A. INTRODUCTION

R v Sinclair began as a trial for second degree murder, and was eventually brought to the Supreme Court of Canada (SCC) to resolve an issue relating to the scope and purpose of s.10(*b*) of the *Charter*. The main issue was whether or not Mr. Sinclair was entitled to have additional consultation with his lawyer when confronted with new evidence. Ultimately, the court decided that he was not. The decision not only set new boundaries for s.10(*b*), but carried significant ramifications for the admissibility of confessions and the right to silence. This case comment will argue that *Sinclair* has created a dangerous situation for innocent detainees because of its narrow interpretation of the right to counsel and its affirmation of the problematic confessions rule from *R v Oickle*.[1] First, it will examine evidence that shows the power given to police by the *Oickle* confessions rule may have an adverse affect on the prevention of false confessions, and even offends the presumption of innocence. Then, this case comment disputes the majority's assertion in *Sinclair* that the threat of false confessions can be mitigated by the right to silence. Finally, it will demonstrate the strength of the causal link between false confessions and wrongful convictions to illustrate the severity of *Sinclair*'s consequences.

B. CASE SUMMARY

Key Facts

The appellant in this case, Trent Terrence Sinclair, was arrested on December 14, 2002, for the second degree murder of Gary Grice. Upon arrest, Mr. Sinclair was advised of his right to retain and consult counsel, and subsequently spoke privately with a lawyer, Victor S. Janicki, for three minutes. During this call, Mr. Janicki warned Mr. Sinclair that police may lie to him and/or use devices to obtain information, and advised him not to discuss anything important with the authorities. Mr. Sinclair had one more private phone call with Mr. Janicki, also lasting three

minutes, before he was subjected to a five hour interrogation by police.[2] During this interrogation, police denied between four to six independent requests by Mr. Sinclair to consult with his lawyer again.[3] Eventually, Mr. Sinclair implicated himself in the murder and was subsequently put in a cell with an undercover officer. There, he made additional incriminating statements to the undercover officer and later volunteered to participate in a re-enactment of the crime.[4]

Procedural History

At trial, counsel for Mr. Sinclair argued that the police refusal to allow additional consultations with his lawyer was a breach of s.10(*b*) of the *Canadian Charter of Rights and Freedoms*. These confessions would then be rendered involuntary and would be subsequently excluded as evidence under s.24(2) of the *Charter*. Justice Powers rejected this argument on the grounds that Mr. Sinclair's knowledge of his right to silence was sufficient to fulfill his right to counsel.[5] At the Court of Appeal for British Columbia, Justice Frankel affirmed the trial judgement, stating that police have no duty to refrain from questioning when an accused requests to speak with counsel.[6] Mr. Sinclair then appealed his conviction to the SCC.

Supreme Court of Canada Decision

Mr. Sinclair's appeal was dismissed in a markedly divided judgement from the SCC. Chief Justice McLachlin and Justice Charron, ruling for the majority, concluded that s.10(*b*) of the *Charter* is predominantly concerned with an accused's right to silence, derived from the relevant jurisprudence on s.7. In their view, this right to silence is sufficient when an accused is exposed to real *or fake* evidence by the police.[7] They held that the right to consult with counsel is only the right to a single consultation.[8] However, they also acknowledged three situations where a change in circumstances makes additional consultation with counsel necessary. These three

situations are: (a) when the detainee is subjected to new procedures (such as a lineup or polygraph), (b) when the detainee experiences a change in jeopardy, and (c) when interrogators have a reason to believe the detainee did not understand the initial advice of counsel. It was held that Mr. Sinclair does not fall into any of them and therefore s.10(*b*) was not violated in this case. They justified their narrow interpretation of s.10(*b*) with reference to the voluntariness requirement that is embedded in the confessions rule.[9]

Justice Binnie (dissenting) asserted that in this case, Mr. Sinclair's requests to receive advice from his lawyer were within s.10(*b*) of the *Charter* because his initial advice could not have remained meaningful after police disclosed new evidence to him. Justice Binnie concluded that while s.10(*b*) does not require the presence of counsel during custodial interrogation, it should give detainees the relevant legal information that a lawyer would possess.[10] His dissent called into question the notion that s.10(*b*) *only* exists to preserve a detainee's right to silence. Instead, he asserted that the right to counsel only has value if it is customized for the circumstances. This is because an innocent accused often has an interest in co-operating (at least to a certain extent) with police, and a defence lawyer cannot advise an innocent detainee how to exonerate themselves without contextual information. Justice Binnie characterized the majority's decision as the third "trump card" to police given by the SCC. The first "trump card" was the confessions rule from *Oickle*, where the court held that police conduct had to be egregious in order for a statement to be deemed involuntary. The second was *R v Singh*, which allowed police to engage in a prolonged interrogation, even if the detainee makes repeated requests to return to his cell. Justice Binnie warned that the cumulative effect of these three cases is an increased risk of false confessions and wrongful convictions.[11]

Justices LeBel and Fish (dissenting) disagreed with Justice Binnie's reasoning, concluding that "the right to counsel is inextricably bound up with, although not subsumed by, the right to silence."[12] Their view was that Mr. Sinclair's s.10(*b*) right was violated by his interrogators' refusal to allow him additional consultation with his lawyer irrespective of the circumstances. Accordingly, a mere request to speak with counsel would be a justification for retriggering a detainee's s.10(*b*) right.[13]

C. LEGAL CONTEXT OF THE RIGHT TO COUNSEL

Sinclair is part of a trilogy of companion cases released by the SCC on October 8, 2010, regarding the limits of the right to counsel and their implications for the admissibility of confessions to police. In all three cases, the court limited the scope of s.10(*b*) of the *Charter* and set new boundaries to reject arguments from counsel for the accused. As illustrated in the case summary, the judgement in *Sinclair* definitively ruled out the disclosure of evidence to the accused during interrogation as grounds for retriggering the right to counsel.[14] *R v McCrimmon* affirmed the rule from *Sinclair* but also noted that there is no exception for an accused who is forced to resort to legal aid because the counsel of their choice is unavailable.[15] Lastly, *R v Willier* concluded that police are not obligated to monitor the quality of a detainee's legal advice.[16]

In both *Sinclair* and *McCrimmon*, judges were divided on what the scope of s.10(*b*) was during interrogation.[17] While the majority concluded that neither situation warranted a renewed right to counsel, Justices LeBel and Fish maintained in both cases that repeated requests for counsel during a "lengthy interrogation" are enough to retrigger a detainee's 10(*b*) right.[18] In contrast, Justice Binnie took a position in both cases that was situated between the two polarized viewpoints. His assertion that the "one size fits all" right to counsel is insufficient implied that

the confession in *Sinclair* was involuntary, but did not take issue with the end result in *McCrimmon*.[19] The key issue in both of his analyses was whether or not it was possible to locate a point in time where a change of circumstances suggested that an additional opportunity to speak with counsel would be useful. While in *Sinclair* there was a specific moment when the accused requested his right to counsel, in regards to incriminating evidence that was disclosed to him in *McCrimmon* it was impossible to "flag a point in time or an issue on which a further consultation could be considered 'reasonably justified by the objective circumstances' ".[20]

Sinclair reflects the Crown's claim that acknowledging a reengagement of Mr. Sinclairs's s.10(*b*) right would inappropriately convert s.10(*b*) into a result oriented right rather than a procedural one.[21] This argument is a marked departure from past judgements of the SCC. In *Sinclair,* the majority's description of s.10(*b*)'s purpose is derived from a passage cited from *R v Hebert* with a striking omission.[22] The following passage is omitted from *Sinclair* with ellipses: "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 obtains appropriate advice with respect to the choice he faces*."[23] *Sinclair* does acknowledge that changing circumstances can necessitate "further advice from counsel" in order to allow a detainee to make a meaningful choice.[24] However, the omission of the passage above re-emphasizes the majority's position that the facts of *Sinclair* did not involve a change in circumstances.

D. THE RIGHT TO COUNSEL: A MEANINGFUL CHOICE?

The issue of changing circumstances is a fundamental point of disagreement between Justice Binnie and the majority. His views on s.10(*b*) have roots in the decision of *R v Bartle*,

which conclusively stated that "…s.10(*b*) is about providing detainees with *meaningful* choices".[25] In *Sinclair*, Justice Binnie's main criticism of the majority's decision was their reluctance to acknowledge that the value of legal advice is dependent on its relevance to the detainee's current circumstances.[26] His remarks about the worthlessness of a one-time consultation bear a strong resemblance to Justice Wilson's analogy in *R v Black*: "If the Crown's argumentation on this point were sound, each time an accused was asked to blow into a breathalyser there would be no need to advise the accused of his s.10(*b*) rights, since it might be assumed that counsel would advise the accused that he should submit to the breathalyser on the basis that failure to do so constitutes a criminal offence."[27] While this point of view has merit in light of the dangers posed by false confessions, it is also a departure from the way s.10(*b*) has been treated in case law. *Hebert*, for instance, postulates that "the most important function of legal advice upon detention is to ensure the accused understands his rights, chief among *which is his right to silence.*"[28] This principle is consistent with *R v Brydges*, another decision the same year which linked the right to silence with the right to counsel.[29] It has been assumed by the courts that any gaps left by this proposition can be addressed by applying the confessions rule.

E. APPLICATION OF THE CONFESSIONS RULE IN *SINCLAIR*

The most recent authority of the confessions rule is found in *Oickle*. The confessions rule in *Oickle* was described by Justice Iacobucci in four parts: threats or promises, oppression, operating mind, and police trickery. Whether or not Justice Binnie's assessment of the impact of *Oickle* is excessively harsh, there are at least two valid concerns related to how this rule was applied by the majority in *Sinclair*. First, the judgement in *Oickle* is based on the notion that "the *Charter* is not an exhaustive catalogue of rights. Instead, it represents a bare minimum before which the law must not fall. A necessary corollary of this statement is that the law,

whether by statute or common law, can offer protections beyond those guaranteed by the Charter."[30] This principle is arguably in contradiction with *Sinclair*'s narrow interpretation that "[t]he scope of s.10(*b*) of the *Charter* must be defined by reference to its language."[31] A second concern arises when the analysis from *Oickle* is applied to conclude that confronting a suspect with fake evidence does not retrigger the right to speak with a lawyer.[32] This conclusion seemingly ignores Justice Iacobucci's statement that confronting a suspect with fake evidence is a relevant consideration of whether or not a confession is voluntary in the first place. His judgment is clear that entirely fabricated evidence poses a greater danger than other inadmissible evidence (such as polygraph).[33] With these concerns in mind, they still do not preclude the argument that the judgement of *Oickle* is inherently problematic. Justice Binnie's criticism is rooted in the significant implications that both *Oickle* and *Sinclair* have for the right to counsel and the admissibility of confessions.

F. THE PHENOMENON OF FALSE CONFESSIONS

Justice Binnie's argument in *Sinclair* for a flexible approach to the right to counsel is justified at least partially, if not entirely, by the phenomenon of false confessions and the danger of wrongful convictions. In order to prevent false confessions, Canadian common law has mandated that the objective requirement of voluntariness must be satisfied before a confession can be admitted as evidence. Although much of society treats confessions as incontrovertible proof of guilt, many confessions have been definitively proven as false.[34] Although the only such incident cited by Justice Binnie's in *Sinclair* was Romeo Phillion, a man who falsely confessed to murder, false confessions for less serious charges are widespread.[35] Examples include Michael St. John, who falsely confessed to assaulting his son in 1998, and Dwight Grant, who falsely confessed to sexually assaulting a student in 1992.[36] Incidents like these have fed to

criticism of the Reid Technique, whose interrogation strategies were largely approved of in *Oickle* and were affirmed in *Sinclair*.[37] Specifically, several criticisms have been raised about the "Behavioural Analysis Interview" (or BAI) phase of the Reid Technique, where the "interviewer" (i.e., the interrogator) makes a subjective assessment of the suspect's guilt.[38] Studies have shown that police officers are unable to properly detect deception, and that as they gain more training and experience they build a greater propensity to view the suspect as guilty.[39] One of the most troubling features of the Reid Technique is the presumption of guilt that evidently follows an assessment of guilt in the BAI.

The Reid Technique, used by "[t]he vast majority of Canadian Police Officers who receive training for suspect interviewing", poses a threat to both the right to counsel and the right to silence.[40] In *McCrimmon*, not only did the police reject the detainee's repeated requests for additional consultation with his lawyer, they also made efforts to subvert his right to silence.[41] This is particularly problematic because studies have shown that some detainees will confess even when they are innocent, either because of individual characteristics or the interrogation techniques used by the police.[42] For example, individuals with "compliant personalities" will be more inclined to please members of authority and will avoid confrontation, which means that they may agree to a story that is different than how they actually remember it.[43] Studies suggest that even entirely legitimate police investigations can elicit false confessions, since those who have a compliant personality will often confess without the application of pressure during interrogation.[44]

These studies imply that there is an inherent power imbalance that can only be remedied with a more expansive interpretation of the confessions rule and/or the right to counsel. The relegation of the right to counsel to a subset of the right to silence, a principle unanimously

affirmed in *Sinclair* with the exception of Justice Binnie, will only perpetuate this problem. As Justice Binnie remarked, a constant use of the right to silence is not a panacea for every situation, since sometimes an innocent detainee is best served by full or partial co-operation with the authorities.[45] These consequences are discussed in detail in the wrongful convictions section.

Further concerns arise from the classification of the disclosure of incriminating evidence during interrogation as a change in circumstances that does *not* constitute a right to re-consultation with a lawyer. This in itself would be enough to raise concerns for its implications in the area of false confessions. However, the problem is exacerbated with Chief Justice McLachlin and Justice Charron's remark that even the use of fake evidence is permissible within the bounds of s.10(*b*).[46] This concern is substantiated by American psychological studies, which have established a strong link between fake evidence and the probability of false confessions. To borrow the words of Professor Saul M. Kassin, "confronting innocent individuals with false evidence not only increases the risk of a false confession, it also increases the risk that the individuals will internalize a false belief in their guilt."[47]

Sinclair's affirmation of the *Oickle* confessions rule compounds this problem. Professor Dale E. Ives criticizes *Oickle*'s unrealistic requirement that police conduct be egregious enough to "[shock] the community" in order to satisfy the "police trickery" feature of the confessions rule.[48] In fact, studies have shown that an unpopular defendant can create a palpable community sense of prejudice against an innocent accused, rendering this requirement virtually impossible to meet.[49] This point has particular resonance with wrongful convictions, given its relevance to issues of class and racism.[50] It is also relevant that police misconduct is less likely to be challenged or even detected if it is against lower class or marginalized groups of society.[51]

G. WRONGFUL CONVICTIONS

As mentioned in Justice Binnie's dissent in *Sinclair*, wrongful convictions are a growing problem.[52] Though there have been no comprehensive studies on the topic in Canada, it is widely agreed upon that false confessions are the most common cause of wrongful convictions.[53] In 2004, it was estimated that false confessions accounted for between fourteen and twenty-five percent of wrongful convictions in the United States.[54] Professor Gary T. Trotter asserts that "almost every major academic study of wrongful convictions has pointed to false confessions as an important contributing factor."[55] The case of wrongfully convicted Canadian Guy Paul Morin is illustrative of this assertion. Police interrogated him in a room covered with pieces of evidence such as enlarged fingerprints and photographs of clothing from the victim: "The purpose of this charade was to convince the suspect that a special task force working on the case was in possession of sufficient evidence to secure a conviction."[56] It is in situations like these where the implications of *Sinclair* are most powerful. One would assume that the advice given by a lawyer to Mr. Morin upon his initial arrest would be substantially different than any advice that he would receive after confronted with this new evidence. Given the fact we know now that he was innocent, it is conceivable that an alibi or some information disassociating Mr. Morin with the evidence could have had a tremendous impact on the outcome of that investigation.

Although it cannot be said that all legal counsel will have the level of expertise necessary to prevent a false confession or a wrongful conviction, there is an abundance of useful legal advice that strays from a strict adherence to the right to silence. For example, during Gregory Parson's interrogation (who was later wrongfully convicted), the RCMP decided that Mr. Parson's reference to his mother as "her" instead of "mom" was suspect, and his reference to the "night" his mother died proved he knew his mother died and was an indication of guilt.[57] It is

situations like these that suggest "360 seconds of legal advice" is often insufficient to fulfill a *meaningful* application of s.10(*b*).

H. CONCLUSION

In *Bartle*, Chief Justice Lamer (as he was then) remarked, "breaches of s.10(*b*) tend to impact directly on adjudicative fairness."[58] It is clear that this statement has roots in both jurisprudence and the causal link between the right to counsel, false confessions, and wrongful convictions. Though it is impossible to predict who the next Guy Paul Morin or Donald Marshall Jr. will be, the consequences of *Sinclair'*s explicit limitations on s.10(*b*) and affirmation of the *Oickle* confessions rule are inevitable. There was no compelling evidence presented in *Sinclair* that this particular right would allow a guilty suspect to go free by re-exercising his/her right to counsel. Furthermore, the notion that allowing a detainee to understand his legal rights will undermine the legal system is contrary to reason. Not only does a wrongful conviction put an innocent individual in prison, it also allows a guilty individual to roam free. For these reasons, a more expansive interpretation of s.10(*b*) and a re-evaluation of the confessions rule would benefit Canadian society as a whole.

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[1] *R v Oickle* 2000 SCC 38 [*Oickle*].
[2] *R v Sinclair* 2010 SCC 35 at paras 4-9 [*Sinclair*].
[3] *Ibid* at paras, 10, 207 (there was disagreement among SCC justices as to how many times Mr. Sinclair was denied counsel).
[4] *Ibid* at paras 11-13, 72.
[5] *R v Sinclair* [2003] BCSC 2040, *77* WCB (2d) 375 at paras 49, 56, 57, 142.
[6] *R v Sinclair* [2008] BCCA 127, 169 CRR (2d) 232 at para 65.
[7] *Sinclair*, *supra* note 1 at paras 25, 60.
[8] *Ibid* at para 22.
[9] *Ibid* at paras 46-62.
[10] *Ibid*, at paras 82, 87, 97, Binnie J, dissenting.
[11] *Ibid*, at paras 90, 92, 84, 86, Binnie J, dissenting.
[12] *Ibid,* at para 124, LeBel and Fish JJ, dissenting.
[13] *Ibid*, at paras 172, 213, LeBel and Fish JJ, dissenting.
[14] See page 2, above.
[15] *R v McCrimmon*, 2010 SCC 36 at paras 22-26 [*McCrimmon*].
[16] *R v Willier*, 2010 SCC 37 at paras 42-44.
[17] *Sinclair*, *supra* note 2; *McCrimmon*, *supra* note 14.
[18] *Sinclair*, *supra* note 2 at paras 60, 212; *McCrimmon, supra* note 14 at paras 35-62.

[19] *McCrimmon, supra* note 14 at para 29 .
[20] *Sinclair*, *supra* note 2 at para 118, *McCrimmon supra* note 14 at para 31.
[21] *R v Sinclair*, 2010 SCC 35 (Factum of the Respondent at para 84).
[22] *Sinclair*, *supra* note 2 at para 2.
[23] *R v Hebert* [1990] 2 SCR 151 at para 52, 47 BCLR (2d) 1[*Hebert*] [emphasis added].
[24] *Sinclair*, *supra* note 2 at para 50.
[25] *R v Bartle* [1994] 3 SCR 173 at para 21 [*Bartle*] [emphasis added].
[26] *Sinclair supra* note 2 at para 86.
[27] *R v Black* [1989] 2 SCR 138 at para 26, 242 APR 3 [*Black*].
[28] *Hebert*, *supra* note 22 at para 52 [emphasis added].
[29] *R v Brydges* [1990] 1 SCR 190 at para 16, [1990]2 WWR 220.
[30] *Oickle*, *supra* note 1 at para 31.
[31] *Sinclair, supra* note 2 at para 38.
[32] *Ibid* at para 60.
[33] *Ibid* at paras 61, 90.
[34] Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L Rev 477 at 477 [Ives].
[35] *Sinclair , supra* note 1 at para 78.
[36] "Widely used police interrogation technique can result in false confession : Disclosure, *CBC News* (28 January 2003) online: CBC News <http://www.cbc.ca/canada/story/2003/01/27/interrogation030127.html>.
[37] *Ibid; Sinclair, supra* note *2* at para 60.
[38] Brent Snook et al., "Reforming Investigative Interviewing in Canada" (2010) 52:2 Canadian Journal of Criminology & Criminal Justice 215 at 218 [Snook].
[39] *Ibid* citing Christian A. Meissner & Saul M. Kassin, " 'He's guilty!': Investigator bias in judgments of truth and deception" (2002) 26 Law and Human Behaviour 469 at 469–480.
[40] Snook, *supra* note 37 at 217.
[41] *Ibid* at para 48.
[42] Ives, *supra* note 33 at 478.
[43] *Ibid* at 482.
[44] *Ibid* at 484, citing Saul M. Kassin & Gisli H. Gudjonsson, "The Psychology of Confessions: A Review of the Literature and Issues" (2004) 5 Psychological Science in the Public Interest 33 at 56.
[45] *Sinclair, supra* note 2 at para 104.
[46] *Ibid* at para 97.
[47] Ives, *supra* note 33 at 485, citing Saul M. Kassin, "On the Psychology of Confessions: Does Innocence Put Innocents at Risk?" (2005) 60 American Psychologist 215 at 221.
[48] *Ibid* at 490.
[49] Ministry of the Attorney General, Media Release, "Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System" (21 January 2008) online: Ministry of the Attorney General Inquiries <http://www.attorneygeneral.jus.gov.on.ca/> at 19.
[50] Government of Nova Scotia, Digest of Findings and Recommendations, "Royal Commission on the Donald Marshall, Jr., Prosecution" (December 1989) online: Nova Scotia Key Initiatives - Marshall Inquiry <http://www.gov.ns.ca/just/marshall_inquiry/default.asp> at 10.
[51] Dawn Anderson & Barrie Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (Blackpoint, NS: *Fernwood* Publishing, 2009) at 25 [Anderson].
[52] *Sinclair*, *supra* note 2 at para 90.
[53] Ives, *supra* note 33 at 478; Brandon Ruth & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: Allen and Unwin, 1973) at 47.
[54] Ives, *supra* note 33 at 478, citing Steven A. Drizin & Richard A. Leo, "The Problem of False Confessions in the Post-DNA World" (2004) 82 NCL Rev 891, at 901–07 (2004).
[55] Gary T. Trotter, "False Confessions and Wrongful Convictions" (2004) 35 Ottawa L Rev 179 at 182.
[56] Anderson, *supra* note 50 at 79.
[57] MaDonna Rose Maidment, *When Justice is a Game: Unravelling Wrongful Convictions in Canada* (Blackpoint:: Fernwood Publishing, 2009) at 43.
[58] *Bartle*, *supra* note 24 at para 54.