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Effective Assistance of Counsel after *R. v. Sinclair*: Keep Your Mouth Shut

In the Supreme Court of Canada's recent decision in *R v Sinclair*, a deeply divided court held that the right to counsel during custodial detention under s. 10(b) of the *Charter* does not typically require that detainees be allowed more than one consultation with counsel. Nor does s. 10(b) mandate the presence of counsel throughout police interrogations.¹

In *Sinclair*, the police interrogated the appellant for five hours and denied his repeated requests to consult his lawyer, whom he had spoken with by telephone for just six minutes before the interrogation. The majority of the Court, consisting of Chief Justice McLachlin and Justices Deschamps, Charron, Rothstein and Cromwell, concluded that the police's conduct did not infringe s. 10(b).

The Majority Decision

According to the majority, s. 10(b) guarantees detainees access to legal advice relevant to their right to choose whether to cooperate with the police. This purpose is achieved by requiring that detainees be informed of their right to consult counsel and, if a detainee so requests, that he or she be given an opportunity to do so. In the majority's view, the nature of the legal assistance guaranteed under s. 10(b) is *informative* – detainees have the right to be informed of their rights by legal counsel so they can make a meaningful choice about how to respond (or not) to police questioning. The right to counsel is re-triggered only (a) when there is an objectively observable change in circumstances during an interrogation, and (b) re-consultation with counsel is objectively necessary for the detainee to make a meaningful choice about cooperating with the police.

The majority indicated that such changed circumstances may result when:

- (a) there are new procedures involving the detainee;

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Commercial List Paul LeVay	(b) there is a change in the level of jeopardy faced by the detainee or
Competition and Trade Law James B. Musgrove	(c) there is reason to question the detainee's understanding of his or her s. 10(b) rights.
Constitutional/Administrative Jason MacLean	Although these categories are not closed, new categories should <i>only</i> be developed where necessary to fulfill the purpose of s. 10(b).
Construction Law Anne McNeely	The Dissent of Justices LeBel, Fish and Abella
Corporate Transactions and Securities Matters Michael Partridge	In dissent, Justices LeBel, Fish, and Abella concluded that a broader s. 10(b) grants detainees the right to immediate ("NOW") and <i>effective assistance of counsel</i> , and is not spent upon the detainee's initial consultation with counsel. In their view, detainees have the right to legal <i>protection</i> , not merely information. Accordingly, the right to immediate and effective legal assistance cannot and does not depend on an interrogator's judgment about whether or not it is necessary. Finally allowing detainees access to counsel during an interrogation is of critical importance to ensuring the protection of a detainee's other <i>Charter</i> rights including the right to silence, the right against self-incrimination, and the presumption of innocence.
Court Procedures James C. Morton	
Criminal Law Dirk Derstine	
Environmental Law Jack Coop	
Estates and Trusts Ian Hull	The Dissent of Justice Binnie
Family Law Melanie Manchee	In a separate dissent, Justice Binnie criticized the majority for conflating a detainee's right to counsel with the right to silence and for its "unduly impoverished" view of s. 10(b). However, he was not prepared to accept the other dissenting justices' "more expansive approach" to s. 10(b), and offered an "intermediate" approach which, unlike the model favoured by the dissent, hinges on the exercise of police judgment regarding the necessity and legitimacy of an accused's request to re-consult counsel. Under this approach, a detainee has the right to re-consult with counsel when such a request (a) falls within the purpose of the s. 10(b) right (i.e. to satisfy a need for legal assistance rather than delay or distraction), and (b) is reasonably justified by the objective circumstances which were or ought to have been apparent to the police during the interrogation.
Franchise Law David Kornhauser	
Immigration Randolph K. Hahn	
Intellectual Property Don MacOdrum	
Labour and Employment Paul Bonifero	Implications for Trial Courts: Pigeonholing the Right to Counsel
Media Law Lorne Honickman	The attempt by the majority in <i>Sinclair</i> to catalogue the circumstances in which a detainee's right to counsel will be re-triggered is reminiscent of the ill-fated categorical approach no longer applied by the Court in areas of the law such as hearsay evidence, similar fact evidence, and the test for distinguishing between conscriptive and non-conscriptive evidence which until recently formed part of the test for excluding unconstitutionally obtained evidence under s. 24(2) of the <i>Charter</i> . The approach to s. 10(b) articulated in <i>Sinclair</i> has the potential for causing similar problems of application for lower courts.
Professional Liability/Discipline Christopher Wayland	
Real Estate Tannis A. Waugh	
Regulatory Compliance Ken Jull	In particular, it is likely that defence lawyers will now attempt to pigeonhole cases into the categories identified by the majority in an attempt to enforce their clients' rights under s. 10(b). Lower courts, which are strictly bound by the majority's checklist, will either attempt to engage in a similar exercise of mental gymnastics in order to remedy a <i>Charter</i> violation or simply conclude that the circumstances of a particular case do not neatly fit any of the established categories. Given the majority's admonition against creating new categories, it is highly unlikely that lower courts will develop any new categories anytime soon, if at all.
Tax and Pensions Kathy Bush	
Tort Litigation Paul Tushinski	

Defence Counsel's Best Advice? Cover Your Ears and Say Nothing

Based on *Sinclair* and the Court's hollowing out of the right to silence in its earlier decision in *R. v. Singh*, defence lawyers should advise their clients that unless the police decide otherwise, their first consultation may be the only opportunity they will have to speak with one another until the completion of the interrogation, and that the police are not required to allow counsel to be present during an interrogation. Such a narrow approach to a right as fundamental as the right to counsel is inconsistent with the purposive approach to interpreting *Charter* rights first recognized by Justice Dickson in *Hunter et al. v. Southam Inc.* over a quarter century ago.² Accordingly, the best advice to clients in the custody of the police may be that of the Ontario Criminal Lawyer's Association: "You have reached counsel. Keep your mouth shut. Press one to repeat this message."³

¹ This approach was applied in the companion cases of *R v McCrimmon* and *R v Willier*.

² See para. 84 of Binnie J.'s reasons in *Sinclair*.

³ Quoted at para. 86 of Binnie J.'s reasons in *Sinclair*.

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The Importance of the Vote: The Test for Approval of Plans of Arrangement

In *Re Magna International Inc.*, [2010] O.J. No. 3791 (Div. Ct.) the Divisional Court interpreted the test for approval of plans of arrangement pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 in a manner that will provide little solace to dissenting shareholders.

The Divisional Court upheld the decision of the Applications Judge at [2010] O.J. No. 3454, who concluded that Magna's proposed plan of arrangement (the "Proposal") was fair and reasonable, notwithstanding that Magna's Special Committee had been unable to recommend to shareholders that they vote in favour of it and had obtained no fairness opinion. The Applications Judge found that the Proposal would result in the holder of Magna's Class B multiple voting shares receiving an immediate, 1800% premium over the trading price of the Class A shares at the expense of the Class A shareholders, who would suffer an unprecedented level of dilution. The Applications Judge stated that he was unable to determine whether, on a balance of probabilities, there was a reasonable possibility that the Class A shareholders would in fact realize the potential benefits of the Proposal, which were contingent upon achieving a sustained increase in the share price and expansion of the trading multiple after its implementation.

The Divisional Court concluded, *inter alia*, that the Applications Judge did not err in approving the Proposal as fair and reasonable, notwithstanding that he was unable to make "an exact determination of the relative financial costs and benefits of the intended arrangement". Other "credible evidence" was available that could allow shareholders to "reasonably conclude that the perceived benefits equal or outweigh the costs of the arrangement". The fact that 75% of the votes cast by class A shareholders were in support of the Proposal was found to be deserving of "considerable weight", and indicated that the Class A shareholders had concluded that there was a "reasonable possibility that the potential benefits to them exceeded the certain costs of the transaction". Evidence of favourable market reaction to the announcement of the Proposal, as indicated by an increase in the share price, and recommendations of other market participants, including research analysts, also was found to have been properly relied upon by the Applications Judge as evidence of fairness upon which shareholders could reasonably have relied.

However, both the failure of the Special Committee to obtain an opinion from an independent financial advisor that the transaction was fair to the Class A shareholders, and the existence of an opinion from a credible financial advisor retained by the dissenting shareholders that the Proposal was unfair to the Class A shareholders were given little weight, as "ultimately, shareholders must make their own judgment" concerning the potential benefits of the Proposal.

The result in *Magna* suggests that the results of a favourable shareholder vote and the reaction of the financial markets will be treated by the courts as important indicators of whether a plan of arrangement is fair. The absence of other accepted indicia of fairness, such as an independent fairness opinion, will not be fatal, provided that the markets and most of the affected shareholders perceive the transaction to be fair and that sufficient information about it has been disclosed. Unfortunately, this may invite corporations to focus their efforts upon communications strategies and public relations campaigns to solicit support for a plan of arrangement prior to the vote, rather than upon obtaining independent, expert advice concerning the objective merits of the transaction in order to allow the board of directors to make a recommendation to shareholders concerning its fairness.

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Condominium Unit Owner's Reign of Terror Ends in Forced Sale by the Court

Court decisions in real estate are often disagreements over contractual provisions, not highly charged emotional ordeals culminating in allegations of a "reign of terror." The decision in *MTCC 747 v. Korolekh*¹

was exactly that, however, and details the continued self-destructive behaviour of a condominium unit holder until she is ultimately ordered to sell her unit pursuant to the Court's discretion in p. 134(c)(3) of the *Condominium Act*.

The benefits or drawbacks (depending on your perspective) of living in an Ontario condominium emanates from the legislative scheme governing condominium ownership and living, *The Condominium Act*². For the most flagrant and continuous violations of the *Act*, the Court has the discretion to force an owner to sell their unit and will exercise this discretion in the most serious cases, as evidenced by the Honourable Mr. Justice Code's decision in *MTCC 747 v. Korolekh*.

Ms. Korolekh had been a resident of a townhouse complex in downtown Toronto for approximately 5 years. Over the course of her ownership, she had engaged in an unrelenting and vicious campaign of harassment, violence, using her 150 pound Rottweiler³ to frighten other residents and mischief, according to the findings of fact by Mr. Justice Code.

The decision is remarkable in that it contains an extremely dense analysis of the facts and the law despite the Respondent's blanket denial of the allegations against her and the complete lack of evidence before the Court to support her position. It is clear that Mr. Justice Code wanted to leave no stone unturned in his decision as a result of the unusual and exceptional relief requested from the Applicant.

The Respondent's attempt at defending the Application from MTCC 747 consists of procedural arguments only. The first of which dealt the mediation provision in the *Condominium Act*. It was the Respondent's position that the Applicant was required to attempt mediation under ss.132 and 134(2) of the *Condominium Act* before bringing an Application of this nature against a unit holder.

Mr. Justice Code considered this proposition at length and determined that there was no such requirement under the Act when the issue was a disagreement between a condominium board and an owner.⁴ His Honour further notes that because the dispute primarily dealt with a breach of s. 117 of the *Condominium Act*⁵, that the mandatory duty to mediate set forth in s. 132 of the Act did not apply for the following reasons:

- The argument was only raised by the Respondent in their factum, 4 days before the hearing of the Application even though it had been brought over a year prior. As such, the Respondent was deemed to have waived any potential to mediation by not advancing the argument sooner;
- It would be unfair to the Applicant to force it into mediation when it had perfected its Application; and
- The Respondent's blanket denial of all of the Applicant's affidavit evidence suggested that mediation would be fruitless.⁶

The second procedural issue concerned the Respondent's assertion that the Application should be converted into a trial pursuant to Rule 14.05(3)(h) and Rule 38.10(1)(b) of the *Rules of Civil Procedure*, as there were "material issues in dispute". This argument was also rejected by the Court. Under Rule 14.05(3)(h), the Application had been properly brought via the statutory authorization in the *Condominium Act*.⁷ As for the discretionary power awarded to the Court in R. 38.10(1)(b) to convert

an Application to a trial, the decision listed a litany of reasons why that would be unfair or unjust for the Applicant.⁸

There is an interesting discussion regarding the integrity of title and the importance of compliance of the rules, by-laws and declaration of a condominium. The registered documents on title are intended to provide that integrity to future owners – which is vastly different in the context of freehold properties. The exception is the restrictive covenant sometimes found on title in developments where there is a clear decision on the part of the developer to bring some uniformity to the development. However, registered restrictive covenants generally do not have the same level of detail or the same goals as the by-laws, declaration and rules for a condominium.

The Court then proceeded to, painstakingly and with the same attention to detail, go through all of facts that support a finding that the Respondent had violated s. 117 of the *Condominium Act*, giving rise to the remedial provisions in s. 134 of the Act.

S. 117 of the *Condominium Act* is broad and appears to be designed with the intent of giving the Court discretion to determine when an owner's behaviour is such that remedies under s. 134 pursuant to the violation of s. 117 are warranted. It states:

No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.⁹

S. 117 is somewhat problematic in that a vast number of actions on the part of unit holders could fall within the s. 117 prohibition, particularly since it deals with the conditions of property damage or injury which are "likely" occur in the future. Interestingly, there have been few decisions interpreting s.117.

The Court relied on a decision, *YCC No. 136 v. Roth*¹¹, to support the decision to find a violation of s. 117 based on the prior violence of the Respondent. The Court further notes the threats made to other residents in addition to the use of her dog to scare residents and repeated acts of mischief to property represent a violation of s. 117 not just because they are "likely" to cause damage or injury but have already done so.¹²

It appeared that Court was persuaded that the Respondent's conduct was so egregious to warrant a forced sale by virtue of the totality of the Respondent's conduct proven by the Applicant.

The civil burden of proof, of course, is a balance of probabilities. The overwhelming and credible affidavit evidence presented by the Applicant and the Respondent's virtual silence in respect of those allegations established the burden for the Applicant according to the Court.¹³

The Court's last decision after determining that the Respondent had violated s. 117 was determining an appropriate remedy. It is interesting to note that in *YYC No. 136 v. Roth*, the Court noted that forcing the sale is "extraordinary" and "draconian" and did not find that it was appropriate to order the Respondent to sell his unit as the act of violence in that case was isolated, other incidents were trivial or happened many years ago, some of the evidence was of doubtful quality and the Respondent was entitled to an opportunity to demonstrate he could abide by the rules.¹⁴

None of reasons in *Roth* to deny the requested order of forced sale were applicable in *MTCC No. 747 v. Korolekh*. The Court determined that the violence was not isolated and the Respondent's conduct was not trivial, the Respondent had been ordered to remove her dog but had ignored the demand, there was no effort by the Respondent to change her behaviour after the instigation of the Application and lastly, that a compliance order in this case would require the Court to oversee (long-term) the Respondent's behaviour which is not the role of the Court.¹⁵

Mr. Justice Code's final conclusion on why the extreme measure of forcing the sale of the Respondent's unit was appropriate indicates that a forced sale is only available in the most serious and flagrant cases of consistent violations of S. 117:

In short, this case is a "perfect storm" where the misconduct is serious and persistent, where its impact on a small community has been exceptional and where the Respondent appears to be incorrigible or unmanageable. It must have been difficult to obtain the nine affidavits as some of the affiants are vulnerable and fear reprisals. They are entitled to the security of an order that removes Ms. Korolekh from their condominium corporation. She has been given opportunities, since May, 2009, to reform her ways or even to offer to reform her ways. There is no sign from her that she is willing or able to change.¹⁰

The legislative scheme of the *Condominium Act* and its ensuing interpretation by the Courts, especially with respect to the remedies in s. 134, demonstrate the difference between condominium living and freehold living in that the owners agree to be bound by a series of rules and regulations by purchasing a condominium. These rules are either not found in the ownership of freehold homes or dealt with under other legislative schemes that have different policy goals, like the Criminal Code or municipal by-laws. The moral of the story for those prone to violent and abusive behaviour directed at their neighbours: you will fare better with a freehold home as your neighbours will have fewer remedies and potentially a higher standard of proof.

¹ ThisMetro Toronto Condominium Corporation v. Korolekh 2010 CanLII 4448 (O.S.C.).

² *The Condominium Act* S.O. 1998, c.19.

³ Edwards, Peter "Condo Owner to Judge: You Win" (September 17, 2010) *The Toronto Star*. Online: <http://www.thestar.com/news/gta/article/862780--condo-owner-to-judge-you-win>

⁴ *Supra*, note 1 at para 49.

⁵ *The Condominium Act* S.O. 1998, c.19, s. 117.

⁶ *Supra*, note 1 at para 59.

⁷ *Supra*, note 4 at s. 134(1).

⁸ *Supra*, note 1 at para 60.

⁹ *Supra*, note 4 at s. 117.

¹⁰ *Supra*, note 1 at para 68.

¹¹ *York Condominium Corporation No. 136 v. Roth* 2006 CanLII 29286 (ON S.C.), 2006 CANLII 29286 (Ont. S.C.J.).

¹² *Supra*, note 1.

¹³ *Supra*, note 1 at para 76.

¹⁴ *Supra*, note 11.

¹⁵ *Supra*, note 1 at para 86.

¹⁶ *Supra*, note 1 at para 87.

Supreme Court Provides Guidance on Plan Administrator and Sponsor Duties, Surplus and Expense Issues

The Unanimous Supreme Court of Canada Decision in *Burke v. Hudson's Bay Co* determines that: (1) given the plan documentation at issue, there was no obligation to transfer surplus pension plan assets on the sale of the business; and (2) the employer had the right to charge expenses against the pension plan.

Facts

This appeal arises out of the sale of a division of the Hudson's Bay Company (HBC) to the North West Company (NWC). The employees of the division were transferred to NWC and their pension benefits were transferred to a new pension plan established by NWC. At the time of the transfer, the HBC pension plan had a projected surplus. HBC negotiated with NWC and transferred enough of the pension fund to cover the transferred employees' defined benefit liabilities but did not transfer any of the surplus funds.

The transferred employees alleged that HBC had breached its fiduciary duties and was required to transfer a portion of the projected surplus to the NWC plan. They argued that the result of the failure to transfer a pro rata share of the surplus was uneven treatment, with the remaining HBC employees benefiting from a plan in surplus when the transferred employees did not. They also argued that HBC improperly charged pension plan administration expenses to its pension fund.

The trial judge found in favour of HBC on the issue of administrative expenses but held that the employees had an equitable interest in the surplus. HBC appealed the issue of surplus and the transferred employees cross-appealed on the issue of administrative expenses. The Ontario Court of Appeal allowed the appeal and dismissed the cross-appeal.

Result

The Supreme Court of Canada (SCC) concluded that the pension plan documentation allowed HBC to charge pension administration expenses to the fund. The SCC also concluded that there was no obligation on HBC to transfer a pro rata portion of the surplus on the sale, given the fact that the employees were not entitled to surplus on a plan termination. In addition, the SCC in this case followed the analysis of the Ontario Court of Appeal and found that it was appropriate for costs to be paid out of the pension trust fund because this case dealt with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries and ordered that the cost of both parties were to be paid on a solicitor-and-client basis out of the pension trust fund.

It is important to note that the SCC stated that with respect to the transfer of surplus funds on the sale of a business that "the resolution of the issue of surplus transfer when the pension plan documents indicate that employees are entitled to surplus on plan termination is best left to another case where that issue arises."

Therefore, unfortunately, there still remains legal uncertainty with respect to what assets must be transferred where pension assets are transferred in the context of the sale of business. As a practical matter, this is likely to mean that vendors will be reluctant to transfer assets to a purchaser's pension plan where they are in surplus, as a full analysis of historical entitlement to surplus would be required to know whether there is a risk that surplus must be transferred. This would be difficult and expensive to do in the context of a sale of a business. Accordingly, given that pension legislation does not require a transfer of benefits on a sale of a business, the easiest route for employers will be to retain the pension liabilities, at least, in the case of a pension plan with surplus.

In addition, under the recently passed amendments to the *Pension Benefits Act* (Ontario) (PBA) when the sale of business asset transfer rule changes are proclaimed to be in effect, the value of the transferred assets must include a portion of the surplus which is to be determined in accordance with rules to be provided in the regulations. Accordingly, it appears that once the PBA amendments and regulations come into force, this issue of the required transfer amount will be clarified. However, employers are likely to be reluctant to transfer pension assets even if the rules are clear if more than a nominal amount of surplus is required to be transferred.

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