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The Nature and Limits of the Right to Counsel: SCC

A deeply divided Supreme Court of Canada has ruled on the nature and limits of the s.10(b) *Charter* right to counsel in *R. v. Sinclair*, 2010 SCC 35 and its companion cases *R. v. McCrimmon*, 2010 SCC 36 and *R. v. Willier*, 2010 SCC 37. Among other things the majority found that the purpose of s.10(b) is to support detainees' right to choose whether to cooperate with the police investigation or not, by giving them access to legal advice (informing them of the right to counsel and an opportunity to consult counsel if requested). This may involve the right to re-consult counsel where necessary, but does not demand the continued presence of counsel throughout the interview process. On the latter point, McLachlin C.J. and Charron J. specifically rejected the adoption of the American *Miranda* rule at para. 38 of *Sinclair*, holding:

> We are not persuaded that the *Miranda* rule should be transplanted in Canadian soil. The scope of s. 10(b) of the *Charter* must be defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement in the Canadian context. Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures.

The judgment has been criticised by legal commentators and the public, many of whom agree with Justice Binnie's dissenting opinion in *Sinclair* that:

> What now appears to be licenced as a result of the "interrogation trilogy" is that an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards. (para. 98)

These articles reflect the debate:

- *No right to counsel during interrogation: top court* and The right to counsel, diminished, *Globe and Mail;*

- *The right to legal advice*, Don Mathias, Criminal Law Blog.

Intent to Obstruct Justice Inferred: MBCA

In *R. v. Abdullah (G.)*, 2010 MBCA 79 the Court of Appeal overturned the acquittals of the two witnesses who refused to testify in the Cansanay murder trial, holding that the only possible verdicts on the undisputed facts are ones of guilty and remitting the matter to the trial court for sentencing on the attempt obstruct justice convictions. The court found:

> The failure or refusal of an accused to testify because he does not want to lie on the stand by "standing by" an earlier false statement given to the police is simply not capable, in law, of raising a reasonable doubt about his or her specific intent to wilfully obstruct the course of justice. A witness in a trial is put on the stand to tell the truth, not to perpetuate a lie or to "stand by" earlier lies. A person cannot refuse to be sworn or affirmed to give testimony for the purpose of not perpetuating a lie without also intending to obstruct the course of justice. In doing so, the clear inference is that the person intended or knew that his acts would tend to obstruct the course of justice, whatever the stated motive or desired outcome.

Use of Prior Criminal Records in Sentencing: MBCA

The Court of Appeal reviews how sentencing judges may consider prior criminal records in *R. v. Wright*, 2010 MBCA 80, finding that:

> ...although a sentencing judge cannot punish an accused again for previous convictions, a prior criminal record can assist that judge in determining the normative character of that accused and, when that record shows repeated related criminal behaviour, it may be viewed as an aggravating factor (thereby causing the sentence to be increased along the appropriate range of sentences) in order to better address certain objectives of sentencing more particular to the offender, such as specific deterrence, protection of society and/or the prospects of rehabilitation. (para.16)

Despite disconcerting facts and "a noticeable and troublesome escalation in the level of violence used by the accused" the court found the four year sentence for sexual assault to be "outside an acceptable range of sentences under similar circumstances" and thereby "demonstrably unfit." The court substituted a sentence of three years.

Section 8 of the ***Charter*** Attaches to People Not Places: MBQB

A temporal link between an unreasonable search and seizure of a vehicle and the execution of a pre-existing search warrant on a private residence does not give the vehicle owner standing to challenge the search warrant relative to the residence according to the court in *R. v. Thai*, 2010 MBQB 204. The fact that the police used the keys and garage door opener obtained during the illegal vehicle search to gain entry to the residence was irrelevant since the search warrant gave them the right to make a forced entry. The accused had not established that he had a reasonable and subjective expectation of privacy with regard to the property and therefore he had no standing to challenge the search warrant.

Feds Add Further Crime Bills To Full Fall Agenda

The government introduced new legislation to end sentence discounts for multiple murders on October 5, 2010. Bill C-48, which is similar to the previously introduced Bill C-54, would allow judges to impose consecutive parole ineligibility periods on individuals convicted of more than one first or second degree murder. Also on the horizon, according to this Law Times article, is legislation to increase penalties for sexual offences against children and an as-yet undefined "additional action" to address the "disturbing" number of unsolved cases of murdered and missing aboriginal women. There were nine outstanding crime bills on the agenda when

Parliament adjourned for the summer, including the controversial Bill C-4, amending the *Youth Criminal Justice Act* and Bill C-17, the *Combating Terrorism Act*.

Recommended Reading

These articles deal with current issues in criminal law:

- In *The Real Truth About Truth in Sentencing* author Omar Ha-Redeye comments on the speculation that the new *Truth in Sentencing Act* will have a disproportionate affect on aboriginal offenders and those in rural communities. Winnipeg gets a mention for our high rate of granting 2-for-1 credit, our significant aboriginal population, and our lengthy trial waiting periods.
- It has been a while since the Supreme Court has considered the doctrine of entrapment, but it is on the agenda for consideration this fall. *Entrapment: Bringing the Administration of Justice into Disrepute? (Aliu Imoro v. Her Majesty the Queen)*, posted September 29, 2010 on The Court, reviews the existing case law on entrapment and speculates on how the court may rule in *Aliu Imoro*.

Remedies From Dollars to Sense? - 2010 Isaac Pitblado Lectures

The 2010 Isaac Pitblado Lectures will explore developments in the law of remedies in both the traditional courts and administrative bodies. Keynote speakers include The Hon. Mr. Justice Cromwell of the Supreme Court of Canada, Dame Hazel Genn, Faculty of Laws, University College, London, and Professors John McCamus, Kent Roach and Gerald Heckman. The lectures will be held November 26 and 27 at the Fort Garry Hotel.