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The Limits of Police Interrogation: The Limits of the Charter

Hon. Justice Gary T. Trotter[*]

I. INTRODUCTION

A confession has long been recognized as a powerful piece of evidence in a criminal trial, a virtual "queen of proofs".[1] It is now well accepted that it is a "natural manifestation of human experience" that judges and juries generally accord great weight to confessions.[2] As Cory J. explained in *R. v. Hodgson*:[3]

> It is because of the tremendous significance attributed to confessions and the innate realization that they could be obtained by improper means that the circumstances surrounding a confession have for centuries been carefully scrutinized to determine whether it should be admitted.[4]

This concern for the proper limits of police interrogation has been galvanized by a growing body of literature that suggests that false confessions may play a significant role in wrongful convictions.[5] Yet, despite the importance of police interrogation to the investigative process, the *Canadian Charter of Rights and Freedoms*[6] has had only a limited

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[*] Superior Court of Justice, Ontario. This paper is based partly on an earlier paper entitled, "Voluntariness in a Nutshell", presented at the Ontario Bar Association Conference, *The Ultimate Guide on Hearsay and Voluntariness*, on February 3, 2007, in Toronto.

[1] See Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000), at 4. In extravagant terms, Brooks also writes: "Meanwhile, Western culture, most strikingly since the Romantic era to our day, has made confessional speech a prime mark of authenticity, par excellence the kind of speech in which the individual authenticates his inner truth."

[2] See *R. v. Hodgson*, [1998] S.C.J. No. 66, 127 C.C.C. (3d) 449, at 460 (S.C.C.), *per* Cory J.

[3] [1998] S.C.J. No. 66, 127 C.C.C. (3d) 449 (S.C.C.). See also *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 29 (S.C.C.), in which Charron J. said: "[A] confession is a very powerful item of evidence against an accused which, in and of itself, can ground a conviction."

[4] *R. v. Hodgson*, [1998] S.C.J. No. 66, 127 C.C.C. (3d) 449 (S.C.C.), at 460 (S.C.C.).

[5] See Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601 and Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003-2004) 35 Ottawa L. Rev. 179.

[6] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

impact on what takes place inside the interrogation room. As Professor Lisa Dufraimont observes, "the common law rule excluding voluntary confessions remains the suspect's best protection against coercive interrogation."[7] Of course, it would be an overstatement to say that the Charter has had *no* impact on interrogation. Rules have been developed under sections 10(a) and (b) of the Charter that place limits on the timing, and, to a very limited extent, the substantive content of interrogations. But limits on what transpires during an interrogation have been left largely to the dynamic common law confessions rule.[8]

Some critics lament the fact that the law relating to interrogations seems to have been left behind by the Charter.[9] For those who favour greater control over the interrogation process, the Charter is thought to promise more meaningful protection for detained persons. However, this proposition is debatable. There are many benefits associated with leaving the law of interrogation to the realm of the common law confessions rule, benefits that might be eroded by attempts to "Charter-ize" this area of the law. Moreover, given that Charter values are reflected in the modern common law confessions rule, it is doubtful that the law would develop in a more robust manner if it were to become more firmly rooted in the Charter. The majority of the Supreme Court essentially reached this conclusion in its recent judgment in *R. v. Singh*.[10]

II. CHARTER RIGHTS IMPLICATED IN THE INTERROGATION PROCESS

There are numerous rights under the Charter that might be said to be implicated in police interrogation. Section 10(a), which guarantees the right of a detainee to be "informed promptly of the reasons" for arrest

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[7] Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions", in this volume, at 249.

[8] There are numerous excellent treatments of the common law rule in Canada. See David Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005), Chapter 8; John Sopinka, Sidney Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) (and second edition supplement, 2004), Chapter 8; S.C. Hill *et al.*, *McWilliams' Canadian Criminal Evidence*, 4th ed. Looseleaf (Aurora, ON: Canada Law Book, 2003-), Chapter 8; and Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 134-43.

[9] See Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions" in this volume and Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188.

[10] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.). The implications of this decision are discussed below.

and detention, is a pre-condition to interrogation of a detained person. However, the Supreme Court has interpreted the section rather conservatively, with little in the way of consequences when breaches of the section are established.[11]

The most obvious Charter right implicated in limiting interrogations is section 10(b) of the Charter, which guarantees the right to counsel to persons who are "detained". Section 10(b) has generated a complex web of doctrine, addressing many aspects of the encounter between the police and a detained person.[12] At the heart of the section 10(b) is the right against self-incrimination, a value pursued in many aspects of the jurisprudence of former Chief Justice Antonio Lamer, the architect of many of the early Supreme Court's decisions applying the Charter to the criminal law.[13] In the context of the right to counsel, Lamer C.J.C. said the following in *R. v. Bartle*:[14]

> 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: *R. v. Manninen* (1987), 34 C.C.C. (3d) 385 (S.C.C.), at pp. 391-3. 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 …[15] (emphasis added)

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[11] The Court has addressed this section of the Charter on only a few occasions. See *R. v. Greffe*, [1990] S.C.J. No, 32, 55 C.C.C. (3d) 161 (S.C.C.); *R. v. Evans*, [1991] S.C.J. No. 31, 63 C.C.C. (3d) 289 (S.C.C.); *R. v. Latimer*, [2001] S.C.J. No. 1, 39 C.R. (5th) 1 (S.C.C.); and *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.).

[12] See Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 331-53.

[13] There are many aspects of the criminal law that Lamer C.J.C. addressed with self-incrimination in mind. One obvious area was s. 10(b) of the Charter. This theme also dominated his vision of the exclusion of evidence under s. 24(2), starting in *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.). Chief Justice Lamer's views on self-incrimination are explored in the context of when it is appropriate to re-open the Crown's case and amend an information: see *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, 89 C.C.C. (3d) 289 (S.C.C.).

[14] [1994] S.C.J. No. 74, 92 C.C.C. (3d) 289 (S.C.C.).

[15] *R. v. Bartle*, [1994] S.C.J. No. 74, 92 C.C.C. (3d) 289, at 300 (S.C.C.). See also *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229 (S.C.C.).

From this theme, a number of duties have been imposed on the police, obligations that must be discharged before a detained individual may be questioned. These are called informational[16] and implementational[17] duties. They are designed to further the objective of preventing the accused from incriminating himself. They comprise a set of procedural ground rules for interrogation. With one exception, they fall short of regulating the substance of an interrogation (in terms of the questions the police may ask and the tactics they may use).

Until the police have discharged their implementational duties (*i.e.*, to retain and instruct counsel), they must refrain from questioning[18] or otherwise attempting to elicit information[19] from the detained person. This is essentially a "holding-off" period.[20] However, once the detainee has had the opportunity to consult with counsel, subject to comments concerning section 7 of the Charter below, the police are free to question a detained person, even in the face of protestations that he or she does not wish to participate in the interview.[21] This means that, while section 10(b) provides protection against self-incrimination through access to counsel, it does not create a right not to be interviewed or interrogated by state officials. This puts a great premium on defence counsel giving advice to a detained person to warn him or her that the police may continue with their questioning when the call with counsel is completed.

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[16] Flowing from *R. v. Bartle*, [1994] S.C.J. No. 74, 92 C.C.C. (3d) 289 (S.C.C.), and other cases, the police must advise the detainee of the right to retain and instruct counsel without delay. This includes the duty to advise of free legal advice and the availability of legal advice through a "1-800" service, in locations where it exists: see *R. v. Brydges*, [1990] S.C.J. No. 8, 53 C.C.C. (3d) 330 (S.C.C.).

[17] The police must provide a reasonable opportunity for the accused to consult with counsel (*R. v. Manninen*, [1987] S.C.J. No. 41, 34 C.C.C. (3d) 385 (S.C.C.) and *R. v. Baig*, [1987] S.C.J. No. 77, 61 C.R. (3d) 97 (S.C.C.)) in private (*R. v. Playford*, [1987] O.J. No. 1107, 40 C.C.C. (3d) 142 (Ont. C.A.).

[18] See *R. v. Manninen*, [1987] S.C.J. No. 41, 34 C.C.C. (3d) 385 (S.C.C.); *R. v. Prosper*, [1994] S.C.J. No. 72, 92 C.C.C. (3d) 353 (S.C.C.); and *R. v. Brydges*, [1990] S.C.J. No. 8, 53 C.C.C. (3d) 330 (S.C.C.).

[19] *R. v. McKenzie*, [2002] O.J. No. 3029, 167 C.C.C. (3d) 530 (Ont. C.A.).

[20] *R. v. Prosper*, [1994] S.C.J. No. 72, 92 C.C.C. (3d) 353 (S.C.C.). See also *R. v. Lewis*, [2007] O.J. No. 1784, 86 O.R. (3d) 46 (Ont. C.A.). Relying on *R. v. Plaha*, [2004] O.J. No. 3484, 188 C.C.C. (3d) 289 (Ont. C.A.), the *Lewis* Court found that the breach of this duty tainted statements taken shortly thereafter that *were* taken in compliance with s. 10(b).

[21] See *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.), in which McLachlin J. (as she then was) held at 188:

> Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the *Charter*. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.

See also *R. v. Roy*, [2003] O.J. No. 4252, 180 C.C.C. (3d) 298, at 302-303 (Ont. C.A.).

Consequently, accused persons ought to be advised, not just of their right to remain silent, but how to exercise that right.

Everything that has been discussed above is a pre-condition to the commencement of an interview or interrogation. A further obligation sometimes arises once questioning has commenced. If the reasons for the detainee's detention change during questioning, the informational and implementational duties are triggered once again. This may occur when the accused's jeopardy changes (for example, when an assault victim dies and the charge is upgraded to a homicide),[22] or when the investigation turns in the direction of other offences for which the detained person was not initially arrested.[23]

The only rule to emanate from section 10(b) of the Charter that impacts on the substance of police questioning arises from the Supreme Court's decision in *R. v. Burlingham*.[24] The accused was detained by the police and was being questioned on a charge of murder. The accused stood by his right to remain silent. Among other tactics, police made "repeated disparaging comments … about defence counsel's loyalty, commitment, availability, as well as the amount of his legal fees".[25] The Court held that this conduct was improper. In particular, Iacobucci J. addressed the nature of the interrogation insofar as it related to the accused's lawyer:

> . . . s. 10(*b*) specifically prohibits the police, as they did in this case, from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in and relationship with defence counsel. It makes no sense for s. 10(*b*) of the *Charter* to provide for the right to retain and instruct counsel if law enforcement authorities are able to undermine either an accused's confidence in his or her lawyer or the solicitor-client relationship.[26]

All other limitations imposed by section 10(b) focus on the external parameters for interrogation, conditions-precedent for questioning. *Burlingham* stands as an exception because it prohibits a specific line of questioning.

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22 See *R. v. Black*, [1989] S.C.J. No. 81, 50 C.C.C. (3d) 1 (S.C.C.).

23 See *R. v. Evans*, [1991] S.C.J. No. 31, 63 C.C.C. (3d) 289 (S.C.C.) and *R. v. Borden*, [1994] S.C.J. No. 82, 92 C.C.C. (3d) 404 (S.C.C.).

24 [1995] S.C.J. No. 39, 97 C.C.C. (3d) 385 (S.C.C.).

25 *R. v. Burlingham*, [1995] S.C.J. No. 39, 97 C.C.C. (3d) 385, at 393 (S.C.C.).

26 *R. v. Burlingham*, [1995] S.C.J. No. 39, 97 C.C.C. (3d) 385, at 397 (S.C.C.).

The right to silence, recognized to be an aspect of section 7 of the Charter,[27] is sometimes resorted to in the interrogation context. Section 7 is typically[28] asserted in circumstances of persistent questioning by the police, after section 10(b) compliance, but in the face of assertions by the detained person that he or she wishes to exercise his or her right to silence. Success on this basis has been mixed.[29] More recently, judges have approached this question by exploring the connection between the common law confessions rule and the right to silence in section 7 of the Charter. In *R. v. Roy*,[30] Doherty J. observed that "[t]he trial judge clearly linked the voluntariness argument and the claim that the appellant had been denied his right to silence. That link exists both in and on the facts of this case."[31] Ultimately, the Court of Appeal agreed with the trial judge that, under the rubric of the common law confessions rule, the accused had not been deprived of his right to choose whether to remain silent.

More recently, the Supreme Court of Canada in *Singh*[32] has finally addressed this issue, which has been percolating in the jurisprudence of some appellate courts for many years. Mr. Singh was charged with first degree murder. After consulting with counsel, he advised the police that he did not wish to make a statement. The police persisted in the face of many more protestations from the accused that he wished to remain silent. The trial judge found that his subsequent admissions to the police were voluntary. This conclusion was affirmed by the British Columbia Court of Appeal.[33] In a 5:4 split, the Supreme Court upheld this decision. The majority held that, when an accused person is in detention and is speaking to a person that he or she knows is a person in authority, the confessions rule "effectively subsumes" the right to silence.[34] In this

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27 See *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.), *R. v. Broyles*, [1991] S.C.J. No. 95, 68 C.C.C. (3d) 308 (S.C.C.); and *R. v. Liew*, [1999] S.C.J. No. 51, 137 C.C.C. (3d) 353 (S.C.C.). The right to silence is also reflected in other sections of the Charter, including s. 11(c) (right not to be compelled to be a witness) and s. 13 (right against self-incrimination).

28 *R. c. Otis*, [2000] J.Q. no 4320, 37 C.R. (5th) 320 (Que. C.A.).

29 See the discussion of this body of law in Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 128-29. See also Guy Cournoyer, "Saying 'No' to Interrogation: The Quebec Court of Appeal Asserts a Meaningful Right to Silence" (2001) 37 C.R. (5th) 342.

30 [2004] O.J. No. 4252, 15 C.R. (6th) 282 (Ont. C.A.).

31 *R. v. Roy*, [2004] O.J. No. 4252, 15 C.R. (6th) 282, at 285-86 (S.C.C.). For commentary on this case, see Guy Cournoyer, "Annotation: *R. v. Roy*" (2003) 15 C.R. (6th) 283.

32 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

33 *R. v. Singh*, [2006] B.C.J. No. 1274, 38 C.R. (6th) 217 (B.C.C.A.).

34 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 39 (S.C.C.).

context, the two tests (*i.e.*, whether the right to silence has been infringed and whether the voluntariness test is satisfied) are "functionally equivalent".[35] As Charron J. (McLachlin C.J.C. and Bastarache, Deschamps and Rothstein JJ., concurring) explained for the majority:

> Therefore, voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the s. 7 issue. In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a *Charter* violation of the right to silence in respect of the same statement. The converse holds true as well. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test.[36]

Essentially, persistent questioning in the face of insistence on silence is an inquiry into whether the accused "exercised free will by choosing to make a statement",[37] which, as discussed in the next part, is at the heart of the voluntariness doctrine. The majority could not find error with the trial judge's conclusion that Mr. Singh's will was not overborne by the persistence of the police.

In a dissenting judgment, Fish J. (Binnie, LeBel and Abella JJ., concurring) held that Mr. Singh's rights under section 7 of the Charter were violated by the persistent questioning of the police. Quoting from *Hebert*,[38] the dissenters held that the police "unfairly frustrated [Mr. Singh's] decision on the question of whether to make a statement to the authorities".[39] In doing so, Fish J. rejected the contention that the protections articulated in *Hebert* were restricted to detainees who were dealing with undercover officers or other detainees.[40] The dissenters also

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[35] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 39 (S.C.C.). The majority did recognize that s. 7 offers a residual protection in certain circumstances, such as when the accused person is dealing with an undercover officer.

[36] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 37 (S.C.C.).

[37] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 53 (S.C.C.).

[38] *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.).

[39] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 63 (S.C.C.). Square brackets inserted in original text.

[40] After quoting from *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.), Fish J. held at para. 62:

> Nothing in either passage, or elsewhere in *Hebert*, suggests that McLachlin J. limited the right of silence under s. 7 of the *Charter* to statements made by a detainee to undercover police officers or to other detainees. On the contrary, in determining its scope on a principled basis, Justice McLachlin dealt with the right to silence in the context of statements made

found that Mr. Singh's right to counsel was "collaterally" infringed in the circumstances by the officer's comments about his counsel's advice to remain silent.[41] More fundamentally, Fish J. held that the protection afforded by section 7 of the Charter is not subsumed within the confessions rule and that a confession that is otherwise voluntary may still, in some circumstances, infringe section 7 of the Charter.[42]

For those hoping for more robust protections against interrogation, *Singh*[43] will be a disappointment. However, this paper does not dwell upon the issue of whether there should be greater or lesser procedural safeguards for those interrogated by the police. For present purposes, *Singh* is important because it demonstrates that the scope of protection may be modulated within the confines of the common law confessions rule (albeit, a rule, the contemporary incarnation of which is imbued with Charter values).

III. VOLUNTARINESS AND THE CHARTER

The Supreme Court of Canada has addressed the substantive content of the common law confessions rule on many occasions prior to the entrenchment of the Charter. After 1982, the issue has arisen for consideration in only a handful of cases. Earlier treatments by the Court[44] may have supported the assertion that the "confessions rule has attained some indeterminate constitutional status under the *Charter*".[45] The Supreme Court's recent decisions have perpetuated this indeterminate status. In *R. v. Oickle*,[46] perhaps one of the most important Canadian criminal cases in many years, the Court purported to cut ties between the

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> "*to the police*" or "*to the authorities*" by detainees *under interrogation.* And she dealt with it as a constitutional right not subsumed by the common law confessions rule. (emphasis in the original)

The majority interpreted *Hebert* more narrowly, restricting it to circumstances in which the accused person was unaware that he/she was speaking to a person in authority: see paras. 46-47.

41 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 62 (S.C.C.).

42 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at paras. 73-78 (S.C.C.).

43 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

44 See *R. v. Whittle*, [1994] S.C.J. No. 69, 92 C.C.C. (3d) 11 (S.C.C.), in which Sopinka J. said at 24: "While the confession rule and the right to silence originate in the common law, as principles of fundamental justice they have acquired constitutional status under s. 7 of the *Charter*." This passage was quoted by Bastarache J. in *R. v. G. (B.)*, [1999] S.C.J. No. 29, 135 C.C.C. (3d) 303, at 318 (S.C.C.).

45 Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions", in this volume, at 249.

46 [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

Charter and the voluntariness rule. As discussed above, *Singh*[47] purports to re-establish some link between the two, but in a manner that will have little practical impact on substantive outcomes in terms of the admissibility of statements.

In *Oickle*,[48] the Court imposed further structure on the developing common law confessions rule, clarifying the various categories of involuntariness, and elaborating on the role of oppressive circumstances in undermining the voluntariness of statements.[49] The Court also considered the social-legal context in which the present law operates,[50] as well as the values embodied in the dynamic common law rule. Writing for the majority, Iacobucci J. confirmed that the rule is concerned with ensuring the reliability of statements (*i.e.*, weeding out false confessions), but also "protection of the accused's rights and fairness in the criminal process".[51] In terms of fairness, the Court touched on the issue of the right to silence, holding that the confessions rule can provide appropriate protection:

> Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. *If a confession is involuntary for any of these reasons, it is inadmissible.*[52] (emphasis added)

This provided explicit confirmation that the common law confessions rule is capable of accommodating right to silence claims.

The *Oickle*[53] Court also faced the question of whether the future development of the confessions rule would be best entrusted to the Charter. This was prompted by the Court's earlier decision in *Hebert*,[54] in which McLachlin J. (as she then was) interpreted the right to silence in light of the common law confessions rule. The *Oickle* Court considered

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47 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

48 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

49 See Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions", in this volume, in which she reviews the various categories: threats and inducements, operating mind, oppression and other police trickery.

50 See the discussion of the empirical literature considered by the Court in Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003-2004) 35 Ottawa L. Rev. 179.

51 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321, at 354 (S.C.C.), quoting John Sopinka, Sidney Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999), at 339.

52 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321, at 354 (S.C.C.).

53 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

54 *R. v. Hebert*, [1990] S.C.J. No. 64, 77 C.R. (3d) 145 (S.C.C.).

the corresponding question of whether the Charter should subsume the rule. Justice Iacobucci rejected this position:

> But I do not believe that this view is correct, for several reasons. First, the confessions rule has a broader scope than the *Charter*. For example, the protections of s. 10 only apply "on arrest or detention". By contrast, the confessions rule applies whenever a person in authority questions a suspect. Second, the *Charter* applies a different burden and standard of proof from that under the confessions rule. Under the former, the burden is on the accused to show, on a balance of probabilities, a violation of constitutional rights. Under the latter, the burden is on the prosecution to show beyond a reasonable doubt that the confession was voluntary. Finally, the remedies are different. The *Charter* excludes evidence obtained in violation of its provisions under s. 24(2) only if admitting the evidence would bring the administration of justice into disrepute: see *R. v. Stillman*, [1997] 1 S.C.R. 607, *R. v. Collins*, [1987] 1 S.C.R. 265, and the related jurisprudence. By contrast, a violation of the confessions rule always warrants exclusion.
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> These various differences illustrate that the *Charter* is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below 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*. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the *Charter*. While it may be appropriate, as in *Hebert*, *supra*, to interpret one in light of the other, it would be a mistake to assume one subsumes the other entirely.[55]

The majority in *Singh* recognized these same relative benefits[56] and held that, instead of the confessions rule being subsumed by the Charter, "the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention."[57] In these circumstances, the two tests are "functionally equivalent".[58]

On Iacobucci J.'s analysis, there are considerable benefits to addressing the limits of interrogation through the common law. The most profound benefits are reflected in the burden and standard of proof. Apart from the adjudication on the ultimate issue of guilt or innocence, there is no

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55 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321, at 340 (S.C.C).

56 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 25 (S.C.C.).

57 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 39 (S.C.C.).

58 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 39 (S.C.C.).

other juncture in the criminal process where proof beyond a reasonable doubt is the standard of proof. Combined with the burden of proof, all an accused person need do is raise a reasonable doubt that the statement was involuntary on any of the grounds recognized in *Oickle*.[59] Moreover, the Crown must adduce evidence to show the full context in which the statement was made, which generally involves calling the evidence of all persons in authority who came into contact with the accused leading up to the making of the statement.[60] By contrast, on a Charter motion, the accused bears the burden of proof, on a balance of probabilities, on the issues of both breach and remedy.[61]

When Iacobucci J. wrote, it was debatable whether the differing remedial frameworks (common law versus the Charter) favoured adjudication under the common law. It is true that a finding of involuntariness mandates the exclusion of evidence. However, at the time *Oickle*[62] was decided, when conscriptive evidence (a statement being the paradigmatic example) was found to be taken in violation of Charter rights, exclusion was virtually automatic.[63] However, the circumstances

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[59] See *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.); *R. v. Hodgson*, [1998] S.C.J. No. 66, 127 C.C.C. (3d) 449 (S.C.C.); *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 160 C.C.C. (3d) 493 (Ont. C.A.); and *R. v. Backhouse*, [2005] O.J. No. 754, 194 C.C.C. (3d) 1 (Ont. C.A.). See *R. v. West*, [2003] N.S.J. No. 457, 182 C.C.C. (3d) 83 (N.S.C.A.), in which the trial judge said that the burden on the Crown was "substantial", but less than proof beyond a reasonable doubt. The Court of Appeal held this to be a serious error that could not be cured by the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. In *R. v. Tessier*, [2002] S.C.J. No. 6, 162 C.C.C. (3d) 478, at para. 2 (S.C.C.), the Supreme Court approved of the following approach of the dissenting judge in the New Brunswick Court of Appeal (*R. v. Tessier*, [2001] N.B.J. No. 131, 153 C.C.C. (3d) 361, at 393 (N.B.C.A.)): "The appropriate test to be applied in this case was whether the evidence raised a reasonable doubt that the statements were voluntary by reason of a combination of oppressive conditions and inducements, taking into account all the circumstances surrounding the taking of the impugned statements."

[60] See *R. v. Koszulap*, [1974] O.J. No. 726, 20 C.C.C. (2d) 193 (Ont. C.A.), in which Martin J.A. held at 198: "The burden of proving that a confession was made voluntarily is not discharged by evidence that it was preceded by a caution and by the evidence of the police officer who obtained the statement that it was not induced by threats or promises. All the surrounding circumstances must be examined in order to enable the Court to determine whether the statement was made voluntarily." See also *R. v. Holmes*, [2002] O.J. No. 4178, 169 C.C.C. (3d) 344 (Ont. C.A.), in which it was held that proof that the accused had exercised his right to counsel was no substitute for proving that the accused was not mistreated during a 16-hour period.

[61] See *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.).

[62] *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

[63] A number of the Supreme Court's decisions, starting with *R. v. Collins*, [1987] S.C.J. No. 15, 33 C.C.C. (3d) 1 (S.C.C.), and followed by many others (in particular, see *R. v. Stillman*, [1997] S.C.J. No. 34, 113 C.C.C. (3d) 321 (S.C.C.)), have been taken to strongly suggest that exclusion is automatic. However, in *R. v. Elias; R. v. Orbanski*, [2005] S.C.J. No. 37, 196 C.C.C. (3d) 481 (S.C.C.), LeBel J. (dissenting in part) stated at 518: " … our Court has not suggested that

under which conscriptive evidence is excluded has since become less clear, with change potentially on the horizon. If the law moves at all on this issue, there is only room to move in a manner that would make the automatic exclusion remedy under the common law more favourable.

Another reason, not advanced in *Oickle*[64] or *Singh*,[65] for keeping the common law rule separate from the Charter relates to preliminary inquiries. While the provisions relating to the conduct of preliminary inquiries have been amended to streamline the process,[66] in order to introduce the statement of the accused into evidence at a preliminary inquiry, the Crown must still establish that the statement is voluntary.[67] Conversely, the Charter does not apply at a preliminary inquiry. In a ruling that came after *Oickle* (but before *Singh*), the Supreme Court in *R. v. Hynes*[68] held that a judge conducting a preliminary inquiry is not a court of competent jurisdiction and, as such, has no power to exclude a statement obtained in violation of s. 10(b) of the Charter.[69] Therefore, subsuming the confessions rule within the Charter might have the result of constricting the ambit of the confessions rule by excluding its application from preliminary inquiries. Alternatively, subsuming the common law within the Charter could result in the undesirable development of two versions of the confessions rule, a purely common law version applicable at the preliminary inquiry, and a Charter-based version at trial.

One complaint about the common law confessions rule is that it fails to impose clear limits on the police.[70] Others have suggested that *Oickle*[71] has done the opposite and has created a "recipe" or list of coercive

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the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant."

64 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

65 *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

66 See Part XVIII of the *Criminal Code*, R.S.C. 1985, c. C-46.

67 See s. 542(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. See *R. v. Pickett*, [1975] O.J. No. 675, 28 C.C.C. (2d) 297 (Ont. C.A.). See *R. v. Rajab*, [2005] O.J. No. 5795, 193 C.C.C. (3d) 436 (Ont. C.J.) for an example of exclusion of a statement at a preliminary inquiry on the basis of voluntariness.

68 [2001] S.C.J. No. 80, 159 C.C.C. (3d) 359 (S.C.C.).

69 See also the companion case *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, 159 C.C.C. (3d) 321 (S.C.C.).

70 See Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions", in this volume.

71 *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

techniques.[72] It is unrealistic to expect bright lines in this area. In *Oickle*, the Court favoured a contextual approach, holding that:

> Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.[73]

Singh[74] too fails to impose any bright-line distinctions in this context. Beyond the theoretical debate between the majority and minority judgments in *Singh*, all judges accepted the proposition that persistent questioning by police officers, in the face of an assertion of the right to remain silent, *may* trigger the operation of the common law confessions rule or the right to silence, as the case may be. However, *Singh* provides little guidance on where to draw the line. *Oickle*[75] establishes that the common law confessions rule is dynamic, capable of changing to the realities of modern police investigations. *Singh* confirms that the rule vindicates right to silence claims. Even if the Supreme Court could be persuaded to develop "hard and fast rules" in this area, and working on the debatable assumption that this is desirable, clarity is achieved just as effectively within the confines of the common law rule, without drawing upon the Charter. Indeed, Parliament could establish clear guidelines and ground rules for interrogation.[76]

The types of complaints made in the right to silence cases involve policy choices about the proper role of the police in the interrogation process. If the law is developed to provide greater protection to detainees whose assertions of the right to remain silent are ignored by the police, it is unlikely that "hard and fast" rules will emerge as a response to this situation. Like many questions concerning interrogation, a contextual approach seems more sensible. The dynamic common law confessions rule seems ideally suited to this task. There is nothing inherent in the Charter that promises to deliver greater or more clearly defined protections.

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[72] See Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188, who actually compiles lists of permissible and impermissible techniques in light of *Oickle*.

[73] *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321, at 345 (S.C.C.).

[74] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

[75] *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321 (S.C.C.).

[76] See Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions".

Singh[77] proves this point. The resolution of the dispute over the admissibility of Mr. Singh's utterances did not turn on the choice of analytical frameworks. It was open to the majority to find that the type of conduct engaged in by the police undermined the voluntariness of Mr. Singh's utterances. In the end, the majority was not prepared to find that the trial judge erred in holding that the conduct of the police did not cross the line. Even if the majority had accepted the minority's more robust view of the Charter in this context, it is difficult to envisage the majority coming to a different conclusion on the merits. It addressed the same question of value, but without the aid of the Charter.

IV. CONCLUSION

Since 1982, there has been a strong tendency to dispatch all criminal law problems directly to the Charter. Admittedly, the Charter has revolutionized some aspects of criminal law. However, the Charter is not a panacea; it does not automatically prescribe ready-made solutions for all perceived shortcomings in the criminal law. In the context of confessions, the Charter is accompanied by significant procedural baggage that would render relief less accessible. In the end, our law relating to the interrogation of suspects engages a complex web of values that sometimes conflict.[78] Policy options abound and compete for ascendant positions. Sensible and well-grounded reforms do not require the currency of the Charter to succeed. This has been the experience of Canadian law concerning the interrogation of suspects. If the law relating to the interrogation of suspects is inadequate, and this is far from apparent, it cannot be seriously maintained that this is due to the fact that the common law confessions rule has not been subsumed by the Charter.

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[77] *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.).

[78] In *R. v. Oickle*, [2000] S.C.J. No. 38, 147 C.C.C. (3d) 321, Iacobucci J. said at 354: "Wigmore perhaps summed up the point best when he said that voluntariness is 'shorthand for a complex of values': *Wigmore on Evidence* (Chadbourn rev. 1970, vol. 3, 826, at p. 351." This passage is quoted with approval by Charron J. in *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48, at para. 30 (S.C.C.).