Court File No. 31558

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

BETWEEN:

JAGRUP SINGH

Appellant

and

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER, CANADIAN ASSOCIATION OF CHIEFS OF POLICE

PERLEY-ROBERTSON, HILL & McDOUGALL LLP
Barristers & Solicitors
400 - 90 Sparks Street
Ottawa, ON K1P 1E2

Attention: David Migicovsky and Lynda Bordeleau
(613) 238 2022
(613) 238 8775 - fax
Solicitors for the Canadian Association of Chiefs of Police

TO:

G.D. McKinnon, Q.C.
Paul McMurray
500 - 701 West Georgia Street
Vancouver, BC V7Y 1C6

Tel: (604) 681 7888
Fax: (604) 681 7877

Solicitors for the Appellant

GOWLING, LAFLEUR, HENDERSON LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 786 0107
Fax: (613)788 3500
Ottawa agents for the solicitors for the Appellant

Wendy Rubin, Kate Ker
Ministry of the Attorney General
Criminal Appeals
6th Floor - 865 Hornby Street
Vancouver, BC V6Z 2 G3

Tel: (604) 660-1138
Fax: (604) 660-1133
Counsel for the Respondent

BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Ottawa agents for the solicitors for the Respondent

FLEMING BREEN
370 Bloor Street East
Toronto, ON M4W 3M6

Timothy E. Breen
Tel: (416) 927 9000
Fax: (416) 927 9069
Counsel for the Intervener Criminal Lawyers' Association of Ontario

GOWLING, LAFLEUR, HENDERSON LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 786 0107
Fax: (613)788 3500
Ottawa agents for the Intervener Criminal Lawyers' Association of Ontario

ATTORNEY GENERAL OF CANADA
211, 10199 - 101 Street
Edmonton, AB T5J 3Y4

Ronald C. Reimer
Tel: (403) 495 4079
Fax: (403) 496 6940
Counsel for the Intervener Director of Public Prosecutions of Canada

PUBLIC PROSECUTION SERVICES OF CANADA
284 Wellington Street, Rm. 2299
East Memorial Building
Ottawa, ON K1A 0H8
Francois Lacasse
Tel: (613) 957 4770
Fax: (613) 613 941 7865

MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1

Tel: (416) 326 2220
Fax: (416) 326 4007

BURKE-ROBERTSON LLP
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
Ottawa agents for the Intervener Attorney General of Ontario

The Registrar of this Honourable Court
Supreme Court of Canada
Kent & Wellington Streets
Ottawa, ON K1A 0J1

Court File No. 31558

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

BETWEEN:

JAGRUP SINGH

Appellant

and

HER MAJESTY THE QUEEN

Respondent

TABLE OF CONTENTS

Court File No. 31558

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

BETWEEN:

JAGRUP SINGH

Appellant

10

and

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENER, CANADIAN ASSOCIATION OF CHIEFS OF POLICE

20

PART I - OVERVIEW OF POSITION and STATEMENT OF FACTS

A. Overview of Position

1. The Canadian Association of Chiefs of Police (the "Association") is a national organization whose goals include developing high standards in efficiency, ethics, integrity, honour and conduct of the profession of law enforcement and to encourage the study of modern and progressive practices in the prevention and detection of crime. The Association represents the interests of its members with respect to the effect the present appeal would have on police practices throughout Canada.

2. The Association submits that this appeal should be dismissed. The Appellant's position

30 does not take into account the balance required between an individual's rights under the *Canadian Charter of Rights and Freedoms* (the "Charter") and the right of Canadian society to have effective law enforcement and a justice system that gets at the truth.

3. The interest in criminal justice law enforcement includes an interest in ensuring that guilty persons are brought to justice and that innocent persons are not subject to wrongful conviction. The best way to ensure these outcomes is to collect all relevant information while respecting the rights of individuals.

4. In Canadian society, criminal investigations and the collection of information and evidence relating to criminal matters have been delegated to police officers. One of the most important tools of police officers is the interrogation of witnesses and suspects.

5. Police officers have been exhorted to obtain all relevant information, not to develop tunnel vision and not to cease following up leads just because a suspect has been charged with an offence. A police officer's duty to investigate and question witnesses, suspects and accused persons should be constrained only where necessary to avoid impinging on the rights of individuals, including the right to silence provided for in the Charter.

6. The Association submits that the proposals made by the Appellant are unnecessarily rigid and would therefore unreasonably constrain police officers in the exercise of their investigative duties. The Association submits that the rule relating to interviewing an accused who has been informed of his right to silence properly recognizes the balance required between individual rights and the interests of society in proper law enforcement.

B. Statement of Facts

7. The Association accepts as correct the facts as set out by the Respondent, the Attorney General of British Columbia in its factum.

8. The Association further relies upon the following additional facts regarding the Appellant's April 8, 2002 Statement to Sgt. Attew. During the Appellant's April 8, 2002 statement to Sgt. Attew, Sgt. Attew acknowledged in one form or another eight times during the 70-minute interview with the Appellant that it was the Appellant's choice whether or not he wanted to speak. The statements of Sgt. Attew in this regard are attached as Appendix "A".

PART II - QUESTIONS IN ISSUE

9. The Association submits that the British Columbia Court of Appeal did not err in law in its interpretation of *R. v. Hebert*, [1990] 2 S.C.R. 151. The general test distilled from this

decision and applied in numerous subsequent cases is that an accused must be informed of his right to counsel and be provided with a reasonable opportunity to exercise that right. Where an accused has availed himself of that right and has then asserted his right to silence, a police officer may attempt to persuade the accused to share information and answer questions, as long as in doing so, the accused is not deprived of an operating mind or the right to choose to remain silent. The same test applies to an accused or suspect who is in custody or out of custody. A court may take the conditions of the accused or suspect's custody into account when determining whether the accused or suspect was deprived of the right to choose to remain silent.

10 10. The Association submits that this Court should not change the present test, as it strikes a proper balance between individual rights and the rights of society to effective law enforcement, including the need to find the truth so that guilty persons are held accountable for their crimes and innocent persons are not convicted.

PART III - STATEMENT OF ARGUMENT

A. The Need to Balance Rights and Interests

11. The Charter exists for the benefit of all Canadian society, not just those charged with a criminal offence. When considering rights set out in the Charter, a court must weigh the general public interest, as well as the individual right claimed. Effective law enforcement benefits
20 society as a whole. The search for truth through the judicial system also benefits society as a whole. Fundamental rights of individuals must be respected, but the ability of society to achieve effective law enforcement and seek the truth through the judicial system should not be unnecessarily limited.

The Honourable Mr. Justice Gerard V. La Forest, **"The Balancing of Interests under the Charter"**, (1992), *2 N.J.C.L. 133*

R. v. S.A.B., [2003] 2 S.C.R. 678 at para. 51

R. v. Levogiannis, [1993] S.C.J. No. 70 at para. 19

12. In "The Balancing of Interests under the Charter", La Forest J. notes that not only are rights and freedoms outlined in the Charter subject to the general limits acceptable in a free and democratic society (a section 1 balancing), but some rights are subject to internal balancing by the nature of their pronouncement. At page 134, La Forest J. notes:

> ... But the very first section of the *Charter* tells us that the rights and freedoms enumerated therein are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". And indeed several of the provisions themselves expressly provide for internal balancing of specific rights under such rubrics as "the principles of fundamental justice" (section 7), "unreasonable" searches and seizures (section 8), "arbitrary" detention (section 9), "cruel and unusual" punishment and treatment (section 12), and so on.

13. When considering section 7 balancing, he notes that the rights cannot be absolute, as the very terms used to express it comprise limitations[1]. He notes further that when weighing law enforcement measures, the public interest must be weighed[2].

14. In *R. v. S.A.B.*, Arbour J. for the court noted that it was necessary to review both the state's interest in law enforcement and the interest of the individual. At para. 51, she noted:

> Before turning to the specific challenges to the DNA warrant scheme advanced by the appellant, it is also necessary to consider the interests of the state in seeking a DNA warrant. The state's interest in the DNA warrant scheme is a significant one. Effective law enforcement benefits society as a whole. Subsumed under the larger head of "law enforcement" is the interest in arriving at the truth in order to bring offenders to justice and to avoid wrongful convictions. ...

15. In *R. v. Levogiannis*, L'Heureux-Dubé J. for a unanimous court indicated that when determining whether the accused's right to a fair trial, it was necessary to weigh competing interests. She noted at paragraphs 13 and 19:

---

[1] Ibid. p. 156

[2] Ibid. p. 158

> The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth. The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. ...
>
> The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society. ... While the objective of the judicial process is the attainment of truth, as this Court has reiterated in *L. (D.O.), supra*, the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence. ...

16. Where the balance required by Charter interpretation weighs too heavily on the protection of the individual, without giving proper weight to the public interest in law enforcement, then the justice system will lose the trust and respect of Canadian citizens.

> David M. Paciocco, **"Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof",** (2000) *80 Can. Bar Rev.* 433 at 453
> Jennifer A.I. Addison, Richard C. Fraser, **"What's Truth Got to Do with It? The Supreme Court of Canada and Section 24(2)"**, (2004) *29 Queen's Law Journal No. 2* 823-47

17. In "Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof", David Paciocco discussed the balancing required with respect to the search for truth. This requires a balancing of societal interests with the constitutional rights of the accused. He reviewed several different contexts in which the courts have had to weigh these kinds of interests and, according to his analysis, have come to a proper balance of the competing interests. However, the author suggests that the virtual automatic exclusion of conscripted evidence pursuant to section 24(2) has not reached the correct balance and has sacrificed the search for truth in the law enforcement context to a rigid rule favouring the exclusion of evidence, even where the rights of the accused may have been minimally impaired. This has eroded public respect for the law.

18. Similarly, Jennifer Addison and Richard Fraser suggest that the automatic exclusion of reliable and pivotal evidence has tipped the balance too far in favour of individual rights and has

negatively affected the public's opinion of the criminal justice system. The authors note negative publicity after cases which excluded evidence in very serious crimes. The authors observe:

> Sometimes the Charter will curtail police powers to investigate crimes, in favour of greater protection of individual rights. However, the Court's application of the Charter in cases like *Feeney* goes so far as to exclude evidence found through valid police methods. Admitting the evidence against Feeney would by no means have brought the administration of justice into disrepute in the eyes of the community. Indeed, the exclusion of such overwhelming evidence resulting in the acquittal of an obviously guilty man, does not uphold the administration of justice at all.

10

19. The right to silence is not an absolute prohibition against self-incrimination. Rather, it is a requirement subsumed under concepts of fundamental justice which require that a person accused of a crime has free choice as to whether or not to remain silent or share information with the investigating police.

> ***R. v. Hebert,*** *supra*, at para. 129
> ***R. v. R.J.S.,*** [1995] 1 S.C.R. 451 at para. 104
> ***R. v. Crawford; R. v. Creighton,*** [1995] S.C.J. No. 30 at para. 25-26

20. In *R. v. Hebert*, McLachlin J. (as she then was) for the majority rejected the narrow view
20 that the right to silence was constrained by the confession rule. Rather, she determined that the right to silence was based on a choice of whether to speak to the investigating police or not. This determination was made on an objective basis. She then observed at para. 129:

> This approach may be distinguished from an approach which assumes an absolute right to silence in the accused, capable of being discharged only by waiver. On that approach, all statements made by a suspect to the authorities after detention would be excluded unless the accused waived his right to silence. ...

21. In *R. v. R.J.S.*, the question was whether a separately charged accused could require the other accused to testify at his trial. The Court observed that although the Charter contains
30 protection against self-incrimination, this is not absolute, noting at para. 104:

> In post-Charter terms, other limitations on the principle against self-incrimination are also visible. The right to silence recognized by *Hebert, supra*, is not a free-floating right always available, but rather a right which has so far been linked to the concept of detention, and, moreover, it is not a right which is absolute and "capable of being discharged only by waiver". ...

22. In *R. v. Crawford; R. v. Crieghton*, this Court accepted that there were differences between pre-trial and trial right to silence, but rejected the submission that pre-trial silence was an absolute right, noting at para. 26:

> I accept that the distinctions referred to are apt, but nonetheless I am not prepared to accept that, therefore, the right to pre-trial silence is absolute. In *Hebert, supra*, at p. 179, McLachlin J. stated:
>
> > [Section 7] guarantees the individual's life, liberty and security of person. But it recognizes that these rights are not absolute. In certain circumstances, the state may properly deprive a person of these interests. But is must do so in conformity with the principles of fundamental justice. ...

23. This Court has recognized that in the context of a claim of a breach of a Charter right to silence, the Court must carefully weigh the interest of society to proper law enforcement and the interest of an individual's Charter rights.

> ***Application Under s. 83.23 of the Criminal Code (Re)*** (2004), 2 S.C.R. 248 at para. 78
> ***R. v. R.J.S.***, *supra* at para. 268
> ***R. v. White***, [1999] 2 S.C.R. 417 at para. 47
> ***R. v. Hebert, supra,*** at para. 116

24. In *Application under s. 83.28 of the Criminal Code*, the Court recognized the competing interests of the right against self-incrimination and the interests of society in law enforcement. Iacobucci and Arbour JJ. noted at para. 78: "As in many other areas of law, a balance must be struck between the principle against self-incrimination and the state's interest in investigating offences".

25. In *R. v. R.J.S.*, this Court considered the protection against self-incrimination in the context of two accuseds separately charged with the same offence. This Court was required to weigh the competing interests between an accused's right to silence and another accused's right to compel relevant evidence at his trial. At para. 268, L'Heureux-Dubé J. stated:

> Like other provisions of the Charter, s. 7 must be approached purposively. A commitment to purposive interpretation entails a commitment to ensuring that a legal principle is interpreted sufficiently broadly to further the interests it is meant to protect, yet not so broadly as to overshoot them. *Beare, supra*, at p. 401. Ultimately, the

> principles of fundamental justice require a balancing of societal interest with those of the accused. ...

26. In *R. v. White*, this Court examined the protection against self-incrimination. Iacobucci J. for the majority observed at para. 47:

> ... As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society. ...

27. In *R. v. Hebert*, McLachlin J. (as she then was) for the majority observed at para. 116:

> The Charter through s. 7 seeks to impose limits on the power of the state over the detained person. It thus seeks to effect a balance between the interests of the detained individual and those of the state. On the one hand s. 7 seeks to provide to a person involved in the judicial process protection against the unfair use by the state of its superior resources. On the other, it maintains to the state the power to deprive a person of life, liberty or security of person provided that it respects fundamental principles of justice. The balance is critical. Too much emphasis on either of these purposes may bring the administration of justice into disrepute – in the first case because the state has improperly used its superior power against the individual, in the second because the state's legitimate interest in law enforcement has been frustrated without proper justification.

B. The Investigative Tools required by Police

28. The importance of police questioning to the investigative role of police services cannot be doubted. It is certainly one of the primary methods through which police officers gather information in the pursuit of law enforcement and the seeking of truth.

> ***R. v. Oickle***, [2000] S.C.J. No. 38 at 33
> ***R. v. Fitton***, [1956] S.C.R. 948 at p. 10 (cited to QL)

29. In *R. v. Oickle,* this Court recognized the importance of the investigative tool of questioning and adopted the following statement from *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.) at para. 33:

> In defining the confessions rule, it is important to keep in mind its twin goals of protecting the rights of the accused without duly limiting society's need to investigate and solve crimes. Martin J.A. accurately delineated this tension in *R. v. Precourt* (1976), 18 O.R. (2d) 714 (C.A.), at p. 721:

> Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation. ...

30. *R. v. Fitton* is an early recognition by this Court of the essential role police questioning plays in the investigation of crime. Nolan J. observed at page 10:

> In my view it would be quite impossible to discover the facts of a crime without asking questions of persons from whom it was thought that useful information might be obtained. Indeed, such questions might give the suspected an opportunity of demonstrating that the suspicion of guilt attaching to him was without foundation. The questioning must not, of course, be for the purpose of trapping the suspected person into making admissions and every case must be decided according to the whole of the circumstances.

31. Similarly, this Court has recognized that obtaining confessions from suspects or accused is a legitimate goal of police questioning, providing that it is done in a fair manner. In *R. v. Smith*, L'Heureux-Dubé J. observed at para. 46:

> In Canada, admissions of guilt are just as desirable as they are south of the border. Confessions are among the most useful types of evidence. Where freely and voluntarily given, an admission of guilt provides a reliable tool in the elucidation of crime, thereby furthering the judicial search for the truth and serving the societal interest in repressing crime through the conviction of the guilty. An effective police investigation may therefore include as one of its aims the obtention of a confession from a suspect, provided of course that any such statement is freely and voluntarily given by the suspect and that the police acts fairly in eliciting the statement. ...
>
> ***R. v. Smith***, [1989] S.C.J. No 89 at paras. 45-48

32. In *R. v. Liew* at paragraphs 41 to 45, this Court recognized the reality that the police may have to use limited acts of subterfuge in order to obtain information from an accused. In the words of Major J.:

> ... In a more perfect world, police officers may not have to resort to subterfuge, but equally, in that more perfect world, there would be no crime. For the moment, in this

> space and time, the police can, within the limits imposed by law, engage in limited acts of subterfuge. In our opinion, that is the case in this appeal.
>
> ***R. v. Liew***, [1999] 3 S.C.R. 227 at para. 45

33. It must be observed that the ability to question witnesses, suspects and accused is one of the few tools that police officers have at their disposal in order to properly fulfill their duty. The proposal put forward by the Appellant would take away from police officers the ability to fairly persuade a suspect or an accused who has asserted the right to silence within the lawful parameters which have been recognized by existing case law. In the present test, all surrounding circumstances are weighed on a case-by-case basis to ensure that persuasion does not amount to unfairly depriving the accused or suspect of their choice to remain silent. It must be noted that there are considerable safeguards for the individual's rights in the present test, since an accused must be informed of the right to counsel and given a reasonable opportunity to exercise it. Furthermore, although videotaping is not present in every case, videotaping is routine in most cases. This permits the reviewing judge to carefully review all surrounding circumstances.

34. The present test achieves the proper balance between the right of an individual to remain silent and society's interest in proper law enforcement. If the Appellant's proposal is accepted, the balance would fall too far over on the individual rights side of the equation, to the detriment of society's interests in arriving at the truth in order to bring offenders to justice. The scheme proposed by the Appellant would hamper police services in their attempts to carry out their investigative role.

C. The Test in *Hebert*

35. The right to silence means that an accused person can choose whether to speak to the authorities or to remain silent. However, this does not mean that an accused who has raised the right to silence cannot be further questioned by the police, provided the police do not act in such a manner that the accused is deprived of an operating mind or the right to choose to remain silent.

> ***R. v. Hebert,*** *supra*, at para. 118-136

36. At para. 123 in *R. v. Hebert*, McLachlin J. (as she then was) made the following observations about the scope of the right to silence:

> The scope of the right to silence must be defined broadly enough to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state. ...

37. She then went on to determine that the test of whether the right to silence had been breached was an objective rather than a subjective test, noting at para. 126:

> The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the Charter shifts to the conduct of the authorities vis-à-vis the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?

38. McLachlin J. (as she then was) also observed that police persuasion which did not amount to depriving the suspect of the right to choose to remain silent, or which did not deprive the suspect of an operating mind would not amount to a breach of the right of silence, noting at para. 170:

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

39. The current test is well understood by police officers and applied consistently by reviewing courts. In each of the cases noted below, it was a question of fact whether the accused was deprived of an operating mind or the ability to choose to remain silent as the result of police questioning.

> ***R. v. Otis*** (2000), 151 C.C.C. (3d) 416 (Que. C.A) at para. 54, application for leave to appeal dismissed [2000] C.S.C.R. No. 640
> ***R. v. Roy***, [2003] O.J. No. 4252 (C.A.) at para. 12
> ***R. v. Sarrazin***, [2005] O.J. No. 1404 (C.A.) at para. 95
> ***R. v. Edmondson***, [2005] S.J. No. 256 (C.A.) at para. 31, application for leave to appeal dismissed, [2005] S.C.C.A. No. 273

40. In *R. v. Otis*, the trial judge had held a confession to be inadmissible after finding that the accused's psychological disintegration during questioning amounted to the lack of an operating mind. The Quebec Court of Appeal found that although the admission should not be excluded on the basis of the confession rule or lack of an operating mind, it should be excluded because the police tactics totally overwhelmed the accused's attempts to exercise his right to remain silent. The Court observed at para. 54:

> Although the police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice. ... It is this choice and the respect of free will which are the principal underpinnings of the rules relating to confessions. ...

41. In *R. v. Roy*, the Court reviewed the Supreme Court of Canada decision in *R. v. Hebert, supra*, and observed: "The right to choose whether to speak to the police lies at the heart of the right to silence...".

42. In *R. v. Sarrazin*, the Court observed at para. 94:

> The police investigators were entitled to pursue their questioning of the appellant, even though he was endeavouring to assert his right to remain silent, provided they did not persist to the point where Mr. Cetoute was no longer able to exercise his free will in choosing whether to speak to them. ...

43. In *R. v. Edmondson*, the Saskatchewan Court of Appeal observed at para. 31:

> In keeping with *R. v. Hebert* the police officer was not obliged to protect the accused against making a statement if he chose to do so. Indeed, it was open to the officer to use legitimate persuasion to encourage Mr. Edmondson to choose to talk about what had occurred, and to do so in the absence of counsel. As noted in *Hebert*, at p. 184, "police persuasion short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence".

44. Trial judges, who have developed expertise in determining the voluntariness of confessions, are in the best position to determine the related right to remain silent pursuant to the Charter. It is submitted that the fact that there are cases which reach different decisions with respect to whether or not an accused's right to silence has been breached by police interrogation

tactics is not an indication that the test is not well understood. Rather, it is an indication that courts are correctly applying the test to the facts before them on a case by case basis to determine whether the accused has been deprived of the choice to remain silent.

45. Some of the factors that trial courts have taken into consideration in holding that an accused's right to remain silent had been breached have included the fact that the person interrogated was a vulnerable 18-year-old with no experience of intense police interrogations[3]; that the accused was deprived of water, interrogated in raised voices and verbally pressed, kept in an interview room for eight hours, even after numerous assertions of her right to silence[4]; and the fact that interrogations were conducted in an oppressive manner[5]. On numerous occasions, courts have determined that the persistent questioning of an accused in the face of repeated assertions of the right to remain silent amounted to depriving the accused of the right to silence[6].

46. As observed in *R. v. Otis, supra*, it is necessary to review the circumstances surrounding the taking of statements on a case by case basis. Trial judges have always done this with respect to voluntariness of statements, and trial judges are in the best position to determine whether the right to silence has been breached on a case by case basis. As observed in *Otis* at para. 54:

> ... The analysis of the dynamics existing between the investigator and the subject must always be reviewed on a case-by-case basis. What is abusive in the present matter might not be with respect to another individual. The power of resistance to police persuasion will vary according to circumstances and individuals. Certainly it is always prudent to keep in mind that any tension or pressure observed with a subject faced with his interrogator, either due to discomfort, embarrassment or shame, which he may feel following arrest, detention or confrontation with an investigator who brings him back to a reality he would prefer to forget at any price, must be deemed to be in the normal course of events. ...

---

[3] *R. v. Tammie*, [2001] B.C.J. No. 1948 (F.C.)

[4] *R. v. Flett*, [2004] M.J. No. 242 (Q.B.)

[5] *R. v. Ciliberto*, [2005] B.C.J. No. 3013 (S.C.)

[6] *R. v. Elkadry*, [2003] O.J. No. 971(S.C.J.), *R. v. M.S.*, [2000] O.J. No. 5673 and *R. v. Daunt* (2005), 31 C.R. (6th) 31 (Y.T.S.C.)

47. In fact, courts have indicated that there will be a high level of judicial scrutiny in any case where an accused asserts the right to remain silent and the police continue their questioning. Therefore, this factor alone is a feature which will be carefully considered by a court in determining whether all surrounding circumstances lead to the conclusion that the accused's decision to remain silent has been breached by the police behaviour. As noted in *R. v. Roy*, where a detained person asserts a right to remain silent and the police officers proceed with an interrogation, the facts will be closely reviewed. At para. 13, the Court noted:

> ... The question is, however, a factual question to be decided on a case by case basis by the trial judge. On the facts as found by this trial judge, the appellant never chose to remain silent.

48. The Trial Judge in the present matter was aware that it was necessary under the circumstances to determine whether the right to remain silent was undermined or overborne by the questioning. Based on a review of all the surrounding circumstances and after viewing a videotape of the interview, the Court came to the conclusion that the Appellant's choice was not "undermined or overborne".

49. David Paccioco in "Evidence About Guilt: Balancing the Rights of the Individual and Society in Matters of Truth and Proof" suggested that it is better for the courts to have flexible rules about evidence and the search for truth, than have rigid rules of evidence that control the admissibility of evidence. He also goes on to relate the desirability of flexibility when considering the tension between Charter rights and the search for truth in the administration of justice. As noted in para. 17 above, he is critical of the virtual automatic exclusion of conscriptive evidence pursuant to section 24(2) of the Charter. However, he does applaud other developments where this Court has taken a more flexible and contextual approach to determining the rights of individuals and weighing those rights against law enforcement and the search for truth. The author specifically notes the flexibility of the approach adopted in *R. v. Hebert*, and discusses other examples where rules relating to constitutional rights are flexible rather than rigid, and concludes at page 451:

> These rules are complex and highly tailored. They require careful, case-specific application, often necessitating *voir dires* which can be complex and protracted. I nonetheless applaud the approach the Supreme Court of Canada is taking. It is an approach that reflects an appropriate commitment to the rectitude of decisions. Simpler rules have definite virtue but their cost is to inflate individual rights, thereby needlessly sacrificing the truth.

50. Police officers have a duty to collect all relevant information, as this is more likely to lead to the prosecution of the correct perpetrator and prevent wrongful conviction of innocent persons. In the present case, the questioning of the accused did not lead to a confession, but rather to the identification of a photograph. In other cases, police officers may be attempting to gather information about other parties' involvement, factual matters relating to the commission of the offence which may or may not directly involve the accused, or other facts which may end up leading to evidence that points away from the accused. Police also have an ongoing duty to investigate. New issues may arise as information is received and analysed. By preventing the police from speaking with an accused who has asserted a right to silence, this very important source of information would be foreclosed. This would be an interference with the public interest in appropriate law enforcement without justification, as there are many instances where an interview with a police officer would not impinge upon the accused's or suspect's right to silence. Allowing a police officer to interview an accused or suspect who has asserted a right to silence, but subjecting the ensuing interview to judicial scrutiny to ensure that the accused or suspect has not been deprived of the right to silence, provides the proper balance between the protection of the individual and the interests of law enforcement and the seeking of truth.

D. The Distinction between Right to Counsel and Right to Silence

51. The Appellant suggests that because courts do not countenance any interference with the right to counsel, it must follow that any police persuasion of an accused to break his silence must be prohibited. It is submitted that such an approach fails to distinguish the different purposes of the right to counsel and the right to silence.

52. The right to counsel is found in section 10(b) of the Charter. The right to remain silent is considered one of the principles of fundamental justice referred to in section 7 of the Charter.

Although these rights are related, they are not identical. Through the right to counsel, an accused is provided with someone to shepherd them through the legal system. The violation of the right to counsel can result in an accused being unaware of the full panoply of other rights, including the right to silence and the manner of exercising such a right.

> ***R. v. Hebert***, *supra* at paras. 109-110
> ***R. v. Manninen***, [1987] 1 S.C.R. 1233 at para. 23

53. In *R. v. Hebert*, McLachlin, J. (as she then was) observed as follows at paragraphs 109-110:

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10 (b) confirm the right to silence in s.7 and shed light on its nature.
>
> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however obliged to allow the suspect to make an informed choice about whether or not the will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

54. In *R. v. Manninen*, the Court was considering whether the accused was properly provided with the opportunity to contact his counsel after indicating that he wished to speak with his lawyer. The Court observed at para. 23:

> Further, s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence. ...

55. The right to silence entails the right of an accused not to be required to provide evidence which would incriminate himself to the state. The essence of the right is the ability of the accused to choose whether or not to provide information to police.

R. v. Fitzpatrick, [1995] 4 S.C.R. 154 at para. 34, 44
R. v. Hebert, *supra,* at para. 137

56. In *R. v. Fitzpatrick*, La Forest J., for the Court, observed at para. 34:

> The parameters of the general principle against self-incrimination were succinctly described by the Chief Justice in *Jones, supra.* Although the Chief Justice was there speaking in dissent, his analysis of the principle against self-incrimination was endorsed by Iacobucci J. for the majority of the Court in *S. (R.J.)*, and must, accordingly, be considered authoritative. In *Jones*, the Chief Justice wrote (at p. 249):
>
> > Any state action that coerces an individual to furnish evidence against him- or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

57. La Forest J. then went on to consider the underlying interests at stake in the right to silence and observed at para. 44:

> In *Jones, supra*, at p. 250, the Chief Justice identified the two fundamental purposes behind the principle against self-incrimination as being: first, to protect against unreliable confessions, and second, to protect against the abuse of power by the state. He further stated, at p. 257, that in his view any limits on the principle against self-incrimination should be determined by reference to these two underlying rationales. I agree. In my view, neither of these two rationales is threatened by allowing the Crown to use hail reports and fishing logs in the prosecution of those who overfish, and this strengthens my conviction that the principle against self-incrimination should be limited in this area.

58. In *Hebert*, McLachlin J. (as she then was) described the essence of the right to silence as one of choice and observed at para. 137:

> The essence of the right to silence is that the suspect be given a choice; the right is quite simply the freedom to choose – the freedom to speak to the authorities on the one hand, and the freedom to refuse to make a statement to them on the other. This right of choice comprehends the notion that the suspect has been accorded the right to consult counsel and thus to be informed of the alternatives and their consequences, and that the actions of the authorities have not unfairly frustrated his or her decision on the question of whether to make a statement to the authorities.

59. The essence and purpose of the right to counsel is to inform the accused of his rights and methods to enforce these rights. Therefore, if an accused is not given his right to counsel, then the accused will not have the knowledge and ability to enforce other rights. That is why courts are so insistent that a right to counsel should be given prior to questioning of the accused. Once the accused has exercised his right to counsel, then the accused has the choice as to whether or not to exercise the right to remain silent or share information with the investigating officers.

60. The present test does not permit interference with this right to remain silent. If a court determines, after reviewing all the surrounding circumstances, that the accused's right to choose to remain silent was denied by the interaction with the police officers, then the right to silence has been breached. This protects against the possibility of unreliable confessions and abuse of power by the state.

E. The Written Waiver Proposal of the Appellant

61. In the matter under appeal, the Appellant proposes that any waiver of the right to silence should be done by a written waiver. It is the position of the Association that there is no need to create any different system for determining waiver in this context than for any other Charter right.

62. In order for a waiver of a Charter right to be valid, it must be demonstrated that the waiver is clear and unequivocal and that the person waiving the right has full knowledge of the right waived and the effects the waiver will have upon that right.

R. v. Clarkson, [1986] 1 S.C.R. 383 at para. 18

63. In *R. v. Clarkson*, the question was whether an accused who was highly intoxicated had validly waived her right to counsel prior to making inculpatory statements. At para. 18, the Court outlined the correct test for determining whether a valid waiver of a Charter right had occurred, as follows:

> Given the concern for fair treatment of an accused person which underlies such constitutional civil liberties as the right to counsel in s. 10(b)of the Charter, it is evident that any alleged waiver of this right by an accused must be carefully considered and that

> the accused's awareness of the consequences of what he or she was saying is crucial. Indeed, this Court stated with respect to the waiver of statutory procedural guarantees in *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at p. 49, that any waiver "... is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process" ...

64. The Association submits that this same test is appropriate for the waiver of the right to silence. A requirement for a written waiver is unnecessarily rigid and not in line with the approach to waiver for other Charter rights.

F. The False Dichotomy Respecting Detained Accuseds

65. The claim by the appellant that there is a gap in the protection offered to an accused person who is in custody is misleading. The same protection for right to silence that relates to a person not in custody relates to a person who is also in custody. The fact that a party is in custody and that the police have control over the prisoner's conditions is one of the factors that a court may weigh in determining whether the police used tactics which deprived the accused's choice to exercise a right to silence. The cases of *R. v. Edmondson, supra*, *R. v. Otis, supra*, *R. v. Sarrazin, supra*, and *R. v. Roy, supra*, noted above, involved accused persons who were in custody. Clearly, courts take into account the fact that the accused is in custody when determining whether the police actions overrode their choice to assert a right to silence.

G. Summary

66. The Association submits that the present test with respect to the right to silence achieves an appropriate balance between the individual's right to silence and society's interest in effective law enforcement, including seeking the truth so that those guilty of offences will be brought to account to society, and those innocent of any offence will be exonerated. Under the present regime an accused is informed that he is not required to say anything, is informed of his right to counsel and given an opportunity to exercise that right to counsel. Police officers may question an accused who has raised his right to silence provided the interaction does not deprive the accused of an operating mind and/or the right to choose whether to exercise the right to silence. It is clear from the number of cases reported on this issue that this approach is well understood and generally followed. Police officers are aware that their interactions with an accused will be

subject to judicial scrutiny, and interviews are routinely videotaped. Trial judges are in the best position to determine whether the questioning deprived the accused of the right to choose to exercise the right to silence. There are many cases where police officers have questioned an accused within the parameters of the test as it is presently understood, including very serious and complex cases presently before Canadian courts. It is submitted by the Association that any change in the present approach to a rigid rule would upset the balance between individual rights and society's interest in effective law enforcement and would have a detrimental effect on the administration of justice and the ability of police officers to perform their duties.

10

PART IV - COSTS SUBMISSIONS

67. Costs are not sought by the Association.

PART V - ORDER REQUESTED

68. The Association respectfully requests that this appeal be dismissed.

69. If this Court determines that the appeal should be allowed, the Association respectfully requests that this Court suspend the application of the effect of this judgment, similar to the decisions in *R. v. Brydges,* [1990] 1 S.C.R. 190 and *R. v. Feeney (Application)*, [1997] 2 S.C.R 117, to allow a transition period for adjustment and retraining.

20

70. The Association respectfully requests permission to present oral argument at the hearing of this Appeal, in order to address the importance of any ruling in this Appeal on the ability of police services to fulfil their law enforcement mandate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON APRIL 30, 2007.

Lynda Bordeleau Counsel for the Canadian Association of Chiefs of Police	**David Migicovsky** Counsel for the Canadian Association of Chiefs of Police

30

Appendix "A"

Statements made by Sgt. Attew during the Interview of Mr. Singh

"And if you've spoken to any Police Officers including myself in respect to this matter who have offered you any hope or advantage, or suggested any fear of prejudice should you speak or refuse to speak to me at this time, it's my duty to warn you that no such offer or suggestion can in any way effect, and must not influence you or make you feel compelled to say anything to me." [A.R., III, 278(6-11)]

"...like I said before, we certainly don't have to talk about anything you don't want to talk about." [A.R., III, 286]

"And you know what? If you don't want to talk about it, that's fine." [A.R., III, 296]

"You...you don't have to talk to me if you don't wanna talk to me. I ob...you know, obviously I understand that and you understand that's within your right." [A.R., III, 303-304]

"Like I said, we certainly can go back to the cell, but I still wanna present you with more of this stuff." [A.R., III, 319]

"Like I said, we don't...you don't have to say anything to me. We don't have to talk. Uh...you can let me do all the talking if you want, that's fine with me." [A.R., III, 324]

"I'm not going to force you to talk about who your friend is, okay." [A.R., III, 336]

"And I mean, you don't have to talk to me, and uh...you know, discuss that..." [A.R. III, 338]

PART V - TABLE OF AUTHORITIES

Authorities: **Page Reference(s)**

Texts: