32537
32769

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of British Columbia)
(On Appeal from the Court of Appeal for the Province of Alberta)

B E T W E E N:

TERRENCE TRENT SINCLAIR

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO);
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA;
ATTORNEY GENERAL OF ONTARIO;
BRITISH COLUMBIA CIVIL LIBERTIES ASOCIATION;
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

B E T W E E N:

STANLEY JAMES WILLIER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO);
DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA;
ATTORNEY GENERAL OF ONTARIO;
ATTORNEY GENERAL OF BRITISH COLUMBIA;
BRITISH COLUMBIA CIVIL LIBERTIES ASOCIATION;
CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(pursuant to Rules 42 and 55 to 59 of the *Rules of the Supreme Court of Canada*)

P. ANDRAS SCHRECK
CANDICE SUTER
SCHRECK & GREENE
Suite 1100
20 Dundas Street West
Toronto, Ontario M5G 2G8
Tel.: (416) 977-6268
Fax: (416) 977-8513
E-mail: schreck@schreckgreene.com

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

GOWLING LAFLEUR HENDERSON
Barristers & Solicitors
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3

Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Criminal Lawyers' Association (Ontario)

GIL D. McKINNON, Q.C. Barrister & Solicitor 1500-701 West Georgia Street Vancouver, B.C. V7L 1C6 Tel.: 604-681-7888 Fax: 604-681-7877 Email: gdm2004@shaw.ca **Counsel for the Appellant (Sinclair)**	**BRIAN A. CRANE, Q.C.** **GOWLING LAFLEUR HENDERSON** 2600-160 Elgin Street Ottawa, Ontario K1N 8S3 Tel.: 613-233-1781 Fax: 613-563-9869 Email: Brian.Crane@gowlings.com **Ottawa Agent for the Appellant (Sinclair)**
SUSAN J. BROWN **M. JOYCE-DEWITT-VAN OOSTEN** **MINISTRY OF ATTORNEY GENERAL** Criminal Appeals 6th Floor – 865 Hornby Street Vancouver, B.C. V6Z 2G3 Tel.: 604-660-1126 Fax: 604-660-1133 Email: Susan.J.Brown@gov.bc.ca Joyce.DeWittVanOosten@gov.bc.ca **Counsel for the Respondent (Sinclair)**	**ROBERT HOUSTON, Q.C.** **BURKE-ROBERTSON** 70 Gloucester Street Ottawa, Ontario K2P 0A2 Tel.: 613-236-9665 Fax: 613-235-4430 Email: rhouston@burkerobertson.com **Ottawa Agent for the Respondent (Sinclair)**
LAUREN L. GARCIA **DAWSON STEVENS & SHAIGEC** Barristers & Solicitors #300, 9924-106 Street Edmonton, Alberta T5K 1C4 Tel.: 780-424-9058 Fax: 780-425-0172 Email: lgarcia@dsscrimlaw.com **Counsel for the Appellant (Willier)**	**COLLEEN BAUMAN** **SACK GOLDBLATT MITCHELL LLP** Barristers & Solicitors 500-30 Metcalf Street Ottawa, Ontario K1P 5L4 Tel.: 613-235-5327 Fax: 613-235-3041 Email: cbauman@sgmlaw.com **Ottawa Agent for the Appellant (Willier)**

GORAN TOMLJANOVIC, Q.C. **BRIAN GRAFF** **APPEALS AND PROSECUTION POLICY BRANCH** Alberta Justice Criminal Justice Division 3rd Floor, Centrium Place 300, 332-6 Avenue S.W. Calgary, Alberta T2P 0B2 Tel.: 403-297-6005 Fax: 403-297-3453 Email: goran.tomljanovic@gov.ab.ca **Counsel for the Respondent (Willier)**	**HENRY S. BROWN, Q.C.** **GOWLING LAFLEUR HENDERSON** Barristers & Solicitors 2600-160 Elgin Street P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tel. (613) 233-1781 Fax: (613) 788-3433 Email: henry.brown@gowlings.com **Agent for the Respondent (Willier)**
CHRISTOPHER MAINELLA **PUBLIC PROSECUTION SERVICE OF CANADA** 515-234 Donald Street Winnipeg, Manitoba R3C 1M8 Tel.: 204-983-8991 Fax: 204-984-1350 Email: chris.mainella@ppsc-sppc.gc.ca **Counsel for the Intervener,** **Director of Public Prosecutions Canada**	**FRANÇOIS LACASSE** **PUBLIC PROSECUTION SERVICE OF CANADA** 2nd Floor, 284 Wellington Street Ottawa, Ontario K1A 0H8 Tel.: 613-957-4770 Fax: 613-941-7865 Email: flacasse@ppsc-sppc.gc.ca **Ottawa Agent for the Intervener,** **Director of Public Prosecutions Canada**
JOHN S. McINNES **ATTORNEY GENERAL OF ONTARIO** Crown Law Office – Criminal 720 Bay Street, 10th Floor Toronto, Ontario M5G 2K1 Tel.: 416-326-4594 Fax: 416-326-4656 Email: john.mcinnes@jus.gov.on.ca **Counsel for the Intervener,** **Attorney General of Ontario**	**ROBERT HOUSTON, Q.C.** **BURKE-ROBERTSON** Barristers & Solicitors 70 Gloucester Street Ottawa, Ontario K2P 0A2 Tel.: 613-236-9665 Fax: 613-235-4430 Email: rhouston@burkerobertson.com **Ottawa Agent for the Intervener,** **Attorney General of Ontario**
M. JOYCE-DEWITT-VAN OOSTEN **MINISTRY OF ATTORNEY GENERAL** Attorney General of British Columbia 3rd Floor, 940 Blanshard Street Victoria, B.C. V8W 3E6 Tel.: 250-387-0284 Fax: 250-387-4262 Email: Joyce.DeWittVanOosten@gov.bc.ca **Counsel for the Intervener,** **Attorney General of British Columbia**	**ROBERT HOUSTON, Q.C.** **BURKE-ROBERTSON** 70 Gloucester Street Ottawa, Ontario K2P 0A2 Tel.: 613-236-9665 Fax: 613-235-4430 Email: rhouston@burkerobertson.com **Ottawa Agent for the Intervener,** **Attorney General of British Columbia**

WARREN B. MILMAN **McCARTHY TÉTRAULT LLP** 1300-777 Dunsmuir Street P.O. Box 10424 Vancouver, B.C. V7Y 1K2 Tel.: 604-643-7100 Fax: 604-643-7900 **Counsel for the Intervener,** **British Columbia Civil Liberties Association**	**COLIN S. BAXTER** **McCARTHY TÉTRAULT LLP** 1400-40 Elgin Street Ottawa, Ontario K1P 5K6 Tel.: 613-238-2000 Fax: 613-563-9386 Email: cbaxter@mccarthy.ca **Ottawa Agent for the Intervener,** **British Columbia Civil Liberties Association**
JONATHAN C. LISUS **McCARTHY TÉTRAULT LLP** Suite 4700, 66 Wellington Street West Toronto-Dominionn Bank Tower Toronto, Ontario M5K 1E6 Tel. 416-601-7848 Fax: 416-868-0673 **Counsel for the Intervener,** **Canadian Civil Liberties Association**	**COLIN S. BAXTER** **McCARTHY TÉTRAULT LLP** 1400-40 Elgin Street Ottawa, Ontario K1P 5K6 Tel.: 613-238-2000 Fax: 613-563-9386 Email: cbaxter@mccarthy.ca **Ottawa Agent for the Intervener,** **Canadian Civil Liberties Association**

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

I. OVERVIEW

1. On March 23, 2009, the Honourable Madam Justice Charron granted the Criminal Lawyers' Association (Ontario) ("CLA") leave to intervene in these appeals and to file a factum not to exceed 15 pages in length. The CLA's request to present oral argument was deferred to a date following receipt and consideration of the written argument.

2. The CLA wishes to make two points in relation to the issues that arise on these appeals:

- Although there is a state interest in the effective investigation of crime, that interest cannot justify a restrictive interpretation of the right to counsel. The right to counsel is a constitutional right. The state interest in law enforcement is not. The notion of constitutionally entrenched rights necessarily implies the recognition that government action will be constrained. To interpret *Charter* rights narrowly in order to accommodate state interests is contrary to the approach this Court has taken since the early days of the *Charter*. If state interests are to limit a *Charter* right, they must do so under s. 1

- The reasoning employed by the courts below and the respondents in these cases are implicitly premised on the belief that counsel's role upon being contacted by a person who has been recently arrested is simply to tell the person not to say anything. Once this has been done, s. 10(*b*) of the *Charter* has fulfilled its purpose and the detainee has no right to any further consultation with counsel. It is the CLA's position that this reflects an

impoverished view of the role of criminal defence counsel who advise detainees. Section 10(*b*) is designed to ensure that detainees are made aware of their rights and are given advice as to how best to exercise them. How that responsibility is discharged will depend on the circumstances of the case and may require more than one telephone call. If the police are entitled to attempt to persuade a detainee to give up his right to silence, then the detainee is entitled to advice from counsel on whether or not to accede to such attempts at persuasion. Otherwise, any choice by the detainee is not a truly informed choice.

II. STATEMENT OF FACTS

3. The CLA accepts the facts as set out in the facta of the parties.

PART II – POINTS IN ISSUE

4. The central issue on these appeals on which the CLA wishes to make submissions is as follows:

> Does s. 10(*b*) of the *Charter* guarantee an individual who has been arrested or detained the right to the ongoing assistance of counsel, or is the right exhausted following a single telephone call to a lawyer?

5. It is the CLA's position that a purposive interpretation of s. 10(*b*) guarantees a detainee as much access to counsel as is required for counsel to be able to fully advise the detainee as to how to exercise his rights. It follows that the British Columbia Court of Appeal erred in concluding that after the appellant Sinclair had spoken to counsel, he had no right to further consultation with

counsel or to have his counsel present during questioning. It also follows that the Alberta Court of Appeal erred in concluding that the appellant Willier had waived his right to counsel of choice based on the fact that he had already spoken to duty counsel.

PART III – ARGUMENT

I. STATE INTERESTS DO NOT JUSTIFY RESTRICTING THE SCOPE OF SECTION 10(b)

A. Overview

6. In *R. v. Singh*, a majority of this Court held that requiring the police to cease questioning an accused who has indicated a desire to remain silent "ignores the state interest in the effective investigation of crime." The British Columbia Court of Appeal and the respondent in *Sinclair* have both attempted to rely on this portion of *Singh* in support of considering the state interest in effective law enforcement when interpreting the scope of s. 10(*b*). It is the CLA's position that *Singh* does not support such an approach. Moreoever, such an approach would run contrary to the basic principles of *Charter* interpretation set out in the jurisprudence of this Court.

R. v Singh, [2007] 3 S.C.R. 405 at ¶45;
R. v. Sinclair, A.R. I. p. 72, at ¶40

B. The Need for a Broad and Liberal Interpretation of Charter Rights

7. In the early days of the *Charter*, some courts were of the view that the proper approach to *Charter* interpretation should be one of restraint. This Court emphatically rejected that approach in its decision in *Hunter v. Southam*, where it was held that a "broad, purposive analysis" was the correct approach and that the *Charter* should be given a "large and liberal interpretation." Writing for this Court, Dickson J. (as he then was) stated:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.

Similarly, in *R. v. Therens*, Le Dain J. adopted with approval the following comments made by Tallis J.A. in the Saskatchewan Court of Appeal:

> Our nation's constitutional ideals have been enshrined in the *Charter* and it will not be a "living" charter unless it is interpreted in a meaningful way from the standpoint of an average citizen who seldom has a brush with the law. The fundamental rights accorded to a citizen under s. 10(*b*) should be approached on the basis application of the *Charter* should not be blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language. Using this approach, our citizens will not be placed in a position of feeling that the statements in the *Charter* are only rights in theory. If these rights are to survive and be available on a day-to-day basis we must resist the temptation to opt in favour of a restrictive approach.

It is the CLA's position that this approach remains the correct one.

> *Hunter v. Southam,* [1984] 2 S.C.R. 145 at 156;
> *R. v. Therens,* [1985] 1 S.C.R. 613 at 633, *per* Le Dain J. (dissenting on other grounds)

C. The Consideration of State Interests

8. While state interests are obviously not ignored in the *Charter* jurisprudence, for the most part, the liberal approach has meant that state interests are not considered when determining the scope of a *Charter* right. Instead, they are considered under s. 1, as was explained by Professor Stuart in *Charter Justice in Canadian Criminal Law*:

> In the United States balancing of interests must inevitably take place when the court determines the boundary of a Constitutional Right. Under the Canadian *Charter*, in the absence of internal modifiers such a "unreasonable", the balancing of the rights of the individual against other state interests should occur under s. 1 or at the point of deciding upon the appropriate remedy. *Our courts have generally adopted a clear two-stage approach under which the content of the right or freedom is first defined in terms of the individual interest it was meant to protect. State objectives and other interests are only relevant once a violation has been found and the state is attempting to demonstrably justify the violation as*

> *a reasonable limit under s. 1.* Balancing at the first stage weakens *Charter* protections in view of the state's heavy burden under s. 1 [emphasis added].

Or, as this Court put it in *R. v. Zundel,* ". . . we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection."

> D. Stuart, *Charter Justice in Canadian Criminal Law,* 4th ed. (Toronto: Thomson Carswell, 2005) at 6-7;
> *R. v. Zundel,* [1992] 2 S.C.R. 731 at 756

9. A limited consideration of state interests may, in some cases, inform a consideration of the scope of protection under s. 7 of the *Charter.* Most of the cases considering this section have dealt with the interpretation of the term "principles of fundamental justice." As Lamer J. (as he then was) observed in *Reference Re Section 94(2) of the Motor Vehicle Act*, "[t]he term 'fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right." For this reason, a consideration of whether a restriction on the right to life, liberty or security of the person is in accordance with the principles of fundamental justice will sometimes involve a balancing between individual and societal interests. However, such a balancing will be limited, as was made clear by Gonthier and Binnie JJ. in *R. v. Malmo-Levine; R. v. Caine:*

> We do not think that these authorities [listed *infra*] should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7.
>
> . . . .
>
> The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice.

> As Sopinka J. explained in *Rodriguez* [*infra*], "*in arriving at these principles [of fundamental justice]*, a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:
>
> > It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.
> >
> > . . . .
> >
> > The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question [emphasis in original].

It was in this limited sense that state interests were considered by the majority in *Singh*.

> *Reference Re Section 94(2) of the Motor Vehicle Act,* [1985] 2 S.C.R. 486 at 501;
> *R. v. Malmo-Levine, R. v. Caine*, [2003] 3 S.C.R. 571 at ¶ 96-99;
> *Cunningham v.Canada*, [1993] 2 S.C.R. 143;
> *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 539, *per* La Forest J.;
> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 592-593

D. Interpreting Section 10(b) of the Charter in Light of Its Purpose

10. The purpose of s. 10(*b*) of the *Charter* was explained by Lamer C.J.C. in *R. v. Bartle* as follows:

> The purpose of the right to counsel guaranteed by s. 10(*b*) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, *most importantly, to obtain advice on how to exercise those rights and fulfil those obligations*. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in

> *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty [emphasis added and in original].

The scope of the protection afforded by s. 10(*b*) must be interpreted in a such way as to give effect to these objectives, that is, to ensure that detainees are in a position to be informed of their rights, and to obtain advice on how to exercise them. That advice cannot always be given only immediately following arrest. For the reasons outlined below, the detainee's need for advice is ongoing and may continue beyond the initial telephone call.

R. v. Bartle, [1994] 3 S.C.R. 173 at 191

11. In *Sinclair*, the British Columbia Court of Appeal declined to give s. 10(*b*) such a broad interpretation because in its view, a "balancing of societal and individual rights" favoured a more restrictive approach. In this Court, the Respondent in *Sinclair* asks this Court to take societal interests into account and to conclude that s. 10(*b*) is a "limited" right. Both relied on the majority judgment in *Singh.* With respect, this approach is wrong and finds no support in *Singh.* As outlined in *Malmo-Levine*, a limited consideration of societal interests may be appropriate in "elucidating a particular principle of fundamental justice," such as the right to silence. That is what occurred in *Singh.* However, the right to counsel under s. 10(*b*) is a free-standing right. Its scope must be delineated in light of its purpose and should not involve any balancing of individual and state interests. State interests can and should only be considered under s. 1

R. v. Sinclair, supra at ¶ 39;
R. v. Singh, supra at ¶ 17

12. If the Crown takes the position that allowing a detainee more than one telephone call or allowing counsel to attend an interview will somehow unacceptably impede effective law enforcement, then it must justify its proposed limit on the right to counsel under s. 1. In this

regard, it is noteworthy that as pointed out in the Appellant Sinclair's factum, individuals arrested in Australia, England, New Zealand and the United States all have the right to ongoing contact with counsel. There is no reason to believe that law enforcement in those jurisdictions is any less effective than in Canada.

II. SECTION 10(b) OF THE CHARTER AND THE ROLE OF DEFENCE COUNSEL

A. Overview

13. The reasoning employed by the Courts of Appeal and the Crown in these cases is based on the implicit premise that the sole purpose of having a detainee speak to counsel upon arrest is so that counsel can advise the detainee to be quiet. Once that has been done, the purpose of s. 10(*b*) has been achieved and there is no reason why further contact with counsel is necessary. With respect, this characterization trivializes the role of criminal defence counsel.

14. While ensuring that detainees are advised of the right to remain silent is an important purpose of s. 10(*b*), it is not the only purpose. In most cases, the police will already have advised the detainee that he need not say anything. It is true that in the vast majority of cases, a lawyer speaking to a person who has just been arrested will not only explain to the detainee that he has the right to remain silent, but will also advise him to exercise the right. However, proper legal advice can and often will involve much more. As Simmons J.A. of the Ontario Court of Appeal put it in *R. v. Badgerow*:

> The right to seek advice from counsel of choice on arrest or detention is not limited to receiving perfunctory advice to keep quiet. Rather, it entitles an accused to obtain *sufficiently meaningful advice to enable him or her to make an informed choice concerning whether to exercise his or her right to silence* [emphasis added].

R. v. Badgerow, [2008] O.J. No. 3416 at ¶ 50 (C.A.)

15. As this Court has noted on more than one occasion, a person who is detained is at a disadvantage relative to the state. Defence counsel's role under s. 10(*b*) is to restore balance to the relationship by informing the detainee of his rights and, most importantly, by advising him on how to exercise those rights. However, even after an initial telephone call, a detainee who has spoken to counsel remains at a disadvantage relative to the state. If the police wish to keep questioning him, there is nothing he can do about it. As one commentator put it:

> The accused cannot stop the interrogation absent putting his hands over his ears, closing his eyes, and curling up in a ball in the corner until the police leave. Vigorous and skilfull questioning is permitted. The police are allowed to misstate facts, exaggerate facts, appeal to the conscience of the accused, sympathise, exhort, even offer inducements as long as there is no *quid pro quo* understanding.

The French version of s. 10(*b*) guarantees a detainee "l'assistance d'un avocat." In order to effectively provide that assistance, counsel may need ongoing contact with the detainee, either through subsequent telephone calls or by attending at the police station.

L. Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002), 29 Man. L.J. 149 at ¶ 35;
R. v. Bartle, supra at 191;
R. v. Hebert, [1990] 2 S.C.R. 151 at 176

B. The Role of Counsel in Ensuring an Informed Choice

16. As this Court held in *Hebert* and re-affirmed in *Singh,* when a detainee asserts an intention to exercise his right to silence, the police are entitled to resort to means of "legitimate persuasion" in an effort to get the detainee to change his mind. In other words, the police are entitled to attempt to persuade the detainee to give up his constitutional right to remain silent, provided the detainee's choice is informed and voluntary. However, a truly informed choice necessarily entails a consideration of the advantages and disadvantages of each course of action. If the police can advise the detainee of the advantages of speaking, it is only fair that the detainee have access to information respecting the advantages of remaining silent. One of the purposes of s. 10(*b*)

is to allow detainees to obtain advice on how best to exercise their rights. Decisions in this regard are not only made immediately following arrest. They may be made later on, and once made, may be reconsidered. It follows that the need for the advice s. 10(*b*) guarantees is not exhausted following a single phone call made immediately after arrest. While the Respondent Crown in *Sinclair* is of the view that a detainee's s. 10(*b*) rights are exhausted following initial contact with counsel, the Respondent Crown in *Willier* appears to accept, in paragraph 25 of its factum, that a detainee is entitled to more than one contact with counsel.

17. A valid decision to give up the right to silence must be informed. What is meant by "informed" was explained by McLachlin J. in *R. v. Hebert* in the following terms:

> I should not be taken as suggesting that the right to make an informed choice whether to speak to the authorities or to remain silent necessitates a particular state of knowledge on the suspect's part over and above the basic requirement that he possess an operating mind. The *Charter* does not place on the authorities and the courts the impossible task of subjectively gauging whether the suspect appreciates the situation and the alternatives. *Rather, it seeks to ensure that the suspect is in a position to make an informed choice by giving him the right to counsel* [emphasis added].

Thus, the task of ensuring that any choice a detainee makes is informed falls to counsel. Provided the detainee has had access to counsel, the courts will assume that counsel fulfilled his or her obligation to provide the detainee with all of the advice and information required to make an informed choice. However, the advice a lawyer will give in any situation will depend on what information the lawyer has. Usually, this information is very limited at the time of the initial telephone call following arrest. As the investigation progresses, more information may become available and as a result, the lawyer's advice may change. Counsel cannot fulfill his or her role if he or she is forced to give advice on the basis of very little information and is then provided no opportunity to update that advice when more information becomes known. If counsel is to be

charged with the responsibility of ensuring that a detainee's choice is informed, then counsel must be given the freedom to have ongoing contact with the detainee if necessary, including attendance at an interview.

R. v. Hebert, supra at 177

18. The facts in *Sinclair* demonstrate why the need for the assistance of counsel continues beyond the initial telephone call. At the time Mr. Sinclair had his two three-minute telephone conversations with counsel, all he had apparently been told by the police was that he had been arrested for the murder of Mr. Grice. At the outset of his interrogation, Mr. Sinclair told the police that he wished to exercise his right to silence. He presumably did so on the advice of his lawyer. The police then attempted to persuade Mr. Sinclair to reverse his decision to remain silent by informing him of the extent of the evidence in their possession. At this point, Mr. Sinclair had to decide whether to continue to remain silent notwithstanding that the police possessed substantial evidence of his guilt. At the time he spoke to his lawyer, he was not aware of what the police knew. Mr. Sinclair clearly wished to speak to counsel again, presumably with a view towards obtaining advice on whether he should continue to remain silent notwithstanding the strength of the case against him. He was denied that opportunity and had to make the decision on his own.

C. Ongoing Access to Counsel is Consistent With Effective Investigation

19. For the reasons outlined earlier, it is the CLA's position that an interpretation of the scope of s. 10(*b*) should not involve a balancing of individual and societal interests. However, even if it did, it is difficult to understand how allowing a detainee to speak to a lawyer more than once will have an adverse effect on legitimate law enforcement practices. A majority of this Court in *Singh* held that

the police are permitted to employ legitimate means of persuasion, but are not allowed to deny the detainee the right to choose. It is difficult to understand how allowing detainees more than one opportunity to consult counsel will hinder *legitimate* attempts by the police to persuade a detainee to give up his right to silence. It is true that subsequent contact with counsel will probably result in counsel telling the detainee why he should not be moved by the police's attempts to persuade him to speak. However, a truly free and informed choice necessarily entails a consideration of the advantages and disadvantages of each course of action. If the police can advise the detainee of the advantages of speaking, it is only fair that the detainee have access to information respecting the advantages of remaining silent. Allowing detainees to speak to counsel may result in fewer confessions, but it will result in more detainees being able to make informed choices.

20. The Respondent in *Sinclair* submits that allowing a detainee subsequent contact with counsel is inconsistent with this Court's judgment in *Singh* since it would allow a detainee to "shut down" the interview process by requesting counsel and thereby do indirectly what this Court in *Singh* said could not be done. At issue in *Singh* was whether a detainee's assertion of the right to silence meant that the police had a duty to cease questioning. A detainee's request for additional contact with counsel would not "shut down" the interview process. At most, a request for a second consultation with counsel or to have counsel present will require that the interrogation be briefly suspended. As with the initial consultation with counsel, a detainee would have to exercise his rights in a reasonable manner. Once the detainee has consulted counsel, the interrogation could continue.

21. Furthermore, it is overly simplistic to presume that counsel's advice to a detainee will always be to remain silent. The task of providing sound legal advice to somebody who has been arrested is more complex than that and will depend on the circumstances of the case. This point can be illustrated by the following hypothetical fact situation. A person is arrested for robbery and consults

counsel. Counsel, who knows only the nature of the charge at this point, advises the person to remain silent. The police then interrogate the accused and attempt to persuade him to make a statement by disclosing facts about their investigation. One of the facts they disclose is that the robbery occurred at noon the previous Friday. The accused knows that he has an alibi at that time and that it can be easily verified. He wonders whether his lawyer's advice would be the same in light of this new information. If no further contact with counsel is permitted, the accused may well decide to continue to follow his counsel's advice. As a result, he spends more time in custody and the police fail to take steps to apprehend the real perpetrator. Had further contact with counsel been permitted, or had counsel been present for the interview, the alibi may have been disclosed and verified, with the result that the accused regains his liberty and the police do not waste valuable investigative resources on the wrong suspect.

D. Contact With Counsel Does Not Amount to Waiver of the Right to Further Contact

22. In *Willier*, the Court of Appeal concluded that the appellant had waived his right to counsel of choice. There was no explicit waiver. Rather, waiver was inferred from the fact that the appellant made no further request to speak to his counsel of choice *and* because he had spoken to duty counsel. Had the appellant not spoken to duty counsel, his failure to re-assert his wish to speak to counsel of choice could not have amounted to waiver. In *R. v. Prosper*, Lamer C.J.C. held:

> In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.

There is no principled reason why the approach should be any different when a detainee indicates a wish to speak to a particular counsel. Section 10(*b*) includes a right to counsel of choice. The standard for waiver of this aspect of s. 10(*b*) should be no different than the standard for any other aspect. The Alberta Court of Appeal's conclusion to the contrary was based on the implicit premise that the purposes of s. 10(*b*) were fulfilled once there was a conversation with duty counsel. They were not.

R. v. Willier, A.R. I., Tab 4, p. 26 at ¶56;
R. v. Prosper, [1994] 3 S.C.R. 236 at 278;
R. v. Ross, [1989] 1 S.C.R. 3 at 10

PART IV – COSTS

23. The CLA asks that no costs be awarded against it and does not seek costs.

PART V – ORDER REQUESTED

24. The CLA respectfully requests leave to make oral submissions of not longer than 15 minutes.

25. The CLA takes no position on the disposition of these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF APRIL, 2009

P. Andras Schreck
Candice Suter

P. ANDRAS SCHRECK
CANDICE SUTER
SCHRECK & GREENE
Barristers
Suite 1100

20 Dundas Street West
Toronto, Ontario M5G 2G8

Tel.: 416.977.6268
Fax: 416.977.8513
E-mail: schreck@schreckgreene.com

Of Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

PART VI – TABLE OF AUTHORITIES

PART VII – RELEVANT STATUTES

None.