R v. Sinclair: The Disappearance of The Right to Counsel in Canada

By Z Shams

In the U.S., detainees have Miranda rights that legally entitle them to have their lawyers present during police interrogations. A common misconception is that this right also exists in Canada. The truth though, is that the analogous protection - s. 10 (b) of the Canadian Charter of Rights and Freedoms - does not allow legal counsel to be present during questioning. In fact, the Canadian protection is much narrower and doesn't even allow detainees to consult their lawyers during questioning, except for in a very limited number of scenarios.[1] This narrow interpretation of s. 10 (b) was confirmed in *R v. Sinclair*. The facts giving rise to the decision are as follows:

Mr. Terrence Sinclair was arrested in Vernon, British Columbia for murder. Upon his arrest, he was informed of his right to counsel, and prior to being interrogated, he ostensibly exhausted that right by speaking to a lawyer of his choice for a total of six minutes. During the course of the interrogation Sinclair stated many times that he had nothing to say on the matter and that he wanted to speak to his lawyer. The interrogating officer denied his request but informed him of his right to silence. Eventually, Sinclair confessed to murder. He was placed in a jail cell where he confessed, again, to an undercover police offer. He later proceeded to participate in a re-enactment of the murder, further incriminating himself. The Supreme Court of Canada upheld the lower courts decision in finding that there was no s. 10 (b) infringement, rendering all three instances of self-incrimination admissible.

The judgement in *Sinclair* runs contrary to the fundamental purpose of s. 10 (b); protection against self-incrimination. There exists a power imbalance between the state, who is armed with experienced counsel and police power, and the accused, who lacks equivalent resources.[2] The role of defence counsel is to rectify this inherent power imbalance by intervening whenever someone's liberty is threatened as a result of it; they fulfill this role by providing *meaningful legal advice*. The decision in *Sinclair* undermines this essential function and attempts to justify it under the guise of balancing charter rights with societal interest in apprehending criminals.

On the surface, the justification makes sense, mostly because the balancing act it appeals to is a legitimate one; clearly, it's in the benefit of society to catch criminals, but it is also important to ensure that it's done fairly without the abuse of state power. However, the scales must not be tipped too far in the favour of the accused so to make it too onerous to apprehend them, because then too many criminals would escape justice.

Sinclair fails this balancing act. From the outset, the odds favour the state. As a result, anything that further shifts power towards the state is necessarily a failure. The law must be shaped not in a way that allows the accused to manipulate the interrogation so to vastly increase their odds of circumventing justice, but in a way that equips them with a broader arsenal to even the legal playing

[1] R. *v.* Sinclair, 2010 SCC 35 at paras 49-52
[2] Wayne N. Renke, "By-Passing the Tell-Tale Heart: The Right to Counsel and the Exclusion of Evidence" (1996) 30 30 UBC L Rev 99-136 at para 8.

field. This does not amount to providing detainees with a 'get out of interrogation free' card. It does however amount to the constitutionally protected ability to obtain *meaningful legal advice*, which at least provides detainees with a legitimate defence against expert police tactics. Meaningful legal advice does not take the form: "you have reached counsel; keep your mouth shut; press one to repeat this message" as is effectively the case when a detainee is only allowed to speak to their lawyer before an interrogation.[3] To echo Justice Binnie, "what else can the lawyer advise at that outset?" The Supreme Court, by refusing to allow detainees to consult counsel during interrogations creates a pernicious problem. It is best described by Justice Binnie:

> *The Crown seems to conceive of the police interrogation as an endurance contest between the detainee, who starts off with the benefit of the standard police warning and generic advice from his or her lawyer (presumably to refuse to cooperate — what else can the lawyer advise at that outset?) and, on the other hand, an experienced police interrogator who wants to cajole and manoeuvre and wear down the detainee into making incriminating statements and, if possible, a full confession.*[4]

Justice Binnie comes to a compromise that gets the aforementioned balancing act just right. According to Justice Binnie, detainees should be able to access counsel in situations where there is a genuine need to do so. He sets out an objective test for police to consider when determining if detainees should be able to consult counsel. It considers factors like the extent of prior contact with counsel, the length of the interview, and the evidence (true or false) bought forward against the detainee.[5] This approach does not allow the detainee to unilaterally end or delay an interrogation like the dissent of Lebel and Fish does.[6] It provides detainees with a viable defence against expert police interrogators who are otherwise able to extract confessions from them.

Binnie's solution is not perfect, though. Under his framework, it is actually the police who determine when the detainee is able to consult counsel. This is a major issue because the goals of the police are diametrically opposed to the goals of s. 10 (b); the police are trying to achieve self-incrimination while s. 10 (b) is trying to prevent it. This is the paramount issue with the decision in *Sinclair* – the majority reads 10 (b) too narrowly while the dissent (Lebel & Fish) reads it too broadly, yet unfortunately, the opinion that achieves the proper balance is unworkable due to the inherent conflict of interest that arises as a result of its application. Perhaps the question has now become about picking the lesser of two evils.

[3] *Supra* note 1 at para 86.
[4] *Ibid* at para 89.
[5] *Ibid* at para 106.
[6] *Ibid* at para 112.