Citation: *R. v. Vittrekwa-Butler,* 2023 YKTC 9

Date: 20230524
Docket: 22-00061
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before Her Honour Judge K.L. McLeod

REX

v.

DAYTONA FREDRICK GARNETT VITTREKWA-BUTLER

Appearances:
Taylor Ormond — Counsel for the Crown
David Tarnow — Counsel for the Defence

**RULING ON *CHARTER* APPLICATION**
**AND REASONS FOR JUDGMENT**

[1] Mr. Vittrekwa-Butler faces one charge of driving with excess blood alcohol contrary to s. 324.14(b) of the *Criminal Code* (the "*Code*").

[2] Mr. Vittrekwa-Butler was stopped while driving a car, during a MADD roadblock by the RCMP on Saturday, April 23, 2022, at 8:31 p.m. Cst. Rimanelli, now a five-year veteran officer, had an approved screening device with him and within a minute of the stop, demanded Mr. Vittrekwa-Butler blow into the machine. It registered a fail and thus Cst. Rimanelli arrested Mr. Vittrekwa-Butler for "impaired operation".

[3] Following a breathalyser demand, Mr. Vittrekwa-Butler provided two samples of his breath into the machine, the results of which were introduced by way of a Certificate of a Qualified Technician. These results were not disputed and are as follows:

- Test No. 1 revealed a reading of 160 milligrams of alcohol in 100 millilitres of blood, it was taken at 9:53 p.m.; and

- Test No. 2 revealed a reading of 150 milligrams of alcohol in 100 millilitres of blood; it was taken at 10:16 p.m.

[4] Thus, the factual basis of the charge is made out. The only issue is whether the Certificate of Analysis should be excluded pursuant to s. 24(2) of the *Charter* because of an alleged breach of Mr. Vittrekwa-Butler's s. 10(b) *Charter* rights.

[5] Mr. Tarnow, Counsel for Mr. Vittrekwa-Butler, sets out in the Notice of Application that his client's s. 10(b) *Charter* rights were breached because "[t]he Accused was never informed that he could wait a reasonable period of time for his counsel of choice to call back".

**The Evidence on the s. 10(b) *Charter* Issue**

[6] After his arrest, and in response to receiving his rights to counsel, Mr. Vittrekwa-Butler indicated he had a lawyer, and that he had the number in his phone. He provided the number of his lawyer, Mr. David Tarnow, who appears here as defence counsel. The officer told Mr. Vittrekwa-Butler that they would find the number once they got back to the detachment. They arrived there at 8:50 p.m.

[7] Cst. Rimanelli testified at the trial. There was also an audio recording of the interaction between he and Mr. Vittrekwa-Butler when dealing with the issue of access to counsel.

[8] At 8:55 p.m. the recording commences, and we hear the following:

- The officer speaking, saying he was going to make contact with the lawyer;

- The defendant's phone had two numbers for his lawyer whom he referred to as Dave: Cell number (604) 328-7420 and office number (604) 278-0555;

- Two calls were made from the detachment landline at 8:56 p.m. to the numbers provided, neither call allowed for a dial tone and then appeared to have a busy tone;

- Then Mr. Vittrekwa-Butler was asked, and he agreed, that his cellphone could be used to access counsel, the cellphone was put on loudspeaker;

- A call was made to what was apparently Mr. Tarnow's cellphone; voice mail responded. The officer is heard giving his name and number and asking Mr. Tarnow to respond. This call was placed at 8:58 p.m.;

- A call was attempted to what was apparently Mr. Tarnow's office number. Again, a voice mail message, to which the officer again left his details for a call back. This was placed at 8:59 p.m.;

- The officer is then heard asking Mr. Vittrekwa-Butler if he had any other lawyer that he wished to call in case of no response. He did not, the officer is then heard saying, and I quote, "we will give him time to answer. If not, would you like to speak to legal aid?";

- The audio provides the following in terms of a response; there is a long pause and then Mr. Vittrekwa-Butler says, “okay, I guess so”.

- Officer; “we will try again in a few minutes”;

- Three minutes and 15 seconds later, again we hear on the audio, the officer asked again if they could use the cellphone to call Mr. Tarnow;

- At 9:05 p.m. and 9:06 p.m. calls were made to both of Mr. Tarnow's numbers again, there was voicemail, and a message was left at each of these numbers;

- The officer is then heard saying: “we will wait five minutes and then I will ask you if you want to wait further or call legal aid”;

- Mr. Vittrekwa-Butler responded: “I will think about it okay”.

- At 9:14 p.m., the officer says: “I will leave it up to you if you want me to call legal aid”;

- Mr. Vittrekwa-Butler asked if he would be able to talk in private. The officer responded saying that once they got through to legal aid, he would leave the room;

- At this stage the officer testified he had not contacted legal aid;

- Mr. Vittrekwa-Butler is heard saying “yes” to the legal aid contact;

- The officer called legal aid and waited two minutes and 13 seconds while on hold to speak to a person and then is heard explaining the purpose of his call;

- Finally legal aid counsel called back at 9:25 p.m. Until that time, no call from formally chosen counsel had been received, and, in fact, no call was ever received;

- Mr. Vittrekwa-Butler spoke with legal aid counsel for five minutes.

[9] In cross examination of this officer, Mr. Tarnow suggested to the officer that he was in a hurry to deal with Mr. Vittrekwa-Butler because his overtime was running out. The officer denied that and said that his concern was to put Mr. Vittrekwa-Butler in touch with a lawyer to get advice.

[10] When asked why he did not wait longer for counsel to call back before contacting legal aid, the officer had no response.

[11] Mr. Vittrekwa-Butler testified. He explained that he is a 19-year-old First Nations man. He was 18 when he was arrested for this charge. His education is limited, he dropped out of school at age 15, after Grade 10.

[12] Mr. Vittrekwa-Butler explained that he wanted to speak to Mr. Tarnow as he had helped Mr. Vittrekwa-Butler and his family in the past.

[13] He said that when he was offered legal aid he was confused and thought that after the five-minute waiting period, he had no choice but to speak to legal aid.

[14] When he did speak to that counsel, Mr. Vittrekwa-Butler indicated he only got "one sentence of advice". He never told anyone he was not content with the advice he received, but he felt very dissatisfied. In response to a query as to why he did not tell that to the officer, Mr. Vittrekwa-Butler said he did not know he was able to complain. He indicated that the officer never asked him about whether the advice he received satisfied him.

[15] In cross examination, Mr. Vittrekwa-Butler agreed that at no time did the officer give him a deadline for Mr. Tarnow to call back. Indeed, he agreed there was nothing the officer said that led him to believe he was out of options, rather it was something “he was feeling”.

[16] He said he was new to the process and very young and never expressed how he was truly feeling and felt everything was rushed, even though the officer never indicated that time had run out.

[17] In submissions, Mr. Tarnow described his client as of limited education, only 18 years old, a straightforward naïve young man whose knowledge was so limited, he did not even know he could speak to counsel in private. Mr. Tarnow argues that Mr. Vittrekwa-Butler, while accepting the services of a legal aid lawyer, did not waive his rights to speak to his counsel of choice, and thus a finding of a breach of his *Charter* rights is one I should make.

[18] However, the Crown argues that it is not an issue of waiver, rather one of choice of counsel which Mr. Vittrekwa-Butler, upon not receiving a call back from Mr. Tarnow, decided to speak to legal aid counsel, thus changing his mind as to whom he wished to speak. For that submission, Ms. Ormond, for the Crown, relies on the Supreme Court of Canada decision in *R. v. Willier*, 2010 SCC 37.

**The Legal Principles**

[19] I will now turn to the legal principles which circumscribe the s. 10(b) *Charter* right.

[20] This right encompasses two duties; the informational duty, in this case that is not an issue, and the implementational duty i.e., to make the right of access to counsel available to detainees. Until these two duties have been fulfilled, police are obliged to "hold off" from eliciting evidence from that detainee.

[21] The obligation to implement the right to counsel extends to the police providing a "reasonable opportunity" to access counsel of choice. It is important to quote the Supreme Court of Canada in *Willier*, at para. 35:

> Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole and may include factors such as the seriousness of the charge and the urgency of the investigation: … If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended: …

[22] Whether the police have made reasonable efforts to provide a detainee with a reasonable opportunity to contact counsel, given all the circumstances of a particular situation, is a fact driven determination. The recent summary conviction appeal decision of *R. v. Wijesuriya*, 2020 ONSC 253, at para. 75 is of assistance:

> …The factors at play in what constitutes reasonable efforts in the circumstances to provide the detainee a "reasonable opportunity" to facilitate contact [with] counsel of choice will require and be dependent on a consideration of all relevant circumstances including:
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> a) The time of the detention;
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> b) The type of day of the detention;
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> c) The status and next steps of the investigation;
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> d) The information provided by the detainee;
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> e) The efforts of the police made to contact counsel of choice;
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> f) The results of the police efforts; and
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> g) The elapsed time since the detention.

[23] With respect to the issue of waiver of choice of counsel versus change of choice of counsel, I will turn again to *Willier.*

[24] At para. 43, the Court stated:

> …The police had an informational duty to ensure that Mr. Willier was aware of the availability of Legal Aid, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. Mr. Willier was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise.

[25] Both counsel provided a number of authorities; firstly, I will review the defence authorities.

**Defence Authorities**

[26] *R. v. Vernon,* 2015 ONSC 3943, is a summary conviction appeal case which upheld the decision of the trial judge. The trial court decision found that the defendant's right to counsel was violated when the arresting police officer failed to wait longer than one minute after the defendant had left a message at his lawyer's office before the officer placed a call to duty counsel, with whom the defendant ultimately spoke when duty counsel called back. The officer then told the defendant; some 14 minutes after the call to counsel of choice, that there had been no response and that duty counsel was on the phone. The defendant then spoke to duty counsel for 12 minutes. Thereafter the defendant did not express any concerns with the call to duty counsel. The trial judge found that the officer failed to properly tell the defendant he had the right to wait a reasonable time for counsel of choice to call and also failed to wait a reasonable amount of time for counsel to call back before contacting duty counsel. The appellate judge agreed.

[27] With respect to the issue of waiver the appellate judge also found that at para. 44:

> …Absent the type of circumstances that were present in *Willier*, where it was held that the detainee had simply chosen to speak to another lawyer rather than waive his right of counsel of choice, the onus is on the Crown to establish a valid waiver. To impose the obligation urged upon the court by the Crown would be to reverse that onus. Instead, evidence that a detainee failed to complain, seemed satisfied or no longer asked to speak to counsel of choice after speaking with duty counsel is simply evidence to be considered on the issue of waiver, where that issue arises.

[28] Obviously, the factual basis of *Vernon* can be distinguished to the case at bar in terms of the timing of the call to duty counsel and the availability of duty counsel right then and there.

[29] Frankly, I read this case as *obiter dicta*, and is not authority on the issue, endorsing the defence position that the obligation is on the Crown to prove the usual prerequisites for a waiver of rights to apply, absent the replication of the facts in *Willier.* It is my understanding that it is the obligation of a trial judge to examine whether the officer, in all the circumstances, allowed for a reasonable opportunity for counsel to call back. It is not the officer's obligation to <u>inform</u> (emphasis added) the defendant that they have to wait a reasonable time for his counsel of choice to call back unless the defendant says he has changed his mind and <u>no longer wants legal advice</u>. This obligation arises in circumstances of a potential waiver of a positive right (see para. 43 of *R. v. Prosper*, [1994] 3 S.C.R. 236). At no time did Mr. Vittrekwa-Butler ever waive his right to counsel. That is not the issue here.

[30] In order to satisfy myself of the binding nature of this decision, I looked at how this decision has been considered by other courts. It appears that this appellate decision is the only one of 856 cases citing *Willier* which is marked in red "not followed".

[31] For that reason, I looked to the Court of Appeal which considered an application to appeal the Superior Court decision in *R. v. Vernon,* 2016 ONCA 211. The Court of Appeal denied the appeal for the following reasons:

1. The Crown asks this Court to grant leave on the basis that it raises important questions about a detainee's obligation of diligence in a s.10(b) *Charter* application. In our view, this case does not raise those questions.

2. On the findings of the trial judge -- ratified by the summary conviction appeal judge -- the police officer failed to satisfy his obligations to afford Mr. Vernon (the detainee) not only a reasonable opportunity to contact counsel of his choice but also to facilitate that contact (see *R. v. Traicheff*, 2010 ONCA 851, at paras. 2 and 3).

3. In light of those failings, it is unsurprising that the trial judge accepted Mr. Vernon's evidence and that he felt he had no choice but to speak with duty counsel.

[32] The Court of Appeal did not deal with the issue of waiver versus change of choice of counsel. Given the overwhelming authority of *Willier* and other cases, I do not find *Vernon* binding on me for the reasons suggested by Mr. Tarnow.

[33] *R. v. Maciel,* 2016 ONCJ 563, is a first instance decision in which Mr. Maciel was arrested for impaired driving and refuse breath sample. He received his rights to counsel and responded that he wanted to call his lawyer, David Locke. Once back at the division at 3:09 p.m. the first calls to Mr. Locke's office and cell number were made. Voicemails were left.

[34] At 3:12 p.m., duty counsel was offered but the defendant rejected the offer. Two further calls were made at 3:32 p.m. and at 3:34 p.m., again with no response. Duty counsel was again offered, and again declined.

[35] At 3:38 p.m., Mr. Maciel was moved into the breath room. Again, he was offered duty counsel. He declined and said he wanted to speak to his lawyer before providing his breath sample. Despite being cautioned, he maintained that position and was then charged with refuse.

[36] In his decision, Justice Stribopoulos found that a failure of the police to discharge their responsibilities to the required standard on two bases:

1. The failure to consult Mr. Locke's website; and

2. They did not ask Mr. Maciel whether he had, or possibly knew someone who had, a contact number for Mr. Locke.

[37] Justice Stribopoulos also concluded that the police violated his s. 10(b) *Charter* rights when they only waited 25 minutes for counsel of choice to call back.

[38] This decision provided recommendations as to the steps Peel Police should take.

[39] This decision was expressly distinguished in *Wijesuriya*, where Justice Ricchetti said this:

> 79 In my view, there is good reason the law requires the police to take reasonable steps to afford the detainee a "reasonable opportunity" to speak with counsel of choice without specifying exactly or setting minimum standards of what police steps and conduct satisfied a "reasonable opportunity" in any particular case. The standard described by the Supreme Court of "reasonable opportunity" provides the much-needed flexibility in any particular case.
>
> Conclusion
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> 80 In my view, the law requires the police, in the context of all the relevant circumstances, to take reasonable steps to provide a detainee with a "reasonable opportunity" to implement the detainee's s. 10(b)'s *Charter* right.

[40] *R. v. Edwards*, 2022 ONSC 3684, is a summary conviction appeal decision in which Mr. Edwards sought to overturn his convictions. One of the grounds for the appeal was the fact that the trial judge had found that Mr. Edwards' s. 10(b) *Charter* rights were not infringed. Mr. Edwards was arrested for impaired driving and stated he wanted to call his own lawyer. He was allowed to retrieve his cell phone from his car in which the number of his counsel was stored. Once back at the station at 6:37 a.m., Mr. Edwards texted his lawyer and then had the phone removed from him. The officer called the number and left a voicemail. The officer asked whether he had another lawyer, if this one did not call back, and the answer was "no". Then the officer asked whether duty counsel would be okay if they could not reach Mr. Edwards' lawyer and he indicated, "yes".

[41] Twelve minutes after leaving the message for the lawyer of choice, a message was left for duty counsel. Duty counsel called back, and Mr. Edwards spoke to counsel.

The officer conceded she did not ask whether he wanted to wait longer for counsel of choice to call back, or state he had the right to wait a reasonable time to wait to speak to counsel.

[42] Once in the breath room, Mr. Edwards was perceived by the breath technician to not be satisfied with his conversation with duty counsel and that determined that Mr. Edwards still wanted to speak to counsel of choice. Thus, another call to counsel was made at 7:14 a.m. Twelve minutes later, the defendant was escorted back to the breath room and was told to blow. In allowing the appeal, Justice Spies found that the proffer of the officer to call duty counsel at such an early stage of the access-to-counsel process and the 12-minute wait before duty counsel was called, was essentially, a steering by the police to duty counsel. Furthermore, the fact that the officers only left two voice mails in quick succession and then ended their efforts to contact counsel of choice was not sufficient. Justice Spies referred to the aforementioned decision of *Maciel* in referring to other efforts the officers should have made, including asking Mr. Edwards for other means of contacting counsel.

[43] In the trial decision of *R. v. Hicks*, 2023 ONCJ 64, Mr. Hicks was charged with impaired driving and refusing to provide a breath sample. He argued his s. 10(b) *Charter* rights were infringed. Mr. Hicks was charged during the COVID-19 lockdown when all court proceedings had been stalled. Mr. Hicks indicated he wanted to speak to a named counsel. Neither officer asked Mr. Hicks for his counsel's number. One officer performed a Google search and placed a call to the phone number. There was no answer, so a voicemail was left. The fact of no contact was told to Mr. Hicks, and he

was asked if he wanted to speak to duty counsel. Mr. Hicks did not, but said he wanted to speak to his lawyer.

[44] Notwithstanding this choice, the officer called duty counsel seven minutes after the voicemail was left for counsel of choice. The trial judge found that the police did not make further efforts to reach counsel or tell Mr. Hicks he had the right to wait a reasonable amount of time for the lawyer to call back. The breath technician also ignored the fact that Mr. Hicks told him that the call to duty counsel had not satisfied him, and that he wanted to speak to counsel of choice.

**Crown Authorities**

[45] The Crown has relied on a number of cases. Two are of note, the first; *R. v. Keror*, 2017 ABCA 273, in which the Alberta Court of Appeal found at paras. 42 and 43:

> 42 The police do not violate a detainee's right to counsel of choice when his preferred counsel is unavailable and the detainee voluntarily chooses to call a different lawyer. This case is similar to *Willier* and *McCrimmon*, in that the appellant initially told the police he wanted to speak with a specific lawyer, but when his preferred lawyer was unavailable, the appellant decided to speak with duty counsel instead. Like both *Willier* and *McCrimmon*, the appellant was "properly presented with another route by which to obtain legal advice," and he freely chose to speak with a different lawyer: *Willier* at para 43.
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> 43 Having freely pursued the option of speaking with a different lawyer, "unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview": *Willier* at para 42. The appellant did not express any concerns about the advice he received. Nor did he express any continuing desire to speak with Mr. Chow. In fact, he told Det. Barrow that he was satisfied.

[46] The second case of note, to which I will refer, is *R. v. Sikora,* 2021 ONSC 5869, a summary conviction appeal in which the Court was examining the grounds on which a second consultation with a lawyer during an impaired driving investigation was permitted. The defendant did not have any issue with the advice given by duty counsel at the time. Rather, he testified at trial that he was unhappy with duty counsel and his main concern was feeling rushed and that he felt uncomfortable talking to a stranger.

[47] The judge stated, at para. 66:

> It is apparent from the trilogy of cases, and in particular the above quoted passages from para 41 of *Willier*, and para 55 of *Sinclair*, that the focus of the analysis must be on what was said by the accused at the police station, not what the accused later testifies he or she was thinking but did not say.

[48] What does differentiate *Sikora* from the case at bar is this; in *Sikora* the defendant expressed satisfaction contemporaneously with the advice he received from duty counsel. While Cst. Romanelli testified that he did not ask Mr. Vittrekwa-Butler whether he was satisfied with counsel's advice, and while Mr. Vittrekwa-Butler did testify that he was not, he never, in any way, raised any issue.

[49] Finally, I will turn to a very recent appellate decision which was released on March 2, 2023.

[50] *R. v. Rizvi,* 2023 ONSC 1443 is a summary conviction appeal decision similar to case at bar where the only issue was the claim of a s. 10(b) *Charter* violation.

[51] Upon arrest for driving with excess blood alcohol, the defendant stated at 2:12 a.m. he did not have a specific lawyer but wanted to speak to legal aid. At

2:14 a.m. he said he wanted to call his personal lawyer. He arrived at the police division at 2:42 a.m. and provided the officer with his personal lawyer's number. At 2:49 a.m., a call was made to the lawyer "Randy" ("lawyer no. 1"). A voicemail message was left.

[52] Seven minutes later, the officer asked if there was any other lawyer to contact. The defendant provided another name and phone number. That lawyer ("lawyer no. 2") was called at 2:58 a.m.

[53] The officer, also aware of the time of night, asked if he wished to contact duty counsel. He advised the defendant that this did not remove his right to speak to his lawyer if they called back.

[54] At 3:01 a.m., duty counsel was called.

[55] At 3:15 a.m. the officer left a second message for lawyer no. 1.

[56] At 3:17 a.m., duty counsel called back, and the defendant spoke to him for seven minutes.

[57] At 3:20 a.m. the officer left another message for lawyer no. 2.

[58] The first sample was taken at 3:33 a.m. and the second at 3:55 a.m. Lawyer no. 2 called back at 4:05 a.m. and the defendant spoke to counsel.

[59] Justice Woollcombe, in *Rizvi*, stated at para. 48, after reviewing a number of cases:

> These cases demonstrate an obvious point: that when a detainee asserts a desire to speak to a specific counsel, the detainee must be afforded a reasonable opportunity to do so. But, they also highlight that if counsel of choice is unavailable, there is nothing preventing police from offering the option of speaking with duty counsel. If a detainee decides to forego speaking with counsel of choice in favour of speaking with duty counsel, that person's s. 10(b) rights have not been violated. In such a situation, the Court declined to impose on police any requirement to explain to the detainee the consequences of choosing to speak to duty counsel, rather than continuing to wait for counsel of choice to call back. That is because choosing to speak to duty counsel is not a waiver of the right to counsel, it is a decision to exercise the right to counsel by speaking to duty counsel.

[60] The appeal was allowed.

[61] I have also just become aware of the decision of *R. v. Fern*, 2023 SKPC 27, dated April 17, 2023.

[62] In that decision, ACJ Anand states at para. 47:

> … I conclude that courts in Saskatchewan should now recognize a new informational obligation under section 10(b) of the *Charter*. This new informational obligation on the police arises where the detainee has clearly expressed his or her desire to speak to a particular lawyer who cannot be immediately contacted, and where, within a reasonable waiting time, the police choose to present the detainee with the idea of speaking to duty counsel or another lawyer. In such a situation, police must tell the detainee that he or she is also entitled to wait a reasonable time to connect with counsel of choice and that the police have a duty to hold off on questioning or attempting to elicit evidence from the detainee during this time.

[63] This duty on the police is described by the learned judge as a “new informational obligation” for courts in Saskatchewan to recognize. This obviously serves as notice to the police in that province.

[64] Whether or not I concur with this decision is not the issue. The issue is at the time of Mr. Vittrekwa-Butler's arrest, over 12 months ago, there was this obligation on the police in the Yukon. There was not.

**Summary**

[65] I turn now to a summary of the pertinent facts of the case before me.

1. Mr. Vittrekwa-Butler was arrested on a Saturday night at approximately 8:30 p.m.;

2. The first call to counsel was attempted at 8:55 p.m.;

3. The first breath sample was taken at 9:53 p.m.;

4. Calls to counsel of choice were made firstly, by a landline which did not seem to connect, then through the defendant's cellphone to the numbers he provided on his contact list of the office and cellphone of his chosen lawyer at 8:58 p.m. and 8:59 p.m. Messages were left at both. Mr. Vittrekwa-Butler heard both voicemail messages and took no issue with the number contacted;

5. Calls were made to the same numbers at 9:05 p.m. and 9:06 p.m. from Mr. Vittrekwa-Butler's cell phone, again he heard the voicemail messages and voiced no issue with the numbers called. The officer left messages on both numbers;

6. Finally, after thinking about whether he wished to speak to legal aid, and not receiving a call back from Mr. Tarnow, Mr. Vittrekwa-Butler indicated a “yes” to contacting duty counsel. At 9:14 p.m., duty counsel was called;

7. The defendant testified that he felt rushed. He heard the officer telling him, “I will leave it up to you if you want to call legal aid”. Despite the fact that the officer never gave him a time limit, the defendant was feeling he was not allowed to wait;

8. The officer is heard saying, “I will leave it up to you if you want to call legal aid.” There is no issue of coercion or steering;

9. The defendant admitted he never told the officers he was dissatisfied with his conversation with counsel and never told the officer how he was feeling;

10. The defendant did ask whether he could speak to duty counsel in private and was reassured of his right to do so;

11. Counsel never called back.

**Conclusion**

[66] Mr. Vittrekwa-Butler and indeed his counsel, focussed on the fact of Mr. Vittrekwa-Butler's youth and ignorance about the criminal justice system in explaining why there was a sense of lack of choice to wait for counsel to call back, or speak to legal aid. While being in police custody is, I am sure, a very intimidating

process, it was not so intimidating that Mr. Vittrekwa-Butler did not feel free to ask questions or take time to think on his answers.

[67] The evidence shows this is not a young man who is forced into making a decision; he says, in no uncertain terms "**he will think about"** whether he will agree to legal aid. That implies he knew he had a choice. To add to that is the officer's statement; "I will leave it to you if you want me to call legal aid". The only inference from all of that is that this was Mr. Vittrekwa-Butler's choice.

[68] Mr. Vittrekwa-Butler is also not frightened to ask clarifying questions. Mr. Tarnow argues the question about privacy of his call shows complete naivety as he says everyone knows about privileged conversations. I disagree. While it may be common knowledge amongst those in the criminal justice system, to make that assumption is perhaps a bit of an overstatement.

[69] Having said that, I find Mr. Vittrekwa-Butler's query to the officer's question to be evidence of the fact that this young man thinks through issues and is not so overwhelmed as to be lulled into an atmosphere of compliance.

[70] Of note also is that the entire proceedings were audio recorded; the officer's tone of voice was in no way intimidating, demanding, or insistent. He left the impression that time was not the enemy when offering choices to Mr. Vittrekwa-Butler and that indeed just before Mr. Vittrekwa-Butler opted to speak to legal aid the officer said; "I will leave it up to you if you want me to call legal aid".

[71] While the grounds for the *Charter* violation contained in the Notice of Application are that Mr. Vittrekwa-Butler was never informed that he could wait a reasonable period of time for his counsel to call back, the caselaw dictates that the s. 10(b) *Charter* right only includes the obligation on an officer to wait a reasonable period of time and that is a determination of fact (with the exception of *Vernon*). Rather, (and most recently in *Fern*) the Supreme Court of Canada is clear, the s. 10(b) right only includes a right to be informed of the obligation of an officer to state to a detainee "I have to wait a reasonable time to call back", when the detainee is contemplating refusing to accept any legal advice. It is the actions of the officer, and now with the gift of audio recording, the tone of the conversation and the other circumstances referred to above that dictate whether the officer actually waited a reasonable time.

[72] While the application was framed in very narrow terms, I make the following more expansive findings. Mr. Vittrekwa-Butler made the choice to speak to legal aid counsel, thus the issue of waiver does not arise, and secondly, that he was offered a reasonable opportunity to speak to counsel of choice.

[73] The application fails. Given that I find the Crown has proven the charge beyond a reasonable doubt, Mr. Vittrekwa-Butler, I find you guilty.

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MCLEOD K.L. T.C.J.