CANADA / JUDGMENT

R. v. O'Reilly

2021 BCSC 766

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. O'Reilly,

2021 BCSC 766

Date: 20210308

Docket: 85704-2

Registry: Nanaimo

Regina

v.

Declan Briggs O'Reilly

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Ruling on Section 10(b) Charter Application

Counsel for the Crown:

J. Rutherford

Counsel for the Accused:

K. Bradshaw

Place and Dates of Hearing:

Nanaimo, B.C.

March 3 & 5, 2021

Place and Date of Ruling:

Nanaimo, B.C.

March 8, 2021

[1] Mr. O'Reilly is charged with three counts of possessing various controlled substances for the purpose of trafficking, and one count of possession of a stolen truck. This is a voir dire that was declared to hear evidence and argument in relation to the accused's s. 10(b) Charter application. In particular, the question is whether implementational aspects of his s. 10(b) rights have been infringed. This ruling will not address remedy issues.

[2] The facts are for the most part not disputed, although some difficulties arise from Cst. Coddington having to rely on his memory or reconstruct events because he did not make notes of what have, in the event, emerged as important details.

[3] In broad compass, the accused was arrested while operating a pickup truck that had been reported stolen. In response to being advised of his right to counsel by Cst. Coddington, the accused said that he wished to speak to a lawyer. The accused was taken to the detachment. It was 43 minutes after the accused indicated a desire to exercise his right to counsel before the police took any steps to facilitate access to counsel by putting the accused in a secure phone room. A message was left with a law office. A lawyer returned the call hours later -- it was over four hours after first telling the police that he wanted to speak to a lawyer that he had this opportunity.

[4] The accused argues that the police failed in their implementational duty to provide him with a reasonable opportunity to exercise his right to retain and instruct counsel without delay -- one of the duties imposed on police who arrest or detain an individual. A second issue arises in relation to the implementational duty to refrain from eliciting evidence until the detainee has had a reasonable opportunity to retain and instruct counsel. See R. v. Manninen, [1987] 1 S.C.R. 1233 at 1241-42.

[5] As part of a booking process that Cst. Coddington elected to proceed with before facilitating the accused's right to counsel, he asked the accused a question or questions designed to discover if there was anything from the truck that the accused would like to claim or if there was anything in the truck that was his property. The accused made a response that caused Cst. Coddington to write in his notebook: "LG black, pattern-lock." (Cst. Coddington explained what is well known: one of the available ways of locking or unlocking phone screens on some models is to trace a pattern rather than type a password or number.) Mr. O'Reilly's claim of possession of this phone is, I gather, important evidence and information that was of value to the police in their investigation.

Background

[6] On 7 November 2018, Cst. Coddington was called in with the rest of his unit to assume surveillance on a parked pickup truck. This truck had been reported stolen. Cst. Coddington believes he began his surveillance of the truck at approximately 1245 hrs. At 1330 hrs, a man -- later identified as the accused -- got behind the wheel of the truck and drove away. Several unmarked police vehicles followed, awaiting a safe opportunity to stop the truck and arrest the driver.

[7] At 1335 hrs, the truck stopped at a red light at an intersection on the Nanaimo Parkway. Some of the unmarked vehicles boxed the truck in. Cst. Coddington was a short distance back of the intersection and heard sounds on the radio that he interpreted as two separate vehicle impacts. He assumed the first was a police vehicle striking the truck, and the second he assumed might be the driver trying to get away; however, at least one of the sounds turned out to be one police vehicle striking another.

[8] The accused was dragged out of the truck by police officers, deposited on the roadway, and handcuffed. A quick pat-down search was conducted while the accused was on the road. He was then taken to a grassy area near the intersection.

[9] Cst. Coddington, who had participated in apprehending and searching the accused, began "chartering" the accused at 1339 hrs. He advised the accused that he was under arrest for "possession of a stolen truck" and advised him of his right to counsel, reading from a card. The accused affirmed that he understood, and indicated that he wanted to speak to a lawyer. Cst. Coddington estimated that the chartering process took about three or four minutes, and based on this estimate testified that at approximately 1343 hrs he called dispatch for a car to transport his detainee to the RCMP detachment. (The unmarked police vehicles at the scene did not have a protective shield between the driver and prisoner compartments.)

[10] At 1346 hrs, Cst. Coddington was advised by dispatch that the accused was prohibited from driving. At 1348 hrs, while still at roadside, Cst. Coddington arrested the accused and chartered the accused on this offence. The accused again indicated that he wished to speak to a lawyer.

[11] At 1351 hrs, the marked police car arrived and the accused began the trip to the detachment. Cst. Coddington could not recall whether he returned to the detachment in the marked police car or whether he took the unmarked car he was driving earlier. In either event, he testified that he left for the detachment at the same time as the accused so he could "deal with the booking process."

[12] Cst. Coddington testified that it takes about eight minutes to make the trip to the detachment from the takedown intersection if there is no traffic. However, he testified that a traffic jam had been created by the RCMP securing the intersection. When the "in-town route" (as opposed to the Parkway route) is taken, "it is likely to be closer to ten minutes to get to the detachment." It would be expected from this evidence, and Cst. Coddington agreed in cross-examination, that he would have arrived at the detachment at approximately 1401 hrs.

[13] Cst. Coddington made no entry in his notebook of his time of arrival at the detachment. Confusion arises on the timeline because he testified that immediately after his arrival at the cellblock area of the detachment, he heard Cst. Coyne radio that a firearm had been located in the pickup truck. Cst. Coddington testified that this occurred at 1408 hrs, and he then arrested and chartered the accused for a third time -- this time for possession of a firearm. Again, and for the third time, the accused indicated that he wished to exercise his right to counsel. Because he remembers getting the firearm information from Cst. Coyne right after he arrived at the detachment, Cst. Coddington testified to his belief that he arrived at the detachment at 1408 hrs.

[14] Cst. Coddington testified that he would have finished chartering the accused by 1410 hrs. By this time, the accused was in the cellblock/booking area. There is a secure phone room in this area where detainees may privately consult with counsel. There is live-feed video, but not audio, to monitor this phone room. The phone room's door also has a small window.

[15] Cst. Coddington decided in light of the firearm information to conduct a more thorough search of the accused. This took two minutes, and as was the case for the pat-down search on the highway, nothing of note was found during this search. There is no reference to this search in Cst. Coddington's notebook. He estimated that this second search was finished by 1412 hrs.

[16] Cst. Coddington testified that it was at this time the process of booking the accused was begun. His evidence was that this process has a "dual purpose" of getting needed routine information and also accessing "previous flags" about whether the detainee is supposed to be "in the general population" or segregated. He testified that he thinks that this part of the booking-in process is called VISEN, and it is important because it allows the police to "get a baseline of where [the detainee is] at emotionally, whether they are going to be violent, or whether they have infectious or contagious diseases." This process was said to allow the police to determine what level of threat the person might be to the police, and the level of threat the person might be to themselves when placed alone in a secure phone room. Cst. Coddington testified that he had previous personal experience with someone who tried to hang themselves in the phone room. When it was suggested in cross-examination that there was no reason why the lawyer call could not have been made at 1412 hrs, after the search at the detachment and prior to going through this booking process, Cst. Coddington agreed but with the reservation that this would be "skipping out on other steps."

[17] The accused was put through the entire booking-in process before he was escorted to the phone room to make an attempt to contact counsel. Cst. Coddington was asked about some notes that he made while preparing to give evidence: "I see on your timeline that you have made some notations of time, 'this regular booking process likely ten minutes,' correct?" In response, Cst. Coddington affirmed that it was about a ten-minute process that would have taken up until 1422 hrs. The evidence did not disclose how much of this ten minutes was taken up with the threat assessment part of the booking process.

[18] During booking, one part of the process is that police take formal custody of a detainee's personal effects. Cst. Coddington testified to a practice of his during this part of the booking process in circumstances where he is dealing with a detainee found in a stolen vehicle. He asks the detainee if there is anything in the vehicle that they would like to claim as their property. He explained that he does this because when ICBC receives stolen vehicles from the towing yard, there may be things found in the vehicle that do not belong to the vehicle's owner. To ensure that ICBC does not return "garbage" to the owner, ICBC regularly cleans out the vehicle and disposes of anything not belonging to the owner, and this process can result in loss of a detainee's personal property.

[19] Cst. Coddington followed his usual practice and made the query that caused the accused to claim the LG phone, which, it is common ground, is an admission that could have serious consequences in this case. Recall, however, that in the moments before making this query, Cst. Coddington had just finished arresting and chartering the accused for possession of a firearm found in the truck. This is important context that I will return to later in these reasons.

[20] The accused was escorted to the phone room at 1422 hrs, a time when -- as Cst. Coddington put it -- the "booking process was complete." Cst. Coddington called the office of the accused's counsel of choice, but had to leave a call-back message with a secretary or office assistant. The message was left at 1425 hrs, and at 1426 hrs the accused was lodged in a cell to await the call back. Cst. Coddington said his usual practice when lodging a detainee in a cell in circumstances such as this is to ask if another lawyer should be contacted or if the detainee wished to wait for a call back. The note in his notebook reads: "In cell number 9, wait for lawyer call."

[21] A lawyer called at 1747 hrs -- over three hours after the accused had been deposited in a cell -- and the accused was on the phone with the lawyer from 1749 hrs until 1812 hrs. When asked if there was any contact with the accused about phoning other counsel during the period stretching from when he was initially lodged in a cell until a lawyer called, Cst. Coddington said he has no note of making any contact with the accused in this period. It is my impression that Cst. Coddington was quite sure that he did not do so.

Legal Framework

[22] One of the purposes of the right to retain and instruct counsel is to guard against the risk of involuntary or accidental incrimination: R. v. Suberu, 2009 SCC 33 at para. 40; R. v. Taylor, 2014 SCC 50 at paras. 21-22, 28. Accordingly, a person who is detained is in immediate need of legal advice in order to protect their right against self-incrimination: R. v. Bartle, [1994] 3 S.C.R. 173 at 191. The duty to inform a detained person of their right to counsel arises immediately upon detention, and the duty to facilitate access to a lawyer arises immediately upon the request to speak to a lawyer; the arresting officer's obligation is to facilitate the request at the "first reasonably available opportunity" and, while the onus is on the accused to establish a Charter infringement, the Crown has the burden of showing that a given delay in facilitating the right to counsel was reasonable in the circumstances. See R. v. Taylor, at para. 24; R. v. Luong, 2000 ABCA 301 at para. 12. A detainee's onus of establishing that he has been reasonably diligent in exercising his right to counsel arises only if the Crown has established that the detainee who has invoked his right to counsel was provided with a reasonable opportunity to exercise the right: R. v. Luong, at para. 12; R. v. Hardenstine, 2010 BCSC 899 at paras. 70, 72-73.

[23] The important purpose of guarding against the risk of involuntary or accidental incrimination also explains the importance of the requirement for the police to "hold off" in their inquiries of a detainee. Answers to seemingly innocuous questions -- even those posed without an investigatory purpose -- can result in accidental incrimination. The s. 10(b) right allows detainees to obtain advice about their rights, but as importantly allows them to obtain advice about how to exercise those rights: R. v. Manninen, at 1242-43.

[24] The obligations to immediately facilitate right to counsel and in the meantime to avoid asking questions to elicit information that might bear on the investigation are not absolute. In particular, "urgent and dangerous circumstances" are recognized as a legitimate reason for non-compliance or postponement of compliance: R. v. Manninen, at 1241-1242; R. v. Bartle, at 192; R. v. Taylor, at para. 23. For example, officer or public safety concerns may excuse non-compliance or suspend the requirements for compliance: R. v. Suberu, at para. 42; R. v. Ashby, 2013 BCCA 334 at paras. 70-73. In order to be within the boundaries of this "officer or public safety" ground, questions of a detainee must be motivated solely by safety concerns, be minimally intrusive, and narrowly tailored. See R. v. Patrick, 2017 BCCA 57 at para. 102; R. v. Simard, 2018 BCSC 1816 at paras. 84-86.

[25] It is common ground that the test for elicitation is an objective one, based on what a reasonable person would perceive rather than focusing on the police officer's intent when asking the question. In R. v. G.T.D., 2017 ABCA 274, after the detainee had invoked his right to counsel, he responded with an incriminating answer to a question not designed for investigatory purposes -- the question "Do you wish to say anything?" was asked at the end of the standard caution used by the Edmonton Police Service. Veldhuis J.A. said:

[66] The respondent argues that the arresting officer did not intend to elicit an incriminatory response when he asked the question. But for Charter purposes, a police officer's conduct is typically measured against an objective standard, based on how a reasonable person would perceive the circumstances, rather than focusing solely on the officer's subjective intent: Hebert at p 177; Grant at paras 31-32; Suberu at para 28; Sinclair at paras 55, 57. Even if the arresting officer did not subjectively intend to elicit incriminating information when he read from his police-issued card, viewed objectively, his concluding question "do you wish to say anything?" still risked prompting an incriminating response.

. . .

[71] The respondent suggests the police may ask some routine questions before giving a detainee the opportunity to consult with counsel: see e.g. R v Sinclair, 2003 BCSC 2040 at paras 68-76 (ownership of belongings at the place of arrest); R v Learning, 2010 ONSC 3816 at paras 38-45, 78-83, 258 CCC (3d) 68 (biographical details such as name, date of birth, and weight); R v Dupe, 2010 ONSC 6594 at paras 12-18, 19-38 (questions about health conditions, medication, and drug consumption); R v Ashby, 2013 BCCA 334 at paras 16, 61-65, 340 BCAC 298 (asking whether the detainee has "anything on her" prior to a pat-down search); R v Mullins, 2015 ONSC 1552 at paras 16, 33-37, 40-42, 331 CRR (2d) 95 (questions about medication and health issues). But see also R v Smith, 2011 BCSC 1695 at paras 170-221 (disapproving of "rapport building" questions); R v Ngo, 2003 ABCA 121 at paras 17-39, 327 AR 320 (disapproving of questions used to obtain voice identification evidence); R v Patrick, 2017 BCCA 57 at paras 95-104, 35 CR (7th) 59 (suggesting questions asked prior to a frisk search should be narrowly tailored to address officer safety issues, and that the detainee's answers may be inadmissible).

[72] Without deciding how far police may go with any such preliminary questioning, I note the questions asked in these cases are distinguishable, as are the circumstances in which the police asked those questions. In most cases, a reasonable person would not expect a few innocuous "booking questions" to elicit potentially incriminating information or otherwise have an adverse effect on the conduct of the detainee's trial. In contrast, the broad question "do you wish to say anything?" -- asked immediately after the officer told the appellant why he was arrested -- invited the appellant's response to the substance of the charges and posed a serious risk of self-incrimination.

[Emphasis added.]

[26] Justice Veldhuis was writing in dissent, but the appeal to the Supreme Court of Canada was allowed by the majority of the Court: R. v. G.T.D., 2018 SCC 7. On the issue of whether the question posed by the police officer violated the duty to "hold off," the five judge division was unanimous. Justice Brown's brief oral reasons for the Court on this issue of the infringement of the duty to hold off said only this, at para. 2: "We are all of the view that it did, because it elicited a statement from G.T.D."

The Delay Argument

[27] The Crown has established that some but not all of the delay in facilitating Mr. O'Reilly's right to counsel was reasonable in the circumstances. I conclude that during the time from 1335 hrs when the accused asserted his wish to speak to a lawyer until 1401 hrs, the likely time of his arrival at the police detachment, it was reasonable to delay a phone call to a counsel. However, after the accused's arrival at the detachment, the delay -- with the exception of the four minutes or so to arrest and charter him for possession of a firearm and thoroughly search him -- has not been satisfactorily accounted for.

[28] The accused does not argue that access to counsel ought to have been facilitated at roadside. However, he argues that his arrest was planned and a police car to transport him to the detachment ought to have been standing by so that less than eight minutes (i.e., from 1343 hrs until 1351 hrs) would have been lost waiting for the police car to arrive. Ms. Bradshaw's argument draws on authorities such as R. v. Hamdan, 2017 BCSC 467, and R. v. Smith, 2011 BCSC 1695, to argue that in cases of planned arrests, the plan must include facilitating access to counsel without delay. The accused argues that there was a plan to surveil the vehicle and to follow and arrest anyone who came to the vehicle and drove it away, but no plan to have prompt transportation to the detachment available.

[29] However, an important difference between the case at bar and those cited by defence counsel is that, because of its nature, this was an operation that could not have a planned arrest time or planned arrest location. Cst. Coddington might have been watching a parked car for his whole shift without anyone approaching it. I am not persuaded it would make sense to have a police officer and police car standing by for the contingent purpose of transporting an unknown person at an unknown time from an unknown place.

[30] Accordingly, I find that the time up until the 1351 hrs departure time from the scene, and the ten minutes thereafter from the time of departure from the scene until the accused's arrival at the detachment, has been shown to be a reasonable delay. The same cannot be said of the time between 1401 hrs and 1408 hrs, bearing in mind that the Crown has the burden of explaining what occurred during this period. The evidence about this period of time is unsatisfactory and, I find, unexplained.

[31] The time from 1408 hrs until approximately 1412 hrs was spent re-arresting, re-chartering, and searching the accused, as a result of information received by Cst. Coddington at 1408 hrs that a firearm had been found in the truck. This was a reasonable use of time. The accused argues that the second search was not reasonably necessary, but I accept that locating a weapon in the vehicle raised issues of officer safety that justified the two minutes it took to do a more thorough search than had been conducted at the time of his first arrest.

[32] The time from 1412 hrs until 1422 hrs was spent completing the entire booking process. This was impermissible delay. I am not persuaded that on the facts of this case it was reasonable to postpone access to counsel to conduct the VISEN inquiries. The accused had by this time been under close police observation for about 40 minutes and two searches had revealed

nothing of concern; and there is nothing in the evidence that suggests that he would have been a danger to himself if left alone in the phone room to speak with counsel -- recall that the room had a small window in the door and an available live video feed. I acknowledge Cst Coddington's evidence about the detainee who attempted to hang himself or herself in the phone room, but this does not justify going through this VISEN part of the booking process for every case before facilitating right to counsel. There must be a case by case assessment.

[33] It has not been established that this delay to conduct VISEN inquiries was justified, but even if it was justified, then when this part of the process was finished, the accused should have been immediately put in the phone room rather than continuing the booking-in process to a conclusion. The fact that the booking process continued until completion, including asking questions about Mr. O'Reilly's property, leads me to conclude that facilitating right to counsel ranked lower in priority than routine tasks. In light of the legal framework requiring immediacy or urgent or dangerous circumstances (such as might require attention to officer or public safety), it is not surprising that the authorities provided to me were critical of delaying the facilitation of right to counsel to allow for completion of routine booking-in procedures. In R. v. Deschamps, 2017 BCSC 1989 at para. 38, another case involving a delay in facilitating right to counsel in the cellblock at the Nanaimo RCMP detachment, Justice Baird put the point succinctly: "workaday booking-in procedures should not take precedence over constitutional obligations."

[34] After the first step to facilitate the right to counsel was taken between 1422 hrs and 1425 hrs when Mr. O'Reilly was placed in a phone room and the police officer left a message with an assistant in a lawyer's office, he was lodged in a cell at 1426 hrs. I think this reflects the likelihood that the accused told Cst. Coddington that he would prefer to wait for the lawyer to call back rather than call another lawyer or legal aid at that time.

[35] A lawyer called back at 1747 hrs. This was nearly 3.5 hours after Mr. O'Reilly had been lodged in a cell. I find that no one followed up with him during this period to check to see if he was still of a mind to wait for a return call from the lawyer. I take notice of the fact that this occurred on a Wednesday afternoon during business hours. It seems a long time to wait for a call back. The cases on delayed call-backs that I was referred to are of limited utility because they address the issue in a different context: the police in those cases wanted to get on with interviewing the detainee, who in turn wished to wait for his lawyer of choice. The Crown in these cases argued that the detainees were not diligently pursuing their right to counsel, and could not postpone the police investigation by waiting indefinitely for a call back.

[36] The issue in this case takes on a different complexion. There is no indication, and it is not suggested, that Mr. O'Reilly told Cst. Coddington that he would wait indefinitely for a call back. I think it was incumbent on the police to check with their detainee after the passage of a reasonable length of time -- which during business hours on a Wednesday afternoon might be a shorter time than on a weekend day or in the middle of the night. Without quantifying this length of time, I find that the time for checking with Mr. O'Reilly about whether he was

still content to wait for a call back or whether he wished to contact another lawyer had long passed by 1747 hrs.

[37] The Crown argues that after the step had been taken to facilitate the right to counsel by leaving the message at a lawyer's office at 1425 hrs, the burden shifts to the accused to establish that he diligently exercised his right. And, on the facts of this case, the argument goes that the accused would be required to show that he made a reasonable effort to let the police know that he wanted to call another lawyer, say by letting the cellblock guard know his wishes. I think this argument loses sight of the continuing obligation to provide a detainee with a reasonable opportunity to exercise the right to counsel in the circumstances. Mr. O'Reilly had repeatedly asserted his interest in speaking with a lawyer, and the effort to contact counsel had been unsuccessful. The police obligation to facilitate access to counsel did not evaporate at 1425 hrs with this first unsuccessful attempt. A police officer may know that if a detainee tells a cellblock guard that he wants to call another lawyer that the guard would contact him or an NCO to assist with facilitating access to counsel, but I am not persuaded that a detainee would reasonably know this. A police detainee is in a position of vulnerability and disadvantage relative to the state: R. v. Bartle, at 191; R. v. Suberu, at para. 41. In these vulnerable circumstances of being a police detainee, especially if all information about right to counsel has been provided by one police officer, I think it reasonable for a detainee who is waiting for a call back to expect that the police will follow up with him from time to time if the call back is delayed, and I do not think that a detainee that adopts this approach is failing to diligently exercise his right.

[38] Leaving the detainee for over three hours waiting for a lawyer call back without checking in on him to see if he wanted to call another lawyer was an infringement of the implementational duty to provide him with a reasonable opportunity to exercise his right to retain and instruct counsel without delay. The outcome on this aspect of the analysis would likely be different if, for instance, Cst. Coddington had asked the accused how long he wanted to wait for a call back, and told him that he would check in on him from time to time about whether he was still prepared to wait, and that if at any time he wanted another lawyer he could let the cellblock guard know this and steps would be taken.

The Elicitation Argument

[39] I find that Cst. Coddington elicited the evidence about the LG phone, in breach of the implementational obligation to hold off. The police officer had just finished chartering the accused for possession of a firearm found in the pickup truck. In circumstances where he was under arrest for being in possession of a firearm found in the truck, I think it is obvious -- and it ought to have been obvious to Cst. Coddington -- that asking the accused if there is anything in the vehicle that he would like to claim as his property is a failure in the implementational duty to avoid eliciting evidence.

[40] In R. v. G.T.D., Justice Veldhuis referred to some of the cases that were cited to me in argument. I respectfully agree with her that in most cases, a reasonable person would not expect innocuous booking questions to elicit information that might adversely affect the detainee's legal position. In one of the cases she referred to and relied upon by the Crown in the case at bar, R. v. Dupe, 2010 ONSC 6594 at para. 24, Justice Dambrot opined that booking-in questions to help the accused or protect the health or safety of others are not prohibited:

Questioning to assist the accused to exercise his rights, preserve his property, provide care for his family, or protect his health and safety or the health and safety of others, just to name the most obvious examples, are not prohibited by the language in Manninen. Nor should they be. Prohibiting such questions would not enhance the purpose of s. 10(b). An accused does not require the advice of counsel to assist him or her in determining how to answer such questions, while the best interests of not only the accused but those around him demand that they be asked.

[Emphasis added.]

[41] Context is critical. The detainee in R. v. Dupe was in police custody on a murder case; the dicta about questions designed to preserve property cannot be universally applied in all cases. Justice Veldhuis made a similar statement in R. v. G.T.D. but qualified it with the words, "in most cases." The case at bar is an excellent example of an exception to usual circumstances. The question put to Mr. O'Reilly was, in the circumstances of an arrest for possession of a firearm found in a vehicle he was driving, a world away from an "innocuous" booking question: it was a specific invitation to claim possession of material in the vehicle. And, it is exactly the type of question that a criminal lawyer familiar with booking procedures might equip a client to manage, probably by remaining silent.

[42] Cst. Coddington relied on his usual practice and the note of what was said by the accused -- "LG black, pattern lock" -- to give evidence about what he asked the accused. There is no note in his notebook of the question or questions posed to the accused. From the "pattern lock" part of the note, I infer that the accused was likely asked at least two questions. I think it likely that he answered a question about whether he had property in the truck he wanted to claim by referring to an LG phone, black in colour. I think it likely that he was asked a follow-up question about how to access to the phone's contents. The competing possibility is that Mr. O'Reilly's description of the phone included the method of unlocking it. It strikes me as improbable that one would describe one's phone by reference to the manner of accessing the data on it. The accused was probably asked a follow up investigatory question about how to unlock the phone. The Crown submits that such a finding would be speculation. Of course, an audio recording or a notebook entry of the questions put to the accused and his responses would be invaluable and allow for more certainty. I am left to draw reasonable inferences from the evidence made available to me. The two-question inference is, I think, a reasonable inference on the evidence and not speculation.

[43] I find that Cst. Coddington's initial question of whether Mr. O'Reilly wished to claim property from the truck and the follow-up question about the means of access to the phone's contents were both questions that infringed the duty to hold off.

Conclusion

[44] In summary, I find that the police failed in both implementational duties -- the duty to provide a reasonable opportunity to exercise the right to counsel and the duty to refrain from eliciting evidence. It follows that the accused has established infringement of his right to retain and instruct counsel without delay.

"Thompson J."

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