File Numbers: 32537, 32769, 32969

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURTS OF APPEAL FOR
BRITISH COLUMBIA AND ALBERTA)

BETWEEN:

TRENT TERRENCE SINCLAIR

Appellant
(Appellant)

AND

HER MAJESTY THE QUEEN

Respondent
(Respondent)

AND BETWEEN:

STANLEY JAMES WILLIER

Appellant
(Respondent)

AND

HER MAJESTY THE QUEEN

Respondent
(Appellant)

AND BETWEEN:

DONALD RUSSELL McCRIMMON

Appellant
(Appellant)

AND

HER MAJESTY THE QUEEN

Respondent
(Respondent)

AND

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
ATTORNEY GENERAL OF ONTARIO
CANADIAN CIVIL LIBERTIES ASSOCIATION
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

FACTUM
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, INTERVENER
(Rule 37)

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PART I
STATEMENT OF FACTS

A. Overview

1. The Director of Public Prosecutions of Canada ("DPP") intervenes to urge against the appellants' proposed expansion of the implementational component of the right to counsel. The appellants' proposals would unduly upset the existing measured balance between society's interest in effective law enforcement and individual liberty, as presently struck by careful judicial interpretation of police powers, the legal rights under the *Charter* and the confessions rule.

2. The appellants' reliance on the law surrounding the right to counsel in other jurisdictions does not advance their case. The right to counsel elsewhere is differently structured than in Canada. Comparing our law on the right to counsel to the law in other jurisdictions without the full context and the necessary nuances provides an inexact and misleading picture. This factum aims at filling the lacunae by attempting to provide a more complete description of the state of the relevant law in foreign jurisdictions.

B. Statement of Facts

3. The DPP relies upon the facts as stated by the parties. The DPP would highlight the fact that in all three appeals, after being arrested and informed of their rights, each detainee spoke to counsel before being interviewed by police. None of the detainees expressed any concern as to the adequacy of the legal advice they had received before being interviewed. None of the appellants testified at trial that the legal advice was inadequate.

PART II
ISSUES

4. The principal issues are:

> (1) Whether a detainee who has consulted counsel and has received legal advice, and who understands his or her right to silence, has the continuing right during police questioning to consult counsel again?
>
> (2) Whether the police have a duty to "hold off" questioning a detainee who says he or she wishes to consult counsel again?

(3) Whether a detainee has the right to have his or her counsel present during police questioning?

(4) Whether a detainee has the right to consult counsel of choice?

5. The DPP's position is that this Court should answer these questions in the negative. The effort to find answers to these questions is not advanced by importing piecemeal rules from other jurisdictions.

PART III
ARGUMENT

Introduction

6. The probative value of a statement is well known: "A confession, if freely and voluntarily made, is evidence of the most satisfactory character."[1] In addition to its intrinsic evidence of guilt or innocence, a detainee's statement can lead police to other relevant evidence such as new witnesses or real evidence. Suspects (including detained suspects) are therefore a "fruitful source" of information in a criminal investigation and the state's interest in questioning them is a critical factor to be considered in the judicial regulation of the questioning of detainees by the police.[2]

7. Striking the appropriate balance between individual rights and freedoms and effective law enforcement has been and continues to be an important but difficult task for the judiciary.[3] This Court, both pre-*Charter*[4] and post-*Charter*[5], has consistently and correctly resisted the creation of fine-grained rules governing all aspects of the questioning of detainees by the police, recognizing instead that trial judges must possess a broad discretion in applying the confessions rule and relevant *Charter* principles to the unique facts of individual cases.[6]

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[1] ***Hopt v. Utah***, 110 U.S. 574 (1884), p.584; ***R. v. Oickle***, 2000 SCC 38, [2000] 2 S.C.R. 3, ¶141.
[2] ***R. v. Singh***, 2007 SCC 48, [2007] 3 S.C.R. 405, ¶45.
[3] ***R. v. Baldry*** (1852), 169 E.R. 568 (C.A.), p. 574; Kaufman, The Admissibility of Confessions, 3rd ed. (Carswell, 1979), pp.1-2, 18-24.
[4] ***Boudreau v. R.***, [1949] S.C.R. 262, p.270.
[5] ***R. v. Hebert***, [1990] 2 S.C.R. 151, pp.167-168.
[6] ***Singh***, ¶38-40.

The Existing Due Process Framework

8. In Canada a detained suspect is presently well-protected against unfair self-crimination by the following established rules:

I. The suspect must be lawfully arrested or detained.[7]

II. Upon arrest or detention, the suspect must be meaningfully informed of the reason for his or her arrest or detention.[8]

III. Upon arrest or detention the suspect must be effectively informed of his or her right to consult with legal counsel, including the right to free legal advice available in the jurisdiction and the right to do so immediately.[9]

IV. The right to counsel must be explained in a manner that the suspect understands.[10]

V. The suspect must have a reasonable opportunity to speak to counsel in private.[11]

VI. Where a suspect expresses the desire to speak with counsel, the police must hold off questioning until he or she has been given a reasonable opportunity to do so.[12]

VII. Where a suspect who has previously asserted the right to counsel indicates that he or she has changed his or her mind and no longer wants legal advice, the police must advise the suspect of the right to a reasonable opportunity to contact a lawyer and of the police's obligation to hold off questioning until the suspect has had that reasonable opportunity.[13]

VIII. The standard for waiver of the right to counsel requires a finding of express, unequivocal and informed waiver. [14] Implied waiver is insufficient.

IX. Rules II to VIII above are all reengaged if the suspect's legal jeopardy changes[15].

X. A suspect's statement obtained during custodial questioning in compliance with the above noted rules is admissible only if the Crown also proves beyond a reasonable doubt that it was the product of an operating mind and was voluntary and was not compelled by any *quid pro quo*.[16]

XI. In considering whether a statement was voluntary, the trial judge must also consider whether the will of the suspect was otherwise overborne by oppressive conduct or circumstances such that the suspect's choice whether to speak to the police was effectively undermined.[17]

XII. The suspect must know that he or she is speaking to the police. Active elicitation of a statement by an undercover operative (whether a police officer or a civilian agent

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[7] ***R. v. Storrey***, [1990] 1 S.C.R. 241, pp.250-1; ***R. v. Mann***, 2004 SCC 52, [2004] 3 S.C.R. 59, ¶71-77; *Charter* s. 9.
[8] ***R. v. Evans,*** [1991] 1 S.C.R. 869, pp.875, 886-888; *Charter*, s. 10(a).
[9] ***R. v. Brydges***, [1990] 1 S.C.R. 190, pp.203, 206.
[10] ***Evans***, p.891.
[11] ***R. v. Playford*** (1987), 40 C.C.C. (3d) 142 (Ont. C.A.), p.155, and cases cited therein; ***R. v. Standish*** (1988), 41 C.C.C. (3d) 340 (B.C.C.A.), p.343.
[12] ***R. v. Manninen***, [1987] 1 S.C.R. 1233, pp.1242-1243; ***R. v. Ross***, [1989] 1 S.C.R. 3, p.12; ***R. v. Whitford*** (1997), 115 C.C.C. (3d) 52 (Alta.C.A.), pp.55-60, leave ref'd [1997] 3 S.C.R. xiii.
[13] ***R. v. Prosper***, [1994] 3 S.C.R. 236, pp.269-274.
[14] ***R. v. Clarkson***, [1986] 1 S.C.R. 383, pp.394-395; ***Prosper***, pp.274-275.
[15] ***R. v. Black***, [1989] 2 S.C.R. 138, pp.153-154; ***Evans***, pp.893-894.
[16] ***Oickle***, ¶24-25, 57; ***R. v. Spencer***, 2007 SCC 11, [2007] 1 S.C.R. 500, ¶13-15.
[17] ***Oickle***, ¶58-60; ***Hebert***, p.182; ***Singh***, ¶46-50.

of the police) is not permitted.[18]

XIII. A detainee has the right to remain silent.[19] A detainee's refusal to answer relevant questions, to provide explanation, or to make a statement, generally cannot be used in evidence against him or her.[20]

9. The following sections will show that comparing other criminal jurisdictions does not support any expansion of this matrix, particularly in respect of the implementation of the detainee's right to counsel such as establishing a detainee's right to speak to counsel of choice, requiring the police to hold off questioning anytime a detainee wishes to speak to counsel again, or entitling a detainee to have counsel present during police questioning.

International Standards – Right to Counsel

(a) International Covenant on Civil and Political Rights ("*ICCPR*")

10. Article 9 of the *ICCPR*[21] has no equivalent to s. 10(b) of the *Charter* which grants a suspect the right to counsel upon arrest or detention, prior to being formally charged. In this respect Canadian due process law exceeds international standards, particularly given this Court's numerous pronouncements on the informational and implementation components of a detainee's rights as summarized above. While Art. 9 of the *ICCPR* does not specifically address the right to counsel on arrest, the U.N. Human Rights Committee ("HRC") has placed a temporal limit on Art. 9, so that pre-charge detention of a criminal suspect cannot surpass a "few days," without judicial process commencing.[22] The HRC has interpreted the *ICCPR* to mean that if a person is held too long without charge, then the fair trial guarantees of the *ICCPR*,[23] including the right to counsel (Art. 14.3(b)), will apply to pre-charge proceedings.[24]

11. Article 9 of the *ICCPR* does not oblige Canada to provide a detainee, who has already spoken to counsel, with the additional right to have counsel present during police questioning. The U.N. General Assembly's restatement of the international standards applicable to criminal

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[18] ***Hebert***, pp.186-187; ***R. v. Broyles***, [1991] 3 S.C.R. 595; ***R. v. Liew***, [1999] 3 S.C.R. 227, pp.242-243.
[19] ***Hebert***, p.164; ***Singh***, ¶7.
[20] ***R. v. Chambers***, [1990] 2 S.C.R. 1293, pp.1315-1318; ***R. v. Turcotte***, 2005 SCC 50, [2005] 2 S.C.R. 519, ¶45-56.
[21] 999 U.N.T.S. 171 (1966), entered into force March 23, 1976.
[22] ***Freemantle v. Jamaica***, Comm. N. 625/1995, HRC views of 24 March 2000, ¶7.4; Nigel S. Rodley, The Treatment of Prisoners under International Law, 2nd ed. (Oxford, 1999), pp.335-337.
[23] Once a charge is laid and a person is before the Courts, in similar language to s. 11 of the *Charter*, Article 14 of the *ICCPR* sets out several obligations on states.
[24] ***Kelly v. Jamaica***, Comm. N. 537/1993, HRC views of 17 July 1996, ¶9.2 (5 days without counsel pre-charge was held to be too long).

suspects under arrest or detention does not recognize a detainee's right to have counsel present during police questioning.[25] Canadian law, as outlined in ***Ekman*** (2000),[26] fully complies with international standards.

(b) European Convention on Human Rights ("*ECHR*")

12. Interpretation of Arts. 5 and 6 of the *ECHR*[27] has been similar to that of Art. 9 of the *ICCPR*. Although Art. 5 of the *ECHR* does not entitle a detainee access to counsel prior to charge, the fair trial guarantees of Art. 6.3(c) of the *ECHR* are violated when a suspect, not formally charged, is held with undue delay without access to counsel before the commencement of judicial proceedings.[28] Under the *ECHR* a detainee's pre-charge right of access to counsel is dependent upon a review of the entirety of the proceedings in a particular case with allowances made for differing pre-charge procedures as among European states.[29] The European Court of Human Rights has not mandated that detainees may have a lawyer present during questioning by police.

13. The appellants' suggestion (appellants' facta: Sinclair, ¶53-55; McCrimmon, ¶49-50) that existing Canadian law allows for "*incommunicado* interrogation", contrary to international standards, is extravagant. Canadian law in fact exceeds international standards and protects against *incommunicado* interrogations by the mosaic of due process protections listed earlier. As well, while international rules allow for detainees to be denied access to counsel for a "few days," under Canadian law a detainee cannot be held by police for more than 24 hours before being brought before the court.[30] A deliberate decision by Canadian police to hold a suspect beyond the 24 hour limit for the purpose of attempting to obtain a statement has been ruled to be a violation

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[25] United Nations High Commissioner for Human Rights, "Human Rights Standards and Practice for the Police – Expanded Pocket Book on Human Rights for the Police" (Geneva, 2004), p.14; Principles 13, 15, 17-18, 21, 23 - *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988); Rodley, pp.326-329.

[26] ***R. v. Ekman***, 2000 BCCA 414, ¶22, 26; leave denied [2001] 1 S.C.R. x.

[27] (1950) 213 UNTS 222 – See: ***Imbrioscia v. Switzerland*** (1993), 17 EHRR 441, ¶36; ***Murray v. U.K.*** (1996), 22 EHRR 29, ¶62-63. ***Salduz v. Turkey***, [2008] ECHR 1542, ¶50-55. Although the wording of Art. 5 of the *ECHR* differs from Art. 9 of the *ICCPR* it is the functional equivalent. The same is the case for Art. 6 of the *ECHR* and Art. 14 of the *ICCPR*.

[28] ***Öcalan v. Turkey*** (2005), 41 EHRR 985, ¶131 (7 days pre-charge detention without counsel violated Art. 6.3(c) of *EHCR*); ***Brennan v. U.K.*** (2002), 34 EHRR 18, ¶44-48 (24 hours detention did not).

[29] Mario Chiavario, "*Private Parties: the Rights of the Defendant and the Victim*" in Mireille Delmas-Marty and J.R. Spencer, ed., European Criminal Procedures (Cambridge, 2002), p.563; ***Salduz***, ¶51.

[30] Section 503(1) of the *Criminal Code*.

of s. 9 of the *Charter*, rendering any ensuing statement inadmissible at trial.[31] Applying the jurisprudence of the HRC and the European Court of Human Rights to the facts at bar would lead to a finding of no violation of any of the rights under the standards applied by those tribunals, particularly since each of the appellants spoke to counsel before being interviewed and in each case the trial judge found the statement to be voluntary.[32]

(c) Rome Statute of the International Criminal Court ("*Rome Statute*")

14. Properly considered, Art. 55 of the *Rome Statute*[33], cited by the appellants (appellants' facta: Sinclair, ¶69; McCrimmon, ¶94), is of no help in the domestic interpretation of s. 10(b) of the *Charter*. Article 55 is directed solely to the different context of how an international organization (the ICC) conducts its own investigations for trials held outside of Canada.

15. Unlike the *ICCPR*, the *Rome Statute* was never intended by its drafters to be a form of "higher law". The ICC is an international court for unique cases and has a limited role and purpose: it exercises limited jurisdiction, and it does not have jurisdiction over international crimes such as drug trafficking, terrorism or violations of many international treaties.[34] Unlike the ad hoc tribunals created by the U.N. Security Council for the serious human rights violations that occurred in the Former Yugoslavia and Rwanda[35] in the 1990s, the ICC is based on the idea of complementarity.[36] The ICC's jurisdiction is secondary to national courts and only engages when the national courts are unable or unwilling to exercise jurisdiction.[37] As the Italian jurist Antonio Cassese observes, at the core of the formation of the ICC was a desire to respect state sovereignty "as much as possible."[38]

16. Article 55 does not reflect international investigative standards such as Art. 9 of the *ICCPR*.

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[31] ***R. v. Mangat*** (2006), 209 C.C.C. (3d) 225 (Ont. C.A.), ¶14.
[32] Articles 7 and 10 of the *ICCPR* prohibit inhumane treatment of detainees, conduct that would under Canadian law run afoul of the oppression component of the confessions rule: ***Oickle***, ¶58-62. Accordingly a judicial finding that a statement is voluntary meets these other international standards.
[33] U.N. Doc. A/Conf. 183/9.
[34] Article 5 of the *Rome Statute*; William A. Schabas, An Introduction to the International Criminal Court (Cambridge, 2002), pp.21, 28-29; Kriangsak Kittichaisaree, International Criminal Law (Oxford, 2001), pp. 226-229.
[35] See: ***Prosecutor v. Tadic*** (1997), 105 ILR 453 (ICTY Appeals Chamber); Schabas, pp.10-13.
[36] See the *Rome Statute*, ¶10 of the preamble, and Articles 1, 15, 17, 18 and 19. See also Philippe Sands, "After *Pinochet*: The Role of National Courts" in Philippe Sands, ed., From Nuremberg to the Hague – The Future of International Criminal Justice (Cambridge, 2003), p.75.
[37] Antonio Cassese, International Criminal Law (Oxford, 2003), p.351.
[38] *Ibid.*

As Professor Schabas puts it:

> These rights go well beyond the requirements of international human rights norms set out in such instruments as the International Covenant on Civil and Political Rights, and as a general rule surpass the rights recognized in even the most advanced and progressive justice systems.[39] [emphasis added]

17. It is also important to weigh the unique context of an ICC investigation. The ICC exercises limited jurisdiction over crimes such as genocide which are committed systematically, openly and on a vast scale. ICC cases involve very public matters typically the subject of great interest by states, international organizations and the media. ICC cases involve the actions of political leaders or government officials who often document their actions in a manner that a domestic criminal would have no desire to do.[40] In contrast, domestic crimes are typically more private in their commission.

18. Finally, as Cassese notes, while the Canadian criminal justice system is firmly rooted on the adversarial model, the ICC system has elements of the inquisitorial model to reduce perceived disadvantages of the adversarial model.[41] The *Rome Statute's* investigative scheme encompasses roles unparalleled in the Canadian system, such as the involvement of the prosecutor, judiciary and victims in the investigation.[42] The context in which Art. 55 operates is completely foreign to Canadian domestic proceedings; there is no compelling policy reason to import rules for a court operating in such a different foreign context into domestic procedure. The existing Canadian balance between the rights of society to investigate crime and the rights of a suspect should not be disrupted due to a context which is *sui generis*.

England and Wales

(a) Police and Criminal Evidence Act 1984[43] ("PACE") and Codes

19. A detainee's right to counsel in England and Wales is provided primarily by statute (*PACE*) and subordinate Practice Codes (e.g. *Code C – Code of Practice for the Detention,*

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[39] Schabas, pp.107-108.
[40] For example, see: ***Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg*** (30th September and 1st October, 1946) (London: HMSO, Cmd. 6964, Reprinted 1999).
[41] Cassese, pp.366, 386.
[42] Cassese, pp.386-387; Articles 53.1(c), 54(1) and 58 of the *Rome Statute*.
[43] *Police and Criminal Evidence Act 1984* (U.K.), 1984 c. 60.

Treatment and Questioning of Persons by Police Officers[44]). Unlike constitutional documents, these legislative provisions are not universally applied[45] and are susceptible to frequent revision.[46] There is no common law right to counsel.[47] As well, in England and Wales there is a distinction between pre-charge and post-charge questioning of detainees which is unrecognizable in Canadian law.[48]

20. *PACE* and the *Codes* supplanted the *Judges' Rules 1964* and purported to codify nearly every aspect of the interaction between a suspect and the police. Section 58 of *PACE* entitles a detainee to consult a solicitor privately, and obliges the police to arrange a consultation as soon as practicable. *Code C* establishes that an arrestee must be advised, orally and in writing, that he or she has the right (*inter alia*) to consult privately with a solicitor (s. 3.1(ii); s. 3.2), and must be asked to sign the custody record confirming his or her decision in this respect (s. 3.5). Section 6 gives a detainee the right to consult a solicitor in person and, significantly, s. 6.6 provides that a detainee who wants legal advice may not be interviewed until he or she has received that advice.

21. The police are, however, permitted to delay a detainee's access to legal advice and question him or her in narrowly prescribed circumstances having to do, generally, with the need to protect the integrity of the investigation; for example, to avoid alerting other suspects (*Code C*, ss. 6.5-6.6) or where a solicitor has been contacted and is prepared to attend the police station, but awaiting the solicitor's arrival would unreasonably delay the investigation (s. 6.6(b)(ii)). Questioning without access to counsel is also allowed where the detainee's solicitor will not attend and the detainee has been advised of the Duty Solicitor Scheme but declines it (s. 6.6(c)).

22. Importantly, a detainee's right to counsel under *PACE* and the *Codes* must be considered in

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[44] As promulgated by the Secretary of State pursuant to s. 66 of *PACE*, and approved by both Houses of Parliament pursuant to s. 67(5) of *PACE*: http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final).pdf.

[45] The applicable rights under *PACE* and the *Codes* vary, e.g., if the detainee has been arrested for a terrorism offence: see ***R. v. Chief Constable of the Royal Ulster Constabulary, ex parte Begley; R. v. McWilliams***, [1997] 4 All E.R. 833 (H.L.).

[46] *Archbold - Criminal Pleading, Evidence and Practice - 2009*, London: Sweet & Maxwell, §15-7. The Home Office website usefully includes links to revisions in "track changes" format, highlighting, e.g., amendments to Code C: http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(Tracked_C1.pdf?view=Binary

[47] ***Ex parte Begley***, pp.836-838.

[48] See, e.g., Clive Walker, "Post-Charge Questioning of Suspects", [2008] Crim.L.R. 509, pp.511-6; Ed Cape, "Modernising Police Powers – Again?", [2007] Crim.L.R. 934, pp.947-948.

the light of evidentiary rules that allow the prosecution to tender evidence of, and the trier of fact to draw adverse inferences from, a suspect's exercise of the right to remain silent. By Canadian standards these rules are striking. For instance, the *Criminal Justice and Public Order Act 1994*[49] provides that if an accused fails to mention to police interviewers any fact later relied upon in his defence the court or jury "may draw such inferences from the failure as appear proper."[50] Similarly, the court or jury may draw adverse inferences when an accused is questioned by police about any "object, substance or mark" on his or her person or clothing or in his or her possession or surroundings, or about his or her presence at a particular place, and the accused fails or refuses to explain;[51] however the adverse inference may be drawn only if the accused was first cautioned about the consequences of his or her silence.[52] *PACE Code D* – concerning identification procedures – also expressly requires the police to caution a suspect that if he or she does not consent to and co-operate in identification procedures, his or her refusal may be given in evidence at trial and the police may conduct identification procedures without consent.[53]

23. In 1996 the European Court of Human Rights in ***Murray*** (1996)[54] criticised parallel provisions in the Northern Ireland legislation which denied a detainee access to a lawyer prior to charge while also permitting an adverse inference to be drawn from silence during police questioning, and found that the combination violated Art. 6 of the *ECHR*.[55] The ***Murray*** judgment motivated a 1999 amendment to the 1994 statute,[56] so that adverse inferences can be drawn only if the detainee was first allowed an opportunity to consult a solicitor.

(b) Amendments to *PACE* and the *Codes*

24. Ongoing amendments to *PACE* and the *Codes* have resulted in what one commentator describes as "a complex piece of legislation which, for those who are unfamiliar with its

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[49] *Criminal Justice and Public Order Act 1994* (U.K.), 1994 c. 33.
[50] *Ibid*, s.34.
[51] *Ibid*, s.36, s.37.
[52] *Ibid*, s.36(4), s.37(3). Under *Code C*, s. 10.5 the presumptive caution reads: "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."
[53] *Code D – Code of Practice for the Identification of Persons by Police Officers*, s.3.17(v); http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_D_(final).pdf.
[54] ***Murray v. U.K.*** (1996), 22 EHRR 29.
[55] ***Murray***, ¶66.
[56] *Youth Justice and Criminal Evidence Act 1999* (U.K.), 1999 c. 23, s.58; Ed Cape, "The Revised PACE Codes of Practice: A Further Step Towards Inquisitorialism", [2003] C.L.R. 355, p.363; *Archbold 2009*, §15-421.

intricacies, is hard to understand."[57] In March 2007 the Home Office published a consultation paper about possible changes to *PACE* and the *Codes*. This generated a large number of responses, and the Home Office has proposed a new round of amendments to *PACE* with revised *Codes* due to be promulgated by the end of April, 2009.[58] One proposed change is the elimination of a suspect's right to have a solicitor present during a video identification parade, as now exists under *Code D*.[59]

25. Thus England and Wales has a comprehensive, fine-grained regime dealing with the interaction between police and detainees. Any effort to draw on one single rule (e.g. the detainee's right to have counsel present) must recognize that there are other rules in play (e.g. the state's ability to use the detainee's silence against him).

Australia

26. The Australian context is also quite different. The criminal law power under the Australian Constitution is one of concurrent jurisdiction with a tradition of each level of government making its own criminal laws as opposed to one national approach.[60] Australia has ten criminal justice systems, each with its own criminal procedure.[61] The Australian Constitution has almost no guarantees of individual legal rights, and none pertaining to the right to counsel. Some common law rules in Australia regarding statements are different than in Canada: for example, in Australia the burden of proof to establish voluntariness under the confessions rule is on a balance of probabilities.[62]

27. There is no national standard in Australia as to whether a detainee has a right to have counsel present during a custodial interview. The Australian High Court has confirmed that a detainee does not have a common law right to be advised that he or she may communicate with

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[57] Ed Cape, "Modernising Police Powers – Again?", [2007] Crim.L.R. 934, p.934.
[58] http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/PACE-Review.
[59] http://www.homeoffice.gov.uk/documents/cons-2008-pace-review/cons-2008-pace-review-pdf, §14.4 – 14.6.
[60] Peter W. Hogg, Constitutional Law of Canada, 5th ed. Supp., (Carswell, 2007), Vol. 1, §18-1.
[61] Under the *Commonwealth of Australia Constitution Act 1900*, 63 & 64 Vic. c.12 (UK), the six states and three self-governing territories have concurrent jurisdiction to enact laws in all matters not specifically assigned to the federal government including matters related to criminal law. This differs from the Canadian approach of exclusive federal jurisdiction over criminal law in s. 91(27) of the *Constitution Act, 1867*.
[62] ***Tofilau v. The Queen***, [2007] HCA 39, ¶282. There are other restrictions on admissibility beyond voluntariness depending on the law of the particular Australian jurisdiction, such as the 'reliability' test, the 'fairness' test and the 'public policy' test.

counsel before being questioned by police.[63] Accordingly it is left to the ten federal, state and territorial legislatures to prescribe a detainee's right to counsel in each of their respective systems.[64]

28. Not surprisingly, there is no consensus among the ten different Australian legislatures. Several jurisdictions do not afford a right for counsel to be present during custodial interviews at all.[65] Some jurisdictions which afford a detainee the right to have counsel present during an interview also give police the ability to prevent access to counsel in certain situations to preserve the integrity of an investigation.[66] Queensland limits the detainee's right for counsel to be present to indictable offences[67] and also gives the police the authority to eject a counsel who interferes with police questioning,[68] and has detailed rules about this.[69] The Commonwealth, using general language, leaves that issue to police discretion,[70] while other jurisdictions are silent on the point. New South Wales specifically addresses how long the police must delay questioning a detainee before counsel arrives at the police station (2 hours).[71]

New Zealand

29. In New Zealand the right to counsel is not as comprehensive as it is in Canada.[72] In 1994, the New Zealand Law Commission proposed legislation to explicitly recognize the right of a detainee to have counsel present when being interrogated (proposed *Police (Questioning of*

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[63] ***Carr v. The State of Western Australia***, [2007] HCA 47, ¶39. The self-governing territory of **Norfolk Island** has not passed legislation creating rules beyond the common law rule.

[64] **Commonwealth** – s. 23G of the *Crimes Act 1914* (Cth); **New South Wales** – s. 123 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); **Queensland** – ss. 418-430 of *Police Powers and Responsibilities Act 2000* (Q); **Victoria** – ss. 464A-464H of *Crimes Act 1958* (V); **Tasmania** – s. 6 of *Criminal Law (Detention and Interrogation) Act 1995* (T); **Southern Australia** - s. 79A of *Summary Offences Act, 1953* (SA); **Western Australia** – ss. 137-138 of *Criminal Investigation Act 2006* (WA); **Northern Territory** – s. 140 of the *Police Administration Act* (NT); **Australian Capital Territory** – ss. 187, 233 of the *Crimes Act 1900* (ACT).

[65] Tasmania, Victoria, Western Australia, Northern Territory, Norfolk Island.

[66] **Commonwealth** - s.23L of the *Crimes Act 1914*; **New South Wales** - s. 125 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

[67] **Queensland** – s.414 of the *Police Powers and Responsibilities Act 2000*.

[68] **Queensland** – s.419(3) of the *Police Powers and Responsibilities Act 2000*.

[69] **Queensland** – ss.424-426 of the *Police Powers and Responsibilities Act 2000*.

[70] **Commonwealth** – s.23G(3)(b) of the *Crimes Act 1914*.

[71] **New South Wales** – s.123(8) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

[72] *New Zealand Bill of Rights 1990*, No. 109, s.23(1)(b); ***R. v. Alo***, [2007] NZCA 172, ¶72; ***R. v. Tye***, [2007] NZCA 330, ¶17-21, 29.

Suspects) Act).[73] The Law Commission's recommendations were not acted upon by the New Zealand Parliament.[74] In accordance with s. 30(6) of the *Evidence Act, 2006*[75] the Chief Justice of the Supreme Court of New Zealand has set out judicial guidelines in a practice note as to police questioning of detainees. These rules do not oblige police to refrain from questioning a detainee in the absence of counsel.[76]

United States

30. The appellants' reliance (appellants' facta: Sinclair, ¶82-83; McCrimmon, ¶94) on the United States' ***Miranda*** rules also must be viewed in context. ***Miranda*** operates as an extension of the right against self-crimination in the Fifth Amendment; the right to counsel in the Sixth Amendment applies only once a charge has been laid.[77] Further, the wording of *Charter* s.10(b) is substantially different than that of the Fifth and Sixth Amendments.

31. Perhaps the most striking substantive difference between the law in the U.S. and in Canada is the judicial acceptance in the U.S. of the doctrine of "implied waiver" of the right to counsel. Unlike in Canada, where this Court has insisted on express, unequivocal and informed waiver of constitutional rights, the U.S. Supreme Court has accepted the notion of implied waiver[78] even where the suspect was unaware of his actual jeopardy.[79] By not invoking the rights and making a statement, the detainee is said to have impliedly waived his or her rights, including the right to counsel.[80] Legal scholars suggest that the vast majority of U.S. criminal suspects, something like

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[73] Law Commission (New Zealand), "Police Questioning," Report No. 31 (Wellington, 1994): p.43 (proposed s. 10(2)); p.44 (proposed ss. 10(6)(b) and 10(7).
[74] Hon. Justice J.B. Robertson, "What is Distinctive about New Zealand Law and the New Zealand Way of Doing Law," Law Commission 20th Anniversary Seminar, August 25, 2006, Legislative Council Chamber, Parliament Buildings, Wellington, NZ - http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/33f390cb-99d7-4a7f-8b84-a5e64825b098//Law%20Com%20Anniversary%20Address%20Robertson.pdf, p.3.
[75] *Evidence Act 2006* (N.Z.), 2006 No. 69.
[76] The Rt. Hon. Chief Justice Dame S. Elias, "Practice Note on Police Questioning (s. 30(6) *Evidence Act, 2006*)" (July 16, 2007) - http://www.courtsofnz.govt.nz/business/practice-directions/Practice-note-on-Police-questioning.pdf.
[77] ***Kirby v. Illinois***, 406 U.S. 682 (1972).
[78] ***North Carolina v. Butler***, 441 U.S. 369 (1979).
[79] ***Colorado v. Spring***, 479 U.S. 564 (1987), p.574.
[80] Richard A. Leo & Welsh S. White, "Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by *Miranda*" (1994) 84 Minn. L. Rev. 397, pp.414-417.

80% in serious cases, are considered to actually waive ***Miranda*** rights.[81]

32. Another signal difference is that American law is far more permissive in the use of a statement, voluntary but inadmissible under ***Miranda*** rules, for impeaching the accused at trial.[82] As well, in the U.S. there is a "public safety" exception to ***Miranda***.[83]

33. U.S. law on the right to counsel does not fit the Canadian framework.

Section 146(2) of the *Youth Criminal Justice Act* ("*YCJA*")

34. The appellants rely on s. 146(2) of the *YCJA* (appellants' facta: Sinclair, ¶65-66; McCrimmon, ¶94) without acknowledging the special status given to young persons.[84] *Charter* guarantees are only minimum standards; Parliament can go further, and in the case of young persons it has done so.[85] The "enhanced" or "special" protections[86] governing statements by young persons are measures Parliament has enacted in order to honour international obligations unique to young persons under Art. 14.4 of the *ICCPR*, Arts. 37(d) and 40 of the *Convention on the Rights of the Child*[87] and Art. 15.1 of the *Standard Minimum Rules for the Administration of Juvenile Justice*.[88] In this vein, Parliament has said that a statement taken from a young person, without counsel present, is presumptively inadmissible: *YCJA*, s. 146(2). No similar rule applies to adults; nor should one be implied; nor should one be inferred.[89]

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[81] 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, p.859; Richard A. Leo, "Inside the Interrogation Room" (1996) 86 J. Crim. L. & Criminology 266, p.276.

[82] ***Harris v. New York***, 401 U.S. 222 (1971); ***Oregon v. Hass***, 420 U.S. 714 (1975); ***Michigan v. Harvey***, 494 U.S. 344 (1990); ***Kansas v. Ventris***, 556 U.S.___ (2009), http://www.law.cornell.edu/supct/html/07-1356.ZS.html

[83] ***New York v. Quarles***, 467 U.S. 649 (1984)

[84] ***R. v. J.(J.T.)***, [1990] 2 S.C.R. 755, pp.766-767; ***R. v. Z.(D.A.)***, [1992] 2 S.C.R. 1025, pp.1053-1054.

[85] ***R. v. Kuldip***, [1990] 3 S.C.R. 618, p.638; ***Oickle***, ¶31.

[86] The case law of this Court on the unique rules under s. 146 of the *YCJA* and s. 56 of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, have used both adjectives: "enhanced" in ***R. v. H.(L.T.)***, 2008 SCC 49, per Fish J., ¶1, 7, 18, 46, 47; "special" in ***R. v. Z. (D.A.)***, pp.1049, 1054-1055.

[87] (1989), 1577 UNTS 3.

[88] General Assembly Resolution A/RES/40/33 on November 29, 1985, known as the "*Beijing Rules*". This Court looked to the *Beijing Rules* as an international standard for youth criminal justice in ***R. v. D.B.***, 2008 SCC 25, ¶85. See also: ***Reference re: Bill C-7 respecting the criminal justice system for young persons*** (2003), 175 C.C.C. (3d) 321 (Que. C.A.), ¶122-123.

[89] ***R. v. Z.(D.A.)***, per Lamer J., pp.1053-1054.

Conclusion

35. The above review of the relevant foreign law demonstrates that the selective approach embraced by the appellants, which consists of extricating single threads from other criminal law jurisdictions and weaving them into the fabric of Canada's constitutional law, does not help in deciding the boundaries of Canada's constitutionally based right to counsel. As La Forest J. accurately put it in *Thomson Newspapers* (1990) in respect of the right against self-crimination:[90]

> ...I am not convinced that a comparative analysis of different legal systems can provide anything more than a mere background in determining "fundamental justice" under s.7. Each legal system, intertwined with a particular legal tradition, is predicated on a number of integrated elements, and to look at each piece-meal through a magnifying glass cannot provide an accurate picture of the whole nor can such an exercise take into account differences between the systems... [emphasis added]

[90] ***Thomson Newspapers Ltd. v. Canada***, [1990] 1 S.C.R. 425, p.539; see also ***R. v. Harrer***, [1995] 3 S.C.R. 562, per La Forest J., ¶14-18, per McLachlin J., ¶55.

PART IV
COSTS

36. The DPP makes no submissions as to costs.

PART V
ORDER REQUESTED

37. The DPP requests permission to make oral argument at the hearing of these appeals.

38. The DPP asks this Court to reaffirm existing Canadian law on the constitutional right to counsel, without importing single principles from other jurisdictions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Original signed "D.W. Schermbrucker"
David Schermbrucker

Original signed "per D.W. Schermbrucker"
Chris Mainella

Counsel for the intervener,
Director of Public Prosecutions

May 1, 2009
Halifax, Nova Scotia

PART VI
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ACTS AND REGULATIONS

PART VII
STATUTES

Criminal Code, R.S.C. 1985, c. C-46, s. 503(1)		*Code criminel*, L.R.C. (1985), C-46, s. 503(1)
APPEARANCE OF ACCUSED BEFORE JUSTICE		**COMPARUTION DU PRÉVENU DEVANT UN JUGE DE PAIX**
503. (1) **Taking before justice** – A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) or into whose custody a person is placed under subsection 163.5(3) of the *Customs Act* shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law:		**503.** (1) **Prévenu conduit devant un juge de paix** – Un agent de la paix qui arrête une personne avec ou sans mandat, auquel une personne est livrée en conformité avec le paragraphe 494(3) ou à la garde de qui une personne est confiée en conformité avec le paragraphe 163.5(3) de la *Loi sur les douanes* la fait mettre sous garde et, conformément aux dispositions suivantes, la fait conduire devant un juge de paix pour qu'elle soit traitée selon la loi :
(*a*) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and		*a*) si un juge de paix est disponible dans un délai de vingt-quatre heures après qu'elle a été arrêtée par l'agent de la paix ou lui a été livrée, elle est conduite devant un juge de paix sans retard injustifié et, dans tous les cas, au plus tard dans ce délai;
(*b*) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,		*b*) si un juge de paix n'est pas disponible dans un délai de vingt-quatre heures après qu'elle a été arrêtée par l'agent de la paix ou lui a été livrée, elle est conduite devant un juge de paix le plus tôt possible,
unless, at any time before the expiration of the time prescribed in paragraph (*a*) or (*b*) for taking the person before a justice,		à moins que, à un moment quelconque avant l'expiration du délai prescrit à l'alinéa *a*) ou *b*) pour la conduire devant un juge de paix :
(*c*) the peace officer or officer in charge releases the person under any other provision of this Part, or		*c*) ou bien l'agent de la paix ou le fonctionnaire responsable ne la mette en liberté en vertu de toute autre

(*d*) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.		disposition de la présente partie; *d*) ou bien l'agent de la paix ou le fonctionnaire responsable ne soit convaincu qu'elle devrait être mise en liberté soit inconditionnellement, notamment en vertu du paragraphe (4), soit sous condition, et ne la mette ainsi en liberté.

Youth Criminal Justice Act, S.C. 2002, c.1, s.146 **EVIDENCE** General law on admissibility of statements to apply **146.** (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons. When statements are admissible (2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless (*a*) the statement was voluntary; (*b*) the person to whom the statement was made has, before the statement was made, clearly explained to the		***Loi sur le système de justice pénale pour les adolescents***, L.C. 2002, ch.1, s.146 **PREUVE** Régime de la preuve **146.** (1) Sous réserve des autres dispositions du présent article, les règles de droit concernant l'admissibilité des déclarations faites par des personnes inculpées s'appliquent aux adolescents. Cas où les déclarations sont admissibles (2) La déclaration orale ou écrite faite par l'adolescent de moins de dix-huit ans à un agent de la paix, ou à toute autre personne en autorité d'après la loi, au moment de son arrestation ou de sa détention ou dans des circonstances où l'agent ou la personne a des motifs raisonnables de croire que l'adolescent a commis une infraction n'est pas admissible en preuve contre l'adolescent, sauf si les conditions suivantes sont remplies: *a*) la déclaration est volontaire; *b*) la personne à qui la déclaration a été faite a, avant de la recueillir, expliqué clairement à l'adolescent, en

young person, in language appropriate to his or her age and understanding, that		des termes adaptés à son âge et à sa compréhension, que :
(i) the young person is under no obligation to make a statement,		(i) il n'est obligé de faire aucune déclaration,
(ii) any statement made by the young person may be used as evidence in proceedings against him or her,		(ii) toute déclaration faite par lui pourra servir de preuve dans les poursuites intentées contre lui,
(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (*c*), and		(iii) il a le droit de consulter son avocat et ses père ou mère ou une tierce personne conformément à l'alinéa *c*),
(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (*c*), if any, unless the young person desires otherwise;		(iv) toute déclaration faite par lui doit l'être en présence de son avocat et de toute autre personne consultée conformément à l'alinéa *c*), le cas échéant, sauf s'il en décide autrement;
(*c*) the young person has, before the statement was made, been given a reasonable opportunity to consult		*c*) l'adolescent s'est vu donner, avant de faire la déclaration, la possibilité de consulter :
(i) with counsel, and		(i) d'une part, son avocat,
(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and		(ii) d'autre part, soit son père ou sa mère soit, en l'absence du père ou de la mère, un parent adulte, soit, en l'absence du père ou de la mère et du parent adulte, tout autre adulte idoine qu'il aura choisi, sauf si la personne est coaccusée de l'adolescent ou fait l'objet d'une enquête à l'égard de l'infraction reprochée à l'adolescent;
(*d*) if the young person consults a person in accordance with paragraph (*c*), the young person has been given a reasonable opportunity to make the statement in the presence of that		*d*) l'adolescent s'est vu donner, dans le cas où il a consulté une personne conformément à l'alinéa *c*), la possibilité de faire sa déclaration en présence de cette personne.

person.		
Exception in certain cases for oral statements		Exceptions relatives à certaines déclarations orales
(3) The requirements set out in paragraphs (2)(*b*) to (*d*) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.		(3) Les conditions prévues aux alinéas (2)*b*) à *d*) ne s'appliquent pas aux déclarations orales spontanées faites par l'adolescent à un agent de la paix ou à une autre personne en autorité avant que l'agent ou cette personne n'ait eu la possibilité de se conformer aux dispositions de ces alinéas.
Waiver of right to consult		Renonciation
(4) A young person may waive the rights under paragraph (2)(*c*) or (*d*) but any such waiver (*a*) must be recorded on video tape or audio tape; or (*b*) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.		(4) L'adolescent peut renoncer aux droits prévus aux alinéas (2)*c*) ou *d*); la renonciation doit soit être enregistrée sur bande audio ou vidéo, soit être faite par écrit et comporter une déclaration signée par l'adolescent attestant qu'il a été informé des droits auxquels il renonce.
Waiver of right to consult		Admissibilité de la renonciation
(5) When a waiver of rights under paragraph (2)(*c*) or (*d*) is not made in accordance with subsection (4) owing to a technical irregularity, the youth justice court may determine that the waiver is valid if it is satisfied that the young person was informed of his or her rights, and voluntarily waived them.		(5) Même si la renonciation aux droits prévus aux alinéas (2)*c*) ou *d*) n'a pas été faite en conformité avec le paragraphe (4) en raison d'irrégularités techniques, le tribunal pour adolescents peut conclure à la validité de la déclaration visée au paragraphe (2) s'il estime que l'adolescent a été informé de ces droits et qu'il y a renoncé volontairement.
Admissibility of statements		Admissibilité de la déclaration
(6) When there has been a technical irregularity in complying with paragraphs (2)(*b*) to (*d*), the youth justice court may admit into evidence a statement referred		(6) Le juge du tribunal pour adolescents peut admettre en preuve une déclaration faite par l'adolescent poursuivi — même dans le cas où l'observation des

to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.		conditions visées aux alinéas (2)*b*) à *d*) est entachée d'irrégularités techniques — , s'il est convaincu que cela n'aura pas pour effet de déconsidérer le principe selon lequel les adolescents ont droit à la prise de mesures procédurales supplémentaires pour leur assurer un traitement équitable et la protection de leurs droits.
Statements made under duress are inadmissible		Déclarations faites sous la contrainte
(7) A youth justice court judge may rule inadmissible in any proceedings under this Act a statement made by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was made under duress imposed by any person who is not, in law, a person in authority.		(7) Dans les poursuites intentées sous le régime de la présente loi, le juge du tribunal pour adolescents peut déclarer inadmissible une déclaration faite par l'adolescent poursuivi, si celui-ci l'a convaincu que la déclaration lui a été extorquée par contrainte exercée par une personne qui n'est pas en autorité selon la loi.
Misrepresentation of age		Déclaration relative à l'âge
(8) A youth justice court judge may in any proceedings under this Act rule admissible any statement or waiver by a young person if, at the time of the making of the statement or waiver,		(8) Il peut également déclarer admissible toute déclaration ou renonciation de l'adolescent si, au moment où elle faite, les conditions suivantes sont remplies :
(*a*) the young person held himself or herself to be eighteen years old or older;		*a*) l'adolescent prétendait avoir dix-huit ans ou plus;
(*b*) the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person was eighteen years old or older; and		*b*) la personne ayant reçu la déclaration ou la renonciation a pris des mesures raisonnables pour vérifier cet âge et avait des motifs raisonnables de croire que l'adolescent avait effectivement dix-huit ans ou plus;
(*c*) in all other circumstances the statement or waiver would otherwise be admissible.		*c*) en toutes autres circonstances, la déclaration ou la renonciation serait par ailleurs admissible.

Parent, etc., not a person in authority (9) For the purpose of this section, a person consulted under paragraph (2)(*c*) is, in the absence of evidence to the contrary, deemed not to be a person in authority.		Exclusion (9) Pour l'application du présent article, l'adulte consulté en application de l'alinéa (2)*c*) est réputé, sauf preuve contraire, ne pas être une personne en autorité.