File No. 39570

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

and

NIGEL VERNON LAFRANCE

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CRIMINAL LAWYERS' ASSOCIATION

Interveners

FACTUM OF THE INTERVENER
(CANADIAN CIVIL LIBERTIES ASSOCIATION)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. In *Sinclair*, the dissenting opinions predicted that the majority judgment would give the police "unfettered and continuing access to the detainee, for the purpose of conducting a custodial interview".[1] They were right. *Sinclair* gives the police all the cards. Combined with its predecessor custodial cases *Singh* and *Oickle*, *Sinclair* forges an iron triangle of case law favouring the interrogator over the detainee. This trilogy, decided more than a decade ago, needs re-thinking.

2. The practical effect of *Sinclair* and *Singh* is to create lengthy interrogations where individuals, some of whom have had only a conversation of a few minutes with a lawyer, are incommunicado with the rest of the world in the face of persistent questioning by people in authority. In *Sinclair*, both dissents predicted that without renewed access to counsel on request, the interrogation would become an "endurance contest".[2] Case law is replete with examples of lengthy interrogations with multiple futile assertions of the right to silence, or requests to contact counsel again, from the detainee.[3]

3. The detention and right to counsel case law should reflect a purposive approach to the *Charter*. The reconciliation of *Charter* rights with other important rights and societal interests should take place under s. 1. In the current s. 10(b) jurisprudence, however, the definition of the right incorporates a vague and fluid balancing of law enforcement interests that significantly undermine the rights protection afforded to detained individuals. There is no justification for any

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[1] *R v Sinclair*, 2010 SCC 35 at para 89, 190 [*Sinclair*].
[2] *Ibid* at paras 89, 92, 177.
[3] See e.g. *R v Cleveland*, 2019 MBQB 58 (the accused asserted his right to silence at least 60 times during a three-hour interview); *R v Davidson*, 2017 BCSC 2497 (the accused told officers that he would not speak without his lawyer present approximately 54 times); *R v Gyles*, 2015 MBQB 21 (the accused asserted his right to silence approximately 41 times); *R v Biddersingh,* 2015 ONSC 5904 (the accused requested to speak to a lawyer more than 50 times during a three-and-a-half-hour interview); *R v Davis,* 2011 ONSC 5564 (the accused asserted his right to silence more than 100 times during a three-hour interview); *R v Smith,* 2011 BCSC 1695 (the accused asserted his right to silence approximately 33 times and asked to speak to a lawyer approximately 70 times); *R v. Othman*, 2018 ONCA 1073 (the defendant asserted his right to silence on more than 100 occasions over the course of a five hour interview) .

interpretative approach that is not purposive. Instead, taking an approach that respects the evolution of *Charter* interpretation jurisprudence, including the importance of equality, leads to a different and more robust definition of the right to counsel.

4. The limits *Sinclair* put on renewed contact with counsel should be revisited. The Court's current jurisprudence is an invitation to the police to recite the right to counsel by rote, and then immediately ignore it. The combined effect of *Sinclair* and *Singh* is that, after the initial phone call to a lawyer, detainees are on their own. The non-exhaustive list the Court created in *Sinclair* for renewed contact (a change in jeopardy, police employment of new procedures, or reason to believe that the detainee may not have understood the initial advice) does not provide meaningful rights protection to a detainee in police custody.

5. A purposive approach to the right can correct the course of the jurisprudence. The detainee should have tools to assert – both in law and in practice – their constitutional right to silence in the face of persistent interrogation by the state. In this case, the tool is the ability to consult with counsel upon request throughout the interrogation.

6. The CCLA takes no position on the facts.

PART II – CCLA POSITION ON QUESTIONS ON APPEAL

7. The CCLA argues:

- The right to counsel jurisprudence needs to reflect the purpose of s. 10(b) – ensuring that an individual has a meaningful choice to exercise their constitutional rights through the effective assistance of a lawyer;
- Principles of *Charter* interpretation demand a broader interpretation of the s. 10(b) right;
- Canada lags behind comparator countries in relation to the right to counsel;
- Detainees should be afforded continued access to counsel upon request.

PART III – STATEMENT OF ARGUMENT

1. The purpose of 10(b) is to foster fairness between the detainee and the state

8. This Court's jurisprudence explains the importance of a broad and purposive approach to rights determinations.[4] This approach has been the hallmark of *Charter* development. Section

[4] See *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 157.

10(b), which delivers information about and access to key democratic rights – including the right to silence and the protection against self-incrimination – is a centerpiece of the *Charter*.

9. A full review of the jurisprudence shows that the right to counsel is designed to foster fairness and ensure that the detainee is capable of making free and informed decisions regarding whether to avail himself of his *Charter* rights.[5] This requires the effective assistance of counsel.

10. Over the last four decades, the Court has articulated a number of purposes for s. 10(b), all of which reflect meaningful access to a lawyer as integral to the administration of justice. In *Brydges*, the Court stated that s. 10(b) is "aimed 'at fostering the principles of adjudicative fairness'" and the "fair treatment" of a detainee.[6] The Court clarified in *Bartle* that s. 10(b) is about providing detainees with meaningful choices and an opportunity to make informed decisions about their legal rights and obligations.[7] The Court said that the right is necessary because a detainee is "put in a position of disadvantage relative to the state."[8] Counsel are there to remedy the "situation of vulnerability" that exists in a detention.[9] The *Sinclair* majority, which contained the narrowest framing of the purpose of the right to counsel, recognizes that s. 10(b) is about equipping the detainee with an understanding of his rights so that he knows how to exercise them in the context of an investigation.[10] The majority found that the purpose of s. 10(b) goes beyond the simple provision of information, and accepted that it demands the detainee receive advice on how to exercise one's constitutional rights.[11] The dissent found that s. 10(b) furthers the proper administration of justice by protecting the presumption of innocence, the right against self-incrimination and the right to silence by giving effective legal advice to those "most in need of its protection."[12]

11. For a detainee who is in the hands of the state, s. 10(b) is the first necessary step to access the full protection granted by the constitution. The effective assistance of counsel helps create a fair investigation and a level playing field between the interrogator and detainee. It assists in

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[5] See *R v Black*, [1989] 2 SCR 138 and *R v Brydges*, [1990] 1 SCR 190 [*Brydges*].
[6] *Brydges*, *supra* note 5 at 203.
[7] *R v Bartle*, [1994] 3 SCR 173 [*Bartle*].
[8] *Ibid* at 191.
[9] *R v Suberu*, 2009 SCC 33 at para 41.
[10] *Sinclair*, *supra* note 1 at para 26.
[11] *Ibid*.
[12] *Ibid* at para 163.

mitigating not only the asymmetry of information, but also the asymmetry of power in a custodial interrogation.

2. Shrinking the purpose of s. 10(b) is out of step with principles of *Charter* interpretation

12. Purporting to follow *Sinclair*, some courts have interpreted s. 10(b)'s purpose as only correcting information asymmetry; this is an impoverished, and incorrect, interpretation of the constitutional right to counsel.[13] This result is not entirely unexpected. When *Sinclair* was decided, it drew criticism from academics and practitioners alike.[14] This case presents an opportunity to respond to these criticisms and revisit two particular elements of the *Sinclair* approach which limited the s. 10(b) right. First, in determining the contours of the right, the Court should focus on the purpose of the right, not law enforcement interests. Second, the Court should assess the importance of equality in shaping the right to counsel.

a. Societal concerns with solving crime should not factor into the rights-definition stage

13. *Sinclair'*s failure to provide meaningful protection for the right to counsel is a result of the majority's prioritization of ease in the investigation of crime over detainees' constitutional rights.[15] The majority came to its conclusion on the limits of the right to counsel after suggesting that s. 10(b) must be defined by reference to, among other things, "public interest in effective law enforcement."[16] This framework places an internal limit on the s. 10(b) right not mentioned anywhere in the text of s. 10(b) of the *Charter* and improperly incorporates a vague law enforcement interest into the purpose of the constitutional right to counsel.[17]

14. Creating an internal balance against the societal concerns of law enforcement at the rights-definition stage leads to a dangerous analytical framework. Societal concerns with solving crime

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[13] See trial judgment in *LaFrance*, for example, at paras. 133-135; See also *R v Biddersingh,* 2015 ONSC 5904 at para. 77.
[14] See e.g. Scott Hutchison, "Charter Case of the Decade: *R v Sinclair*" *For the Defence: The Criminal Lawyers' Association Newsletter* 33:2 (April 2012) BOA Tab 5; Benjamin Goold, "Why Sinclair Ignores the Realities of Police Interrogation" *The Lawyer's Weekly* 30:39 (February 2011) BOA Tab 4.
[15] *Sinclair*, *supra* note 1 at para 63.
[16] *Ibid* at para 38.
[17] Vanessa A MacDonnell, "R v Sinclair: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter" (2012) 38:1 Queen's LJ 137, at p. 138-140, 163-164.

should not factor into determining the scope of the right. This internal limit on the content of the *Charter* right means that, in cases where police conduct would otherwise be a breach, the Courts have found a way of "saving" the breach by making law enforcement concerns a core part of the analysis.[18] This internal balancing is problematic for two reasons. First, the Court does not have the rigorous structure of the *Oakes* test to guide its analysis. Without further explanation as to what constitutes "the proper balance"[19] in this context, "the sole criterion appears to be concern for defining rights in a way that allows the police to do their job."[20] Second, at the rights definition stage, the burden is not on the state to prove why the right should be so limited.[21]

b. The Sinclair majority does not account for systemic inequality

15. *Sinclair* does not fully account for constitutional principles of equality in defining the s. 10(b) right.[22] Before and after *Sinclair*, ss. 8 and 9 jurisprudence recognized the important role that race, gender, ability, and other individual characteristics play in individual encounters with the police. In *Golden*, for example, the Court accepted that racial equality has to be part of the contextual analysis of the right to privacy.[23] In *Mills*, the Court found that the interpretation of *Charter* rights should be shaped by equality of the sexes.[24] In *Le*, the Court accepted that race relations impact the s. 9 detention analysis.[25] These social dynamics, which reflect individuals' and communities' historic and contemporary experiences with the criminal justice system, are equally relevant in defining the s. 10(b) right.

16. Judicial attention to the demands of equality should shift the Court's analysis of the s. 10(b) right. Equality requires that jurisprudence be sensitive to the varying social dynamics of individuals subject to custodial interrogations. An individual's experience of detention, and the practical impact of a single call with duty counsel in the face of sustained police questioning, will differ depending on the individual and their communities' lived experiences.

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[18] MacDonnell, *supra* note 17 at 161.
[19] *Sinclair, supra* note 1 at para 63.
[20] MacDonnell, *supra* note 17 at 161.
[21] See *ibid* at 151.
[22] See Christine Boyle, "*R. v. Sinclair*: A Comparatively Disappointing Decision on the Right to Counsel" (2010) 77 CR (6th) 310 at pg. 3, BOA Tab 2.
[23] *R v Golden*, 2001 SCC 83 at paras 83 – 90 [*Golden*].
[24] *R v Mills*, [1999] 3 SCR 668 at para 90.
[25] *R v Le*, 2019 SCC 34 at para 106 [*Le*].

17. Case law accepts that Black and Indigenous communities experience racial disparities in policing.[26] Yet, that same case law created a system where individuals who are particularly wary of police or susceptible to misunderstanding their advice can be isolated from both their established community support structures and their legal counsel following a brief initial consultation. *Sinclair'*s refusal to recognize the right to ongoing access to legal counsel has the greatest impact on the very individuals who are most vulnerable and most in need of a lawyer during a police interview.

18. Many communities, including Indigenous people, Black and other racialized people, those living with substance use disorders, and those living in poverty, have too much experience with ways in which the criminal justice system can countenance rights violations, repression, and discrimination. The Court should address the exacerbated disadvantage faced by these groups by ensuring that the constitutional right to counsel includes access to a lawyer upon request.

3. Compared to other democracies, Canada's right to counsel is significantly limited

19. The state of the law after *Sinclair* is out of step with other comparator jurisdictions:

- At the federal level in Australia, the *Commonwealth Crimes Act 1914* obligates the police to advise a detainee before an interrogation that not only may he or she communicate with a lawyer, he or she may also arrange for a lawyer to attend the questioning. If a lawyer attends, the investigating officer must allow a consultation in private with the lawyer, and allow for the lawyer to be present with the detainee during questioning and provide advice.[27] Further, if an Aboriginal person is detained, the *Act* also requires an investigating official to contact an Aboriginal Legal Assistance Organization to assist the detainee.[28]

- In England and Wales, the *Police and Criminal Evidence Act* and the *Codes* developed under the *Act,* allow a person arrested and held in custody to consult a solicitor privately

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[26] See *R v* Gladue, [1999] 1 SCR 688 at paras 61 – 65, 68; *R v Ipeelee*, 2012 SCC 13 at paras 60, 62; *Le*, *supra* note 31 at paras 90 – 97; *R v Grant,* 2009 SCC 32 at para 154; *R v Brown,* [2003] OJ No 1251, 64 OR (3d) 161 at para 9; *R v Williams,* [1998] 1 SCR 1128 at para 58.
[27] *Commonwealth Crimes Act 1914* (AU), s. 23G; the legal practitioner cannot "unreasonably interfere" with questioning. See limits on this right at s 23L.
[28] *Ibid*, s 23H.

"at any time." [29] In *Code C*, 6.8 states that a detainee is permitted to consult a solicitor and is entitled to have that solicitor present during an interview on request.[30]

- The United States Supreme Court in *Miranda* interpreted the Fifth Amendment of the US Constitution as including the right to have counsel present during custodial interrogations. [31]

20. An international comparison provides a useful touchpoint for determining the contours of a particular constitutional right.[32] The international landscape demonstrates that a robust protection for the right to counsel during custodial interrogations is not a novel concept. For instance, the International Criminal Court's Rome Statute states that a suspect has the right to be interrogated in the presence of counsel.[33] If other jurisdictions consistently protect their detainees to a greater extent than Canada does, and foundational international instruments have enshrined the right to access counsel during an interview, we might question whether our prevailing constitutional interpretation is affording meaningful protection for individuals.

4. Canada Catches Up

21. Taking into account the above principles of *Charter* interpretation and the international landscape, the appropriate interpretation of s. 10(b) is one that provides detainees the right to renewed access to counsel upon request. The fact that an initial consultation took place should be irrelevant. The fact that police have not changed tactics should not be of concern. No increase in jeopardy should be required. The detained person remains in a position of significant vulnerability throughout the police interview. In order to level the field between the detainee and the police and

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[29] See *Police and Criminal Evidence Act 1984* (UK), c 60, s. 58 (including exceptions to access to counsel) and *Code C*, *Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (August 2019), s. 3.21A(b)(i) allows for a solicitor present during a suspect's voluntary interview.

[30] See *Code C Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers* (August 2019), s. 6.8 (limits at 6.6). It should be noted that the United Kingdom allows for adverse inferences to be drawn in some circumstances for a failure to mention facts later relied on at trial (*Criminal Justice and Public Order Act 1994*, at s. 34).

[31] *Miranda v State of Arizona,* 86 S Ct 1602 at 443 (1966), BOA Tab 1.

[32] See Christine Boyle and Emma Cunliffe, "Right to Counsel During Custodial Interrogation in Canada: Not Keeping Up with the Common Law Joneses" in Paul Roberts and Jill Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions*, (Portland, Oregon: Hart Publishing, 2012) at p. 82, 90, BOA Tab 3.

[33] Rome Statute of the International Criminal Court, Article 55(2).

provide meaningful, practical protection for a range of constitutional rights, the detainee should be entitled to access counsel at any point during the police interview.

22. Not only is this consistent with a purposive approach to s. 10(b) and the protections of other similar jurisdictions, it moves the ability to make decisions about access to counsel out of the hands of the interrogator and into the hands of the vulnerable detainee. As currently formulated, the power to decide the trigger for renewed contact with counsel (a change in jeopardy, police employment of new procedures, or reason to believe that the detainee may not have understood initial advice) belongs to the police. Beyond the limits on renewed access being out of touch with the purpose of the s. 10(b) right, this places too much faith in the impartiality of the police and their role in the investigation.[34] Police may at times experience their duty to ensure the safety of all persons and maintain public order as in conflict with the individual interests of a detainee. Only an individual's lawyer can be expected to effectively discharge their duty to protect the detainee's interests.

23. The concerns articulated by the majority in *Sinclair* relating to ongoing access to counsel are overstated. For instance, the majority had concerns that providing further or renewed access to counsel would give the detainee an additional "tool to control the interrogation."[35] In the majority's view, allowing for renewed access to counsel would enable detainees to delay investigations and allow for evidence to be "lost, destroyed, or impossible to maintain."[36] The right to silence and the right against self-incrimination, however, explicitly give detainees the constitutional right not to participate in their own prosecution. Similarly, the presumption of innocence places the burden of proof on the state alone. The police are not entitled to confessions or to derivative evidence from the mouth of the accused.[37]

24. There will undoubtedly be cases where police will be required to pause their interrogation at a time not of their own choosing. In some cases, evidence may be more difficult to locate due to this delay. Properly viewed, however, this is not a direct result of the right to counsel, but a

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[34] See Goold, *supra* note 14: "it is simply unrealistic to expect the police to recognize an 'objectively observable' change in circumstances during the course of their own questioning" and immediately halt their planned interrogation, BOA Tab 4.
[35] *Sinclair,* supra note 1 at para 58.
[36] *Ibid*.
[37] *Sinclair*, *supra* note 1, at para. 157.

necessary implication of the right to silence. Constitutional rights cannot be curtailed simply because the police wish to pursue their investigative process with expedience.

25. The police are entitled to investigate crimes and use interrogation as an investigative technique. However, the individual needs tools to effectively realize his constitutional rights when in the custody of the state and accused of a crime. He needs a generous and ongoing ability to access counsel to guard against the practical erosion of the right to silence during an interrogation. Section 10(b), properly interpreted, provides it.

PART IV – SUBMISSIONS ON COSTS

26. The CCLA seeks no costs in the intervention and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF AUGUST, 2021.

Frank Addario
Samara Secter
Reakash Walters

Part V - Table of Authorities

Cases — **Paragraphs in Memorandum**

Secondary Sources

Legislation