No. 32537

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

TRENT TERRENCE SINCLAIR

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

APPELLANT'S FACTUM

Counsel for the Appellant:

Gil D. McKinnon Q.C.
Lisa Helps
1500 - 701 West Georgia Street
Vancouver, V7Y 1C6
Tel: (604) 601- 5616
Fax: (604) 601-5617
e-mail: gdm2004@shaw.ca

Ottawa Agents for the Appellant:

Brian A. Crane, Q.C.
GOWLING, LAFLEUR, HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario K1N 8S3
Tel: (613) 786-0212
Fax: (613) 788-3500
e-mail:ed.vanbemmel@sympatico.com

Counsel for the Respondent:

Susan J. Brown
Joyce DeWitt-Van Oosten
Ministry of Attorney General
Criminal Appeals
6th Floor - 865 Hornby Street
Vancouver, V6Z 2G3
Tel: (604) 660-1138
Fax: (604) 660-1133
e-mail: susan.brown@gov.bc.ca

Ottawa Agents for the Respondent:

Robert Houston, Q.C.
BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario, K2P OA2
Tel: (613) 236-9665
Fax: (613) 235-4430
email: rhouston@burkerobertson.com

INDEX

PART I

STATEMENT OF FACTS

A. OVERVIEW

1. At issue on this appeal is the scope of s. 10(b) of the *Charter of Rights* in a custodial interrogation. In particular, does a person who spoke briefly to counsel of his choice on the telephone after his arrest have a constitutional right to the assistance of counsel during a police interrogation? The Appellant's request for assistance was two-fold: (i) he wanted his counsel to be present to tell him what questions to answer and not answer, and (ii) as the police disclosed more information, the Appellant requested a second consultation with his lawyer before answering any further questions. Both requests were denied. The trial judge and the B.C. Court of Appeal found that there was no infringement of s. 10(b) of the *Charter*.

2. The Appellant's position is that there was a s. 10(b) infringement, that the statement should have been excluded under s. 24(2) of the Charter, and that his subsequent statements to the undercover officer and to the police at the crime scene (re-enactment of the crime) were tainted by this infringement and should also have been excluded: **R. v. Wittwer**, [2008] 2 S.C.R. 235.

B. BACKGROUND

3. On December 18, 2003 the Appellant was convicted of manslaughter before Powers J. and a jury in the stabbing death of Garry Grice on November 21, 2002. The jury acquitted him of second degree murder. The killing was in the Appellant's hotel room in Vernon. The Crown tendered the Appellant's incriminating statements to the police on the date of his arrest during: (i) a 5-hour interrogation (first statement), (ii) a subsequent discussion with an undercover police officer in the Appellant's cell, and (iii) a subsequent re-enactment of the crime at the crime scene. The Appellant did not testify or call any evidence. He advanced self-defence, intoxication, and provocation through his statements to the police.

4. After his interrogation, the Appellant returned to his cell where he made an incriminating statement to an undercover police officer (second statement). The police then took the Appellant to the scene of the killing where he did a video-recorded re-enactment, and repeated what he had told the police earlier (third statement): Appellant's Record ("A.R") IV, pp. 623-671.

5. The defence unsuccessfully challenged the voluntariness of the first and third statements and unsuccessfully alleged a *Charter* infringement (s. 10(b) and/or s. 7) of all three statements.

C. APPELLANT'S EXERCISE OF HIS S. 10(b) RIGHT TO COUNSEL

6. The police arrested the Appellant in a Vernon apartment at **6:23 a.m.** on Saturday, December 14, 2002. Cpl. Leibel told the Appellant he was under arrest for the murder of Gary Grice on or about November 21, 2002, and informed the Appellant of his s. 10(b) *Charter* right, and of a 24-hour telephone service to provide legal advice: A.R. IV, p. 524. The Appellant said it was kind of early in the morning for that.

7. They arrived at the police station at **6:35 a.m.** After some booking procedures were finished, Cpl. Leibel asked the Appellant whether he wanted to call a particular lawyer or call the Legal Aid 24-hour service. The Appellant said he had a lawyer in Kelowna for another charge (marihuana) and perhaps he could phone him. The name of the lawyer (Janicki) was on a card in the Appellant's wallet. The police placed the call. The Appellant took the phone in a private room. The conversation lasted three minutes (6:53 to 6:56 a.m.). After the call, Cpl. Leibel asked the Appellant whether he was satisfied with his chance to speak to counsel. The Appellant replied, "Yeah, he's taking my case." At **8:16 a.m.** Cpl Leibel asked the Appellant whether his lawyer was coming to the police station to see him. The Appellant replied, "No, he said he's takin my case. He said he'd get back to me, but how or when he didn't say."

8. At **9:40 a.m.** Cpl Leibel placed another call to the lawyer to see if he was coming to the police station. The lawyer said he did not have a Legal Aid retainer, and that he would not be attending the jail that day but would see the Appellant on Monday. The lawyer asked to speak to the Appellant, who then took the call in a private room. The conversation lasted two to three

minutes (9:51 to 9:54 a.m.). When the police asked the Appellant whether he was satisfied with talking to the lawyer, he said "Yeah." The Appellant was taken to his cell. An undercover officer was placed in his cell. Just before **12:00 p.m.** a justice of the peace, via teleconference, remanded the Appellant in custody until Monday.

D. POLICE INTERROGATION - DECEMBER 14, 2002

9. In the late afternoon of December 14, 2002 Sgt. Skrine started questioning the Appellant. The session continued five hours and ten minutes **(16:38 to 21:50)**. The 119-page statement (Exhibit H on the Voir Dire) is found at Suppl. A.R, pp. 1-119. Sgt. Skrine advised the Appellant that everything was being audio and video recorded. Sgt. Skrine confirmed with the Appellant that he had exercised his right to counsel and talked to a lawyer, and that he knew that anything he said could be used against him. The Appellant said he didn't have anything to say.

1. Request to Have Defence Lawyer Attend Interview

10. At page 3 of the Statement, the Appellant indicated that he did not wish to say anything until his lawyer was present:

> Q. What's that?
> A. I'm just gonna say right now, I don't have anything to say right now. I don't know what they figure they have on me or don't have on me or what's goin on and I'm not sayin anything or talkin about anything until my lawyer's around and he tells me what's goin on and stuff, like....
> S.A.R., p. 3. (emphasis added)

11. After a few more questions, Sgt. Skrine referred to the Appellant's telephone calls to a lawyer and explained that a defence lawyer could not attend the interview:

> Q. Okay? And I know he gave you advice, all right? Um at the end of the day in this country, my understanding the law in this country anyway is that uh you do not have a right to have a lawyer present with you, okay, while you're being interviewed by the police. All right? You do have a right to contact counsel, but you don't have a right to have them present with you during an interview. Okay? Um okay so bottom line is you've exercised those rights, now, you choose whether you talk to me or not, but I still have a duty to both...S.A.R., p. 3.

12. A few pages of transcript later (at p. 7), the Appellant again raised the issue of having his lawyer present to assist him in the interview:

> Q. Pretty much?
> A. What are these questions, like, I'm ju not feeling comfortable not havin a lawyer around. Like you say I, I don't have a right to have a lawyer in the room while I'm being questioned and I don't think that make doesn't even make sense in my head.
>
> Q. So, what doesn't make sense?
> A. Well you're not allowed to have a lawyer with you present saying well you can answer this, don't answer that, like this is your rights, not your rights, like.
>
> Q. No
> A. You guys have got me on a pretty serious charge here.
>
> Q. Absolutely.
> A. Yeah like...
>
> Q. Absolutely.
> A. I feel I should have my lawyer present while any type of questioning goes on like....
>
> Q. Okay
> A. Like if you were reverse the scenario, and it was you in this chair..
>
> Q. Yeah
> A. I think you'd wanna have a lawyer present. You guys are lookin at puttin me away for the rest of my life.
>
> Q. Okay
> A. Right? That's serious to me. [S.A.R., p.7, emphasis added]

13. Sgt. Skrine explained that the Appellant had the right to choose whether or not to speak to the police, and then refused the Appellant's request to have his lawyer present. Sgt. Skrine stated:

> That having been said, okay, I know that there is no uh place in law that says that a lawyer um that we have to have a lawyer present when we talk to you and you have no right to have that lawyer in this room. And my experience is that lawyer's don't wanna be uh actually present, okay, because at the end of the day they'd be witnesses to what we talk about. Okay? All right? So that that is the law, all right?: S.A. R., p. 8.

2. First Request to Speak to Lawyer

14. Sgt. Skrine then asked the Appellant a number of questions about his background, including his previous conviction for manslaughter. Eventually (at p. 24) Sgt. Skrine questioned the Appellant about his acquaintance with Gary Grice just prior to November 21, 2002: S.A.R., pp. 24-41. Sgt. Skrine told the Appellant that the police had found a number of large blood stains on the floor of the hotel room he was occupying in November, 2002. The Appellant said the stains were on the floor when he moved in: S.A.R., p. 38. When Sgt. Srkine said that it was important to find out what caused the blood stains, the Appellant replied:

> A. Well I got nothin more to say on that anyways. Like I already told you, the stains were there: S.A.R., p. 41.

15. A few pages of transcript later (p. 42 of Statement), Sgt. Skrine again asked about the hotel room. He had not yet disclosed that the police had located Mr. Grice's body. The Appellant said he was being charged for murder on a missing person and suggested that Mr. Grice could be in Vancouver: S.A.R., p. 42. Sgt. Skrine said they knew it was Gary Grice's blood. Sgt. Srkine said he didn't want the Appellant to make up any lie about the blood being there before. The Appellant responded:

> A. Oh rah, I'd rather not blowin smoke up your ass, I'd rather talk to my lawyer about it first.
>
> Q. Okay, so all right, if you're choosing not to tell me, that's that's fine. Okay? That is your right, so long as, I guess what I wanna make clear to you is don't don't lie in here. If you choose to say nothing, that is your choice.
>
> A. Well I choose to say nothing at the moment: S.A.R., p. 43 (emphasis added)

3. Second Request to Speak to Lawyer

16. Further general questions followed. Sgt. Skrine said he thought Mr. Grice had met with foul play. Sgt. Srkine asked whether the Appellant's DNA would be found on his body when they found it: S.A.R, p. 45. Sgt. Skrine left the room. When he re-entered he asked about two youths, Tyler Bru and Nathan. The Appellant said they used to come to his hotel room and Tyler was over almost every day. Sgt. Skrine left the room again. When he re-entered he said, "There's

absolutely no doubt you killed Gary Grice." The Appellant replied, "In your mind": S.A.R., p. 50. Sgt. Skrine then gave an account of how he thought the Appellant, while intoxicated, had killed in a blind rage. Sgt. Srkine appealed to the Appellant to say what had happened. He said "the evidence is overwhelming" but didn't say what it was: S.A.R., p. 54. The Appellant's responses were non-committal: S.A.R., pp 51-58. When Sgt. Skrine told the Appellant that he shouldn't take the interview lightly, the Appellant said:

> A. I don't take any of this lightly. That's at least I'm not I sure, I'm not talkin right now and I wanna see my lawyer and stuff but like I don't take anything you're sayin lightly. S.A.R., p. 58.

4. Third Request to Speak to Lawyer

17. Sgt. Skrine then reminded the Appellant about the gravity of the decision he had to make [whether to talk to the police]. Sgt. Skrine told the Appellant that he knew what his lawyer had told him. Sgt. Skrine said he couldn't bring his lawyer into the interview room to sit beside the Appellant, and at the end of the day only the Appellant could decide to make the decision that he knew in his heart was the right decision to make: S.A.R., p. 58. The following exchange occurred:

> A. I got nothin more to say today anyways. I just I heard everything you have to say.
>
> Q. You know what, you know what, Trent? I'm not about to abandon you and run away....
> A. No, no, no.....
>
> Q. I was hopin, no listen. I was hopin that you didn't have to see everything I have here, all right. I was hopin that I didn't have to paint that picture to you. Maybe you're sittin there with some glimmer of hope. Some glimmer of hope that this is all gonna go away. But it's not. It is not gonna go away. You are done. The evidence here is absolutely overwhelming. Absolutely overwhelming. And you can't change that. The only questions left are why.
> A. I want my lawyer to look through all that.
>
> Q. Your lawyer's gonna get all that.
> A. Well fine. I want him to look through all that.
>
> Q. Trent, listen, don't get pissed off at me...
> A. I know, I'm not..... S.A.R., pp. 58-59

5. Fourth and Fifth Requests To Speak to Lawyer

18. Sgt. Skrine then started to reveal more evidence against the Appellant about the condition of his hotel room: S.A.R., p. 60. Sgt. Srkine disclosed he knew that the two youths had gone to the Appellant's room the day after the killing, that their socks were soaked in blood, and they watched him clean the carpet for two days, trying to get the blood out: S.A.R., pp. 60-61. He talked about the police theory and background factors: S.A.R., pp. 59-67. He played a segment of Tyler Bru's statement describing blood in the room: S.A.R., pp. 61-62. The Appellant's responses continued to be non-committal. When Sgt. Srkine pushed him for an explanation as to the motive behind the killing, the following exchange occurred:

> Q. There had to be something that caused the snap. Hey? You didn't do this without reason, right? Hmm? Trent? You killed Gary because you enjoy it right? Hmm? Gary? Er Trent?"
>
> A. I wanna talk to my lawyer.
>
> Q. Trent you talked to your lawyer, okay?
>
> A. For a minute on the phone, that's no, I wanna talk to him when he's when I see him on Monday.
>
> Q. Well you'll have an opportunity to talk to him again, but you already talked to him twice, okay Trent. And you know what? And nobody can come in and make this decision for you but you.
>
> A. When my lawyer comes... S.A.R., p. 67 (emphasis added)

19. Sgt. Skrine continued to reveal more evidence against the Appellant. He said that Trent Bru had told the police that the Appellant had disclosed to him "exactly what happened": S.A.R., p. 67. Sgt. Skrine then related Bru's recollection of how the Appellant had described the killing: S.A.R., pp. 67-69. Sgt. Skrine then talked about general background and how important it was for the Appellant to let everyone know what happened: S.A.R., pp. 63-75. The following exchange then occurred:

> Q. If you could catch yourself before you snapped (snaps fingers), and slit that man's throat, you would. Hey? Wouldn't you? 'Cause you're not a monster. Trent Sinclair is not a monster. It's the alcohol isn't it? Trent? Is the alcohol isn't it? Hmm? Trent?"

A. I hear what you're sayin, I got nothin to say right now. You're playing with my mind: S.A.R., p. 75 (emphasis added)

20. Sgt. Skrine continued to question the Appellant in a similar fashion and received the same non-committal responses: S.A.R., pp. 75-79. Sgt. Skrine said he knew everything except why the killing happened and where the body was: S.A.R., p. 79. Sgt. Skrine left the interview room again. When he returned he disclosed that they had the body. He said Brut's account also revealed that the Appellant had told him about taking the body to the dumpster. He said the police found in the dump the body and the sheets and bedding from the hotel room. Sgt. Skrine said that the Appellant's D.N.A. was "all over those sheets", which was untrue: S.A.R., pp. 82-85.

21. At p. 85 of the 119-page transcript, the Appellant said that Sgt. Srkine already knew all the answers before he brought the Appellant into the interview room: S.A.R., p. 85. Thereafter, the Appellant began talking about the killing and gave his account of how it happened: S.A.R., pp. 85-119. Grice showed up at his hotel room with some liquor and cocaine. The Appellant drank the liquor and Grice used the cocaine. They went outside so Grice could purchase some pills. After the purchase, they returned to the room. Grice took the pills. The Appellant had a few more beer. He was drunk. When he was in the kitchen, Grice entered. He had a knife in his hand. The Appellant thought he wanted money for another fix. The Appellant hit Grice on the head with a frying pan. The knife fell to the floor. A fight ensued. The Appellant choked Grice, then "lost it". The Appellant said that when he tries to defend himself he grabs things. He grabbed the knife from the floor. He stabbed Grice four to six times and slit his throat. He put his body in a dumpster outside, and then took the bedding from his room and threw it into the dumpster. He then cleaned up the blood in his room: S.A.R., pp. 85-105.

E. TRIAL JUDGE'S FINDINGS

22. The trial judge concluded that the Appellant's first statement to Sgt. Skrine during the interrogation and third statement in the re-enactment were voluntary: A.R. I, pp. 2-65 (paras. 176-179, 194). He found that the third statement flowed from the first statement (para. 197). With respect to the statement to the undercover officer, the trial judge said there was no improper elicitation by the officer or *Charter* infringement (paras. 180-181). The trial judge dismissed the alleged s. 10(b) infringement during the police interrogation. He would have excluded the statements under s. 24 (2) of the *Charter* if there had been a s. 10 infringement (para. 49).

1. Findings of Fact (A.R. I, pp. 2-65)

23. The learned trial judge made the following findings of fact:

- The interrogation was between 4.5 and 5 hours (para. 39); the Appellant has a Grade 10 education and is dyslexic; he is intelligent enough to understand what his situation was and to make his own choices: A.R. I, pp. 2-65 (paras. 152, 154);
- Upon arrest, the police gave the Appellant the opportunity "to retain and instruct counsel". The Appellant spoke with counsel of his choice in two three-minute conversations. The Appellant understood his right to remain silent (to choose whether to speak or not). The lawyer also advised the Appellant of some devices the police might use, including a cell plant and telling lies (paras. 158-161);
- The police kept introducing "bits of evidence that they had, a little at a time, exaggerating some of it, misrepresenting some of it" (paras. 132, 137, 171, 178);
- There were a number of times when Sinclair asserted his right to silence. He indicated that he wanted his lawyer to see the evidence, that he did not have anything to say about it, and that he wanted to talk to his lawyer about it. In one instance, he said he would like to talk to his lawyer on Monday (this was a Saturday). The trial judge stated:

> At one point towards the end, he did say, "I don't know what to do. I want to think about it, muddle through it. I want to talk to my lawyer."[1] And it was suggested that clearly indicated that he was confused about what his rights were and that he should have been given an opportunity to consult with

---

[1] This was the trial judge's interpretation and/or recollection of the Appellant's statement.

> counsel. It think it was getting close to the line in this particular case but I am satisfied that what Mr. Sinclair was concerned about and confused about is the choice he had to make, not whether it was his choice to make. (paras. 139, 140) [emphasis added];

- The police did not make any attempt to denigrate counsel or the advice the Appellant received from counsel. All they did was confirm that ultimately it was Mr. Sinclair's decision as to whether he said anything or not: (para. 141); and
- The Appellant was not prepared to talk about the offence with Sgt. Skrine and made that clear until almost the end of the interview (para.152);
- With respect to the Appellant's references to counsel, it is clear that he understood what his rights were and was clear that it was his decision whether he was going to speak or not; although he might have liked to have been able to talk to his lawyer, he understood what his choice was (para. 169)

2. Legal Conclusions (A.R. I, pp. 36-57)

24. The learned trial judge made the following findings of law:

- The police are not obliged to allow defence counsel to be present during an interrogation: A.R. I, p. 38 (paras. 115, 124);
- It would be wrong to conclude that the advice the Appellant received was inadequate; the information a person must be given at the time of their arrest or detention when they exercise their right to counsel is fairly limited; they have to know the reason for their arrest and their rights, but there is no obligation on the police at that point to make full disclosure of their case (para. 163);

> The police were not obliged after he had been able to retain counsel to give him a further opportunity to contact counsel in this particular interview. Many times police do and it may be a good tactic. The advice is not going to change very much (para. 169).

- The law does not require the police to stop the interview when a person asks to speak to counsel. In some cases, a failure to give a detainee a further opportunity to speak to counsel might be sufficient to tip the balance against the admissibility of a statement but it

does not in this case (para. 170); and

- There may be changes that occur during the interrogation, changes in circumstances that reactivate their right to counsel, perhaps changes in their jeopardy. At that point, there may be an obligation on the police then to advise them of their right to counsel again and give them an opportunity to consult (para. 111).

F. B.C. COURT OF APPEAL'S JUDGMENT

25. In dismissing the appeal, the B.C. Court of Appeal stated: (A.R I, pp. 72-99):

- a detainee does not have the right to have a lawyer present during a custodial interrogation (para. 4);
- s. 10 (b) focuses on the initial interaction between an individual and the state, and is exhausted when the individual has had an opportunity to obtain legal advice (para. 48);
- a purposive interpretation of s. 10(b) of the *Charter* does not require the police to "hold off" on their questions during an interview when a detainee, who has exercised his or her right to counsel, asks to speak with a lawyer again (para. 52); such a "broad proposition" is not found in **R. v. Burlingham**, [1995] 2 S.C.R. 206, or in any other decision of the Supreme Court (paras. 33-34);
- the French text of s. 10(b) of the *Charter* does not support a broader interpretation than the English text (paras. 56-57);
- since the police are entitled to use legitimate means to persuade a detainee, who has exercised his or her right to counsel, to speak [**R. v. Hebert**, [1990] 2 S.C.R. 151; **R. v. Singh**, [2007] 3 S.C.R. 405], there is no policy reason for providing a detainee, who does not have the right to terminate an interview by stating "I wish to remain silent", the peremptory right to do so by stating, "I want to talk to my lawyer again" (para. 41); and
- there were no "special circumstances" in the case at Bar which required the police to "hold off" questioning the Appellant until he had spoken again with his lawyer (paras. 61-69).

PART II

QUESTIONS IN ISSUE

26. **A.** Did the B.C. Court of Appeal err in law in upholding the learned trial judge's decision that s. 10(b) of the *Charter of Rights* does not require the police to respect a detainee's request to consult with counsel *during* a custodial interrogation, where the detainee had consulted with counsel *prior to* the interrogation?

B. Did the B.C. Court of Appeal err in law in upholding the learned trial judge's decision that s. 10(b) of the *Charter of Rights* does not require the police to respect a detainee's request to have counsel present during a custodial interrogation?

PART III

ARGUMENT

A. OVERVIEW

27. This Court has stated that the purpose of s. 10(b) is to ensure that a detainee is treated fairly in the criminal process, is advised about how to exercise his or her rights when dealing with the authorities, and is provided with meaningful choices. It is aimed at correcting the imbalance caused by detention. In ruling that a detainee's s. 10(b) rights are exhausted after an initial consultation with counsel, the B.C. Court of Appeal has sanctioned incommunicado interrogations. However, this Court's jurisprudence affirms that s. 10(b) guarantees a continuing right to consult counsel, in recognition that a detainee's need for legal advice evolves as the investigation and interrogation proceed, and as the detainee receives new information from the authorities and as they place new demands on the detainee.

28. Further, there are persuasive policy arguments why s. 10(b) should be interpreted as guaranteeing the right to have counsel present during a custodial interrogation. It would be consistent with the purpose underlying s. 10(b), with the meaning of "instruct" and "l'assistance" in the English and French texts, with other domestic legislation and Canada's international human rights obligations, and with the law in other liberal democracies. It would also protect the vulnerable in our society. Consistent with this Court's jurisprudence, every detainee should be advised of the right to have counsel present during a custodial interrogation.

B. A DETAINEE'S CONTINUING RIGHT TO COUNSEL UNDER S. 10(b)

1. The purpose of s. 10 (b)

29. With respect to the interpretation of *Charter* provisions generally, this Court has adopted a purposive approach. In **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145, at p. 157, Dickson J. (as he then was) stated (in relation to the s. 8 protection against unreasonable search and seizure):

> Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing the search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

30. When considering s. 10(b) specifically, this Court has consistently applied this purposive approach (see **R. v. Therens,** [1985] 1 S.C.R. 613, at p. 641e), and has repeatedly given s. 10(b) a broad interpretation (see **R. v. Burlingham**, [1995] 2 S.C.R. 206, at 227). Section 10(b) states that:

> Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right.

31. Beginning in 1985 this Court, has, in a series of decisions, interpreted these words in a variety of different factual circumstances. These decisions demonstrate this Court's commitment to a broad interpretation, based on its understanding of the underlying purpose of the provision.

32. In keeping with its commitment to a purposive analysis of *Charter* rights and a broad interpretation of s. 10(b), this Court has articulated several purposes for s. 10(b):

- It is aimed at fostering the principles of adjudicative fairness, and is designed to ensure that the accused is treated fairly in the criminal process: **R. v. Black**, [1989] 2 S.C.R. 138, and **R. v. Brydges**, [1990] 1 S.C.R. 190.
- To allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights when dealing with the authorities: **R. v. Manninen**, [1987] 1 S.C.R. 1233; **R. v. Ross**, [1989] 1 S.C.R. 3; **R. v. Hebert**, [1990] 2 S.C.R. 151.
- It is about providing detainees with meaningful choices, and with an opportunity to make informed choices about their legal rights and obligations: **R. v. Bartle**, [1994] 3 S.C.R. 173.

33. In **R. v. Brydges**, *supra*, this Court said that the right to counsel is "triggered" on arrest or detention – it is at that point that fair treatment takes on special significance, because the detainee is now in the control of the police, and as such is not at liberty to exercise the privileges that he otherwise would be free to pursue (see also **R. v. Hebert**, *supra*). This implies that the goal of s. 10(b) is to provide to a detainee comparable access to legal advice as the person would have if not in custody.

a. Informational rights

34. This Court's jurisprudence illustrates an unwavering commitment to providing a detainee with important information, so that the detainee can make informed decisions:

- The authorities must inform the detainee of his rights: **R. v. Therens**, *supra,*
- The authorities must inform detainees, in all cases, of the existence of duty counsel and the detainee's ability to apply for legal aid: **R. v. Brydges**, *supra*,
- The standard s. 10(b) caution should include basic information about how to access available services which provide free, preliminary legal advice: **R. v. Bartle**, *supra*,
- The authorities have a duty to re-advise the accused of his or her right to counsel where there is a fundamental and discrete change in the purpose of the investigation which involves a different and unrelated offence or a significantly more serious offence: **R. v. Black**, *supra*; **R v. Burlingham**, *supra* .

b. Implementational rights / duties

35. If, after being informed of the right to counsel, a detainee expresses a desire to consult counsel, then several implementational rights arise (or, in the case of the authorities, implementational obligations):

- The police must not prevent the detainee in any way from exercising those rights, and must not call upon the detainee to provide evidence that may be incriminating without first providing the detainee with a reasonable opportunity and time to retain and instruct counsel: **R. v. Therens**, *supra*,

- It is incumbent on the police to delay their questioning and the taking of a statement until an intoxicated detainee is in a sufficiently sober state to properly exercise his or her right to counsel or to be fully aware of the consequences of waiving this right: **R. v. Clarkson**, [1986] 1 S.C.R. 383,
- The police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay: **R. v. Manninen**, *supra*,
- Once an accused or detained person has asserted the right to counsel, the police cannot, in any way, compel the detainee to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of the eventual trial until that person has had a reasonable opportunity to exercise that right: **R. v. Ross**, *supra*,
- Even where a detainee consults with counsel after being advised of their s. 10(b) rights, an officer has a duty to hold off further questioning of the detainee (in circumstances where the police had increased the charge from attempted murder to first degree murder), until the detainee has a reasonable opportunity to consult counsel: **R. v. Black**, *supra*,
- Where, during a protracted interrogation, a detainee repeatedly requests an opportunity to speak with counsel, the police must refrain from attempting to elicit incriminating evidence: **R. v. Burlingham**, *supra*,
- It is a violation of s. 10(b) to pressure a detainee into accepting a plea bargain deal without first having the opportunity to consult with his or her lawyer: **R. v. Burlingham.**

2. Treatment of this issue by appellate courts

36. At least two appellate courts have recognized a detainee's continuing right to consult with counsel. In **R. v. R.(P.L.)** (1988), 44 C.C.C. (3d) 174 (N.S.C.A.) the accused had, upon arrest, been advised of his s. 10(b) rights and had met with his lawyer at the detachment office. After the lawyer left, the officers interrogated the accused, who initially said he was not saying anything and said he wanted to call his lawyer. The officers continued questioning the accused, who shortly thereafter gave an inculpatory statement. The Court of Appeal upheld the trial judge's ruling that the accused's right to consult with counsel had been infringed.

37. In **R. v. Whitford**, [1997] A.J. No. 309 (Alta. C.A.) the accused was, after being arrested and transported to the detachment, advised of his s. 10(b) rights. He called a law office, but the officer did not know if he talked to a lawyer. When he asked the accused if he wished to tell him about the alleged offence, the accused responded: "No, I'll wait until I talk to legal aid." The officer continued questioning the accused, who made a statement that the Crown sought to use in cross-examination to impeach the accused. The Court of Appeal ruled that the accused's rights under s. 10(b) had been infringed. The accused had not exhausted his s. 10(b) rights simply by contacting a law office:

> I decline to approve police questioning after completion of a first telephone call to a law office when the accused has clearly said that he does not wish to speak to the police until he has spoken with Legal Aid (para. 14).

38. Other appellate courts have construed s. 10(b) more narrowly. In **R. v. Logan** (1988), 46 C.C.C. (3d) 354 (Ont. C.A.), the Court of Appeal ruled, after discussing **R. v. Clarkson**, *supra* and **R. v. Manninen**, *supra*, that the words "upon arrest or detention" in s. 10(b) indicate a point in time, not a continuum: "They do not deal with a continuing right to be reinstructed before every occasion on which the police obtain a statement from the accused" (p. 381). In **R. v. Wood** (1994), 94 C.C.C. (3d) 193 (N.S.C.A.), the Court stated, at p. 225c:

> . . . the "advised detainee" does not enjoy the automatic right of cessation of the interview merely upon indicating that he would like to speak to counsel. . . . A detainee always has a right to a reasonable opportunity to consult counsel. However, once he is informed he cannot, without more, stop an interrogation or investigation merely by purporting to exercise his right to counsel again.

39. In **R. v. Roper** (1997), 32 O.R. (3d) 204 (Ont. C.A.) the accused said, during interrogation, that he had better speak to his lawyer again. The Court of Appeal ruled that the accused's s.10(b) rights had not been violated: "there was no change in circumstances thereafter that required the police to cease questioning of the appellant until he had a further opportunity to consult with counsel" (p. 210b).

40. In **R. v. Gormley** (1999), 140 C.C.C. (3d) 110 (P.E.I.S.C., A.D.) the Appeal Division ruled that the accused had a reasonable opportunity to retain and instruct counsel during the 3-minute phone conversation, and that the subsequent questioning did not violate his rights. There was no change in circumstances that would have required the police to cease questioning until the accused had a further opportunity to consult with counsel when he arrived at the police station.

41. In **R. v. Baidwan**, [2001] B.C.J. No. 3073 (B.C.S.C.), *affd* [2003] B.C.J. No. 1439 (B.C.C.A.) the Court of Appeal ruled that the trial judge had not erred in finding no breach of the accused's s. 10(b) rights. She had ruled that s. 10(b) is limited to the circumstances in which the *Charter* gives it life, namely on a person's arrest or detention, and she had concluded that the accused had been fully advised of his right to counsel and the circumstances did not require that he be re-advised at any stage prior to the conclusion of his third statement: "the circumstances here, including his repeated professed wish to consult counsel before making a statement, did not require the interviews to come to a halt" (para. 79).

3. Discussion

42. In the case at bar the Appellant was, at the time of his arrest, advised of his right to counsel, and he exercised that right by having two brief phone conversations with his counsel of choice. Later that day, during a five-hour interrogation, as the officer disclosed more and more of the evidence against the Appellant, the Appellant indicated on five occasions that he wished to speak to his lawyer again before answering any further questions. The officer did not permit him to do so, the questioning continued and the Appellant made inculpatory statements. The trial judge ruled that the law does not require the police to stop the interview when a detainee asks to speak to counsel. The B.C. Court of Appeal agreed, holding that:

- S. 10(b) focuses on the initial interaction between an individual and the state, and is exhausted when the individual has had an opportunity to obtain legal advice, and

- A purposive interpretation of s. 10(b) does not require the police to "hold off" on their questions during an interview when a detainee, who has exercised his or her right to counsel, asks to speak with a lawyer again.

43. It is respectfully submitted that, in so ruling, the Court of Appeal erred in law. Conversely, if the Court of Appeal is correct, then two results inevitably flow. First, Canadian law allows a detainee only one consultation with counsel. Second, the law of Canada condones incommunicado interrogations. During a police interrogation of a detainee, police officers routinely take the position that a defence lawyer who attends at the police station is not entitled to see the detainee until the interrogation is complete. More importantly, the police assert that the detainee has no right to see counsel in such circumstances. Further, if the detainee states to the interrogating officer that he or she does not want to speak to the officer and wants to be returned to the cell, the officer may ignore that request and may continue questioning the detainee (**R. v. Singh**, [2007] 3 S.C.R. 405). Based on the decision of the court below in the case at bar, the detainee's predicament is made worse because the police are at liberty to ignore the detainee's repeated requests to consult counsel, as the officer reveals new information during the interrogation. The police are free to continue the interrogation as long as they wish, using the whole range of interrogation techniques, including lies, in order to obtain inculpatory statements.

44. If the court below is correct, the police have a licence to conduct incommunicado interrogations at will, during which no legal advisor can get to the detainee, the detainee cannot go back to his or her cell, any assertions of the right to silence can be ignored and the detainee cannot get to anyone for legal advice about his or her legal rights and obligations, about how to respond to information presented by the interrogators, or about how to respond to any number of demands, such as demands for breath, blood or DNA samples, a polygraph examination, participation in a line-up, a visit to the scene, a re-enactment of the offence, or a time-sensitive plea bargain. The detainee is entirely powerless, completely at the whim of the interrogating officers, with no recourse to any kind of legal assistance. It is a chilling prospect in a country that prides itself on its liberal democratic values.

45. Contrary to the approach taken by the court below, this Court has repeatedly rejected an interpretation of s. 10(b) that would countenance incommunicado interrogations. In **R. v. Burlingham**, *supra*, the Court said that the police cannot rely on a mechanical recitation of the right to counsel in order to discharge their s. 10(b) responsibilities. Rather, the Court has consistently given s. 10(b) a broad interpretation, which is aimed at the imbalance that arrest or detention causes. According to **R. v. Brydges**, *supra*, fair treatment takes on special significance at this stage, because the detainee is now in the control of the police, and as such is not at liberty to exercise the privileges that he otherwise would be free to pursue. Section 10(b) is directed at correcting this imbalance, by guaranteeing comparable access to legal advice as the person would have had if he or she were not in detention which, in the Appellant's respectful submission, includes a continuing right to consult counsel during a police interrogation.

46. This Court's jurisprudence illustrates unequivocally that a detainee's need for legal counsel is not static, but evolves as the police investigation proceeds. Initially, a newly-detained person's principal need may relate to advice about the right to remain silent, but even at that stage it is important that the detainee also receive advice about how to exercise that right (**R. v. Manninen**, *supra)* which, from the advising lawyer's perspective, may require an understanding of what evidence the police have and what demands they are placing on the detainee. This Court has repeatedly emphasized the importance of a detainee receiving legal advice about rights and obligations, which goes well beyond any *pro forma* recitation of the right to remain silent, and will necessitate some understanding of the charges the detainee faces. Finally, this Court has on at least three occasions recognized that s. 10(b) includes an ongoing right to legal advice, as the detainee learns more about the case against him or her, or when the police place demands on the detainee to say or do something that may be incriminatory:

- In **R. v. Ross**, *supra*, it was an hour after the initial s. 10(b) caution that the accused was required to participate in a line-up. This Court ruled that counsel has an important role in advising a client about participating voluntarily in a line-up, and it then enumerated the types of matters respecting which the detainee might need legal advice. The Court did not restrict the right to counsel to some preliminary recitation of the right to remain silent.

Rather, the Court described the purpose of s. 10(b) as ensuring that a detainee is advised of their legal rights and how to exercise them "when dealing with the authorities" (p. 14).

- In **R. v. Black**, *supra*, the accused was advised of her s. 10(b) rights and consulted with counsel. More than 90 minutes later, the officer advised the accused that she was now being charged with a more serious offence and she requested another opportunity to consult counsel. This Court ruled that the officer's failure to provide her with a reasonable opportunity to have that second consultation constituted a breach of her s. 10(b) rights. It is a clear example of this Court's recognition of an ongoing right to consultation with counsel, as the investigation/interrogation proceeds and as the need for legal advice changes.

- In **R. v. Burlingham**, *supra*, the accused repeatedly requested, during an intensive and often manipulative four-day interrogation, an opportunity to consult counsel. This Court ruled that the officer's continued questioning in the face of the accused's repeated requests for consultation with counsel constituted a violation of his s. 10(b) rights. The Court went further, and found an additional violation of s. 10(b) when the police pressured the accused into accepting a time-sensitive plea bargain without first having the opportunity to consult with his lawyer. In both instances, the detainee's need for legal advice changed as the interrogation progressed, and this Court affirmed that the ambit of s. 10(b) extends to this type of ongoing access to legal advice.

47. In summary, s. 10(b) aims to correct the imbalance that detention causes, guaranteeing a detainee comparable access to legal advice as the person would have had if he or she were not in detention. A detainee's need for legal advice evolves, as the investigation and interrogation proceed, depending on what new information the detainee receives and what new demands or pressures the police place upon the detainee. If s. 10(b) is interpreted to deny to a detainee the right to ongoing consultation with counsel during an interrogation, then the police have a licence to engage in incommunicado interrogations.

C. A DETAINEE'S RIGHT UNDER S. 10(b) OF THE *CHARTER* TO HAVE COUNSEL PRESENT DURING AN INTERROGATION

1. Introduction

48. This Court has never been asked to rule on whether s. 10(b) of the *Charter* guarantees to a detainee the right, upon request, to have counsel present during a police interrogation. In **R. v. Therens**, *supra*, Lamer J. (as he then was) declined to give an exhaustive definition of the s. 10(b) rights, but added at p. 625b:

> Whether s. 10(b) extends any further, so as to encompass, for example, the principle of *Miranda v. Arizona*, 384 U.S. 436 (1966), and apply to matters such as interrogation and police line-ups, need not be decided in this case and I shall refrain from doing so.

2. Treatment of this issue by appellate courts

49. Three decisions of the B.C. Court of Appeal have ruled that the police can ignore a detainee's request to have counsel present during an interrogation:

- In **R. v. Ekman** (2000), 146 C.C.C. (3d) 346 (B.C.C.A.), the court ruled that, while an accused has the right to counsel and can therefore impose or insist on specifying conditions under which he is willing to give up that right, the officer did not negate or interfere with that right when he told him that a lawyer does not have the right to be present during questioning.

- In **R. v. Baidwan**, *supra*, the court found that the accused's s. 10(b) rights had not been violated when the officer initially deflected the accused's request to have his lawyer present, and later told the accused that he (*i.e.* the officer) would not speak to him with his lawyer present.

- In **R. v. Ekman** (2006), 209 C.C.C. (3d) 121 (B.C.C.A.) the same accused as in **R. v. Ekman (2000)** appealed his conviction for first degree murder, following his third trial. He advanced the same argument as he had earlier, that the officer's refusal to allow

counsel to be present during the interrogation breached the accused's s. 10(b) rights. The Court of Appeal dismissed this argument on the basis that the court's earlier decision was indistinguishable and that this panel of the court was obliged to follow it under the doctrine of precedent (para. 26).

50. In another case (**R. v. Osmond** (2007), 227 C.C.C. (3d) 375 (B.C.C.A.)), the Court found it unnecessary to decide whether the accused had a right to the presence of counsel while under custodial interrogation. Given the Court's clear authority to the contrary in **R. v. Ekman (2000)**, *supra*, a five-member division of the Court would have been required. However, after reviewing the Supreme Court's jurisprudence on s. 10(b), the fact that many common law countries provide for the presence of counsel during custodial interrogations, and the guarantee "to be questioned in the presence of counsel" under the Rome Statute establishing the International Criminal Court, Donald J.A. (for the court) concluded that they all underscore the importance of "effective legal assistance at the investigative stage" (paras. 32-35).

3. Reasons why this Court should interpret s. 10(b) as guaranteeing to a detainee the right to have counsel present during a custodial interrogation

51. In the case at bar, the Appellant asked to have his lawyer present during the custodial interrogation. When the officer stated his understanding that the law in Canada does not give a detainee the right to have a lawyer present, the Appellant responded that that did not make sense in his head. In the Appellant's respectful submission, this Court should interpret s. 10(b) of the *Charter* as guaranteeing to a detainee the right to have counsel present during a custodial police interrogation, for the following reasons.

a. It is consistent with the purpose of s. 10(b)

52. This Court has described the purpose of s. 10(b) as fostering principles of adjudicative fairness and as intended to ensure that the accused is treated fairly in the criminal process (**Black** and **Brydges**), to provide a detainee with advice about how to exercise his or her legal rights when dealing with the authorities (**Ross**), to provide detainees with meaningful choices (**Bartle**),

and to correct the imbalance caused by detention (**Hebert** and **Brydges**).

53. Incommunicado interrogation, by definition, precludes access to any form of legal assistance, and creates a serious state/suspect imbalance that is not tolerated at any other stage in the process. Thus, it defies common sense to characterize incommunicado interrogations as fair to a detainee. Even if this Court decides on this appeal that a detainee has the right to interrupt the interrogation for legal advice, the detainee still has to go back into the interrogation room, alone, to face further interrogation. What possible justification can there be for such incommunicado interrogations, other than to give the interrogating officer an unfair advantage. As Warren C.J. observed in **Miranda v. Arizona**, 384 U.S. 436 (1966), it is precisely this *privacy* that gives the interrogator the psychological advantage. Privacy may be effective, but it is the antithesis of treating an accused fairly in the criminal process.

54. In the same way, guaranteeing the right to have counsel present during a custodial interrogation is consistent with the purpose of correcting the imbalance caused by detention. No one questions the right of a suspect, not in custody, to insist on his or her lawyer being present during police questioning. Why then would the courts endorse any lesser right to a detained suspect? There may be some consequences of detention that cannot be remedied, but the right to have counsel present during interrogation is not one of them. If the law of Canada is that a detainee does not have the right to have counsel present during a custodial interrogation, then such a law is an open invitation to the police to use their extraordinary power of detention and arrest for an improper and abusive purpose – to conduct an incommunicado interrogation, for as long as they wish, until the detainee makes an inculpatory statement. Rather than correcting the imbalance caused by detention, such a law aggravates the imbalance.

55. A police officer's resort to incommunicado interrogation when investigating a civilian suspect is to be contrasted with the procedure at least one police department follows when it investigates one of its own officers in a police-related death. In Vancouver, the first group to have access to the officer at the scene is the department's post-critical incident trauma team,

followed by the Vancouver Police Union's representative. The officer is not detained, and the practice is that the officer is neither subjected to a face-to-face interview nor interrogated. The officer's only obligation is to submit a written duty report, and the officer may have up to five business days to do so. In preparing the report, the officer is entitled to up to 10 hours of legal consultation, paid for by the department.[2]

b. It is consistent with our understanding of a client's right to "instruct" counsel

56. In determining the scope of s. 10(b), it may assist the Court to consider dictionary definitions of the word "instruct" and "instruction":

- ***"instruct":***
  - "to convey information as a client to an attorney. . ." - *Black's Law Dictionary* (4th ed., 1951).
  - "(of client, solicitor) give information to (solicitor, counsel)" – *Concise Oxford Dictionary* (5th ed., 1964).
  - "to give information as a client to a solicitor" - *Oxford English Dictionary* (2nd ed., 1989).
- ***"instruction"***:
  - "directions to solicitor or counsel" - *Concise Oxford Dictionary* (5th ed., 1964).
  - "direction given to a solicitor or counsel" - *Oxford English Dictionary* (2nd ed., 1989).

57. Section 10(b) gives to a detainee the right to "instruct counsel." Lawyers understand their professional obligation to "take instructions from" their client, in the sense of being given direction respecting what legal action to take on the client's behalf. But such "instruction" is the final stage in a process, which is typically preceded by:

- The client advising the lawyer of all relevant facts,
- The lawyer gaining a complete understanding of the client's predicament, and
- The lawyer giving the client advice about his or her legal position, and the legal options available to the client.

---

2 See Vancouver Police Department's *Regulations and Procedures Manual*, Section 47.04 (Statements and Duty Reports), available at http://vancouver.ca/police/Planning/RPM/RPM.pdf at p. 659, and the testimony of Insp. Porteous at the Davies Commission inquiring into the death of Frank Paul, at http://frankpaulinquiry.ca/transcripts/2008-02-21.pdf#MichaelPorteous, pp. 47-48.

58. It is only then that the client can properly "instruct" counsel. Further, lawyers understand that this is an iterative process – as the client advises the lawyer of new facts and as the lawyer makes any necessary adjustments to his or her legal advice to the client, the client's "instructions" may change.

59. In non-custodial situations, no one would suggest that a client is only entitled to "instruct" his or her lawyer once, and that at the beginning of the retainer. It is a continuing right, that can be exercised in the lawyer's or client's office, during a meeting with an opposing party, or in a courtroom. Nothing in the wording of s. 10(b) supports the Court of Appeal's opinion in the case at bar that "the s. 10(b) right focuses on the initial interaction between the individual and the state, and is exhausted when the individual has had an opportunity to obtain legal advice" (para. 48, emphasis added). While the right to instruct counsel is unquestionably triggered by arrest or detention, and while the detainee is entitled to exercise the right without delay, it would be contrary to this Court's commitment to interpret *Charter* provisions broadly, to construe "instruct" so narrowly as to permit only one consultation with counsel, and that at the commencement of the detention. To the contrary, a client's right to "instruct" counsel conveys the notion of a continuing right that can be exercised whenever and wherever the client needs legal assistance.

c. It is consistent with the French language wording of s. 10(b)

60. While the English version of s. 10(b) uses the expression "to retain and instruct counsel without delay," the French version uses the expression "d'avoir recours sans délai à l'assistance d'un avocat". "Assistance" has been interpreted as follows:

- "to give/lend assistance" – *Collins' Robert French Unabridged Dictionary*, 8th ed., 2006.
- "Action d'assister qqn **1.** Action de venir en aide à qqn; appui, secours donné ou reçu... *Donner, prêter son assistance. Demander assistance auprès de qqn."* – *Le Nouveau Petit Robert*, 2002.

61. Although the English wording is identical to s. 2(c)(ii) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, the French wording in that Act reads: "du droit de retenir et constituer un avocat sans délai." The discrepancies in the French text of s. 10(b) of the *Charter* and the language used in s. 2(c)(ii) of the *Bill of Rights* may be explained by the important change that legislative drafting underwent in the early 1980s. Until then, statutes were first drafted in English, and then the French text was prepared, working from the English version. The 1980s saw a shift to simultaneous drafting in both English and French.

62. According to Prof. Sullivan, when both French and English versions of a statute are drafted simultaneously, "each is drafted in a style that is natural to the language in question" (*Sullivan on the Construction of Statutes*, 4th ed. (Markham: LexisNexis, 2002) at 78). When drafted in this way, the two versions will not necessarily mirror each other in the same way that a translated text would correspond to the English original in the traditional method of drafting:

> This approach to bilingual legislation sometimes leads to discrepancies between the two versions. More often than not, these discrepancies disappear upon careful analysis. They are the result of the different styles of drafting used by English and French drafters (p. 78).

63. Use of the expression "l'assistance d'un avocat" conveys the sense of coming to the aid of another, or giving/lending assistance. As with the English term "instruct", the French wording invites a broad and unrestricted interpretation focused on meeting the needs of another whenever and wherever required, and does not imply an arbitrary "one shot" opportunity to consult with counsel at the commencement of detention. In the Appellant's respectful submission, there is no conflict between the English and French versions, and one is not broader or narrower than the other – both support a broad interpretation.

d. It is consistent with Canada's domestic legislation

64. Parliament has never legislated procedural rules for the taking of statements from adults. Determining what is acceptable and unacceptable police behaviour has, by default, devolved to the courts which have, over the years, developed the common law and, since 1982, interpreted relevant provisions of the *Charter*, most notably sections 7 and 10(b).

65. However, when Parliament did legislate in this area, it clearly affirmed a detainee's right to have counsel present during a custodial interrogation. Section 146(2) of the *Youth Criminal Justice Act* states in part (underlining added):

> (2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless . . .
>
> (*b*) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that
>
> (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (*c*), if any, unless the young person desires otherwise;
>
> (*d*) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.[3]

66. The Appellant recognizes that the Preamble to the Act emphasizes that young persons "have special guarantees of their rights and freedoms", including a criminal justice system that is separate from that of adults and which emphasizes "enhanced procedural protection" (s. 3(1)(b)(iii)). However, that provision goes on to clarify that this enhanced procedural protection is designed "to ensure that young persons are treated fairly." Consequently, the protection under consideration in this appeal (a detainee's right to have counsel present during a custodial interrogation) should not be perceived as some exceptional protection that should be available only to young persons because of their developmental immaturity. To the contrary, the Act explicitly links this right to counsel to the right to be treated fairly. If it would be unfair to deprive a young person of the right to have counsel present during a custodial interrogation, how can denial of the same right to an adult detainee be fair?

---

3 The predecessor *Young Offenders Act* contained a similar provision: *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. C-19, s. 35.

e. It is consistent with Canada's international commitments

67. Canada was a leading proponent of the International Criminal Court. It is a signatory to and has ratified the *Rome Statute of the International Criminal Court,*[4] which came into force on July 1, 2002. The statute establishes the Court and deals comprehensively with the investigation and prosecution of genocide, crimes against humanity, war crimes and the crime of aggression. Part 5 (Investigation and Prosecution) includes Article 55 (Rights of persons during an investigation), which states in part:

> 2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: . .
> (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

68. Part 9 of the *Rome Statute* (International Cooperation and Judicial Assistance) imposes a duty on States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. That Part deals with arrest and surrender, provisional arrest, and other forms of cooperation which, under Article 93(1)(c), includes "The questioning of any person being investigated or prosecuted."

69. Article 55 of the *Rome Statute* makes it clear that before an ICC prosecutor questions a suspect, the suspect must be informed of his or her right to have counsel present during questioning. When the ICC makes a request to a State Party such as Canada, under Part 9, for assistance in questioning a suspect, Article 55 would appear to impose the same requirement on the Canadian interrogator, although that issue has not, as far as the Appellant is aware, been the subject of judicial determination.[5]

---

4 See: http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. There are comparable provisions in relation to other international criminal courts, suggesting an emerging international consensus.

5 The same issue arose before the International Criminal Tribunal for the former Yugoslavia, in **The Prosecutor v. Zdravko Mucic**, September 2, 1997 (http://www.icty.org/x/cases/mucic/tdec/en/70902732.htm). The accused had, at the

70. In **United States v. Burns**, [2001] 1 S.C.R. 283, at paras. 79-80, this Court affirmed earlier decisions to the effect that the Court will take Canada's international human rights obligations into account when interpreting *Charter* provisions. The Court stated:

> 79 In *Re B.C. Motor Vehicle Act*, *supra*, Lamer J. expressly recognized that international law and opinion is of use to the courts in elucidating the scope of fundamental justice, at p. 512:
>
> > [Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.
>
> 80 Dickson C.J. made a similar observation in *Slaight Communications*, *supra*, at pp. 1056-57:
>
> > . . . Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. [Emphasis added.]
>
> Further in *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (S.C.C.), [1987] 1 S.C.R. 313, at p. 348, Dickson C.J. stated:
>
> > The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.
>
> See also *R. v. Keegstra*, 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697, at pp. 750 and 790-91.

71. Consequently, the Appellant respectfully submits that this Court should interpret s. 10(b) in a manner that is consistent with Canada's international human rights obligations under the

---

request of the Court, been interviewed by the Austrian police, who followed Austrian rules that stated in part: "You may not have legal counsel present when you are questioned for a criminal offence." The rules of the International Tribunal provided that: "Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel." The Tribunal excluded the accused's statement, ruling that "the Austrian rights of the suspect are so fundamentally different from the rights under the International Tribunal's Statute and Rules as to render the statement made under it inadmissible" (para. 52).

Rome Statute, which accords to a detainee the right to have counsel present during a custodial interrogation.

f. It is consistent with a detainee's rights in other liberal democracies

72. Other Commonwealth and/or common law jurisdictions recognize a detainee's right to have counsel present during a custodial interrogation – in some by way of legislative prescription, in others through judicial interpretation of constitutional guarantees. The legislative approach sometimes includes exceptions or permits the trier of fact in some circumstances to draw an adverse inference from the accused's silence, while interpretation of constitutional guarantees can sometimes generate divergent views about the scope of the protected right. But neither detracts from the fundamental proposition that these jurisdictions recognize and respect a detainee's right to have counsel present during a custodial interrogation.

i. Australia

73. At the federal level, the Commonwealth *Crimes Act 1914*, s. 23G obligates an investigating officer to advise a detainee, before questioning begins, that the detainee may communicate with a friend, relative or legal practitioner and that the detainee may attempt to arrange for a legal practitioner to be present during the questioning, and the investigating officer must defer questioning for a reasonable time for that communication to occur and for the legal practitioner to attend. If the detainee arranges for a legal practitioner to be present during questioning, the investigating official must:

- Allow the detainee to consult with the legal practitioner in private, and
- Allow the legal practitioner to be present during the questioning and to give advice to the detainee, but only while the legal practitioner does not unreasonably interfere with the questioning.

74. Section 23L establishes two exceptions:

- the requirements imposed on an investigating officer do not apply if, and for so long as, the officer believes on reasonable grounds that:
  - compliance with the requirement is likely to result in an accomplice of the detainee taking steps to avoid apprehension, or in the concealment, fabrication or destruction of evidence or the intimidation of a witness, or

- the questioning is so urgent, having regard to the safety of other people, that it should not be delayed.

75. Section 23L(3) makes it clear that any interruption of a detainee's right to have counsel present during interrogation is only temporary. That right must be restored as soon as possible after the matters justifying interruption cease to apply.

76. In New South Wales, the *Law Enforcement (Powers and Responsibilities) Act 2002*[6], s. 123(1) imposes a duty on a custody manager to inform a detainee of the right to communicate with a legal practitioner, including the right to ask the legal practitioner to attend the place of detention and to be present during any investigative procedure. Under ss. (5), if the detainee has made a request, the custody manager must allow the legal practitioner to be present during any such investigative procedure and to give advice to the detainee. Sections 24-27 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (Reg. 24)[7] have special provisions respecting vulnerable persons, which includes children, persons with impaired intellectual or physical functioning, aboriginals and persons who are of non-English speaking background. Such persons are entitled to the custody manager's assistance in exercising their rights, and to having a support person present during any investigative procedure. Section 33 requires, in the case of aboriginals, that the custody manager notify Aboriginal Legal Services Limited of the detention, unless the custody manager is aware that the detainee has arranged for a legal practitioner to be present during questioning of the detainee.

77. Finally, in **Driscoll v. R.** (1977) 137 C.L.R. 517, at p. 540, Gibbs J. stated:

> It was submitted that the learned trial judge should have rejected the tender of these documents, because the police conducting the interviews refused to allow the solicitor for the applicant to be present. . . . If the police did prevent the applicant from seeing his solicitor (the learned trial judge made no finding on that question) their conduct was not only reprehensible but, as I have said, was a matter to be considered by the jury in deciding whether the answers recorded in the records of interview were in fact given.

---

6 Available at http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/
7 Available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/learr2005542/

ii. England and Wales

78. The *Police and Criminal Evidence Act 1984*, c. 60, has now superseded the *Judges Rules* ([1964] 1 W.L.R. 152), which dealt with the admissibility of statements made by an accused to a police officer. Section 58(1) of *PACE* provides that: "A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time." A detainee who has made a request must be permitted to consult a solicitor "as soon as practicable" (ss. (4)) and in any case within 36 hours (ss. (5)), although a superintendent may delay complying with the request if the officer has reasonable grounds for believing that the exercise of the right at the time requested:

- Will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
- Will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- Will hinder the recovery of any property obtained as a result of such an offence (ss. (8)).

79. Under s. 66(b), the Secretary of State shall issue codes of practice in connection with the questioning of persons by police officers. Code C,[8] effective February 1, 2008, deals comprehensively with the detention, treatment and questioning of persons by police officers. Part 5 (Right not to be held incommunicado) grants an arrestee the right to have a person known to them or likely to take an interest in their welfare to be informed at public expense of their whereabouts as soon as practicable. Part 6 (Right to legal advice) contains numerous paragraphs including the following:

- **6.8** a detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed unless one of the exceptions in paragraph 6.6 applies.

- **6.15** if a solicitor arrives at the station to see a particular person, that person must be so informed whether or not they are being interviewed and asked if they would like to see the solicitor.

---

8 Available at http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final).pdf?view=Binary

80. Section 34 of the *Criminal Justice and Public Order Act 1994*, 1994, c. 33[9] permits adverse inferences to be drawn in some circumstances from a failure, when interviewed by the police, to mention facts later relied on at trial.

iii. New Zealand

81. The *New Zealand Bill of Rights 1990*, s. 23(1)(b) provides that everyone who is arrested or detained under any enactment "shall have the right to consult and instruct a lawyer without delay and to be informed of that right." The *Legal Services Act 2000* (2000, No. 42) assists in the interpretation of that general provision. Sections 49-52 continue the police detention legal assistance (PDLA) scheme established under the predecessor legislation, and s. 51(2) states:

> Every person to whom the PDLA scheme applies is entitled (subject to this Act and any regulations made under it) to the services of 1 lawyer during the period for which the person is being questioned or is detained (underlining added).

iv. United States of America

82. In ***Miranda v. Arizona***, *supra*, the U.S. Supreme Court interpreted the Fifth Amendment of the U.S. Constitution as including the right to have counsel present during custodial interrogation. In reaching that conclusion Warren C.J., for the majority, quoted from several "police manuals and texts which document procedures employed with success" (p. 448-9):

- "The principal psychological factor contributing to a successful interrogation is *privacy* – being alone with the person under interrogation" – Inbau and Reid, *Criminal Interrogation and Confesions*, (1962), at 1;

- "In [the officer's] own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law" – O'Hara, *Fundamentals of Criminal Investigation*, (1956), p. 99.

83. In his view, guaranteeing the right to counsel during interrogation serves several subsidiary functions beyond protection against self-incrimination – it can mitigate the dangers of untrustworthiness, it can reduce the likelihood that police will practice coercion, and it will help

---

9 Available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num_act/1994/ukpga_19940033_en_1.html&query="Criminal+and+Justice+and+Public+and+Order+and+Act+and+1994"&method=boolean

to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. He added:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. . . . (p. 457)
>
> Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo v. Illinois*, 378 U.S. 478, 485 n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires (p. 470).

g. It protects the vulnerable

84. When this Court, in **R. v. Golden**, [2001] 3 S.C.R. 679, considered the constitutionality of strip searches, it accepted that African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches. As a result: "it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur" (para. 83). It is respectfully submitted that this Court should adopt a similar approach in determining whether s. 10(b) includes the right to have counsel present during a custodial interrogation.

85. In the same way that this Court applied an "anti-racist lens" in **R. v. Golden** and a "feminist lens" in **R. v. Mills**, [1999] 3 S.C.R. 668,[10] it is appropriate to address the issue of incommunicado interrogations with due regard to the vulnerabilities of those who are most likely to be the subject of such interrogations. They will inevitably include those with a mental

---

10 See Tanovich, David M., "Ignoring the *Golden* Principle of Charter Interpretation?" (2008) 42 S.C.L.R. (2d) 441, at p. 443.

disability or an intellectual disability,[11] those who are at a cultural disadvantage (*e.g.* aboriginals,[12] or immigrants who fear people in authority), women, and those who are overcome by grief or guilt and may not appreciate that they have a legal excuse for their conduct.

86. The psychological disadvantage that *any* detainee faces is exacerbated in the case of detainees with these vulnerabilities. This disadvantage can only be redressed by having access to legal advice whenever and wherever the detainee needs it, especially during a custodial interrogation.

7. How the right should be articulated

87. This Court has, since **R. v. Therens**, *supra,* consistently rejected an approach that leaves it up to the detainee to know about the right to counsel, and to request it. It has affirmed an informational component to the s. 10(b) right, imposing a positive duty on the officer to advise the detainee of his or her rights, as well as an implementational component, obligating the officer to refrain from questioning the detainee until he or she has had a reasonable opportunity to exercise the right. Consistent with this Court's jurisprudence and with a purposive interpretation of s. 10(b), the Appellant respectfully submits that a similar approach should be adopted in this

---

11 See Moore, Timothy E. and Karina Gagnier, "'You can talk if you want to:' Is the police caution on the 'right to silence' understandable?" (2009), __ C.R. (6th) __, where the authors state, at p. __: "Individuals of lower intellectual ability are at increased risk of being acquiescent because they have learned that submissiveness is adaptive. Consequently, mentally retarded individuals are inherently inclined to produce self-incriminating statements during police interrogation because of their compliant disposition as well as their aim to appear socially desirable and competent."

12 In **R. v. Golden**, Iacobucci and Arbour JJ. cited at para. 83 the *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1 (Winnipeg: Queen's Printer, 1991), which stated at pp. 604-605:

> . . . Aboriginal people, particularly those in remote communities and those whose primary language is not English, appear to have special problems in exercising their rights to remain silent and to refrain from incriminating themselves. Their statements appear to be particularly open to being misunderstood by police interrogators and, as a result, may convey inaccurate information when read out in court. Their vulnerability arises from the legal system's inability to break down the barriers to effective communication between Aboriginal people and legal personnel, and to differences of language, etiquette, concepts of time and distance, and so on.

case, which would mean that:

- The s. 10(b) caution should include a statement to the effect that the detainee is entitled to have counsel present during any custodial interrogation or questioning.

- A detainee is entitled to be advised, at the beginning of any custodial interrogation or questioning, that the detainee has the right to have counsel present during the interrogation or questioning.

- When a detainee expresses a desire to have counsel present during a custodial interrogation or questioning, the detainee shall be given a reasonable opportunity to have counsel attend, before the interrogation or any questioning begins.

- When counsel attempts to contact a detainee while the detainee is being interrogated, the detainee should be immediately advised; if the detainee wishes to speak to counsel, any further interrogation should be deferred until the detainee has had a reasonable opportunity to consult with counsel.

D. CONCLUSION

88. The Appellant respectfully submits that s. 10(b) guarantees a continuing right to consult counsel, in recognition that a detainee's need for legal advice evolves as the investigation and interrogation proceed, and as the detainee receives new information from the authorities and as they place new demands on the detainee. Further, there are persuasive policy arguments why s. 10(b) should be interpreted as guaranteeing the right to have counsel present during a custodial interrogation. Consistent with this Court's jurisprudence, every detainee should be advised of the right to have counsel present during a custodial interrogation.

89. Accordingly, it is respectfully submitted that the Appellant's first statement to Sgt. Skrine

was obtained in violation of s. 10(b), and should have been excluded under s. 24(2) – he was conscripted to provide evidence against himself and the use of this evidence rendered the trial unfair, "for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination:" **R. v. Collins**, [1987] 1 S.C.R. 265, at p. 284. The Appellant's second statement to the undercover officer in the cell, and his third statement during the re-enactment, were tainted because "the breach and the impugned statement can be said to be part of the same transaction or course of conduct:" **R. v. Wittwer**, *supra*, at para. 21. For that reason, the second and third statements should also be excluded under s. 24 (2) of the *Charter*.

PART IV SUBMISSIONS ON COSTS

90. The Appellant does not seek costs on appeal.

PART V ORDER SOUGHT

91. That the appeal be allowed, the conviction quashed, and a new trial ordered.

Gil D. McKinnon, Q.C.
Counsel for the Appellant

Keith R. Hamilton

Vancouver, B.C.
January 29, 2009

PART VI

TABLE OF AUTHORITIES

Paras.

Supreme Court of Canada Decisions

Provincial Appellate and Trial Decisions

Articles and texts

Foreign Cases/Materials

Australia

New Zealand

England and Wales

United Nations

Reference Materials

PART VII

RELEVANT STATUTES

1. *Charter*, s. 10(b):

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

---

10. Chacun a le droit, en cas d'arrestation ou de détention:

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

2. *Youth Criminal Justice Act*, s 146(2):

(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(*a*) the statement was voluntary;

(*b*) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (*c*), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (*c*), if any, unless the young person desires otherwise;

(*c*) the young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(*d*) if the young person consults a person in accordance with paragraph (*c*), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(2) La déclaration orale ou écrite faite par l'adolescent de moins de dix-huit ans à un agent de la paix, ou à toute autre personne en autorité d'après la loi, au moment de son arrestation ou de sa détention ou dans des circonstances où l'agent ou la personne a des motifs raisonnables de croire que l'adolescent a commis une infraction n'est pas admissible en preuve contre l'adolescent, sauf si les conditions suivantes sont remplies :

a) la déclaration est volontaire;

b) la personne à qui la déclaration a été faite a, avant de la recueillir, expliqué clairement à l'adolescent, en des termes adaptés à son âge et à sa compréhension, que :

(i) il n'est obligé de faire aucune déclaration,

(ii) toute déclaration faite par lui pourra servir de preuve dans les poursuites intentées contre lui,

(iii) il a le droit de consulter son avocat et ses père ou mère ou une tierce personne conformément à l'alinéa *c*),

(iv) toute déclaration faite par lui doit l'être en présence de son avocat et de toute autre personne consultée conformément à l'alinéa *c*), le cas échéant, sauf s'il en décide autrement;

c) l'adolescent s'est vu donner, avant de faire la déclaration, la possibilité de consulter :

(i) d'une part, son avocat,

(ii) d'autre part, soit son père ou sa mère soit, en l'absence du père ou de la mère, un parent adulte, soit, en l'absence du père ou de la mère et du parent adulte, tout autre adulte idoine qu'il aura choisi, sauf si la personne est coaccusée de l'adolescent ou fait l'objet d'une enquête à l'égard de l'infraction reprochée à l'adolescent;

d) l'adolescent s'est vu donner, dans le cas où il a consulté une personne conformément à l'alinéa *c*), la possibilité de faire sa déclaration en présence de cette personne.