The Right to Counsel and the Right to Have Counsel Present

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I. INTRODUCTION

> The police are not the guardians of the solicitor-client relationship ... the primary function of the police is to investigate an alleged crime with a view to solving it and obtaining a conviction.
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> *R v Bain*[1]

> The Charter does not prohibit admissions of guilt. ⋯ Where freely and voluntarily given, an admission of guilt provides reliable tool in the elucidation of crime, thereby furthering the judicial search for the truth and serving the societal interest in repressing crime through the conviction of the guilty. An effective police investigation may therefore include as one of its aims the obtention of a confession from a suspect.
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> *R v Smith*[2]

On December 3, 2021, the Supreme Court of Canada heard appeals in two different cases. Both involved the right to counsel, in particular the right to counsel during the custodial interview by police.[3] The Court was being asked to consider (or reconsider) the accused's right to silence in the absence of counsel.[4] In both cases the accused was told to say nothing to the police by their lawyer on the phone. Invariably, however, they did provide

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1 *R v Bain*, (1989), 47 CCC (3d) 250 (Ont CA), 45 CRR 193, rev'd [1992] 1 S.C.R. 91 on other grounds.

2 *R v Smith*, [1989] 2 SCR 368, per L'Heureux-Dube concurring at 388-39.

3 *R v LaFrance*, 2021 ABCA 51, now decided *R v LaFrance*, 2022 SCC 32; and *R v Dussault*, 2020 QCCA 746, now decided *R v Dussault*, 2022 SCC 16.

4 See *Canadian Charter of Rights and Freedoms*, s 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

incriminating evidence in their respective trials for murder. In *Dussault*, the lawyer was turned away at the police station when he arrived for a follow-up with his client. In *LaFrance*, the accused was denied the assistance of his father in obtaining legal advice.

In both cases the accused had the benefit of private consultation with their lawyer prior to the police continuing with the interview and eventually obtaining the incriminating comments. In *LaFrance*, counsel for the Intervener before the Supreme Court, the Canadian Civil Liberties Association, suggested in order to level the field between the accused and the police, that the accused's lawyer (presumably once identified by the father) should be present during the interview to provide advice as in similar jurisdictions.

Certainly in the United States a confession is not admissible where there has been a request for counsel to be present. This has generally been the rule since the Supreme Court's 1966 decision of *Miranda v. Arizona* and is best articulated in the Court's 1990 decision of *Minnick v. Mississippi*.

In *Minnick* a majority of the United States Supreme Court held that "police-initiated interrogations [are prohibited] unless the accused has counsel with him at the time of questioning ... when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has [already] consulted with an attorney".[5]

Such a bright-line rule, acknowledged by the majority of the Supreme Court, would also result in "the suppression of trustworthy and highly probative evidence even though the confession might be voluntary." As a result the dissenting justices held that such a "prophylactic rule," which simply excludes all confessions (including the trustworthy and probative), must be assessed not only on the basis of what is gained, but also on the basis of what is lost.

> Police questioning [is] a tool for effective enforcement of criminal laws. Admissions of guilt ... are more than merely desirable; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law.[6]

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5 *Minnick v Mississippi*, 498 US 146 (1990), at 153 (6:2). Souter, J., took no part in the consideration or decision of the case. Also see *Miranda v Arizona*, 384 U.S. 436 (1966).

6 *Ibid* at 161 per Scalia, J and Rehnquist, CJ, dissenting. This oft repeated phrase was originally penned in *Moran v Burbine*, 475 US 412 (1986) at 426.

In 2007 the Supreme Court of Canada followed the general reasoning of the dissent in *Minnick* holding, in a 5:4 decision, that nothing prevents the police from attempting to obtain an admission from a suspect who has previously and repeatedly invoked his right to silence. To hold otherwise overshoots the protection afforded to the individual's freedom of choice both at common law and under the *Charter*. More importantly such a proposition ignores the state interest in the effective investigation of crime.[7]

> What the common law recognizes is the individual's right to *remain* silent. This does not mean, however, that a person has the right *not to be spoken to* by state authorities. The importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime.[8]

In 2010 a majority of the Supreme Court of Canada affirmed that the "Miranda rule" and the right to have counsel present throughout a police interview should not be transplanted in Canadian soil, holding that:

> The scope of s. 10(b) of the Charter must be defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement in the Canadian context. Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures.[9]

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7 See *R v Singh*, 2007 SCC 48, at paras 43, 45 [*Singh*].

8 *Ibid* at para 28. Also see *R v Smith*, [1989] 2 SCR 368, per L'Heureux-Dube concurring at 388-39, where she stated:

A main goal of s. 10(b) ... does not preclude the interrogation of suspects by the police, nor is it inconsistent with the taking by the police of incriminating statements. The Charter does not prohibit admissions of guilt. ... Where freely and voluntarily given, an admission of guilt provides reliable tool in the elucidation of crime, thereby furthering the judicial search for the truth and serving the societal interest in repressing crime through the conviction of the guilty. An effective police investigation may therefore include as one of its aims the obtention of a confession from a suspect.

9 *R v Sinclair*, 2010 SCC 35 at paras 37-38. The case was part of a trilogy of cases released by the Supreme Court, along with *R v Willier*, 2010 SCC 37 and *R v McCrimmon*, 2010 SCC 36. See also *R v Dussault*, 2022 SCC 16 and *R v Alix*, 2010 QCCA 1055, application for leave to appeal dismissed (2010) SCCA No 278, where the accused's statements were admitted notwithstanding the police refused to allow her counsel to be

These cases created some concern within the defence community that the police will now trample on suspect rights, especially those of vulnerable individuals who are either immature or who have language or mental health issues. In addition these decisions will change the manner in which lawyers practice because it gives the police "no disincentive at all from over-reaching and engaging in potentially oppressive tactics."[10]

However, with the courts expecting and even mandating the continuous videotaping of all interviews and interrogations of suspects, such arguments are no longer as substantial as they once might have been. In fact, all of the interviews were audio and video taped, providing the court with an accurate and unbiased account of what transpired in the interview room including the actual words used and the manner in which they were spoken.

In addition, the rules regarding voluntariness still apply and "in some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused' s repeated assertions of the right to silence denied the accused the accused a meaningful choice whether to speak or to remain silent." One example cited by the Court in both *Singh* and *Sinclair* was *R. v. Otis*, where four times was too many for an individual with an intellectual disability.[11]

Although some commentators had been suggesting prior to the Court's decision in *Singh* that the police were actually losing their right to question suspects in the absence of their lawyer (if they could at all) once they had invoked their right to silence, the case law was actually "going the other way"

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present during interrogation and not suspending questioning when she asked to contact counsel again after already being afforded that opportunity.

10 See Helen Burnett, "Decision Creates Concern – Police Can Speak to those Asserting Right to Silence" (2007) 18:36 Law Times at 1-2.

11 *R v Otis*, *infra,* note 73. Cited by Justice Charron in *Singh*, *supra* note 7 at para 50-51. However, see *R v Cleveland*, 2019 MBQB 28, where the accused's assertion of his right to counsel up to 110 times was not sufficient in and of itself to rule the statement involuntary. However, it was the cumulative effect of a hypothetical scenario, undermining his counsel's knowledge of his situation, and whether he may or may not be charged and released, that tipped the scales in ultimately excluding the statement as involuntary. It was disingenuous of the Canadian Civil Liberties Association to suggest it was only the assertion of the right to counsel 110 times that resulted in the statement being ruled inadmissible.

and defence lawyers should have been better prepared for the decision in this case.[12]

In fact, the courts in Canada want to hear trustworthy and highly probative evidence, especially when it is a voluntary confession. As noted by the majority in *Singh* "the suspect may be the best source of information and it is in society's interest to tap into this source."[13]

In this article, I will attempted to canvass a number of court decisions dealing with the constitutional right to remain silent leading up to the Court's decisions in *Singh*, *Sinclair*, *Willier*, *McCrimmon*, and its eventual rulings this year, 2022, in *Dussault* and *LaFrance* that, subject to exceptional circumstances, excluding counsel from actually being present during the interview process, either as a silent witness or as a "coach" is not unconstitutional.

Furthermore, while the Canadian Civil Liberties Association (CCLA) has suggested that the accused's lawyer should be present during the interview to provide advice as in similar jurisdictions, one must be careful in "adopting procedural protections from other jurisdictions in a piecemeal fashion that risk upsetting the balance that has been struck by Canadian courts and legislatures."

In fact, while the United Kingdom's *Police and Criminal Evidence Act 1984*, s. 58,[14] and *Code C, Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers*, s. 3.21A(b)(i),[15] provides for a solicitor to be present during a suspect's voluntary interview, the *Criminal Justice and Public Order Act 1994*, at s. 34 allows for adverse inferences to be

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12 See e.g. Kelly Enright, "The Right to Silence During Police Interrogation: No is Starting to Mean No" (2004) 25:3 For the Defence: Criminal Lawyers' Association at 21-25. See also Benissa Yau "Making the Right to Choose to Remain Silent a Meaningful One" (2006) 38 CR (6th) 226.

13 *Singh*, *supra* note 7 at para. 45. Also see *R v B(KG)*, [1993] 1 SCR 740, in which Mr. Justice Cory stated "a trial must always be a quest to discover the truth. Irrational and unreasonable obstacles to the admission of evidence should not impede that quest. In order to reach a true verdict, a court must be able to consider all the relevant admissible evidence."

14 *Police and Criminal Evidence Act 1984* (UK), s 58.

15 *Police and Criminal Evidence Act 1984* (UK), Code C, Revised, Code of Practice for the detention, treatment and questioning of persons by Police Officers, s 3.21A(b)(i) [Code C], online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf> [perma.cc/8HLP-44LF].

drawn in circumstances for a failure to mention facts later relied on at trial.[16] Furthermore, the solicitor may be required to leave the interview if their conduct is such that the interviewer is unable properly to put questions to the suspect.[17]

In addition, the police may forego having the solicitor present where there are reasonable grounds for believing that it, or a delay in their arrival, will

- lead to interference with, or harm to, evidence connected with an offence;
- lead to interference with, or physical harm to, other people;
- lead to serious loss of, or damage to, property;
- lead to alerting other people suspected of having committed an offence but not yet arrested for it;
- hinder the recovery of property obtained in consequence of the commission of an offence.

However, the adverse onus provisions of the statute will no longer apply.[18]

As the Supreme Court of Canada has consistently held that, as a general rule of law, no independent weight is to be attached to the silence of the accused at trial as it violates both the right to silence and the presumption of innocence, simply adopting the UK model displaces a different set of Charter protections.[19]

Nevertheless, the majority of the Supreme Court in *LaFrance* said it was inaccurate to describe the request as having "a lawyer be present with him during the interview," disposing of the appeal on the grounds that a second contact with legal counsel was required in light of the accused's "vulnerabilities." These included his age (19), minority status (Indigenous), and level of sophistication, aggravated by the overwhelming power imbalance and history of discrimination between the state and the accused, possibly rendering his initial legal advice inadequate and impairing his

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16 *Criminal Justice and Public Order Act 1994* (UK), s 34.

17 Code C, *supra* note 15, s 6.9.

18 *Ibid* s 6.6; Annex B(A)(1).

19 See *R v Noble*, [1997] 1 SCR 874, 146 DLR (4th) 385. See also *R v Bhander*, 2012 BCCA 441, where the Court declined to apply a similar practice to that in the UK (the Rome Statute) as never been replicated in Canadian law, or applied in Canadian jurisprudence on investigative procedures.

ability to make an informed choice whether to cooperate with the police. As such, he was entitled to an additional consultation with counsel.[20]

On the other hand, the four dissenting Justices held there was no ongoing right to legal assistance during the interview and that "s. 10(b) is [not] intended to shield the detainee from legitimate interrogation by police." They felt consultation with legal counsel had been properly implemented by the police and Mr. LaFrance was not entitled in law to a further consultation with a lawyer (on the phone or otherwise).[21]

Therefore, the CCLA suggestion to adopt procedural protections from another jurisdiction that would require the accused's lawyer to be with him in the interview room was never considered by either the majority or the dissent. As such, I will canvass the law as it has stood for many years in Canada without the need to resort to the piecemeal (mis-)application of laws from other jurisdictions.

II. Adults Have No Right to Counsel in the Interview Room

Once an adult has been arrested and received advice from counsel the police can begin questioning them. Generally, there is no right for an adult suspect to have counsel present before questioning can take place.

While an adult has no right to have his lawyer present during a police interview, by virtue of s. 146(1) of the *Youth Criminal Justice Act* (YCJA)[22] or s. 56 of its predecessor, the *Young Offender's Act* (YOA),[23] a youth does have the right (if they choose) to have both an adult relative and a lawyer present during such interviews.

The police are entitled to tell an adult suspect that they will not accept counsel being present as a condition of the interview. The suspect must decide for themselves whether to speak to the police or not. Of course some police investigators may actually encourage counsel's presence when they

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20 *LaFrance*, *supra* note 3 at paras 79, 83.

21 *Ibid* para 169.

22 *Youth Criminal Justice Act*, SC 2002, c 1, s 146(1) [YCJA].

23 *Young Offenders Act*, RSC 1985, c Y-1, s. 56 [YOA].

believe it might assist in their investigation. Nevertheless they are not there as the accused's bargaining agent. [24]

Nevertheless, the police must be careful to ensure that their actions cannot be interpreted as an interference with the right to remain silent. If the accused repeatedly asserts his right to remain silent, continued questioning may render the statement involuntary.

As noted by Justice Fish, for the Quebec Court of Appeal in *R. v. Timm*: "detention until confession is an unacceptable form of persuasion."[25]

A. Right to Counsel

The right to retain and instruct counsel prior to the *Charter* was previously enshrined in s. 2(c) of the Canadian *Bill of Rights* (1960). Even under that legislation the police could and did question an accused person without counsel being present. This is no more evident than the decision of the Saskatchewan Court of Appeal in *R. v. Settee*:

> In the present case, Mr. Agnew, counsel for the accused who was first called, told the police officers not to question the accused unless he was present. Such direction, in my view, was not one which the police officers were required to follow. While counsel had every right to advise the accused to give no statement to the police, and while the accused had every right to follow that advice, counsel could not prevent the police officers from following the investigation of the alleged offence, including proper interrogation of the accused.[26]

Although an opposite view was taken by Justice DuPont in *R. v. Greig* after passing the *Charter*,[27] that where an accused has retained counsel no further interrogation can take place without reasonable notice to counsel. Failure to do so constituted an infringement of the accused's rights under ss. 7 and 10(b) of the *Charter*. However, most courts of appeal have held that the decision in *Greig* was wrong, especially after the decision of the Supreme Court of Canada in *R. v. Hebert* where the Court stated:

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24 See *R v Richard (DR) et al.*, 2013 MBCA 105, at para 54. Leave to appeal dismissed September 4, 2014. Docket: 35705. Also see *R. v. Ekman*, *infra* note 56 that counsel is not "entitled to interject or interrupt during the interview or to override or 'assist' with answers offered by the client."

25 *R v Timm*, (1998), 131 CCC (3d) 306 (Que CA) [*Timm*], aff'd [1999] 3 SCR 366. Although in dissent, Fish's comments were subsequently adopted by a unanimous Court of Appeal in *R v Otis* (2000), *infra* note 73. See also *R v Papadopoulos*, 2006 CanLII 49050 (ON SC) at para 116-120.

26 *R v Settee* (1974), 22 CCC (2d) 193 (Sask CA), at p 205, 3 WWR 177.

27 *R v Greig* (1987), 33 CCC (3d) 40 (Ont SC).

> First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
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> ...
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> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is the 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 obtain appropriate advice with respect to the choice he faces.
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> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.[28]

Indeed, even before the decision in *Hebert*, several justices of the Manitoba Court of Appeal felt that DuPont "went too far" and that they "harbour[ed] doubt as to [the] soundness" of his decision.[29] Even the Newfoundland Court of Appeal in *R. v. Cuff* dismissed DuPont's comments in *Greig* a year before the decision in *Hebert*, stating that:

> [O]nce counsel has been retained and instructed there is no reason why the police should not question the suspect. It is part of the process of criminal investigation ...Where a person has been arrested and advised of his right to retain and instruct counsel and has either waived that right or has retained and instructed counsel, he may be questioned by the police in the absence of counsel.[30]

Nevertheless there were recent attempts by the courts in Manitoba to change this position subtly and without reference to the decision in *Creig*. For example, in *R. v. Guimond*, Justice Oliphant concluded that:

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[28] *R v Hebert*, [1990] 2 SCR 151 at 181-186 [emphasis added], 47 BCLR (2d) 1.

[29] See e.g. *R v FJC*, (1987), 46 Man. R. (2d) 92; *R v J(JT)*, (1988), 40 CCC (3d) 97, 50 Man R (2d) 300 (MB CA).

[30] *R v Cuff* (1989) 49 CCC (3d) 65 (Nfld CA) at p 72-73.

> [...] [T]he right to silence and the right to counsel are equal rights. If the police must stop questioning a suspect when he or she asserts the right to counsel, it follows, I think, that they must also stop questioning the suspect when the right to silence is asserted by him or her.
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> ...
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> It seems to me that once the police are told by the suspect that he or she wishes to remain silent, the questioning by police must also stop. Otherwise, the suspect will likely feel that his or her right to silence is of no effect and may feel compelled to speak to the police despite the suspect's having made a meaningful choice to the contrary.[31]

However, as noted by Professor Lee Stuesser, this argument is without any legal foundation and "with respect, Justice Oliphant may be outlining what he wished the law to be. This, however, is not the law."[32]

Oliphant had relied on the decision of Justice Quijano in *R. v. Olson* and the Supreme Court decision in *R. v. Manninen*. However, Stuesser stated his reliance was "misplaced" and that "there was no detailed analysis other than using *Manninen* by way of analogy, but it is a false analogy."[33]

While it is true that Justice Lamer (as he then was) in *R. v. Manninen* stated, "where a detainee has positively asserted his desire to exercise his right to counsel and the police have ignored his request and proceeded to question him, he is likely to feel that his right has no effect and he must answer," the issue in that case was not that the police should cease questioning the accused once he has indicated his desire not to speak to them, but rather the duty on the police not to question him further once he has stated he wishes to retain counsel. [34]

Not only were these comments out of step with the decision in *Hebert* ("there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent ...

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31 *R v Guimond*, [1999] MJ No 214 at para 40-44 [emphasis added], 137 Man R (2d) 132 (MBQB). Also see *R v McKay* 2003 MBQB 141 at para 99; *R v Flett and Thomas*, 2004 MBQB 143 (although Schulman, J. did not rely on this paragraph specifically he quoted other excerpts from the decision in *Guimond*); *R v Reader*, 2007 MBQB 136.

32 Lee Steusser, "The Accused's Right to Silence: No Doesn't Mean No" (2004) Man LJ 29:2 150 at 158 [emphasis added]. See also *R v FJP*, 2002 BCSC 106 in which the accused unsuccessfully attempted to argue that the police had to refrain from interrogating the accused after he had retained counsel and after he had specifically told them that he was advised by his lawyer not to speak to them.

33 *Ibid.*

34 *R v Manninen*, [1987] 1 SCR 1233 at para 25, 41 DLR (4th) 301.

Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence"),[35] it was out of step with most appellate courts across Canada.

In fact, most appellate court decisions supported the proposition that the police are free to question an accused person, notwithstanding their right to silence and in the absence of counsel, so long as the accused has been informed of the following:

(1) His or her right to retain and instruct counsel; and

(2) The available free services of duty counsel and Legal Aid before being expected to assert the right; and

(3) The accused has been given a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and

(4) As long as the police refrain from eliciting evidence from the accused until the accused has had a reasonable opportunity to retain and instruct counsel.[36]

This statement of the law was re-affirmed by the Saskatchewan Court of Appeal in *R. v. MacKay* when deciding whether an accused's *Charter* rights had been violated when the police questioned him outside the presence of his lawyer:

> The appellant had had an opportunity to speak to duty counsel after his first warning. The investigator then carried on with the interrogation of the appellant, understanding that there was a possibility that there might be a further call by counsel to speak to the appellant ... As counsel for the Crown correctly pointed out the right to counsel need not necessarily precede every encounter with the police; the true question is whether the accused has been advised of his rights and particularly the right to silence. It is clear from the course of the interrogation that when the examination resumed the appellant was aware of his right to remain silent and said that he would make no comment until a lawyer was present.[37]

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35 *Hebert*, *supra* note 28 at 181.

36 See e.g. the elements of the right to counsel summarized in *R v Loung*, 2000 ABCA 301 at para 12.

37 *R v MacKay*, 2004 SKCA 24, at para. 20-21. Application for leave to appeal to the SCC granted on April 21, 2005, but not on this point (appeal dismissed 2005 SCC 75). See also *R v Weeseekase*, 2007 SKCA 115; *R v Edmondson*, 2005 SKCA 51, where the accused brought up his lawyer's advice not to speak, but the officer encouraged him to continue with the interview, noting that the lawyer was not the one being charged and that he needed to decide for himself whether or not to speak. The Saskatchewan Court of Appeal held that the subsequent confession admissible as "it cannot be said that the officer's remarks served to effectively or unfairly deprive the accused of his right to

However, it is also clear that the police must not employ tactics denying the accused the right of choice or of depriving the accused of an operating mind. For example, in *R. v. Playford*, the Court held that where police officers were in full view of and close to the accused and overheard parts of his telephone conversations (even with the lawyer's secretary), will substantially prejudice the accused in making use of his right to retain and instruct counsel in private.[38]

B. Persuading the Accused to Give a Statement

> Bringing about a guilty suspect to admit guilt in a statement is not in itself an improper activity. It is only to be repressed if it is done in a way that offends our basic values, that is in a manner which would be contrary to the rules of law we have developed for their protection and furtherance. Our criminal justice system has vested the Courts with two responsibilities: the protection of the innocent against conviction; and the protection of the system itself by ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society. These concerns have brought about the elaboration by Judges and Legislatures of procedural and evidentiary safeguards.[39]

While the police must be careful to ensure that their actions, following a decision to exclude counsel from the interview room, cannot be interpreted as an interference with the right to remain silent, they are entitled to use any "legitimate means of persuasion to encourage the suspect to [give a statement]."[40]

In fact, in *R. v. Oickle* the Supreme Court of Canada stressed that few criminals confess to serious crimes without some persuasion. The courts are much more receptive to police interview techniques than lawyers might imagine, particularly where the interview process has been videotaped. As noted by Justice Iacobucci, in discussing the application of the modern confessions rule:

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choose to remain silent. The officer employed legitimate techniques of persuasion, repeatedly telling the accused it was up to him to decide whether to disclose or not disclose what had happened" at para 43.

38 *R v Playford* (1987), 40 CCC (3d) 142, 3 WCB (2d) 301 (Ont CA). However, see *R v Coaster*, 2014 MBCA 108, at para. 33 that "s. 10(b) of the Charter is infringed when the detainee has a reasonable belief that he or she cannot speak to counsel in private, unless it can be shown that the detainee was, in fact, able to speak to counsel in private".

39 Rene J Martin, *Admissibility of Statements*, 9th ed binder/looseleaf (Toronto: Thompson Reuters, 2022) at p 7-7.

40 *Hebert*, *supra* 28 at 186. Approved by the majority in *Sinclair*, *supra* note 9 at para 25.

> [The] courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interest to confess. This becomes improper only when the inducements, whether standing alone or in combination with other facts, are strong enough to raise a reasonable doubt about whether the will of a subject has been overborne. On this point, I found the following passage from *R v. Rennie* (1981) 74 Cr. App. R. 207 (C.A.) at page 212, particularly apt:
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> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases, the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case, the confession will not have been obtained by anything said or done by a person in authority. More commonly, the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.[41]

Justice Iacobucci then went on to deal with the relevance of oppression to the confessions rule. The factors that he identified which might create an atmosphere of oppression, that is, depriving a suspect of food, clothing, water, sleep or medical attention, the denial of access to counsel, being excessively aggressive or intimidating over a prolonged period of time, or a police use of non-existent evidence in confronting a suspect. He subsequently goes on to adopt Justice Lamer's comment in *R v. Rothman* that "what should be repressed vigorously is conduct on their [the police] part that shocks the community."[42]

In *R. v. Paternak* the Alberta Court of Appeal further illustrated the increasingly sympathetic trend of the courts to police interview techniques. In this case the court held that police persuasion, including the use of subtle and sophisticated ploys, is not enough to render a statement involuntary so long as the accused has been informed of his right to counsel and has been afforded the opportunity to exercise that right. As noted by Justice Kerans:

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41 *R v Oickle*, 2000 SCC 38 at para. 57 [emphasis added].

42 *R v Rothman*, [1981] 1 SCR 640 at 697, 121 DLR (3d) 578.

> For an otherwise healthy and mature human to be deprived of an "effective choice" (as to whether or not to talk) the police influence must be so overbearing that it can be said that the subject has lost any meaningful independent ability to choose to remain silent, and has become a mere tool in the hands of the police.[43]

Justice Kerans continued that while an accused's effective choice whether or not to give a statement to the police can be influenced through torture, brainwashing, or by totalling breaking the individual, Justice Kerans states:

> [A]ll human communication usually does involve a degree of influence ... and the opinion of the hearer can be influenced in many ways, sometimes very subtly, by what the speaker says or does. Moreover, in my view, the Supreme Court did not intend to forbid an agent of the state even to attempt to influence the detainee to speak. On the contrary, if that were the rule, one may as well forbid the admission of any statements by detainees because the mere facts of detention and interrogation can influence one to speak. In other words, if there is to be absolutely no influence, there must be no communication. Similarly, I cannot accept the suggestion, implicit in the position of the defence, that the rule permits the police to interrogate, but not to interrogate effectively or with sophistication.[44]

In *R. v. Timm*, a majority of the Quebec Court of Appeal also found that police persuasion which does not deprive the suspect of his right to decide to speak or not does not contravene his right to remain silent and, therefore, that nothing prevents the police from obtaining a confession from a suspect who previously invoked his right to remain silent, provided no reprehensible means were used to obtain them.[45]

On November 1, 2007, in *Singh*, the Supreme Court confirmed that nothing prevents the police from obtaining admissions from a suspect who has previously invoked his right to silence:

> [To hold otherwise] would overshoot the protection afforded to the individual's freedom of choice both at common law and under the *Charter*. More importantly, this approach [respects] the state interest in the effective investigation of crime. The critical balancing of state and individual interests lies at the heart of this

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43 *R v Paternak*, 1995 ABCA 356 at para 27. Rev'd on other grounds, [1996] 3 SCR 607, 2 CR (5th) 119.

44 *Ibid* at 28.

45 *Timm*, *supra* note 25, per Proulx, J.A. In this case the accused was held in custody for 40-hours, during which he was repeatedly interrogated. Although the accused did not say anything incriminating, the accused argued that his right to silence was nevertheless undermined by the length and conditions of his detention. However, see *R v Auclair* (2004), 183 CCC (3d) 273 (QC CA) where an interrogation occurring almost 24-hours after arrival in the police station created an atmosphere of intimidation.

> Court's decision in *Hebert* and in subsequent s. 7 decisions. There is no reason to depart from these established principles.[46]

In *R. v. Borkowsky* the Manitoba Court of Appeal was one of the first appellate courts to consider the decision in *Singh*. In this case the accused, who had been appropriately cautioned on two separate occasions and who had spoken with his lawyer, declined to make a statement or speak with the police on the advice of counsel. However, against the objections of the accused, who raised on nine occasions the advice he had received from his lawyer, the interviewing officer continued to speak with the accused until he began discussing the allegations of the offence.

It was argued that the officer had skilfully engaged the accused in a conversation about irrelevant matters, intermingled with relevant issues, thereby effectively overcoming his right to remain silent. However, the Court of Appeal affirmed the trial judge's ruling that the questioning was not oppressive and that "the police are permitted to endeavour to persuade an accused or suspect to break his or her assertion of the right to silence by legitimate means."[47]

C. Is Refusing Defence Counsel the Right to Sit in the Interview Room Reprehensible?

Does influencing an adult accused to speak after he has consulted with legal counsel and asserted his right to counsel breach his right to silence if he is denied the opportunity to have his counsel present during the interview?

Historically, because of concerns surrounding the "sinister" interrogation practices of the police such as their use of oppressive tactics, force, or the "third degree" when their lawyers or other witnesses were absent, at least one author suggests that "counsel's presence at interrogation could serve as a substantial guard against such practices."[48]

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46 *Singh*, *supra* note 7.

47 *R v Borkowsky*, 2008 MBCA 2 at para 46-48.

48 See Charles Donahue Jr, "An Historical Argument for the Right to Counsel During Police Interrogation" (1964)73 Yale LJ 1000 at 1044. The term "third degree" is "an overarching term that refers to a variety of coercive interrogation strategies, ranging from psychological duress such a prolonged confinement to extreme physical violence and torture." See Richard Leo, "The Third Degree and the Origins of Psychological Interrogation" in editor, G Daniel Lassiter, *Interrogations, Confessions and Entrapment*, (New York: Springer Publications, 2004) 37.

However, with the courts now expecting and even mandating the continuous videotaping of all interviews and interrogations of suspects, such arguments are no longer as substantial as they once were.[49]

For example, in *R. v. Therrien*, the accused, a francophone, was arrested in connection with a double murder. He was read his rights in French and English and informed he could contact counsel anywhere he chose. He consulted with a legal aid lawyer in Vancouver by phone who told him not to say anything. He was subsequently interviewed by the police in English for more than five hours, during which he confessed to the murders. A *voir dire* was held to determine whether the statements were voluntary, and a videotape of the interview revealed that the accused freely chose to speak and was comfortable proceeding in English. Nothing in the police conduct went beyond permissible persuasion or created an atmosphere of oppression and the statement was held voluntary.[50]

Generally, once an adult accused has received advice from counsel the police can begin questioning. The accused has no right to have the lawyer physically present during the interview and the police are entitled to tell the accused that they will not accept a condition that counsel be present for the interview, nor are they required to let them consult with counsel repeatedly unless his jeopardy changes.[51] This is elaborated upon in *R. v. Friesen*:

> [Any] firm rule of law … that the police would violate the Charter if they ever did anything under any circumstances which by any means to any degree dissuaded a detained accused from again speaking to a lawyer or from answering questions without a lawyer present … [is too] broad and rigid [and] would do much more harm than good.
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> …
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> The law does not exclude all statements to the police; a suspect has a choice in the matter. We should not (and cannot) change the law of Canada so as to forbid the police to talk to a detained suspect unless defence counsel sits in and rules on each

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49 See John Burchill and Elizabeth Patts "Video Interrogation: Losing the Evidence ~ A Comprehensive Look at the Legal Use of Video Statements in Canada" (2003) reprinted in (2005) 16:2 IALEIA J. Also see *R v Nikolovski*, [1996] 3 SCR 1197, in which the Supreme Court pointed out the benefits of the video camera – "it records accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all it observed … [it] can provide the most cogent evidence not only of the actual words used but in the manner in which they were spoken" at para 21.

50 *R v Therrien*, 2006 BCSC 1739.

51 *Ibid* at 53.

> question. Given that, I cannot see how an accused could be in a better position to decide whether to talk to the police than this accused was.[52]

This fact was further articulated by Justice Rosenberg in *R. v. Mayo*:

> [A]s the law now stands, the Charter does not guarantee an adult offender the right to have a lawyer present during questioning. McLauchlin J. made that clear in *R. v. Hebert*, in the following excerpt from her summary of the right to silence rule:
>
> > First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.
>
> Since the appellant did not have the right to have counsel present during the questioning, the officer was not obliged to cease questioning the appellant in the face of such a request. Accordingly, the appellant's rights were not infringed merely because the officer continued to question the appellant.[53]

The Court in *Mayo* expressly contrasted the situation with s. 56(2) of the *Young Offenders Act* (now s. 146(1) of the *Youth Criminal Justice Act*) which provided, in part, that a young person has not only the right to consult with counsel, but also that they be given a reasonable opportunity to make the statement in the presence of that person. Implicit in this comparison is that Parliament, if they had so chosen, could have granted the same right to adults – but they did not. Other acts have similar conditions.[54]

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52 *R v Friesen*, 1995 ABCA 320. at 179-182 [emphasis added]. Leave to appeal to SCC denied [1996] 2 SCR vi. See also *R v Wood*, 1994 NSCA 239 , leave to appeal to SCC denied (1995); *R v Roper* (1997), 32 OR (3d) 204 (Ont CA); *R v Ekman*, 2000 BCCA 414, leave to appeal to SCC denied (2001); *R v Gormley* (1999), 140 CCC (3d) 110 (PE SCAD); *R. v Legato* (2002), 172 CCC (3d) 415 (Que CA); *R v Plata* (1999), 136 CCC (3d) 436 (Que CA); *R v Delmore*, 2005 NWTSC 53.

53 *R v Mayo* (1999) 133 CCC (3d) 168 (Ont CA) at 175-76 [emphasis added]. Also see *R v Wells* (2001), 139 OAC 356 (Ont CA), in which *Mayo* was cited with approval at para 37. See also *R c Racine*, [2003] JQ no 7751 (Que SC).

54 See e.g. s 24(1)(k) of the *Workplace Safety and Health Act*, CCSM c W210, which provides that any person interviewed may nominate another person to be present during that interview (i.e. legal counsel). Also consider s. 2(d) of the *Rome Statute of the International Criminal Court*, Article 55, which provides that a person being question has the following rights ... "to be questioned in the presence of counsel unless the person has

It was also clearly articulated by the B.C. Court of Appeal in *R. v. Ekman* when they were called upon to address the appropriateness of a police officer's comment to an accused that "in Canada, a lawyer doesn't have a right to be present when someone is questioned by the Police, okay. They have a right to give you advice on whether or not to speak to the Police."

In this case, the accused had already consulted with counsel, but on the advice of counsel, the accused requested that he be present when interviewed. The police denied the request as it was up to the accused, not his counsel, whether he spoke with them. The accused subsequently confessed to murder.

In upholding the confession, the Court of Appeal rejected the "American sense of a right to the assistance of counsel apparently on a continuing basis,"[55] stating that:

> Whilst an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, after consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing a suspect (again within reasonable limits), nor bound to advise counsel they intend to question the detainee.
>
> In my view ... The officer's statements were correct: a lawyer cannot insist on being present when the police question an accused who has obtained counsel; and the cases discussed above do not support the proposition that if counsel were in attendance, he or she would be entitled to interject or interrupt during the interview or to override or "assist" with answers offered by the client. Sergeant Adam's statements that a lawyer may advise an accused on whether or not to speak to the police, and that the decision was up to Mr. Ekman, were also correct - despite Mr. Orris's suggestion, equally correct, that a lawyer can provide advice on many issues and any decision must be a properly informed one. [56]

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voluntarily waived his or her right to counsel." Although Canada is a signatory to the Rome Statute (signed Dec. 18, 1998 - ratified July 7, 2000) and created the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, as a result, Parliament did not provide for a right to the presence of counsel for such a prosecution. Again, if they had so chosen, Parliament could have granted this right as they have in the UK – but they did not.

55 The Court quoted this passage from *R v Logan* (1988). 46 CCC (3d) 354(Ont CA) at 380-1.

56 *R v Ekman*, 2000 BCCA 414 at para. 26-28 [emphasis added]. Leave to appeal SCC dismissed Feb. 22, 2001 (80 C.R.R. (2d) 186). *Ekman* was followed in *R v Lisi*, 2001 BCCA 514, a case in which the accused had already spoken with a lawyer, indicated that he understood the charge and knew what he was doing, and what he wanted was for everyone (himself, the lawyer and the police) to sit down and go over everything. This was not a request to speak to counsel again, but rather a request for the lawyer to

The issue arose again before the B.C. Court of Appeal in *R. v. Osmand*. However, Justice Donald, speaking for a unanimous Court, stated that he "would not embark upon a determination of the asserted right to the presence of counsel under custodial interrogation [because] the declaration of such a right would reverse clear authority to the contrary: see, for example, *R. v. Ekman*, and would have to be considered by a five-member division of the Court."[57]

The American cases regarding the "right to the assistance of counsel apparently on a continuing basis" is best articulated in *Minnick v. Mississippi*. In that case a majority of the United States Supreme Court held that "police-initiated interrogations [are prohibited] unless the accused has counsel with him at the time of questioning … when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has [already] consulted with an attorney."[58]

However, the reasoning of the majority is not persuasive and it is the dissenting opinion of Justice Scalia, concurred with by Chief Justice Rehnquist, that is perhaps more consistent with Canadian jurisprudence.

While the majority claims the rule ensures that statements are not the result of coercive pressures, such a rule also makes it easier on the Court by "conserve[ing] judicial resources which would otherwise be expended in making difficult determinations." Unfortunately such a bright-line rule (acknowledged by the majority), will also result in "the suppression of trustworthy and highly probative evidence even though the confession might be voluntary."[59]

Justice Scalia, on the other hand, found that such a "prophylactic rule" which simply excludes all confessions (including the trustworthy and probative) from persons in police custody must be assessed not only on the basis of what is gained, but also on the basis of what is lost:

> Police questioning [is] a tool for effective enforcement of criminal laws. Admissions of guilt … are more than merely desirable; they are essential to society's

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come to down to the police detachment and be present during the investigation. The Court held that since the accused was not entitled to have counsel present during the questioning, the police were not obliged to cease their questioning in face of such a request.

57 *R v Osmond*, 2007 BCCA 470 at para 6.

58 *Minnick v Mississippi*, *supra* note 5 at 153.

59 *Ibid.*

> compelling interest in finding, convicting and punishing those who violate the law.[60]

More recently, in *R. v. Bhander,* the accused argued that in addition to United States jurisprudence, the *International Covenant on Civil and Political Rights*,[61] and the *Rome Statute of the International Criminal Court*,[62] should also apply in Canada. Specifically, the *Rome Statute*, which expressly provides for counsel during interrogations. However, the Court of Appeal stated, the *Rome Statute* has never been replicated in Canadian law, or applied in Canadian jurisprudence on investigative procedures. Whatever the animating reasons for that provision in the context of the International Criminal Court, the Court stated, "Canadian law measures the admissibility of a confession on the standard of voluntariness and of a willing mind of an individual who has had the opportunities to be informed of his rights." Applying the majority decision in *Sinclair,* the Court of Appeal affirmed that "adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures."[63]

In *R. v. Roper*,[64] the accused was informed of his right to counsel and taken to the police station. During that time, he made three statements and asked for more information about the allegations against him. At the end of the third statement the accused asserted his right to counsel and gave the police the name of his lawyer. The lawyer subsequently spoke to the accused on the telephone for approximately two minutes. The lawyer advised the appellant of his right to silence and urged the appellant to exercise that right. The lawyer advised the police officer that the appellant intended to exercise his right to silence. The police officer gave no assurance that the investigation, including questioning of the appellant, would not continue.

The officer subsequently resumed his investigation and about two hours later re-entered the interview room. The accused stated, "I just better speak to my lawyer" at which time the officer replied "there are two sides to every

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60 *Ibid* at 161.

61 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9-14.

62 *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF 183/9, 37 LLM 999, art 55.

63 *R v Bhander,* 2012 BCCA 441, application for leave to appeal dismissed without costs May 9, 2013. Docket: 25237 (SCC) at para 52.

64 *R v Roper* (1997), 32 OR (3d) 204 (Ont CA), 33 WCB (2d) 423 [*Roper*].

story and we would like to hear yours." Although not literally denying the accused access to counsel, the effect was the same and the accused ultimately confessed.

In addition, at some point while this interview was being conducted, the lawyer called the police station and asked to speak to the accused. He was told that it was impossible as the accused was being interviewed. About two hours later the appellant made several further comments that were not sparked by any questioning other than some small talk by the officer. The comments made by the accused were subsequently admitted at trial and on review the Court of Appeal found that the accused

> [...] [H]ad been fully advised of his rights by the lawyer, that he had been given an adequate opportunity to consult counsel at that time and that accordingly, there had been no initial violation of his right to counsel. In addition, as found by the trial judge, there was no change in circumstances thereafter that required the police to cease questioning of the appellant until he had a further opportunity to consult with counsel. Accordingly, there was no subsequent violation of s. 10(b) of the *Charter of Rights and Freedoms*. Even if there was a violation there is much to be said for the Crown's submission in its factum that the admission of these statements would not bring the administration of justice into disrepute in view of the appellant's continuing desire to talk to the police notwithstanding the advice he had been given, in strong terms, by his lawyer.[65]

Unlike the case in *Roper,* where the police did not acknowledge the lawyers request to not interview his client, in *R. v. Kerr* counsel told the investigating officer "I don't want you interviewing my client unless I'm there." To this the constable replied that he would not be interviewing the accused. After the accused's lawyer left, the same officer asked the accused if he would submit to a breathalyser test in his lawyer's absence, to which request the accused agreed. The Court held that the actions of the police did not breach the accused's right to fair treatment under s. 7 of the *Charter*. In arriving at that conclusion, the Court referred to *R. v. Hebert,* where the Court stated:

> The right to silence conferred by s. 7 reflects these values. The suspect, although placed in the superior power of the state upon detention, retains the right to choose whether or not he will make a statement to the police. To this end, the *Charter* requires that the suspect be informed of his or her right to counsel and be permitted to consult counsel without delay. If the suspect chooses to make a statement, the suspect may do so. But if the suspect chooses not to, the state is not

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65 *Ibid* at 209.

> entitled to use its superior power to override the suspect's will and negate his or her choice.[66]

However, where the police have afforded the accused the opportunity to speak with counsel, they cannot later prevent the lawyer from continuing to speak with his client in private simply because he left the room to make a phone call. As noted by Justice O'Connor in *R. v. Hunter*:

> The police provided Mr. Hunter with his right to counsel on three occasions, the first two by facilitating telephone calls to duty counsel. That may well have been sufficient to meet their obligations to him under the Charter. They may not have violated his s. 10(b) rights if they had refused him access to Mr. Sakran. Once the police have fulfilled their obligation under s. 10(b), they need not necessarily do so a second time ... However, in this case the police acceded to Mr. Hunter's request that he see Mr. Sakran. They provided a private room for the interview. They obviously did not take the position their right to counsel obligations had been fulfilled.
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> ...
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> [Mr. Sakran] asked, and was granted permission to use a telephone to make some calls, to whom, and about what we are not aware. When he completed the calls, he and his client simply wished to continue the consultation process ... [However, by preventing him from returning to the interview room] the police action denied Mr. Hunter the opportunity to receive advice as to his options. The denial by the police of Mr. Hunter's right to consult with counsel in private violated his s. 10(b) Charter rights.[67]

As noted above, the police should be careful in the methods they use when excluding the lawyer from the interview room. Threats, use of force and/or trickery to get counsel out of the interview room may interfere with the accused's right to consult with counsel. For example, in *R v Burlingham* the Supreme Court concluded that the accused's right to counsel was violated when the police belittled his lawyer.[68]

D. Can the Accused Stop and Delay the Interview by Requesting Counsel's Presence?

As noted above, where there is no change in circumstances the police are not required to cease questioning the accused until he has had a further opportunity to consult with counsel unless there is an indication that he

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66 *R v Kerr*, 2000 BCCA 209 at para 17.

67 *R v Hunter* (2004), 116 CRR (2d) 170 (Ont SC) at p 178-79 [emphasis added].

68 *R v Burlingham* [1995] 2 SCR 206, 124 DLR (4th) 7. See also *Dussault*, *supra* note 3; *Cleveland*, *supra* note 11.

did not understand his rights or that the lawyer advised him they should speak in person.

However, where the accused is informed of his right to counsel but declines to call his lawyer in the evening, indicating his desire to remain silent during questioning until he sees his lawyer in the morning, any statements he makes "off the record" are subsequently admissible where the accused has failed to be reasonable diligent in the exercise of his rights. As noted by the Supreme Court in *R. v. Smith*:

> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in *R. v. Manninen*, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.
>
> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks.[69]

Furthermore, while an accused always has a right to a reasonable opportunity to consult counsel, once he is informed, he cannot, without more, stop an interrogation or investigation merely by purporting to exercise his right to counsel again. This is especially true when the clock is ticking for taking breath samples within the statutory time frame for impaired driving cases. As noted by the court in *R. v. Hunter*:

> The courts usually agree with the police officer's interpretation that the multiple requests for counsel or the over-lengthy consultation is a delaying tactic to forgo the breathalyser tests until the expiry of the two hours. [70]

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69 *R v Smith*, [1989] 2 SCR 368, 61 DLR (4th) 462 per Lamer and Gonther, JJ [emphasis added]. Also see *R v Sinclair*, *supra* note 9 at para 58, where the majority, citing *Smith*, stated "the purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay 'needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [for whatever reasons, made] impossible to obtain.'"

70 *Hunter*, *supra* note 67 at p 178. See e.g. *R v Turiff*, [1998] 82 OTC 180, 40 WCB (2d) 234 (ONCJ); *R v Green* (1999), 213 NBR (2d) 68, 546 APR 68 (NB CA.); *R v Littleford*

An accused can, of course, stop the interview by exercising his right to remain silent and, thus, withdraw further participation in it. However, the right to counsel is not something that can be asserted without reasonable limits. "Police pressure, short of denying the right of choice or of depriving the detainee of an operating mind does not breach the right of silence once the detainee has been advised."[71]

In *R. v. Whitford* the accused was arrested for sexual assault. After being given a Charter warning on arrest, the accused asked to telephone a lawyer. He then had telephone contact with a lawyer. Almost immediately thereafter he refused to speak with the police until he spoke to legal aid. One of the issues before the court was whether or not the accused had been deprived of his right to retain and instruct counsel contrary to s. 10 (b) of the *Charter*. Justice Berger for the Court stated:

> Here the Appellant invoked the right to counsel and was reasonably diligent in exercising it. We ought not to adopt a rule that would artificially limit reasonable opportunity to exercise the S.10 (b) *Charter* right to a single phone call to a law office. An accused who wishes to make two or three successive phone calls in the exercise and pursuit of his right to retain and instruct counsel must be permitted to do so unfettered by police questioning. The relevant inquiry after an initial phone call to a law office is not simply whether the accused did nor did not speak to a lawyer. After all, the lawyer might tell the accused that he is too busy, too expensive, or simply not interested in acting for and advising the accused. He might even recommend that the accused contact Legal Aid. An accused is entitled to a reasonable opportunity to have meaningful contact with and advice from counsel. I decline to approve police questioning after completion of a first telephone call to a law office when the accused has clearly said that he does not wish to speak to the police until he has *also* spoken with Legal Aid.
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> It was certainly open to Constable Zol to seek clarification from the Appellant in order to determine, with certainty, whether he had satisfied his desire to retain and instruct counsel without delay. I do not say that the police are, in all

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(2001), 86 CRR (2d) 148, 50 WCB (2d) 261 (ONCJ); *R v Melfi* (2001), 22 MVR (4th) 248, 52 WCB (2d) 82 (ONSC); *R v Neziol* (2001), 22 MVR (4th) 299, 51 WCB (2d) 474(ONSC).

71 *R v Wood*, 1994 NSCA 239 at 222-223, 225, leave to appeal SCC refused, [1995] 99 CCC (3d) vi. In this case the accused asserted on some 53 separate occasions that he did not wish to make a statement (at least at that time). It was evident that he understood his right to choose whether or not to do so and while he frequently asserted his right not to make a statement, he still elected to continue engagement in the conversation and ultimately to make one. See also *R v Baidwan*, 2001 BCSC 1412, aff'd 2003 BCCA 351, leave to appeal SCC dismissed 328 NR 199 (note), January 8, 2004.

> circumstances, under a duty to seek such clarification. I say only that where the accused has asserted his s. 10(b) rights, has contacted a law office, and immediately thereafter has refused to speak to the police until he has spoken to Legal Aid, the police are obliged to refrain from eliciting evidence until they have provided the accused with a reasonable opportunity to contact Legal Aid.[72]

E. Is Being Interviewed Without Counsel Present Oppressive?

In *R. v. Otis*, Justice Proulx recognized that the court in *Hebert* acknowledged the police have the right to pursue their investigation and to try to convince a person to make a confession, or provide statements despite the fact the person has indicated his or her decision to remain silent:

> Although the police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice. I will grant that a person persuaded to confess for personal reasons or due to the talent of the investigator may well have done so freely despite his previous silence. It is this choice and the respect of free will, which are the principal underpinnings of the rules relating to confessions. — What is abusive in the present matter might not be with respect to another individual. The power of resistance to police persuasion will vary according to circumstances and individuals. Certainly it is always prudent to bear in mind that any tension or pressure observed with a subject faced with his interrogator, either due to discomfort, embarrassment or shame, which he may feel following arrest, detention or confrontation with an investigator who brings him back to a reality he would prefer to forget at any price, must be deemed to be in the normal course of events.[73]

In this case the accused clearly stated four times over thirty-five minutes that he did not want to say any more and wanted to talk to his lawyer. The Court of Appeal found that the while the "police may interrogate a suspect and attempt to persuade him to break his silence, they cannot abuse that right by ignoring the will of the suspect and denying his right to make a choice."

Interestingly, although the trial judge found that the accused had a "complete emotional disintegration," the Court of Appeal found that this was not relevant to the issue of an operating mind as the emotional disintegration may have been as a result of confessing, not as a result of police pressure:

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72 *R v Whitford,* 1997 ABCA 85.), at 59-60.

73 *R v Otis* (2000), 151 CCC (3d) 416 (Que CA) at 437, 37 CR (5th) 320. Leave to appeal SCC dismissed June 21, 2001.

> While presenting an "operating mind aware of his right", the [accused] could easily have plunged into a state of "complete emotional disintegration" for reasons which may be attributed to police action, without, however, altering his operating mind ... in the same manner one can easily conceive of police "oppression" which nevertheless does not deprive the subject of an "operating mind."[74]

However, the Quebec Court of Appeal did raise the question: How many times is a person such as the accused, who sufferers from a limited cognitive capacity and low intellect, required to assert his right to remain silent before it is respected? Mr. Otis asserted his right on four occasions. The Court considered it significant that these assertions were expressed consecutively and within a brief period of time that should have left no doubt as to the accused's wish that the interrogation cease. These objective observations by the Court were bolstered by the trial judge's findings with respect to subjective factors, related to the accused's intellectual and cognitive capacity.

While four times was sufficient cause to rule the statement inadmissible in this case (compared to 53 times in *R. v. Wood*, where the statement was admissible), the Court found that *Otis* had "limited cognitive capacity" and was "intellectually deprived." As a result, the police actions, while "abusive in the present matter might not be with respect to another individual." This is a very important distinction when one considers the subsequent decision of the very same Court in *R. v. Legato.*

In *R. v. Legato* the accused, after killing another individual, attempted to commit suicide by stabbing himself four times in the abdomen. He was operated on and afterwards administered morphine on several occasions to ease the pain. While in the intensive care unit the accused spoke with counsel on the phone and then was interrogated by the police. The accused told the police he would only speak in the presence of his lawyer and that he had nothing more to say in her absence. Nevertheless, he made an incriminating remark after being asked further questions by the police.

On appeal the accused complained that he was interrogated at the hospital while under sedation and, furthermore, after having stated to the police that he would only speak in the presence of his layer. However, the Court ruled that "that there was no evidence submitted to the judge which would lead to the conclusion that the accused was not in full possession of his faculties ... In fact, the responses given indicate that appellant had

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74 *Ibid* at 432. See for example *Paternak*, *supra* note 43.

retained the advice of his lawyer and was quite capable of following his lawyer's instructions."[75]

The Court further considered the principles laid out in *Otis* regarding the law of confessions, however they stated that the police in this case "did not use their superior power to ignore the will and deny the appellant his choices ⋯ on the contrary the police officer was particularly respectful of his will."[76]

As such, where an accused does not have "limited cognitive capacity"; is not "intellectually deprived"; has not been deprived of food, clothing, water, sleep or medical attention; the interrogation is not excessively aggressive or intimidating over a prolonged period of time; or that the police used non-existent evidence in confronting the accused (see *R. v. Oickle*), then the likelihood of the interview being found oppressive is significantly remote.

This is precisely the reasoning employed by the Alberta Court of Appeal in *R. v. Bohnet*,[77] which found that, unlike the accused in *Otis*, Bohnet was not intellectually deficient.

> [While] he was not given a second opportunity to talk with his lawyer before he confessed, [it] was not a Charter breach in the contest of this case ... The fact that he police successfully engaged him in further discussions after he stated he would follow his lawyer's advice not to say anything, and after he once more said that discussions should cease, does not constitute a breach of his rights.[78]

Without citing any of the above cases, the Ontario Court of Appeal also upheld the admission of comments by an accused that was interviewed by the police over an eight-hour period in the absence of counsel. While it was a prolonged interview, the Court not only took into consideration the police officer's stated intention to keep the accused talking, but also the accused's own "game plan" of answering some questions, declining to answer others and posing questions to the investigating officer as he saw fit. In the end, the Court agreed with the trial judge's ruling that "there is no prohibition against police questioning an accused in the absence of counsel after the accused has retained counsel. And there is nothing wrong with

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75 *Legato*, *supra* note 52 at 25-6. See also *Plata*, *supra* note 52.

76 *Legato*, *ibid*.

77 *R v Bohnet*, 2003 ABCA 207, leave to appeal SCC refused (February 5, 2004). See also *R v Russell*, 1998 ABCA 184, aff'd on other grounds 2000 SCC 55.

78 *Bohnet*, *ibid* at para 16.

police trying to persuade an accused to speak to them about a crime. But investigators must not deny the accused the right to choose, or deprive him of her of an operating mind." [79]

However, as noted by the Ontario Court of Appeal in *R. v. Hoilett*:

> [O]ppressive conduct by the police [stripping him of his clothing and leaving him naked in the interview room], in and of itself, will not in every case render a statement of an accused inadmissible as involuntary. There may be circumstances where an accused person has the self-confidence to withstand the more subtle intimidation that is communicated by the police through an atmosphere of oppression. Or an accused may have his or her own reasons for believing that it is in their best interest to speak to the police so that oppressive police conduct may not have the effect of making a statement involuntary.[80]

More recently, in *R. v. Richard* the Manitoba Court of Appeal considered a number of factors raised by the accused why his confession to murder should have been deemed involuntary:

- he told the police officer on a number of occasions during his first interview that he did not want to talk to police about the incident;
- he had been held in a cold cell overnight and the interview room was warm;
- he did not have his anti-anxiety medication on the day of the second interview;
- he did not sleep well the prior night and could not eat on the morning of the second interview;
- cigarettes were progressively given to him as the interviews unfolded, which he urges the Court to find were an enticement to cooperate.[81]

The accused argued that the environment surrounding the interviews caused by the continued questioning, despite his assertions of his right to silence was exacerbated by the oppressive conditions created by police.

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79 *R v Roy* (2003), 15 CR (6th) 282 at para 10, 59 WCB (2d) 253 (Ont CA), aff'ing [2002] OJ No 5541.

80 *R v Hoilett* (1999), 136 CCC (3d) 449 at para 24, 26 CR (5th) 332 (Ont. C.A. See also *R v Owen* (1983), 4 CCC (3d) 538, 56 NSR (2d) 541 (NS CA); *R v Serack* (1974), 2 WWR 377 (BCSC). But see *R v Flintoff* (1998), 126 CCC (3d) 321, 16 CR (5th) 248 (Ont CA).

81 *Richard*, *supra* note 24 at para 27. See also *Cleveland*, *supra* note 11, where the accused's assertion of his right to counsel up to 110 times was not sufficient in and of itself to rule the statement involuntary. However, it was the cumulative effect of a hypothetical scenario, undermining his counsel's knowledge of his situation, and whether he may or may not be charged and released, that tipped the scales in ultimately excluding the statement as involuntary.

However, in upholding the admissibility of the confession, the Court of Appeal found that the trial judge had properly considered all the evidence, including having viewed the video interviews. The Court of Appeal agreed with the trial judge's conclusion that "there was nothing in the circumstances of [Donald's] almost 24 hours in custody, nor in [Sells'] actions, that in any way could be said to be inhumane or otherwise oppressive." She found that the cold cell amounted to a minor discomfort, cigarettes had not been used as a reward or punishment for cooperation, and she did not observe Donald to be anxious or feeling any negative effect from not having his medication.[82]

Nevertheless, where both the accused and his lawyer are told by one police officer that it would be "no problem" for the lawyer to attend to the police station to continue their conversation in person, the confession will be excluded where another police officer then refuses to allow the lawyer to continue that conversation when he does arrive. The offer (and then refusal) to allow the conversation to continue provides objectively observable indicators that the police conduct had the effect of undermining the legal advice that the lawyer had originally provided the accused during their telephone call.[83]

Although the decision of the Supreme Court was unanimous (9:0), they were clear in their ruling that the circumstances in this case were unique. Generally, the Court stated, once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice.[84]

> Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Although other jurisdictions recognize a right to have counsel present throughout a police interview, that is not the law in Canada. Canadian courts and legislatures have taken a different approach to reconciling the personal rights of detainees with the public interest in effective law enforcement: *Sinclair* [2010 SCC 35] at paras. 37-39.[85]

III. Do Young Offenders Have the Same Rights?

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82 *Richard*, *ibid* at para 36.

83 *Dussault*, *supra* note 3.

84 *Ibid* at paras 3, 34.

85 *Ibid* at para 33.

Any consideration of the voluntariness of a statement given by a youth to a police officer or a person in authority must begin with an understanding of the particular vulnerabilities of young persons, and the need to ensure that their rights are carefully safeguarded.

That the young person does not seem vulnerable does not affect the obligations of the police to scrupulously observe the requirements of the *YCJA*, including s. 146, which protect and enforce those rights. Nor does it mean that the relevant legal principles are somehow lessened in his case. As Justice Cory wrote in *R. v. J.(J.T.)* in reference to s. 56 of the *YOA*:

> It may seem unnecessary and frustrating to the police and society that a worldly wise, smug 17-year-old with apparent anti-social tendencies should receive the benefit of this section. Yet it must be remembered that the section is to protect all young persons of 17 years or less. ...
>
> S. 56 itself exists to protect all young people, particularly the shy and the frightened, the nervous and the naïve. Yet justice demands that the law be uniformly applied in all cases. The requirements of s. 56 must be complied with whether the authorities are dealing with the nervous and naïve or the street-smart and worldly-wise. ... Principles of fairness require that the section be applied uniformly to all without regard to the characteristics of the particular young person. [86]

In this case, the accused, a 17-year-old who had been living in a common law relationship and who had fathered a child, was tried in adult court and convicted of first-degree murder. After a lengthy evening interrogation at the police station, he made an oral inculpatory statement and was then asked if he wanted an adult relative present. The relative attended and was present for about three minutes of the interrogation. The accused was charged with murder and informed of his right to counsel. His clothing was seized and hair and fingernail scrapings were taken before his lawyer arrived after midnight.

The lawyer spoke with the accused and then with the adult relative. The police again interrogated the accused when neither his lawyer nor the adult relative was present. In fact, the police this time did not ask him if he wished to have an adult relative present.

The Court ruled that s. 56 of the *YOA* recognized the problems and difficulties that beset young people when confronted with authority. The section is to protect <u>all</u> young people of 17 years or less and must be applied uniformly without regard to the characteristics of the particular young

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86 *R v J(JT)*, [1990] 2 SCR 755 at paras 18, 20, 79 CR (3d) 219.

person. Notwithstanding their bravado, young people would not appreciate the nature of their rights to the same extent as would most adults and are more susceptible to subtle threats arising from their surroundings and from persons in authority. It is just and appropriate that young people be provided with additional safeguards before their statements should be admitted. Under s. 56(2) no statement given by a young person to a person in authority is admissible without compliance with its enunciated requirements (i.e.: that they have the right to choose to have a lawyer or adult present when giving a statement).

In *R v. I.(L.R) and T.(E.)* the Supreme Court again ruled on the obligations of the police under the *YOA*:

> Section 56 sets out strict requirements which must be complied with in order to render a statement made by a young person to a "person in authority" admissible in proceedings against him or her. The rationale for this lies in Parliament's recognition that young persons generally have a lesser understanding of their legal rights than do adults and are less likely to assert and exercise fully those rights when confronted with an authority figure.[87]

The Court then went on to say:

> In my opinion, the purpose of the requirement that the explanation prescribed by Section 56 precede the making of the statement is to ensure that the young person does not relinquish the right to silence except in the exercise of free will in the context of a full understanding and appreciation of his or her rights.[88]

In this case the accused was charged with second-degree murder of a cab driver. His great-aunt, a First Nation band elder with little formal education, accompanied him on his arrest to the police station. The police informed her that there would be time to look for a lawyer upon their arrival at the police station but, on their arrival, both were taken to an interview room where the investigating constable began taking a statement over the course of four and a half hours.

Prior to taking the statement, a "Statement to Person in Authority Form" required by s. 56 of the *YOA* was completed. The officer tried to explain the right to counsel, the right to have an adult present, and the fact that any statement could be used in proceedings against the accused. A statement was made without the advice of a lawyer. Later, the accused, at his request, met with a lawyer for a half hour. The next day, the accused

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87 *R v I(LR) and T(E)*, [1993] 4 SCR 504, 109 DLR (4th) 140.

88 *Ibid* at para 35.

informed the investigating constable that he had information to add to his statement and, after speaking with his lawyer; he and the constable went through the process of completing the "Statement to Person in Authority" form. The accused indicated that he did not want a lawyer or other adult present. The second statement included an exchange about the plan the appellant and his co-accused's had to murder a cab driver. The trial judge excluded the first statement but admitted the second. The accused appealed and both statements were ruled inadmissible and the charges were stayed. In reaching their decision the Court held that:

> Section 56 not only incorporates the common law of voluntariness but also imposes statutory requirements with respect to the right to consultation and the presence of counsel or an adult. The requirement that the explanation as to the accused's rights precede the making of the statement is to ensure that the young person does not relinquish the right to silence except in the exercise of free will in the context of a full understanding and appreciation of his or her rights.
>
> A previous statement may operate to compel a further statement notwithstanding explanations and advice belatedly proffered. If, therefore, the successor statement is simply a continuation of the first, or if the first statement is a substantial factor contributing to the making of the second, the condition envisaged by s. 56 has not been attained and the statement is inadmissible.[89]

A. *Youth Criminal Justice Act* (*YCJA*)

Pursuant to section 146(1) of the *YCJA*, any statement made by a young person is required to be made in the presence of counsel and any other person consulted, if any, unless the young person decides otherwise. In addition, the young person has, before the statement is made, been given reasonable opportunity to consult with counsel, and with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect to the same offence; and if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

As this section is similar in substance to s. 56 of the *YOA*, the police would be required to have a lawyer or another adult representative present when a statement is made (see *R. v. J.(J.T.)* and *R v. I.(L.R) and T.(E.)*), unless the young person decides otherwise. While this might seem like a daunting

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89 *Ibid,* headnote.

task, the police in *R. v. K.* were successful in getting a statement admitted under the *YCJA*.

In this case the accused (Mr. T.) was fully aware of his right to silence, his right to speak to counsel and a parent, and his right to have them present at an interview if he so chose. He had received legal advice, and had been put on the phone to speak to his mother. He knew that even if someone had promised him something, including specifically his being released, in exchange for giving a statement, that such a promise wasn't valid. There was nothing about his physical condition that prevented him from thinking clearly and making a valid decision to waive any of his rights. He was articulate and mature for his age. He nonetheless decided to waive his rights and to give a statement. His conduct throughout the interview shows him to be unintimidated and confident, and voluntarily offering information to the police about this investigation and other criminal matters – statements admitted.[90]

Nevertheless, trying to exclude a lawyer or adult from the interview room against the wishes of the young person will result in any subsequent statement being ruled inadmissible, especially if the actions of the police can in any way be seen as belittling the accused's choice of lawyer or lawyers in general.[91]

However, while the language of the *YCJA* states that a lawyer or adult may be present, it makes no mention of a right to "participate," "coach," or otherwise assist the young person in providing that statement. As previously noted in *R. v. Ekman* "the cases [involving adults] discussed above do not support the proposition that if counsel were in attendance, he or she would be entitled to interject or interrupt during the interview or to override or "assist" with answers offered by the client."

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90 *R v K et al*, 2004 BCPC 210.

91 See *Burlingham supra* note 68 at n 29. The Supreme Court of Canada concluded that the accused's rights to counsel were violated when the police belittled the accused's lawyer and continued to question him despite his repeated statements that he would say nothing, absent consultation with his lawyer. See also *R v McKinnon*, 2005 ABQB 303, where it was determined the police undermined the accused's confidence in her lawyer or the solicitor-client relationship by "failing to clarify there would be further opportunity to consult counsel." See also *R v Timmons*, 2002 NSSC 113 for other inappropriate comments concerning counsel.

VI. CONCLUSION

Although some commentators had been suggesting prior to the Supreme Court's decisions in *Singh*, *Sinclair*, *Willier*, and *McCrimmon* that the police were actually losing their right to question suspects in the absence of their lawyer (if they could at all) once they had invoked their right to silence, the case law was actually "going the other way" and defence lawyers should have been better prepared for the decisions in these cases than relying on United States jurisprudence in the area.

As noted by Justice MacKenzie in *R. v. Therrien*,[92] who summarized the state of the law four years prior to the decisions in *Sinclair*, *Willier*, and *McCrimmon* being released in 2010 and 16 years before *Dussault* and *LaFrance* in 2022, the following four basic principles could be ascertained from the case law:

1. The police have a duty to investigate crimes, and it includes questioning people: *R. v. Oickle*, *R. v. Smith* and *R. v. Cuff*;
2. The police have the right to try to persuade suspects or accused persons to speak to them: *R. v. Hebert* and *R. v. Ekman*;
3. The right to silence is really the right to choose whether to remain silent: *R. v. Ertmoed* and *Ekman*; and
4. Once an accused has exercised his s. 10(b) right, the police are not required to terminate an interview simply because the accused says he does not want to speak to them: *R. v. Baidwan*, *R. v. Singh* (BCCA), *R. v. Bohnet*, and *R. v. Gormley*.

Subject to exceptional circumstances, these principles were all confirmed by the Supreme Court in *Singh*, *Sinclair*, *Willier*, and *McCrimmon*, and again in *Dussault* and *LaFrance*. While some police investigators may on occasion encourage counsel's presence during questioning when they believe it might actually assist in their investigation, in such instances it is obviously desirable to have the suspect answer the questions, not counsel. However, where counsel's answers appear to be "adopted" by the suspect they may still be used as evidence. While defence counsel may choose not to be present to avoid becoming a compellable witness against their own client, participating in the interview is not a bar to defending the case, particularly if there is no dispute over what was said.

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92 *Therrien*, *supra* note 50 at para 74-75.