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

Court File No.: 32537

BETWEEN:

TRENT TERRENCE SINCLAIR

APPELLANT

– and –

HER MAJESTY THE QUEEN

RESPONDENT

– and –

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF ONTARIO,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
and CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS*

FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

COUNSEL FOR THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

McCARTHY TETRAULT LLP
1300 – 777 Dunsmuir Street
Vancouver, B.C. V7Y 1K2
Telephone: 604-643-7100
Facsimile: 604-643-7900
E-mail: mfeder@mccarthy.ca
WARREN B. MILMAN
MICHAEL A. FEDER

OTTAWA AGENT FOR THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

McCARTHY TETRAULT LLP
1400 – 40 Elgin Street
Ottawa, Ontario K1P 5K6
Telephone: 613-238-2000
Facsimile: 613-563-9386
E-mail: cbaxter@mccarthy.ca
COLIN S. BAXTER

* Styles of cause continue inside cover.

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

Court File No.: 32769

AND BETWEEN:

STANLEY JAMES WILLIER

APPELLANT

– and –

HER MAJESTY THE QUEEN

RESPONDENT

– and –

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF ONTARIO,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
and CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

COUNSEL FOR TRENT TERRENCE SINCLAIR

1500 – 701 West Georgia Street
Vancouver, B.C. V7Y 1C6
Telephone: 604-681-7888
Facsimile: 604-681-7877
GIL D. McKINNON, Q.C.

OTTAWA AGENT FOR TRENT TERRENCE SINCLAIR

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466 Station D
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
BRIAN A. CRANE, Q.C.

COUNSEL FOR HER MAJESTY THE QUEEN IN RESPECT OF THE *SINCLAIR* APPEAL (NO. 32537)

ATTORNEY GENERAL OF BRITISH COLUMBIA
Criminal Appeals
600 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3
Telephone: 604-660-1126
Facsimile: 604-660-1133
SUSAN J. BROWN
JOYCE DEWITT-VAN OOSTEN

OTTAWA AGENT FOR THE HER MAJESTY THE QUEEN IN RESPECT OF THE *SINCLAIR* APPEAL (NO. 32537)

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario K2P OA2
Telephone: 613-236-9665
Facsimile: 613-235-4430
ROBERT E. HOUSTON, Q.C.

COUNSEL FOR STANLEY JAMES WILLIER

DAWSON STEVENS DUCKETT & SHAIGEC
300 – 9924 106 Street
Edmonton, Alberta T5K 1C4
Telephone: 780-424-9058
Facsimile: 780-425-0172
LAUREN L. GARCIA

OTTAWA AGENT FOR STANLEY JAMES WILLIER

SACK GOLDBLATT MITCHELL LLP
500 – 30 Metcalfe Street
Ottawa, Ontario K1P 5L4
Telephone: 613-235-5327
Facsimile: 613-235-3041
COLLEEN BAUMAN

COUNSEL FOR HER MAJESTY THE QUEEN IN RESPECT OF THE *WILLIER* APPEAL (NO. 32769)

ATTORNEY GENERAL OF ALBERTA
Appeals Unit, 3rd Floor, Centrium Place
300 – 332 6 Avenue S.W.
Calgary, Alberta T2P 0B2
Telephone: 403-297-6005
Facsimile: 403-297-3453
GORAN TOMLJANOVIC, Q.C.
BRIAN GRAFF

OTTAWA AGENT FOR THE HER MAJESTY THE QUEEN IN RESPECT OF THE *WILLIER* APPEAL (NO. 32769)

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466 Station D
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
HENRY S. BROWN, Q.C.

COUNSEL FOR THE DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

PUBLIC PROSECUTION SERVICE OF CANADA
515 – 234 Donald Street
Winnipeg, Manitoba R3C 1M8
Telephone: 204-983-8991
Facsimile: 204-984-1350
CHRISTOPHER MAINELLA

OTTAWA AGENT FOR THE DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
284 Wellington Street, 2nd Floor
Ottawa, Ontario K1A 0H8
Telephone: 613-957-4770
Facsimile: 613-941-7865
FRANCOIS LACASSE

COUNSEL FOR THE ATTORNEY GENERAL OF ONTARIO

ATTORNEY GENERAL OF ONTARIO
10th Floor, Crown Law Office Criminal
720 Bay Street
Toronto, Ontario M5G 2K1
Telephone: 416-326-4594
Facsimile: 416-326-4656
JOHN S. McINNES

OTTAWA AGENT FOR THE ATTORNEY GENERAL OF ONTARIO

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario K2P OA2
Telephone: 613-236-9665
Facsimile: 613-235-4430
ROBERT E. HOUSTON, Q.C.

COUNSEL FOR THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

SCHRECK & GREENE
20 Dundras Street West
Suite 1130, P.O. Box 180
Toronto, Ontario M5G 2G8
Telephone: 416-977-6268
Facsimile: 416-977-8513
P. ANDRAS SCHRECK

OTTAWA AGENT FOR THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
P.O. Box 466 Station D
Ottawa, Ontario K1P 1C3
Telephone: 613-233-1781
Facsimile: 613-563-9869
BRIAN A. CRANE, Q.C.

COUNSEL FOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION

McCARTHY TETRAULT LLP
Suite 4700, Toronto-Dominion Bank Tower
Toronto, Ontario M5K 1E6
Telephone: 416-601-7848
Facsimile: 416-868-0673
JONATHAN C. LISUS
ALEXI N. WOOD

OTTAWA AGENT FOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION

McCARTHY TETRAULT LLP
1400 – 40 Elgin Street
Ottawa, Ontario K1P 5K6
Telephone: 613-238-2000
Facsimile: 613-563-9386
COLIN S. BAXTER

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association (the "BCCLA") accepts that the facts in these appeals are as described by the respective parties to them.

PART II – QUESTIONS IN ISSUE

2. In general terms, these appeals concern the interpretation of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*, which guarantees "the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right". The BCCLA's submissions focus on the specific question raised in the *Sinclair* appeal, namely, whether a detainee has the right to speak again with counsel during a custodial interrogation, having had an initial consultation once before.

PART III – STATEMENT OF ARGUMENT

A. Overview

3. The BCCLA submits that *Charter* s. 10(*b*) gives a detainee a right to consult counsel that is extant during the entire period of a custodial interrogation, absent exigent circumstances and provided that the detainee exercises reasonable diligence. This ongoing right is breached where the police deny the detainee a reasonable opportunity to contact counsel in the face of his or her clear request to exercise that right.

4. An ongoing right to consult counsel is consistent with a purposive approach to s. 10(*b*). The purpose of s. 10(*b*) is to mitigate the severe power imbalance between the state and its detainee. It does this by ensuring that the detainee has access to counsel able to inform and, more importantly, advise the detainee about his or her rights and obligations. If s. 10(*b*) gave a detainee the right to consult counsel only at the outset of his or her detention, counsel would rarely, if ever, be able to fulfill his or her role because of the evolving nature of a custodial situation and the limited perspective possessed by the detainee at the outset of his or her detention.

5. An ongoing right to consult counsel is also consistent with the plain meaning of s. 10(*b*), which describes a right to "retain and instruct" counsel (or, in French, "d'avoir recours ... à l'assistance d'un avocat") that is triggered "on arrest or detention". The former words necessarily imply an ongoing relationship in which a detainee may instruct counsel and obtain counsel's assistance as the custodial situation evolves. The latter words must refer to the entire time a detainee is in custody, not merely the outset of his or her detention, otherwise the detainee's right of *habeas corpus* under s. 10(*c*) would be rendered meaningless.

6. Neither the confessions rule, nor this Court's jurisprudence regarding the right to silence, justify the restrictive interpretation of s. 10(*b*) for which the Crown argues in the *Sinclair* appeal. The confessions rule does not achieve s. 10(*b*)'s purposes, and is any event a common law evidentiary rule incapable of diminishing a constitutional guarantee. As for the right to silence, it is only one of many rights connected to the s. 10(*b*) guarantee. Further, different considerations apply to its exercise than to the exercise of the right to counsel, because different interests are engaged.

B. Detention gives rise to a severe power imbalance between the state and the detainee and an attendant atmosphere of coercion.

7. Of the protections afforded by the *Charter*, those triggered on arrest or detention are among the most critical. It is then that an individual is most vulnerable to the vastly superior powers of the state. The atmosphere is inherently coercive. This is because the detainee has suffered a deprivation of liberty, he or she is often at risk of engaging in self-incrimination and the state has (or at least may appear to have) total control.

> *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. ●
>
> *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. ●

8. Charron J. has explained the significance of detention in this way:

> After detention, the state authorities are in control and the detainee, who cannot simply walk away, is in a more vulnerable position. There is a greater risk of abuse of power by the police. The fact of detention alone can have a significant impact on the suspect and cause him or her to feel compelled to give a statement.
>
> *R. v. Singh*, [2007] 3 S.C.R. 405, 2007 SCC 48, at para. 32

9. The magnitude of the power imbalance between the police and their detainee cannot be overstated. The police control the time of the arrest or detention and its conditions. They then employ highly skilled interrogators and tested techniques for psychological manipulation, all of which the detainee has no means of avoiding. These techniques are intended to maximize the detainee's discomfort, confusion and sense of powerlessness (all within the limits of the confessions rule) with a view to obtaining an admission of guilt. Even deceit and trickery are permissible, provided that they do not render the detainee's statements involuntary or shock the community.

> Lee Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002), 29 Man. L.J. 149, at para. 35
>
> *R. v. Oickle*, [2000] 2 S.C.R. 3, 2002 SCC 38, at paras. 61 and 65-67

10. One American prosecutor has described the interrogation experience in the United States in these terms:

> [T]he variety of deceptive techniques is limited chiefly by the ingenuity of the investigator. Interrogators still rely on the classic "Mutt and Jeff," or "good cop, bad cop," routine. Interrogators tell suspects that non-existent eyewitnesses have identified them, or that still at-large accomplices have given statements against them. Interrogators have been known to put an unsophisticated suspect's hand on a fancy, new photocopy machine and tell him that the "Truth Machine" will know if he is lying. Occasionally, an interrogator will create a piece of evidence, such as a lab report purporting to link the suspect's bodily fluids to the victim. Perhaps most often, interrogators lie to create a rapport with the suspect. Interrogators who feel utter revulsion toward suspects accused of horrible crimes sometimes speak in a kindly, solicitous tone, professing to feel sympathy and compassion for the suspect and to feel that the victim, even if a child, should share the blame. At the very least, the successful interrogator deceives the suspect by allowing the suspect to believe that it somehow will be in the suspect's best interest to undertake the almost always self-defeating course of confessing.
>
> Laurie Magid, "Deceptive Police Interrogation Practices: How Far Is Too Far?" (2000-01), 99 Mich. L. Rev. 1168, at p. 1168

11. The coerciveness of the interrogation atmosphere is exacerbated by the socio-economic and other characteristics of the typical detainee:

> [Studies describe the criminal accused population] as a very low functioning population whose members are generally poorly educated,

> have low levels of literacy and lead very disordered lives. A significant proportion may experience mental disorders, learning disabilities, the debilitating effects of excessive drug and alcohol abuse and cognitive disabilities relating to severe and prolonged addictions.
>
> ...
>
> Detainees who suffer from mental disorders or learning disabilities can be highly suggestive and possibly vulnerable to persuasive interrogation techniques. These vulnerabilities may be exacerbated when under arrest because of confusion, fear, and the use of physical force.
>
> Canada, Department of Justice, Research and Statistics Division. *The Unmet Need for Criminal Legal Aid: A Summary of Research Results*, by Ab Currie, Principal Researcher. Ottawa: Department of Justice Canada, 2003.

C. Section 10(*b*)'s serves to mitigate the power imbalance by ensuring that detainees have access to the legal information and advice needed to make informed choices about their rights and obligations.

12. Broadly speaking, s. 10(*b*) of the *Charter* serves to mitigate a detainee's disadvantage and to help ensure his or her fair treatment.

> *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at paras. 17-18
>
> *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. ●
>
> *R. v. Bartle*, *supra*, at p. ●

13. This broad purpose is achieved by giving the detainee access to counsel duty-bound to assist him or her to make informed choices about whether and, if so, how to cooperate with the state. This is s. 10(*b*)'s narrower purpose.

> *R. v. Hebert*, *supra*, at p. ●
>
> *R. v. Singh*, *supra*, at para. 33

14. One of the most important forms of assistance provided by counsel is the provision of information concerning a detainee's rights. Chief among these is the right to silence. Thus Fish J.'s observation in *R. v. Singh* that the right to counsel and the right to silence are "close companions, like glove and hand".

R. v. Hebert, *supra*, at p. ●

R. v. Prosper, [1994] 3 S.C.R. 236, at p. ●

R. v. Singh, *supra*, at p. ●

15. However, counsel's role involves more than just apprising the detainee of his or her right to be silent. It involves informing the detainee of all of his or her rights and obligations, and, crucially, providing advice regarding them. Lamer C.J.C. explained this in *R. v. Bartle*:

> The purpose of the right to counsel guaranteed by s. 10(*b*) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfill those obligations … .

R. v. Bartle, *supra*, at p. ●.

See also *R. v. Mannien*, [1987] 1 S.C.R. 1233, at para. 23.

D. This Court has consistently endorsed a purposive approach to the interpretation of s. 10(*b*).

16. This Court has "consistently endorsed" a purposive approach to the interpretation of s. 10(*b*), as it has with respect to *Charter* rights generally.

R. v. Bartle, *supra*, at p. ●.

See, *e.g.*, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

17. In keeping with that approach, this Court has held that s. 10(*b*) imposes "at least" three duties on the part of the police. The first is an "informational" duty to advise a detainee of his or her right to consult counsel. The second and third are "implementational" duties to give the detainee a reasonable opportunity to consult counsel, and to hold off from eliciting evidence from the detainee pending that reasonable opportunity.

R. v. Mannien, *supra*, at paras. 21-23

R. v. Brydges, *supra*, at p. ●

R. v. Bartle, *supra*, at p. ●

18. The informational duty flows from the final words of s. 10(*b*) ("and to be informed of that right"). The implementational duties reflect that a detainee's right to consult counsel is meaningless without duties on the part of the police to facilitate the consultation. Such is the nature of detention.

> *R. v. C.G.*, [2004] O.J. No. 229 (QL) (Ct. Jus.), at para. 93, as cited with approval in *R. v. Singh*, *supra*, at para. 43.

19. This Court has further held that the informational duty applies not only at outset of the detention, but also whenever there is a "fundamental and discrete change in the purpose of investigation".

> *R. v. Evans*, [1991] 1 S.C.R. 869, at p. ●

20. However, the question now before this Court as to the temporal scope of s. 10(*b*)'s implementational duties – and thus a detainee's right to consult counsel – is largely one of first impression. Beyond *R. v. Burlingham* (the significance of which appears to be in much dispute), a majority of this Court appears never to have decided whether the police have a duty to facilitate access to counsel where a detainee requests again to consult counsel but the police's informational duty has not been re-triggered.

> *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 13

E. A purposive approach to s. 10(*b*) favours an ongoing right to consult counsel.

21. In the context of its broad purpose of mitigating the power imbalance suffered by a detainee, and its narrower purpose of ensuring access to legal information and advice in that connection, s. 10(*b*) should be understood generally to guarantee a right to consult counsel that is extant during the entire period of a custodial interrogation. Consistent with this understanding that s. 10(*b*) confers an ongoing right, the police's implementational duties apply whenever a detainee clearly requests to speak with counsel.

22. Such an understanding reflects the fact that a detainee's one-time interaction with counsel at the outset of a detention will usually go little distance towards dispelling the coercive atmosphere and imbalance of power with which the detainee is faced. Nor ordinarily will it allow the detainee to

obtain sufficient legal advice to make informed choices concerning his or her cooperation with the state. This is a function of several practical considerations.

23. First, at the outset of his or her detention, the detainee will likely be in a poor position to instruct counsel. The detainee will probably know little about the police's allegations, about the information being sought by the police and about the strength of the police's real or purported case. The detainee will not know at all what requests the police intend to make. And the detainee will probably not have had a chance to collect his or her thoughts and to reflect on the events about which the police wish to ask.

24. Second, prudent counsel can and will provide only the most general information and advice until there has been "an opportunity of thoroughly exploring the circumstances surrounding the offence with which [the detainee] is charged and interviewing him carefully with regard to the nature of his [or her] defence". At first contact with a client who has been detained, counsel's usual advice will be simply to "[s]it tight, keep your mouth closed, your eyes open and your ears open".

> Patrick T. Galligan, "Advising an Arrested Client", in *Special Lectures of the Law Society of Upper Canada 1963, Part IV, Representing an Arrested Client and Police Interrogation* (Toronto: Richard De Boo, 1963), at p. 37

25. In practical terms, such advice is likely to be little more helpful to the detainee than the warning about the right to silence already provided by the police as a matter of custom.

> *R. v. Singh*, *supra*, at para. 31

26. Language barriers may further compromise the effectiveness of counsel's preliminary advice:

> In certain parts of Canada with large immigrant populations, there are larger numbers of detainees who do not speak English or French well. Lack of facility in English or French can present a significant barrier to the ability of a person to understand advice not provided in his or her mother tongue. The study of barriers to the accessibility of legal aid services by immigrants and members of visible minority groups also pointed specifically to the problem that immigrants who not speak English or French may have in comprehending legal advice provided by telephone.

> Canada, Department of Justice, Research and Statistics Division. *The Unmet Need for Criminal Legal Aid: A Summary of Research Results*, by Ab Currie, Principal Researcher. Ottawa: Department of Justice Canada, 2003.

27. Third, even if effective instructions and advice could be exchanged at the outset of a detention, the reality is that a custodial interrogation is constantly evolving. As the interrogation progresses, the police may present new evidence, proffer new inducements or employ new psychological tactics. They may request that the detainee take a polygraph, give a blood sample, participate in a re-enactment or assist in a line-up. All of these police actions may prompt a need or desire for further legal advice.

28. Quite apart from police actions, the detainee may, with the passage of time, remember new information or formulate new questions requiring legal advice. For example, the detainee may come to wonder whether his or her actual behaviour constitutes an offence, whether there is an available defence, whether the evidence earlier presented by the police is admissible in court, what sentence he or she is likely to receive if convicted of an offence and what other potential consequences he or she may face as a result of a conviction.

29. The need for time may be particularly strong in the case of Aboriginal detainees:

> [T]he lack of time that lawyers have to talk to clients can create a "culture clash" with traditional Aboriginal styles of communication. Aboriginal people who are strongly rooted in traditional oral cultures will not establish a bond of trust and effective communication unless there is time for the Aboriginal client to speak at sufficient length to "tell his or her story". This is often not the case and ... many Aboriginal accused will not communicate critical information to the lawyer ... .
>
> Canada, Department of Justice, Research and Statistics Division. *The Unmet Need for Criminal Legal Aid: A Summary of Research Results*, by Ab Currie, Principal Researcher. Ottawa: Department of Justice Canada, 2003.

30. Fourth, a detainee's vulnerability only increases as his detention is prolonged. Advice from counsel that seemed comprehensible enough at the outset may become less clear with time – and a lack of contact. As Chief Justice Earl Warren has observed, counsel's clear preliminary advice "can be swiftly overcome by the secret interrogation process".

Miranda v. Arizona, 384 U.S. 436, at p. 470

31. This is deeply problematic since s. 10(*b*)'s goal is to allow detainees to make informed choices about their cooperation with the state. Too often the detainee will be left knowing that he has a choice "but concerned about and confused about" how to make it, as Powers J. indeed found at first instance in the case of *Sinclair*. The solution is to ensure that the detainee has ongoing access to counsel – the only person with whom the detainee may interact while in custody who has his or her best interests at heart.

HMTQ v. Sinclair, 2003 BCSC 2040, at para. 140

32. All four of these practical considerations are aggravated by the fact that neither the police nor the courts will ever be in a position to assess the adequacy of legal advice received by a detainee. This is because lawyer-client communications are confidential. Any temporal limitation on the right will necessarily need to be drawn arbitrarily, without any real evidence as to the legal advice actually sought and received by the detainee.

F. The plain meaning and context of s. 10(*b*) also favour an ongoing right to consult counsel.

33. The words used in s. 10 and s. 10(*b*) in particular also support an ongoing right to consult counsel. Section 10 reads:

> 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.

34. Looking first at paragraph (*b*), the use of the two words "retain" and "instruct" connotes an ongoing relationship, not merely a one-time consultation. This is because the word "retain" by itself refers to at least the first meeting in which the lawyer-client relationship is constituted. In order for "instruct" to have any meaning at all, it must refer to steps beyond this initial engagement and associated consultation. It necessarily implies access to counsel's ongoing assistance.

Oxford English Dictionary, 2d ed. (1989), *s.v.* "retain"

35. This reading is confirmed by the French version of paragraph (*b*), which speaks of the right "d'avoir recours sans délai à l'assistance d'un avocat" – *i.e.*, to have "the assistance" of a lawyer. That broad language leaves no doubt that a detainee is intended to have access to counsel's help in the most unqualified sense. If the English version of paragraph (*b*) is at all ambiguous, this clear French language (which the *Constitution Act, 1982* says is "equally authoritative") resolves the ambiguity.

Collins Robert Concise French Dictionary, 4th ed. (2000), *s.v.* "assistance"

Constitution Act, 1982, s. 57

Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876, at para. 28

36. The broader context of s. 10 provides further support for an ongoing right to counsel. The opening words of s. 10 – "upon arrest or detention" – qualify not only the s. 10(*b*) right to counsel, but also the s. 10(*c*) right to have the validity of a detention determined by way of *habeas corpus*. The latter right would be meaningless if limited in time to the outset of a detention, before *habeas corpus* proceedings could ever be brought. Therein lies the error in the Court of Appeal for Ontario's conclusion, accepted by Frankel J.A. in the Court of Appeal in *Sinclair*, that "[t]he words '*upon* [*sic*] arrest or detention' indicate a point in time, not a continuum" for the purpose of the rights conferred by s. 10.

R. v. Logan (1988), 46 C.C.C. (3d) 354 (Ont. C.A.), at p. 381, as cited with approval in *R. v. Sinclair*, 2008 BCCA 127, at para. 48 (italics in original).

G. General s. 10(*b*) limitations temper an ongoing right to consult counsel.

37. An ongoing right to consult counsel is subject to the general limitations imposed on the exercise of s. 10(*b*) rights.

38. For example, it is well established that a detainee must be reasonably diligent in the exercise of his right to consult counsel. In the context of an ongoing right to consult counsel, this means that the police need not accommodate, and the courts need not countenance, a detainee's requests to

consult counsel that are, in true character, dilatory, obstructionist or obstreperous, or otherwise unreasonable in the circumstances.

R. v. Brydges, *supra*, at p. ●

R. v. Bartle, *supra*, at p. ●

39. This answers the Crown's straw-man concerns about detainee demands for the physical presence of counsel where counsel is excessively distant, available only by telephone or unable to attend because of security concerns.

Respondent's factum (*Sinclair*), at p. 21

40. Similarly, this Court has recognized that "compelling and urgent circumstances" may affect the scope of a detainee's s. 10(*b*) rights. In exigent circumstances, such as where public safety is threatened, this stipulation might permit the police to question a detainee who had not yet satisfied his or her desire to consult counsel. But such circumstances will be exceptional.

R. v. Prosper, *supra*, at p. ●

41. An ongoing right to consult counsel would also be subject to the usual rules regarding waiver.

Clarkson v. The Queen, *supra*, at paras. 18-19

R. v. Bartle, *supra*, at p. ●

H. The confessions rule does not justify one-time right to consult counsel.

42. In the *Sinclair* appeal, the Crown argues that s. 10(*b*) should be interpreted to confer only a one-time right to consult counsel at the outset of a detention, since the "confessions rule adequately protect[s] a detainee during the custodial interview process".

Respondent's factum (*Sinclair*), at p. 22

43. To this argument, the BCCLA offers two responses.

44. First, although the confessions rule helps to prevent police actions that would deprive a detainee of his or her right to silence, it does nothing to ensure that a detainee has information and

assistance respecting that and other rights and obligations. That is the role of s. 10(*b*), and of counsel, and the confessions rule is no substitute.

45. Second, and more fundamental, the confessions rule is a common law evidentiary rule. It is open to Parliament to attempt to modify or even eliminate it by legislation. No remedy ever lies for its breach besides the exclusion of evidence.

46. While the common law and legislation "can offer protections beyond those guaranteed by the *Charter*", it is fundamental that the *Charter* "represents a bare minimum below which the law must not fall". It would be perverse to limit any *Charter* guarantee, including s. 10(*b*), on the basis that its protections are, at least for the moment, elsewhere on offer.

R. v. Oickle, *supra*, at para. 31

I. An ongoing right to consult counsel does not conflict with this Court's decisions regarding the right to silence.

47. In the *Sinclair* appeal, the Crown contends that s. 10(*b*) is intended merely "to support" the right to silence. The Crown goes on to argue that since *R. v. Singh* permits persistent police questioning even after a suspect has invoked the right to silence, and since an ongoing right to consult counsel might impede such questioning, s. 10(*b*) cannot, in its "supporting role", involve an ongoing right. This argument largely accords with the view expressed by Frankel J.A. in the Court of Appeal in the *Sinclair* case.

Respondent's factum (*Sinclair*), at pp. 18-19

R. v. Sinclair, *supra*, at para. 40

48. The BCCLA disagrees with the Crown's argument, for three reasons.

49. First and foremost, the fundamental premise of the Crown's argument is flawed. This Court has never suggested that counsel's function is only "to support" the right to silence. To the contrary, and as set out above, this Court's jurisprudence emphasizes that counsel's role is to inform and advise the detainee of all of his or her rights and obligations. While particularly important in the context of a detention, the right to silence is not the only right of a detainee that needs protection.

Infra, at para. 15

50. Moreover, the right to silence is not even explicitly mentioned in the *Charter*. By contrast, the right to counsel is conferred expressly. It would be surprising if the latter, express right were treated as a mere adjunct to the former, unspoken one.

51. Second, even if s. 10(*b*)'s role was only to support the right to silence (which it is not), the Crown's argument would still fail to recognize the different effects of persistent police questioning on those rights and the different interests at play with respect to each of them.

52. The right to silence consists in the freedom to choose whether to speak. Persistent police questioning does not necessarily violate the right because the detainee may nonetheless retain the choice. Recognizing this, and society's interest in the effective investigation of crime, this Court has refused categorically to prohibit persistent police questioning. It is said that such a prohibition is unnecessary to protect the detainee's right to silence and would therefore impede police investigations without legal justification.

R. v. Hebert, *supra*, at p. 184

R. v. Singh, *supra*, at paras. 45-47

53. By contrast, a detainee's ability to consult with counsel is dependent upon the police facilitating that consultation. This flows from the nature of a detention. If the police persist in questioning a detainee rather than facilitating his or her consultation with counsel, the right to counsel may be denied (even if the right to silence is not). Any negative effect on police investigations is the constitutionally required cost of protecting the right.

Infra, at para. 18

54. Third, an ongoing right to consult counsel does not necessarily preclude persistent police questioning. It simply grants the detainee the much-needed assistance of counsel in deciding whether and how to respond to that questioning. Indeed, in appropriate circumstances, counsel's advice may well be to cooperate with the police, thereby facilitating police questioning. In this way, the ongoing assistance of counsel to protect a detainee's interests can indirectly advance society's interest in effective police investigations too.

PART IV – SUBMISSIONS CONCERNING COSTS

55. The BCCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDERS REQUESTED

56. The BCCLA asks that this Court make orders that are consistent with its submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Warren B. Milman, counsel for the
British Columbia Civil Liberties Association

Michael A. Feder, counsel for the
British Columbia Civil Liberties Association

Dated April 20, 2009.

PART VI – TABLE OF AUTHORITIES

Paragraph(s)

Cases

Secondary Sources/Other Materials

PART VII – STATUTES CITED

All statutory provisions relied upon by the BCCLA are reproduced in its book of authorities.