SCC File No. 39570

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

NIGEL VERNON LAFRANCE

Respondent
(Appellant)

- and -

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada,* SOR/2002-156)

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PARTS I & II: OVERVIEW AND STATEMENT OF POSITION

1. At issue in this case is the meaning of detention under ss. 9 and 10 of the *Charter*; specifically, identifying when police have detained someone. The Attorney General of Ontario's intervention concerns the respondent's first of two interviews with police. The interview occurred at the station after police informed the respondent that it was his choice to accompany them, he was under no obligation to talk, and he could leave at any time. A question on appeal is whether the respondent was detained during the interview, which would have triggered his s. 10 rights.

2. Ontario intervenes to propose a purposive, bright-line rule to identify when police have *not* detained someone. The rule is comprised of three instructions that police could convey to someone they wish to engage without infringing on their *Charter*-protected liberty:

i. Police must briefly explain to the person their purpose for engaging them;

ii. Police must convey to the person that speaking or cooperating with them is optional; and

iii. Police must explain that they will remove barriers, if any exist, that prevent the person from ending the interaction.

3. The rule would not oust the contextual analysis set out in *Grant* that governs ambiguous cases (*i.e.*, those not invoking any bright lines). Rather, whereas the law already provides bright-line rules on when police conduct *will* trigger a detention, similar certainty is required on when their conduct will *not*.

4. The proposed rule incorporates the reality that some people may feel obligated to cooperate with police, despite no legal requirement to do so. Whether it flows from their personality, socio-economic status, or experiences growing up in a marginalized community, some people are more vulnerable to the coercive pressure inherent in policing. The rule addresses this imbalance by promoting the liberty to choose that must be available to all individuals. It emphasizes the choice enjoyed on whether to cooperate with police; elucidates the police purpose to help inform that choice; and explains how to exercise a choice to cease or withhold cooperation.

5. The proposed rule strikes balance between protecting individual liberties and fostering the police-civilian cooperation that is necessary to investigate crime and uphold public safety. By tethering the proposed rule to the purpose of s. 9 – protecting liberty of choice – police maintain the ability to pursue the public's assistance and to act on a person's decision to cooperate.

PART III: ARGUMENT

i. Bright-line rules are necessary in the detention context

6. The liberty to make decisions without unjustified government interference is the backbone of a free society under the rule of law.[1] Equally, the societal expectation of effective policing demands that police be capable of determining the bounds of their authority, with confidence, in real-time.[2]

Prevailing detention law does not provide enough certainty

7. This Court in *Grant* and *Suberu* sought to clarify the law of detention.[3] Over ten years ago, this Court recognized that the detention jurisprudence of the time was "difficult to apply and may lead to unsatisfactory results".[4] This Court outlined three factors to guide a contextual analysis on psychological detention.[5]

8. The post-*Grant* jurisprudence reveals that uncertainty still afflicts detention law. The contextual analysis has left courts reaching opposite conclusions on detention in similar factual circumstances. Brown J.A. of the Ontario Court of Appeal in *Omar* highlighted the contrasting results reached in *R. v. Atkins*, 2013 ONCA 586 (not detained) and *R. v. Fountain*, 2015 ONCA 354 (detained).[6] In both cases, police were in their vehicles when they initiated interactions with young men walking along city streets. Schwann J.A. of the Saskatchewan Court of Appeal

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[1] *R. v. Le*, 2019 SCC 34 at paras. 152-153.
[2] *R. v. Suberu*, 2009 SCC 33 at para. 24; *R. v. Reid*, 2019 ONCA 32 at para. 26.
[3] Detention's definition is the same under ss. 9 and 10: *R. v. Hufsky*, [1988] 1 S.C.R. 621 at 632, 1988 CanLII 72 at para. 12.
[4] *R. v. Grant*, 2009 SCC 32 at paras. 2-3, 31.
[5] *R. v. Grant*, 2009 SCC 32 at para. 44.
[6] *R. v. Omar*, 2018 ONCA 975 at paras. 74-97.

provided another example in *Todd*.[7] She outlined the disparate results reached in *R. v. Tran*, 2010 ABCA 211 and *R. v. Schrenk*, 2010 MBCA 38 (both not detained) versus *R. v. Blanchard*, 2009 NLTD 180, aff'd on s. 24(2) 2011 NLCA 33 (detained). In all three cases, police told a driver that they were free to leave after a traffic stop but then asked the driver whether they would agree to answer a few questions.

9. The problems associated with legal uncertainty are pronounced in the detention context, where the test is meant to be objective – all individuals are subject to the same standard and enjoy equal *Charter* protection.[8]

Police must know when they have triggered a detention with precision

10. This uncertainty cannot endure. Police, tasked with performing their duties in a *Charter*-compliant fashion, require clear rules on when they have (or have not) detained someone.[9] Police must know the *precise* moment that a detention has commenced to ensure it is lawful under s. 9, at which point they must immediately explain the reasons for the detention (s. 10(a)) and provide rights to counsel (s. 10(b)).[10] In many cases, this initial police-civilian interaction kicks off what becomes a lengthy investigation, followed by a lengthier prosecution. Lacking practical guidance on when a detention has crystallized, police are more apt to get it wrong, and cascading *Charter* breaches flow.[11] The justice system consumes years of investigation and prosecution, even though an error at the outset may have jeopardized the case to never seeing adjudication on its merits.[12]

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[7] *R. v. Todd*, 2019 SKCA 36 at paras. 60-62.
[8] *R. v. Le*, 2019 SCC 34 at para. 115; *R. v. Thompson*, 2020 ONCA 264 at para. 42.
[9] *R. v. Grant*, 2009 SCC 32 at para. 32. And see: *Kosoian v. Société de transport de Montréal*, 2019 SCC 59 at para. 76.
[10] The timing of detention is litigated down to the minute. See: *R. v. Pawson*, 2021 BCCA 22 at paras. 2-14 (the parties litigated a range of 5 minutes); *R. c. Michael*, 2019 QCCQ 5444 at paras. 1-5, 117-194 (less than 11 minutes); *R. v. Virk*, 2020 ONCJ 380 at paras. 29, 31, 38 (4 minutes).
[11] Steven Penney & James Stribopoulos, "'Detention' under the *Charter* after *R. v. Grant* and *R. v. Suberu*" (2010), 51 S.C.L.R. (2d) 439 at 439-440, 476-477.
[12] See: *R. v. Thompson*, 2020 ONCA 264 at paras. 5, 86-88, 109-110; *R. v. Wong*, 2015 ONCA 657 at paras. 3-4, 34, 61-62, 93; *R. v. McSweeney*, 2020 ONCA 2 at paras. 3, 55, 86.

11. Bright-line rules would infuse stability into detention law and provide on-the-ground direction for police action: "It is important for the courts to give officers the clearest possible guidance".[13] The contextual approach requires a probing analysis of all the circumstances – a task well-suited for courts, but not for police officers charged with analyzing a fluid situation and measuring their words and actions accordingly.[14] Police are already equipped with bright-line rules on when certain actions *will* trigger a detention, such as using physical restraint or making demands under the *Criminal Code*.[15] What is missing is bright-line guidance on when their actions will *not* trigger a detention.[16]

ii. Ontario's proposed rule is purposive and incorporates a person's vulnerabilities

12. Ontario proposes a purposive, bright-line rule that aligns with the s. 9 jurisprudence.

Detention law is dictated by the purpose of section 9

13. "The purpose of a [*Charter*] right must always be the dominant concern in its interpretation".[17] An overly generous approach extends the right beyond its purpose and risks it straying into the domain of other *Charter* protections.[18] Dedication to the purposive approach balances society's interest in effective policing with robust constitutional protections.[19]

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[13] *Fleming v. Ontario*, 2019 SCC 45 at para. 52.

[14] Jennifer Woollcombe, "Grant, Suberu and Harrison: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts" (2010), 51 S.C.L.R. (2d) 479 at 486-487; S. Penney & J. Stribopoulos, "'Detention' under the *Charter* after *R. v. Grant* and *R. v. Suberu*" (2010), 51 S.C.L.R. (2d) 439 at 451.

[15] Bright-line rules have developed over time to add certainty. For example, road-side stops and statutory demands were not always bright-line triggers of a detention: Steve Coughlan & Robert Currie, "Sections 9, 10 and 11 of the Canadian *Charter*" (2013), 62 S.C.L.R. (2d) 143 at para. 8; *R. v. Chromiak*, [1980] 1 S.C.R. 471 at 479-480; 1979 CanLII 181.

[16] This Court has expressed the need for certainty in the s. 10(b) context: *R. v. Suberu*, 2009 SCC 33 at paras. 37, 39, 42. And in the s. 11(b) context: *R. v. Jordan*, 2016 SCC 27 at paras. 29-38.

[17] *R. v. Grant*, 2009 SCC 32 at para. 17 [emphasis added]. Also see: *R. v. Poulin*, 2019 SCC 47 at para. 54.

[18] *R. v. Lyons*, [1987] 2 S.C.R. 309 at 326, 1987 CanLII 25 at para. 21.

[19] See: *R. v. Singh*, 2007 SCC 48 at paras. 43, 45; *R. v. Thompson*, 2020 ONCA 264 at para. 29.

14. The core purpose of s. 9 is to protect "liberty of choice".[20] It guards against unjustified state intrusions on a person's liberty to choose whether to cooperate with police or to go about their day.[21] As then-Professor David Paciocco explained: "[w]hat is given protection, essentially, is the right to choose whether to stay or leave when interacting with state agents".[22]

15. Bright-line rules strengthen this protection of choice. For example, if police stop a vehicle by using their lights and siren, the driver is unequivocally detained because they had no choice in the matter. By the same token, if police conduct protected a person's choice on whether to cooperate throughout an interaction, then the person should not be considered detained.

The proposed bright-line rule

16. Ontario proposes the following bright-line rule for when police will *not* have detained someone.[23] It builds on the proposition presented in *Grant* that police can offset the coercive effect of their actions by informing "the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go".[24] The rule's three components are presented in the sequence of instructions that police would provide to a person they wish to engage:

17. *First*, police must briefly explain to the person their purpose for engaging them. At a high level, the information conveyed should also include *what* the interaction will entail, *where* it will occur, and for how long it will last (*when*). For example, if police are responding to a reported break-and-enter in the neighbourhood and wish to talk with someone walking by, they could inform

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[20] *R. v. Suberu*, 2009 SCC 33 at para. 28 [emphasis added].

[21] *R. v. Grant*, 2009 SCC 32 at paras. 20-21; *R. v. Thompson*, 2020 ONCA 264 at para. 30. The purpose of s. 9 does not include guarding someone against legal jeopardy or consequences. *Whether* someone is detained is distinct from their needs *when they are* detained and thus under state control. "Detention" is not defined as "when someone would benefit from counsel".

[22] David M. Paciocco, "What to Mention About Detention: How to Use Purpose to Understand and Apply Detention-Based Charter Rights" (2010) 89 Can. Bar Rev. 65 at 71.

[23] Ontario will not repeat the appellant Crown's argument that this Court in *Grant* already set a bright-line rule on how police can avoid a detention: *Factum of the Appellant* at paras. 46-50.

[24] *R. v. Grant*, 2009 SCC 32 at paras. 32, 39. And see: S. Penney & J. Stribopoulos, "'Detention' under the *Charter* after *R. v. Grant* and *R. v. Suberu*" (2010), 51 S.C.L.R. (2d) 439 at 462.

the person, "we're investigating a crime in the area, and we're hoping to chat with you here for a few minutes". This component of the rule provides the person with some facts to consider in deciding whether to cooperate. It sheds light on "the circumstances giving rise to the encounter".[25]

18. *Second*, police must convey to the person that speaking or cooperating with them is optional. Appellate courts have considered this component of the rule important in finding against a detention.[26] It was also raised by the dissenting Justices in *Omar* as a possible caution that police would provide someone.[27] This instruction was missing from the police conduct in *Le*, which contributed to a finding of detention.[28] And it is an important factor in the analysis of whether someone is subject to a "custodial interrogation" under the Fifth Amendment of the United States.[29]

19. Police would retain discretion to tailor their exact words to the situation and individual before them. There is no magic in uniform incantations.[30] Police may choose direct, formal language: "you are free to leave at any point and do not need to speak with us". In some situations, informal language might be sufficient: "would it be alright with you if we had a quick chat".[31] However police go about it, the bright line is drawn when police bring home to the person that they are not obligated to cooperate.

20. *Third*, police must explain that they will remove barriers, if any exist, that prevent the person from ending the interaction. This component is necessary when tangible barriers prevent

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[25] *R. v. Grant*, 2009 SCC 32 at para. 44(2)(a); *R. v. Le*, 2019 SCC 34 at para. 31(a).
[26] See: *R. v. Saretzky*, 2017 ABQB 494 at paras. 1-5, 20-33, aff'd 2020 ABCA 421 at paras. 2-50; *R. v. Schrenk*, 2010 MBCA 38 at paras. 49-62; *R. v. Todorovic*, 2014 ONCA 153 at paras. 3-17.
[27] *R. v. Omar*, 2019 SCC 32 at para. 2.
[28] *R. v. Le*, 2019 SCC 34 at para. 64.
[29] While perhaps not a perfect analogue, whether someone is subject to custodial interrogation is strikingly similar to the Canadian question of whether they are detained: *U.S. v. Griffin*, 922 F.2d at 1347-1350, 1355; *Yarborough v. Alvarado*, 541 U.S. at 661, 665; *U.S. v. Cazares*, 788 F.3d at 980-981.
[30] See: *R. v. Ahmed*, 2020 ONSC 5990 at paras. 28-29; *R. v. Campbell*, 2018 ONCA 837 at para. 8.
[31] See possible language police could use in: James Stribopoulos, "The Forgotten Right: Section 9 of the *Charter*, Its Purpose and Meaning" (2008), 40 S.C.L.R. (2d) 211 at 247 and fn. 156.

the person from walking away. For example, police may speak with someone in a police cruiser or station because it is calmer, safer, and permits reliable recording. Police would articulate how the person remains empowered to walk away (*e.g.*, "We're in a secure interview room. The door out locks automatically. But your cooperation remains optional. If you want to leave, let us know and we'll open the door right away"). Or if police received permission to speak with someone on their private property, police would emphasize that they themselves would leave upon request.[32]

21. As for the timing of these three instructions, police would provide them near the outset of the encounter. An objective change in circumstances relating to any of the three components would require police to repeat and reformulate the instructions to maintain a bright line against detention. For example, if the initial encounter involved general questioning on the sidewalk, police would refurnish tailored instructions before proceeding with an interview at the police station.[33]

The proposed rule does not displace the contextual analysis for ambiguous cases

22. Cases where police did not follow this proposed bright-line rule would not inexorably result in detention. In ambiguous cases (*i.e.*, those not invoking any bright-line rules triggering *or* avoiding a detention), the usual assessment of all the circumstances would prevail.[34]

23. The proposed rule cannot be converted into a *pre-condition* for avoiding a detention, because myriad police conduct can fall short of imposing "significant physical or psychological restraint" – which remains the *sine qua non* of detention.[35] For example, police arriving at an accident or recent crime scene and orienting themselves to an unclear situation would be unlikely to trigger detentions, even without telling every single person they spoke with that their cooperation was optional.[36] When police are operating at a pronounced informational deficit, the law must

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[32] See: *R. v. Le*, 2019 SCC 34 at paras. 51-52, 155.
[33] See: *R. v. Saretzky*, 2020 ABCA 421 at para. 46; *R. v. Todorovic*, 2014 ONCA 153 at paras. 11, 17.
[34] *R. v. Grant*, 2009 SCC 32 at para. 31.
[35] *R. v. Mann*, 2004 SCC 52 at para. 19; *R. v. Le*, 2019 SCC 34 at para. 27.
[36] *R. v. Suberu*, 2009 SCC 33 at paras. 31-32; *R. v. Guenter*, 2016 ONCA 572 at paras. 40-47; *R. v. Grant*, 2009 SCC 32 at para. 37; *R. v. Sandhu*, 2014 ONCA 356 at paras. 2-7; *R. v. Petit*, 2005 QCCA 687 at paras. 6, 18-19; *R. v. MacMillan*, 2013 ONCA 109 at paras. 4-6, 36-38.

afford them some flexibility to get up to speed. Life or public safety could be at stake.

The proposed rule incorporates individual characteristics and vulnerabilities

24. The law recognizes that, owing to their individual characteristics, different people will feel obligated to cooperate with police at different moments in an encounter.[37] Factors like age, socio-economic status, and stature can all impact this perception. Some characteristics mitigate, while others deepen, the power imbalance between police and the individual. One's race, in particular, is an important factor driving an individual's perception of whether they are free to walk away.[38]

25. The proposed bright-line rule incorporates this understanding and protects the rights of those vulnerable to feeling a sense of obligation.[39] It does so in two main ways. *First*, the proposed rule shifts power to the individual by *providing facts* about the cooperation that is sought; *educating* them that cooperation is optional; and *offering tools* on how to terminate cooperation. The individual is better positioned to decide whether to cooperate with police, which is an important step to addressing a learned mindset of those who have been cultured to comply with authority.

26. *Second*, the proposed rule does not entitle police to disregard individual considerations, which includes the person's responses to the instructions. If there is objective indication that the person misunderstands information conveyed by police (*e.g.*, that their cooperation is optional), police must adapt their approach to bring home the salient points.[40]

27. Baking individual differences into a bright-line rule results in a legal framework that is responsive to the documented police history with marginalized groups, including Black, Indigenous, and other communities of colour.[41] At the same time, the rule equips police with

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[37] *R. v. Le*, 2019 SCC 34 at paras. 69-73, 81, 121.
[38] Amar Khoday, "Ending the Erasure? Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*" (2021), 100 S.C.L.R. (2d) 165 at para. 12.
[39] See: *R. v. Le*, 2019 SCC 34 at para. 109 on "learned helplessness".
[40] The approach to police informational obligations under s. 10(b) can be applied here: *R. v. Evans*, [1991] 1 S.C.R. 869 at 891, [1991] S.C.J. No. 31 at para. 44; *R. v. Bartle*, [1994] 3 S.C.R. 173 at 192-193, [1994] S.C.J. No. 74 at paras. 19-20.
[41] *R. v. Le*, 2019 SCC 34 at paras. 97, 260.

workable direction. After all, police will rarely be privy to the particular life story of the person they engage (*e.g.*, their education, family situation, troubles with authority).[42] Basing the detention determination on facts unavailable to the officers in the moment nullifies the decree in *Grant* that "police must be able to know when a detention occurs".[43] The test loses any semblance of being objective.[44]

iii. Ontario's proposed rule balances individual and societal interests

28. Ontario's proposed bright-line rule advances individual and societal interests in three ways. *First*, communication with the public is essential to effective law enforcement. Many people do not appreciate the precise limits of police authority.[45] Some – notably people of colour – are influenced by an "unspoken rule" that compliance with police is necessary.[46] The proposed rule encourages police to verbalize the purpose behind their actions (*e.g.*, explaining why they wish to speak with someone) and incentivizes them to clarify murky situations. It urges police to clarify that the choice to cooperate always rests with the individual. And it guides them to seek cooperation that is the product of free will, rather than unspoken obligation.

29. *Second*, effective law enforcement depends on the cooperation of the public.[47] Society is better served when people *want* to help police with their investigation and to share their side of the story. Police must be encouraged to speak with witnesses, suspects, and persons of interest.[48] By

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[42] *People v. Rodney P.*, 21 N.Y.2d at 9-10: an objective test benefits from not demanding that police anticipate "the frailties or idiosyncrasies of every person whom they question".

[43] *R. v. Grant*, 2009 SCC 32 at para. 32.

[44] *R. v. Le*, 2019 SCC 34 at paras. 114-115, 262; *R. v. Thompson*, 2020 ONCA 264 at para. 42.

[45] *R. v. Le*, 2019 SCC 34 at para. 26; *R. v. Therens*, [1985] 1 S.C.R. 613 at 644, 1985 CanLII 29 at para. 57.

[46] This Court in *R. v. Le*, 2019 SCC 34 at para. 101 highlighted the testimony of one young person of colour whose experiences with police illustrated how people learn this unspoken rule.

[47] The Honourable Michael H. Tulloch, "Report of the Independent Street Checks Review" (2018), online: *Ministry of Community Safety & Correctional Services* at p. 45; *R. v. Le*, 2019 SCC 34 at para. 162; *R. v. Grant*, 2009 SCC 32 at para. 39.

[48] *R. v. Singh*, 2007 SCC 48 at para. 45.

fostering mutual respect and consent, the proposed rule reinforces the social contract of assisting police based on moral duty or civic pride, instead of learned (or actual) coercion.[49]

30. *Third*, by focusing on the purpose of s. 9, the proposed rule balances generous *Charter* protections with the societal interest in effective policing.[50] Untethering detention law from s. 9's purpose – the protection of choice – would hobble police investigations. Merely interviewing a suspect in a secure setting should not trigger a detention if police protect the person's freedom of choice.[51] The jurisprudence illustrates how people choose to give lengthy interviews at a police facility, without courts ruling that they were detained.[52] Indeed, if suspects who provide a lengthy, focused interview are routinely considered detained, then police would be prohibited from speaking with them beyond short, generic questions (without restraining their liberty via arrest). This is because the resulting detention would assuredly violate s. 9. Assuming police even have grounds to detain, the detention must still be "reasonably necessary" and "brief".[53] Most interviews will be neither. And simply providing rights to counsel is not a solution. Implementing s. 10(b) does not solve the s. 9 breach.[54] In short, the proposed rule offers a *Charter*-compliant method for police to take detailed statements from people that *want* to make known their version of events.[55]

PARTS IV & V: SUBMISSIONS ON COSTS & TIME FOR ORAL ARGUMENT

31. Ontario does not seek costs and has been granted five minutes for oral argument.

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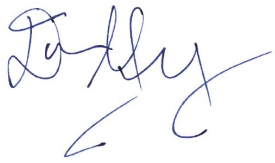
[49] *R. v. Grant*, 2009 SCC 32 at para. 37; *R. v. Grafe*, 1987 CanLII 170, (1987) 36 C.C.C. (3d) 267 (Ont. C.A.) at 271; *Rice v. Connolly*, [1966] 2 All E.R. 649 at 652.
[50] *R. v. Suberu*, 2009 SCC 33 at para. 24.
[51] *R. v. Suberu*, 2009 SCC 33 at para. 23; *R. v. Grant*, 2009 SCC 32 at para. 41; *R. v. Mann*, 2004 SCC 52 at para. 19 ("… or even interview").
[52] See: *R. v. Joseph*, 2020 ONCA 73 at paras. 13-15, 34-43; *R. v. Sandeson*, 2017 NSSC 197 at paras. 1-3, 9(1), 35-43, 203-215; *R. v. Taylor*, 2012 MBQB 30 at paras. 1-11, 188-230; *R. v. Peterson (D.C.)*, 2013 MBCA 104 at paras. 8-16, 20-23, 46-55; *R. v. Ahmed*, 2020 ONSC 5990 at paras. 1-2, 7-8, 18.
[53] *R. v. Mann*, 2004 SCC 52 at paras. 33-34, 45; *Fleming v. Ontario*, 2019 SCC 45 at para. 98; *R. v. McGuffie*, 2016 ONCA 365 at paras. 35-39.
[54] *R. v. Mann*, 2004 SCC 52 at para. 22.
[55] Even when facilitating consultation with counsel is not constitutionally mandated, doing so may help in proving a statement voluntary at trial: *R. v. Sinclair*, 2010 SCC 35 at paras. 29, 42.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

32. Ontario makes no submissions on case sensitivity.

ALL OF WHICH is respectfully submitted by,



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PART VII: TABLE OF AUTHORITIES

Canadian Cases	Paragraph Reference in Factum
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