No. 32537

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for British Columbia)

BETWEEN:

TRENT TERRENCE SINCLAIR

APPELLANT

AND:

v.

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM

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PART I – OVERVIEW and STATEMENT OF FACTS

A. Overview of the Respondent's Position

1. The Appellant claims two distinct violations of the right to counsel. Although he spoke twice with a lawyer of his choice before being interviewed by police, the Appellant says it was wrong for the questions to continue once he indicated that he wanted another opportunity to contact counsel. In his words, s.10(b) of the *Charter* "guarantees a continuing right to consult counsel". Second, the Appellant expressed a desire to have his lawyer in attendance when interviewed. He says that s.10(b) guarantees a right to "have counsel present during a custodial interrogation".

2. The Appellant's constitutional assertions are grounded in a construction of the right to counsel that is not supported by the jurisprudence; expands the scope of the right well beyond its accepted purpose; and demands the functional equivalent of that which was denied by the majority in ***R. v. Singh***, [2007] 3 S.C.R. 405, namely, an obligation on the part of police to refrain from questioning any detainee who indicates that he or she does not want to speak with the authorities.

3. Under the guise of a purposive approach to s.10(b), the Appellant seeks to undermine the interview powers of police by putting new roadblocks in their way. In ***Singh***, it was argued that an assertion of the right to silence prohibits police from attempting to obtain a statement in the absence of a signed waiver. In this appeal, the Appellant hopes that a second request for consultation with counsel, or a stated desire for the presence of a lawyer, will accomplish the same result.

4. The position advanced in ***Singh*** was rejected because it "ignores the critical balancing of state and individual interests [that] lies at the heart of this Court's decision in [***R. v. Hebert***, [1990] 2 S.C.R. 151] and of subsequent s.7 decisions": ***Singh***, *supra*, para.7. For these same reasons, the Appellant cannot succeed on his construction of the right to counsel. Section 10(b) cannot offer broader protection than the pre-trial right to silence. The role of the right to counsel is to *support* the right to silence, not give it greater effect than what s.7 of the *Charter* itself contemplates.

5. The Court of Appeal for British Columbia did not err in finding that the Appellant's right to counsel was respected in the circumstances of this case. The Respondent respectfully requests that

the appeal from conviction for manslaughter be dismissed.

B. Statement of Facts

6. The Respondent accepts as substantially correct the Statement of Facts prepared by the Appellant. However, there are additional portions of the record that provide important context for the appeal.

7. On the evening of November 21, 2002, the Appellant stabbed Gary Grice to death in a motel room in Vernon, British Columbia. The only evidence as to how the killing unfolded came from statements the Appellant made to police following his arrest three weeks later, and ones he made to a teenaged friend shortly after the incident. According to the Appellant, Grice came to his room for a visit. After several hours during which the two men drank and Grice consumed cocaine, Grice threatened the Appellant with a butcher knife and demanded money. In response, the Appellant blocked the knife with his hand, punched Grice in the head, hit him on the back of the head with a frying pan, and wrestled him to the ground. Then he picked up the knife, slit Grice's throat, turned him over, and stabbed him in the back nine or ten times. He disposed of the body in a dumpster in the motel parking lot and covered it with bedding taken from his room. The following day he disposed of the knife.

8. The victim's body was recovered from a Vernon landfill on December 12, 2002, bearing stab wounds as described by the Appellant. In addition, the pathologist noted a large number of multiple fractures to Grice's legs, ankles, and ribs, consistent with his body having been placed in a waste receptacle and subjected to crushing or folding.

9. The Appellant was charged with second degree murder. After a trial at which he did not testify or call any evidence, the Appellant was found guilty by a jury of manslaughter. His defence, as advanced through his various statements, was that he acted in self-defence in killing Grice, or in the alternative, that as a result of provocation or intoxication or both, he ought to be convicted of manslaughter rather than murder.

(a) The Appellant's Statements to Police

10. The Appellant made a number of statements to police following his arrest. These included: comments made when first arrested; a recorded statement that was obtained during an in-custody interview held on December 14, 2002; words spoken to an undercover cell operator; and a re-enactment of the offence.

11. The admissibility of these statements was challenged under the common law confessions rule (voluntariness), and pursuant to ss.7 and 10(b) of the *Charter*.

12. The Appellant was arrested at his residence early on the morning of December 14, 2002. He was immediately informed of his right to counsel: A.R., Vol.I, p.5, para.[11]; p.21, para.[65]. He was asked if he wanted to call a lawyer. The Appellant said: "Not right this second": A.R., Vol.IV, p.524. He was transported to the Vernon police detachment where he spoke privately by phone with a lawyer of his choice for approximately three minutes: A.R., Vol.I, p.6, para.[16]. He told police he was satisfied with the call: *supra,* para.[16]. Some time later, police contacted the same lawyer to determine if he planned to come to the detachment to speak with the Appellant. Counsel said he would not be attending, but asked to speak with the Appellant again: para.[17]. The police put the Appellant on the phone and a second conversation took place, lasting approximately three minutes: para.[17]. After the call completed, the Appellant was asked if he was "satisfied with talking to [the lawyer]". He responded: "Yeah": A.R., Vol.IV, p.524. About six and a half hours later, Sgt. Skrine began to interview the Appellant: A.R., Vol.I, p.8, para.[20]. The Appellant confirmed that he had spoken with a lawyer. He was told that the interview was being recorded and that it could be used in court: para.[20]. During the interview, he admitted killing the victim and described what occurred: para.[20].

13. Upon completion of the interview, the Appellant was returned to his cell and, amongst other things, he told an undercover police officer that he was "going away for a long time", but felt "relieved": A.R., Vol.I, p.14, para.[40]. The Appellant agreed to participate in a re-enactment of the crime (which was conducted later the same day and also recorded): para.[39]. Prior to doing so, he was warned that the re-enactment could be used in court against him: A.R., Vol.IV, p.626.

(b) Evidence on the *Voir Dire*

14. The admissibility of the Appellant's statements to police was tested on a *voir dire*. The prosecution bore the onus of establishing voluntariness beyond a reasonable doubt. The Appellant bore the onus of showing a *Charter* violation on a balance of probabilities.

15. The Appellant did not testify on the *voir dire*. He tendered no evidence to raise a doubt on voluntariness; no evidence to suggest that, during his interaction with police, he did not understand that he had a right to remain silent; he did not understand how to exercise the right to remain silent; that he felt compelled to provide a statement; or that he failed to appreciate it was his choice on whether to speak with police.

16. Sgt. Skrine was cross-examined extensively about the Appellant's various comments to him that he did not want to say anything; that he wanted to run things by his lawyer first; that he wanted to speak with his lawyer; and that he felt he should have his lawyer present. The cross-examination is found at pages 279 through 419 of the Appellant's Record, Volume III and speaks for itself. The following excerpts provide an indication of Sgt. Skrine's reasons for proceeding as he did:

> Again, I – I've answered this question several times and I did not see at any time that he requested to speak to a lawyer at that moment. Even if he had, without inquiring further to determine whether or not he was confused about the advice he received, or if I got that feeling through his conversation, or if we had some sort of change in jeopardy as we talked through here, I wouldn't have necessarily automatically provided that phone call. I believed that we had met his rights. We had met our obligation at this time: A.R., Vol.III, p.337, ll.2-12.
>
> ....
>
> And, again, sir, up to that point in time if Mr. Sinclair simply said, "I've had enough. I want to call my lawyer, " you would've stopped it, wouldn't you? You would've stopped the interrogation and let him call his lawyer.
>
> ....
>
> No, I – no. It would all depend on the conversation that took place from thereon in. You know, My Lord, I always take the approach that, you know, unless the jeopardy of the individual changes or in some way I – I believe he's confused about his right of whether or not he can talk to me or not, um, you know – and I know that he has contacted counsel, like he did in this case, I'm not just arbitrarily going to provide him another opportunity to contact counsel. I don't

> believe there is a continuous right to obtain counsel unless some of those other issues present themselves: A.R., Vol.III, p.311, ll.14-35.
>
> ....
>
> Well, were you aware that the Charter of Rights gives a person the right to remain silent?
>
> Yes, My Lord, I – I'm aware that a person has a right to choose whether or not to speak – you know, or to self-incriminate. I also am aware that we, the police, are expected to be persistent in our line of questioning, especially when I'm dealing with a homicide investigation: A.R., Vol.III, p.302, ll.24-31.

17. Sgt. Skrine testified that throughout his interaction with the Appellant, he made it "very clear" that it was the Appellant's "choice whether or not he [spoke] to [him] through [the] interview". He also gave him a choice on whether to be involved in the re-enactment video: A.R., Vol.III, p.179, ll.12-19. Sgt. Skrine said that when the interview began, he was "very sincere about getting [the Appellant's] right to counsel, making sure that those rights were covered properly and that he received legal advice": A.R., Vol.III, p.302, ll.19-23. When asked why he did not provide the Appellant with a second s.10(b) warning and access to counsel prior to the re-enactment, Sgt. Skrine explained that he did not see a "change in jeopardy" from the "stage of the interview to the re-enactment", and it was his understanding of the law that without a change in jeopardy, he was not obliged to re-iterate the right to counsel: A.R., Vol.III, p.179, ll.29-35.

(c) <u>Trial Judge's *Reasons* on the *Voir Dire*</u>

18. As noted, the Appellant's statements were challenged on grounds of voluntariness and an alleged infringement of ss.7 and/or 10(b). The Judge found that the recorded interview with Sgt. Skrine and the re-enactment both met the test for voluntariness. He summarized his findings in this manner:

> I am satisfied beyond a reasonable doubt that Mr. Sinclair voluntarily disclosed his involvement in this offence to Sergeant Skrine. What, in my opinion, happened in this case is that all of the efforts that Sergeant Skrine made to try to encourage Mr. Sinclair to speak were without avail. Mr. Sinclair stood up to them very well.
>
> *At the end of the day, to use that phrase, when Mr. Sinclair was satisfied that the police had all the evidence they needed to convict him, he decided that he would get it off his chest, that he would tell the police what happened and he did so quite voluntarily and confirmed that when he*

was back in cells with the undercover officer.

The police kept introducing bits of evidence that they had, a little at a time, exaggerating some of it, misrepresenting some of it, *but ultimately when Mr. Sinclair knew that the body had been found, that is when he decided the game was up and he thought he may as well come clean and he did so, not because anybody offered him anything, because it relieved him of the pressure he was under*, the police investigation, not the interview, and as he said himself, the court might look more kindly on him having cooperated and that is why he decided to do the re-enactment as well: A.R., Vol.I, *Oral Reasons for Ruling on voir dire,* pp.58-59, paras.[176]-[178], emphasis added.

....

The re-enactment was voluntary as well. It really flows from the statement that was made ... I am satisfied that he participated in that voluntarily, again knowing the circumstances: A.R., Vol.I, p.65, para.[197].

19. The comments made to the undercover cell operator were not "elicited" by the officer. The officer did not do anything "inappropriate" in conversing with the Appellant. As such, this statement was not obtained in violation of the *Charter:* A.R., Vol.I, p.60, paras.[180]-[181]. On the question of whether the other of the Appellant's statements infringed the *Charter,* the Judge said this:

I can say though that the large number of authorities referred to by the Crown satisfy me that it is not the law that the police must cease questioning after a person has retained counsel and said they do not wish to make a statement, that the police are entitled ... that they can continue to question the individual and that does not result in either a denial of counsel or a denial of their Section 7 rights to choose, as long as the questioning does not result in overbearing or overwhelming or depriving them of their right to choose.

....

I am satisfied that the law is clear that once the person has been advised of their rights under Section 10(b), exercised those rights to retain and instruct counsel, that the police can then continue to interview them. If the person simply says, "I do not wish to say anything on advice of counsel," or simply they do not wish to say anything, the police can continue to question them. They are not obliged to stop, nor are they obliged to allow defence counsel to be present during that portion of the investigation or interrogation.

What they cannot do is override or overbear the person's right to choose ...: A.R., Vol.I, pp.36-38, paras.[110]-[116].

20. The trial Judge found, as a fact, that the Appellant was not confused about his rights during his interaction with Sgt. Skrine. He was "concerned" and "confused" about the "choice he had to make, *not whether it was his choice to make*": A.R., Vol.I, p.46, para.[140], emphasis added.

21. The Appellant was "able to communicate" and "clearly [understood] his situation": A.R., Vol.I, p.50, para.[152]. He "understood his right to silence, the advice he got from his counsel": para.[152]. During "many portions of the interview he held his own with [Sgt.] Skrine and challenged Skrine on comments that he made. He talked freely about many things": para.[152]. After watching the recording of the December 14 interview, the Judge was satisfied that the Appellant was "certainly intelligent enough to understand what his situation was and *to make his own choices*": para.[154], emphasis added. From the Appellant's own comments, it was apparent that "he understood his right was to remain silent, *to choose whether to speak or not.* Nobody ever tried to tell him that he did not have that right": para.[160]. See also: A.R., Vol.I, p.57, paras.[169] and [171].

(d) <u>The Court of Appeal for British Columbia</u>

22. On appeal, the Appellant limited his admissibility challenge to the Judge's ruling under s.10(b) of the *Charter.* He did not contest the findings of voluntariness and he abandoned his argument in favour of a s.7 violation after this Court released its decision in ***Singh***, *supra.*

23. The Court of Appeal agreed with the trial Judge that "there was no obligation on the police to stop questioning [the Appellant] when he asked to speak with his lawyer again": A.R., Vol.I, p.74, para.[5]. The Appellant's claim that detainees are entitled to have counsel present during a custodial interview was rejected based on the Court of Appeal's prior decisions to the contrary: A.R., Vol.I, p.74, para.[4].

24. The Appellant takes no issue with the findings of fact that were made by the trial Judge on the *voir dire*, only the legal conclusions that were drawn from them.

PART II – RESPONDENT'S POSITION ON APPELLANT'S QUESTIONS

25. The Respondent does not agree with either of the s.10(b) propositions put forward by the Appellant.

26. Once consultation with legal counsel has occurred on arrest or detention, s.10(b) of the *Charter* does not oblige police to stop a custodial interview and facilitate further contact with a lawyer upon the request of the detainee, unless there has been a fundamental and discrete change in the nature of the investigation within the meaning of ***R. v. Black***, [1989] 2 S.C.R. 138.

27. Section 10(b) of the *Charter* does not guarantee a right to have legal counsel present during a custodial interview.

PART III – ARGUMENT

A. Outline of the Respondent's Argument

28. The Appellant claims that the *Charter* constitutionally guarantees an ongoing right to consult with counsel, as well as the right to have a lawyer present during a custodial interview. In advancing these propositions, he invites the Court to "break new constitutional ground": per Fish J., writing for the minority in ***Singh***, *supra,* para.56.

29. The Appellant's interpretation of s.10(b) extends well beyond the already-established parameters of this right. If accepted, the proposed new implementation duties will fundamentally restrict police interview powers. Notwithstanding initial consultation with a lawyer (including more than one telephone call or an in-person visit, and no matter the length), a detainee will be able to terminate the police interview simply by asking for another opportunity to speak with counsel, or by requesting that his lawyer be present when questioned. Section 10(b) was never intended to have this effect. Nor should it be used as a means by which to negate the important public interest considerations that underlie the scope of the common law confessions rule, as recently accepted by a majority of this Court in ***Singh***, *supra.*

30. In response to the Appellant's claim, the Respondent will make the following points: (1) his expansive interpretation of s.10(b) is not supported by the jurisprudence of this Court or the provincial courts of appeal ; (2) the Appellant has adopted the wrong analytical framework in construing s.10(b) as a constitutional guarantee; and (3) the specifics of his argument in favour of an expanded scope are not persuasive once examined within the proper framework.

B. The Appellant's Expansive Interpretation is not Supported by the Jurisprudence

31. The s.10(b) propositions advanced by the Appellant have been considered on numerous occasions by the provincial courts of appeal and rejected.

32. This is important for a couple of reasons. One, it shows that he seeks to have the scope of s.10(b) re-defined in a significant way. His interpretation of the right to counsel, if endorsed by this Court, will completely change the legal landscape for custodial interviews in Canada. Two, it begs the

question: why has a purposive approach to the right to counsel *not* resulted in the construction put forward by the Appellant, despite 27 years of consideration? The Respondent says the answer is simple. Section 10(b) has never been understood – by its framers or by the courts - to guarantee the extent of protection that the Appellant says it does.

(a) Police are Not Obliged to Facilitate Further Opportunities to Contact Counsel

33. Numerous appellate courts across Canada have held that the implementation duties under s.10(b) of the *Charter* are not re-engaged each time a detainee requests another opportunity to speak with counsel:

> ***R. v. Logan*** (1988), 67 O.R. (2d) 87 (Ont.C.A.), paras.75 and 76; affirmed, [1990] 2 S.C.R. 731:
>
> To sum up, the decisions of the Supreme Court of Canada concerning s. 10(b) deal only with a right to counsel *upon* arrest or detention. Although, in *Clarkson,* Wilson J. spoke for "fairness" to the accused, we agree with Crown counsel that she did so in the context of an accused who was too intoxicated to understand the police warning concerning her right to counsel. *The right to counsel arose at the time of the initial detention. Nothing in the judgment of Wilson J. adopted the American sense of a right to the assistance of counsel apparently on a continuing basis:* emphasis added.
>
> ***R. v. Wood*** (1994), 94 C.C.C. (3d) 193 (N.S.C.A.), paras.113 and 115; leave to appeal dismissed, [1995] S.C.C.A. No.41:
>
> The position of the police in the interrogation of a person who has already received his right to counsel is, I believe, generally different. The police have now complied with the informational and implementational components of s. 10 (b) of the *Charter*. Presumably, such a detained person has now been advised of the right to choose whether to talk or remain silent. The pressing need to stop questioning until counsel's advice has been obtained on this and other matters is no longer there.
>
> ....
>
> *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.* He can, of course, stop the interview by exercising his right to remain silent and, thus, withdraw further participation in it ... emphasis added.

R. v. Roper, (1997), 32 O.R. (3d) 204 (Ont.C.A.), paras.10-12:

... At the end of the third statement the appellant asserted his right to counsel and gave the police the name of his lawyer. The lawyer was eventually located and spoke to the appellant on the telephone for approximately two minutes. The lawyer advised the appellant of his right to silence and urged the appellant to exercise that right ...

Subsequent to these communications, the officer continued with the investigation and about two hours later re-entered the interview room. The officer, having obtained further information about the allegations, provided it to the appellant. The appellant then said "I just better speak to my lawyer" at which time the officer replied that "there are two sides to every story and we would like to hear yours." The appellant then provided his version of the events ...

In our view, it cannot be said that the trial judge erred in finding that the appellant's rights were not violated. The trial judge found that the appellant had been fully advised of his rights by the lawyer, that he had been given an adequate opportunity to consult counsel at that time and that accordingly, there had been no initial violation of his right to counsel. In addition, as found by the trial judge, 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. Accordingly, there was no subsequent violation of s. 10(b) of the Charter of Rights and Freedoms ...

R. v. Gormley (1999), 140 C.C.C. (3d) 110 (P.E.I.C.A.), per Carruthers C.J., paras.43 and 45:

...The evidence establishes that the accused did speak to Mr. MacDougall and that he was advised by Mr. MacDougall of his right to silence and that he should not say anything...

The appellant exhibited a desire to talk to the police about certain matters despite the advice he had been given by Mr. MacDougall. There was no change in circumstances that required the police to cease questioning the appellant until he had a further opportunity to consult with Mr. MacDougall when he arrived at the Detachment. The police did not employ any tactics to deny the appellant of his right of choice or to deprive him of an operating mind. There was, therefore, no violation of s. 10(b) of the *Charter* during the interrogation from the time of the call to Mr. MacDougall at 7:50 a.m. and his arrival at the Detachment at 11:02 a.m. despite the fact the appellant made several assertions during this time period to the effect that he was not saying anything or that he had to wait for Mr. MacDougall ...

R. v. Baidwan, [2001] B.C.J. No.3073 (B.C.S.C.), per Holmes J., paras.78 and 79; affirmed [2003] B.C.J. No.1439 (B.C.C.A.); leave to appeal dismissed, [2003] S.C.C.A. No.377:

I accept Mr. Weber's submission that s.10(b) is limited to the circumstances in which the Charter gives it life, namely on a person's arrest or detention. In those circumstances it

provides the arrested or detained person with an opportunity to consult counsel and with that assistance gain an understanding of his or her position in relation to the state. Mr. Baidwan consulted counsel and by all accounts gained that understanding.

I conclude that Mr. Baidwan was fully advised of his right to counsel and exercised his right to counsel, and that the circumstances did not require that he be re-advised at any stage prior to the conclusion of his third statement. *I find also that 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:* emphasis added.

R. v. Bohnet, [2003] A.J. No. 1106 (C.A.), per Hunt J.A. for the Court, para.16; leave to appeal dismissed, [2003] S.C.C.A No. 479:

In this case, the Appellant consulted a lawyer who, apparently, advised him not to make any statements. Although he was not given a second opportunity to talk to his lawyer before he confessed, that was not a Charter breach in the context of this case...

R. v. Mackay (2004), 241 Sask.R. 238 (Sask.C.A.), para.21; affirmed, [2005] 3 S.C.R. 607:

As counsel for the Crown correctly pointed out the right to counsel need not necessarily precede every encounter with the police; the true question is whether the accused has been advised of his rights and particularly the right to silence. It is clear from the course of the interrogation that when the examination resumed the appellant was aware of his right to remain silent and said that he would make no comment until a lawyer was present. This right, as counsel conceded in this court, is the most fundamental and most important at this early stage of the proceeding. In the circumstances the trial judge did not err in concluding that there had been no violation of his Charter rights.

R. v. Weeseekase, [2007] S.J. No.573 (Sask.C.A.), paras. 3 and 21:

The *Charter* breach, as determined at trial, consisted of the investigating officer's failure to delay or "hold off" taking the respondent's statement during an interview that was conducted nine days after the respondent's arrest. By the time of the interview, the respondent had already appeared twice in court on the offence charged, had been represented both times by Legal Aid counsel, and had been remanded in custody both times, by consent.

....

In the circumstances of the present case, the respondent, had been on remand nine days, having had not one, but two, court appearances where she was represented by legal counsel. She is presumed to have been given the essential advice regarding her right to remain silent. Upon asserting her desire to consult her counsel prior to giving a statement, then deciding against it, she in any event received the benefit of an additional overnight period to exercise the desired right. She was given another opportunity to contact counsel prior to the taking of the statement.

> We agree that in these circumstances different considerations apply, and the principles in *Prosper* are inapplicable.
>
> ***R. v. Anderson***, [2009] A.J. No.176 (Alta.C.A.), para.34:
>
> We are not persuaded that the trial judge misapplied the *Charter* to his reasonable fact findings. *The appellant's position comes down to the suggestion that, regardless of the circumstances, the police must hold off from interviewing the detainee if the detainee seems diffident about answering questions without more legal advice* ... emphasis added.

34. The Appellant cites two appellate decisions that he says recognize a continuing right to access counsel: ***R. v. R.(P.L.)*** (1988), 44 C.C.C. (3d) 174 (N.S.C.A) and ***R. v. Whitford***, [1997] A.J. No. 309 (Alta.C.A.). They are discussed at paragraphs 36 and 37 of his Factum.

35. Neither of these cases supports the Appellant's position. ***R. v. R.(P.L.)*** was decided before the decision of this Court in ***Hebert***, *supra*, wherein McLachlin J. (as she then was), noted the following:

> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. *Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter.* Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence: p. 184, emphasis added.

36. In ***Whitford***, the Alberta Court did not endorse – as a stand alone proposition – the Appellant's suggestion that each time a detainee asks to speak with a lawyer, s.10(b) is re-engaged and contact with counsel must be facilitated. Rather, the detainee in that case asserted his right to counsel, contacted a law office, and almost immediately thereafter, indicated to police that he did not want to speak with them until he spoke to someone from "legal aid". The police, *without knowing whether the detainee had in fact spoken with a lawyer and received legal advice*, proceeded to question him. On the facts of the case, the Court found that the detainee was not afforded a reasonable opportunity to contact counsel pursuant to his *first* request to do so: paras.13-14.

(b) <u>Section 10(b) Does Not Guarantee a Right to Have Counsel Present</u>

37. In line with this Court's decision in ***Hebert***, *supra*, appellate courts across Canada have also

rejected the suggestion that the right to counsel guarantees the presence of a lawyer during a custodial interview. The Appellant offers no authority to the contrary:

> ***R. v. Emile*** (1988), 42 C.C.C. (3d) 408 (N.W.T.A.), per Lieberman J.A., para.78:
>
> To hold that once the accused person has consulted counsel the authorities cannot question him without first receiving permission from his counsel or without counsel being present is in my view reading more into s. 10(*b*) than was intended ...
>
> ***R. v. Logan***, *supra*, para.76 :
> ... s. 10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel before any statements of the accused are elicited. The words "upon arrest or detention" indicate a point in time, not a continuum ...
>
> ***R. v. Cuff*** (1989), 49 C.C.C. (3d) 65 (Nfld.C.A.), per Goodridge C.J.N., p.72:
>
> ... once counsel has been retained and instructed there is no reason why the police should not question the suspect. It is part of the process of criminal investigation. The ethical code which requires in civil cases that persons represented by counsel should communicate only through counsel has no relevance in that process. It is not a deprivation of the right to retain and instruct counsel.
>
> ***R. v. Friesen*** (1995), 101 C.C.C. (3d) 167 (Alta.C.A.), per Côté J.A., paras.47-48; leave to appeal dismissed, [1995] S.C.C.A. No.539:
>
> ... he suggests that the police would violate the Charter if they ever did anything under any circumstances which by any means or to any degree dissuaded a detained accused from again speaking to a lawyer or from answering questions without a lawyer present ...
> As a matter of policy, any such broad and rigid rule would do much more harm than good ...
>
> ***R. v. W.M.*** (1999), 133 C.C.C. (3d) 168 (Ont.C.A.), per Rosenberg J.A. paras.15-16:
>
> ... as the law now stands, the Charter does not guarantee an adult offender the right to have a lawyer present during questioning ...
>
> ***R. v. Plata*** (1999), 136 C.C.C. (3d) 436 (Que.C.A.), per LeBel J.A., paras.9-10:
>
> La déclaration verbale faite par Plata résulte de sa décision libre et volontaire de parler aux policiers, après consultation d'un avocat qui lui a donné les conseils nécessaires et fourni toutes les informations utiles. À ce moment, on ne saurait faire grief aux policiers d'avoir interrogé l'appelant en l'absence de son avocat. Aucune règle n'interdit à des policiers de parler au prévenu une fois qu'il a exercé son droit constitutionnel de communiquer avec un avocat et après avoir obtenu l'avis de celui-ci. Dans ces conditions, si le prévenu choisit

volontairement de donner des renseignements, la Charte canadienne est respectée ...

R. v. Gormley, *supra,* paras.37-41:

The appellant ... submits the police should have refrained from eliciting evidence from him until he had a reasonable opportunity to actually discuss his situation with Mr. MacDougall in person and have Mr. MacDougall present during the interrogation ...

... the former decisions of the Supreme Court of Canada ... do not support the appellant's submission on this point. *Nor is there anything in the Burlingham case to distinguish the comments of Madam Justice McLachlin in the Hebert case where she, when dealing with the right to silence, states on p. 42 that there is nothing to prohibit the police from questioning an accused in the absence of counsel after the accused has retained counsel ..*: emphasis added.

R. v. Ekman (2000), 146 C.C.C. (3d) 346 (B.C.C.A.), per Newbury J.A., para.26; leave to appeal dismissed, [2006] S.C.C.A. No.339:

In summary, whilst an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, after consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing a suspect (again within reasonable limits), nor bound to advise counsel they intend to question the detainee.

See also:

R. v. Wells, [2001] O.J. No.81 (Ont.C.A.), paras.37-39; leave to appeal dismissed, [2001] S.C.C.A. No.347

R. v. Soomel and Mann (2006), 205 C.C.C. (3d) 45 (B.C.C.A.), para.62; leave to appeal dismissed, [2006] S.C.C.A. No.83

R. v. Ekman (2000), 209 C.C.C. (3d) 121 (B.C.C.A.), para.26; leave to appeal dismissed, [2000] S.C.C.A. No.347.

38. These cases speak to a common perspective on the scope of s.10(b). They recognize the right to counsel as a *limited* right, one that is focused on a particular point in the investigative process and has a specific purpose, namely, facilitating immediate access to preliminary legal advice that is intended to assist detainees in making an informed choice about whether to speak with the authorities. This is the correct way in which to approach s.10(b). It is consistent with the

jurisprudence; the principles that govern a purposive interpretation; and with *Charter* analysis generally.

C. The Appellant Applies an Incorrect Analytical Framework in Construing s.10(b)

(a) A Misguided Purposive Approach to *Charter* Interpretation

39. The Appellant describes his interpretation of s.10(b) as the product of a purposive approach and says it is consistent with the manner in which the right to counsel has been construed over time. This is incorrect.

40. Under a purposive analysis, the parameters of the right are defined *in light of its purpose as that purpose is revealed through a consideration of the guarantee* within its "proper linguistic, philosophic and historical contexts": ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295, p.344. The actual purpose of the right emerges after full consideration of the context in which it was established as a form of constitutional protection, and has functioned over time. The purposive approach is explained this way by Professor Peter Hogg:

> The actual purpose of a right is usually unknown, and so a court has a good deal of discretion in deciding what the purpose is, and at what level of generality it should be expressed. *But some guidance can be obtained from the language in which the right is expressed, from the implications to be drawn from the context in which the right is to be found, including other parts of the Charter, from the pre-Charter history of the right and from the legislative history of the Charter.* Moreover, as a body of case-law develops on the meaning of a particular right, the core of the definition tends to become settled.[1]

41. Ascertaining the purpose of a right through a consideration of its context is important. Although it is accepted that constitutional rights should be liberally construed to ensure they secure the full benefit of the *Charter's* protection, a proper appreciation of context is necessary to prevent an interpretation of the right that "overshoot[s]" its "actual purpose":

> the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific

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1 Peter W. Hogg, *Constitutional Law of Canada (Volume 2)*, Loose-leaf Edition, Thomson Carswell, p.36-30, emphasis added.

> right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker [1984], 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts:* ***Big M Drug Mart****, supra,* p.344, emphasis added.

42. There is no question that s.10(b) has been broadly construed by the courts in light of its underlying purpose(s), and that both the meaning and the scope of the right to counsel will necessarily be informed by the interests it was meant to protect: ***Big M Drug Mart****, supra*, p.344. However, a purposive approach to rights-construction does not start with selecting a desired end result based on ideological or policy considerations, and then demand that the guarantee be construed in a manner which best achieves this objective. The *Charter* "is not a panacea; it does not automatically prescribe ready-made solutions for all perceived shortcomings in the criminal law".[2] As noted by McIntyre J. in ***Reference Re Public Service Employee Relations Act (Alberta)***, [1987] 1 S.C.R. 313, p.394:

> while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, *is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society:* emphasis added.

43. The Appellant has misapplied the purposive approach to *Charter* interpretation by pursuing an end result without consideration of important contextual factors. Consequently, he does treat s.10(b) as an "empty vessel", ready to take on whatever meaning he considers most advantageous to the detainee. The Appellant has selected broadly-framed objectives that he considers ideal. In his words, s.10(b) is about ensuring detainees are "treated fairly" and is "aimed at correcting the imbalance caused by detention": Appellant's Factum, para.27. He has then proceeded to interpret

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2 The Honourable Justice Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter", *The Charter and Criminal Justice Twenty-Five Years Later,* Jamie Cameron and James Stribopoulos, LexisNexis (2008), p.306.

s.10(b) with these objectives in mind, arriving at a point where in order to achieve his desired result, it seemed only logical to impose new implementational duties on police. An expanded scope of s.10(b) was inevitable on this analysis.

44. The problem with the Appellant's approach is three-fold. First, his construction of the right ignores a highly significant aspect of the constitutional context in which s.10(b) operates, namely, the right to silence and the manner in which its parameters have been construed by this Court. Second, his articulation of purpose fails to account for the fact that this Court has consistently limited the purpose of s.10(b) to the provision of *preliminary* legal advice on arrest or detention. Using the terminology of Professor Hogg, the "core" of the right to counsel is already "settled". Third, the Appellant approaches s.10(b) as if it functions on the same level as s.7 - as a basic and overarching guarantee of adjudicative fairness. The right to counsel is much more specific and plays a qualitatively different role than s.7. It is one of the *Charter's* enumerated legal rights that offer *support* for the broader notion of adjudicative fairness, but were not themselves intended to address all aspects of the process.

(b) <u>The Appellant's Analysis Ignores the Constitutional Context of s.10(b)</u>

(i) <u>The Right to Counsel Plays a Supporting Role</u>

45. The purpose of s.10(b) – and its scope – must be ascertained with reference to its larger constitutional context, including "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter": ***Big M Drug Mart***, *supra*, p.344. This includes the right to silence as protected under s.7 and subsumed in the common law confessions rule.

46. As the dissenting judgment notes in ***Singh***, *supra*, the right to counsel and the right to silence are "close companions, like glove and hand": para.62. The relationship was explained this way in ***Hebert***, *supra:*

> Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent. Section 10(b) requires that he be advised of his right to consult counsel and permitted to do so without delay.

> *The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence.* The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces ... : per McLachlin J., writing for the majority, p.176, emphasis added.

47. In ***R. v. Hawkins*** (1992), 72 C.C.C. (3d) 524 (Nfld.C.A.); reversed [1993] 2 S.C.R. 157, it was noted that the right to counsel and the right to silence are:

> *associated and complementary.* The right to be informed that one may consult counsel can be viewed as *enriching* one's right to keep one's silence ... It is thus an added protection against unwitting prejudicial statements: per Marshall J.A. for the majority, p.538, emphasis added.

48. The Appellant's analysis of s.10(b) makes no mention of the role that the right to silence, as articulated by this Court, plays in defining the extent of constitutional entitlement under this provision. The omission is significant in light of the obvious nexus between the two guarantees. The "most important function" of the right to counsel is to *support* a detainee's right to silence through access to preliminary legal advice that tells the detainee he or she is not obliged to speak with police: ***Hebert***, *supra.* The s.10(b) propositions advanced by the Appellant do more than *support* the right to silence – they overtake it.

49. It is constitutionally illogical to define s.10(b) in a way that more broadly safeguards the right to silence than s.7 of the *Charter* itself. Instead, the scope of the right to counsel must be determined in a manner consistent with the limits that this Court has recognized for the right to silence, and in light of s.10(b)'s supporting role.

(ii) <u>The Appellant's Construction is Irreconcilable with *Singh*</u>

50. The "essence" of the right to silence is a free and informed choice on whether to speak with the authorities: ***R. v. Jones***, [1994] 2 S.C.R. 229. The most recent pronouncement from this Court on the application of the right to silence within the context of a custodial interview is ***Singh,*** *supra.* At issue in that case was the scope of a detainee's pre-trial right to silence as protected by s.7 of the

Charter, and the "intersection between" the right to silence and the common law confessions rule: para.1. The appellant in ***Singh*** made admissions to police that he acknowledged were "voluntary" and "obtained in conformity with the common law confessions rule": para.22. However, he sought their exclusion based on the "residual protection afforded to the right to silence" under s.7: para.22. The appellant's complaint was grounded in the fact that during his interview he "asserted his right to silence 18 times": para.13. Police continued to question him and the appellant argued that once he asserted his right to silence, the interview should have terminated.

51. Charron J., writing for the majority, held that a finding of voluntariness will be "determinative" of the right to silence issue: para.37. As the common law confessions rule does not preclude persistent questioning by police in the absence of counsel once the detainee has spoken to a lawyer (short of denying the suspect the right to choose or depriving him of an operating mind), nor does the right to silence: para.46, relying on ***Hebert***, *supra.* The use of "legitimate means of persuasion" is permitted under the confessions rule (and thereby the right to silence), even where a detainee says that he or she does not want to speak to police: para.47.

52. In ***Singh***, *supra,* this Court refused to impose an obligation on police to "stop questioning a suspect whenever he or she clearly asserts the right to silence": para.43. In this appeal, the Appellant seeks the functional equivalent under s.10(b). Through expanded implementational duties, the Appellant wants this Court to require of police that they stop questioning a suspect whenever he or she seeks a further opportunity to consult with a lawyer, or makes a request to have a lawyer present. A different methodology; but the same end result.

53. If the right to silence is not infringed by persistent questioning in the absence of counsel once a detainee has received legal advice, then the parameters of s.10(b) cannot be defined in a way that prohibits this same conduct. Otherwise, the right to counsel offers greater protection for the right to silence than the right to silence itself.

54. The Appellant's interpretation of s.10(b) is irreconcilable with ***Singh***. The right to silence was defined the way it was in ***Singh*** to take account of the state interest in the effective investigation of crime, and to achieve a "proper balance between the individual's right to choose whether to speak to the authorities and society's interest in uncovering the truth in crime investigations": para.45. The importance:

> of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident: ***Singh***, *supra,* para.28.

55. This balancing occurred with a full knowledge and appreciation of the same realities of the custodial interview process that the Appellant now relies upon to justify an expansion of s.10(b):

> After detention, the state authorities are in control and the detainee, who cannot simply walk away, is in a more vulnerable position. There is a greater risk of abuse of power by the police. The fact of detention alone can have a significant impact on the suspect and cause him or her to feel compelled to give a statement: ***Singh***, *supra,* para.32.

56. The Appellant's construction of s.10(b) serves only the interests of the detainee. No attempt is made by him to balance the individual's interests with those of the state, as was undertaken by this Court in ***Singh.*** If the Appellant's view of s.10(b) is accepted, all a detainee need do to shut down the police interview process is ask for another opportunity to speak with counsel, or demand that a lawyer be present.

57. Moreover, serious questions arise about the workability of the implementational duties proposed by the Appellant. If the right to counsel guarantees the physical presence of a lawyer, how will that be achieved in small, rural jurisdictions where access to counsel may only be available by way of telephone? What if counsel is not available to attend in person for a considerable period of time? How long must police wait with their investigation to accommodate attendance? What if the place at which the detainee is being held, for security reasons or otherwise, cannot accommodate the attendance of counsel? What about detainees who cannot afford to have a lawyer attend in person?

Does the Appellant suggest that because s.10(b) guarantees the presence of counsel, this is a service that must be facilitated and paid for by the state? In ***R. v. Prosper***, [1994] 3 S.C.R. 236, the Court specifically cautioned against construing s.10(b) in a manner that imposes a "positive constitutional obligation" on government: p.266.

58. A more appropriate – and constitutionally consistent response – to the issues raised in this case is to affirm the implementational duties that have already been ascribed to s.10(b), and let the Appellant's concerns about the "leeway afforded to the police in questioning [a] detainee" be addressed through the common law confessions rule: ***Singh***, *supra*, para.47. The confessions rule allows for a contextual consideration of the interview process on a case-by-case basis and an assessment by the trial judge, on the evidence, of its *actual* impact on the detainee's choice to speak with the authorities. A reasonable doubt on whether a detainee's will has been overborne during a custodial interview will result in exclusion of the statement. Persistent questioning in the face of repeated requests to speak with counsel, or demands that the questioning not occur without a lawyer present, can be factors that are considered in assessing voluntariness:

> Without trying to indicate all the factors that can create an atmosphere of oppression, such factors include depriving the suspect of food, clothing, water, sleep, or medical attention; *denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time*: ***R. v. Oickle***, [2002] 2 S.C.R. 3, para.60, emphasis added.

59. Together, the right to counsel (as presently defined), the right to silence and the common law confessions rule adequately protect a detainee during the custodial interview process. As noted in ***R. v. Whittle***, [1994] 2 S.C.R. 914, these rules "operate together to provide not only a standard of reliability with respect to evidence obtained from persons suspected of crime who are detained but fairness in the investigatory process": p.931, per Sopinka J., writing for the Court.

(c) <u>The Core of the Right to Counsel is Settled</u>

60. In seeking an expanded scope for s.10(b), the Appellant describes its purpose in various ways, always using open-ended language . The right to counsel exists to "ensure that a detainee is treated fairly in the criminal process": Appellant's Factum, para.27. It facilitates advice on "how to

exercise his or her rights when dealing with the authorities": paras.27 and 52. Section 10(b) ensures that a detainee is "provided with meaningful choices": paras.27 and 52. It is "aimed at correcting the imbalance caused by detention": paras.27 and 52. Its purpose is to guarantee "comparable access to legal advice as the person would have had if he or she were not in detention": para.45. The right to counsel "[fosters] principles of adjudicative fairness": para.52.

61. The purpose of the right to counsel does not have the breadth attributed to it by the Appellant. It is narrower in its focus and more importantly, oriented toward a specific point of time in the investigative process. Section 10(b) is aimed at the "external parameters for interrogation, conditions-precedent for questioning".[3]

(i) <u>The Right Crystallizes at the Point of First Contact</u>

62. As established by this Court, the principal objective of s.10(b) is to "provide detainees with *an* opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfill those obligations": ***R. v. Manninen***, [1987] 1 S.C.R. 1233, pp.1242-43, emphasis added. Section 10(b) "seeks to ensure that persons who become subject to the coercive power of the state will know about their right to counsel and will be given *the opportunity* to exercise it so they can make an informed choice whether to participate in the investigation against them": ***Singh***, *supra*, para.33, emphasis added. The right to counsel is focused on the front end of the investigative process – the period of time between "arrest or detention" and the state's attempt to gather evidence from the detainee.

63. The right to counsel responds to the "*immediate need* of legal advice" in order to protect a detainee against self-incrimination and assist him or her in regaining liberty: ***R. v. Bartle***, [1994] 3 S.C.R. 173, p.191, emphasis added. The words "without delay" as found within s.10(b) have been equated with "immediately" in recognition of the fact that the right to counsel was intended to crystallize *and* fulfill its purpose when an arrest or detention first arises: ***R. v. Debot,*** [1989] 2 S.C.R.

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3 The Honourable Justice Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter", *supra*, p.297.

1140. As noted in ***Hebert***, *supra*, p.176: "The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel *at the outset*, so that he is aware of his right not to speak to the police ...": emphasis added.

64. The main function of counsel who is contacted pursuant to s.10(b) is to confirm the existence of the right to remain silent: ***Manninen***, *supra*. The purpose of s.10(b) is to ensure that the detainee has access to advice "*before* he is questioned or otherwise required to provide evidence": ***Manninen***, *supra*, p.1243, emphasis added. Only then can the detainee make an informed choice about whether to speak with police, or otherwise co-operate in the gathering of evidence. As noted by the Ontario Court of Appeal in ***Logan***, *supra*, the "clear implication" of this Court's judgment in ***Manninen*** is that:

> s. 10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel before any statements of the accused are elicited. The words "upon arrest or detention" 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.113, emphasis added.

65. In ***R. v. Oickle***, *supra*, this Court drew a clear distinction between the time-specific protection afforded by s.10 and the common law confessions rule, which remains engaged throughout the interaction between detainee and interviewer. The confessions rule applies whenever a person in authority questions a suspect. *By contrast*, "the protections of s.10 only apply 'on arrest or detention'": para.30.

(ii) <u>The Language of s.10(b) is Consistent with A Limited Purpose</u>

66. Had it been intended that the right to counsel extend beyond the initial act of arrest or detention, or include an entitlement to have counsel present, the language of s.10(b) could easily have been drafted that way. Section 10 might have been worded in this manner: "Everyone has the right on arrest or *throughout detention"* (a) to be informed promptly of the reasons therefore; (b) to retain and instruct counsel without delay and to be informed of that right; (c) *to have counsel present when questioned ...* ". Language to this effect was not utilized and although not determinative of the issue, a purposive approach to rights-construction does not ignore the linguistic context of the

guarantee: "the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, *to the language chosen to articulate the specific right or freedom ...*": ***Big M Drug Mart***, *supra*, p.344, emphasis added.

67. The Appellant argues that the use of the word "instruct" in s.10(b) conveys the "notion of a continuing right that can be exercised whenever and wherever the client needs legal assistance": Appellant's Factum, para.59. This broad reading of "instruct" would leave the definitional parameters of the right forever uncertain, capable of shifting and taking on new meaning with each different set of circumstances. It furthermore ignores the constitutional context of which s.10(b) forms a part, including the close relationship between s.10(b) and the right to silence. In light of its supporting role, the right to counsel has been repeatedly referenced as a right to access *preliminary* legal advice, *immediately* following arrest or detention and *before* the detainee is questioned by police. The meaning of the word "instruct" must be informed by this context. Consistent with its dictionary definition, the term as it appears in s.10(b) does speak to a sharing of information between counsel and the detainee client, but with a specific focus and for a limited purpose.

68. The Appellant also argues that the French version of s.10(b) – including the phrase "l'assistance d'un avocat" - invites a broad and unrestricted interpretation of the right to counsel because it "conveys the sense of coming to the aid of another, or giving/lending assistance": Appellant's Factum, para.63. Again, context is important and although a particular word may be capable of broad scope in certain circumstances, this does not mean that it mandates a specific construction, or that it must play a determinative role in the interpretive process.

69. Although not referred to frequently in the case law, the French version of s.10(b) was noted by this Court in ***Prosper***, *supra*, where the right to counsel was characterized as a right to *consult*, not a right to have counsel present. The French version of s.10(b) was also referred to by McLachlin J.A. (as she was then), writing in dissent in ***R. v. Smith*** (1988), 43 C.C.C. (3d) 379 (B.C.C.A.); affirmed [1989] 2 S.C.R 368:

> The French version of the *Charter*, it may be noted, leaves no doubt that the *provision of legal advice* to the detainee is one of the purposes of s. 10(b). While the English version refers to the right to "retain and instruct counsel without delay", the French version speaks of the right "d'avoir recors sand delai a l'assistance d'un avocat..." p.390, emphasis added.

In neither case was the French version of s.10(b) seen to take the right beyond the provision of legal advice at the front end of the process. Nor is the concept of providing legal advice for a specific and time-limited purpose inconsistent with the notion of "coming to the aid of another, or giving/lending assistance".

70. The Appellant's reliance on the French wording as a justification for an expanded scope to s.10(b) presupposes that "l'assistance d'un avocat" necessarily entails something greater than consultation for the purpose of obtaining preliminary legal advice. If this is so, one has to ask why the framers of the *Rome Statute of the International Criminal Court,* which the Appellant points to in support of his argument, found it necessary to include under Article 55 both the right "to have legal *assistance* of the person's choosing" and the right to "be questioned in the presence of counsel". If the right to "assistance" automatically includes the right to be questioned in the presence of counsel, the second of these safeguards was entirely unnecessary.

71. The provincial appellate decisions that have declined to interpret s.10(b) in the manner proposed by the Appellant (referenced earlier), reflect the proper understanding of the right to counsel's limited purpose. So do the ruling of the trial Judge in this case, and the decision of the Court of Appeal for British Columbia:

> it is important to keep in mind the principle underlying the right to counsel entrenched in s.10(b) of the *Charter*. Simply put, it is to ensure that persons who are in the vulnerable position of *just* having been arrested or detained are informed of their right to obtain *timely* legal advice, particularly with respect to their right to remain silent: A.R., Vol.I, p.84, para.[35], emphasis added.

(iii) <u>The Informational Duties Speak to a Limited Purpose</u>

72. On close examination, the informational and implementational duties that have been ascribed to s.10(b) are consistent with this same appreciation. A detainee must be told of the right to retain

and instruct a lawyer "without delay" – emphasizing that what is contemplated by s.10(b) is contact with counsel at the very start of the arrest or detention. The information provided by police must mention the availability of legal aid and whatever duty counsel service is then available in the place of arrest or detention. The detainee must be told of the right to access free, immediate and *"temporary"* legal advice through the duty counsel service, without regard to financial means: ***Prosper**, supra,* pp.256-8. The focus of the informational component is on immediate and preliminary legal advice, not the ongoing assistance of counsel.

73. The detainee must be told of the means by which to access duty counsel, including the availability of a toll-free number if it exists. This ensures that the detainee can make an informed choice on whether to assert the right to counsel *before* speaking with police, and exercise it at the point that it was meant to be exercised. When a detainee initially asserts the right and then changes his or her mind, police must tell the detainee of the right to a reasonable opportunity to contact counsel, as well as the police obligation to hold off from trying to elicit incriminating evidence until that occurs: ***Prosper**, supra.* This ensures that the decision to forego legal advice *before* speaking with police is an informed one. Finally, where there is a fundamental and discrete change in the nature of the investigation, such that the detainee is rendered subject to a different charge or faces a significant increase in jeopardy, police must again provide the information mandated by s.10(b). The change in the investigation puts the detainee back into a position of *first instance*:

> The rights accruing to a person under s. 10(b) arise because he or she has been arrested or detained for a particular reason. An individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy: ***Black**, supra,* p.152.

(iv) <u>The Implementational Duties Speak to a Limited Purpose</u>

74. The implementational duties under s.10(b) are also tailored to meet the needs of a detainee *between* arrest or detention and the start of demands or requests by police for the provision of evidence. Upon assertion of the right to counsel, police must provide the detainee with a reasonable opportunity to exercise the right in private and contact a lawyer of his or her choice. In the absence of a valid waiver, police must refrain from using the detainee as a source of information *until* the right

has been exercised. They cannot commence attempts to elicit incriminating evidence, compel the detainee to make a decision or request that the detainee participate in a process with potentially adverse consequences *until* he or she has been provided with a reasonable opportunity to reach counsel: ***R. v. Ross***, [1989] 1 S.C.R. 3. Where there is a fundamental and discrete change in the nature of the investigation, mandating that the detainee be re-advised of the right to counsel, police must again provide a reasonable opportunity to make contact with a lawyer. The detainee is back in precisely the same position that he or she was when the arrest or detention first arose.[4]

75. The informational components of s.10(b) "equip" the detainee to make an informed choice on whether to exercise the right to counsel. The implementational components provide the opportunity to "put the choice into effect". [5] Together, they work to ensure that *after* an arrest or detention and *before* police approach the detainee with requests or demands, the detainee understands his or her rights and obligations vis-à-vis the authorities. Once that occurs, the purpose of s.10(b) has been fulfilled.

76. Nowhere in the decisions of this Court setting out the informational and implementational duties is it said that once the right to counsel has been exercised, both duties continue to apply and each time a detainee indicates a desire to speak with a lawyer, or wants to have a lawyer present, the police must down their tools and facilitate access to counsel.

(v) <u>The Right to Counsel is Known as a Limited Right</u>

77. This Court has already held that s.10(b) is not without limits. For instance, it cannot be construed so broadly that – even with a purposive approach - it places a substantive obligation on government to provide state-funded counsel: ***Prosper***, *supra,* pp.265-8. Indeed, a proposal to this effect was specifically rejected by the framers of the *Charter.* They declined to incorporate a clause into s.10 which read this way: "if without sufficient means to pay for counsel and if the interests of

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4 This summary of the informational and implementational duties under s.10(b) was taken, in part, from The Honourable Mr. Justice David Watt, *Watt's Manual of Criminal Evidence (2006),* Thomson Carswell:2006, pp.583-590.

5 *Ibid,* p.590.

justice so require, to be provided with counsel".[6] As a result, legal assistance for trial purposes as a matter of constitutional entitlement is not addressed through s.10(b). Rather, it is managed under sections 7 and 11(d) of the *Charter,* and state-funded counsel is available only if it can be shown that the assistance is essential to a fair trial: ***R. v. Rowbotham*** (1988), 63 C.R. (3d) 113 (Ont.C.A.).

78. The Court has also emphasized that a detainee must be diligent in exercising the right to counsel. Where diligence is lacking, police are not required to suspend their investigation and await contact with a lawyer. In ***R. v. Smith***, [1989] 2 S.C.R. 368, Lamer J. noted the following at p.385:

> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. *The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society.* An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks: emphasis added.

79. The Respondent does not dispute that in ascertaining the purpose of s.10(b), this Court has recognized the power imbalance brought about by state detention; has emphasized the importance of the right to counsel in ensuring fair treatment; and has repeatedly noted the need for access to legal advice so that detainees can make an informed choice about whether to speak with the authorities, or otherwise co-operate with the evidence-gathering process.

80. However, the fact that these interests are protected by s.10(b) does not mean that the purpose of the right must be defined in a manner that ensures "adjudicative fairness" *generally;* facilitates advice on the exercise of rights at *all stages* of the "criminal process"; or "corrects the imbalance caused by detention" throughout the *whole* of a detainee's interaction with state authorities.

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6 Don Stuart, *Charter Justice in Canadian Criminal Law (4th),* Thomsen Carswell: 2005, p.342.

(vi) *Burlingham* Does Not Assist the Appellant

81. The Appellant says that ***R. v. Burlingham***, [1995] 2 S.C.R. 206 supports his interpretation of s.10(b) as an ongoing right, but as noted by the Court below, he has overstated the effect of the decision. Section 10(b) violations were found in that case and continued questioning by police despite a further request to speak with counsel was cited as a factor. However, the Court's reference to that aspect of the circumstances must be viewed in context. Two other – and much more significant - factors were also at play. First, police "constantly denigrated the integrity of defence counsel" through repeated disparaging comments about his loyalty, commitment and availability: para.4. This undermined the detainee's confidence in his lawyer, putting him in a situation equivalent to not having received advice in the first place. Second, the Court found that as the interview unfolded, there was a fundamental change in the nature of the investigation and the detainee was led to understand that he faced a charge which was different than the one he was arrested for. In accordance with ***Black,*** *supra,* this fact alone would have triggered a reiteration of the s.10(b) right and police were obliged to facilitate a further opportunity to contact the detainee's counsel of choice: para.20.

82. The s.10(b) violations in ***Burlingham*** arose out of acts that cumulatively amounted to a deliberate attempt by police to deny the detainee his right to counsel. The Appellant submits that in *every* case, *irrespective* of the circumstances, s.10(b) obliges police to cease their questioning and facilitate a second opportunity to speak with counsel upon the request of a detainee. Moreover, in *every* case, *irrespective* of the circumstances, s.10(b) guarantees the right to have a lawyer present during the interview. These propositions were not considered in ***Burlingham*** and given the unique features of that case, the judgment does not speak to a broadened purpose for s.10(b).

(d) Section 10(b) is a Specific Legal Right, not an Overarching Guarantee

83. Underlying the Appellant's interpretive approach to s.10(b) is an implied assumption that it functions on the same level as s.7 of the *Charter,* namely, as an overarching "basic guarantee" of fairness in criminal law process. As a matter of constitutional theory, this characterization of the right would render it capable of filling in perceived gaps, or offering residual protection in areas that may

not otherwise be subject to scrutiny through a specific *Charter* right or freedom. It also carries "greater potential for the exercise of judicial authority" because of the broadened nature of the right.[7]

84. It is wrong to approach s.10(b) in this way. The right to counsel does not work as an overarching guarantee of fairness, the purpose of which is to establish minimum thresholds that seek to achieve a certain quality of result in varying circumstances. Section 10(b) is a specific, enumerated legal right that plays a fundamentally different role than s.7. It guarantees a *particular* procedure in a *particular set* of circumstances that – *in combination with other legal rights* – works to support the notion of fairness enshrined within s.7.[8]

85. The relationship between s.7 and the *Charter's* more specific guarantees was explored by this Court in ***Motor Vehicle Reference***, [1985] 2 S.C.R. 486, per Lamer J., writing for the majority, p.509. There, it was considered whether the term "fundamental justice" in s.7 is limited to natural justice. Lamer J. adopted a broader construction, in large part to ensure that the legal rights delineated in ss.8 through 14 of the *Charter* do not take on "greater content" than s.7:

> [Equating "fundamental justice" with natural justice] would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). *Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8 to 14 greater content than the general concept from which they originate.*
> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. *They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14 ...:* emphasis added.

86. Building on this same framework, the Court held in ***Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),*** [1990] 1 S.C.R. 425 that s.7 has "residual content": per Wilson J., pp.470-1. As explained by Professor Don

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7 David M. Siegel in "*Canadian Fundamental Justice and U.S. Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*", (2005) 37 Geo.Wash. Int'l L. Rev 1, p.7.

8 The distinctions between a constitutionally entrenched "basic guarantee" of adjudicative fairness and enumerated rights are canvassed by Siegel, *ibid,* at pp.7-8.

Stuart, this means that "[e]ven where the subject matter of the *Charter* challenge would appear to have been covered by one of the specific protections in ss.8 to 14, it is now quite clear that an alternative argument can be tried under s.7".[9]

87. Depending on the context, the principles of fundamental justice as guaranteed through s.7 can be "broader" and "more general" than particular legal rules that arise out of the common law, or have themselves been constitutionally entrenched through ss.8 to 14 of the *Charter*: ***Hebert**, supra,* pp.163-4. There are a number of reasons for this, including the Court's recognition of the fact that a "legal rule relevant to a fundamental right may be too narrow to be reconciled with the philosophy and approach of the Charter and the purpose of the Charter guarantee": ***Hebert,** supra,* p.164. Furthermore, the principles of fundamental justice must remain broad-scoped and inherently flexible so that they allow for progressive interpretation, and can be adapted over time to changing conditions.[10]

88. If this Court accepts the Appellant's interpretation of the right to counsel, it will turn the residual protection theory on its head and result in precisely the "incongruity" that the Court sought to avoid in ***Motor Vehicle Reference***. Section 10(b) will take on "greater content" than s.7. As discussed, the right to silence as a principle of fundamental justice does not prohibit persistent questioning of a detainee after his or her initial consultation with counsel, and in the absence of a lawyer. To hold that s.10(b) precludes police from engaging in this same behaviour will create a situation whereby the procedural means by which the *Charter* safeguards a detainee's right to silence takes on larger scope than the principle of fundamental justice itself.

89. Not only has the Appellant failed to account for the parameters of the right to silence as a contextual consideration in defining the scope of s.10(b), he has failed to appreciate the implications for *Charter* analysis generally should his construction of the right prevail.

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9 *Charter Justice in Canadian Criminal Law (4th), supra,* p.52.
10 Peter W. Hogg, *Constitutional Law of Canada (Volume 2), supra,* pp.36-25, 36-27.

D. The Appellant's Justifications for a Broad Scope to s.10(b)

90. The Appellant lists a number of "reasons" at paragraphs 51 to 86 of his Factum that he says justify construing s.10(b) in a manner that guarantees the presence of counsel during a custodial interview. In light of the foregoing analysis, the Respondent respectfully submits that none of these "reasons" are persuasive once s.10(b) is understood within its proper interpretive context. The parameters of the right have already been determined and its limitations make good sense in light of s.10(b)'s accepted role. There are additional points to make on the Appellant's justification for an expanded interpretation, to which the Respondent will now turn.

(i) The Youth Criminal Justice Act, S.C. 2002, c.1 (*YCJA*)

91. The Appellant argues that s.10(b) should be interpreted in a manner consistent with Canada's domestic legislation, namely, s.146 of the *YCJA*. In the *YCJA*, Parliament legislated the presence of counsel as a pre-requisite to the admissibility of "oral or written statements" made by young persons to police, "unless the young person desires otherwise" (s.146(2)(b)(iv) and (2)(d)).

92. The Appellant's position on this point fails to appreciate the significant distinction drawn by Parliament and by the courts between young persons and adults in the administration of criminal justice. As Cory J. stated in ***R. v. J.(J.T.)***, [1990] 2 S.C.R. 775 (within the context of s.56 of the *Young Offenders Act*, R.S.C. 1985, c.Y-1):

> No matter what the bravado and braggadocio that young people may display, it is unlikely that they will appreciate their legal rights in a general sense or the consequences of oral statements made to persons in authority; certainly they would not appreciate their rights to the same extent as would most adults. Teenagers may also be more susceptible to subtle threats arising from their surroundings and the presence of persons in authority. A young person may be more inclined to make a statement, even though it is false, in order to please an authoritarian figure. *It was no doubt in recognition of the additional pressure and problems faced by young people that led Parliament to enact this code of procedure*: p.766, emphasis added.

93. In contrast, adults are presumed capable of understanding and exercising their legal rights without the need for "enhanced procedural protection" (s.3(1)(b), *YCJA*).

94. The existence of s.146 of the *YCJA* does not support the Appellant's position. It may represent an ideal scenario from his perspective, but providing young persons with this added form of protection does not assist in understanding the scope of s.10(b) as a constitutional guarantee. On the contrary, the existence of s.146 effectively drives home the Respondent's point that s. 10(b) is a limited right. If s.10(b) of the *Charter* guarantees the right to have counsel present when questioned by police, why was it necessary for Parliament to include a provision to this effect in the *YCJA?* If the Appellant is correct in his interpretation of the right to counsel, ss.146(2)(b)(iv) and (2)(d) are superfluous.

(ii) Canada's International Commitments

95. The Appellant notes that Canada is a signatory to the *Rome Statute,* an international treaty that governs proceedings before the International Criminal Court and establishes rules for the conduct of investigations that are initiated under the treaty. Amongst other things, the *Rome Statute* provides in Article 55(2)(d) that persons who are "about to be questioned either by the Prosecutor [acting under the *Statute* in relation to matters that fall within the jurisdiction of the International Criminal Court], or by national authorities pursuant to a request [for assistance] made under Part 9", are entitled to "be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel". The Appellant says that s.10(b) of the *Charter* should be construed in a manner consistent with Canada's international commitments.

96. Canada implemented its obligations as signatory to the *Rome Statute* through the enactment of the *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. 24. The *War Crimes Act* criminalizes genocide, crimes against humanity and war crimes and allows for the prosecution of these offences in Canada. Through the *War Crimes Act,* Canada has tangibly demonstrated its commitment to the international community by agreeing to take action and hold persons accountable for crimes that have international impact. However, neither the *Rome Statute* nor the *War Crimes Act* expressly obligates Canada to adopt or implement the procedural guarantees that are delineated in Article 55 when fulfilling its investigation and prosecution commitments. The *Rome Statute* and its procedural rules do not supplant the Canadian courts and Canada's domestic process. Rather, they are complementary and the International Criminal Court takes jurisdiction only when a state party refers a situation to the

Prosecutor for conduct; the Security Council acting under the *Charter of the United Nations* refers a situation for conduct; or a Prosecutor acting under the terms of the *Statute* initiates an investigation of his or her own accord (Articles 1 and 13). As the Respondent understands it, the International Criminal Court will generally only conduct investigations and prosecutions under the terms of the *Statute* when the applicable state is unable or unwilling to do so.

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(iii) The Right to Counsel in Other Jurisdictions

97. The Appellant points to procedural safeguards in other jurisdictions to support his argument that this Court should expand the boundaries of s.10(b). While the Court has indeed looked to other jurisdictions and to international law principles to assist with *Charter* interpretation (***R. v. Hape***, [2007] 2 S.C.R. 292, at paras.55-56), the Respondent submits that a comparative analysis for interpretive purposes is only of value when accompanied by a proper understanding of the full legal and social context in which the safeguards are applied. The Appellant has noted entitlements that exist in other jurisdictions, but he has not shown that in their application, they offer superior protection of fundamental rights; they better reflect Canadian constitutional values; or perhaps most importantly, that their existence would necessarily have informed the creation and intended meaning of the *Charter's* guarantees.

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98. It is dangerous to engage in a comparison of entitlements based on their mere existence, and then allow conclusions drawn from that comparison to inform the parameters of a constitutionally entrenched guarantee. Particularly a guarantee that itself has a longstanding interpretive history, one that has taken into account its unique context. Just as the scope of s.10(b) of the *Charter* is defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement, so will the parameters of rights or entitlements in other jurisdictions be shaped by their historical, statutory, jurisprudential and social context. As L'Heureux-Dube J. observed in ***Thomson Newspapers***, *supra*:

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> Each legal system, intertwined with a particular legal tradition, is predicated on a number of integrated elements, and to look at each piece-meal through a magnifying glass cannot provide an accurate picture of the whole nor can such an exercise take into account differences between the systems...: p.583.

99. The Respondent will not address each of the jurisdictions cited by the Appellant, but *The Police and Criminal Evidence Act* 1984, c. 60 *(PACE)* of England and Wales offers a good example of why international comparisons - to the extent explored by the Appellant - are of limited use on the scope of s.10(b). Although *PACE* permits the presence of counsel in certain circumstances, this procedure forms only a small part of a detailed statutory regime that is subject to ongoing amendment and supplemented by Codes of Practice. Moreover, it is a regime that addresses the treatment of detainees within a setting that involves different rules of arrest; defence disclosure; and significantly, the drawing of inferences from both pre-trial and trial silence. Under the *PACE* system, a person for whom there are grounds to suspect of an offence must be cautioned that their answers to questions posed, *or their silence*, may be given in evidence at trial. This is fundamentally different than the system at issue in the case at bar, and it may make good sense within that other context to have counsel present during a custodial interview. In Canada, the choice to remain silent cannot be used in evidence against someone charged with an offence.[11]

E. Application of the Legal Principles to the Facts of this Case

(i) There Has Been No Violation of s. 10(b) of the *Charter*

100. The infringements of the right to counsel that are alleged on the facts of this case stand or fall with this Court's acceptance of the Appellant's interpretation of s.10(b).

101. If the right to counsel does not guarantee a "continuing right" to consult a lawyer, then Sgt. Skrine did nothing wrong and the Appellant's s.10(b) right was respected. The Appellant fully exercised his right to counsel before the interview began (with two separate opportunities to speak to a lawyer of his choice), and he does not allege a fundamental and discrete change in the nature of the investigation such that ***Black***, *supra* would apply. By the same token, if s.10(b) does not guarantee a right to "have counsel present during a custodial interrogation", there was nothing unconstitutional about the manner in which his interview with Sgt. Skrine unfolded.

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11 Foreward by Baron Stevens to Paul Ozin, Heather Norton, and Perry Spivey, *PACE A Practical Guide to the Police and Criminal Evidence Act 1984* [Great Britain: Oxford University Press, 2006]; Code of Practice C. 10.1.

102. The trial Judge was satisfied that the Appellant was "certainly intelligent enough to understand what his situation was and *to make his own choices*": A.R., Vol.I, p.51, para.[154], emphasis added. From the Appellant's own comments during his interview with Sgt. Skrine, it was apparent that "he understood his right was to remain silent, *to choose whether to speak or not.* Nobody ever tried to tell him that he did not have that right": para.[160].

(ii) The Application of s. 24(2)

103. If this Court finds a breach of the Appellant's right to counsel, it is the Respondent's position that the impugned statements should nonetheless be admitted under s. 24(2) of the *Charter*. Although the statements are properly characterized as conscriptive evidence, they are not subject to automatic exclusion: ***Hebert,*** *supra,* at p. 186. The Appellant does not question the reliability of his statements. As such, the police conduct cannot be said to have resulted in potentially unreliable evidence that would adversely affect the truth-seeking function of the trial.

104. Nor can the conduct be viewed as highly intrusive or oppressive. The police were clearly acting in good faith and, as apparent from Sgt. Skrine's evidence on the *voir dire*, they relied upon well-established authority to conclude that they fulfilled their obligations on the right to counsel. If violations of s.10(b) are found in this case, they will be based on a *new* approach to the right to counsel, one that Sgt. Skrine cannot be faulted for not having anticipated.

105. Finally, it is submitted that exclusion of the evidence would have a more serious impact on the repute of the administration of justice than admitting it. As noted, there is no issue as to the reliability of the Appellant's statements. They were corroborated by his statement to the teenaged friend; by the location of the victim's body; the nature of the injuries; and by evidence at trial putting the Appellant and the victim in each other's company the night of his disappearance. The Appellant relied on these statements to advance his defence before the jury. The findings of fact made by the trial Judge and not disputed on this appeal, establish that the Appellant understood it was his *choice* on whether to speak with police. He was charged with one of the most serious offences in the *Criminal Code* and the statements provide important evidence. In these circumstances, the repute of the administration of

justice would suffer if the evidence was excluded: ***Wood***, *supra*.

F. Conclusion

106. The Appellant complains throughout his Factum that the present law on s.10(b) of the *Charter* sanctions "incommunicado interrogations". He says it is a "chilling prospect in a country that prides itself on its liberal democratic values": Appellant's Factum, para.44.

107. The Appellant levies an unfair criticism at the Canadian system and one that fails to appreciate the context as a whole. In deciding whether detainees receive fair treatment, the in-custody interview cannot be viewed in isolation. Section 10(a) must be taken into account, as well as the entirety of the informational and implementational duties that have been imposed under s.10(b). This includes the obligation to refrain from gathering evidence until the detainee has been afforded a reasonable opportunity to exercise the right to counsel; the restrictions on the nature of questioning that arise through ***Burlingham***, *supra*; and the right to a further consultation with legal counsel whenever there is a fundamental and discrete change in the nature of the investigation within the meaning of ***Black,*** *supra*.

108. Detainees have a constitutional right to remain silent: ***Singh***, *supra*. They are under no obligation to speak with the authorities. Moreover, during the course of the interview, police are governed by the common law confessions rule and prohibited from obtaining admissions from persons without an operating mind; or ones that are grounded in threats, promises or inducements; obtained through an atmosphere of oppression; or by use of unfair police trickery: ***Oickle***, *supra*. The prosecution bears the burden of proving voluntariness beyond a reasonable doubt. When a doubt exists on whether the will of a detainee has been overborne, the admissions will be excluded from evidence.

109. Section 8 of the *Charter* protects a detainee from unreasonable search and seizure while in custody. Section 9 protects against detentions that are arbitrary. Finally, the abuse of process doctrine as embodied within s.7 of the *Charter* provides a remedy for abusive conduct on the part of police. Where it is established that a case was investigated in a way that renders the proceedings unfair or

otherwise damages the integrity of the judicial system, a stay of proceedings may be available: ***R. v. Regan***, [2002] 1 S.C.R. 297.

110. Fair treatment does not mean the most favourable procedures imaginable or procedures that are crafted only to take a detainee's interests into account: ***R. v. Harrer***, [1995] 3 S.C.R. 562, p.573; ***R. v. Darrach***, [2000] 2 S.C.R. 443, pp.461-462. What constitutes fair treatment must also "be looked at from the point of view of fairness in the eyes of the community": ***R. v. A.W.E.***, [1993] 3 S.C.R. 155, p. 198.

111. The Respondent respectfully submits that once the custodial interview process is considered within its proper context – including the whole of the safeguards that are available to detainees – the current system on the right to counsel *is* fair, and achieves a "proper balance between the individual's right to choose whether to speak to the authorities and society's interest in uncovering the truth in crime investigations": ***Singh***, *supra*, para.45.

PART IV – SUBMISSIONS ON COSTS

112. The Respondent makes no submissions on the issue of costs.

PART V – NATURE OF THE ORDER SOUGHT

113. The Respondent respectfully requests that the appeal from conviction for manslaughter be dismissed and the decision of the Court of Appeal for the Province of British Columbia affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Susan J. Brown
Counsel for the Respondent

for M. Joyce DeWitt-Van Oosten
Counsel for the Respondent

Dated this 24th day of March, 2009
Vancouver, British Columbia

PART VI – TABLE OF AUTHORITIES

Articles and Texts

Other Materials

PART VII - STATUTES

Rome Statute of the International Criminal Court, Articles 1, 13

Article 1
The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.