

Charter Issues Update:

B. Section 7 Right to Silence

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Impaired Driving – The Changing Landscape

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SECTION 7 – RIGHT TO SILENCE? WHAT RIGHT TO SILENCE?

A. INTRODUCTION

1. The recent co-mingling by the Supreme Court of Canada of the common law voluntariness rule with the Charter section 7 right to silence as they pertain to custodial interrogations and statements has received near universal condemnation from legal scholars and practitioners far more learned than this writer. The so-called “Interrogation Trilogy” of **R. v. Oickle**, **R. v. Singh** and **R. v. Sinclair** give police far more discretion and opportunity to elicit damaging admissions from any detainee held on any criminal investigation or charge. This will inevitably have a trickle-down effect even in the less statement-driven world of impaired driving law. Beware!

(I wish to acknowledge and thank Jim Edgett of my office for his tireless and invaluable assistance to me in the preparation of this paper.)

B. RECENT EVOLUTION OF VOLUNTARINESS / RIGHTS TO SILENCE AND COUNSEL

2. The analysis and commentary under this heading is adapted in part from “The Future of Self-Incrimination Protection” by Professor Tim L. Quigley, University of Saskatchewan School of Law, as presented at the Saskatchewan Trial Lawyers Association’s “Current Issues in Criminal Law” Conference, May 4, 2012, with permission.
3. In **R. v. Oickle** [2000] 2 S.C.R. 3, the Court said that voluntariness required all of:
 - a. Absence of threats or promises inducing statement;
 - b. Operating mind;
 - c. Absence of oppression;
 - d. Absence of tricks that would shock the community

But the Court also said that an implied threat or promise (discussed in older cases) had to be more overt; a *quid pro quo* had to be demonstrated.

4. The first three criteria relate to the reliability of a confession. The last criterion (and arguably oppression as well) relates to police conduct during interrogations. **Oickle** appears on its face to require a more stringent test for voluntariness.

5. But appearances can be deceiving. There are problems with **Oickle**. On its facts, the Court found no implied threat or promise from the police saying “It would be better ...” (paras. 53-55). The *quid pro quo* requirement was elevated for a threat or promise to be found. A polygraph test followed by an interrogation exaggerating its reliability was found to be acceptable. Thus the facts of the case in combination with the impugned statements being admitted was a signal to lower courts to admit such statements in such circumstances.
6. The Charter s. 7 right to remain silent was recognized in **R. v. Hebert** (1990), 77 C.R. (3d) 145 (S.C.C.) – all that was required to initiate it was detention. The decision did not focus much on police interrogations. However, in **R. v. Singh** (2007), 51 C.R. (6th) 199 (S.C.C.) the court considers the relationship between the s. 7 right to remain silent and the voluntary confession rule.
7. Singh was a suspect in the accidental shooting of a bystander at a pub. He was interrogated by police. He asserted his right to silence 18 times and requested to go back to his cell. Police deflected these assertions and persisted in getting admissions “no matter what.” Singh eventually made inculpatory statements identifying himself in still images taken from CCTV video from the pub and another pub the next day.
8. The Court held that:
 - (a) Where a person is detained in a police interrogation the voluntariness and s. 7 analyses are functionally equivalent - if a statement is found to be voluntary there is no s. 7 breach. Where an accused can show that his s. 7 right was breached the Crown will be unable to prove voluntariness.
 - (b) The stratagem of placing evidence before the detainee to extract a confession no matter what may give rise to an inference that the confession was not voluntary, but it is a question of degree.
 - (c) The confessions rule has moved from being primarily concerned with reliability to a protection against self-incrimination [should make it broader to include reliability, but don't].
 - (d) The right to silence recognizes the individual's right to remain silent, not the right not to be spoken to by the authorities.