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The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law

Lisa Dufraimont*

I. INTRODUCTION

The recent case of *R. v. Sinclair*[1] constitutes the third instalment in the so-called "interrogation trilogy" from the Supreme Court of Canada.[2] The first case in the trilogy, *R. v. Oickle*,[3] outlined the limits on police interrogation imposed by the common law confessions rule. Then, in *R. v. Singh*,[4] the Court addressed the constitutional right to silence and its operation in the interrogation context, including its relationship with the confessions rule. Finally, in *Sinclair*, the Supreme Court has explained how the constitutional right to counsel applies in the context of police questioning a detainee. These three cases span more than a decade and touch on different rules and rights under the common law and the *Canadian Charter of Rights and Freedoms*.[5] But taken together, the trilogy lays out the basic framework of legal safeguards available to interrogated suspects under Canadian law.

Reaction to the cases in the trilogy has been swift, strong and mainly negative. The primary criticism levelled by commentators — which was also a concern of the dissenting judges in each case — is that the Supreme Court decisions making up the interrogation trilogy do not go far enough

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1 [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310, 77 C.R. (6th) 203 (S.C.C.) [hereinafter "*Sinclair*"].

2 The phrase "interrogation trilogy" was coined by Binnie J. in *Sinclair*, *id.*, at para. 77.

3 [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321 (S.C.C.) [hereinafter "*Oickle*"].

4 [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405, 51 C.R. (6th) 199 (S.C.C.) [hereinafter "*Singh*"].

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

to safeguard suspects and control police abuses in the interrogation room.[6] No doubt there are real questions about whether the Supreme Court's pronouncements on interrogation have struck the right balance between state power and individual rights. At the same time, it seems important to avoid focusing so much on the protections the law *does not* provide to interrogated suspects that the protections the law *does* provide are forgotten.

This paper aims to assess the interrogation trilogy and its impact on the procedural safeguards surrounding police interrogation, with particular emphasis on the effect of the recent decision in *Sinclair*. The analysis will focus on interrogation in the ordinary scenario where the suspect knows he or she is interacting with police; undercover operations raise different issues that go beyond the scope of this paper. Regarding the protections available to suspects in the ordinary interrogation case, it will be argued that despite the strong reaction from critics, the interrogation trilogy has done little to change Canadian law. The Supreme Court has now clearly rejected the idea that detainees should be permitted to cut off interrogation by invoking Charter rights, and the implications of that rejection will be discussed. The interrogation trilogy has also firmly established the confessions rule as the central safeguard available to interrogated suspects. Legitimate concerns have been raised about the vitality of the confessions rule as a protection for individuals subjected to police interrogation, but it will be argued that there are advantages to privileging the confessions rule in this way.

II. Overview of the Interrogation Trilogy

Before analyzing the current state of the law, it will be useful to review the Supreme Court's decisions in the interrogation trilogy. The

[6] See, *e.g.*, Don Stuart, "*Sinclair* Regrettably Completes the *Oickle* and *Singh* Manual for Coercive and Lawless Interrogation" (2010) 77 C.R. (6th) 303 [hereinafter "*Sinclair* Regrettably"]; Christine Boyle, "*R. v. Sinclair*: A Comparatively Disappointing Decision on the Right to Counsel" (2010) 77 C.R. (6th) 310 [hereinafter "Boyle"]; Dale E. Ives & Christopher Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2007) 51 C.R. (6th) 250 [hereinafter "Ives & Sherrin"]; Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 69 [hereinafter "Thomas"]; Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L. Rev. 477 [hereinafter "Ives"]; Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188.

judgments in *Oickle*, *Singh* and the recent case of *Sinclair* will be discussed in turn.

1. *R. v. Oickle* and the Confessions Rule

The confessions rule has deep roots in the common law of evidence, dating back more than 200 years.[7] It remains a vital part of Canadian law, requiring that any out-of-court statement made by an accused person to a person in authority be excluded from evidence unless the prosecution proves beyond a reasonable doubt that the statement was made voluntarily.[8] The Supreme Court reaffirmed the confessions rule in *Oickle*,[9] and that case provides extensive guidance on the factors that should be considered in the analysis of voluntariness.

Oickle involved the interrogation of a suspect in a series of arsons. The suspect, Oickle, submitted to a polygraph test to probe his involvement, if any, in the fires. The polygraph test was administered in the afternoon, after which the police immediately began a series of interrogations lasting late into the night. The police employed numerous tactics calculated to put pressure on Oickle to confess. For example, they exaggerated the reliability of the polygraph, repeatedly claiming that because Oickle failed the test they already knew him to be guilty.[10] They also suggested to Oickle that if he did not confess, they might have to interrogate his fiancée or subject her to a polygraph examination.[11] Oickle made various self-incriminating statements and, ultimately, about eight hours into his interaction with police, he confessed to setting seven of the eight fires under investigation. He later participated in a re-enactment at the scene of each fire. The trial judge admitted Oickle's statements, having determined that they were voluntary in all the circumstances, and Oickle was convicted. The Nova Scotia Court of Appeal held that the statements were involuntary and should have been excluded, quashed the convictions and entered acquittals on all counts.

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[7] On the origins of the confessions rule in 18th-century England, see John H. Langbein, *The Origins of Adversary Criminal Trial* (New York: Oxford University Press, 2003), at 220-21.

[8] See, *e.g.*, *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 12 (S.C.C.). It is worth noting that this rule only applies where the accused knows he or she is talking to a "person is authority"; statements made in undercover operations are not covered by the confessions rule.

[9] *Supra*, note 3.

[10] *Id.*, at para. 84.

[11] *Id.*, at para. 94.

The Supreme Court allowed the appeal by a 6-1 majority and reinstated Oickle's convictions. The judgment of the majority was delivered by Iacobucci J., who took the opportunity to elucidate the scope of the confessions rule. He explained that, even in the Charter era, the confessions rule continues to apply as a matter of common law; the protections for the accused under the Charter co-exist with the confessions rule, and neither wholly subsumes the other.[12] Justice Iacobucci further explained that a restatement of the confessions rule was needed to respond to the growing consciousness of the danger of false confessions. A primary reason to exclude involuntary confessions is that they may be unreliable, and the confessions rule should be informed by knowledge of the kinds of interrogation techniques that are prone to produce false confessions.[13] Ultimately, Iacobucci J. stressed that the confessions rule should be defined with a view to the twin objectives of "protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes".[14]

Justice Iacobucci explained that the confessions rule focuses on "voluntariness, broadly understood".[15] Bright line rules are inconsistent with the contextual nature of the voluntariness inquiry; trial judges must consider all the circumstances to make the determination.[16] Among the factors that can alone or taken together vitiate the voluntariness of a confession are express or implied threats or promises from the authorities[17] and oppressive circumstances in the interrogation, as where the questioning is intimidating and prolonged or the interrogators withhold sleep, food or water.[18] A confession will also be involuntary when obtained from a suspect who lacked an operating mind.[19] These factors should be considered together as elements of the larger voluntariness inquiry. Finally, the confessions rule requires a separate inquiry into police trickery: where the police use tactics that would shock the conscience of the community, any resulting confession should be excluded on that ground alone.[20]

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12 *Id.*, at para. 31.
13 *Id.*, at para. 32.
14 *Id.*, at para. 33.
15 *Id.*, at para. 27.
16 *Id.*, at paras. 47, 68.
17 *Id.*, at paras 48-57.
18 *Id.*, at paras. 58-62.
19 *Id.*, at paras. 63-64.
20 *Id.*, at paras. 65-67.

According to Iacobucci J., where a trial judge arrives at a conclusion on voluntariness after properly considering the totality of the circumstances, that finding is essentially factual and entitled to deference.[21] In the view of the majority, such was the case on the facts of *Oickle*. While several features of the interrogation potentially raised voluntariness issues, there was no error in the trial judge's analysis of voluntariness and no basis to overturn her finding on appeal.[22] Justice Arbour, writing in dissent, took a very different view of the interrogation, finding that Oickle's statements were made in response to various improper inducements from the authorities and unfair use of the "failed" polygraph.[23]

2. *R. v. Singh* and the Right to Silence

The Charter does not explicitly mention the right to silence, but the Supreme Court has recognized that this right is protected under section 7.[24] Writing for seven members of the Court in the landmark case of *R. v. Hebert*,[25] McLachlin J. explained that the right to silence is, in essence, the right to choose freely whether or not to speak with authorities.[26] *Hebert* involved a detainee who refused to speak with police but was tricked into making incriminating statements by an undercover officer placed in his cell. In these circumstances, the police effectively negated the accused's choice to remain silent and violated his section 7 rights.[27]

From the outset, the section 7 pre-trial right to silence recognized in *Hebert* was defined narrowly. Anxious not to disrupt undercover operations generally, the majority explained that the right is only engaged when the suspect is detained and when the undercover operative elicits the statement.[28] After *Hebert*, courts were uncertain whether and how this Charter right to silence applied in the context of interrogation by known police. A line of authority began to develop applying *Hebert* to traditional police interrogation: where a detainee's repeated assertions of the right to silence were ignored in the context of unrelenting interrogation,

[21] *Id.*, at para. 71.
[22] *Id.*, at para. 104.
[23] *Id.*, at para. 150.
[24] Section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[25] [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) [hereinafter "*Hebert*"].
[26] *Id.*, at 175.
[27] *Id.*, at 186-87.
[28] *Id.*, at 184-85.

some courts held that the police had impermissibly negated the detainee's choice and therefore violated the section 7 right to silence.[29] In these earlier cases, the right to silence implications of persistent interrogation were conceived as separate from any concerns about voluntariness, and the section 7 pre-trial right to silence was sometimes used to exclude even statements that had been ruled voluntary.[30]

The Supreme Court clarified the relationship between the confessions rule and the right to silence in *Singh*.[31] The accused Singh was arrested for murder after a stray bullet killed a bystander in a pub. Singh consulted with counsel and, during subsequent police questioning, he asserted his right to silence some 18 times. Police repeatedly affirmed Singh's right to silence but persisted with the interrogation, eventually eliciting some incriminating statements from him. The trial judge admitted the statements in evidence, finding that they were voluntary and that they were not obtained in violation of the Charter right to silence.

The Supreme Court of Canada, by a 5-4 majority, dismissed Singh's appeal from conviction. Justice Charron, for the majority,[32] rejected the suggestion that police must cease questioning when a detainee asserts the right to silence. Indeed, the majority held that when a detainee is interrogated by known police, the section 7 right to silence provides no protection beyond the protection already offered by the confessions rule; "the confessions rule effectively subsumes the constitutional right to silence"[33] when a detainee is questioned by known police because, in that context, "the two tests are functionally equivalent."[34] Concerns that persistent interrogation in the face of repeated assertions of the right to silence may have overwhelmed a detainee's free will should be dealt with — and may lead to exclusion — under the confessions rule.[35] But where the Crown proves beyond a reasonable doubt that a detainee's statement in the interrogation room was made voluntarily, there is no room left for a Charter claim that the statement was obtained in a manner

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[29] See *R. v. Otis*, [2000] J.Q. no 4320, 151 C.C.C. (3d) 416 (Que. C.A.) [hereinafter "*Otis*"]; *R. v. Roy*, [2003] O.J. No. 4252, 15 C.R. (6th) 282 (Ont. C.A.).

[30] See, *e.g.*, *R. v. Reader*, [2007] M.J. No. 225, 49 C.R. (6th) 301 (Man. Q.B.).

[31] *Supra*, note 4.

[32] Chief Justice McLachlin and Bastarache, Deschamps and Rothstein JJ. concurred with Charron J.

[33] *Singh*, *supra*, note 4, at para. 39.

[34] *Id*.

[35] *Id.*, at para. 47.

that violated the section 7 right to silence.[36] In the view of the majority, then, since the trial judge had fully considered the circumstances and found that the statements were voluntarily made, Singh's Charter argument could not succeed.

Justice Fish delivered a scathing dissent on behalf of four members of the Court.[37] The dissenters stressed that, once asserted, a detainee's right to silence should be respected and not deliberately undermined by police. Justice Fish acknowledged the significant overlap in the protection offered by the confessions rule and the right to silence, but insisted that in some circumstances a voluntary confession may nonetheless be obtained in violation of section 7.[38] Moreover, the dissenters argued that if interrogators are permitted to ignore assertions of the right to silence and persist in questioning detainees under their total control, detainees "are bound to feel that their constitutional right to silence has no practical effect and that they in fact have no choice but to answer".[39] According to Fish J., Singh's self-incriminating statements were obtained in violation of his section 7 right to silence because the police persistently disregarded his choice to remain silent.

3. *R. v. Sinclair* and the Right to Counsel

Section 10(b) of the Charter affords a person who has been arrested or detained the right "to retain and instruct counsel without delay and to be informed of that right". As is clear from its language, section 10(b) imposes both informational and implementational duties on police: they must both inform the detainee of the right to counsel and offer the detainee a reasonable opportunity to exercise that right when the detainee indicates a desire to do so.[40] In *Sinclair*,[41] the Supreme Court considered the meaning of the right to counsel and the implementational duties of police in the context of custodial interrogation. The Court split over the issue, offering three very different interpretations of the right.

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[36] *Id.*, at paras. 8, 37.

[37] Justices Binnie, LeBel and Abella concurred with Fish J.

[38] *Singh*, *supra*, note 4, at paras. 75-77.

[39] *Id.*, at para. 81.

[40] *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, 33 C.R. (4th) 1 (S.C.C.).

[41] *Supra*, note 1. See also the companion cases of *R. v. McCrimmon*, [2010] S.C.J. No. 36, [2010] 2 S.C.R. 402, 77 C.R. (6th) 266 (S.C.C.); and *R. v. Willier*, [2010] S.C.J. No. 37, [2010] 2 S.C.R. 429, 77 C.R. (6th) 283 (S.C.C.), which applied the principles from *Sinclair* on different facts.

Sinclair was arrested for the killing of another man. He was advised of the reason for his arrest and of his right to counsel. He spoke to the lawyer of his choice twice for about three minutes each time. Later the same day, police interrogated Sinclair for five hours. He was told at the outset that he did not have to say anything and that the interview was being recorded and could be used in court. From the beginning, Sinclair took the position that he did not want to say anything without his lawyer present. The interrogator confirmed that Sinclair had the right not to speak, but explained that he did not have the right to have his counsel present during questioning.

To encourage him to talk, police tried to convince Sinclair that the case against him was overwhelming. The interrogator repeatedly confronted Sinclair with incriminating evidence, even falsely claiming that DNA evidence linked him to the crime scene. As questioning progressed, Sinclair repeatedly expressed (four to five times) a desire to speak with his lawyer and the intention to remain silent. Each time, the interrogator indicated that Sinclair had a choice whether to speak, then proceeded to further questioning. Eventually Sinclair described how he had fatally stabbed the victim. Later on, Sinclair made incriminating statements to an undercover officer in his cell and participated in a re-enactment at the scene of the killing.

Chief Justice McLachlin and Charron J. delivered the judgment of the five-member majority.[42] They rejected the proposition that section 10(b) requires defence counsel to be present during custodial interrogation.[43] Instead, the majority explained, the right to counsel that arises upon detention is normally satisfied by the police doing two things: first, offering an initial warning informing the detainee of his or her right to counsel, and second, affording a reasonable opportunity to consult with counsel when the detainee invokes the right. After this initial consultation, section 10(b) does not guarantee the detainee the right to consult further with counsel in the course of the interrogation unless developments in the investigation indicate the need. Further consultation must be permitted where changed circumstances make it necessary to serve the purpose underlying section 10(b), which is to permit the detainee access to legal advice relevant to her legal situation and, specifically, to her right

[42] Justices Deschamps, Rothstein and Cromwell concurred.
[43] *Sinclair*, *supra*, note 1, at paras. 2, 33-42.

to choose whether to remain silent or cooperate with police.[44] The changes in circumstances that trigger a right to consult further with counsel must be objectively observable; they include but are not limited to efforts by police to involve the detainee in new procedures like line-ups, changes in the detainee's jeopardy and indications that the initial information provided by counsel was deficient.[45]

Applying the law to the circumstances, the majority held that Sinclair's right to counsel was not violated. Sinclair was properly advised of his right to counsel and given an opportunity to exercise it by speaking to his lawyer twice. While the police exaggerated the strength of their case, the majority held that the right to consult further with counsel is not automatically triggered by police employing the common tactic of progressively revealing real or invented evidence against the detainee.[46] Thus, on the facts, no changed circumstances arose during the interrogation to trigger a right to consult further with counsel.

Dissenting reasons were delivered by Binnie J., who took the view that, together with the Supreme Court's interpretations of the confessions rule and the right to silence in *Oickle* and *Singh*, the *Sinclair* majority's analysis of the right to counsel improperly favoured the state interest in criminal investigations over individual rights.[47] Justice Binnie agreed with the majority that section 10(b) does not guarantee the right to have one's lawyer present during custodial interrogation.[48] However, he rejected as overly restrictive the majority's holding that section 10(b) grounds a right to consult further with counsel only in changed circumstances. In his view, a detainee's right to consult further with counsel would be triggered in the evolving circumstances of an ongoing interrogation when the detainee makes a request to speak with counsel that satisfies two criteria. First, the request must be consistent with the purpose of section 10(b), which is to ensure access to legal assistance; requests designed to delay an investigation or serve as a distraction would not meet this criterion. Second, to trigger a right to consult further with counsel, the detainee's request must be reasonably justified by objective circumstances apparent to police at the time of the interroga-

44 *Id.*, at paras. 2, 25, 32, 47.
45 *Id.*, at paras. 49-55.
46 *Id.*, at para. 60.
47 *Id.*, at paras. 77, 93-99.
48 *Id.*, at paras. 82, 100-102.

tion.[49] Emphasizing the risk of false confessions, Binnie J. disavowed a view of interrogation as an endurance contest between the detainee who has been advised not to speak and the police who try to wear him down.[50]

On the facts, Binnie J. concluded that Sinclair's right to consult further with counsel was triggered after the police confronted him with what they claimed was overwhelming evidence against him. At that point, Sinclair's renewed request to speak again with his lawyer was reasonable and justified in the evolving circumstances of the interrogation. The interrogator's refusal to suspend the interrogation and allow Sinclair to consult with his lawyer at that time was a breach of section 10(b) warranting exclusion of all resulting statements.

Separate dissenting reasons were delivered by LeBel and Fish JJ., with whom Abella J. concurred. They argued that the majority's interpretation of the right to counsel eroded the presumption of innocence and the principle against self-incrimination. In particular, they objected that the effect of the majority decisions in *Sinclair* and *Singh* was to grant police a right of "unfettered and continuing access to the detainee, for the purpose of conducting a custodial interview to the point of confession".[51] Justices LeBel and Fish interpreted section 10(b) as grounding an ongoing right to counsel rather than a right that is exhausted after the detainee's initial consultation with a lawyer.[52] Emphasizing the importance of the right to counsel for detainees who are vulnerable and subject to the control of police, they insisted that detainees may exercise their right to counsel at any time upon request, and that the reasonableness of the request should not be subject to evaluation by police.[53] Consequently, LeBel and Fish JJ. concluded that Sinclair's section 10(b) right to counsel was violated when the police failed to suspend their interrogation and permit him to consult with counsel after his numerous requests to be allowed to do so. Like Binnie J., they would have excluded all Sinclair's incriminating statements under section 24(2) of the Charter.

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[49] *Id.*, at paras. 80, 106.
[50] *Id.*, at paras. 89-90.
[51] *Id.*, at para. 190.
[52] *Id.*, at para. 154.
[53] *Id.*, at para. 177.

III. Impact of the Trilogy

For all the intense reaction they have provoked, the cases of the interrogation trilogy made few changes to Canadian law. *Oickle* was primarily a restatement and consolidation of the existing law on voluntariness; what was new was the emphasis on reliability and the risk of false confessions.[54] The principal contribution of *Singh* and *Sinclair* was to confirm that suspects are not entitled to stop a police interrogation by stating the intention to remain silent or the desire to re-consult with counsel. While perhaps disappointing, these holdings should not be surprising. Apart from a detainee's initial assertion of the right to counsel — which obliges the police to hold off on questioning until the detainee has had a chance to consult with a lawyer[55] — detainees in Canada have never had a power to cut off questioning simply by asserting their Charter rights.[56] In fact, the holdings of the majority in *Singh* and *Sinclair* were, in large part, already expressly stated on behalf of a seven-member majority of the Supreme Court when the Charter right to silence was first recognized in *Hebert*. Justice McLachlin held that, notwithstanding the right to silence, police may try to persuade a detainee to speak: "The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so."[57] *Hebert* also affirmed that police may question a detainee in the absence of counsel even after counsel has been retained.[58]

It is true that *Singh* overturned the line of cases that had developed under section 7 holding that even a voluntary statement can be excluded on Charter grounds where police subject a detainee to unrelenting interrogation despite repeated attempts to assert the right to silence.[59] However, the majority's disagreement was not with the proposition that incessant questioning of a reticent suspect can violate the right to silence,

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[54] See, *e.g.*, Gary T. Trotter, "False Confessions and Wrongful Confessions" (2004) 35 Ottawa L. Rev. 179, at 186 [hereinafter "Trotter"].

[55] *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233, 58 C.R. (3d) 97, at para. 23 (S.C.C.).

[56] *For example*, *R. v. Wood*, [1994] N.S.J. No. 542, 94 C.C.C. (3d) 193, at para. 115 (N.S.C.A.) ("A detainee always has a right to a reasonable opportunity to consult counsel … [but] once he is informed he cannot, without more, stop an interrogation … merely by purporting to exercise his right to counsel again").

[57] *Hebert*, *supra*, note 25, at 176-77.

[58] *Id.*, at 184.

[59] See, *supra*, notes 29-30 and accompanying text.

but rather with the premise that such a violation could occur without also rendering the statement involuntary.[60] Justice Charron explained that a statement may be excluded in these factual circumstances under the confessions rule because "police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities."[61] Thus, under *Singh*, these same considerations that might have been conceived in the earlier cases only as going to the section 7 right to silence can now be considered as factors going to voluntariness.[62]

The courts have taken notice: since *Singh* there have been several reported cases where persistent questioning in the face of repeated assertions of the right to silence has contributed to a confession being excluded as involuntary.[63] Not surprisingly, several other cases have decided, as the trial judge did in *Singh*, that persistent questioning did not render the statement involuntary in the circumstances.[64] But the issue

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[60] Tellingly, even as she suggested that the analysis should be undertaken under the confessions rule, Charron J. cited with approval *Otis*, *supra*, note 29, in which the Quebec Court of Appeal found a violation of the Charter right to silence.

[61] *Singh*, *supra*, note 4, at para. 47.

[62] In the words of Charron J., *id.*, at para. 37, "voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence".

[63] See, *e.g.*, *R. v. S. (D.)*, [2010] O.J. No. 5748, 2011 ONSC 260 (Ont. S.C.J.) (the accused's statements were involuntary when the police violated his right to counsel and persistently and at times confrontationally questioned him over his repeated protestations that he had nothing to say); *R. v. C. (S.E.)*, [2009] M.J. No. 463, 2009 MBQB 242, at para. 29 (Man. Q.B.) (a confession was involuntary where the accused was intoxicated and drowsy and subjected in the middle of the night to "continued questioning over an extended period of time despite the defendant expressing his wish (on 13 occasions) to follow his lawyer's advice not to make a statement"); *R. v. Hankey*, [2008] O.J. No. 2548, at para. 37 (Ont. S.C.J.) (the accused's statements were involuntary because of "the cumulative effect of the context of the persistent questioning of the accused combined with the statements by the officer … which eroded the confidence of the accused in the legal advice he had received from counsel"); *R. c. Côté*, [2008] J.Q. no 7951, 2008 QCCS 3749 (Que. S.C.), affd [2011] S.C.J. No. 46, 2011 SCC 46 (S.C.C.) (statements obtained from the exhausted, claustrophobic accused after a lengthy detention, a patterns of violating her rights and persistent questioning in the face of repeated assertions of her right to silence were excluded as involuntary).

[64] See *R. v. Borkowsky*, [2008] M.J. No. 20, 225 Man. R. (2d) 127, at para. 48 (Man. C.A.) (in deciding that the accused's statement was voluntary despite nine assertions that he wished to follow his lawyer's advice and remain silent, the trial judge "made a judgment call that [was] supported by the record"); *R. v. King*, [2011] O.J. No. 532, 2011 ONSC 687 (Ont. S.C.J.) (the accused's statements were voluntary despite 16 assertions of the right to silence and police misstating the law by suggesting it was his last chance to make a statement); *R. v. Kembo*, [2009] B.C.J. No. 2809, 2009 BCSC 1879, at para. 40 (B.C.S.C.) (the accused's statements were voluntary after "the police chose to ignore his express wish to remain silent and used legitimate means of persuasion to get him to speak"); *R. v. Dunsford*, [2009] S.J. No. 373, 335 Sask. R. 43, at para. 16 (Sask. Q.B.) (confession voluntary where "the accused, under persistent questioning by well

remains very much alive in the confessions cases.[65] Contrary to the fears expressed by some, then, *Singh* has not had the effect of sanctioning utter disregard for assertions of the right to silence in the interrogation room.[66]

By holding that concerns about the right to silence are subsumed by the voluntariness inquiry in the context of questioning by known police, the majority in *Singh* positioned the confessions rule as the central procedural safeguard for interrogated suspects. The same emphasis on the broad, residual protection offered by the confessions rule also appears in *Sinclair*. Admittedly, the connection between the right to counsel and the confessions rule is not as close as the nexus between the right to silence and the confessions rule. As the majority in *Sinclair* pointed out, voluntariness does not mean that the right to counsel has necessarily been respected, and neither does compliance with section 10(b) imply voluntariness.[67] Still, McLachlin C.J.C. and Charron J. suggested in *Sinclair* that the confessions rule buttresses the right to counsel in the interrogation context: "We do not agree with the suggestion that our interpretation of s. 10(b) will give *carte blanche* to the police. This argument overlooks the requirement that confessions must be voluntary in the broad sense now recognized by the law."[68]

Moreover, in rejecting the suggestion of Binnie J. that the Court should recognize broader rights to re-consult with counsel under section 10(b), the majority in *Sinclair* declared that "[t]he better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule."[69] Arguably, this reasoning implies that even

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prepared highly skilled interrogators, was rather easily persuaded to abandon his resolve, supported by his lawyer's advice, not to respond to questions about the alleged crime"); *R. v. Kematch*, [2008] M.J. No. 468, 244 Man. R. (2d) 210 (Man. Q.B.) (statements by the accused were voluntary and motivated by conscience, even though he told police on a few occasions that his lawyer told him not to say anything); *R. v. Shi*, [2008] O.J. No. 5950, 2008 ONCJ 799 (Ont. C.J.) (the accused's statement was voluntary despite his stating several times during the interrogation that his lawyer told him to remain silent).

[65] See *R. v. Rybak*, [2008] O.J. No. 1715, 90 O.R. (3d) 81, at para. 190 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 311 (S.C.C.) ("A lengthy interview, coupled with repeated refusals to answer some questions without first speaking to a lawyer, mandate close judicial scrutiny of the admissibility of the record of interview").

[66] See Suhail Akhtar, "Whatever Happened to the Right to Silence?" (2009) 62 C.R. (6th) 73, at 85 ("After the decision in *Singh*, there was some complaint that the police had the right to ride roughshod over the wishes of the accused … [but s]uch an approach, aside from *Charter* implications, would more than likely render any statement made inadmissible through the voluntariness rubric").

[67] *Sinclair*, *supra*, note 1, at para. 29.

[68] *Id.*, at para. 62.

[69] *Id.*, at para. 60.

if repeated assertions of one's desire to speak again with one's lawyer do not give rise to a right to consult further with counsel under the majority's changed circumstances test, they may militate against a finding of voluntariness in the particular circumstances. Even in the months since *Sinclair* was decided, courts have acknowledged the ways in which the section 10(b) right to counsel and the voluntariness inquiry can be interrelated.[70] Consider the case of *R. v. Delormier*,[71] in which statements from the accused were excluded as involuntary for a variety of reasons, including veiled threats from police that the accused's children might be taken away if she did not cooperate. For present purposes, the case is notable because Power J. considered the accused's repeated requests to have her lawyer present or speak with him again as a factor tending to suggest that her statements were involuntary.

In sum, the interrogation trilogy has not created any dramatic movement in Canadian law, but the cases do have some interesting implications. Taken together, *Singh* and *Sinclair* clearly reject the notion that an interrogated suspect should have the power to cut off interrogation by invoking the right to silence or the right to re-consult with counsel. These two cases also emphasize the role of the confessions rule as outlined in *Oickle* in providing broad protection for interrogated suspects that enhances and complements the safeguards available under sections 7 and 10(b) of the Charter. These two features of the interrogation trilogy, including their advantages and disadvantages, will be explored for the balance of this paper.

IV. NO CUT-OFF RULES

The most controversial feature of the interrogation trilogy is that it denies interrogated suspects the power to stop police questioning by asserting their Charter rights. Under the well-known *Miranda* rules in the

[70] See, *e.g.*, *R. v. Gonzales*, [2011] O.J. No. 395, 2011 ONSC 543, at para. 23 (Ont. S.C.J.) (failure to re-inform accused of his rights to silence and counsel when he faced new jeopardy breached s. 10(b) and raised a reasonable doubt about voluntariness because the accused may have been given "the impression that he was required to give a statement"); *R. v. Somogyi*, [2010] O.J. No. 4350, 221 C.R.R. (2d) 49 (Ont. S.C.J.) (statements drawn out of an autistic man with relentless, aggressive questioning that created an atmosphere of oppression were involuntary, and this conclusion was reinforced by the fact that police breached the accused's right to counsel when they did not permit him to consult further with counsel after it became clear that he did not understand that the duty counsel he had earlier spoken to was a lawyer).

[71] [2010] O.J. No. 5708, 2010 ONSC 7191 (Ont. S.C.J.).

United States, custodial interrogation must cease when the detainee asserts the right to remain silent, and police are prohibited from questioning detainees in the absence of their lawyers once they have asserted the right to counsel.[72] The appellants in *Singh* and *Sinclair* urged the Supreme Court to adopt such "questioning cut-off rules"[73] under the Charter. Singh argued that police should be required to stop questioning a detainee who states an intention not to speak,[74] while Sinclair submitted that police must cease questioning when a detainee requests the opportunity to consult again with counsel.[75] These arguments were largely accepted by the dissenters in the two cases. The dissenting judgment in *Singh* is somewhat unclear on this point: some of its language suggests that even one assertion of the right to silence should put an end to police questioning,[76] but other parts of the judgment trace the violation of section 7 to the "persistent disregard" of the accused's choice to remain silent.[77] In *Sinclair*, by contrast, the dissenting judgment of LeBel and Fish JJ. clearly accepts that detainees have a right to cut off questioning by asserting their Charter rights even once. In their words, "detainees who demand access to counsel before being further subjected to relentless interrogation against their will … are constitutionally entitled 'to speak to [their] lawyer NOW'."[78]

Whatever the position of the dissenting judges, the majority judgments in *Singh* and *Sinclair* have firmly established that questioning cut-off rules do not form a part of Canadian constitutional law. The majority judges offered two justifications for their rejection of American-style interrogation cut-off rules. First, they argued that giving detainees the unilateral power to stop interrogations would upset the balance between individual rights and society's interest in enforcing the criminal law.[79] In *Singh*, the majority went so far as to claim that the argument that interro-

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72 *Miranda v. Arizona*, 384 U.S. 436 (U.S. Sup. Ct. 1966).

73 This descriptor is drawn from the American legal literature: *e.g.*, Paul G. Cassell, "Protecting the Innocent from False Confessions and Lost Confessions — and from *Miranda*" (1998) 88 J. Crim. L. & Criminology 497, at fn. 216.

74 *Singh*, *supra*, note 4, at para. 6.

75 *Sinclair*, *supra*, note 1, at para. 18.

76 *Singh*, *supra*, note 4, at para. 70 ("A right that need not be respected after it has been firmly and unequivocally asserted *any* number of times is a constitutional promise that has not been kept") (emphasis in original).

77 *Id.*, at para. 95. See also *id.*, at para. 70 ("I … find it unnecessary to decide whether 18 times is too many or once is too few").

78 *Sinclair*, *supra*, note 1, at para. 177.

79 See, *e.g.*, *id.*, at para. 63.

gation should cease upon assertion of the detainee's right to silence "ignores the state interest in the effective investigation of crime".[80] At least in its strong form, this justification for rejecting cut-off rules seems misguided. The long American experience with such rules fatally undermines any claim that their adoption would devastate Canadian law enforcement.[81] This justification carries some limited force, however, in its weaker form. Adopting cut-off rules would shut down some interrogations and thereby hamper criminal investigations in some measure, and even a modest effect on law enforcement seems to be a legitimate (but not decisive) factor in considering the scope of individual rights.

The second justification offered by the majority for rejecting cut-off rules is that such rules are grounded in the mistaken notion that being compelled to endure questioning amounts to compulsory self-incrimination.[82] In principle at least, there does seem to be a distinction between being made to listen and being forced to speak. On the other hand, the psychological pressures of police interrogation, particularly in the context of detention, may be strong enough to make it unrealistic to expect detainees to exercise their right to silence in the face of persistent questioning.[83] Sensitivity to the inherent pressures of police interrogation probably explains why most commentators view the Supreme Court's rejection of cut-off rules as disappointing. It appears that, in *Singh* and *Sinclair*, the Supreme Court missed an opportunity to guarantee that the Charter rights to silence and counsel, once asserted, can be effectively exercised in the interrogation room.

It would be a mistake, however, to focus on this missed opportunity and forget the safeguards that do exist for interrogated suspects in Canadian law. The fact that police may continue to question a detainee even after an assertion of the right to silence or counsel does not mean, as Don Stuart has suggested, that "the right to remain silent does not … exist".[84] It does not, as the dissenters wrote in *Sinclair*, grant police the

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[80] *Supra*, note 4, at para. 45.

[81] See, *e.g.*, Ives & Sherrin, *supra*, note 6, at 251-53; *Singh*, *id.*, at para. 89 (Fish J., dissenting).

[82] *Singh*, *id.*, at para. 28; *Sinclair*, *supra*, note 1, at para. 63.

[83] See, *e.g.*, Stephen J. Schulhofer, "*Miranda*'s Practical Effect: Substantial Benefits and Vanishingly small Social Costs" (1996) 90 Nw. U.L. Rev. 500, at 558 (the distinction between compelling a detainee to submit to questioning and compelling a self-incriminating statement should be abandoned because "[i]n the context of custodial interrogation, there is only a slender conceptual difference here, not a practical difference that can possibly matter").

[84] Stuart, "*Sinclair* Regrettably", *supra*, note 6, at 307.

right to interrogate a detainee "to the point of confession".[85] The majority judges in both *Singh* and *Sinclair* were at pains to point out that where an interrogation becomes overbearing and negates the detainee's freedom of choice about whether to speak to authorities, the right to silence will be violated and any resulting statement will be involuntary and inadmissible pursuant to the confessions rule.

The safeguards available in Canadian law arguably have some advantages over a system of interrogation cut-off rules. As the majority pointed out in *Sinclair*, empirical research in the United States indicates that around 80 per cent of suspects waive their *Miranda* rights to silence and counsel.[86] This is not to suggest that those rights are unimportant; no doubt they operate as crucial safeguards for the minority of detainees who invoke them. What the high waiver rate does show is that cut-off rules in and of themselves cannot function as an adequate systemic response to the danger of coercion in police interrogation. Surely it would be preferable to conduct a case-by-case analysis of the circumstances of every confession and exclude all coerced statements whether the rights to silence and counsel were invoked or not. This is what the confessions rule aims to do.

Potentially, a robust confessions rule could co-exist with interrogation cut-off rules, in which case there is no need to choose between them and interrogated suspects could have the benefit of both. Yet, the American experience casts some doubt on the idea that the voluntariness inquiry would maintain its vitality alongside a system centred on warnings and cut-off rules. In the United States, as in Canada, confessions are supposed to be admissible only if they are voluntary.[87] But commentators have observed that, since the *Miranda* regime was adopted, the admissibility of a confession in an American court depends almost entirely on whether the proper warnings were given and the necessary waivers of

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[85] *Sinclair*, *supra*, note 1, at para. 190.

[86] *Id.*, at para. 41; Richard A. Leo, "Inside the Interrogation Room" (1995) 86 J. Crim. L. & Criminology 266, at 276 (reporting a study involving real police interrogations, in which 78 per cent of interrogated suspects waived their *Miranda* rights); Paul G. Cassell & Bret S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*" (1996) 43 UCLA L. Rev. 839, at 860 (discussing an empirical study in which 79.9 per cent of suspects waived their *Miranda* rights throughout the custodial interrogation, while another 3.9 per cent initially waived their rights but invoked them at some point during questioning).

[87] The voluntariness standard applies as a matter of due process under the Fourteenth Amendment of the U.S. Constitution. See, *e.g.*, *Brown v. Mississippi*, 297 U.S. 278 (U.S. Sup. Ct. 1936).

rights obtained.[88] American judges appear content to rely on the safeguards provided by *Miranda*, to the exclusion of a thorough voluntariness inquiry. In the words of Steven Duke, "*Miranda* is a substantial factor in the twenty-first century reality that the suppression of confessions by trial judges on involuntariness grounds is almost as rare today as four-legged chickens."[89]

Of course, one can only speculate about what would happen to the confessions rule if interrogation cut-off rules were incorporated into Canadian law. Yet one cannot dismiss the possibility that adopting *Miranda*-type rules, including questioning cut-off rules, would undermine the voluntariness standard for confessions. Moreover, there is every reason to expect that such cut-off rules would provide no protection at all to most interrogated suspects, because they would never invoke their rights. By contrast, the confessions rule has the advantage of requiring a contextual inquiry into the whole circumstances of every confession.

V. VOLUNTARINESS AT THE CENTRE

The interrogation trilogy identifies the confessions rule as the central safeguard for interrogated suspects, a safeguard that supports and overlaps with the Charter rights to silence and counsel. This emphasis on the broad protection offered by the confessions rule was criticized by the dissenting judges in *Sinclair* and *Singh*. In the words of LeBel and Fish JJ., "the suggestion … that our residual concerns can be *meaningfully* addressed by way of the confessions rule … ignores what we have learned about the dynamics of custodial interrogation and renders pathetically anemic the entrenched constitutional rights to counsel and silence."[90] Clearly these comments bespeak a high degree of skepticism about the confessions rule. The analysis in the pages that follow will consider whether this skepticism is justified. The reasons to mistrust the protection offered by the confessions rule include its common law status, its indeterminacy and the results of several recent Supreme Court of Canada cases considering voluntariness. On the other hand, the courts'

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[88] For example, Charles D. Weisselberg, "Mourning Miranda" (2008) 96 Cal. L. Rev. 1519, at 1595 [hereinafter "Weisselberg"] (from a law enforcement perspective, "the reason *Miranda* is advantageous is that it has practically displaced voluntariness determinations").

[89] Steven B. Duke, "Does Miranda Protect the Innocent or the Guilty?" (2007) 10 Chapman L. Rev. 551, at 562.

[90] *Sinclair*, *supra*, note 1, at para. 184 (emphasis in original).

focus on the confessions rule has real virtues that arguably outweigh these concerns.

One potential concern about relying on the confessions rule as the principal protection for interrogated suspects is that it seems incongruous to favour a common law rule over constitutional standards. At least in the context of interrogation, the section 7 right to silence in particular seems almost to disappear in the shadow of the confessions rule. That constitutional right has no independent remedy in this context because *Singh* established that the voluntariness inquiry contains and resolves any question about right to silence in interrogation.[91] One might argue that this approach negates the section 7 right to silence.[92] Yet, if we take the view that the actual availability of procedural protections matters more than their legal source, then relying on the confessions rule seems less problematic: potentially, the right to silence can be vindicated as fully through the confessions rule as through a distinct section 7 analysis. Of course, if the confessions rule were abrogated, it would become necessary for Courts to decide the limits of the right to silence under section 7. For now, according to the Supreme Court, the confessions rule adequately protects the suspect's right to remain silent in the face of interrogation.

The more challenging objection to the courts' reliance on the residual protection offered by the confessions rule is that that protection is weak and inadequate. Certainly there are reasons to doubt its adequacy. For one thing, the confessions rule can be frustratingly indeterminate. The rule requires a contextual analysis of the totality of the circumstances relevant to voluntariness. And while the law has a lot to say about the factors that bear on voluntariness, the reality is that trial judges enjoy wide latitude in reaching a conclusion on the issue. As the rule was outlined in *Oickle*, it imposes few firm limits on interrogation. *Oickle* did indicate that confessions extracted with actual or threatened physical violence will be involuntary,[93] but it appears that no other interrogation tactics are entirely prohibited under the rule. Even when police offer a *quid pro quo* for a confession in the form of a threat or a promise, the Court held that such inducements only vitiate voluntariness when they "are strong enough to raise a reasonable doubt about whether the will of

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[91] See *supra*, notes 33-36 and accompanying text.

[92] See Stuart, "*Sinclair* Regrettably", *supra*, note 6, at 307 (arguing that the right to silence no longer exists because it has no Charter remedy).

[93] *Oickle*, *supra*, note 3, at paras. 48, 53.

the subject has been overborne".[94] Some commentators have suggested that the confessions rule should be strengthened by recognizing firmer limits on police conduct,[95] but the Supreme Court in *Oickle* disavowed "[h]ard and fast" rules as inconsistent with the overall contextual approach to voluntariness.[96]

The very language of the confessions rule attests to its indeterminacy: to be admissible, confessions must be proven "voluntary". Historically, the rule excluded as involuntary those statements obtained by "fear of prejudice or hope of advantage exercised or held out by a person in authority",[97] but the modern cases, especially *Oickle*, indicate that threats and promises are only a part of a larger inquiry into voluntariness. Often, as in *Oickle*, the language of voluntariness is left to stand essentially on its own as the full articulation of the test. When other language is used, it is the language of free will, choice and the overborne will.[98] Without engaging in philosophical debates about the nature of human action, how can a judge answer the question whether a statement was made voluntarily, as a product of the suspect's free will?[99] In almost all cases, there will be some element of choice and some external constraint or pressure that, together, give rise to the statement.[100] A cursory review of the confessions cases reveals that involuntariness does not equate with a total absence of volitional action akin to automatism. On the other hand,

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[94] *Id.*, at para. 57. On this point, see *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, 44 C.R. (6th) 199 (S.C.C.) [hereinafter "*Spencer*"].

[95] See, *e.g.*, Ives, *supra*, note 6, at 498 (suggesting that the Court should "partially abandon the totality of the circumstances approach to assessing voluntariness and, instead, begin the process of regulating more directly the conduct of interrogations and permissibility of certain interrogation techniques"). See also Lisa Dufraimont, "The Common Law Confessions Rule in the Charter Era: Current Law and Future Directions" in Jamie Cameron & James Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 249, at 258-60 [hereinafter "Dufraimont"].

[96] *Oickle*, *supra*, note 3, at para. 47.

[97] *R. v. Ibrahim*, [1914] A.C. 599, at 609 (P.C.), adopted in Canada in *R. v. Prosko*, [1922] S.C.J. No. 6, 63 S.C.R. 226 (S.C.C.).

[98] For example, the majority in *Singh*, *supra*, note 4, at para. 53, stated that under both the confessions rule and the right to silence, "[t]he ultimate question is whether the accused exercised free will by choosing to make a statement."

[99] See Ronald J. Allen, "Miranda's Hollow Core" (2006) 100 Nw. U.L. Rev. 71, at 76 (arguing that it is impossible to "distinguish between 'free will' and 'compelled' statements. … it seems inescapable that either free will always exists in the sense that one always has choices one can make, or more likely it never exists because we live in a deterministic world").

[100] Hamish Stewart, "The Confessions Rule and the Charter" (2009) 54 McGill L.J. 517, at 540 [hereinafter "Stewart"] ("in a typical case of wrongful pressure, the conduct of the person whose will is said to be overborne is fully voluntary and rational; it is a deliberate, though highly constrained, effort to avoid an unpleasant consequence").

recalling the principle that the police may use "legitimate means of persuasion"[101] to encourage a suspect to speak, it seems equally clear that voluntariness does not require an unconstrained will, liberated from any external influence. Ultimately, the voluntariness rule demands a will that is not entirely free but free *enough* — free from pressure that, in all the circumstances, seems illegitimate. Inescapably, it is a muddy, line-drawing exercise. The indeterminacy of the confessions rule gives some reason to be skeptical that the voluntariness standard can provide meaningful, consistent protection to interrogated suspects.

This skepticism has been fed, in recent years, with unease about a number of cases in which the Supreme Court has upheld findings of voluntariness in troubling circumstances. *Oickle* and *Singh* are examples of cases where the Court has countenanced police conduct that pushes the line between persuasion and coercion.[102] Another example is *R. v. Spencer*,[103] where the Supreme Court reinstated the trial judge's finding that the accused's confessions to robbery were voluntary even though the police withheld a visit to his girlfriend until he "cleaned his slate".[104] The trial judge concluded that this inducement was not strong enough to raise a reasonable doubt about whether the accused's free will was overborne, and a majority of the Supreme Court agreed. Some have suggested that *Spencer* changed the voluntariness test in the Crown's favour, since the trial judge relied on a Court of Appeal holding in *R. v. Paternak*[105] that voluntariness turns on whether "the detainee has lost *any* meaningfully independent ability to choose to remain silent, and has become a mere tool in the hands of the police".[106] However, the majority of the Supreme Court in *Spencer* explicitly distanced itself from this "colourful language"[107] and upheld the trial judge's findings on the basis that he

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[101] *Hebert*, *supra*, note 25, at 176-77.

[102] Don Stuart has written that "the Supreme Court rulings on voluntariness on the facts of *Oickle* and *Singh* give no comfort for those seeking such judicial control on aggressive interrogation determined to get the detainee to confess at all costs. The Court has proved far too tolerant of truly coercive interrogations in these high profile cases. ..." Stuart, "*Sinclair* Regrettably", *supra*, note 6, at 307. See also Thomas, *supra*, note 6 (carefully reviewing the troubling features of the interrogation in *Oickle*).

[103] *Spencer*, *supra*, note 94.

[104] *Id.*, at para. 8.

[105] [1995] A.J. No. 795, 101 C.C.C. (3d) 452 (Alta. C.A.).

[106] *Id.*, at para. 27 (emphasis in original). For discussion of whether the reference to *Paternak* in *Spencer* changed the voluntariness test from *Oickle*, see Ives & Sherrin, *supra*, note 6, at 259-60.

[107] *Spencer*, *supra*, note 94, at para. 19.

repeatedly referred to the appropriate standard of proof and to the decision in *Oickle*.[108] In light of this reasoning, it is difficult to maintain that *Spencer* should be read as changing the voluntariness test. Still, *Spencer* represents one further instance of the Supreme Court finding confessions voluntary despite police use of some questionable interrogation techniques.

A partial answer to worries about these troubling cases is that the Supreme Court has maintained a high standard of deference to trial judges on the issue of voluntariness,[109] a deference that is arguably appropriate in light of the fact-driven, contextual nature of the inquiry. Notwithstanding this deference argument, the Supreme Court's recent decisions on the facts of confessions cases, coupled with the indeterminacy of the rule itself, raise legitimate concerns about the strength of the protection that the confessions rule offers to interrogated suspects.

It will be argued here, however, that these real concerns about the confessions rule are outweighed by the benefits of privileging it as the central safeguard for interrogated suspects. The principal benefits are three. First, as the Supreme Court has repeatedly observed, the accused benefits from certain procedural advantages when relying on the confessions rule. The Crown bears the burden of establishing voluntariness and involuntary statements are automatically excluded from evidence, whereas the accused must establish a Charter breach and statements obtained in violation of Charter rights are only excluded under section 24(2) if their admission "would bring the administration of justice into disrepute".[110] Second, as has already been discussed, the confessions rule casts its protection over all interrogated suspects, since all confessions must be shown to be voluntary before they can be entered in evidence. This wide scope of protection means that the confessions rule is better suited to be the central protection for interrogated suspects than, for example, the questioning cut-off rules that were rejected in *Singh* and *Sinclair*.

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[108] See *id.*, at para. 19:

> Arguably, taken out of context, the impugned passage from *Paternak* appears to overstate the test in *Oickle* since it does not make reference to the *quid pro quo* or to the reasonable doubt standard. However, it is clear from reading the trial judge's reasons that he did not commit these errors, since he expressly and repeatedly referred to the proper standard of proof and to this Court's decision in *Oickle*.

[109] See Stewart, *supra*, note 100, at 543.

[110] Charter, s. 24(2). For discussion of these differences, see *Singh*, *supra*, note 4, at para. 38, citing *Oickle*, *supra*, note 3, at paras. 29-31.

The third advantage of the confessions rule is the breadth of the voluntariness analysis, which encompasses a wide range of factors concerning the risk of false confessions, the limits of acceptable police conduct, the psychological dynamics of interrogation and the vulnerabilities of the individual suspect. It is well established that the confessions rule has two main purposes: to exclude unreliable statements and to protect individuals from coercive and improper interrogation tactics.[111] Since the touchstone of admissibility is "voluntariness, broadly understood",[112] a confession can be excluded because of concerns about its reliability, on grounds related to improper police conduct, or for both kinds of reasons. In *Oickle*, the Supreme Court confirmed that voluntariness can be vitiated by a range of factors including threats and promises, oppression, a failure to meet the operating mind requirement and shocking police trickery. Beyond these categories, the Court drew liberally on social science literature on the psychology of interrogation and encouraged courts to approach the voluntariness inquiry mindful of the tactics and factors that contribute to false confessions.[113] For example, Iacobucci J. emphasized the need to be sensitive to the vulnerabilities of individual suspects[114] and conscious that the common tactic of confronting suspects with "non-existent evidence" risks overwhelming even the innocent, who may come to believe that their "protestations of innocence are futile".[115]

The already broad range of considerations bearing on voluntariness has arguably now been further expanded by *Singh* and *Sinclair*. As discussed above, *Singh* expressly stated that unrelenting questioning of a suspect in the face of repeated assertions of the right to silence can make a confession involuntary. This result could well have been achieved even before *Singh* by applying the doctrine of oppression, but if there was any doubt on the matter it has now been resolved by *Singh*.[116] Moreover, as

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[111] For example, Stewart, *supra*, note 100, at 527; *Singh*, *id.*, at para. 21 ("Although historically the confessions rule was more concerned with the reliability of confessions than the protection against self-incrimination, this no longer holds true in the post-Charter era").

[112] *Oickle*, *supra*, note 3, at para. 27.

[113] Trotter, *supra*, note 54, at 181 ("*Oickle* is significant for its absorption of the growing body of social science literature on false confessions and police interrogation practices"). See also Dufraimont, *supra*, note 95, at 258.

[114] *Oickle*, *supra*, note 3, at para. 42.

[115] *Id.*, at para. 43.

[116] This reasoning answers the claim that certain violations of the right to silence in the interrogation context will not be caught by the confessions rule, which has been raised by some commentators and by the dissent in *Singh*, *supra*, note 4 and *Sinclair*, *supra*, note 1, at para. 185. In an article written after *Singh*, Hamish Stewart purported to offer an example of a situation where an

argued above, *Sinclair* can be read as suggesting that repeated requests to speak with one's lawyer, like repeated assertions of the right to silence, can militate against a finding of voluntariness.

The myriad factors that can affect the voluntariness of a confession have the disadvantage of adding to the indeterminacy of the confessions rule; they cannot be reduced to a test to be applied with analytical precision. But the breadth of the inquiry makes the confessions rule a good vehicle for addressing the complex policy issues surrounding interrogation and confessions. The confessions rule gives the courts a way to respond not just to abusive police tactics, but also to vulnerable suspects and unreliable statements.

Admittedly, certain of the themes of the confessions rule identified here need to be developed further in future cases. For example, vulnerabilities of individual suspects resulting from factors like youth and mental disability are known to be a major factor contributing to false confessions.[117] While the Supreme Court in *Oickle* cautioned judges to be mindful of these vulnerabilities in the voluntariness inquiry, there was little discussion of how that analysis should work.[118] Few would deny that the law should develop a more sophisticated response to the vulnerabilities of interrogated suspects; the advantage of the confessions rule is that it provides a doctrinal opening for that development. In her critique of *Sinclair*, Christine Boyle observed that the majority's discussion of section 10(b) seems insensitive to the "varying vulnerabilities of detained persons".[119] She noted that it seems "disturbing … that agents of the state should be able to keep women isolated, not to mention people with mental disabilities and people with good reason to be terrified of police

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interrogation would result in a voluntary confession despite breaching the suspect's right to silence: Stewart, *supra*, note 100, at 539. In this example, the youthful and vulnerable suspect asserts the intention to remain silent but is persuaded to speak after repeated requests from the police. Stewart posits that there are no improper inducements, oppression or other factors that would make the statement involuntary. The problem is that the example as framed contains factors that *could* combine to vitiate voluntariness: the suspect's youth and vulnerability and the persistence of the police. It also seems problematic to posit that there is no oppression, since the persistent questioning would seem capable of creating an atmosphere of oppression.

[117] See, *e.g.*, Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601, at 629 [hereinafter "Sherrin"] (reviewing the "individual factors that could prompt a person to falsely incriminate him or herself").

[118] See Ives, *supra*, note 6, at 483 (lauding the Court's recognition that the suspect's vulnerabilities can affect the overall voluntariness inquiry, but noting that *Oickle* does not provide much guidance on how to approach this issue); Sherrin, *id.*, at 639-56.

[119] Boyle, *supra*, note 6, at 314.

officers".[120] One answer to this concern is that, by emphasizing the residual protection offered by the confessions rule, the majority in *Sinclair* provided a means for those problems of vulnerability to be addressed.

In sum, with its multidimensional contextual analysis, the confessions rule has the potential to ground meaningful responses to the overlapping problems of false confessions and police abuse in the interrogation room. Of course, much depends on how individual judges apply the voluntariness standard. As Don Stuart observed in his commentary on *Sinclair*, "the hope for a better balance now lies … with trial judges presiding over voluntary confession voir dires."[121] There seems to be some reason for optimism, as a review of the confessions cases reveals that trial judges often show sensitivity to the coercive pressure of interrogation in ruling confessions involuntary.[122]

VI. CONCLUSION

While the cases of the interrogation trilogy did not work any major change in Canadian law, they have provoked a strong reaction that merits a close analysis of their implications. Taken together, *Singh* and *Sinclair* have confirmed that American-style questioning cut-off rules find no place in Canadian law. There are, in short, no magic words that a detainee can utter to bring an end to an interrogation. Since such cut-off rules amount to simple procedural guarantees capable of ensuring that unequivocal assertions of the rights to silence and counsel are given full effect, and since the majority's reasons for rejecting them in *Singh* and *Sinclair* were not entirely persuasive, it seems fair to conclude that the Court has missed an opportunity to enhance the protection of these Charter rights.

At the same time, the significance of this missed opportunity should not be exaggerated. Even if questioning cut-off rules were adopted in Canada, they would probably not assist most interrogated suspects because only a small minority could be expected to invoke their rights. The dangers of coercion in the interrogation room clearly require a broader systemic response. Despite its acknowledged flaws, the confes-

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[120] *Id.*, at 313.

[121] Stuart, "*Sinclair* Regrettably", *supra*, note 6, at 308.

[122] See *supra*, notes 63, 70-71 and accompanying text. See also the cases cited by Stuart, *id*.

sions rule as outlined in *Oickle* is well suited to provide that broader protection. Consequently, in *Singh* and *Sinclair*, the majority of the Supreme Court positioned the confessions rule as the central safeguard for interrogated suspects, a safeguard that supports and complements the Charter rights to silence and counsel.

American scholar Charles Weisselberg has written that the *Miranda* regime of warnings and waivers should be abandoned because it fails to provide meaningful protection for most people subjected to custodial interrogation. In its place, he advocated a system in which judges

> would be required to assess the voluntariness of statements in light of all the circumstances, including suspects' age, education, the existence of any mental disabilities or disorders, the application of sophisticated interrogation tactics, express and implied promises, and other factors, shorn of the unwarranted assumption that all suspects somehow understand form warnings and are empowered thereby.[123]

A Canadian reader cannot help but be reminded of our confessions rule, which at least has the potential to take account of these factors that are so crucial to the dynamics of police interrogation.

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[123] Weisselberg, *supra*, note 88, at 1598-99.