MORE ON *MIRANDA* — RECENT DEVELOPMENTS UNDER SUBSECTION 10(b) OF THE *CHARTER*

*D.M. Paciocco**

I. INTRODUCTION

In a recent edition of this journal I published an article entitled *The Development of Miranda-Like Doctrines Under the Charter*.[1] The article canvassed the extent to which we, in Canada, are developing doctrines like those that were adopted by the Americans in the famous case of *Miranda* v. *Arizona*.[2] The article concluded that, through independent initiatives inspired by subsection 10(b) of the *Canadian Charter of Rights and Freedoms*,[3] we are in the process of refining constitutional rules which largely parallel those that burst onto the American legal scene with the release of that seminal decision. In the few short months since the article was published, the Supreme Court of Canada has released three decisions which go a large way to confirming the evolution of *Miranda*-like doctrines here in Canada and to clarifying the scope of some of those doctrines.

II. CLARIFICATION ON THE BURDEN OF PROOF ON THE VALIDITY OF WAIVERS OF SUBSECTION 10(b) RIGHTS — *R.* V. *BAIG*[4]

Perhaps the most important aspect of the *Miranda* decision was its rejection of the basic premise of the common law "confession rule". That rejected premise held that so long as a statement was made voluntarily by a suspect, it was fair to use that statement against the suspect, regardless

---

* Faculty of Law, Common Law Section, University of Ottawa.

[1] D.M. Paciocco, *The Development of Miranda-Like Doctrines Under the Charter* (1987) 19 OTTAWA L. REV. 49.

[2] 384 U.S. 436 (1966) [hereinafter *Miranda*].

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

[4] (1987), [1987] 2 S.C.R. 537 [hereinafter *Baig*].

of how ignorant the suspect was about his rights, or about the consequences of speaking. In *Miranda*, the United States Supreme Court held that mere voluntariness was not enough. Statements made by suspects while under custodial interrogation would be unconstitutionally obtained unless they were the product of an informed waiver by the suspect of his right to counsel and of his right to remain silent.[5]

As early as 1986 a similar rule was developed in Canada. In *Clarkson* v. *R.*,[6] the Supreme Court of Canada held that the decision by a detained suspect to speak in the absence of counsel will not amount to a waiver of the constitutional right to counsel guaranteed by subsection 10(b) of the *Charter* simply because the decision to speak is made in the absence of some form of compulsion exercised by the police. A necessary condition of a valid waiver is that the detainee have a true appreciation of the consequences of not exercising the constitutional right. Moreover, it appears that for a waiver to be valid, the detainee must have knowledge both of the constitutional right to consult counsel and of the underlying rights and liberties that this constitutional right is intended to safeguard. The liberty that will most often be relevant is the liberty of a suspect not to speak.[7]

The *Clarkson* case raised significant questions about who bears the burden of proof on the waiver issue. The Crown, of course, bears the burden of establishing voluntariness under the common law confession rule, and parallel reasoning might suggest that the Crown must thereby establish an informed and comprehending waiver of the liberty not to speak. On the other hand, to obtain relief under the *Charter*, the individual claiming that there has been a *Charter* violation must typically establish that violation on the balance of probabilities. This suggests that when the complaint is made that the police violated subsection 10(b) by obtaining a statement from a suspect who did not appreciate the consequences of speaking, the complainant should bear the burden of establishing that violation by demonstrating his lack of knowledge or his failure to comprehend. In *Clarkson*, without analysis, the Court appears to have presumed that the burden of proof is on the Crown to establish a valid waiver.[8] The nature of that burden has since been clarified by the Supreme Court of Canada decision in *Baig*.[9]

Baig was arrested for murder. He was immediately advised of his subsection 10(b) rights. He did not express a desire to consult counsel or to remain silent. Upon questioning he made an oral statement concerning his involvement in the murder, but not before he was asked whether he understood "the caution". He subsequently signed both a written statement and a form which repeated the *Charter* warning and

---

[5] *See* Paciocco, *supra*, note 1 at 51-52.
[6] (1986), [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207 [hereinafter *Clarkson*] .
[7] *See* Paciocco, *supra*, note 1 at 54-57.
[8] *See ibid.* at 57-60.
[9] *Supra*, note 4.

indicated that he understood both the charge and the caution. Despite this, the trial Judge held that the statements were obtained in violation of subsection 10(b). The statements were then excluded and a directed verdict of acquittal was ordered. The *Charter* violation that the trial Judge identified was that the police had made no effort to ensure that the accused comprehended his subsection 10(b) rights; the *pro forma* question as to whether the accused understood was insufficient.[10] In a brief judgment, the Supreme Court of Canada upheld the Ontario Court of Appeal's decision to overturn the trial Judge and to grant the Crown a new trial.[11]

The immediate impact of the *Baig* decision is that there is no *generally applicable* duty on the police to ensure that detained or arrested suspects appreciate *Charter* warnings, or the consequences of waiving the relevant protections.[12] Moreover, the decision reveals that the voluntary choice of a detainee to speak in the absence of counsel will, in the usual case, be assumed to constitute a valid waiver.[13] This can be inferred from the Court's description of the burden of proof on the waiver issue. The Supreme Court of Canada cited, with approval, the decision of the Ontario Court of Appeal in *R.* v. *Anderson*,[14] and quoted and applied the following passage from that decision to resolve the issue before it:

> [A]bsent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forward in this case.[15]

Thus, absent proof of circumstances operating at the time of the detention of the accused which cast doubt upon his comprehension of the right to counsel, there is no onus on the Crown to establish a valid waiver. A

---

[10] *R.* v. *Baig* (1985), 46 C.R. (3d) 222 at 229, 9 O.A.C. 266 at 271 (C.A.), *rev'g* (24 January 1984), (Ont. S.C.) [unreported], *aff'd* (1987), [1987] 2 S.C.R. 537.

[11] *Baig*, *supra*, note 4.

[12] As the following discussion, and the *Clarkson* case make clear, there is such a duty where it is reasonably apparent that the detainee suffers from some defect in comprehension, such as severe impairment. In *Clarkson*, Wilson J. was critical of the police in seeking to take advantage of Clarkson's impaired condition to get an admission they might not otherwise have obtained. In effect, the police had a duty to refrain from seeking to obtain evidence until satisfied that she was sober enough that any waiver by her would be meaningful. *Supra*, note 6 at 397-98, 25 C.C.C. (3d) at 219-20.

The existence of this duty should not confuse the fact that the focus of the waiver inquiry is primarily on the mind of the detainee and not on the actions of the police. While improprieties by the police, such as the exercise of coercion, may invalidate an apparent waiver, the absence of such improprieties will not automatically make any waiver by the detainee valid.

[13] The corollary, that a detainee must expressly invoke the right to counsel, has been criticized. *See* D. Stuart, *Annotation — Porter v. R.* (1987), 46 C.R. (3d) 232.

[14] (1984), 45 O.R. (2d) 225, 10 C.C.C. (3d) 417 (C.A.).

[15] *Ibid.* at 239, 10 C.C.C. (3d) at 431, quoted in *Baig*, *supra*, note 4 at 540.

legal burden to establish the validity of an apparent waiver which is manifested through the post-warning decision of a detainee to speak, will be imposed on the Crown only where the validity of that waiver has been put into issue. Therefore, unless the case for the Crown itself reveals circumstances which cast doubt upon the comprehension by the detainee of the consequences of waiving the right to counsel, the accused has an evidential burden to lay such a foundation through evidence in order to bring the validity of that waiver into issue. In effect, therefore, the decision to speak is presumed to constitute a valid waiver until evidence is presented to cast doubt upon that presumption.

Dicta in two earlier Supreme Court of Canada decisions appears to call the existence of this presumption into question. In *R.* v. *Manninen*,[16] Lamer J. cited *Clarkson*[17] for the proposition that "[w]hile a person may implicitly waive his rights under s. 10(b), the standard will be very high. . .".[18] This statement, and the comments in *Clarkson*, must be read in the context in which they were made in order for them to be reconcilable with *Baig*.[19] In *Clarkson*, the accused was severely intoxicated when she spoke. Thus, there was reason to be skeptical of the submission that the decision by Clarkson to speak manifested an informed waiver. In *Manninen*, the accused had attempted, unsuccessfully, to get the police to accord him his right to consult counsel without delay. As Lamer J. said in the course of his judgment in *Manninen*, where an accused attempts to remain silent and the police ignore his request for counsel by continuing to question him, he is apt to conclude that he has no real liberty to refrain from responding.[20] In each case, therefore, a foundation had been laid on the evidence to cast doubt upon the integrity of the waiver which the decision by each detainee to speak was alleged to represent. It follows that where there is a foundation for doubt, the Crown's submission that the detainee's decision to speak evidences a valid waiver will be tested according to a very high standard.

III. The Development of an "Almost" Automatic Exclusionary Rule — *R.* v. *Collins*[21]

Perhaps the most well known aspect of the *Miranda*[22] decision was the development of the now familiar warning that police officers must give before interrogating persons who are in custody. The *Charter*'s

---

[16] (1987), [1987] 1 S.C.R. 1233, 58 C.R. (3d) 97 [hereinafter *Manninen*].
[17] *Supra*, note 6 at 394-95, 25 C.C.C. (3d) at 217-18.
[18] *Supra*, note 16 at 1244, 58 C.R. (3d) at 105.
[19] *Supra*, note 4.
[20] *Supra*, note 16 at 1244, 58 C.R. (3d) at 105.
[21] (1987), [1987] 1 S.C.R. 265, 56 C.R. (3d) 193 [hereinafter *Collins*].
[22] *Supra*, note 2.

subsection 10(b) expressly requires that our police provide detained persons with similar warnings. At present the subsection 10(b) warning differs in kind from the *Miranda* warning in that our police apparently need not advise detained persons that they have the right to remain silent,[23] nor need they tell detainees that counsel will be appointed for them if they cannot afford one.[24] However, in the earlier article,[25] I suggested that the most substantial distinction between the operation of the two warnings was that, in the United States, subject to limited exception, the failure to provide the warning results in automatic exclusion of subsequent statements, whereas in Canada, the decision whether to exclude such statements is to be made on a case by case basis according to the formula in subsection 24(2). I inferred that exclusion would constitute a common, but much less automatic consequence. The Supreme Court of Canada decision in *Collins* has proven that to be wrong. Statements obtained in violation of subsection 10(b) will be excluded in this country, perhaps more readily than are "non-Mirandized" statements in the United States.

The decision in *Collins* is not about subsection 10(b). It relates to the admissibility of evidence obtained as a result of what was presumed to be an unconstitutional search and seizure.[26] In discussing the exclusionary remedy, however, Lamer J. noted that the most important factor in determining whether unconstitutionally obtained evidence will be excluded is the nature of the evidence obtained. Where it is an admission that is obtained from the accused in a manner that contravenes his *Charter* rights, it will almost automatically be excluded. This is because for a court to use that admission is to deprive the accused of "one of the fundamental tenets of a fair trial, the right against self-incrimination".[27] The Crown must fashion its "case to meet" against the accused without using the accused as a witness against himself. Use of the accused's

---

[23] There is reason to believe that this customary warning will become mandatory. *See* Paciocco, *supra*, note 1 at 62-66. Indeed, in *Manninen*, Lamer J. noted that the police had "correctly informed the respondent of his right to remain silent. . ." (*supra*, note 16 at 1243, 58 C.R. (3d) at 104). In my opinion, this would be undesirable. It would simply present one more technical and unnecessary basis for the exclusion of trustworthy evidence. Where the accused is already aware of his liberty not to speak, it would seem inappropriate to exclude evidence because of a failure to advise him of that which he already knows. *See R.* v. *Olson* (19 October 1987), (B.C.C.A.) [unreported], to this effect in the context of a breath sample. Given the almost automatic exclusion of incriminatory statements obtained in a manner inconsistent with the *Charter*, this is the likely result (*see* the discussion below). Where the accused is in fact ignorant of his liberty not to speak, it is unlikely that statements made by him will be the product of a comprehending waiver, and will therefore be inadmissible on that account.

[24] *But see* D. Stuart, *The Charter Right to Counsel — A Status Report* (1987), 58 C.R. (3d) 108 at 111.

[25] Paciocco, *supra*, note 1.

[26] The case was sent back to trial to determine whether there had in fact been an unreasonable search and seizure, since the trial Judge made an evidentiary error which had prevented the Crown from establishing the basis for the decision to search the accused, Collins.

[27] *Supra*, note 21 at 284, 56 C.R. (3d) at 211.

unconstitutionally obtained statements to prove his guilt would be tantamount to using the accused as a witness against himself and would render the entire trial unfair. By contrast, the admission of real evidence, such as that which would be discovered during an unconstitutional search, could not render the trial unfair, for its admission compromises no accusatorial system principles. The accused is not the source of the incriminating information. Moreover, unlike a statement by the accused, such real evidence exists prior to the constitutional violation and is in no way an improperly obtained response by the accused to the allegations against him.[28] If real evidence is to be excluded at all, which it will very often be given the pro-exclusionary tests enunciated in *Collins*, it must be because the admission of the evidence in light of the seriousness of the *Charter* violation could cause the administration of justice to fall into disrepute in the eyes of the reasonable person, who is sensitive to the importance of protecting the fundamental rights and freedoms housed in the *Charter*.

Since it is the use of the accused's unconstitutionally obtained statement that is offensive, the particular way in which it was obtained is relatively unimportant.[29] It therefore follows that some of the American exceptions to the automatic exclusion of "non-Mirandized" evidence may not be available here, for they relate to the conduct of the officers.[30] As a result, Canadian courts might well exclude evidence that the American courts would not.

---

[28] *Ibid.* For a criticism of this distinction, *see* R.J. Delisle, *Collins: An Unjustified Distinction* (1987), 56 C.R. (3d) 216. In my view, while the distinction between statements and real evidence may appear to be arbitrary, it is a principled one having its origin in our accusatorial system. For a further discussion, *see* D.M. Paciocco, CHARTER PRINCIPLES AND PROOF IN CRIMINAL CASES (Toronto: Carswell, 1987) at 547-50.

There is a troubling ambiguity in Lamer J.'s decision. It is possible that he would treat bodily samples taken from an accused on the same footing as self-incriminating statements. While he cites the principle against self- incrimination, which is well understood not to apply to real evidence, and while he refers to the creation of new evidence by the accused (which seems to describe communications by the accused alone) in describing evidence whose admission could render the trial unfair, he refers to "a confession *or other evidence* emanating from [the accused]" (*ibid.* at 284, 56 C.R. (3d) at 211 (emphasis added)). Subsequently in *R.* v. *Pohoretsky* (1987), [1987] 1 S.C.R. 945, 58 C.R. (3d) 113, the Court treated a blood sample taken unconstitutionally from an accused as a case where the evidence should be readily excluded, in part because its obtainment was to "conscript the appellant against himself" (at 949, 58 C.R. (3d) at 116). According to established accusatorial system principles, real evidence should be treated on a different footing than communications from an accused person, even where that real evidence is obtained from the person of the accused.

[29] Lamer J. notes that, in contrast to real evidence, the decision whether to exclude self-incriminating evidence will "not [depend] so much [on] the manner in which the [*Charter*] right was violated" where the evidence is an admission obtained from the accused unconstitutionally. *Collins*, *supra*, note 21 at 284, 56 C.R. (3d) at 211.

[30] *See*, *e.g.*, the developing "good faith" exception and the "public safety" exception described in Paciocco, *supra*, note 1 at 50, n. 7.

IV. THE "NO QUESTIONING BAN" — *R.* v. *MANNINEN*[31]

In *Miranda*[32] the United States Supreme Court created an absolute ban on questioning a suspect where the suspect expressed a desire to speak to counsel or to remain silent. At the time that the article, *The Development of Miranda-Like Doctrines Under the Charter*, was published, authority in Canada was moving towards the development of a similar ban.[33] The *Manninen* decision has since confirmed this line of authority. Lamer J., speaking for a unanimous Supreme Court of Canada, said that where a detained suspect has not waived his rights under subsection 10(b), that section

> imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights.[34]

Despite the fact that the police had properly advised Manninen of his rights, the police violated subsection 10(b) by persisting in questioning him after he indicated a desire to speak to counsel and after he asserted his right to remain silent.[35]

Quite clearly, the mere decision of a detained suspect to respond to questioning which is occurring in violation of the "no questioning ban" will not constitute a waiver of subsection 10(b) rights. If the accused has a right not to be asked questions, it would be startling if his mere decision to respond to such unconstitutionally placed questions could amount to a waiver of that constitutional right.[36]

V. CONCLUSION

There is little left, of substance, to distinguish the holdings in *Miranda* from those that the Canadian courts have arrived at using subsection

---

[31] *Supra*, note 16.

[32] *Supra*, note 2.

[33] Paciocco, *supra*, note 1 at 66-70.

[34] *Supra*, note 16 at 1242-43, 58 C.R. (3d) at 104.

[35] The accused's rights were also violated when the police ignored his request to consult counsel, thereby frustrating the exercise of his right to obtain legal advice without delay. *Ibid.*

[36] *Ibid.* at 1244, 58 C.R. (3d) at 105.

10(b) of the *Charter*. It is doubtful that many anticipated this result when the *Charter* was proclaimed into force. Yet, whether one approves of these developments philosophically, or regrets that they have occurred, the doctrines cannot be criticized as the product of erroneous legal reasoning. Each of these *Miranda*-like doctrines represents the full flowering, and perhaps the inevitable product, of the constitutionalization of basic criminal law principles. The piece-meal but carefully principled erection of a Canadian regime like that developed in the single American case of *Miranda*, is perhaps a testament to that decision. Like it or not, *Miranda* and the *Miranda*-like doctrines Canadian courts have adopted are the legitimate progeny of the accusatorial system that Canada shares with the United States.