No. 31558

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

JAGRUP SINGH

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND: DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF ONTARIO, CANADIAN ASSOCIATION OF CHIEFS OF POLICE, AND CRIMINAL LAWYERS'S ASSOCIATION (ONTARIO)

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PART I

STATEMENT OF FACTS

A. Overview

1. On October 28th, 2003 before Mr. Justice Bauman, the Appellant, Jagrup Singh, was convicted by jury in New Westminster, B.C., of the second degree murder of Richard Lof. The conviction was based on s. 229 (b) of the *Criminal Code* - transferred intent.

2. On the evening of Friday, April 5, 2002 Richard Lof, aged 30, died after being shot in the head with a .45 caliber bullet while standing inside the Delanies Show Pub ("Delanies") on King George Highway in Surrey, B.C. Mr. Lof was an innocent bystander to an argument taking place just outside the Pub between some Indo-Canadian men and Delanies' employees. One of the men claimed he had not received his change back from a $100 bill. At the request of the management, he left the premises to continue the discussion outside. His friends followed.

3. The argument continued outside in a dimly lit parking lot. One of the exterior pub doors was opened, partially exposing the interior doors and patrons inside. Three employees of Delanies had their backs to the front doors of the pub. Facing them were three Indo-Canadian men, one of whom took out a pistol and started firing into the ground and air. He then fired the revolver in the direction of Michael Marchi, a pub manager, who was standing about four feet away. The bullet did not strike Mr. Marchi. It went through the window of Delanies' inside front door and hit Mr. Lof. He was standing just inside the pub. Three Indo-Canadian men took off in a black car. The weapon was never found. The Crown's position was that the shooter had the requisite intent for murder when he discharged his revolver in the direction of Mr. Marchi and that by accident, or mistake, the bullet struck Mr. Lof.

4. There was no forensic evidence linking the Appellant to the shooting. He did not testify, or call any evidence. The defence was that the police had charged the wrong person.

5. A critical issue at trial was the identification of the shooter. The Crown's identification evidence depended, in large part, on the testimony of two witnesses (Marchi, Pai), and the Appellant's admission during a police interrogation that he was in Delanies that evening and that he was the person in a still photo with a baseball cap on backwards: Exhibit 10 on *voir dire*: A.R. III, p. 330, p. 341. The photo was from a surveillance video inside Delanies' pub just before the shooting occurred outside. It showed a group of persons, who were involved in the argument, leaving the pub. In addition, the Crown relied upon fingerprint evidence. The police lifted the Appellant's fingerprints from a beer and a glass in the pub that evening.

6. The testimony of the Crown's two identification witnesses was strengthened by the Appellant's admission that he was the person in the still photo (Ex.10). **Mr. Marchi** identified the person in this photo with the hat on backwards as the shooter, and as the Appellant. Mr. Marchi also identified the Appellant from a photo line-up, and in court. **Jim Pai** was a manager of an adjacent club who assisted in escorting the group of patrons out of Delanies. A half-hour after the shooting he looked at Delanies' surveillance video. He could see the argument in the bar and the group of people walking towards the exit, along with Delanies' staff. He identified the shooter as the person in the video who was wearing a baseball cap on backwards.

7. The testimony of two other Crown witnesses was linked to the Appellant's admission that he was the person in the Exhibit 10 photo with the hat on backwards. **Cst. Everson** took surveillance photos of the Appellant for a few days following the shooting. In court she identified the Appellant as the man with the baseball cap on backwards in the Delanies' surveillance video. **Mark Lavallee**, 29, was a door-man at an adjacent club. He had escorted the group out of Delanies and was outside at the time of the shooting. He was not able to identify the shooter. However, he identified the person in the baseball cap on backwards in the surveillance video (Ex. 10) as one of the persons he escorted outside: A.R. III, p.195 (33) - p. 198 (18).The other identification evidence, from six persons in Delanies that evening, was problematic for the Crown.

8. On the *voir dire* to consider the admissibility of the Appellant's statement to the police, Crown counsel stated in his opening that the Appellant's identification of himself in the Delanies photo (Ex.10) was "significant evidence" as the Crown anticipated that identification would be one of the key issues at trial: A.R., III, p. 52 (31-42). The trial judge's Ruling to admit the statement said that the Appellant made an "important admission" and that it was "a potentially important piece of evidence", as identification was a central issue: A.R. I, p. 5 (para. 6);p. 20 (para. 36). During the final stages of the trial there were references to the Delanies' still photo, to testimony that the man with the hat on backwards in the photo was in the group of arguing patrons and/or was the shooter, and to the Appellant's admission to Sgt. Attew that he was the person in the still photo with the cap on backwards. In total there were eight references, which are:(i) in the Crown's final submission to the jury [A.R.III, p.158 (1-7), p.160 (10-15), p.162 (1-5),] and (ii) in the trial judge's final instructions to the jury when he reviewed (a) the exhibits [A.R III, p. 190 (26-36)], (b) the identification evidence [A.R. III, p. 239 (5-17), (32-43), p. 240 (23-34)], and (c) the Crown's position [A.R.III, p. 249 (47) - p. 250 (9)].

B. Background Factors Relating To Appellant's Admission

9. **Two Interrogations - Only One Statement Tendered in Evidence -** Sgt. Attew first questioned the Appellant at 9:25 p.m. on April 8, 2002. The interrogation was 70 minutes. Sgt. Attew again questioned the Appellant at 6:34 a.m. the following day (April 9). That interrogation was 47 minutes. Both statements were audio and video taped. The Appellant did not confess to the crime in either session. In the first statement, he said he was in the pub prior to the shooting but left with friends and was not involved in the killing. It was during this first interrogation that the Appellant identified himself in the Delanies' photo. Both statements were tendered on the *voir dire*: A.B. II, pp. 70, 84. The trial judge admitted both statements with editing. The Crown chose to tender only an edited version of the first statement. The defence had challenged the admissibility of the first statement on two grounds - that the statement (i) was not voluntary, and (ii) was given in violation of the Appellant's s. 7 *Charter* right to silence. The trial judge rejected both arguments: A.R. I, pp. 2-25.

10. **Arrested, Charged with Second Degree Murder** - On April 5, 2002 the shooting occurred. That evening and over the week-end the police conducted their investigation and gathered evidence. On April 8, 2002 at 2:30 p.m. the police arrested the Appellant: A.R. III, p. 58 (6-9). Before the arrest, Sgt. Attew had consulted with Crown counsel and received an indication that the Crown would approve a charge of second degree murder: A.R. II, p. 91 (19-29).The following morning the Appellant appeared in court charged with that offence: A.R. II, p. 139 (18-30).

11. ***Chartered* - s. 10 (a), (b), and Warned** - Upon arrest, Sgt. Attew advised the Appellant that he was under arrest for the murder at Delanies, that he had the right to retain and instruct counsel, and that included Legal Aid counsel (24 hours): A.R. II, p. 61 (3-31). He also advised the Appellant that he was not obliged to say anything, but anything that he did say might be used as evidence: A.R. II, p. 61 (32-34). The Appellant said "yes" when asked whether he understood, and "yes" when asked whether he wanted to call a lawyer: A.R. II, p. 61 (35-39). After a walk to the police car, Sgt. Attew read out the Appellant's *Charter* rights, and the police caution from a card from another officer: A.R. II, p. 52 (15-34), A.R. III, p. 276. The Appellant said he understood and wanted to contact a lawyer: A.B. II, p. 62, (1-37), p. 92 (36) - 93 (4).

12. **Telephone Call to Lawyer** - The Appellant arrived at the Surrey police detachment at 2:52 p.m. Sgt. Attew took the Appellant to the phone area of the cells. He requested a specific lawyer. He gave the phone number to Sgt. Attew who dialed the number and spoke to a lawyer. He advised her that the Appellant was arrested for murder and that he wanted to speak to a lawyer: A.R. II, p. 63 (12-43). The lawyer asked to speak to the Appellant on the phone in private, which Sgt. Attew permitted. The conversation was about 10 minutes (3:15 to 3:25 p.m.): A.B. II, p. 63 (1-47), p. 83.

13. **Lawyer's Telephone Call, Visit** - Shortly after, another lawyer from the same office called Sgt. Attew and said he was on his way down to the police station. The lawyer spoke to the Appellant on the phone. An hour later, at 4:20 p.m., the lawyer arrived and spoke privately with the Appellant for about 20minutes: A.R.II, pp. 63-65, pp.93 (30)- 94 (6).

C. Appellant's First Interrogation (April 8, 2002, 9:25 - 10:35 p.m.)

(i) General Factors

14. **Interview -** There was a 4.5 hour gap between the Appellant's meeting with his lawyer and the commencement of his first interrogation: A.R. II, p. 94 (26-30). A transcript of the first interview (64 pages) is found at A. R. III, pp. 277 - 340. The interview room is a little larger than 8 feet by 8 feet, with a solid door. It was not locked: A.B. II, p. 115 (39) - p. 116 (10). **Purpose of Interview -** Sgt. Attew said the purpose in showing photos and documents to the Appellant was to get a response. Sgt. Attew said, "It's obviously for evidence, to – if we've asked them something in a photograph and he answers the questions either positive or negative, it obviously adds to the evidence": A.R. II, p. 76 (34-42). In cross-examination, he agreed that the purpose of his interview was to obtain an admission from the Appellant about his involvement in the killing:A.R. II, p. 94 (7-17), p. 113 (16-23).

15. **Police Control -** Sgt. Attew agreed that a prisoner in the cell block was under the total physical control of the police: A.R. II, pp. 81(44) - 83 (1), p. 97 (25)- p. 98 (38), p.115 (39) - p. 116 (39).The police decide when it is advantageous to conduct an interview. Sgt. Attew's position was that the Appellant was a "captive audience" in the interview room and wasn't going anywhere until the Sergeant had said what he had to say: A.R. II, p. 121 (3-25), p. 130 (7-12).

16. ***Charter* and Police Warnings -** At the beginning of the interview, Sgt. Attew advised the Appellant that (i) he was under arrest for homicide, (ii) if any police officer had offered him any hope or advantage or suggested any fear of prejudice should he speak or refuse to speak that he should disregard that and not let it influence him or make him feel compelled to say anything [secondary warning], and (iii) anything he did say could be used in evidence in court. The Appellant said he understood: A.R. II, p. 98 (39). Sgt. Attew did not caution the Appellant again that he was not obliged to speak. Sgt. Attew explained that he had already given that caution on two previous occasions: A.R. II, p. 99 (23-47).

(ii) Appellant's Admission

17. At p. 19 of the 64 page statement the Appellant admitted that he was at Delanies on Friday night (April 5, 2002), that he played some pool, and that he went home: A.R. III, p. 295. At p. 54 of the statement the Appellant made the critical admission, identifying himself in the Delanies' still photo as the person wearing the baseball cap backwards: A.R. III, p. 330. In the interview the Appellant twice said the police had the wrong guy: A.R.III, pp. 295, 338-9.

(iii) Assertions of his Right to Silence

18. During the 70 minute interrogation, the Appellant asserted his right to silence 21 times in the following way: **See Appendix** [pp.45-50, *infra*]

- **10** times he said, "I don't wanna talk about it [the investigation]," or words to that effect: A.R. III, p. 292 (13), p. 293 (x2), p. 296 (x2), p. 303, p.310 (18), p. 329 (21), p. 323, p. 336 (15);
- **5** times he said, "Let's go back to the cell", or words to that effect: A.R. III, p. 296, p. 303, p. 310 (20), p. 319 (14), p. 323;
- **3** times he said, "I can't talk to you" A.R. III, p. 309 (x2), ll. 8-10, p. 336 (10); **1** time he said, "I can't talk about it." A.R. III, p. 303;
- **1** time he said that before speaking to Sgt. Attew he wanted to talk to his lawyer, that he might be coming the following morning, and that his lawyer's advice was to "Shut up": A.R. III, p. 309 (11-18); and
- **1** time, during the interview, he said, "We're done.": A.R. III, p. 314 (17).

(iii) Sgt. Attew's Testimony

19. In cross-examination, Sgt. Attew acknowledged that he had some training in interview techniques and in what is permissible and impermissible: A.R. p. 108 (35) - p. 109 (3). He had taken workshops with police officers and/or Crown counsel. Sgt. Attew agreed that in 15-20 instances during the interview the Appellant repeatedly asserted his right to silence but that Sgt. Attew kept asking questions: A.R. II, p. 109 (20) - p. 110 (36); p. 112

(13-47); p. 114 (7-45); p. 115 (1-22); p. 120 (12) - p. 121 (25); p. 127 (1) - p. 128 (42); p. 129 (4-39); p. 133 (1-19) - p. 134 (9); p. 138 (1-29), p. 139 (1-12). Sgt. Attew agreed that he was trying to get the Appellant to answer despite his statements that he did not want to talk: A.B. II, p. 112 (10-47), A.R. III, p. 293.

20. Sgt. Attew acknowledged that he kept saying he was just in the interview to present the facts to the Appellant. Sgt. Attew agreed that he was not really there for that purpose but rather to hopefully prompt the Appellant into making some admissions that could be used in evidence: A.R. II, p. 113 (1-20), p. 115 (26-38), p. 125 (1-15), p. 128 (43) - p. 130 (11). The trial judge noted that it was just after one of these exchanges that the Appellant identified himself in the Delanies' photo: A.R. I, p. 18, para. 32.[1]

D. Trial Judge's Ruling to Admit First Statement

21. The trial judge concluded that the Crown had proven beyond a reasonable doubt that the statement was voluntarily made by the Appellant with an operating mind: **R. v. Oickle**, [2000] 2 S.C.R. 3. The trial judge rejected the Appellant's submission that his s. 7 right to silence was infringed during the police interrogation.

22. **Factual Findings -** On the s. 7 *Charter* Ruling the trial judge made the following findings of fact [A.R I, pp. 2-25]: **(i)** Mr. Singh made an important admission, but it was not a confession to the crime: A.R. I, p. 20, para. 37; **(ii)** Mr. Singh's right to choose to talk or to remain silent was not undermined or overborne by Sgt. Attew's admitted dedication to his agenda; **(iii)** Mr. Singh was quite successful in exercising his right to silence repeatedly;**(iv)**

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[1] The trial judge is correct in this observation but inadvertently used the wrong transcript reference in his Ruling, at para.32.Following that reference, Sgt. Attew showed the Appellant surveillance photos the police had taken the day after the shooting. The Appellant identified himself in a photo: A.R.III, p. 326. A few pages later Sgt. Attew showed the Appellant the Delanies' still photo. At that point, the Appellant identified himself as the person wearing the baseball cap on backwards: A.R. III, p.329(21)- p.331 (2).

his admission that he was the individual in the still surveillance video came freely and not as a result of his desire to maintain silence being systematically broken down by police questioning: A.R. I, p.19, paras. 35-36; and **(v)** on numerous occasions Mr. Singh indicated that he did not want to talk about the incident, that he did not know anything about it, or that he wanted to return to his cell. Sgt. Attew conceded that he considered all of these indications as assertions by Mr. Singh of his right to silence. On each occasion, Sgt. Attew was able to deflect Mr. Singh's assertion and to eventually engage him in at least limited conversation. Eventually, Sgt. Attew succeeded in getting Mr. Singh to identify himself in a picture from the video surveillance within the club. Sgt. Attew did this many times by using a "stratagem" saying words to the effect that Mr. Singh had the right not to say anything, but that he, Sgt. Attew, had a duty or desire to place the police evidence, or at least part of it, before Mr. Singh to show him what the police authorities had: A.R. I, pp. 4-5, para. 6; p. 17, para. 29.

23. **Application of Legal Principles to Facts** - The trial judge relied on **R. v. Hebert** [1990] 2 S.C.R. 151: A.R. I, pp 18 - 19 (paras. 34-35).

E. B.C. Court of Appeal's Judgment

24. The B.C. Court of Appeal rejected the Appellant's submissions that the trial judge had erred: A.R. I, pp. 33-43. The Court relied on **Hebert**, *supra*, and other decisions to conclude that the police are not precluded from using reasonable persuasion to encourage a detained person to break his silence after his right to silence has been asserted following the exercise of his right to counsel [p. 40, para. 15]. The Court concluded that there was no error of law or principle in the trial judge's approach to the issue, and there were no grounds to disturb his factual conclusion that the interview technique employed by Sgt.Attew was a legitimate technique of persuasion [p. 42, para.20]. Relying on **R. v. Carpenter** (2001), 151 C.C.C. (3d) 151 (BCCA), the Court said in the context of an investigatory interview with an obvious person in authority, the expansive view of the confession rule in **Oickle**, *supra*, "may leave little additional room for s. 7 but there is no particular utility in a double-barrelled test of admissibility" [p. 42, para. 19].

PART II

POINTS IN ISSUE

25. (A) Did the B.C. Court of Appeal err in law by interpreting **R. v. Hebert**, [1990] 2 S.C.R. 151 as authority for the principle that in the context of a custodial interrogation it does not constitute a violation of s. 7 of the *Charter of Rights* for a police officer to attempt to persuade a detained person, who has asserted a right to remain silent following the exercise of the right to counsel, to break his or her silence, provided that the officer does not act unfairly?

(B) Did the B.C. Court of Appeal err in law by concluding that the expansive view of the confessions rule in **R. v. Oickle**, [2000] 2 S.C.R. 3 means that once a person's statement to a police officer during a custodial interrogation has been found to be voluntary at common law, there is little, or no scope, for the statement to be excluded on the basis that there was an infringement of that person's s. 7 *Charter* right to silence?

PART III - ARGUMENT

A OVERVIEW

26. The right to remain silent is a principle of fundamental justice within the meaning of s. 7 of the *Charter of Rights.* The question on this appeal is the extent to which this right applies during a custodial interrogation.[2] Does the *Charter of Rights* guarantee to a detainee, who asserts his or her right to silence, the right to remain silent? Is it "truly a right"? Asserting this right is the only way individuals can exercise their right against self-incrimination in this situation. The adversarial/accusatorial relationship between the State and the suspect is significant. The degree of coerciveness in the surrounding circumstances is very high. The suspect is a "captive audience."The interrogation is designed to elicit an incriminating statement to use against the suspect at his or her trial. The risk of self-incrimination is at its zenith. The stakes are high for the suspect. A confession is accorded great weight by a trier of fact.[3] Does s. 7 of the *Charter* provide any protection to the suspect in these circumstances? This appeal is the Court's first opportunity to determine the parameters of the right to silence in a custodial interrogation where the confessions rule is engaged.

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2 "custodial interrogation" describes police questioning of a suspect in custody, before or after charge, where the suspect knows the interrogator is a police officer.

3 **R. v. Hodgson**, [1998] 2 S.C.R. 449, at para. 14, *per* Cory J.

27. Over the past 25 years this Court's *Charter* jurisprudence has provided to an individual effective procedural and evidentiary protections against the risk of self-incrimination at every stage of the criminal process, except one - the custodial interrogation. With respect, this lacuna in the law is due to the lower courts' mis-interpretation of **R. v. Hebert**, [1990] 2 S.C.R. 151, and their failure to give sufficient weight to the principle against self-incrimination in the context of a police interrogation. They view **Hebert**, *supra,* as an authoritative statement which permits the police to ignore a detainee's expressed wish to remain silent and to use "legitimate means of persuasion" to break that silence. In the case at bar, the B.C. Court of Appeal went even further. Applying its earlier decision in **R. v. Carpenter** (2001), 151 C.C.C. (3d) 151 (B.C.C.A.), the Court concluded that the expanded common law confessions rule in **R. v. Oickle**, [2000] 2 S.C.R. 3 governs the admissibility of a custodial statement, and leaves little, if any, room for a separate s. 7 *Charter* inquiry. The decision in the case at bar has effectively extinguished the s. 7 right to silence in this context in British Columbia. This development in the criminal law is an anomaly, in an adversarial system which is organized around the principle against self-incrimination and the right to remain silent, and is grounded in the presumption of innocence.

28. If an accused who, following arrest, has been advised of his *Charter* rights and has consulted privately with counsel, repeatedly informs the investigating police officer that he does not want to speak to the officer and wants to return to his cell, does the officer's persistence in questioning the accused in order to break his silence constitute a violation of s. 7? If so, should any admission resulting from that questioning be excluded under s. 24(2)? The Appellant submits that these two questions should be answered in the affirmative. Otherwise, the detainee's constitutional right to silence and right against self-incrimination are illusory. A proper balance between the interest of the State in investigating crime and the interest of a person during pre-trial detention should allow the police to question the suspect but require the police to stop when that person clearly expresses a wish to remain silent. Any further questioning

should be recognized by Canadian courts as an infringement of s. 7 of the *Charter*. Put simply, “No” means “No”. The right to remain silent is “truly a right.”[4]

29. Today in Canada a detainee who has made a free and informed choice not to speak to the police is left to fend for himself against a skilled interrogator. A suspect in Canada does not have the right to have a lawyer present. When an individual asserts his or her right to silence, the police routinely ignore it with no consequence. Some trial judges see the problem first-hand, and are troubled by it. In **R. v. Lamirande** [sub.nom **R. v. Guimond**] (1999) 137 Man. R. (2d) 132 (Q.B.), Oliphant A.C.J., at paras. 41-47, expressed his concern:

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4 **R. v. Hebert**, [1990] 2 S.C.R. 151, at p. 196, *per* Sopinka J., in dissent.

> It seems to me that once the police are told by the suspect that he or she wishes to remain silent, the questioning by police must also stop. Otherwise, the suspect will likely feel that his or her right to silence is of no effect and may feel compelled to speak to the police despite the suspect's having made a meaningful choice to the contrary....[para. 45]
>
> Either the right to silence on the part of a suspect exists or it does not. What possible value can there be in having a vested, constitutionally guaranteed right if that right can be ignored by the police without any ramifications? The answer, I think, is obvious. [para. 47]

More recently in **R. v. Daunt** (2005) Y.J. 31 C.R. (6th) 31, Veale J. stated:

> Unfortunately, the case law leaves the field open for the police to try various techniques of persuasion, which some courts prohibit and others find tolerable. Because of the apparent inconsistencies that arise in the application of the principle of the right to remain silent, some alarm bells are ringing at the trial court level about police persuasion tactics....[para. 116] In my view, once the right to silence is asserted, it should be respected rather than open to endless police persuasion tactics, the results of which are dependent upon the skill of the interrogator or the frailty or inability of the accused person to continue to assert their rights....[para. 117]

30. This Court consistently takes a purposive approach to the interpretation of a *Charter* right. From its earliest recognition, the right to silence "...was designed to shield an accused from the unequal power of the prosecution..."[5] Arrested persons are in need of that protection. They are in the total control of the State. It is capable of infringing an "individual's mental liberty by techniques made possible by its superior resources and power."[6] To empower an individual who expresses a decision not to speak in a police interrogation, the Appellant respectfully invites this Court to consider adopting the following proposal. First, at the commencement of the interview

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5 **R. v. Hebert**, [1990] 2 S.C.R. 151, p. 201, *per* Sopinka J., in dissent.

6 **Hebert**, *supra*, at pp. 179-80, *per* McLachlin J. (as she then was), for the majority.

the police officer would be required to tell the suspect that he has the right[7] to remain silent, that the person is not required to say anything, and that anything he says may be used in evidence against him. Second, if the suspect clearly states that he does not wish to speak to the police, the officer will not question him. Third, if the suspect says he wants to talk, he will sign a waiver document acknowledging that he is giving up his right to silence, and the interrogation will proceed. Fourth, if during the interrogation the suspect changes his mind and says he does not wish to speak, the interview will end.

31. This incremental development in the law would recognize the supremacy of the *Constitution*, provide meaningful protection to suspects when they are most vulnerable to the risk of self-incrimination, ensure fairness in the investigation and prosecution of criminal offences, put an end to police conduct which ignores a constitutional right and thereby impugns the integrity of custodial interrogations, and encourage a more consistent application of the law across the country. Suspects who wish to speak will do so, knowing it is their decision to make. All of these values would be enhanced by this change. It may alter some police practices but it would not unduly hamper their ability to investigate crime.

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[7] Having the police inform the suspect of his right to silence would ensure that those suspects who choose not to consult counsel upon arrest are aware of this right. It would also re-enforce the right in the minds of those suspects who have spoken to counsel prior to an interrogation. Using the words "right" and "not required" instead of the words "caution" and "not obliged", that are part of the customary police warning, would emphasize to the suspect and the police that the right to silence is "truly a right", just like the s. 10 (b) right: See L. Steusser, "*The Accused's Right to Silence: No Doesn't Mean No*" (2002), 29:2 Man. L.J. N 149, pp. 152-53.

32. The Appellant respectfully submits that the B. C. Court of Appeal erred in three significant respects in its interpretation of **Hebert**, *supra*. First, the Court relied on the "police persuasion" statement in **Hebert**, *supra*, at p. 184, to justify persistent police questioning after an accused in custody has stated that he does not want to make a statement. Second, the Court erred when it did not find a s. 7 infringement after the trial judge had concluded that Sgt. Attew used a "stratagem"to elicit a statement from the Appellant. The first error tends to explain why the Court reached its decision. The second error is significant only if the Court rejects the Appellant's main submission and concludes that the police may persuade a detainee to break his decision to remain silent. For these reasons, the Appellant prefers to deal with these two errors at the end of his Argument, paras.87-90*, infra*. The third error is relevant to the s. 7 analysis, and will be dealt with in that section, paras.70-79, *infra*. The Appellant submits that the Court erred in applying a *voluntariness* test for assessing the police conduct *vis-a-vis* the Appellant's decision to remain silent rather than a test of *interference*, as articulated in **R. v. Jones**, [1994] 2 S.C.R. 229, p. 253, and suggested in **Hebert**, *supra*. In support of the Appellant's main argument that the B.C. Court of Appeal was wrong to dismiss the appeal, he will develop his Argument around the following five points.

33. **First**, a review of many lower court decisions in Canada discloses uncertainty about the scope of the s. 7 right to silence in a custodial interrogation and the proper limits of police persuasion. These decisions demonstrate the need for this Court's insight and direction. **Second**, a brief glance at the United States, England and Wales indicates that a suspect in a custodial interrogation in those countries has better protection against the risk of self-incrimination than an individual in Canada.

34. **Third**, there are at least four principles of fundamental justice engaged in this s. 7 inquiry. The Appellant relies on the principle (right) against self-incrimination[8] and

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[8] **R. v. P. (M.B.)**, [1994] 1 S.C.R 555, p. 577; **R. v. Jones**, [1994] 2 S.C.R. 229**,** pp. 248-251; **R. v. S. (R.J.)** [1995] 1 S.C.R. 451, para. 47.

procedural fairness[9] to shape the content of the s. 7 right to silence in a custodial interrogation. The Appellant recognizes there are two other relevant principles. The confessions rule is a principle of fundamental justice.[10] However, its capacity to protect a suspect from the *risk* of self-incrimination is minimal when compared to a broadly interpreted s. 7 right to silence. The B.C. Court of Appeal's decision in the case at bar failed to take into account significant differences in the nature and operation of the confessions rule and the s. 7 right to silence. The opposing interest of the State to investigate crime and search for the truth is also recognized as a principle of justice.[11] However, the factors which favor law enforcement during an interrogation do not outweigh society's interest in respecting the principle against self-incrimination and in providing a suspect with a meaningful right to silence. Searching for the "critical balance" between the interests of the State and the individual in the context of a custodial interrogation requires taking into account the wider *Charter* context as well as three *Charter* rights - the right of an accused not to be compelled to be a witness at his own trial (s. 11 (c)), the scope of the s. 7 right to silence in other contexts, and the right to retain and instruct counsel without delay (s. 10(b)).

35. **Fourth**, the contextual factors of a custodial interrogation re-enforce the need to interpret the s. 7 right to silence broadly. There are coercive pressures from being in custody. Those pressures are enhanced in a small interrogation room. The police use manipulative interrogation techniques. As in the case at bar, the interrogation often occurs in the accusatorial stage of the criminal process, after the police have decided to charge the suspect. The police seek to elicit a confession from the very person they intend to put on trial.

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9 **Charkaoui v. Canada (Citizenship and Immigration)**, [2007] S.C.R. No. 9, paras.19-20.

10 **R. v. Whittle**, [1994] 2 S.C.R. 417, p. 931.

11 **R. v. S. (R.J.),** [1995] 1 S.C.R. 451, para. 108; **R. v. White**, [1999] 2 S.C.R. 417, para. 45.

36. **Fifth**, a combination of these factors support setting the boundaries for the s. 7 right to silence in a custodial interrogation at that point where a suspect states to the police that he or she does not wish to make a statement. The Appellant respectfully asks the Court to consider imposing on the police a correlative obligation, comparable to s. 10 (b) of the *Charter*, to stop questioning a suspect whenever he or she clearly asserts the right to silence. To make this effective, the waiver doctrine should apply to the s. 7 right to silence. The doctrine applies to other *Charter* rights (s. 10 (b)), and to the s. 7 right to silence in a non-custodial context: **R. v. Turcotte**, [2005] 2 S.C.R 519, para. 52.

B. INADEQUATE PROTECTION DURING CUSTODIAL INTERROGATION

37. One of the factors which led this Court to recognize a constitutional right to silence in **Hebert**, *supra*, p. 174, was its concern about a legal system that protected an accused from incriminating himself at trial (s. 11 (c), s. 13), but offered *no* protection to a suspect's statements in pre-trial detention who, after choosing not to speak to the police, was targeted by an undercover operation.[12] A review of the following cases demonstrates that 17 years after **Hebert**, *supra*, there is still *inadequate* protection in a custodial interrogation for a suspect who states that he does not want to speak to the police.

38. With some justification, the Crown and police tend to view several appellate decisions as a licence to ignore a suspect's expressed wish to remain silent and to continue their questioning as long as they want, so long as it does not cross an ill-defined line of abuse or coerciveness that would render the statement involuntary under the confessions rule.[13] The B.C. Court of Appeal's decision in the case at bar endorses this approach:A.R. I, pp.38-43, at paras. 13-21. Based on **Hebert**, *supra*, most lower courts sanction police questioning after a suspect has asserted his or her right to silence. Support is also found in **R. v. Timm** (1998), 131 C.C.C. (3d) 306 (Q.C.A.), at pp. 319 - 320, Fish J.A. (as he then was) in dissent, at pp. 284-6; *affd*. [1999] 3 SCR. 666.[14]

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12 This rationale for the s. 7 right to silence was recognized in **R. v. Jones**, [1994] 2 S.C.R. 229, by Gonthier J., for the majority, at pp. 284-6, and by Lamer C.J., in dissent, at p. 256.

13 In **R. v. Elkadri**, [2003] O.J. No. 971 (S.Ct.), paras. 62-68, the accused in 18 minutes asserted over 20 times his choice to follow his lawyer's advice and remain silent. At one point he asked to go back to the cells. When the accused asserted his right to silence the police officer employed strategies which the trial judge found were designed to frustrate the accused's decision and to effectively deprive him of the right of choice. When asked about the limit of such strategies, the officer expressed the opinion that short of being abusive toward the accused, any other technique was permissible in order to overcome the accused's choice to remain silent.

14 In a one paragraph judgment, this Court in **Timm**, *supra*, dismissed the appeal as of right "substantially for the reasons of the majority of the Court of Appeal of Quebec." .....**Timm**, *supra*, Fish J.A.(as he then was) found that the accused had asserted his right to silence and that the police officers used their superior power to override his will and negate his choice whether to speak to the authorities or to remain silent.

39. Several courts have ruled that if the accused tells the police that he does not want to speak to them, but the police persist in questioning him and he eventually makes an incriminating statement, the making of his statement shows that he has made his choice to speak, and there is no violation of s. 7. In the case at bar, this was one of the reasons the trial judge gave for not finding a s. 7 violation: A.R. I, p.19, para. 36; pp. 21-2, para. 38.Cases which have expressed this view are: **R. v. Gormley** (1999), 140 C.C.C. (3d) 110 (P.E.I.C.A.), at paras. 48-49; **R. v. Baidwan (No.1)**, [2001] B.C.J. No. 3073 (S. Ct.), at para. 56-69; *affd.* [2003] B.C.J. No. 1439 (C.A.); **R. v. M.L.P.**, [2004] B.C.J. No. 1482 (S.Ct.), at paras. 42 - 47; **R. v. Turpin**, [2005] B.C.J. No. 839 (S.Ct.), at paras. 90-95.

40. In **Baidwan**, *supra*, at para. 65, the trial judge accepted the Crown's submission that "...the right protected by s. 7 of the *Charter* is not a right to proclaim a wish to be silent. It is a right to actually remain silent." In **Gormley**, *supra*, the Court of Appeal upheld the trial judge's finding that the accused had waived his right to remain silent when he finally spoke to them. After consulting counsel, Gormley told the police officers 4 or 5 times that he had been told to keep his mouth shut and that he was not going to say anything. The police kept questioning him and took him to the crime scene, after which he made admissions.

41. Numerous appellate and trial courts have ruled that the facts of each case must be examined to determine whether the police conduct constituted legitimate police persuasion, or whether it crossed the line and deprived the suspect of his right to choose to speak or not. In the case at bar both the trial judge and Court of Appeal endorsed this view, and found that the police had not crossed the line, even though the Appellant had asserted his wish to remain silent 18 times before he made his admission: A.R. I, pp. 19-22, paras. 35-38; pp. 40- 41, paras. 15-17. Other cases where the police questioning did not cross the line are: **R. v. Robinson**, [1997] B.C.J. No. 1845 (S.C.), paras. 189-204, *revd.* on other grounds: (2000)

142 C.C.C. (3d) 521 (B.C.C.A.); **R. v. A. (B.)**, [2003] B.C.J.No. 1102, at paras. 108-120 (S. Ct.); **R. v. Bohnet** (2003), 339 A.R. 175 (Alta.C.A.), at paras.16 - 17; **R. v. L.(F.)**, [2006] O.J. No. 658 (Ont. S.Ct.), at paras. 17-25;**Timm**, *supra*, p. 320 (C.C.C.). In **Timm**, the majority of the Quebec Court of Appeal stated that "nothing prevents the police from obtaining admissions from a suspect who previously invoked his right to silence, on the condition that they did not use reprehensible means to get the suspect to speak."

42. **R. v. Wood** (1994), 94 C.C.C. (3d) 193 (N.Sct.C.A.), p. 226, illustrates the distance some courts have travelled in letting the police persuade a suspect to break his or her silence. Subsequent decisions frequently cite **Wood**, *supra*, as authority for this approach[15]. Wood was re-arrested on May 16, 1992 for first degree murder and robbery. Just prior to his interrogation at 2:36 a.m. he consulted with his lawyer for 90 minutes. In the interrogation he asserted his right to silence 53 times. The police continued to question him until he confessed at 6:01 a.m.The Court of Appeal used his repeated assertions of his right to silence against him, saying they demonstrated that he was "truly an informed detainee".The Court upheld the trial judge's decision that the statement was voluntary and that there was no *Charter* violation. On the *Charter* argument, the Court of Appeal said, at para. 117:

> During the interview that followed, the appellant first took the position that while he might ultimately tell what had happened at McDonald's, he did not intend to give the police a statement at that time. He stated his intention not to give a statement on some 53 occasions. He was truly an informed detainee. His persistent assertions of his rights to the officers put this conclusion beyond a shadow of a doubt. He resisted pressure by the police in the form of suggestions that his friend Lawrence was in jeopardy. He knew better. He asked, but quickly dropped the idea of speaking to counsel

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[15] For example, see **R. v. Baidwan** (No. 1), [2001] B.C.J. No. 3073 (S. Ct), paras. 67-8;

R. v. Turpin, [2005] B.C.J. No. 839 (S.Ct.), at para. 93.

> "now". At no time was he deprived of his right of choice - a right of which he was well aware. In the end, he gave a statement in response to the psychological pressure exerted by Sergeant Scharf. [emphasis added]

43. The Ontario Court of Appeal's decision in **R. v. Roy** (2003), 180 C.C.C. (3d) 298, at para. 13, raised a "red flag" about this approach. Doherty J.A.stated:

> ....the repeated assertion by a detained person during a lengthy interview that he does not want to speak to the police any further will provide strong and sometimes conclusive evidence that any subsequent statement was not the product of a free exercise of the detainee's right to choose whether to speak.

44. Cases where the police questioning crossed the line are: **R.v. Otis** (2000), 151 C.C.C. (3d) 416 (Q.C.A.), paras. 43-58; **R. v. Tammie**, [2001] B.C.J. No. 1948 (S.Ct.)366, paras. 77-81; **R. v. Timmons** (2002), 205 N.S.R. (2d) 37 (S. Ct.), 27-44; **R. v. Ingram**, [2002] B.C.J No. 1141 (S.Ct.), paras. 71-86; **R. v. Rhodes** (2002), 3 C.R. (6^{th}) 21 (B.C.S.C.), pp. 35-48, *affd*. [2003] B.C.J. No. 1442 (B.C.C.A.), para. 10; **R. v. McKay** (2003), 16 C.R. (6^{th}) 347 (Q.B.), paras. 83-102; **R. v. Chamberlain** (2003), 178 Man. R. (2d) 174 (Q.B.), paras. 55-58; **R. v. Elkadri**, [2003] O.J. No. 971 (S.Ct.), paras. 62-68; **R. v. Flett** (2004), 23 C.R. (6^{th}) 337(Q.B.), paras. 25-30; **R. v. M.S.** [2004] O.J. No. 5673 (S. Ct), para. 30; **Daunt,** *supra***; R. v. Ciliberto**, [2005] B.C.J. No. 3013 (S.Ct.), paras. 52-90. In these cases the Crown unsuccessfully sought to tender incriminating statements where the accused had repeatedly tried to assert their constitutional right to remain silent.

45. In **Otis**, *supra*, at paras. 51-52, and **McKay**, *supra*, the accused asserted their right to silence 4 times. **Chamberlain**, *supra*, asserted his right to remain silent 10 times. **Timmons**, *supra*, at para. 41, asserted his right to be silent 18 times in about 3.5 hours of questioning. **Elkardi**, *supra*, asserted his right to silence 20 times in 18 minutes. In **Cilberto**, *supra*, the police repeatedly ignored and interrupted the accused's assertions of his right to silence 50 times. **Daunt**, *supra*, at para. 99 (#3,4), used the word "lawyer" over 80 times to express his right to silence which was ignored, and made over 30 references

requesting to speak to a lawyer. **Tammie**, *supra*, during a two hour interview, told the police approximately 148 times that he did not wish to speak to them. In **Tammie**, *supra*, McKenzie J. stated:

> I wonder how many times an accused person should have to assert his choice to remain silent. It is surely not 148 times. The police used unfair techniques to frustrate Aaron Bradley's constitutional right to remain silent. They are not entitled to simply ignore it, to ensnare him with it and finally to render it illusory. The police conduct far exceeded the legitimate attempt at persuasion referred to in **Hebert**, *supra*. [para. 73]

46. These cases demonstrate that there is something amiss at a critical stage of the investigative process in Canada. Where a suspect asserts his right to silence, there is simply no protection from having to listen to further questions and endure the risk of self-incrimination. A passage from Professor Steusser's article, *"The Accused's Right to Silence"* (2002), 29:2 Man. L.J. 149, at p. 160, summarizes the Appellant's position and frames the issue for this Court:

> ..... The choice is the accused's as to whether to speak to police or not. Protestations that the accused does not want to talk to the police will not end the interview. The police are allowed to persuade the accused to break his or her silence. Only where it is found to be an abuse of persuasion will the accused's right to silence under s. 7 be breached. In most cases such confessions would also be found to be involuntary under the confessions rule.
>
> PROTECTING THE UNPROTECTED
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> .....OUR EXISTING RIGHT TO REMAIN SILENT is an inadequate shield to protect the accused from the coercive pressures inherent in any custodial interrogation. The accused cannot stop the interrogation absent putting his hands over his ears, closing his eyes, and curling up in a ball in the corner until the police leave. Vigorous and skilful questioning is permitted. The police are allowed to misstate facts, exaggerate facts, appeal to the conscience of the accused, sympathize, exhort, even offer inducements so long as there is no *quid pro quo* understanding. A great deal of power is given to the police and the challenge for the law is to ensure that the police do not abuse this power.

C. FOREIGN JURISDICTIONS - ENGLAND/WALES, UNITED STATES

47. While recognizing the distinctions between Canada's criminal justice system and other countries, it is worth noting that a suspect enjoys better protection in other jurisdictions. In the **United States**, a suspect in a custodial interrogation is protected by two constitutional rights - - the right not to be questioned without first having waived his right to silence, and the right to have a lawyer present: **Miranda v. Arizona**, (1966) 384 US 436; **Dickerson v. U.S.** (2000), 530 U.S. 428. There is a clear rule, "Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to discontinue questioning and asserts his right to remain silent, the questioning must cease": **Miranda**, *supra*, p. 474.

48. In **England and Wales** the Code C of the *Police and Criminal Evidence Act 1984 (PACE)* establishes the standard of fairness which police officers must observe. These provisions are based on the Judges' Rules. A police investigation is divided into two parts. In the first part, the police try to determine who committed the offence. The police may question a suspect. There are four circumstances in which inferences may be drawn at trial from a suspect's failure to answer police questions about incriminating circumstances: *PACE* (C), ss. 34-37. A suspect has the right to have a solicitor present during the interview to protect the rights of the individual and give legal advice. The police may require the solicitor to leave if his or her conduct unreasonably obstructs proper questions being put to the suspect or the individual's response being recorded: *PACE* (C), ss. 6.8-6.11.

49. The second part of an investigation begins when the police decide to charge a person with an offence. It is only in exceptional circumstances that the police may interrogate that individual during this second stage. In **R. v. Peart**, [2006] J.C.J. No. 3, the Judicial Committee of the Privy Council explained this prohibition against interrogation:

> Once the suspect has been charged, the efforts of the police interviewers are directed to establishing his guilt. He is under a greater disadvantage at that stage, in that he may feel under greater compulsion to answer questions, notwithstanding a caution……. But the basic fundamental reason for the prohibition is the principle that to interrogate the prisoner at this stage tends to be unfair as requiring him possibly to incriminate himself. [para. 21]

D. SECTION 7 ANALYSIS

Life, Liberty and Security of the Person

Section 7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

50. As pointed out by La Forest J. in **R. v. Harrer**, [1995] 3 S.C.R. 562, at para. 14, a "delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice...." is required.[16] A few years earlier in **Hebert**, *supra*, at p.180, the Court applied the same principle when it found a s. 7 infringement of the right to silence in pre-trial detention.

51. The simple question on this appeal is whether the Appellant's liberty interest was deprived "in accordance with the fundamental principles of justice." There is no question that the Appellant's liberty interest is engaged. The Crown relied on the Appellant's incriminating admission to the police to convict him of second degree murder. He was sentenced to life imprisonment with no eligibility of parole for 13 years. For this reason, the Appellant will focus his submissions on the relevant principles of fundamental justice, the inter-relationship of other *Charter* rights, and the significant contextual factors of a custodial interrogation. Just as "the principle against self-incrimination demands different things at different times"[17], so does the constitutional right to silence.

(i) Relevant Principles of Fundamental Justice, and *Charter* Rights

52. During the past 25 years this Court has consistently emphasized the importance of the "overarching"principle against self-incrimination. It is described as an "elemental canon of the

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16 See also **R. v. Mills**, [1999] 3 S.C.R. 668, paras.72-74

17 **R. v. Jones,** [1994] 2 S.C.R. 229, p.257; **R. v. Fitzpatrick**, [1995] 4 S.C.R. 154, para. 25; **R. v. White**, [1999] 2 S.C.R. 417, para. 45

Canadian criminal justice system, "[18] and "one of the cornerstones of our criminal law."[19] The principle is perhaps "...the single most important organizing principle in criminal law."[20] It's historical origins can be traced to *nemo tenetur seipsum accusare.*[21] It developed as a response in the 17th century to coercive interrogation tactics by the State and ecclesiastical courts to punish silence and/or provoke suspects to confess.[22] This Court has identified two underlying rationales for the principle: (i) to protect against unreliable confessions or evidence, and/or (ii) to protect against the abuse of power by the state.[23] These values are related to human sovereignty, privacy, autonomy, and dignity.[24] In a battle with the State an individual is "not to be conscripted by his opponent to defeat himself', [25] and has no obligation to assist in his or her own prosecution.[26] The principle "imposes limits on the extent to which an accused can be used as a source of information about his or her own criminal conduct".[27] The presumption of innocence, the adversarial system, and the power imbalance between the State and the individual are at "the root of this principle and the procedural and evidentiary protections to which it gives rise": **P. (M.B.)**, *supra*, p.578; **R. v. Underwood,** [1998] 1 S.C.R. 77, p. 81.

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18 **R. v. Jarvis**, [2002] 3 S.C.R. 757, para. 67; **Application under s. 83.28 of the Criminal Code**, [2004] S.C.R. 248, paras. 69-70

19 **R. v. Henry, Riley**, [2005] 3 S.C.R 609, para. 2

20 **R. v. P. (M.B.),** [1994] 1 S.C.R. 555, p. 577; **R. v. Jones**, [1994] 2 S.C.R. 229, paras. 33-45

21 "no one shall be required to say anything which criminates himself"

22 **Thompson Newspapers v. Canada** [1990] 1 S.C.R. 425**,** pp. 47-2, *per* Wilson J. **Henry and Riley**, *supra*, at para. 2, *per* Binnie; In **R. v. S. (R.J.)** [1995] 1 S.C.R. 451**,** at paras. 54-62, Iacobucci J. expressed his views on the historical origin of *nemo tenetur*.

23 **R.v. Jones,** [1994] 2 S.C.R. 229**,** pp. 250-51; **R. v. White**, [1999] 2 S.C.R 417, para. 43; **R. v. S.A.B.**, [2003] 2 S.C.R. 678, para. 57

24 **White**, *supra*, at para. 43, **Jones**, *supra*, at pp. 250-51

25 **R. v. Dubois**, [1985] 2 S.C.R. 350, p. 358; **Jones**, *supra*, p. 248

26 **P**. **(M.B.)**, *supra*, pp. 577-79; **S. (R.J.)**, *supra*, paras. 81-83, *per* Iacobucci J.

27 **S.A.B.**, *supra*, para. 33, *per* Arbour J.

53. A constitutional right which emerged from the principle against self-incrimination is the right to remain silent. In **Hebert**, *supra*, at p. 175, McLachlin J. (as she then was) stated:

> ....the measure of the right to silence may be postulated to reside in the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself or herself, but rather has the right to choose whether to speak or to remain silent.

54. Since **Hebert**, *supra*, this Court has consistently taken the position that the s. 7 right to silence is grounded in the principle (right) against self-incrimination: **R. v. S. (R.J.)**, [1995] 1 S.C.R. 451, para. 93, *per* Iacobucci J.; **R. v. Noble**, [1997] 1 S.C.R. 874, para. 74, *per* Sopinka J; **R. v. Henry and Riley,** [2005] 3 S.C.R. 609, para. 2, *per* Binnie J.; **R. v. Turcotte**, [2005] 2 S.C.R. 519, para. 51, *per* Abella J.

55. Prior to custody, the common law right to silence is protected by s. 7.[28] In pre-trial detention, the right is protected by s. 7: **Hebert**. At trial, silence is specifically protected by s. 11 (c) of the *Charter*.[29] In **R. v. Liew**, [1999] 3 S.C.R. 227, pp. 241-42, the Court spoke about the breadth with which **Hebert** defined the 7 right to silence, observing that an atmosphere of oppression in pre-trial detention was not required for its violation. The right to silence is further enhanced by jurisprudence which restricts the Crown's use of a person's decision to remain silent at every stage of the criminal process. With few exceptions,[30] the Crown cannot place on the evidentiary scales an accused's silence prior to arrest or detention,[31]

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[28] **R. v. Turcotte**, [2005] 2 S.C.R. 519; **R. v. Rothman**, [1981] 1 S.C.R. 640, p. 683

[29] **R. v. Crawford**, [1995] 1 S.C.R. 858, p. 875

[30] **Turcotte**, *supra*, at paras. 47-50, outlined the limited circumstances in which evidence of an accused's silence may be admissible: (i) if the Crown can establish a "real relevance and proper basis": **R. v. Chambers**, [1990] 2 S.C.R. 1293, (ii) at a joint trial where one accused cross-examines a co-accused on his failure to make a statement to the police: **R. v. Crawford**, [1995] 1 S.C.R. 858, (iii) where the defence raises an issue that makes the accused's silence relevant: **R. v. Lavallee**, [1980] O.J. No. 540 (C.A.), and (iv) where the accused fails to disclose an alibi in a timely or adequate fashion: **R. v. Cleghorn**, [1995] 3 S.C.R. 175.

[31] **Turcotte**, *supra*, p.55

on arrest[32], or at trial.[33]

56. The current gap in the protective shield against self-incrimination for a suspect in a custodial interrogation is inconsistent with the protection accorded individuals at other stages of the criminal process. A person is most vulnerable to state coercion during a criminal investigation.[34] However, prior to detention or custody an individual can insist on having the police respect his right to silence by simply walking away from police questioning. At trial, an accused is generally represented by counsel. The lawyer ensures that the procedural rules protecting the client's right to silence are respected.[35] Compare these situations to a suspect in a custodial interrogation where the coercive pressures are more intense. Given the scope in 2007 of the s. 7 right to silence in other contexts, there is no principled reason not to grant the suspect better protection against self-incrimination. A lawyer's prior advice to keep quiet, is not sufficient: s.10 (b), *Charter*.

57. This Court explained in **Hebert**, *supra*, that one of the reasons for according constitutional status to the common law right to silence was because pre-trial statements in detention had "no protection."[36] There was a concern that without some protection the guarantee of s. 11 (c) would be potentially "illusory" in that context.[37] The Appellant submits that s. 11 (c) of the *Charter* is imperilled in a similar fashion today in a custodial interrogation

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32 **R. v. Chambers**, [1990] 2 S.C.R. 1293, p. 1316

33 **R. v. Noble**, [1997] 1 S.C.R. 874, paras. 70-76; s.4 (6) of the *Canada Evidence Act*, R.S.C. 1985, Chap.C-5

34 **R. v. Hodgson**, [1998] 2 S.C.R. 449, para. 24

35 In **R. v. Crawford**, [1995] 1 S.C.R. 858, pp. 876-7, Sopinka J. summarized some of the circumstances which make a suspect's situation, after arrest, more vulnerable to the coercive power of the state than an accused's situation at trial.

36 **R. v. Hebert**, [1990] 2 S.C.R. 151, p. 174

37 **R. v. S. (R.J.)**, [1995] 1 S.C.R. 451, para. 93

where a suspect has made an informed decision not to speak. The confessions rule does not provide *any* protection against the *risk* of making a statement in this situation:see paras.71-74, *infra*.

58. Not having a tool in a suspect's arsenal to secure his or her expressed choice not to make a statement to the police is contrary to the s. 7 guarantee of procedural fairness, and imperils the fairness of the trial guaranteed by s. 11 (d) of the *Charter*. In **Jones**, *supra*, at p.284, Gonthier J., writing for the majority, stated that one finding of the **Hebert** decision was that "...s. 7 protection of pre-trial statements was necessary to ensure that the ensuing trial was fair." In **Hebert**, *supra*, the Court stated:

> *Charter* provisions related to the right to silence of a detained person under s. 7 suggests that the right must be interpreted in a manner which secures to the detained person the right to make a free and meaningful choice as to whether to speak to the authorities or to remain silent. A lesser protection would be inconsistent not only with the implications of the right to counsel and the right against self-incrimination affirmed by the *Charter* but with the underlying philosophy and purpose of the procedural guarantees the *Charter* enshrines. (emphasis added)

(ii) Contextual Factors

59. There are three circumstances about the Appellant's interrogation that demonstrate the need to protect a suspect against the risk of self-incrimination. They are characteristic of other custodial interrogations in Canada. First, the information is provided in a proceeding in which "the individual and the state are adversaries,"[38] and the suspect is about to be charged with a crime. Second, the information is obtained when the State is exercising significant coercive measures over the suspect, and if necessary, relying on manipulative

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[38] **R. v. Jones**, [1994] 2 S.C.R. 229, p.249; **R. v. Fitzpatrick**, [1995] 4 S.C.R. 154, paras. 35-36

persuasion techniques. Third, the information is usually obtained after the suspect has exercised his right to counsel under s. 10 (b) and been advised not to speak to the police.

(a) Adversarial (Accusatorial) Relationship

60. The police arrested the Appellant on a charge of second degree murder, and were going to charge him the following day with that offence. The criminal process had progressed from the investigative stage to the accusatorial stage. The Appellant knew Sgt. Attew was a person in authority. Sgt. Attew agreed that he was in the interview room to prompt the Appellant into making some admissions that could be used in evidence against him: A.R. I, p. 18, para.34; II, p.113 (1-23). In England and Wales this interrogation would not have occurred because the police had already decided to charge the Appellant with the offence: **Peart**, *supra*. In the United States this interrogation would not have proceeded because the Appellant told the police he did not want to talk: **Miranda**, *supra*; **Dickerson**, *supra*.

(b) Coercive Measures

61. **Custodial Surroundings -** The suspect is compelled to attend the interrogation room, sit down, and listen to the officer until the police decide to terminate the session. A person's only assistance is the advice he receives earlier from his lawyer not to speak, and his own "intestinal fortitude.[39] The Appellant's situation was described by Hill J. in **R. v. Van Wyk**, [1999] O.J. No. 3515 (S.Ct.), at para. 149:

> As accused in the custody of the state is not only physically restrained but also, by virtue of restriction of liberty, has a diminished capacity to withstand the influence of others. At times, the actions of persons in authority may be directly coercive, while on other occasions, the psychological pressures of those seeking further incriminatory evidence may be subtly compulsive. Custody imports a relationship of dependency - the prisoner cannot walk away - the prisoner relies on his or her jailers for not only the basic necessities of life, but also for civilized recognition of individual dignity associated with respecting a lawful refusal to cooperate in the creation of self-incriminatory evidence. Accordingly, it has been said that a person in custody is"in a position of disadvantage relative to the state" because he or she may be at risk of incriminating him or herself: **Bartle v. The Queen** (1994), 92 C.C.C. (3d) 289 at 300 *per* Lamer C.J.C. It is surely in this context that it has been

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[39] Alan G. Gold is critical of this development. He states that in this context the actuality of the constitutional right to silence is abandoned to "the intestinal fortitude of the accused": Collection of Criminal Articles (October 30, 2000).

observed that a detained person has no absolute right to remain silent: **R. v. Smith**, *supra*.

62. **"Reid Method" of Interrogation** - Sgt. Attew was a skilled interrogator, trained in psychological interrogation and in what is generally approved by Canadian courts. Sgt. Attew's questions reflected the "Reid Interviewing and Interrogation Technique" that several Canadian police forces have successfully used over the years:[40] see **Appendix**, pp.45-50, *infra*. The technique seeks to isolate the suspect and deprive the individual of every psychological advantage. The interrogator develops "....themes during a tightly controlled questioning session....and immediately cuts off any attempts by the suspect to deny involvement": **R. v. L.F.** [2006] O.J. No. 658 (S. Ct.), paras. 9-10. The interrogator seeks to establish a rapport with the suspect so he comes to trust the interrogator. As Fontana J. stated in **R. v. Whalen**, [1999] O.J. No. 3488 (St. Ct.), para. 12, the technique "involves a high degree of psychological manipulation in order to secure the co-operation of the subject." The techniques include "direct positive confrontation", deceit, stratagems, falsehoods, praise, and flattery. The interrogators display understanding and sympathy, minimize a suspect's offence, condemn others in order to ease the responsibility of the suspect, and give lengthy monologues. Sometimes the interrogators move closer to the suspect's physical space when they sense withdrawal.[41] They concede to the suspect that he has the right to silence but then ignore it, and talk around it.

63. **Police Stratagem To Ignore Right To Silence** - The case at bar is typical of the police response when a suspect follows his lawyer's advice and states that he does not wish to talk. During the 70-minute interrogation, the Appellant asserted his right to silence about 20-21 times, which included requests to go back to his cell. Eighteen of these assertions occurred before he made his critical admission. Sgt. Attew conceded that there were 15-20 occasions when the Appellant asserted his right to silence but that the questioning continued.

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40 **R. v. Whalen**, [1999] O.J. No. 3488, paras. 11-15, 28 (S. Ct.); **R. v. Peters**, [2000] O.J. No. 4233 (S.Ct.), para. 14; **R. v. Minde** (2003), 179 C.C.C. (3d) 188 (Alta. Q.B.), para. 32. The "Reid method" is outlined in a text, *Criminal Interrogation and Confessions* (3rd ed.) by Imbau, Reid and Buckley.

41 **Minde**, *supra*, para. 32; **R. v. L.F.** , [2006] O.J. No. 658 (S.Ct.), paras. 9-10.

The trial judge found that on each occasion Sgt. Attew was able to “deflect” the Appellant’s assertion

and eventually engage him in limited conversation: A.R. I, p. 5, para. 6; p. 17, para. 29. It was after one of these assertions and deflections that the Appellant made his critical admission: A.R, I, p. 329 (21) - p. 331 (2).

(c) Section 10 (b)

64. The broad scope of s. 10 (b) of the *Charter*, with its corollary obligation on the police to respect a detainee's decision to exercise that right, supports a similar breadth of interpretation to the s. 7 right to silence in a custodial interrogation. Section 10 (b) is aimed at fostering the principles of adjudicative fairness given the detainee's obvious disadvantage relative to the State.[42] The underlying rationale for s. 10 (b) is to provide immediate legal advice to an individual "on arrest or detention" in order to protect his or her right against self-incrimination.[43] This right to counsel is diminished if the police do not respect a suspect's wish to act on the advice of his counsel and say nothing.

65. The Appellant submits that **Burlingham**, [1995] 2 S.C.R. 266, para. 12, is an authoritative statement which rejects police conduct that seeks to persuade a detainee in a custodial interrogation "directly or indirectly to disregard or act contrary" to legal advice. In **Burlingham**, the Court adopted a statement of McEachern C.J.B.C., in dissent:

> The s. 10 *Charter* rights of detained persons who have elected to exercise their constitutional rights to retain and instruct counsel could be seriously compromised if police officers having complete control over such persons, should seek....[words omitted by Iacobucci J.].....,directly or indirectly, to disregard or act contrary to the advice they have received.[44]

66. In re-stating this passage from the judgment of McEachern C.J.B.C, Mr. Justice Iacobucci omitted the following words "...by the means employed in this case to persuade

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42 **Clarkson**, *supra*, p. 394; **Hebert**, *supra*, p.176; **Bartle**, *supra*, p. 191

43 **Hebert**, *supra*, p. 176; **R. v. Brydges**, [1990] 1 S.C.R. 190, p. 206; **R. v. Bartle**, *supra*, pp. 191-92; **R. v Prosper**, [1994] 3 S.C.R. 236, pp. 271-72

44 **R. v. Burlingham**, (1993), 85 C.C.C. (3d) 343, (B.C.C.A.), pp. 367-68.

them....” That deletion suggests that this statement was intended to have a broad application, going beyond the particular facts of that case. Such an interpretation would be consistent with Iacobucci J.’s initial statement in **Burlingham**, *supra*, at p. 227, that “This Court has consistently given a broad interpretation to s. 10 (b).” This Court found an infringement of s. 10 (b) where the police “continually questioned him (the accused) despite his repeated statements that he would say nothing absent consultation with his lawyer” (p.227).

67. Something similar occurred in the case at bar. Sgt. Attew’s testimony concedes as much. He knew that the Appellant had talked to his lawyer prior to the interrogation and had received legal advice not to talk to the police. The Appellant said he couldn’t talk about the allegations. He explained that his lawyer had told him to “Shut Up.”A.R.III, p. 309 (8-19). When cross-examined, defence counsel asked Sgt. Attew if he was trying to persuade the Appellant to abandon his silence. Sgt Attew replied, “Trying to ask him to answer the question, yes, My Lord, that’s correct”: A.R. II, p.112 (44-47). There should not be any difference between the limitations placed on the power of the State with respect to the s. 10 (b) right to counsel and the s. 7 right to silence. Imagine the reaction of the courts if police officers ignored, or tried to persuade an individual out of, other constitutional rights that the person properly asserted.

68. In a number of decisions this Court has carefully articulated guidelines for the police under s. 10 (a) and (b) of the *Charter*. Once a detainee asserts the right to counsel, the police must “hold off”. They cannot persuade a person to make a decision or participate in a process which could have an adverse effect on the defence at trial until the individual has had a reasonable opportunity to exercise that right, or unequivocally waives that right**.**[45] Writing for the Court in **R. v. Manninen**, [1987] 1 S.C.R. 1233, at p. 1244, Lamer C.J. stated:

> In addition, where a detainee has positively asserted his desire to exercise his right to counsel and the police have ignored his request and have proceeded to question him, he is likely to feel that his right has no effect and that he must answer.

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45 **R.v. Manninen**, [1987] 1 S.C.R. 1233, pp. 1242-44; **R. v. Ross**, [1989] 1 S.C.R. 3, pp 10-12; **R. v. Brydges**, [1990] 1 S.C.R. 190, p.206; **R. v. Prosper**, [1994] 3 S.C.R. 236, p 278.

69. If the right to obtain and act upon legal advice, especially advice to say nothing, is jealously protected by the courts, it would be ironic if the police were allowed to persuade a detainee not to act on that advice. It doesn't withstand scrutiny, unless the law enforcement interest to investigate and solve crime is so important at this stage of the criminal process that it can trump the right to silence and thereby undermine the right against self-incrimination. The Appellant submits that this Court's jurisprudence does not support such a conclusion.

(iii) *Voluntariness* vs. *Coerciveness (Interference)*

70. With respect, the B.C. Court of Appeal mis-read a passage in **Oickle**, *supra*, at paras. 28-31, to support its view that a s. 7 inquiry could be governed by the confessions rule and its test of *voluntariness*. The passage in question illustrated how some aspects of the confessions rule differed from some *Charter* protections. The statement never suggested that a *Charter* right, let alone the s. 7 right to silence, could be subsumed under the confessions rule.

71. The Appellant recognizes that there is considerable overlap between the confessions rule and the s. 7 right to silence.[46] Both modern rules reflect the principle against self-incrimination, the right of a person to choose whether or not to speak to the police, and the right of the police to investigate and solve crimes. Both rules express concerns for adjudicative fairness and the reputation of the administration of justice. Both abhor abusive or coercive tactics by the authorities. However, the two rules are designed to serve different purposes and for that reason are not governed by the same test. The B.C. Court of Appeal failed to recognize this point. That led the Court to collapse the s. 7 right inquiry into the confessions rule, thereby removing from a suspect in a custodial interrogation an important constitutional protection.

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[46] For some different perspectives on this point see: **R. v. S. (R.J.),** [1995] 1 S.C.R. 451, paras. 72-75; **R. v. Hebert**, [1990] 2 S.C.R. 151, p. 173; **R. v. Jones**,[1994] 2 S.C.R.229, p. 252; **R. v. Hodgson**, [1998] 2 S.C.R. 449, paras. 22-24; Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule*, (Part I) 53 Ohio St. L.J. 101 (1992), pp. 170-194, cited in **Hodgson**, at para.18.

72. The primary purpose of the confessions rule is to exclude at trial an involuntary statement that was obtained in or out of custody by a person in authority. It is an evidentiary rule

of exclusion. The rule is only engaged *if* a statement is obtained. The confessions rule reflects many values. It is inspired by the principle of *voluntariness*: **Oicke**, *supra*, at para. 64. V*oluntariness* is "shorthand for a complex of values,"[47] which includes a significant concern about the "putative reliability" of the statement. The "totality of circumstances" are relevant. The test is not exclusively objective, as subjective factors about the suspect's decision-making process are considered.

73. In deciding whether a statement is *voluntary*, the court considers a number of specific factors: (i) whether the confession was induced (*quid pro quo*) by threats or promises, (ii) whether it was obtained in an atmosphere of oppression, and/or (iii) whether the police engaged in certain kinds of trickery: **Oickle**, *supra*, paras. 57, 65-71. The first two questions are "primarily concerned with reliability." If there is a reasonable doubt about whether "the will of the subject has been overborne" by *inducement*, and/or oppressive conditions the statement will be excluded: **Oickle**, *supra*, at paras. 57-58. The third question of police trickery is "a distinct inquiry."It is designed to maintain integrity in the criminal justice system. A statement will be excluded only if the police engaged in trickery that "shocks the community." This multi-faceted test for *voluntariness* is quite different, and more onerous than, the test that assesses state conduct *vis-a-vis* an individual's exercise of his or her right to silence.

74. The primary purpose of the s. 7 right to silence is to protect an individual from the *risk* of self-incrimination. In **Jones**, *supra*, at p. 251, Lamer C.J. stated that, "Concern about the abuse of state power is at the heart of the principle against self-incrimination." This concern and the "case to meet"principle breathe life into the s. 7 right to silence and constitute its core values. It is an effective tool for a suspect in a coercive atmosphere to fend off an unwanted interrogation by the State. If the right is exercised and respected by the authorities, *no* statement is obtained. The s. 7 right to silence may have a secondary function, along with s. 24 (2) of the *Charter*, to exclude evidence at a subsequent trial if a statement is

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[47] Wigmore's description was adopted by Iacobucci J. in **Oickle**, *supra*, at para. 70.

obtained in circumstances

where the State did not respect a suspect's choice to remain silent. However, that is not its main purpose. For the suspect who does not want to speak to the police, s. 7 serves as a "protective shield" when the authorities are about to start their interrogation.

75. A s. 7 inquiry is focused on a specific issue. Did the State *interfere* in any way with the suspect's right to make a free and informed choice as to whether to speak to the police? The test is objective: **Hebert**, *supra*, at p. 181. As McLachlin J. (as she then was) stated, once it is established that the suspect has an operating mind, "...the focus under the *Charter* shifts to the conduct of the authorities *vis-a-vis* the suspect." The parameters of this test are found in this Court's jurisprudence.

76. In **Jones**, *supra*, Lamer C.J. articulated (i) the general test which separates proper State conduct from improper coercive conduct, and, after considering the decisions in **Hebert**, *supra*, and **Broyles**, *supra*, he articulated (ii) a specific test when the right to silence is engaged:[48]

(i) Any state action that coerces an individual to furnish evidence against him-or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent. [p. 249].

(ii) A general rule can be seen in the approach this Court has taken to the right to silence: if the state interferes with either element of free and informed consent, then the individual's right to silence is limited. This is a rule that is clearly grounded in the principle against self-incrimination.[p.253](emphasis added)

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[48] In **Jones**, [1994] 2 S.C.R. 229, Lamer C.J. spoke in dissent. However, La Forest J., writing for the Court in **R. v. Fitzpatrick**, [1995] 4 S.C.R. 154, para. 33, pointed out that Iacobucci J., for a majority of the Court in **R. v. S. (R.J.)**, [1995] 1 S.C.R. 451, at para. 46, endorsed Chief Justice Lamer's analysis of the principle against self-incrimination in **Jones**, *supra*, p. 252, and therefore it must be considered as an authoritative statement of the Court. In **R. v. White,** [1999] 2 S.C.R. 417, paras. 40-42, Iacobucci J., writing for the majority, endorsed Chief Justice Lamer's analysis of this principle in **Jones**, *supra*, as did Major J., writing for the Court, in **R. v. Brown,** [2002] 2 S.C.R. 185, paras. 91-94.

77. With respect to the specific test for the right to silence, Lamer C.J. crystalized it at a place lower on the continuum of *coerciveness* than the **Oickle** test for *voluntariness.* He stated, "if the state interferes with either element of free and informed consent, then the individual's right to silence is limited." **Interferes** is defined as "*to hamper or meddle, inhibit, check, hinder, infringe, encroach, interrupt,"but in".*[49] **Interfere** is consistent with some words **Hebert**, *supra*, used to describe the test for improper State conduct with respect to the s. 7 right to silence. The Court said the State cannot use its superior power to infringe a suspect's mental liberty [p.179], or unfairly frustrate his decision [p.186]. **Infringe** means "*interfere*."[50] **Frustrate** means "*to prevent a plan or action from progressing, or succeeding"*[51] All of these words describe negative conduct that is contrary to the **respect** the State must give a detainee's constitutional rights. As stated in **Hebert**, *supra*, p. 184, after a person is detained, "the situation is quite different: the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected."

78. The Appellant recognizes that in **Hebert**, *supra*, the Court also said that the State could not override the suspect's will [p. 180],or undermine it [p.189]. **Override** is defined as "*nullify, supersede, prevail over, negate, disregard, thwart, ignore*...."[52] **Undermine** means "*demoralize, frustrate, impair, deter.*"[53] Most of these words are

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49 *West's Legal Thesaurus Dictionary* (1985), p. 421; see also *The Concise Oxford Dictionary* (10th ed), p. 738, which defines "interferes with" as "*prevent from continuing or being carried out properly, get in the way of.*"

50 "infringe" is defined as "e*ncroach, interfere, break*": *Thesaurus* , p. 407; see also *Concise Oxford* (10th ed. rev.), p. 728

51 *Concise Oxford*, p. 570: see also *Thesaurus*, at p. 341, which defines "frustrate" as "*to prevent or thwart, obstruct, undo, neutralize, confound, confuse, balk, interrupt, impede...*"

52 *Thesaurus*, p. 551; see also, *Concise Oxford*, p. 1017

53 *Thesaurus*, p. 767; see also, *Concise Oxford*, p. 1561

consistent with the **Jones** test of *interference*. However, the meaning of “override” and “undermine” may indicate for some jurists a higher degree of coerciveness, comparable to the *voluntariness* test, than was intended by this Court in

Hebert, *supra*. Seventeen years have now passed since the decision in **Hebert**, *supra*. As Mr. Justice Binnie pointed out in **Henry and Riley**, *supra*, at p. 643, the common law develops by experience and creativity. The intervening years of police interrogation designed, in part, to ignore a detainee's constitutional right to silence demonstrates the need to confirm, and perhaps fine-tune, the **Jones/Hebert** test. Words are important. As Madam Justice L'Hereux-Dubé wrote in **R. v. Netté**, [2001] 3 S.C.R. 488, at paras. 11-12, in dissent:

> Moreover, it is worth emphasizing that language is the medium through which the law finds expression. As. P.M. Tiersman, an American law professor and author, duly points out in Legal Language (1999), at p. 1:
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> > Our law is a law of words. Although there are several major sources of law in the Anglo-American tradition, all consist of words. Morality or custom may be embedded in human behaviour, but law – virtually by definition – comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations, or judicial opinions.
>
> .
>
> Language is the outward sign of our legal reasoning. The words we use provide a filter through which we view and acknowledge legal concepts.

79. When evidence is elicited from the inner sanctum of an accused's mind by a police officer who knows that the detainee does not wish to make a statement, it is appropriate to apply a threshold of *coerciveness* [*interference*] that is somewhat lower than the confessions rule applies. This approach is consistent with Major J.'s observation in **Liew**, *supra*, that a violation of the s. 7 right to silence does not require an atmosphere of oppression. If the B.C. Court of Appeal had applied the correct test, they would have found a s. 7 infringement in the case at bar.

E. "A CRITICAL BALANCE" - A CORRELATIVE OBLIGATION ON POLICE

80. The Appellant submits that this Court's jurisprudence on the test of *coerciveness* in relation to the right to silence is authority for the proposition that once a detainee

states that he does not want to make a statement, he has exercised his s. 7 *Charter* right, and any further police conduct during an interrogation, such as persistent questioning and/or police trickery to obtain an

admission, constitutes an infringement of that right. The Appellant asks the Court to broadly interpret the s. 7 right to silence in a custodial interrogation by imposing on the police a correlative obligation, to stop their questioning when a suspect states that he does not wish to speak to them.Such a development would result in the s. 7 right to silence being interpreted in a manner consistent with s. 10 (b). Together with other rights, they would "form a cohesive and internally consistent framework for a fair and effective criminal process": **Hebert**, *supra*, p. 176.

81. The Appellant recognizes that "Properly conducted police questioning is a legitimate and effective aid to criminal investigation…": **R. v. Precourt** (1976), 39 C.C.C. (2) 311 (C.A.), p. 317: **Oickle**, *supra*, para. 33. The Appellant acknowledges that "The state is not obliged to protect the suspect against making a statement...":**Hubert**, pp. 176-177. Respecting a suspect's constitutional right to silence in a custodial interrogation will not undermine, or unduly hamper, the State's ability to investigate and prosecute offenders. The police would continue to elicit statements from suspects who chose to speak. Obtaining statements in this manner would be "in accordance with the fundamental principles of justice", as guaranteed by s. 7 of the *Charter*. On this point, the words of the U.S. Supreme Court in **Escobedo v. Illinois** 378 U.S. 478 (1964), at p. 490, are worth noting:

> If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

F. WAIVER PROPOSAL

82. If the Court accepts the Appellant's submission that the police are not entitled to interrogate a detainee who asserts his or her right to silence, the Appellant respectfully invites the Court to consider applying the doctrine of *waiver* for the s. 7 right to silence: **Korponay v. A.G. Canada**, [1982] 1 S.C.R. 41, p. 49. In **Hebert**, *supra*, at p. 183, the Court rejected this principle. In their dissenting judgments Wilson J. (p. 91) and Sopinka J. (pp. 203-4) adopted it. The Appellant submits that it would be appropriate to re-consider this issue for several reasons.

83. First, it was in the context of an undercover operation in pre-trial detention that the majority in **Hebert**, *supra*, at p. 183, declined to adopt the *waiver* doctrine. McLachlin J. (as she then was) explained that *waiver* is a subjective concept that depends on the accused knowing that he or she is speaking to a person in authority. Adoption of the *waiver* doctrine would have effectively terminated all undercover operations in jail and hindered the legitimate law enforcement interests of the State. These difficulties have no application in the context of a custodial interrogation where the suspect knows the interrogator is a person in authority.

84. Second, the scope of a s. 7 right is "contextually sensitive." There is no reason in principle why the doctrine of waiver should not apply to a custodial interrogation simply because it is not operative for an undercover operation in pre-trial detention.

85. Third, this Court has adopted the waiver doctrine for the constitutional right to silence in other contexts. In **Turcotte**, *supra*, para. 52, the Court recognized that the doctrine applies to the s. 7 right to silence before detention. In addition, Sopinka J., writing for the majority in **Noble**, stated:

> In **Hebert** itself, it was held that the state could not trick a detained accused into making self-incriminating statements through the use of an undercover police officer eliciting information in the accused's cell. Once under the coercive power of the state, the accused's right to silence could only be waived by an informed decision of the accused; state trickery was unacceptable. [para. 70]

86. Fourth, if the waiver doctrine protects a citizen's voluntary interaction with the police prior to arrest or detention, and perhaps even after detention, it should apply to a suspect's compelled interaction with the police in a custodial interrogation. Applying *waiver* to the s. 7 right to silence in this context would be consistent with the application of this doctrine to other *Charter* rights, particularly s. 10 (b).[54] The question of a waiver of the s. 10 (b) right is aimed at fostering the principles of adjudicative fairness: **R. v. Clarkson,** [1986] 1 S.C.R. 383, p. 394. Requiring a written waiver would not be an

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[54] **R. v. Black**, [1989] 2 S.C.R. 138, pp. 156-8; **R. v. Prosper**, [1994] 3 S.C.R. 236, pp. 274-278; **R. v. Ross**, [1989] 1 S.C.R. 3, pp. 14-15

onerous task for the police. It would ensure real protection.

G. MIS-INTERPRETATION OF *HEBERT*

(i) "Police Persuasion" Statement

87. The Court of Appeal relied on the "police persuasion" statement in **Hebert**, *supra*, at p.184, as have many other courts, to justify persistent police questioning after an accused in custody has stated that he does not want to make a statement. This error is rooted in a failure to distinguish between the right to retain and instruct counsel guaranteed under s. 10(b) of the *Charter*, and the right to remain silent guaranteed under s. 7. When a detainee expresses a desire to consult counsel, the officer must give the detainee a reasonable opportunity to do so, and must hold off any further interrogation until the detainee has consulted counsel: **Manninen**, *supra*, at pp. 1242-43. However, once the detainee has talked to a lawyer, **Hebert**, *supra*, made it clear that "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"(p. 184). It was in that context that the additional "police persuasion" statement was written. Where a suspect at the outset of an interrogation is indifferent as to whether or not to speak, or does not expressly assert his right to silence, the police may question him so long as they only use "legitimate means of persuasion"[**Hebert**, p. 177], which do not render the statement involuntary under **Oickle**, *supra*.

88. The situation is qualitatively different under s. 7 of the *Charter*. When an accused, after consulting counsel, advises the investigating officer that he does not wish to make a statement, the accused has, by that declaration, already made his choice not to speak to the officer, and at that point the officer should not be permitted to *interfere* with it any way. In such a case, the test for admissibility is the *interference* test articulated in **Hebert**, *supra*, and **Jones**, *supra*.

(ii) Police Use of "Stratagem" is a Section 7 Infringement

89. The Appellant further submits that the B.C. Court of Appeal and trial judge erred in failing to find that the "stratagem" the police used to encourage the Appellant to talk constituted a "subterfuge" which infringed s. 7 of the *Charter*: A.R. I, p. 19, para. 35; p. 41, para. 17. The trial judge also found that Sgt. Attew used a number of ruses: A.R. I, p. 21, para. 38. In

Hebert, *supra*, at pp. 184-85, the Court said it was contrary to the *Charter* to permit the authorities to use subterfuge “to do indirectly what the *Charter* does not permit them to do directly...”

90. The two words **stratagem** and **subterfuge** are very similar in meaning. **Stratagem** is defined as "*a plan or scheme intended to outwit an opponent, cunning*"[55] and "a dishonest scheme either by words or by action."[56] **Subterfuge** is defined as "*a trick or deception used in order to achieve one's goal*."[57] This conduct captures Sgt. Attew's interrogation to elicit an admission despite the Appellant's wish not to talk. This "stratagem" may not meet the test of police trickery that "shocks the community" under the **Oickle** test, but it should satisfy the s. 7 test. Although the *devious plans* were different in **Hebert**, *supra*, and the case at bar, the result was the same. At the instance of the police, both suspects participated in processes that were designed to obtain an incriminating statement from them after they had expressly declined to speak to the police.

H. SECTION 1 , 24 (2) OF THE *CHARTER*

91. If the Court finds a violation of s. 7 of the *Charter*, s. 1 of the *Charter* does not apply given the test in **R. v. Therens**, [1985] 1 S.C.R. 613, p. 645; **Hebert,** *supra*, pp. 187-89; **R. v. Orbanski**, [2005] 2 S.C.R. 3, para.36.

92. If the Court finds a violation of s. 7 of the *Charter*, the Appellant's incriminating identification of himself in a photo during the custodial interrogation should be excluded under s. 24 (2) of the *Charter*: **Hebert**, *supra*, pp. 188-89; **R. v. Stillman**, [1997] 1 S.C.R. 607; **Orbanski**, *supra*, paras. 85-104, *per* Lebel and Fish JJ., in dissent. First, the admission of the conscriptive evidence would render the trial unfair.It was obtained after the Appellant repeatedly asserted his wish to remain silent. The Crown and the trial judge considered this evidence was potentially significant on identification, which was the critical issue at trial. Second, the violation was serious. The police ignored the Appellant's statements that he wished to remain silent and return to his cell. The interrogation was designed to break the Appellant's decision to remain silent. Third, the

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55 *Concise Oxford Dictionary* (10th ed.), p. 1417

56 *Legal Thesaurus Dictionary* (1985), p. 719

57 *Concise Oxford*, p. 1430; see also *Thesaurus*, p. 725

effect of excluding this evidence is serious. It should result in a new trial. Not to exclude this evidence would bring the administration of justice into disrepute.

PART IV SUBMISSIONS ON COSTS

96. The Appellant does not seek costs on appeal.

PART V - ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

Vancouver, B.C.
February 28, 2007

PART VII - TABLE OF AUTHORITIES

Provincial Appellate and Trial Decisions **Paras.**

Articles

Foreign Cases//Materials
Paras.

Reference Materials

PART VIII - STATUTES

The Respondent relies upon the following provisions:

1. **Charter of Rights**

Life, Liberty and Security of the Person

Section 7

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> Chacun a droit à la vie, à la liberté et à la securité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principles de justice fondamentale.

2. **Canada Evidence Act**, R.S.C. 1985, Chap. C-5

Section 4 (6)

> The failure of the person charged, or the wife of husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.
>
> Le défaut de la personne accuseé, ou de son conjoint, de témoigner ne peut faire le sujet de commentaires par le juge ou par l'avocat du poursuivant.

APPENDIX

Sgt. Attew's Interrogation of the Appellant

April 8, 2002 (9:25 to 10:35 p.m.)

1. After the initial *Charter* and police warnings, Sgt. Attew then said he wanted to know a little more about the Appellant's background. The Appellant answered questions about his family situation (wife and two children), when he came to Canada (1989), his occupation (truck driver), a head injury that caused him to be temporarily unemployed, his medication for his head pain, and his anticipated surgery to remove a tumor: A.R. III, pp. 279 - 286. When asked about the tumor, the Appellant said, "I don't wannna talk about it." Sgt. Attew replied, "Okay. And you know what, you certainly don't….like I said before, we certainly don't have to talk about anything you don't wanna talk about: AR. III, p. 286.

2. Sgt. Attew then said he was just trying to get to know the Appellant. Sgt. Attew said that the Appellant had a pretty bad month. Sgt. Attew then described a fictitious account about his life: A.R. II, p. 135 (16-19). He said that he was drunk and drove his girlfriend home. They crashed and she had a miscarriage. Sgt. Attew described his anguish over this incident, and said he had turned his life around. He compared his mistake to that of the Appellant's situation: A.R. III, pp. 287-9. Sgt. Attew asked the Appellant what kind of a person he was: A.R. III, pp. 289-291. The Appellant gave some answers. Sgt. Attew then said it seemed like the Appellant was in the wrong place at the wrong time. Sgt. Attew said he felt for the position the Appellant was in.

3. Sgt. Attew's questions then moved closer to the incident. He said he felt what happened on the week-end was not intended to happen. He asked the Appellant whether it was intended. The Appellant said, "I don't know what happened." He said he heard that someone was shot there but that he and some others just took off before everything happened. A.R.II, p.292-3. He agreed he was talking about Delanies. Then the following

exchange occurred:

> Q. Okay. And what night are you talking about? Like how did you hear…
> A. I don't wanna talk about it.
> Q. How did you hear about it.
> A. I don't wanna talk about it.
> Q. Okay. And you now what? I can understand that, but understand that part 'a my job is obviously, uh….as an investigator is to provide you with….the facts and evidence that we have in….in our case, okay. A.R. III, pp. 293-4 [emphasis added]

4. Sgt. Attew then asked the Appellant how he was feeling. The Appellant said he felt sick (flu) and lost, "Don't know what's happening." Sgt. Attew asked the Appellant to give him a better understanding of what happened. The Appellant said he didn't know what the officer was talking about, that he probably had the wrong guy. Sgt. Attew asked again about Delanies and what happened on Friday night. The Appellant said he went there with some friends, played pool and went home. Then there was the following:

> Q. Okay, and who did you meet there?
> A. That, I don't wanna talk about. A.R. III, p. 296

5. Sgt. Attew said the Appellant knew what happened at Delanies. The Appellant said he heard about it on the radio or T.V.After a few more questions, this occurred:

> Q. Do you remember what happened or what went on there?
> A. I just…I don't wanna talk about it.
> Q. You don't wanna talk about it?
> A. Let's go back to the cell. A.R. III, p. 296

6. Sgt. Attew responded by saying he was there to present the facts of what was going on. He said the Appellant was in a predicament, and started talking about the Appellant's family. The Sergeant then gave him a note his wife had written to him. Sgt. Attew then spoke about the Appellant's predicament. When asked whether he

understood why he was there, the Appellant said "No", then said "Uh…something with murder." There were questions and answers about his upcoming surgery and job: A.R. II, pp. 298-303. When Sgt. Attew moved the questioning back to the Delanies' shooting, the Appellant said he had nothing to do with it. The following exchange then occurred:

Q. Okay, Well, you're leaving things out, though. I mean, you are leaving things out, okay. You know what?
A. I can't talk about it.
Q. Okay.
A. Let's go back to my cell.
Q. Okay, let me….let me say something to you here first though, okay.
A. Yeah. Uh….nothing's gonna change nothing.
Q. Okay. And you know what?
A. I don't wanna talk anymore. A.R. III, p. 303

7. Sgt. Attew said the Appellant didn't have to talk to him if he didn't want to. Sgt. Attew said he totally respected that. He said he was there to give the Appellant the evidence the police had. Sgt. Attew said he was trying to seek the truth and that there was a huge difference between an accidental and a planned shooting. He again repeated that he was there to present the facts. He said he saw the Appellant as a good, family man who had made a mistake. Sgt. Attew then started showing the Appellant some identification reports of fingerprints. Sgt. Attew said they identified the Appellant as having been at Delanies. The Appellant repeated that he didn't know what happened. He said he wasn't there during the argument. He said he and his friends went home: A.R. II, pp. 303-309. Then there were the following questions and answers:

Q. Okay, but tell me what happened, what was the reason why you guys were getting thrown out?
A. I can't talk to you.
Q. What's that?
A. I can't talk to you.
Q. You can't talk to me. Okay, and why….what would be the reason why you don't wanna talk to me?

A. Talk to my lawyer first.
Q. You wanna talk to your lawyer first?
A. [Mark's [58] coming] in the morning I guess, I don't know.
Q. You're gonna talk to…okay, you have talked to your lawyer though, already – right?
A. Yeah, but he's, "Shut up."
Q. He said to shut up. And you know what? You know what? That is absolutely great advice. If I was your lawyer I'd be telling you the same thing. But understand that for us to do our job effectively, we have to still present you with the facts and the evidence…….[further monologue by Sgt. Attew]…….But obviously you know, we have to understand why that happened.
A I don't know.
Q. Well, you tell me. Was it uh….you know….
A. I don't wanna talk about it, man.
Q. You don't wanna talk about it?
A. Let's go back to the cell now.
Q. Okay. You know what? Like I said, I mean..
A. I wanna go to sleep.

Q. You wanna go to sleep. And I understand that you're probably pretty tired, and I certainly can….
A. Got a headache.

A.R. III, pp. 309-310

8. Sgt, Attew repeated that it was his job to present the evidence. He said that the Appellant had spoken to his lawyer and did not have to talk to the Sergeant. The Appellant said nothing was going to change. Sgt. Attew then gave his account of what he thought happened at Delanies. He suggested that the Appellant pulled out a gun and started shooting, trying not to hit anybody. The Appellant said he never carried a gun. Sgt. Attew said he was just trying to understand what happened. The Appellant said the Sergeant had everything he needed. Sgt. Attew said they had a lot of evidence: A.R. III, pp. 311-314. Sgt. Attew said he was giving the Appellant an opportunity to say whether the killing was intentional or not. The following exchange occurred:

Q. Maybe it was. Maybe I'm totally wrong and I read you wrong. I

[58] Mark Jette was the second lawyer the Appellant spoke to on the telephone.

don't think so, like, 'cause I don't think you are. I think you're a ….like I said, a family man that was in a position that can't be changed now.

A. I don't know. We're done.
Q. Well, I still have more obviously to talk to you about.
A. Yeah. A.R. III, p. 314

9. Sgt. Attew then explained that he was just trying to understand what happened. He started asking questions about the Appellant's family, his being shot on a previous occasion, and the victim's family: A.R. III, pp. 314 - 319. Sgt. Attew said the Appellant couldn't change what happened but could help the victim's family. When Sgt. Askew asked him if he would want to do that, there was the following exchange:

A. I don't know what to do.
Q. Okay.
A Let's go back to the cell.
Q. Okay. And you know what? Like I said, we certainly can go back to the cell, but I still wanna present you with more of this stuff.
A. Yeah.
A.R. III, p. 319

10. Sgt. Attew then spoke to the Appellant about religion, taking responsibility, and forgiveness. The Appellant said he didn't do anything. Sgt. Attew asked about Delanies. The Appellant said he was playing pool and then drove home. Sgt. Askew then asked the Appellant about his changed hair style. When the officer returned to the topic of Delanies and asked whether the Appellant went to his house after Delanies, he responded:

A. Let's…….let's not talk about it, go to the cell. A.R. III, p. 323

11. Sgt. Attew then stepped out of the cell for around 10 minutes: A.R. II, p. 70 (15-21), III, p. 324. Just before leaving he said the Appellant didn't have to say anything. After Sgt. Attew returned, he showed the Appellant a surveillance photo. The Appellant identified himself in the photo: A.B. III, p. 326. Sgt. Attew expressed his concern for the Appellant's

kids. He mentioned that the arrest would be in the media and wondered what the reaction would be. Sgt. Attew said he knew the Appellant was at Delanies and there was an altercation. He said there was no point in arguing. The Appellant responded: But I'm not talking. A.R. III, p. 329

12. Sgt. Attew said "Okay". He said what he was doing there was telling the Appellant what evidence they had. **It was at this point the Appellant made his critical admission. Sgt Attew showed him some photos from inside Delanies. The Appellant identified himself in a photo as the person with the cap on backwards, and said, "So, I was in the pub."**: A.B. III, pp. 330-1.When asked about the identity of others in the photo, the Appellant said he didn't know. He said he was playing pool with one of the persons in a photo but didn't leave with him: A.B. III, p. 331. When asked for the name of the friend who was in the pub with him, the Appellant said:

A. I can't talk to you.

Q. Okay, you can't talk to me because your friend was there, or because you don't wanna say who your friend was?
A. Yeah.
Q. Is that the reason? You don't wanna say who he was?
A. I don't wanna talk about nothing. A.R. III, p. 336

13. Sgt. Attew then began wrapping up the interview. He said he could see that the Appellant was tired, that he should get a good sleep, and they could talk again. Sgt. Attew said he thought a mistake had been made. When he said he had a lot of evidence to show the Appellant the next day, the following exchange occurred:

A. I don't wanna see.
Q. Okay. Would you at least give me an opportunity to show it to you?
A. Aah, just show it to my lawyer.
Q. Okay, I'd like the opportunity to show it to you first. And you know what? Then you can tell your lawyer what I showed you.
A. Oh.

A.R. III, p. 338

14. Sgt. Attew said he would to talk to the Appellant the following morning, his lawyer would then come and they would go to court. The Appellant said the police had the

wrong guy: A.R. III, pp. 338 -9. The interview was then concluded.

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