

**Court File Number: 32537**

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)**

**BETWEEN:**

**TRENT TERRENCE SINCLAIR**

**Appellant**

**- and -**

**HER MAJESTY THE QUEEN**

**Respondent**

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**Court File Number: 32769**

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

**BETWEEN:**

**STANLEY JAMES WILLIER**

**Appellant**

**- and -**

**HER MAJESTY THE QUEEN**

**Respondent**

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**FACTUM OF THE INTERVENER  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

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## PART I—OVERVIEW AND FACTS

### A. OVERVIEW

1. These appeals call on the Court to determine the reach of the right to counsel within the context of statements obtained through custodial interrogation. This requires clarification of the relationship between the specific right to retain and instruct counsel and the general right to remain silent. Although these rights are close companions,<sup>1</sup> often analyzed together, they are distinct rights with different roles. They exist in a complementary not superior/subordinate relationship. The right to counsel is an active right which imposes positive obligations on the state and positive rights on the accused. The right to silence is different – in essence the right *not* to participate in, and to withdraw from, the state’s investigation.

2. A purposive interpretation of s. 10(b), responsive to the context in which it is exercised, must recognize that the protection afforded by s. 10(b) *begins*, not ends, on arrest or detention. The *Charter* right must move with the government action in issue and its impact on the accused.

3. There are important differences between the immediate need for counsel on arrest and the need for counsel in subsequent stages, where the vulnerability of the accused can be significantly greater. The initial need upon arrest is generally for summary advice regarding the exercise of the right to silence. Thereafter, this initial need evolves and changes.

4. The interpretation of s. 10(b) must recognize that arrest and detention are frequently the entry points to a process of rapidly-escalating state power and rapidly-increasing vulnerability for the accused, culminating in the kind of prolonged, sophisticated, pressurized and manipulative custodial interrogation seen here. The exclusion of meaningful constitutional assistance from the process of custodial interrogation is inconsistent with a purposive interpretation of the text of the *Charter* and relevant jurisprudence, the overriding object of which is to strike a sensible and fair balance between the rights of the individual and the interests of the state.

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<sup>1</sup> As Fish J. recognized in *R. v. Singh*, [2007] 3 S.C.R. 405, ¶ 62 [CCLA’s Authorities, Tab 25]: “These rights are close companions, like glove and hand.”

5. Once a custodial interrogation has commenced, two of society's most pressing interests have generally been resolved: the individual suspected of committing the offence is in custody and an important source of evidence is secured.

6. A purposive and contextually-realistic interpretation of s. 10(b) demands its extension, where it has been exercised by the detainee, beyond the outset of detention into the custodial interrogation where it is most needed. This may not require an absolute and immediate obligation to "hold off" nor does it necessarily require the presence of counsel during interrogation. At a minimum, however, it means that interrogations which persist in the face of efforts to exercise the right to counsel will, in the proper circumstances, violate s. 10(b), despite a finding that the ultimate statements were voluntary.

## **B. FACTS**

7. The CCLA submits that the following facts are of critical importance to these appeals.

### **(i) Key Facts in *R. v. Sinclair***

8. At the outset and many times thereafter during his five-hour interrogation,<sup>2</sup> Mr. Sinclair said he did not want to discuss the investigation before he spoke with counsel.<sup>3</sup> Every one of these requests was deflected, re-framed, ignored or brushed aside.<sup>4</sup> At a critical point, Sgt. Skrine told him that, because he had already spoken to counsel, there was no additional opportunity to do so until the next day.<sup>5</sup> Mr. Sinclair protested that his previous conversation with counsel lasted only "a minute," which suggested that, in his mind, the advice was insufficient.<sup>6</sup> In response to continued requests for counsel, Sgt. Skrine told him

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<sup>2</sup> According to the British Columbia Court of Appeal, the interrogation lasted for "approximately four and one-half hours." *R. v. Sinclair*, 2008 CarswellBC 573 (C.A.) ¶ 19 [CCLA's Authorities, Tab 24].

<sup>3</sup> Sinclair's Supplementary Appellant Record, p. 3.

<sup>4</sup> Sinclair's Supplementary Appellant Record, p. 7 ("I should have my lawyer ..."), p. 43 ("I'd rather talk to my lawyer about it first), p. 58 (I wanna see my lawyer"), p. 59 ("I want my lawyer to look through all that [evidence]"), and p. 67 ("I wanna talk to my lawyer").

<sup>5</sup> At that point in the interrogation, Mr. Sinclair had yet to make his most inculpatory statements.

<sup>6</sup> Sinclair's Supplementary Appellant Record, page 67 ("A: I wanna talk to my lawyer. Q: Trent you talked to your lawyer already, okay? A. For a minute on the phone, that's no ... Q: Well ... you already talked to him ... And nobody can come in and make this decision for you but you ...").

that he had exhausted his right to counsel.<sup>7</sup> This is consistent with the testimony that he believed the right to counsel had been fully exercised with the initial telephone consultation.

9. Sgt. Skrine told Mr. Sinclair that he had no right to have a lawyer present during the interrogation,<sup>8</sup> that “lawyers don’t wanna be ... actually present ... because at the end of the day they’d be witnesses to what we talk about,”<sup>9</sup> that counsel could not “make the decision for him.”<sup>10</sup> He strongly implied that, in light of the (fabricated) DNA evidence, the assistance of counsel would be futile.<sup>11</sup>

10. While interviewing Mr. Sinclair, Sgt. Skrine’s stratagems included referencing the fact that Mr. Sinclair’s mother was sick and was awaiting heart surgery,<sup>12</sup> comparing Mr. Sinclair to child serial killer Clifford Olson,<sup>13</sup> fabrication of evidence, and alleging provocative acts without foundation such as homosexual sexual assault.<sup>14</sup> Sgt. Skrine’s interview techniques were the subject of this Court’s censure last year.<sup>15</sup>

**(ii) Key Facts in *R. v. Willier***

11. Mr. Willier is of diminished mental capacity. He has a grade four education,<sup>16</sup> and has been abusing alcohol since age 8.<sup>17</sup> On the night in question, he was so intoxicated from alcohol and crack cocaine that upon arrest, he was hospitalized because of a possible

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<sup>7</sup> Sinclair’s Supplementary Appellant Record, p.3 (“... you [already] did talk to a lawyer ... okay so bottom line is you’ve exercised those rights ...”); pp. 7-8 (“...I can only tell you what your rights are ... And you’ve been afforded that right [to counsel] ... So that is the law, all right?”).

<sup>8</sup> Sinclair’s Supplementary Appellant Record, page 3.

<sup>9</sup> Sinclair’s Supplementary Appellant Record, page 8.

<sup>10</sup> Sinclair’s Supplementary Appellant Record, page 58, 67.

<sup>11</sup> *R. v. Sinclair*, 2008 CarswellBC 573, ¶ 22 [CCLA’s Authorities, Tab 24].

<sup>12</sup> See *e.g.*, Sinclair’s Supplementary Appellant Record, page 64.

<sup>13</sup> See *e.g.*, Sinclair’s Supplementary Appellant Record, page 74.

<sup>14</sup> Sinclair’s Supplementary Appellant Record, page 81.

<sup>15</sup> *R. v. Wittwer*, [2008] 2 S.C.R. 235 [CCLA’s Authorities, Tab 28]. At paragraphs 25 to 27, this Court held that Sgt. Skrine’s “fatal change in strategy” brought the administration of justice into disrepute and as such, a statement he obtained was excluded, a conviction overturned and a new trial ordered; see also *R. v. Kerwin*, 2008 BCSC 1083 [CCLA Authorities, Tab 14].

<sup>16</sup> Willier’s Appellant Appeal Book, Volume 5, page E0120.

<sup>17</sup> Willier’s Appellant Appeal Book, Volume 5, page E0106.

overdose.<sup>18</sup> During his interrogation he exhibited physical withdrawal symptoms,<sup>19</sup> and the police withheld his withdrawal medication until later in the day.<sup>20</sup>

12. Mr. Willier told the police he wanted to call a specific lawyer, Mr. Royal. It was Sunday morning at 8 a.m. so he could only leave a message for Mr. Royal.<sup>21</sup> The police “actively discouraged” Mr. Willier from waiting for Mr. Royal to call back and inappropriately directed him to duty counsel.<sup>22</sup> He had a one minute call with duty counsel, was returned to his cell, and less than an hour later the police began to interrogate him.<sup>23</sup>

13. During his interrogation Mr. Willier asked for the help of counsel because he thought he may require psychiatric assistance.<sup>24</sup> This request was ignored.<sup>25</sup> He also raised the issue of self defense.<sup>26</sup>

## PART II—ISSUES

14. These appeals, in the context of custodial interrogations, raise the extent to which s. 10(b) provides meaningful access to counsel.

## PART III—ARGUMENTS

### A. THE REACH OF S. 10(B)

15. Section 10(b) is “triggered”<sup>27</sup> on arrest or detention, and its ambit must extend – in a meaningful way – to custodial interrogation. The reach of s. 10(b) is very much a live issue of constitutional principle in Canada. Contrary to the suggestion in paragraphs 62-65 of the

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<sup>18</sup> Willier’s Appellant Appeal Book, Volume 5, page E0097.

<sup>19</sup> Willier’s Appellant Appeal Book, Volume 5, pages E0196 and E0236.

<sup>20</sup> Willier’s Appellant Appeal Book, Volume 1, Decision of Trial Judge, page 276.

<sup>21</sup> *R. v. Willier*, 2008 CarswellAlta 404 (C.A.), ¶ 7 and ¶ 8 [CCLA’s Authorities, Tab 27].

<sup>22</sup> *Ibid.* ¶ 16.

<sup>23</sup> *Ibid.* ¶ 9 and ¶ 10.

<sup>24</sup> Willier’s Appellant Appeal Book, Volume 5, page E0147. Note: Mr. Willier stated he thought he might need “psychic help” but it can be inferred from context that he is seeking psychiatric assistance.

<sup>25</sup> Willier’s Appellant Appeal Book, Volume 5, page E0147. With respect, the Alberta Court of Appeal misapprehended the evidence when it stated at para. 45 that this “was not a case where the police ignored an outstanding request to speak to counsel again”. In fact, this is precisely such a case.

<sup>26</sup> Willier’s Appellant Appeal Book, Volume 5, page E0188-89.

<sup>27</sup> *R. v. Singh*, [2007] 3 S.C.R. 405 ¶ 33 [CCLA’s Authorities, Tab 25]; *R. v. Orbanski* [2005] S.C.R. 3 ¶ 2 [CCLA’s Authorities, Tab 19]; *R. v. Grant* [1991] 3 S.C.R. 139 at p. 151 [CCLA’s Authorities, Tab 12].

*Sinclair* Respondent’s factum, this Court has *never* restricted s. 10(b) to the immediate, post-arrest period.

16. Contrary to paragraphs 4, 49, and 53 of the *Sinclair* Respondent’s Factum, s. 10(b), on its face, goes beyond the right to silence. Although related and *complementary*, especially during the immediate post-arrest period, the two rights are constitutionally distinct. In *Singh* this Court recognized that s. 10(b) is broader than the right to silence.<sup>28</sup>

17. The right to silence is, in substance, a passive right – the right to refrain from participating in the state’s investigation and to be left alone. By contrast, s. 10(b) is fundamentally an active right – the right to make “meaningful”<sup>29</sup> and informed decisions with *legal* consequences by retaining counsel to provide information and advice.<sup>30</sup> When detainees invoke the right to counsel, they are taking an *active* step to overcome their particular vulnerability. Given the difference in the nature of the two rights, it would be incompatible with the s. 10(b) promise of access to justice to decide these appeals through the conceptual lens of the right to remain silent.

18. As this Court emphasized in *Singh*, the right to counsel has both an informational and an implementational component. It seeks to *ensure* that persons who become subject to the coercive power of the state will *know* about their right to counsel and will be given the opportunity to exercise it so they can make an *informed* choice whether to participate in the investigation against them.<sup>31</sup>

19. The thrust of this Court’s s. 10(b) jurisprudence to date has focused on the immediate post-arrest / post-detention period, where the acute concern is the detainee’s understanding of the right to silence. During this period, this Court has emphasized the accused person’s need for “preliminary legal advice”<sup>32</sup> that is “temporary”<sup>33</sup> and provided by lawyers, such as duty

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<sup>28</sup> *R. v. Singh*, [2007] 3 S.C.R. 405 ¶ 42 and ¶ 43 [CCLA’s Authorities, Tab 25].

<sup>29</sup> *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 193 (“...the purpose of the right to counsel under s.10(b) is about providing detainees with meaningful choices...”) [CCLA’s Authorities, Tab 4].

<sup>30</sup> *R. v. Hebert*, [1990] 2 S.C.R. 151 [CCLA’s Authorities, Tab 13]. At page 176, this Court recognized that s.10(b) read with s.7, extends positive protection to the right to silence.

<sup>31</sup> *R. v. Singh*, [2007] S.C.R. 405 ¶ 33 [CCLA’s Authorities, Tab 25].

<sup>32</sup> *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 194 [CCLA’s Authorities, Tab 4].

<sup>33</sup> *Ibid.* at p. 195, citing *R. v. Brydges*.

counsel, who can “bridge the gap between arrest and the retention of a lawyer who will deal more fully with a case”:

[O]ne of the main functions of counsel at this early stage [*upon* arrest or detention] is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial ...<sup>34</sup>

20. These decisions recognize that the nature of a detainee’s need for legal advice will evolve through the various stages of the criminal process. The fundamental purpose of s. 10(b) is to provide accused persons with information and advice regarding relevant rights and obligations. Ensuring and understanding the basic right to silence in the *immediate post-arrest period* is only one such purpose. It is submitted that the B.C. Court of Appeal, in restricting the purpose of s. 10(b) to “immediate legal advice,”<sup>35</sup> unduly limited and narrowed the scope and applicability of s. 10(b).

21. The right to counsel is textually and conceptually distinct from the right to remain silent. There is no textual support for the assertion that s. 10(b) was intended to be restricted to a mechanism whereby detainees are informed of their right to remain silent. Similarly, there is no textual support for the assertion that the right is triggered and spent with the act of arrest and detention. As the arrest and detention process evolves, as it inevitably will, into the interrogation phase, justice requires that s. 10(b), which lies at the heart of the process, remains intact. To hold otherwise is to exclude the right when it is needed most.

22. The established s. 10(b) jurisprudence clearly contemplates the extension of s. 10(b) beyond the immediate arrest and detention. For example, it has required the police to wait eight hours to accommodate the right to instruct counsel of choice<sup>36</sup> and imposed an

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<sup>34</sup> *R. v. Brydges*, [1990] 1 S.C.R. 190 at p. 206 [CCLA's Authorities, Tab 7]; see also *R. v. Hebert*, [1990] 2 S.C.R. 151 at p. 176 [CCLA's Authorities, Tab 13].

<sup>35</sup> *R. v. Sinclair*, 2008 CarswellBC 573 (C.A.) ¶ 40 [CCLA's Authorities, Tab 24].

<sup>36</sup> *R. v. Black*, [1989] 2 S.C.R. 138 at p. 155 [CCLA's Authorities, Tab 5]; see also *R. v. Ross*, [1989] 1 S.C.R. 3 at p.10 [CCLA's Authorities, Tab 23].

additional obligation on the police to inform detainees of the right to counsel every time there is a “fundamental and discrete change in the purpose of [an] investigation.”<sup>37</sup>

23. Section 10(b) demands “a reasonable opportunity to [exercise the right]”.<sup>38</sup> What constitutes a “reasonable opportunity” will depend on all the “surrounding circumstances.”<sup>39</sup> It is submitted that these circumstances must include – or at the very least cannot exclude – the most significant interaction of the detention process, custodial interrogation.

24. In addition, this Court has recognized that arrest is a continuous concept.<sup>40</sup> Detention is a continuing transaction in the investigation and prosecution of crime. Just as the state interest in crime investigation does not end when the accused is placed under arrest, the right to counsel should not be interpreted to end at the outset of the process and prior to its most critical phase. After arrest, the interests of the state change, as do the interests and jeopardy of the accused. Stratagems designed to induce a suspect to confess during prolonged interrogations, such as misrepresenting the investigation, fabricating evidence, deflecting and trivializing requests for counsel, and brushing aside invocations of the right to counsel, can necessitate a continuing need for legal counsel.

25. Different legal issues, beyond the right to silence, are engaged during a detention. These include an understanding of the coming interrogation process, including the police propensity to fabricate and misrepresent evidence, nature of culpability, reliability of evidence, availability of affirmative defences, mental capacity issues, the likelihood of bail, and the potential for a plea bargain. The Crown’s position on this appeal removes all protection for the accused in relation to these issues, as they arise during the custodial interrogation.

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<sup>37</sup> *R. v. Evans*, [1991] 1 S.C.R. 869 at p. 893 [CCLA's Authorities, Tab 10].

<sup>38</sup> *R. v. Ross*, [1989] 1 S.C.R. 3 at p. 10 [CCLA's Authorities, Tab 23]; *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 192 (“except in cases of urgency or danger”) [CCLA's Authorities, Tab 4]; *R. v. Manninen*, [1987] 1 S.C.R. 1233 at p. 1241 to 1242 (“... First, the police must provide the detainee with a reasonable opportunity to exercise the right ... [which] rais[es] a correlative obligation upon the police authorities to facilitate contact with counsel ... 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”) [CCLA's Authorities, Tab 16]

<sup>39</sup> *R. v. Prosper*, [1994] 3 S.C.R. 236 at p. 269 [CCLA's Authorities, Tab 21].

<sup>40</sup> *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3 ¶ 33 [CCLA's Authorities, Tab 2].

26. At its core, the right to counsel recognizes that many people are not aware of, and do not understand their rights and obligations under penal statutes, such as the *Criminal Code*, at common law, and under the *Charter*.<sup>41</sup> Section 10(b) recognizes that ignorance and misunderstanding regarding legal rights may further exacerbate existing vulnerabilities, which in turn could increase the possibility of miscarriages of justice.<sup>42</sup>

27. In these two cases, the appellants: had been in custody for at least ten hours;<sup>43</sup> were subject to “deceptive,”<sup>44</sup> “manipulative”<sup>45</sup> and “psychological”<sup>46</sup> interrogation techniques which were designed to encourage confessions, and had been interrogated persistently in this fashion for several hours *before* making any inculpatory statements.<sup>47</sup>

28. Interrogation is an integral aspect of detention, a primary purpose. As the state moves into this phase of detention, detainees must be permitted access to legal advice that transcends the “immediate” and “preliminary” questions such as the right to remain silent.

29. During a custodial interrogation, the various factors that create the power imbalance between detainees and the state are exacerbated. A custodial interrogation contains four fundamental features, all of which are constitutionally significant in the context of the right to counsel:

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<sup>41</sup> *R. v. Manninen*, [1987] 1 S.C.R. 1233 at p. 1242 to 1243 (“The purpose of the right to counsel is to allow the detainee ... to be informed of his rights and obligations under the law, equally if not more important, to obtain advice as to how to exercise those rights”) [CCLA’s Authorities, Tab 16]; see also *R. v. Ross*, [1989] 1 S.C.R. 3 at p.14 (“The very purpose of the right to counsel is to ensure that those who are accused or detained be advised of their legal rights and how to exercise them when dealing with the authorities”) [CCLA’s Authorities, Tab 23]; *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 191 [CCLA’s Authorities, Tab 4].

<sup>42</sup> *R. v. Bartle*, [1994] 3 S.C.R. 173 at p. 191 [CCLA’s Authorities, Tab 4] (“[W]hen an individual is detained by state authorities, he or she is put in a position of disadvantage ... Not only has this person suffered a deprivation of liberty, but also this person may be at [increased] risk of incriminating him- or herself”).

<sup>43</sup> Mr. Sinclair was arrested at 6:23 a.m., and was interrogated by Sgt. Skrine commencing at 16:38. Mr. Willier was formally arrested at 12:40 p.m. on the day before the interrogation, although he was not brought to the police station from the hospital until 12:00 p.m. on the day of the interrogation, which Sgt. Gillespie commenced at about 9:00 a.m.

<sup>44</sup> *R. v. Evans*, [1991] 1 S.C.R. 869 at p. 893 to 894 [CCLA’s Authorities, Tab 10].

<sup>45</sup> *R. v. Burlingham*, [1995] 2 S.C.R. 206 ¶ 3 [CCLA’s Authorities, Tab 8].

<sup>46</sup> *R. v. Osmar*, 2007 Carswell Ont 339 (C.A.) ¶ 55, ¶ 59 and ¶ 69 [CCLA’s Authorities, Tab 20].

<sup>47</sup> In both cases, the interrogations lasted many hours and the most inculpatory statements are given after the detainee had already been subject to prolonged interrogation.

- (a) The state is all powerful, with limitless resources and absolute control over detainees. <sup>48</sup>
- (b) Detainees are powerless, without liberty or resources:

Other than covering his ears and standing mute in response to anything said by the police, how is the detained person to exercise his/her right to remain silent? How long is he to be detained in an interview room after he has stated that he has nothing to say while police persist with an interrogation? At what point in time will the assertion of a right to remain silent be respected by ceasing questioning?<sup>49</sup>

- (c) Unlike other parts of the criminal justice system, there are no neutral or mitigating actors, such as judges, juries or defence lawyers, present. Detainees are isolated, alone, without knowledge of the law, and at the mercy of the state.
- (d) Once a custodial interrogation has commenced, two of society's most pressing interests have generally been resolved: the individual suspected of committing the offence is in custody and an important source of evidence is secured.

30. This Court in *Oickle*<sup>50</sup> has acknowledged the danger of false confessions and wrongful convictions and their close connection to interrogation techniques. This danger is an overriding concern of our criminal justice system. The role of counsel in preventing these miscarriages of justice ought to extend to the point in the custodial process where that danger is at its highest.<sup>51</sup>

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<sup>48</sup> *R. v. Singh*, [2007] S.C.R. 405 [Willier's Respondent Authorities, Tab 23].

<sup>49</sup> *R. v. McKay*, 2003 CarswellMan 243 (Q.B.) ¶ 100 [CCLA's Authorities, Tab 17].

<sup>50</sup> *R. v. Oickle*, [2003] 2 S.C.R. 3 ¶ 32, ¶ 35, ¶ 36, ¶ 37, ¶ 42 and ¶ 58 [CCLA's Authorities, Tab 18].

<sup>51</sup> See e.g., Christopher Sherrin, "False Confessions and Admissions in Canadian Law," (2005), 30 Queen's L. J. 601-59 [CCLA's Authorities, Tab 30]. For more information on false confessions, see generally Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?" (2008), 33 Queen's L.J., 261-326 [CCLA's Authorities, Tab 31]. See also, Saul M. Kassin and Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis," *Law and Human Behavior*, (1997), Vol. 21, No. 5, at page 469 ("In criminal law, confession evidence has long been regarded as powerfully incriminating against a defendant. In his classic treatise on evidence, Wigmore (1970) ranked confessions as highest in the scale of evidence.") [CCLA's Authorities, Tab 33]; Richard Leo and Richard Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," (1998) 88 J. Crim. L. & Criminology 429, at 429 ("Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant.") [CCLA's Authorities, Tab 32].

## B. JURISPRUDENCE IN THE PROVINCIAL COURTS OF APPEAL

31. To the extent that the provincial courts of appeal have addressed the role of s. 10(b) after arrest, their decisions are entirely distinguishable from these appeals and consistent with the CCLA's suggested approach to this issue.<sup>52</sup>

- In *R. v. Logan*, the Ontario Court of Appeal considered whether an undercover police officer, who elicited an admission after the accused retained counsel, violated s. 10(b). According to the Court: “although the right to counsel *continues after initial retention and instruction*, we hold that in this case, there has been no contravention of the right to retain and instruct counsel.”<sup>53</sup>
- In *R. v. Wood*, the Nova Scotia Court of Appeal was faced with an accused who had received *1.5 hours of legal advice*, and was then interrogated for 2-3 hours before invoking the right to counsel again. The Court found no s. 10(b) violation, but left open the question of whether, in a different case, there may be a right to subsequent access to counsel.<sup>54</sup>
- *R. v. Roper* should be read for what it is – a short endorsement addressing the *Charter* issue in three paragraphs, without any discussion of the jurisprudence. The Ontario Court of Appeal affirmed the trial judge's finding that there was no “change in circumstances” demanding the interrogation to cease.<sup>55</sup>
- In *R. v. Gormley*, the accused made an admission during a 3-hour interrogation after he spoke to his lawyer. During interrogation, he asked to speak to counsel again, *and the police gave him that opportunity*, but his lawyer could not be reached. The P.E.I. court held that there was no obligation on the police to hold off.<sup>56</sup>

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<sup>52</sup> See discussion below.

<sup>53</sup> [1988] O.J. No. 2107 (C.A.) [CCLA's Authorities, Tab 15].

<sup>54</sup> [1994] N.S.J. No. 542 (C.A.) ¶ 106 and ¶ 114. [CCLA's Authorities, Tab 29].

<sup>55</sup> [1997] O.J. No. 305 (C.A.) [CCLA's Authorities, Tab 22].

<sup>56</sup> [1999] P.E.I.J. No. 80 (C.A.) [CCLA's Authorities, Tab 11].

- *R. v. Ekman*, is about *presence* of counsel *during* an interrogation. Before the interrogation, the accused had three separate consultations with counsel, one for five minutes; another for two minutes and then a full meeting for 30 minutes. The accused was then interrogated for 75 minutes and confessed. He did not ask to speak to a lawyer again – he simply said he wanted his lawyer present.<sup>57</sup>
- In *R. v. Bohnet*, the interrogation was short. The accused first spoke to counsel and then indicated he wanted to hear the evidence against him. *A few minutes later*, the accused asserted the right to counsel again, after which the accused made an incriminating statement. The B.C. Court of Appeal found no breach “in the context of this case”.<sup>58</sup>
- In *R. v. Baidwan*, the accused had a short consultation with counsel, *then met with another lawyer for 45 minutes*. In the middle of the interrogation, he said he wanted to have his lawyer present, which was ignored. He then made an incriminating statement. The B.C. Court of Appeal found no violation of s. 10(b) in this context.<sup>59</sup>
- In *R. v. Weeseekase*, the Saskatchewan Court of Appeal was faced with a detainee who: “... had been on remand nine days, having had not one, but *two*, court appearances where she was *represented by legal counsel* ... [S]he in any event had received the benefit of an *additional overnight period to exercise* the desired right. She was given *another opportunity* to consult counsel prior to the taking of the statement”.<sup>60</sup>
- In *R. v. Anderson*, the Alberta Court of Appeal’s holding is predicated on (1) that fact that the “trial judge ... did *not* find that the [accused] was ...

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<sup>57</sup> 2000 BCCA 414 [CCLA’s Authorities, Tab 9]

<sup>58</sup> 2003 ABCA 207 ¶ 6-8 and ¶ 16 [CCLA’s Authorities, Tab 6].

<sup>59</sup> 2001 BCSC 1412 [CCLA’s Authorities, Tab 3].

<sup>60</sup> 2007 SKCA 115 ¶ 21 [CCLA’s Authorities, Tab 26].

discouraged from speaking to counsel”; and (2) the accused’s position before the Court, which was that “*regardless of the circumstances*, the police must hold off from interviewing the detainee if the detainee seems diffident about answering questions without more legal advice”.<sup>61</sup>

**C. CONCLUSION**

32. At a minimum, in the presence of appropriate circumstances, a detainee’s request to speak with counsel during the course of an interrogation cannot be ignored and must be honoured, notwithstanding the receipt of preliminary advice some time before.

33. The following non-exhaustive factors are relevant:

- (a) A diligent and genuine, as opposed to purely tactical, assertion by the detainee of a desire to speak with counsel;
- (b) The extent of access to counsel prior to the interrogation;
- (c) The deployment of deceptive, manipulative or psychological pressure tactics against the detainee by the police interrogator, including introducing false evidence;
- (d) Attempts by the police interrogator to convey the futility of invoking the right to counsel;
- (e) The provision of legal advice to the detainee by the interrogating police officer, particularly where the advice obfuscates a detainee’s rights or is misleading;
- (f) A *bona fide* foundation for the detainee wanting to speak to counsel again, such as new “facts” provided by the police, whether actual or false;
- (g) An expression by the detainee of a legal question, such as the possibility of diminished capacity, or the availability of an affirmative defence; and
- (h) A detainee that is vulnerable, either mentally, psychologically, emotionally or physically.

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<sup>61</sup> 2009 ABCA 67 ¶ 31 and ¶ 34 [CCLA’s Authorities, Tab 1].

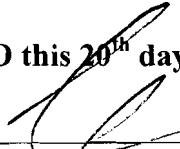
34. While the common law voluntariness test and its “functional equivalent” in s. 7 provide a measure of protection, they are incomplete because they do not give due weight to the separate and freestanding *Charter* right to retain and instruct counsel.

35. The Crown’s characterization of the scope and content of s. 10(b) renders the right to counsel synonymous with the right to remain silent. This is inconsistent with the text of the *Charter*, the jurisprudence, and the reality of the overwhelming power imbalance in the custodial interrogation process.

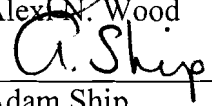
**PARTS IV & V – COSTS SUBMISSIONS AND ORDER SOUGHT**

36. The CCLA respectfully requests that this Court allow the appeals and set aside the convictions, and that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2009.**

  
\_\_\_\_\_  
Jonathan C. Lisus

  
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\_\_\_\_\_  
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**PART VI - TABLE OF AUTHORITIES**

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27.	<i>R. v. Willier</i> , 2008 CarswellAlta 404 (C.A.)	12
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29.	<i>R. v. Wood</i> , [1994] N.S.J. No. 542 (C.A.) (Q.L.)	31
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31.	Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?" (2008), 33 <i>Queen's L.J.</i>	30
32.	Richard Leo and Richard Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," (1998) 88 <i>J. Crim. L. &amp; Criminology</i>	30
33.	Saul M. Kassin and Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis," <i>Law and Human Behavior</i> , (1997), Vol. 21, No. 5	30

**PART VII – LIST OF STATUTES**

*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11, s. 10(b):*

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right;  
and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE BRITISH COLUMBIA  
COURT OF APPEAL)

BETWEEN:

TRENT TERRENCE SINCLAIR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE BRITISH COLUMBIA  
COURT OF APPEAL)

BETWEEN:

STANLEY JAMES WILLIER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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