

Criminal

Speaking out on the right to remain silent

By **Timothy Moore**

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The Supreme Court's majority decision in *R. v. Singh* 2007 SCC 48 concerned a suspect's s. 7 Charter right to silence and whether the person made a meaningful choice. Singh was a detained murder suspect. During his police interrogation, he asserted his right to remain silent 18 times before ultimately making some inculpatory statements. Despite defence objections, the statements were deemed admissible.

Critics have argued that the decision undermines the right to silence because the detainee's continual declarations of his right to silence were an exercise in futility. In dissent, Justice Morris Fish observed that "a right that need not be respected after it has been firmly and unequivocally asserted *any* number of times is a constitutional promise that has not been kept" (at para. 70). The majority in *Singh* did recognize however that persistent police questioning in the face of repeated assertions of the right to silence *could* result in the exclusion of any subsequent statements.

In addition to the legal uncertainty regarding statements whose admissibility may be compromised by a s. 7 breach, there is the controversy around whether suspects understand their rights in the first place, especially their right to silence.

Numerous investigations have demonstrated widespread misinterpretations of the police cautions. Not only is comprehension typically rather modest, participants are often unaware of the extent of their misunderstandings. In one study, research participants conflated the right to speak to counsel with an offer to speak with the arresting officer. Police confidence in the efficacy of the cautions is belied by the actual data on comprehension.

This issue was pivotal in the recent case of *R. v. G.T.D.* 2017 ABCA 274. Having been provided with his s.10(b) Charter warning, the suspect indicated his wish to consult a lawyer. The officer then continued: "You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything?" To which the suspect made an incriminating reply.

A "caution" about the right to remain silent that includes an invitation to say something may obscure, if not defeat the purpose of the caution. Additionally, delivering the 10(b) caution without allowing for its implementation prevents the very protection that 10(b) is supposed to provide.

As said by Justice Beverley McLachlin (as she then was) in *R. v. Hebert* [1990] 2 S.C.R. 151: "The most important function of legal advice upon detention is to ensure that the

accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces (at para. 52). ... The guarantee of the right to counsel in the Charter suggests that ... the test for whether [the choice to speak or not] has been violated is essentially objective. Was the suspect accorded his or her right to consult counsel?" (at para. 55).

This sentiment was reaffirmed by the majority in Singh: "If the detainee has exercised his s. 10 Charter right to counsel, he will presumably have been informed of his right to remain silent, and the overall significance of the caution may be somewhat diminished. Where the suspect has not consulted with counsel, however, the police caution becomes all the more important as a factor in answering the ultimate question of voluntariness."

G.T.D. clearly was not afforded the opportunity to exercise his right to counsel. The majority nevertheless found the violation to have been minor. His inculpatory statement was admitted, notwithstanding that it had been elicited by the question "Do you wish to say anything?"

When is a caution not a caution? When it jeopardizes the protection that it was intended to provide and encourages the suspect to engage in the very action that he has a right not to engage in.

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