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' ASSOCIATION (ONTARIO)

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FACTUM OF INTERVENER DIRECTOR OF PUBLIC PROSECUTIONS (Pursuant to Rule 37)

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PART I
STATEMENT OF FACTS

A. Overview

1. The Appellant asks this Court to transform the right to silence into a right not to be spoken to, preventing the police from fairly encouraging detained criminal suspects to make statements that would lead to the discovery of truth in the most serious criminal cases. The ***Charter*** does not mandate such a fundamental shift in the balance between a suspect's rights and society's competing interest in seeking the truth. Suspects' rights are already comprehensively and robustly protected in Canada. The Appellant has shown no compelling reason for this Court to reverse its long-standing and well-functioning jurisprudence and work such an upheaval in Canadian due process.

2. The Director of Public Prosecutions intervenes to urge that the existing procedural rules surrounding custodial questioning carefully balance the suspect's right to silence and society's compelling interest in securing highly reliable evidence of crime. The present law vigorously protects detained suspects by insisting they are given sufficient

information about their jeopardy and sufficient access to and opportunity to receive legal advice before questioning by police. By also allowing them to remain silent and by requiring proof beyond a reasonable doubt that any custodial utterance is the uncoerced product of an operating mind, this Court has established substantial protection of the right to silence. Given those requirements, it is fundamentally fair to allow the police to use legitimate means of persuasion to obtain voluntary confessions.

3. The new procedural rules proposed by the Appellant would tip the balance beyond fair procedure with no account for the important societal interests served by non-coercive custodial questioning. If the Canadian standard of due process is augmented by these new rules, we will lose a vital tool in solving and prosecuting crime. The broader impact of this development would be that many crimes would go unresolved, society would be less safe and more convictions would necessarily rest upon other less reliable forms of evidence, thereby increasing the potential for conviction of the innocent.

4. Contrary to the Appellant's assertion, the existing due process framework in Canada already offers more substantial and effective protection for the right of silence than other major common law jurisdictions. The Appellant's suggested changes would move Canada far beyond what any other common law jurisdiction has found necessary or desirable by functionally prohibiting custodial interviews. Custodial questioning remains a vital and regular means of solving crime and establishing the truth in those other adversarial legal systems that recognize a right to silence. So should it here. Otherwise, this Court would establish an undue process.

5. The Appellant has not demonstrated compelling reasons for rejecting the limited accommodation of society's truth seeking interest allowed by this Court—the use of legitimate means of persuasion to encourage a detainee to make a voluntary statement. Before turning the investigation of crime upside down in the manner proposed by the Appellant, this Court should require cogent evidence that the existing voluntariness framework is an invitation to overwhelming or oppressive custodial interrogation. The Appellant offers no such proof.

B. Statement of Facts

6. The Director of Public Prosecutions relies upon the facts as stated by the parties to this appeal and takes no issue with respect to any factual disputes between the parties. For the purposes of this intervention, it is sufficient to highlight the following circumstances.

7. On 28 October 2003, a jury convicted the Appellant of murder in the shooting death of Richard Lof, an innocent bystander to an argument that turned senselessly violent. During questioning following his arrest on reasonable grounds three days after the shooting, the Appellant acknowledged that he was the person depicted in a video image taken in the vicinity of the shooting. That limited confession became part of the Crown's proof of identity.

8. The Appellant was questioned in custody only after he had been fully apprised of his legal rights under sections 10(a) and 10(b) of the ***Charter***, had been afforded two separate consultations with legal counsel (once over the telephone and once in person), and after he had been given a significant interval in which to digest that legal advice. Upon arrest, the Appellant was twice cautioned that he was not required to speak but that anything he did say might be used in evidence. He acknowledged understanding that advice. Immediately prior to the interview in question, the Appellant was cautioned for a third time that he was not obliged to speak. He said he understood.

9. During the 70 minute interview, the Appellant demonstrated clear awareness of his right not to speak to the police. He did not confess to the crime. Rather, he chose to make a largely *exculpatory* statement offering a partial alibi. The trial judge found beyond a reasonable doubt that the statement was the product of an operating mind and was voluntary in accordance with this Court's clarification of the confession rules[1]. That ruling was not appealed to the British Columbia Court of Appeal and is not challenged before this Court.

[1] ***R. v. Oickle***, [2000] 2 S.C.R. 3.

PART II
ISSUES

10. The fundamental question posed by this case is whether further restrictions on police investigative interviewing are necessary beyond the existing rules that detained suspects must be legally informed about their right to choose whether to speak to the police, and that their statements be proven beyond a reasonable doubt to be voluntary, uncoerced and free of oppression.

11. The position of the Director of Public Prosecutions is that it is fair to allow the police to use "legitimate means of persuasion to encourage"[2] detained suspects to make a statement. This submission will trace the following themes:

A. Added to the existing panoply of rules governing custodial questioning, the Appellant's proposed new rules establish protection against voluntary self-incrimination beyond what fairness demands. The Appellant's new procedural framework makes no accommodation for society's competing interest in the pursuit of the truth in criminal cases.

B. Changing the rules in the manner suggested by the Appellant would have a devastating impact on criminal justice in Canada: fewer crimes would be solved, fewer convictions would be secured, and a greater proportion of convictions would rest upon other less reliable forms of evidence, thereby increasing the potential for wrongful conviction.

C. In comparison with other common law jurisdictions, the Canadian due process framework surrounding custodial questioning is already the most protective of the right of silence with the least accommodation for society's competing interest in enforcing the law and seeking the truth in criminal cases.

D. The Appellant has not shown any compelling reason to justify overturning this Court's holding in ***Hebert***[3] that allows the police to fairly encourage detainees to make voluntary statements. Nor is there any evidence that such upheaval in our procedural rules is necessary to discourage overwhelming or oppressive custodial interrogation.

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[2] ***R. v. Hebert,*** [1990] 2 S.C.R. 151, at pp. 176-177.
[3] *Ibid.*

PART III
ARGUMENT

A. The Appellant proposes an unprincipled extension of the right to silence—a new right not to be spoken to by the police.

12. Adding the Appellant's four new rules to our existing due process framework elevates the right of silence beyond what fairness demands. This Court has applied section 7 and related ***Charter*** rights to establish a due process framework governing custodial questioning and the admission of confessions and evidence derived thereby. That framework is fundamentally fair in that it affords substantial protection against self-incrimination with some limited accommodation of society's interest in seeking the truth in criminal cases, by allowing the police to use "legitimate means of persuasion to encourage" detainees to speak.[4]

13. Adding the Appellant's rules would lead to a prohibition on custodial questioning in the vast majority of cases. Such an approach tips the section 7 balance too far in favour of the right to silence for no good reason and with no accommodation for the competing societal interest in discovering the truth through custodial interviews. That dimension is completely ignored by the Appellant's proposed new rules.

The existing due process framework.

14. Under the existing due process framework in Canada, a detained suspect is already well-protected against self-incrimination by the following rules:

I. The suspect must have been lawfully arrested or detained. In the typical custodial interview following arrest, this requires that the arresting officer had objectively reasonable grounds to believe that the suspect had committed an indictable offence.[5]

II. Upon arrest or detention, the suspect must be meaningfully informed as to the reason for his arrest or detention.[6]

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[4] ***Hebert***, *supra*, note 2, at pp. 176-177.
[5] ***R. v. Storrey***, [1990] 1 S.C.R. 241, at pp. 250-51.
[6] ***R. v. Evans,*** [1991] 1 S.C.R. 869, at pp. 875, 886-888.

III. Upon arrest or detention the suspect must be effectively informed of his right to consult with legal counsel, including his right to access free legal services available in the jurisdiction and his right to do so immediately.[7]

IV. The right to counsel must be explained in a manner that the suspect can understand.[8]

V. The suspect must be given a reasonable opportunity to exercise those rights in privacy.[9]

VI. Where the suspect indicates a desire to speak with counsel, the police must hold off questioning until the suspect has been given an opportunity to consult with legal counsel.[10]

VII. Where a suspect has not opted to exercise his right to counsel, upon any subsequent indication by the suspect that he may wish to do so, the police must re-advise the suspect of those rights and of the obligation upon them to hold off questioning until those rights have been exercised.[11]

VIII. The mere fact that a suspect says he knows his rights is not sufficient to constitute waiver of the informational component of section 10(b) of the ***Charter***. Waiver requires that the suspect explicitly waive the right to receive the standard information about section 10(b) and the circumstances reveal that the suspect has adverted to his rights and is aware of the means by which these rights can be exercised.[12]

IX. Rules II to VIII above are all subject to reapplication where there is a fundamental and discrete change in the purpose of the investigation involving a different and unrelated offence or a significantly more serious offence than was contemplated at the time the original warnings were given.[13]

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[7] ***R. v. Brydges***, [1990] 1 S.C.R. 190, at pp. 203 and 206.
[8] ***Evans,*** *supra*, note 6, at p. 891.
[9] ***R. v. Playford*** (1987), 40 C.C.C. (3d) 142, at p. 155 (Ont. C.A.); ***R. v. Standish*** (1988), 41 C.C.C. (3d) 340 at p. 343 (B.C.C.A.); ***R. v. Lepage*** (1986), 32 C.C.C. (3d) 171, at p. 177 (N.S.S.C.A.D.).
[10] ***R. v. Manninen***, [1987] 1 S.C.R. 1233, at pp. 1242-1243; ***R. v. Ross***, [1989] 1 S.C.R. 3, at p. 12; ***R. v. Whitford*** (1997), 115 C.C.C. (3d) 52 (Alta. C.A.), leave ref'd [1997] 3 S.C.R. xiii..
[11] ***R. v. Prosper,*** [1994] 3 S.C.R. 236; ***Playford***, *supra*, note 9; ***Evans***, *supra*, note 6, at pp. 882-883 and 893-894.
[12] ***Evans,*** *supra*, note 6 at pp. 893-894; ***Prosper***, *supra*, note 11, at p. 274.
[13] ***R. v. Burlingham,*** [1995] 2 S.C.R. 206; ***R. v. Clarkson***, [1986] 1 S.C.R. 383 at pp. 394-395.

X. A statement of a suspect obtained during custodial questioning complying with the above noted rules is admissible in evidence only where the Crown proves beyond a reasonable doubt that it was the product of an operating mind and was voluntary, not compelled by any *quid pro quo*.[14]

XI. In considering whether a confession is voluntary, the trial court must also consider whether the will of the suspect was otherwise overborne by oppressive conduct or circumstances so that he was effectively denied the choice of whether to speak to the police.[15]

XII. The suspect must know that he is speaking to the police. In the custodial setting, eliciting a statement through the functional equivalent of interrogation by an undercover operative (whether a police officer or a civilian agent of the police) is not permitted.[16]

XIII. A refusal to answer relevant questions, provide an explanation, or make a statement generally cannot be used to incriminate the suspect.[17]

The existing framework is fundamentally fair.

15. That this comprehensive code of protections adequately safeguards the right to silence is apparent when one considers its main impact on criminal justice in Canada. Where the police get it wrong in relation to any of these rules, the consequences are clear and immutable; there will be either a finding of conscriptive ***Charter*** breach or a basis for reasonable doubt about the voluntariness of the statement. In the case of either finding, the statement and any derivative evidence are likely to be excluded at trial.[18]

16. This is a balanced approach to competing interests. While this framework does not provide absolute protection against self-incrimination—the onus is on the suspect to remain silent—it is fair because the police are prevented from enticing or coercing a suspect into speaking. The right to silence is safeguarded because the police are allowed

[14] As explained by this Court in ***Oickle,*** *supra*, note 1, at pp. 32 and 40.
[15] As illustrated by cases relied upon by the Appellant at para. 44 of his factum, on this basis, some trial judges have refused to admit confessions where suspects asserted the right to silence and police conduct went too far to overcome those assertions; ***Oickle,*** *supra*, note 1, at pp. 38-39; ***Hebert,*** *supra*, note 2, at p. 182.
[16] ***Hebert,*** *supra*, note 2, at pp. 186-187; ***R. v. Broyles,*** [1991] 3 S.C.R. 595; ***R. v. Liew,*** [1999] 3 S.C.R. 227, at pp. 242-243.
[17] ***R. v. Chambers,*** [1990] 2 S.C.R. 1293, at pp. 1315-1318.
[18] ***R. v. Stillman***, [1997] 1 S.C.R. 607.

to question only those detainees who are aware of their right to choose whether to speak to them. Conversely, the police are permitted to attempt to persuade a suspect to cooperate or engage with them, within the bounds of fair play, thus making a limited accommodation for society's significant competing interest in seeking the truth in criminal cases.

B. Changing the rules in the manner suggested by the Appellant would tip the balance too far with a devastating impact on society's ability to seek the truth.

17. Piling the Appellant's four new rules on top of the existing procedural safeguards would virtually prohibit custodial questioning. In isolation, these new rules present the illusion of incremental change; as an addition to existing protections, they involve a giant leap into a whole new world. The greater proportion of detainees, those who confer with counsel before questioning, can be expected to return from that consultation and parrot some stock phrase such as, "I invoke my right not to be interviewed." From that point, the police would be prohibited from any attempt to fairly encourage the suspect to make a statement.

18. This would involve a fundamental shift from the present situation in Canada. Relying on what this Court allowed in ***Hebert***,[19] the use of "legitimate means of persuasion to encourage suspects to speak," the police routinely proceed with interviews of suspects after they have exercised their right to confer with legal counsel. Although the results vary widely, the police frequently secure useful statements. The Appellant's new rules would bar such interviews at great cost to the search for truth in criminal cases.

19. It is vitally important that this Court consider the potential impact of rules that would require the police to stop questioning detainees upon their mere assertion that they do not want to be questioned. The case at bar is perhaps the paradigm example of legitimate means of persuasion being employed to obtain a valuable admission from a suspect who had exercised his right to confer with legal counsel. The police carefully attended to every aspect of the due process framework before interviewing the accused, who was clearly well aware of his right not to speak. The interview was conducted entirely within the rules. Nothing deprived the accused of the right to choose whether to

[19] ***Hebert,*** *supra*, note 2, at p. 177.

speak to the police. It takes little imagination to consider how this type of uncoercive questioning plays out every day in the police interview rooms of this country to the significant benefit of society.

20. Custodial questioning continues to play a vital role in our criminal justice system. When done skilfully but fairly without any compulsive *quid pro quo* and a suspect makes a statement that can be proven beyond a reasonable doubt to be the voluntary product of an operating mind, such that there is no legitimate concern about the statement's veracity,[20] society benefits by acquiring very reliable information about a crime. While there is no Canadian scholarly research either about the statistical incidence of custodial questioning or about how often it produces a useful confession, it is axiomatic that this highly reliable type of evidence is essential for the investigation of crime and the discovery of the truth, "the ultimate aim of any trial, criminal or civil."[21]

21. Some measure of the importance of this investigative tool can be taken from the fact that in the relatively short time since this Court's seminal decision in ***Oickle***,[22] there have been at least 204 electronically reported trial rulings in which that decision has been applied to judge the voluntariness of a confession secured during a custodial interview.[23] The total number of cases in which useful custodial statements were obtained in Canada during those years is undoubtedly much larger, including many cases where the strength of the evidence led the accused to plead guilty. This number also does not capture those cases in which the police obtained some useful evidence but the investigation is still ongoing. Just as importantly, this survey cannot capture those cases in which a suspect answered questions and provided a credible explanation for apparently incriminating circumstances such that the police recognized they had arrested the wrong person or that no crime had actually been committed.[24]

22. The view that our criminal justice system places substantial reliance on uncoerced confessions is also strongly supported by scholarly research showing that this means of

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[20] ***Oickle,*** *supra*, note 1, at paras. 34-46, 68-71.
[21] ***R. v. Nikolovski,*** [1996] 3 S.C.R. 1197, at paras. 13-18.
[22] ***Oickle,*** *supra*, note 1.
[23] See: List generated by Quicklaw search annotated to exclude non relevant cases such as non-custodial interviews.
[24] Such as where the accused's statement credibly revealed a substantive defence of justification.

investigation is vitally important in other adversarial justice systems. In the United States, statements of detained suspects are obtained in something like 80% of all serious cases.[25] In England and Wales, formal interviews produce useful statements in somewhere between 2/3 to 3/4 of all cases.[26] Given the shared heritage of a similar voluntariness framework governing the admissibility of statements made to the police, the relative importance of custodial interrogation in the investigation of crime in the other major common law jurisdictions is a strong indicator of its significance in Canada.

23. It is also relevant to consider that all of humankind relies upon the statements of accused persons to investigate and prosecute crime. Reliance upon the fruits of some form of official questioning is a universal norm. In addition to other adversarial criminal justice systems that regularly rely upon voluntary confessions of guilt, the majority of legal systems in the world, those that are inquisitorial (rather than adversarial),[27] place even greater reliance upon what a criminal suspect says when questioned about the crime by an agent of the state.[28]

24. Thus, it would appear that the idea of affording state agents some avenue to question detained criminal suspects is universally regarded as beneficial for the suppression of crime and the pursuit of the truth. As discussed, there are good reasons for this common-sense approach to balancing the rights of suspects and society. This Court should be loath to depart from this international norm without compelling reasons.

25. The cost of elevating the right to silence to a right not to be spoken to is grave. The vital importance of police questioning in advancing every societal interest in criminal justice is most vividly demonstrated when it serves to resolve our worst and most vexing cases of murder. A prime example is the planned and deliberate mass murder by bombing

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[25] See discussion of this data at paragraph 30 *infra*.
[26] G. Van Kessel, "The Suspect as a Source of Testimonial Evidence: A comparison of the English and American Approaches" (1986-1987) 38 Hastings L.J. 1, at pp.110-115.
[27] According to the World Legal Systems website maintained by the Civil Law Section of the Faculty of Law of the University of Ottawa, 154 political entities have adopted a civil law system and 96 a common law system: http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php.
[28] For example, in France, a police officer may summon and hear any person likely to give information in respect of an offence and reduce their statement in writing in an official report (*procès -verbal*). When there are one or more plausible reasons to suspect that the person has committed an offence, the police officer can detain for up to 24 hours (extendable up to 48 hours on the approval of the district prosecutor) for the requirements of the investigation including interrogations (*garde à vue*): see articles 62-66 and 77-78 of the *Code of Criminal Procedure*, Art. 62-66, 77-78 C. proc. pén.

of nine miners during a bitter labor dispute at Yellowknife's Giant gold mine.[29] Months of wiretapping and gathering of circumstantial evidence had led police to seriously consider charging two striking miners, known to be responsible for two prior non-fatal bombings at the mine, with the murders.[30] However, their innocence was established and the crime solved when a third suspect, Roger Warren, was fairly but skillfully interviewed. While detained, Warren, against whom the police had essentially no useable evidence, made a "carefully considered personal decision" to confess, participate in a reenactment and assist police in locating physical evidence of the crime he had perpetrated entirely alone.[31] Shortly before confessing, Warren became more reluctant to speak and his interview would have most likely ended under the Appellant's regime. It is chilling to consider what a different course justice might have taken (with the crime unsolved and two innocents possibly being charged) in the Appellant's proposed world of prophylactic protection against fair police encouragement of voluntary confession.

26. If custodial questioning were prohibited as proposed by the Appellant, it would be logical to expect a variety of disturbingly different outcomes in those cases where permitting legitimate means of persuasion to be employed to encourage the suspects to speak would have otherwise revealed some cogent information or evidence.

- In some cases involving heinous crimes, the police would be unable to secure sufficient evidence to support prosecution; dangerous criminals would be turned loose to harm others.
- In an even greater number of cases, the lack of some incriminating utterance corroborative of other evidence would be the difference between conviction and acquittal; those crimes would go unpunished.
- In cases of murder and other serious crimes of violence, inability to question suspects in custody would cause greater resort to legally complicated and intrusive investigative means like wiretapping and long-term undercover

[29] D. Staples and G. Owens, *The Third Suspect: The Inside Story of the Hunt for the Yellowknife Mass Murderer*, (The Publishers: Red Deer, 1995); and ***Fullowka v. Royal Oak Ventures Inc.***, [2004] N.W.T.J. 64 (S.C.).
[30] ***R. v. Warren***, [1997] N.W.T.J. No. 41 at para. 4 (C.A.); and Staples and Owens, *supra*, note 29, at p. 185. These men were later convicted of the other bombings.
[31] *Ibid.*, note 30, at paras. 11 and 16.

operations in which the police may commit acts that would otherwise be crimes[32] to secure the trust of the non-detained suspect.

- In some cases, the lack of a custodial interview would mean no opportunity for police to hear first hand a persuasive explanation of apparently incriminating circumstances or to hear an innocent explanation for apparently wrongful conduct. Some suspects might face indictment and trial unnecessarily.
- In a few cases, where the police have objective reasonable grounds for arrest that are in fact mistaken, the lack of opportunity to question the prime suspect would turn out to be a significant contributor along a path of missteps leading to a wrongful conviction. With no early opportunity to hear a credible denial and explanation of apparently incriminating facts,[33] the police would fail to refocus their investigative theory and more vigorously pursue other leads that would have revealed the true perpetrator and exonerated their prime suspect.
- Finally, fewer opportunities to secure reliable confessions of guilt would mean more cases built entirely upon circumstantial evidence or upon other less reliable types of evidence such as fleeting glance eye-witness identifications or purported jail house admissions. That would not only lead to a loss of convictions but, more significantly, would result in an increased risk of wrongful convictions because there would be less opportunity for the police to obtain a true confession that would have steered them away from charging the wrong person.

27. In short, the quality of justice would be reduced. The foreseeable impact of virtually eliminating custodial questioning would be the significant loss of reliable information upon which important decisions are made within our criminal justice system today. In almost every case where uncoercive custodial questioning under the existing framework would have produced some cogent information there would be, under the proposed framework, less information on which to decide whether to charge, prosecute, commit for trial, defend the accused[34] and convict.

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[32] Albeit in the context of a statutory scheme that regulates such conduct.
[33] Otherwise, that credible explanation may not be revealed until the moment of its presentation at trial.
[34] Sometimes a confession that the Crown needs to prove its case also narrates a defence that may be presented to the jury without having the accused testify subject to cross-examination.

C. The International Comparative Perspective—Canada already leads in protection against self-incrimination.

28. By presenting particular features of the law in United Kingdom and the United States divorced from the fundamentally different contexts in which those rules operate, the Appellant has promoted the misconception that those common law jurisdictions offer detainees greater protection against self-incrimination during custodial interviews than do the existing rules in Canada. In fact, the opposite is true. Canada leads the way in protecting the right to choose whether to speak to the police.

In the United States, the law has accommodated police adaptations that avoid the invocation by suspects of the apparent strictures imposed by Miranda.

29. The vast majority of interviewed detainees in the United States choose to make statements and do not invoke their ***Miranda***[35] rights. Although the invocation of ***Miranda*** rights can operate to prohibit interrogation, over the last 40 years the United States Supreme Court has upheld a framework of investigative practices that serve to avoid that impact of the ***Miranda*** doctrine. In practice, the American due process framework is far less protective of the suspect's right against self-incrimination than are the existing Canadian rules.

30. Legal scholars in the United States debate the extent to which the ***Miranda*** rules result in a loss of information to law enforcement but are in agreement that the vast majority of U.S. criminal suspects, something like 80% in serious cases, actually waive those rights rather than invoke them.[36] The high incidence of waiver stems from a fundamentally different concept of legally valid waiver in the United States. Unlike the situation in Canada, where this Court has insisted on express waiver with clear awareness of the consequences of waiving the ***Charter*** right in question,[37] the United States Supreme Court has approved implied waiver of ***Miranda*** rights[38] and has upheld waiver made without appreciation of the legal consequences, even in circumstances where the

[35] ***Miranda v. Arizona***, 384 U.S. 436 (1966).
[36] See: Paul G. Cassell & Brett S. Hayman, "Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda" (1996) 43 U.C.L.A. L. Rev. 839 at p. 859; Richard A. Leo, "Inside the Interrogation Room" (1996) 86 J. Crim. L. & Criminology 266, at p. 276.
[37] ***R. v. Borden***, [1994] 3 S.C.R. 145, at pp. 161-165; ***Evans***, *supra*, note 6, at pp. 882-883, 893-894; ***Clarkson***, *supra*, note 13, at pp. 394-396.
[38] ***North Carolina v. Butler***, 441 U.S. 369 (1979).

suspect was unaware of his actual jeopardy.[39] As a consequence, waivers are often obtained by police by the simple expedient of reading the four part ***Miranda*** warnings[40] without the two invocation warnings[41] and then proceeding directly to interrogation. By not invoking the rights and by making a statement, the detainee is said to have implicitly waived his rights.[42]

31. Moreover, it is important to recognize that, distinct from the situation that would apply under the Appellant's proposed new rules in Canada, the ***Miranda*** rules operate from the very outset of the custodial encounter in an all or nothing fashion. As a result, the vast majority of U.S. criminal suspects make an implied or express waiver of ***Miranda*** rights and face police questioning, without ever having the benefit of consultation with legal counsel concerning their present jeopardy. That is fundamentally different from the typical custodial interview in Canada, which, as in this case, involves a suspect who, before questioning, had the benefit of receiving advice from his own lawyer about both his right to silence and his present legal predicament.

32. In addition, the obligation on American police to provide ***Miranda*** warnings applies only to truly custodial encounters that curtail the suspect's freedom "to the degree associated with formal arrest."[43] As such, the ***Miranda*** rules are not applied in many situations that, under Canadian law, would involve "detention" and result in a suspect receiving his rights to legal counsel.[44]

33. Finally, it is also significant to note that even where a suspect has invoked ***Miranda*** rights and the police proceed to obtain a statement in violation of ***Miranda***, that statement is not inadmissible for all purposes. Unlike the situation in Canada,[45] in the U.S.,

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[39] ***Colorado v. Spring***, 479 U.S. 564 (1987) at p. 574.
[40] "You have the right to remain silent, anything you can say can and will be used against you in a court of law; you have the right to an attorney; if you cannot afford one, one will be provided to you free of charge."
[41] "Do you understand these warnings? Having these rights in mind, do you wish to speak to me?"
[42] Richard A. Leo & Welsh S. White, "Adapting to Miranda: Modern Investigators's Strategies for Dealing with the Obstacles Posed by Miranda" (1994) 84 Minn. L. Rev. 397 at pp. 414 to 417.
[43] ***Berkemer v. McCarty***, 468 U.S. 420 (1984), at p. 440; See also; Kate Greenwood & Jeffrey A. Brown, *Investigation and Police Practices: Custodial Interrogations*, (1998) 86 Geo. L.J. 1318.
[44] ***R. v. Therens***, [1985] 1 S.C.R. 613, at pp. 640-644, (per Le Dain, J.).
[45] ***R. v. Calder,*** [1996] 1 S.C.R. 660, at pp. 677-678.

American authorities may use such statements to impeach the credibility of the accused if he testifies.[46]

34. Accordingly, consideration of the ***Miranda*** rules in context illustrates that it is misleading to suggest, as the Appellant does, that the ***Miranda*** doctrine generally prohibits custodial interrogation. In fact, the reality is much to the contrary. The American concept of due process governing custodial interrogation balances protection of the right against self-incrimination and the competing societal interest in a manner that provides greater accommodation to law enforcement and considerably less protection against self-incrimination than does our existing due process framework in Canada.

The rules in England and Wales are also much less protective against self-incrimination. Measured against this Court's teachings, the protection of the right to silence under PACE is somewhat illusory.

35. The Appellant has similarly painted a too rosy picture of the protection against self-incrimination available in England and Wales. Most significantly, a suspect's choice not to answer police questions may now be used to incriminate him at trial in a wide range of circumstances, reflecting an adoption of significant inquisitorial elements in the due process model there.[47] Also, the supposed bright line rule, which the Appellant suggests would have precluded custodial questioning in this case, is neither as bright as the Appellant suggests, nor would it have precluded interrogation of a suspect similarly situated to the Appellant.

36. Suspects in England and Wales are subject to interview and questioning after arrest irrespective of their right to silence. Although the English or Welsh criminal suspect enjoys the benefit of facing the police interrogator accompanied by his solicitor, there is no general right to avoid questioning.[48] More significantly, choosing not to answer relevant questions can be used to incriminate where the accused testifies or otherwise calls affirmative evidence about matters he failed to mention or refused to discuss, even when done on the advice of counsel.[49] The best synopsis of the situation in England and

[46] ***Harris v. New York***, 401 U.S. 222 (1971), at pp. 224-225.
[47] ***Criminal Justice and Public Order Act (U.K.)*** 1994 c. 33, ss. 34-37.
[48] ***Police and Criminal Evidence Act 1984 (PACE) CODE C*** *– Code of Practice For The Detention, Treatment And Questioning Of Persons By Police Officers*, Note For Guidance 1K.
[49] See ***R. v. Bowden***, [1999] 2 Cr. App. R. 176; ***R. v. Condron***, [1997] 1 Cr. App. R. 185.

Wales is revealed by the standard caution now given to a suspect before he is questioned in the presence of his solicitor:

> *You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you rely on later in Court. Anything you do say may be given in evidence*.[50]

37. It is also inaccurate to suggest that the English and Welsh rules involve a clearly demarcated two stage process (pre- and post-charge) which, had it applied here, would have barred questioning of a person similarly situate to this Appellant at the time of his custodial interview (a suspect arrested on reasonable grounds). The line of demarcation between the two stages of investigation is much different than the Appellant suggests.

38. A review of relevant English jurisprudence belies the notion of a bright line between the pre and post charge stages of investigation. The statutory provision says that the second stage starts when the "officer in charge of the investigation" (or the officer in charge of the suspect's custody) "reasonably believes there is sufficient evidence to provide a realistic prospect of conviction."[51] The Criminal Court of Appeal described the transition from one stage to the next as "a benign continuum,"[52] and has upheld, as lawful, questioning that continued beyond the point where a strong *prima facie* case existed.[53] One legal scholar has described the rule's effect as prohibiting questioning "only when other evidence of guilt is so overwhelming that a confession is unnecessary for a conviction."[54] Moreover, questioning is explicitly permitted to clear up matters that were omitted during any first stage interview and to confront the suspect with new information.[55]

39. Thus, the existing law in Canada is substantially more protective of the right to choose whether to speak to the police than are the procedural rules imposed by PACE and other recent statutory reforms in England and Wales. Commentary in the leading English criminal procedural text characterizes the present formulation of the law surrounding custodial questioning in that country as reflecting, "a marked shift in emphasis towards

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[50] ***PACE Code C***, *supra*, note 48, Rule 10.5.
[51] *Ibid*., Rule 11.6 (c).
[52] ***R. v. Howell***, [2003] EWCA Crim 1, at paras. 23 and 24.
[53] ***R. v. Iannou,*** [1999] Crim L.R. 586; ***R. v. McGuiness,*** [1999] Crim L.R. 318.
[54] G. Van Kessel, *supra*, note 26, at p. 46.
[55] ***PACE Code C***, *supra*, note 48, Rule 16.5; ***R. v. Elliott***, [2002] EWCA Crim 931.

an overtly inquisitorial procedure."[56] Contrary to the Appellant's assertion, by Canadian ***Charter*** standards the right to silence in England and Wales is, to paraphrase what this Court said in ***Chambers***,[57] if not a snare, certainly something of a delusion.

The Canadian due process model sets the standard for measured protection of the right to choose whether to speak to the police.

40. Far from trailing other common law jurisdictions in protection for the accused in custodial interviews, as the Appellant has suggested, the Canadian model provides the most substantial protection of the right to choose whether to speak to the police. In this connection, it is noteworthy that this Court's balanced approach to addressing the competing interests has been emulated in New Zealand. In a recent case involving indistinguishable facts, the New Zealand Court of Appeal re-affirmed its adoption of the Canadian approach, quoting the seminal passage in McLachlin C.J.'s judgment in ***Hebert*** permitting police to use "legitimate means of persuasion to encourage the suspect" to speak with them after consulting counsel.[58]

D. The Appellant has failed to demonstrate compelling reasons to change the existing regime of comprehensive protections for detained suspects in the arrest and interview process.

41. The Appellant has not presented any evidence supporting the idea that his proposed four new rules are necessary to alleviate unfair custodial questioning of detainees in Canada. In ***Miranda,***[59] the majority judgment of United States Supreme Court paints a stark portrait of the state of custodial interrogation in that country in the 1960's. There is no evidence that present day custodial interviews in police stations and detachments in Canada bear any resemblance to the mean precincts depicted in the ***Miranda*** judgment. Moreover, the very Canadian trial jurisprudence relied upon by the Appellant to support his call for reform strongly supports the contrary view that the existing framework is very effective at protecting detainees from any police conduct that oversteps the boundaries set by this Court.

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[56] Archbold, *Criminal Pleadings and Practice*, (2007 edition) at §15-425.
[57] ***Chambers,*** *supra*, note 17, at p. 1296.
[58] ***R. v. Ormsby***, [2005] NZCA 493/04 at para. 12.
[59] See: ***Miranda v. Arizona***, *supra*, note 35, at pp. 445-455.

42. This Court's holding in ***Hebert***, allowing that police may use "legitimate means of persuasion to encourage" a detainee to speak even after he had asserted his desire to remain silent,[60] established an important precedent that has been strongly relied upon by the police conducting custodial interviews and by both trial and appellate courts reviewing the lawfulness of such police conduct.[61] As such, the Appellant is asking this Court to overturn its own previous decision, and therefore bears a "formidable burden" of providing "compelling reasons" for doing so.[62] The Appellant has not met that burden.

43. The only evidence offered by the Appellant to support the need for new rules is a myriad of trial decisions that, when taken together, actually demonstrate that the nuanced rule enunciated in ***Hebert*** is working very well to serve the relevant ***Charter*** section 7 purpose—protecting accused persons from coerced self-incrimination. Put simply, the body of trial jurisprudence shows that the ***Hebert*** formulation is a workable procedural rule that promotes justice case by case, by balancing the competing interests of suspects and society.

44. Further, a review of the cases discussed by the Appellant[63] involving situations where trial judges have considered the voluntariness of statements in the face of suspect assertions of the right to silence, belies the need for any prophylactic rule to prevent a consistent abuse of police authority. In most of those cases, the trial judges did not even have a reasonable doubt that the police conduct had overborne the suspect's right to choose. In the other cases, where the police had gone too far, trial judges applied the nuanced ***Hebert*** rule to exclude statements. There is no suggestion in those cases that trial judges find the rule too difficult to apply or otherwise inadequate for its protective purpose.

45. By comparison, a bright line rule would simply produce needless injustice. A single example will suffice. In ***R. v. Ertmoed*** the accused had undressed and strangled a 10 year old girl before dumping her body in a lake.[64] While he at first said he did not wish to

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[60] ***Hebert,*** *supra,* note 2, at pp. 176-177.
[61] See the jurisprudence discussed at paras. 39 to 44 of the *Factum of the Appellant*.
[62] ***R. v. B. (K.G.)***, [1993] 1 S.C.R. 740, at pp. 777-783. Other relevant jurisprudence is discussed in the *Factum of the Respondent.*
[63] See paras. 38 to 46 of the *Factum of the Appellant.*
[64] ***R. v. Ertmoed,*** [2006] B.C.J. No. 2067 (B.C.C.A.) at para. 18 (B.C.C.A.).

speak to police, he ultimately chose to engage with the interviewer in an "articulate" and "confident" manner, at times asserting his right to silence, but then later choosing to speak.[65] During his conversation with the officer, he confessed to the murder and described how he committed the crime. This confession was of "overriding" importance to the Crown's case.[66] It was common ground that the confession was made absent any coercion or intimidation,[67] and the trial judge found that the accused understood his right to remain silent.[68] The Appellant's proposed new rules would have precluded this fair process and just conviction. This Court should not invite such results by altering the law for the sake of administrative simplicity.

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46. In short, there is no compelling reason for abandoning our existing due process framework in favour of the one proposed by the Appellant. The existing rules provide an effective balance between protection of the right against self-incrimination and society's competing interest in seeking the truth. That equates to fundamental justice as mandated by Section 7 of the ***Charter***. The Appellant's proposal would upset that fair balance and would establish an undue process.

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[65] ***R. v. Ertmoed***, [2002] B.C.J. No. 3253 (B.C.S.C.), at para. 47.
[66] ***Ertmoed,*** *supra*, note 64 at para. 73.
[67] ***Ertmoed***, *supra*, note 65 at para 53.
[68] *Ibid*.

PART IV
COSTS

47. This Intervener makes no submissions as to costs.

PART V
REQUEST TO PRESENT ORAL ARGUMENT
POSITION OF THE INTERVENER

10 48. As requested in the Motion to Intervene, the Director of Public Prosecutions seeks permission to make oral argument at the hearing of this appeal.

49. It is the position of the Director of Public Prosecution that the issues should be answered in accordance with these submissions namely:

a) That section 7 of the ***Charter*** does not require an explicit written waiver of the right to silence prior to custodial questioning of a detainee.

b) That this Court should reaffirm its holding in ***Hebert***, allowing the police to use "legitimate means of persuasion to encourage" detained suspects to speak to
20 them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Ronald C. Reimer

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Nicholas E. Devlin

Counsel for the Intervener,
Director of Public Prosecutions

40 27 April 2007

PART VI
AUTHORITIES

Other References

PART VII
STATUTE / REGULATION / RULE

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right;

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

(a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;
d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

***CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994 CHAPTER 33* (U.K.)**

34 Effect of accused's failure to mention facts when questioned or charged

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (1) below applies.

(2) Where this subsection applies—
[(a) a magistrates' court inquiring into the offence as examining justices;]
(b) a judge, in deciding whether to grant an application made by the accused under—
(i) section 4 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act)

[paragraph 2 of Schedule 3 to the Crime and Disorder Act 19981:

(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper

[[2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.]

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above
"officially informed" means informed by a constable or any such person.

(5) This section does not—

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

35 Effect of accused's silence at trial
(1) At the trial of any person . . . for an offence, subsections (2) and (3) below apply unless—
(a) the accused's guilt is not in issue; or
(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence; but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court That the accused will give evidence or, where be is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment [with a jury], in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure: to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—
(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
(b) the court in the exercise of its general discretion excuses him from answering it. (6) . .

(7) This section applies--
(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

36 Effect of accused's failure or refusal to account for objects, substances or marks
Where:
(a) a person is arrested by a constable, and there is—
(i) on his person; or
(ii) in or on his clothing or footwear; or (iii) otherwise in his possession; or (iv) in any place in which he is at the time of his arrest, any object, substance or mark, or there is any mark on any such object; and
b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and (d) the person fails or refuses to do so, then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, sub- section (2) below applies.

(2) Where this subsection applies—
[(a) a magistrates' court inquiring into the offence as examining justices;]
(b) a judge, in deciding whether to grant an application made by the accused under--
(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act)

[paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998;
(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (l)(c) above what the effect of this section would be if he failed or refused to comply with the request.

[(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.]

(5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(8)…

37 Effect of accused's failure or refusal to account for presence at a particular place

(1) Where --
(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
(c) the constable informs the person that he so believes, and requests him to account for that presence; and
(d) the person fails or refuses to do so, then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) be- low applies.

(2) Where this subsection applies—
[(a) a magistrates' court inquiring into the offence as examining justices;]
b) a judge, in deciding whether to grant an application made by the accused under—
(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act)
[paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998];
(c) the court, in determining whether there is a case to answer; and
(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (l)(c) above what the effect of this section would be if he failed or refused to comply with the request.

[(3A) Where the accused was at an authorised place of detention at the rime of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.]

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(7) ...

***Police and Criminal Evidence Act 1984 (s.66(1)) - CODE OF PRACTICE C: detention, treatment and questioning of persons by police officers* (U.K.)**

Note 1K. This Code does not affect the principle that all citizens have a duty to help police officers to prevent crime and discover offenders. This is a civic rather than a legal duty; but when a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person from whom he thinks useful information can be obtained, subject to the restrictions imposed by this Code. A person's declaration that he is unwilling to reply does not alter this entitlement.

10.5 The caution which must be given on:(a) arrest; (b) all other occasions before a person is charged or informed they may be prosecuted, see section 16, should, unless the restriction on drawing adverse inferences from silence applies, see Annex C, be in the following terms: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."

11.6 The interview or further interview of a person about an offence with which that person has not been charged or for which they have not been informed they may be prosecuted, must cease when:

(a) the officer in charge of the investigation is satisfied all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or clarify what the suspect said;
(b) the officer in charge of the investigation has taken account of any other available evidence; and
(c) the officer in charge of the investigation, or in the case of a detained suspect, the custody officer, see paragraph 16.1, reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence.

16.5 A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it, unless the interview is necessary:

- to prevent or minimise harm or loss to some other person, or the public
- to clear up an ambiguity in a previous answer or statement
- in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted

Before any such interview, the interviewer shall:

(a) caution the detainee, 'You do not have to say anything, but anything you do say may be given in evidence.';
(b) remind the detainee about their right to legal advice.

***CODE DE PROCEDURE PENALE (Partie Législative)* (France)**

Article 62
L'officier de police judiciaire peut appeler et entendre toutes les personnes susceptibles de fournir des renseignements sur les faits ou sur les objets et documents saisis.

Les personnes convoquées par lui sont tenues de comparaître. Si elles ne satisfont pas à cette obligation, avis en est donné au procureur de la République, qui peut les contraindre à comparaître par la force publique.

Il dresse un procès-verbal de leurs déclarations. Les personnes entendues procèdent elles-mêmes à sa lecture, peuvent y faire consigner leurs observations et y apposent leur signature. Si elles déclarent ne savoir lire, lecture leur en est faite par l'officier de police judiciaire préalablement à la signature. Au cas de refus de signer le procès-verbal, mention en est faite sur celui-ci.

Les agents de police judiciaire désignés à l'article 20 peuvent également entendre, sous le contrôle d'un officier de police judiciaire, toutes personnes susceptibles de fournir des renseignements sur les faits en cause. Ils dressent à cet effet, dans les formes prescrites par le présent code, des procès-verbaux qu'ils transmettent à l'officier de police judiciaire qu'ils secondent.

Les personnes à l'encontre desquelles il n'existe aucune raison plausible de soupçonner qu'elles ont commis ou tenté de commettre une infraction ne peuvent être retenues que le temps strictement nécessaire à leur audition.

Article 63
L'officier de police judiciaire peut, pour les nécessités de l'enquête, placer en garde à vue toute personne à l'encontre de laquelle il existe une ou plusieurs raisons plausibles de soupçonner qu'elle a commis ou tenté de commettre une infraction. Il en informe dès le début de la garde à vue le procureur de la République.

La personne gardée à vue ne peut être retenue plus de vingt-quatre heures. Toutefois, la garde à vue peut être prolongée pour un nouveau délai de vingt-quatre heures au plus, sur autorisation écrite du procureur de la République. Ce magistrat peut subordonner cette autorisation à la présentation préalable de la personne gardée à vue.

Sur instructions du procureur de la République, les personnes à l'encontre desquelles les éléments recueillis sont de nature à motiver l'exercice de poursuites sont, à l'issue de la garde à vue, soit remises en liberté, soit déférées devant ce magistrat.

Pour l'application du présent article, les ressorts des tribunaux de grande instance de Paris, Nanterre, Bobigny et Créteil constituent un seul et même ressort.

Article 63-1
Toute personne placée en garde à vue est immédiatement informée par un officier de police judiciaire, ou, sous le contrôle de celui-ci, par un agent de police judiciaire, de la nature de l'infraction sur laquelle porte l'enquête, des droits mentionnés aux articles 63-2, 63-3 et 63-4 ainsi que des dispositions relatives à la durée de la garde à vue prévues par l'article 63.

Mention de cet avis est portée au procès-verbal et émargée par la personne gardée à vue; en cas de refus d'émargement, il en est fait mention.

Les informations mentionnées au premier alinéa doivent être communiquées à la personne gardée à vue dans une langue qu'elle comprend.

Si cette personne est atteinte de surdité et qu'elle ne sait ni lire ni écrire, elle doit être assistée par un interprète en langue des signes ou par toute personne qualifiée maîtrisant un langage ou une méthode permettant de communiquer avec des sourds. Il peut également être recouru à tout dispositif technique permettant de communiquer avec une personne atteinte de surdité.

Si la personne est remise en liberté à l'issue de la garde à vue sans qu'aucune décision n'ait été prise par le procureur de la République sur l'action publique, les dispositions de l'article 77-2 sont portées à sa connaissance.

Sauf en cas de circonstance insurmontable, les diligences résultant pour les enquêteurs de la communication des droits mentionnés aux articles 63-2 et 63-3 doivent intervenir au plus tard dans un délai de trois heures à compter du moment où la personne a été placée en garde à vue.

Article 63-2
Toute personne placée en garde à vue peut, à sa demande, faire prévenir dans le délai prévu au dernier alinéa de l'article 63-1, par téléphone, une personne avec laquelle elle vit habituellement ou l'un de ses parents en ligne directe, l'un de ses frères et soeurs ou son employeur de la mesure dont elle est l'objet.

Si l'officier de police judiciaire estime, en raison des nécessités de l'enquête, ne pas devoir faire droit à cette demande, il en réfère sans délai au procureur de la République qui décide, s'il y a lieu, d'y faire droit.

Article 63-3
Toute personne placée en garde à vue peut, à sa demande, être examinée par un médecin désigné par le procureur de la République ou l'officier de police judiciaire. En cas de prolongation, elle peut demander à être examinée une seconde fois.

A tout moment, le procureur de la République ou l'officier de police judiciaire peut d'office désigner un médecin pour examiner la personne gardée à vue.

En l'absence de demande de la personne gardée à vue, du procureur de la République ou de l'officier de police judiciaire, un examen médical est de droit si un membre de sa famille le demande ; le médecin est désigné par le procureur de la République ou l'officier de police judiciaire.

Le médecin examine sans délai la personne gardée à vue. Le certificat médical par lequel il doit notamment se prononcer sur l'aptitude au maintien en garde à vue est versé au dossier.

Les dispositions du présent article ne sont pas applicables lorsqu'il est procédé à un examen médical en application de règles particulières.

Article 63-4
Dès le début de la garde à vue ainsi qu'à l'issue de la vingtième heure, la personne peut demander à s'entretenir avec un avocat. Si elle n'est pas en mesure d'en désigner un ou si l'avocat choisi ne peut être contacté, elle peut demander qu'il lui en soit commis un d'office par le bâtonnier.

Le bâtonnier est informé de cette demande par tous moyens et sans délai.

L'avocat désigné peut communiquer avec la personne gardée à vue dans des conditions qui garantissent la confidentialité de l'entretien. Il est informé par l'officier de police judiciaire ou, sous le contrôle de celui-ci, par un agent de police judiciaire de la nature et de la date présumée de l'infraction sur laquelle porte l'enquête.

A l'issue de l'entretien dont la durée ne peut excéder trente minutes, l'avocat présente, le cas échéant, des observations écrites qui sont jointes à la procédure.

L'avocat ne peut faire état de cet entretien auprès de quiconque pendant la durée de la garde à vue.

Lorsque la garde à vue fait l'objet d'une prolongation, la personne peut également demander à s'entretenir avec un avocat à l'issue de la douzième heure de cette prolongation, dans les conditions et selon les modalités prévues aux alinéas précédents.

Si la personne est gardée à vue pour une infraction mentionée aux 4º, 6º, 7 º, 8 º et 15 º de l'article 706-73, l'entretien avec un avocet ne peut intervener qu'à l'issue d'un délai de quarante-huite heures. Si elle est gardée à vue pour une infraction mentionnée aux 3 º et 11 º du meme article, l'entretien avec un avocet ne peut intervenir qu'à l'issue d'un délai de soixante-douze heures. Le procureur de la République est avisé de la qualification des faits retenue par les enquêteurs qu'il est informé par ces derniers du placement en garde à vue.

Article 63-5
Lorsqu'il est indispensable pour les nécessités de l'enquête de procéder à des investigations corporelles internes sur une personne gardée à vue, celles-ci ne peuvent être réalisées que par un médecin requis à cet effet.

Article 64
Tout officier de police judiciaire doit mentionner sur le procès-verbal d'audition de toute personne gardée à vue la durée des interrogatoires auxquels elle a été soumise et des repos qui ont séparé ces interrogatoires, les heures auxquelles elle a pu s'alimenter, le jour et l'heure à partir desquels elle a été gardée à vue, ainsi que le jour et l'heure à partir desquels elle a été soit libérée, soit amenée devant le magistrat compétent. Il mentionne également au procès-verbal les demandes faites en application des articles 63-2, 63-3 et 63-4 et la suite qui leur a été donnée.

Cette mention doit être spécialement émargée par les personnes intéressées, et, au cas de refus, il en est fait mention. Elle comportera obligatoirement les motifs de la garde à vue.

Article 65
Les mentions et émargements prévus par le premier alinéa de l'article 64, en ce qui concerne les dates et heures de début et de fin de garde à vue et la durée des interrogatoires et des repos séparant ces interrogatoires, doivent également figurer sur un registre spécial, tenu à cet effet dans tout local de police ou de gendarmerie susceptible de recevoir une personne gardée à vue.

Dans les corps ou services où les officiers de police judiciaire sont astreints à tenir un carnet de déclarations, les mentions et émargements prévus à l'alinéa précédent doivent également être portés sur ledit carnet. Seules les mentions sont reproduites au procès-verbal qui est transmis à l'autorité judiciaire.

Article 66
Les procès-verbaux dressés par l'officier de police judiciaire en exécution des articles 54 à 62 sont rédigés sur-le-champ et signés par lui sur chaque feuillet du procès-verbal.

Article 77
L'officier de police judiciaire peut, pour les nécessités de l'enquête, garder à sa disposition toute personne à l'encontre de laquelle il existe une ou plusieurs raisons plausibles de soupçonner qu'elle a commis ou tenté de commettre une infraction. Il en informe dès le début de la garde à vue le procureur de la République. La personne gardée à vue ne peut être retenue plus de vingt-quatre heures.

Le procureur de la République peut, avant l'expiration du délai de vingt-quatre heures, prolonger la garde à vue d'un nouveau délai de vingt-quatre heures au plus. Cette prolongation ne peut être accordée qu'après présentation préalable de la personne à ce magistrat. Toutefois, elle peut, à titre exceptionnel, être accordée par décision écrite et motivée sans présentation préalable de la personne. Si l'enquête est suivie dans un autre

ressort que celui du siège du procureur de la République saisi des faits, la prolongation peut être accordée par le procureur de la République du lieu d'exécution de la mesure.

Sur instructions du procureur de la République saisi des faits, les personnes à l'encontre desquelles les éléments recueillis sont de nature à motiver l'exercice de poursuites sont, à l'issue de la garde à vue, soit remises en liberté, soit déférées devant ce magistrat.

Pour l'application du présent article, les ressorts des tribunaux de grande instance de Paris, Nanterre, Bobigny et Créteil constituent un seul et même ressort.

Les dispositions des articles 63-1, 63-2, 63-3, 63-4, 64 et 65 sont applicables aux gardes à vue exécutées dans le cadre du présent chapitre.

Article 78
Les personnes convoquées par un officier de police judiciaire pour les nécessités de l'enquête sont tenues de comparaître. Si elles ne satisfont pas à cette obligation, avis en est donné au procureur de la République qui peut les y contraindre par la force publique.

Les personnes à l'encontre desquelles il n'existe aucune raison plausible de soupçonner qu'elles ont commis ou tenté de commettre une infraction ne peuvent être retenues que le temps strictement nécessaire à leur audition.

L'officier de police judiciaire dresse procès-verbal de leurs déclarations. Les agents de police judiciaire désignés à l'article 20 peuvent également, sous le contrôle d'un officier de police judiciaire, entendre les personnes convoquées.

Les procès-verbaux sont dressés dans les conditions prévues par les articles 62 et 62-1.

CODE OF CRIMINAL PROCEDURE **(France) (Unofficial English Translation)**

Article 62
A judicial police officer may summon and hear any person likely to give information in respect of the offence or of the articles and documents seized.

The persons he summons are obliged to appear. The judicial police officer may use the law enforcement agencies to compel the persons mentioned in article 61 to appear. With prior permission from the district prosecutor, he may also use the law-enforcement agencies to compel persons who have not responded to a summons or persons he suspects will not respond to such a summons to appear.

He draws up an official report of their statements. The persons read this record through themselves; they may have their observations recorded on it and they affix their signature to it. If they declare they cannot read, the record is read over to them by the judicial police officer prior to signature. In the event of refusal to sign the police record, this is noted in the record.

The judicial police agents designated in article 20 may also hear under the supervision of a judicial police officer any person likely to give information concerning the facts of the case. They draft official reports for this purpose in accordance with the formalities prescribed by the present Code, which they transmit to the judicial police officer whom they assist.

Persons in respect of whom there is no plausible reason to suspect that they have committed or attempted to commit an offence may only be detained for as long as is necessary for their hearing.

Article 63
A judicial police officer may, where this is necessary for an Inquiry, arrest and detain any person against whom there exist one or more plausible reasons to suspect that they have committed or attempted to commit an offence. At the beginning of the arrest and detention he informs the district prosecutor.

The person so placed in custody may not be held for more than twenty-four hours. However, the detention may be extended for a further period of up to twenty-four hours on the written authorisation of the district prosecutor. The district prosecutor may make this authorisation conditional on the prior production before him of the person detained.

On instructions given by district prosecutor, any persons against whom the evidence collected is liable to give rise to a prosecution are, at the end of the police custody, either set free or referred to the district prosecutor.

For the implementation of the present article, the area jurisdiction of the Paris, Nanterre, Bobigny and Creteil district courts constitute a single jurisdiction.

Article 63-1
Any person placed in police custody is immediately informed by a judicial police officer, or under the latter's supervision, by a judicial police agent, of the nature of the offence which is being investigated, of the rights mentioned under articles 63-2, 63-3 and 63-4 as well as of the provisions governing the length of police custody provided for by article 63.

A mention of this information is entered on the official report and signed by the person under custody; in the event of a refusal to sign, this is noted.

The information mentioned under the first paragraph must be given to the person held in custody in a language that he understands, where appropriate by using written forms.

Where the person is deaf and cannot read nor write, he must be assisted by a sign language interpreter or by some other person qualified in a language or method of communicating with the deaf. Use may also be made of any other means making it possible to communicate with persons who are deaf.

Where a person is released after detention without the district prosecutor having made a decision as to prosecution, the provisions of articles 77-2 are brought to his attention.

Save in exceptional and unavoidable circumstances, the steps taken by investigators to communicate the rights mentioned in articles 63-2 and 63-3 must be taken no later than three hours from when the person was placed in custody.

Article 63-2
Any person placed in police custody may, at his request and within the time limit provided for by the last paragraph of article 63-1, have a person with whom he resides habitually, one of his relatives in direct line, one of his brothers or sisters, or his employer, informed by telephone of the measure to which he is subjected.

If the judicial police officer considers that he should not grant this request because of the needs of the inquiry, he reports the request forthwith to the district prosecutor, who grants it if he considers it appropriate to do so.

Article 63-3
Any person placed in police custody may, at his request, be examined by a doctor appointed by the district prosecutor or the judicial police officer. Where the police custody is extended, he may request to be examined a second time.

The district prosecutor or the judicial police officer may at any time appoint on their own motion a doctor to examine the person under police custody.

Where no request has been made by the person under police custody, by the district prosecutor or by the judicial police officer, a medical examination is as of right if a member of the person's family requests it. The doctor is appointed by the district prosecutor or by the judicial police officer.

The doctor examines the person under police custody forthwith. The medical certificate, which must specifically state the fitness of the person to be held further in custody, is attached to the case file.

The provisions of the present article are not applicable where a medical examination is made pursuant to any specific rule.

Article 63-4
At the start of the custody period, the person may request to talk to an advocate. Where he is not in a position to choose one, or if the advocate chosen cannot be reached, he may request an advocate to be appointed to him officially by the president of the bar.

The president of the bar is informed of such a request forthwith and by any means available.

The advocate chosen may communicate with the person under police custody under conditions which ensure the confidentiality of the conversation. He is informed of the type and believed date of the offence investigated by the judicial police officer or by a judicial police agent under the officer's supervision.

Following the conversation, which may not extend beyond thirty minutes, the advocate, if there is occasion to do so, presents written observations which are attached to the proceedings. The advocate may not mention this conversation to anyone for the duration of the custody period.

Where the police custody has been extended, the person may also request an interview with an advocate at the start of the extension, subject to the conditions and in the manner prescribed by the previous paragraphs.

If the person is in custody for an offence mentioned in 4, 6, 7, 8 and 15 of article 706-43, the interview may take place only after 48 hours have elapsed. If he is in custody for an offence mentioned in 3 and 11 of the same article, the interview with the advocate may only take place after 72 hours have elapsed. The district prosecutor is informed of the definition of the offences recorded by the investigators at the same time that he is notified that the person has been placed in custody.

Article 63-5
When it is indispensable for the progress of the inquiry to carry out an internal examination of the person held in police custody, this may only be done by a doctor brought in for this purpose.

Article 64
Every judicial police officer must enter on the official report of the hearing of any person under police custody the length of the interrogations to which this person was subjected and that of the rest taken between these interrogations, the times at which he was allowed to eat, the date and time he was taken into custody, and also the dates and times when he was either set free or brought before the competent judge or prosecutor. The officer notes in the official report any requests made pursuant to articles 63-2, 63-3 and 63-4 and the answer which was given to them.

This entry must be specifically signed in the margin by the persons concerned and, in the event of a refusal, mention of this is made. It is compulsory for this entry to state the reasons for the police custody.

Article 65
The entries and signatures provided for by the first paragraph of article 64 in respect of the dates and times of the beginning and end of police custody and the length of interrogations and the rest periods separating these interrogations must also be entered in a special register which is kept for this purpose in any police or gendarmerie premises where people are held in police custody.

Article 66
The official reports drafted by the judicial police officer pursuant to articles 54 to 62 are written up immediately and signed by him on each page of the record.

Article 77
The judicial police officer may keep at his disposal for the requirements of the inquiry any person against whom there are one or more plausible reasons to suspect that he has committed or attempted to commit an offence. He informs the district prosecutor of this when the police custody begins. The person under police custody may not be kept more than twenty-four hours.

Before the twenty-four hours have expired the district prosecutor may extend the police custody by a further period not exceeding twenty-four hours. This extension may be granted only after a prior presentation of the person to this prosecutor. However, it may exceptionally be granted by a written and reasoned decision in the absence of a prior presentation of the person. If the inquiry is followed in an area other than that of the seat of office of the district prosecutor dealing with the offence, the extension may be granted by the district prosecutor of the place where the measure is carried out.

On the instructions of the district prosecutor dealing with the case, at the end of the police custody persons against whom material has been collected liable to give rise to a prosecution are either set free, or referred to the prosecutor.

For the implementation of the present article, the area jurisdiction of the Paris, Nanterre, Bobigny and Creteil district courts constitute a single jurisdiction. The provisions of articles 63-1, 63-2, 63-3, 634, 64 and 65 are applicable to police custody that takes place within the framework of the present Chapter.

Article 78
Persons summoned by a judicial police officer for the requirements of the inquiry are obliged to appear. With the prior authorisation of the district prosecutor, the judicial police officer may use the law enforcement agencies to compel to appear persons who have not responded to a summons, or persons in relation to whom there is reason to suspect that would not respond to one.

Persons against whom no plausible reason exists to suspect that they committed or attempted to commit an offence may not be kept longer than the time strictly necessary for their hearing.

The judicial police officer draws up an official report of their statements. The judicial police agents mentioned under article 20 may also, under the supervision of a judicial police officer, hear the persons summoned.

The official reports are drafted pursuant to the conditions set out by articles 62 and 62-1.