that these concerns must be balanced against society's need to investigate and prosecute criminal activity. The confessions rule therefore recognizes that "properly conducted police questioning is a legitimate and effective aid to criminal investigation."[16]

Person in Authority Requirement

An accused's statement is caught by the confessions rule only if it is made to a "person in authority".[17] All other statements are simply admissions and therefore admissible under the admissions exception to the hearsay rule.[18] There are two categories of persons in authority recognized in Canadian law: conventional persons in authority and deemed persons in authority.

Conventional persons in authority are those persons who are formally engaged in the arrest, detention, examination or prosecution of the accused such as police officers, correction officers, and Crown prosecutors.[19] These individuals normally constitute persons in authority because their official status gives them the ability to influence the course of the accused's prosecution, and it is therefore normally reasonable for the accused to believe that making a confession or failing to do so could lead to some benefit or harm.[20] The same logic does not apply to private individuals, and they are therefore not usually considered to be persons in authority.[21]

Ultimately, however, the actual status of the individual is not determinative. Rather, the issue is whether the accused actually and reasonably believed that he or she was speaking to someone who could affect the course of the prosecution.[22] If the accused does not hold such a belief, or if the belief is not reasonable, the individual will not be considered to be a person in authority. Consequently, despite their official status, undercover police officers are not generally found to be persons in authority because the accused has no basis for believing they can affect the

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15 *Oickle, supra* note 2, at p. 25.

16 *Ibid.*, at p. 26, quoting *R.* v. *Precourt,* 18 (1976) OR (2d) 714 (CA), at 721.

17 *Hodgson, supra* note 1, at pp. 467, 470. See section 4.3 for a discussion of statements made to individuals who are not persons in authority for the purposes of the confessions rule.

18 *R.* v. *Smith or Schmidt,* (1948) SCR 333, at 336; *R.* v. *Streu,* 1 (1989) SCR 1521, at 1529.

19 *R.* v. *Rothman,* 1 (1981) SCR 640, at 663-664; *Hodgson, supra* note 1, at pp. 462, 471-472.

20 *Hodgson, ibid.,* at p. 473.

21 *Ibid.,* at p. 467.

22 *Ibid.,* at pp. 472-473; *R.* v. *Wells,* 2 (1998) SCR 517, at 525.

outcome of the prosecution.[23] On the other hand, in some circumstances private individuals may be deemed to persons in authority based on the accused's reasonable understanding of their relationship to the police or the prosecution. The range of potential persons who may be deemed to be persons in authority is very broad and includes parole officers, insurance adjusters, social workers, complainants and their family or friends, employers, teachers, and physicians and nurses.[24] However, each case depends on its own facts.

Voluntariness Requirement

The meaning of voluntariness has evolved over the years. Under the original test, which was adopted from the Privy Council's decision in *Ibrahim* v. *The King*,[25] a confession would be excluded if the Crown was unable to prove that it had not been obtained through "fear of prejudice or hope of advantage",[26] or in modern terms threats or promises. Over time the Supreme Court of Canada recognized additional ways for establishing involuntariness. In *Ward* v. *The Queen* and *Horvath* v. *The Queen*, the court extended the rule to exclude confessions that were not the product of an operating mind in that the accused lacked the necessary cognitive capacity to make a voluntary confession.[27] In *R.* v. *Hobbins,* the court further extended the rule to exclude confessions obtained by oppressive conduct or circumstances.[28] In addition, in *R.* v. *Rothman*, some members of the court suggested that a confession could be excluded if the police had engaged in a form of trickery that shocked the conscience of Canadians.[29] However, trial judges tended to examine each of the potential grounds for exclusion independently, excluding a confession as involuntary only when a distinct violation of one of these grounds was established.

In *R.* v. *Oickle*, the Supreme Court re-examined the traditional rule.[30] In order to better protect against the risk of false confessions being admitted at trial, the court concluded that trial judges should adopt a more

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23 *Rothman*, *supra* note 19, at pp. 663-664; *R.* v. *Grandetti*, 1 (2005) SCR 27, at 40.

24 See generally Sopinka et al., *supra* note 5, at p. 363, §8.68.

25 (1914) AC 599 (PC).

26 *Prosko* v. *The King*, 63 (1922) SCR 226, at 229-230, adopting *Ibrahim*, *ibid.*, at p. 609.

27 *Ward* v. *The Queen*, 2 (1979) SCR 30, at 40; *Horvath* v. *The Queen*, 2 (1979) SCR 376, at 400, 425.

28 *R.* v. *Hobbins*, 1 (1982) SCR 553, at 556-557.

29 *Rothman*, *supra* note 19, at pp. 695-697 (per Lamer J. concurring).

30 *Supra* note 2.

contextual approach that focuses on the totality of the circumstances. [31] The court therefore held that a confession may be excluded as involuntary if it was obtained by an improper inducement, the lack of an operating mind, oppression, *or* a combination of any these circumstances. [32] In addition, a confession may be excluded as involuntary if it was obtained through police trickery that shocks the conscience of Canadians. [33] However, a confession will be ruled involuntary only if there is a causal connection between the conduct of the police and the making of the confession. [34] Consequently, in deciding whether a confession is involuntary, trial judges must consider not only whether the circumstances that existed were capable of depriving the accused of the ability to choose whether to make a statement, but also whether those circumstances did in fact prevent the accused from exercising the ability to choose.

In determining voluntariness, trial judges must first consider whether the accused had the minimal level of cognitive capacity that is required for a voluntary confession. As set out in *R.* v. *Whittle*, accused persons will have an operating mind if they know what they are saying and they understand that their statements may be used to their detriment in court. [35] This is a very low standard: it is not concerned with the ability of accused persons to make wise choices or to act in their own best interests. Personal vulnerabilities such as age, intellectual capacity or mental illness and incident-specific concerns such as intoxication, withdrawal symptoms or sleep-deprivation will therefore usually be relevant only as part of the overall assessment of voluntariness. Only in rare cases, such as where an accused is extremely intoxicated or in severe shock, will the operating mind branch of the rule operate on its own to exclude a confession. [36]

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[31] *Ibid.*, at pp. 22-23, 25, 44.

[32] *Ibid.*, at pp. 31, 42-44. In its recent decision in *R.* v. *Spencer* the court reaffirmed the approach set out in *Oickle*. See *R.* v. *Spencer*, 2007 SCC 11, at paras. 11-12.

[33] *Ibid.*, at pp. 41, 43.

[34] *Hobbins, supra* note 28, at p. 557. The sole exception is where the accused lacks the minimal cognitive capacity necessary to make a voluntary statement.

[35] *R.* v. *Whittle*, 2 (1994) SCR 914, at 941-942.

[36] See generally Sopinka et al., *supra* note 5, at p. 343, §8.25; Hill et al., *supra* note 5, at pp. 8-35 to 8-37, §8:60.20. For a recent discussion of the case law relating to personal vulnerabilities and incident-specific concerns, see Sherrin, C., "False Confessions and Admissions in Canadian Law", 30 (2005) *Queen's Law Journal*, pp. 601-659, at pp. 639-656.

Assuming the accused had an operating mind, trial judges must go on to assess the impact of (1) any improper inducements directed at either the accused or a close personal friend or relative and (2) any oppressive circumstances on the accused's ability to choose whether to speak, in light of the accused's personal vulnerabilities and situation.[37] In assessing the existence of improper inducements, the key consideration is the existence of a *quid pro quo* offer, whether explicit or implicit, that was sufficient in the circumstances to overcome the accused's desire to stay silent.[38] The actual strength of the threat or promise is not necessarily determinative.[39] A strong inducement may be required if the accused had full capacity and was treated properly, whereas a more minor inducement might suffice if the accused was vulnerable in certain respects or was subjected to oppressive circumstances. In assessing whether oppressive circumstances existed, trial judges must examine the actual circumstances of the accused's detention and interrogation including any denial of basic needs such as food or clothing or access to counsel or medical care, the use of aggressive or intimidating questioning for a lengthy period or degrading treatment, exposure to extreme temperatures or lighting, or repeated interrogations without adequate rest.[40] In addition, trial judges should consider whether in questioning the accused the police used inadmissible or falsified evidence in order to mislead the accused about the strength of the case.[41]

Finally, trial judges must independently consider whether the police engaged in conduct that would shock the conscience of Canadians. This is a very difficult standard to satisfy, as is apparent in the examples given in *Rothman*—pretending to be a chaplain or a defence lawyer, or a doctor injecting insulin that is really truth serum.[42] The police conduct must undermine deeply held societal values such that the admission of the

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37 *Oickle, supra* note 2, at pp. 37, 44.

38 *Ibid.*, at p. 38. See also *Spencer, supra* note 32, at para. 15.

39 Certain types of inducements such as the use of actual or threatened physical violence and explicit offers to secure lenient treatment are so improper that they will in themselves normally lead to a finding of involuntariness. However, less explicit and milder inducements must normally be combined with other factors to justify a finding of involuntariness. *Ibid.*, at pp. 32-38.

40 *Ibid.*, at p. 39.

41 *Ibid.*, at pp. 39, 54.

42 *Rothman, supra* note 19, at p. 697. For an analysis of the limited impact of the police trickery branch of the confessions rule, see Plaxton, M.C, "Who Needs Section 23(4)? Or: Common Law Sleight-of-Hand", 10 (2003) *Criminal Reports* (6th), pp. 236-242, at pp. 239-241.

statement would bring the administration of justice into disrepute. Mere trickery including using undercover officers to obtain statements or confronting the accused with exaggerated or falsified evidence is not enough to satisfy the test.[43]

Procedural Issues

Need for and Conduct of the Voir Dire

The Crown may not use a statement that an accused made to a person in authority for any purpose until it establishes beyond a reasonable doubt that the statement was made voluntarily.[44] Trial judges must therefore conduct a voir dire if there is some evidence to indicate that the accused's statement might have been made to a person in authority unless the accused expressly waives the need for the voir dire.[45] The voir dire focuses on two issues: proof that the statement was made to a person in authority and proof of voluntariness

If the statement was made to a conventional person in authority, the first issue is automatically satisfied and the Crown must prove voluntariness. However, if the statement was not made to a conventional person in authority, the accused bears the initial evidential burden of adducing some evidence to establish that the individual should be deemed to be a person in authority.[46] Accused persons will normally discharge their evidential burden by testifying as to their knowledge of or reasonable belief about the relationship between the individual who received the statement and the police or prosecuting authorities. Once the accused satisfies the evidential burden on the person in authority requirement, the ultimate burden of proof shifts to the Crown.[47] To discharge its burden and have the statement admitted, the Crown must prove beyond a reasonable doubt that either the receiver of the statement was not a person in authority or the statement was made voluntarily.

The voluntariness voir dire is concerned with the voluntariness of the statement, not with its truth or falsity.[48] To establish that a statement was made voluntarily, the Crown must generally call all witnesses who were involved in the

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43 *Oickle, supra* note 2, at pp. 42, 58.

44 *Piche, supra* note 8, at p. 36. This includes using the statement to impeach the accused's credibility. See *R.* v. *Monette,* (1956) SCR 400, at 402.

45 *R.* v. *Park,* 2 (1981) SCR 64, at 69-75.

46 *Hodgson, supra* note 1, at p. 482.

47 *Ibid.,* at p. 483.

48 *DeClercq* v. *R.,* (1968) SCR 902, at 906.

events leading up to the making of the statement.[49] In determining whether a statement was made voluntarily, the court may consider whether the accused was cautioned about the right to remain silent, but the absence of such a warning is not determinative of admissibility.[50] The accused is entitled to testify on the voir dire. If the accused does testify, the Crown may ask the accused if the statement is true.[51] However, the Crown may not subsequently use the accused's testimony during its case-in-chief in the main trial, but it may use the testimony to impeach the accused's credibility.[52] The evidence given by the other witnesses at the voir dire may only be used at trial with the consent of both parties.[53]

Failure to Videotape

The modern rule does not make the admissibility of a confession dependent on it being videotaped. In *Oickle*, the Supreme Court acknowledged the benefits of videotaping suspect interrogations, but it emphasized that this does not mean "that non-recorded interrogations are inherently suspect."[54] Consequently, in cases without a videotape disputes over admissibility must be resolved in the traditional way by assessing the credibility and reliability of the Crown and defence witnesses.[55] However, as part of the assessment of the credibility of the police officers who interrogated the accused, trial judges may consider their explanation for failing to videotape the confession in light of the facilities that were available for recording it.

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49 *R.* v. *Sankey*, (1927) SCR 436, at 440-441.

50 *Boudreau*, *supra* note 12, at pp. 266, 267, 268-269, 276-277. In Canada suspects do not have a legal right to be informed about their right to remain silent. However, as a matter of practice the police generally do warn suspects of this right. See *R.* v. *W.(W.R.)*, 15 (1992) CR (4th) 383 (BCCA), at p. 403.

51 *DeClercq*, *supra* note 48, at p. 906.

52 *R.* v. *Darrach*, 2 (2000) SCR 443, at 482-483. This is only permitted if the statement has been ruled voluntary. See *Monette*, *supra* note 44, at p. 402. An involuntary confession may not be used for any purpose. See *R.* v. *G.(B.)*, 2 (1999) SCR 475, at 494.

53 *R.* v. *Gauthier*, 1 (1977) SCR 441, at 452-454.

54 *Oickle*, *supra* note 2, at p. 31. Provincial appellate courts initially expressed differing views on this aspect of *Oickle*. Compare, *e.g.*, *R.* v. *Crockett*, 170 (2002) CCC (3d) 569 (BCCA), at p. 574-575 and *R.* v. *Ducharme*, 182 (2004), C.C.C. (3d) 243 (Man. C.A.), at 256-257, with *R.* v. *Moore-McFarlane*, 160 (2001) CCC (3d) 493 (Ont CA), at pp. 516-517.

55 *Crockett*, *ibid.*, at p. 574.

Expert Evidence

The admissibility of expert evidence on the reliability of a confession is uncertain.[56] To be admissible the evidence must satisfy the same test as other forms of expert evidence, namely it must be necessary, reliable, not excluded by another exclusionary rule, and introduced through a qualified expert.[57] To date courts have refused to admit expert evidence that explains generally the phenomenon of false confessions and the factors that may contribute to a false confession on the basis that in the immediate case such evidence was neither necessary nor sufficiently reliable.[58] However, they have not ruled that such evidence is never admissible.[59] In addition, experts have been permitted to testify as to personal vulnerabilities of the accused.[60]

Relationship to the *Charter*

The confessions rule is not the only safeguard designed to protect an individual's right to choose whether to speak to the authorities.[61] It is supplemented by certain minimal constitutional rights that are afforded to all detained and arrested individuals, most notably the right to remain silent under s. 7 of the *Charter*[62] and the right to counsel under s. 10(b) of the *Charter*.[63] The right to silence protects detained or arrested individuals from having agents of the state covertly and actively elicit statements from them, thereby undermining their right to choose whether to speak to the authorities.[64] The right to counsel ensures detained and arrested individuals

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56 For a discussion of the admissibility of expert evidence relating to false confessions, see Trotter, G.T., "False Confessions and Wrongful Convictions", 35 (2003-2004) *Ottawa Law Review*, pp. 179-210.

57 *R.* v. *Mohan*, 2 (1994) SCR 9, at 20. See also *R.* v. *J.(J-L.)*, 2 (2000) SCR 600 regarding the need for heightened scrutiny in relation to novel science.

58 See *R.* v. *Warren*, 35 (1995) CR (4th) 347 (NWTSC), aff'd 117 (1997) CCC (3d) 418 (NWTCA); *R.* v. *Leland*, 17 (1998) CR (5th) 70 (BCSC); *R.* v. *Osmar*, 217 (2007) CCC (3d) 174 (Ont CA).

59 *Osmar*, *ibid.*, at p. 195.

60 *R.* v. *Dietrich*, 1 (1970) CCC (2d) 49 (Ont CA), at 61-67; *Whittle*, *supra* note 35, at pp. 942, 946.

61 *Oickle*, *supra* note 2, at pp. 24-25.

62 Section 7 guarantees every individual "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."

63 Section 10(b) guarantees everyone on arrest or detention "the right to retain and instruct counsel without delay and to be informed of that right."

64 *Hebert*, *supra* note 14, at pp. 184-185; *R.* v. *Broyles*, 3 (1991) SCR 595, at 609-612.

are aware of their right against forced self-incrimination by requiring the authorities to inform these individuals of the existence of the right and to assist those who wish to invoke the right to implement it, including avoiding eliciting evidence from them until there has been a reasonable opportunity to consult with counsel.[65] Where a statement has been obtained in violation of either right, accused persons may apply to have the statement excluded under s. 24(2) of the *Charter*.[66]

There are three important differences between the confessions rule and the *Charter* rights.[67] First, the confessions rule is broader in scope—it arises whenever a suspect is questioned by a person in authority whereas the rights to silence and to counsel arise only on detention or arrest. Second, the burden and standard of proof are allocated differently—the confessions rule assigns the burden to the Crown and requires proof of voluntariness beyond a reasonable doubt whereas the *Charter* assigns the burden to the accused and requires proof of a violation of a right on the balance of probabilities. Finally, there are different remedial consequences—an involuntary statement is automatically excluded whereas a statement obtained in breach of the *Charter* is excluded only where its admission would bring the administration of justice into disrepute.

Additional Issues

Multiple Confessions

Accused persons often make multiple confessions to the police. If an accused's first confession is ruled involuntary, any subsequent confession contaminated by the prior involuntary confession will be ruled involuntary even if the latter confession was not itself obtained improperly.[68] A subsequent confession will be tainted by a prior involuntary statement if the factors that caused the initial confession to be involuntary were still operating

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65 The various aspects of the right are referred to, respectively, as the informational component, the implementational component, and the "holding off" period. See *R.* v. *Bartle*, 3 (1994) SCR 173, at 192; *R.* v. *Prosper*, 3 (1994) SCR 236, at 278-279. Accused persons must be duly diligent in exercising this right. See *Tremblay* v. *R.*, 2 (1987) SCR 435, at 439; *R.* v. *Ross*, 1 (1989) SCR 3, at 11.

66 Section 24(2) allows for the exclusion of evidence that "was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter* … if it is established that, having regard to all the circumstances, the admission of [the evidence] in the proceedings would bring the administration of justice into disrepute." For the current test for s. 24(2), see *R.* v. *Stillman*, 1 (1997) SCR 607, at 671.

67 *Oickle, supra* note 2, at pp. 24-25.

68 *Horvath, supra* note 27, at pp. 427-429.

at the time the subsequent confession was made.[69] The Crown bears the onus of establishing that such factors were no longer operative if it wishes the later confession to be admitted. In considering whether to exclude a later confession, trial judges will consider a variety of factors including the time lapse between the confessions, any causal connection between them, any similarities between the interviews such as the involvement of the same officers or locations, and the discovery of new evidence or the giving of a further caution or advice of counsel after the first confession.[70]

Confessions Confirmed by Subsequent Facts

A confession that is ruled involuntary is normally inadmissible in its entirety. However, in some cases the accused's confession may lead the police to evidence that confirms the actual reliability of parts of the confession. Where this occurs the traditional common law position, as set out in *R.* v. *St. Lawrence*,[71] is that the evidence and any part of the involuntary confession that is directly confirmed by the finding of that evidence is rendered admissible by virtue of that discovery because there is therefore no reason to doubt the reliability of those aspects of the confession.[72] Both commentators and courts have expressed considerable doubt over the continued validity of the *St. Lawrence* rule. Leading evidence scholars have suggested the rule is ripe for reconsideration given the modern confessions rule's emphasis on fundamental fairness and the protection against compelled self-incrimination.[73] In addition, some provincial appeal courts have recognized a discretion on the part of the trial judge to exclude those parts of the confession confirmed by the

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69 *G.(B.), supra* note 52, at pp. 490-491; *R.* v. *I.(L.R.),* 4 (1993) SCR 504, at 526.

70 *Ibid.* See also *R.* v. *McLean,* 50 (1989) CCC (3d) 326 (Ont CA), at 335-337.

71 93 (1949) CCC 376, at 391 (Ont. H.C.). In *R.* v. *Wray* the Supreme Court of Canada approved of the *St. Lawrence* rule. See *R.* v. *Wray*, (1971) SCR 272, at 296, 300-301.

72 The application of this rule requires a careful analysis of the accused's initial statement and the subsequent confirmatory evidence to determine what part of the confession is admissible. For example, in *St. Lawrence* the accused told the police that he had thrown certain items over a fence into a field. The police searched the field and located the items. The accused's statement was ruled involuntary, but his knowledge of the location of the items was admitted because that part of his statement was confirmed by the finding of the items. However, his statement that he threw the items into the field was not admissible because the finding of the items did not itself confirm how the items came to be there.

73 See, *e.g.*, Sopinka et al., *supra* note 5, at p. 382, §8.113; Hill et al., *supra* note 5, at p. 8-121, §8:140.

subsequent discovery of the evidence to protect the fairness of the trial, and indicated that it would only be in the most exceptional circumstances that a trial judge would be entitled to exercise that discretion in favour of admitting part of an involuntary confession.[74]

Statements to Persons Not in Authority

The confessions rule only applies if the statement was made to a person in authority. However, the Supreme Court has recognized that private individuals may also use improper means to obtain a statement from an accused. In *R.* v. *Hodgson*, the court therefore held that where there is evidence that this has occurred trial judges must clearly direct the jury about the danger of relying on the statement because it may be the result of the actual or feared treatment rather than a true desire to confess, and it may therefore be unreliable.[75] If the jurors conclude that the statement was obtained improperly they may and should assign little weight to the statement.[76]

Proposals for Reform

The legal profession's reaction to *Oickle* has been mixed. The Supreme Court of Canada's decision to reformulate the rule to provide better protection against false confessions has been universally applauded, but concern has been expressed over the ability of the reformulated rule to accomplish this goal.[77] A variety of options for further judicial and legislative reform have therefore been suggested including mandatory videotaping of some or all statements, greater judicial guidance on individual vulnerabilities that create an enhanced risk of a false confession; better training for police, lawyers and judges about false confessions; the direct regulation of police interrogations; and expanding the rule to require a post-interrogation reliability analysis.

The most common proposal for reform is mandatory videotaping of some or all of the statements of suspects. As part of his inquiry into the wrongful conviction of Thomas Sophonow, for example, the Honourable

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74 *R.* v. *Sweeney*, 148 (2000) CCC (3d) 247 (Ont CA), at 270-271. Although recognizing that the *Charter* required the modification of the common law, the court actually relied on ss. 7 and 24(2) of the *Charter* to exclude the statement. *Ibid.*, at pp. 260, 271.

75 *Hodgson*, *supra* note 1, at pp. 481-483, sets out a model instruction for trial judges to follow.

76 The court has encouraged Parliament to study this area and potentially reform it. *Ibid*, at p. 470.

77 See, *e.g.*, Stuart, D., *Charter Justice in Canadian Criminal Law*, 4th ed., Toronto, 2005, at pp. 134-143.

Peter deC. Cory recommended mandatory videotaping of all suspect interviews, with audiotaped interviews being admissible only if there was an adequate explanation for why there was no videotape.[78] The Federal Provincial Territorial Working Group on the Prevention of Miscarriages of Justice proposed a more limited reform that would mandate videotaping of suspect interviews in cases involving the alleged commission of a serious personal violent offence.[79] Academic commentators universally prefer the broader approach, arguing that there is no convincing reason to restrict videotaping to only certain cases.[80]

There is such widespread support for videotaping because of its perceived benefits and few costs. Videotaping provides a full and accurate account of the accused's statement and the manner in which it was obtained, and thus reduces the number of disputes over admissibility, while also enhancing the ability of judges and juries to assess the credibility and reliability of conflicting Crown and defence witnesses. In addition, videotaping allows the courts to monitor interrogation practices, and thus deters the police from resorting to improper methods of interrogation while also protecting the police against false allegations of such practices. Finally, videotaping has few drawbacks. The technology is relatively inexpensive, and the evidence indicates that taping does not diminish the willingness of suspects to make statements. However, proper regulation is required. Not only must the full interrogation be recorded to minimize the risk that the confession is the result of off-camera interactions, but proper camera placement is necessary to ensure the most representative depiction of events.

Apart from this reform, two further changes to the law have been proposed.[81] First, both Parliament and the courts should consider whether it is

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78 Hon. P. deC. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation*, Winnipeg, 2001, at p. 19.

79 Federal Provincial Territorial Heads of Prosecutions Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice*, Ottawa, 2004, at p. 84.

80 Ives, D.E., "Preventing False Confessions: Is *Oickle* Up to the Task?", 44 (2007) *San Diego Law Review* (forthcoming); Sherrin, C. "Comment on the Report on the Prevention of Miscarriages of Justice", 52 (2007) *Criminal Law Quarterly*, pp. 140-174, at pp. 157-165; Roach, K., "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions", 52, (2007*) Criminal Law Quarterly*, pp. 210-236, at pp. 231-233; Trotter, *supra* note 56, at pp. 200-208.

81 There is also increasing recognition that legal professionals—judges, lawyers and police—need to be educated about the risk factors relating to false confessions. See FPT Committee, *supra* note 79, at p. 74.

time to regulate more directly how the police conduct interrogations, including perhaps limiting the length of interrogation sessions by requiring regular breaks for meals and sleep and making it illegal for the police to confront individuals with falsified forensic evidence in order to mislead them about the strength of the case.[82] Second, courts should consider expanding the current rule to require a direct inquiry into the actual reliability of the confession before it may be admitted at trial.[83] That is, as part of the admissibility test, trial judges should assess the likely truth of the confession based on various factors including whether the accused provided information about the victim or the crime scene that only the true perpetrator would know, whether the accused's confession led the police to additional evidence, and whether the accused's account is internally consistent and matches the physical, medical and other objective evidence of the crime.[84]

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82 Ives, *supra* note 80. But see Sherrin, *supra* note 80, at pp. 622-29. This is a controversial reform. Not only is there disagreement on the need for such an approach given the current state of false confessions research, but *Oickle* also provides little support for it given the Supreme Court's emphasis on the need to focus on the totality of circumstances in assessing voluntariness.

83 Ives, *ibid.*

84 *Ibid.*