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Improving the Comprehension of Detainees' Legal Rights: A Review of Two Canadian Programs of Research

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Abstract

Individuals detained by police organizations in most Western countries are typically made aware of two legal rights – the right to silence and right to legal counsel – prior to being interrogated. Detainees must understand these rights fully; both for their own protection and to ensure any information gained from them is admissible in court. Two programs of research in Canada have examined the comprehension of Canadian police cautions (i.e., passages of text used by police officers to deliver the aforementioned legal rights), as well as ways to modify cautions to make them more comprehensible. The central findings are that police cautions are difficult to understand but that theoretically driven changes to the structure of the cautions can increase comprehensibility dramatically. In general, it is hoped that this research can serve as an example of how psychological science can have a practical impact on this important aspect of investigative interviewing.

Keywords: *legal rights; caution comprehension, detainee protection; investigative interviewing; psychological science.*

Introduction

As per the Canadian Charter of Rights and Freedom (1982) and subsequent case law, individuals who are detained by a police officer in Canada must be aware of their legal rights prior to being interrogated (i.e., right to silence and right to legal counsel). It is imperative that detainees comprehend these rights fully – which are typically delivered using a passage of text known as a police caution – both for their own protection against self-incrimination and to ensure

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that any evidence derived from an interview is admissible in court (Marin, 2004)[1]. Over the past five years, two programs of research have been assessing the comprehensibility of police cautions being used by Canadian police organizations. The current paper reviews the findings from those programs of research. In particular we discuss: (i) the comprehensibility of Canadian police warnings, (ii) potential explanations for the observed lack of comprehension, and (iii) ways to increase comprehension levels through the restructuring of police warnings. Broadly, we show how psychological principles and knowledge can be mobilized to achieve positive change for this important area of investigative interviewing.

As mentioned, detainees facing an interview in Canada are afforded the right to silence and the right to legal counsel. The right to silence is derived from section 7 of the Canadian Charter of Rights and Freedoms (1982; henceforth referred to as The Charter), which states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof in accordance with the principles of fundamental justice." As outlined in subsequent case law, this right means that interviewees must be given a free choice about whether or not to speak to the police and that the police cannot overtly interfere with this right (e.g., offer promises or threats in exchange for a confession; *R* v. *Herbert*, 1990). Although there is no apparent requirement for police officers to advise people of the right to silence (that is the role of legal counsel), detainees are cautioned routinely about this right because a failure to do so could potentially affect the perceived voluntariness of any subsequent statements and jeopardize admissibility of evidence in court[2].

The right to legal counsel is outlined in section 10(b) of The Charter and states that "everyone had the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right." As clarified in subsequent cases (i.e., *R* v. *Bartle*, 1994; *R* v. *Brydges*, 1990), the right to legal counsel includes the following four basic rights: (i) to retain and instruct counsel (i.e., a lawyer) without delay; (ii) to access immediate, temporary, legal advice irrespective of financial status (duty counsel); (iii) to obtain basic information about how to access available services that provide free, preliminary legal advice (e.g., phone number); and (iv) to access legal counsel free of charge when an accused meets prescribed financial conditions set up by provincial legal aid plans. Police officers are required to make detainees aware of these rights, and give them an opportunity to exercise them prior to carrying out an interview.

The main purpose of providing the two aforementioned rights is to help balance the inherent power differential between the detainee and the police interviewer. In order to ensure that these rights are accomplishing this goal, legal rulings in Canada dictate that the rights contained in police cautions can be waived only if the interviewee has full knowledge of those rights and a full appreciation of the consequences of giving up those rights (*Clarkson* v. *The Queen*, 1986; *Korponay* v. *Attorney General of Canada*, 1982). In order to fulfil this requirement, law enforcement officers typically read passages of text containing the aforementioned legal rights, known colloquially as cautions, to adult detainees. Absent special circumstances (e.g., obvious mental disability, language issues, declared lack of understanding), the courts appear to be satisfied that an individual is informed fully of his or her legal rights – and are therefore protected properly and capable of making an informed decision about waiving their rights – if a caution is simply recited aloud a single time (*R* v. *Brydges*, 1990).

Do Canadians understand their legal rights?

The Moore and Gagnier (2008) Study. An initial study in this area by Moore and Gagnier (2008) involved testing the comprehension of the right to silence caution used in Toronto. Three

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different versions of the caution were created with modified wording and organization in an attempt to increase comprehensibility. The four resulting versions (three modified and one standard) were delivered to 56 undergraduate students. Along with testing comprehension using a free recall procedure, participants were told to imagine that they were either innocent or guilty, and report whether or not they would be willing to waive their right to silence. Their results showed no difference in levels of understanding between the four versions of the caution. Comprehension levels across the different versions were low. Only 43% of their university sample received a perfect score on comprehension, and 15% did not understand *any* of their legal rights. As further evidence of the lack of comprehension and its impact of behaviour, many participants reported that they would be willing to waive their right to silence because they (erroneously) believed that statements could be used in their defence.

The Eastwood and Snook (2010) Study. Building on the findings from Moore and Gagnier's (2008) article, a test of comprehension of both a right to silence and a right to legal counsel caution in a sample of 56 university students was carried out (Eastwood & Snook, 2010). Each caution was first presented verbally in its entirety, followed by its sentence-by-sentence presentation in a written format. Participants were asked to record their understanding of the cautions after each presentation using a provided booklet, along with their level of confidence in the accuracy of their answers. For the silence caution, only 4% fully understood the caution when presented verbally in its entirety. When presented in written/sentence-by-sentence format, 48% of participants understood the caution fully. For the legal counsel caution, only 7% displayed full comprehension when presented verbally in its entirety, but 32% of participants understood the caution fully when presented in written/sentence-by-sentence format. In addition, there was no relationship between participants' ratings of confidence in their answer and the actual accuracy of their answer.

The Eastwood, Snook, and Chaulk (2010) Study. A third study presented 121 undergraduate students with one of three legal counsel cautions. The cautions varied in their level of linguistic complexity, and included one from Calgary (high complexity), Brockville (moderate complexity), and one created by the authors (low complexity). The cautions were presented to participants via video, and comprehension was assessed using a free recall procedure. Results showed no difference between cautions, with participants comprehending approximately 30% of the information in the caution, regardless of condition. In addition, only 23% of participants understood more than half of the caution.

The Chaulk, Eastwood, and Snook (2014) Study. In an attempt to address the limitation of the above research related to the use of student samples, a recently completed study measured comprehension of cautions using a sample of offenders. Participants were 60 parolees, all of whom had heard both the silence and legal counsel cautions previously. After watching a video of the two cautions being delivered, participants' comprehension was assessed using a free recall measure. Comprehension levels were comparable to those found in student populations. Participants, on average, comprehended one third of the information in the cautions and only 12% of participants understood more than half of the information. These data suggest that having previous experience with the caution may not ameliorate the issue of low comprehension.

The results from these four studies present a clear and consistent finding – people struggle to fully comprehend the content of Canadian police cautions. In fact, it was rare for participants to even understand half of the information contained in the cautions. It should be noted that the conditions under which comprehension was tested were optimal, with cautions being presented to university-level participants at acceptable speeds of delivery under non-stressful conditions. It seems likely that comprehension levels are even lower in real police interviews, which typically

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occur with lower-functioning individuals in high-stress situations and cautions being delivered at high speech rates (see Snook, Eastwood, & MacDonald, 2010). Poor comprehension of these cautions obviates the possibility of detainees making an informed decision to assert or waive their rights and leaves the individuals facing a police interview at risk.

Explanation for lack of comprehension

One explanation for the observed lack of comprehension that is common in the literature pertains to the linguistic complexity of the cautions (Rogers, 2008). For example, a common variation of the Canadian right to silence caution reads: "You are charged with X. Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence". As discussed by Davis, Fitzsimmons, and Moore (2011), this caution contains several features that violate typical discourse and grammatical pragmatics. The caution is typically read straight through from beginning to end without a pause; this occurs despite the fact that the second sentence ("Do you wish to say anything in answer to the charge?") is an interrogative. The second sentence from that caution is also an invitation for the suspect to talk to police, which contradicts the purpose of the caution to inform suspects of their right to remain silent. Further, the invitation to talk comes *before* the part of the warning telling interviewees that anything they say can be used as evidence. The terminology of the caution is also problematic. For example, the word "unless" can be difficult for non-native speakers, "obliged" is a low frequency word, and "in evidence" is a legal term that may not be well understood by those unfamiliar with legal jargon. Similar arguments apply equally to the structure of right to legal counsel cautions.

The Eastwood, Snook, and Chaulk (2010) Study. In order to quantify the complexity of a sample of Canadian police cautions (38 silence and 38 legal counsel cautions), Eastwood and colleagues calculated: (i) a FK score (estimates of the grade level needed for comprehension of a passage of text; cut-off = 6th grade), (ii) a Grammatik sentence complexity score (program in Corel WordPerfect software that provides a measure of sentence complexity by using the number of words and clauses in sentences; cut off ≤ 40), (iii) the number of infrequent words (determined by using word frequency guides from the Unites States and Britain; cut-off ≤ 1 occurrence per 1 million words), (iv) the number of difficult words (approximate grade level needed to understand each unique work; cut-off ≥ 10th grade), and (v) Caution length (number of words in each caution; cut-off ≤ 75 words) for each caution[3].

The results of the complexity analysis showed that the majority of the right to silence cautions would be classified as relatively simple in terms of linguistic complexity. Almost 80% of the cautions had an FK score under 6th grade; all had a Grammatik sentence complexity score under 40; difficult and infrequent words were rare; and only one silence caution was longer than 75 words. Overall, 37% of silence cautions met all five cut-off criteria, while 95% met at least three criteria. By contrast, the legal counsel cautions were relatively complex. Approximately 65% of cautions had an FK score over 6th grade; 40% had a Grammatik score over 40; the vast majority contained at least one difficult or infrequent word; and 80% of cautions were longer than 75 words. Overall, almost a third of legal counsel cautions did not meet *any* of the five cut-off criteria, and none met more than three.

The results from the Eastwood et al. (2010) study indicated that the complex structure of cautions (the legal counsel cautions in particular) might help explain the observed lack of comprehension. A logical next step, then, was to revise current police cautions by: (i) reducing

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words that are difficult to understand (e.g., *retain*) and are not used often in everyday communications (e.g., *detained*), (ii) shorten the cautions so that they match what we know about short-term memory (e.g., Neath, 1998), and (iii) shorten the length of the sentences in the cautions and avoid the use of multiple-syllable words. It was expected that such revisions to the content of the cautions would allow individuals to better understand the rights contained in these cautions.

Is complexity truly responsible?

As outlined above, in the Moore and Gagnier (2008) study three different modifications were made to an existing silence caution to make it less complex. This included: (i) substituting "you don't have to" for "you are not obliged" in the third sentence, (ii) moving the question "do you want to say anything about the charge?" to the end of the caution, and (iii) altering the second sentence so that it read "…whatever you say may be used against you", as opposed to "used in evidence". The four versions were then presented to participants verbally and comprehension was assessed. Despite the intuitive hypothesis that the simpler cautions would be better understood, no significant difference in comprehension were found.

In order to test the validity of the complexity measures used in their study to classify police cautions, Eastwood et al. (2010) presented three different legal counsel cautions verbally to participants. These cautions included one that did not meet *any* of the aforementioned five complexity measures (Calgary), one that met two of the criteria (Brockville), and one that was created by the authors to meet all five criteria. The Created caution had a FK score of 4; a Grammatik score of 40; contained no difficult or infrequent words; and was only 57 words in length. Despite the marked difference in reading complexity between the cautions, comprehension levels for all cautions were uniformly low, with participants comprehending about one third of the information that was presented to them.

The findings from these studies suggest that the complexity measures used to analyse and modify cautions in the studies may not be as useful as initially thought. The authors expected that passages of text that are relatively short, require low levels of reading ability, have simple sentences, and do not contain difficult or rare words would be easier to comprehend when presented verbally than would those that do not meet those criteria. Those expectations were not met; thus highlighting the need to consider whether or not the acts of reading and listening are comparable processes – some researchers have argued that listening and reading are two distinct modalities (see Rubin, 1987). As a consequence, one potential way to improve listening comprehension is to alter a passage of text so that it is easier to process in an auditory manner (Rubin, 1993; Rubin & Rafoth, 1986).

A new way forward in increasing comprehension

Reducing complexity may not have increased peoples' ability to understand cautions because detainees are not typically given a written copy of a police caution (but see Eastwood & Snook, 2010; regarding the effectiveness of reading cautions), but instead must listen while the interviewer reads the caution. Unlike reading a passage of text, listeners often only hear the text a single time, and must retain the information in their working memory while simultaneously attempting to interpret the meaning of the information (Shohamy & Inbar, 1991). Prototypical cautions, however, do not contain characteristics designed to lessen the impact of these constraints. For example, each piece of information presented in the cautions is followed

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immediately by a new piece of information without pauses or repetition of information that could allow listeners to review the initial information. Nor do the cautions contain introductory information regarding the purpose of a police caution or what listeners are supposed to do with the information. There are also no organizational cues to guide listeners regarding the structure and content of the caution.

In order to improve the comprehension of a verbally-delivered caution, Eastwood and Snook (2012) employed three modifications to a legal counsel caution. For the first modification (Instructions), participants received instructions informing them of the nature of the upcoming information and what they were expected to do with that information after the caution was delivered. The second modification (Listing) involved informing participants that they had four legal rights and they were notified prior to each of them being mentioned. The third modification (Explanations) involved expressing each sentence of the caution in a different way – to build in redundancy. Each of these modifications was predicted to increase comprehensibility independently by allowing participants to know what to listen for and better focus their attention while listening (Instructions), logically organizing the information and explicitly separating the four rights (Listing), and reducing the chance that participants would miss information by providing redundancy (Explanations).

Eight different versions of a legal counsel caution were created where each of the modifications was either present or absent. The resulting cautions were then presented verbally to 160 undergraduate students in a between-subjects design, and comprehension was assessed using a free recall procedure. Eastwood and Snook (2012) found that the Explanations modification greatly increased comprehension, while the remaining two modifications had only a small effect on comprehension. Despite the relatively small effect of Listing and Instructions, the caution that contained all three modifications was associated with the highest comprehension score. It was suggested that the Explanations modification boosted comprehension levels by allowing participants to capture information that they may have missed when first mentioned and/or by acting as a built-in rehearsal mechanism to assist working memory. Compared to previous legal counsel comprehension studies, the caution that contained all modifications was able to increase comprehension levels from approximately 30% to 70%. A follow-up study using a mock police interview has also shown that the gains in comprehension hold up under more ecologically valid situations (Snook, Luther, Eastwood, Collins, & Evans, 2014).

In a related study, an existing right to silence caution was modified in the following ways: (i) a sentence was added to alert suspects to the fact that they would receive two important pieces of information that they need to understand (i.e., the right to counsel and the right to silence), (ii) an explicit statement to the right of silence (i.e., “you have the right to remain silent”) was included, (iii) the interrogative statement (“do you wish to say anything in answer to the charge?”) was moved to the end of the paragraph, (iv) a sentence was included mentioning that whatever was said could be used against the suspect in court, (v) respondents were informed that a refusal to talk could not be used against them in court (Davis et al., 2011).

The standard and modified cautions were presented to participants verbally and comprehension was assessed using both free-recall and direct questions (e.g., T/F, word definitions). Participants who received the modified caution produced, on average, higher comprehension scores compared to those who received the standard. Moreover, those in the modified condition were better able to recall the two fundamental rights contained in the silence caution – that they do not have to make a statement and that any statement made can be used as evidence against them. These findings suggest that the modifications were successful in making an existing caution more comprehensible.

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Looking across both the Eastwood and Snook (2012) and Davis et al. (2011) studies, it is apparent that using modifications that match what we know about how people process verbally delivered information can increase comprehension of police cautions. In both cases, an already existing caution was made significantly *more* comprehensible by providing explanations after each original sentence, organizing the information in a logical manner, and informing listeners regarding the information that they were about to receive. Although comprehension levels remained less than perfect (approximately 70% across both studies), these studies represent a promising step forward in accomplishing the ultimate goal of fully comprehensible cautions[4].

Mobilizing psychological knowledge on caution comprehension

Since 2008, the Royal Newfoundland Constabulary – a police organization in Eastern Canada – has undertaken major reforms regarding the way their police officers carry out interviews. Specifically, they have implemented an intensive scientific-based interviewing training program (Snook & House, 2008), which also incorporates the psychological findings on how people comprehend their rights. Based on the research reviewed here, they now provide the following recommendations to all officers on how to administer Charter rights and cautions:

(i) Deliver the legal rights at a slow to moderate rate of speech.
(ii) Chunk the delivery of information into smaller parts (e.g., perhaps by telling them there are four things they need to know for each caution) and have the person tell you in their own words what each of the four sections means. Use pauses between sentences to slow the delivery because this will give the person time to process the information. You may wish to read one sentence at a time and then check comprehension after each sentence.
(iii) After the person has given you their understanding of what has been read to them, repeat to them back the main points in simple language as listed on attached sheet even if you feel that they already understand. If the interviewee explains something incorrectly, you will need to correct this to ensure that they are fully aware of their rights.

This process is designed to (i) ensure that interviewees have the best possible opportunity to comprehend their rights prior to being interviewed, and (ii) give officers the means to identify and correct any misunderstandings that do arise. Although no formal evaluations of these procedural changes have been conducted as of yet, anecdotal evidence suggests that these recommendations are leading to superior explanations of legal rights and better comprehension of them by interviewees.

A recent study by Fitzsimmons and Moore (under review) demonstrates why it is so important that comprehension be appraised thoroughly before assuming that the caution has accomplished its purpose. Fitzsimmons and Moore (under review) presented participants with either one of two different right to silence cautions or a passage of text that was inherently incomprehensible (i.e., semantically confusing and depicted an impossible scenario; the control condition). When asked whether or not they understood the caution, the majority of participants claimed comprehension (94%). As in other studies, however, they also found that only 30% of participants understood the cautions fully, and rates of actual comprehension were well below rates of professed comprehension for each caution. Even in the control condition, over 30% of participants professed to understand a passage of text that defied understanding. These findings

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are consistent with the idea that detainees are predisposed to answer a closed yes/no question about understanding with "yes", even though they do not understand; presumably because they seek to please the interviewer (Sigelman, Budd, Spanhel, & Schoenrock, 1981). These findings, combined with the finding from Eastwood and Snook (2010) that participants' confidence in their level of knowledge and actual knowledge levels were unrelated, suggest that interviewers should not assume high levels of comprehension when interviewees' claim full understanding.

Complexity and comprehensibility of youth waiver forms

Along with adult police cautions, research is just beginning to assess the complexity and comprehensibility of the cautions used specifically for young offenders. Due in large part to the enactment of the Youth Criminal Justice Act (2002), youths facing a police interview in Canada are now made aware of their rights through youth waiver forms – written passages of text that outline all the rights afforded to youths. Although the process of delivering the form differs across organizations and officers, it is common practice for the forms to be read out loud while the youth follows along on a written copy. In an initial study looking at these forms, Eastwood, Snook, and Luther (2012) collected 31 waiver forms from police organizations across Canada and analysed them according to the same complexity measures as used in Eastwood, Snook, and Chaulk (2010). The results of that study showed that the waiver forms are typically very lengthy, are written at a relatively high grade level, contain numerous complex sentences, and often contain difficult and infrequent words. In a preliminary test of comprehensibility, 32 high school students were presented with a representative waiver form and comprehension was assessed. Youths understood approximately 40% of the information in the waiver form – a level of comprehension that is similar to what has been found with adult police cautions.

In a more recent study, one-hundred sixty high school students ranging from grade 7 to grade 11 were presented with one of two youth waiver forms – the forms were read aloud and participants were given a written version to consult (Freedman, Eastwood, Snook, & Luther, 2014). The waiver forms were chosen based on the complexity scores from Eastwood et al. (2012), and included one from the Royal Canadian Mounted Police (RCMP) in Charlottetown, PEI (low complexity) and one from the Orangeville Police Service (high complexity). Comprehension was then assessed using a combination of free recall and multiple choice questions. Their results showed that students in higher grades comprehended more information than those in lower grades. Despite differences in the complexity of the two waiver forms, no meaningful differences in comprehension were found between the two waiver forms. Consistent with the original Eastwood et al. (2012), overall comprehension rates were very low; participants recalled approximately 15% of the information contained in the forms. Answers to the multiple choice questions also revealed some disconcerting misconceptions regarding the legal right – for example, almost half of the youths thought they had to answer *all* the questions posed by a police interviewer as opposed to just the questions they wanted to answer. Ongoing research with youth waiver forms is attempting to improve their comprehensibility based on what has been learned from research on adult cautions.

Concluding comments

The goal of the current article was to trace the progress of two programs of research designed to measure and improve the comprehensibility of Canadian police cautions. Thus far, we have learned – like has been demonstrated in other countries (e.g., Fenner, Gudjonsson, & Clare,

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2002; Grisso, 1981; Rogers, 2008) – that people struggle to understand the content of police cautions. Importantly, we are also beginning to learn that tackling the constraints inherent in listening situations can increase comprehension levels. Psychological science is continuing to expand these findings to more ecologically valid samples and situations, along with new research on the comprehensibility of youth waiver forms. More broadly, this research represents a successful attempt to use scientific research on social psychology, memory, and linguistics to take steps toward solving a practical real-world problem within the investigative interviewing context.

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Footnotes

[1]Although the exact content and wording differs between countries, the majority of other English-speaking Western countries provide people being questioned about their involvement in a criminal offence with the right-to-silence and the right-to-legal counsel as well (e.g., Fenner, Gudjonsson, & Clare, 2002; Miranda v. Arizona, 1966). Courts within these countries have also typically ruled that interviewees must fully understand the rights contained within police cautions before the police can interview them (e.g., Colorado v. Spring, 1987).

[2]The importance of the right to silence needs to be understood in the context of false confessions. An innocent person who undergoes an interview without understanding the protection of remaining silent may unwittingly incriminate himself or herself, or even admit to committing criminal acts that they did not commit – which is problematic given the compelling nature of confession evidence (Blair, 2007; Kassin, 2012). A further difficulty for detainees in Canada is that, following the Supreme Court's decision in R v. Singh (2007), police may continue to question a suspect despite the suspect's objection that he or she does not wish to speak. Thus a detainee who asserts his or her wish to remain

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silent can nevertheless have to endure repeated exhortations on the part of the police to give a statement. Understanding (and exercising) one's right to silence can provide some modest protection. Without such understanding, the protection vanishes.

[3]The lack of standardized wording for both types of cautions is likely because policing in Canada is primarily a provincial responsibility, and therefore many police organizations would have developed their cautions independently of other organizations. A similar diversity in the wording of legal rights has been found in the U.S., where research has shown Miranda warnings range from 50 to approximately 550 words in length and differ greatly in wording and structure (see Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008). Such diversity in the structure of cautions raises additional questions about procedural fairness, as detainees in some regions may be afforded better protection of their rights than detainees in other regions.

[4]A further impediment to full comprehension of Canadian cautions is that participants are repeatedly exposed to *Miranda* warnings from American television shows. Although many of the rights are similar, important differences between the two countries do exist (e.g., in Canada detainees do not have the right to halt questioning until a lawyer is present; R v. Sinclair, 2010).

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