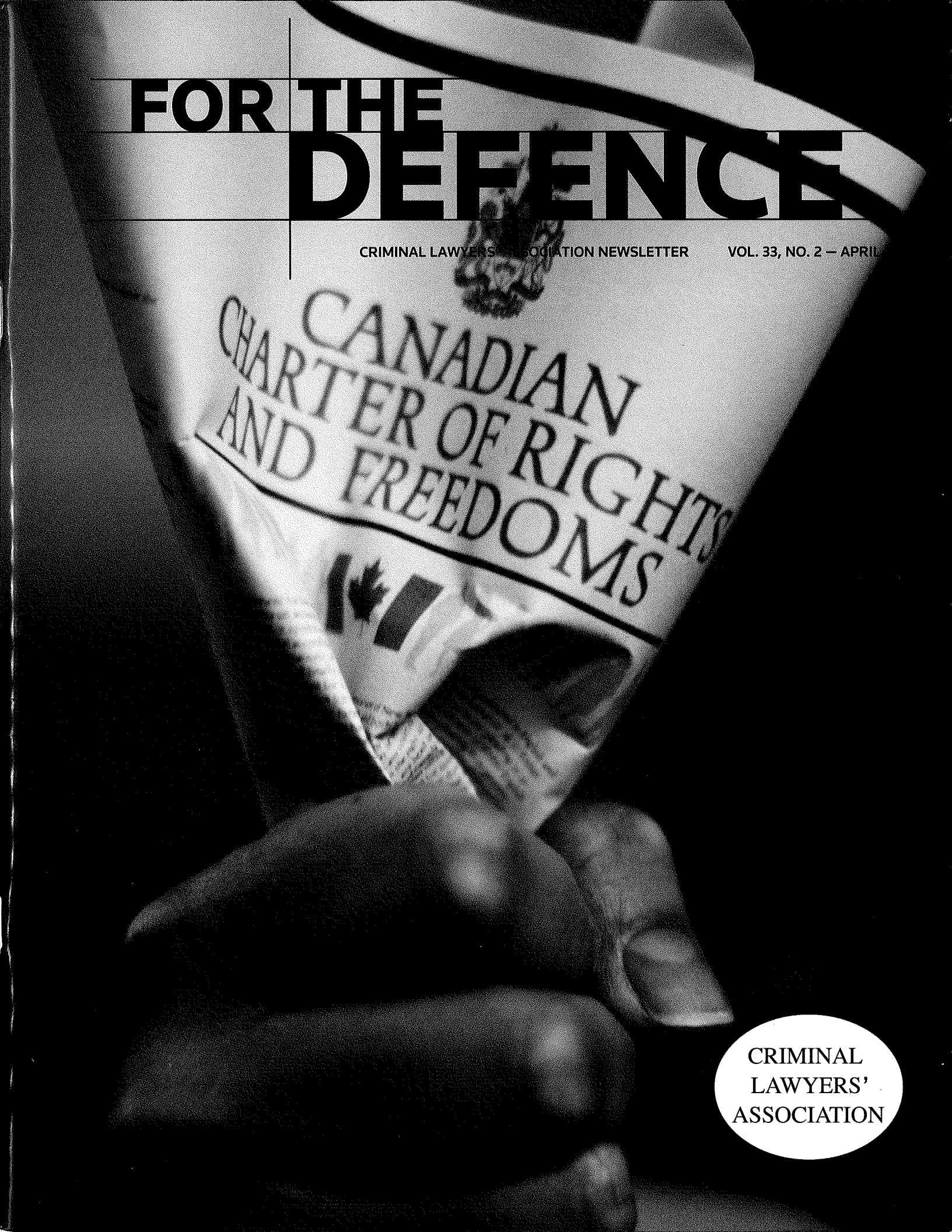
FOR THE DEFENCE

CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER VOL. 33, NO. 2 — APRIL



CRIMINAL LAWYERS' ASSOCIATION

Charter Case of the Decade: *R. v Sinclair*

by Scott C. Hutchison[1]

In 1927 the editors of *Time* magazine came up with the idea of the "Man of the Year" (later updated to "Person of the Year") to generate some filler to deal with a slow news week. It was not intended originally to be something done every year, but soon became an institution. As the annual designation took hold the editors quickly moved to establish and formalize their criteria for selection: they decided that the title would go to the person "who for better or for worse, ... has done the most to influence the events of the year."[2]

It is to be noted that being picked a person of the year was by no means intended as an endorsement of the person selected. In the intervening years many historical *villains* have made their way onto the cover of the magazine as person of the year. For example, the Ayatollah Khomenhi was picked in 1979.[3] Joseph Stalin was selected—twice.[4] Osama Bin Laden lost out only narrowly to George Bush for 2001.

The creator of Facebook was named in 2010.

It is in this spirit that I have approached this particular task of "list making." In recognition of the 30th anniversary of the *Charter,* the editors of *For the Defence* have asked for the most important *Charter* case of the first decade of the 21st century. I have taken the liberty of modifying that request to ask, as the editors of *Time* might, "What is the Charter case that *for better or worse* has done the most to influence the practice of criminal in the last decade?"

To qualify for such an "honour" the case must be significant because it changed or clarified the law in a way that matters. It must impact on a range of cases or the practice of criminal law generally. Esoteric developments, how-

Standing alone, like an exclamation point at the end of a sentence that begins with *Oickle* and continues with *Singh*, we find the decision of the Supreme Court of Canada in *Sinclair*, my nomination as the case of the decade.

ever significant to their special areas, will not be worthy.

I will confess, that I was originally tempted to adopt *R. v. Singh*.[5] The case is without a doubt a disaster for rights of presumptively innocent people subjected to extended police interrogation. Since just about everyone who ends up charged with anything serious gets interrogated, it is obvious that the case has the potential to have an impact on a range of cases. It is a tempting candidate for this particular contest.

Perhaps *Oickle*[6] is the case which this decennial honour for its "development" of the law related to interrogations.

But as bad as those cases were, they were merely a precursors, appetizers, for the case which truly deserves to be labelled the case of the decade. Standing alone, like an exclamation point at the end of a sentence that begins with *Oickle* and continues with *Singh*, we find the decision of the Supreme Court of Canada in *Sinclair*,[7] my nomination as the case of the decade. That case stands for the proposition that save in very narrow (and arguably arbitrary) situations, a citizen subjected to custodial interrogation has no right to speak to a lawyer after their initial, usually very brief, consultation.

Let me be clear, I carry no grudge against judges responsible for the court's decision in that case, but I say with all due respect that I believe that the case was wrongly decided. The holding there, when coupled with the Court's holdings in *Oickle* and *Singh*, profoundly alters the relationship between the state and the citizen in this country. Those three cases form what one author has called a legal "iron triangle" for detainees in this country.[8]

In this context, while I consider *Sinclair* to be a "villain" in the constellation of cases decided in the last ten years, I believe it to be villain of such deserved infamy that it warrants the title of the case of the decade.

The facts of *Sinclair* have been rehearsed many times and are hardly surprising to any experienced criminal law practitioner: Mr. Sinclair was arrested for the murder of an acquaintance. He was given the common law and s.10(b) cautions in the usual language by the police. After booking he invoked the right and spoke by telephone to a lawyer for all of three minutes. Later, after a time in the cells, he spoke by telephone with the same lawyer for another three minutes, for a total of 360 seconds of legal advice. Six minutes.

Armed now with his presumptively comprehensive knowledge of his common law and constitutional legal rights as a detainee and instructed on how to deal with a highly trained and skilled investigator, he entered the lion's den of the interrogation room.

There the police did exactly what they are trained to do: they did everything in their power to wear down his decision to exercise his right to remain silent. We know from *Oickle* and *Singh* that they are permitted continue the interrogation for hours and hours over his protests that he did not wish to

speak. They are permitted to reveal selectively the evidence they have. They are permitted to exaggerate or even lie about the evidence they have; they can say they have DNA evidence when they don't (as they did here). They could have, had they wished, implicated the interests of those close to him to suggest he should speak. They repeatedly told him his position in the investigation was hopeless and that he should confess.

Again, it will surprise no one to hear that Mr. Sinclair, armed with all of his 360 seconds of legal advice, eventually sought a chance to consult again with his lawyer so that he might have some advice and assistance on how to deal with this developing situation. Indeed, he repeatedly indicated his desire to speak to his lawyer. Five times he asked for a chance to consult counsel and five times he was told "no"; he was on his own, in it for the duration, and it was up to him, as an autonomous, self-actualized person to decide whether to speak or not.

The *Oickle/Singh/Sinclair* iron triangle creates a doctrinal game of rock-paper-scissors in which voluntariness is watered down by the right to silence; the right to silence is diluted because of the right to counsel, which in turn can be minimized because of the voluntariness rule.

To be clear, it was not suggested that Mr. Sinclair was seeking to consult with counsel to obstruct the interrogation nor was he being unreasonable. His request was based on the unfolding new information (some of which was fabricated) that was being presented to him by the police. While the formal charge he faced had not changed, the nature of the case he faced was not the same as the one that he understood at the start of his *five hour* interrogation by the police.

The majority of the Supreme Court of Canada found that Sinclair had no right to speak to a lawyer after his initial consultation six minutes of advice. There was, they said, a body of non-binding precedent that was against such a proposition, and policy argued against such a rule.

And so with *Sinclair* the law governing custodial interrogation is now perfected for the police:

> *Oickle* sets down that police can use a number of techniques during an interview calculated to overcome detainee's desire to exercise his constitutional rights, including deceit;
>
> *Singh* says that the assertion of the right does not prevent police from repeatedly questioning, for hours and hours and hours in the face of repeated assertions of right to remain silent;
>
> Now *Sinclair* says your right to consult with counsel is exhausted after the initial consultation which will take place when all you are entitled to know is (a) that you have been detained and (b) the basic transaction alleged as the reason for the detention.
>
> . . . .

The *Oickle/Singh/Sinclair* iron triangle creates a doctrinal game of rock-paper-scissors in which voluntariness is watered down by the right to silence; the right to silence is diluted because of the right to counsel, which in turn can be minimized because of the voluntariness rule. The cumulative effect of this body of law, crystallized and confirmed in *Sinclair*, is an interrogation regime that, as Justice Binnie observed[9] turns police questioning into an endurance test in which the police enjoy virtually every advantage.

What are we afraid of? Are we afraid that people might actually manage to successfully exercise their rights if they really understood what those rights are and were fortified by counsel's advice that those rights actually are supposed to mean something?

In the United States of America, that great conviction factory to the south, they have had a rule allowing detainees to consult their attorney at any time during an interrogation for more than 45 years.[10] The country that gave us Guantanamo Bay and legalized water-boarding has managed to operate a very efficient criminal justice system while still letting people talk to lawyers.[11]

Individual rights always *cost* something. Having a constitution worth the paper it is written upon *costs* something. Treating detainees fairly and respectfully and honouring their rights *costs* something. Choosing to be a country where those things are respected and protected by the courts *costs* something. *Sinclair* confirms that in the world of custodial interrogation, we are not yet prepared to pay what it costs to have these limits on what the police can do.

I have offered *Sinclair* as the case of the decade more in sadness then in celebration. I offer it not because I agree with the decision, not because of what is says about who we are as a country, but because of what I fear it says about the country we are choosing to become.

Scott Hutchison is a partner at Stockwoods LLP where he carries on a criminal, civil and public law practice.

NOTES:

[1] Stockwoods LLP, Toronto, Ontario (scotth@stockwoods.ca)

[2] See generally wikipedia.org/wiki/Time_Magazine_Person_of_the_Year (accessed March 5, 2012).

[3] The various "winners" of the title of "person of the year" are recounted at www.time.com.

[4] Stalin was person of the year in 1939 for his sinister secret treaty with Germany. He was person of the year again in 1941, by then as America's ally against Germany.

[5] *R. v. Singh*, 2007 CarswellBC 2588, 2007 CarswellBC 2589, [2007] 3 S.C.R. 405, [2008] 1 W.W.R. 191, 51 C.R. (6th) 199, 73 B.C.L.R. (4th) 1, 249 B.C.A.C. 1 (S.C.C.).

[6] *R. v. Oickle*, 2000 CarswellNS 257, 2000 CarswellNS 258, [2000] 2 S.C.R. 3, 36 C.R. (5th) 129 (S.C.C.).

[7] *R. v. Sinclair*, 2010 SCC 35, 2010 CarswellBC 2664, 2010 CarswellBC 2679, [2010] 2 S.C.R. 310, 77 C.R. (6th) 203 (S.C.C.).

[8] Achoneftos, L., "A New Iron Triangle (*Oickle, Singh & Sinclair*): Limiting Rights during Police Interrogation" at www.thecourt.ca (www.thecourt.ca/2010/11/10/a-new-iron-triangle-oickle-singh-sinclair-limiting-rights-during-police-interrogation/) accessed March 4, 2012.

[9] *Sinclair, supra* note 5, at para. 89-90:

> [89] The Crown seems to conceive of the police interrogation as an endurance contest between the detainee, who starts off with the benefit of the standard police warning and generic advice from his or her lawyer (presumably to refuse to cooperate — what else can the lawyer advise at that outset?) and, on the other hand, an experienced police interrogator who wants to cajole and maneuver and wear down the detainee into making incriminating statements and, if possible, a full confession.
>
> [90] It bears repeating that persons detained or arrested may be quite innocent of what is being alleged against them. . .

[10] *Miranda v. Arizona*, 10 A.L.R.3d 974, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (U.S. Sup. Ct.).

[11] S. J. Schulhofer, "*Miranda's* Practical Effect: Substantial Benefits and Vanishingly Small Social Costs" (1996), 90 Nw. U. L. Rev. 500.