SUPREME COURT OF YUKON

Citation: *R v Simon*
2024 YKSC 65

Date: 20240513
S.C. No. 23-01504
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

KYLAND SIMON

Before Justice E.M. Campbell

Counsel for the Crown — Neil Thomson

Counsel and Agent for the Defence — Amy Steele

This decision was delivered in the form of Oral Reasons on May 13, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] CAMPBELL J. (Oral): Kyland Simon is charged with robbery, contrary to s. 344 of the *Criminal Code*, RSC, 1985, c C-46, (the "*Criminal Code*"). It is alleged that on August 7, 2022, he stole money from the complainant while armed with a knife.

[2] Mr. Simon elected trial by judge and jury. He has filed a pre-trial *Charter* (*Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*")) application seeking a stay of proceedings on the basis that the police violated his s. 10(b) *Charter* right by not facilitating his access to counsel for 12 hours after his arrest without any justification.

[3] Mr. Simon submits the breach of his *Charter* protected right to counsel is serious and the only appropriate remedy in the circumstances is a stay of proceedings. In the alternative, he seeks a sentence reduction as a remedy for the *Charter* breach if found guilty after trial.

[4] Crown counsel concedes that Mr. Simon's s. 10(b) *Charter* right to counsel was breached. However, he submits a stay of proceedings is not warranted. Rather, a reduction of sentence is an appropriate remedy in the circumstances of this case.

[5] I will go through the evidence on the application before starting with my analysis.

[6] Two witnesses testified on this application: Cst. Mark Steven Ford and the accused, Kyland Simon. In addition, an Agreed Statement of Facts was filed with respect to the evidence of Cst. Mitchell Bouchard.

[7] I will start with Cst. Ford's testimony.

[8] Cst. Ford has 15 years of experience as a police officer with the Royal Canadian Mounted Police (the "RCMP"). He has been posted for the last three years in the Yukon. However, most of his years of service were with the RCMP in northern Manitoba.

[9] Cst. Ford testified that on August 17, 2022, a restaurant located on Main Street, in Whitehorse, called the RCMP to report that an intoxicated and unruly male customer was causing a disturbance and refusing to leave their premises. Shortly after 7:00 p.m., Cst. Ford and two other police officers attended the location and located the accused, Kyland Simon, across the street. Mr. Simon matched the description of the unruly customer.

[10] Cst. Ford recognized Mr. Simon from previous interactions. Cst. Ford knew there was an outstanding warrant for Mr. Simon's arrest for a robbery that had allegedly taken

place a few weeks prior. Cst. Ford engaged with Mr. Simon and formally arrested him for robbery with an offensive weapon. Cst. Ford handcuffed Mr. Simon and put him in the back seat of the police vehicle.

[11] Once in the vehicle, Cst. Ford continued with the arrest process and read the pre-formatted RCMP *Charter* card verbatim to Mr. Simon. When Cst. Ford asked Mr. Simon if he understood why he was under arrest, Mr. Simon started to sing, ignoring Cst. Ford, and refusing to answer.

[12] Cst. Ford asked Mr. Simon if he wanted to speak to a lawyer. Mr. Simon replied yes, he did. Cst. Ford proceeded to read the police caution to Mr. Simon and asked him if he understood. Mr. Simon responded, “You want to know something? You’re still a human being. How big do you feel?”

[13] Immediately after arresting Mr. Simon, reading his *Charter* rights and giving him the police caution, Cst. Ford transported Mr. Simon from Main Street to the Arrest Processing Unit (the “APU”) at the Whitehorse Correctional Centre (the “WCC”) on Range Road. Cst. Ford estimates the transport to the APU took between seven to 10 minutes.

[14] Cst. Ford testified that immediately upon approaching Mr. Simon at the time of his arrest, he noticed that Mr. Simon was showing signs of intoxication. Cst. Ford could smell the alcohol coming from Mr. Simon, he had glazed eyes, and his speech was a little slurred.

[15] Upon arrival at the WCC, Cst. Ford parked his vehicle in the secure bay. He opened the door for Mr. Simon, and they started to walk towards the lodging area. Cst. Ford testified there are two sets of locked doors, six to seven feet apart, that

separate the secure bay from the lodging area. WCC staff are responsible for unlocking those doors.

[16] Cst. Ford testified that it is only when they reached the first door that Mr. Simon started resisting by putting his feet off the doorframe to try to prevent them from taking him any further. Cst. Ford described that, at that point, Mr. Simon started putting his feet on the walls, pulling away, pushing and yelling, trying to prevent the officers from taking him through those thresholds.

[17] Cst. Ford testified that he and other officers, including corrections officers, had to physically drag Mr. Simon and force him through the two doorways and into a cell. Mr. Simon was resisting, not being cooperative, and acting in a manner showing he had no desire to take directions from police or corrections staff.

[18] Cst. Ford testified that what he meant by “flailing” was that Mr. Simon was irrationally moving his legs and arms and/or body in an unconventional means against the requests of officers.

[19] Cst. Ford testified that Mr. Simon was a young, fairly tall, fit, and intoxicated individual who was very resistant and who resisted the entire way to the cells. Cst. Ford added that Mr. Simon was very irrational at the time, even dangerous considering the uncontrolled way he moved his body. According to Cst. Ford, this made for a potentially dangerous interaction with Mr. Simon because of the uncontrolled nature of his movements, whether they were intentional or not.

[20] Cst. Ford said that before they lodged him into cell, Mr. Simon told him to “suck him off”, which Cst. Ford understood to mean that Mr. Simon was being very vulgar in telling him to suck his penis.

[21] Cst. Ford added that they had to put Mr. Simon on the ground to remove certain pieces of clothing before they could leave him in the cell. During that time, Mr. Simon was kicking around. Cst. Ford testified he did not believe Mr. Simon was trying to kick someone intentionally, but the nature of his movements was such that he could have hurt Officer Bagwell, who was trying to remove his footwear before lodging him in cell.

[22] Cst. Ford added that they had to put Mr. Simon on his stomach in the cell before removing the handcuffs to give the officers enough time to exit the cell quickly before Mr. Simon could get up on his feet again. He added that as soon as the officers removed the handcuffs, Mr. Simon started to get up, and then ran towards the door as the officers were closing the cell.

[23] Cst. Ford testified that Mr. Simon moved towards the door with significant purpose, whatever that purpose may be. However, the door was closed and locked before Mr. Simon could reach it. Cst. Ford stated that nobody was hurt as a result.

[24] Cst. Ford testified that Mr. Simon then started urinating, not in the toilet located in the cell, but on the floor, directing it out towards the bottom of the door. He added that Mr. Simon's urine poured out into the hallway. Also, Mr. Simon started banging on the cell door and screaming.

[25] After exiting the cell, Cst. Ford completed the required paperwork. He testified he left at around 7:40 p.m.

[26] Cst. Ford testified Mr. Simon was still banging on the door cell and screaming when the police left the APU.

[27] Cst. Ford testified that Mr. Simon appeared highly intoxicated and high on drugs. He was seemingly a little irrational. Cst. Ford testified he had had previous interactions with Mr. Simon while he was intoxicated but had never seen him that intoxicated.

[28] Cst. Ford testified that his previous interactions with Mr. Simon were related to calls regarding things Mr. Simon had done. He added that he and other officers had had some good chats with Mr. Simon and that their previous interactions had been fairly good with him.

[29] Cst. Ford added that the interactions they had after arresting Mr. Simon were far off any other interactions he had had with him. All his other interactions with Mr. Simon would have taken place approximately six months before the arrest. Cst. Ford has not had any interaction with Mr. Simon since then.

[30] Cst. Ford testified it was determined that Mr. Simon was acting in a manner that was unsafe for officers to have further interactions with him at the time. Cst. Ford added it was unknown what Mr. Simon may or may not do, if given the opportunity, now that he was no longer in handcuffs. Because of his behaviour and the way Mr. Simon reacted when they put him in cell, they determined it was not safe for officers and staff to attempt to take Mr. Simon out of his cell to give him the opportunity to speak with counsel in private at that time.

[31] Due to his state of intoxication and actions, Cst. Ford believed it would take time for Mr. Simon to sober up and calm down. Therefore, they decided to pass the information to the next shift and wait until the next morning to give Mr. Simon time to sleep and sober up before giving him the opportunity to speak to a lawyer the next morning when it was safe to do so.

[32] Considering the nature of the charge he was facing the plan was to hold Mr. Simon for a bail hearing the next day. The police officer also testified that there are days where show cause hearings are at 10:00 a.m. and other days are at 1:00 p.m., and he did not know or did not remember what time the show cause was supposed to be the next day.

[33] Cst. Ford acknowledged the right to counsel is an important *Charter* right; however, he explained that they decided to delay giving Mr. Simon access to counsel because he was intoxicated and police officers believed he was high on drugs. In addition, Mr. Simon had demonstrated he had the potential of being violent with corrections staff and police. Based on their interactions with him, they believed that it was not feasible and safe to allow him to have access to the phone with unrestricted movements.

[34] Due to his state of intoxication, Cst. Ford expected that Mr. Simon would have been sleepy throughout the night and would be given the opportunity to speak with counsel the next morning. The request was passed on to the next shift, who gave Mr. Simon the opportunity to speak to counsel in the morning.

[35] Cst. Ford testified that he spent many years working in smaller detachments where they have had to hold people and guard them overnight. There were times where they had to wake up people for medical and safety reasons. He added that people would become upset with officers for waking them up.

[36] Cst. Ford acknowledged that Mr. Simon’s actions were not considered significant enough to charge him with assaulting a police officer. He also acknowledged that Mr. Simon did not make any direct threats. However, he stated that Mr. Simon’s actions

would have warranted a charge of obstructing a police officer or resisting arrest. He added that he decided not to lay those charges because he knew of some of Mr. Simon's challenges, and he did not think it was necessary to add to the serious offence Mr. Simon had already been charged with.

[37] Cst. Ford testified that the fact Mr. Simon did not make any verbal threat or did not assault one of the officers did not mean that he was not acting in a way that was dangerous to others. Cst. Ford added that if someone is kicking and flailing and resisting and throwing their body around, they may not be intentionally trying to assault someone, but they are putting people around them in a situation where they could get hurt, and the way Mr. Simon acted put others at risk at the time. That is the reason why the least interactions possible with him was deemed to be the safest course of action at the time.

[38] Cst. Ford testified that Mr. Simon was relatively cooperative and following directions up until the point they started going through the two sets of doors at the WCC. He acknowledged that Mr. Simon was handcuffed upon arrest. Due to his aggressive behaviour, Mr. Simon remained in handcuffs until he was placed in a cell.

[39] Cst. Ford testified he has arrested over 1,000 people over his 15-year career. He testified that usually by the time detained persons arrive in cells, they may be upset and unhappy with the police but very few act the way Mr. Simon did, especially to go from being fairly cooperative to suddenly have this outburst of energy and resistance, as Mr. Simon did, which appeared very irrational to Cst. Ford.

[40] Cst. Ford did not specifically recall speaking to the watch commander about facilitating Mr. Simon's right to counsel at a later time or taking specific steps to ensure

officers of the following shift would be informed of the need to do so before completing his shift. However, he added that whether it was him or Cst. Bagwell who did so, the other shift was informed because an officer went to the WCC early on in the following shift to afford Mr. Simon the opportunity to speak with counsel.

[41] Cst. Ford did not have a recollection of having an opportunity throughout the night to give Mr. Simon access to counsel, but indicated he was afforded that opportunity the next morning. Cst. Ford did not think any police officer had any further interaction with Mr. Simon during the night because of his actions and his level of intoxication. Cst. Ford did not think it was safe for them to continue engaging with Mr. Simon until he was sober, which, according to his experience, would have taken quite some time.

[42] Cst. Ford testified that it is not the practice of the RCMP to systematically delay someone's right to counsel because they are intoxicated or high on drugs. Cst. Ford stated that detained persons who are intoxicated and/or high, acting with reason and in a safe manner, are afforded the right to speak to counsel without delay. Cst. Ford pointed out he has arrested many people who were intoxicated and/or high and that he did not have to handcuff them because he did not think it was necessary in the circumstances. He added that it is only because of the unsafe way Mr. Simon acted that they postponed his right to access to counsel until it was feasible and safe to do so.

[43] Constable Ford testified that he did not know whether there was further assessment of Mr. Simon's behaviour during the night to see if it was safe for him to exercise his right to counsel. When asked whether there should have been further assessment of Mr. Simon's state during the evening and the night, Cst. Ford responded

that, from his experience working in small detachments, when they sometimes have to detain people overnight, individuals' people who are intoxicated or high become very agitated if they are woken up for safety or medical reasons while they may still be intoxicated or in the process of sobering up.

[44] Cst. Ford added that this is not conducive to them exercising their right to counsel. Therefore, he testified that if people are sleeping while they are sobering up, it is standard practice, from his experience, to allow them to sleep.

[45] Cst. Ford testified that he knows that the police have a duty to provide access to counsel upon arrest or detention as soon as practicable. He agreed that 12 hours would not usually be considered as soon as practicable but added that it may be considered as soon as practicable if it is not safe to allow someone to access counsel during that time.

[46] Cst. Ford testified that Mr. Simon was highly intoxicated, and he did not think, from his experience with dealing with other intoxicated individuals, he would have been sober after four hours. However, Cst. Ford admitted he did not know what Mr. Simon did overnight. Cst. Ford acknowledged he did not check on Mr. Simon during that time nor did he have anybody else check on him.

[47] Cst. Ford testified that it did not concern him that no one from the RCMP checked up on Mr. Simon during that period of time, considering his experience with people not wanting to be disturbed while they are sleeping. Cst. Ford expressed his belief that early in the morning, when Mr. Simon was up, had a chance to sober up and calm down, was a "pretty reasonable time to offer him access to counsel." Cst. Ford

added that it is not as if the RCMP waited until noon the next day to provide Mr. Simon with access to counsel.

[48] Cst. Ford also stated that, given the circumstances they were facing, he would follow the same course of action again. In addition, he thought his superiors would approve of the way he responded to the question.

[49] Cst. Ford agreed he would tell junior officers to delay implementing the right to counsel for safety reasons. Cst. Ford said he is not aware of any written RCMP policy that mandates specific actions within a specific timeline with respect to the implementation of the right to counsel.

[50] Cst. Ford repeated that the *Charter* says the right to counsel needs to be implemented as soon as practicable and they felt that, considering Mr. Simon's behaviour and level of intoxication, the next morning was the most appropriate time to give him the opportunity to speak with counsel.

[51] Cst. Ford testified Mr. Simon requested to speak to counsel at the time of arrest and Cst. Ford did not think that his desire to speak to counsel had changed since making the request. That is why an officer attended the APU to facilitate the right to counsel the next morning. Cst. Ford agreed it is important for an accused to speak with counsel prior to a bail hearing, which is why another officer went to see Mr. Simon in the morning to afford him a chance to speak with counsel prior to his bail hearing.

[52] Finally, Cst. Ford testified his shift ended at 6:00 a.m. on August 18, 2022, and another officer followed up with Mr. Simon when they were able to early on in their shift the next morning.

[53] I will now move on to the Agreed Statement of Facts that was filed before me on this application.

[54] The Agreed Statement of Facts reveals that on August 18, 2022, at 7:59 a.m., Cst. Bouchard attended the APU to speak with Mr. Simon. Cst. Bouchard advised Mr. Simon that he had been charged with the offence of robbery and asked if he would like to speak with a lawyer. Mr. Simon said he would.

[55] At 8:05 a.m., Cst. Bouchard facilitated a call between Mr. Simon and legal aid counsel.

[56] I will now turn to Mr. Simon's evidence/testimony.

[57] Mr. Simon is 23 years old. He was 21 at the time he was arrested. Mr. Simon is a member of the Selkirk First Nation. He was not working at the time he testified. His last employment was with Lands and Resources in Pelly Crossing. Mr. Simon does not have a criminal record.

[58] Mr. Simon remembered being arrested on August 17, 2022. He testified that he was walking down the street when a police cruiser stopped beside him. Two police officers then jumped out of the vehicle, put him in handcuffs, and threw him in the back of the police cruiser. Mr. Simon did not recall being asked if he wanted to speak to a lawyer at the time but recalled asking to speak to a lawyer. He added he told the officers he wanted to speak to a lawyer as soon as they arrested him and threw him into the back of the police cruiser because he was scared and did not know why he was being arrested. He found the situation very intimidating and wanted to speak to a lawyer immediately.

[59] Mr. Simon later acknowledged he was walking down Main Street and had just been asked to leave a restaurant due to his state of intoxication when he was arrested by the police. He maintained he did not recall the police telling him he was under arrest for robbery, nor did he recall singing in the back of the police cruiser.

[60] Mr. Simon testified the police officers then drove him to the APU, where they put him in a cell before removing the handcuffs. Mr. Simon acknowledged he resisted police going into the building and the cell. He stated he was very stubborn about it.

[61] Mr. Simon explained that he did not want to be put into the cell and that he was holding himself back by stopping in his tracks. He testified he had never been arrested for a criminal offence and held in a cell before. He felt very intimidated and scared about the situation.

[62] Mr. Simon testified he was put down to the ground and held with excessive force. He did not feel comfortable, nor did he understand why the police were removing the outer layer of his clothing.

[63] Mr. Simon also remembered having his handcuffs removed and the cell door slammed on him. He added that he was left there alone and that no one came to check up on him. He did not know what was going on and he felt intimidated. Mr. Simon added that he was in cell for a long time, that no one came to check up on him, that he never got to speak to a lawyer, and that no one came to talk to him until the next day.

[64] Mr. Simon acknowledged he ran towards the cell door after the police removed the handcuffs. He did so because he did not want to be locked in a cell. He did not have any intention to do anything to the police officers or the corrections officers at the time. He just wanted to get out.

[65] Mr. Simon testified there were big and multiple police officers surrounding him and holding him very aggressively. In addition, handcuffs were put on him, reducing his mobility. He did not understand why he was put in that situation. He confirmed that, after being put into a cell, he continued to want to speak to a lawyer. However, he testified that no one talked to him about a call to a lawyer until some time the next morning when a police officer came to give him access to counsel.

[66] Mr. Simon testified that he did not know when he was given his right to speak to counsel because there is no way to track time when being held in a cell. He told the officer he wanted to speak to a lawyer immediately upon being detained. However, he did not get to do so immediately. Mr. Simon added that he felt very upset and very violated by being left in a cell and ignored, as if he was not a human being.

[67] Mr. Simon acknowledged that, after the officers closed the cell door, he remained standing at the door, and that he started banging on the door and yelling at the door. He also acknowledged to urinating under the door. He agreed that, after 15 minutes or so, he went to lay on the bed and that he continued to lay on the bed for several hours. However, he did not fall asleep immediately. Mr. Simon recalled waking up in the morning, but he did not recall when he fell asleep.

[68] Mr. Simon acknowledged that a corrections officer gave him two blankets at some point during the night. He also recalled asking for juice and an officer giving him some as per his request. Mr. Simon agreed he was given breakfast in the morning.

[69] Mr. Simon acknowledged that he had consumed more alcohol than usual the day of his arrest. However, he denied taking any drugs other than alcohol that day. Mr. Simon agreed he was intoxicated to the point where he had been kicked out of a

restaurant. He believed he was intoxicated to a point where he was blacking out at the time.

[70] At first, Mr. Simon testified that he sobered up immediately after being placed in cell. However, he later conceded he was not sober when he banged on the cell door and when he urinated under it. Mr. Simon further agreed that he sobered up after he had some juice and slept for a number of hours.

[71] Mr. Simon confirmed he spoke to a lawyer in the morning. He believed he was released after a bail hearing between 1:00 p.m. and 3:00 p.m. that day.

[72] Finally, Mr. Simon did not recognize Cst. Ford as someone with whom he would have interacted before, nor did he recognize who he was when he saw him testify.

[73] I will now turn to my analysis with respect to the breach and the remedy sought.

[74] First, I will start with the right to counsel.

[75] As stated, the Crown concedes that Mr. Simon's *Charter* protected right to counsel was breached. Nonetheless, I believe it useful to review the principles that govern the application of s. 10(b) of the *Charter* in order to assess the nature and extent of the breach in the context of the test that I have to apply to determine whether ordering a stay of proceedings is warranted in this case.

[76] The impact of a s. 10(b) breach must be considered in light of the nature of the interests protected by the right to counsel and the length of delay in providing it (see *R v Noel*, 2019 ONCA 860 ("*Noel*") at para. 27 and *R v Jarrett*, 2021 ONCA 758 ("*Jarrett*") at para. 53).

[77] Section 10(b) of the *Charter* guarantees that everyone arrested or detained has the right to retain and instruct counsel without delay and to be informed of that right. The

right to counsel is meant to assist detained persons regain their liberty and guard against the risk of involuntary self-incrimination. As "a situation of vulnerability relative to the state is created at the outset of detention", the right to counsel is engaged immediately upon detention or arrest (see *R v Suberu*, 2009 SCC 33 ("*Suberu*") at paras. 40 to 42).

[78] Courts have, on numerous occasions, recognized the importance of the right to counsel. Speaking with counsel allows a detained person to obtain legal advice and relevant information regarding their legal situation, including the lawfulness of their detention or arrest; their obligation to comply with police demands; how long their detention may last; bail and what can or should be done to regain their liberty; as well as the right to silence and the exercise of that right, including the issue of self-incrimination (see *Suberu* at para. 41, *Noel* at paras. 24 to 26, *R v Whittaker*, 2024 ONCA 182 at para. 51, *R v Williams*, 2024 ONSC 1170 at para. 193).

[79] In addition, the right to counsel has been qualified as a lifeline for detained persons. As stated by Justice Doherty in *R v Rover*, 2018 ONCA 745 ("*Rover*") at para. 45:

> The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

[80] Courts have held that "holding a person without any explanation for why they cannot access counsel or any indication of when that might occur compromises their security of the person": *Jarrett* at para. 52.

[81] The right to counsel guaranteed by s. 10(b) of the *Charter* imposes three duties on the police. First, the police have a duty to inform a detained person of their right to retain and instruct counsel upon arrest or detention and of the existence and availability of legal aid and duty counsel (the informational duty).

[82] Second, if a detained person indicates a desire to exercise their right to counsel, the police have a duty to provide them with a reasonable opportunity to retain and instruct counsel (the implementation duty).

[83] Third, the police have a duty to refrain from eliciting incriminatory evidence from the detained person until they have had a reasonable opportunity to reach a lawyer, or they have unequivocally waived the right to do so. This has been described as the duty to hold off (see *Suberu* at para. 38 and *R v Brunelle*, 2024 SCC 3 ("*Brunelle*") at para. 80).

[84] The first duty under s. 10(b), the informational duty, is triggered immediately upon detention or arrest. The other two duties arise when a detained person indicates a desire to exercise their right to counsel:

> … Where this is the case, the police are under a constitutional obligation to facilitate access to counsel at the first reasonably available opportunity and to refrain from eliciting evidence from the detainee until that time [citations omitted]. (see *Brunelle* at para. 82)

[85] However, courts have recognized that in certain circumstances, some delay in providing and implementing the right to counsel may be justified (see *R v Cameron*, 2024 ONCA 231, and *Rover* at para. 26).

[86] These circumstances include, but are not limited to, where required for officer or public safety, the risk of destruction of evidence and where the detained person would

not immediately be able to consult with counsel in private (see *Rover* at paras. 26 and 33, *R v Pileggi*, 2021 ONCA 4, *R v Patrick*, 2017 BCCA 57 at para. 116).

[87] It is important to stress that the ability of a detained person to exercise their right to counsel is completely dependent on the police. Therefore "[t]he police must understand that right and be willing to facilitate contact with counsel" (*Rover* at para. 34).

[88] Police officers may not assume in advance that it will be impracticable for them to facilitate access to counsel if requested. Rather, they must be mindful of the particular circumstances of the detention and take proactive and reasonable steps to minimize the delay in granting access to counsel (see *Rover* at para. 27, *R v Taylor*, 2014 SCC 50 ("*Taylor*") at paras. 25 and 33, and *Brunelle* at para. 95).

[89] The determination of whether the delay in providing a detained person access to counsel is reasonable is based on a factual and contextual inquiry (see *Taylor* at para. 24). Barriers to access or exceptional circumstances that justify briefly suspending the exercise of the right cannot be assumed. They must be proved.

[90] When there is a delay in providing access to counsel "the burden is always on the Crown to prove the circumstances, exceptional or not, that make the delay reasonable (*Taylor* at para. 24)" (*Brunelle* at para. 93).

[91] Nonetheless, as stated in *Brunelle* at para. 96:

> … [T] he fact that a police officer assumes in advance that it will be reasonable to delay the implementation of the right to counsel, without regard to the circumstances of the detention, will not in itself entail an infringement of this right. After all, the central question remains whether the delay was reasonable having regard to all of the circumstances, whether those circumstances were considered by the police or not. However, the fact that the police assume the delay

> will be reasonable will make it much more difficult for the Crown to show that it was in fact reasonable.

[92] The central question to answer is "whether the delay in facilitating access to counsel [in *Taylor*, it was a failure to facilitate such access (para. 35)]was reasonable in the circumstances" (see *Brunelle* at para. 100).

[93] When I look at the evidence before me with respect to the witnesses' testimony, I find that both Cst. Ford and Mr. Simon were credible witnesses. They were both prepared to acknowledge the limits of their recollection of events. For example, Cst. Ford testified that due to the dynamic and fast situation he faced once Mr. Simon started resisting being brought into the APU, he did not remember the precise nature and extent of all of Mr. Simon's movements at the time.

[94] As for Mr. Simon, he agreed he had consumed more alcohol than usual and was intoxicated to a point where he was blacking out at the time. I also note that Mr. Simon was not argumentative with counsel.

[95] As for Cst. Ford, he willingly acknowledged the limits of his perspective of events by acknowledging, for example, that he did not know what Mr. Simon's intent was when he charged at the cell door after the handcuffs had been removed. However, considering Mr. Simon's admitted state of intoxication, I do not find his testimony reliable when it comes to the specifics of his arrest and of the police conduct when he was brought into the APU and a cell, including his testimony that he did not recall being told of the reasons for his arrest and that he was not informed of his right to counsel. I note that he recalled requesting to speak to counsel immediately. Also, Mr. Simon did not recall anyone checking on him overnight after being placed in cell until Crown

counsel put to him that he had at least two interactions with a corrections officer, who brought him juice and blankets.

[96] In addition, there is agreement that Mr. Simon resisted as much he could being brought into the APU and into a cell that evening. Mr. Simon acknowledged he was stubborn about it. And there is agreement about what I would qualify as Mr. Simon's impaired and belligerent actions and behaviour when he was put in cell.

[97] I therefore accept Constable Ford's description of Mr. Simon's actions as they proceeded through the sets of doors that separate the bay from the lodging area of the APU and into the cell. I accept that Mr. Simon's actions as he was flailing, kicking, pushing, and pulling to prevent police officers and corrections officers from bringing him into the APU and a cell constituted a real concern for the safety of the officer's present at the time.

[98] Considering Mr. Simon's unpredictable and aggressive behaviour, probably due to his level of intoxication, I am of the view that it was justifiable and reasonable to delay the implementation of Mr. Simon's right to counsel until such time as he had sufficiently calmed down to a point where he no longer represented a concern for the safety of others, in this case, police officers and corrections officers.

[99] Mr. Simon testified he was of the view the police used excessive force against him. However, he has not otherwise raised issue with the force employed by police to arrest and control him, and the evidence before me does not support Mr. Simon's assertion during his testimony that police used excessive force against him. I note that despite his aggressive behaviour, police removed the handcuffs when he was left in the cell.

[100] Mr. Simon was arrested on an outstanding warrant on a charge of robbery following an unrelated complaint that he was intoxicated and causing a disturbance in a restaurant in downtown Whitehorse. A decision was made to hold him overnight for a show cause hearing the next day and he was brought right away to the APU of the WCC. The handcuffs were removed at the time Mr. Simon was placed in the cell.

[101] The evidence before me is that the officers used force as warranted in the circumstances considering Mr. Simon's intoxicated and belligerent behaviour. Mr. Simon was held overnight and released after he appeared for a show cause hearing.

[102] However, I am of the view that it was not reasonable for Constable Ford to assume Mr. Simon would not be in a state to exercise his right to counsel and would not have calmed down enough to be given access to counsel in private in another room of the APU until the next morning because he was highly intoxicated. It was not reasonable for Constable Ford to assume that Mr. Simon would need the night to sleep it off and sober up. As the arresting officer, Constable Ford had the responsibility to take positive steps to inquire or have others inquire about Mr. Simon's state and behaviour in order to provide him access to counsel without delay when the safety concerns dissipated.

[103] This is not what happened here. Once he left the APU, Constable Ford did not take any steps or ask that any other officer take any steps to assess Mr. Simon's situation. He did not ask corrections officers at the APU to keep him, or other officers informed of changes in Mr. Simon's behaviour. He did not recall how the next shift was informed that they needed to attend the APU the next morning to facilitate Mr. Simon's

access to counsel. As a result, Mr. Simon was left overnight without being provided with access to counsel when the evidence reveals that, at some point, he was calm enough to interact with a corrections officer, who provided him with blankets and juice.

[104] The fact that the police did not try to question Mr. Simon before he could speak to counsel cannot be used to attenuate a breach of the police's implementational duty to provide access to counsel (see *Noel* at paras. 17 to 20). However, the fact that the police attended the next morning before Mr. Simon's show cause hearing to provide him with access to counsel and the fact that Mr. Simon was able to speak with counsel that morning before attending a show cause hearing later that day, reveal that the police remained aware of their *Charter* obligation and took steps to implement Mr. Simon's right to counsel. The steps taken by the police the next morning attenuates, in my view, the extent of the breach.

[105] I am also of the view that the evidence before me does not reveal that Constable Ford's assumption and beliefs that, in the circumstances, Mr. Simon would not be in a position to exercise his right to counsel until the next morning, as well as his statement that he would do the same thing again if faced with the same set of circumstances, reflects a widespread practice within the Whitehorse RCMP detachment of delaying access to counsel. Constable Ford's response is nonetheless a concern to the Court, as he is an experienced officer that younger officers may go to for advice, and it demonstrates, in my view, a clear misunderstanding of the extent of a police officer's obligations pursuant to s. 10(b) of the *Charter*.

[106] The fact there is no evidence that Constable Ford's views reflect a systemic practice within the police, does not, constitute a circumstance that takes this case out of the serious breach category. As stated in *Jarrett* at para. 48:

> … The police are expected to comply with the *Charter*. The absence of evidence that the police's failure to comply with the *Charter* was systemic is not a mitigating factor when assessing the seriousness of the breach: *McGuffie*, at para. 67.

[107] The police cannot rely on assumptions when it comes to fulfilling their duty of providing access to counsel pursuant to s. 10(b) of the *Charter*. They have the obligation to take proactive steps to provide access to counsel without delay. In this case, this meant remaining in contact with corrections staff to determine the evolution of Mr. Simon's condition and providing access to counsel without delay after he had calmed down and it was safe to do so.

[108] In addition, I am of the view that the length of the breach and the impact of the breach on Mr. Simon's mental and emotional state militate in favour of finding that the breach is at the serious end of the spectrum. Indeed, Mr. Simon testified he did not understand what was happening, he felt ignored and scared. As someone without a criminal record who had never been held in custody before, he was deprived for many hours of the lifeline the right to counsel represents. The impact of the breach on Mr. Simon cannot be overlooked.

[109] Now that I have reviewed the nature, extent and seriousness of the *Charter* breach in this case, I will move to the remedy under s. 24(1) of the *Charter*.

[110] Section 24(1) of the *Charter* gives the Court the power to grant "such remedy as [it] considers appropriate … in the circumstances", which includes a stay of proceeding.

A stay of proceedings has been described as the ultimate remedy or the most drastic remedy a criminal court can order because of its finality. Charges that are stayed may never be prosecuted, an alleged victim will never get their day in court, and society will never have the matter resolved by a trier of fact (see *R v Babos*, 2014 SCC 16 ("*Babos*") at para. 30 and *Brunelle* at para. 112). Therefore, a stay of proceedings should only be granted in the clearest of cases (see *Babos* at paras. 30, 31; *Brunelle* at para. 29).

[111] These cases generally fall into two categories:

1. where state conduct compromises the fairness of an accused's trial - the main category; and
2. where state conduct creates no threat to trial fairness, but risks undermining the integrity of the judicial process - the residual category (see *Babos* at para. 31).

[112] The test to determine whether a stay of proceedings is warranted is the same for both categories. Three conditions must be met before a stay of proceedings may be ordered. These conditions are cumulative and none of them is optional (see *Brunelle* at para. 114):

1. There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome.
2. There must be no alternative remedy capable of redressing the prejudice.
3. Where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the Court is required to balance the interests in favour of

> granting a stay such as denouncing misconduct and preserving the integrity of the justice system against the interest that society has in having a final decision on the merits.

[113] The parties agree that this case falls within the residual category.

[114] With respect to the residual category, the Supreme Court of Canada added the following observation in *Babos* at para. 44 regarding the onerous burden placed on an accused person who seeks a stay of proceedings on that basis:

> Undoubtedly, the balancing of societal interests that must take place and the "clearest of cases" threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be "exceptional" and "very rare". But this is as it should be. It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay of proceedings will be warranted. [citations omitted]

[115] When a case falls within the residual category, the first stage of this test involves a consideration of:

> … [W]hether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met. (see *Babos* at para. 35)

[116] Considering the importance of the right to counsel, the length of the breach of Mr. Simon's right to counsel and its impact on him, its seriousness, I find the police

conduct sufficiently troublesome to require the Court to clearly dissociate itself from it in order to protect the integrity of the justice system The first part of the test is met.

[117] At the second stage of the test, when determining whether any other remedy short of a stay can redress the prejudice, the focus must be on the existence of remedies directed towards the harm to the integrity of the justice system. Again, in *Babos* at para. 39, the Court said:

> … It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[118] Robbery is a serious offence which is punishable by a maximum of life imprisonment; however, there is no minimum sentence provided for a robbery committed with a weapon other than a firearm. In my view, in the particular circumstances of this case, this leaves the Court with sufficient ability to craft a sentence which, if the accused is found guilty, would recognize the seriousness of the breach and signal the Court's disapproval of the police conduct that breached Mr. Simon's *Charter* protected right to counsel and dissociate itself from it.

[119] I am of the view that this case is distinguishable from the two cases filed by the accused where a stay of proceedings was ordered. This is not a case where, after the accused indicated around the time of his arrest that he wanted to speak with counsel and was told twice by police that arrangements would be made for him to do so, the accused was lodged in cell without speaking to counsel and left while the police went on to attend to other tasks, appeared to completely forget about the accused's request, and

did nothing to facilitate the accused's contact with counsel prior to his show cause hearing the next day, as was the case in *R v Chinnadurai*, 2016 OJ No 2116.

[120] In that case, the judge found that the police's conduct was reprehensible and almost amounted to gross negligence. The judge recognized that the charges of domestic violence against the accused were serious but determined that the police conduct was egregious and that the integrity of the justice system required that the Court direct a stay of proceedings.

[121] I also find that the circumstances before me are different from the case of *R v Korecki*, 2007 ABPC 321, where the judge ordered a stay of proceedings on an impaired driving charge on the basis that the accused was arbitrarily detained contrary to s. 9 of the *Charter* and his right to speak to counsel completely denied contrary to s. 10(b) of the *Charter*.

[122] In that case, the accused requested to speak to counsel and was offered to speak with counsel upon arrival at the police station. However, the accused was intoxicated, became belligerent and aggressive. The police decided to delay her access to counsel due to safety concerns.

[123] The judge found the police were justified not to provide access to counsel at that time. The accused was placed handcuffed alone in a cell where she remained with her hands cuffed behind her back for over two hours against what appeared to be established police practice and without justification., The arresting officer had indicated that the accused be released when sober. However, even when she appeared to have calmed down, the accused was not released. She was only released seven hours later. The judge found this amounted to arbitrary detention. With respect to the s. 10(b)

Charter breach, the accused was denied access to counsel despite her stated desire to speak with counsel upon arrest and, having calmed down by the time the handcuffs were removed, she was not allowed to speak to counsel before being released. The judge found that the police had made a considered and conscious decision to deny completely the accused's right to counsel.

[124] As for other possible appropriate remedy, the judge considered, amongst other remedies, that a reduction of sentence was not appropriate considering the mandatory minimum sentence provided by the *Criminal Code* and considering the nature and extent of the two *Charter* breaches. He found that a stay of proceedings was the only remedy that was adequate to ensure future compliance with fundamental *Charter* rights.

[125] Again, I do find that, in the particular circumstances of this case, in light of the nature and extent of the *Charter* breaches, a reduction of sentence is an appropriate remedy to address the breach to Mr. Simon's *Charter* protected right to counsel. As I have found that a remedy short of a stay of proceedings is appropriate in this case, the test is not met and the accused's application for a stay is dismissed.

[126] I want to make it clear that I am not saying that a complete denial of the right to counsel before a person is released after a lengthy period of detention will be required before the Court orders a stay of proceedings based on a breach of s. 10(b) of the *Charter*. What I am saying is that the analysis is highly contextual, that I am of the view that this case is not the clearest of cases and that a sentence reduction is an appropriate remedy considering the wide range of sentences available to the Court on the charge of robbery as well as the particular circumstances of the *Charter* breach before me.

[127] In conclusion, the accused's right to counsel protected by s. 10(b) of the *Charter* was breached. However, his application for a stay of proceedings is dismissed. A reduction of sentence, if the accused is found guilty, is an appropriate remedy for the breach of the accused's *Charter* right to counsel.

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CAMPBELL J.