SUPREME COURT OF CANADA

CITATION: R. *v.* McCrimmon, 2010 SCC 36

DATE: 20101008
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BETWEEN:

Donald Russell McCrimmon
Appellant
and
Her Majesty The Queen
Respondent
- and -
Director of Public Prosecutions of Canada,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Criminal Lawyers' Association of Ontario

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 27)	McLachlin C.J. and Charron J. (Deschamps, Rothstein and Cromwell JJ. concurring)
CONCURRING REASONS: (paras. 28 to 34)	Binnie J.
DISSENTING REASONS: (paras. 35 to 62)	LeBel and Fish JJ. (Abella J. concurring)

Donald Russell McCrimmon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions of Canada, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Criminal Lawyers' Association of Ontario *Interveners*

Indexed as: R. *v.* McCrimmon

2010 SCC 36

File No.: 32969.

2009: May 12; 2010: October 8.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to counsel — Custodial interrogation — Presence of counsel throughout interrogation — Renewed opportunity to consult counsel — Accused's counsel of choice unavailable — Accused spoke instead to duty counsel — Neither counsel present during police interrogation — Repeated requests for further consultation — Incriminating statements made during interrogation — Whether accused's right to counsel breached — Canadian Charter of Rights and Freedoms, s. 10(b).

M was arrested in relation to eight assaults committed against five different women over the course of the preceding two months. Upon being informed of the reasons for his arrest and of his right to counsel, he stated that he wished to speak to a lawyer. When the police failed to reach the particular lawyer he requested, M agreed to the police contacting Legal Aid and he spoke to duty counsel briefly. During the course of the police interrogation that followed, he stated several times that he wanted to speak to a lawyer and to have a lawyer present. His requests were denied. Eventually, M made incriminatory statements. His objections to the admissibility of the statements on *Charter* grounds were rejected in the trial and appeal courts below.

Held: The appeal should be dismissed.

Per **McLachlin** C.J. and Deschamps, **Charron**, Rothstein and Cromwell JJ.: For the reasons set out in the companion case of *R. v. Sinclair*, 2010 SCC 35, s. 10(*b*) of the *Charter* does not require the presence, upon request, of defence counsel during a custodial interrogation. Also,

no s. 10(*b*) violation ensued from the failure to provide M with an opportunity to consult with the particular lawyer of his choice prior to the interrogation or from the denial of his requests for further consultation during the course of the interrogation. While M expressed a preference for speaking with a particular lawyer, the police rightly inquired whether he wanted to contact duty counsel instead when that lawyer was not immediately available. M agreed, exercised his right to counsel before the interrogation began, and expressed satisfaction with the consultation. He also indicated an awareness of his rights at the commencement of the interrogation. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as M's counsel of choice became available. Therefore, there was no breach of s. 10(*b*) prior to commencing the interrogation.

Nor was there a breach when the police continued the interrogation despite M's assertion that he did not want to discuss the incidents in question until he had spoken with his lawyer. As explained in *Sinclair*, the police may provide the detainee with any number of opportunities to consult with counsel. However, they are constitutionally required to do so only where developments in the course of the interrogation make this necessary to serve the purpose underlying s. 10(*b*) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not. During the course of the interrogation, there was no objectively discernable change in circumstances which gave rise to M's right to consult again with counsel. When pressed for his version of the events, M emphasized the absence of his lawyer, expressing his sense of vulnerability without legal representation and his ignorance of the law, and insisted that he would not speak without his lawyer. Arguably, M's expression of vulnerability and ignorance of the law, when considered in isolation, could indicate confusion about his choices and right to remain

silent. However, when the circumstances are viewed as a whole, it is clear that M understood his right to silence. The police repeatedly confirmed that it was M's choice whether to speak or not. It is apparent from M's interjections in the course of the interrogation that he understood this. Further, the trial judge properly considered any impact on M arising from the police's refusals to facilitate further contacts with counsel in assessing the voluntariness of the statements. There is no reason to interfere with the trial judge's conclusion that the statements were voluntary or with his dismissal of the *Charter* application

Per **Binnie** J.: M was not denied his s. 10(*b*) right to counsel. For the reasons set out in a dissent in the companion case of *Sinclair*, a detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interrogation where his or her request falls within the purpose of the s. 10(*b*) right (i.e. to satisfy a need for legal assistance rather than delay or distraction) and such request is reasonably justified by the objective circumstances that were or ought to have been apparent to the police during the interrogation. M meets the first branch of the test, but fails at the second. Nothing in the transcript of the interrogation suggests an attempt by M to assert his s. 10(*b*) right for a purpose other than meaningful legal assistance. On the other hand, there is nothing in the transcript to suggest that his requests were reasonably justified by the objective circumstances. Nowhere can M flag a point in time or an issue on which a further consultation could be considered reasonably justified. M's incriminating statements occur when the officer showed M a photograph of one of the victims and related some of her story. The breakthrough, when it came, seemed to drop gently into the officer's lap. There is nothing in the exchange that ensued, or elsewhere in the transcript, to suggest that M was wrongfully denied his right to counsel.

Per **LeBel**, **Fish** and Abella JJ. (dissenting): Since detainees have no legal obligation to participate in a custodial interrogation, they can hardly be said to frustrate, impermissibly, any persistent attempts by the police to prevent them from exercising their constitutional right to counsel. In addition, the right to consult counsel does not depend on the narrow and restrictive finding, in the opinion of the police interrogator, of a manifest or material change in jeopardy. A purposive reading of s. 10(*b*) must give greater weight to the role of counsel — under our system of justice generally, and in the context of custodial interrogations specifically. It is a limitation on the right to counsel, not the exercise of that right, that must be constitutionally justified. Finally, characterizing the relentless interrogation of a confined suspect as an "investigative interview" does not transform its true nature and sole purpose. A relentless interrogation is an attempt by police officers who have total physical control of a detainee to obtain an incriminating statement by systematically disregarding the detainee's express wish and declared intention not to speak with them. The police cannot refuse to allow a detainee to consult counsel and, by pursuing their interrogation, render ineffective the detainee's assertion of the right to silence.

In this case, M sought but was denied access to counsel during the course of a lengthy interrogation. The interrogation transcript makes it abundantly clear that, from the outset and up until the point where he begins to confess, M clearly expressed his desire not only to speak with a lawyer, but to have a lawyer explain the situation and charges to him. Throughout his interrogation, M's repeated requests to speak with his lawyer, that the interrogation be terminated, and that he be returned to his cell, were consistently rebuffed by a police interrogator, intent on extracting a confession, notwithstanding M's unequivocal and repeated assertion of his right to silence. The police thereby breached his rights under s. 10(*b*) *Charter*. Since the officer's *Charter*-infringing

conduct was therefore serious, and that conduct had a serious impact on M's *Charter* rights, the statements obtained should be excluded pursuant to s. 24(2). A new trial must therefore be had.

Cases Cited

By McLachlin C.J. and Charron J.

Applied: *R. v. Sinclair*, 2010 SCC 35; *R. v. Willier*, 2010 SCC 37;**referred to:** *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Brydges*, [1990] 1 S.C.R. 190.

By Binnie J.

Applied: *R. v. Sinclair*, 2010 SCC 35.

By LeBel and Fish JJ. (dissenting)

R. v. Sinclair, 2010 SCC 35; *R. v. Willier*, 2010 SCC 37; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 10(*b*), 24(2).

APPEAL from a judgment of the British Columbia Court of Appeal (Huddart, Frankel and Neilson JJ.A.), 2008 BCCA 487, 262 B.C.A.C. 193, 441 W.A.C. 193, [2008] B.C.J. No. 2567 (QL), 2008 CarswellBC 2813, affirming a decision of Wingham J., 2006 CarswellBC 3754. Appeal dismissed, LeBel, Fish and Abella JJ. dissenting.

Gil D. McKinnon, Q.C., and *Christopher J. Nowlin*, for the appellant.

Mary T. Ainslie, for the respondent.

David Schermbrucker and *Christopher Mainella*, for the intervener the Director of Public Prosecutions of Canada.

Warren B. Milman and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

Jonathan C. Lisus, *Alexi N. Wood* and *Adam Ship*, for the intervener the Canadian Civil Liberties Association.

P. Andras Schreck and *Candice Suter*, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of McLachlin C.J. and Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] This appeal and its companion cases, *R. v. Sinclair*, 2010 SCC 35, and *R. v. Willier*, 2010 SCC 37, elaborate upon the nature and limits of the right to counsel provided under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. Mr. McCrimmon was arrested in relation to eight assaults committed against five different women over the course of the preceding two months. Upon being informed of the reasons for his arrest and of his right to counsel, he stated that he wished to speak to a lawyer. When the police failed to reach the particular lawyer he requested, Mr. McCrimmon agreed to contacting Legal Aid and he spoke to duty counsel for about five minutes. During the course of the police interrogation that followed, he stated several times that he wanted to speak to a lawyer and to have a lawyer present. His requests were denied. Eventually, Mr. McCrimmon made incriminatory statements. His objections to the admissibility of the statements on common law and *Charter* grounds were rejected in the trial and appeal courts below.

[2] In his appeal to this Court, Mr. McCrimmon alleges that the police violated his rights under s. 10(*b*) in three ways: by failing to hold off the custodial interview until he consulted counsel of his choice; by denying him the right to have counsel present during the interview; and by repeatedly denying his requests for further consultation with counsel during the course of the interrogation. No further appeal is taken from the ruling on voluntariness, although Mr. McCrimmon invites the Court to hold that the trial judge's failure to recognize an infringement of

s. 10(*b*) undermined his conclusion that his statements were voluntary.

[3] For the reasons set out in *Sinclair*, we reject Mr. McCrimmon's submission that s. 10(*b*) requires the presence, upon request, of defence counsel during a custodial interrogation. We also agree with the courts below that no s. 10(*b*) violation ensued from the failure to provide him with an opportunity to consult with the particular lawyer of his choice prior to the interrogation or from the denial of his requests for further consultation during the course of the interrogation. As explained in *Sinclair*, the police may provide the detainee with any number of opportunities to consult with counsel. However, they are constitutionally required to do so only where developments in the course of the interrogation make this necessary to serve the purpose underlying s. 10(*b*) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not. Where no such change occurs, the better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule.

[4] In this case, there was no change in circumstances triggering a right to renewed consultation with counsel. Further, the trial judge properly considered any impact on Mr. McCrimmon arising from the police's refusals to facilitate further contacts with counsel in assessing the voluntariness of the statements. We see no reason to interfere with the trial judge's conclusion that the statements were voluntary or his dismissal of the *Charter* application.

[5] For the reasons that follow, we would dismiss the appeal.

II. Facts

[6] On Saturday, December 3, 2005, the RCMP arrested Mr. McCrimmon at his home in relation to eight assaults committed against five different women over the course of the previous few months. He was alleged to have picked up the women in downtown Chilliwack, B.C., driven them to an isolated area, and assaulted them. Two of the complainants alleged that he had drugged them with what turned out to be chloroform. The offences with which he was charged included assault, sexual assault, assault causing bodily harm, unlawful confinement, and the administration of a noxious substance with intent to cause bodily harm.

[7] At the outset, Cst. Laurel Mathew advised Mr. McCrimmon of the reasons for his arrest, his right to retain and instruct counsel, and his right to remain silent. She told him that he could call any lawyer he wanted, and that he had a right to contact a Legal Aid lawyer through a 24-hour telephone service. Mr. McCrimmon stated that he wished to speak to a lawyer. Cst. Mathew escorted him to the RCMP detachment in Chilliwack where Mr. McCrimmon provided the name of a Vancouver lawyer, John Cheevers, with whom he wished to speak. Cst. Mathew called Mr. Cheevers' office, but was unable to reach him and left a message on the answering machine. She did not attempt to find Mr. Cheevers' home telephone number, nor did Mr. McCrimmon ask her to do so. He said to Cst. Mathew: "I don't know if I'll hear back from him. Like I said, I only used him once. He's the only guy I know. I've never really dealt with a lawyer before." Cst. Mathew asked Mr. McCrimmon if he would like to call a Legal Aid lawyer, to which he replied: "Well, yes, definitely, but I prefer Mr. Cheevers." Mr. McCrimmon then spoke privately with duty counsel for

approximately five minutes. At the end of his conversation, Mr. McCrimmon confirmed that he was satisfied with the consultation and that he understood the advice provided by duty counsel.

[8] At 5:15 p.m., Sgt. Allan Proulx, an officer with specialized training in interrogation techniques, took Mr. McCrimmon into an interview room outfitted with an audio and video recorder and spoke with him for approximately three hours and twenty minutes. At the outset of the interview, Mr. McCrimmon confirmed having spoken with a Legal Aid lawyer, revealing the advice received that he did not have to say anything to the police. Sgt. Proulx affirmed Mr. McCrimmon's right to silence, cautioned him that anything he said could be used against him, and commenced with the investigative interview.

[9] When Sgt. Proulx turned to the incidents under investigation, Mr. McCrimmon stated that he did not want to discuss the topic until he had spoken with his lawyer (A.R., vol. 3, at p. 37), but at the same time indicated that he did not mind speaking with the officer (A.R., vol. 3, at p. 39). Sgt. Proulx told Mr. McCrimmon that at the end of the day, he had the choice to talk or not, but that he could not have his lawyer in the interview room with him. Ten minutes into the discussion, after Sgt. Proulx explained the incriminatory nature of potential DNA evidence, Mr. McCrimmon reiterated his request to speak to his own lawyer. Sgt. Proulx declined this request, stating his understanding that Mr. McCrimmon had already exercised his right to counsel by speaking to duty counsel and had expressed satisfaction with the advice received. Mr. McCrimmon did not dispute this but asked to be taken back to his cell, indicating that he was not going to answer any more questions. Sgt. Proulx told Mr. McCrimmon he did not have to answer questions but that it was his

job as a police officer to provide him with the facts (A.R., vol. 3, at p. 46).

[10] Sgt. Proulx continued his attempts to persuade Mr. McCrimmon to discuss the incidents under investigation, interspersing his remarks with references to what the police knew about the incident and referring to witness statements. When pressed for his version of events, Mr. McCrimmon emphasized the absence of his lawyer, his sense of feeling "vulnerable without any representation", and his ignorance of "the legal ways" (A.R., vol. 3, at p. 51). Mr. McCrimmon insisted that he would not speak without his lawyer, stating "my voice will be heard in the end, with my lawyer", and that he was "adamant about that" (A.R., vol. 3, at pp. 53 and 55). Sgt. Proulx affirmed that Mr. McCrimmon had a right to exercise his right to silence and that he did not have "to keep repeating it ... to get that" (p. 55).

[11] Sgt. Proulx then carried on with long monologues obviously designed to establish a rapport with Mr. McCrimmon and elicit information from him. Later, steering the topic of conversation back to the alleged offences, Sgt. Proulx related more details known to the police, prompting Mr. McCrimmon to begin describing his version of the events. As Sgt. Proulx showed photographs of the assaulted women (A.R., vol. 3, at p. 87), Mr. McCrimmon said he was going to be sick, and he was escorted to the washroom where he threw up. At this point, two hours after the start of the interview, Mr. McCrimmon began to admit to his involvement in the investigated offences, following Sgt. Proulx's display of photographs taken from a store security camera. Mr. McCrimmon subsequently made a number of statements implicating himself in the offences. The interview concluded at approximately 8:24 p.m. and Mr. McCrimmon was returned to his cell.

III. Judicial History

[12] On a pre-trial *voir dire* in the Provincial Court of British Columbia, Mr. McCrimmon argued that his statements were involuntary and thus inadmissible, and in the alternative, sought their exclusion under s. 24(2) on the basis of alleged s. 7 and s. 10(*b*) violations of the *Charter*. Mr. McCrimmon did not call evidence on the *voir dire*.

[13] The trial judge dismissed these arguments and admitted the statements (2006 CarswellBC 3756). He found that the police had not gone too far in the use of their interrogation techniques with Mr. McCrimmon, neither running afoul of the confessions rule, nor breaching his right to silence under s. 7 of the *Charter*. In particular, he rejected the contention that the questioning of Mr. McCrimmon was a "grilling" that, taken with the ignoring of his numerous requests to speak to counsel, amounted to an atmosphere of oppression. Rather, "the evidence indicates that Mr. McCrimmon was treated with respect from the time of his arrest and through his interview with Sgt. Proulx" (2006 CarswellBC 3754, at para. 28). He therefore ruled the statements voluntary. The trial judge held further that Mr. McCrimmon's *Charter* rights under s. 10(*b*) were satisfied when he consulted with the lawyer from Legal Aid. He rejected the contention that the denial of a further opportunity to consult with counsel violated either s. 10(*b*) or s. 7, as the evidence indicated that Mr. McCrimmon fully understood his rights.

[14] Ultimately, Mr. McCrimmon pleaded guilty to two of the eight counts during the course

of the trial, and he was convicted on two further charges of sexual assault and two related charges of administering a noxious substance.

[15] Mr. McCrimmon appealed the trial judge's finding of voluntariness and his *Charter* ruling before the British Columbia Court of Appeal. Frankel J.A. for a unanimous court affirmed the voluntariness of Mr. McCrimmon's statements, and agreed with the trial judge that this determination defeated any allegation of a s. 7 violation (2008 BCCA 487, 262 B.C.A.C. 193). He also rejected the argument that the trial judge erred in dismissing his claim of a s. 10(*b*) violation, holding that Mr. McCrimmon had no right to speak with the lawyer of his choice prior to being interviewed by Sgt. Proulx, given that he had exercised his right to counsel by speaking with a lawyer from Legal Aid, and had expressed satisfaction with the advice received. Frankel J.A. also rejected Mr. McCrimmon's contention that s. 10(*b*) required the police to refrain in their questioning once he asked to speak with a lawyer again, holding that s. 10(*b*) afforded no such right.

IV. Analysis

[16] As stated at the outset, we reject Mr. McCrimmon's submission that s. 10(*b*) requires the presence, upon request, of defence counsel during a custodial interrogation for the reasons set out in *Sinclair*. The remaining issues are the following:

(1) Did the police breach Mr. McCrimmon's rights by failing to hold off the interview until he had an opportunity to consult with counsel of his choice, Mr. Cheevers?

(2) Alternatively, did the police breach his s. 10(*b*) rights under the *Charter* by denying his repeated requests to consult further with counsel? If so, did the trial judge's failure to recognize a violation of s. 10(*b*) undermine his conclusion that the statements were voluntary under the confessions rule?

A. *Did the Police Breach Section 10(b) by Denying Mr. McCrimmon his Right to Counsel of Choice?*

[17] As explained in *Willier*, the right to choose counsel is one facet of the guarantee under s. 10(*b*) of the *Charter*. Where the detainee opts to exercise the right to counsel by speaking with a specific lawyer, s. 10(*b*) entitles him or her to a reasonable opportunity to contact chosen counsel. If the chosen lawyer is not immediately available, the detainee has the right to refuse to contact another counsel and wait a reasonable amount of time for counsel of choice to become available. Provided the detainee exercises reasonable diligence in the exercise of these rights, the police have a duty to hold off questioning or otherwise attempting to elicit evidence from the detainee until he or she has had the opportunity to consult with counsel of choice. If the chosen lawyer cannot be available within a reasonable period of time, the detainee is expected to exercise his or her right to counsel by calling another lawyer, or the police duty to hold off will be suspended: *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Black*, [1989] 2 S.C.R. 138.

[18] What amounts to a reasonable period of time depends on the circumstances as a whole, including factors such as the seriousness of the charge and the urgency of the investigation. It is also informed by the purpose of the guarantee. The right to counsel upon arrest or detention is intended to provide detainees with immediate legal advice on his or her rights and obligations under the law,

mainly regarding the right to remain silent. As Lamer J. (as he then was) aptly noted in *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. 206:

> It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel.

It is also because of this immediate need to consult counsel that information about the existence and availability of duty counsel and Legal Aid plans must be part of the standard s. 10(*b*) caution upon arrest or detention (*Brydges*). In turn, the detained person, faced with this immediate need for legal advice, must exercise reasonable diligence accordingly (*Ross*, at pp. 10-11).

[19] In this case, we agree with the courts below in rejecting Mr. McCrimmon's contention that he was denied the right to counsel of choice in a manner that contravened his rights under s. 10(*b*). While Mr. McCrimmon expressed a preference for speaking with Mr. Cheevers, the police rightly inquired whether he wanted to contact Legal Aid instead when Mr. Cheevers was not immediately available. Mr. McCrimmon agreed, exercised his right to counsel before the interview began, and expressed satisfaction with the consultation. He also indicated an awareness of his rights at the commencement of the interview. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as Mr. Cheevers became available.

[20] We would therefore answer the first question in the negative and find no breach in

relation to Mr. McCrimmon's choice of counsel.

B. *Did the Police Breach Section 10(b) by Denying Mr. McCrimmon's Repeated Requests to Consult Further with Counsel?*

[21] In *Sinclair*, we explained that a single-occasion rule for consulting counsel will not always fulfill the purpose of s. 10(*b*). A principled and purposive interpretation of the s. 10(*b*) right to counsel requires that detainees should be able to speak to a lawyer again during the course of a custodial interrogation where "a change in circumstances makes this necessary to fulfill the purpose of s. 10(*b*) of the *Charter* of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so": *Sinclair*, at para. 53. While we noted in *Sinclair* that the categories of situations in which a change in circumstances triggers a detainee's right to consult with counsel again are not closed, we did identify three situations currently recognized in which s. 10(*b*) requires a renewed right to consultation with counsel: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe the first information provided was deficient. The question then becomes whether, in this case, there was a change of circumstances of this nature that made it necessary to provide Mr. McCrimmon with a further opportunity to consult with counsel to fulfill the purpose of s. 10(*b*).

[22] As discussed earlier in relation to the right to counsel of choice, there was no breach of s. 10(*b*) prior to commencing the interview. We would also find no breach when Sgt. Proulx continued speaking to Mr. McCrimmon despite the latter's assertion, immediately when the

discussion turned to the incidents in question, that he did not want to discuss the incidents under investigation until he had spoken with his lawyer (A.R., vol. 3, at p. 37). At that point, Sgt. Proulx confirmed with Mr. McCrimmon that he understood it was his choice whether to say anything but that he, Sgt. Proulx, had a lot of information to provide and wanted to get to know Mr. McCrimmon (A.R., vol. 3, at p. 39). Some 10 minutes further into the discussion, Mr. McCrimmon stated that he wanted to speak to a lawyer, indicated that he would answer no further questions until he spoke to his own lawyer, and asked to go back to his cell (A.R., vol. 3, at p. 46). Sgt. Proulx explained that it was his job to get to understand Mr. McCrimmon and to provide him with the facts. What followed was essentially a long monologue in which Sgt. Proulx continued to discuss the police investigation in relation to the incidents and tried to establish a rapport with Mr. McCrimmon in an attempt to persuade him to give his side of the story. During this portion of the interview, there was no objectively discernable change in circumstances which gave rise to Mr. McCrimmon's right to consult again with counsel.

[23] Sgt. Proulx then proceeded to progressively reveal the evidence against Mr. McCrimmon. As described earlier, when pressed for his version of the events, Mr. McCrimmon emphasized the absence of his lawyer, expressing his sense of vulnerability without legal representation and his ignorance of the "legal ways", and insisted that he would not speak without his lawyer (A.R., vol. 3, at pp. 51-55). As we discussed in *Sinclair*, the gradual revelation to the detainee of the evidence that incriminates him does not, without more, give rise under s. 10(*b*) to a renewed right to consult with counsel. However, where developments in the investigation suggest that the detainee may be confused about his choices and right to remain silent, this may trigger the

right to a renewed consultation with a lawyer under s. 10(*b*).

[24] Arguably, Mr. McCrimmon's expression of vulnerability and ignorance of the law, when considered in isolation, could indicate such confusion. However, when the circumstances are viewed as whole, it is clear that Mr. McCrimmon understood his right to silence. Sgt. Proulx repeatedly confirmed that it was Mr. McCrimmon's choice whether to speak or not. It is apparent from Mr. McCrimmon's interjections in the course of the interview that he understood this. As the trial judge put it: "He clearly discerned which questions might put him in jeopardy and indicated he did not wish to answer those questions" (para. 46).

[25] We conclude that there were no changed circumstances during the course of the interrogation that required renewed consultation with a lawyer.

[26] It follows that we reject Mr. McCrimmon's further argument that the trial judge's failure to recognize a breach of the right to counsel undermined his conclusion that the statement was voluntary. It is important to add, however, as we noted in *Sinclair*, that the continuation of an interview in the face of the detainee's repeated expression of his desire for the interview to end and to speak with counsel may raise a reasonable doubt as to the voluntariness of any subsequently given statement. However, it is clear from the trial judge's reasons that he considered all relevant circumstances in determining that the statements were voluntary, including any subjective impact the refusal of Mr. McCrimmon's requests to speak to counsel may have had on him. Consequently, we see no reason to interfere with the trial judge's conclusion on voluntariness.

V. Disposition

[27] We would dismiss the appeal and affirm Mr. McCrimmon's convictions.

The following are the reasons delivered by

BINNIE J. —

[28] I agree with the conclusion of the Chief Justice and Charron J. that this appeal should be dismissed. On the facts, the appellant was not denied his right to counsel under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*.

[29] I reach that conclusion by a somewhat different route. In my view, Mr. McCrimmon's s. 10(*b*) right was not exhausted when he received the "one size fits all" advice from Legal Aid duty counsel who, according to Mr. McCrimmon, "just told me not to say anything" (A.R., vol. 3, at p. 11). For the reasons set out in my dissent in the companion case of *R. v. Sinclair*, 2010 SCC 35, I believe a detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interview where his or her request falls within the purpose of the s. 10(*b*) right (*i.e.* to satisfy a need for legal assistance rather than delay or distraction), and such request is reasonably justified by the objective circumstances, which were or ought to have been apparent to the police during the interrogation (*Sinclair*, at para. 80). Mr. McCrimmon meets the first branch

of the test, but fails at the second.

[30] Nothing in the transcript of the interrogation suggests an attempt by Mr. McCrimmon to assert his s. 10(*b*) right for a purpose other than meaningful legal assistance. In the first 34 pages of the 115 page interview, the officer was talking about everything except the offences, including his own (real or fake) marital problems, presumably to build a relationship of some trust with the detainee. It is not until p. 34 that the officer, after saying "there's two sides to every story", begins to talk about the allegation of the beatings of female sex workers. At that point, Mr. McCrimmon says he wants "to talk to my lawyer" (A.R., vol. 3, at p. 37 (emphasis added)), a request he reiterates a few minutes later. I agree with my colleagues that the police, having waited a reasonable time and having made reasonable efforts to contact Mr. McCrimmon's lawyer of choice, were not required to wait until he became available. Mr. McCrimmon had earlier pronounced himself satisfied with duty counsel's advice. However, his renewed requests coincided with the start of serious business and were quite plausibly within the purpose of s. 10(*b*).

[31] On the other hand, there is nothing in the transcript to suggest that his requests were "reasonably justified by the objective circumstances" (*Sinclair*, at para. 80). At pp. 35-36, Mr. McCrimmon says that he wants "the opportunity to have [his] counsel present" and the officer responds that "there's law that says that doesn't happen". General questions about relations with sex workers follow. Mr. McCrimmon says "[n]o comment" on several occasions, clearly understanding his right to silence. At p. 48, he again asks for his lawyer to be present, repeated at p. 50, but at p. 52 the police officer says "you don't have to keep repeating it" and the interview

proceeds for a further couple of hours or so without any further request to consult counsel. The officer's request not to "keep repeating it" may have been a factor in inhibiting further requests, but nowhere in the balance of the interrogation can Mr. McCrimmon flag a point in time or an issue on which a further consultation could be considered "reasonably justified by the objective circumstances, which were or ought to have been apparent" to the officer: *Sinclair*, at para. 80.

[32] Mr. McCrimmon's initial incriminating statements do not occur until p. 77 after the officer has chatted at length about different breeds of dogs, the "Willy Picton thing", joblessness, second marriages, drug use, shoplifting, and so forth. Having skirted the hard questions, perhaps putting Mr. McCrimmon more at ease, the breakthrough, when it came, seemed to drop gently into the officer's lap. He showed Mr. McCrimmon a photograph of one of the victims. He then related some of her story and the following exchange ensues:

Officer:	. . . she tells us about that, she points you, she guns you off from the car right, she says that's the guy that took me out to by the river, she describes exactly where it is and did this, this, this to me, right. Okay so . . .
McCrimmon:	That's untrue, that's untrue.
Officer:	Okay, well what is the truth.
McCrimmon:	She stole my wallet.
Officer:	Okay, so tell me about it, what happened? She rips you off?
McCrimmon:	She tries ripping me off, I caught her stealing my wallet.
Officer:	In the car?
McCrimmon:	In the car.

Officer: So how do you stop her?

McCrimmon: I hit her.

Further incriminating statements follow over the next 37 pages.

[33] There is nothing in any of this to suggest that Mr. McCrimmon was denied reasonable access to counsel in the course of the interrogation.

[34] Accordingly, I join in the dismissal of the appeal.

The reasons of LeBel, Fish and Abella JJ. were delivered by

LEBEL AND FISH JJ. —

I. Overview

[35] We disagree with the Chief Justice and Justice Charron that Mr. McCrimmon's incriminating statements to the police were not obtained in a manner that infringed his right to counsel under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. During the course of a lengthy interrogation, Mr. McCrimmon sought but was denied access to counsel. The police thereby breached his rights under s. 10(*b*) of the *Charter*. We are of the view that the statements thereby obtained should be excluded pursuant to s. 24(2), and that a new trial must therefore be had.

[36] With respect, we believe that our colleagues' reasons reflect an interpretation of the s. 10(*b*) right to counsel that ignores the text of s. 10(*b*) itself, as well as the broad purpose of the right to the effective assistance of legal counsel under the *Charter*. We reiterate that a purposive reading of s. 10(*b*) must give greater weight to the role of counsel — under our system of justice generally, and in the context of custodial interrogations specifically. In both regards, we repeat what we said in *R. v. Sinclair*, 2010 SCC 35.

[37] Our particular concern here, as in the companion appeals of *Sinclair* and *R. v. Willier*, 2010 SCC 37, is with the effective exercise of the right to counsel by detainees who are subjected to relentless custodial interrogation, even after they have unequivocally and repeatedly invoked their right to silence or to counsel. Both rights, and their meaningful exercise, are integral aspects of a detainee's pre-trial protections under the *Charter*. The right to counsel is both fundamental and necessarily broad in scope. While the initial advice to simply keep quiet may suffice at the outset of an interrogation, more substantive advice and assistance may be required as the interrogation progresses.

[38] We do not agree with our colleagues that detainees who, in this context, invoke their right to counsel in order to render more effective their right to silence can be denied either right on the ground that doing so would improperly frustrate the *investigative interview*. We do not believe that the right to consult counsel depends on the narrow and restrictive finding, in the opinion of the police interrogator, of a *manifest* or *material* change in jeopardy. Nor does the presence or absence

of any factors set out by our colleague Binnie J. similarly constitute such a prerequisite.

[39] It is a *limitation* on the right to counsel, not the *exercise* of that right, that must be constitutionally justified. We reiterate our objection to any limitation on the s. 10(*b*) right without constitutional justification and evidence of necessity, and that would depend on the interrogator's exercise of discretion.

[40] Moreover, a custodial interrogation by any other name remains just that. Characterizing the relentless interrogation of a confined suspect as an "investigative interview" does not transform its true nature and sole purpose. An "interview" is a conversation between two or more consenting participants who are free to leave as they choose. A relentless custodial interrogation, on the other hand, is an attempt by police officers, who have total physical control of a detainee, to obtain an incriminating statement by systematically disregarding the detainee's express wish and declared intention not to speak with them. That is the exercise that concerns us here, as it did in *Sinclair*.

[41] The decisive issue is whether the police can refuse to allow a detainee to consult counsel and, by pursuing their custodial interrogation, render ineffective the detainee's assertion of the right to silence. Our firm answer to that question is "no, they cannot".

[42] Since detainees have no legal obligation to participate in a custodial interrogation, they can hardly be said to *frustrate*, impermissibly, any persistent attempts by the police to prevent them from exercising their constitutional right to counsel. There is no police right, under the common law

or the Constitution, to the unfettered access to a detainee, for interrogation to the point of confession.

[43] This case illustrates yet again why the right to counsel is not *spent* upon its initial exercise. It demonstrates the broader role played by counsel even within the relatively narrow confines of a custodial interrogation.

[44] Having reiterated our view of the purpose, scope, and role of s. 10(*b*), we turn now to an application of these principles to the facts of Mr. McCrimmon's case.

II. Application

A. *The Breach of Section 10(b)*

[45] As we did in *Sinclair*, we feel it important to examine the chronology of Mr. McCrimmon's repeated requests to consult with counsel, and to invoke his right to silence.

[46] The police arrested Mr. McCrimmon at his home at approximately 11:37 a.m. on December 3, 2005, and brought him to the Chilliwack RCMP detachment. He was kept in a holding cell for nearly five hours, and only then taken to the interrogation room. The arresting officer, Cst. Laurel Matthew, testified that Mr. McCrimmon sought to exercise his right to counsel, and to this end placed a call to Legal Aid duty counsel. At his request, a call was placed to the Vancouver

lawyer that Mr. McCrimmon wished to consult. The lawyer did not call back.

[47] Sgt. Al Proulx of the Major Crime Interview Team conducted Mr. McCrimmon's interrogation. He began with the ordinary pleasantries, attempting to build a rapport with Mr. McCrimmon. The two discussed their respective upbringings and family histories, as well as Mr. McCrimmon's work history, his desire to play CFL football, and his friendship with a man named Marco.

[48] As the interrogation progressed, Sgt. Proulx's stated intention was to provide Mr. McCrimmon with an opportunity "to tell [his] side of the story" (A.R., vol. III, at p. 28). Noting that the problem was an "absence of explanations" (A.R., vol. III, at p. 52), Sgt. Proulx suggested that it was in Mr. McCrimmon's best interest to provide one (A.R., vol. III, at p. 53):

Proulx:	Don't let people be your voice for you, Russ, that's what, that's what's happening here. You are letting other people be your voice for you ...
McCrimmon:	That's fine because my voice ...
Proulx:	You know you're letting these people ...
McCrimmon:	Will be heard, my voice will be heard in the end, with my lawyer. That's all I got to say.
Proulx:	I'm just, you know what ...
McCrimmon:	I know, I know what you're saying but do you what, until I have legal representation ...
Proulx:	Yeah, it's important.

McCrimmon: It's in my best interest cause I, I, no I ah, I'm not going to say anything more. And I'm not trying to be an asshole.

[49] Sgt. Proulx presented Mr. McCrimmon with the information known to the police about the offence. Initially Mr. McCrimmon was quite successful in rebuffing the officer's questions — offering a "No comment" here and an "I'm not gonna answer that" there (A.R., vol. III, at p. 41).

[50] And yet Sgt. Proulx was not dissuaded. He continued to encourage Mr. McCrimmon to explain "why" these offences happened (A.R., vol. III, at p. 45). He then presented Mr. McCrimmon with pieces of physical evidence — most notably DNA found in his car — that implicated him directly in the offences under investigation. Mr. McCrimmon's immediate response was to reiterate his desire to speak to counsel (A.R., vol. III, at p. 45):

Proulx: You don't know why they would be?

McCrimmon: No.

Proulx: Okay. Because they've never been in there or?

McCrimmon: Ah, no comment. I, I really want to speak to a lawyer, please.

Proulx: Okay, well you, you've done that.

McCrimmon: Yeah

Proulx: Okay, you've done that.

McCrimmon: Well, duty counsel, I haven't spoken to my own lawyer.

Mr. McCrimmon also reiterated his decision to exercise his right to silence, and asked to be returned to his cell. All told, Mr. McCrimmon asserted his desire to consult with a lawyer at least six times, over the course of a discussion covering over eight pages of transcript. All six requests were ignored.

[51] After a series of lengthy monologues by Sgt. Proulx, Mr. McCrimmon begins to waiver (A.R., vol. III, at p. 78). Shortly thereafter, he caves completely and commences his confession.

[52] The interrogation transcript makes it abundantly clear that, from the outset and up until the point where he begins to confess, Mr. McCrimmon clearly expressed his desire not only to speak with a lawyer, but to have a lawyer *explain the situation and charges to him* (A.R., vol. III, at p. 10):

> Proulx: Okay ah, and you, and you were provided a piece of paper as well with, with all that?
>
> McCrimmon: Yeah and when I spoke to Legal Aid it was given to me too, so.
>
> Proulx: Oh okay. Okay, so you were given that piece of paper and I, and I can't recall the names off the top of my head but we're gonna talk about that in a little bit here too, so. Not that the names are that important but just so you understand that you are, you were arrested for ah, for a number of those assaults on, on ah sex trade workers for what it's worth and ah, I think at least one of them ah, there's Assault Causing Bodily Harm so that's ah, kind of a separate thing, there's Assault, and then there's Assault Causing and there's Aggravated Assault so there's varying degrees of ah, of assault.
>
> McCrimmon: I'm sure what lawyer will explain it to me.

[53] And later (A.R., vol. III, at p. 50):

Proulx:	... Okay. So now you got a version of a person that, to them is John DOE, they don't know you, they describe you, they describe your vehicle and I think in some cases they do an exceptional job in both. Right, so then it's our job as cops to fuck okay, well what makes that person credible, what makes their story, their version true, it's ...
McCrimmon:	That's where my lawyer is gonna come into play.
Proulx:	Right, so but I'm telling you, this is, this is how it works, right.
McCrimmon:	That's fine.
Proulx:	Okay.
McCrimmon:	But ah, no I'll just, I'll let my lawyer deal with this ...

[54] This pattern continued with every new piece of incriminating evidence that Sgt. Proulx presented to Mr. McCrimmon.

[55] Throughout his interrogation, Mr. McCrimmon's repeated requests to speak with his lawyer, that the interrogation be terminated, and that he be returned to his cell, were consistently rebuffed by a police interrogator, intent on extracting a confession, notwithstanding Mr. McCrimmon's unequivocal and repeated assertion of his right to silence.

[56] Mr. McCrimmon's s. 10(*b*) right to counsel was consequently breached, and we therefore turn to a consideration of the appropriate remedy.

B. *Exclusion of the Statement pursuant to Section 24(2)*

[57] In determining whether the admission of evidence obtained by way of a *Charter* breach would bring the administration of justice into disrepute, the court must weigh three factors:

> (1) the seriousness of the *Charter*-infringing conduct;
>
> (2) the impact of the breach on the accused's *Charter*-protected rights and interests; and
>
> (3) society's interest in the adjudication of the case on its merits.
>
> (See *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and *R. v Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.)

[58] Our analysis in *Sinclair* is equally applicable in this case. We nonetheless think it necessary to add the following observations.

[59] Sgt. Proulx proceeded on the basis of his understanding of the law as it stood at that time, and was therefore acting in good faith. However, like the interrogating officer in *Sinclair*, Sgt. Proulx acted as if he was entitled to Mr. McCrimmon's statement — that he was entitled to have his side of the story. Sgt. Proulx therefore not only denied Mr. McCrimmon his right to counsel. In doing so, Sgt. Proulx also explicitly refused to accept and respect Mr. McCrimmon's assertion of his constitutionally-entrenched right to silence.

[60] The officer's *Charter*-infringing conduct was therefore serious, and that conduct had a serious impact on Mr. McCrimmon's *Charter* rights.

[61] Accordingly, we would exclude Mr. McCrimmon's statement pursuant to s. 24(2) of the *Charter*.

III. Disposition

[62] For these reasons, and the reasons given in *Sinclair*, the appeal should be allowed and a new trial should be ordered.

Appeal dismissed, LEBEL, FISH *and* Abella JJ. *dissenting.*

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