"Interrogators often use honey, not vinegar, in pursuit of the truth": Resistance, the Constitutional Right to Silence and Judicial Responses to Cell-Plant Operations

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ABSTRACT

Police officers employ numerous tactics to elicit incriminating statements from an accused. For instance, law enforcement officials will sometimes insert undercover police officers into a detention cell to procure evidence – cell-plant operations. During the 1990s, the Supreme Court of Canada held that where undercover state agents actively elicit incriminating statements from an accused while in detention, such conduct violates the latter's right to silence situated in section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Remaining silent is a legitimate way to resist the power of the state when it conducts investigations. Police officers undermine this right and ability to resist when dispatching undercover officers in this manner, since an accused is unaware that they are speaking to state agents. However, an accused person with the assistance of their lawyer(s) may further resist the prosecution's intended use of these incriminating statements through litigation – specifically, applications to exclude evidence under the *Charter*. While the Court has not considered cell-plant cases since 1999, Canadian trial courts at the superior court level have developed the right to silence jurisprudence concerning cell-plant cases. In addition, the Supreme Court of New Zealand has adopted the legal tests formulated by its Canadian counterpart. This article examines this jurisprudence, revealing how some decision-makers are showing

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sensitivity to the spatial context in which these operations occur. The case law also exposes how undercover officers may impact their exchanges with accused persons by building temporary and situational relationships with them. This is despite the lack of a prior relationship between the accused and undercover agent(s). In turn, this raises concerns about whether state actors have actively elicited incriminating statements from an accused. The jurisprudence also highlights how undercover officers are engaging in the functional equivalent of an interrogation despite the Supreme Court of Canada's decisions in the 1990s admonishing against these tactics. An examination of this jurisprudence provides tools to challenge prosecution attempts to use cell-plant statements in future cases.

Keywords: *Canadian Charter of Rights and Freedoms*; cell-plant operations; constitutional law; police trickery; resistance; right to choose; right to silence; undercover interrogations.

I. INTRODUCTION

During police investigations, law enforcement officials seek to procure crucial information to solve crimes. Authorities acquire knowledge about an offence by, *inter alia*, speaking with people as well as collecting physical, documentary, and/or digital evidence. The more incriminating and admissible evidence that police officers can obtain, the stronger the case can be made against those whom the state alleges are responsible for committing crimes. For many investigators, arrested or detained suspects are obvious target-rich environments from whom inculpatory evidence may be harvested. Through their statements, an accused may, amongst a range of information, reveal motives for crimes, confirm their presence at a crucial place and time, concede to committing acts that constitute the *actus reus* (or guilty act), and/or admit to having the intent to commit certain acts to bring out the natural and foreseeable consequences of their conduct. To access this potential evidentiary treasure trove, police interrogators use various techniques, including deception and lies, to elicit incriminating statements from suspects. Confronted with such tactics, suspects who maintain their resolve to remain silent engage in an act of resistance to the overwhelming power of law enforcement officials and institutional power.[1] This resistance deprives state actors of potentially crucial incriminating evidence which can be used by Crown prosecutors.[2] With respect to serious

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1 Hannah Quirk, *The Rise and Fall of the Right of Silence* (London: Routledge, 2018) at 18 [Quirk].

2 There is also an important role for lawyers advising on how to resist cooperating with

offences like murder, police investigators may not rest content in allowing an individual's silence to stand. Investigators may use other creative and deceptive measures to circumvent the individual's choice not to speak to authorities.[3] These measures include planting an undercover police officer or officers into detention cells to masquerade as fellow inmates who then surreptitiously question an accused. I refer to these techniques as "cell-plant operations" and an undercover officer who acts as an inmate in these operations as a "cell-plant." Individuals subjected to these tactics are, in turn, typically unaware that they are speaking to an undercover state agent. These deceptive techniques constitute powerful and problematic tools that undermine an accused's ability to make an informed choice to speak to state actors about crimes they are suspected of perpetrating. When prosecutors have sought to use incriminating statements procured through cell-plant operations ("cell-plant statements"), various accused have resisted such efforts with the crucial assistance and advice of counsel by launching pre-trial legal challenges to their admission.

In numerous countries, there are legal norms that ostensibly preserve an individual's ability to resist the state's attempts to use cell-plant statements at trial.[4] In 1990, the Supreme Court of Canada ("SCC" or the "Court") interpreted the *Canadian Charter of Rights and Freedoms* to incorporate a constitutional pre-trial right to silence within section 7.[5] This provision 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."[6] The SCC recognized the right to silence as a principle of fundamental justice and that its purpose is to

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state actors. *R v Lafrance*, 2021 ABCA 51 at para 48 [*Lafrance ABCA*] (stating, "The consultation with counsel provides an opportunity for a lawyer to inform the detainee of their rights, but also to discuss the benefits and drawbacks of cooperating with the police investigation, as well as strategies to resist cooperation should that be the detainee's choice" at para 48). See also *R v Lafrance*, 2022 SCC 32 at paras 71, 75 [*Lafrance SCC*].

3 In some instances, police interrogators may be able to extract admissible confessions during standard questioning but may still engage in surreptitious questioning to secure further evidence.

4 For example, in the United States of America (US), the protection can be found in the right to assistance of counsel under the Sixth Amendment to the US Constitution. The application of the Sixth Amendment to cell-plant contexts can be found in *United States v Henry*, [1980] 447 US 264 [*Henry*]. As discussed below, New Zealand law furnishes protections too. See also *Allan v The United Kingdom*, [2003] 36 EHRR 12; *R v Swaffield*, [1998] HCA 1.

5 *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1 [*Hebert* citing to SCR].

6 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

protect an individual's freedom to choose whether to speak to authorities.[7] This right is breached whenever an undercover state actor actively elicits incriminating statements from an accused who is in detention.[8] In a later decision, the Court further clarified that an accused does not have to be subjected to an atmosphere of oppression when state actors surreptitiously and actively elicit incriminating statements.[9] Furthermore, an accused is not required to have expressly invoked their right to silence prior to being subjected to a cell-plant interrogation to benefit from its protection.[10] If a court determines that an individual's right to silence has been infringed, it may then consider whether the evidence should be excluded pursuant to section 24(2) of the *Charter*.[11]

During the 1990s, the SCC decided four cases concerning undercover operations occurring within the detention context where the defendants claimed breaches of their right to silence – *Hebert* (1990),[12] *Broyles* (1991),[13] *Brown* (1993),[14] and *Liew* (1999).[15] Of the four judgments, the SCC provided its own substantial reasons in *Hebert*, *Broyles*, and *Liew*; they are often most cited, and together they have been referred to as a trilogy by various trial courts.[16] However, *Brown* has been overlooked. In that case, the SCC issued a very brief decision reversing the Alberta Court of Appeal, substantially for the reasons provided by Justice Harradence, the dissenting judge.[17] The SCC's decision does not provide clues to the importance of the facts. Since *Liew*, the SCC has not adjudicated any further cell-plant cases. Yet, numerous trial court decisions have addressed *Charter* claims relating to cell-plant operations in response to pre-trial defence applications in criminal cases to exclude evidence procured during these operations. While

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7 *Hebert*, *supra* note 5 at 186.

8 *Ibid* at 184–185; *R v Broyles*, [1991] 3 SCR 595 at 611, 68 CCC (3d) 308 [*Broyles*].

9 *R v Liew*, [1999] 3 SCR 227 at para 37,137 CCC (3d) 353 [*Liew*].

10 *Ibid* at paras 44–45.

11 *Charter*, *supra* note 6, s 24(2); *R v Grant*, 2009 SCC 32.

12 *Hebert*, *supra* note 5.

13 *Broyles*, *supra* note 8.

14 *R v Brown*, [1993] 2 SCR 918, 83 CCC (3d) 129 [*Brown* SCC].

15 *Liew*, *supra* note 9.

16 *R v Radjenovic*, 2010 BCSC 1459 at paras 7, 13, 19 [*Radjenovic*]; *R v Deboo*, 2015 BCSC 69 at para 26 [*Deboo*]; *R v Quigley*, 2016 BCSC 2308 at para 6 [*Quigley*]; *R v Sparks and Ritch*, 2020 NSSC 128 at para 69 [*Sparks and Ritch*].

17 However, in *Brown*, the Court heard the case by right of appeal and reversed the majority decision of the Alberta Court of Appeal. Writing for the majority of the Court, Justice Iacobucci asserted, "I am of the opinion that this appeal should be allowed for substantially the reasons given by Harradence J.A. in the Alberta Court of Appeal [...] solely on the ground of the alleged violation of the appellant's rights under section 7 of the Canadian Charter of Rights and Freedoms." *Brown* SCC, *supra* note 14 at 920.

several judges have ruled against such motions, numerous others have excluded evidence pursuant to section 24(2) on the grounds that undercover state agents violated an accused's *Charter* right to silence by actively eliciting incriminating statements.

These trial court decisions, all occurring after the SCC's cell-plant decisions have received scant, if any, scholarly attention, and this article seeks to fill this gap.[18] In addition, as part of the discussion on the development of the jurisprudence surrounding cell-plant operations, I shall consider a decision of the Supreme Court of New Zealand ("SCNZ") from 2015, *R v Kumar*.[19] Although set in another jurisdiction, the *Kumar* decision draws heavily on the SCC's right to silence jurisprudence by adopting the legal tests articulated by it. The *Kumar* decision provides important insights about the very legal tests articulated in *Broyles* with respect to active elicitation. Notably, the SCNZ is New Zealand's highest appellate court, and its jurisprudence is persuasive and worthy of consideration.

In examining these various decisions by Canadian trial courts and the SCNZ's decision in *Kumar* that exclude evidence based on cell-plant operations, I argue that they offer significant insights into the nature of cell-plant operations and the development of the jurisprudence concerning them. Indeed, they address concerns and factual scenarios not fully fleshed out or addressed in the SCC's trilogy. For individuals seeking to resist the attempted admission of cell-plant statements through litigation, the decisions contain the following indicia about how to mount a successful constitutional challenge. First, such judgments highlight the rather active nature of many undercover officers in seeking to elicit incriminating statements despite, in the Canadian context, the ostensible limits provided in *Broyles* and *Liew*. The newer jurisprudence also highlights aspects of the exchanges between the accused and state actors not addressed in *Broyles* and *Liew*. Second, I posit that these decisions recognize and shed light on how

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18 Much of the scholarship to date regarding cell-plant operations concerns earlier jurisprudence. Patrick Healy, "The Value of Silence" (1990) 74 CR (3rd) 176; David Tanovich, "The Charter Right to Silence and the Unchartered Waters of a New Voluntary Confession Rule" (1992) 9 CR (4th) 24; Gordon Wall, "Doubts Cast on Hebert Limits on the Pre-Trial Right to Silence" (1995) 36 CR (4th) 134; Amar Khoday, "Uprooting the Cell Plant: Comparing United States and Canadian Constitutional Approaches to Surreptitious Interrogations in the Detention Context" (2009) 31:1 W New Eng L Rev 39 [Khoday].

19 *R v Kumar*, [2015] NZSC 124 [*Kumar*]. Though notably, in his concurring opinion, Chief Justice Elias would dispense with the majority's adoption of the test articulated in *Broyles* in favour of a more direct causal inquiry. Such an inquiry would examine whether the actions of the police agents elicited the statements in cases where a police agent is placed in the cell of a person detained in order to obtain admissions. See *ibid* at paras 78–79.

undercover officers may forge temporary and situational relationships with detainees in the absence of pre-existing bonds, and to such a degree that they contribute to a finding of active elicitation. Third, I contend that these decisions legitimize and reinforce the importance of the right to silence and, drawing from *R v Lafrance*, the ability to resist cooperation with the state's investigation of the accused.[20] When undercover state actors actively elicit incriminating statements from an accused, they undermine and breach the right to silence and the accused's underlying freedom to choose whether to speak to the state. Launching a *Charter* challenge is a way to resist the power of the state, albeit well after such constitution-infringing police conduct has already occurred. An accused does not need to resist at the very moment that police officers are breaching their constitutional rights. This is true in the case of cell-plant operations, where an accused is unaware that their right to silence has been infringed until after the fact.

This remainder of this article will be divided into four parts. Part II provides some definitional scope to the concept of resistance and situates the use of litigation as a form of resistance. Drawing on the work of Alice Ristroph in the United States legal context, I will discuss how bringing a *Charter* claim alleging a violation of the right to silence serves as a way to resist the dominant power of the state and, in particular, the prosecution's intended use of evidence through putatively unconstitutional means.

Part III situates cell-plant operations in two broader contexts. First, they are a species of police interrogations. Many of the techniques relevant to formal police questioning in an interrogation room are also relevant and employed in cell-plant interrogations. Since an accused is unaware of the true identity of their interrogator(s) in cell-plant operations, such standard questioning and related techniques may be more effective. The second context is the detention environment and the social dynamics and norms within such a setting that make an accused vulnerable and susceptible to surreptitious questioning. These conditions facilitate the weakening of an accused's ability to remain silent. This context is crucial to understanding how the legal test articulated by the SCC in its trilogy with respect to active elicitation should be understood and developed.

In Part IV, I provide a brief history of the *Charter* right to silence, its integral connection with cell-plant operations, and the SCC's jurisprudence governing the analysis. This history will also delineate the limitations of the Court's jurisprudence in protecting one's resistance to the state and foreground how recent decisions provide valuable insights and developments on the right to silence.

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20 *Lafrance* SCC, *supra* note 2 at para 71.

Part V is divided into four sections, each highlighting certain aspects of the right to silence jurisprudence developed in Canadian trial court decisions and the SCNZ's decision in *Kumar*. The first section focuses on how some decisions address the spatial and temporal considerations of cell-plant interrogations. The close and confined spaces accentuate the vulnerabilities of the accused. The second section identifies how other asymmetries of power affect communications between state agents and the accused, specifically cell-plants' pre-operation preparation and their prior interrogation experiences. Sections three and four tackle the two series of factors relating to active elicitation covered under recent jurisprudence. Section three addresses how courts have examined the nature of the relationship between cell-plants and the accused in substantial ways beyond the SCC's decisions in the 1990s. This includes the building of temporary and situational relationships. These examinations include closer scrutiny of the rapport-building techniques of cell-plants. The fourth section focuses on how courts examine the interrogation techniques of cell-plants to determine whether they are the functional equivalent of an interrogation. Despite the lessons of the SCC jurisprudence, many officers have engaged in active forms of elicitation in tandem with building a relationship with the accused, resulting in the breach of their right to silence and the exclusion of evidence.

II. *CHARTER* LITIGATION AS RESISTANCE

Is engaging in litigation a form of resistance? For many, the relationship between litigation and resistance may seem odd or counterintuitive. Litigation deals with the process of resolving a legal dispute within an adjudicative context. It is a legal process whereby one seeks to vindicate their rights. Resistance often appears to implicate the violation of legal norms rather than the deployment of the law itself for the purpose of carrying out an act of defiance. However, resistance is not limited to the use of force, engaging in civil disobedience, or any other forms of defiance typically associated with the breaching of legal norms. Utilizing law and legal processes may be useful and suitable weapons to resist some forms of dominant or hegemonic power. This is even the case when the power being opposed is the state itself. Through litigation, individuals may challenge the constitutionality of the conduct of state actors, and particularly, police officers.[21]

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[21] Litigation may also be used to challenge other aspects of state conduct, including the passing of legislation or creation of criminal prohibitions. See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5.

In designating litigation as a form of resistance, it may be helpful to define the latter. Although there is no singular definition of resistance, there are at least two key components that likely constitute it. First, many scholars argue that, at its core, resistance stands in opposition to something.[22] That "something" is often associated with those who hold and exercise dominating power. Various types of actors and institutions possess such power within a given society, including those within the state. Second, scholars have also identified intentionality as a key element of resistance.[23] After all, resistance does not happen by accident.[24] Drawing on these concepts and my past work,[25] I define resistance to include acts or omissions committed individually or collectively that intentionally challenge the dominant or hegemonic[26] power of another individual, group, institution, entity and/or (section of a) society—regardless of whether such power is rooted in, or affiliated with, state authority.[27]

When police officers arrest or detain an accused, they clearly exercise dominant power over them. Although an accused may physically resist their detention or arrest, they are likely to be unsuccessful in escaping captivity. A detainee may also resist by refusing to cooperate in any way with the state's investigation and questioning of them. Indeed, the role of legal counsel includes advising an accused of their right to remain silent in the face of police questioning and "strategies to resist cooperation should that

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22 Gene Sharp, *Sharp's Dictionary of Power and Struggle: Language of Civil Resistance in Conflicts* (Toronto: Oxford University Press, 2012) at 253; Elizabeth Stanley & Jude McCulloch, "Resistance to state crime" in Elizabeth Stanley & Jude McCulloch, eds, *State Crime and Resistance* (Toronto: Routledge, 2013) at 5 [Stanley & McCulloch]; Sally Engle Merry, "Law, Culture, and Cultural Appropriation" (1998) 10:2 Yale JL & Human 575 at 599–600.

23 See e.g. Stanley & McCulloch, *supra* note 22 at 5.

24 Though accidents may nevertheless have an adverse impact on those exercising dominant power or their interests.

25 See e.g. Amar Khoday, "Resisting Criminal Organizations: Reconceptualizing the 'Political' in International Refugee Law" (2016) 61:3 McGill LJ 461.

26 Hegemonic power may be understood as the maintenance of dominant power exercised "not through the use of force but through having [the] worldview [of the dominant power] accepted as natural by those over whom domination is exercised." BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 Intl Community L Rev 3 at 15. Dominant power that is not hegemonic may require the use or threat of force or other coercive means, such as the legal system or law enforcement to control or impose itself on others. See e.g. Joanne P Sharp et al, "Entanglements of Power: Geographies of Domination/Resistance" in Joanne P Sharp et al, eds, *Entanglements of Power: Geographies of Domination/Resistance* (New York: Routledge, 2000) 1 at 2.

27 In past work, I left out the word "intentionally" but have explicitly included it here. Though intentionality is likely inferred in relation to challenging dominant or hegemonic state power, it is helpful to be more precise.

be the detainee's choice."[28] Realistically, these forms of resistance can often give way to the overwhelming power of the state. Many individuals subjected to lengthy interrogations without the assistance of a lawyer present during questioning often succumb and reveal incriminating information.[29]

Yet, when law enforcement officials initiate a cell-plant operation, the target is unaware that they are speaking to an undercover state agent or agents and hence do not even realize that they should be resisting these state actors by remaining silent. This raises the following question: once police investigators have procured all their principal evidence and the prosecution is ready to litigate the matter, are further efforts to resist the methods employed to gather some or all of the evidence foreclosed? Thankfully, the answer is no. The litigation process with respect to criminal prosecutions, and particularly applications to exclude unconstitutionally obtained statements, offer a further and crucial avenue to resist the state's methods to procure and use such incriminating evidence.[30]

How do the definitional components stated earlier regarding resistance apply to and incorporate the concept of litigation? In particular, how do these components pertain to litigation that challenges the allegedly unconstitutional conduct of police officers? By initiating such litigation, an accused and their defence counsel intentionally oppose the power of the police to employ such techniques in the first place, as well as the prosecution's attempted exploitation of such evidence. Furthermore, where a court recognizes explicitly that police officers have acted unconstitutionally and assuming the criteria for excluding the impugned evidence have been satisfied, such resistance via litigation is vindicated.

Each of these constitutional victories contributes to the building of a resistance jurisprudence. The cases that comprise this jurisprudence illustrate that resistance need not happen only when an exercise of dominant power is occurring (e.g., during an arrest, standard interrogation, or cell-plant operation). Resistance can transpire at a much later stage during legal proceedings, where it arguably really counts. Indeed, as Alice Ristroph contends, the considerable harms that are occasioned by a constitutional breach, namely conviction and punishment, occur when other state actors (i.e., prosecutors) use the information police have gathered at trial.[31] As a practical matter, the prosecution's use of such

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28 *Lafrance* SCC, *supra* note 2 at para 71.

29 Under SCC precedents, an accused does not possess a constitutional right to have a lawyer present during questioning. See *R v Sinclair*, 2010 SCC 35 at paras 1, 2, and 42 [*Sinclair*].

30 *Charter*, *supra* note 6, s 24.

31 Alice Ristroph, "Regulation or Resistance: A Counter-Narrative of Constitutional

evidence would likely force many accused to take the witness stand to explain why they (falsely) confessed and render them vulnerable to cross-examination.

The notion that litigation may qualify as a form of resistance finds support in other scholarly writing. Some academic writers examine how litigation strategies have been deployed as part of resistance efforts against colonial[32] and authoritarian states.[33] Other scholars explore the use of litigation as a resistance strategy to assert one's rights and/or otherwise challenge human rights violations in or by democratic states.[34] Most apropos to this writing is Alice Ristroph's article regarding litigation as a means to resist constitutional violations by state actors in the United States context. In "Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure," Ristroph challenges the notion that the primary purpose of constitutional criminal procedure is the top-down judicial regulation of police officers.[35] Instead, she advances a refocusing of this purported purpose where the accused takes centre stage asserting constitutional claims as a form of resistance to state power and coercion.[36] Ristroph contends: "Every mundane motion to suppress evidence is a claim that the government has overstepped its power, and thus a claim about the appropriate scope of government power."[37] Furthermore, she argues that:

> Rights claims are a form of resistance to the state, and a Fourth, Fifth, or Sixth Amendment claim [under the United States Constitution] is a way of resisting punishment. These acts of resistance are part of our constitutional design. The litigation and jurisprudence they produce are an important part of our political discourse – even if defendants lose, and even if the resulting doctrines fail to regulate the police well.[38]

Criminal Procedure" (2015) 95 BUL Rev 1555 at 1573 [Ristroph].

32 Sanjukta Das Gupta, "From Rebellion to Litigation: Chotanagpur Tenancy Act (1908) and the Hos of Kolhan Government Estate" (2016) 19:2 Irish J Anthropology 31.

33 Junxin Jiang, "Rightful Resistance through Public Interest Litigation in China" (2015) 1 Asia in Focus 13; Xin He, "Maintaining Stability by Law: Protest-Supported Housing Demolition Litigation and Social Change in China" (2014) 39:4 Law & Soc Inquiry 849.

34 Jules Lobel, "Victory Without Success? – The Guantanamo Litigation, Permanent Preventive Detention, and Resisting Injustice" (2013) 14 JL in Soc'y 121; Robert Nicholson, "Legal Intifada: Palestinian NGOs and Resistance Litigation in Israeli Courts" (2012) 39:2 Syracuse J Intl L & Com 381.

35 Ristroph, *supra* note 31 at 1556–1565.

36 *Ibid* (stating: "Constitutional criminal procedure is also an adversarial project in which individual defendants resist the power of the state. It is a forum to discern and to debate our most basic conceptions of government power and its limits" at 1564).

37 *Ibid* at 1563.

38 *Ibid* at 1564.

Constitutional rights are mechanisms that limit state power and, as Ristroph rightly contends, invite principled challenges that are initially bottom-up.[39] Indeed, they require subjects of the state to initiate the mechanism of limitation.[40]

Though Ristroph's article concerns the United States legal context, her positions have salience for other legal systems, including the Canadian legal system, where constitutional and other legal norms circumscribe state conduct. In Canada, the *Charter* places various limits on the state, which includes, *inter alia*, how police officers gather evidence. These constitutional limits include the right to be secure from unreasonable search or seizure, the right not to be arbitrarily detained or imprisoned, the right to retain and instruct counsel upon arrest or detention, and the right to remain silent while in detention.[41] As indicated above, such constitutional norms are not self-actuating and require an accused to initiate proceedings via an application and to prove the constitutional violations on a balance of probabilities.[42] In making such applications based on the purported violation of one or more *Charter* provisions, rights claims are forms of resistance to the Crown prosecutors' attempted use of evidence obtained by police through putatively unconstitutional means.

Having explained how *Charter* litigation qualifies as a form of resistance, I next turn to how the nature of cell-plant operations and the detention environments in which they occur make it highly challenging, if not improbable, to resist these actions as they are occurring. Post-investigation resistance through litigation to exclude unconstitutionally obtained cell-plant statements may be the only practical defiance available to an accused.

III. Police Interrogation Techniques, Turn-Taking Violations and Carceral Environments

To characterize certain behaviour as resistance requires that a resister possesses some requisite knowledge concerning the circumstances they face and are challenging. While an accused who is physically detained in a police station or state detention facility is typically aware of their confinement (assuming no cognitive deficits or mental health issues), during a cell-plant operation, they are unconscious of the state's efforts to elicit incriminating statements. Thus, they lack full knowledge of the circumstances of what is

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39 *Ibid* at 1596.
40 *Ibid*.
41 *Charter*, *supra* note 6, ss 7–10.
42 *R v Oickle*, 2000 SCC 38 at para 30 [*Oickle*].

occurring, and their ability to resist (and appreciate whether they should) is diminished, if not non-existent. But if these conditions were not enough, there are other contextual factors that make it difficult to resist the investigative efforts of undercover state agents. First, many techniques that police interrogators successfully employ during non-undercover custodial interrogations ("standard interrogations") are also deployed in cell-plant scenarios to great effect. Second, there are certain informal norms governing carceral contexts which make it exceedingly difficult for an accused to remain silent about their alleged crime(s). The perceived consequences flowing from violations of such norms could coerce many accused to answer questions from undercover state agents for fear that the refusal to do so will result in punishment by fellow inmates and particularly their cellmate(s). I address both in this part.

A. Police Techniques

During standard interrogations, detainees may refuse to disclose incriminating statements to police officers. They may assert their right to remain silent, particularly after a lawyer has advised them of this right and how to exercise it. Undaunted, police interrogators have adopted myriad techniques in the context of standard interrogations to weaken a detainee's resolve, and in various cases, they have successfully elicited incriminating statements. In addition, an interrogator's success will be facilitated by the reality that police are not required to permit an accused's lawyer to be present during an interrogation,[43] and the right to silence does not require interrogators to refrain from questioning for lengthy periods and despite an accused's repeated assertions that they wish to remain silent.[44] During cell-plant operations, a lawyer will similarly not be present to remind the accused to remain silent and that they may be conversing with an undercover state agent. Thus, many accused may be more susceptible to the psychological ploys of undercover state agents since they are not even aware of the true identity of their cellmate(s).

During standard interrogations, police adopt diverse techniques to elicit incriminating statements from detainees while exploiting the environment and their domination over the accused. These techniques include the "use of intimidation, bluffs, gentle prods, silence, simulated friendship, sympathy, concern, self-disclosure, appeals to religion and God, the presentation of trickery and false evidence [...]."[45] Officers place suspects

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43 *Sinclair*, *supra* note 29 at paras 1, 2 and 42.

44 *R v Singh*, 2007 SCC 48 [*Singh*].

45 A Daniel Yarmey, "Police Investigations" in Regina A Schuller & James RP Ogloff, eds, *Introduction to Psychology and Law: Canadian Perspectives* (Toronto: University of

in isolated and unfamiliar surroundings.[46] Because an accused is under state control, police officers create a context wherein they create the impression that they are omniscient and omnipotent.[47] During questioning, interrogators can interrupt and change topics indicating control and dominance. In addition, the experience of isolation and the stress of confinement can produce heightened suggestibility.[48] As a result of such conditions, detainees may be "disarmed and lulled into a false sense of security by offers of sympathy, moral justification, face-saving excuses, rationalizations, blame-the-victim accusations, and down-playing of the seriousness of the crime."[49] However, even in such an obviously police-controlled environment, police manuals will advise that interrogators question a suspect in close quarters (roughly three to four feet away) while wearing civilian clothing, being unarmed, and without any badges or other indicators of police affiliation.[50] This is an attempt to place some distance between the interrogator and their status as a state actor in the mind of the detainee.

Although cell-plant operations present different investigative environments in contrast to standard interrogations, undercover officers may nevertheless utilize similar techniques to elicit incriminating responses. Indeed, several interrogation practices may translate very well and be more effective when coming from someone who does not appear to be a police officer but another inmate. For instance, undercover state agents may try to establish a rapport and temporary friendship, feign sympathy and concern, and engage in self-disclosure about alleged crimes, all amidst a heightened context of trickery where they are pretending to be fellow inmates in a similar predicament. Within the cell-plant environment, an accused is largely confined to a detention cell, perhaps without anything to read or use to pass what may feel like vast and excruciatingly slow passages of time, all while experiencing the anxieties associated with confinement. An accused may be highly suggestible and open to speaking to a friendly and loquacious individual to help pass this difficult yet often boring time. Similar to a standard interrogation, within a cell-plant operation, an undercover officer may direct the conversation to subjects of interest; though, as discussed below, such techniques run the risk of courts concluding that the conduct veers into the zone of active elicitation.

Toronto Press, 2001) at 81.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 Michael Skerker, *An Ethics of Interrogation* (Chicago: University of Chicago Press, 2010) at 93.

Notably, these techniques are not employed in a social or normative vacuum. I turn to these issues next.

B. Turn-Taking Violations

When someone is being spoken to, remaining silent and refusing to speak is not as easy as it seems, even in non-custodial contexts. Drawing from scholarship in linguistics, Hannah Quirk posits that refusing to speak or answer questions, even in standard questioning, "breaches the normal rules of 'turntaking' in conversation. Linguists often label silence as a 'turn-taking violation.'"[51] Georgina Heydon asserts that "to offer silence as a response to a question by another speaker, or even to delay one's turn to talk, is to challenge the structural integrity of that fundamental element of conversation, the adjacency pair."[52] She adds that such a challenge may not prove to be an obstacle to the social relationship between two close companions. However, this barrier may not be easy to overcome between interlocutors who are not close in a relational sense, such as between an undercover officer masquerading as an inmate trying to establish a rapport with the accused, who is the target of the cell-plant operation. To rebuff queries from a fellow inmate with silence or minimal communication may invite an unfriendly response. This brings the discussion to the next key point, the location where these operations occur and the social norms that govern these environments.

C. Carceral Environments

The right to silence and the concept of active elicitation must be understood in relation to the distinct environment in which cell-plant operations occur – detention facilities. There are numerous reasons why an undercover officer might be able to elicit incriminating statements from an accused in a cell without being too "active" and still arguably infringe on their right to silence. For instance, where the target of a cell-plant operation has no prior experience of arrest and detention, the introduction to this carceral environment can be jarring and destabilizing. Through his research into Canadian carceral spaces, including interviews with incarcerates, Michael Weinrath has observed, not surprisingly, that inmates experience considerable distress upon entering custody. He writes, "[n]ew inmates focused on withstanding the initial shock, maintaining communication with friends/family outside, and securing stability/safety in a potentially

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51 Quirk, *supra* note 1 at 79.

52 Georgina Heydon, "Silence: Civil Right or Social Privilege? A Discourse Analytic Response to a Legal Problem" (2011) 43 J Pragmat 2308 at 2308.

volatile realm."[53] In addition, Weinrath contends, "first-time incarcerates had to contend with the stigma of arrest and detention, and also had to manage both the ambiguous setting of custody and the attendant discomfort in dealing with new people. In most cases, subjects experienced considerable angst and trepidation on entering custody."[54]

For new inmates, there might be an inclination to be or appear stoic, aggressive, or demonstrate a willingness to be violent.[55] Weinrath asserts that while obtaining respect by behaving appropriately was important over time, in the initial stages, it was also important not to lose respect.[56] New inmates might retain or earn respect by "acting strong, not showing fear, and being stoic, but this might not be enough; being strong might require a willingness to be violent."[57] It is well understood or perceived that carceral spaces can be violent domains. In anticipation of this, some inmates may try to compensate by recounting actual or fabricated versions of their own histories of violence. As US Supreme Court Justice Thurgood Marshall once expressed in a dissenting opinion in relation to a cell-plant case, "where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts."[58] On a connected point, with respect to how inmates might interact with one another, Weinrath explains that inmates might engage in small talk, including the telling of crime stories of past offences, anecdotes about their lives on the streets, or "war" stories about past incidents in prisons.[59]

In approaching the jurisprudence on the right to silence in the context of cell-plant operations and the factors used to determine whether a state actor has actively elicited incriminating information, one must be cognizant of the context in which these statements may be elicited from detainees. Whether they have committed the offences for which they have been detained, many individuals are nevertheless in a vulnerable condition. Given the carceral environment in which a detainee is forced to reside, their ability to remain silent in the face of questioning by an ostensible inmate may be significantly weakened. As discussed above, this may be because of the shock and lack of acclimatization to being confined, the awkwardness and fear of the consequences of engaging in turn-taking

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53 Michael Weinrath, *Behind the Walls: Inmates and Correctional officers on the State of Canadian Prisons* (Vancouver: UBC Press, 2016) at 77 [Weinrath].

54 *Ibid* at 79.

55 *Ibid* at 87.

56 *Ibid*.

57 *Ibid*.

58 *Illinois v Perkins*, [1990] 496 US 292 at 307 (Marshall J, dissenting) [*Perkins*].

59 Weinrath, *supra* note 53 at 93.

violations, or the desire to earn respect in the carceral setting by appearing strong (or even violent).

As the discussion in this part has sought to demonstrate, remaining silent in the face of state efforts to elicit incriminating statements during cell-plant operations can be incredibly difficult. Realistically, resistance will have to take place through *Charter* litigation to attempt to exclude the incriminating evidence. In Parts IV and V, I set out how legal action by various accused and their defence counsel have helped develop resistance strategies through litigation and, importantly, how courts have responded.

IV. The Origins of the *Charter* Right to Silence and Cell-Plant Operations

Individuals who engage in resistance have the capacity to transform societies. When people use litigation as their method to successfully resist police conduct that violates constitutional norms, they can change the course of legal history. Through litigation, police investigative techniques that were once given a wide berth may end up being subsequently limited. Prior to the SCC's decision in *Hebert* which established a constitutional pre-trial right to silence, the Court did not recognize any effective legal limitations on police authorities inserting an undercover agent in a suspect's cell to elicit incriminating statements or evidentiary rules on the statements they procured. Under the common law confessions rule, the Crown must demonstrate beyond a reasonable doubt that an accused gave incriminating statements voluntarily.[60] However, a crucial pre-condition must be satisfied for the rule to be operative. Specifically, an accused must subjectively believe that they were speaking to a person in authority over them, and this belief must be objectively reasonable.[61] In *Rothman v The Queen*, a pre-*Charter* decision from 1981, the SCC concluded that the confessions rule does not apply in instances of cell-plant operations since the accused is not subjectively aware that they are speaking with a person in authority over them.[62] In his concurrence, Justice Lamer (as he then was) articulated that there may be instances where police use dirty tricks that shock the conscience of the community to elicit incriminating statements, and their admission should not be permitted.[63] Examples of such dirty tricks would include officers masquerading as legal aid lawyers or

60 *Singh*, *supra* note 44 at para 29.
61 *R v Hodgson*, [1998] 2 SCR 449 at paras 31–34, 127 CCC (3d) 449 [*Hodgson*].
62 *Rothman v The Queen*, [1981] 1 SCR 640 at 664, 59 CCC (2d) 30.
63 *Ibid* at 696–698.

chaplains.[64] Yet, he indicated that this new category would not embrace police officers pretending to be another inmate in the context of cell-plant operations.[65]

Less than a decade after *Rothman*, the *Hebert* case reached the SCC. This time, the result was radically different. It is important to note that the following developments would not have occurred but for the accused appealing the SCC and litigating to uphold his *Charter* rights – rights that were unavailable in 1981. Relying on section 7 of the *Charter*, the Court interpreted the principles of fundamental justice to include a pre-trial right to silence. In explaining this *Charter* right, the SCC asserted that it is connected to the privilege against self-incrimination and the confessions rule.[66] At a basic level, this constitutional right to silence applied where a state agent actively elicited incriminating statements from an accused. Unlike the confessions rule, this right to silence applied only in the context of detention[67] and thus did not embrace undercover operations outside of detention – e.g., Mr. Big operations.[68] The rationale for this threshold requirement was that in cell-plant operations, the state is in control of the accused, and the latter is not at liberty to leave; the state is responsible for ensuring an accused's rights are respected.[69] Factually, there was little information provided in *Hebert*. The SCC explained that the accused was arrested for robbery, spoke to legal counsel, and then asserted their right to remain silent.[70] An undercover officer was then placed in Hebert's cell and engaged him in conversation.[71] In doing so, the undercover officer undermined Hebert's stated wish to remain silent with respect to state questioning.

Like many legal developments, the growth of a resistance jurisprudence does not happen in one decision. As important as *Hebert* was in establishing a constitutional pre-trial right to silence, particularly regarding cell-plant operations, much was still missing at a granular level. From a normative perspective, the SCC did not spend any time to properly explain the meaning of "active elicitation." This is a crucial concept needed to show a

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64 *Ibid* at 697.
65 *Ibid* at 698.
66 *Hebert*, *supra* note 5 at 164.
67 *Ibid* at 184.
68 *R v McIntyre*, [1994] 2 SCR 480, 153 NBR (2d) 161 [*McIntyre*]. Mr. Big operations involve undercover police officers masquerading as members of organized crime syndicates seeking to recruit a suspect and offering admission into the organization in exchange for incriminating statements. See *R v Hart*, 2014 SCC 52.
69 *Hebert*, *supra* note 5 at 184.
70 *Ibid* at 158–159.
71 *Ibid*.

violation of the right to silence in cell-plant cases. With respect to the factual matrix of the *Hebert* case, various aspects which would have been relevant to considering the nature of the elicitation were left unaddressed. For example, there was no indication of the length of time that the undercover officer was housed with Hebert in the cell. Did the state agent actively elicit the incriminating statements in a few minutes, or did it take several hours? With respect to the content of what was said, the SCC provided no excerpts from the transcript of the conversations between the two indicating the nature of the exchange and how it contributed to being considered active elicitation. In addition to the content of the exchange, there was no examination of the nature of the relationship and whether the undercover officer sought or created a relationship with Hebert. In addition, there was no information about what the undercover officer was informed regarding Hebert prior to entering the cell, the details concerning the crime for which Hebert was arrested, or any instructions that the officer was given. As I discuss below, these are factual components discussed in many Canadian trial-level decisions and the SCNZ's decision in *Kumar* concerning cell-plant operations, which provide important ingredients for a successful outcome when advancing an application to resist the prosecution's efforts to include the impugned evidence at trial.

Following the decision in *Hebert,* further litigation before the SCC has contributed to a resistance jurisprudence. One year after *Hebert*, the SCC provided greater definition to the notion of active elicitation as well as state agency in *Broyles*.[72] The reason for defining the concept of state agency was to address the specific facts presented in that case. In *Broyles*, the accused was charged with murdering his grandmother.[73] The police launched a cell-plant operation. However, rather than inserting an undercover police officer into the detention facility or cell, the chief investigating officer enlisted the assistance of Todd Ritter, a non-inmate and friend of Broyles to speak with him.[74] Investigators outfitted Ritter with a body-pack listening device and provided him access to Broyles in the detention facility.[75] During their conversations, Broyles admitted to knowing that his grandmother died on the day she went missing.[76] Because Ritter did not present as a typical state agent – he was neither an undercover police officer nor an inmate acting as a jailhouse informant – the Court articulated a flexible test

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72 The events, as well as the trial court and court of appeal decisions all occurred prior to the SCC's decision in *Hebert*.

73 *Broyles*, *supra* note 8 at 602.

74 *Ibid* at 599–600, 612–613.

75 *Ibid.*

76 *Ibid* at 600–601.

for determining whether a person qualified as a state agent.[77] The need for this test was most relevant in circumstances not involving undercover police officers or staff in a detention facility. As most reported cell-plant cases involve the use of undercover police officers, including those examined later in this article, I shall dispense with any further discussion of this test regarding state agency.[78]

More importantly, for the purposes of this article, the SCC furnished a series of factors to assess whether an undercover state actor actively elicited incriminating statements from a detainee. Such considerations help to consider how police actors may take steps to undermine an accused's choice to remain silent. At the heart of these considerations is the following inquiry, which centers on the relationship between the state agent and the accused: "considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused?"[79] In view of this framing, the Court in *Broyles* grouped these non-exhaustive factors into two particular clusters.[80]

The first cluster considers the nature of the exchange between the undercover officer and the accused. Given that the elicitation must be "active" in order to infringe the right to silence, one must assess whether the exchange between the agent(s) and the accused could be characterized as being akin to an interrogation, "or did he or she conduct his or her part of the conversation as someone in the role the accused believed the informer to be playing would ordinarily have done?"[81] Later in the decision, the Court articulated that one must assess whether the state agent allowed the conversation to flow naturally or if they directed the conversation to areas where police investigators needed information.[82] The *Broyles* Court posited that the focus "should not be on the form of the conversation, but rather on whether the relevant parts of the conversation were the functional equivalent of an interrogation."[83] A cell-plant interrogation may carry some indicia of a cordial exchange between two cellmates, however, as the SCC's phrasing suggests, an undercover agent may nevertheless make statements or return the conversation pointedly to subjects about which they are seeking to elicit incriminating statements.

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77 *Ibid* at 607–609.

78 The issue of state agency has arisen in other decisions. See e.g., *R v Broyles*, 1999 ABCA 102; *R v Fatima*, 2006 CarswellOnt 5523, [2006] OJ No 3634.

79 *Broyles*, *supra* note 8 at 611.

80 *Ibid*.

81 *Ibid*.

82 *Ibid* at 613.

83 *Ibid* at 611.

In connection with cell-plant operations, developing a rapport with an accused can be crucial to eliciting incriminating admissions. Interrogations do not occur in a relational vacuum. Accordingly, the second cluster identified in *Broyles* examines the nature of the relationship between the undercover state agent and the accused and how such a relationship may have some connection with the elicitation of incriminating statements. For instance, the *Broyles* Court asks: "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?"[84] These factors, particularly the first two, appear more apropos to situations resembling those in *Broyles*, where the undercover state agent was already a friend of the accused and had a pre-existing relationship.

In most reported decisions, such pre-existing relationships have not been the case. The undercover state agent tends to be a police officer who has no prior relationship before the commencement of the cell-plant operation. Yet, as subsequent trial court decisions and the SCNZ's judgment in *Kumar* examined below illustrate, courts have developed the jurisprudence to consider how even short-lived relationships forged in the confined quarters of a cell may nevertheless produce sufficient conditions in which to manufacture a meaningful rapport with an accused. The building of a relationship, however brief, can have a sufficient, if not strong causal link with the eliciting of incriminating statements. Examining such ephemeral relationships and the courts' treatment of them may be part of a successful litigation strategy to resist the Crown's attempt to admit incriminating statements into evidence.

Unlike *Hebert*, the SCC's decision in *Broyles* offered better guidance with respect to understanding active elicitation and state agency. Regarding active elicitation, the Court provided and examined excerpts from the conversation between Broyles and Ritter illustrating the way Ritter engaged in the functional equivalent of an interrogation. It concluded that "there is no question that parts of the conversation were functionally the equivalent of an interrogation."[85] Noticeably, these excerpts did not include Broyles's incriminating statement or Ritter's statements leading up to Broyles's admission, but they were illustrative of Ritter's approach to actively eliciting statements. Tied to the examination of active elicitation, the *Broyles* Court observed the impact of the relationship between Ritter and Broyles on the elicitation generally and when Ritter undermined the advice of Broyles's counsel to remain silent. The SCC posited, "Ritter did exploit the special

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84 *Ibid.*

85 *Ibid* at 613.

characteristics of his relationship with the appellant to extract the statement. Ritter sought to exploit the appellant's trust in him as a friend to undermine the appellant's confidence in his lawyer's advice to remain silent and to create a mental state in which the appellant was more likely to talk[.]"[86] Thus, what one may observe here is the breaking down of Broyles's resistance to maintain his choice not to speak with the police by asking questions to elicit an incriminating statement in tandem with Ritter exploiting his pre-existing relationship to achieve this goal.

While *Broyles* offers some level of guidance, the factual scenario here is distinctive in that the police deployed a friend of the accused to carry out its work. As mentioned above, investigators will typically insert an undercover officer who has no pre-existing relationship with an accused. The conversation and approach to elicitation may look different and be more subtle than that which is deployed by an untrained state agent. An undercover police officer in cell-plant contexts almost always does not have the benefit of a pre-existing relationship with the accused. However, given the nature and context of detention, this lack of a pre-existing relationship is not a necessity for engaging in active elicitation and furthermore in developing a type of impactful relationship in the detention milieu. This was illustrated in *Brown*.

As mentioned earlier, the SCC considered an appeal in *Brown* where the Court reversed the decision of the majority of the Alberta Court of Appeal, affirming the trial court's first-degree murder conviction of the accused.[87] In a very brief judgment, the SCC majority granted the appeal "substantially" for the reasons articulated by Justice Harradence, writing in dissent, who concluded that undercover police officers actively elicited incriminating statements from the accused.[88] The SCC offered no independent analysis of its own.[89] Notably, as in *Broyles*, the cell-plant operation and original trial took place prior to the SCC's judgment in *Hebert*.[90] By the time the Court of Appeal decided the matter in July 1992, the SCC had adjudicated both *Hebert* and *Broyles*. Applying the nature of the relationship and exchange factors articulated in *Broyles*, Justice Harradence concluded that two undercover officers had actively elicited incriminating statements from Brown.[91] The first undercover officer, "J", was the primary cell-plant who was housed with Brown

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86 *Ibid* at 614.

87 *Brown* SCC, *supra* note 14.

88 *Ibid*.

89 Such decisions can be unsatisfying as the SCC does not give detailed reasons. For an article examining deeper issues concerning bench decisions, see Alex Bogach, Jeremy Opalsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 SCLR (2d) 251.

90 *R v Brown* (1992), 127 AR 89, 73 CCC (3d) 481 at 520 [*Brown ABCA*].

91 *Ibid* at 495.

for at least thirty hours following the latter's arrest.[92] The second undercover officer, "L", posed as J's spouse, who visited the accused in detention to elicit incriminating statements.[93] Justice Harradence determined that L's interactions with Brown were a continuation of what J had commenced, concluding that "the conversations with [L] were founded entirely upon what had previously gone on with [J]."[94]

Justice Harradence first tackled the nature of the relationship between Brown and Officer J. Although J was housed in the same cell with Brown for at least 30 hours and had no prior relationship with him, Justice Harradence asserted that the "creation of a relationship between the accused and the officers — particularly Officer [J] — is a critical element of the over-all scheme designed to obtain incriminating statements." Specifically, undercover Officer J did so in the following ways:

> [J] portrays the experienced criminal, who knows that the police must have strong evidence against the accused. He has been there. He has beaten the murder rap himself. Of course, as a "fellow criminal", [J] offers to help the accused in various ways. He has friends "outside" who can silence witnesses, hide evidence, or even "take the fall" for an appropriate fee. He conveys the ["us] versus the cops" attitude throughout his conversations with the accused. [J's] specific aim is to subvert the accused's clear will not to speak with any state authorities about the offence and he does this by developing a fictitious friendship with the accused — which friendship he then exploits by pressing the accused to speak about the offence.[95]

This passage has tremendous significance concerning the "nature of the relationship" jurisprudence. It recognizes that a fictitious relationship can be forged with an accused within a short span of time. As we shall see in subsequent decisions discussed below, cell-plants like J will present themselves as experienced criminals giving friendly advice, which will likely be well-received. Although the *Broyles* Court placed the nature of the relationship as the second group of factors, it is the nature of the relationship that can give an essential context to the nature of the exchange analysis.[96]

In turning to the nature of the exchange analysis, Justice Harradence posited that the "conversations with the accused were focused upon the accused and his alleged involvement in a murder."[97] In assessing the transcripts, he observed that the "exchanges provide an education in subtle but powerful elicitation techniques, beginning shortly after the accused was brought into the cell with [J]."[98] Such techniques included assertions that the

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92 *Ibid* at 523.
93 *Ibid* at 503–504.
94 *Ibid.*
95 *Ibid* at 496.
96 *Ibid* at 501.
97 *Ibid.*
98 *Ibid.*

police would not have charged Brown with murder unless he committed the crime, as well as casting doubts about the integrity of Brown's lawyer.[99] What Justice Harradence describes as perhaps "the most offensive examples of elicitation" in the case involve exchanges where J proposed to Brown that a fictitious individual named "Raymond" would admit to the offence if Brown would provide for Raymond's family. For Raymond to successfully admit to the crime, Brown would have to provide details of the crime to make the confession more believable. On this technique, Justice Harradence opined, "I find it difficult to imagine any type of conduct which better illustrates the sort of 'elicitation' which Hebert made clear was unacceptable."[100]

While *Hebert*, *Broyles*, and *Brown* each concluded with determinations that the defendant's right to silence was infringed and the statements excluded, *Liew* provided an example where the SCC held that an undercover state agent did not actively elicit incriminating statements from the accused.[101] However, once again, the context provided an atypical presentation relative to most cell-plant operations. The state agent was a police officer who was part of an undercover drug operation that also involved the accused. When arrests were made, the undercover officer remained in character and was also seemingly arrested as part of the operation. The agent and accused were transported together to police headquarters. Although separated for some time upon arrival at headquarters, they were later placed in an interview room together, and they sat three feet apart. There the accused initiated the conversation and the Court concluded that the officer followed the natural flow of the conversation even though a question he asked elicited an incriminating statement. The Court posited that "the undercover officer did not direct the conversation in any manner that prompted, coaxed or cajoled the [accused] to respond."[102] Notably, trial courts in recent years have made explicit reference to this language of prompting, coaxing, and cajoling in connection with assessing active elicitation. With respect to the nature of the relationship, the Court determined that there was no "relationship of trust," no evidence that Liew was vulnerable or obligated to the undercover agent, nor did the agent manipulate Liew to bring about a mental state in

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99 *Ibid* at 501–503. In other cases, the diminishment of counsel or the advice of counsel, can serve as a basis for finding a violation of the right to counsel under section10(b). See e.g., *R v Burlingham*, [1995] 2 SCR 206, 124 DLR (4th) 7; *R v Dussault*, 2022 SCC 16.

100 *Brown ABCA*, *supra* note 90 at 503. Notably, this "Raymond" scenario discussed in *Brown* strongly resembles techniques employed in some Mr. Big undercover operations. See e.g., *R v Mentuck*, 2000 MBQB 155 at para 90.

101 *Liew*, *supra* note 9.

102 *Ibid* at para 51.

which he was more likely to talk.[103] From one angle, it might be argued that the state agent did little to subvert Liew's right to silence since the elicitation was not "active." However, at a more basic level, if one is unaware that the person with whom they are speaking is a state agent, that lack of knowledge affects the decision to speak. Here the undercover officer appeared to be arrested and involved in the very operation through which Liew was also arrested. While there may not have been much of a relationship to speak of, there was a decision to place the two together, which may prompt someone in Liew's situation to speak to someone in similar circumstances about their shared jeopardy.

As mentioned above, notwithstanding the Court's conclusion on the facts in *Liew*, it nevertheless clarified that the right to silence does not require the existence of an atmosphere of oppression to coincide with the active elicitation of incriminating statements.[104] In addition, an accused need not invoke their right to silence before statements are actively elicited in order to benefit from the protection.[105] If one sees the right to silence as a means of protecting an individual's right to resist compelled disclosure of incriminating statements to the state, then these were important clarifications. Undercover state agents can counter an accused's ability to remain silent in contexts where there is no (additional) atmosphere of oppression beyond the fact of custody and loss of liberty itself. Indeed, as the United States Supreme Court expressed in a cell-plant case decided under the Sixth Amendment right to counsel, "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents."[106]

Following *Liew*, the SCC has not directly considered the *Charter* right to silence in connection with cell-plant operations. In *R v Singh*, a 2007 decision, the SCC clarified that the *Charter* right to silence does not mandate the police to cease questioning in the context of a non-undercover custodial interrogation. Since the accused is aware that they are speaking to a person in authority, any purported claim that the right to silence has been infringed becomes effectively subsumed within the confessions rule analysis.[107] However, where the right to silence continues to retain its

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103 *Ibid* at para 52.

104 *Ibid* at para 37.

105 *Ibid* at para 44.

106 *Henry*, *supra* note 4 at 274.

107 *Singh*, *supra* note 44 at para 39 (stating: "the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances, the two tests are functionally equivalent" at para 39).

independent quality is in connection with cell-plant interrogations where the confessions rule has no application as set out in *Rothman*.[108]

The SCC's cell-plant jurisprudence offered some important guidance with respect to the scope of the right to silence. However, there were limitations to this jurisprudence given the factual peculiarities of the *Broyles* and *Liew* decisions. These were not decisions that involved typical cell-plant operations where an undercover police officer was placed in a cell with the accused. In *Broyles*, the accused and cell-plant had a pre-existing friendship, which does not normally exist between an accused and the cell-plant. In *Hebert*, there was very little information discussed regarding the conduct of the undercover agent apart from labelling it as a form of "active elicitation." In addition, the Court's analysis neglects to consider how the context of carceral environments may play a role in eliciting incriminating statements, and accordingly, an understanding of what constitutes "active" elicitation may have to be calibrated to account for an individual's vulnerabilities. *Brown* was arguably the most important of the SCC's cell-plant decisions since the case involved the factors developed in *Broyles* and were applied to a more typical cell-plant operation. However, since the SCC relied substantially on the dissenting opinion of Justice Harradence and did not undertake its own analysis within the body of its decision, the case has been overlooked by many subsequent courts. Accordingly, with respect to the *Charter* right to silence, there was significant room to develop the jurisprudence of this entitlement. Many accused and their lawyers would subsequently mount challenges to the admission of incriminating statements procured through cell-plant operations launched against them. I address this jurisprudence below.

V. Cell-Plant Jurisprudence and Active Elicitation

The SCC's jurisprudence regarding the *Charter* right to silence did not eliminate cell-plant operations. Instead, the Court placed restrictions on how the police could elicit incriminating statements. With the various deployments of these surreptitious tactics, the accused and their counsel would launch *Charter* applications resisting the Crown's use of the incriminating statements at trial. Due to these litigation maneuvers, trial court judges have not only concluded that police actors violated the right to silence of various accused but have expanded on the jurisprudence the SCC constructed in the 1990s. The courts have identified various facts that have led to their findings of unconstitutional police behaviour.

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[108] *Ibid* at para 40.

Accordingly, in this part, I examine how lower courts have concluded that undercover police officers have infringed an accused's *Charter* right to silence and, as per section 24(2), that the inclusion of the evidence would bring the administration of justice into disrepute.

In evaluating such decisions, I shall focus on how these judges concluded that state actors elicited incriminating statements in violation of an accused's right to silence, with an emphasis on the ways that they have developed the jurisprudence surrounding the concept of active elicitation with respect to the right to silence. Studying this jurisprudence is crucial to the success of future litigation that seeks to resist the efforts of prosecutors to admit evidence obtained through cell-plant operations. As opposed to relying primarily on broad, abstract principles, the devil is truly in the details in these cases, as it is the factual circumstances upon which these decisions are made.

To recall, the notion of active elicitation involves a consideration of two constellations of factors: the nature of the exchange; and the nature of the relationship between the accused and the undercover police officer(s). In addition, I discuss how such courts provide information about the way cell-plant operations are conducted. This information includes how officers are prepared prior to their insertion and interactions with an accused, as well as the ways that undercover officers stimulate conversations and build rapport. All of these techniques work to undermine an accused's ability to resist disclosing incriminating information to the police. Thus, it is important to consider how judges have upheld an accused's right to silence by assessing the state actors' tactics in violating the right. In affirming the right to silence, courts sustain an accused's right to resist cooperation with the state's investigation and its efforts to undermine their choice not to disclose information.

As noted earlier, I focus on Canadian trial court decisions at the superior court level that have evaluated *Charter* right to silence claims. This is unsurprising since many cell-plant operations have been deployed where serious crimes, such as murder, are at issue. Notably, the adjudication of murder is within the exclusive jurisdiction of the superior courts.[109] However, I shall also be analyzing a key decision of the SCNZ in *R v Kumar*,[110] which has adopted the SCC's legal test derived from *Hebert*, *Broyles* and *Liew*. Although the operative source of law in New Zealand is human rights legislation (i.e., the *New Zealand Bill of Rights Act*), as opposed to a constitutional right, the fact that the SCNZ has employed SCC's framework so substantially makes its analysis worthy of consideration.

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109 *Criminal Code*, RSC 1985 c C-46, s 469.

110 *Kumar*, *supra* note 19.

Overall, it is noteworthy that in all of the cases examined below, the courts held that the accused's right to silence was violated and excluded the evidence. Yet, despite the loss of the incriminating statements and unless otherwise indicated, the prosecuting authorities were nevertheless able to obtain convictions based on other incriminating evidence. Thus, the cell-plant operations and ensuing violations of the defendants' right to silence were not pivotal to securing convictions. Consequently, these tactics are arguably of limited utility.

A. Spatial and Temporal Considerations

Cell-plant interrogations occur in a particular context – state-controlled detention facilities. In resisting the prosecution's intended use of cell-plant statements, the accused and their counsel might strongly consider addressing how these physical spaces affect both the nature of the exchanges and the relationships between the accused and undercover police officers. The spatial and temporal aspects of such confinement augment the adversities that an accused faces when attempting to remain silent in a cell-plant scenario.[111] At the direction of state actors, an accused is confined with another person in close proximity, and they are unable to leave. The close quarters make it a substantial challenge for an accused to maintain their silence, especially when someone is attempting to converse with them. Temporally, an accused is unaware of how long their confinement with this new cellmate will last. Thus, persisting in silence and refusing to answer questions can be awkward and uncomfortable at the very least, in addition to being difficult to maintain for an extended period. As discussed in Part III, persistent silence breaches a social norm of turn-taking. Indeed, remaining silent may be viewed as antagonistic and disrespectful in a context where such behaviour may elicit an aggressive response. Where the undercover operator is actively engaging a detainee and directing the conversation toward a particular subject matter, the more an accused must exercise their agency to refuse to speak. When the undercover agent is presented to the accused as a fellow inmate and a potentially dangerous one with an established criminal record, this will likely diminish their firmness to remain silent for fear of appearing rude and possibly angering their cellmate. During their time together, a relationship may be forged, either out of fear or desire to diminish their anxiety, or both.

To varying degrees, several courts have noted the significance of these spatial environments and their relevance to cell-plant interrogations.[112]

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111 While an accused may not be aware that they are speaking to a cell-plant, they may be nevertheless reluctant to speak to a stranger.

112 *R v Connors*, 2006 NLTD 61 at paras 32–33 [*Connors*]; *R v Skinner*, 2017 ONSC 2115

More frequently, cell-plant interrogations occur in very close quarters, thereby creating an environment which makes it exceedingly difficult to avoid conversations or some form of verbal interaction. In some cases, as in *R v Whynder*, an accused may even be eager to converse with another human being to break the monotony and relieve the anxiety of being in captivity.[113] This impulse to talk or the inability to resist conversation by a cell-plant is heightened when detention cells are brightly or constantly lit and may be outfitted with few, if any, distractions such as television sets, books, crossword puzzles, or playing cards.[114] In the context of a cell-plant operation, at least, the cells are set up to do little else but speak with one's cellmate, sleep, or attend to one's bodily functions. Maintaining silence in such settings likely becomes extremely trying for most individuals. As the court in *Whynder* observed, "[i]t is clear that the scenario set up by the undercover operators and the nature and extent of the double bunking custodial arrangement, made Mr. Whynder more susceptible to engaging in conversation with Cst. M. This must be borne in mind as we examine the nature of the discussions between them."[115] Even in circumstances where an accused is reluctant to speak, undercover police officers will often exploit this difficulty to maintain silence when housed in a closed space to draw detainees out to make incriminating statements. In *R v Connors*,[116] the undercover officer testified as follows during a voir dire in connection with assessing the admissibility of a cell-plant confession: "You are in a little confined area. There's got to be conversation. It's just not natural."[117] According to the undercover officer, for him to maintain silence in such

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at para 40 [*Skinner*]; *R v Whynder*, 2019 NSSC 156 at paras 21, 28 [*Whynder*]; *Kumar*, *supra* note 19 at para 20.

113 In *Whynder*, the accused was arrested for murder. The court concluded that the cell-plant actively elicited incriminating statements in violation of Whynder's right to silence and excluded the statements under section24(2) of the *Charter*. However, due to other evidence including other admissions by Whynder and circumstantial evidence, a jury found him guilty of second-degree murder. The Nova Scotia Court of Appeal reversed due to other reasons and sent the matter back for retrial. See *Whynder*, *supra* note 112 at paras 60–63; *R v Whynder*, 2020 NSCA 77.

114 *Whynder*, *supra* note 112 at paras 21, 24–27; *Connors*, *supra* note 112 at para 32.

115 *Whynder*, *supra* note 112 at para 29.

116 Connors was charged and ultimately convicted by a jury for first-degree murder, attempted murder, and robbery. Another individual was tried separately. The jury was presented with evidence of statements made during private conversations with non-state actors and other circumstantial evidence. The Newfoundland and Labrador Court of Appeal dismissed his appeal. *R v Connors*, 2006 NLTD 70; *R v Connors*, 2007 NLCA 55.

117 *Connors*, *supra* note 112 at para 48 [emphasis in original].

tight quarters would be very uncomfortable for both him and the accused.[118]

In many cases, a single undercover officer is housed in a cell with the accused. Such quarters are already compact with two individuals lodged together. In some circumstances, two officers are deployed simultaneously. This heightens the already asymmetrical power dynamics between the state and the accused within confined spaces. In *R v Kumar*, two undercover officers were placed in the same cell with the accused.[119] The SCNZ observed: "The cell had two tables on one wall with bench seats on either side, with room for two people on each bench."[120] Power imbalances may be present even when either or both state agents are not housed in the same cell with the accused. In *R v Skinner*, the accused was placed in his own cell with undercover officers placed in adjacent cells on either side of the accused's.[121] The officers engaged in conversation with each other and Skinner. The court noted this context and its impact:

> While not having to share a holding cell, Mr Skinner nevertheless was situated between an undercover officer in each adjacent cell. In the result, Mr Skinner could not physically retreat very far from conversations with or between the undercover officers, or distance himself more than 6-12 feet from either undercover officer, (depending on where that particular officer was located within that officer's own holding cell), and moving away from one undercover officer would simply bring Mr Skinner into closer proximity with the other.[122]

Whether cell-plant operations involve one or two undercover officers surreptitiously interrogating a detained suspect, the spatial and temporal contexts make an accused more susceptible to their interrogation techniques. This context alone can contribute greatly to breaking down an accused's resolve and ability to maintain their refusal to speak about their alleged crimes. However, it is not only the space and time in which

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118 *Ibid.*

119 Kumar was charged with murder along with a co-accused. The victim had been burnt alive after being doused with gasoline. Although Kumar's incriminating statements to undercover agents planted in his cell were excluded from evidence by the trial court, and the SCNZ affirmed this, he and his co-accused were nevertheless found guilty by a jury based on circumstantial evidence. His appeal regarding his conviction was dismissed by the SCNZ. See *Shivneel Shahil Kumar v R*, [2016] NZCA 329; *Shivneel Shahil Kumar v R*, [2016] NZSC 147.

120 *Kumar*, *supra* note 19 at 20.

121 In *Skinner*, the accused was suspected of murdering a one-year-old child in 1994. The matter was a cold case. After the court concluded that the cell-plants actively elicited incriminating statements from the accused in violation of his right to silence, it excluded the evidence under section 24(2). Although a trial had been scheduled, there is no information that any trial occurred. Given that the matter was a cold case, it would seem that the only evidence available would have been the excluded statements.

122 *Skinner*, *supra* note 112 at para 40.

detainees are housed with undercover state agents that play a role in undermining the right to silence. Additionally, the preparation and experience of the undercover officers also increase the asymmetrical power dynamics between the state agents and the accused. I turn to these next.

B. Asymmetries of Power – Pre-Operation Preparation and Officer Experience

Unlike the SCC's trilogy in the 1990s, the trial court decisions under review provide more information about the preparation undercover officers undertake in advance of a cell-plant operation and their prior experience with such roles. Although this is seemingly background information, it offers a further understanding concerning the power disparities and environments in which cell-plant interrogations operate. In many cases, undercover officers are supervised by a handler with whom they consult and develop strategies and modifications to the operation's plan as needed.

In various cases, courts address the fact that cell-plants are provided a briefing sheet that supplies certain information about the accused and the information sought. The quantum of information provided to a cell-plant can vary along a spectrum. In some instances, handlers may furnish cell-plants with limited information. For example, in *R v Leung*, the police suspected that the accused was responsible for the deaths of her two infant children.[123] In the undercover officer's briefing sheet, she was instructed "[t]o seek the truth about the involvement, if any, of Sarah Leung in an incident that took place on or about April 2, 2009 and March 7, 2010 in the City of Vancouver" and "identify any co-conspirators or as yet un-identified witnesses who may have participated in or have knowledge about the above incident."[124] Similarly, in *R v Deboo*,[125] the "fact sheet contained

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123 Leung was charged with the murder of her two infant children. Although the trial court concluded that the accused's incriminating statements were actively elicited in breach of her *Charter* right to silence, the accused was found guilty of infanticide with respect to both children. The evidence to convict included incriminating statements she made during formal questioning which was admissible under the common law confessions rule. *R v Leung*, 2013 BCSC 1229; *R v Leung*, 2014 BCSC 1894.

124 *R v Leung*, 2013 BCSC 1230 at para 6 [*Leung*].

125 In *Deboo*, the accused was charged and convicted by a jury of first-degree murder. The British Columbia Court of Appeal affirmed the conviction. The trial court found that the cell-plant actively elicited incriminating statements from the accused in violation of his *Charter* right to silence and excluded the evidence under section 24(2). Nevertheless, the jury heard other evidence, which included that Deboo admitted to a police officer during formal questioning to murdering the victim. The admission was admitted under the common law confessions rule. See *Deboo*, *supra* note 16; *R v Deboo*, 2014 BCSC

limited information about Mr. Deboo's arrest and the overall objective of the undercover operation. That objective was 'to determine Deboo's knowledge and/or involvement, if any, in the Howsen homicide.'"[126] In the examples provided, the accused are clearly identified; however, the briefing sheet varied in degrees of detail. In *Leung*, the cell-plant was not initially informed about the nature of the incident(s) (i.e., that it involved homicide), though she was advised of the possible dates on which incidents occurred and where they occurred. In *Deboo*, the undercover officer was informed that the case involved homicide and identified a particular victim.

In other cases, undercover officers may be provided with more substantial information, which might capture the court's attention and criticism, however slight. In *R v Quigley*, the undercover officer was advised that the victim was found dead in her home.[127] Evidence at the scene caused the police to believe the death was suspicious and that she had been murdered. The briefing sheet then noted that Quigley was "the recently estranged boyfriend/fiancée of" the victim.[128] Regarding the information provided in the briefing sheet, the court observed, "in my view, [the briefing sheet] revealed too much to the undercover officer."[129] Although the court did not specify what particular information provided in the briefing sheet crossed the line, it was possibly identifying Quigley as the estranged boyfriend or fiancé of the victim. Notably, in contrast to *Leung*, the briefing sheets in *Deboo* and *Quigley* both highlighted that the offences were connected to homicide. In *Kumar*, decided by the SCNZ, the Court noted that the two undercover police officers placed in Kumar's cell were provided with the following information: "personal information about Mr Kumar, his criminal history, associated persons and vehicles and details of his interests, social activities and such like."[130] There does not appear to be

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1949; *R v Deboo*, 2014 BCSC 1305; *R v Deboo*, 2016 BCCA 62.

126 *Deboo*, *supra* note 16 at para 12.

127 Quigley was charged with the second-degree murder of his fiancée. The trial court found that the cell-plant actively elicited incriminating statements from the accused in violation of his *Charter* right to silence and excluded the evidence under section24(2). During the trial and following the Crown's final witness, Quigley offer the Crown to plead guilty to manslaughter, which it accepted. During the sentencing decision, the court pointed out that the accused had an addiction to crack cocaine and suffered from mental health issues. His membership in the Okanagan Indian Band was also acknowledged. The court's decision regarding the accused's statements that were actively elicited in violation of the right to silence included no reference to the accused's ostensible First Nations status or mental health issues. *R v Quigley*, 2016 BCSC 2184; *Quigley*, *supra* note 16.

128 *Quigley*, *supra* note 16 at para 9.

129 *Ibid*.

130 *Kumar*, *supra* note 19 at para 16.

any attempt to limit the information provided to the cell-plants or criticism about the extent of the information provided to the cell-plants.

From these few examples, what one can perceive are a range of different approaches to briefing undercover officers regarding the information supplied about the target of the cell-plant operation. This raises a question: what may be the rationale for limiting the information provided about the accused and the crime for which the operation was launched? Notionally, it is so that the undercover officers do not direct the conversations, consciously or otherwise, to subjects about which they seek answers.[131] Conversations with the accused impermissibly transgress into the realm of active elicitation when it becomes the functional equivalent of an interrogation and where state agents fail to follow the natural flow of the conversation. Being supplied with too much information may tempt cell-plants to direct the conversation to specific areas. While limiting such information would appear to be a helpful strategy to mitigate against such dangers, an inquisitive and overzealous undercover officer may still actively elicit incriminating statements and redirect conversations to areas of interest. This was certainly the case in *Leung*, where the cell-plant was given limited information.

The asymmetrical power relationships between accused individuals and cell-plants are not only influenced by the information provided in the briefing sheet. It is also heightened by the degree of experience possessed by the cell-plants. The information provided in several reported decisions suggests that many of the undercover police officers were very experienced. Conversely, some accused were inexperienced with the criminal justice system and being incarcerated, thus heightening the power imbalance. In *R v Connors*, the undercover officer was a sergeant with 33 years of experience working in the RCMP and 27 years specifically in connection with undercover operations. Part of this experience involved establishing and coordinating cell-plant operations. The sergeant specifically constructed the role of someone charged with a lesser crime (someone involved in drug trafficking) than that of someone who he is investigating so as to not intimidate the accused. Connors was suspected of committing murder, attempted murder, arson, and robbery. In several other instances, courts may not specify a cell-plant's length of service on the force generally or as an undercover operator, but judges may nevertheless posit that a cell-

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131 *Deboo*, *supra* note 16 at para 13 (stating, "Consistent with his training and standard police practice, Cst. A was not told about the details of the Howson murder investigation. The goal of this practice is to avoid leading questions or direction in a cell plant exchange" at para 13).

plant is an experienced undercover agent.[132] While such experiences may vary, it nevertheless indicates some level of expertise in playing a role that places them at a heightened advantage vis-à-vis an accused (who is already at a disadvantage due to being in detention).

Having established a series of contextual factors with which to consider cell-plant interrogations and the power imbalance, I next turn to how a cell-plant(s) may exploit their dominant power to develop a relationship with an accused.

C. Nature of the Relationship

One of the two main series of factors for determining whether an undercover police officer has actively elicited incriminating statements is the nature of the relationship between the accused and the state agent(s). When resisting the prosecution's intended use of incriminating statements procured through cell-plant operations, accused persons and their counsel should seek to identify whether and how undercover officers built temporary and situational relationships with the targets. As explained earlier, the SCC first formulated and considered this factor in *Broyles* due to the pre-existing friendship between the accused and the state agent, who was the former's friend. On the face of it, this factor seems most relevant in situations like *Broyles* but seemingly irrelevant in other standard cell-plant operations.

In most cell-plant cases, an accused and a cell-plant meet for the first time in a detention cell or facility – as was the case in *Hebert* and *Brown*. There is no pre-existing relationship, especially where the cell-plant is a police officer. Indeed, this line of thinking was followed by the trial judge in *R v Pickton*.[133] In concluding that there was no relationship of trust between the accused and the cell-plant who met for the first time in the cell, the court observed: "It seems to me that when the authorities speak of a relationship of trust in this context, they are generally referring to a relationship of a more enduring quality than the transient camaraderie between two people sharing a cell."[134] The *Pickton* court distinguished the facts of the case before it and that of *Broyles*, as well as *R v Jackson*, an Ontario Court of Appeal decision.[135] In the latter, a female undercover police officer, masquerading as a student researcher, cultivated a romantic

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132 *R v Tse*, 2008 BCSC 1421 at paras 20–21 [*Tse*]; *Deboo*, *supra* note 16 at para 11; *Skinner*, *supra* note 112 at para 21; *Whynder*, *supra* note 112 at paras 2–4. In *Skinner*, the court noted that the two cell-plants had special training in undercover operations, including rapport building. *Skinner*, *supra* note 112 at para 21.

133 *R v Pickton*, 2006 BCSC 995 [*Pickton*].

134 *Ibid* at para 325.

135 *Ibid*.

relationship with the accused detainee over a six-month period through various visits.[136] In *Pickton*, the connection between the accused and the cell-plant "was not a relationship cultivated over a sustained period of time."[137] Nevertheless, the trial judge posited,

> The undercover officer deliberately and skilfully attempted to foster a bond or rapport with Mr. Pickton; it would have been surprising had he not. He was reasonably successful in that endeavour. To my mind, that cannot be improper. In my view, a concern under this head would arise where this has occurred in such a way that the detainee has been unfairly or improperly manipulated, whether because o[f] his vulnerabilities or otherwise, so that his autonomy is undermined. That did not occur here.[138]

Taken as a whole, the court's conclusion focuses on the brevity of the relationship, in comparison to *Broyles* and *Jackson*, even where an undercover officer is successful in fostering a bond or rapport with an accused.

In contrast to the trial court in *Pickton*, various Canadian trial courts and the SCNZ have developed the jurisprudence regarding the nature of the relationship factor beyond the limited factual circumstances found in cases like *Broyles*.[139] Specifically, these courts have recognized that a sufficiently significant rapport can be established, which contributes to a determination that state actors actively elicited incriminating statements from an accused, absent a pre-existing or long-term relationship. While it is fair to say that the main focus of the active elicitation inquiry will often prioritize the nature of the exchange, such conversations occur in a relational context which may certainly affect the conversations between a cell-plant(s) and an accused. In many cases, it might be said that the statements made by cell-plants to forge a connection with the accused also play a role in the nature of the exchange analysis. Nonetheless, this section addresses some of the main themes arising from the jurisprudence regarding the nature of the relationship and the ways in which undercover officers establish a rapport with suspects and create "situational and temporary" relationships. It is likely safe to conclude that cell-plants will employ a combination of different techniques to establish rapport which in

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136 *R v Jackson* (1991), 68 CCC (3d) 385, 9 CR (4th) 57.

137 *Pickton*, *supra* note 133 at para 326.

138 *Ibid* at para 327.

139 Though, as discussed above, the *Brown* case illustrated early on how a relationship could be developed between an accused and an undercover police officer. However, these facts were not apparent in the body of the SCC's decision since the Court simply referred back to the dissenting opinion of Justice Harradence at the Alberta Court of Appeal. See *Brown SCC*, *supra* note 14; *Brown ABCA*, *supra* note 90.

turn facilitate effective strategies to elicit incriminating statements and undermine an accused's will to remain silent vis-à-vis the state.

One key method to establish a relationship between the accused and the cell-plant(s) is to manufacture certain shared commonalities. In addition to both being ostensibly confined in a detention facility for an alleged crime, a cover story may be created where the cell-plant has committed a crime that is similar to or parallels the circumstances of the accused in some meaningful way. This may assist in forging a relationship between the inmates. For example, in *R v Leung*, the accused was suspected of killing her two infants, one in 2009 and the second in 2010.[140] The cell-plant was briefed that her cover story included her causing injuries to her niece due to drinking and driving.[141] When the cell-plant first attempted to engage Leung in conversation, the latter was not forthcoming. In consultation with her handler, the undercover officer's narrative was revised to foster a rapport with Leung by conveying to her that the cell-plant's niece died.[142] Ultimately, the cell-plant was supposed to portray someone involved in a tragedy resulting from a mistake.[143] Leung began to open up only after the undercover officer returned to the cell appearing distraught and proclaiming that she would never get out of jail. This stimulation (or "stim") tactic succeeded. It broke the ice and made Leung more willing to converse. After the cell-plant's dramatic re-entry, Leung inquired about the reasons for her inmate's statements. The cell-plant then revealed that due to her error, her niece was killed. This opened the door to Leung discussing her circumstances.

The tactics employed in *Leung* similarly paved the way to further conversation and active elicitation in *R v Quigley*. In that case, the accused was suspected of murdering his fiancée.[144] As in *Leung*, the accused was at first minimally responsive to the cell-plant's attempts to engage in conversation. In consultation with his handler, a police officer entered the cell to arrest the cell-plant for domestic assault in Quigley's presence.[145] This manufactured charge, the court observed, was "chosen for its possible parallels to what the undercover officer knew about the nature of the offence charged against Mr. Quigley...."[146] In both *Leung* and *Quigley*, the accused were rather tight-lipped and did not initially engage with their undercover cell-mates until such "stims" were instituted. However effective,

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140 *Leung*, *supra* note 124 at para 1.
141 *Ibid* at para 7.
142 *Ibid* at para 8.
143 *Ibid*.
144 *Quigley*, *supra* note 16 at para 1.
145 *Ibid* at para 9.
146 *Ibid*.

there are other ways to forge commonalities between a cell-plant and an accused, as illustrated below.

Police officers may exploit personal characteristics such as race, ethnicity, gender, age, language, and/or cultural identifiers to help develop a situational and temporary relationship between a cell-plant and an accused. For instance, in *Kumar*, the accused was an eighteen-year-old of East Indian descent.[147] One of the two racialized officers was also of East Indian origin and appeared to be around the age of 25.[148] In tandem with other considerations, the SCNZ observed that "the fact that one of the officers was a young Indian man [...] must have been designed to enable the officers to build a rapport or relationship with Mr Kumar by making him feel comfortable, thus enabling them to engage him in conversation more easily and facilitating his giving of information."[149] Here, ethnicity, gender, and age likely played a substantial and combined role in the rapport-building process. Similarly, in *Leung*, the cell-plant shared similar cultural characteristics with the accused; both were racialized women of Chinese descent who spoke Cantonese.[150] The court posited: "The cell-plant mentioned speaking Cantonese and her parents' traditional attitudes in order to build rapport with Ms. Leung."[151] In addition, the cell-plant was older and knew that she could leverage the inherent respect that comes from this age difference within this specific cultural and relational context.[152] In combination with the fact that the cell-plant made Leung aware that she too was in custody because of a tragic and accidental mistake relating to a family member, these tactics were successful. Due to such efforts, the court found that "a relationship, temporary and situational, was established."[153]

Cultural factors are not only relevant to establishing connections with a racialized accused. Regional identities within Canada may also play a role in contributing to the building of these temporary and situational relationships. In *Garnier*, the accused disclosed that he is from Cape Breton, while the cell-plant revealed that he is from neighbouring Newfoundland.[154] The cell-plant in select instances sought to draw

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147 *Kumar*, *supra* note 19 at paras 18, 66.

148 *Ibid* at para 15.

149 *Ibid* at para 66.

150 *Leung*, *supra* note 124 at para 72.

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*

154 *R v Garnier*, 2017 NSSC 340 at para 22 [*Garnier*]. Garnier was charged with the second-degree murder of an off-duty police officer and improper interference with the officer's remains. The court concluded that the cell-plant actively elicited incriminating

attention to their common cultural and regional connections: "I'm from fucking Newfoundland, you're from fucking Cape Breton, right? You probably still have the fucking trigger fucking temper on you too, do you?"[155] Later in the conversation, the cell-plant stated, "[y]ou seem like a fucking solidguy [sic], man. I worked Cape Bretoners, man, they're basically the fucking same as Newfoundlanders, right?"[156]

In some instances, law enforcement officials may try to prime an accused to be favourably predisposed to the cell-plant before they even meet. In staged events called "bumps"[157] or "takedowns,"[158] police officers arrest the cell-plant in plain view of the accused as the latter is being transported to the detention facility. Witnessing this event implants a connection in the accused's mind about the cell-plant, establishing the latter's credibility as a criminal. Not unlike a "stim" discussed above, a bump or takedown also creates a subject about which both can discuss when they eventually meet in the cell. This type of setup occurred in *Tse* and *Garnier*. In *Tse*, the accused, Nhan Trong Ly, was one of several defendants charged with kidnapping, unlawful confinement, extortion, and assault.[159] Following Ly's arrest, and while he was being transported to an RCMP detachment, he witnessed the cell-plant being dramatically arrested at a gas station. The cell-plant would later testify that Ly "recognized him from the 'bump' and laughed about the attitude [the cell-plant] displayed toward the police while being arrested."[160] As the court would note with respect to the nature of the relationship, through the bump, "the police set the tone of the intended relationship between [the cell-plant] and Ly at its very beginning[.]"[161] A similar technique was employed in *Garnier*, though the court made no mention of its significance

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statements from the accused in breach of his *Charter* right to silence and excluded the evidence under section 24(2). Although further incriminating statements were excluded under other constitutional and common law norms, other incriminating statements were properly procured and admitted under the common law confessions rule. The jury convicted the accused for the crimes charged. The Nova Scotia Court of Appeal affirmed the sentence and admission of the incriminating statements that the trial court allowed. *R v Garnier*, 2020 NSCA 52.

155 *Garnier*, *supra* note 154 at para 25.

156 *Ibid* at para 26.

157 *Tse*, *supra* note 132 at paras 23–24.

158 *Garnier*, *supra* note 154 at para 11.

159 The court concluded that the cell-plant actively elicited incriminating statements from the accused in violation of the *Charter* right to silence and excluded the evidence under section 24(2). However, based on other evidence, the trial judge sitting without a jury found the accused guilty of various offences and the judgment was upheld by the British Columbia Court of Appeal. *Tse*, *supra* note 132; *R v Ly*, 2013 BCCA 122.

160 *Tse*, *supra* note 132 at para 24.

161 *Ibid* at para 118.

in its decision to conclude a breach of the right to silence and exclude the evidence.

Another way in which undercover officers may build a relationship to thwart an accused's ability to remain silent is to play the role of an experienced criminal and insider, lending a sympathetic ear in addition to advice to someone less experienced. In such cases, the asymmetrical quality of the relationship is further augmented. As introduced previously, in *Connors*, the cell-plant had significant experience in undercover interrogations. The court observed how the cell-plant did his best to "inveigle Mr. Connors to confide in him, implying that talking about the incident might be helpful to him and that he, as an 'insider,' was a potential confidante."[162] For example, the court highlighted certain portions, among others (emphasis in original):[163]

> U/C: Yeah. You know, there's always, it's like everything else, aye? (Unintel). Your mind's all fucked up when you're in here. I don't care how they says that you're not, right?
> Connors: Ummh.
> U/C: (Unintel) sometime, it will always good [sic] to have someone to fuckin' talk to inside, you know (unintel).

The court then explained, "I have underlined portions in the preceding excerpts for two reasons: to emphasize them; and because the comments emphasized seem to imply that Mr. Connors would be better off talking to an insider [...] than anyone else, including Mr. Connors' counsel."[164] The court further observed these types of exchanges occurred during an earlier stage of the operation marking a developmental phase. Having established the relationship, the cell-plant directed conversations the following month when eliciting incriminating statements.

The attempt to gain an accused's trust is an important part of building a relationship between the cell-plant and their target, however temporary and situational. This may go beyond lending a sympathetic ear and extend to offering more significant assistance. In *Kumar*, the SCNZ noted several ways that the two cell-plants housed with the accused in a small cell attempted to gain the accused's trust. For example, they would advise Kumar to be quiet whenever a police officer was close to their cell, thus seeking to limit the possibility of their conversation being overheard by state actors.[165] As older individuals, the cell-plants also offered to obtain a lawyer for Kumar (while undermining his counsel at the time).[166] They also

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162 *Connors*, *supra* note 112 at para 64.
163 *Ibid.*
164 *Ibid* at para 65.
165 *Kumar*, *supra* note 19 at para 64.
166 *Ibid* at paras 64.

offered to assist Kumar in leaving the country should he be released on bail and to organize lucrative employment for him.[167] While these are arguably significant forms of assistance for any number of accused, they would likely leave a significant impression on a young person such as Kumar, who, as the SCNZ observed, was in a stressful situation.[168]

In other circumstances, a cell-plant portraying a hardened and experienced criminal may instill sufficient fear into an accused, prompting the latter to bond with them. In *Garnier*, the cell-plant counselled the accused, an individual who was inexperienced with the criminal justice system, to watch how he spoke and carried himself lest he attract unwanted attention and hostility.[169] The following is an excerpt from *Garnier* illustrating this:[170]

> U/C OPERATOR: [...] But a fucking word of advice, man, like I said, I've been around and fucking, that's what I've been told too, and it seemed to work out fucking in my favour, right? Just fucking keep your fucking chin up, you know, and just fucking go with it.
> MR. GARNIER: Yeah.
> U/C OPERATOR: Know whatI mean [sic]? You got guys overthere [sic], fucking, first guys coming in, they think they're fucking hood smart, shit like that, running their fucking mouth, and then the next thingthey're [sic] fucked. It's fucking, you know, (unintelligible) fucking happen to him, right? He's going to fucking run his mouth with the fucking wrong person.
> MR. GARNIER: Yeah.
> U/C OPERATOR: That's it. You learn the fucking hard way. At least it's fucking good, like, I had someone fucking telling me, right, like, you know.
> MR. GARNIER: Yeah.
> U/C OPERATOR: But like I said, we all make fucking mistakes, right, and you learn the fucking hard way a lot of fucking times too, right?

If such advice about how to speak and present oneself was not enough, the cell-plant conveyed to the accused the possibility of the latter being transferred into a new facility late at night.[171] In so doing, the accused would awaken other inmates and infuriate them. The cell-plant advised the accused to make friends with others from Cape Breton and Newfoundland.[172] He added that he could try and arrange to be housed in the same facility and block as the accused: "I'll tell you, man, what I'll do, you go first and I'll see if I can – when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking – we want the fucking same

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167 *Ibid* at para 64.
168 *Ibid* at para 66.
169 *Garnier*, *supra* note 154 at para 32.
170 *Ibid*.
171 *Ibid* at para 31.
172 *Ibid*.

block."[173] In considering these efforts, the court concluded, "[the] undercover operator was clearly trying to scare Mr. Garnier into quickly bonding with him. He was trying to use this fear tactic to intimidate Mr. Garnier into speaking with him."[174]

Cell-plants may develop a relationship by virtue of an accused's desperation to speak with someone or otherwise pass the time to cope with their circumstances. In *Whynder*, the accused expressed his frustration about the limited options available to him and the cell-plant. At one stage, he complained: "Fucking no books, no fucking cards, just the walls and your thoughts."[175] Whynder would proceed to say to the cell-plant: "I am happy they double bunked me with you man cause if I (unintelligible) by myself, my mind would be just fucking racing and racing like… fucking seven days, six days sitting here."[176] Given Whynder's desperation to speak to relieve the circumstances and boredom of confinement, the court concluded, "[i]t is clear that the scenario set up by the undercover operators and the nature and extent of the double bunking custodial arrangement, made Mr. Whynder more susceptible to engaging in conversation with Cst. M. This must be borne in mind as we examine the nature of the discussions between them."[177]

An individual's sense of isolation and search for someone to diminish that feeling attached to confinement is accentuated when an accused has some heightened vulnerability.[178] In *Skinner*, the accused was a drug addict who suffered from schizoaffective disorder.[179] After his arrest, he was not brought to court, where he might have encountered counsel, family, or supporters.[180] Instead, two undercover officers (UCH and UCB) were Skinner's main point of face-to-face contact and were placed in adjacent cells on either side of his cell.[181] The court considered the impact of this situation on Skinner, positing:[182]

> [I]n the immediate wake of unexpectedly being arrested and charged with second degree murder, (a situation that inherently would be very stressful), and apart from his brief telephone conversations with lawyers, (whom he had not seen), Mr Skinner had been and would continue to be figuratively "on his own" *vis-à-vis* the

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173 *Ibid* at para 29.
174 *Ibid* at para 33.
175 *Whynder*, *supra* note 112 at para 24.
176 *Ibid* at para 26.
177 *Ibid* at para 29 [emphasis added].
178 The relevance of an accused's vulnerabilities has been considered in other *Charter* cases. See e.g., *Lafrance SCC*, *supra* note 2 at para 79.
179 *Skinner*, *supra* note 112 at para 21.
180 *Ibid* at para 40.
181 *Ibid*.
182 *Ibid*.

> authorities for a considerable period of time, generally confined to a relatively small space with nothing to occupy his attention but his own thoughts and possible conversation with those in adjacent cells. Apart from the police, U.C.H. and U.C.B., (who already were exhibiting friendship *vis-à-vis* each other), were and would be the only available points of human contact available to Mr Skinner.

Ultimately, the court concluded that the cell-plants forged a temporary and situational relationship with Skinner and exploited his various vulnerabilities.[183] Skinner's vulnerabilities included his social isolation, lack of employment, homelessness, and his serious and formally diagnosed mental illness.[184]

As one can perceive from the foregoing discussion, the nature of the relationship can have a marked impact within the active elicitation analysis, even when the accused and cell-plant(s) are only meeting for the first time in detention.[185] The court decisions set out above have developed the nature of the relationship jurisprudence significantly since *Broyles* and *Brown*. An accused need not demonstrate a pre-existing relationship, as was the case in *Broyles*. Cell-plants may develop sufficiently impactful relationships, providing important contextual information that shapes the actual exchanges between the accused and cell-plant(s). Drawing considerable attention to these relationships may play a significant role in resisting the prosecution's attempt to include cell-plant statements as part of the active elicitation analysis. Of course, crucial to the overall analysis of active elicitation is the nature of the exchange between the cell-plant and the accused. I turn to the nature of the exchange next.

D. Nature of the Exchange

The SCC's trilogy, but particularly *Broyles* and *Liew*, provides some modest guidance on what it means when undercover state agents engage (or do not engage) in active elicitation and infringe on the accused's right to silence. The *Hebert* court revealed very little about the exchange that transpired in that case. One simply learns that the cell-plant engaged the accused in conversation and, in doing so, actively elicited incriminating statements.[186] In *Broyles*, the Court went further. It provided brief excerpts from the recorded transcript of the exchange illustrating the ways in which the undercover state agent – the accused's friend – engaged in questioning that the Court determined was the functional equivalent of an

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183 *Ibid* at para 41.

184 *Ibid*.

185 This is set out in Justice Harradence's dissent in *Brown ABCA*. *Brown ABCA*, *supra* note 90 at 501.

186 *Hebert*, *supra* note 5 at 159, 186–187, 189.

interrogation.[187] Specifically, it identified how the agent did not follow the natural flow of conversation but instead directed or re-directed the topic of conversation to Broyles's crime.[188] Furthermore, in seeking to elicit incriminating statements, the agent sought to undermine the advice of Broyles's lawyer to remain silent.[189] Notably, the short excerpts that the SCC provided did not include Broyles's incriminating statement. Rather they were illustrations of how the undercover state actor actively elicited incriminating statements from Broyles. In *Liew*, the Court furnished a longer excerpt from the exchange between the undercover police officer and the accused to contextualize and illustrate how the officer followed the natural flow of the conversation and did not actively elicit incriminating information.

If the trilogy was intended, in part, to provide guidance on how undercover officers were not to engage in active elicitation, not all cell-plants have internalized these lessons. This is striking since many trial court judges have observed that the state agents in the cases before them were experienced in undercover police interrogations. In at least two reported cases in particular, readers learn that in preparing for the undercover operations, the cell-plants revisited the jurisprudence governing the right to silence and cell-plant operations.[190] Namely, they reviewed relevant case law, including the *Broyles* and *Liew* decisions. Nevertheless, what is apparent from several decisions, trial courts have concluded that undercover officers actively elicited incriminating statements by failing to follow the natural flow of the conversation and by engaging in the functional equivalent of an interrogation. For instance, in *Whynder*, the court noted that after the accused spoke about incidents unrelated to the crime for which he was arrested (e.g., his cousin being shot along with another incident where Whynder himself sustained a gunshot wound), the cell-plant brought the conversation back to the evidence which police might have against the accused.[191] In another flagrant example, following Whynder's conversations about relationships with women and when he might be returned to Halifax, the cell-plant brought the conversation back to evidence regarding Whynder's alleged crime.[192] In describing the active nature of the elicitation found in some cases, a few judges employed terms such as "prompting," "coaxing," and/or "cajoling" (drawing from *Liew*[193])

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187 *Broyles*, *supra* note 8 at 613–614.
188 *Ibid.*
189 *Ibid* at 614–615.
190 *Connors*, *supra* note 112 at para 29; *Skinner*, *supra* note 112 at para 21.
191 *Whynder*, *supra* note 112 at para 38.
192 *Ibid* at para 39.
193 *Liew*, *supra* note 9 at para 51.

to characterize the undercover officers' conduct.[194] While not every judge used these same terms, it is evident from various decisions that these descriptors would correctly describe the conduct of many cell-plants. I provide examples below to illustrate such active elicitation and that this practice has continued well beyond *Broyles* and *Brown*.

As noted earlier, cell-plant interrogations often occur in a small cell that may be constantly lit and where the accused and undercover police officer are double-bunked. This may make an accused more susceptible to speaking, especially when there is nothing else to do but converse in order to pass the time.[195] This also makes an accused more vulnerable to a wide range of interrogation techniques that a cell-plant may employ against them. For instance, in *Whynder*, the court posited:

> In police interviews there are a number of techniques used which are designed to encourage the subject to provide information. These include making factual assertions, suggesting evidence which the police may have, offering excuses or explanations which might diminish the accused's moral culpability, and suggesting that providing a present explanation might be more beneficial than waiting until trial. Cst. M utilized all of these in his interactions with Mr. Whynder.[196]

The court in *Whynder* concluded that the cell-plant ("Cst. M") "subtly and skilfully moved the conversation into areas that might be of interest to them."[197] Using the tactics noted above, the cell-plant directed the conversation[198] toward the motive of the alleged murder for which Whynder was accused, whether there was hard evidence that might tie Whynder to the crime, and what techniques were used to minimize evidence such as DNA or fingerprints.[199] While some accused may be wary of non-undercover police officers using such techniques in an interrogation room, the accused are more vulnerable in the context of a detention cell. An accused is unaware of a cell-plant's true identity, and their defences are lowered.

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194 *Quigley*, *supra* note 16 at para 13; *Skinner*, *supra* note 112 at para 40; *Garnier*, *supra* note 154 at para 35.

195 *Whynder*, *supra* note 112 at paras 27–28 (Observing, "...Mr. Whynder was becoming concerned about having no contact with family members and the lack of activities which might help pass the time. His only option seemed to be talking with Cst. M, who was more than happy to oblige" at para 57).

196 *Ibid* at para 57.

197 *Ibid* at para 58.

198 *Connors*, *supra* note 112 at para 58 (The court posited that such conversations were choreographed with the cell-plant directing the flow of conversation).

199 *Whynder*, *supra* note 112 at para 58.

The context of confinement is stress-inducing, and while some accused may seek to relieve their anxiety through conversation,[200] others may be more reluctant to speak to cellmates regardless. Thus, an undercover officer's prompting and coaxing may prove to be more pronounced with accused who are parsimonious in their communications. Cell-plants in those situations may turn to active forms of elicitation. As discussed previously regarding *Leung*, the accused was reticent and did not engage with the undercover officer despite the latter's initial efforts.[201] The cell-plant was removed from the cell to discuss how to stimulate conversation with the accused. In consultation with her handler, the cell-plant altered her cover story to present herself as someone involved in a tragedy (i.e., the death of her niece) because of a mistake she made. Such stims are both icebreakers to build rapport and inject new life into the conversation. The cell-plant returned to the cell feigning distress about this news. In tandem with other considerations noted previously, this had a high level of success in fostering Leung's willingness to speak. However, her incriminating admissions did not emerge without active prompting from the undercover officer.[202] The court observed that the officer was "talkative, nosey and inquisitive, continually breaking the silence, and even when the conversation flowed in a general fashion about other topics, she inevitably brought it back to the reason Ms. Leung was in the cell, or to her relationship with her boyfriend or with her parents."[203] The court also posited that "[w]hile many of the questions the cell plant asked might naturally come from an inquisitive and sympathetic stranger, the cell-plant is a police officer who was playing a strictly controlled role. She was not free to steer the conversation, prompt answers, and repeatedly bring the topic back to Ms. Leung's predicament."[204]

In addition to peppering a suspect with questions, some cell-plants will also try to emphasize the moral benefits of confessing to wear down an accused's resolve not to speak. This is not dissimilar to standard police questioning outside the cell-plant context.[205] *R v Quigley* illustrates another instance of how an undercover officer sought to draw out an initially unresponsive accused. Similar to *Leung*, the cell-plant in *Quigley* was removed to initiate a "stim," which involved having another officer remove

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200 *Henry*, *supra* note 4 at 274; *Perkins*, *supra* note 58 at 307 (Marshall J dissenting).

201 *Leung*, *supra* note 124 at para 8.

202 One can observe this from a reading of transcripts furnished by the court. See *ibid* at paras 9–48.

203 *Ibid* at para 64.

204 *Ibid* at para 69.

205 *Oickle*, *supra* note 42 at para 56.

the cell-plant and arrest him for domestic assault.[206] In *Quigley,* the Court observed that following the stim, "the undercover officer did commence actively coaxing, cajoling, and prompting Mr. Quigley to speak about the offence and he repeatedly directed or redirected the conversation with that goal."[207] The cell-plant's briefing sheet revealed that Quigley was suspected of killing his estranged girlfriend/fiancée. The connection with domestic violence was used as a subject matter to build a rapport with the accused and leverage this connection, as noted above. In addition to turning the subject matter back to Quigley's circumstances, the cell-plant used statements that suggested a moral justification for the violent conduct. Very shortly after the arresting officer left the cell, the cell-plant stated to Quigley: "Bet you your shit is not as deep as mine, man," and then, "She pushed me… I'm allowed to defend myself, right?"[208] The cell-plant followed by mentioning his own lawyer and then asking questions about Quigley's lawyer and their privileged communications.[209] After noting his lawyer admonishing him not to speak to the police, Quigley admitted that after interrogators showed him crime scene photographs, "[y]ou can't really hold anything back so …."[210] The cell-plant then stressed the value of getting the truth off his chest: "Yeah, it doesn't (indiscernible), man, I'm tellin' ya, I just, good to get it out. I told you 'cause it's nice to get it off my chest, right. I know (indiscernible). Cops knew about it. So it felt good when I told you my story, you know."[211] In reiterating the value of "getting thing things off his chest," the cell-plant then asserted, "… buddy, if you wanna start unloading anything off your chest, I'm (indiscernible) I'm just a listening post, you know. (Indiscernible). It was great when I put it off my chest. It felt good. Yeah, I was tired. I was tired of running an' all that, you know, hiding."[212] The court held that the cell-plant's various statements and questions amounted to active elicitation.[213]

In some instances, the elicitation may venture impermissibly into the realm of intimidation, even if the questions the undercover officer poses might not qualify as the functional equivalent of an interrogation. In *Garnier*, the accused had no prior experience with the criminal justice system or being in jail. As illustrated above, the undercover officer built a rapport with the accused. However, part of this rapport-building was

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206 *Quigley*, *supra* note 16 at para 9.
207 *Ibid* at para 10.
208 *Ibid* at para 11.
209 *Ibid* at para 12.
210 *Ibid.*
211 *Ibid.*
212 *Ibid* at para 13.
213 *Ibid* at para 14.

predicated on inducing the accused to be fearful about his impending transfer to another facility. The cell-plant conveyed to the accused that he would incur the wrath of the inmates due to his arrival late at night.[214] The following is a portion of the transcript illustrating this instilling of fear:[215]

> MR. GARNIER: So are they supposed to move me tonight?
> U/C OPERATOR: Yeah, yeah, that's what they fucking told me. I'm fucking waiting here ever fucking since, right? I want to get down there and lie down. Fuck, you get there at night, the lights are out, right?
> MR. GARNIER: Oh, really?
> U/C OPERATOR: Yeah, the lights – and fucking everyone's gone down for the night, and the next – the last thing you want to do is come there, right, fucking making a fucking racket, waking the fucking boys up, pissing everyone fucking off, right?
> MR. GARNIER: Yeah.
> U/C OPERATOR: So that's why I'm fucking asking, being a half prick to buddy there, because, you know, I don't want to be that fucking guy going in there, right?
> MR. GARNIER: Yeah, really.
> U/C OPERATOR: You know what I mean?
> MR. GARNIER: Yeah.
> U/C OPERATOR: You're in there fucking ten minutes and fucking people fucking hating you already.
> MR. GARNIER: Yeah.
> U/C OPERATOR: You know what I mean?
> MR. GARNIER: Shit. Yeah, that's the last thing I'd want to be doing down there.

However, the cell-plant, posing as a hardened and experienced criminal, encouraged Garnier to make friends with other Newfoundlanders and Cape Bretoners to keep safe.[216] He then offered, "I'll tell you, man, what I'll do, you go first and I'll see if I can – when I go in I'll see if I can get the same fucking block as you, I'll ask the boys if fucking – we want the fucking same block."[217]

Regarding these efforts, the *Garnier* court concluded: "The undercover operator was clearly trying to scare Mr. Garnier into quickly bonding with him. He was trying to use this fear tactic to intimidate Mr. Garnier into speaking with him."[218] The court posited that Garnier would not have made certain potentially inculpatory comments. Indeed "Mr. Garnier's comments were caused by the cell plant's prompting, coaxing and insidiously intimidating him."[219] After finding a breach of Garnier's right to silence, the court concluded that the evidence should be excluded under

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214 *Garnier*, *supra* note 154 at para 22.
215 *Ibid* at para 23.
216 *Ibid* at paras 31–32.
217 *Ibid* at para 32.
218 *Ibid* at para 33.
219 *Ibid* at para 35.

section 24(2). In making this determination, the court asserted that the cell-plant's conduct was serious and had a serious impact on Garnier's *Charter*-protected rights: "The Crown and the police cannot be permitted to use fear to prey on a vulnerable individual who is under state control, in order to force him to supply self-incriminating evidence."[220]

Does active elicitation only occur when an accused is, at least initially, uncommunicative? Unlike the situations in *Leung*, *Quigley*, or *Garnier*, there will be circumstances where an accused is not necessarily quiet at the outset who then has to be cajoled and/or intimidated into speaking by a cell plant. Indeed, an accused can be loquacious themselves, and yet a court may nevertheless find that a cell-plant engaged in active elicitation. For instance, in *Kumar*, the SCNZ observed that the accused "was a talkative young man and that he spoke freely throughout the conversation [with the cell-plants]," as the trial court judge found.[221] In addition, Kumar appeared relaxed throughout the conversation and eager to talk.[222] While acknowledging Kumar's talkative nature, the SCNZ determined that the two undercover officers planted in the cell with Kumar both "guided the conversation and were direct and/or persistent in their questioning on key points."[223] The cell-plants' questioning was "both systematic and comprehensive. The officers steered the conversation to matters that interested them in terms of the police investigation in a way that other detainees would have had no particular interest in doing, and they were persistent."[224] In particular, the SCNZ noted how the cell-plants inquired how much the deceased owed the accused and sought clarifications on the amount.[225]After concluding a violation of his right to silence, the SCNZ determined that the exclusion of the incriminating statements was proportionate, considering the seriousness of the offence balanced against the fundamental importance of the right to refrain from making a statement and the need for an effective and credible justice system.[226]

When contemplating what constitutes the functional equivalent of an interrogation, cell-plants may of course be friendly and non-adversarial.[227]

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220 *Ibid* at para 39.

221 *Kumar*, *supra* note 19 at para 61.

222 *Ibid*.

223 *Ibid*.

224 *Ibid* at para 63.

225 *Ibid* at paras 61–63.

226 *Ibid* at para 70.

227 *Liew*, *supra* note 9 (the SCC affirmed this stating that "We respectfully disagree with the majority of the Court of Appeal that an atmosphere of oppression [typically but not exclusively thought of as persistent questioning, a harsh tone of voice, or explicit psychological pressure on the part of the state agent] is required to ground a finding that a detainee's right to silence was violated" at para 37).

Naturally, this could be important for establishing some rapport with an accused, even one that is temporary and situational. An amicable tone is also significant with respect to questioning and in determining whether a cell-plant actively elicited incriminating statements. For example, in *Skinner*, two cell-plants engaged the accused in conversation.[228] Sporting a friendly demeanour, the cell-plants "effectively encouraged Mr Skinner to keep talking through pervasive and almost constant comments of agreement, praise, or other forms of positive reinforcement."[229] Importantly, as in other cases, the cell-plants re-directed the conversations to critical areas of inquiry, straying from the natural flow. For instance, following a discussion between Skinner and the cell-plants regarding his prior interview with the police detective about allegations of physical injury by the alleged murder victim, Skinner shifted the conversation "in a significantly different direction[.]"[230] Specifically, Skinner directed the conversation toward "prior unrelated encounters with the police."[231] Rather than continue with the natural flow of the conversation, one of the cell-plants returned to the subject of the alleged murder victim's physical injuries. The cell-plant stated: "Fucking lacerated liver. How the fuck did that even happen without you fucking stabbing him? That's fucked."[232] Assessing this particular exchange, the court concluded, "I found it difficult to view such questioning as something other than functional interrogation relating to the murder charge against Mr Skinner."[233] This was not an isolated moment as the court identified numerous other instances where the cell-plants re-directed the subject to incriminating subject matters.[234]

Of course, an amicable demeanour can be a useful strategy when engaging with an accused who is similarly not suffering from a mental illness too. In *Deboo*, an experienced undercover officer partook in a "friendly and congenial" conversation with the accused.[235] Despite Deboo asserting with some irritation that he did not wish to share a cell with anyone and indicating that he did not wish to speak to the police, the cell-plant persisted with his friendly demeanor. As the court observed, the undercover officer conducted "the functional equivalent of a subtle

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228 It is worth recalling, as noted above, that Skinner had a formally diagnosed mental illness.

229 *Skinner*, *supra* note 112 at para 40.

230 *Ibid* at para 89.

231 *Ibid.*

232 *Ibid.*

233 *Ibid.*

234 *Ibid.*

235 *Deboo*, *supra* note 16 at para 18.

interrogation."[236] Furthermore, although "the atmosphere was congenial and questioning gentle, on several occasions, [the cell-plant] actively encouraged Mr. Deboo to speak with him about the murder charge. When he did so, he often met with success."[237] The court posited that the success of this approach was unsurprising: "Interrogators often use honey, not vinegar, in pursuit of the truth."[238] In the court's view, this was permissible in the context of a formal police interview and did not breach an accused's right to silence because the accused was aware of whom they were speaking to.[239] Such persuasion was fair and effective since the detainee made an informed choice about whether to speak.[240] However, "when the context changes, the permissible parameters of police persuasion also change."[241] The court found that while Deboo was talkative, he was in the state's control and this impacted on his ability to exercise his right to choose whether to speak to the police. It stated:

> Mr. Deboo was a garrulous individual held in the state's superior power. Facing a charge of murder, he had a constitutionally protected right to make an informed choice about whether or not to speak to police about his version of events. After consulting with counsel, he repeatedly stated his intention not to do so. However, when [the cell-plant] engaged him he unwittingly produced evidence against himself at the instance of police.[242]

After holding that the state infringed Deboo's right to silence, the court elected to exclude all the incriminating statements under section 24(2). It concluded that Deboo's entire statement was tainted by the active elicitation, finding that the "prompting, coaxing and cajoling is sprinkled and interwoven throughout."[243]

Despite the lessons that *Broyles* and *Liew* provide regarding parameters of the nature of the exchange (as part of active elicitation), it is striking how far even highly trained police officers will go to actively elicit incriminating statements in breach of an accused's right to silence. Some of the examples set out previously clearly illustrate that many cell-plants do not follow the natural flow of their conversations but redirect the colloquies to obviously incriminating subject matters. In the language of *Liew*, which was adopted in several trial decisions, undercover officers have prompted, coaxed, and cajoled their targets into making incriminating statements. As the cases

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236 *Ibid* at para 63.
237 *Ibid*.
238 *Ibid* at para 64.
239 *Ibid*.
240 *Ibid*.
241 *Ibid*.
242 *Ibid* at para 61.
243 *Ibid* at para 71.

above illustrate, there is of course no single way to accomplish these feats. It is also important to recognize the other considerations that shape the context of these elicitations – the spaces in which the questioning occurs, the power disparities between the cell-plants and accused in tandem with the relationships that are developed and engineered to foster these elicitations. Together, all of these considerations work to undermine an accused's ability to remain silent. By placing limits on the state's ability to harvest incriminating statements in breach of an accused's right to remain silent, courts legitimize an individual's resistance to the Crown's intended use of cell-plant statements at trial.

VI. Conclusion

Following the SCC's decisions in the 1990s regarding the right to silence and its application in the context of cell-plant operations, Canadian trial courts and the Supreme Court of New Zealand have made striking contributions to this jurisprudence. Through this article, I have sought to draw attention to the salient features of this case law and what it reveals about the nature of cell-plant operations. First, many decisions demonstrate that courts have steadfastly ruled against the admission of incriminating statements procured by undercover officers who have actively elicited such evidence from the accused in detention. When Crown prosecutors have sought to use the cell-plant statements at trial, various accused, with the assistance of their counsel, have resisted these efforts by mounting legal challenges that have been upheld in various cases discussed in this article.

Second, this jurisprudence offers important insights into the methods employed by trained police officers to actively elicit incriminating statements and provides tools to those seeking to challenge the admission of cell-plant statements going forward. Such methods include techniques to forge temporary and situational relationships with individuals whom they are meeting for the first time in detention. Authorities manufacture any number of commonalities to foster these relationships. Furthermore, such rapport-building transpires in very confined spaces where accused persons are already vulnerable and may be seeking to speak with another individual to lessen their anxiety and/or may be fearful about the consequences of not socializing. These short-lived and seemingly tenuous interactions can nevertheless create sufficiently momentous relationships between the cell-plants and the accused. Courts and lawyers must be attentive to the development of these relationships and their impact on the active elicitation analysis. The absence of a pre-existing relationship between the cell-plant and an accused should not foreclose a more

penetrating analysis of the temporary and situational relationships that undercover police officers may develop with detainees.

In turn, these relationships soften up and make the accused susceptible to questioning that may often, and in several cases, easily be qualified as the functional equivalent of an interrogation. The jurisprudence also reveals that despite the guidance provided in the SCC's decisions in *Broyles* and *Liew* regarding the nature of the exchange analysis, many undercover police officers have failed to follow the natural flow of the conversations they engage in and have blatantly re-directed the conversations to elicit incriminating evidence. The lack of discipline and the degree to which some officers failed to abide by the SCC's jurisprudence is so striking that one might think that the officers assigned to be cell-plants were actually untrained civilians, not dissimilar to Todd Ritter, the state agent and friend of the accused in *Broyles*. However, another theory might very well be that rather than being undisciplined attempts at eliciting incriminating statements, these were conscious attempts to test the boundaries of the existing jurisprudence and push the interpretation of "active elicitation" in new directions. If that is truly the case, from the numerous decisions discussed, it appears that many courts are not taking up these invitations to weaken the right to silence. Indeed, I would argue that courts should resist such attempts.

When police actors undermine the right to silence by surreptitiously engaging in active elicitation, it is up to the judiciary to uphold the accused's right not to cooperate with the state. By developing the jurisprudence in the manner discussed above, many Canadian trial court judges and the SCNZ have fortified the right to silence as an entitlement that permits the accused to resist cooperation with the state through constitutional challenges. However, because some jurisprudential developments, particularly at the trial court level, may not attract the attention they deserve, this article has sought to shine a light on them. In addition, highly relevant judgments by another country's highest appellate court, such as the SCNZ, may not always come to the attention of courts in another country. The SCNZ's application of the legal tests set out in the SCC's jurisprudence may offer some persuasive guidance here in Canada.

Although the decisions discussed in this article highlight the ways that courts may fortify an accused's ability to resist the state's intended use of cell-plant statements by accounting for, among other things, space, context, and the ways that officers may develop relationships with accused in detention, there may be other ways to consider how the right to silence and ability to resist may be fortified. Perhaps, it is time to consider whether to limit the ability of state actors to engage in cell-plant operations. Rather

than setting the threshold for elicitation at the "active" side of the spectrum – a threshold by which many officers seem incapable or unwilling to abide – perhaps there needs to be greater legal restraints imposed on them. When considering the pressures of incarceration, and the relationships that can be developed as discussed earlier, it may be that one way to truly strengthen an individual's right to resist cooperation through silence is to reset the threshold for elicitation. Rather than requiring an accused to demonstrate that the cell-plant(s) engaged in active elicitation, an alternative formulation might be to simply show that the conduct of state agents went beyond a passive role akin to a listening post. Because the current elicitation standard connects to both the nature of the exchange and the nature of the relationship between the accused and the state agent, the existing inquiries would necessarily have to be revised.

For instance, consideration of the nature of the relationship would include asking whether the state agent formed a temporary and situational relationship with the accused that in some way impacted the exchange between them. As the cases discussed above suggest, relationships need not exploit special characteristics of the relationship, evidence of a relationship of trust, or one where the accused was obligated or vulnerable to the state agent. With respect to the nature of the exchange, a revised inquiry would shift away from the functional equivalent of an interrogation. Given the context of the detention environment and the possibility of a rapport between the accused and state agent, the nature of the exchange does not need to be active or qualify as the functional equivalent of an interrogation. As I have posited in an earlier writing, the nature of the exchange should be examined for signs that the agent went beyond acting as a listening post or its functional equivalent.[244] Such revised inquiries would be in keeping with the principle that an accused should have the freedom to choose whether to speak to the police. If a state agent acts in a manner that is passive and the accused reveals incriminating statements nevertheless, then their freedom to choose will not be subverted.

I shall close by stressing that the fortifying of the right to silence and the ability to resist the prosecution's intended use of cell-plant statements, does not mean that police investigators are left without other options. As noted earlier, in most of the cases discussed, the police acquired other incriminating evidence, and despite the exclusion of the cell-plant evidence, the accused have been found guilty. Indeed, for better or worse, police officers possess other constitutional or otherwise legal means to secure incriminating evidence as permitted by the SCC. Such means include the ability to interrogate an accused outside the presence of counsel and for

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244 Khoday, *supra* note 18 at 89-93.

lengthy periods of time, regardless of the accused's declaration(s) not to speak.[245] Provided that interrogators do not engage in the types of extreme behaviours prohibited under the confessions rule, they have a wide berth and range of action in formal non-undercover interrogations. Even within cell-plant contexts, it is possible to elicit incriminating statements without venturing into the prohibited zone of active elicitation.[246]

245 *Sinclair*, *supra* note 29; *Singh*, *supra* note 44. I would note that these are not in my view, positive developments.

246 *Liew*, *supra* note 9.