

The Accused's Right to Silence: No Doesn't Mean No

LEE STUESSER*

I. INTRODUCTION

WE ARE IN A PERIOD OF *CHARTER* INERTIA. By that I mean we place too much faith in the *Charter of Rights and Freedoms* to protect our individual rights and consequently, there is no perceived need to augment those rights. In fact, I would suggest that the perception, widely held by politicians and the public alike, is that accused persons have too many rights under the *Charter*. The result is legislative inertia.

The political reality is that there are few votes to be had in protecting the rights of accused persons. It is not the politically wise stance to take in these times when the prevailing concern is that of increasing security. Getting "tough on crime" is good politics. Our ministers of justice always seem to be at the ready to complain when an accused supposedly "gets off" on a "technicality" or is released on bail.¹ These same ministers stand mute when it comes to defending laws that protect those charged—that protect us all.

The politicians are content to leave protecting the accused to the courts. Let the courts make the unpopular decisions. The politicians are then free to complain, to blame, and, if need be, to pass reactive legislation. For example, after the Supreme Court of Canada, in *R. v. Seaboyer*,² struck down as uncon-

* Professor of Law, University of Manitoba.

¹ For example, the Federal Minister of Justice, Anne McLellan, ordered a review of the law respecting cross-examination of accused persons on their prior convictions, in the wake of the uproar over the case of Francis Carl Roy. Roy was charged with raping and killing 11-year-old Alison Parrott. The jury did not know that he had two other prior convictions for sexual assault. See the *National Post* (16 April 1999). The Manitoba Minister of Justice, Vic Toews, complained when four suspects charged with a series of gang rapes were released on bail. See the *Winnipeg Free Press* (13 August 1998) at A3. In both these examples the decisions of the courts followed existing law, which was intended to protect accused persons from precisely the type of hysteria fueled by the comments of the ministers involved.

² (1991), 66 C.C.C. (3d) 321 (S.C.C.) [hereinafter *Seaboyer*].

stitutional s. 276 of the *Criminal Code*,³ the old "rape shield" law, Parliament immediately enacted a new s. 276; after the Supreme Court of Canada, in *R. v. O'Connor*,⁴ ruled that third party records in sexual assault cases may have to be produced to the accused, Parliament enacted ss. 278.1 to 278.91, which makes it very difficult for an accused to access such records; and after the Supreme Court of Canada, in *R. v. Daviault*,⁵ recognised the defence of extreme intoxication, Parliament enacted s. 33.1, which effectively removed the defence for crimes of violence. In each of these examples, the legislation was designed to give greater protections to complainants, witnesses, and victims. By way of contrast, when the Supreme Court of Canada created a judicial scheme for Crown disclosure in *R. v. Stinchcombe*,⁶ Parliament did not follow with legislation to codify the law. Obviously, our Parliamentarians did not view codifying disclosure to the defence of relevant information in the possession of the Crown as a pressing need.

The legal reality, however, is that the *Charter* provides minimal and not optimal rights.⁷ It is always open to Parliament to provide greater protections. What is lacking is the political will. This article will concentrate on the right to remain silent in Canadian law. It will show that this right provides minimal and inadequate protection for accused persons. The focus will be on custodial interrogations. In these situations, accused are in the control of the state, are most vulnerable to coercion, and are in the most need of protection. The sad reality is that in the almost twenty years that have passed since the proclamation of the *Charter* Canada has fallen behind other common law countries in protecting accused persons from improper custodial interrogation.

II. DEFINING THE RIGHT TO SILENCE

THE RIGHT TO SILENCE UNDER S. 7 OF THE CHARTER "confers on the detained person the right to choose whether to speak to the authorities or to remain silent."⁸ Should the detained person choose to remain silent, that fact is not admissible against that person by the state.⁹

³ R.S.C. 1985, c. C-46.

⁴ (1995), 103 C.C.C. (3d) 1 (S.C.C.).

⁵ (1994), 93 C.C.C. (3d) 21 (S.C.C.).

⁶ (1991), 8 C.R. (4th) 277 (S.C.C.) [hereinafter *Stinchcombe*].

⁷ See *R. v. Kuldip et al.* (1990), 61 C.C.C. (3d) 385 at 400 (S.C.C.).

⁸ *R. v. Hebert* (1990), 77 C.R. (3d) 145 at 182 (S.C.C.) [hereinafter *Hebert*].

⁹ See *R. v. Chambers* (1990), 80 C.R. (3d) 235 (S.C.C.). It should be noted that in a joint trial an accused might be cross-examined by a co-accused about remaining silent. See *R. v. Crawford (sub nom. R. v. Creighton)* (1995), 37 C.R. (4th) 197 at 213 (S.C.C.).

The accused's choice should be an informed one. To this end, the right to silence under s. 7 of the *Charter* is intertwined with the right to consult counsel under s. 10(b) of the *Charter*. It is assumed that counsel will inform the accused of the right to remain silent. Madam Justice McLachlin (as she then was) explained the relationship between the right to counsel and the right to silence in the following terms:

The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.¹⁰

Our law places a premium on informing those persons arrested or detained of their right to counsel. Section 10(b) is simply phrased: "Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." In the beginning, the caution with respect to the right to counsel was equally simple. In 1982 an accused was told simply: "It is my duty to inform you that you have the right to retain and instruct counsel without delay."¹¹

However, in order to give full understanding of the right to retain and instruct counsel additional "informational" duties are placed on the police.¹² The police must advise the detained person of the availability of legal aid and duty counsel and they must advise the accused how those counsel can be contacted. The present right to counsel caution is far more detailed than it was in 1982 and reads along these lines:

You have the right to retain and instruct counsel in private without delay. This means that before we proceed with our investigation you may call a lawyer. You may call any lawyer you wish or get free legal advice from duty counsel immediately. If you want to call duty counsel we will provide you with a telephone and telephone numbers. If you wish to contact any other lawyer a telephone and a telephone book will be provided. If you are charged with an offence you may also apply to Legal Aid for assistance. Do you understand?¹³

Besides fully informing the accused of the availability of counsel, the police also have "implemental" duties. One of the main purposes of s. 10(b) is to facili-

¹⁰ *Hebert*, *supra* note 8 at 183.

¹¹ Taken from *R. v. Manninen* (1987), 58 C.R. (3d) 97 (S.C.C.) [hereinafter *Manninen*].

¹² See e.g. *R. v. Bartle* (1994), 33 C.R. (4th) 1 (S.C.C.); *R. v. Brydges* (1990), 53 C.C.C. (3d) 330 (S.C.C.).

¹³ Taken from *R. v. Genaille* (1997), 116 C.C.C. (3d) 459 (Man. C.A.). This caution is used by the Winnipeg Police Service.

tate contact with counsel. Once the accused has indicated a desire to consult counsel the police are obliged to provide a reasonable opportunity to do so and provide privacy for that consultation. Most importantly, once the accused indicates a desire to consult counsel the police are to cease questioning or otherwise attempting to elicit evidence from the accused until the consultation with counsel has occurred.

Do the police have a corresponding duty to inform the accused of his right to remain silent? As a matter of common practice, they caution the accused along these lines: You are not bound to say anything but, anything you do say may/will be taken down in writing and may be used as evidence. Do you understand? But is this caution required by law?

Under common law, the fact that a warning is not given is a factor to consider in determining the voluntariness of any confession, but it is not regarded as a fatal defect.¹⁴ In other words, although a warning is desirable it is not required. Has this changed under the *Charter*? Perhaps. The British Columbia Court of Appeal made this tentative observation:

The jurisprudence has not yet developed to the extent that it can be said with assurance that in every case, and under all circumstances before detained persons are questioned by police officers they must be advised they have the right to remain silent.¹⁵

What then are the circumstances where a caution is required? The fundamental principle underlying the right to silence is freedom of choice. Presumably that imports a recognition that the choice must be an informed one. In circumstances where an accused exercises the right to consult counsel we can infer that the accused is now informed of the right to remain silent. It is presumed that counsel will inform the accused to "keep his mouth shut."¹⁶ Therefore, as in *Hebert*, where the accused has consulted with counsel we may not require an express caution. On the other hand there is arguably a greater need to inform those accused who do not consult counsel. Keep in mind that the essence of the right to silence is free and informed choice.¹⁷

Professor Quigley in his text on criminal procedure argues that the police should be under a duty to inform a suspect of the right to remain silent. He writes:

It is anomalous that the Supreme Court has repeatedly indicated the purpose behind the right to counsel under section 10(b) is for the accused to learn from counsel of the right to silence, without at the same time ensuring that the latter right is known to all

¹⁴ *R. v. Boudreau* (1949), 94 C.C.C. 1 (S.C.C.).

¹⁵ *R. v. Williams* (1992), 15 C.R. (4th) 383 at 403 (B.C. C.A.).

¹⁶ This was the advice given to the accused by his counsel in *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 (S.C.C.). In *Hebert*, *supra* note 8 at 188, McLachlin J. wrote, "Presumably, counsel will inform the accused of the right to remain silent."

¹⁷ See the comments of Lamer C.J.C. in *R. v. Jones* (1994), 30 C.R. (4th) 1 at 44 (S.C.C.).

accused. The duty would not be an onerous one for police, particularly since they already follow the practice of giving a caution designed to the same end but not nearly so clear in its terms. ...To place a more comprehensive duty on police, the only changes required would be to the form of the caution to adequately convey that silence is a right and to make its administration mandatory whenever the coercive power of the state has been brought to bear on a person.¹⁸

One reason that this issue has not been addressed directly by the courts is that, as Professor Quigley notes, the police already follow the practice of giving a "caution" about making a statement. The "police caution"—as noted above—is given as a matter of course along with the right to counsel. The issue then is largely moot. But Professor Quigley does make the point that a "caution" is not the same thing as a "right." It is fair to say that having a "right to silence," would instil in the accused a greater awareness that statements need not be made to the police. A "caution" informs accused that they need not speak and of the consequences of so doing, but it does not carry the same power or weight as affirming a "right" to remain silent. Ours is a rights based society. We understand what a right means. We speak in terms of rights. As the law now stands, the accused has the right to retain and instruct counsel, and "advice" with respect to the choice to speak. It would be a small, but important step to inform the accused of the right to remain silent. The current caution is too tied to the common law wording.

In the United States the portion of the *Miranda* warning on the right to remain silent is simple and provides a better model that captures the affirmation of a right. It reads:

Before we ask you any questions, you must understand:
You have the right to remain silent.
Anything you say can be used against you in court.
Do you understand?¹⁹

True, the use of the word "right" may instil more resilience in the accused to resist the persuasions of the police, but this should not be regarded as a bad thing, rather it simply goes to ensure that the accused is making a truly informed choice to speak.

III. RELIANCE ON THE INITIAL WARNING

CANADIAN LAW PLACES GREAT FAITH IN THE INITIAL caution as to the right to counsel and any resulting consultation. As we have seen, our law is careful to

¹⁸ T. Quigley, *Procedure in Canadian Criminal Law* (Scarborough: Carswell, 1997) at 136.

¹⁹ *Miranda v. Arizona* (1966), 384 U.S 436 [hereinafter *Miranda*]. This caution is taken from the card carried by agents of the Drug Enforcement Administration, "Crime, Punishment and the Passions of Miranda" *The New York Times* (16 April 2000) 4:1.

insure that the accused is properly informed of the right to retain and instruct counsel. What follows after counsel leaves?

The case of *R. v. Greig*²⁰ is a good starting point. The accused was charged with second degree murder. The victim was a security guard on a construction site, who appeared to have been killed in the course of a theft at the site. The accused was arrested, charged and cautioned, and placed in a detention centre. Three days after his arrest he was interviewed by two officers new to the investigation. At their request the accused was brought to an interview room "to clear up some discrepancies," as one of the officers put it. When the accused first entered the room he told the officers that he did not wish to say anything and had been advised not to do so by his lawyer. Nevertheless one of the officers proceeded to read the accused's statement to see if that is what really happened. The officer cautioned the accused that the second officer would be writing down everything and that it could be used as evidence, "so you need not say anything if you don't want to." The accused responded by again stating that he did not want to say anything. The accused was not advised of his right to counsel, as the officers were of the view that he had already been properly charged and cautioned. The officers then commenced reading his statement and after fifteen minutes the accused said, "I don't care, man, what my lawyer says, I want to clear myself." He then proceeded to make statements that the Crown was now seeking to use against him.

The trial judge, Justice DuPont, excluded these inculpatory statements on two bases. First, under s. 10(b) Justice DuPont found that the police had interfered with the accused's right to counsel. "Once the accused had retained counsel to the knowledge of the police officers, it was not open to them to deal with him as if he had not done so."²¹ Justice DuPont then went on to conclude:

Should police wish to interrogate the accused who to the knowledge of the police has retained counsel, they should provide counsel with reasonable notice of their intention to do so. This would permit the lawyer to either attend the interview and/or properly advise his client prior thereto.²²

Justice DuPont was clearly imposing a continued right to counsel. Secondly, the police were found to have infringed the accused's right to remain silent when they ignored on two occasions the accused's stated intent not to say anything.

²⁰ (1987), 56 C.R. (3d) 229 (Ont. S.C.).

²¹ *Ibid.* at 236.

²² *Ibid.* at 237.

Let us examine the two propositions put forth in *Greig* concerning the right to silence:

1. An accused person has the continued right to have counsel present during police questioning; and
2. Once an accused person asserts his or her right to silence the police must cease questioning.

Concerning the first proposition, Monnin C.J.M. stated, "I think that Dupont J. has gone too far."²³ Chief Justice Monnin rejected any suggestion that counsel had a right to be present during police questioning. In a strongly worded retort, he wrote:

There is no right given to counsel to instruct police officers to refrain from questioning their client unless it is done in his or her presence. Some maintain that it is an illusory right if police officers, moments after counsel has left the detention cell or interview room, can immediately continue their interrogation. I must confess that this argument has no appeal for me and holds no sway. The right to remain silent is there; it has existed for many centuries under English law. The accused can choose to remain mute or to talk. If he is a rather weak-willed individual who, after having been told to keep his mouth shut, succumbs to the temptation to answer questions and gives a full account of the events—whether the statement is exculpatory or inculpatory—that is his right and his responsibility alone. The task of law enforcement is arduous and difficult enough without asking police officers to act as babysitters.²⁴

Courts of appeal across the land agree with this conclusion, although perhaps not in such strong language. The Ontario Court of Appeal in *R. v. Roper*²⁵ affirmed that where there is no change in circumstances there is no obligation on the police to cease questioning an accused until he has further opportunity to consult counsel. In *R. v. Friesen* the accused indicated that "I'll talk about it but only if I have a lawyer present." The interviewing police officer replied that in his experience legal counsel would not sit in on interviews. In argument before the Alberta Court of Appeal the defence put forth the following firm rule of law that "the police would violate the Charter if they ever did anything under any circumstances which by any means or to any degree dissuaded a detained accused from again speaking to a lawyer or from answering questions without a lawyer present."²⁶ The Court rejected any such broad or fixed rule. The Court noted that s. 10(b) of the *Charter* is violated when the police belittle the accused's lawyer with the express goal or effect of undermining the accused's con-

²³ *R. v. J.(J.T.)*, [1988] 2 W.W.R. 509 at 516 (Man. C.A.), aff'd [1990] 6 W.W.R. 152 (S.C.C.) [hereinafter cited to Man. C.A.].

²⁴ *Ibid.* at 517.

²⁵ (1997), 32 O.R. (3d) 204 (C.A.).

²⁶ *R. v. Friesen* (1995), 101 C.C.C. (3d) 167 at 179 (Alta. C.A.); appeal to S.C.C. denied [1995] S.C.C.A. No. 539 [hereinafter *Friesen* cited to Alta. C.A.].

fidence in, and relationship with, defence counsel.²⁷ However, mild dissuasion is not improper. The Court went on to observe:

The law does not exclude all statements to the police; a suspect has a choice in the matter. We should not (and cannot) change the law of Canada so as to forbid the police to talk to a detained suspect unless defence counsel sits in and rules on each question.²⁸

In *R. v. Ekman*²⁹ the British Columbia Court of Appeal followed *Friesen*. In this case the accused had consulted with counsel. The police then questioned the accused, who was prepared to answer if his counsel were present. The police officer replied:

Okay, lemme, first off, in Canada, a lawyer doesn't have a right to be present when someone is questioned by the Police, okay. They have a right to give you advice on whether or not to speak to the Police ... Alright and then the Canadian law is that it's up to you to, to decide for yourself what or what you will not say ...³⁰

The British Columbia Court of Appeal found that this statement was correct and that the accused was not misinformed by the officer. The Court summarised the law as follows:

In summary, whilst an accused has the right to counsel and the right to remain silent in response to questioning by the state, he or she does not have an absolute right, *after* consulting counsel, to be free from police questioning. Conversely, the police are not bound to refrain from interviewing a suspect (again within reasonable limits), nor bound to advise counsel they intend to question the detainee.³¹

Having established that this is the Canadian position, there is much to be said for a right to have counsel present during police questioning. Custodial interrogation is inherently coercive. Chief Justice Warren in *Miranda v. Arizona* observed that “[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process.”³² For that reason the United States Supreme Court in *Miranda* mandated that an accused

²⁷ *R. v. Burlingham* (1995), 38 C.R. (4th) 265 (S.C.C.).

²⁸ *Friesen*, *supra* note 26 at 182.

²⁹ (2000), 146 C.C.C. (3d) 346 (B.C. C.A.); appeal to S.C.C. denied [2002] S.C.C.A No. 349 [hereinafter cited to B.C. C.A.].

³⁰ *Ibid.* at 350.

³¹ *Ibid.* at 359 [emphasis added].

³² *Miranda*, *supra* note 19 at 470.

held for interrogation must be informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. The *Miranda* warning includes the following: You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning.

In *Minnick v. Mississippi* the Supreme Court went on to affirm that once an accused has "lawyered up," there is a clear and unequivocal bar on questioning the accused any further in the absence of counsel. The police are prohibited from reinitiating interrogation without counsel present.³³ The only exception is where the accused initiates the contact. The rationale for the Court's ruling is explained by Justice Kennedy in the following terms:

A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged.³⁴

There is much truth in this observation, but this is not the law in Canadian.

Let us now turn to the second proposition in *Greig* that the right to silence means that the police must cease questioning the accused when the accused expressly invokes the right to silence. Once again, this is the American position. If an accused indicates in any manner that he wishes to remain silent, the interrogation must cease. Chief Justice Warren in *Miranda* wrote:

Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.³⁵

In the United States at least, "no means no."

In *R. v. Guimond*,³⁶ Associate Chief Justice Oliphant of the Manitoba Court of Queen's Bench, ruled that when an accused declines to talk, the police must honour that decision and persistence in the face of resistance violates the accused's right to remain silent. The accused was arrested for murder and robbery. She was informed of her right to silence and right to counsel. She told the police that "she would let them know if she wanted to call a lawyer." Justice Oliphant found that the accused was a person who knew the system. When she requested counsel, counsel was provided. The police persisted in questioning her about the murder and robbery even though on several occasions she told

³³ *Minnick v. Mississippi* (1990), 498 U.S. 146.

³⁴ *Ibid.* at 153. Justice Scalia replied, in dissent, at 166: "Both holdings are explicable, in my view, only as an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment?"

³⁵ *Miranda*, *supra* note 19 at 474.

³⁶ *R. v. Guimond* (1999), 137 Man. R. (2d) 132 (Q.B.) [hereinafter *Guimond*].

them that she did not want to say anything about the incident. Justice Oliphant accepted this statement of law from *R. v. Olson*:

The accused has the right to remain silent, and there is a positive duty on the police not to question the accused further once he has indicated his desire not to speak with them.³⁷

Justice Oliphant reasoned:

Therefore, I conclude that the right to silence and the right to counsel are equal rights. If the police must stop questioning a suspect when he or she asserts the right to counsel, it follows, I think, that they must also stop questioning the suspect when the right to silence is asserted by him or her.³⁸

With respect, Justice Oliphant may be outlining what he wished the law to be. This, however, is not the law and his reliance on *Olson* is misplaced. Quijano J., in *Olson*, articulated the above statement of the law in a one paragraph reference. There was no detailed analysis other than using *Manninen* by way of analogy, but it is a false analogy.

We have already seen that the courts place a great deal of emphasis on ensuring that an accused is informed of the right to counsel and, if an accused asserts the right, that the police facilitate contact. In *Manninen* the accused invoked his right to counsel, not his right to remain silent. Once an accused has consulted counsel and is informed of his or her rights there is nothing to prevent the police from questioning the accused. The police are to cease questioning pending the accused's contact with counsel. Cessation of questioning is not permanent. Once the accused is empowered with advice from counsel the questioning can begin anew. If we accept Justice Oliphant's interpretation of the law, once an accused says "no" the police must cease questioning. The prohibition is presumably permanent. Our law does not accept such a fixed prohibition.

In *Hebert*, Madam Justice McLachlin clearly allowed for the questioning of accused in custody after they asserted their right to silence. Justice Oliphant distinguished *Hebert* on the basis that "Hebert never asserted his right to silence." This is not correct. Hebert did assert his right to silence. The case was argued on the basis of an agreed statement of facts and paragraph six reads:

After exercising his right to contact counsel, Hebert was taken into an interview room by Constable Mike Stewart. He was given the usual police caution, and then told that the police wanted to know why he had done it. *He indicated that he did not wish to make a statement.*³⁹

Following upon this express refusal the police then used an undercover police officer who elicited a statement. Nowhere in *Hebert* does Madam Justice

³⁷ *R. v. Olson*, [1998] B.C.J. No. 391 (S.C.). Quoted in *Guimond*, *ibid* at 138.

³⁸ *Guimond*, *ibid.* at 139.

³⁹ *Hebert*, *supra* note 8 at 169 [emphasis added].

McLachlin say that invoking the right triggers a bar to further questioning. In fact, she says the opposite. Persuasion short of denying the accused the right to choose or depriving him of an operating mind does not breach the right to silence.

Madam Justice McLachlin in *Hebert* crafted a balance between the interest of the state in law enforcement and the interest in protecting suspects from abusive interrogation. For that reason automatic rules were rejected. As a practical reality many accused persons, for obvious reasons, are reluctant to confess their crimes. It takes time. Interviews progress through a number of phases or stages.⁴⁰ Persistence is required.⁴¹

Guimond can be compared to the Nova Scotia Court of Appeal decision in *R. v. Wood*.⁴² In this case the accused was arrested for first degree murder. He was advised of his right to counsel and met with his lawyer. After the lawyer left, the accused was subjected to intense questioning. Over the course of the questioning the accused indicated that he did not wish to say anything on 53 occasions. Notwithstanding these protestations the accused did talk and did incriminate himself. Obviously, the accused knew of his right to remain silent, and perhaps should have refused to talk the 54th time. The fact that he did talk was his choice. The statement was admitted.

The Prince Edward Island Court of Appeal came to the same conclusion in *R. v. Gormley*.⁴³ The accused was informed of his rights, contacted counsel, and after consulting counsel was questioned by the police. During the course of that questioning the accused told the police, "I've already been told to keep my mouth shut so I mean I'm not gonna say anything else regardless o.k." On several occasions the accused made similar statements. Eventually he confessed. The Court found no breach of the accused's right to remain silent. The fact that the accused asserted his rights confirmed his awareness of those rights and no express waiver of his right to silence is required. The confession was admitted.

These cases illustrate that persuasion short of denying the accused the right to choose or depriving him of an operating mind does not breach the right to silence. On the other hand, *R. v. Otis* is an example of abusive persuasion.⁴⁴

⁴⁰ For a detailed description of police interrogation methods see: F. Inbau, J. Reid & J. Buckley, *Criminal Interrogation and Confessions*, 3rd ed. (Baltimore: Williams & Williams, 1986). Police interrogation methods are also discussed in *R. v. Dell*, [2001] O.J. No. 715 at para. 19 (S.C.).

⁴¹ See *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.) [hereinafter *Oickle*].

⁴² (1994), 94 C.C.C. (3d) 193 (N.S. C.A.), leave to appeal to S.C.C. denied [1995] S.C.C.A. No. 41 [hereinafter *Wood* cited to N.S. C.A.].

⁴³ (1999), 140 C.C.C. (3d) 110 [hereinafter *Gormley*].

⁴⁴ *R. v. Otis* (2000), 151 C.C.C. (3d) 416 (Que. C.A.), leave to appeal to S.C.C. denied [2000] S.C.C.A. No. 640 [hereinafter *Otis* cited to Que. C.A.].

The accused had a limited vocabulary and a low I.Q. Psychiatric evidence was introduced by the defence to the effect that the accused suffered an emotional disintegration during the police interrogation. The accused on four occasions said that he did not want to say anything. The Quebec Court of Appeal noted that the Supreme Court of Canada in *Hebert* recognised that police officers were entitled to persuade a person to break his or her silence after having chosen to remain silent. However, in this case, in the context of an accused of limited intelligence facing an experienced police officer, who repeatedly ignored the accused's wish to remain silent, the accused's decision to talk was not a free one. His will was overborne. His right to remain silent was breached and the statement was excluded. As an aside, the Court would also have excluded the statement under the confessions rule.

To summarise the Canadian position, once an accused has been properly informed of his or her rights and, if he or she desires, allowed to contact counsel, the accused has no continuing right to have counsel present during any questioning—absent a change in his or her legal circumstances. One example is where a new and more serious charge is laid by the police. The accused is now alone. The choice is the accused's as to whether to speak to the police or not. Protestations that the accused does not want to talk to the police will not end the interview. The police are allowed to persuade the accused to break his or her silence. Only where it is found to be an abuse of persuasion will the accused's right to silence under s. 7 be breached. In most cases such confessions would also be found to be involuntary under the confessions rule.

IV. PROTECTING THE UNPROTECTED

AS OUTLINED ABOVE, OUR EXISTING RIGHT TO REMAIN silent is an inadequate shield to protect the accused from the coercive pressures inherent in any custodial interrogation. The accused cannot stop the interrogation absent putting his hands over his ears, closing his eyes, and curling up in a ball in the corner until the police leave. Vigorous and skilful questioning is permitted. The police are allowed to misstate facts, exaggerate facts, appeal to the conscience of the accused, sympathise, exhort, even offer inducements so long as there is no *quid pro quo* understanding.⁴⁵ A great deal of power is given to the police and the challenge for the law is to ensure that the police do not abuse this power.

The history and experience of the common law is that abuse occurs. Professor Wigmore, many years ago, in writing on the policy behind the privilege against self-incrimination made these sage observations:

The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer

⁴⁵ *Oickle, supra* note 41.

morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.⁴⁶

Canada is not immune from the abuse referred to by Wigmore. Two recent cases make the point. In *R. v. Jetté*, the Quebec Court of Appeal heard an appeal even though the accused had died. In essence the appeal was there to clear his name.⁴⁷ Jetté was convicted of manslaughter. His conviction rested entirely upon a statement that he allegedly made to the police. Jetté said that he had been beaten and forced to confess. On appeal, fresh evidence was heard from a rogue police officer, who confirmed that Jetté had indeed been beaten and threatened. The Quebec Court of Appeal granted the appeal and entered a stay of proceedings.

The wrongful prosecution and conviction of Thomas Sophonow provides a second example. Sophonow was prosecuted for the murder of Barbara Stoppel, a young, beautiful, vivacious, friendly student working in a doughnut shop. The murder shocked Winnipeg. Sophonow was tried three times and spent forty five months in jail. The first trial resulted in a hung jury and in the second and third trials, he was convicted. In both instances his convictions were overturned on appeal. Thomas Sophonow always protested his innocence. The Winnipeg Police Service reinvestigated the case and on 8 June 2000 it announced that Thomas Sophonow was not responsible for the murder. Another suspect was identified. Peter Cory, former Justice of the Supreme Court of Canada, was asked to conduct an inquiry into the circumstances surrounding the criminal proceedings brought against Sophonow.⁴⁸

One of the reasons Thomas Sophonow was prosecuted and convicted concerned statements that he made to police officers upon his arrest. The arrest occurred on 12 March 1982, a month prior to the proclamation of the *Charter*. Sophonow was not informed of any right to counsel and was not even cautioned as to his right to remain silent. During this interview Sophonow allegedly admitted to being at the donut shop at the time of the murder and described to the

⁴⁶ J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence In Trials At Common Law*, 3rd ed. (Boston: Little, Brown, 1940) at para. 2251.

⁴⁷ *R. v. Jetté* (1999), 141 C.C.C. (3d) 52 (Que. C.A.).

⁴⁸ Manitoba, *The Inquiry Regarding Thomas Sophonow* (Winnipeg: Queen's Printer, 2001) (Commissioner: Justice P. Cory), online: Manitoba Justice <<http://www.gov.mb.ca/justice/sophonow/toc.html>> (date accessed: 28 February 2002).

officers how he had twisted the lock on the door. The twisting of the lock was described by the Crown at trial as the “most devastating piece of evidence implicating Thomas Sophonow.”⁴⁹ We accept that Thomas Sophonow was not the killer. He was not there. As Justice Cory observed, “He would not and could not have known how that door was locked.”⁵⁰ The only possible conclusion is that he was told by the police officers and that they had planted the suggestion. Sophonow was also subjected to a strip search and anal cavity search during the interview. Justice Cory was highly critical of this conduct. There was no need for it. It was an affront to his dignity and composure. It was a psychological blow to Thomas Sophonow that, in Justice Cory’s observation, continued to haunt him to this day.

The interviewing officers supposedly took verbatim notes. Justice Cory commented, “[y]et it is clear that the record is anything but verbatim.”⁵¹ He found that the twisting motion of the lock, which had to have been suggested by the officers, was not recorded. With respect to the officers’ notes recording the critical admission that he was at the donut shop the following appeared:

OFFICER ONE:	OFFICER TWO:
“I stopped for a coffee where the chick got killed there between 8:00 and 9:00”	“Coffee Donut shop 8:00–9:00 15–20 minutes coffee black only”

This interview is a classic example of tunnel vision. As far as the interviewing officers were concerned Thomas Sophonow was their man. They got what they wanted—a confession. The interview was not audio or video recorded. In that regard, Justice Cory made the following recommendations:

The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.

I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.

⁴⁹ *Ibid.* at 18.

⁵⁰ *Ibid.* at 17.

⁵¹ *Ibid.* at 14.

Further, interviews that are not taped should, as a general rule, be inadmissible. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect.⁵²

It is a sad commentary on our Canadian law that such a rule, as suggested by Justice Cory, is still not in place twenty years after Thomas Sophonow's interview. It is a common theme in wrongful conviction cases that inappropriate police questioning is putting innocent people in jail. In 1989 the inquiry into the wrongful conviction of Donald Marshall recommended videotaping of statements.⁵³ In 1998 the inquiry into the wrongful conviction of Guy Paul Morin made a similar recommendation.⁵⁴ These recommendations in turn follow upon the Law Reform Commission of Canada's call for the electronic recording of interviews, which was made in 1984.⁵⁵

It is interesting to compare the Canadian situation to that in England where the right to silence has been abrogated. In England, an accused's silence may well be used against him or her in a court of law. Accordingly, an accused is told as follows:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.⁵⁶

English law, however, mandates a detailed process to ensure that any statement given or not given is free from coercion or fabrication. Upon request the accused's solicitor may be present during the questioning.⁵⁷ Moreover, interviews conducted at police stations *shall* be videotaped.⁵⁸ The procedure is intended to be transparent so that the accused witnesses the tape going into the tape machine and after the interview the tape is sealed. Should the interviewee object to the videotaping, the objection is noted and the officer is then obliged

⁵² *Ibid.* at 19.

⁵³ Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr. Prosecution*, vol. 1 (Halifax: Queen's Printer, 1989) at 296, recommendation 75.

⁵⁴ Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen's Printer, 1998), recommendation 96.

⁵⁵ Law Reform Commission of Canada, *Working Paper 32 Questioning Suspects* (Ottawa: 1984) at 58.

⁵⁶ *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 (Code of Practice on Tape Recording of Interviews with Suspects) [hereinafter Code of Practice].

⁵⁷ *Ibid.* at s. 58.

⁵⁸ See *Code of Practice*, *supra* at note 56.

to keep a written record. Although the English may have abrogated the "right to silence," at least they do give the accused the "right to an accurate record."

The various states in Australia similarly require, under statute, the electronic recording of confessions and admissions. The *Acts* vary in their language and structure.⁵⁹ For example, in Queensland the questioning of suspects must "if practicable" be electronically recorded.⁶⁰ Tasmania uses stronger language:

- 8(2) On the trial of an accused person for a serious offence, evidence of any confession or admission by the accused person is not admissible unless
- a) there is available to the court a videotape of an interview with the accused person in the course of which the confession or admission was made; or
 - b) if the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why a videotape referred to in paragraph (a) could not be made, there is available to the court a videotape of an interview with the accused person about the making and terms of the confession or admission or the substance of the confession or admission in the course of which the accused person states that he or she made a confession or an admission in those terms or confirms the substance of the admission or confession; or
 - c) the prosecution proves on the balance of probabilities that there was a reasonable explanation as to why the videotape referred to in paragraphs (a) and (b) could not be made; or
 - d) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence.⁶¹

Regardless of the language used, the important fact is that through statute, the videotaping of confessions is required in Australia. The legislatures in these jurisdictions have moved to protect the record. There is no comparable statute in place or contemplated in Canada. Having said this, in fairness to the police, an increasing number of police forces are videotaping custodial interrogations. For example, in many of the cases already cited in this article the interviews were videotaped.⁶²

⁵⁹ See: Queensland, *Police Powers and Responsibilities Act 1977*, s. 104; Tasmania, *Criminal Law (Detention and Interrogation) Act 1995*, s. 8; Northern Territory of Australia, *Police Administration Act 1996*, ss. 142-143; Western Australia, *Crimes Act 1914*, s. 23V; Victoria, *Crimes Act 1958*, ss. 464G-464H; South Australia, *Summary Offences Act 1953*, s. 74D; New South Wales, *Criminal Procedure Act 1986*, s. 108.

⁶⁰ Queensland, *Police Powers and Responsibilities Act 1977*, s. 104.

⁶¹ *Criminal Law (Detention and Interrogation) Act 1995*, Tasmanian Consolidated Legislation, s. 8.

⁶² See for example *Oickle*, *supra* note 41; *Wood*, *supra* note 42; *Gormley*, *supra* note 43; *Otis*, *supra* note 44.

Because police departments are moving in this direction does not remove the need for legislation. If anything, it is a factor that speaks in favour of legislation. These police departments show that videotaping is practical. They will have protocols and procedures in place, which can be referred to in crafting any law. Conversely, it is also true that not all police departments require the videotaping of interviews. These departments need to be forced to adopt the practice. In the absence of legislative action the courts need to act.

The British Columbia Court of Appeal in *R. v. Richards*⁶³ is of the view that such a change in the law is for Parliament and not the courts. However, this position ignores the political reality. There is no political will to act. Furthermore, such a stance is an abdication of judicial responsibility. It is a fundamental principle of our law that the innocent not be punished. The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial.⁶⁴ The courts are there to oversee state actions to ensure that the state treats the accused fairly.

The High Court of Australia in *McKinney v. The Queen*⁶⁵ took action. The High Court established that whenever a confession, allegedly made by an accused while in police custody, is disputed and its making is not reliably corroborated, the trial judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone. The Court was influenced to make this rule, first, because of the increased availability of videotaping and, secondly because of "the special position of vulnerability of an accused to fabrication when he is involuntarily so held."⁶⁶ The Court noted that the contest established by a challenge to police evidence of a confession is not one that is evenly balanced. The accused faces a heavy practical burden. Therefore, in order to even the playing field and ensure a fair trial the High Court adopted the rule of practice requiring that a warning be given.

An apt analogy in Canada is the Supreme Court of Canada's decision in *R. v. Stinchcombe*, which mandated Crown disclosure.⁶⁷ Prior to the Supreme Court's decision, disclosure was largely left to the pleasure of the Crown attorney; disclosure was haphazard and varied from province to province and from prosecutor to prosecutor. According to Justice Sopinka, uniform, comprehensive rules for disclosure was both beneficial in practice and essential in principle. In practical terms Justice Sopinka was of the view that time savings would be had if the defence had full disclosure of all relevant evidence. More importantly,

⁶³ (1997), 6 C.R. (5th) 154 (C.A.).

⁶⁴ *Seaboyer*, *supra* note 2.

⁶⁵ (1991), 171 C.L.R. 468 (H.C.A.).

⁶⁶ *Ibid.* at 478.

⁶⁷ *Stinchcombe*, *supra* note 6.

the overriding concern was that failure to disclose impedes the ability of the accused to make full answer and defence. The Court was very mindful of Donald Marshall's wrongful conviction, where non-disclosure of Crown information was a major factor in his miscarriage of justice. I suggest that the concerns and rationale that prompted the Supreme Court to act in *Stinchcombe* apply equally with respect to videotaping of custodial interrogations.

The Ontario Court of Appeal addressed the issue of videotaped confessions in *R. v. Barrett*.⁶⁸ In that case, the accused alleged that he had been beaten by members of the Toronto hold-up squad and forced to sign a confession. The police interview was not videotaped. Arbour J.A. wrote the majority opinion and was highly critical of the hold-up squad's failure to adequately record the interview either in notes or on videotape. Carthy J.A., in a short concurring opinion, felt compelled to comment more generally on the desirability of videotaping statements. He first outlined the practical benefits:

Universal use of videotapes would obviously be of assistance to judges in weighing evidence and reaching a just conclusion, but beyond that, there is the potential to benefit the entire administration of justice. The case before us is but one of many where the centre-piece at trial is an inculpatory statement. They are centre-pieces because their admission so often leads to a conviction. And, in many cases, there is a trial simply because the accused has challenged the procedures leading to the confession and the defence lawyer has no choice but to carry the challenge forward and insist upon proof beyond a reasonable doubt of voluntariness. The present case involved a preliminary hearing, a six-day trial, and two days on appeal which may have been avoided altogether if defence counsel had reviewed a tape which confirmed the evidence given by the police officers. On that assumption there were no alternatives to a guilty plea. How many hundreds or even thousands of such cases are presently ongoing across Canada? As many as there may be, there are an equal number of cases that are being delayed in reaching trial while costs accumulate on unnecessary trials, to the detriment of the administration of justice and the general public.

Justice Carthy then looked at videotaping of custodial interrogations as a matter of fundamental fairness. He went on to write:

Further, our system of justice treats proof beyond a reasonable doubt as a foundation-stone assuring, to the extent possible, that no innocent person be convicted. It is fair comment for a police officer who has secured a written confession to say, "he's as good as convicted." If the statement is admitted as voluntary the observation is probably accurate. On this determinative issue of conviction the police force has, by its own choice in this case, denied the court the opportunity of an undeniable record of what led to the "conviction." Given the modest cost of videotape equipment, such critical evidence should not, in fairness, be restricted to sworn recollection of two contesting individuals as to what occurred in stressful conditions months or years ago. The evi-

⁶⁸ (1993), 82 C.C.C. (3d) 266 (Ont. C.A.), rev'd on unrelated grounds 96 C.C.C. (3d) 319 (S.C.C.) [hereinafter cited as Ont. C.A.].

dence is admissible under our present rules, but everyone involved in the criminal justice system should make reasonable efforts to better serve its ultimate ends.⁶⁹

The Supreme Court has already given strong hints as to the desirability of videotaping statements. In its path breaking decision in *R. v. B. (K.G.)*,⁷⁰ the Court ruled that prior inconsistent statements could be admitted for their truth. One of the prerequisites for the admitting of such statements was that they be videotaped. In fact, Chief Justice Lamer in overturning the long standing precedent to the contrary observed in his opening paragraph, “[i]n my opinion, the time has come for the orthodox rule to be replaced by a new rule recognizing the changed means and methods of proof in modern society.”⁷¹ He was talking about videotaping.

More recently in *R. v. Oickle*, the Supreme Court had occasion to re-examine the voluntary confessions rule. The statements in *Oickle* were videotaped. In its decision, the Court outlined a “contextual” approach to the admissibility of confessions. Trial judges are instructed to look at the entire context in which a confession is made to determine its voluntariness. What better way to understand “context” than by watching the interview in question? Justice Iacobucci wrote:

Before turning to how the confessions rule responds to these dangers, I would like to comment briefly on the growing practice of recording police interrogations, preferably by videotape. As pointed out by J.J. Furedy and J. Liss in “Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses” (1986), 29 C.L.Q. 91 at p. 104, even if “notes were accurate concerning the content of what was said ... the notes cannot reflect the tone of what was said and any body language that may have been employed.” White, similarly offers four reasons why videotaping is important:

First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have the additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

This is not to suggest that non-recorded interrogations are inherently suspect; it is simply to make the obvious point that when a recording is made, it can greatly assist the trier of fact in assessing the confession.⁷²

⁶⁹ *Ibid.* at 269–70.

⁷⁰ (1993), 79 C.C.C. (3d) 257 (S.C.C.).

⁷¹ *Ibid.* at 262.

⁷² *Oickle*, *supra* note 41 at para. 46 [citations omitted].

Justice Iacobucci's comments are all correct, but why not take the next step and mandate videotaping? Failure on the part of the police to videotape the interviews is denying the court the full "context" and may well be denying the accused the means to prove that a statement was improperly obtained. There is something incongruous in the law when we require the videotaping of statements made by other witnesses, who contradict themselves on the stand, but we do not require that an accused's confession be videotaped before admitting it into evidence. Our courts need to take a stronger stance on the videotaping of statements. Statements of approval are not enough.

Most recently the Ontario Court of Appeal in *R. v. Moore-McFarlane*⁷³ has taken a stronger stance. The Crown relied upon confessions made by the co-accused. Both accused testified that they had been physically beaten and threatened to confess by members of the Toronto hold-up squad (the same unit referred to earlier in *Barrett*). Neither confession was videotaped. The defence argued that there should be a firm requirement to record all statements. The Court of Appeal refused to go so far. Justice Charron, writing for the Court, reasoned that such an absolute rule ran counter to the "contextual" approach to confessions outlined by the Supreme Court in *Oickle*. However, she went on to write:

[T]he Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect. In such cases, it will be a matter for the trial judge on the *voir dire* to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.⁷⁴

The Crown, on the other hand, argued that the sufficiency of the record was simply a matter of weight and not admissibility. The Court disagreed with this position as well. Justice Charron concluded:

And, in my view, the completeness, accuracy and reliability of the record have everything to do with the court's inquiry into and scrutiny of the circumstances surrounding the taking of the statement. Indeed, it is difficult to see how the Crown could discharge its heavy onus of proving voluntariness beyond a reasonable doubt where proper recording procedures are not followed.⁷⁵

⁷³ [2001] O.J. No. 4646 (C.A.).

⁷⁴ *Ibid.* at para. 65.

⁷⁵ *Ibid.* at para. 67.

Similarly, the Manitoba Court of Appeal has also adopted a more hard-line stance. In *R. v. Bunn*⁷⁶ the accused contested the admissibility of certain oral statements made to the police. The accused testified that he was induced to confess because he was told by the officers that if he confessed he would be released on a promise to appear and would not be in jail for Christmas. The officers acknowledged that the accused had expressed a wish to be out for Christmas and that a promise to appear had been discussed, but this was only at the end of the interview *after* he had confessed. The statement was not video or audiotaped. The Court was told that such recording equipment was not available at the district police station.⁷⁷ Nor did the officers take their notebooks with them. One of the officers explained that interviewing suspects without a notebook made them more at ease. Once the interview was over the officer and his partner would sit down and record what they remembered about the interview. Justice Twaddle, writing for the Court, was not impressed. He ruled that a police officer who questions a suspect without keeping a contemporaneous record of the interrogation risks an adverse finding on the accuracy of what was said. The Court was not prepared to accept the police officer's reasons for not ensuring a proper record. If the Court were to accept this police practice there would be "no incentive for the police to make a contemporaneous recording of the interview."⁷⁸ At the end of the day, the Court was left with a reasonable doubt as to the voluntariness of the confession.

Incentive there must be. The Courts should demand more from the police. Why not demand that the police, where practical, videotape their custodial interrogations of suspects? Why not adopt the position, as Justice Cory recommended in the Sophonow Inquiry, that as a general rule if confessions are not videotaped they are not admissible?

Justice Whealy of the Ontario Superior Court has adopted this position. As far as Justice Whealy is concerned the police have been warned enough and the time has come for judicial action. Therefore, in cases where there is contested testimony on the voluntariness of a confession, Justice Whealy has now moved to the point that:

The obligation of the Crown to prove beyond a reasonable doubt that a statement has been made voluntarily, according to the common law, includes the obligation of putting forward the best and most reliable evidence. Where, as in this case, it was possible to video-tape the process of taking the statement but the persons in authority have

⁷⁶ *R. v. Bunn* (2001), 153 Man. R. (2d) 264 (C.A.) [hereinafter *Bunn*].

⁷⁷ It does not appear that the Winnipeg Police Service routinely videotapes statements. It may be recalled that in *Guimond*, *supra* note 36, the statements were also not recorded. See also *R. v. Mentuck* [1995] M.J. No. 267 (Q.B.) in which Justice Schulman examined the Winnipeg Police Service policy on videotaping of interviews.

⁷⁸ See *Bunn*, *supra* note 76.

voluntarily or negligently failed to do so, the statement might not be admitted into evidence.⁷⁹

V. CONCLUSION

THE QUESTION IS REALLY ONE OF FUNDAMENTAL FAIRNESS. Accused persons are being wrongfully convicted in part because of improperly conducted police interrogations. Thomas Sophonow is but one example. We can see the wrong. What do we do about it? The American response is to give the accused greater rights under the rubric of the "right to silence." Provide for a right to have counsel present during any police interview. Provide that when an accused says "no" to answering questions the interview must stop. The English response is to ensure the accuracy of the record by requiring that all custodial interrogations be videotaped. At present Canadian law is in the unsatisfactory middle between the American and English practices. The Canadian accused's rights are limited and there is no assurance of a fair and complete record of interview. I suggest that we move to demand, where feasible, that police interviews be videotaped. Videotaping protects both the accused from improper questioning and the police from unwarranted allegations of misconduct. We have the means. We need the will. The courts cannot expect Parliament to act, this is something that the courts need to do simply because it is the right thing to do.

⁷⁹ See *R. v. Haynes*, [2001] O.J. No. 73 at para. 22 (S.C.) in which Justice Whealy referred to earlier decisions of his in *R. v. Nelson*, [1999] O.J. No. 4377 (S.C.) and *R. v. Smart and Richards*, (16 December 1994) (Ont. Gen. Div.).