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Canada Right to Counsel: Confessions of Dangerously Unrepresented Minds

JURIST Guest Columnist Timothy Moore of York University and Special Guest Columnist Andras Schreck of Schreck Presser Law say a recent ruling by the Supreme Court of Canada leaves suspects with such a weak right to counsel that police interrogations are quite likely to lead to false confessions . . .

The Supreme Court of Canada ruled earlier this month that the right to counsel is a one-time-only opportunity, with few exceptions. In a 5-4 decision, the majority in *R. v. Sinclair* held that the essential purpose of the right to counsel is informational rather than protective.

Sinclair had been arrested for murder. After being advised of his right to counsel, he had two 3-minute telephone conversations with his lawyer prior to a police interrogation that lasted 5 hours and was denied repeated requests for further consultation with counsel.

In our opinion, the majority decision erodes constitutional protections of detainees and expands police powers at the cost of fewer safeguards for suspects.

The ruling in Sinclair cannot be fully appreciated without reference to *R. v. Singh*, [2007] 3 S.C.R. 405. In *Singh*, by a 5-4 majority, the Supreme Court sanctioned the use by the police of persistent questioning, notwithstanding the suspect's objection that he did not wish to speak. The court noted that although the suspect can seek refuge in silence, there is no right "not to be spoken to by state authorities". The distinction is significant and renders the right to silence relatively meaningless. Typically, a suspect will have been instructed by counsel to remain silent. Upon the assertion of this right, it is routinely ignored and subverted by the police. The suspect's resolve may crumble in the face of evidence (real or fabricated) and his possible confusion regarding legal

advice to remain silent juxtaposed with the police's unremitting questions. Should it surprise us that the suspect might seek further assistance from counsel? Following *Sinclair*, he will not get it. In light of the growing concerns and awareness of the risks of false confessions, this state of affairs is especially worrisome.

It is indisputable that false confessions are a problem. The '*Reid* technique' is the most influential and widely used police interrogation procedure in North America. Comprehensive critiques have identified a number of fundamental assumptions of that protocol, the dubious validity of which imperils the reliability of the entire exercise. The procedure is unabashedly guilt presumptive, confrontational, and accusatory. From the suspect's perspective, isolation, fatigue, and fear may produce a compliant (but false) confession from a person who merely wants to extricate himself from an aversive situation and/or who succumbs to implied threats of dire consequences or implicit promises of clemency. The suspect may make a regrettable but understandable decision about the perceived costs and benefits of confessing. Are they confessing to something they did, or are they signing on to the spin that the interrogator has persuaded them is in their best interests to endorse? Advocates of the Reid technique assert that innocent suspects are impervious to these tactics. The numerous DNA-exonerated defendants who had confessed belie this claim.

At trial, confessions are compelling. In actual cases in which it was later shown that a false confession was in fact made during a custodial interrogation, jury conviction rates were at least 75%. Erroneous confessions appear no less powerful to jurors than truthful ones. Numerous juror simulations attest to the persuasive impact that a confession can have on the jury. It is one of the most important forms of evidence influencing determinations of guilt, and along with mistaken identification evidence, it is a predominant cause of factually wrongful convictions. People trust confessions and have difficulty disregarding them even when there are good reasons to do so.

The *Reid* technique tactics are often successful in extracting 'true' confessions from guilty suspects, but the same tactics are at risk for producing false confessions from innocent suspects. A substantial body of

social science research has consistently demonstrated that there is no scientific basis from which to conclude that the *Reid* approach is reliable and diagnostic. Despite the counterevidence, front line officers are encouraged to depend on unreliable indicators of deception to make inferences about deception. Interrogators are trained to believe that their intuitions about deception are trustworthy when, in fact, they are not. Interrogators are told that innocent suspects will not succumb to the confrontational pressures of the interrogation when, in fact, they often do. Innocent suspects are told that their fingerprints or DNA were found at the crime scene. Innocent suspects may be psychologically manipulated into believing that providing a false confession is in their best interests. In light of these concerns there can be little doubt that detainees are in need of protection against interrogation tactics that are inherently unreliable. The right to counsel and the right to silence are supposed to provide such protection. Together, the *Sinclair* and *Singh* decisions substantially impair those badly needed protections.

The purpose of the right to counsel (s. 10(b) of the *Charter*) was described by the Court 16 years ago in *R. v. Bartle* [1994] 3 S.C.R 173 as guaranteeing a detainee an opportunity to be advised of their right and "most importantly, to obtain advice on how to exercise those rights." This was said to be necessary because the detainee was "in a position of disadvantage relative to the state." In *Singh,* the Court held that where a detainee asserts his right to silence, the police are entitled to resort to "legitimate means of persuasion" to get the detainee to change his mind and speak to the authorities. The effect of the judgment in *Sinclair* is that while the police can try to persuade a detainee to give up his right to silence, a detainee who is considering acceding to those attempts at persuasion must make this decision entirely on his own. Surely, a detainee who is being subjected to "legitimate means of persuasion" has the right to know the advantages and disadvantages of each possible course of conduct. While the police can outline the "advantages" of giving up the right to silence, the detainee has no corresponding source of information about the disadvantages.

The Court's decision is based on a sadly impoverished view of the role of defence counsel. In most cases, the initial contact a detainee has with

counsel is immediately after arrest. At that stage, all the detainee and counsel will usually be aware of is very basic information respecting the nature of the allegations. In practice, most lawyers being called upon to give advice based on such limited knowledge will simply advise a detainee to remain silent. That advice may well change once more information becomes known, but there is no further opportunity for the detainee to update his lawyer as the interrogation progresses. The result is that defence counsel's role in almost all cases will be limited to perfunctory advice to remain silent. As Justice Binnie pointed out in his dissent, this could be accomplished with a recorded message.

The impetus behind the decision in *Sinclair* is the same as in *Singh,* namely, a concern about impeding effective law enforcement. The Court appears to be motivated by a concern that if detainees are allowed to contact counsel more than once, the police will obtain fewer confessions. This reasoning is troubling for a number of reasons. First, as pointed out in the dissent, the concern was entirely speculative and the experience in other jurisdictions suggests that such concerns are unfounded. Second, while the right to counsel is constitutionally protected, the right to effective law enforcement is not. In other contexts, the Court has declined to give restrictive interpretations to constitutional protections in order to promote state interests. Third, and perhaps most troubling, confessions obtained from detainees who are denied the advice of counsel do not always advance an investigation. The Court's reasoning appears to be based on the premise that only the guilty confess and that all confessions are true. As outlined above, this is not always the case. Effective law enforcement does not include obtaining false confessions.

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Andras Schreck represented the intervener Criminal Lawyers' Association at the Sinclair appeal.

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