Court File Number: 39330

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

- AND -

PATRICK DUSSAULT

RESPONDENT

- AND -

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INTERVENERS

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada* S.O.R./2002-156*)*

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PART I: STATEMENT OF THE CASE

1. This case, along with *Lafrance* (File No. 39570),[1] raises the following question: to what extent are the police permitted to regulate and determine how a detainee exercises the right to counsel?

PART II: POSITION ON QUESTION IN ISSUE

2. The CLA respectfully submits that:

a. The right to counsel is a constitutional protection that has both an informational and implementational component. The police[2] have an obligation to facilitate its implementation. The informational component focusses on the necessary information that a detainee requires to make an informed and free choice on whether to forego their constitutional right to silence and speak to police; the implementational component concerns the modality by which the information is delivered. The police are obliged to adopt procedures which allow for both the informational and implementational components of the right to be realised.

b. The informational component includes a focus on the steps taken by counsel to ensure that the detainee understands not only the right to silence, but also the various police strategies that may be used to persuade the detainee to speak.

c. The implementational component includes a recognition that counsel may have to approach different detainees differently as they may be more or less sophisticated. The modality of the delivery of the right to counsel may also differ; for some detainees a phone consultation will do, for others an in-person consultation will be necessary. The key is to ensure, as best one can, that the detainee receives the relevant information in an efficacious manner and understands the information provided.

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[1] The CLA was also granted leave to intervene in the *LaFrance* matter *(*File No. 39570*),* in which it makes the same submissions.

[2] In this memorandum the CLA references the police but the obligations apply to any lawful detaining authority.

d. The police facilitation obligation includes providing a safe zone in which solicitor client communications can reach their appropriate conclusion. The police cannot be the arbiters of when the right to counsel has been successfully exercised.

e. Finally, in situations where an accused argues that counsel failed to ensure that she understood the advice provided prior to a police interrogation, reviewing courts ought to adopt an approach similar to the inquiry conducted when determining whether a guilty plea was informed (see *Wong*[3]).

PART III: ARGUMENT

A) Meaning of the Right to Counsel

3. In *Sinclair,* this Honourable Court described the purpose of the right to counsel as follows:

> "The purpose of the right to counsel is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights" […] The emphasis, therefore, is on assuring that the detainee's decision to cooperate with the investigation or decline to do so is **free and informed**."[4]

4. This Honourable Court has further held that s. 10(b)'s purpose is fulfilled in two ways:[5]

a. The detainee must be advised of her right to counsel (informational component); and

b. The detainee must be given an opportunity to exercise her right to counsel (implementational component).

5. When there is reason to believe that the detainee's first consultation with counsel was "deficient," this Honourable Court has held that further consultation is necessary. [6] The CLA respectfully submits that the informational and implementational components must include the following to satisfy s. 10(b) of the *Charter.*

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[3] *R. v. Wong,* 2018 SCC 25 [*Wong*].
[4] *R. v. Sinclair*, 2010 SCC 35 at para 26 [*Sinclair*].
[5] *Ibid* at para 27
[6] *Ibid* at para 2.

i) The Informational Component

a) Educating the Detainee

6. Counsel must take steps to ensure that the detainee understands not only the right to silence, but also the various stratagems the police may use to persuade the detainee to speak. As the Ontario Court of Appeal held in *Badgerow*, "the right to seek advice from counsel of choice on arrest or detention is not limited to receiving perfunctory advice to keep quiet."[7]

7. The information a detainee needs to make an informed and free choice must reflect the variety of strategies that police can employ during an interrogation to influence the decision to speak and what to speak about, these include:

a. Lying about incriminating evidence in relation to the detainee;[8]
b. Exaggerating the strength of the case against the detainee;[9]
c. Questioning the advice given by defence counsel;[10]
d. Using moral and spiritual inducements to produce a confession;[11]
e. Downplaying the moral culpability of the detainee;[12]
f. Conducting lengthy interrogations which can last for hours and hours;[13] and
g. Continuing the interrogation despite the detainee's repeated assertions of his or her right to silence.[14]

8. Detainees should understand they are under no obligation to speak to the police and why it may be in their best interests not to speak. They must understand that the police have no obligation to respect their decision not to speak and that if they do not want to speak, they may

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[7] *R. v. Badgerow*, 2008 ONCA 605 at para 50 [*Badgerow*].
[8] *Sinclair*, *supra* note 4 at para 60
[9] *Ibid* at para 60.
[10] *R. v. Shannon*, 2012 BCSC 1519 at paras 70-85.
[11] *R. v. Oickle,* 2000 SCC 38 at para 56 [*Oickle*].
[12] *Ibid* at para 74.
[13] See for example, *R. v. Dhaliwal*, 2016 BCSC 2528 at paras 268, 301-307, 322, where the accused was interrogated for 26 hours within a window of 41.5 hours while in police custody. Despite this, the court found that Mr. Dhaliwal's statement was voluntary and admissible.
[14] *R. v. Singh,* 2007 SCC 48 at para 28; *Sinclair*, *supra* note 4 at para 63.

have to withstand continued police questioning and the use of various strategies designed to persuade them to relinquish their constitutional right to silence.

9. Providing detainees with this constellation of information is consistent with *Sinclair* where this Honourable Court held:

> "The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(b) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary: R. v. Ross, [1989] 1 S.C.R. 3."[15]

10. In other words, counsel should discuss routine procedures used by the police during interrogations, including the tactics listed above at paragraph 7. Indeed, in *Sinclair*, this Honourable Court held that Mr. Sinclair did not need a further consultation because police tactics, including the fact that police can lie during an interrogation, were canvassed during the first consultation.[16]

11. Informing the detainee of police tactics is also consistent with this Honourable Court's recognition of the power imbalance between a detainee and police officers during an interrogation. As former Chief Justice Lamer wrote in *Bartle*, the right to counsel "is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state."[17]

12. In Canada, the presence of defence counsel throughout a custodial interrogation is not constitutionally mandated.[18] Consequently, counsel is the last person a detainee will speak to who has their interests at heart before they are turned over to their adversary, the police, for interrogation.

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[15] *Sinclair*, *supra* note 4 at para 50.
[16] *Ibid* at paras 3, 73.
[17] *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191.
[18] *Sinclair*, *supra* note 3 at para 42.

13. For the right to counsel to be robust enough to counteract police tactics, the CLA respectfully submits that detainees must be informed of their right to counsel, in addition to the various tactics used by police during interrogations. At a minimum, in addition to explaining the limits of the right to silence, counsel ought to make clear that police can lie to provoke a statement.

b) Detainees must understand counsel's advice

14. The right to counsel also incorporates the notion that counsel take steps to ensure that the accused *understands* the advice provided. The purpose of the right to counsel is to ensure that the "detainee's decision to cooperate with the investigation or decline to do so is free and **informed"** [emphasis added].[19] Moreover, "if circumstances indicate that the detainee may not have *understood* the initial s. 10(b) advice of his right to counsel," police have a duty to give the detainee a further opportunity to talk to a lawyer.[20]

15. Accordingly, the implementational component of the right to counsel must respect the steps taken by counsel to ensure that the detainee understands the advice provided.

ii) The Implementational Component

16. Counsel may have to approach different detainees differently. Some detainees may be more or less sophisticated. Some may require more or less time to understand the advice given. Moreover, depending on the seriousness of charges faced by the detainee, counsel may also wish to spend more time with the detainee prior to the interrogation. The modality of the delivery of the right to counsel may also differ and be provided either by telephone, in person or a combination.[21] For example, counsel may not be satisfied that the detainee understands the situation and feels that it will be more effective to deliver the advice/information in person – that should be permitted as a matter of constitutional law.

17. Counsel ought to be sensitive to the detainees' idiosyncrasies given the following:

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[19] *Ibid* at para 26.
[20] *Ibid* at para 52.
[21] It is possible that the advice could be given by secure video connection where facilities are available.

> "False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities[…]"[22]

18. In other words, the right to counsel is for the benefit of the detainee and it ought to be flexible enough to accommodate *all* detainees regardless of aptitude.

B) Police Cannot be the Arbiters of the Rights to Counsel

19. Police must provide for a "safe zone" in which solicitor client communications can reach their appropriate conclusion. The police *cannot* be the arbiters of when the solicitor client communication has concluded; that is for the lawyer and their client to determine.

20. This Honourable Court has concluded as much in *Willier*:

> "While s. 10(*b*) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. The solicitor-client relationship is one of confidence, premised upon privileged communication. Respect for the integrity of this relationship makes it untenable for the police to be responsible, as arbiters, for monitoring the quality of legal advice received by a detainee. To impose such a duty on the police would be incompatible with the privileged nature of the relationship."[23]

21. If a detainee indicates that the advice he or she received was inadequate, the police must take steps to assist the detainee *prior* to commencing or carrying on with their interrogation. As the Ontario Court of Appeal held in *Badgerow:* "although the police cannot be expected to be mind readers, they are not entitled to ignore statements by an accused that raise a **reasonable prospect** that the accused has not exercised his or her s. 10(b) rights" [emphasis added].[24]

22. Likewise, the police cannot ignore statements by counsel indicating that his or her consultation with the detainee has not come to its appropriate end or that more is needed. The lawyer is familiar with the detainee's particular circumstances and is best positioned to

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[22] *Oickle, supra* note 11 at para 42.
[23] *R. v. Willier,* 2010 SCC 37 at para 41.
[24] *Badgerow*, *supra* note 7 at para 46.

determine whether the detainee has processed and understood the legal advice given. The police must respect and facilitate counsel's desire for a continued consultation.

23. This raises the question of limits on the exercise of the right to counsel. It must be acknowledged that the search for limits on the exercise of the right to counsel – for example, the length and delivery modality of the advice - is partly premised upon a cynical view that counsel will weaponize the delivery of the right to counsel to frustrate a police investigation. There is no empirical basis for this fear. The reported cases show a reality in which most calls with counsel are short and do not impede the police.

24. Further, the CLA's proposed framework will not allow "suspects, particularly sophisticated and assertive ones, to delay **needlessly** and with impunity an investigation" [emphasis added].[25] Rather, the right to counsel requires further consultation with counsel only when the purpose of s. 10(b) of the *Charter* mandates it; namely, when the detainee indicates that the first consultation was inadequate in assisting the detainee in exercising his or her constitutional right in a free and informed manner.[26]

25. Moreover, there should be no concern about whether this approach may impede a police investigation. Recall that a detainee has no obligation to assist the police; a fact of which the police are aware. Despite not having interrogated the detainee, the police in most cases *already* have formed reasonable and probable grounds to charge/arrest the detainee. [27] Therefore, a prospective confession is not integral to the effective *investigation* of crime – even though it may be desirable for the Crown as it assists in the eventual proof of a crime. The search for limits on the right to counsel to preserve an investigative space for the police is of diminished importance when the investigative reality is considered against the constitutional centrality and imperative of the right to counsel.

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[25] *Sinclair*, *supra* note 4 at para 58.
[26] *Ibid* at para 57.
[27] Unless the individual is detained, in which case police only need "reasonable grounds to suspect" (*R. v. Mann,* 2004 SCC 52 at para 45).

26. There will be detainees who need more time to understand their constitutional protections and they should be permitted that time so they can better understand the power the police have over them.

C) Enforcing the Right to Counsel

27. There may be instances where an accused will argue that she did not make an informed decision to speak to police (a s.10(b) violation) because the detainee's consultation with counsel was inadequate. In those cases, courts ought to determine the issue as they would determine whether a guilty plea was informed:

a. Was the detainee properly advised of the right to silence including the nature of police power during interrogations to make an informed choice to cooperate with the police; and

b. Whether there has been prejudice as a result of the failure to provide the proper s.10(b) information, specifically that the detainee would have exercised her choice differently if she was provided with adequate advice and understood the advice provided.[28]

28. As in *Wong,* the reviewing court will assess the veracity of the accused's claim by adopting an inquiry which is "subjective to the particular accused […]."[29] The decision to cooperate with police during an interrogation "reflects deeply personal considerations," and is ultimately the decision of the accused *not* the reasonable accused.[30] An entirely objective framework is inappropriate when assessing potential breaches of the right to counsel.

29. However, as with guilty pleas, the assessment of whether a breach of the right to counsel has occurred must also allow for an objective assessment of contemporaneous evidence to determine the *credibility* of the accused's subjective claim.[31] Factors that the reviewing court may consider include:

a. The seriousness and circumstances of the offence;
b. The particular circumstances of the accused; and

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[28] *Wong*, *supra* note 3.
[29] *Ibid* at para 6.
[30] *Ibid* at paras 11-12.
[31] *Ibid* at para 6.

c. Whether in light of a) and b) counsel took appropriate steps to ensure that the accused understood the advice provided.

D) Conclusion

30. This case and *Lafrance* present this Honourable Court with an opportunity to affirm and clarify the informational and implementational components to the right to counsel and, importantly, to provide much needed guidance to police to ensure that they do not limit a detainee's exercise of their right to counsel. Respectfully, the CLA position refines the existing law to reflect the core values encompassed within the right to counsel.

PART IV AND V: COSTS AND ORDER SOUGHT

31. The CLA takes no position on the disposition of this appeal. The CLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 19th day of August 2021.

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PART VI: TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
R. v. Badgerow, 2008 ONCA 605	6, 21
R. v. Bartle, [1994] 3 S.C.R. 173	11
R. v. Dhaliwal, 2016 BCSC 2528	7
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