

## **Oct. 8, 2010 – Landmark Decision Day**

### **Part 1**

by Gino Arcaro M.Ed., B.Sc.

No free trade of constitutional rights. Canada will not adopt the American rulebook on Miranda Rights.

On Oct. 8, 2010, the Supreme Court of Canada released a trilogy of case law decisions regarding interrogations related to major crime investigations. All three cases involved major crimes – two homicides and a series of attacks on women. The decisions confirmed that:

- i. An adult offender does not have the right to have a lawyer present during interrogation.
- ii. The police may ignore the suspect's decision to remain silent while trying to change the suspect's mind about that decision. Invoking the right to silence is not absolute or final.
- iii. Adult offenders don't have the right to a second opinion – a re-consultation – after they speak to a lawyer, if the nature of the investigation remains unchanged, e.g., the victim dies, thereby changing the severity of the offence.

The SCC sent a clear message in its decision in all three cases:

- i. Canada will keep a separate constitutional identity regarding the right to a lawyer being present and the right to remain silent in major crime interrogations. These rules are in place. They will not change.
- ii. Victims of major crimes will not be ignored. A victim's suffering is just as important as a suspect's rights.
- iii. The police have and will continue to be afforded reasonable opportunities to question an arrested suspect to determine the truth in horrific major crime cases.
- iv. Adult offenders will continue to have the right to a lawyer consultation – as always. Offenders may refuse to confess – as always. The only difference is that the suspect in a major crime investigation will not call the shots during the interrogation.
- v. NO EXCUSES, POLICE OFFICERS. NEVER COMPLAIN ABOUT LAWS BEING AGAINST YOU.

This is Part 1 of a series that will explain the rulings in detail, include an extensive comparison between the United States Miranda system and the Canadian section 10(b) *Charter*, Right to Counsel, and provide practical application of each case.

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## **No cross-border right to lawyer/right to silence: Oct. 8, 2010 – Landmark Decision Day**

### **Part 2 - *R. v. Sinclair*(2010)<sup>1</sup>SCC**

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**The Problem.** How many initial legal consultations are enough after a suspected murderer is arrested? One, two...more? And, how many more consultations are enough after suspected murder has received initial advice from a lawyer? One more....two more? Can a suspected murder interrupt an interrogation and demand more consultation? And, can a suspected adult murderer direct who will be present during an interrogation...can he successfully demand that his lawyer be present during interrogation?

The Supreme Court of Canada answered these questions in *R. v. Sinclair*(2010) – generally, one consultation is enough and ‘no’ to defence lawyers being present during interrogations.

And, ‘no’ the Americanization of Canadian criminal justice.

Incredibly, the Supreme Court of Canada never directly ruled on the question of lawyers presence during an adult interrogation – not once in the history of the Canadian criminal justice system...until Oct. 8, 2010.

**Referendum.** The trilogy of cases released on 10-10-08 - *Sinclair, Willier, McCrimmon* – was a referendum on the current system of right to counsel relating to interrogations...Canadian or American rulebook? The SCC rejected the American *Miranda* model. The trilogy of cases are connected – they confirm existing rules, provide points-of-reference for applying them, and explain the difference between the Canadian and American model and the rationale for retaining the Canadian model .

This series includes:

- i. the actual rulings of each case
- ii. analysis of interrogation strategy – a *Best Practice Research*...the Psychology of a Confession
- iii. Canadian vs. American model – a philosophical, psychological, and sociological analysis of the SCC’s rationale. A historical and contemporary review of case law and empirical literature intended to explore the deeper meaning of the right to counsel and right to silence and how they impact interrogation strategy.

#### ***Sinclair* rules**

1. No re-consultation with lawyer after initial consultation.
2. No presence of lawyer during interrogation
3. Police may change suspect’s mind after right to silence is invoked

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<sup>1</sup> **2010 SCC 35.** File No.: 32537. October 8, 2010

4. The American *Miranda* model does not apply in Canada – the police do not have to “retreat” when the right to counsel and right to silence are invoked.
5. The police have a green light to interrogate after the right to counsel is communicated and the accused declines it or exercises it and receives legal advice.
6. After an arrested person has exercised a reasonable opportunity to get legal advice, he is not entitled to more legal advice/consultation. The suspect cannot interrupt, obstruct, or frustrate the interrogation by demanding additional consultation and the presence of a lawyer.
7. The exception is “change of circumstance” that includes change in severity of offence or change in investigative tactic from interrogation to polygraph or live line-up

**Synopsis.** The accused was arrested for murder. That’s the key point – the victim suffered the greatest crime. He was informed of his right to counsel. The accused exercised and spoke to his lawyer not once – twice. Afterward, he was interrogated for five hours. During the questioning, the accused invoked: (a) his right to silence several times, and (b) his right to counsel again by asking to re-consult with his lawyer.

The police responded by informing the accused that: (a) he had the right to choose whether to answer or not (b) he would not be allowed to consult with his lawyer again, and (c) he had no right to have a lawyer present during questioning. Questioning continued, leading to inculpatory statements made by the accused.

After, the accused was placed in the cells with an undercover officer (UCO) and made more inculpatory statements to the UCO. Then, the accused consented to a re-enactment at the crime scene. The accused made a total of three sets of inculpatory statements – during the interrogation, to the UCO, crime scene re-enactment.

The accused was convicted at the trial. All three statements were admitted. They were voluntary and no sec. 10(b) Charter violation occurred. The British Columbia Court of Appeal agreed. So did the SCC.

### **SCC Rulings**

1. *Sec. 10(b) Charter does not mandate the presence of defence counsel during custodial interrogation of an adult offender.* Arrested persons 18 years or older have no right to have a lawyer present during interrogation. The police have no obligation to allow a lawyer to be present. The rationale is found by examining the purpose of sec. 10(b) Charter: (a) to give initial instruction about having the right to get advice from a lawyer, and (b) if invoked, provide the accused with a reasonable opportunity to contact and consult with a lawyer. The first purpose is mandatory. The second is conditional. The purpose does not include, demand or require the presence of a lawyer during custodial interrogation.
2. *Only one consultation is mandatory - second or more consultations are not automatic.* When the right to counsel is invoked, adult offenders are allowed one consultation – not one phone call...one consultation. They have the right to a reasonable opportunity to contact a lawyer of choice or duty counsel – one or more calls if necessary to make contact. The reasonable

opportunity is not quantified. But the number of mandatory consultations is limited to one. Second or more consultation are not automatic but are possible if one condition exists – “if developments in the course of the investigation make it necessary.” If a situation change happens, the accused is allowed a second consultation. If the situation remains unchanged, only one consultation is mandatory.

3. *There are 3 groups of situation changes that require additional right to counsel and consultation.* Situation changes that mandate a additional lawyer consultations are defined in existing case law, including: (a) change in the accused’s jeopardy (b) change in investigative procedure - new investigative procedure used (c) reason to believe that the arrested person did not understand the initial advice.
4. *Change in accused’s jeopardy refers to increased potential consequences.* Legal advice/consultant is customized, tailored to the exact circumstances of the alleged offence. In some cases, the severity of the offence investigated escalates - an injured victim dies, weapons are discovered, multiple offences are uncovered. When the severity of the offences being investigated increase, the right to counsel process must be repeated – additional instruction, additional opportunity for lawyer consultation, if it’s requested. Legal advice is connected to offence specificity and severity. It stands to reason that when the offence changes, so does the decision for more consultation.
5. *Change in investigative procedure.* The initial right to counsel and caution is geared to one investigative procedure – interrogation. The right to counsel and caution are connected to questioning – a routine investigative strategy. When a non-routine investigative strategy is introduced that requires the accused’s consent, the right to counsel procedure must be repeated including the opportunity for additional consultation. Two example of non-routine strategies that need consent are live-line-ups and polygraph tests.
6. *Reason to believe accused failed to understand.* In some cases, concrete evidence shows that the accused failed to comprehend what was instructed. Like with any failed instruction, start over and repeat – additional reps solves any failure... including misunderstanding.
7. (a) *The accused may make a defence lawyer’s presence a pre-condition of giving a confession.* (b) *The police are free to arrange defense lawyer presence if they decide to* (c) *Defence lawyer’s presence during custodial interrogation needs consent from the police and the accused.* These three points are connected. The police cannot be forced to have a defence lawyer present during an adult interrogation. The police are the decision-makers about who is present during an adult interrogation, not defence lawyers. The accused may confess on the condition of having a lawyer present without the condition being classified as an inducement. The confession is the result – the by-product of interrogation. Presence of a defence lawyer to watch the confession being given is different than being present for the entire interrogation.
8. *The rational for this ruling is connected to the primary aim of sec.10(b) Charter.* The primary aim of sec. 10(b) Charter is to guarantee that the arrested person decision-making is meaningful and informed, about whether to cooperate by giving them access to legal advice/consultation. Whether the decision is wise or not is not a matter of police concern.
9. *The circumstances of this case are a point-of-reference of a situation that did not require a second right to counsel or second consultation.* Nothing changed to trigger the need for a second

right to counsel. No live line-up or polygraph was used, no change in charges happened, and there was no concrete reason to believe that the accused failed to fully understand the initial right to counsel. Additionally, the accused told the police he was satisfied with both calls he made to his lawyer.

10. *The goal is to strike a balance between the accused's rights and society's interest in solving crime.* Societal interest imposes a chain reaction of duties on the police - the duty to investigate crimes which includes the duty to make inquiries from "relevant sources of information" including suspects. The police are bound by this duty, to at least attempt to elicit information. The duty implies a degree of negligence by not investigating fully, including a failure to make inquiries from relevant sources including the suspect. The suspect's rights do not supersede the police duty to investigate. Although the police must respect the accused's rights, those rights do not demand a "police retreat" from interrogation. An immediate retreat from interrogation as soon as the suspect invokes the right to counsel would create an imbalance. This ideology is the fundamental reason why the SCC refused to adopt the American model of "immediately retreating" from an interrogation as soon as a suspect invokes the right to counsel.

**Practical Application.** The goal of every interrogation is to elicit an admissible confession. One of the keys is preventing sec. 10(b) Charter violations. The most important factor in sec. 10(b) Charter violation prevention is a proactive strategy of meaningful instruction within the context – communicate all relevant information about the exact charges the suspect faces within the situation. Conceal nothing – reveal everything. Guarantee the suspect informed decision-making. **The right to counsel must match the situation.**

When the right to counsel is communicated and the suspect either waives the right or exercises it, the police have a green light to interrogate. The green light continues as long as the investigation and interrogation remain unchanged – no change in severity of offence, no other investigative tactic.

If the investigation changes direction, communicate the change to the offender and repeat the right to counsel. If the suspect waives the right to counsel, green light to interrogate. If the suspect invokes the right to counsel, guarantee access to legal consultation. After the consultation is finished, green light to interrogate - note the suspect's reaction. The lawyer's advice is privileged but if the accused comments on the quality of the legal advice, note it.

If you decide to seek the accused's consent take a polygraph test or participate in a live line-up, repeat the right to counsel. A waiver is a green light to continue. If he invokes the right, guarantee access to legal consultation. After consultation is finished, green light to continue.

If an adult suspect talks to a lawyer and nothing changes during the interrogation, no additional right to counsel is needed and no additional consultation has to be arranged.

Do not agree to adults offenders or lawyers demand for defence counsel to be present during interrogations. If the suspect agrees to give a confession on the condition that a lawyer be present, arrange it.

You decide who is present during an adult offender interrogation – not the offender, not the lawyer.

These rules do not apply to young offenders.