

The Top Five 2011

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



***R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310**

<http://scc.lexum.org/en/2010/2010scc35/2010scc35.html>

In this case, the Supreme Court of Canada (SCC) considered what limitations exist on the right of an accused person to have a lawyer present during questioning by police.

Date Released: August 8, 2010

Ruling

The right to counsel provided by s. 10(b) of the *Canadian Charter of Rights and Freedoms* does not require a lawyer to be present throughout an interrogation of an accused person by the police. Where a detainee has already received legal advice prior to police interrogation, s. 10(b) only requires the police to provide a reasonable opportunity to consult a lawyer again if there is a change in circumstances.

Facts

Mr. Sinclair was arrested for murder following an altercation with another man. Upon his arrest, Mr. Sinclair was advised of his right to speak to counsel, but he declined. After processing at the police station, Mr. Sinclair was again asked whether he wanted to speak with counsel. He identified a lawyer and they spoke privately on the phone for approximately three minutes. Three hours later, Mr. Sinclair spoke again for three minutes with his lawyer. In total, he spoke to the counsel of his choice twice. Mr. Sinclair indicated he was satisfied.

Mr. Sinclair was then interrogated by police for approximately five hours. He was advised by police that he did not have to say anything and that the interview was being recorded and could be used in court. Mr. Sinclair repeatedly expressed discomfort with being interviewed in the absence of a lawyer. Police reiterated it was his decision whether or not to answer the questions. Mr. Sinclair eventually told police precisely what had happened between himself and the victim. He stated that the two of them were intoxicated and that the victim approached Mr. Sinclair with a knife looking for money. Mr. Sinclair admitted that after a struggle, he killed the victim. Police later placed Mr. Sinclair in a cell with an undercover police officer. Mr. Sinclair advised the undercover officer, "I'm going away for a long time but I feel relieved". He later accompanied police and participated in a re-enactment of the crime.

At trial, Mr. Sinclair's lawyer argued that his statements to police should not be considered on the basis that his constitutional rights had been infringed. Specifically, it was argued that his s. 10(b) right to counsel was violated by police because the interrogation continued despite his statements that he did not want to speak to police without a lawyer present.

Canadian Charter of Rights and Freedoms

10. Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right.

Decision

The purpose of s. 10(b) of the *Charter* is to facilitate a detainee's choice of whether to speak to the police by providing the opportunity to receive legal advice. Legal advice assists the detained person in understanding his options, including whether to cooperate with police.

The Supreme Court of Canada (SCC) held that facilitating a detainee's choice does not require the continued presence of a lawyer throughout an interrogation. The purpose of s. 10(b) in facilitating choice can be achieved by allowing for further consultations with a lawyer where circumstances in the interrogation change. A detainee is entitled to a further opportunity to consult with counsel if an investigation takes a "new and more serious turn as events unfold". In other words, if the situation facing the detained person becomes more serious and the person is in more jeopardy, an opportunity to consult with counsel must be given. The change of circumstances must be "objectively observable" in order to activate the requirement for further consultation.

A simple request, without something more, is insufficient to reactivate the right to counsel. A rule that requires the police to stop questioning a suspect each time a suspect asserts a desire not to speak would not strike the right balance between the constitutional rights of suspected criminals and the need for the police to investigate and solve crimes. To reactivate the right to counsel, there must be a significant change in the circumstances faced by the accused, necessitating further legal advice.

Discussion

1. If a detained person insists on speaking again to a lawyer after having already done so, should the police have to allow it? What tension might there be between the need for police to conduct full investigations and the need to respect the rights of the accused?
2. Why is receiving legal advice when there is a change in circumstances important?
3. Imagine a change in circumstances that might have necessitated further legal advice for Mr. Sinclair, and reactivated his right to counsel.
4. Does the long term Canadian interest in avoiding wrongful convictions change your thinking? Would more lawyer involvement at early stages of investigations prevent the innocent from receiving convictions?