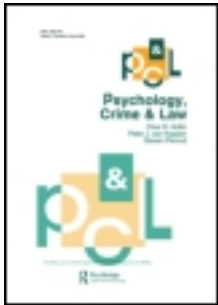


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Publisher: Routledge

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Psychology, Crime & Law

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/gpcl20>

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Published online: 15 Nov 2013.

To cite this article: Marc W. Patry, Steven M. Smith & Nicole M. Adams , Psychology, Crime & Law (2013): Recent Supreme Court of Canada rulings on criminal defendants' right to counsel, Psychology, Crime & Law, DOI: 10.1080/1068316X.2013.854795

To link to this article: <http://dx.doi.org/10.1080/1068316X.2013.854795>

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Recent Supreme Court of Canada rulings on criminal defendants' right to counsel

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(Received 10 February 2013; accepted 18 September 2013)

The Supreme Court of Canada recently issued a trilogy of decisions pertaining to suspects' right to legal representation. These rulings further a major difference between the US and Canadian law: Canadian criminal suspects have far less access to legal counsel than suspects in the USA. This paper summarizes these decisions and draws comparisons between Canadian and the US criminal procedure with respect to a suspect's rights to legal representation. We present preliminary data on Canadian citizens' misunderstanding of criminal suspects' right to counsel and also Canadian legal professionals' opinions about the right to counsel. We recommend empirical investigation of the hypothesis that Canadian suspects are more likely than the US suspects to make false confessions.

Keywords: interrogation; confession; right to lawyer; law

1. Overview

On the night of 21 November 2002, Gary Grice and Trent Terrence Sinclair were drinking in Sinclair's hotel room in Vernon, British Columbia, Canada. Grice was also using cocaine. Later that night, Grice was dead. His body was found with bloody bed linens in a dumpster not too far from the hotel. On 14 December 2002, Sinclair was arrested for the killing, read his rights, and taken into police custody for questioning. Sinclair asked to speak to a lawyer he had used in a previous case. Sinclair called the lawyer and spoke to him for approximately 3 minutes. The lawyer declined to go to the police station, however, as he had not yet received his Legal Aid retainer. Sinclair spoke to his lawyer for another 3 minutes.

Later, the police interrogated Sinclair. He was advised of his right to remain silent and that he had already exercised his right to counsel. He was told that he did not have the right to speak to his lawyer again and he did not have the right to have his lawyer present during questioning. Police questioned Sinclair despite his indication that he was exercising his right to remain silent, and his repeated requests to speak to his lawyer again and to have his lawyer present during questioning. Eventually, Sinclair made incriminating statements to the interrogating officer, and later on, when he was in his cell Sinclair made additional incriminating statements to an undercover officer. Eventually, he participated in a reenactment of the crime. He confessed to beating Grice with a frying pan and slitting his throat in his hotel room before dumping the body. He claimed Grice had come at him with a knife.

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At trial, Sinclair's incriminating statements were allowed into evidence, and he was convicted of second-degree murder. The trial judge determined that his right to counsel had been satisfied. His conviction was upheld on appeal. His appeals eventually reached the Supreme Court of Canada. In *R. v. Sinclair* (2010), the Supreme Court held that a criminal suspect in Canada has no right to additional consultations with a lawyer following an initial preinterrogation discussion.

The Canadian Charter of Rights and Freedoms (1982) allows suspects similar constitutional rights as the US suspects in a general sense: criminal suspects in Canada have the right to silence and the right to legal assistance (free of charge to those who cannot afford it). However, upon close examination, it is clear that Canadian suspects' rights are far narrower than those afforded to suspects in the USA. The Charter has historically been interpreted as not extending to the police interrogation: Canadian suspects do not have the right to have a lawyer present during questioning. Sinclair refined and narrowed the parameters of suspect's rights to a single consultation with a lawyer. The right to counsel expires after the suspect has conferred with a lawyer, even for just a brief time. Sinclair spoke with a lawyer in two brief telephone calls totaling about six minutes before police began to question him. He was then interrogated for five hours without another opportunity to speak with his lawyer, despite his requests for additional legal assistance. This scenario did not violate Sinclair's Charter right to legal counsel, according to the majority holding, since his right to counsel had been satisfied by his preinterrogation telephone conversations with counsel. In two companion cases to *Sinclair*, *R. v. Willier* (2010) and *R. v. McCrimmon* (2010), the Supreme Court of Canada further clarified the right to counsel: criminal defendants in Canada have the right to satisfactory legal counsel but not necessarily from the lawyer of their choosing. In other words, if the defendant requests a specific lawyer who is unavailable or otherwise unwilling to take the case, then legal advice from duty counsel (free of cost) satisfies the defendant's right.

2. The US criminal rights: *Miranda* to present day

In the USA, the sixth Amendment right to counsel allows defendants to have a lawyer present during questioning (*Miranda v. Arizona*, 1966). The right is continual, meaning it can be asserted at any time during a police interview. Thus, criminal suspects in the USA have the right to have a lawyer present at all times during a police interview or interrogation. Furthermore, an interview conducted in the absence of counsel must be halted whenever a suspect indicates a desire for counsel (i.e., asserts their sixth Amendment right).

In the USA, criminal rights are contained in the fourth through to the eighth amendments to the US Constitution. These amendments outline a citizen's rights pertaining to search and seizure, legal punishment, trials, questioning, and legal representation. Two landmark cases have defined criminal rights upon arrest, specifically the fifth Amendment (right to not self-incriminate) and the sixth Amendment (the right to counsel). In *Escobedo v. Illinois* (1964), the US Supreme Court addressed the question of whether the sixth Amendment includes pretrial custodial interrogations; the Court held that the right to a lawyer is triggered upon arrest because the defendant has graduated from suspect to accused (see also Dearborn, 2011).

The US Supreme Court expanded on its *Escobedo v. Illinois* (1964) holding in the well-known case *Miranda v. Arizona* (1966) in which the Court recognized the intimidating and

adversarial nature of police interviews. In *Miranda*, the Court noted that the presence of a lawyer may assist the accused in exercising his/her fifth Amendment right to silence, thus the Court interpreted the fifth Amendment to also include the right to legal counsel (Boxer, 2008). The majority opinion stated, '[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation... This warning is an absolute prerequisite to interrogation' (*Miranda v. Arizona*, 1966, p. 472). The *Miranda* Court also explicitly defined the rights about which an arrestee must be informed prior to interrogation. At minimum, an arresting officer must inform the suspect that she/he has the right to remain silent and anything the suspect says can be used against the suspect in court. The police must also inform the suspect that she/he has the right to an attorney and that attorney can be present during questioning. Additionally, if the suspect cannot afford an attorney, one will be provided at the government's expense. Most importantly, these rights are continual, meaning they can be asserted at any time during a police interview (*Edwards v. Arizona*, 1981; Weiss, 1983).

Subsequent US Supreme Court decisions have narrowed the latitude of *Miranda* through decisions aimed at clarifying what constitutes police coercion and defining circumstances in which a suspect is deemed to have waived his/her rights. For example, in the cases of *California v. Beheler* (1983), *Oregon v. Elstad* (1985), and *Stansbury v. California* (1994), the Court found that prearrest incriminating evidence obtained before a *Miranda* warning was given was admissible at trial. In *Oregon v. Bradshaw* (1983), the Court addressed situations where the *Miranda* warnings had already been provided, holding that a waiver to the right to counsel could be implied in situations where a suspect had indicated she/he wanted to exercise his/her rights to silence and legal counsel, but later initiated a conversation with the police, which led to a waiver of his rights and subsequent self-incrimination absent counsel. The *Bradshaw* Court held that once the suspect initiated conversation with the police, she/he had in effect waived the rights to silence and counsel and the conversation was not deemed coercive.

Opponents of *Miranda* assert that the ruling has reduced conviction rates and has increased the inadmissibility of confessions. Proponents of *Miranda* claim that there have been no significant effects on valid and legally obtained confessions (Oberlander & Goldstein, 2001).

Over the last 45 years, researchers have examined the form of *Miranda* warnings and suspects' comprehension of them. Both laboratory studies and field studies yield similar results: the majority of suspects do not fully understand the warning, and they waive *Miranda* rights. Research has also demonstrated that innocent suspects are most likely to waive their rights, and those who waive their rights are more likely to confess to crimes they did not commit (Rogers, 2011; Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008; Rogers et al., 2010). For example, Leo (1996) found that 80% of suspects waived their rights and participated in interrogations without their lawyer present. In a mock crime experiment, Kassin and Norwick (2004) found that participants that were innocent of any crime were most likely to waive their *Miranda* rights and speak with police without the presence of counsel. Perillo and Kassin (2011) reported that certain interrogation techniques used by police correspond with a high rate of false confessions.

There is general consensus among researchers that comprehension of *Miranda* rights is the key to alleviating the problems of false confession and wrongful conviction. The *Miranda* warning informs defendants of their right to have a lawyer present during questioning. A police interview conducted in the absence of counsel must be halted

whenever a suspect indicates a desire for a lawyer; however, it is unlikely that a suspect will invoke their rights if they misunderstand the *Miranda* warning.

3. Canadian criminal rights

Canadian criminal suspects have the right to counsel but do not have the right to have a lawyer present during interrogation (see *R. v. Sinclair*, 2010). Section 10(b) of the Charter states that on arrest or detention, suspects have the right ‘to retain and instruct counsel without delay and to be informed of that right.’ Recent Supreme Court of Canada rulings make it clear that a suspect’s *s.10(b)* right to counsel has been satisfied once the suspect has had an opportunity to speak with a lawyer, even if only a brief telephone conversation before the police have started questioning or laid out any details about the case (see *R. v. Sinclair*, 2010). There is no requirement that legal counsel come from a lawyer chosen by the suspect, but the suspect must be satisfied with their counsel (see *R. v. McCrimmon*, 2010; *R. v. Willier*, 2010). The suspect has a renewed right to counsel if the legal circumstances change substantially (e.g., new charges are added) or if there are indications that the suspect did not understand his/her rights when initially informed of them. A Canadian suspect exhausts the right to counsel with a brief telephone conversation prior to interrogation. After having an initial consultation with counsel, a suspect’s request for additional legal advice has no legal effect. Police may continue to question a suspect for hours and legally deny multiple requests for additional counsel. Of course, Canadian suspects have the right to silence, and police must inform suspects about the right to silence. However, suspects have no right to stop an interview or gain access to a lawyer once they have had an opportunity to talk with counsel (unless there is a significant legal change such as a new charge being laid).

The *Sinclair* decision was 5–4, with two separate dissenting opinions: one written by Justice Binnie and another by Justices LeBel and Fish and joined by Justice Abella. The five-justice majority opinion was written by Chief Justice McLachlin and Justice Charron, who were joined by Justices Dechamps, Rothstein, and Cromwell.

The *Sinclair* majority holding clearly establishes that the Charter *s.10(b)* right to legal assistance is not a continuing right that extends throughout the interview. *Sinclair* argued an interpretation of *s.10(b)* that would allow for presence of counsel throughout a police interview. This interpretation of the right to counsel in *s.10(b)* was based, in part, on the interpretation of constitutional right to counsel in other countries, especially in the USA where the *Miranda v. Arizona* (1966) interpretation of the right to counsel has established a criminal suspect’s right to have counsel present throughout all stages of police custody including the police interview. The *Sinclair* majority refuted such a broad interpretation of *s.10(b)*, and held that the Canadian criminal suspect has a one-time right to consult with a lawyer.

The *Sinclair* majority holding explicitly recognized three sets of special circumstances where a criminal suspect has the right for a reconsultation with his/her lawyer: (1) if there are new procedures involving the detainee, for example, a lineup or polygraph, (2) if there is a change in jeopardy, for example, new charges are laid against the defendant, or (3) if there is some new information that indicates a suspect who had previously waived the *s.10(b)* right did not understand that right at the time of the waiver. The majority indicated that the classes of circumstances requiring a right to reconsultation are not closed, but that additional exceptions would arise only when they involve clear changes to suspect’s circumstances. A suspect’s requests for additional legal counsel following an initial

consultation, or a post hoc claim by the suspect that she/he did not understand their rights during the police interview, will generally not be enough to trigger an additional *s.10(b)* right to consultation, or to indicate after the fact that a *s.10(b)* violation occurred.

In his dissent, Justice Binnie declined to recognize a *s.10(b)* right to have counsel present during the police interview, but he believed that a suspect's need for counsel could evolve during the course of a police interview and require re-consultation in order to satisfy the *s.10(b)* right to legal assistance.

My colleagues the Chief Justice and Charron J. acknowledge that there may be a need for further consultation if there is a change in the legal jeopardy confronting the detainee. Equally important, however, will be the detainee's belated appreciation in many cases of his or her existing jeopardy as the interrogation develops in ways that were not — and could not be — anticipated at the outset during the initial consultation with counsel...It cannot reasonably be said, in my view, that the 360 seconds of legal advice he received in two initial phone calls before the police began their work was enough to exhaust his *s.10(b)* guarantee. (pp. 52–53) According to Justice Binnie, the majority holding too narrowly interpreted the *s.10(b)* right to counsel, effectively reducing the right to counsel to a one-time message from lawyer to suspect about their right to remain silent. In Binnie's view, the majority holding so severely strips the value from the *s.10(b)* right to counsel that it could be accomplished with a brief telephone message "You have reached counsel. Keep your mouth shut. Press one to repeat this message," (p. 54, quoting the Ontario Criminal Lawyers' Association). According to Binnie, a lawyer cannot meaningfully assist the client if the consultation occurs only in an 'informational vacuum' before the police have begun to lay out their strategy in the interrogation room. A pre-interrogation consultation can only include advice to remain silent and refrain from cooperating with the police: by Binnie's analysis, the majority holding 'undershoots' criminal suspects' rights to legal consultation under *s.10(b)*.

Justices LeBel and Fish wrote, in a dissenting opinion joined by Justice Abella, that the majority holding 'subjects the exercise of the right to consult counsel to a detainee's successful demonstration, to the satisfaction of the police, that there have been fresh developments amounting to a material or substantial change in jeopardy' (p.78). They view this as an inappropriate restriction on a defendant's Charter right to legal counsel, which they understand to be an ongoing, continual right of the defendant. Their position differs starkly from the majority's view that the right to counsel exists at a fixed point in time, at the point of arrest or detention, and is exhausted once the defendant has spoken with counsel (unless there is a demonstrated, significant change in legal status or interview circumstances).

According to LeBel and Fish, the notion that a defendant's right to counsel could be spent after an initial consultation is at odds with the clear intention of that right in the Charter. 'Section 10(b) does not create for the detainee a black hole between the time of arrest or detention, and the detainee's first appearance before a judge.' (p. 85). Among the ways in which they support their interpretation of that right in the Charter, they cite in the French version of the text the phrase 'l'assistance d'un avocat,' [assistance of a lawyer], which arguably holds a much broader meaning than one-time consultation. "Accordingly, the plain meaning of *s.10(b)*, in both French and English, supports a broad application of the right to counsel, which includes an ongoing right to consult with counsel' (p. 87).

LeBel and Fish take issue also with the dissenting opinion of Justice Binnie. Their contention is that the *s.10(b)* right to counsel should be completely independent from any judgment on the part of the investigators. In their view, the defendant has a right to

assistance of counsel throughout the entire interview process, including the right to have counsel present during police questioning.

LeBel and Fish criticize the majority holding, which they view as a major expansion of police power when coupled with the holding in *R v. Singh* (2007) that defendants do not have the right to halt an interrogation by asserting their right to silence. In this dissenting view, the *Sinclair* and *Singh* holdings have the effect of seriously curtailing a criminal suspect's rights in the context of custodial interrogation: the police have unfettered access to the defendant, who does not have the right to counsel following an initial pre-interview consultation. In their view, this amounts to a significant erosion of Charter rights. The Court is permitted under *s.1* to curtail individual liberties when it is justifiably of interest to the public good. However, in the opinion of the dissenting justices LeBel, Fish, and Abella, such major infringement of individual Charter rights should be done only following analysis of rigorous evidence that such a reduction in individual rights is indeed necessary to protect the interests of the public at large. According to these dissenting justices, the majority holdings in *Sinclair* and *Singh* amount to invalid use of judicial power since there have been no such evidence-based *s.1* analyses in either decision: 'none of these purported justifications were put through the rigor of a *s.1* analysis, and are based on nothing more than speculation' (p. 104).

LeBel and Fish go on to compare the *Sinclair* holding to the US ruling in *Miranda*, noting that similar concerns about the presence of lawyers hindering the operation of law enforcement were raised prior to that decision and that the vast majority of research on the effects of *Miranda* indicate that it has not trampled the ability of law enforcement to elicit confessions from guilty suspects.

In *Willier*, the defendant consulted briefly with duty counsel by telephone. He tried to contact a lawyer of his choosing, but chose to consult briefly by telephone with duty counsel a second time before being questioned by the police. He eventually confessed. Prior to being interrogated, the defendant expressed satisfaction with the advice he had received from duty counsel. The trial judge acquitted the defendant, ruling that his *s.10(b)* right to counsel had been violated because the defendant did not consult with the counsel of his choosing, a decision that was overruled by the appellate court, which ordered a new trial. The majority (the same five justices as the majority in *Sinclair*) affirmed the ruling by the appeals court, holding that *s.10(b)* guarantees satisfactory legal advice, but does not guarantee that a suspect may choose his/her lawyer: satisfactory legal advice from duty counsel satisfies *s.10(b)*.

Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, *s.10(b)* entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond.... [i]f the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended. (p. 22)

Justice Binnie filed a concurring opinion, distinguishing the *Willier* situation from *Sinclair* in that the defendant did not ask to speak with counsel again once the police had begun questioning him, even though the police offered to stop the interview at any time if he wanted additional counsel. Justices LeBel and Fish also filed a concurring opinion, indicating that the defendant's *s.10(b)* right to counsel had been satisfied.

Table 1. Comparison of suspects' right to counsel: Canada versus the USA.

Situation/defendant rights	USA	Canada
Right to consult a lawyer	Yes	Yes
Right to consult with a specific lawyer of defendant's choice	No	No
Right to lawyer free-of-charge	Yes	Yes
Right to have lawyer present during questioning/interrogation	Yes	No
Right to halt questioning for an initial consultation with a lawyer	Yes	Yes
Right to halt questioning for a second consultation with a lawyer	Yes	No
Right to consult with a lawyer a second time	Yes	No
Right to in-person consultation with a lawyer	Yes	No

In *McCrimmon*, the defendant attempted to contact a lawyer of his choosing, but then spoke with duty counsel prior to being questioned by police. During the interrogation, he repeatedly requested additional legal counsel and the presence of counsel during questioning, which the police denied, and the defendant eventually confessed. The incriminating statements were admitted at trial, over the objections of the defense, and the appeals court affirmed the conviction.

The same majority as *Sinclair* and *Willier* affirmed the conviction, holding that *McCrimmon's* *s.10(b)* right to legal counsel was satisfied by his speaking with duty counsel via telephone for about five minutes, after which he indicated he was satisfied with the advice he had received. Justice Binnie filed a concurring opinion which essentially agreed with the majority, following logic he had laid out in his concurrence in *Sinclair* as to circumstances that trigger an additional *s.10(b)* consultation with a lawyer: given that there was no substantive change in the legal status of the defendant or the interrogation methods being used by the police, and there was no indication that the suspect did not understand his legal circumstance at any time, there was no trigger for an additional *s.10(b)* legal consultation. Justices LeBel and Fish, joined by Justice Abella, filed a dissenting opinion. Reaffirming their view expressed in *Sinclair*, the minority asserted that *s.10(b)* allows defendants the right to have unfettered access to counsel, including their presence during questioning, if they so request.

4. Defendants' right to counsel: international comparisons

4.1. Comparison between Canada and the USA

Canada and the USA have long been considered to provide very similar rights to criminal suspects. Given the recent decisions in *Sinclair*, *Willier*, and *McCrimmon*, it is clear that Canadian suspects' rights to legal counsel are now (and may always have been) much more limited than criminal suspects in the USA. This difference may make Canadian suspects in police custody more vulnerable to the interrogation techniques employed by the police. There are significant differences between Canada and the USA regarding criminal suspects' right to counsel, differences that are emphasized by *R. v. Sinclair* (2010) and its companion cases.

Table 1 highlights several key differences in criminal suspects' rights between Canada and the USA. First, Canadian criminal suspects do not have the right to an in-person consultation with legal counsel. Though suspects may be allowed to meet with a lawyer in person, they do not have a Charter right to in-person consultation; a brief telephone

conversation with counsel will generally be sufficient to satisfy the Charter right to counsel. Second, Canadian suspects do not have the right to have a lawyer present during questioning. It is all well and good to advise a suspect to remain silent during an interrogation, but when a suspect does not have the right to end the interview and there is no lawyer present in the room to provide support, the pressure to speak can be intense. These pressures can range from the very subtle (long pauses by the interrogators, implying a response from the suspect is expected) to the more explicit (see, e.g., *R. v. Oickle*, 2000). For example, in one well-publicized Canadian case from Alberta (see *R. v. Dix*, 2000) the police were videotaped interrogating a suspect. In the video, officers were shown waving the supposed murder weapon (a handgun) in the suspect's face. After the suspect repeatedly said that he declined to answer their questions on the advice of his lawyer, one police officer screamed repeatedly at him: "What are you, a fucking parrot?"

Finally, Canadian suspects do not have the right to halt questioning once they have consulted with a lawyer. Of course, as noted above, the *Sinclair* ruling notes that three circumstances can change this: new procedures involving the suspect, a change in jeopardy, or new information suggesting the suspect did not understand his or her rights. It is worth noting that all of these changes are fundamentally based on the interrogator's perception of the situation. For example, unless the police officer conducting the questioning perceives that the legal status of the suspect has changed (i.e., the potential chargeable offense has become more serious), then the suspect does not have the right to speak to counsel again.

It is worth noting that there are numerous parallels between criminal suspects' rights in Canada and the USA, both of which evolved out of the British Common Law. Both systems allow: protection against unreasonable searches (*s.8* of the Charter; fourth Amendment to the US Constitution); protection from self-incrimination (*ss.7* and *11c* of the Charter; fifth Amendment to the US Constitution); the right to be informed of the charges against one when detained by police (*s.11(a)* of the Charter; sixth Amendment to the US Constitution); right to a speedy trial (*s.11(b)* of the Charter; sixth Amendment to the US Constitution); protection against double jeopardy (*s.11(h)* of the Charter; fifth Amendment to the US Constitution); and protections against cruel and unusual punishment (*s.12* of the Charter; eighth Amendment to the US Constitution). These similarities between Canadian and the US legal systems with respect to criminal suspects' rights bring into specific relief the contrasts that are evident in the area of criminal suspects' right to legal counsel.

4.2. Comparison to non-North American Jurisdictions

Perhaps the most obvious comparison to North American jurisdictions is the UK. In the UK, the Police and Criminal Evidence Act (PACE, 1984) governs police behavior. PACE requires police to give suspects a caution and inform suspects that they are entitled to a lawyer who may be present during any interrogation (see Slobogin, 2004 for a review). Canadian criminal suspects have more limited rights than suspects in the UK.

The European Union (EU) has been making strides towards minimum rights for criminal suspects. Draft legislation is nearing its first reading in the European Parliament which would require that all criminal suspects in EU countries would be allowed access to a lawyer (European Commission, 2011; European Parliament, 2012). The legislation specifies that criminal suspects would be allowed free legal representation if they cannot afford it. In addition, criminal suspects would have the right to have a lawyer present at

all times during police questioning or interrogation. The draft legislation also includes provisions for translation in cases where there is a language barrier. The legislation would also require that criminal suspects be informed of their rights in writing as well as verbally.

Presently, EU countries vary significantly in terms of criminal suspects' rights to legal counsel, and also in terms of how those rights are implemented (see Cape, Namoradze, Smith, & Spronken, 2010 for a comprehensive review). Criminal suspects in most EU countries have the right to legal representation following arrest. In Belgium, criminal suspects are allowed legal aid if they cannot afford it, but suspects are not routinely informed of this right. Belgium criminal rights do not allow for access to a lawyer during the 24 hours following arrest. In England and Wales, criminal suspects have the right to counsel following arrest. Although suspects have the right to silence, silence during police questioning is often taken as indicative of guilt at trial (Cape et al., 2010). In Finland, suspects can be tried without legal representation if they have confessed or the case is seen as routine. Suspects in Finland are not provided a written summary of their rights. Criminal suspects have very limited rights in France: suspects do not have guaranteed access to a lawyer upon arrest, and they are limited to a 30-minute consultation with a lawyer. Criminal suspects in France do not have a right to have a lawyer present during police questioning. In addition, French police are not required to inform suspects of their right to remain silent. In Germany, individuals are classified either as 'suspects' or 'accused.' Suspects do not have a right to a lawyer. Accused individuals in Germany have the right to a lawyer but in practice are often convinced by the police that a lawyer is not necessary and questioned for extended periods without a lawyer (Cape et al., 2010). In Hungary, criminal suspects have the right to legal counsel during the police investigation, but due to a number of factors, it is rare for suspects to have access to a lawyer. In Italy, criminal suspects are provided a written copy of their rights and the charges against them. However, suspects in Italy are not entitled to learn of changes to the charges against them. Furthermore, criminal suspects in Italy can have access to a lawyer delayed for up to 48 hours on a prosecutor's authority, or delayed up to 5 days on a judge's authority. Thus, in Italy, police can question suspects before they have an opportunity to consult with a lawyer and outside the presence of counsel. In Poland, individuals are classified as either 'suspected persons' or 'suspects.' Suspected persons do not have the same rights as suspects, but they may be detained for up to 48 hours. Suspects are provided a written statement of rights, but suspects often do not understand the statement. In some cases in Poland, prosecutors can supervise consultations with lawyers during the first 14 days of detention, and can deny lawyers access to the police file (Cape et al., 2010).

In summary, the rights of criminal suspects in EU countries vary substantially. Some countries have stronger protections for criminal suspects that allow guaranteed access to a lawyer and presence of counsel during questioning, while others have far less protections. However, as a whole, the EU is moving toward a model which requires basic criminal protections that would afford greater rights for all EU criminal suspects compared to Canadian suspects. It is worth noting that the proposed legislation faces significant hurdles to implementation (Lööf, 2006). In any case, if the EU passes and implements the proposed legislation, Canadian criminal suspects will have fewer protections than suspects in any EU country.

5. Implications – potentially high risk of false confessions in Canada

There is no question that the tactics used by police in North America are effective at getting guilty suspects to confess (e.g., see Inbau, Reid, Buckley, & Jayne, 2005; Kassin et al., 2010; Smith, Stinson, & Patry, 2009, 2010, 2012). Police interrogations create a very powerful social psychological situation for the suspect, one which is intended to cause a great deal of stress and which will eventually lead to a confession (e.g., Kassin et al., 2010). Unfortunately, these tactics have been shown to cause some suspects to confess to crimes they did not commit: there is ample evidence that police interrogation techniques commonly employed in North America can cause false confessions (see, e.g., Kassin et al., 2010). Suspects who have access to legal counsel during an interrogation are at a distinct advantage compared to suspects who no longer have access to a lawyer. Lawyers can advise their clients to remain silent, can evaluate the legal implications of any questions posed by interrogators, and are generally available to protect the interests of their client. While interrogations conducted outside of counsel are, from a police perspective, very efficient, suspects who do not have legal counsel are especially vulnerable to the powerful psychological tactics used by the police.

People falsely confess for a number of reasons (Kassin & Wrightsman, 1985). Sometimes, they do so voluntarily, without any external pressure. Others confess because they are led to believe they have committed the crime. However, the most common type of false confession is the coerced-compliant false confession, wherein the innocent suspect confesses after being exposed to a great deal of external pressure, as response to a real or implied threat, or by promise of a real or implied reward (Gudjonsson & MacKeith, 1988).

The risk of false confession begins shortly after the police first interview an innocent suspect (Kassin, 2005). The ‘Reid Technique’ (developed by Inbau et al., 2005) forms the basis for almost all North American police interview training. The technique is designed to break down suspects’ resistance to admitting their guilt. It is based on three complementary processes: isolating the suspect from any social support, confronting the suspect with assertions of their guilt, and providing psychological minimization of the crime in order to convince the suspect to confess.

Police in North America are allowed to use mistruths in the pursuit of justice. For the purpose of the interrogation, it is common for police to exaggerate and/or to fabricate evidence that the suspect is guilty, including DNA evidence, eyewitnesses, fingerprints, and other forensic evidence. In *R. v. Rothman* (1981) the Supreme Court of Canada determined that all police tactics are acceptable, as long as they do not ‘shock the conscience’ of the Canadian public. However, the definition of ‘shock the conscience’ is unclear. Indeed, in *R. v. Mentuck* (2000) the presiding judge noted that police, in attempting to extract confessions from suspects they believe to be guilty might, at times, use tactics that will be seen by an outsider as ‘...unfair or dirty’ (p. 47).

What seems clear, given the above, is that false confessions occur in the USA with substantial regularity (the exact rate/number of false confessions is unknown; Kassin et al., 2010; InnocenceProject.org). There is no reason to suspect that the false confession level is any lower in Canada. Indeed, given the more limited rights with respect to police cautions, and techniques that are unique to Canada which circumvent these rights (e.g., the noncustodial ‘Mr. Big’ technique, see Smith, Stinson, & Patry, 2009, 2010), it stands to reason that the problem of false confessions in Canada may be greater (per capita) than in the USA. The consequences of such a possibility are substantial. Convicting an

innocent person is a miscarriage of justice, and the perpetrator who committed the crime is likely still on the street committing further crimes. In an analysis of Innocence Project (2009) cases in New York State, it was reported that 9 out of 10 criminals, who remained free because an innocent person was wrongfully convicted, committed crimes while the innocent person was in prison.

6. Preliminary findings and a research agenda

We hypothesize that Canadian criminal suspects are at a significant disadvantage in comparison to defendants in the USA and other countries where there are more robust rights to legal assistance. To date, there is no published empirical research comparing Canadian confession data to other countries. In this section, we share some preliminary findings and propose a research agenda for empirical examination of this issue. The data summarized below point to public confusion about criminal suspects' right to legal counsel.

6.1. Preliminary findings

Using paper and pencil survey methods, we collected data ($N = 119$) from convenience samples of law enforcement professionals ($n = 64$), criminal lawyers ($n = 14$), and undergraduate students ($n = 41$) in Eastern Canada. Though the emphasis of this study was much different than the focus of the present paper, the data shed some light on the risks associated with Canadian criminal suspects' rights to legal assistance. All participants were asked for their opinions. Student participants also listened to an audio recording of the standard police caution provided to criminal suspects in an eastern Canadian city; afterward, comprehension of suspect rights was measured through responses to a series of true/false questions. Student data showed significant confusion about most aspects of the right to legal counsel. More than 75% ($n = 23$) believed that arrested persons in Canada have the right to have a lawyer present during police questioning, more than half ($n = 23$) believe incorrectly that police cannot continue to question a suspect after they have chosen to remain silent, and 25% ($n = 11$) did not understand that suspects have the right to speak with a lawyer immediately following arrest.

Legal professionals' ($n = 78$) opinions about public comprehension of their rights to counsel paralleled the student comprehension data. More than half of legal professionals ($n = 42$) thought that suspects believe they have a right to have a lawyer present during police questioning, more than 70% ($n = 55$) indicated that suspects think the police cannot continue to question them after they have indicated they intend to remain silent, and 31% ($n = 24$) believed that suspects did not understand their right to call any lawyer of their choosing.

These data provide preliminary indications that the general public has a poor understanding of criminal suspects' right to counsel, even after having heard a standard police caution. Legal professionals clearly observe suspect confusion about the right to legal counsel. Perhaps a root cause for this stems from the US media saturation; *Miranda* rights are commonly portrayed on both fictional and documentary portrayals of crime which enjoy very high ratings in Canada (see, e.g., Patry, Stinson, & Smith, 2008; Smith, Patry, & Stinson, 2007; Stinson, Patry, & Smith, 2007). These preliminary data point to a

clear need for additional research about Canadians' understanding of criminal suspects' right to legal counsel.

6.2. Research agenda

Prior research has shown that Canadian police waivers are generally very poorly understood (Eastwood & Snook, 2010). The preliminary data presented above supports that conclusion and also highlights the public's lack of understanding about the *s.10(b)* right to counsel. Much more research is needed in order to determine the magnitude of the problem of confusion about Canadian suspects' right to counsel and to evaluate the potential implications.

Historical analysis of confirmed wrongful convictions could provide some preliminary, albeit anecdotal, evidence about the vulnerability of Canadian criminal suspects. Analysis of all of the overturned convictions could give some base rate data which could then be compared to the comprehensive databases in the USA that are already in existence (e.g., the Innocence Project).

Researchers should consider interviews and/or surveys of Canadian inmates, with comparisons to inmates in the United States and perhaps other countries as well. Carefully crafted questions could help to illustrate differences vis-à-vis legal rights to counsel and corresponding vulnerability to police interrogation tactics. In a somewhat related vein, researchers should conduct surveys of legal professionals including judges, prosecutors, and defense lawyers, in both Canada and other countries to make comparisons across legal systems. Lawyers and judges are uniquely qualified to provide analysis of the vulnerability of criminal suspects.

It is clear from the preliminary findings presented above that Canadian law enforcement professionals think the public is misinformed about criminal suspects' right to legal counsel. Additional surveys on a national scale will help to determine the scope of the problem from a law enforcement perspective. Furthermore, surveys of police can illustrate the actual access to counsel afforded to suspects, and the degree to which police interviews with suspects are conducted outside of counsel. The Supreme Court of Canada decisions in *Sinclair*, *McCrimmon*, and *Willier* established that there is no Charter protection which guarantees a suspect the right to have legal counsel during the police interview, and there is no Charter right to additional legal counsel once a suspect has had a satisfactory initial conversation with a lawyer. However, it is important to notice that the recent Supreme Court of Canada rulings on suspects' rights to legal counsel define the *minimum* rights found in the Charter. Police have the discretion to allow suspects additional consultations with a lawyer, and police may allow a suspect to have counsel present during an interview. What is not clear is the degree to which police hold the legal line with criminal suspects' minimum right to counsel. Surveys of police, and of criminal defense lawyers, may show that police frequently allow suspects to have additional legal counsel upon request and/or allow the presence of counsel during police interviews. Empirical research can show the operational realities of Canadian suspects' access to legal counsel while in police custody.

Community participants' views about the reality of Canadian suspects' access to legal counsel are also important. Though the Supreme Court has never clearly explained just what sort of evidence might show that particular police procedures 'shock the conscience' of the Canadian public (see *R. v. Rothman*, 1981), it stands to reason that rigorous research with community participants could help to inform this decision. There is not yet

evidence about the degree to which Canadian citizens understand police interview techniques, nor is there evidence about whether any aspects of current police practice are shocking to Canadians. These are empirical questions that can be informed through research.

Finally, experimental research can help to illuminate differences across legal systems with respect to suspects' vulnerability resulting from access to legal counsel. Most likely, at least at first, this research would take place in simulation studies in research laboratories. Access to counsel could be manipulated with mock criminals in simulated interrogation situations. Participants could be randomly assigned to either 'innocent' or 'guilty' conditions, and motivation to refrain from confessing could be accomplished by a financial incentive (one that, for ethical reasons, would actually be paid to all participants regardless of whether or not they confessed). Participants would be randomly assigned to either a US-style condition, in which they were read *Miranda*-style warnings and allowed unfettered access to legal counsel (accomplished through a series of descriptive vignettes), or a Canadian-style condition in which access to counsel would be limited to a one-time telephone conversation before police begin their questioning. Dependent variables would include comprehension of the warnings, the frequency and nature of requests for additional counsel, and confession rates. Results from these laboratory studies could eventually be parlayed into field experiments conducted in partnership with police organizations in Canada and abroad.

7. Conclusions

The recent Supreme Court of Canada rulings clarifying – and limiting – criminal suspects' right to legal counsel (*Sinclair, Willier, and McCrimmon*) create a uniquely oppressive environment for Canadian criminal suspects. Even though the Charter allows that suspects can remain silent in the face of police interrogation, the very limited access to counsel allowed in the wake of these rulings creates enhanced vulnerability to oppressive police interrogation techniques. Preliminary data indicates a very high level of public misunderstanding of Canadian criminal suspects' right to legal counsel. The extent and causes of Canadian confusion about criminal suspects' right to legal counsel are not yet known. We believe that confusion about custodial suspects' right to counsel creates a higher likelihood of false confessions than exists in the USA and other countries where suspects are allowed repeated access to legal counsel, and/or allowed to have counsel present during police interrogation. Admittedly, though we have strong logical reasons to posit this hypothesis, we do not have empirical evidence of heightened suspect vulnerability in Canada. We propose a program of research to examine these issues in the future.

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