**SUPREME COURT OF CANADA**

**CITATION:** R. *v.* Willier, 2010 SCC 37

**DATE:** 20101008
**DOCKET:** 32769

**BETWEEN:**

**Stanley James Willier**
Appellant
and
**Her Majesty The Queen**
Respondent
- and -
**Attorney General of Ontario, Attorney General of British Columbia,**
**Director of Public Prosecutions of Canada,**
**Criminal Lawyers' Association of Ontario,**
**British Columbia Civil Liberties Association and**
**Canadian Civil Liberties Association**
Interveners

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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|---|---|
| **REASONS FOR JUDGMENT:** (paras. 1 to 45) | McLachlin C.J. and Charron J. (Deschamps, Rothstein and Cromwell JJ. concurring) |
| **CONCURRING REASONS:** (paras. 46 to 47) | Binnie J. |
| **CONCURRING REASONS:** (para. 48) | LeBel and Fish JJ. (Abella J. concurring) |

**Stanley James Willier** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

and

**Attorney General of Ontario, Attorney General of British Columbia, Director of Public Prosecutions of Canada, Criminal Lawyers' Association of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association** *Interveners*

**Indexed as: R. *v.* Willier**

**2010 SCC 37**

File No.: 32769.

2009: May 12; 2010: October 8.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Constitutional law — Charter of Rights — Right to counsel — Counsel of choice — Accused's counsel of choice unavailable — Accused spoke instead to duty counsel — Adequacy of advice received — Incriminating statement made during police interrogation — Whether accused's right to counsel breached — Canadian Charter of Rights and Freedoms, s. 10(b).*

Following W's arrest for murder, the police informed him of his right to counsel and facilitated a brief telephone conversation with duty counsel. Offered another opportunity to speak to counsel the next day, he made an unsuccessful attempt to call a specific lawyer. When informed that the lawyer was unlikely to call back before his office reopened the next day and reminded of the immediate availability of duty counsel, W opted to speak with the latter a second time. W expressed satisfaction with the advice he had received from duty counsel. The police officer told W that he would proceed with the interview, but that W would be free at any time during the interview to stop and call a lawyer. W did not attempt to contact his lawyer again before providing a statement to the police during the investigative interview that followed. The trial judge later ruled on a *voir dire* that the statement was voluntary. However, he held that W's right to counsel under s. 10(*b*) of the *Charter* had been breached, as he was denied a reasonable opportunity to consult counsel of his choice before the interview. Further, W's two conversations with duty counsel were insufficient given their brevity to satisfy his right to a meaningful opportunity to instruct counsel. The statement was excluded and W was acquitted. A majority of the Court of Appeal found no *Charter* breach, reversed the acquittal, and ordered a new trial.

*Held:* The appeal should be dismissed.

*Per* **McLachlin** C.J. and Deschamps, **Charron**, Rothstein and Cromwell JJ.: W did not suffer a violation of his s. 10(*b*) right to counsel. In no way did the police interfere with W's right to a reasonable opportunity to consult with counsel of choice by simply reminding him of the immediate availability of duty counsel after his unsuccessful attempt to call a particular lawyer. When W stated his preference to wait, police reasonably informed him that it was unlikely that his lawyer would be quick to return his call given that it was a Sunday, and reminded W of the immediate availability of duty counsel. W was not told that he could not wait to hear back from his lawyer, or that duty counsel was his only recourse. There is no indication that his choice to call duty counsel was the product of coercion. The police had an informational duty to ensure that W was aware of the availability of duty counsel, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. W was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise.

Further, the brief interval between W's attempt to contact his lawyer and the start of the investigative interview did not deprive him of a reasonable opportunity to contact counsel of choice. The brevity of the interval must be viewed in light of all the circumstances prior to the commencement of the interview. After speaking with duty counsel, W expressed satisfaction with that advice. He did not pursue any further opportunity to contact his lawyer, though he was offered an open-ended invitation to contact counsel prior to and throughout the interview. If W maintained any continuing desire to speak with his lawyer, or wait for him to call back, he was not diligent in exercising that right. There is little more that the police could have done in these circumstances to

afford W a reasonable opportunity to exercise his rights under s. 10(*b*).

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. While s. 10(*b*) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. To impose such a duty on the police would be incompatible with the privileged nature of the solicitor-client relationship. In this case, despite the brevity of W's conversations with duty counsel, W gave no indication that these consultations were inadequate. On the contrary, he expressed his satisfaction with the legal advice to the interviewing officer, prior to questioning. W is not entitled to express such satisfaction, remain silent in the face of offers from the police for further contact with counsel, remain silent in the voir dire as to the alleged inadequacies of the actual legal advice received, and then seek a finding that the advice was inadequate because of its brevity.

*Per* **Binnie** J.: The situation here is not comparable to that in the companion case of *R. v. Sinclair*, 2010 SCC 35. W expressed satisfaction with the advice obtained from legal aid prior to the interview. He did not pursue any further opportunity to contact his lawyer of choice though he was invited to do so.

*Per* **LeBel**, **Fish** and Abella JJ.: W was given ample opportunity to exercise the s. 10(*b*) *Charter* rights that he was claiming, but failed to exercise them with diligence.

**Cases Cited**

By McLachlin C.J. and Charron J.

**Considered:** *R. v. Prosper*, [1994] 3 S.C.R. 236; **referred to:** *R. v. Sinclair*, 2010 SCC 35; *R. v. McCrimmon*, 2010 SCC 36; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Smith*, [1989] 2 S.C.R. 368; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520.

By Binnie J.

**Applied:** *R. v. Sinclair*, 2010 SCC 35.

By LeBel and Fish JJ.

**Applied:** *R. v. Sinclair*, 2010 SCC 35; *R. v. McCrimmon*, 2010 SCC 36.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 10(*b*), 24(2).

APPEAL from a judgment of the Alberta Court of Appeal (Ritter and Slatter JJ.A. and Bielby J. (*ad hoc*), 2008 ABCA 126, 89 Alta. L.R. (4th) 22, 429 A.R. 135, 421 W.A.C. 135, 230 C.C.C. (3d) 1, [2008] 7 W.W.R. 251, 168 C.R.R. (2d) 323, [2008] A.J. No. 327 (QL), 2008 CarswellAlta 404, reversing a decision of Gill J., 2006 CarswellAlta 2120. Appeal dismissed.

*Lauren L. Garcia* and *Mary MacDonald*, for the appellant.

*Goran Tomljanovic, Q.C.*, and *Brian Graff*, for the respondent.

*John S. McInnes* and *Deborah Krick*, for the intervener the Attorney General of Ontario.

*M. Joyce DeWitt-Van Oosten*, for the intervener the Attorney General of British Columbia.

*David Schermbrucker* and *Christopher Mainella*, for the intervener the Director of Public Prosecutions of Canada.

*P. Andras Schreck* and *Candice Suter*, for the intervener the Criminal Lawyers' Association of Ontario.

*Warren B. Milman* and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

*Jonathan C. Lisus, Alexi N. Wood* and *Adam Ship*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] This appeal, in conjunction with its companion cases, *R. v. Sinclair*, 2010 SCC 35 and *R. v. McCrimmon*, 2010 SCC 36, elaborates upon the nature and limits of the right to counsel provided under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. Specifically, this case touches upon a distinct facet of the s. 10(*b*) guarantee, namely the right to counsel of choice.

[2] The appellant, Stanley Willier, alleges that the police violated the *Charter* by depriving him of his right to counsel. His allegation arises out of the following circumstances: following Mr. Willier's arrest for murder, the police informed him of his right to counsel and facilitated a brief telephone conversation with Legal Aid. Offered another opportunity to speak to counsel the next day, he made an unsuccessful attempt to call a specific lawyer and left a message on his answering machine. When asked if he wished to speak with another lawyer, Mr. Willier stated his preference to wait to hear back from his chosen counsel. However, when informed that his preferred lawyer

was unlikely to call back before his office reopened the next day and reminded of the immediate availability of free Legal Aid, Mr. Willier opted to speak with duty counsel a second time. Shortly thereafter, the police commenced an investigative interview, prefacing the questioning with an open-ended invitation to contact counsel at any point during the exchange. Mr. Willier expressed satisfaction with the advice he had received from Legal Aid, and did not attempt to contact counsel again before providing a statement to the police.

[3] A pre-trial *voir dire* affirmed Mr. Willier's allegations of a s. 10(*b*) breach. In the trial judge's view, after Mr. Willier's unsuccessful attempt to contact his preferred lawyer and before he spoke to duty counsel, s. 10(*b*) required the police to inform him of his right to a reasonable opportunity to contact counsel of choice and of their duty to refrain from questioning him until he had been afforded that opportunity. Without such a warning, he could not waive his right to counsel of choice. Further, the police had improperly discouraged Mr. Willier from waiting to hear from his preferred lawyer, instead directing him to Legal Aid. Although Mr. Willier spoke with duty counsel twice, the trial judge deemed these consultations inadequate given their brevity, holding that they did not amount to a "meaningful exercise of his right to counsel" (2006 CarswellAlta 2120, at para. 119). The trial judge excluded Mr. Willier's statements, resulting in his acquittal.

[4] The majority of the Alberta Court of Appeal overturned this decision, finding no *Charter* breach (2008 ABCA 126, 89 Alta. L.R. (4th) 22). In their opinion, s. 10(*b*) does not, as held on *voir dire*, impose an additional informational obligation on the police when a detainee is unsuccessful in contacting a specific lawyer and opts to speak with another. The trial judge also erred in basing

a s. 10(*b*) breach upon the inferred inadequacy of Mr. Willier's legal advice. Given the privileged nature of the solicitor-client relationship, the police are not responsible for ensuring that legal advice satisfy a particular qualitative standard. Mr. Willier had been afforded his s. 10(*b*) right. Given his consultations with Legal Aid, his expressions of satisfaction with that advice, and his decision to forego an offer to speak to counsel when again provided with that opportunity prior to being interviewed, the police were entitled to proceed with their questioning. In the absence of a *Charter* breach, there was no basis for excluding Mr. Willier's statement to the police.

[5] Conversely, Bielby J. (*ad hoc*) concurring in the result, affirmed the s. 10(*b*) violation found on the *voir dire*. The brief interlude between Mr. Willier's attempt to contact his preferred counsel and the start of the interview did not afford him a reasonable opportunity to consult with counsel of choice, particularly given the seriousness of the charge and the lack of urgency in commencing the investigation. Mr. Willier's brief calls to Legal Aid did not afford him "meaningful contact" with counsel, and as such failed to discharge his right to counsel (para. 77).

[6] For the reasons that follow, we agree with the majority of the Court of Appeal, find no s. 10(*b*) violation, and dismiss the appeal.

## II. Facts

[7] On about February 25, 2005, Brenda Moreside was found stabbed to death in her house in High Prairie, Alberta. The RCMP identified Stanley Willier as a suspect, given his prior

relationship with the deceased, and arrested him for murder at his brother's Edmonton apartment at midday on February 26, 2005.

[8] Upon arrest, Mr. Willier admitted to having recently taken a number of pills purchased off the street. After a few brief questions regarding his drug use and his physical well-being, the arresting officers became concerned for his health and decided to take him to the hospital. The officers informed Mr. Willier of their intention to speak with him after his hospital visit, to which he responded: "Okay, you guys are done [unintelligible] I want a lawyer, I don't want to be questioned".

[9] At 5:40 p.m., while in the emergency ward, the police informed Mr. Willier of the reason for his arrest and of his right to retain and instruct a lawyer without delay. They told him that he could call any lawyer he wanted, informed him of the availability of free duty counsel, and provided him with a telephone book and the toll-free number for Legal Aid. When asked if he understood those rights, Mr. Willier responded in the affirmative. The police then asked Mr. Willier if he wanted to call a lawyer, clarifying Mr. Willier's misconception that free legal advice was only available after an application to Legal Aid and informing him of its immediate availability. Informed that he wanted to wait until the next day to contact counsel, the police assured Mr. Willier that a telephone would be available whenever he decided he wanted to call a lawyer.

[10] When Mr. Willier was released from hospital at approximately midnight that night, the police took him to the RCMP detachment in Sherwood Park. Informed again of his right to counsel,

he asked to speak to a free lawyer. Provided with a private room, a telephone, and various phone numbers, Mr. Willier had a three-minute conversation with duty counsel. He was then returned to his cell for the night.

[11] The next morning, a Sunday, Cst. Lahaie confirmed with Mr. Willier that he had spoken with a lawyer the night before and offered him another opportunity to contact counsel. Mr. Willier indicated that he wanted to speak with a specific lawyer, Mr. Peter Royal; Cst. Lahaie dialed Mr. Royal's phone number, passed the phone to Mr. Willier, and left him in private to leave a message on the answering machine. After Mr. Willier hung up the phone, Cst. Lahaie asked him if he wanted to contact another lawyer. He declined the offer, indicating his preference to wait. After Cst. Lahaie informed him that Mr. Royal would not likely be available until the next day, given the office closure, and of the immediate availability of Legal Aid, Mr. Willier opted to speak with duty counsel a second time. The exchange leading to Mr. Willier's subsequent call to Legal Aid went as follows:

> Lahaie: Did you, you left a message there, did you?
>
> Willier: Yes.
>
> Lahaie: Did you wanna talk to any other lawyer this morning ...
>
> Willier: No.
>
> Lahaie: ... to, to talk directly to a lawyer? We can phone this number here again, the after hours number, if you'd like.
>
> Willier: No, I think I'll just wait for (inaudible). I just told the lawyer that.
>
> Lahaie: Well, their offices are closed, they said ...

Willier: Yeah.

Lahaie: ... on the answering machine. So they're not gonna be available until tomorrow.

Willier: Oh (inaudible).

Lahaie: Unless they, unless they check their messages all weekend. So if you wanna talk to a lawyer today, a direct lawyer, you can call, that's why we have these after hours, why the Legal Aid sign has these.

Willier: Sure, let's phone them.

After a brief one-minute conversation with a Legal Aid lawyer, the police returned Mr. Willier to his cell.

[12] Approximately 50 minutes later, Sgt. Gillespie initiated an investigative interview with Mr. Willier. After confirming Mr. Willier's prior consultations with Legal Aid, Sgt. Gillespie reinformed him of his right to retain and instruct counsel and offered him another opportunity to contact a lawyer before continuing with the interview. Mr. Willier indicated that he was satisfied with the advice he had received from Legal Aid. Sgt. Gillespie re-cautioned Mr. Willier as to his right to remain silent, informing him that anything he said may be used as evidence against him. He asked Mr. Willier to repeat the nature of the caution back to him to ensure that he understood its meaning, and Mr. Willier did so. Sgt. Gillespie indicated that he would proceed with the interview, but that Mr. Willier would be free at any time during the interview to stop and call a lawyer:

Gillespie: And ah, ah, as long as you're satisfied with the advice you got I think ah, we'll proceed from here but I want you to know that ah, at any time if you

want to stop and call a lawyer you're more than welcome to do so okay. I don't want to, to deprive you of that in any way, shape or form so.

Willier: Yea.

Gillespie: Ahm, if, if you want to talk to a lawyer you just say, hey Charlie I want to talk to a lawyer.

Willier: Hmm hmm.

Gillespie: Does that sound good?

Willier: Yes.

Gillespie: Okay. Do you have any other questions of me at all ah?

Willier: No.

During the ensuing exchange, Mr. Willier provided a lengthy statement as to his involvement in the death of Ms. Moreside.

III. Judicial History

[13] The court proceedings commenced with a *voir dire* to determine the common law admissibility of Mr. Willier's statements and whether there was a *Charter* basis for their exclusion.

[14] The trial judge ruled the statements voluntary and thus admissible under the confessions rule, noting that Mr. Willier was "alert, focused, and rational" throughout the interview, that the police had not offered any improper inducements, and that their persuasive techniques were

reasonable. However, he excluded the statements after finding that the police had breached Mr. Willier's right to counsel under s. 10(*b*) of the *Charter*.

[15] A first violation derived from the failure of the police to inform Mr. Willier of his right to counsel and give him an opportunity to exercise that right at the time of his arrest, obligations fulfilled only later at the hospital. Although a contravention of s. 10(*b*), the trial judge noted (at para. 105) that the delay was "perhaps not significant" as no evidence was gathered in close proximity to the *Charter* violation. On this appeal, there is no allegation that the delay in informing Mr. Willier of his right to counsel constituted a s. 10(*b*) breach and we agree with the trial judge as to its insignificance, given the absence of a nexus between the delay and the production of the statement.

[16] The trial judge identified a second s. 10(*b*) violation in the police denial of Mr. Willier's right to a reasonable opportunity to contact his counsel of choice, as evidenced by Cst. Lahaie's actions in "actively discouraging" Mr. Willier from waiting for a call back from Mr. Royal and directing him to Legal Aid, and Sgt. Gillespie's initiation of the interrogation shortly thereafter (paras. 111-12). In light of the totality of the circumstances, including a lack of investigative urgency and the absence of any indication that Mr. Royal would not be available within a reasonable time, the failure of the police to hold off in the interrogation amounted to a s. 10(*b*) breach. Mr. Willier had not waived his right to a reasonable opportunity to contact counsel of choice by opting to speak with duty counsel, as the police had not informed him of his entitlement to that right. Despite Mr. Willier's two conversations with Legal Aid, these conversations were insufficient to

satisfy his right to a meaningful opportunity to instruct and retain counsel, in light of their brevity. Given the s. 10(*b*) violation, the trial judge excluded Mr. Willier's statement under s. 24(2) of the *Charter*. The Crown's subsequent inability to offer any evidence resulted in Mr. Willier's acquittal.

[17] At the Alberta Court of Appeal, the majority allowed the appeal, reversed the acquittal, and ordered a new trial.

[18] As a preliminary matter, Slatter J.A., writing for the majority, held that s. 10(*b*) does not require the police to monitor the quality of advice received, writing that "[t]he police are required to notify the detained person that he has a right to counsel, not to audit that advice once given" (para. 28). Such communication being subject to privilege, the police are not entitled to know its contents. Even if the police were voluntarily informed of the advice provided to a detainee, it would be inappropriate for them to second-guess its adequacy. As such, the trial judge erred in basing a *Charter* breach on the inferred inadequacy of Mr. Willier's legal advice.

[19] Slatter J.A. found that the police had complied with their informational and implementational obligations under s. 10(*b*), and that there was no basis for a *Charter* breach. There was nothing amiss when Cst. Lahaie informed Mr. Willier of the availability of Legal Aid after his unsuccessful attempt to contact Mr. Royal, as such conduct is consistent with the police duty to ensure a detainee is aware of the availability of immediate and free legal consultation (para. 47). The police had afforded Mr. Willier a reasonable opportunity to contact counsel, given his two consultations with Legal Aid, his expressions of satisfaction with that advice, and his decision to

forego an offer to speak to counsel when again provided with that opportunity prior to the interview. Slatter J.A. wrote: "Having discharged their obligations to advise the respondent of his right to counsel of choice, and after the respondent actually spoke to counsel, they were entitled to attempt to obtain a statement from him absent any further request to speak to counsel of choice" (para. 56).

[20] Slatter J.A. also held that Mr. Willier had waived any continuing right to speak with counsel, given his indications of satisfaction with the advice received from Legal Aid. This waiver suspended the police obligation to hold off, entitling them to commence with their questioning as they did.

[21] In the absence of a *Charter* violation, there was no need to exclude the statement under s. 24(2). Nevertheless, Slatter J.A. identified errors in the trial judge's s. 24(2) analysis as an additional basis for a retrial.

[22] Bielby J., concurring in the result, found that the police had violated Mr. Willier's s. 10(*b*) right because of their failure to wait a reasonable period of time to allow Mr. Willier's counsel of choice to return his call before initiating their interview. In finding that the 50-minute interval between Mr. Willier's attempt to call Mr. Royal and the start of the interview did not amount to a reasonable period of time, she focused on the seriousness of the charge and the lack of urgency in commencing the investigation. She also noted that Mr. Willier's two brief calls to Legal Aid did not provide him with "meaningful contact with and the receipt of satisfactory advice from a lawyer" (para. 77). She also held that the Crown had failed to prove a waiver of Mr. Willier's right

to wait for further legal advice from his counsel of choice, given the failure of the police to inform him of that right and of their obligation to hold off. However, despite the *Charter* breach, Bielby J. held that the trial judge conducted an inadequate s. 24(2) analysis and ultimately agreed with the majority as to the necessity of a retrial.

[23] Mr. Willier appeals to this Court.

## IV. Analysis

[24] As indicated at the outset, the focal point in this appeal is the right to counsel of choice under s. 10(*b*) of the *Charter* and the corresponding obligations on the police to facilitate that choice. While the right to choose counsel is certainly one facet of the guarantee under s. 10(*b*), the *Charter* does not guarantee detainees an absolute right to retain and instruct a particular counsel at the initial investigative stage regardless of the circumstances. What the right to counsel of choice entails must be understood having regard to the purpose of the guarantee.

### A. *The Text and Purpose of Section 10(b)*

[25] Section 10(*b*) provides:

> **10.** Everyone has the right on arrest or detention
>
> ...
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right.

[26] While s. 10(*b*)'s text remains the starting point in its interpretation, an understanding of its animating purposes is essential to a full understanding of its content. This is especially true in this case, as the text of s. 10(*b*) makes no explicit mention of the right to counsel of choice.

[27] As we describe in *Sinclair*, the right to silence in s. 7 and the right to counsel in s. 10(*b*) work together "to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed" (para. 25). Section 10(*b*) aims to realize this purpose by ensuring that detainees have an opportunity to be informed of their rights and obligations under the law and to obtain advice on how to exercise those rights and perform those obligations. As Lamer C.J. wrote in *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191:

> This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: *Brydges*, at p. 206; *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77; and *Prosper*. Under s. 10(*b*), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this Court suggested in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at p. 394, the right to counsel protected by s. 10(*b*) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process. [Emphasis deleted.]

[28] Accordingly, s. 10(*b*) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(*b*) is to provide

detainees an opportunity to mitigate this legal disadvantage.

B. *The Rights and Obligations Engaged by Section 10(b)*

[29] The purposes of s. 10(*b*) serve to underpin and define the rights and obligations triggered by the guarantee. In *Bartle*, Lamer C.J. summarized these rights and obligations in terms of the duties imposed upon state authorities who make an arrest or effect a detention (p. 192). Section 10(*b*) requires the police

> (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel;
>
> (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
>
> (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[30] The first duty is an informational duty, while the second and third duties are implementational in nature and are not triggered until detainees indicate a desire to exercise their right to counsel. As explained in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, these duties are triggered immediately upon an individual's arrest or detention, as "the concerns about self-incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected" (para. 41).

[31] The informational duty imposed on the police is relatively straightforward. However, should a detainee positively indicate that he or she does not understand his or her right to counsel, the police cannot rely on a mechanical recitation of that right and must facilitate that understanding: *R. v. Evans*, [1991] 1 S.C.R. 869. Additionally, there are specific, narrowly defined circumstances in which s. 10(*b*) prescribes an additional informational obligation upon the police. In *R. v. Prosper*, [1994] 3 S.C.R. 236, Lamer C.J. described this additional informational duty, and the circumstances that trigger it, as follows (p. 274):

> In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the *Charter*-protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.

[32] Thus, when a detainee, diligent but unsuccessful in contacting counsel, changes his or her mind and decides not to pursue contact with a lawyer, s. 10(*b*) mandates that the police explicitly inform the detainee of his or her right to a reasonable opportunity to contact counsel and of the police obligation to hold off in their questioning until then. This additional informational obligation, referred to in this appeal as the duty to give a "*Prosper* warning", is warranted in such circumstances so as to ensure that a detainee is informed that their unsuccessful attempts to reach counsel did not

exhaust the s. 10(*b*) right, to ensure that any choice to speak with the police does not derive from such a misconception, and to ensure that a decision to waive the right to counsel is fully informed.

[33] Detainees who chooses to exercise their s. 10(*b*) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel: *R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Smith*, [1989] 2 S.C.R. 368. What constitutes reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole. As Wilson J. stated in *Black* (pp. 154-55):

> A rider is attached to these police obligations, namely that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused person is not diligent in this regard, then the correlative duties imposed upon the police to refrain from questioning the accused are suspended: see *R. v. Tremblay*, [1987] 2 S.C.R. 435.

[34] Such a limit on the rights of a detainee are necessary, as Lamer J., as he then was, noted in *Smith*, "because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society" (p. 385).

[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: *Black*. 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: *R. v. Ross*, [1989] 1 S.C.R. 3; and *Black*. As Lamer J. emphasized in *Ross*, diligence must also accompany a detainee's exercise of the right to counsel of choice (pp. 10-11):

> Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in *R. v. Tremblay*, [1987] 2 S.C.R. 435, a detainee must be reasonably diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in *Manninen* are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.

[36] Bearing these principles in mind, we turn to the resolution of the issue raised on this appeal.

C. *Did Mr. Willier Suffer a Breach of his Section 10(b) Right to Counsel?*

[37] Mr. Willier claims that the police violated the *Charter* by failing to provide him with a reasonable opportunity to consult his counsel of choice. Echoing the findings on *voir dire*, he argues that s. 10(*b*) mandates the extension of a *Prosper*-type warning to circumstances where detainees are unsuccessful in contacting their counsel of choice and opt to contact another. Uninformed of his right to a reasonable opportunity to consult counsel of choice, and of the police obligation to refrain from questioning him until he was afforded that opportunity, he was unable to validly waive that right before speaking with duty counsel and ultimately providing a statement to the police during questioning (para. 51). Mr. Willier also asserts that his consultations with duty counsel, given their brevity, were insufficient to provide him a meaningful exercise of his right to counsel and thus satisfy his s. 10(*b*) entitlement.

[38] The circumstances prompting this Court to articulate the additional informational duty in *Prosper* are fundamentally different from those in the case at hand. As noted above, a *Prosper* warning is warranted in circumstances where a detainee is diligent but unsuccessful in contacting a lawyer and subsequently declines *any* opportunity to consult with counsel. Section 10(*b*)'s provision of a reasonable opportunity to consult with counsel is a fundamental guarantee aimed at mitigating a detainee's legal vulnerability while under state control. It affords detainees the chance to access information relevant to their self-incrimination and liberty interests: *Bartle*. The *Prosper* warning ensures that detainees are aware that their right to counsel is not exhausted by their

unsuccessful attempts to contact a lawyer. This additional informational safeguard is warranted when a detainee indicates an intent to forego s. 10(*b*)'s protections in their entirety, ensuring that any choice to do so is fully informed. In *Prosper*, the detainee ceded any opportunity to mitigate his legal disadvantage and benefit from the protections afforded by s. 10(*b*), triggering the additional informational warning.

[39] The circumstances of this case are not analogous. The concerns animating the provision of a *Prosper* warning do not arise when a detainee is unsuccessful in contacting a specific lawyer and simply opts to speak with another. In no way did Mr. Willier attempt to relinquish his right to counsel and thus any opportunity to mitigate his legal disadvantage. He made no attempt to waive his s. 10(*b*) right. Instead, unsuccessful in contacting Mr. Royal, he exercised his right to counsel by opting to speak with Legal Aid. As such, the police were under no obligation to provide him with a *Prosper* warning, and its absence fails to establish a *Charter* breach.

[40] We are also unable to agree with Mr. Willier's claim that his consultations with duty counsel were insufficient to satisfy his right to a reasonable opportunity to contact counsel under s. 10(*b*), as they did not amount to a meaningful exercise of that right. Echoing the trial judge's finding on *voir dire*, he asserts that the inadequacy of his two consultations with Legal Aid is to be inferred from their brevity, and thus that they were insufficient to suspend the police duty to hold off in their questioning. Effectively, his argument implies that the police must ensure that a detainee's legal advice meets a particular qualitative standard before they are entitled to commence with an investigative interview.

[41] While s. 10(*b*) requires the police to afford a detainee a reasonable opportunity to contact counsel and to facilitate that contact, it does not require them to monitor the quality of the advice once contact is made. The solicitor-client relationship is one of confidence, premised upon privileged communication. Respect for the integrity of this relationship makes it untenable for the police to be responsible, as arbiters, for monitoring the quality of legal advice received by a detainee. To impose such a duty on the police would be incompatible with the privileged nature of the relationship. The police cannot be required to mandate a particular qualitative standard of advice, nor are they entitled to inquire into the content of the advice provided. Further, even if such a duty were warranted, the applicable standard of adequacy is unclear. As this Court recognized in *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 27, there is a "wide range of reasonable professional assistance", and as such what is considered reasonable, sufficient, or adequate advice is ill defined and highly variable.

[42] As noted, s. 10(*b*) aims to ensure detainees the opportunity to be informed of their rights and obligations, and how to exercise them. However, 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. In this case, despite the brevity of Mr. Willier's conversations with Legal Aid, Mr. Willier gave no indication that these consultations were inadequate. Quite the contrary, he expressed his satisfaction with the legal advice to the interviewing officer, prior to questioning. Mr. Willier is not entitled to express such satisfaction, remain silent in the face of offers from the police

for further contact with counsel, remain silent in the *voir dire* as to the alleged inadequacies of the actual legal advice received, and then seek a finding that the advice was inadequate because of its brevity. A s. 10(*b*) *Charter* breach cannot be founded upon an assertion of the inadequacy of Mr. Willier's legal advice.

[43] Considering the circumstances of this case as a whole, the majority of the Court of Appeal correctly found that Mr. Willier did not suffer a violation of his s. 10(*b*) right to counsel. In no way did the police interfere with Mr. Willier's right to a reasonable opportunity to consult with counsel of choice by simply reminding him of the immediate availability of free Legal Aid after his unsuccessful attempt to call Mr. Royal. When Mr. Willier stated his preference to wait, Cst. Lahaie reasonably informed him that it was unlikely that Mr. Royal would be quick to return his call given that it was a Sunday, and reminded him of the immediate availability of duty counsel. Mr. Willier was not told that he could not wait to hear back from Mr. Royal, or that Legal Aid was his only recourse. There is no indication that his choice to call duty counsel was the product of coercion. 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.

[44] Further, the brief interval between Mr. Willier's attempt to contact Mr. Royal and the start of the investigative interview did not deprive him of a reasonable opportunity to contact counsel of choice. The brevity of the interval must be viewed in light of all the circumstances prior

to the commencement of the interview. After speaking with Legal Aid, Mr. Willier expressed satisfaction with that advice prior to being questioned. He did not pursue any further opportunity to contact Mr. Royal, though he was offered an open-ended invitation to contact counsel prior to and throughout the interview. If Mr. Willier maintained any continuing desire to speak with Mr. Royal, or wait for him to call back, he was not diligent in exercising that right. There is little more that the police could have done in these circumstances to afford Mr. Willier a reasonable opportunity to exercise his rights under s. 10(*b*). There was therefore no violation of Mr. Willier's right to counsel.

V. Disposition

[45] For these reasons, the appeal is dismissed.

The following are the reasons delivered by

BINNIE J. —

[46] Subject to the disagreement I expressed in *R. v. Sinclair*, 2010 SCC 35, with regard to the majority's interpretation of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*, I agree with the Chief Justice and Charron J. that with respect to the lawyer of choice aspect of the right to counsel "[i]f 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" (para. 35). The situation here is not comparable to *Sinclair*. As my colleagues

note "[a]fter speaking with Legal Aid, Mr. Willier expressed satisfaction with that advice prior to being questioned. He did not pursue any further opportunity to contact [his lawyer of choice], though he was offered an open-ended invitation to contact counsel prior to and throughout the interview" (para. 44).

[47] I would therefore join in dismissing the appeal.

The reasons of LeBel, Fish and Abella JJ. were delivered by

LEBEL AND FISH JJ. —

[48] In this case, subject to our reasons in *R. v. Sinclair*, 2010 SCC 35, and *R. v. McCrimmon*, 2010 SCC 36, we agree that the appeal should be dismissed. On the facts, it appears that the appellant was given ample opportunity to exercise the rights in s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* that he was claiming, but he failed to exercise them with diligence.

*Appeal dismissed.*

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