The Balancing Approach to *Charter* Interpretation: Theoretical and Practical Problems in the Context of Detention and Interrogation

ALANAH JOSEY*

ABSTRACT

This paper explores different methods of interpreting the rights triggered upon custodial detention with particular reference to the right to counsel and the right to silence under ss. 10(b) and 7 of the *Charter*, respectively. This paper will discuss the common law and statutory antecedents of those rights to highlight the perceived need in the case law to adopt to a generous approach to interpretation in the wake of the *Charter*. Early in the case law, the Supreme Court of Canada adopted the purposive approach to delineate the scope of the *Charter*'s legal rights. The purposive approach was designed to ensure that individuals enjoy the full benefit of the procedural protections available under the *Charter*, which were intended to safeguard the principle against self-incrimination.

This paper takes the position that a second method of *Charter* interpretation emerged subsequently in the case law coming out of the Supreme Court of Canada. The analysis adopted in the case law shifted from assessing the purpose of the right to balancing the respective interests of the state with the interests of the individual engaged during custodial interrogation. This paper takes the position that balancing interests to delineate the scope of the *Charter*'s legal rights is inappropriate from a theoretical and

* Criminal lawyer and LLM Candidate at the Schulich School of Law, Dalhousie University. Many thanks to Professor Archie Kaiser and the two anonymous peer reviewers for their insightful comments on the earlier draft of this paper. Unless otherwise indicated, all views (and errors) expressed here are my own.

practical perspective. The balancing approach should be abandoned in favour of a return to the purposive approach.
Keywords: *Charter of Rights and Freedoms*; *Bill of Rights*; Legal Rights; Right to silence; s 7; Right to counsel; s 10(b); Principle against self-incrimination; Constitutional interpretation; Purposive approach; Balancing; Custodial detention; Interrogation

I. INTRODUCTION

During custodial interrogation, the detainee is afforded certain rights to safeguard their interests. The principle against self-incrimination maintains that, where the state alleges criminal wrongdoing, the state cannot force the target of the allegation to assist the state in proving it. Human dignity and autonomy require that the individual remains free to choose whether to cooperate with the state, and if they choose not to cooperate, to be left alone by the state.[1]

The principle against self-incrimination is supported during police interrogation by procedural protections, such as the right to retain and instruct counsel and the right to silence, which have attracted constitutional status under the *Canadian Charter of Rights and Freedoms*[2] ("*Charter*"). The purpose of the *Charter* in its entirety is to constrain government action to conform with fundamental rights and freedoms. This is considered to be essential to a democratic society in which the basic dignity of all individuals is recognized.[3] In the context of custodial interrogation, this places an obligation on the state to respect the principle against self-incrimination.

Following the entrenchment of the *Charter*, a substantial body of Supreme Court of Canada case law developed on the right to counsel under s 10(b). Subsequently, the right to silence under s 7 of the *Charter* developed its own case law more slowly. In the early *Charter* jurisprudence, the Supreme Court of Canada adopted a relatively generous approach to interpretation, which was premised on recognizing the disadvantaged position of the individual during detention. The Court gave meaning to the right to counsel under s 10(b) by holding that the right involved free and immediate legal advice or immediate consultation with counsel of choice, during which time the police are required

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1 See *R v D'Amour* (2002), 166 CCC (3d) 477, 163 OAC 164 (ONCA) at para 25 [*D'Amour*].

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 [*Charter*].

3 See *R v Singh*, 2007 SCC 48, [2007] 3 SCR 405 at para 76 [*Singh*].

to hold off from investigation. These protections are intended to protect the detainee's vulnerable position by ensuring fair treatment during detention so as to safeguard the principle against self-incrimination.

Subsequently, the Court endorsed a different approach to *Charter* interpretation. This emerged as a subtle shift beginning in 1989 with the Supreme Court of Canada decision in *R v Smith*,[4] which culminated in three decisions collectively referred to as the interrogation trilogy: *R v Oickle*, *R v Singh*, and *R v Sinclair*.[5] The new approach is fundamentally a balancing act. Instead of assessing the purpose of the right to delineate its scope, the new approach interprets *Charter* rights by attempting to reconcile the state's interest in law enforcement with the individual's interest in freedom from state intrusion. This paper will refer to the new approach as the "balancing approach."

The balancing approach is problematic from both a theoretical and a practical perspective. The balancing approach departs from accepted *Charter* interpretation by giving constitutional weight to societal interests at the stage of delineating the scope of the right rather than at the remedial stage of the analysis. This places an internal limitation *Charter* rights based on collective interests, which is wholly inconsistent with the very nature of fundamental freedoms, which are inherently individualistic rights.[6]

From a practical perspective, the balancing approach results in a narrowing of the protections available under the *Charter*'s legal rights. This is insufficient to safeguard the principle against self-incrimination for the average detainee. Under the balancing approach, the Supreme Court of Canada interprets ss 7 and 10(b) in a way which fails to recognize fully the practical realities of interrogation.[7] The case law envisions relatively easy exchanges between officer and detainee, which minimizes the impact of the inherently coercive nature of detention. The case law seems to presume that the average detainee not only understands the scope of their rights, but how to assert and exercise them confidently and effectively. Practitioners will appreciate that this is inconsistent

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4 *R v Smith*, [1989] 2 SCR 368, 39 BCLR (2d) 145 [*Smith*].

5 *R v Oickle*, 2000 SCC 38, [2000] 2 SCR 3; *Singh*, *supra* note 3; *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310 [*Sinclair*].

6 See Vanessa A MacDonnell, "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the Charter" (2012) 38 Queen's LJ 137 (QL) at para 35 [MacDonnell].

7 See Steven Penney, "Triggering the Right to Counsel: "Detention" and Section 10 of the *Charter*" (2008) 40 SCLR (2d) 271 at 272 [Penney].

with their experience, even in respect of sophisticated clients. It is also inconsistent with empirical data on police interactions. The practical effects of the balancing approach are more restrictive than the case law which endorses the balancing approach seems willing to acknowledge.

This paper will explore the problems inherent in the balancing approach by analyzing the right to counsel under the *Canadian Bill of Rights*[8] and under the *Charter*'s purposive approach. This paper will then assess the right to counsel and the right to silence under the early case law which endorsed the balancing approach. This paper will conclude that the balancing approach should be abandoned in favour of a return to the purposive approach whereby consideration of the state's interest in law enforcement is reserved for the remedial analysis under ss 1 and 24 of the *Charter*.

II. THE RIGHT TO COUNSEL UNDER THE *BILL OF RIGHTS*

The right to counsel did not originate with the *Charter*. It was recognized at common law and ultimately codified under the *Bill of Rights* in 1960. The *Bill of Rights* provided under s. 2(c)(ii) that no law of Canada would be construed so as to deprive a detainee of the right to retain and instruct counsel without delay. Prior to the entrenchment of the *Charter*, however, the right to counsel was interpreted narrowly, as a result of which the detainee's procedural protections during the investigative stage of the criminal process were tenuous at best.

Under the *Bill of Rights*, the police were not required to advise the detainee of the right to counsel or to facilitate its exercise.[9] The right to counsel was not usually interpreted as imposing limitations on the investigative powers of the state. The case law tended to bolster investigative powers unless the police demonstrated flagrant disregard for the detainee's right to counsel.[10] In the decision in *R v Steeves*,[11] Chief Justice Ilsley held that violations of pre-trial rights generally did not undermine trial fairness or the admissibility of evidence, stating that:

> [T]he mere fact that the police have obtained in any case knowledge of a relevant fact as the result of holding out an improper inducement does not of itself render evidence

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8 *Bill of Rights*, SC 1960, c 44 [*Bill of Rights*].

9 See *R v Gray* (1962), 132 CCC 337 at para 16, 1962 CarswellBC 223 (BCCC) [*Gray*].

10 See Brian Donnelly, "Right to counsel" (1968) 11 Crim LQ 18 at 19 and 21 [Donnelly].

11 *R v Steeves*, [1964] 1 CCC 266, 42 DLR (2d) 335 (NSSC) [*Steeves*].

> of that fact inadmissible... No more, it seems to me, should the acquittal of an accused person or the dismissal of the charge against him necessarily result because at some pre-trial stage of the proceedings after he was arrested he was deprived of the right to instruct counsel without delay. Whatever the remedies, civil or criminal, may be against those who deprived him of the right to instruct counsel, the right to acquittal or dismissal of the charge does not, in my opinion accrue to him.[12]

In *R v O'Connor*,[13] the detainee was detained for impaired driving. When placed in a cell for the night, he asked to contact counsel. He was unable to reach his lawyer and was denied further opportunity to consult with counsel. On appeal from conviction, Justice Haines commented that he was "considerably disturbed as to the timeliness" of the detainee's request to contact counsel given that the police were under no obligation to inform him of that right or to facilitate it.[14] The conviction was upheld.

On appeal to the Supreme Court of Canada,[15] Justice Ritchie did not assess the meaning of the right to counsel, but proceeded straight to the remedial analysis. He did not consider whether the illegally-obtained evidence should be admitted or excluded, but asked whether the right, if properly exercised, could have affected the outcome of the trial. Notwithstanding that the violation deprived the detainee of the opportunity to obtain legal advice on the breathalyzer, the breath sample was admissible at trial.[16]

Under the *Bill of Rights*, the case law tended to blend the delineation stage of the analysis with the remedial stage. Other than outlining what the right did not include, little attention was paid to interpreting the scope of the right. To compound this problem, the case law highlighted a basic doctrinal unavailability of any remedy at all. A breach of the right to counsel under the *Bill of Rights* generally did not give rise to a remedy. This underscores the tenuous nature of the right to counsel under the *Bill of Rights*. If a breach of a right has no real bearing on the way in which police conduct their investigations or the manner in which the prosecution unfolds, the right itself counts for little.

The narrow scope of the right to counsel began to shift in Justice Laskin's concurring opinion in the Supreme Court of Canada decision in *R v Brownridge*.[17] In that case, the detainee's request to contact counsel was denied,

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12 *Ibid* at paras 12-13.

13 *R v O'Connor*, [1965] 1 OR 360, [1965] 1 CCC 20 (OHCJ) [*O'Connor* OHCJ].

14 *Ibid* at para 6.

15 *R v O'Connor*, [1966] SCR 619, [1966] 4 CCC 342 [*O'Connor*].

16 *Ibid* at para 16.

17 *R v Brownridge*, [1972] SCR 926, 7 CCC (2d) 417 [*Brownridge*].

and he refused to provide a breath sample. On appeal from conviction, Justice Laskin that the right to counsel could not be interpreted so as to empower an arresting officer to determine, at their discretion, whether or when to permit the detainee to exercise the right. Justice Laskin's opinion was that the right to counsel could only have meaning if it was taken as raising a correlative obligation on the police to facilitate contact with counsel by providing access to a telephone if one was requested.[18]

On the admissibility of the illegally-obtained evidence, Justice Laskin stated that the Crown's need to have the benefit of the evidence was not more important than the detainee's need to have the benefit of counsel.[19] In Justice Laskin's view, police could not be permitted to assert their powers, as if lawfully exercised, when that assertion amounted to a denial of legal rights. His opinion was that the rights of the detainee had to be affirmed, which meant that the state could not be permitted to use the violation of a right as an exercise of law enforcement powers to support the charge of a criminal offence.

Justice Laksin's comment on the Crown's need for the evidence and the detainee's need for legal counsel bespeaks the idea of balancing interests, albeit at the remedial stage of the analysis. As noted, the case law under the *Bill of Rights* tended to blend the delineation and remedial stages of the analysis, and certain decisions did endorse a balancing exercise. For example, in the decision in *R v Gray*,[20] Justice Ostler's opinion was that the interests of the community mandated that criminal investigations could not be "cramped" by the invocation of legal rights. This was because the "business of police officers in investigating offences is difficult enough without unnecessary obstacles being placed in the path."[21]

At the appellate level in the *O'Connor* decision, Justice Haines similarly stated that:

> Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from Police power and individual freedom is really a quest for balance. Our Courts recognize there are two important interests that are liable to come into conflict, (a) the interest of the citizen to be protected from illegal invasions of his liberties by the authorities, and (b) the interest of the state to ensure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical

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18 *Ibid* at para 70.

19 *Ibid* at para 72.

20 *Gray, supra* note 9.

21 *Ibid* at para 14.

> ground... This right of the public to be free and safe from the depredations of other citizens is often overlooked in our zeal to accord those charged with crime what we consider to be certain basic rights or freedoms, which are nothing more than guarantees of balance between the exercise of police powers and individual rights. In the last analysis it is for our Courts to exercise a broad discretion to find that balance in each case and protect those competing interests.[22]

The language employed is evocative of the balancing approach endorsed by the Supreme Court of Canada some 30 years later under the *Charter*. This might support recognition of a custom of balancing interests to delineate the scope of rights to which the Supreme Court of Canada ultimately returned. However, even if balancing interests influenced the interpretation of the right to counsel under the *Bill of Rights*, balancing interests to delineate the scope of constitutional rights is inappropriate.

In the decision in *R v Therens*,[23] Justice Le Dain noted that, while the framers of the *Charter* adopted the wording of s. 2(c)(ii) of the *Bill of Rights*, the framers could not be presumed to have intended for those words to be given the exact same meaning and interpretation.[24] The task of expounding a constitution is fundamentally different from that of construing a statute. For Justice Le Dain, this conclusion follows naturally from s. 52 of the *Constitution Act, 1982*, whereby any law which is inconsistent with the provisions of the constitution is of no force and effect, as well as from s. 24 of the *Charter*, which furnishes trial judges with broad discretion to remedy *Charter* violations.

Importantly, the *Charter* represents a new affirmation of legal rights. The narrow interpretation of the right to counsel under the *Bill of Rights* had to be abandoned in the face of a clear constitutional mandate to render decisions which could limit and qualify the traditional sovereignty of the state.[25] A new approach to the interpretation of legal rights was required whereby the delineation of the scope of a right and the remedial analysis to be applied on its breach remained separate inquiries. To meet this need, the Supreme Court of Canada developed the purposive approach.

III. The Purposive Approach to the Interpretation of *Charter* Rights

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22 *O'Connor OHCJ, supra* note 15 at para 5.

23 *R v Therens*, [1985] 1 SCR 613, 40 Sask R 122 [*Therens*].

24 *Ibid* at para 47.

25 *Ibid*.

The purposive approach to *Charter* interpretation was adopted by the Supreme Court of Canada shortly after the *Charter*'s entrenchment. In the decision in *R v Big M Drug Mart*,[26] Justice Dickson held that the meaning of a *Charter* right is to be ascertained through analysis of the right's purpose.[27] The interpretation must be generous rather than legalistic to secure the full benefit of the *Charter*'s protection. Justice Dickson cautioned, however, that the analysis cannot overshoot the intended purpose of the right. While a narrow approach to interpretation risks impoverishing a *Charter* right, an overly generous approach risks expanding the protection beyond its intended scope.[28]

Justice Dickson determined that, to assess the scope of a *Charter* right according to its purpose, the right must be placed in its proper linguistic and philosophic context. This must be done with a view to the larger objectives of the *Charter* itself and the historical origins of the concepts enshrined, as well as the meaning and purpose of other related rights and freedoms.[29]

While the historic origins of a *Charter* right bear upon the delineation of its scope, prior conceptions of its scope are not determinative. Justice Le Dain made clear in the *Therens* decision that the constitutional status of the right to counsel meant that the right had to take on additional importance in the wake of the *Charter*.[30] The principles of statutory interpretation employed to construe the *Bill of Rights* was inappropriate for the *Charter*, which required a broader approach. A statute defines present rights and obligations, but a constitution is drafted with an eye to the future. Its provisions must be capable of growth and development over time.[31] Thus, narrow or technical approaches to interpretation, such as those employed under the *Bill of Rights*, risked subverting the goal of ensuring that each individual enjoys the full benefit and protection of the *Charter*.[32] The result is that the scope of s. 10(b) of the *Charter* is not limited to the confines of s. 2(c)(ii) of the *Bill of Rights*. The historical origins of a *Charter* right are simply one factor to consider.

The purpose of the *Charter* right is the dominant concern when tasked with delineating its scope.[33] This requires consideration of the larger objective of the

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26 *R v Big M Drug Mart*, [1985] 1 SCR 295, 37 Alta LR (2d) 97 [*Big M Drug Mart*].

27 *Ibid* at para 117.

28 See *R v Grant*, 2009 SCC 32 at para 17, [2009] 2 SCR 353.

29 *Big M Drug Mart*, *supra* note 26 at para 117.

30 *Therens*, *supra* note 23 at para 48.

31 *Hunter v Southam Inc.*, [1984] 2 SCR 145, 33 Alta LR (2d) 193 at para 16 [*Hunter v Southam*].

32 *Big M Drug Mart*, *supra* note 26 at para 16.

33 *Ibid*.

Charter's legal rights, which are enshrined under ss. 7—14. In the early *Charter* case law, the Supreme Court of Canada held that the purpose of the *Charter*'s legal rights was to constrain government action to ensure that the detainee is treated fairly during the pre-trial criminal process.[34] The *Charter*'s legal rights acknowledge that the detainee, who possesses far fewer resources than the state, has been taken into state control and is at risk of self-incrimination. The goal is to limit the investigative powers of the state. This is necessary to protect the principle against self-incrimination.

IV. The Purposive Approach to s. 10(b) of the *Charter*

Section 10(b) of the *Charter* provides that, on arrest or detention, everyone has the right "to retain and instruct counsel without delay and to be informed of that right." The right to counsel is among the earliest of the *Charter*'s legal rights to develop a settled case law, which delineated the contours of s. 10(b).[35] The early case law interpreted the right as encompassing a wide range of protections in favour of the detainee, as well as concomitant obligations on the part of the police. This included categorizing the legal protections conferred by the right into informational and implementational components, as well as recognizing the right to counsel of choice and developing a test for waiver.

A. The Informational Component

The informational component of the right to counsel provides the detainee with an opportunity to obtain basic information about the protections conferred by s 10(b). The police are required to advise the detainee of the right itself, as well as the availability of legal aid and duty counsel.[36] This enjoins the police from providing misinformation on the right to counsel. A breach of s. 10(b) will be made out where police belittle the legal advice the detainee has received with the goal of undermining the detainee's confidence in their relationship with counsel.[37]

The early case law established that the right to counsel is triggered by the act of detention within the meaning of ss. 9 and 10 of the *Charter*, which

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34 *Clarkson v R* [1986] 1 SCR 383 at para 26, 69 NBR (2d) 40 [*Clarkson*].

35 See Steve Coughlan & Robert J Currie, "Sections 9, 10 and 11 of the Canadian *Charter*" (2013) 62 SCRL (2d) 143 at para 37 (QL) [Coughlan and Currie].

36 See *R v Bartle*, [1994] 3 SCR 173 at para 18, 19 OR (3d) 802.

37 See Coughlan & Currie, supra note 35 at para 52.

includes investigative detention.[38] Effective community policing must allow officers to approach persons in the community to ask questions of a general nature, in which case there is no obligation to inform the citizen of their legal status or rights. However, if the conversation shifts from general inquiries to a focused investigation, the law recognizes that the individual needs immediate legal protection.[39]

In the decision in *R v Bartle*,[40] Chief Justice Lamer recognized that, pursuant to s. 10(b), the detainee requires information about their legal rights in a timely and comprehensive manner to make an informed decision on whether to exercise their legal rights.[41] As a result, "without delay" under s. 10(b) of the *Charter* means "immediately". The immediacy requirement can only be displaced by urgent and compelling circumstances, such as medical emergency or legitimate concerns for officer or public safety.[42] The desire for investigatory and evidentiary expediency cannot suffice.[43]

The detainee must be informed of their right to counsel as soon as detention arises to give meaning to the right to counsel.[44] This is highlighted by the Supreme Court of Canada decision in *R v Evans*.[45] The detainee was asked if he understood his right to counsel as read, and he replied in the negative. The officer made no attempt to explain the substance of right and proceeded with a nine-hour interview. On appeal from conviction, Justice Wilson held that, if the detainee indicates that they do not understand their rights as the police have read them, the officer must take steps to facilitate satisfactory comprehension.[46] A mechanical recitation of the right to counsel, as read from the standard *Charter* card, was insufficient given that the detainee unequivocally expressed his lack of comprehension.[47] The officers should have done more under the circumstances in order to facilitate understanding.

Pursuant to s. 10(b), the police are required to follow up or make further inquiries if the detainee demonstrates a lack of understanding about the information provided on their right to counsel. A sufficient level of

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38 See *R v Prosper*, [1994] 3 SCR 236 at para 41, 133 NSR (2d) 321 [*Prosper*].

39 *Grant*, *supra* note 28 at para 22.

40 *Bartle*, *supra* note 36.

41 *Ibid* at paras 20–21.

42 *Ibid* at para 2.

43 *Prosper*, *supra* note 38 at para 42.

44 See *R v Suberu*, 2009 SCC 33, [2009] SCR 460 [*Suberu*].

45 *R v Evans*, [1991] 1 SCR 869, 63 CCC (3) 289 [*Evans*].

46 *Ibid* at para 39.

47 *Ibid*.

understanding is necessary for a detainee to assert and exercise their legal rights effectively. In reality, the operational determinant is knowledge of the right itself: those lacking knowledge or understanding about their right to counsel will ultimately cease to have the right.[48] Insofar as s 10(b) is intended to foster fairness in the pre-trial criminal justice process, knowledge and understanding on the part of the detainee is necessary to give full effect to the right to counsel.

B. The Implementational Component

Similar to the informational component, the implementational component of the right to counsel under s. 10(b) of the *Charter* affords the detainee certain entitlements and imposes correlative obligations on the police. The implementational component recognizes that, once the detainee is informed of the right to counsel, the detainee requires an opportunity to exercise the right. From the police obligation to facilitate the right to counsel flows the concomitant "hold off" duty, which prohibits police from eliciting evidence from the detainee until a reasonable opportunity to consult with counsel has been provided.

This was confirmed in the seminal Supreme Court of Canada decision in *R v Manninen*.[49] In that case, the detainee invoked his right to counsel at the scene of his arrest. The officers immediately proceeded with interrogation on scene, and the detainee made inculpatory statements constituting the basis of his conviction at trial. On appeal to the Supreme Court of Canada, Justice Lamer considered that the right to counsel is intended to afford the detainee an opportunity to obtain advice on how to exercise their legal rights more generally. He concluded that the right to counsel could only be effective and meaningful if the detainee receives access to legal advice before they are questioned or otherwise required to give evidence.[50]

In keeping with this, Justice Lamer determined that the right to counsel imposes a positive obligation upon police to facilitate contact with counsel. He noted that, in *Manninen*, a telephone was readily available where the detainee had been arrested, which the police had used themselves, and there were no exigent circumstances precluding the detainee's use of the telephone.[51] Under the *Bill of Rights*, the detainee was only entitled to use a telephone if such a

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48 Alan Gold, "Chief Justice Lamer and the Right to Counsel under Section 10(b) of the *Charter*; an Admirable Legacy" (2000) 5 Can Crim L Rev 91 at 93 [Gold].

49 *R v Manninen*, [1987] 1 SCR 1233, 61 OR (2d) 736 [*Manninen*].

50 *Ibid* at para 23.

51 *Ibid* at para 25.

request was made and a telephone was available.[52] The purpose of s. 10(b), however, mandated enhanced procedural protections in favour of the detainee. Under the purposive approach, s. 10(b) recognizes that, insofar as the detainee is in the control of the state, the detainee cannot realistically exercise their right to counsel unless the police provide an opportunity to do so.[53] A request for a telephone to contact counsel is therefore unnecessary; its provision should be standard and automatic.

The case law recognizes that, for safety reasons, police are generally not expected to provide the detainee with their own cell phone at roadside.[54] However, the case law also recognizes that circumstances may require cell phone use at roadside to facilitate contact with counsel in order to give meaning to s 10(b). This was considered by the New Brunswick Court of Appeal in its decision in *R c Landry*.[55] In that case, the detainee requested to use his own cell phone to contact counsel at roadside after he was arrested for impaired driving. He was advised that he could only contact counsel at the detachment. The detainee's trial position was that he had no choice but to provide samples of his breath.

On appeal, Justice LaBlond considered that the "overarching purpose" of s. 10(b) is to avoid involuntary incrimination.[56] With respect to telephone use, Justice LaBlond stated that:

> [T]he case law could not be clearer on the issue of when an accused is entitled to avail himself or herself of his or her right to counsel. The right applies immediately following arrest and reading of constitutional rights, insofar as the circumstances of the case allow. No evidence may be obtained before the right is exercised. The Supreme Court of Canada clearly stated in *R. v. Manninen*, [1987] 1 S.C.R. 1233, [1987] S.C.J. No. 41 (QL), that the right requires the police officer to allow the accused to use any available telephone... In *Manninen*, the Supreme Court cited *R. v. Dombrowski*, [1985] S.J. No. 951 (QL) (Sask. C.A.), in which the Saskatchewan Court of Appeal held there is no justification for the police to insist that the right can be exercised only upon arrival at the police station.[57]

Justice LaBlond confirmed that, under the existing circumstances, the accused was entitled to use his own cell phone at roadside to contact counsel. For Justice LaBlond, the right to counsel cannot be effectively exercised unless the detainee

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52 *Ibid* at para 22.

53 *Ibid* at para 21.

54 *R v Taylor*, 2014 SCC 50 at para 32, [2014] 2 SCR 495 [*Taylor*].

55 *R v Landry*, 2020 NBCA 72, 2021 CarswellNB 27 [*Landry*].

56 *Ibid* at para 20.

57 *Ibid* at para 19.

"is in a position to receive legal advice".[58] If the accused was not entitled to avail themselves of the right to counsel immediately following arrest, s.10(b)'s purpose of protecting the principle against self-incrimination would be frustrated.

C. The Right to the Counsel of Choice

The right to counsel under s. 10(b) includes the right to consult with one's counsel of choice. This was initially recognized in the Supreme Court of Canada's decision in *R v Ross*.[59] In that case, the detainee was unsuccessful in reaching counsel via telephone, and he was not asked if he wished to contact another lawyer. On appeal, Justice Lamer affirmed that the purpose of the right to counsel is to ensure that detainees are advised of their legal rights and how to exercise them when dealing with the authorities. His opinion was that the purpose of s. 10(b) would be subverted if it was open to police to proceed with the investigation when the right to the counsel of choice had been clearly invoked.[60] There were no urgent circumstances requiring the police to investigate before providing an opportunity to contact counsel of choice during regular business hours the following morning.[61]

Under the purpose approach, s. 10(b) was interpreted as including the right to decline to speak with alternative counsel and to wait to speak with counsel of choice if counsel is not immediately available. During that time, the police are required to hold off from investigation.[62] The detainee can only be expected to exercise s. 10(b) by contacting another lawyer if counsel of choice cannot be available within a reasonable time.[63] These entitlements and obligations ensure that the detainee is in a position to obtain legal advice and information, which facilitates fairness in the process and protects against the risk of self-incrimination.

D. Waiver

While the informational component of the right to counsel is triggered upon detention, the implementational obligations on the part of the police are triggered by the detainee's choice to exercise the right. The detainee in the

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58 *Ibid* at para 20.

59 *R v Ross*, [1989] 1 SCR 3, 46 CCC (3d) 129 [*Ross*].

60 *Ibid* at para 23.

61 *Ibid* at paras 16, 21.

62 See *R v Willier,* 2010 SCC 37 at para 35, [2010] 2 SCR 429 [*Willier*].

63 *Ross*, *supra* note 59 at para 16.

Manninen decision invoked his right to counsel, but he was not afforded an opportunity to exercise the right. Justice Lamer reasoned that, where a detainee asserts their intention to exercise the right to counsel and police ignore the request by proceeding with interrogation, the detainee is likely to feel that their rights have no effect such that they must answer.[64] As a result, it could not be said that the detainee in *Manninen* actually intended to waive his right to counsel simply because he answered the questions posed by police.

However, if the detainee chooses not to exercise the right to counsel or is not reasonably diligent in exercising the right, the police's implementational obligations either do not arise or are suspended altogether.[65] Under those circumstances, the police are not required to hold off and may proceed with the investigation. Given the consequences of failing to exercise the right to counsel, the Supreme Court of Canada made clear in a number of early *Charter* decisions that the threshold for a valid waiver is high.[66] Before a detainee can be said to have waived the right to counsel, the detainee must have enough information to allow them to make an informed choice on whether to exercise the right or to waive it.[67]

In *R v Clarkson*,[68] the highly-intoxicated detainee responded that there was "no point" in consulting with counsel when her aunt encouraged her to contact a lawyer during police interview. On appeal from conviction, Justice Wilson considered that the purpose of the right to counsel is to ensure that the accused is treated fairly in the criminal process. In keeping with this purpose, the test for a valid waiver must encompass principles of adjudicative fairness.[69] Justice Wilson's view was that the continued interrogation of a detainee who incriminates themselves without being aware of the consequences is incompatible with the need for fairness in the process.[70]

Justice Wilson held that, for s. 10(b) purposes, waiver must be clear and unequivocal in terms of the detainee's understanding that they are waiving a constitutional safeguard. This requires voluntarily action on the part of the detainee, which must have been based upon full knowledge of both the nature

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64 *Manninen, supra* note 49.

65 See *Bartle, supra* note 36 at para 19.

66 See *Clarkson, supra* note 34; *R v Brydges*, [1990] 1 SCR 190, 1045 Alta LR (2d) 145.

67 See Gold, *supra* note 48 at 97.

68 *Clarkson*, *supra* note 34.

69 *Ibid* at paras 19, 26.

70 *Ibid* at para 21.

of the right and the effect that waiver will have on the right.[71] Waiver of the right to counsel is only valid if it is voluntary and informed.

E. The Purposive Approach and Self-Incrimination

Justice Wilson's reasons emphasize that adjudicative fairness is the pivotal function in the test for waiver. This underscores the importance attributed to procedural fairness by the purposive approach more generally. Under the purposive approach, s. 10(b) confers legally-protected entitlements in favour of the detainee and imposes correlative obligations on the part of the police because s. 10(b) is aimed at protecting against involuntary incrimination, which is the overarching purpose of s. 10(b).[72] The goal is to limit the investigative power of the state to foster fairness during the pre-trial criminal process. The scope of the right to counsel must be broad enough to incorporate the necessary procedural protections to achieve that goal.

The right to counsel must therefore afford the detainee an opportunity to learn about the charge they face, as well as the limits of legitimate police power and the extent of their legal rights under the circumstances existing at the material time. This includes information on whether the detainee should or must submit to police power. The right to counsel was viewed under the *Bill of Rights* as an inconvenient barrier to the search for truth. Under the *Charter*, the right to counsel is an indispensable protector of the principle against self-incrimination, which acknowledges the autonomy and dignity of each person. The principle against self-incrimination maintains that allowing the state to employ any and all means to enforce the law would give rise to an undemocratic state in which few people would want to live.[73] People are not simply a vehicle through which to obtain evidence. They are vested with constitutional rights, which must be respected.

The right to counsel is necessarily a limitation on the state's investigative power. The purposive approach begins with that premise. Despite its breadth, however, the right to counsel does not prohibit self-incrimination. It provides an opportunity to consult with counsel, but it does not demand consultation.[74] The detainee is free to make their own choices, and they may waive the right to counsel so long as that waiver is voluntary and informed. The detainee is

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71 *Ibid* at para 24.

72 See *Landry*, *supra* note 55 at para 20.

73 See Alan D Gold & Michelle Fuerst, "The Stuff that Dreams are Made of! – Criminal Law and the Charter of Rights" (1992) 24 Ottawa L Rev 13 at 16 [Gold and Fuerst].

74 See Penney, *supra* note 7 at 275.

equally free to ignore any and all legal advice obtained by exercising the right to counsel. This is consistent with *Charter* values of dignity and autonomy.

V. The Balancing Approach

A diverging approach to constitutional interpretation eventually emerged in the case law, which is referred to as the "balancing approach." While the purposive approach assesses the purpose of a *Charter* right in light of its historical, linguistic, and philosophic context, as well as the larger objectives of the *Charter* itself, the balancing approach is fundamentally a balancing act. It employs an exercise whereby the interests of the individual are weighed against the interests of the state. The assessor attempts to reconcile the competing interests in order to delineate the scope of the *Charter* right. Under the balancing approach, the nature and extent of the procedural protections conferred to the individual are achieved by striking the proper balance between individual and collective interests.

The balancing approach initially emerged in a s. 10(b) decision, *R v Smith*,[75] which considered the hold off duty. The balancing approach then re-emerges in the decision in *R v Hebert*,[76] and subsequently in the interrogation trilogy. The interrogation trilogy governs the current framework for procedural safeguards available to the detainee during custodial interrogation. Use of the balancing approach has highly influenced the current legal landscape.

A. The *Smith* Decision

In *Smith*, the detainee expressed the intention to exercise his right to counsel outside of normal office hours. The private phone number for his counsel of choice was not listed in the phone book, and he decided to wait until morning to place the call, despite urging from the police. During the night, the detainee was interrogated. He invoked his right to counsel three times but was not afforded an opportunity to contact counsel.

On appeal from conviction, the issue was whether police provided the detainee with a reasonable opportunity to exercise the right to counsel. Justice Lamer noted that, when the detainee asserted his s. 10(b) right upon arriving at the detachment, the police's implementational duties were triggered. However, Justice Lamer held that such duties were suspended because the

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75 *Smith*, *supra* note 4.

76 *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1 [*Hebert*].

detainee had not been reasonably diligent in exercising same. While the detainee believed it was useless to call his lawyer given the late hour, it could not be said that it was impossible to contact counsel. Justice Lamer noted that defence lawyers are typically available outside of normal office hours, and calling the office number may have provided another phone number by which to reach counsel.[77]

This suggests that, if the detainee had attempted to contact counsel but failed to reach him, he would have been entitled to wait until morning to call counsel again and subsequently decide whether to call another lawyer. The police would have been required to hold off from interrogation until that time. The decision not even to try to contact counsel was fatal.[78] For Justice Lamer, the fact that the detainee invoked his right to counsel repeatedly was inconsequential. A detainee who has been given a reasonable opportunity to exercise their right but who fails to do so with reasonable diligence cannot expect the police to continue to suspend their investigation.[79]

In Justice Lamer's view, reasonable diligence is an essential limitation on the right to counsel; without it, the detainee would be empowered to delay the investigation endlessly, which risks the destruction or loss of evidence.[80] Justice Lamer drew a distinction between the right to counsel on the one hand and the police duty to provide an opportunity to exercise the right and to hold off from interrogation on the other. He stated that:

> One who is not diligent in the exercise of his right to retain counsel does not lose this right; one can always exercise it. However, one cannot require that the police respect the duty imposed on them to cease questioning until he has had a reasonable opportunity to exercise his right. The duty imposed on the police to refrain from attempting to elicit evidence from a person until this person has had a reasonable opportunity to communicate with counsel is suspended and is not again "in force" when the arrested or the detained person finally decides to exercise his right. A different conclusion would render meaningless the duty imposed on a detained or arrested person to be diligent in the exercise of his rights. This would enable one to do exactly what this obligation seeks to prevent, that is, delaying needlessly and with impunity the investigation and, in certain cases, to allow for an important piece of evidence to be lost, destroyed or, for whatever reasons, made impossible to obtain.[81]

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77 *Ibid* at paras 12-14.

78 *Ibid* at paras 16-17.

79 *Ibid* at para 18.

80 *Ibid* at para 15.

81 *Ibid* at para 19.

In his dissenting opinion, Justice La Forest followed *Manninen* and held that the detainee in *Smith* did not waive his right to counsel simply by answering the questions put to him by police. Pursuant to the decision in *Ross*, if the detainee invokes the right to the counsel of choice, the burden of establishing waiver rests with the Crown.[82] The inculpatory statement in *Smith* was given after the detainee invoked the right to the counsel of choice, and the detainee purported to give a statement "off the record." Insofar as the police did nothing to disabuse the detainee of that notion, it could not be said that he was fully aware of the consequences of making the statement without first consulting with counsel.[83]

Imbuing the s. 10(b) analysis with law enforcement concerns fails to confer the necessary procedural protections to safeguard the principle against self-incrimination. The detainee loses the benefit of the implementational duties, which includes the hold off duty. Justice Lamer reasoned that the detainee will not lose the right to counsel because they can always exercise it; the detainee simply cannot expect police to hold off from interrogation if the detainee is not reasonably diligent. This is a *non sequitur*. A lack of reasonable diligence ultimately amounts to an implied waiver of the right in a situation where the validity of the waiver is assessed by the state official who stands to benefit from the waiver itself. This approach fails to recognize that, if police are permitted to interrogate without any correlative duty to implement the right invoked, the detainee is effectively powerless to exercise their rights.

Justice Lamar's approach is fundamentally a balancing act, which gives effect to law enforcement concerns and investigative expediency. This is in direct conflict with the purpose of the *Charter*'s legal rights. Justice Lamer's application of the balancing approach is further complicated by the fact that he did not outline what constitutes reasonable diligence in exercising the right to counsel. A finding of a lack of reasonable diligence will depend on the circumstances of the case, but little assistance was afforded to lower courts in making that determination. This cast the scope of the detainee's right to counsel into ambiguity, which rendered the law on s. 10(b) somewhat uncertain and unpredictable. What was certain, however, was that the detainee would lose their right to counsel if the detainee did not indicate a desire to exercise the right and take positive steps to exercise same expeditiously. This fails to recognize fully the power imbalance inherent in custodial detention.

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82 *Ibid* at para 34-36.

83 *Ibid* at para 31.

B. The Right to Silence

Section 7 of the *Charter* provides that:

> Everyone 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.

The right to silence is closely related to the right to counsel. One of the most important functions of legal advice upon detention is to ensure that the detainee understands their rights, and chief among them is the right to silence.[84] A crucial piece of legal advice the detainee will receive from counsel on arrest or detention is the right to remain silent during interrogation.

Similar to the right to counsel, the right to silence safeguards the principle against self- incrimination by entitling the detainee not to incriminate themselves with their own words.[85] When faced with interrogation, the detainee may choose to say nothing and they cannot be compelled to speak. The trier of fact cannot draw an inference of guilt from the fact that the detainee remained silent during interrogation. Even if the circumstances of an accusation cry out for an explanation, silence is not evidence to be used against the detainee.[86]

This is because the right to silence hinges on the premise that the individual cannot be forced to assist the state in making out the case against them. The right acknowledges that compelling self-incrimination amounts to treating the detainee as a mere means to the state's objective of law enforcement.[87] In order to recognize the individual's dignity and autonomy, the right to silence is triggered whenever the coercive power of the state is brought to bear upon the individual during interrogation.[88]

Unlike the right to counsel, the right to silence did not attract a substantial body of Supreme Court of Canada jurisprudence immediately following the entrenchment of the *Charter*. In 1988, the Ontario Court of Appeal held that the right to silence was a well-settled principle in its decision in *R v Woolley*.[89] The Court recognized that, at common law, the detainee was under no legal obligation to speak to the authorities during the investigate stage of the criminal process. The Court made clear that the right to silence constitutes a

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84 *Ibid* at para 109.

85 *Ibid* at para 20.

86 *Ibid* at para 20.

87 See Hamish Stewart, "The Confessions Rule and the *Charter*" (2009) 54 McGill L J 517 at 521 [Stewart].

88 Gold & Fuerst, *supra* note 73 at para 5.

89 *R v Woolley*, (1988), 40 CCC (3d) 531, 25 OAC 390 (CA) [*Woolley*].

basic tenant of the criminal justice system such that it comes within the purview of s. 7 of the *Charter*.[90]

C. The Hebert Decision

The Supreme Court of Canada initially recognized the right to silence under s. 7 of the *Charter* in the *Hebert* decision. In that decision, Justice McLachlin reinforced the balancing approach to the interpretation of *Charter* rights, which emerged in the *Smith* decision.

In *Hebert*, Justice McLachlin examined the historical origins of the right in keeping with the purposive approach. She concluded that the right to silence is informed by the common law privilege against self-incrimination and the voluntary confessions rule. She noted that, unlike the right to silence, the privilege against self-incrimination arises only at trial by enjoining the state from forcing the accused to testify.[91] Similarly, however, the right to silence and the privilege against self-incrimination are premised on the proposition that it is the Crown's obligation to prove its case; the accused cannot be compelled to assist the state in doing so.[92]

The voluntary confessions rule shares certain characteristics with the right to silence, but bears important differences. The voluntary confessions rule is primarily concerned with the reliability of evidence at trial. The common law has long recognized that coercive police tactics do not extract truthful statements from detainees, but are wont to elicit statements designed to alleviate the pressure of interrogation so as to bring about its conclusion. Pursuant to the voluntary confessions rule, coerced confessions are inadmissible at trial due to their inherent unreliability.[93] The issue is whether the accused's decision to speak to the police was freely made and prompted by personal reasons, or otherwise arose as a result of coercive and oppressive police conduct, such as threats, promises, or violence.[94]

Both the privilege against self-incrimination and the voluntary confessions rule are concerned with the choice to remain silent when the power of the state is brought to bear against the individual. In terms of the scope of the right to silence under the *Charter*, however, the privilege against self-incrimination and the voluntary confessions rule could not be determinative. Echoing Justice Le

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90 *Ibid* at paras 19-20.

91 *Hebert*, *supra* note 76 at para 19.

92 *Ibid* at para 101.

93 See Stewart, supra note 87 at 522.

94 *Ibid* at 544.

Dain's comments in the *Therens* decision, Justice McLachlin reasoned that it would be incorrect to assume that the fundamental guarantees of the *Charter* are to be interpreted according to the law as it stood in 1982.[95] The *Charter* fundamentally changed the Canadian legal landscape, and to define *Charter* rights in accordance with their common law and statutory antecedents denies the supremacy of the cconstitution.[96] As a result, Justice McLachlin held that the scope of the right to silence under s. 7 of the *Charter* extends beyond the relevant common law doctrines.[97]

Justice McLachlin concluded that the right to silence cannot be limited to the trial stage of the criminal process. A person whose liberty is in jeopardy because of detention cannot be forced by the state to give evidence against themselves. The right to silence is informed by *Charter* values, such as dignity and autonomy. Under the *Charter*, compelled statements are not rejected simply because they are unreliable, but because the detainee is importantly not a resource to be exploited for law enforcement purposes. Thus, the right to silence under s. 7 must be available during custodial interrogation. The protection conferred by a legal system which grants immunity from self-incrimination at trial, but offers no protection with respect to pre-trial statements would be illusory.[98] The right to silence must include not only a negative right to be free from coercive and oppressive investigative tactics, but must denote a positive right to make a free choice to remain silent or to speak during interrogation.[99]

The right to silence under s. 7 of the *Charter* therefore mandates that, where the detainee chooses not to make a statement, the state is precluded from using its superior power to override the detainee's will so as to negate that choice.[100] The choice is defined objectively: where the right to silence is invoked, the focus shifts to the conduct of the authorities to determine whether police effectively deprived the detainee of the right to choose to speak.[101]

However, Justice McLachlin held that s. 7 does not require that police act in a manner so as to protect the detainee from making a statement, and s. 7 does not enjoin police from using means of persuasion, which fall short of

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95 *Hebert*, *supra* note 76 at para 73.
96 *Ibid* at paras 26, 75.
97 *Ibid* at para 104.
98 *Ibid* at paras 102-104.
99 *Ibid* at para 111.
100 *Ibid* at para 122.
101 *Ibid* at para 126.

coercion, to encourage the detainee to speak.[102] Justice McLachlin reasoned that a right to silence, which could only be discharged by waiver, would be "absolute" and overshoot the purpose of the right, thereby expanding it beyond its intended scope.[103] In Justice McLachlin's view, s. 7 simply requires that police allow the detainee to make an informed choice on whether to speak by providing an opportunity for the detainee to exercise their right to counsel.[104]

In her reasons, Justice McLachlin employed some aspects of the purposive approach to delineate the scope of the protections conferred under s. 7, such as considering the historical origins of the right to silence. Her analysis, however, was importantly a balancing exercise. While Justice McLachlin noted that the *Charter*'s legal rights are aimed at limiting the superior power of the state vis-a-vis the individual, she invoked the internal balancing component of s. 7 to support the position that s. 7 seeks to strike a balance between the individual's interests and those of the state. She noted that s. 7 is not absolute; the wording acknowledges that the state may deprive an individual of certain interests in conformity with the principles of fundamental justice. Justice McLachlin reasoned that the purpose of s. 7 is to balance the individual's interest in protection from unfair use of state power with the state's interest in maintaining power to deprive life, liberty, and security of the person.[105] On that basis, Justice McLachlin saw fit to consider the state's interest in law enforcement when delineating the scope of the right to silence.

In her minority opinion, Wilson J took issue with McLachlin J's approach to the right to silence. Wilson J's opinion was that, in order to determine whether police conduct offends principles of fundamental justice contrary to s 7, the focus should be on the police conduct and not on the state's objective of law enforcement.[106]

Justice Wilson followed the decision in *Big M Drug Mart* and reaffirmed that *Charter* rights must be given a generous interpretation, which is aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. In her view, it was inappropriate to qualify a *Charter* right by balancing the interests of the state against the interests of the right holder. She stated that it was contrary to the purposive approach to inject into the analysis of the right's scope justificatory considerations for placing

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102 *Ibid* at para 110.
103 *Ibid* at para 129.
104 *Ibid*.
105 *Ibid* at paras 119-121.
106 *Ibid* at para 8.

limits upon the right.[107] Justice Wilson would have held that the interests of the state are relevant only to the remedial stage of the analysis after the scope of the right has been considered and a breach of the right has been established. She made clear that the state's interests have no bearing on delineating the scope of the right itself.[108]

Even in the context of s. 7 of the *Charter*, which includes an internal balancing component, employing a balancing exercise to delineate the scope of legal rights is problematic. The language of s 7 provides that the state may only deprive an individual of their right to life, liberty and security of the person in accordance with the principles of fundamental justice. In *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*,[109] Chief Justice Lamer held that the meaning of "principle of fundamental justice" must be determined by reference to the interests that s. 7 is meant to protect. Principles of fundamental justice are found in the basic tenants of the legal system; they do not lie in the realm of public policy or public interest, but are contained within the inherent domain of the judiciary as guardian of the justice system and the constitution.[110] This indicates that the state's interest in law enforcement does not constitute a principle of fundamental justice, which should influence the interpretation of the right to silence. Nor could it be used to justify a restrictive interpretation of the right to silence.

It is implicit in the balancing exercise that s. 7 intends to maintain the state's ability to use its law enforcement powers in a fair manner. A finding that s. 7 supports unfair uses of state power would violate principles of fundamental justice. Even if s. 7 only supports fair uses of state power, it appears unfair for interrogation to proceed where the detainee has positively invoked their right to silence even where the state's means of persuading the detainee to speak are "legitimate." Proceeding with interrogation under those circumstances suggests very heavily that the right to silence has little meaning and cannot be exercised effectively. Any distinction between legitimate means of persuasion and negating the detainee's choice to speak arguably boarders on semantics. If the state's interest lies in its law enforcement power and the individual's interest lies in seeing that power limited, it is unlikely that these competing interests can be truly reconciled.

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107 *Ibid* at paras 7-8.

108 *Ibid* at para 9.

109 *Reference re s 94 of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 69 BCLR 145 [*Reference re* MVA BC].

110 *Ibid* at paras 30, 37.

D. The Interrogation Trilogy

Despite Justice Wilson's cautions, the balancing approach to the interpretation of the *Charter*'s legal rights did not end with the decision in *Hebert*. As noted, the balancing approach was employed as the interpretative tool of choice for analyzing the legal rights enshrined under ss. 7 and 10(b) of the *Charter* in the interrogation trilogy.

1. The Oickle Decision

In *Oickle,* the first decision in the interrogation trilogy, Justice Iacobucci considered the voluntary confessions rule in light of the *Charter*. He noted that, while s. 10 is triggered only upon arrest or detention, the confessions rule applies whenever an individual speaks with a person in authority. An involuntary statement is strictly inadmissible under the confessions rule, but illegally-obtained evidence may still be admitted at trial under s. 24(2) of the *Charter*.[111] Justice Iacobucci determined the voluntary confessions rule constitutes a protection offered at common law, which extends beyond the protections guaranteed by the *Charter*. His opinion was that the common law rule is broader than the *Charter*'s guarantees. The *Charter* is not an exhaustive catalogue of rights, but a floor below which the law cannot fall.[112]

Justice Iacobucci's view of the *Charter* as a minimal source of protections underscores the impetus to give a broader definition to the common law rule. In his view, the confessions rule is not strictly concerned with evidential reliability; like the *Charter's* legal rights, it is imbued with concerns of adjudicative fairness. Interestingly, Justice Iacobucci's reasons make little reference to the right to silence, yet his analysis of the voluntary confession's rule was evocative of Justice McLachlin's analysis of the right to silence in *Hebert*.

For Justice McLachlin, the right to silence protects the detainee's power to make a free and meaningful choice on whether to speak to police. For Justice Iacobucci, the voluntary confessions rule overlaps considerably with that purpose. His opinion was that, like the right to silence, the voluntary confessions rule is a manifestation of the broader principle against self-incrimination.[113] *Quid pro quo* inducements are impermissible because the

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111 *Oickle*, *supra* note 5 at para 30.

112 *Ibid* at paras 31-32.

113 See Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence*, 4th ed (Markham: LexisNexis Canada Inc., 2014) at §8.43 [Lederman, Bryant & Fuerst].

detainee may confess so as to gain the benefit offered by the interrogator rather than based upon the personal desire to confess.[114] The *quid pro quo* is prohibited because it effectively empowers the state to negate the detainee's free choice to decide whether to speak with police. According to the reasons in *Hebert*, this is exactly what the right to silence is intended to protect.

Justice Iacobucci's approach to the voluntary confessions rule expanded the rule's scope; however, the procedural protections available to the detainee remained largely unchanged. The rule clearly prohibited coercive police tactics, but the threshold for coercion and oppression is very high. Coercive conduct is improper only when it is strong enough to raise a reasonable doubt as to whether the will of the detainee has been overborne.[115] Subjecting the detainee to utterly intolerable conditions or offering inducements strong enough to produce an unreliable confession will meet this threshold, but eliciting a statement under false pretenses will not.

Justice Iacobucci held that confronting the detainee with inadmissible or fabricated evidence to convince them to speak will not offend the rule. So long as there is no *quid pro quo* or egregious conduct, coercive behaviour on the part of police may be permitted under the voluntary confessions rule. Indeed, Justice Iacobucci found that the detainee's statements in *Oickle* were voluntary despite the fact that the police subjected him to investigative tactics which arguably constituted inducements or threats, including making suggestions of packing/bundling charges and offering psychiatric help, as well as threatening to interrogate the detainee's girlfriend if he did not confess.

2. The Singh Decision

The low threshold under the voluntary confessions rule is important for *Charter* purposes given the doctrinal muddling which occurred in *Singh*. Justice Charron employed the balancing approach to expand upon Justice McLachlin's analysis of the right to silence in *Hebert*. The detainee in *Singh* repeatedly expressed that he did not wish to discuss the incident constituting the subject matter of the investigation with police, invoking his right to silence a total of 18 times during interrogation.[116] On appeal, the detainee invited the Supreme Court of Canada to hold that s. 7 includes a hold off duty whereby police cease questioning if the right to silence is invoked. Justice Charron rejected that

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114 *Oickle*, *supra* note 5 at para 56.

115 *Ibid* at para 57.

116 *Singh*, *supra* note 3 at para 58.

interpretation on the grounds that it ignored the "critical balancing of state and individual interests which lies at the heart of this Court's decision in *Hebert*."[117]

Justice Charron held that s. 7 recognizes the individual's right not to speak; unlike s. 10(b), it does not confer the right not to be spoken to by state authorities.[118] Justice Charron reasoned that the right to silence is, by its very nature, exercised differently from the right to counsel. While the detainee is dependent upon police to facilitate the right to counsel, exercising the right to silence is fully within the control of the detainee. Justice Charron reasoned that hold off duties and waiver requirements are therefore unnecessary. In Justice Charron's view, the law recognizes the detainee's freedom of choice, but it was their responsibility to decide to speak or to remain silent.

The distinction between being made to listen and being forced to speak allowed Justice Charron to interpret the right to silence in a manner which gave effect to the state's interest in law enforcement.[119] She characterized the detainee as an important, fruitful source of information in the state's search for truth. While detention triggers the detainee's immediate need for protection, the interests of the state and society more broadly mandate that the police are empowered to "tap this valuable source."[120] For Justice Charron, the power to use legitimate means of persuasion to encourage the detainee to speak gave effect to the "critical" balance between individual and societal interests.[121]

Justice Charron held that whether persuasion is legitimate would be assessed under the voluntary confessions rule. She reasoned that the common law rule denotes respect for individual freedom of will and overall fairness in the process by supporting the detainee's right to make a meaningful choice on whether to speak with a person in authority.[122] Where a person in authority interrogates a detainee, the voluntary confessions rule and the right to silence would be functionally equivalent such that a finding of voluntariness would be determinative of the s. 7 issue.[123]

Justice Charron cautioned that voluntariness is highly fact-driven. She recognized that, in some cases, continued interrogation in the face of repeated assertions of the right to silence would effectively deny the detainee's *Charter*

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117 *Ibid* at paras 6-7.

118 *Ibid* at para 28.

119 See Lisa Dufraimont, "The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law" (2011) 54 SCRL (2d) 1 at para 31 [Dufraimont].

120 *Singh, supra* note 3 at para 45.

121 *Ibid* at para 47.

122 *Ibid* at paras 30, 35.

123 *Ibid* at paras 37, 39.

rights and call into question the voluntariness of the statement made. However, Justice Charron made clear that the frequency with which the right is asserted only constitutes part of the analysis and is not itself determinative. She held that the ultimate question is whether the accused exercised their free will by choosing to make a statement.[124] An application of this approach to the right to silence led Justice Charron to find that the detainee's rights in *Singh* had not been breached. This gave rise to a very strong dissent.

In his dissenting opinion, Justice Fish took issue with the conflation of the right to silence and the voluntary confessions rule. In his view, the purposive approach made plain that the right to silence under s. 7 was not eclipsed by the voluntary confessions rule under *Oickle*.[125] Justice Fish's opinion was that the right to silence extends beyond the common law rule because it rests on a different foundation of principles. Even under its broader formulation in *Oickle,* the voluntary confessions rule remained primarily concerned with the reliability of evidence. Under the purposive approach, the *Charter*'s aim was to constrain government action, which is essential for a democratic society in which the basic dignity of all persons is recognized.[126]

For Justice Fish, it was the Court's duty to ensure that the right to silence is respected by interrogators once it has been unequivocally asserted. He stated that the right to silence cannot be disregarded by police or insidiously undermined as an investigative stratagem.[127] Given the low threshold for voluntariness under the voluntary confessions rule, it could not be said that a confession passing common law muster invariably represents a free and meaningful choice to speak to the police for the purposes of the *Charter*. In Justice Fish's view, the majority opinion's concern with police powers was incongruous with the approach mandated by the *Charter*. Justice Fish stated that:

> The work of the police would be made easier (and less challenging) if police interrogators were permitted to undermine the constitutionally protected rights of detainees, including the right to counsel and the right to silence — either by pressing detainees to waive them, or by "unfairly frustrat[ing]" their exercise. More draconian initiatives might prove more effective still. Nonetheless and without hesitation, I much prefer a system of justice that permits the effective exercise by detainees of the constitutional and procedural rights guaranteed to them by the law of the land. The

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124 *Ibid* at para 53.

125 *Ibid* at para 77.

126 *Ibid* at paras 56, 76.

127 *Ibid* at para 57.

> right to silence, like the right to counsel, is in my view a constitutional promise that must be kept.[128]

The rights enshrined in the *Charter* were not given constitutional status on the condition that they remain unexercised, lest the investigation of crime is impeded.[129] In the *Manninen* decision, the Court acknowledged that, where the right to counsel is invoked and police proceed with interrogation, the detainee will conclude that their rights have no effect such that they must answer. This applies equally to the right to silence. Detainees who are left alone to face interrogators, who persistently ignore assertions of the right to silence, are powerless and bound to feel that their rights have no meaning such that they have no choice but to speak.[130] Justice Fish's opinion was that there was no support in the common law for the proposition that the police may press detainees to waive their *Charter* rights or to frustrate deliberately their effective exercise. On a purposive approach, the policy of the law is to facilitate, not to frustrate, the effective exercise of *Charter* rights.[131] Justice Fish would have allowed the detainee's appeal from conviction.

The combined effect of the decisions in *Oickle* and *Singh* dictates that the right to silence provides no protection beyond that already offered by the voluntary confessions rule. The *Charter* right was entirely subsumed by the common law rule of evidence. Interestingly, this is contrary to Justice McLachlin's opinion in *Hebert* that the scope of the right to silence should extend beyond the relevant common law doctrines.[132] The doctrinal muddling in *Singh* results in narrowed protection against the risk of self-incrimination. In the decision in *R v McKay*,[133] Justice Duval questioned the efficacy of the right to silence in the wake of the *Oickle* and *Singh* decisions, noting that:

> Other than covering his ears and standing mute in response to anything said by the police, how is the detained person to exercise his/her right to remain silent? How long is he to be detained in an interview room after he has stated that he has nothing to say while police persist with an interrogation? At what point in time will the assertion of a right to remain silent be respected by ceasing questioning?[134]

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128 *Ibid* at paras 96-97.
129 *Ibid* at para 87.
130 *Ibid* at para 81.
131 *Ibid* at paras 71 & 87.
132 *Hebert, supra* note 76 at para 104.
133 *R v* McKay, 2003 MBQB 141, 175 Man R (2d) 121 [*McKay*].
134 *Ibid* at para 100.

Under the authority of s. 503 of the *Criminal Code*, police are empowered to hold a detainee for up to 24 hours. During that time, police are permitted to persuade the detainee to speak so long as the persuasion is "legitimate." *Oickle* and *Singh* addressed disconcerting police conduct, which pushed the line between persuasion and coercion, but such conduct was endorsed as legitimate by the Court.[135] This suggests that police are permitted to exploit emotions and conscience, as well as family or romantic ties. A confession may be voluntary if the interrogation continues for hours over and above the detainee's protests that they wish to remain silent. Sustained efforts to override the assertion of the right to silence, to obtain a confession "no matter what," are acceptable.[136] 24 hours is a very long time for the detainee to exercise their free choice to withstand these investigative tactics.

3. The Sinclair Decision

In *Sinclair*, the Supreme Court of Canada further constrained the protections available during custodial interrogation. On appeal, the detainee's position was that s. 10(b) gives rise to a duty on the part of the police to hold off from questioning where a detainee asserted the desire to speak with counsel after previously exercising the right. The detainee also contended that s. 10(b) requires police to facilitate requests for counsel's presence during interrogation. The detainee submitted that the plain wording of s. 10(b) did not restrict the right to initial, preliminary consultation, but affords ongoing protection, similar to the *Miranda* rights, which included hold off duties and the right to speak with counsel at any time.[137] The Crown's position on appeal was that s. 10(b) concerns only a specific point in time, not a continuum.[138]

In *Hebert*, Justice McLachlin justified a balancing approach to the right to silence based upon s. 7's internal balancing component. Despite the absence of an internal balancing component contained in s. 10(b), the majority in *Sinclair* applied the balancing approach to the right to counsel. Chief Justice McLachlin and Justice Charron purported to apply a purposive approach to construe s. 10(b), but their analysis hinged on balancing the individual's interests against those of the state. They reasoned that, in defining the contours of s. 10(b) of the *Charter* "consideration must be given not only to the protection of the rights

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135 See Dufraimont, *supra* note 119 at para 40.

136 See Don Stuart, Faculty of Law, Queen's University, Annotation of *R v Singh* 2007 SCC 48, [2007] 3 SCR 405 [Stuart].

137 See *Michigan v Mosley*, 423 US 96 at 103, 96 S Ct 321 (US Sup Ct 1975) [*Michigan v Mosley*].

138 *Sinclair*, *supra* note 5 at para 21.

of the accused but also to the societal interest in the investigation and solving of crimes."[139]

For Chief Justice McLachlin and Justice Charron, the scope of the right to counsel had to strike a balance between the state's interest in law enforcement and the detainee's interest in being left alone.[140] They stated that the purpose of the right to counsel is to provide preliminary advice on the right to silence so that the decision to speak with police is free and informed. Section 10(b) of the *Charter* simply gives the detainee the opportunity to access legal advice relevant to that choice.[141]

Chief Justice McLachlin and Justice Charron held that s. 10(b) is satisfied by a one-time-only consultation with counsel, after which police are free to question the detainee. The detainee is only entitled to exercise s. 10(b) a second time where a reasonably-observable change in circumstances makes re-consultation necessary to fulfill the purpose of s. 10(b) to inform the detainee of the right to silence, such as a change in the jeopardy or where there is reason to believe that the detainee did not understand the initial advice received from counsel.[142] Chief Justice McLachlin and Justice Charron held that s. 10(b) does not afford the right to counsel's presence during interrogation. They reasoned that recognizing protections such as those conferred by American law would upset the proper balance between the respective interests of the state and those of the individual.[143]

Under Chief Justice McLachlin and Justice Charron's approach, it is assumed that the initial legal advice given by counsel was sufficient. A simple request for re-consultation, without more, is not enough to trigger police implementational duties to facilitate the right to counsel and to hold off from investigation. Largely, the police are entitled to assume that their duties have been satisfied following a single consultation, even where the jeopardy is serious and the detainee consulted with counsel for only a few minutes.[144] As noted, re-consultation will only be facilitated where there is some observable change in the circumstances, which is assessed by the interrogating officer himself. This gives rise to the possibility that the right to re-consultation will only be recognized on a *voire dire*. An *ex post facto* acknowledgement of the right does

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139 *Ibid* at para 63.

140 *Ibid*.

141 *Ibid*. at paras 24–25.

142 *Ibid* at paras 50-52, 57.

143 *Ibid* at para 38.

144 See Coughlan & Currie, *supra* note 35 at para 63.

little to provide sufficient protection to the detainee, especially since any inculpatory statement made by the detainee may still be admitted at trial under s. 24(2) of the *Charter*.

The majority's interpretation of the right to counsel gave rise to two dissenting opinions. In his opinion, Justice Binnie noted that the majority's approach disproportionately favoured the interests of the state in the investigation of crime over the rights of the individual.[145] He felt that the majority conflated the right to silence and the right to counsel, thereby resulting in an unduly impoverished view of s. 10(b), which belies the liberal, generous interpretation applied in earlier *Charter* case law.[146] Justice Binnie noted that the right to counsel was intended to ensure fair treatment in the criminal process. The analysis to be applied must consider the integrity of the justice system rather than focusing on the need for short-term results in the interrogation room. Justice Binnie felt that the six minutes of legal advice enjoyed by the detainee in connection with a murder charge could hardly be said to exhaust the right to counsel.[147]

In their separate dissenting opinion, Justices LeBel and Fish stated that the majority's interpretation placed limitations on s. 10(b), which were inconsistent with its purpose.[148] In their view, there was nothing to suggest that the phrase "on arrest or detention" limited s, 10(b) to a single point in time. Read in its entirety, the right signified ongoing entitlement to legal assistance.[149] This was evidenced by the French "*l'assistance d'un avocat*", which is triggered "*en cas d'arrestation*". *L'assistance* connoted a broader role for counsel than simply advising the detainee to "keep quiet" during interrogation. As such, s. 10(b) could not be confined to a single consultation for the sole purpose of informing the detainee to remain silent. Such an interpretation was minimalistic and redundant in terms of the s. 7 right to silence. It suggested that the role of counsel could be achieved by playing for the detainee a recorded message on an answering service, which instructs the detainee to remain silent.[150]

An interpretation of s. 10(b) which conceives of the right in such a way that it could be replaced with a recording undermines the integrity of the right. The role of defence counsel under s. 10(b) should be broader than the majority

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145 *Sinclair*, *supra* note 5 at para 77.
146 *Ibid* at para 84.
147 *Ibid* at para 79, 83.
148 *Ibid* at para 170.
149 *Ibid* at paras 145-47.
150 *Ibid* at para 151.

would have it. The advice given by counsel at the pre-trial stage is crucial; the events surrounding detention determine whether the detainee can be charged, prosecuted, and convicted. By prohibiting the detainee from consulting with counsel at this time, the majority recognizes a new police power of virtually unfettered access for the purposes of seemingly endless interrogation in the name of law enforcement.

The result is that the constitution empowers the police to compel the detainee to speak until a confession is obtained, which undermines the effective exercise of s. 10(b). For Justices LeBell and Fish, to suggest that the right to counsel and its exercise must be interpreted so as to assist the state in securing a conviction "turns the system of criminal justice on its head."[151] In their view, if the effective exercise of the right to counsel truly constitutes a threat to law enforcement such that the two must be reconciled, it is the system of justice, not the right to counsel, which should be openly and honestly questioned.[152]

4. The Culmination of the Balancing Approach

The majority opinion in *Sinclair* represents the culmination of the balancing approach, which displaced the purposive approach as the interpretive tool of choice to analyze the *Charter*'s legal rights in the interrogation trilogy. Since the Supreme Court of Canada handed down the interrogation trilogy, the balancing approach has been applied in the context of arbitrary detention cases under s. 9 of the *Charter* and unlawful search cases under s. 8. In *R v Grant*,[153] Chief Justice McLachlin and Justice Charron stated that the ambit of detention for constitutional purposes is informed by the need to safeguard the individual's choice not to cooperate with the police without impairing effective law enforcement. In *R v Saeed*,[154] Justice Moldaver recognized warrantless penile swabs as a valid search under s. 8 on the grounds that the state's interest in law enforcement outweighs the individual's interest in privacy.

The easy manner with which the Supreme Court of Canada continued to embrace the balancing approach is troubling. Justices LeBel and Fish stated in the *Sinclair* decision that the interrogation trilogy resulted in significant and unacceptable consequences for the constitutional rights triggered upon detention.[155] Justice Binnie expressed that the majority tightened "the noose"

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151 *Ibid* at para 128.

152 *Ibid* at para 204.

153 *Grant, supra* note 28.

154 *R v Saeed* 2016 SCC 24, [2016] 1 SCR 518 [*Saeed*].

155 *Sinclair, supra* note 5 at para 180.

around *Charter* rights such that police are afforded more power over the detainee than the *Charter* actually intended.[156] In the aftermath of the interrogation trilogy, the detainee may be detained, isolated, and interrogated for hours on end, during which time the interrogator may ignore assertions of the right to silence and the right to counsel. Interrogation amounts to an endurance contest, a battle of the wills, in which the police hold all the important legal cards.[157]

The balancing approach is therefore problematic from a theoretical and practical perspective. It violates established constitutional norms and leaves the detainee with diminished protections, which is contrary to the purpose of the *Charter*'s legal rights. This results in an unworkable approach to constitutional interpretation.

VI. THEORETICAL PROBLEMS WITH THE BALANCING APPROACH

From a theoretical perspective, the balancing approach is problematic due to the very act of balancing itself. Giving weight to societal and state interests at the stage of delineating the scope of legal rights, rather than at the later stage of remedial analysis, is contrary to established modes of constitutional analysis.[158]

Balancing interests occurs as a matter of course under ss. 1 and 24 of the *Charter*. This was made clear in the seminal s. 1 decision in *R v Oakes*,[159] as well as the *Grant* decision on s. 24(2). Since the Supreme Court of Canada's decision in *Oakes, supra*, analysis under s 1 has followed a standard form. First, the scope of the right is determined according to its purpose. There is no balancing at the delineation stage. The issue is then whether an infringement of the right is established. If so, the analysis shifts to the remedial stage. At that stage, the issue is whether the infringement can be saved under s. 1 of the *Charter*, which provides that the state may enact *Charter*-infringing laws so long as those laws can be justified in a free and democratic society. The Court in *Oakes* held that an infringing law is justified if the state can prove that: the limit imposed on the right is prescribed by law, the limit supports a pressing and substantial objective, the limit is minimally impairing, and the limit is proportional in that the associated benefits outweigh its costs.

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156 *Ibid* at para 84.

157 *Ibid*.

158 MacDonnell, *supra* note 6 at paras 1, 4.

159 *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

The "prescribed by law" requirement may preclude an application of s. 1 in the context of *Charter* breaches arising during custodial interrogation. A limitation is prescribed by law within the meaning of s. 1 if it is expressly provided by statute or regulation, or otherwise results by necessary implication from the terms of a statute, regulation, or its operating requirements. A prescribed limitation may also result from the application of a common law rule.[160] When police questioning creates a coercive environment or frustrates access to counsel, such actions do not a constitute a limitation prescribed by law. Police have statutory and common law powers, but exerting undue pressure on a detainee to elicit a confession is not an action undertaken in the execution of a statutory or regulatory duty, and it does not result from the application of a common law rule.[161] The justificatory analysis of s. 1 is largely unavailable unless statutory police powers are squarely at issue.[162]

In the context of the *Charter*'s legal rights, the remedial analysis will typically involve application of ss. 24(1)-(2). Section 24(1) of the *Charter* furnishes courts of competent jurisdiction with the discretion to grant such relief "as the court considers appropriate and just in the circumstances." Whether a mistrial should be granted, for example, involves balancing the injustice inflicted upon the accused as a result of the *Charter* breach with the seriousness of the offence and the public's interest in law enforcement.[163] Under s. 24(2), illegally-obtained evidence may be excluded from trial if its admission would bring the administration of justice into disrepute. Pursuant to the decision in *Grant*, the court is required to weigh three factors: the seriousness of the *Charter*-infringing conduct, the impact on the accused's *Charter*-protected interests, and society's interest in adjudication on the merits.[164] The remedial analysis under s. 24 of the *Charter* hinges on balancing the state's interests against those of the individual.

Regardless of whether the remedial analysis occurs by way of ss. 1 or 24, standard *Charter* interpretation reserves balancing interests for the remedial stage. As Justice Wilson noted in her dissenting opinion in *Hebert,* it is inappropriate to qualify a *Charter* right by balancing the interests of the state against it.[165] Imbuing the analysis with societal or state interests imposes an

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160 See *Therens*, *supra* note 23 at para 60.

161 See *Hebert*, *supra* note 76 at para 141

162 See MacDonnell, *supra* note 6 at para 2.

163 *R v Burke*, 2002 SCC 55, [2002] 2 SCR 857 at para 75 [*Burke*].

164 See *Grant*, *supra* note 28 at paras 72-86.

165 See *Hebert*, *supra* note 76 at para 7.

internal limitation on the *Charter* right, which is inconsistent with the very nature of individualistic rights themselves. The *Charter*'s substantive guarantees are simply not designed to protect state and collective interests.[166]

While each *Charter* right must necessarily have an outer boundary, the scope of the right must be considered in light of its purpose.[167] Justice Dickson held in *Big M Drug Mart,* that the purpose of a right must be assessed with a view to the larger objectives of the *Charter* itself as well as the meaning and purpose of other related rights and freedoms.[168] Such related rights and freedoms does not include the state's interest in law enforcement. Under the purposive approach, the case law has consistently held that the purpose of the *Charter*'s legal rights is to acknowledge the vulnerable position of the detainee by limiting the investigative powers of the state to ensure procedural fairness.[169] Importantly, locating the boundary of the *Charter*'s legal rights before the point at which their effective exercise could restrict the state's investigative power substantially undermines the purpose of the *Charter* in its entirety. The state's interests should have no bearing on delineating the scope of the *Charter* right and should be reserved for the remedial analysis.

Adopting an approach to *Charter* interpretation which is contrary to established constitutional theory raises the issue of the court's role. The concern with police powers and law enforcement bespeaks the proposition that there is no need to augment the detainee's rights by applying a generous interpretation in newly emerging factual situations. It underscores the public perception that criminals enjoy too many protections and entitlements, which should not be allowed to hamper the state's search for truth. Lee Stuesser notes that this perception results in legislative inertia; while it is always open to Parliament to provide for greater individual protections, there is no political will to do so. There are simply too few votes to be had in basing a political campaign on protecting the rights of people who come into conflict with the law.[170] Ultimately, getting "tough" on crime is good for politics. Politicians may be content to leave protecting the detainee to the judiciary.[171]

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166 See MacDonnell, *supra* note 6 at paras 4, 36.

167 *Ibid* at para 43.

168 *Big M Drug Mart*, supra note 26 at para 117.

169 See *Sinclair*, *supra* note 5 at para 85.

170 Lee Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002) 29 Man LJ 149 at 149-150 [Stuesser].

171 *Ibid* at 149.

In the early decisions following the entrenchment of the *Charter*, the judiciary embraced this responsibility as the "guardian of constitutional rights", which was a titled coined by Justice Dickson in the decision in *Hunter v Southam Inc*.[172] As Justice Le Dain noted in the *Therens* decision, the *Charter* is not only a new affirmation of protected rights, but an affirmation of judicial power and responsibility by virtue of s. 52 of the *Constitution Act, 1982*.[173] The *Charter* signified a shift from a system of Parliamentary supremacy to constitutional supremacy. The separation of powers mandates the independence of the judiciary from the legislative and executive branches of government, thereby empowering the judiciary to make decisions according to the dictates of the constitution alone.[174] Judicial independence denotes the complete freedom to hear and to decide cases independent of any outside interference or influence, whether arising from another judge, individual, group, or branch of government.[175] This independence is limited only by the requirements of the law and justice.[176]

Under the *Charter*, the judiciary has been assigned an interpretive, remedial role to settle disputes on the meaning of constitutional rights.[177] This includes the authority to determine the limits of state power to ensure that the rights of individual citizens are respected during interactions with the authorities in which the coercive power of the state is brought to bear upon the individual.[178] Application of the balancing approach undermines the Court's proper role as the guardian of *Charter* rights. It implicitly supports, if not bolsters, police powers.[179] Limiting the protection afforded to individuals by constitutional mandate for the sake of law enforcement ultimately amounts to making a policy choice. This blurs the line between judicial and political spheres, which is inconsistent with the court's role as the defender of *Charter* rights.[180] The role of the judiciary is to uphold and affirm the constitution.[181] It is importantly not

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172 *Hunter v Southam, supra* note 31 at para 16.

173 *Therens, supra* note 23 at para 47.

174 See *Vriend v Alberta*, [1998] 1 SCR 493 at para 131, 136, 67 Alta LR (3d) 1 [*Vriend v AB*].

175 *R v Beauregard* [1986] 2 SCR 56, 30 DLR (4th) 481 at para 21 [*Beauregard*].

176 *Mackin v New Brunswick (Minister of Justice)* [2002] 1 SCR 405, 245 NBR (2d) 299 at para 37 [*Mackin*].

177 See *Beauregard*, *supra* note 175 at paras 131-134.

178 See MacDonnell, *supra* note 6 at para 53.

179 *Ibid* at paras 36 & 55.

180 *Ibid* at paras 50 & 55.

181 See *Beauregard*, *supra* note 175 at para 136.

the task of the judiciary to make policy choices which prefer law enforcement over individual rights.

VII. Practical Problems with the Balancing Approach

Under the balancing approach, the expansion of police powers and concomitant restriction of individual rights occurred at the expense of constitutional law theory. The Supreme Court of Canada did not subject the police powers it legitimized in the interrogation trilogy to any concrete justificatory process.[182] No criteria were identified to govern the balancing exercise under this approach.[183] This has a direct impact on the way in which investigations and prosecutions unfold, from preliminary advice to plea bargaining and *Charter* applications. From a practical perspective, the efficacy with which *Charter* rights confers the intended protection to the detainee is suspect.

The power to detain for law enforcement purposes is one of the most invasive powers the state possesses.[184] During detention, the average detainee will tend to perceive a police direction or question as a demand mandating compliance.[185] The fact that a command or line of questioning is not justified in law does not make it any less of an imperative in the eyes of the detainee.[186] The detainee is likely to err on the side of caution by acting in a manner so as to comply with the police's wishes.[187]

This problem is compounded when the detainee is disenfranchised person or a member of a marginalized group. Visible minorities are at a particular risk of police intervention.[188] Aboriginal and Black Canadians are placed under the microscope of police surveillance and are subjected to interactions with the police at disproportionality higher rates than members of other racial groups.[189] Unfortunately, state intrusion in the name of law enforcement is not always

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182 See *Sinclair*, *supra* note 5 at para 191.

183 See MacDonnell, *supra* note 6 at para 54.

184 See A Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L J 329 at 329 [Young].

185 See *Grant*, *supra* note 30 at para 171.

186 See *Suberu*, *supra* note 46 at para 61.

187 *Ibid* at para 57.

188 See *Grant*, *supra* note 28 at para 154.

189 See David M Tanovich "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall LJ 145 at 162 [Tanovich].

undertaken to foster the search for truth. It can be used as a tool to exert social control of marginalized groups.[190]

In the aftermath of the interrogation trilogy, the courts have stated in their reasons that detention and interrogation are inherently coercive.[191] However, the perceived need to safeguard investigative powers suggests an implicit unwillingness to recognize fully the disadvantaged position of the individual from a practical perspective. This is not only contrary to the purpose of the *Charter*'s legal rights, but irreconcilable with the need to recognize *Charter* values of dignity and autonomy when interpreting legal rights.

Charter values, such dignity and autonomy, resound with Lockean notions of liberalism.[192] The individual is not simply a vehicle through which to obtain evidence. Defining the right to silence as the choice to speak is premised on the proposition that individuals are free, equal, and autonomous. If the detainee is weak-willed and succumbs to the temptation to answer police questions, that is their right and their problem. In *Sinclair,* the majority associated the free choice to speak with power over the interrogation process. Insofar as the detainee has the right to decide to speak by answering questions put to them, the majority felt that the detainee was vested with "ultimate control over the interrogation."[193]

This does not align with reality. It cannot be said that the accused in *Singh,* who invoked the right to silence 18 times and asked repeatedly to be returned to his cell exerted ultimate control over the interrogation process. He was under the control of the state and was not free to leave. The only way in which the detainee in *Singh* could have controlled the process was to bring about its end by making an inculpatory statement. The reality of custodial detention is that, if the detainee's autonomy is to be preserved and respected during interrogation so as to safeguard the risk against self-incrimination, which is s. 10(b)'s over-arching purpose, procedural protections must be amplified, not limited.

Insofar as the balancing approach affords restricted protections, it cannot be said that the detainee has any power to control the interrogation process unless they truly understand the nature of their rights and the scope of police power. The detainee is unlikely to be legally trained, and they are unlikely to be a resilient, sophisticated opponent for the police, who is capable of

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190 Young, *supra* note 184 at 333.

191 See e.g. reasons in *Grant, supra* note 28, and *Suberu, supra* note 44.

192 Young, *supra* note 184 at 343.

193 *Sinclair, supra* note 5 at para 58.

confidently and effectively exercising their rights. In *Evans, supra*, the detainee spoke with his brother via telephone during custodial detention and was asked if he knew about his rights. The detainee responded by mimicking the *Miranda* rights caution and added "I watch TV, man, I know what's going on."[194] This distorted understanding of the right to counsel is not an isolated phenomenon. The very fact that s. 10(b) was interpreted to furnish the detainee with information on that right recognizes that the average person cannot be expected to know their *Charter* rights, the scope and nature of the protections afforded under the *Charter,* or the scope of legitimate police power.

Experimental studies demonstrate that it is rare for a detainee to understand their rights when those rights are read to them. A study[195] conducted by three forensic psychologists examined 126 police interviews of adult suspects, which were obtained from police organizations in Atlantic Canada between 1995—2009. The *Charter* cards used in the interviews remained unchanged over the time period explored in the study.[196] The study determined that information on the right to silence was missed or read incorrectly in 4.5% of the interviews. Nearly 98% of the detainees responded affirmatively when asked if they understood their right to silence.[197] In approximately 24% of the interviews, information on the right to counsel was missed or stated incorrectly. Only 52% of the detainees were asked if they understood the right to counsel, and 94% of those detainees responded affirmatively.[198] Very few attempts were made by police to explain the rights contained in each caution.[199]

The authors of the study determined that the average rate of speed at which the *Charter* cards were read exceeded rates allowing for adequate comprehension. The authors noted that there is a rapid decrease in comprehension on the part of the listener when the speaker's rate of speech exceeds 200 words per minute. In the study, 65% of the cautions on the right to silence exceeded that benchmark by a rate of 31%. In 32% of interviews, information on the right to counsel was delivered at a rate that was 2% faster

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194 *Evans, supra* note 45 at para 18.

195 Brent Snook, Joseph Eastwood & Sarah MacDonald, "A Descriptive Analysis of How Canadian Police Officers Administer the Right to Silence and the Right to Legal Counsel Cautions" (2010) 52:5 CJCCJ 545 [Snook, Eastwood & MacDonald].

196 *Ibid* at 549.

197 *Ibid* at 552.

198 *Ibid* at 553.

199 *Ibid* at 554.

than that benchmark. This suggests that a significant number in the sample struggled to understand their legal rights, despite their own claims of comprehension.[200]

This is consistent with controlled, experimental studies in which individuals claim comprehension regarding legal rights when comprehension is in fact low.[201] The authors pointed to an experiment in which only 4% of a sample understood the right to silence when the right was read. Only 7% of the sample understood the right to counsel. Another study conducted in 2002 found that none of the participants in its sample demonstrated full comprehension of the content of police cautions, yet 96% of the sample claimed to understand.[202]

Insofar as comprehension of rights is low in controlled settings, it is reasonable to conclude that comprehension levels are equally low or lower during real police interviews. The authors of the study noted that comprehension becomes increasingly difficult during interrogation due to the stressful environment. Moreover, detainees have low literacy levels and high rates of cognitive impairments compared to the general population.[203] This suggests that detainees may struggle to understand their *Charter* rights even when police cautions are administered at an acceptable rate.

The problem of low comprehension is compounded by high levels of acquiescence. The authors of the study noted that acquiescence, despite a lack of comprehension, can result from a desire on the part of the detainee to take the path of least resistance. Acquiescence in general occurs more frequently where the individual has poor intellectual functioning and faces uncertain situations. Admitting a lack of comprehension may lead to an unpredictable and undesirable outcome, such as feelings of embarrassment, police frustration, or a lengthier process. By asserting comprehension, the detainee feels that they are providing the police with the response they desire, and cooperation is believed to expedite the process and even to provide a better outcome overall.[204]

A superficial understanding of *Charter* rights paired with a willingness to assert comprehension is problematic given the restrictive interpretation the balancing approach gives to the right to counsel and the right to silence. If the

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200 *Ibid* at 555.
201 *Ibid* at 555-556.
202 *Ibid*.
203 *Ibid* at 555.
204 *Ibid* at 556.

detainee acquiesces when they do not truly understand, the detainee may fail to avail themselves of the right to counsel or the right to silence. It cannot be said that this choice is made in a way which protects against self-incrimination or supports *Charter* values like dignity and autonomy.

The detainee will be hard-pressed to prove on a *Charter* application that their rights were violated. They will be unable to prove that they requested an opportunity to consult with counsel, but were denied the opportunity. The detainee will be found not to have been reasonably diligent in exercising s 10(b), which results in a loss of that right altogether. If the detainee consults with counsel and affirms their understanding and satisfaction when they are in fact confused or uncertain, the detainee is precluded from a second consultation. It is at the discretion of the police.

This seriously impairs the detainee's ability to decide how they will participate in the investigation process. Even under the balancing approach, this is exactly what the right to silence purports to protect. This results in a gap between the state of the law as enunciated by the Supreme Court of Canada and the practical effects of its application.[205]

VII. CONCLUSION

This paper has discussed differing approaches to the interpretation of the *Charter*'s legal rights to explore the problems inherent in adopting a balancing exercise to delineate the scope of constitutional rights. A balancing approach to the interpretation of the *Charter*'s legal rights is theoretically problematic and results in impoverished rights, which offers insufficient protection to the principle against self-incrimination.

The primary concern animating the balancing approach is the perceived need to reconcile state and individual interests, which are diametrically-opposed. By delineating the scope of *Charter* rights in a manner which gives meaning to state interests, the balancing approach bolsters police investigative powers while restricting the protections available to the detainee. This tips the scale in favour of the state.

Under the balancing approach, the right to counsel is exhausted by a single phone call, which may be waived inadvertently without any appreciation of the consequences of waiving a constitutional right. Moreover, the right to silence under the balancing approach cannot be effectively exercised. The

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[205] Tanovich, *supra* note 189 at 177.

interrogation trilogy created a state of affairs whereby detention and interrogation amount to an endurance contest in which the police invariably possess the upper hand. The state's interest in detaining and questioning the detainee relentlessly and aggressively in order to secure a conviction "no matter what" simply cannot be reconciled with the individual's interest in being free from governmental interference.

From a theoretical perspective, the balancing approach departs from the standard mode of interpretation by giving weight to the state's interest in law enforcement at the delineation stage of the analysis. This undermines the proper role of the courts as well as the very purpose of the *Charter*'s legal rights themselves. Under the balancing approach, the Court conceives of the detainee's primary concern as the interest in being left alone. This is minimalistic in terms of the overarching purpose of s. 10(b) particularly, which is to protect against self-incrimination. Insofar as the purpose of the *Charter*'s legal rights in their entirety is to limit the state's law enforcement powers to secure fairness in the process, this necessarily precludes consideration of the state's interest in law enforcement when assessing the scope of the right. Under the purposive approach, this allows the police more investigative powers than the drafters of the *Charter* intended.

Despite the fact that s. 7 of the *Charter* contains its own internal balancing mechanism, balancing state interests against individual interests is not appropriate when assessing the scope of a constitutional right. Justice Lamer noted in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* that principles of fundamental justice do not lie in the realm of public interest, but within the inherent domain of the judiciary as the guardian of the constitution. The principle of against self-incrimination has been recognized as a principle of fundamental justice within s. 7 of the *Charter*. In the decision in *R v P(MB)*,[206] the Supreme Court of Canada reaffirmed that the accused cannot be forced to assist the state in making out the Crown's case. It is a principle of fundamental justice that it is up to the state to investigate and prove the charge, and the detainee cannot be "conscripted into helping the state fulfill this task."[207]

Under the balancing approach, the state is empowered to treat the detainee as a resource to be exploited for the purposes of law enforcement, and repeated invocations of the right to silence may go unacknowledged. The detainee is powerless to exercise their rights in an effective manner, which suggests that

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206 *R v P(MB)* [1994] 1 SCR 555, 89 CCC (3d) 289 [*P(MB)*].

207 *Ibid* at paras 38, 41.

Charter rights count for little and are meaningless. Empowering the police to negate the detainee's choice to remain silent is not consistent with the principles of fundamental justice. This raises the issue of the constitutionality of the interpretation of the right to silence coming out of the interrogation trilogy.

While all *Charter* rights are not absolute and must necessarily have limits and outer boundaries, the proper approach is to determine the boundary in light of the right's purpose and the interests it is intended to protect. As Justice Binnie noted in his dissenting opinion in *Sinclair*, the focus cannot be the need for short-term results in the interrogation room. As noted, Justice Dickson held in *Big M Drug Mart* that the purpose of a *Charter* right must be assessed with a view to the *Charter*'s larger objectives as well as the meaning and purpose of other related rights and freedoms. Importantly, this does not include the state's interest in law enforcement.

The state's interests in law enforcement and the collective interest in the search for truth must be reserved for the remedial analysis. This gives full effect to the interests that the *Charter*'s legal rights are intended to serve. The balancing approach should be abandoned in favour of a return to the purposive approach.