R. v. Sinclair and R. v. Traicheff: The Slow Death of the Right to Counsel

The impact of recent decisions by the Supreme Court of Canada and the Ontario Court of Appeal have significantly impacted the right of a detained individual to obtain timely and necessary legal advice. The recent Court of Appeal decision in *Regina v. Traicheff* has significantly impacted a detainee's right to speak with counsel of choice while under investigation. Although a detainee maintains the right to request contact with his or her counsel of choice, if the police make the minimalist of attempts, no violation of s. 10(b) will occur and even if a breach is found by a trial court, the evidence will rarely if ever be excluded. As such, the detainee will be left with duty counsel as the only real option while in custody.

In the Supreme Court of Canada's recent decision in *R v Sinclair*, a deeply divided court held that the right to counsel during custodial detention under s. 10(*b*) of the *Charter* does not typically require that detainees be allowed more than one consultation with counsel. Nor does s. 10(*b*) mandate the presence of counsel throughout police interrogations.[1]

In *Sinclair*, the police interrogated the appellant for five hours and denied his repeated requests to consult his lawyer, whom he had spoken with by telephone for just six minutes before the interrogation. The majority of the Court, consisting of Chief Justice McLachlin and Justices Deschamps, Charron, Rothstein and Cromwell, concluded that the police's conduct did not infringe s. 10(*b*).

The MajorityDecision

According to the majority, s. 10(*b*) guarantees detainees access to legal advice relevant to their right to choose whether to cooperate with the police. This purpose is achieved by requiring that detainees be informed of their right to consult counsel and, if a detainee so requests, that he or she be given an opportunity to do so. In the majority's view, the nature of the legal assistance guaranteed under s. 10(*b*) is *informative* – detainees have the right to be informed of their rights by legal counsel so they can make a meaningful choice about how to respond (or not) to police questioning. The right to counsel is re-triggered only (a) when there is an objectively observable change in circumstances during an interrogation, and (b) re-consultation with counsel is objectively necessary for the detainee to make a meaningful choice about cooperating with the police.

The majority indicated that such changed circumstances may result when:

(a) there are new procedures involving the detainee;

(b) there is a change in the level of jeopardy faced by the detainee; or

(c) there is reason to question the detainee's understanding of his or her s. 10(*b*) rights.

---

[1] This approach was applied in the companion cases of *R v McCrimmon* and *R v Willier*.

Although these categories are not closed, new categories should *only* be developed where necessary to fulfill the purpose of s. 10(*b*).

The Dissent of Justices LeBel, Fish and Abella

In dissent, Justices LeBel, Fish, and Abella concluded that a broader s. 10(*b*) grants detainees the right to immediate ("NOW") and *effective assistance of counsel,* and is not spent upon the detainee's initial consultation with counsel. In their view, detainees have the right to legal *protection*, not merely information. Accordingly, the right to immediate and effective legal assistance cannot and does not depend on an interrogator's judgment about whether or not it is necessary. Finally, allowing detainees access to counsel during an interrogation is of critical importance to ensuring the protection of a detainee's other *Charter* rights, including the right to silence, the right against self-incrimination, and the presumption of innocence.

The Dissent of Justice Binnie

In a separate dissent, Justice Binnie criticized the majority for conflating a detainee's right to counsel with the right to silence and for its "unduly impoverished" view of s. 10(*b*). However, he was not prepared to accept the other dissenting justices' "more expansive approach" to s. 10(*b*), and offered an "intermediate" approach which, unlike the model favoured by the dissent, hinges on the exercise of police judgment regarding the necessity and legitimacy of an accused's request to re-consult counsel. Under this approach, a detainee has the right to re-consult with counsel when such a request (a) falls within the purpose of the s. 10(*b*) right (*i.e.*, to satisfy a need for legal assistance rather than delay or distraction), and (b) is reasonably justified by the objective circumstances which were or ought to have been apparent to the police during the interrogation.

Implications for Trial Courts: Pigeonholing the Right to Counsel

The attempt by the majority in *Sinclair* to catalogue the circumstances in which a detainee's right to counsel will be re-triggered is reminiscent of the ill-fated categorical approach no longer applied by the Court in areas of the law such as hearsay evidence, similar fact evidence, and the test for distinguishing between conscriptive and non-conscriptive evidence, which until recently formed part of the test for excluding unconstitutionally obtained evidence under s. 24(2) of the *Charter*. The approach to s. 10(*b*) articulated in *Sinclair* has the potential for causing similar problems of application for lower courts.

In particular, it is likely that defence lawyers will now attempt to pigeonhole cases into the categories identified by the majority in an attempt to enforce their clients' rights under s. 10(*b*). Lower courts, which are strictly bound by the majority's checklist, will either attempt to engage in a similar exercise of mental gymnastics in order to remedy a *Charter* violation or simply conclude that the circumstances of a particular case do not neatly fit any of the established categories. Given the majority's admonition against creating new categories, it is highly unlikely that lower courts will develop any new categories anytime soon, if at all.

Defence Counsel's Best Advice? Cover Your Ears and Say Nothing

Based on *Sinclair* and the Court's hollowing out of the right to silence in its earlier decision in *R. v. Singh*, defence lawyers should advise their clients that unless the police decide otherwise, their

first consultation may be the only opportunity they will have to speak with one another until the completion of the interrogation, and that the police are not required to allow counsel to be present during an interrogation. Such a narrow approach to a right as fundamental as the right to counsel is inconsistent with the purposive approach to interpreting *Charter* rights first recognized by Justice Dickson in *Hunter et al. v. Southam Inc.* over a quarter century ago.[2] Accordingly, the best advice to clients in the custody of the police may be that of the Ontario Criminal Lawyer's Association: "You have reached counsel. Keep your mouth shut. Press one to repeat this message."[3]

[2] See para. 84 of Binnie J.'s reasons in *Sinclair*.

[3] Quoted at para. 86 of Binnie J.'s reasons in *Sinclair*.