R v Sinclair: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*

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The majority judgment in R v Sinclair *reflects what the author sees as a problematic trend in the Supreme Court of Canada's pre-trial legal rights jurisprudence under the* Canadian Charter of Rights and Freedoms. *In* Sinclair, *the Court took the novel step of holding that society's interest in "the investigation and solving of crimes" should be taken into account in determining the scope of the right to counsel under section 10(b). The author explains that such interests are usually left to the justification stage under section 1 of the* Charter, *but that section 1 is functionally unavailable in the context of many pre-trial legal rights claims. This is because in cases of alleged police misconduct, the state action in question is not authorized either by statute or by common law, so the section 1 requirement that the limits on rights be prescribed by law cannot be met. For this reason, the author argues, courts have sought other ways to incorporate interest balancing into* Charter *analysis. In some cases they have done so under the "fundamental justice" proviso to section 7, and in others by expanding police authority under the "ancillary powers doctrine".*

The author situates the Sinclair *decision within the overall jurisprudence on section 10(b), and argues that the Court wrongly imposes an internal limit on section 10(b) in a manner that avoids the rigorous constraints that the* Oakes *test imposes on the section 1 analysis. The author's overall conclusion is that* Sinclair *reflects a judicial encroachment on the role of the legislature and a weakening of the role of the courts as defenders of fundamental rights.*

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Introduction

In *R v Sinclair*, the Supreme Court of Canada's most recent decision on the right to counsel, the majority explained that "in defining the contours of the s. 7 right to silence and related *Charter* rights, consideration must be given not only to the protection of the rights of the accused but also to the societal interest in the investigation and solving of crimes".[1] This approach to *Charter*[2] interpretation gives constitutional weight to societal interests at the stage of delineating the scope of the legal rights of the accused, rather than at the later stage of determining whether a violation of those rights is justified. While this is not a new approach to analyzing section 7 claims, the Court's approach to the section 10(b) right to counsel had never before been framed in this way. Why are "societal interests" now playing a role in determining the content of the right to counsel?

One possible explanation for the majority's approach in *Sinclair* is that in most cases decided under the pre-trial legal rights guarantees of the *Charter*,[3] the constitutional "machinery"[4] upon which courts usually rely to balance societal interests against the rights of the accused is functionally unavailable. Societal interests are normally considered under section 1 of the *Charter* as part of the assessment of whether state action that violates *Charter* rights is "demonstrably justified in a free

1. 2010 SCC 35 at para 63, [2010] 2 SCR 310. I will refer to the "societal interest in the investigation and solving of crimes" or the "societal interest in the investigation of crime" throughout.

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3. *Ibid*, ss 7–10.

4. Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Sup Ct L Rev 469 at 477 [Weinrib, "Section One"]. I will use this term throughout.

and democratic society".[5] The obstacle to considering societal interests in the context of police action which allegedly violates pre-trial legal rights is that when the police act outside the scope of their statutory or common law powers, their actions are by definition not "prescribed by law", a threshold requirement for justifying rights infringements under section 1.[6] In this context, it is apparent that the justification analysis is functionally unavailable, and courts are precluded from resorting to section 1 to balance societal interests against individual rights.

In this paper I will argue that this structural feature of *Charter* adjudication in pre-trial legal rights cases has led the Supreme Court to find alternative ways of balancing the rights of the accused against society's interest in the investigation of crime outside of section 1. One way has been to expand common law police powers under the aegis of the ancillary powers doctrine.[7] A second way, which is the focus of this paper, is the balancing of rights and interests in the course of interpreting the *Charter*'s substantive guarantees.

Four justices dissented in *Sinclair*. In one of the two dissenting opinions, Binnie J suggested that *Sinclair* is the final case in an "interrogation trilogy" which began with the Court's earlier decisions in *R v Singh*[8] and *R v Oickle*[9] and which "disproportionately favours the interests of the state in the investigation of crime over the rights of the individual in a

5. *Supra* note 2 ("[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", s 1).

6. See Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2010) at 27, 322.

7. See Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Canada's *Charter* Jurisprudence" (2012) 57 Sup Ct L Rev (2d) [forthcoming] [MacDonnell, "Ancillary Powers"]; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52:3 Crim LQ 299 [Stribopoulos, "Limits"]; James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31:1 Queen's LJ 1 [Stribopoulos, "Dialogue"]; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41:2 Alta L Rev 335 [Stribopoulos, "A Failed Experiment?"]; James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48:2 McGill LJ 225 [Stribopoulos, "Unchecked Power"].

8. 2007 SCC 48 at paras 1, 45, [2007] 3 SCR 405.

9. 2000 SCC 38, [2000] 2 SCR 3.

free society".[10] In this paper I will argue that *Singh* and *Sinclair* can also be viewed as part of a growing trend of balancing societal interests against the rights of the accused outside of section 1. As Binnie J and the other dissenters explained in *Sinclair*, the majority's analysis may undermine the constitutional rights of accused persons.[11] But there is also a concern that exists at the level of constitutional method, and it is this methodological problem that is the focus of this paper. In my view, the approach of the majority in *Sinclair* risks eroding both the integrity of the *Charter*'s pre-trial legal rights and long-established modes of constitutional analysis.[12] The *Charter*'s substantive guarantees were simply not designed to protect societal interests, and there are compelling reasons why courts should not disregard the structure of the *Charter* by imposing internal limits on those guarantees.[13]

In Part I, I outline the standard mode of constitutional analysis that the Supreme Court has employed since its decision in *R v Oakes*,[14] and I explain why this analysis is functionally unavailable in many pre-trial legal rights cases. In Part II, I discuss the interest balancing that occurs under section 7 of the *Charter*, and I review the criticisms that have been raised about this practice. In Part III, I deconstruct the relevant aspects of the majority and the dissenting analyses in *Sinclair*, and in Part IV, I situate the case within the Supreme Court's right to counsel jurisprudence. In Part V, I outline the similarities between the approaches of the majority in *Singh* and *Sinclair* and the leading ancillary powers doctrine cases. In Part

10. *Supra* note 1 at paras 76–77.

11. *Ibid* at paras 104 (Binnie J, dissenting) 177 (LeBel & Fish JJ, dissenting).

12. See Hon Marc Rosenberg, "Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law (2009) 45 Sup Ct L Rev (2d) 233 at 236, citing *R v Therens*, [1985] 1 SCR 613, 45 CR (3d) 97. See also Stribopoulos, "A Failed Experiment?", *supra* note 7 at 378; James Stribopoulos, "Has the *Charter* Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada" in Margaret E Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) 351 at 353, 364, citing *R v Wong*, [1990] 3 SCR 36, 1 CR (4th) 1 ("it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachment of these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice" at 57).

13. See generally Stephen Gardbaum, "Limiting Constitutional Rights" (2007) 54:4 UCLA L Rev 789 (discussing the distinction between "internal" and "external" limits).

14. [1986] 1 SCR 103, 50 CR (3d) 1.

VI, I argue that because interest balancing under section 1 is inherently political, it should only take place within the strictures of the section 1 analysis. I conclude by suggesting that *Sinclair* can be understood not only as part of an "interrogation trilogy", but also as part of a broader trend of balancing the rights of the accused against the societal interest in the investigation of crime outside of section 1.

I. Section 1 and the Structure of Constitutional Analysis

Except for minor variations that do not concern us here, *Charter* analysis has followed a standard form since the Supreme Court's decision in *Oakes*.[15] At the first stage of the analysis, a court determines the scope of the substantive *Charter* guarantee or guarantees engaged, and asks whether an infringement has been made out.[16] If a *Charter* breach is established, the court then moves on to consider whether the infringement can be "saved" under section 1.[17] As Lorraine Weinrib explains, "[t]he Court has recognized and consistently affirmed the need to keep the two stages of *Charter* argument distinct".[18]

15. The rigour of the section 1 analysis has waned somewhat since *Oakes*. See e.g. *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577. This is particularly clear when the legislature has accommodated "the claims of competing groups" and "the choice of means . . . require[s] an assessment of conflicting scientific evidence and differing justified demands on scarce resources" (*ibid* at 577). See also *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 55 CR (3d) 193; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 Sup Ct L Rev (2d) 501; Lorraine Weinrib, "Canada's *Charter of Rights*: Paradigm Lost?" (2002) 6:2 Rev Const Stud 119; Thomas Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the *Charter*" (1995) 74:3 Can Bar Rev 446 at 449, n 11. More recently, there has also been some discussion about precisely where balancing occurs in the section 1 analysis. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 Sup Ct L Rev (2d) 95; Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 Sup Ct L Rev (2d) 25.

16. See Stuart, *supra* note 6 at 6–7.

17. See Gardbaum, *supra* note 13 at 799.

18. "Section One", *supra* note 4 at 472, n 8.

The section 1 justification analysis also proceeds in stages. The court begins by asking whether the *Charter* violation is "prescribed by law".[19] This prong of the analysis requires the state to show that the infringement is legally authorized, be it by statute or by the common law.[20] As Weinrib observes, the general rule is that "[t]he reprieve that the second stage of *Charter* argument affords from the rigour of the enumerated rights and freedoms is available if, and only if, the state has utilized its democratic law-making machinery".[21] The "prescribed by law" requirement also limits the function of the judicial branch in *Charter* cases: "This filter on the second stage of *Charter* argument narrows the role of the courts under the *Charter*. An unelected, independent judiciary cannot uphold incursions on *Charter* rights and freedoms as reasonable limits on constitutionally guaranteed interests in a free and democratic society if they have not been formally promulgated as 'law' by the law-making organs of the state".[22]

Where the state action under review is a piece of legislation, the prescribed by law requirement is easily satisfied. The situation is more complicated where the state action is police conduct. While some police powers emanate from statute, others have been developed through the common law.[23] Where a police officer infringes the *Charter* rights of the accused and is authorized by statute to do so—say, for example, by a provision that permits a temporary delay in facilitating access to counsel—the *Charter* limit is prescribed by law.[24] On the other hand, if no statute or common law rule authorizes the infringement of a *Charter* right

19. *Oakes*, *supra* note 14 at 135.

20. *Therens*, *supra* note 12 at 645. See also Weinrib, "Section One", *supra* note 4 at 475; Stuart, *supra* note 6 at 27. For further discussion of the practice of courts creating new common law police powers, see MacDonnell, "Ancillary Powers", *supra* note 7; Stribopoulos, "Limits", *supra* note 7; Stribopoulos, "Dialogue", *supra* note 7; Stribopoulos, "A Failed Experiment?", *supra* note 7; Stribopoulos, "Unchecked Power", *supra* note 7.

21. "Section One", *supra* note 4 at 477. Note that this is not the case where a common law rule authorizes the state action in issue.

22. See *ibid.* See also Stribopoulos, "Dialogue", *supra* note 7 at 70–71. Again, this argument does not avail where the common law provides the authorization for an infringement of *Charter* rights. One might legitimately question whether the common law ought to be capable of satisfying the "prescribed by law" requirement. However, such an inquiry is beyond the scope of this paper.

23. See Stuart, *supra* note 6 at 27; Stribopoulos, "Dialogue", *supra* note 7 at 17.

24. See *R v Orbanski; R v Elias*, 2005 SCC 37, [2005] 2 SCR 3. See also Stuart, *supra* note 6 at 27.

by the police, then the action is not prescribed by law (unless, of course, the Court decides to employ the ancillary powers doctrine to create a new common law police power in response to the set of facts before it, an increasingly frequent habit of the Supreme Court under the *Charter*).[25]

Since the threshold requirement for section 1 justification has not been met, the infringement cannot be "saved" and the analysis proceeds directly to the question of whether the evidence should be excluded under section 24(2) of the *Charter*.[26] If the limit *is* prescribed by law, the court moves on to consider whether the legislation or government action furthers a pressing and substantial objective, whether it is minimally impairing, and whether it is proportional, in that its benefits exceed its costs.[27] Since the government's objective is often to further "society's interest" in some way, interest balancing occurs as a matter of course under section 1.[28] If government action that infringes *Charter* rights is to be upheld under section 1, the benefits to society must exceed the costs to an individual's rights.[29]

Stephen Gardbaum explains that this mode of analysis is typical of constitutions that limit rights "externally", in contrast to those *Charter*

25. See Stribopoulos, "Limits", *supra* note 7; Stribopoulos, "Dialogue", *supra* note 7; Stribopoulos, "A Failed Experiment?", *supra* note 7; Stribopoulos, "Unchecked Power", *supra* note 7.

26. *Supra* note 2 ("[w]here, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute", s 24(2)). Following the ruling that the accused's *Charter* right has been infringed, the court will conduct a section 24(2) analysis to determine if admitting the evidence would bring the administration of justice into disrepute. In order to make this determination, the court is asked to consider the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and society's interest in the adjudication of the case on its merits. See *R v Grant*, 2009 SCC 32 at para 71, [2009] 2 SCR 353; Stuart, *supra* note 6 at 591.

27. *Oakes*, *supra* note 14 at 138–40.

28. See e.g. *Hutterian Brethren*, *supra* note 15. See also Berger, *supra* note 15 at 23, 34; Moon, *supra* note 15 at 97, 107, 110, 129.

29. See e.g. *Hutterian Brethren*, *supra* note 15 at para 73.

rights that are "internally" limited, or "qualified".[30] Section 7, for example, explicitly contemplates that the right to life, liberty and security of the person can be limited if the limit complies with the principles of fundamental justice. However, the mere fact that rights are qualified does not mean that courts ought to engage in interest balancing as a matter of course in interpreting those guarantees.

To assess whether it is problematic for courts to engage in interest balancing outside of section 1, when the limitations analysis is functionally unavailable, it is helpful to consider the role of the courts at each stage of the *Charter* analysis. At the first stage, a court determines whether a breach of a *Charter* right has occurred. The court's task at this stage is to determine the scope of the individual right guaranteed by the provision.[31] Since the *Charter* contains a "general limitations clause",[32] the question of whether a limitation on that right can be sustained in the particular circumstances is reserved for the second stage of the analysis. The primary objection to interest balancing at the first stage, therefore, is that it could whittle down the *Charter*'s substantive guarantees and undermine the standard mode of *Charter* analysis, which generally reserves balancing for the section 1 portion of the inquiry.[33] Nevertheless, the balancing of interests now occurs as a matter of course under section 11(b),[34] from time to time under section 7, and presumptively, it would now appear, under section 10(b).

It is not difficult to see why the functional unavailability of the section 1 analysis might be disconcerting for courts. The way the courts conceptualize the *Charter* is very much dependent on the section 1 analysis being available. Section 1 is a central component of standard *Charter* analysis, one which provides a space for justifying legislation or

30. *Supra* note 13. See also Stuart, *supra* note 6 at 6; Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp, loose-leaf (consulted on 3 October 2012), (Toronto: Carswell, 2007) vol 2 at 47-3; Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 at 87. I will use this terminology throughout.

31. See Gardbaum, *supra* note 13 at 798.

32. *Ibid.*

33. See Stuart, *supra* note 6 at 6–7; Lorraine Weinrib, "The Body and the Body Politic: Assisted Suicide under the *Canadian Charter of Rights and Freedoms*" (1994) 39:3 McGill LJ 618 at 627–28, 630 [Weinrib, "Assisted Suicide"]; Singleton, *supra* note 15 at 450.

34. See Stuart, *supra* note 6 at 7, n 30.

other government action that infringes *Charter* rights.[35] Many see section 1 as the central mechanism for retaining a "balance" between entrenched fundamental rights and majoritarian preference.[36] Yet in cases where the state cannot meet the "prescribed by law" requirement, one of the criteria for upholding an infringement of *Charter* rights is absent. If the government wishes to confer upon police the power to limit *Charter* rights, it must generally enact appropriate legislation.[37]

II. The History of Interest Balancing Outside of Section 1

Interest balancing has a long and complex history under section 7 of the *Charter*.[38] Many of the major criticisms of the practice have been mooted in section 7 cases, and for this reason it is helpful to examine the discussion that has unfolded under section 7 in evaluating whether interest balancing at the first stage of *Charter* analysis is problematic. At the same time, it should be noted that section 7 is somewhat of a unique provision. Giving content to the "principles of fundamental justice" has proven to be a very challenging task for courts, as has the process of clarifying the relationship between section 7 and section 1.[39] For that reason, any conclusions drawn in the section 7 context should be applied with caution to other *Charter* guarantees.

35. See Weinrib, "Section One", *supra* note 4.

36. See Hogg & Bushell, *supra* note 30; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 66–67, 156 [Roach, *Supreme Court on Trial*]. See especially Weinrib, "Section One", *supra* note 4.

37. See Weinrib, "Section One", *supra* note 4; Stribopoulos, "Dialogue", *supra* note 7 at 70–71.

38. *Supra* note 2 ("[e]veryone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice", s 7).

39. See Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45:1 Osgoode Hall LJ 169 at 184 [Roach, "Dialogue Debate"]; Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55:3 UTLJ 733 at 764–65 [Roach, "Common Law Bills of Rights"]; Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2001) 38:4 Alta L Rev 1051 at 1065–66.

The Supreme Court has held that section 7 creates a "qualified" right to life, liberty and security of the person, in that the government may curtail the right if it does so in a manner that is consistent with the principles of fundamental justice.[40] In some instances, the Supreme Court has given weight to societal interests in determining whether the government has violated section 7. At other times, however, the Court has rejected this approach, stating that it is only appropriate to consider societal interests under section 1.

In virtually all section 7 cases, the section 1 limitations analysis is functionally unavailable.[41] Sometimes this is because the police have acted outside the scope of their legal authority, in which case their actions are not prescribed by law.[42] However, even in cases in which the "prescribed by law" requirement *could* be satisfied, the Supreme Court has held that violations of section 7 will seldom be saved under section 1.[43] Kent Roach has explained that "[s]ince 1985, the Supreme Court has indicated, with varying degrees of consistency and emphasis, that a violation of s. 7 of the *Charter* could be justified under s. 1 of the *Charter* only in the rarest of circumstances, akin to an emergency".[44] The Court has reasoned that very few violations of society's principles of fundamental justice could be shown to be "demonstrably justified" within the meaning of section 1.

One of the projects of the section 7 jurisprudence has been to determine what role, if any, of societal interests should play in the section 7 inquiry. In doing so, the Court has adopted at least five different approaches. In some cases, the Court has identified principles of fundamental justice that reflect societal interests. In *United States v Burns*, for example, the Court stated that it was a principle of fundamental justice that "individuals accused of a crime should be brought to trial to determine the truth of the charges".[45] In cases where this approach has been followed, the Court has weighed the principle reflecting society's interest against the rights

40. *R v Hebert*, [1990] 2 SCR 151 at 179, 77 CR (3d) 145. See generally Hogg, *supra* note 30; Hogg & Bushell, *supra* note 30.

41. See Roach, "Dialogue Debate", *supra* note 39 at 184; Roach, "Common Law Bills of Rights", *supra* note 39 at 764–65.

42. This would be the case, say, if the police violated an accused's section 7 right to silence.

43. *United States v Burns*, 2001 SCC 7 at para 133, [2001] 1 SCR 283.

44. "Common Law Bills of Rights", *supra* note 39 at 764.

45. *Supra* note 43 at para 72. See also *R v Mills*, [1999] 3 SCR 668, 28 CR (5th) 207; Cameron, *supra* note 39; Roach, *Supreme Court on Trial*, *supra* note 36 at 165.

of the accused, similarly embodied in a distinct principle or principles of fundamental justice. Accordingly, the Court has seen its task as involving the balancing of competing principles of fundamental justice as opposed to societal interests and individual rights per se. This would appear to be one of the more defensible forms of balancing, since it is at least plausible that the principles of fundamental justice embody social concerns as well as individual rights.

A second and less structured way in which societal interests have been considered under section 7 is seen in *Cunningham v Canada*[46] and *Rodriguez v British Columbia (AG)*.[47] In these cases, the Supreme Court reasoned that in deciding whether a deprivation of life, liberty and security of the person was in accordance with the principles of fundamental justice, the Court was required to determine "whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general".[48] On this view, Binnie J explained before rejecting the approach in *R v Malmo-Levine; R v Caine* that "achieving the right balance is itself an overarching principle of fundamental justice".[49]

In *Malmo-Levine*, a majority of the Court settled on a third form of balancing. While rejecting the notion that the section 7 inquiry should "balance individual and societal interests, *independent of any identified principle of fundamental justice*",[50] Binnie J held for the majority that in "elucidating"[51] the principles of fundamental justice, the Court "must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question".[52] In other words, societal interests help shape the scope of the principles of fundamental justice and, by extension, the scope of the right to life, liberty and security of the person under section 7.

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46. [1993] 2 SCR 143, 20 CR (4th) 57.

47. [1993] 3 SCR 519, 107 DLR (4th) 342.

48. *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 96, [2003] 3 SCR 571, citing *Cunningham*, *supra* note 46. See also *Rodriguez*, *supra* note 47; *Hebert*, *supra* note 40.

49. *Supra* note 48 at para 96.

50. *Ibid* [emphasis in original].

51. *Ibid* at para 98.

52. *Ibid* at para 99. See also *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.

This third form of balancing appears to have been at work in *Singh*, another of the cases, along with *Oickle* and *Sinclair*, in the Supreme Court's "interrogation trilogy". The issue in *Singh* was whether statements made by the accused to the police during a custodial interrogation were taken in violation of his right to silence, a principle of fundamental justice under section 7.[53] The police in *Singh* continued to question the accused after he stated numerous times that he did not wish to speak to them. After noting that a "critical balancing of state and individual interests . . . lies at the heart of [the] Court's decision in *Hebert* and of subsequent s. 7 decisions",[54] the majority concluded that societal interests required that the police be permitted to continue to speak with an accused who had already expressed his intention not to co-operate with them in an effort to convince him to change his mind.[55] In other words, societal interests shaped the contours of the section 7 right to silence.

Threads of the analysis in *Singh* are visible in the Supreme Court's earlier decision in *Thomson Newspapers Ltd v Canada*.[56] There, the Court considered whether the right to silence and the right against self-incrimination were violated by provisions of the *Combines Investigation Act* that compelled witnesses to answer questions during investigations conducted under the *Act*.[57] In setting out the scope of the section 7 right against self-incrimination, La Forest J noted that the right should be defined in a manner that did not unduly impede combines investigators: "In cases where information of value to an investigation can most easily be obtained by asking questions of those responsible for the decisions and actions of particular business organizations, an absolute right to refuse to answer questions would represent a dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate

53. See *Hebert*, *supra* note 40 at 175. See also Stuart, *supra* note 6 at 129–32.

54. *Singh*, *supra* note 8 at para 7.

55. *Ibid* at paras 42–43, 46.

56. *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, 76 CR (3d) 129. See also Singleton, *supra* note 15 at 464.

57. RSC 1970, c C-23.

interest in discovering the truth about the existence of practices against which the Act was designed to protect the public."[58]

For the sake of completeness, it should be noted that societal interests often appear as part of the section 7 analysis in a fourth way. When a *Charter* claimant argues that she has been deprived of her section 7 interests in a manner that is arbitrary, overbroad and/or grossly disproportionate, the court's analysis under the principles of fundamental justice begins by considering the objective of the impugned legislation. Given that the objective often reflects societal interests, the analysis under these three principles of fundamental justice also involves a form of balancing, albeit one that is more structured. In particular, when the three principles are examined together, a form of proportionality analysis emerges in which the state must demonstrate that the deprivation of section 7 interests is rationally connected to the objective of the legislation, minimally impairing and not grossly disproportional.[59]

In contrast to the cases recognizing some form of balancing just described, a majority of the Court categorically rejected the balancing under section 7 in *R v Swain*.[60] Chief Justice Lamer objected vigorously to the notion that any internal balancing was warranted in giving content to the principles of fundamental justice: "It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal

58. *Supra* note 56 at 540–41. Justice L'Heureux-Dubé expressed a similar view in her concurring judgment (*ibid* at 579). Justices Sopinka (*ibid* at 603) and Wilson (*ibid* at 486) wrote separate dissents on this point. It is of note that La Forest J specifically distinguished combines investigations from criminal investigations (*ibid* at 542). See also, Singleton, *supra* note 15 at 464. The majority essentially adopted an identical position in *Singh*, *supra* note 8 ([t]he importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident at para 28).

59. See Vanessa A MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17:1 Rev Const Stud 53 at 64; Jula Hughes, Vanessa A MacDonnell and Karen Pearlston, "*Bedford*: Life, Liberty and the Security of . . . Some Sex Workers" (2012) [unpublished, archived with authors]; Hamish Stewart, "*Bedford v. Canada*: Prostitution and Fundamental Justice" (2011) 57:3 Crim LQ 197 at 213; *Bedford v Canada (AG)*, 2012 ONCA 186, 109 OR (3d) 1.

60. [1991] 1 SCR 933, 5 CR (4th) 253.

interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society."[61]

The Supreme Court took a slightly softer position in *Charkaoui v Canada (Citizenship and Immigration)*, the most recent of its judgments to consider the potential objections to internal balancing.[62] In *Charkaoui* the Court affirmed the majority's reasoning in *Malmo-Levine*. Societal interests, it wrote, could be understood as "context for elucidating" the relevant principles of fundamental justice.[63] At the same time, however, the Court indicated that the proper locus of balancing was section 1, creating no small amount of uncertainty about when internal balancing ought to be performed under section 7.[64]

Both *Charkaoui* and *Malmo-Levine* discussed the issue of interest balancing in some depth, and for that reason they are worthy of closer examination. Neither case explains with complete clarity what role balancing plays under section 7. Nevertheless, what the Court has to say in both cases about the distinct forms of balancing mandated by section 7 and section 1 is of some assistance.

In *Malmo-Levine*, the majority explained that "despite certain similarities between the balancing of interests in ss. 7 and 1, there are important differences".[65] Citing *R v Mills*, Binnie J wrote that "the issue under s. 7 is the delineation of the boundaries of the rights and principles in question whereas under s. 1 the question is whether an infringement may be justified".[66] This statement reinforces the distinction between the broad function of the *Charter*'s substantive guarantees and section 1. At the section 1 justification stage, the majority noted, "the range of interests to be taken into account . . . is much broader than those relevant to s. 7".[67] In other words, balancing in the context of the principles of

61. *Ibid* at 977.

62. *Supra* note 52.

63. *Ibid* at para 58.

64. *Ibid* at para 63. See also Nicholas Daube, "*Charkaoui*: The Impact of Structure on Judicial Activism in Times of Crisis" (2004) 4:2 JL & Equality 103.

65. *Supra* note 48 at para 97, citing *Mills*, *supra* note 45 at para 66.

66. *Malmo-Levine*, *supra* note 48 at para 97, citing *Mills*, *supra* note 45 at para 66. I will use this terminology throughout.

67. *Malmo-Levine*, *supra* note 48 at para 97, citing *Mills*, *supra* note 45 at para 66.

fundamental justice is conceptually distinct from balancing for the purpose of determining whether a limit is demonstrably justified in a free and democratic society.

Another point of divergence between balancing under section 7 and balancing under section 1 involves the burden of proof. Because "it is the claimant who bears the onus of proof throughout" the section 7 inquiry, bringing societal interests into the section 7 inquiry adds to the claimant's burden of proof.[68] The degree of additional burden will depend upon the type of balancing adopted by the Court.[69] Unless the Court were to categorically rule out any balancing at the section 7 stage, however, it would seem that the claimant would be required to show that her claim can be made out notwithstanding the presence of competing societal interests.[70] Singleton explains that "[a]n examination of the cases where the Court has taken this route . . . demonstrate[s] that the individual will rarely, if ever, meet the additional burden imposed".[71]

As we can see, the Supreme Court has struggled to determine what role, if any, societal interests should play under section 7. As a general rule, the Court appears to have settled on an intermediate position: while balancing ought not to be conducted "*independent of any identified principle of fundamental justice*",[72] societal interests may be considered in "elucidating"[73] the principles of fundamental justice. Even this intermediate position is problematic, however, because it tends to confuse the analysis of the scope of a rights-conferring provision with the question of whether societal interests require the rights guaranteed by section 7 to be limited in a particular case.[74] Although section 7 confers a qualified right, the relevant qualifier is *not* societal interests but the principles of fundamental justice.

68. Singleton, *supra* note 15 at 449.
69. See *Ibid.*
70. See *ibid.* See also Cameron, *supra* note 39 at 1065.
71. *Supra* note 15 at 450.
72. *Malmo-Levine*, *supra* note 48 at para 96 [emphasis in original].
73. *Ibid* at para 98.
74. See Weinrib, "Assisted Suicide", *supra* note 33 at 627–28, 630; Stuart, *supra* note 6 at 6–7.

III. A Case Study in Interest Balancing Outside of Section 1: *R v Sinclair*

Although the Supreme Court has not adopted a consistent approach to the role of societal interests under section 7, those interests have played an important role in several cases. In *Sinclair*, the majority drew upon the section 7 case *Singh* to conclude that the scope of the right to counsel should be limited by the societal interest in the investigation of crime. As in *Singh*, the section 1 analysis was functionally unavailable in *Sinclair* because any violation of the accused's right to counsel by the police would not have been prescribed by law. In this section I take a closer look at *Sinclair* and at how the Court reached the conclusion that societal interests should be considered in defining the scope of the right to counsel.

Sinclair was charged with second degree murder. He was advised of his right to counsel and right to silence at the time of his arrest. After initially declining to speak with counsel, Sinclair opted to contact a lawyer and spoke with him for approximately three minutes. A second conversation followed three hours later. This call was similarly short in duration. Following the two phone calls, Sinclair was interrogated for five hours by the police, at the end of which he provided a full confession and participated in a re-enactment of the events.

Sinclair requested to have his lawyer attend during the interrogation, a request which was denied by the police. As the interrogation progressed, Sinclair indicated several times that he wanted to speak to his lawyer, but the interrogating officer responded that Sinclair had already spoken twice with counsel.

At trial, the judge held that the accused's right to counsel had not been violated. Before the Supreme Court, the inquiry focused on whether the right to counsel was a "continuing"[75] right or a right which was generally satisfied by "a single consultation" with counsel, as well as on whether the right to counsel included a right to have counsel attend during an interrogation.[76]

75. *Sinclair*, *supra* note 1 at para 22.

76. *Ibid* at paras 18, 20, 43. I will use the Supreme Court's terminology throughout.

The Supreme Court was divided on the first issue, essentially along the lines of its decision in *Singh*. Chief Justice McLachlin and Charron J, writing for the majority, explained that "[t]he scope of s. 10(b) of the *Charter* must be defined by reference to its language; the right to silence; the common law confessions rule; *and the public interest in effective law enforcement*".[77] Taking these various factors into account, the majority concluded that section 10(b) conferred a right to speak with counsel "without delay" upon arrest or detention.[78] A single consultation with counsel would generally suffice unless a "material change in the detainee's situation after the initial consultation" warranted a second opportunity to speak with counsel.[79] Such a "material change" would *not* include the divulging of evidence during the course of an interrogation.[80] In other words, the right to consult counsel was presumptively a "point in time" right that arose on arrest or detention, and the test for whether a second consultation would be required was an objective one.[81] As for the right to have counsel attend during an interrogation, the majority concluded that such a right did not exist, and that it would be inappropriate for the Court to create it.[82]

Justice Binnie, writing in dissent, concluded that section 10(b) required that an accused be permitted to consult again with counsel in response either to "changed circumstances" or "*evolving* circumstances".[83] If the accused requested to speak with counsel, the police were required to facilitate the request if it would "satisfy a need for legal assistance" and if the "request [was] reasonably justified by the objective circumstances".[84] For Binnie J, the crux of the inquiry was the degree of "access to counsel" needed "to provide *meaningful* assistance to a client in trouble with the law".[85] Unlike the other dissenting justices, he rejected a purely subjective test for determining when an individual should be permitted to consult

77. *Ibid* at para 38 [emphasis added].
78. *Ibid* at para 25, citing *Hebert*, *supra* note 40 at 176–77.
79. *Sinclair*, *supra* note 1 at para 43.
80. *Ibid* at para 60.
81. *Ibid* at paras 21, 55.
82. *Ibid* at paras 36, 38.
83. *Ibid* at para 80 [emphasis in original].
84. *Ibid*.
85. *Ibid* at paras 80, 105 [emphasis in original]. I will refer to "access to counsel" throughout.

again with counsel, because such a test would in his view "[tilt] the balance too far against the community interest in law enforcement".[86]

Notwithstanding his somewhat broader conception of the scope of section 10(b), Binnie J agreed with the majority that the right to counsel did not include a right to have counsel attend during an interrogation. He explained that allowing counsel into the interrogation room would interfere with the investigatory process and "excessively undermine the ability of the police to 'adequately carry out their tasks'".[87]

Justices LeBel and Fish, also in dissent, would have adopted a broader approach to section 10(b) than either of the other judgments in *Sinclair*. In their view, section 10(b) was not a "point in time" right but "an ongoing right" which permitted an accused to consult again with counsel whenever he made such a request.[88] They held that it was not necessary to decide whether section 10(b) included a right to have counsel attend during an interrogation.[89]

Most significantly for our purposes, the majority arrived at a legal standard for deciding when an accused would be permitted to speak again with counsel after explaining that in the custodial setting, rights "'must be exercised in a way that is reconcilable with the needs of society'".[90] In other words, the majority was of the view that the right to counsel ought to be defined in a manner that took into account the "societal interest in the investigation and solving of crimes".[91] This position essentially imposed an internal limit on the right to counsel.[92] We know that recourse to section 1 was not possible on the facts of *Sinclair*. Accordingly, the majority's only opportunity to accommodate "societal interests" was at the stage of defining the right itself. If the interests of the individual and of society had not been balanced internally, they could not have been balanced at all.

86. *Ibid* at para 105.
87. *Ibid* at paras 101–02.
88. *Ibid* at paras 145, 147, 178.
89. *Ibid* at para 201.
90. *Ibid* at para 58, citing *R v Smith*, [1989] 2 SCR 368 at 385, 71 CR (3d) 129.
91. *Sinclair*, *supra* note 1 at para 63.
92. See *ibid* at para 176, LeBel & Fish JJ, dissenting; *Oakes*, *supra* note 14; Weinrib, "Section One", *supra* note 4.

IV. The Right to Counsel Prior to *R v Sinclair*

Both the case law and the academic commentary suggest that prior to *Sinclair* and the two cases released concurrently with it,[93] the right to counsel was understood to be a relatively generous guarantee of access to counsel at the pre-trial stage.[94] "[T]his Court", Iacobucci J noted in *R v Burlingham*, "has consistently given a broad interpretation to s. 10(b)".[95] As Le Dain J observed in *R v Therens*, this broad interpretation could be explained in part by the presence of section 1.[96] Comparing section 10(b) to section 2(c) of the *Canadian Bill of Rights*, Le Dain J said:

> [D]espite the similarity in the wording of s. 2(c) of the *Canadian Bill of Rights* and s. 10 of the *Charter*, there is a difference under the *Charter* in the scope or content of the right to counsel and in the approach to the qualification or limitation of the right that must, I think, have an influence on the interpretation and application given to it. Section 10(b) of the *Charter* guarantees not only the right to retain and instruct counsel without delay, as under s. 2(c)(ii) of the *Canadian Bill of Rights*, but also the right to be informed of that right. This, in my opinion, shows the additional importance which the *Charter* attaches to the right to counsel. A significant difference in the contexts of the right to counsel under the *Canadian Bill of Rights* and the *Charter* is that under the *Charter* the right is made expressly subject by s. 1 to such reasonable limits as are demonstrably justified in a free and democratic society. *Thus the right is expressly qualified in a way that permits more flexible treatment of it.*[97]

As Le Dain J noted, the text of section 10(b) provides that individuals have a right, upon arrest or detention, "to retain and instruct counsel without

93. *R v McCrimmon*, 2010 SCC 36, [2010] 2 SCR 402; *R v Willier*, 2010 SCC 37, [2010] 2 SCR 429.

94. See David M Paciocco, "The Development of *Miranda*-Like Doctrines under the *Charter*" (1987) 19:1 Ottawa L Rev 49; David M Paciocco, "More on *Miranda*—Recent Developments under Subsection 10(b) of the [*Charter*]" (1987) 19:3 Ottawa L Rev 573.

95. [1995] 2 SCR 206 at para 12, 38 CR (4th) 265.

96. *Supra* note 12. Justice Le Dain was writing for four justices on this point. However, there was no disagreement on this particular point and Le Dain J's discussion of detention in *Therens* has come to be regarded as authoritative on this question. See Patrick Macklem et al, eds, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 760; *Grant*, *supra* note 26 at para 28.

97. *Therens*, *supra* note 12 at 639 [emphasis added].

delay and to be informed of that right".[98] In the *Charter*'s early years, the Supreme Court established a two-pronged approach to section 10(b), noting that the right to counsel has *informational* and *implementational* components.[99] In other words, the police are required to advise a detainee of her right to counsel, and to provide her with a "reasonable opportunity to consult counsel".[100] As a general rule, where a detainee indicates that she wishes to speak with counsel, the police are required to "hold off" in interrogating the detainee until she has made contact with counsel.[101]

The cases before *Sinclair* note that the purpose of the right to counsel is informed by the reality that upon arrest or detention, a detainee is "put in a position of disadvantage relative to the state".[102] In *R v Hebert*, the Supreme Court explained that counsel help to "rectify the disadvantage" faced by the detainee.[103] Defence counsel play two essential roles at the pre-trial stage: they advise a detainee of her right to silence (and typically advise that it be exercised), and they support a detainee's efforts to "[regain] his or her liberty".[104]

More broadly, the first section 10(b) cases also indicated that the right to counsel flowed from concerns for "adjudicative fairness"[105] and more specifically, for the "fair treatment of an accused person".[106] In other words, the Court recognized that a "situation of vulnerability relative to the state is created at the outset of a detention"—a situation that had

98. *Supra* note 2, s 10(b). The French version of the text reads as follows: "[c]hacun a le droit, en cas d'arrestation ou de détention . . . d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit". The dissenters in *Sinclair* base their conclusion that the right to counsel is an "ongoing" right in the French text of the guarantee. *Supra* note 1 at paras 84–85 (Binnie J, dissenting), 145–54 (LeBel & Fish JJ, dissenting).

99. See *ibid* at para 27; *R v Bartle*, [1994] 3 SCR 173 at 191–92, 33 CR (4th) 1.

100. *Sinclair*, *supra* note 1 at para 27. See *Bartle*, *supra* note 99 at 192.

101. See *R v Prosper*, [1994] 3 SCR 236 at 268, 33 CR (4th) 85; *R v Black*, [1989] 2 SCR 138 at 154, 70 CR (3d) 97, citing *R v Ross*, [1989] 1 SCR 3 at 10, 67 CR (3d) 209; *R v Baig*, [1987] 2 SCR 537, 61 CR (3d) 97.

102. See *Bartle*, *supra* note 99 at 191. See also *Willier*, *supra* note 93 at para 28; *Hebert*, *supra* note 40 at 176; *R v Suberu*, 2009 SCC 33 at para 40, [2009] 2 SCR 460.

103. *Supra* note 40 at 176.

104. See *Bartle*, *supra* note 99 at 191, citing *R v Brydges*, [1990] 1 SCR 190 at 206, 74 CR (3d) 129 and *Hebert*, *supra* note 40 at 176–77. See also *Suberu*, *supra* note 102 at para 40.

105. *Brydges*, *supra* note 104, citing *Clarkson v R*, [1986] 1 SCR 383 at 394, 50 CR (3d) 289. See also *Bartle*, *supra* note 99 at 191.

106. *Clarkson*, *supra* note 105 at 394–95. See also *Sinclair*, *supra* note 1 at paras 79 (Binnie J, dissenting), 160 (LeBel & Fish JJ, dissenting).

the potential to be unfair to the accused.[107] The primary mechanism for ensuring that the accused was treated fairly in this environment was to facilitate contact with defence counsel, so that assistance would be available to the accused at all stages of the criminal process, beginning at the moment of detention.[108]

These purposes have helped to guide the Court in subsequent right to counsel cases.[109] The Supreme Court has added substance to the meaning of the section 10(b) guarantee by holding that the words "without delay" meant "immediately",[110] by recognizing a right to counsel of choice,[111] and by requiring the police to inform detainees of duty counsel or legal aid programs.[112] The Court held that the police violated section 10(b) if they undermined the advice given to a suspect by his or her lawyer,[113] and interpreted section 10(b) to mandate additional access to counsel if "the extent of the accused's jeopardy change[d]".[114] It also concluded that "s. 10(b) mandates the Crown or police, whenever offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of his or her counsel".[115] Where the Crown alleged that a detainee had waived his right to counsel after initially indicating a wish to speak with a lawyer, the burden of establishing a valid waiver lay with the Crown and this burden could not be easily discharged.[116]

The Supreme Court also placed limits on the right to counsel in its section 10(b) decisions. In *R v Bartle* and its predecessor cases, the Court noted that the accused had to be "reasonably diligent" in exercising her right to counsel.[117] Although the police had to advise the suspect of her right to counsel, the police were only "required to assure themselves that

107. *Suberu*, *supra* note 102 at para 41.

108. *Bartle*, *supra* note 99 at 191.

109. See e.g. *Brydges*, *supra* note 104 at 202–03.

110. *Suberu*, *supra* note 102 at para 41.

111. See *Ross*, *supra* note 101 at 10–11.

112. See *Brydges*, *supra* note 104 at 215.

113. See *Burlingham*, *supra* note 95 at para 14.

114. See *Black*, *supra* note 101 at 152–54. See also *R v Evans*, [1991] 1 SCR 869 at 887, 4 CR (4th) 144.

115. *Burlingham*, *supra* note 95 at para 21.

116. See *Evans*, *supra* note 114 at 893; *Brydges*, *supra* note 104 at 204; *Black*, *supra* note 101 157–58; *R v Manninen*, [1987] 1 SCR 1233 at 1244, 58 CR (3d) 97.

117. *Supra* note 99 at 192, citing *Black*, *supra* note 101 at 154–55; *R v Tremblay* [1987] 2 SCR 435 at 439, 60 CR (3d) 59. See also *Willier*, *supra* note 92.

a detainee fully understands the s. 10(b) caution" if a suspect had "language difficulties or a known or obvious mental disability".[118] Otherwise, it was presumed that an accused understood the caution received from police.[119]

Further limits on the scope of the right to counsel were articulated in *Bartle* and in *R v Prosper*,[120] where the majority held that section 10(b) did not create a right to free duty counsel upon arrest or detention. The majority also held, however, that the police were not permitted to question the suspect until he had had a "reasonable opportunity" to speak with counsel.[121] Although this general prohibition could be displaced in "compelling and urgent" circumstances, in the context of an "over 80" charge,[122] the fact that the Crown would not be able to take advantage of certain "evidentiary presumptions" provided by the *Criminal Code*[123] was insufficient to satisfy the urgency standard.[124] The majority reasoned that this was "one of the prices which has to be paid by governments" for a system that did not provide suspects with adequate free legal advice upon arrest or detention.[125]

There are, however, important differences between the "limits" on the right to counsel that emerge from this jurisprudence and the limits that the majority articulates in *Sinclair*. Significantly, not one of the section 10(b) cases that pre-date *Sinclair* suggests that the scope of the right to counsel is to be determined by balancing the rights of the accused against society's interest in the investigation of crime. All rights have outer boundaries, of course, and one of the difficult tasks that courts face is drawing those boundaries in a principled manner. What is problematic about *Sinclair* is that the majority locates the boundary of the right to counsel at the point at which the right encounters society's interest in the investigation of crime. Any extension of the right to counsel beyond that point, the majority suggests, would undermine *society's* interests. The

118. *Bartle*, *supra* note 99 at 192. See also *Evans*, *supra* note 114 at 891.
119. *Ibid*. See also *R v Whittle*, [1994] 2 SCR 914, 32 CR (4th) 1.
120. *Supra* note 101.
121. *Bartle*, *supra* note 99 at 192.
122. *Criminal Code*, RSC 1985, c C-46, s 253(1)(b).
123. *Ibid*, s 258(1)(c) (referred to as the "presumption of identity").
124. *Prosper*, *supra* note 101 at 240. See also Wayne N Renke, "By-Passing the Tell-Tale Heart: The Right to Counsel and the Exclusion of Evidence" (1996) 30:1 UBC L Rev 99.
125. *Prosper*, *supra* note 101 at 275.

problem with this is that societal interests find their footing in section 1, not in section 10(b).

It is important not to overstate the breadth of the Court's interpretation of the right to counsel before *Sinclair*. *Sinclair* and its companion cases are best viewed as a subtle but important shift away from the Court's prior section 10(b) jurisprudence rather than as a wholesale change in the law. On the other hand, it is interesting to note that the majority in *Sinclair* draws upon jurisprudence which held that section 10(b) required multiple consultations with counsel in order to define re-consultation as the exception rather than the rule. Instead of treating those cases as support for a broad guarantee of access to counsel, the Court used them to compile a non-exhaustive list of possible exceptions, bringing them together under the heading of "material change in the detainee's situation".[126] In support of its use of those cases to structure the exceptions rather than the rule, the majority took the position that the "purpose" of section 10(b) would generally "be achieved by a single consultation at the time of detention or shortly thereafter".[127] It is not obvious, however, that the purpose of section 10(b) mandates such a conclusion. Nor is it clear that it was correct to view these cases as setting out the limits of section 10(b) rather than as support for interpreting the right to counsel broadly.

V. Relation to the Ancillary Powers Cases

In their dissent in *Sinclair*, LeBel and Fish JJ argued that the majority judgment appeared to be part of a broader trend of balancing individual rights against societal interests outside of section 1. The majority's conception of the right to silence and the right to counsel, these dissenters said, "effectively recognizes a new police power of virtually unfettered access, for the purposes of endless interrogation, to custodial detainees who have *chosen* to remain silent".[128] This reference to common law police powers links *Sinclair* and *Singh* to cases decided under the ancillary powers doctrine and draws useful parallels between these two groups of cases.[129] In *Singh* and *Sinclair*, the Court gave effect to the societal interest

126. *Sinclair*, *supra* note 1 at para 47.

127. *Ibid.*

128. *Ibid* at para 128 [emphasis in original].

129. See generally MacDonnell, "Ancillary Powers," *supra* note 7.

in the investigation of crime by conducting a variant of internal balancing at the stage of defining the content of the substantive right in question. In the ancillary powers cases, the Court has conducted a similar balancing of societal and individual interests, though with a slightly more involved process. In the ancillary powers cases, the Court has located previously unrecognized state authority in the common law to act in a manner that would otherwise violate the *Charter*.[130] In *R v Mann*, for example, the Court held that the police had the power to detain a suspect for investigative purposes if they reasonably suspected that a crime had been or was about to be committed.[131] In doing so, the Court rendered lawful conduct that would have otherwise violated the right under section 9 of the *Charter*[132] not to be arbitrarily detained.[133]

In determining whether a new police power ought to be created, the Supreme Court employs the *Waterfield* test.[134] Although the elements of this test are not identical to the section 1 analysis, there are many similarities between them. In *Cloutier v Langois*, the Court explained that the ancillary powers test first requires that a court ask "whether the power falls within the general scope of the duty of peace officers".[135] If the answer is yes, "the court must [then] determine whether an invasion of individual rights is justified".[136] This inquiry into "justification" engages many of the same elements found in the *Oakes* test.[137]

What the dissenters in *Sinclair* do not describe in any detail is the constitutional structure that gives rise to the similarities in the approach in ancillary powers cases *Singh* and *Sinclair*. Both the development of new common law police powers under the ancillary powers doctrine and the narrow interpretation of the *Charter* guarantees in *Singh* and *Sinclair*

130. See Stribopoulos, "Limits", *supra* note 7; Stribopoulos, "Dialogue", *supra* note 7; Stribopoulos, "A Failed Experiment?", *supra* note 7; Stribopoulos, "Unchecked Power", *supra* note 7.

131. 2004 SCC 52, [2004] 3 SCR 59.

132. *Supra* note 2 ("[e]veryone has the right not to be arbitrarily detained or imprisoned", s 9).

133. *Ibid.* See also *Suberu*, *supra* note 102; Stribopoulos, "Dialogue", *supra* note 7 at 4.

134. See *R v Dedman*, [1985] 2 SCR 2, 46 CR (3d) 193, citing *R v Waterfield*, [1963] 3 All ER 659 at 661, [1964] 1 QB 164 (CA).

135. [1990] 1 SCR 158 at 181, 74 CR (3d) 316.

136. *Ibid.*

137. *Supra* note 14. See also MacDonnell, "Ancillary Powers", *supra* note 7.

are aimed at balancing the rights of the accused against society's interest in the investigation of crime in cases in which the section 1 analysis is functionally unavailable. Both approaches fulfill the same purpose: they permit the courts to safeguard societal interests in spite of *Charter* guarantees that appear to place strict limits on how police investigations may be conducted.

The major concern in the context of common law police powers is not the unstructured nature of the analysis, given the similarities between the *Waterfield* and *Oakes* tests. Instead, the major concern is that in cases in which police conduct would otherwise be clearly in breach of the *Charter*, the courts have found creative ways of "saving" the breach despite section 1's unavailability.

In cases like *Singh* and *Sinclair*, by contrast, the "balancing" in which the Supreme Court engages is entirely unstructured. In *Oakes*, the Court established a rigorous test for determining exactly when a violation of the *Charter* could be saved under section 1.[138] There is no indication that any principle—not proportionality or anything else—governs the balancing of interests in any meaningful way. One might infer that "balancing" means some variant of proportionality, but the case law simply does not bear this out. The sole criterion appears to be a concern for defining rights in a way that allows the police to do their job. This takes the Court into dangerous territory.

VI. The Politics of Balancing and Justification

In order to fully understand the impact of the majority's reasoning in *Sinclair*, something more must be said about the political dimensions of the section 1 justification analysis as it is currently framed. A law that infringes *Charter* rights, and that stands to be justified under section 1, is the product of policy choices made by the state. Elected representatives have decided that although the law may infringe the *Charter*, it nevertheless ought to be enacted. In short, a political choice is being made to prefer certain interests over the fundamental rights entrenched in the *Charter*. Of course, if the state is acting to protect certain constitutional interests, as it might be said to be doing in some cases, then the issue is better

138. This test has been made less rigorous over time. See generally *supra* note 15.

framed as whether the state has appropriately balanced the competing constitutional rights and interests engaged.[139] But where an interest that is not of a defined constitutional character is being pursued—here, the societal interest in the investigation of crime—the choice to infringe *Charter* rights is in essence a political one.

When a law infringes *Charter* rights in the service of this second type of interest, it seems that two basic pre-conditions ought to attach. First, such decisions ought only to be made by the democratic branch of government.[140] Second, there ought to be some degree of visibility to the infringement of a *Charter* right, so that citizens are aware that the state has elected to proceed in this manner. This "publicity"[141] requirement is familiar in the context of the override provision in section 33 of the *Charter*.[142] When the state decides to override rather than to merely limit a *Charter* right, section 33 requires that the override be "express", that it be embodied in duly enacted legislation, and that it be re-assessed at five-year intervals or left to expire.[143] Mark Tushnet has noted that this "publicity requirement" is central to section 33, and has even suggested that the relatively infrequent invocation of section 33 is directly related to the "political costs" of using it.[144]

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139. See Weinrib, "Section One", *supra* note 4.

140. See Stribopoulos, "Dialogue", *supra* note 7 at 72–73.

141. *Ibid* at 20; Roach, *Supreme Court on Trial*, *supra* note 36 at 66–67, 156.

142. See Hogg & Bushell, *supra* note 30; Roach, *Supreme Court on Trial*, *supra* note 36 at 66–67, 156; Mark Tushnet, "*Marbury v. Madison* Around the World" (2004) 71:2 Tenn L Rev 251.

143. *Supra* note 2, s 33:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

144. *Supra* note 142 at 268–69.

Outside the pre-trial legal rights context, the Supreme Court has expressed great concern about becoming engaged in making these types of political "trade-offs", not only because (as it has been noted) it is ill-equipped to do so, but also because it would blur the line between the judicial and political spheres.[145] James Stribopoulos notes that one reason why the Supreme Court may be less circumspect where legal rights are involved is that courts routinely deal with legal rights issues.[146] It could be argued, however, that the legal rights issues that arise in cases like *Sinclair* are as political as issues the Court has shied away from in other settings.

Another reason why courts should not make political trade-offs where legal rights are concerned is that it is inconsistent with the role of the courts as defenders of rights—a role that long pre-dates the *Charter*.[147] One of the central tasks of the judiciary, it has always been thought, is to police the limits of state power.[148] In the *Charter* era, the entrenchment of fundamental rights gives the courts additional grounds for policing state authority. This renders particularly concerning the practice of limiting the scope of the accused's legal rights in order to give effect to arguments about the importance of societal interest in law enforcement.

Conclusion

In this paper I have attempted to demonstrate that *Sinclair* can be viewed as part of a larger pattern of judicial decision making that gives constitutional weight to societal interests in the investigation of crime

145. See e.g. *Irwin Toy*, *supra* note 15.

146. "Dialogue", *supra* note 7 at 55.

147. See generally *supra* note 12.

148. See e.g. Stribopoulos, "Dialogue", *supra* note 7 at 11; James Stribopoulos, "Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases" (2009) 47 Sup Ct L Rev (2d) 35 at 44–46 [Stribopoulos, "Sniffing Out"]; *R v Kang-Brown*, 2008 SCC 18 at para 12, [2008] 1 SCR 456:

> The common law has long been viewed as a law of liberty. Should we move away from that tradition, which is still a part of the ethos of our legal system and of our democracy? This case is about the freedom of individuals and the proper function of the courts as guardians of the Constitution. I doubt that it should lead us to depart from the common law tradition of freedom by changing the common law itself to restrict the freedoms protected by the Constitution under s. 8 of the *Charter*.

in cases where the section 1 analysis is functionally unavailable. This trend is particularly troubling in the context of the section 10(b) right to counsel, given that the majority in *Sinclair* failed to identify any criteria to govern the balancing of the right against societal interests. The result is that the right to counsel, one of the most basic legal rights of the accused, is significantly undermined.

There is another concern that arises from this larger line of cases. The cases described here pulls the courts into a type of decision making in which judges cannot and should not participate. The fact that these cases engage the criminal law obscures the reality that decisions about police powers are intensely political. It is one thing for the courts to review the actions of the state for compliance with the constitution; it is another thing for judges to begin to interpret *Charter* rights as including implicit protections for police powers. This has never been and ought not to be the task of courts, which have long enforced the boundaries of police powers in the name of individual rights.[149]

The majority's reasoning in *Sinclair* can survive scrutiny only if the separation of powers[150] and longstanding principles of *Charter* interpretation are sacrificed. The better approach is to give *Charter* guarantees their intended scope. To the extent that the *Charter* rights of the accused interfere unduly with law enforcement, limitations on those rights can be imposed through the legislative process.[151] Such limitations would thereby be subjected to appropriate public scrutiny, and their justifiability could be assessed by the courts under section 1.

149. See Stribopoulos, "Dialogue", *supra* note 7 at 70; Stribopoulos, "Sniffing Out", *supra* note 148 at 44–46; *Kang-Brown*, *supra* note 148 at para 12.

150. See Weinrib, "Section One", *supra* note 4 at 478 (discussing the importance of the separation of the judiciary and the legislature as it relates to section 1 of the *Charter* and the prescribed by law requirement).

151. See Stribopoulos, "Dialogue", *supra* note 7 at 70–71.