SCC Court File No. 39480

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

BETWEEN:

JAMES ANDREW BEAVER

APPELLANT

- AND -

HER MAJESTY THE QUEEN

RESPONDENT

- AND -

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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

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PART I - OVERVIEW

1. This case is about the limits of state power and remedies for when the police exceed those limits. The CCLA intervenes on two constitutional questions. The first relates to the contours of the voluntariness rule. The second relates to the maintenance of a purposive approach to the interpretation of "obtained in a manner" under s. 24(2) and the rejection of the "fresh start" analysis.

2. Over 30 years ago in *Hebert* this Court confirmed that voluntariness is about *both* reliability and fairness. For the confessions rule to achieve those aims, individuals need to understand they have a choice regarding whether to speak with the police, the consequences of volunteering information and the context of their jeopardy. It is unfair for police to hold back or provide confusing information about individuals' jeopardy when seeking a statement. Without information about the state of one's jeopardy, a defendant cannot make a meaningful decision to speak or remain silent.

3. The CCLA also asks this Court to maintain its generous, contextual, and purposive approach to the "obtained in a manner" inquiry under s. 24(2) of the *Charter*. The Court should reject the "fresh start" approach to s. 24(2) because it undermines the provision's broad purpose – to protect the integrity of the justice system.

4. If the state violates an individual's *Charter* rights, later state compliance does not automatically fix that violation. Judicial review is not an act of historical revisionism. The so-called "fresh start" principle seeks to implicate the courts in state misbehavior, by asking judges to launder police misconduct with an *a priori* legal rule. In doing so, the "fresh start" principle opens the door to the decades old "causal requirement" rejected by this Court in *Strachan* (1988). The Court should decline this invitation.

5. The "fresh start" principle is an unhelpful, problematic analytical tool. It places judicial focus on *Charter* compliant police conduct and limits a defendant's access to remedies under s. 24(2). It is a confusing, ambiguous principle. It should be rejected for what it is: an invitation to incentivize *Charter* breaches by state actors. Instead, this Court should underline the importance of adherence to the *Charter*, even for police officers engaged in the pursuit of criminals.

6. The CCLA takes no position on the facts.

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

7. The CCLA argues:

- Fairness in the voluntariness analysis requires that the defendant understand his jeopardy, his choices, and their consequences;
- Applying the "fresh start" analysis as the gateway to the s. 24(2) remedy undermines the generous and purposive approach to the provision.

PART III – STATEMENT OF ARGUMENT

1. Individuals Need to Understand their State of Jeopardy During Police Interviews so They Can Make an Informed Decision Whether to Speak

8. The voluntariness analysis is about more than the reliability of the statement – it is also concerned with the fairness surrounding its taking. There is a steady line of authority from this Court since *Hebert* confirming that a voluntariness assessment includes the individual's understanding of the consequences of speaking.[1] Voluntariness does not only imply an "operating mind" in the limited physical sense.[2]

9. The confessions rule, then, is about the individual making a "meaningful choice" about whether or not to speak to the authorities.[3] In order to make a meaningful choice, the individual must be aware of what is at stake. This requires defendants have an ability to appreciate the severity of what is being alleged or investigated.

10. If police keep defendants in an information deficit about the nature of the offences investigated, the defendant cannot meaningfully choose between alternatives.[4] The state cannot trick individuals

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[1] Upheld in *R v. Singh*, 2007 SCC 48 at paras 30, 35 [*Singh*], *R v. Oickle*, 2000 SCC 38 at para 24-26 citing to *R v Hebert,* [1990] 2 SCR 151 – the confessions rule requires the necessary mental element of deciding between alternatives.

[2] For instance, Sopinka J. specified in *Whittle* that the "operating mind" requirement included the accused person's awareness that what they were saying could be used to their detriment, see *R v Whittle*, [1994] 2 SCR 914 at p. 936.

[3] *Hebert*, [1990] 2 SCR 151 at paras 124-125.

[4] See, for example, Watt J. (as he then was in *Worrall,* [2002] OJ No 2711 (Sup Ct.) [Appellant's Book of Authorities, Tab 2] and *R v Higham,* [2007] O.J. No. 2147, 74 W.C.B. (2d) 134 at para 18-19.

into contributing to the case against them by collecting statements while the individual remains unaware of the jeopardy they face. If people are unaware that police are seeking information about a crime with which they may be involved, they may make different decisions about how and if they speak to police at all.[5] In *Sinclair*, the Court noted that legal advice will be tailored to the situation as the detainee and lawyer understand it, but if the investigation takes a new and more serious turn, the initial advice may no longer be accurate.[6] This rule reflects an understanding that advice and decisions are dependent on the seriousness of the situation. Just as an interviewee needs to understand his exposure to sufficiently employ his s. 10(b) rights, he needs to understand his exposure to sufficiently employ his s. 7 right to silence.

11. An individual being questioned by police must have at least a general sense of the reason for the questioning – the jeopardy of the situation – before her statement can be used against her.[7] In some circumstances, state adherence to s. 10(a) of the *Charter* may be sufficient. However, when s. 10(a) is breached in the course of a state-citizen interaction or when there is no detention and s. 10(a) is not triggered, in order for a later statement to be voluntary, the State still has an obligation to clearly advise the individual of the offence about which information is being sought.

12. At a minimum,[8] then, in order for a statement to be voluntary, the Crown must prove beyond a reasonable doubt that the defendant understood:

(a) the nature of the offence or offences being investigated;

(b) that he did not have to speak with the police; and,

(c) that if he did choose to speak, any statement given can be used against him.

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[5] See, for example, *R v Okafor*, 67 WCB (2d) 418, at para 47; *Higham,* [2007] O.J. No. 2147, 74 W.C.B. (2d) 134 at paras 18-19; *R v Wills* (1992), 70 CCC (3d) 529 (Ont. CA) at para 51 cited in *R v Biddersingh,* 2015 ONSC 5904 at paras 67-70.
[6] *R v Sinclair*, 2010 SCC 35.
[7] See, for example, *R v Ahmed,* 2020 ONSC 5990 at paras 17 - 21.
[8] This list provides conditions precedent to the Crown then proving the defendant had "operating mind" and there were no "threats or inducements" analysis.

The CCLA does not seek the implementation of a magical incantation of words. Instead, it proposes the above list as base-line information necessary for the defendant to make a meaningful choice with respect to providing a statement.

2. The "Fresh Start" Analysis Undermines a Generous and Purposive approach to s. 24(2)

A. The "Fresh Start" Analysis is a Causal Requirement by Another Name

13. The Court of Appeal for Alberta defined a "fresh start" as an attempt by police to rectify an earlier breach so that any subsequently discovered evidence would not be "obtained in a manner."[9] Instead of examining the connection between the breach and the evidence holistically, the "fresh start" principle focuses on whether the police, after the breach, corrected their behavior . This definition of "fresh start" does away with a broad "obtained in a manner" analysis and asks only two questions (1) whether there was intervening *Charter* compliant state conduct between the breach and the discovery of the evidence and (2) whether that intervening *Charter* compliance severed the relationship between the breach and the discovery of the evidence.

14. These two questions re-introduce a causal requirement between the breach and the evidence abandoned over 30 years ago. The "fresh start" principle compels judges to find a direct relationship between the impugned police conduct and subsequent evidence, rather than consider the "entire chain of events."[10] The "fresh start" principle asks courts to break the chain of events at compliant state conduct and only examine state action from that break forward. It isolates misconduct so that the court does not consider the earlier breach. This approach ignores the evolution in the jurisprudence, and places victims of *Charter* breaches in the same position they would have been in 1987.[11]

15. Since *Strachan* (1988), a causal relationship between a breach of the accused's *Charter* rights and evidence gathered by police is not necessary for the court to find evidence was "obtained in a manner". In *Strachan* the Court found a causal link is only one factor to consider in the "obtained in a manner" analysis.[12] Instead of requiring a causal connection, the jurisprudence has evolved to broaden

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[9] *R v Beaver*, 2020 ABCA 203 at para 12.
[10] *R v. Strachan*, [1988] 2 SCR 980 at para 55.
[11] See *Strachan* 1988] 2 SCR 980*, R v Plaha* (2004) 188 CCC (3d) 289 (Ont CA)*, Wittwer*, 2008 SCC 33*, Mack*, 2014 SCC 58*, Pino*, 2016 ONCA 389.
[12] *Strachan,* 1988] 2 SCR 980*,* at paras 47-48.

the list of connections that would satisfy the "obtained in a manner" requirement to include a contextual, temporal, or causal connection or a combination of the three.[13] *Charter* violations cause intrinsic harm to the rights of individuals that cannot be captured under the strict causation requirement.[14] Requiring a causal link between the breach and the evidence for access to s. 24(2) artificially narrows the judicial inquiry and directs courts to focus disproportionately on state conduct "most directly responsible for the discovery of evidence rather than on the entire course of events leading to its discovery."[15] The "fresh start" principle does the same.

16. Limiting the "obtained in a manner" determination to the causal nexus required through the "fresh start" principle would thrust courts back into the complex, speculative exercise rejected by this court in *Strachan*. Courts would again be asked to do the impossible: turn back time to predict whether the impugned evidence would have been discovered but for the *Charter* violation that occurred.[16] In *Strachan,* this Court called this exercise a "highly artificial task."[17] Events surrounding the investigation of a suspected crime can be dynamic and fast-paced. Police misconduct is often cumulative, and it may not be possible to draw a direct line between an instance of misconduct and the resulting evidence, even where one in fact did inform the other.

17. If the "fresh start" principle overtakes the "obtained in a manner" analysis it encourages judges to retroactively "split hairs"[18] between state conduct that breached the *Charter* and led to the discovery of evidence versus state conduct that also breached the *Charter* but unquestionably did <u>not</u> lead to the discovery of inculpatory evidence. That is an impossible exercise that was decried by this Court decades ago. This Court should instead affirm the established approach and focus on the entire chain of events surrounding both the *Charter* breach and the impugned evidence. Evidence will be "obtained in a manner" and fulfill the s. 24(2) gateway inquiry if the state's access had a contextual, temporal, or causal connection to wrongful officer conduct.

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[13] *R v Plaha,* (2004) 188 CCC (3d) 289 (Ont CA) at para 45.
[14] *R v Therens,* [1985] 1 SCR 613 at para 66.
[15] *Strachan,* [1988] 2 SCR 980 at para 49.
[16] *Strachan,* [1988] 2 SCR 980 at para 48.
[17] *Ibid.*
[18] *Strachan,* [1988] 2 SCR 980 at para 40.

B. The "Fresh Start" Analysis Ignores s. 24(2)'s Purpose

18. Section 24(2) is just like all other *Charter* provisions – it requires a broad and purposive interpretation.[19] The purpose of s. 24(2) is to maintain the good repute of the administration of justice.[20] However, the "fresh start" principle forces decision makers to focus on acceptable state conduct, and draws trial judges' attention away from prior unacceptable state conduct. It encourages courts to turn a blind eye to *Charter* violations on the basis of later compliant conduct. This shift in focus is inconsistent with maintaining the good repute of the administration of justice, which depends on judges confronting state misconduct even if *Charter* compliant conduct comes after.[21]

19. If s. 24(2) is about the long-term integrity of the administration of justice, evidence may be excluded despite later, acceptable state conduct. It is not the Court's job to launder police misconduct through judicial review. The "fresh start" principle seeks to implicate the courts in state misbehavior by tasking courts with declaring a clean slate in the wake of clear *Charter* breaches. Instead, courts should weigh the stain of prior state misconduct even if it did not lead directly to the evidence as a factor in the "obtained in a manner" inquiry.[22] The purpose of s. 24(2) requires as much.

20. The "fresh start" principle leaves individuals subject to state misconduct without access to a remedy because of later, acceptable conduct. In applying the *Grant* analysis, judges err in principle when they treat *Charter*-compliant conduct by one state actor as a factor that attenuates the severity of

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[19] See *R v 974649 Ontario Inc,* 2001 SCC 81 at para 18; *Doucet-Boudreau v Nova Scotia,* 2003 SCC 62 at para 24; *R v Gamble,* 1988 CanLII 15 (SCC) at para 66; *Reference re Prov. Electoral Boundaries (Sask),* 1991 CanLII 61 (SCC) at p 159.

[20] *R v Grant,* 2009 SCC 32 at para 67.

[21] One example of an improper shift in focus is in the Alberta Court of Appeal's judgment. Relying on "fresh start" principles the Alberta Court of Appeal found that the "important point" of the analysis was that "the police attempted a "fresh start" by trying to correct their earlier mistakes" (para. 17). Subsequent compliant police behavior is not the "important point" of *Charter* remedies. The Court needs to review the entire context of the encounter to determine if state action brings the administration of justice into disrepute.

[22] *R v. Plaha,* (2004) 188 CCC (3d) (Ont CA), at para 47.

earlier police misconduct.[23] The same should be true when it comes to the threshold "obtained in a manner" analysis.

21. The "fresh start" principle asks courts to lower the standards for individual law enforcement officials. If police officers know they can rely on their colleagues to disappear misdeeds with *Charter* compliant conduct, it incentivizes officers to breach. Rather than holding each officer to equal standards of competence the "fresh start" principle in effect anticipates unlawful officer conduct and builds in a fail-safe—when investigators violate the *Charter,* other officers can right their wrongs by merely doing their jobs. This diminishes the integrity of the administration of justice.

C. The "Fresh Start" Analysis Unduly Narrows the "Obtained in a Manner" Inquiry

22. The meaning of "obtained in a manner" should remain a broad and generous inquiry.[24] The initial "obtained in a manner" inquiry is only the gateway to the analysis of whether admitting the impugned evidence would bring the administration of justice into disrepute. This broad and purposive gateway consideration should not be transformed into a strict interrogation of police action and become the focus of the s. 24(2) analysis. Substituting a "fresh start" analysis for a complete and contextual "obtained in a manner" analysis creates an inflexible test that makes *Charter* remedies less accessible to those whose rights were violated. No single rule should disrupt the court's remedial inquiry. A strict "fresh start" analysis is precisely the type of bright line rule Justice Laskin warned against in *Pino.*[25]

23. This Court never intended for the "fresh start" principle to form a complete answer to the "obtained in a manner" analysis. Even the jurisprudence from which the "fresh start" language derives considers later *Charter* compliance as part of the context in the broader and purposive "obtained in a manner" analysis. In *R v Wittwer*, Justice Fish found it is possible for police to try a "fresh start" during the course of an investigation to distance *Charter* compliant interviews from past breaches.[26] Fish J. was not endorsing a new approach to the "obtained in a manner" requirement different from that set

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[23] *R v Reilly,* 2020 BCCA 369 at para 102 and affirmed by this Court in 2021 SCC 38; *R v McGuffie,* 2016 ONCA 365 at para 67.
[24] *R v Mack,* 2014 SCC 58 at para 38; *R v Pino,* 2016 ONCA 389 at para 56; *R v Brydges*, [1990] 1 S.C.R. 190, [1990] S.C.J. No. 8, at p. 210.
[25] *R v Pino,* 2016 ONCA 389 at para 52.
[26] 2008 SCC 33 at para 2.

out in *Strachan*.[27] Similarly, in *R v Manchulenko* the Ontario Court of Appeal clarified that a "fresh start" is merely one component of the multi-factored, case-specific threshold s. 24(2) analysis.[28] No single, bright line rule can "automatically immunize"[29] subsequent evidence from prior *Charter* breaches. Instead, later *Charter* compliant conduct is one factor in the case-specific "obtained in a manner" inquiry.[30]

D. If a "Fresh Start" is Anything More than a Causal Connection Its Definition is Elusive

24. Beyond the issues with "fresh start" set out above – it recreates a causal requirement, ignores the purpose of s. 24(2), and narrows what should be a broad inquiry – it is also difficult to define with precision. Jurisprudential development following the invention of the "fresh start" analysis has failed to establish what police action will be sufficient to sever prior misconduct. The sufficiency of curative officer conduct in the wake of state-produced *Charter* violations varies widely from case to case.[31] This leaves broad latitude for potential police misconduct and abuse to go unremedied and provides minimal direction to lower courts.

25. The ambiguous nature of the "fresh start" analysis provides inadequate direction to law enforcement. Some police officers will approach this ambiguity with principle and take all measures to ensure accused persons are informed of their *Charter* rights at every step. Other officers will be less scrupulous, and the uncharted territory will provide them latitude to breach *Charter* rights or obtain evidence with no regard to *Charter* rights, knowing that their colleagues can fix it through later compliance.

26. These loose contours of the "fresh start" principle are confusing, inconsistent and a potential threat to accused persons. What's more, the "fresh start" principle is unnecessary. This Court should

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[27] Even in *Wittwer,* the Court asks whether the breach has a "temporal, contextual, causal or a combination of the three" to the evidence (para 21).

[28] 2013 ONCA 543 at para 68, 72.

[29] *Plaha,* (2004) 188 CCC (3d) 289 (Ont CA) at para 47

[30] *Plaha,* (2004) 188 CCC (3d) 289 (Ont CA) at para 47.

[31] See, for instance, *Hamilton* (2017 ONCA 179) vs. *Love* (2020 ABQB 689) where similar facts led to opposite conclusions about whether officers successfully executed a "fresh start."

affirm that "obtained in a manner" requires courts to examine the "entire chain of events" for causal, temporal or contextual connections between the breach and the evidence.

PARTS IV & V - ORDERS AND COSTS

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF NOVEMBER, 2021.

Counsel for the Intervener

Samara Secter
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PART VI – TABLE OF AUTHORITIES

Cases	Para Ref.
Doucet-Boudreau v Nova Scotia, 2003 SCC 62	18
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Statutory Provisions

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 10(a), 24(2)

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, a. 10(a), 24(2)