R v Sinclair (2010): No Constitutional Right to Have a Lawyer Present During Police Interrogation

INTRODUCTION

In *R v Sinclair*,[1] the Supreme Court considered the limits and scope of the *Charter of Rights and Freedoms* guarantee to a lawyer in the event of arrest or detention. Under section 10(b) of the *Charter*:

Everyone has the right on arrest or detention … to retain and instruct counsel without delay and to be informed of that right.

In *Sinclair*, the Supreme Court addressed the following questions:

- Does section 10(b) of the *Charter* guarantee that if a person who is arrested or detained asks to speak to their lawyer while they are being questioned by police, the police have to stop the questioning and allow the person to speak to their lawyer?
- Does the section 10(b) *Charter* right guarantee that an arrested or detained person can have a lawyer present while being questioned by police?

THE FACTS

In December 2002, Trent Sinclair was arrested for the murder of Gary Grice. He was then taken to an RCMP detachment in Vernon, British Columbia for questioning.[2] When he was arrested, he was told that he had the right to speak to a lawyer without delay and that he could call any lawyer that he wanted (including a free Legal Aid lawyer).[3]

Mr Sinclair decided to call a lawyer who had assisted him in the past. He spoke with his lawyer privately on the telephone for a couple of minutes on two occasions.[4]

Mr Sinclair was later questioned by a police officer named Sgt Skrine for approximately 5 hours.[5] At the beginning of the interview, Sgt Skrine reminded Mr Sinclair that he had a right to remain silent and did not have to say anything to the police if he didn't want to.[6]

At multiple points during the 5-hour questioning, Sgt Skrine told Mr Sinclair that the police had found evidence proving that Mr Sinclair had committed the murder. Some of this was

true, while some was fabricated in an attempt to get Mr Sinclair to confess. Each time this happened, Mr Sinclair stated that he did not want to say anything until his lawyer was present or he asked if he could contact his lawyer again. Altogether, Mr Sinclair asked to speak to his lawyer again on at least six occasions. Each time, Sgt Skrine did not allow him to contact his lawyer, instead reminding Mr Sinclair that it was his choice whether to speak or not. The questioning continued.[7] It was Sgt Skrine's view that Mr Sinclair had already exercised his right to a lawyer by calling his lawyer and speaking to him on the telephone earlier in the day.[8]

Eventually, Mr Sinclair confessed to the murder.[9]

ISSUE

The issue that the Supreme Court had to address in this case was whether Mr Sinclair's right to consult a lawyer as outlined in section 10(b) of the *Charter of Rights and Freedoms* had been infringed by the actions of Sgt Skrine.

In particular, the issue for the Court was whether section 10(b) requires that people who have been arrested or detained, and have spoken with a lawyer once, have a constitutional right to consult with a lawyer a second time if they ask to.

THE DECISION

The majority of the Supreme Court concluded that section 10(b) of the *Charter* does not require that an arrested or detained individual be given more than one consultation with a lawyer. However, there is an exception to this general rule. There will be a right to additional advice from a lawyer where there is a "change in circumstances."[10] A change in circumstances includes situations such as:

- If the police wish to subject the detainee to a new, non-routine investigative procedure (such as a police line-up);
- If the detainee faces a change in jeopardy (such as a new, more serious charge); or
- If there is reason to believe that the detainee did not understand the legal advice he or she received.

In addition, section 10(b) does not require that a lawyer be present throughout a police interrogation.

Mr Sinclair did not fit into any of the exceptions to the general rule. As a result, the Supreme Court ruled that Mr Sinclair's *Charter* rights had not been violated.

CASE HISTORY: THE DECISIONS IN THE COURTS BELOW

The Trial Decision

At Mr Sinclair's trial, the trial judge considered whether his confession should be admitted into evidence, or whether it should be excluded on the basis that it was obtained in violation of his *Charter* rights.

The trial judge concluded that the confession should be admitted. He ruled that Mr Sinclair's right to a lawyer had been satisfied by the telephone calls that took place before the interrogation started.[11] He explained that – without a change in circumstances – once a person has exercised his or her section 10(b) right and spoken with a lawyer, the police can continue to interview them.[12]

The confessions were admitted into evidence, and a jury convicted Mr Sinclair of manslaughter.

The Decision of the British Columbia Court of Appeal

Mr Sinclair appealed the trial decision, arguing that the confession should not have been admitted because it was obtained in violation of his *Charter* rights. However, the British Columbia Court of Appeal denied his appeal, agreeing with the trial judge.[13]

THE SUPREME COURT DECISION: ANALYSIS

In a 5-4 decision, a majority of the Supreme Court reached the same conclusion as both of the Courts below.

The Majority Decision: No Right to Multiple Consultations

The decision of the 5-judge majority was written by Chief Justice McLachlin and Justice Charron.

The majority ruled that section 10(b) of the *Charter* does not require that an arrested person who is being questioned by police be given the opportunity to have a lawyer present, or to consult with a lawyer multiple times throughout the questioning. Once an arrested person has received legal advice at the outset of the arrest, the section 10(b) right to a lawyer has been fulfilled. The only exception is where there is a change in circumstances.

The majority came to this conclusion based on an analysis of:

- The wording of section 10(b); and
- The purpose of section 10(b).

The wording of section 10(b)

The text of section 10(b) says that a person, upon arrest or detention, has the right "to retain and instruct counsel without delay." Although the text makes clear when the right arises ("upon arrest or detention"), it does not make clear when the right is exhausted.

There was some argument during the Supreme Court hearing that the words "retain and instruct" indicate a continuing relationship with a lawyer.[14] However, the majority

concluded that the text of section 10(b) did not conclusively resolve the issue.

The purpose of section 10(b)

The majority concluded that the purpose of section 10(b) 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."[15] When a person has been arrested, it is important that they understand that they have a right to remain silent, and that they can choose whether they wish to cooperate with police (or not).[16]

Section 10(b) has both an "informational" and an "implementational" component:

- *Informational component:* requires that the police advise the individual who has been arrested or detained of his right to a lawyer;
- *Implementational component:* requires that the police give the individual a reasonable opportunity to exercise his right to a lawyer, and to hold off from questioning the individual until he or she has had an opportunity to consult with a lawyer.[17]

Is there a right to have a lawyer present during police questioning?

The majority of the Supreme Court ruled that section 10(b) of the *Charter* does not grant a constitutional right to have a lawyer present during police questioning.[18] The majority found that the purpose of section 10(b) can be achieved with one initial meeting with a lawyer and additional meetings with a lawyer if the circumstances change.

Of course, there is nothing that prevents all sides, including the police, from consenting to a lawyer being present during police questioning. In some circumstances, a suspect may choose to make this kind of arrangement a pre-condition to giving a statement and the police may choose to allow it.[19]

Is there a right to stop questioning to re-consult with a lawyer?

The majority of the Supreme Court ruled that there is no constitutional right to stop police questioning and to speak with a lawyer, unless there is a change in circumstances. If there is a change in circumstances, an opportunity to speak with a lawyer again may be constitutionally required.[20]

So, what will constitute a "change in circumstances"? The majority gave three examples of situations that will constitute a change in circumstances (while noting that there may be others):[21]

1. *New procedures involving the arrested or detained individual.* A lawyer's initial advice will be based on his or her expectation of the normal procedures that police subject arrested or detained individuals to – such

as police questioning. If the police want the individual to participate in a new, non-routine procedure (such as a police line-up), another consultation with a lawyer should be granted.[22]

2. *A change in jeopardy.* If, after an initial consultation with a lawyer, the investigation takes a new, more serious turn, the lawyer's advice may no longer be tailored to the arrested or detained individual's new circumstances. This would happen if, for example, an individual was initially arrested on a charge of drug possession, but as the investigation unfolded was later charged with murder. Because the legal jeopardy that the individual is facing has changed, an opportunity to re-consult with a lawyer is constitutionally required.[23]
3. *Reason to believe that the individual did not understand the initial advice received from a lawyer.* If the police have reason to question whether the arrested or detained individual understood the initial advice he or she received from a lawyer, the police have a duty to provide the individual with another opportunity to talk to a lawyer.[24]

The majority believed that this interpretation of section 10(b) is consistent with the section's purpose. It ensures that arrested or detained individuals are able to make an informed decision on whether to cooperate with police, while giving police the ability to do their jobs and investigate crimes. If a suspect could stop police questioning simply by stating that he or she wanted to talk to a lawyer again and again, the majority stated that this could "result in long delays in pursuing the interrogation" and "permit suspects, particularly sophisticated and assertive ones, to delay" investigations.[25]

Applying the law to Mr Sinclair's situation

The majority ruled that Mr Sinclair did not experience a change in circumstances, so he was not entitled to a second consultation with his lawyer. He had been advised of his right to a lawyer and had spoken with a lawyer of his choice. The police were not required to stop the questioning and allow him to speak with his lawyer again. The police repeatedly reminded him that it was his choice whether to speak with them or not, and the police acted properly in doing so.[26] It was clear from a reading of the full transcript that Mr Sinclair was well aware of the choices that he had and of his constitutional right to remain silent.[27]

As a result, Mr Sinclair's appeal was denied, and the decision of the jury at trial was upheld.

The Dissenting Opinions

Justice LeBel & Justice Fish: there should be a constitutional right to have a lawyer present during an interrogation

As noted above, the opinion of the Supreme Court in *Sinclair* was not unanimous. Justices

LeBel and Fish wrote one of two dissenting opinions.

In the view of Justices LeBel and Fish, concurred with by Justice Abella, the majority's interpretation of section 10(b) was far too narrow. They wrote that there should be a constitutional right to the ongoing assistance of a lawyer. If a detained or arrested individual asks to speak to a lawyer, the police have an obligation to provide this opportunity.

Otherwise, police have unfettered access to a detained or arrested individual, and are able to subject the individual to a near-endless interrogation. They wrote that this is unfair, given that detainees are under no obligation to cooperate with a police investigation.[28] They emphasized that at the investigation stage, the detained and arrested person must be presumed innocent. In addition, section 10(b) implies the ongoing assistance of counsel, and that this right grants not only a right to the assistance of a lawyer, but to the*effective* assistance of a lawyer.[29]

Justice Binnie: the "intermediate" position

Justice Binnie also wrote a separate, dissenting opinion in *Sinclair*.

He also took objection to the majority's narrow view of the section 10(b) right. In his view, in order for a lawyer to provide *meaningful* assistance to an individual who is in trouble with the law, the lawyer must be able to assist on an ongoing basis.[30] Otherwise, he wrote, a lawyer is no more helpful than a simple recorded message:

You have reached counsel; keep your mouth shut; press one to repeat this message.[31]

However, Justice Binnie did not go as far as Justices LeBel and Fish. He did not believe that section 10(b) requires a lawyer to be present, when requested, at a police interrogation.[32] In his view, an arrested or detained individual who asks to speak with a lawyer should be given this opportunity where the request is reasonable in the circumstances. The decision as to whether the request is "reasonable" will have to be a judgment call made by the police,[33] with consideration given to factors such as:[34]

1. *The extent of prior contact with counsel.* Was it an extended consultation or a cursory phone call?
2. *The length of the interview.* A request made after an hour of questioning may carry more weight than one made right after questioning began;
3. *The extent of other information (true or false) provided by the police to the detainee about the case during the interrogation*. New information may reasonably suggest to the detainee that the advice in the initial consultation may have been overtaken by new events;
4. *The existence of exigent or urgent circumstances* that militate against any delay in the interrogation;

5. *Whether an issue of a legal nature has arisen in the course of the interrogation*, because the detainee might legitimately need legal assistance to understand the issue; and
6. *The mental and physical condition of the detainee*, including signs of fatigue or confusion, to the extent that this is or ought to be apparent.

In Justice Binnie's opinion, Mr Sinclair's request to speak to a lawyer was reasonable. Mr Sinclair had been subjected to five hours of questioning and was being told that the evidence was mounting against him. The police should have given him the opportunity to consult with a lawyer again before continuing the questioning.

CONCLUSION

Although there was some disagreement at the Supreme Court, the majority ruling is that an arrested or detained individual has a constitutional right to speak with a lawyer before police questioning begins, but that individual does not have a constitutional right to speak with a lawyer again during questioning unless there is a change in circumstances. Further, there is no ongoing right to have a lawyer present during police questioning.

The decision of the majority in *Sinclair* and the disagreement between justices at the Supreme Court has raised some residual questions. For example, does the majority opinion value the state's interest in investigating crimes too heavily, at the expense of individual rights? Does the majority ruling mean that an individual who is subjected to extended, lengthy, and intrusive interrogation techniques has no right to take a break to speak again to a lawyer? Does the majority opinion fully recognize the coercive nature of the interrogation room, and the importance of legal advice? These are questions that courts will continue to grapple with in the future.

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[1] 2010 SCC 35, [2010] 2 SCR 310 .

[2] *Ibid* at para 4.

[3] *Ibid* at para 5.

[4] *Ibid* at para 6.

[5] *Ibid* at para 8.

[6] *Ibid*.

[7] *Ibid* at para 10.

[8] *Ibid* at para 9.

[9] *Ibid* at para 11.

[10] *Ibid* at para 2.

[11] *Ibid* at para 15.

[12] *Ibid.*

[13] *Ibid*.

[14] *Ibid* at para 20. It was also argued that the French version of the *Charter* and the use of the word "*assistance*" indicates this even more strongly – "*avoir recours sans delai a l'assistance d'un avocat.*"

[15] *Ibid* at para 26, citing *R v Manninen,* [1987] 1 SCR 1233 at 1242-43.

[16] *Ibid.*

[17] *Ibid* at para 27.

[18] *Ibid* at para 36. Pursuant to *Miranda v Arizona*, 384 US 436 (1966), United States law requires that if arrested person requests, there is a right to have a lawyer present during all police questionings. The majority declined to "transplant" the US *Miranda* rules into Canada, concluding that the Canadian context is different and that there is no definitive conclusion on the effects of the *Miranda* rules. See *ibid* at paras 37-40.

[19] *Ibid* at para 42.

[20] *Ibid* at para 43.

[21] *Ibid* at para 49.

[22] *Ibid* at para 50.

[23] *Ibid* at para 51.

[24] *Ibid* at para 52.

[25] *Ibid* at para 58.

[26] *Ibid* at para 3.

[27] *Ibid* at para 72.

[28] *Ibid* at para 128.

[29] *Ibid* at para 168.

[30] *Ibid* at para 80.

[31] *Ibid* at para 86, citing the factum of the Ontario Criminal Lawyers' Association.

[32] *Ibid* at para 82.

[33] Justices LeBel and Fish were critical of this approach, because the right to counsel "cannot be made to depend on an interrogator's opinion." Justice Binnie responded that the police routinely deal with questions of reasonableness, and this question would be no more difficult than any of the multitudes of other difficult issues that police deal with on a daily basis.

[34] Quoted from *ibid* at para 106.