THE *SINCLAIR* TRILOGY

"WHAT ARE DEFENCE COUNSEL FOR"?[1]

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[1] ***Sinclair***, para. 85 (Binnie J.)

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INTRODUCTION

On October 8, 2010, the Supreme Court of Canada handed down three companion cases: ***R.* v. *Sinclair,*** [2010] 2 S.C.R. 310 (from the B.C.C.A.); ***R.* v. *McCrimmon***, [2010] 2 S.C.R. No. 402 (from the B.C.C.A.); ***R.* v. *Willier***, [2010] 2 S.C.R. 429 (from the Alberta C.A.) dealing with the interrelated issues of the right to counsel, the right the silence and the confessions rule (the "*Sinclair* Trilogy").

The *Sinclair* Trilogy completes another trilogy: the "Interrogation Trilogy" as coined by Binnie J.,[2] joining ***R.* v. *Oickle***[3] (common law confessions rule) and ***R.* v. *Singh***[4] (s. 7 *Charter* right to silence).

Sinclair, in particular, instantly ignited a firestorm of debate in legal circles, in large part because of pointed dissenting judgments from Binnie, J. and LeBel and Fish JJ. (Abella J. concurring).

This paper will summarize the above decisions and then highlight some of the jurisprudential fallout.

FACTS OF THE *SINCLAIR* TRILOGY

R. v. *Sinclair*

In ***Sinclair,*** the accused was arrested for murder. He asserted his right to counsel and named a particular lawyer, Mr. Janicki, who had acted for him previously. He spoke to Mr. Janicki for 3 minutes. The police asked him whether he was satisfied with his call, to which he replied "ya, he's taking my case". The police held off questioning because they expected Mr. Janicki to attend and meet with Mr. Sinclair. After 3 hours had passed, the police telephoned Mr. Janicki and inquired as to his whereabouts. Mr. Janicki told the officer he would not be coming, but another phone call was facilitated between lawyer and client. Sinclair indicated that he was satisfied with this second call.

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[1] ***Sinclair***, para.85 (Binnie J.)
[2] The term "interrogation trilogy" was coined by Binnie J. in ***Sinclair*** at para. 77
[3] 2000 SCC 38

[4] 2007 SCC 48

An interrogation began later that day which lasted some 5 hours. Sinclair held strong for some time, requesting at least 4-5 times that he wished to speak to his lawyer and asserting his right to silence.

Sinclair also raised the issue of his counsel being present for the interrogation on more than 1 occasion but was told he did not have that right. Eventually the interrogator "began to get the kinds of answers he was looking for" (para. 11). He confessed not only to the interrogator, but also to a cell plant post-interrogation, stating that "They've got me….I'm going away for a long time but I feel relieved" (para. 12).

Seeking further fruit from the investigational tree, the police then convinced Sinclair to accompany them to the scene and participate in a re-enactment.

The trial judge admitted the statements on the basis that they were voluntary and that Sinclair's *Charter* rights had not been breached. In a ruling that foreshadowed the S.C.C. majority, Power J. held that police can continue an interview in the face of repeated requests for additional consultations with counsel, as long as the interviewee's will is not overborne to the extent that the statement becomes involuntary.

On appeal, the appellant took another run at the s. 10(b) argument. Frankel J.A. for a unanimous Court agreed with the trial judge, and was buttressed in his reasoning by the decision in ***Singh,*** which had recently been released by the S.C.C.

R.* v. *McCrimmon

McCrimmon was arrested on 8 counts of assault against 5 different women. Upon arrest, the arresting officer, Cst. Mathew, advised McCrimmonof the charges and his s. 10(a) and (b) rights, including the availability of legal aid. McCrimmon identified John Cheevers as his counsel of choice. Cst. Mathew left a message for Mr. Cheevers on his business line, but made no attempt to contact him at his residence. McCrimmon then accepted Cst. Mathew's offer to contact legal aid, although he expressed his preference for Mr. Cheevers. He spoke with duty counsel for 5 minutes. He confirmed that understood and was satisfied with the advice.

An interrogation followed. However, before it began McCrimmon confirmed with the officer that he understood his rights when they were reiterated to him. McCrimmon held fast for 2 hours, citing his right to silence and his refusal to talk. He reiterated his desire to speak to his own lawyer and noted the absence of his lawyer. He asked to go back to his cell but that request was refused. At the 2-hour mark, after being show photographs of the complainants, McCrimmon buckled under the police pressure.

The trial judge rejected McCrimmon's arguments that the statements were involuntary and in violation of ss. 7 and 10(b) of the *Charter*. McCrimmon subsequently pleaded guilty to 2 counts and was convicted of 4 other counts.

The Court of Appeal affirmed the trial judge's rulings. Once again, Frankel J.A. for a unanimous Court held that: (a) McCrimmon's consultation with legal aid had satisfied the state's obligation under s. 10(b); and (b) the police were entitled to persist with the interrogation even though McCrimmon had asked repeatedly throughout to speak with his lawyer.

R.* v. *Willier

Willier was arrested for murder in relation to the death of his ex-girlfriend. He was taken to the hospital to address some concerns the police had with his health, including his admission of taking some pills purchased off the street.

When Willier learned that he would be going to the hospital, but that the police would interview him after he was assessed, Willier responded "Okay, you guys are done (unintelligible) I want a lawyer, I don't want to be questioned" (para. 8). Willier was *Chartered* and warned at the hospital. Later, upon release from the hospital he was escorted back to the detachment in custody. He spoke with duty counsel for 3 minutes before spending the night in a cell.

The next morning, Willier was offered another opportunity to contact counsel. He expressed that his counsel of choice was Mr. Peter Royal. Willier was able to leave a message for him, but did not reach him. Willier opted to wait for a call-back rather than speak to duty counsel again. However, the police informed him that Mr. Royal would likely not be available until the next day. Willier then agreed to speak with duty counsel again. That conversation lasted 1 minute.

Approximately 1 hour later, Sgt. Gillespie initiated an interrogation which led to a confession. However, Sgt. Gillespie first re-*Chartered* him and invited him to stop the interview at any time for the purpose of consulting with counsel. This included his advice to Willier that if he wished to speak to counsel he could: "just say, hey, Charlie, I want to talk to a lawyer" (para. 12).

The trial judge found that the statement was voluntary but nevertheless, was in breach of s. 10(b) of the *Charter*. The finding was based, *inter alia,* on the police failure to hold off for a reasonable period of time to allow counsel of choice to call back. The statement was excluded and that being the only evidence for the Crown, Willier was acquitted.

The majority of the Court of Appeal reversed the decision of the trial judge, finding that there was no s. 10(b) breach. Willier was found to have waived his right to counsel of choice by virtue of his conversation with legal aid and his reported satisfaction with same. The police had no further obligation to hold off in those circumstances.

A COURT DIVIDED

In ***Sinclair***, the Court was crisply divided: McLachlin C.J. and Charron J. writing the majority decision; Binnie J. in a lone, sharply dissenting opinion (which was referred to as an "intermediate position" by LeBel and Fish JJ.[5]); and LeBel J. and Fish J. (Abella J. concurring), with a spirited dissent.

The Court was more united in ***McCrimmon***, with Binnie J. concurring with the majority. Binnie J. reiterated his reasons in *Sinclair* that a detainee is entitled to a further opportunity to consult counsel where that request falls within the purpose of the s. 10(b) right (*i.e*. to satisfy a need for legal assistance and not a mere delay or distraction tactic). However, Binnie J. distinguished McCrimmon's case, finding that the accused had no objectively reasonable justification to speak with counsel again. LeBel and Fish JJ. did not soften their dissent so clearly elucidated in ***Sinclair***. They found that McCrimmon's rights had been breached, concerned as in ***Sinclair*** that the majority's approach was inconsistent with the broad and indispensable role of counsel.

In ***Willier***, all Justices agreed that the accused had been given "ample opportunity" to exercise his s. 10(b) rights, but that he failed to exercise any diligence in that regard (para. 48).

DISTILLATION OF KEY PRINCIPLES

What is the purpose of the s. 10(b) right in the interrogation context?

The majority, McLachlin C.J. and Charron J. (Deschamps, Rothstein and Cromwell JJ. concurring), defines the purpose narrowly as the right to choose whether to cooperate with the police investigation or not by giving him access to legal advice on the situation he is facing. This purpose can be achieved by the right to re-consult counsel where developments make this "necessary" (***Sinclair***, paras. 32, 36).

Binnie J. defines the purpose as helping to put the detainee in a position to navigate his or her legal problems with the informed capacity the detainee could muster alone if he or she possessed the requisite legal knowledge and experience. The right to re-consult must find objective support (***Sinclair***, paras. 87, 106).

LeBel and Fish JJ. (Abella J. concurring) define the purpose as ensuring, insofar as possible, that the detainee's constitutional rights are respected and to provide the sense of security that legal representation is intended to afford. In these circumstances, counsel's advice is not simply a matter of reiterating the detainee's right to silence, but also to explain *why* and *how* that right should be, and can be, effectively exercised. In other words, the lawyer not only

[5] *Sinclair*, para. 171

tells the detainee not to speak but, perhaps more importantly, *why* he ought not to. The s. 10*(*b*)* right "is not spent upon its initial exercise following arrest or detention, nor is its further exercise subject to the permission of the police officers who deliberately ignore the detainee's repeated requests to consult counsel" (paras. 167, 177).

When does the right to re-consult counsel arise in the interrogation context?

The majority states that a detainee will have a right to a supplemental consultation with counsel when there is a change in circumstance, including a new procedure involving the detainee, a change in jeopardy or a reason to question the detainee's understanding of his s. 10(b) right (*e.g*. if the detainee did not understand the legal advice, or if the police undermined the legal advice)(paras. 50-52). The majority states:

> Further, this aspect of the test gives the detainee an additional, vaguely described and unnecessary tool to control the interrogation, a tool more likely to be of benefit to the sophisticated than to the vulnerable. Detainees have an absolute right to silence and, therefore, ultimate control over the interrogation. They have the right not to say anything, to decide what to say and when. It must be remembered that the opportunity to consult again with counsel is accompanied by a duty on the police to hold off further questioning until that consultation has taken place or a reasonable opportunity for it to occur has been provided. This may well result in long delays in pursuing the interrogation. A person's *Charter* rights "must be exercised in a way that is reconcilable with the needs of society": *R. v. Smith*, [1989] 2 S.C.R. 368, at p. 385. The purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay "needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [for whatever reasons, made] impossible to obtain": *Smith*, at p. 385. This, however, is the likely result of Binnie J.'s proposed approach, in our view (***Sinclair***, para. 58).

Binnie J. in his dissent states that a further consultation will depend on the evolving circumstances, which must find objective support in factors including those listed in his judgment at paragraph 106.

LeBel and Fish JJ. reject the approaches of both the majority and Binnie J., concerned that fresh access to counsel not be restricted to situations where *the police interrogator* is satisfied either that there has been a material change in circumstances or that the request is not made in an effort to delay or distract:

> As we shall later explain, the right to counsel is inextricably bound up with, although not subsumed by, the right to silence. One supports the other, particularly in the context of custodial interrogation and, more particularly still, where a detainee who has repeatedly invoked his right to silence is systematically denied access to counsel by a determined police officer who relentlessly pursues the interrogation of the detainee under his total control "in an effort to get [the detainee] to confess, *no matter what*" (*Singh*, at para. 59 (emphasis in original)). At its core, that is what this appeal is about: The focus in *Singh* was on the right to silence; our concern in this case is with the right to counsel. Both rights are constitutionally guaranteed. We know from experience that, in the context of custodial interrogations, *you can't have one without the other* (***Sinclair,*** para. 124).

Is a detainee constitutionally entitled to have counsel present during a police interrogation?

The Court unanimously agreed that there should be no importation of the American *Miranda*[6] principles into Canadian law. Detainees have no constitutional right to have counsel present during the interrogation, although that may be accommodated by police in any given case.

The majority decision noted that the S.C.C. had never ruled on this matter, despite apparent unanimity across the lower courts (***Sinclair,*** para. 34).

The Court concluded:

> ...s. 10(*b*) should not be interpreted as conferring a constitutional right to have a lawyer present throughout a police interview. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain free to facilitate such an arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement (***Sinclair***, para. 42).

This aspect of the decision received a lot of media attention. This may be attributable to the misperception that the Canadian criminal justice system mirrors that of the United States.

The Confessions Rule is the Safety Net

The majority confirmed that the confessions rule is the "better approach" for claims of subjective incapacity or intimidation, contrary to the views expressed in the dissenting judgments in ***Sinclair*** (para. 60). As such, the confessions rule becomes the ever-present safety net which ultimately protects an accused from oppression, threats, intimidation and such other abusive practises as may be employed by the police.

The majority cites the Court's previous decision in ***Singh*** for the proposition that if a detainee repeats a desire to speak to counsel over the course of an interrogation, and such requests are denied, this will factor in to the assessment of whether the statement was voluntary.

[6] *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

In criticizing Binnie J.'s objective approach to determining when a supplemental consultation with counsel is constitutionally mandated, the majority states:

> The better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule. For example, in *R.* v. *Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 61, the Court recognized that using non-existent evidence to elicit a confession runs the risk of creating an oppressive environment and rendering any statement involuntary. In *Singh*, the Court stressed that persistence in continuing the interview, particularly in the face of repeated assertions by the detainee that he wishes to remain silent, may raise "a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities" (para. 47). However, the cases thus far do not support the view that the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him automatically triggers the right to a second consultation with a lawyer, giving rise to renewed s. 10(*b*) rights.
>
> We note that our colleagues LeBel and Fish JJ. express concern that these reasons, together with the majority judgment in *Singh*", "in effect creates a new right on the part of the police to the unfettered and continuing access to the detainee, for the purposes of conducting a custodial interview to the point of confession" (para. 190). While Binnie J. does not endorse their approach, he echoes similar concerns.
>
> We do not agree with the suggestion that our interpretation of s. 10(*b*) will give *carte blanche* to the police. This argument overlooks the requirement that confessions must be voluntary in the broad sense now recognized by the law. The police must not only fulfill their obligations under s. 10(*b*); they must conduct the interview in strict conformity with the confessions rule. On this point, we disagree with Binnie J. that the test for voluntariness in *Oickle* "sets a substantial hurdle to making inadmissible a confession" (para. 92). As explained more fully in *Singh*, the confessions rule is broad-based and clearly encompasses the right to silence. Far from truncating the detainee's constitutional right to silence, its recognition as one component of the common law rule enhances the right as any reasonable doubt on the question of voluntariness must result in the automatic exclusion of the statement. We also disagree with LeBel and Fish JJ. that the number of times Mr. Singh asserted that he had nothing to say during the course of his interview demonstrates that the protection afforded under the confessions rule is meaningless (para. 183). Voluntariness can only be determined by considering all the circumstances...(paras. 60-62) (emphasis added).

The dissenting judgment of LeBel and Fish JJ. in ***Sinclair*** predicts that the majority's decision will have "significant and unacceptable consequences for the administration of criminal justice and the constitutional rights of detainees in this country" (para. 180). This appears to reflect the ongoing concerns of many with respect to the efficacy of the confessions rule in protecting the rights of a detainee during an interrogation (paras. 182-185; 192):

> We question our colleagues' assertion that *Singh*, and the confessions rule more generally, are capable of dealing with these residual concerns in any meaningful manner. The reasons of the Chief Justice and Charron J., we believe, place an over-reliance on the ability of the confessions rule to provide this residual but essential protection.
>
> The common law requirement of voluntariness set out in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, was never intended to serve as a substitute for the constitutional guarantees that concern us here. As Binnie J. amply demonstrates, it has hardly offered the residual protection it is said by the Chief Justice and Charron J. to afford. We need only go back to the particular facts of both *Singh* and the within appeal to demonstrate why this is so. Mr. Singh asserted his right to silence 18 times during the course of his custodial interview. Yet, a majority of the Court concluded that his inculpatory statement was nevertheless voluntary. Similarly, Mr. Sinclair's statement was deemed voluntary by the trial judge, and an appeal against that finding was abandoned in the Court of Appeal (see reasons of Frankel J.A., at para. 4) and not further challenged in this Court. Mr. McCrimmon, the appellant in the companion appeal (*R. v. McCrimmon*, 2010 SCC 36) also challenged the voluntariness of his statement before both the trial judge and the Court of Appeal. Both courts concluded that his statement was voluntary.
>
> With respect, the suggestion of the Chief Justice and Charron J. that our residual concerns can be *meaningfully* addressed by way of the confessions rule thus ignores what we have learned about the dynamics of custodial interrogations and renders pathetically anaemic the entrenched constitutional rights to counsel and to silence (paras. 182-184) (emphasis added).

The majority decision unquestionably confirms the state of the law, yet the concerns expressed in the minority judgments may inform (and perhaps already have informed) judicial consideration of the confessions rule going forward.[7]

[7] L. Dufraimont, "The Interrogation Trilogy" (2011) 54 S.C.L.R. (2d) 309 at 326.

JURISPRUDENCE SINCE THE *SINCLAIR* TRILOGY

New Procedures Involving the Detainee

Respecting police procedures and whether or not they are 'new', the majority in ***Sinclair*** states:

> The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(*b*) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary: *R. v. Ross*, [1989] 1 S.C.R. 3 (para. 50)(emphasis added).

The Court does not set out examples of procedures falling outside the parameters of 'routine'.

In ***R.* v. *Ashmore,*** 2011 BCCA 18 at para. 68, (application for leave to appeal dismissed, [2011] S.C.C.A. No. 280.), the Court held that the playing of a video clip of a detainee's previous confession to an undercover officer in a Mr. Big scenario did not constitute a new procedure triggering a supplemental consultation with counsel:

> In playing the video clip, Inspector Pike did no more than accurately disclose evidence the police had already gathered. That the police might show Mr. Ashmore evidence, even bogus evidence, was a matter on which Mr. Ashmore had received legal advice, so it cannot be said that what occurred was unanticipated. However, even if this possibility had not been the subject of legal advice, or the record was silent as to what advice was given, the police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights. As stated in *Sinclair* (at para. 60):
>
> > ... the cases thus far do not support the view that the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him automatically triggers the right to a second consultation with a lawyer, giving rise to renewed s. 10(b) rights.

In ***Ashmore*** the Court also held that a re-enactment participated in by the detainee is nothing more than a "statement by conduct". It involves a person demonstrating, rather than simply recounting, how events unfolded" (paras. 69-71).

In ***R.* v. *Wu,*** 2010 ABCA 337, counsel for the appellant argued that an interview seeking inculpatory statements is different than an interview seeking forensic evidence, *i.e.* voice identification. The Court held that "no different activity is involved from the perspective of the detainee. No greater participation of the detainee is sought". The Court cited ***R. v. Nolet***, 2010 SCC 24 for the proposition that interaction between police and a detainee may have multiple police purposes, and the purposes may evolve during the interaction. The "crucial question" was whether the purpose and interaction is in compliance with the *Charter* (para. 70).

Change in Jeopardy

Respecting a change in jeopardy, the majority in ***Sinclair*** states:

> The detainee is advised upon detention of the reasons for the detention: s. 10(*a*). The s. 10(*b*) advice and opportunity to consult counsel follows this. The advice given will be tailored to the situation as the detainee and his lawyer then understand [page338] it. If the investigation takes a new and more serious turn as events unfold, that advice may no longer be adequate to the actual situation, or jeopardy, the detainee faces. In order to fulfill the purpose of s. 10(*b*), the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation. See *Evans* and *Black* (para. 51).

Although the Court in ***Sinclair*** notes the importance of s. 10(a), it appears that a change in jeopardy will not always follow from the fact that a person is subsequently questioned about or charged with new or different offences. Unless the new or different charge could potentially increasea sentence at the end of the day, a detainee may not be entitled to consult with counsel again.

In ***R.* v. *Crocker,*** 2011 BCSC 1361, the accused consulted counsel the day before his interrogation. He knew at that time that he was charged with offences involving counterfeit money. He also knew his apartment was being searched at that time. The police located machines to produce the counterfeit money as well as a rifle during the search. Relying on ***R.* v. *Redd***, [1999] B.C.J. No. 1471 (S.C.)(affirmed on other grounds), the Court found that the discovery of the rifle did <u>not</u> constitute a sufficient change in jeopardy because "the maximum sentence on that charge is but five years, considerably less than those of the other offences. This is not a case in which there was a fundamental or discrete change in the purpose of the investigation or the accused was facing questions concerning significantly more serious offences than contemplated at the time of the warning" (paras. 146-148).

In ***R.* v. *Gonzales,*** 2011 ONSC 543, the accused was under investigation for firearm offences. However, by the time the statement at issue was given, he was charged with 5 firearms offences, including one charge carrying a mandatory minimum sentence (paras. 20-23). Given this clear increase in jeopardy, the failure of the police to re-*Charter* the accused and facilitate a supplemental consultation with counsel was a breach of his ss. 7 and 10(b) rights, which eventually led to a s. 24(2) exclusion of the weapons.

In ***R.* v. *Briscoe,*** 2012 ABQB 111, the Court concluded that the fact that an accused, previously *arrested* but not formally charged, was subsequently *charged* for that offence, did not constitute any change in jeopardy requiring an additional consultation with counsel (paras. 104-111).[8]

In ***R.* v. *Somogyi,*** 2010 ONSC 5585, the police abruptly shifted their questioning from offences of luring (the offences the detainee was arrested for) to a sexual assault of the accused's niece. The accused had hitherto heard nothing about the sexual assault. The Court found this was clearly a change in jeopardy necessitating another consultation with counsel (para. 91).

Lack of Understanding of Legal Advice

In ***Sinclair***, the majority found that an apparent lack of understanding or confusion about the legal advice received would trigger the police to stop the interrogation and provide another opportunity to consult with counsel:

> If events indicate that a detainee who has waived his right to counsel may not have understood his right, the police should reiterate his right to consult counsel, to ensure that the purpose of s. 10(*b*) is fulfilled: *Prosper*. More broadly, this may be taken to suggest that circumstances indicating that the detainee may not have understood the initial s. 10(*b*) advice of his right to counsel impose on the police a duty to give him a further opportunity to talk to a lawyer. Similarly, if the police undermine the legal advice that the detainee has received, this may have the effect of distorting or nullifying it. This undercuts the purpose of s. 10(*b*). In order to counteract this effect, it has been found necessary to give the detainee a further right to consult counsel. See *Burlingham* (para. 52).

[8] See also ***R.* v. *Tottenham and Hester,*** 2010 BCPC 424 (paras. 56-57)for an identical conclusion on this issue.

The Court provided no specific guidance on the observable factors which might inform a police assessment of this subjective state of the detainee, except to state the following:

> The change of circumstances, the cases suggest, must be objectively observable in order to trigger additional implementation duties for the police. It is not enough for the accused to assert, after the fact, that he was confused or needed help, absent objective indicators that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so (para. 55).

In ***R.* v. *Delormier***, 2010 ONSC 7191, after referring to the ***Sinclair*** Trilogy, the Court concluded that the police had breached the accused's ss. 7 and 10(b) *Charter* rights by persisting with the interrogation in the face of repeated requests by the accused to speak to her lawyer. The Court interpreted the accused's questions as a genuine confusion about her right to remain silent: "…given her numerous references to the fact that she had retained counsel, it is my opinion that, in the circumstances, the police officers conducting the interrogation should have, at the very least, explored her concerns with her rather than simply finessing them. In my opinion, there is sufficient evidence upon which to conclude that Ms. Delormier did not fully understand her right to remain silent". The Court finds that the police erred by not stopping the interview at that point and facilitating another consultation with counsel. Although the Court would have excluded under s. 24(2), it chose to exclude the statement on the basis of it being involuntary (paras. 54-55).

In ***R.* v. *Somogyi***, 2010 ONSC 5585**,** the Court agreed with defence counsel that the videotape and transcript of the interview revealed that the accused did not understand the legal advice he received. In fact, he did not even understand that the person he had spoken with *was* a lawyer, or that she was providing him with legal advice. The obvious confusion on the part of the accused triggered further obligations on the police under s. 10(b), which obligations were not fulfilled (para. 74).

Facilitation of Contact with Counsel of Choice

As a result of the majority's decision in ***Sinclair***, there would appear to be less latitude in attacking police efforts to facilitate counsel of choice, particularly when the detainee does speak to another lawyer. However, this line of attack has not been entirely snuffed out and is still, as was always the case, dependent on the particular facts.

In ***R.* v. *Smith***, 2011 BCSC 1695, the accused asserted his right to counsel and provided the police with his chosen counsel's name. He placed a call and left a message. The officer gave Smith no opportunity to wait for a call back from counsel, and instead launched right into an offer to call legal aid. The accused was never told he had the option of waiting a reasonable

amount of time for a call back. The Court carefully distinguished both ***Willier*** and ***McCrimmon*** and concluded: "It is the failure to provide Mr. Smith with the added information of the additional option available, that he could wait a reasonable period of time to hear back from the lawyer he tried to contact, that deprived him of the ability to make a fully informed and meaningful choice once apprised of all the options, and which ultimately results in a denial of his right to counsel of choice and therefore constitutes a further breach of his s. 10(b) rights"(paras. 222-242).

In ***R.* v. *Chung,*** 2011 BCCA 131, the accused initially waived his s. 10(b) rights, but eventually, after being in custody for more than a day, indicated that he would like to speak with counsel. The police attempted contact with duty counsel in Vancouver, but could not reach anyone. Chung then handed the officer a business card of Vancouver lawyer, Dale McGregor. Upon reaching Mr. McGregor's office, the officer was advised by his secretary that: (a) he was not there; and (b) in any event, he did not practise criminal law. Upon hearing this news, Chung agreed to speak with duty counsel. He spoke with duty counsel for fourteen minutes. He indicated no dissatisfaction with his legal advice. For this reason, and because Chung had exhibited no diligence in pursuing contact with his named counsel of choice, his appeal failed. The Court commented that this ground of appeal was "more than just weakened" by the ***Sinclair*** Trilogy; it was "devastated" (paras. 42-43).

The Confessions Rule

In ***R* v. *Smith,*** 2011 BCSC 1695, the Court found that the statement was not voluntary based on, *inter alia,* "the ignoring of Mr. Smith's repeated and impassioned assertions that he did not wish to speak"(para. 158).

In ***R.* v. *Somogyi***, 2010 ONSC 5585, the accused was not re-*Chartered* or given another opportunity to consult with counsel when the questioning shifted to an entirely different offence. The Court did not engage in the s. 24(2) analysis because it found that the statement, for this and several other factors, was involuntary and inadmissible. However, the Court stated that had this not been so, it would have excluded the statement under s. 24(2) as a result of the s. 10(b) breach (paras. 65-70).

R.* v. *Fitzgerald, 2009 BCSC 1559, decided before the ***Sinclair*** Trilogy but after ***Singh,*** is an example of police conduct which, in its totality, rendered the accused's right to silence meaningless. The statement was not proven to be voluntary. The facts of that case included the accused "repeatedly and persistently" (approximately 137 times) telling the police of her lawyer's advice that she did not have to speak to them, and that she did not intend to make a statement.

In ***R.* v. *Davis,*** 2011 ONSC 5564, the accused was charged with second degree murder. He was interrogated overnight but the statement was largely exculpatory. Crown sought a voluntariness ruling for the purpose of cross-examination. Defence counsel raised a concern about continued police questioning in the face of more than 100 attempts by the accused to invoke his right to silence. The Court shared this concern, and felt this was the most significant factor vitiating voluntariness (paras. 34-36).

We conclude this summary of the jurisprudence following the ***Sinclair*** Trilogy with the following excerpt from ***R.* v. *Koivisto***, 2011 ONCJ 307:

> **80** In what is referred to as the "interrogation trilogy", the Supreme Court of Canada has spoken directly on the issues raised in this *voir dire*…
>
> **81** Nowhere in the trilogy of cases does the Supreme Court of Canada sanction the following interrogation techniques:
>
> - Not advising the detainee of who the offence is alleged to have been committed against - making the detainee guess who it might be;
> - Not advising the detainee of the nature of the allegation - making the detainee guess what the allegations might be;
> - Referring to non-existing evidence that infers a far more serious allegation than that made by the complainant (example in this case was that the Applicant's DNA was found on the child's body - the allegation involved sexual touching by hand only);
> - Ignoring repeated statements by the detainee that he does not want to say anything;
> - References to the police's obligation to continue questioning despite the detainee's repeated requests not to say anything;
> - Misrepresenting that the police function is to help the detainee.
>
> **82** In ***Sinclair***, the latest decision of the Supreme Court of Canada on these issues, Mr. Justice Binnie in dissent, warns the majority that their words in the ***Oickle/Singh*** and ***Sinclair*** *(supra)* decisions could be misinterpreted.
>
> **83** In this case, that is precisely what has happened. The officer and the Crown have cherry-picked through the trilogy of cases to support their position that the Applicant's common law and *Charter* rights were not violated in this case. They have confused the police duty to investigate crime with an entitlement to ignore and violate a detainee's common law and *Charter* rights.

CONCLUSION

The development of the law continues as the lower courts interpret and apply the ***Sinclair*** Trilogy. In monitoring these developments, questions to consider include:

- In what circumstances will a detainee be entitled to a second consultation?
- What new, "necessary" categories will be added to those enumerated by the ***Sinclair*** majority (para. 49)?
- When will the conduct of the police in taking a statement cross the line, and demand exclusion on the basis of the confessions rule?
- In what circumstances, and for how long, can an arrested accused be held and interrogated without engaging further rights, including the statutory right to be taken before a justice and the overarching constitutional right not to be arbitrarily detained?

In his dissent in ***Sinclair,*** Binnie J. noted that "in their endurance contest with the detainee, the police are now given three trump cards: ***Oickle; Singh***; and the majority ruling in ***Sinclair***" (para. 92; 96-97).

It is respectfully suggested that in applying the governing principles determined by the majority in ***Sinclair***, one should heed the concerns expressed by the dissenting Justices, including the following comments of Binnie J.:

> It bears repeating that persons detained or arrested may be quite innocent of what is being alleged against them. Canada's growing platoon of the wrongfully convicted, including the by now familiar roll call of Donald Marshall, David Milgaard, Guy Paul Morin, Thomas Sophonow, Ronald Dalton, Gregory Parsons, Randy Druken, and others attest to the dangers of police tunnel vision and the resulting unfairness of their investigation. See *The Lamer Commission of Inquiry into the Proceedings Pertaining to: Ronald Dalton, Gregory Parsons and Randy Druken: Report and Annexes*, by the Right Honourable Antonio Lamer (2006), at pp. 171-73. Convinced (wrongly) of the detainee's guilt, the police will take whatever time and ingenuity it may require to wear down the resistance of the individual they just *know* is culpable. As this Court recognized in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, innocent people are induced to make false confessions more frequently than those unacquainted with the phenomenon might expect (paras. 34-45)(*Sinclair*, para. 90).