

CANADA / JUDGMENT

R. v. Willness

2023 BCSC 2209

COURT

Supreme Court of British Columbia

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2023 BCSC 2209 R. v. Willness

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Willness,

2023 BCSC 2209

Date: 20230329

Docket: 26817-2

Registry: Nelson

Rex

v.

Alex Willness

Before: The Honourable Madam Justice Lyster

Oral Ruling on Voir Dire

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Place and Date of Trial/Hearing:

Nelson, B.C.

February 28, March 1-3,

March 23 and March 27, 2023

Place and Date of Judgment:

Nelson, B.C.

March 29, 2023

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Introduction

- [1] These are my oral reasons for judgment with respect to the admissibility of two statements that were made by the accused, Mr. Willness. I will not read out complete citations and, in the interests of time, may not read out all quotations from case law in full. Should a transcript be ordered, I will add citations and headings and review all quotations for completeness and correctness.
- [2] The two statements were made by Mr. Willness on the evening of July 17, 2020. The Crown does not seek to have the statements admitted as part of its case, but wishes to have the right to use them in cross-examination should Mr. Willness choose to testify.
- [3] There are two applications before me. The first is the Crown's application to have the statements declared to be voluntary. The second is the defence's application to exclude the statements under s. 24(2) of the Charter, due to alleged breaches of Mr. Willness' rights under s. 10(b) of the Charter.

- [4] I heard the evidence related to these applications in a voir dire on February 28 to March 3, 2023. I heard submissions on March 23 and 27, 2023.
- [5] I will first briefly outline the relevant chronology of events. I will then determine whether the Crown has proven the statements to be voluntary beyond a reasonable doubt.
- [6] I will then determine whether the defence has proven, on a balance of probabilities, that Mr. Willness' right on arrest and detention to retain and instruct counsel without delay was breached, contrary to s. 10(b). If Mr. Willness' s. 10(b) rights were breached, I will then consider whether one or both statements should be excluded pursuant to s. 24(1) of the Charter.

Chronology of Events

- [7] Mr. Willness is alleged to have been involved in the incident which led to his arrest and current charge of manslaughter at about 11:40 p.m. on July 16, 2020. Constable Sutherland received a call for a fight on Baker Street in Nelson at about 11:48 p.m. and responded with then Constable Tittlemore. Constable Sutherland dealt with Mr. Willness and, after assisting in the initial arrest of Mr. Willness, Constable Tittlemore dealt with the injured person, Mr. Young.
- [8] Constable Sutherland placed Mr. Willness in the back of his police cruiser at about 11:50 p.m. At about 11:58 p.m., Constable Sutherland told Mr. Willness he was under arrest for assault causing bodily harm and read Mr. Willness his Charter rights. Mr. Willness appeared to understand what Constable Sutherland had told him, and told Constable Sutherland that he wanted to talk to a lawyer.
- [9] Constable Sutherland cautioned Mr. Willness that he did not have to talk to him, but that anything he said could be given in evidence. Mr. Willness said words to the effect of he did not do anything.
- [10] Mr. Willness was behaving erratically at the scene, including after he was placed in the back of the police cruiser. While handcuffed in the back of the cruiser, he kicked out the back driver side window. This occurred before Constable Sutherland told him he was under arrest and told him his rights. Mr. Willness was yelling and shouting, swearing and making threats, saying, "I'll fucking kill you". He was not making much sense.
- [11] Constable Sutherland needed more resources to deal with the scene, so he called for Detective Constable Anstey to come and assist, which he did. There were also Nelson RCMP officers on scene. Constable Sutherland was trying to identify witnesses and to obtain contact information. He also seized a skateboard which it was believed Mr. Willness had struck Mr. Young with.

- [12] Mr. Willness complained about pain in his eyes while at the scene. He told Constable Sutherland and Detective Constable Anstey, who came to speak to him, to calm him down after he kicked the window out, that he had been pepper sprayed. None of the officers who dealt with Mr. Willness detected any signs of him having been sprayed, such as the distinctive odour of pepper spray with which they were both familiar.
- [13] Both Constable Sutherland and Detective Constable Anstey smelled alcohol on Mr. Willness and believed him to be intoxicated. There were also some suspicions that he was under the influence of some sort of stimulant.
- [14] Constable Sutherland departed for the Nelson Police Department station with Mr. Willness at about 12:16 a.m., and he arrived there about two minutes later. Constable Sutherland walked Mr. Willness to the booking area from his vehicle. There were three officers in the booking area while Mr. Willness was being booked in.
- [15] Mr. Willness was compliant in the booking area during the booking-in process. He was searched. He had his handcuffs removed, and he had his outer clothing removed. Special Constable McPhee, who was working in the cells area due to the Nelson Police Department video system being out of order, and who has first aid training, was asked to examine Mr. Willness' eyes, which he did. He noted no signs of Mr. Willness having been pepper sprayed, with the exception of Mr. Willness' face being red. Mr. Willness kept his eyes shut approximately 50% of the time while he was being booked in.
- [16] After Mr. Willness was booked in, he was placed by Constable Sutherland in Cell 7, the Nelson Police Department's drunk tank, at about 12:25 a.m. Cell 7 has no bench or bunk. It has no mattress or blanket. It contains only a toilet and a sink. As the name "drunk tank" would suggest, it is typically used to hold people who are grossly intoxicated or otherwise need to be kept under close surveillance due to the possibility of self-harm.
- [17] Constable Sutherland testified about his reasons for choosing to place Mr. Willness in Cell 7. I will return to them later.
- [18] Mr. Willness was told that he could flush his eyes out with the cold running water in the sink in Cell 7. He refused to do so.
- [19] An officer checked on Mr. Willness approximately every 20 minutes in Cell 7, and by an officer, I mean one of the special constables who are responsible for that function, along with dispatch duties. The first check was at 12:30 a.m. on July 17, at which time Mr. Willness was observed to be asleep on the floor. During subsequent cell checks between then and 3:00 a.m., Mr. Willness was generally observed to be sleeping, lying down or sitting up. He was noted to be awake on two occasions, during one of which he was noted to be swearing.

- [20] Constable Sutherland spoke with Mr. Willness at about 3:04 a.m., when he again told him his Charter rights, including his right to counsel. Mr. Willness wanted to talk to a lawyer. Mr. Willness was removed from Cell 7 at 3:10 a.m. by Constable Sutherland for the purpose of putting him in the telephone lawyer interview room for him to speak to a lawyer. Constable Sutherland returned Mr. Willness to Cell 7 at 3:14 a.m. I will return to the evidence surrounding this incident in considering whether Mr. Willness' s. 10(b) rights were breached.
- [21] At 7:47 a.m., Sergeant Markovich moved Mr. Willness from Cell 7 to Cell 5. Cell 5 is a typical cell which has a toilet and a sink, as well as a bunk, mattress, and blanket.
- [22] At 1:05 p.m., Mr. Willness was provided with lunch. There is no evidence that he was provided with breakfast or any food prior to this time.
- [23] At 7:08 p.m., Mr. Willness was provided with dinner. At 7:11 p.m., Special Constable Croteau made a note that Mr. Willness asked to speak to a lawyer again.
- [24] At 8:18 p.m., Detective Constable Anstey retrieved Mr. Willness from Cell 5 to take him to an interview room. I will discuss the evidence of Detective Constable Anstey's interactions with Mr. Willness which led to the two statements at issue in greater detail in considering the two applications before me.
- [25] Mr. Willness was released on a promise to appear at 10:50 p.m.

Voluntariness

- [26] Recently in *R. v. Beaver*, 2022 SCC 54 [Beaver], the Supreme Court summarized the common law confessions rule as follows at para. 45:
- [45] The common law confessions rule provides that a confession to a person in authority is presumptively inadmissible, unless the Crown proves beyond a reasonable doubt that it was voluntary. Under this rule, an involuntary confession always warrants exclusion. But a voluntary confession will not always be admitted into evidence: if a voluntary confession was "obtained in a manner" that breached the Charter, it can still potentially be excluded under s. 24(2). At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system. The twin goals of the rule involve protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes. On the one hand, the common law recognizes an individual's right against self-incrimination and right to remain silent; on the other, it is accepted that the police often need to speak to people when discharging their important public responsibility to investigate and solve crime.
- [27] In *R. v. Oickle*, 2000 SCC 38 [Oickle], at para. 68, Justice Iacobucci summarized the confessions rule as follows:

[68] While the foregoing might suggest that the confessions rule involves a panoply of different considerations and tests, in reality the basic idea is quite simple. First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. Both the traditional, narrow Ibrahim rule and the oppression doctrine recognize this danger. If the police interrogators subject the suspect to utterly intolerable conditions, or if they offer inducements strong enough to produce an unreliable confession, the trial judge should exclude it. Between these two extremes, oppressive conditions and inducements can operate together to exclude confessions. Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

[28] He went on to explain at para. 69 that the doctrines of oppression and inducements are primarily concerned with reliability, but:

the confessions rule also extends to protect a broader conception of voluntariness "that focuses on the protection of the accused's rights and fairness in the criminal process" Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.

[29] At para. 71, Justice Iacobucci emphasized that the analysis must be a contextual one. He stated that:

a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above.

[30] The defence argues that the statements were not voluntary because they were the result of oppression. In this connection, the defence refers to paras. 58-60 of Oickle and, in particular, the non-exhaustive list provided at para. 60 of factors that can create an atmosphere of oppression, including: depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.

[31] In particular, the defence argues that Mr. Willness was placed in conditions he should not have been in for a significant period of time, that he was denied access to medical attention, that he attempted to convey to Detective Constable Anstey that he had had threats made against him, and that he experienced a substantial delay in obtaining access to counsel. I will deal with each of these factors in turn.

[32] I deal first with the circumstances in which Mr. Willness was held. Mr. Willness was held in Cell 7, the drunk tank, from around 12:25 a.m. to 7:47 a.m. on the morning of July 17, 2020, when he was moved to Cell 5 by Sergeant Markovich. No one would describe the conditions

in Cell 7 as ideal. Mr. Willness did not have a bunk, mattress, or blanket. Nonetheless, most of the cell checks during the time he was in Cell 7 indicate that Mr. Willness was asleep or laying or sitting down. There is one note of him talking and complaining at 1:30 a.m., and another of him being awake and swearing at 2:46 a.m. Otherwise, there is no evidence of Mr. Willness complaining about his circumstances while in Cell 7.

- [33] Mr. Willness remained lodged in Cell 5, a typical jail cell containing a bunk, a mattress, and a blanket, until he was ultimately released at 10:55 p.m. on July 17. He was provided with lunch at 1:12 p.m. and dinner at 7:08 p.m. that evening.
- [34] Detective Constable Anstey went to get Mr. Willness from Cell 5 for the first interview at 8:18 p.m. on July 17. As they were exiting Cell 5, Mr. Willness asked if he could get a drink of water, which Detective Constable Anstey encouraged him to do.
- [35] During the second, substantive, interview with Detective Constable Anstey, which began at 9:07 p.m. and ended at 9:38 p.m., Mr. Willness mentioned that he would like to go back to his cell and finish his food, but that he had not really wanted to eat it earlier. When Detective Constable Anstey returned Mr. Willness to his cell, he could be seen picking up a food container and apparently starting to eat its contents.
- [36] Before that, Detective Constable Anstey asked him if he was doing okay in the cell or if he had any other issues, to which Mr. Willness answered, "Well, other than feeling trapped", indicating that he had no issues other than that.
- [37] I find that the circumstances in which Mr. Willness was held, including his access to food, water, sleep, and clothing, were adequate and did not create an atmosphere of oppression.
- [38] I turn to Mr. Willness' concerns regarding access to medical attention. Mr. Willness complained about his eyes and having been pepper sprayed to both Constable Sutherland and Detective Constable Anstey at the scene. During the booking-in process at the station, Special Constable McPhee checked his eyes. His note and his testimony were that Mr. Willness was not displaying typical signs of OC spray. His eyes were checked and they were clear with no redness. He did note that Mr. Willness' face was flushed in colour, but Mr. Willness was also agitated and exhibiting distress over the incident.
- [39] Mr. Willness was brought to the sink in Cell 7, but he refused to use their "dirty sink" and, according to Special Constable McPhee, said that he was going to sue the Nelson Police Department for having a dirty sink. Special Constable McPhee noted that Mr. Willness smelled heavily of feces only, the significance of that in this context being that he did not smell pepper spray, which is consistent with the evidence of both Constable Sutherland and Detective Constable Anstey, neither of whom detected any smell of pepper spray.
- [40] The photos taken during the booking-in process appear to show Mr. Willness with his eyes closed. Detective Constable Anstey testified that Mr. Willness kept his eyes closed during that process approximately 50% of the time.

- [41] Earlier at the scene, no first responder or paramedic was asked to look at Mr. Willness in response to his complaints about being pepper sprayed. In submissions, the defence appreciated that there was a pressing need at the scene for the first responders, paramedics, and Dr. Sparrow to attend to Mr. Young. But the defence argued that the fact none of them was asked to assess Mr. Willness at the scene was part of a pattern of the police not being concerned about or believing Mr. Willness' complaints.
- [42] In hindsight, one can say that it would have been better to ask someone like a first responder to assess Mr. Willness at the scene after they were finished attending to Mr. Young. The scene, however, was a hectic and chaotic one. The paramedics transported Mr. Young to the hospital and Dr. Sparrow accompanied them, so none of those people would have been available to assess Mr. Willness.
- [43] Mr. Willness was behaving very erratically after his arrest, screaming incoherently and kicking out the back window of the police cruiser, so the safety of anyone attempting to assess Mr. Willness at the scene would have been a legitimate concern. Further, there was not a very long delay at the scene, as Mr. Willness was booked in at the Nelson Police station at 12:20 a.m., and very shortly after that Special Constable McPhee did assess Mr. Willness' eyes.
- [44] During the second interview with Detective Constable Anstey, Mr. Willness talked about having been maced or pepper sprayed by someone prior to the incident with Mr. Young. He said that he could still smell it on his clothes and that it kept burning him. Detective Constable Anstey told Mr. Willness that he could not smell any pepper spray on him when he spoke to him in the back of the police cruiser.
- [45] It is apparent that Mr. Willness believed and was complaining that he had been pepper sprayed or maced. The police officers who dealt with him saw and smelled no evidence of it. He was provided access to the only effective remedy for pepper spray in the eyes, flushing his eyes out with running water, but at least initially he chose not to avail himself of it.
- [46] While not referred to by counsel in their submissions, I note that Mr. Willness was given ibuprofen upon his request at 7:57 p.m. on July 17. This suggests some attentiveness on the part of the police to Mr. Willness' health-related concerns. Looked at contextually, I conclude that Mr. Willness was not deprived of necessary medical attention. His eyes were assessed by Special Constable McPhee and he was given access to the effective remedy of flushing his eyes out with cold running water.
- [47] I turn to Mr. Willness' alleged attempt to tell Detective Constable Anstey that someone had threatened him. This arose during the first interview, when Detective Constable Anstey was providing Mr. Willness with the secondary caution. Detective Constable Anstey had just said:

. . . if you have spoken to any other Police Officer, including myself, with respect to this matter who has offered you any hope or advantages or suggested any uhm suggested any fear of prejudice--which means like uh that, you know, were uh--was there any threats or anything like that made towards you to, to make a statement . . .

[48] Mr. Willness can then be heard on the recording stating, "There was". Detective Constable Anstey continued with the secondary warning.

[49] The two men were talking over one another. Detective Constable Anstey testified and I accept that he did not hear Mr. Willness say "There was" at the time. He only picked it up when he was listening to the recordings to review the transcript. He testified, and I accept, that if he had heard it during the interview, he would have addressed it.

[50] It is not clear what Mr. Willness was referring to when he said "There was". It may be that he was attempting to say that someone had offered him an advantage or had threatened him. If so, there is no way of knowing whether that was a police officer or someone else that he had dealt with in the course of the evening of July 16. There is no evidence beyond this interjection by Mr. Willness that any police officer did threaten or offer any hope or advantages to Mr. Willness.

[51] Whatever Mr. Willness may have been starting to communicate, I agree with the Crown's submission that it was effectively neutralized by the comprehensive secondary warning Detective Constable Anstey provided. He continued after the interjection from Mr. Willness as follows:

--you should speak--or that you should speak or refuse to speak to me at this time, it's my duty to warn you that no such offer or suggestion can be made of any effect and must not influence you or make you feel compelled to say anything to me for any reason. But anything you do say may be given as evidence. Do you understand what I just--

Before Detective Constable Anstey had finished his question, Mr. Willness replied, "Yes". He said "Yes" again after Detective Constable Anstey finished his question by saying: "-- read there?".

[52] Detective Constable Anstey then asked what he had read meant to Mr. Willness, to which he responded: "Uh I don't have to say shit".

[53] Mr. Willness clearly understood that he was under no obligation to say anything to Detective Constable Anstey.

[54] I turn to the last factor raised by the defence, which is that Mr. Willness experienced a substantial delay in speaking to counsel. I will address the facts relating to Mr. Willness speaking to counsel in analyzing the defence's application under s. 24(2) of the Charter. It is sufficient to say for present purposes that Mr. Willness certainly did experience some delay in speaking to counsel. However, as the Crown submitted, the passage from Oickle referred to by the defence refers to denying access to counsel, not delaying access to counsel.

- [55] The evidence does not show that Mr. Willness was denied access to counsel. He clearly spoke to counsel before he gave the second statement.
- [56] The Crown submits that the evidence shows that Mr. Willness clearly wanted to speak to Detective Constable Anstey. I agree. In the first statement, Detective Constable Anstey was at pains to tell Mr. Willness repeatedly that he did not want him to say anything to him at that point. He wanted to explain to Mr. Willness that he was under increased jeopardy, as he was now being arrested for aggravated assault due to Mr. Young's worsening medical condition. He wanted to provide him with his Charter rights, including an opportunity to consult with a lawyer. He wanted to provide him with the secondary warning I have already described.
- [57] Throughout the process of doing those things, Mr. Willness repeatedly started to talk and Detective Constable Anstey repeatedly told him he did not want him to say anything until he had talked to a lawyer. Detective Constable Anstey stopped the interview at 8:37 p.m. to provide Mr. Willness with that opportunity.
- [58] When the second interview began at 9:07 p.m., Mr. Willness had spoken with counsel. Mr. Willness continued to want to talk to Detective Constable Anstey and he did so at some length. None of that was as the result of intimidating, aggressive, or prolonged questioning by Detective Constable Anstey. There is no suggestion that Mr. Willness lacked an operating mind or that the police engaged in any trickery.
- [59] Considering the totality of the circumstances, I find that the police did not create an atmosphere of oppression. Mr. Willness was not subjected to utterly intolerable conditions. If he was threatened or offered any inducements by the police, which the evidence does not substantiate, any such threats or inducements would have been effectively neutralized by Detective Constable Anstey's secondary warning.
- [60] There is nothing in the circumstances which would suggest that the statements Mr. Willness provided were unreliable, or that they were obtained in a manner that unfairly denied him his right to silence.
- [61] I, therefore, find that the Crown has established that both statements were voluntary beyond a reasonable doubt.

Section 10(b)

- [62] The defence submits that the police breached Mr. Willness' rights under s. 10(b) of the Charter. Section 10(b) provides detained or arrested persons with the right to retain and instruct counsel without delay.
- [63] In *R. v. Taylor*, 2014 SCC 50 [Taylor], Justice Abella explained the purpose of s. 10(b) as follows at para. 21:

- [21] The purpose of the s. 10(b) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": Manninen, at pp. 1242-43. The right to retain and instruct counsel is also "meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination": R. v. Suberu, [2009] 2 S.C.R. 460, at para. 40. Access to legal advice ensures that an individual who is under control of the state and in a situation of legal jeopardy "is able to make a choice to speak to the police investigators that is both free and informed": R. v. Sinclair, [2010] 2 S.C.R. 310, at para. 25.
- [64] The right to counsel must be implemented without delay. In Taylor at para. 22, Justice Abella quoted the following passage from Chief Justice Lamer's judgment in R. v. Bartle about why that is so:

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 Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. . . . [T]he 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 added; p. 191.]

- [65] There are three duties imposed upon the police under s. 10(b) which were described as follows at para. 23 of Taylor:
- (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).
- [66] There is no suggestion in this case that the police failed to inform Mr. Willness of his right to retain and instruct counsel without delay. Constable Sutherland did so at the scene.
- [67] Nor is there any suggestion that the police failed to refrain from eliciting evidence from Mr. Willness until he had had a reasonable opportunity to exercise his right to retain and instruct counsel. The police held off any questioning of Mr. Willness until after he had spoken to counsel at 8:55 p.m. on July 17. What is in issue is whether, Mr. Willness having indicated a desire to speak to counsel when he was in the back of the police cruiser at the scene, he was provided with a reasonable opportunity to exercise that right.

- [68] While the police's duty to facilitate access to a lawyer arises immediately upon the detainee's request to speak to counsel, the case law makes clear that there are some circumstances that can justify a delay in providing a detained person with an opportunity to speak to counsel. The burden is on the Crown to show that a given delay was reasonable. This was summarized in Taylor at para. 24 as follows:
- [24] The duty to inform a detained person of his or her right to counsel arises "immediately" upon arrest or detention (Suberu, at paras. 41-42), and the duty to facilitate access to a lawyer, in turn, arises immediately upon the detainee's request to speak to counsel. The arresting officer is therefore under a constitutional obligation to facilitate the requested access to a lawyer at the first reasonably available opportunity. The burden is on the Crown to show that a given delay was reasonable in the circumstances (R. v. Luong (2000), 271 A.R. 368, at para. 12 (C.A.)). Whether a delay in facilitating access to counsel is reasonable is a factual inquiry.
- [69] At paras. 41-42 of R. v. Suberu, 2009 SCC 33 [Suberu], the Court emphasized that "without delay" means immediately, subject to concerns for officer or public safety.
- [70] At para. 46 of R. v. Dill, 2018 BCSC 2332, Justice Iyer made clear that a standard policy of processing and booking accused persons immediately upon their arrival at the police station does not justify delay in the implementation of an accused person's s. 10(b) rights. She stated that:
- In the absence of safety concerns or other exigent circumstances, the implementational right to counsel must be given priority over booking procedures.
- [71] In R. v. Patrick, 2017 BCCA 57, at para. 111 [Patrick], Mr. Justice Fitch held that a trial judge erred in concluding that an accused person's right to counsel without delay "admitted of no exceptions grounded in the exigencies of the circumstances of the arrest". At para. 112, he referred to Suberu for the proposition that the "immediacy of this obligation is, however, subject to concerns for officer or public safety" and that "[a] police officer's implementation duties are 'necessarily limited in urgent or dangerous circumstances'".
- [72] At para. 113, he stated that the "practicalities of the situation must be taken into account; they inform the reasonableness of the delay in facilitating the exercise of the right."
- [73] In R. v. Smith, 2011 BCSC 1695, Justice Ker held that the police breached the accused's right to counsel in failing to facilitate access to counsel without delay. At para. 273, she stated that:
- [273] The breach of the right to counsel by delaying access, in circumstances that raised no issues of officer safety, destruction of evidence or exigency, was all part of the ongoing investigation process and a carefully orchestrated and planned arrest.

- [74] From the foregoing, it is clear that the burden is on the Crown to prove that any delay in providing Mr. Willness with access to counsel was reasonable. In keeping with the decision in Patrick, this court must consider whether the Crown has discharged that burden.
- [75] In considering whether the delay is reasonable, the court must take into account the exigencies of the situation. This will include officer safety, public safety and, in the circumstances of this case, preserving evidence.
- [76] With those principles in mind, I turn to a consideration of whether the police breached their implementational duty to provide Mr. Willness with access to counsel without delay. I consider it appropriate to do so in stages, beginning at the scene, then turning to when Mr. Willness was taken to the station, then the period between him being lodged in Cell 7 and Constable Sutherland taking him to the phone room at 3:10 a.m., then Constable Sutherland's attempt to facilitate access at that time, and concluding with Detective Constable Anstey providing him with access at 8:55 p.m. that night.
- [77] I begin with the circumstances at the scene. Mr. Willness was arrested by Constable Sutherland at 11:50 p.m. He was chartered in the back of the cruiser at 11:58 p.m. He appeared to understand what Constable Sutherland said to him and said that he wanted to speak to counsel. Constable Sutherland transported Mr. Willness to the station at 12:16 a.m.
- [78] For the following reasons, I find that the Crown has discharged its burden of showing that the delay on scene until Mr. Willness arrived at the station was reasonable.
- [79] The scene was chaotic, fluid and dynamic. There were a number of people milling about. Detective Constable Anstey estimated 15 or 20 people. Constable Sutherland and Constable Tittlemore split up, with Constable Sutherland attending to the scene at the corner of Baker and Ward where Mr. Willness had been detained by a number of people and Constable Sutherland arrested him, and Constable Tittlemore, for his part, going to the location on the street outside the Cantina Restaurant where Mr. Young lay injured in the street.
- [80] Mr. Willness was frantic. Constable Sutherland was able to quickly arrest him and put him in the back of the police car, but inside the police car, Mr. Willness was screaming incomprehensibly and swearing. He was saying he was going to "fucking kill you", although it was not clear whom, if anyone in particular, that was directed to. He kicked out the back window of the police cruiser, an act which would have required considerable force.
- [81] Constable Sutherland was trying to figure out what had happened, to identify witnesses to the incident, to obtain their names and contact information, and some brief statements. He briefly arrested another individual whom he was told might have been involved in the incident and quickly determined that he had not been, and he released him.

- [82] Mr. Willness seemed calmer when Constable Sutherland gave him his rights to counsel at the back of the police car, but he did remain agitated and emotional. Constable Sutherland needed backup and he called for Detective Constable Anstey to come down and assist, which he did. Once there, Detective Constable Anstey spoke to Mr. Willness in the back of the police cruiser in an attempt to calm him down. This was after he had kicked the window out. Mr. Willness did calm down somewhat after Detective Constable Anstey spoke to him.
- [83] It took approximately 18 minutes from the time Mr. Willness was told of his right to counsel to Constable Sutherland transporting him to the police station. Given the circumstances I have described, issues of officer safety, public safety, and the preservation of evidence were all in play. The delay in facilitating access to counsel through to the point where Mr. Willness was transported to the station was clearly reasonable.
- [84] I turn to the period after Mr. Willness was transported to the police station. There were at least three officers present: Constable Sutherland, Detective Constable Anstey, and Special Constable McPhee. Mr. Willness was walked from Constable Sutherland's police car into the booking area without any apparent difficulty. He was searched. The handcuffs were removed. Special Constable McPhee assessed his eyes.
- [85] Mr. Willness was described as agitated and distressed. Officers smelled alcohol on him and believed him to be intoxicated by alcohol and perhaps under the influence of a stimulant. He was unsteady on his feet, but he was not so intoxicated that he was unable to comply with officer directions. Constable Sutherland described him as intoxicated, but not so intoxicated that he would have arrested him for public drunkenness.
- [86] Once the booking-in process was completed, Mr. Willness was put in Cell 7, as I have already described. Constable Sutherland testified about the decision that he made to put him in Cell 7, and he said that he did so due to a constellation of factors which included the following: Mr. Willness was intoxicated and highly emotional; Constable Sutherland was concerned he might not understand his legal advice due to intoxication; Mr. Willness was alleged to have assaulted someone with a skateboard; he had acted violently in kicking out the police car window; and he needed to be in an area where he could be closely observed for his own safety. Special Constable McPhee was left with that task.
- [87] Once Mr. Willness was lodged in Cell 7, by about 12:25 a.m., his behaviour seems to have been fairly unremarkable, as I have already described. Constable Sutherland testified about his concerns about putting Mr. Willness in the lawyer interview room sooner than he did. The room is small, perhaps a little larger than the witness box, and it would be difficult and dangerous to extricate a detained person from it if anything untoward occurred. He was also concerned that Mr. Willness could pull the telephone receiver out of the wall and use it as a weapon or the cord as a ligature.
- [88] Once Mr. Willness was lodged in Cell 7, Constable Sutherland, Constable Tittlemore, and Detective Constable Anstey went about their other duties. They were the only police officers on duty. Constable Sutherland and Constable Tittlemore responded to a call about a drug

overdose at about 1:30 a.m. It was a high-risk call and neither officer could break away from it. On their way back to the station, they attended to a noise complaint. Detective Constable Anstey was at the police station. He responded to an alarm call to an unsecure building, namely the Nelson City Hall, at about 1:10 a.m. He testified that he returned to the station after about 20 or 30 minutes. He went off duty shortly after 2:00 a.m., perhaps at 2:10 or 2:15 a.m.

- [89] Constable Sutherland finally took steps to facilitate Mr. Willness' access to counsel after 3:00 a.m. He went and spoke to Mr. Willness at 3:04 a.m. Mr. Willness was no longer in an agitated state. Constable Sutherland told him he was under arrest for assault with a weapon and causing bodily harm and re-chartered him. Mr. Willness requested to speak to Legal Aid. It was 3:10 a.m. when Constable Sutherland took Mr. Willness to the interview room. By that time, approximately two hours and 50 minutes had elapsed since Mr. Willness had arrived at the station.
- [90] I find that the Crown has not discharged its burden of showing that the delay in facilitating access to counsel until 3:10 a.m. was reasonable. Mr. Willness was emotional and he was intoxicated. Those are not sufficient reasons to delay access to counsel. As both counsel submitted, intoxicated people are given access to counsel all the time.
- [91] Mr. Willness was alleged to have been involved in a serious assault. He had been volatile in the police cruiser. He was seen to kick out the window of the police cruiser. He was heard to utter threats, albeit to no one in particular, while in the back of the police cruiser.
- [92] I accept that Constable Sutherland would have had reason to be concerned that Mr. Willness might swing back towards being violent, given those earlier events. He did not have the benefit of hindsight, which this court has, in knowing that Mr. Willness did not engage in any more violent behaviour once he was at the police station.
- [93] In my view, Constable Sutherland's concerns would have justified some delay once at the police station to ensure that Mr. Willness was sufficiently calm to be safely taken to the lawyer interview room without threat to police safety or that of Mr. Willness, but it did not justify waiting almost three hours; three hours during which Mr. Willness was, for the most part, sleeping.
- [94] I appreciate that the Nelson Police Department is a small police force. Only three police officers were on duty during this period and they did have some other duties to attend to. There is no evidence that Constable Sutherland checked on Mr. Willness before 3:04 a.m. or asked anyone else whether Mr. Willness had calmed down sufficiently to take him to the lawyer interview room. If he had, he would have seen or been told that Mr. Willness was sleeping and apparently relatively calm.

- [95] Constable Sutherland left on the drug overdose call at approximately 1:30 a.m. He could have facilitated the phone call before that. He also could have delegated Detective Constable Anstey, who was at the police station until he left for City Hall at about 1:10 a.m., and again when he got back to the station some 20 or 30 minutes later, until shortly after 2:00 a.m. when he went off duty, to facilitate the call.
- [96] On that basis, I find that the police breached Mr. Willness' right to retain and instruct counsel without delay. It is appropriate, however, to go on to consider subsequent events, as they are important for the remainder of the analysis.
- [97] I, therefore, turn to Constable Sutherland's attempt to facilitate Mr. Willness' access to counsel starting at approximately 3:10 a.m. Detention records show that Constable Sutherland took Mr. Willness out of his cell at 3:10 a.m. and put him back in Cell 7 at 3:14 a.m. The stated purpose was to phone Legal Aid and Constable Sutherland placed Mr. Willness in the lawyer phone room for that purpose.
- [98] The record of prisoner phone calls indicates that at 3:11 a.m., NP 84 placed a call to legal aid. NP 84 is Constable Sutherland. Constable Sutherland has no recollection of actually placing the call or of who did so. Evidence about the Nelson Police Department's usual practice was that the responsible police officer will ask the person in dispatch to place the call to Legal Aid or the lawyer of the detained person's choice. Special Constable Croteau was the person working in dispatch at that time. He had no recollection of being asked to or of placing the call.
- [99] There was evidence that when the Nelson Police Department calls Legal Aid, they often do not speak to a human being, but leave a message, and a lawyer calls back sometime later. There is no evidence about whether Constable Sutherland or Special Constable Croteau, or whoever made the call, spoke to a person at Legal Aid or whether they left a message.
- [100] Constable Sutherland made a note that Mr. Willness was on the phone for two minutes, but he had no recollection of how he knew that.
- [101] Detective Constable Anstey was assigned to take over this investigation on the morning of July 17. When he arrived at the police station on July 17, he inquired about whether Mr. Willness had spoken to a lawyer and he was told he had, and he looked at the record of prisoner phone calls. He did not specifically confirm with either Constable Sutherland or Mr. Willness that Mr. Willness had, in fact, spoken to counsel.
- [102] The Crown points to the fact that Special Constable Croteau made a note at 7:11 p.m. on July 17 about Mr. Willness that reads, "Requesting to speak to lawyer again. NP 86 advised". NP 86 is Detective Constable Anstey's police number, and he had, by this point, been appointed to take over this investigation.
- [103] The Crown submits that the "again" indicates that Mr. Willness had in fact spoke to a lawyer at 3:11 a.m.

- [104] Having considered the totality of the evidence on this point, I find that the evidence is insufficient to allow me to conclude that Mr. Willness in fact spoke to a lawyer at 3:11 a.m. on July 17. I accept that the police made good faith efforts to provide access to counsel at that time and that they believed he had spoken to a lawyer. That would explain Special Constable Croteau's note to the effect that Mr. Willness asked to speak to a lawyer again. In other words, the "again" may well have been Special Constable Croteau's interpretation, given the belief that Mr. Willness had spoken to a lawyer previously, rather than a representation of Mr. Willness' actual words.
- [105] I have already mentioned that Detective Constable Anstey clearly facilitated Mr. Willness' access to a lawyer in between the two statements. Detective Constable Anstey told dispatch to place a call to Legal Aid, and one was made at 8:26 p.m. A lawyer called back at 8:55 p.m. Detective Constable Anstey himself spoke to the lawyer, because he wanted to make sure that the lawyer knew the nature of the charges against Mr. Willness and that Mr. Willness would be released on a promise to appear, regardless of whether he provided a statement or not. The call from the lawyer was put through to Mr. Willness in the lawyer interview room.
- [106] When the second interview started, Detective Constable Anstey explicitly confirmed with Mr. Willness that he had spoken to a lawyer and he had gotten legal advice. Detective Constable Anstey could have done no more at that stage to ensure that Mr. Willness' right to retain and instruct counsel was facilitated.

Section 24(2)

The legal principles

- [107] Having determined that Mr. Willness' s. 10(b) right was infringed, I must go on to consider whether the statements should be excluded under s. 24(2) of the Charter.
- [108] As stated in *Beaver* at para. 94:
- [94] There are two components to determining whether evidence must be excluded under s. 24(2). The first component -- the threshold requirement -- asks whether the evidence was "obtained in a manner" that infringed or denied a Charter right or freedom. If the threshold requirement is met, the second component -- the evaluative component -- asks whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute (see *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 44, per Doherty J.A., who coined this terminology; see also *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1000; *Tim*, at para. 74; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357, at para. 57; *R. v. Lauriente*, 2010 BCCA 72, 283 B.C.A.C. 215, at para. 35; S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 19:22).
- [109] At para. 96 of *Beaver*, the Court cited *R. v. Mack*, 2014 SCC 58 for the principles governing the threshold requirement as follows:

Whether evidence was "obtained in a manner" that infringed an accused's rights under the Charter depends on the nature of the connection between the Charter violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned evidence will not suffice . . .

[110] In the event I found that the police had breached Mr. Willness' right to retain and instruct counsel without delay, the Crown argued that Detective Constable Anstey's actions, which I have already described, constituted a "fresh start". This argument, if accepted, would mean that the second statement would not have been obtained in a manner that breached the Charter, as the police would have made a fresh start from the earlier breach by severing any temporal, contextual, or causal connection between the breach and the statement or by rendering any connection between them remote or tenuous.

[111] At para. 99 of *Beaver*, the Court stated that "In some cases, evidence will remain tainted by a Charter breach despite subsequent Charter compliance".

[112] It is not enough that the state eventually complies with its Charter obligations. The question the court must answer is whether "there remains a sufficient causal, temporal, or contextual connection between the Charter breach and the impugned evidence".

[113] At para. 103 of *Beaver*, the Court summarized some potential indicators of a fresh start as follows:

[103] When undertaking the case-specific factual inquiry into whether the police effected a "fresh start", some potentially illustrative indicators include:

- Whether the police informed the accused of the Charter breach and dispelled its effect with appropriate language (*R. (D.)*, at p. 882). What constitutes appropriate language will vary with the circumstances of the case. In some cases, it may be sufficient to say, "we're going to start over"; in other cases, more detailed or specific language may be needed to remove the taint from the earlier Charter breach;

- Whether the police cautioned the accused after the Charter breach but before the impugned evidence was obtained (*Plaha*, at para. 53; *Hamilton*, at paras. 58-59; *Woods*, at para. 9). Ideally, this would involve both a primary caution ("You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence" (*Singh*, at para. 31; *Manninen*, at p. 1237)), and a secondary caution ("Your decision to speak to the police should not be influenced by anything you have already said to the police or the police have already said to you" (*Manninen*, at p. 1238));

- Whether the accused had the chance to consult counsel after the Charter breach but before the impugned evidence was obtained (Manchulenko, at para. 69; Woods, at paras. 5 and 9; R. v. Dawkins, 2018 ONSC 6394, at para. 62 (CanLII));
- Whether the accused gave informed consent to the taking of the impugned evidence after the Charter breach (Simon, at para. 74);
- Whether and how different police officers interacted with the accused after the Charter breach but before the impugned evidence was obtained (see Lewis, at para. 32; Woods, at para. 9; McSweeney, at para. 62; I. (L.R.) and T. (E.), at p. 526; Dawkins, at para. 62); and
- Whether the accused was released from detention after the Charter breach but before the impugned evidence was obtained.

[114] In support of its fresh start argument, the Crown emphasizes the second, third, and fifth of the indicators laid out in Beaver. In submitting that there was no fresh start, the defence emphasizes the first and the fifth.

Was there a "fresh start" before the second statement?

[115] I will review the relevant factors as they apply to this case. In this part of my analysis, I am focusing on whether there was a fresh start before the second statement. As the Crown properly acknowledges, there was no fresh start before the first statement, which I will deal with separately.

[116] The police did not inform Mr. Willness that they had breached his Charter rights. In context, this is not surprising, as there is no evidence that would suggest that the police knew or believed that they had, as I have found, breached Mr. Willness' Charter rights.

[117] The police did caution Mr. Willness after the Charter breach, but before the second statement was obtained. I have already detailed Detective Constable Anstey's primary and secondary caution which he provided to Mr. Willness in the first interview.

[118] Mr. Willness had the chance to and in fact did consult with counsel after the Charter breach, but before the second statement was obtained.

[119] Constable Sutherland was the primary police officer that interacted with Mr. Willness during the period in which I have concluded that Mr. Willness' s. 10(b) rights were breached. Detective Constable Anstey had some involvement with Mr. Willness at that time, but it was relatively limited. Detective Constable Anstey was the only officer who interacted with Mr. Willness during and after the alleged fresh start. Mr. Willness was not released from detention before the second statement was obtained.

[120] The question, as I have stated, that I must answer is whether Detective Constable Anstey's conduct severed the temporal, causal, or contextual connection between the police's earlier failure to facilitate Mr. Willness' access to counsel and the second statement, or whether his conduct rendered those connections remote or tenuous.

- [121] There is no causal connection between the earlier breach and the second statement. The police held off eliciting any evidence from Mr. Willness until after he had spoken with counsel. The temporal connection between the earlier breach and the second statement is, in my view, remote and tenuous. Many hours had passed since Mr. Willness had been arrested and chartered by Constable Sutherland by the time Detective Constable Anstey conducted the first and second interviews and provided Mr. Willness with effective access to counsel.
- [122] Looked at contextually, I am satisfied that Detective Constable Anstey's actions severed any connection between the earlier failure to facilitate access to counsel and the second statement. The cautions he provided and the steps he took to ensure that Mr. Willness had access to counsel created a new context for Mr. Willness' interaction with police. Mr. Willness' statements in the second statement were made when he was fully aware of his rights.
- [123] I, therefore, conclude that the second statement was not obtained in a manner that breached the Charter.

The first statement

- [124] I return to the first statement. I have not yet addressed the admissibility of the first statement in particular. There is no fresh start argument available with respect to the first statement, as Mr. Willness was saying things before Detective Constable Anstey had finished explaining his increased jeopardy, his right to counsel, and the primary and secondary warnings, let alone facilitated his right to counsel.
- [125] The Crown relied on the decision of the Alberta Court of Appeal in *R. v. Gitsadig*, 2003 ABCA 91 [Gitsadig] in respect of the first statement. In that case, the accused, a taxi driver, was arrested for sexual assault against a passenger. He was given his s. 10(b) rights and he was cautioned. He requested a lawyer and he was placed in an interview room with a phone and given information about how to call a lawyer. He then asked the police officer, who was leaving the room, what the allegations against him were. The police officer sat down and told him, and the accused stated that he remembered the fare, he remembered picking her up, but he denied touching her.
- [126] The Court of Appeal upheld the trial judge's ruling that, in those circumstances, the accused's s. 10(b) rights were not breached. They held that the accused had given a very short, spontaneous statement after being chartered and warned. The Court of Appeal also agreed with the trial judge that, even had a breach been found, it was a technical breach and the admission of the evidence would not bring the administration of justice into disrepute.

- [127] The defence submitted that Mr. Willness' statements in the first statement were not analogous to those of the accused in Gitsadig. The defence submitted that Mr. Willness' statements in the first statement were not spontaneous, but were made after he had been held in custody for some 21 hours without talking to a lawyer.
- [128] I agree with the defence that the first statement is not analogous to that in Gitsadig. The interaction in the first interview between Mr. Willness and Detective Constable Anstey appears to have been lengthier than that between the accused and the officer in that case. Despite Detective Constable Anstey's best efforts, Mr. Willness certainly said more than Mr. Gitsadig did. Mr. Willness had been in custody for a lengthy period of time without talking to a lawyer. I do find that the first statement was obtained in a manner that breached the Charter.
- [129] It is, therefore, necessary to proceed to the second stage of the s. 24(2) analysis with respect to the first statement. As stated in Beaver at para. 116:
- [116] Whether the administration of justice would be brought into disrepute by admitting [Mr. Willness' first statement] involves examining the impact its admission would have on public confidence in the administration of justice over the long term, based on a balancing of the three lines of inquiry described by this Court in R. v. Grant . . . (1) the seriousness of the Charter-infringing state conduct; (2) the impact of the breach on the accused's Charter-protected interests; and (3) society's interest in the adjudication of the case on its merits . . .
- [130] I deal first with the seriousness of the breach. There was a very substantial delay in Mr. Willness having access to counsel, in the area of 21 hours. This suggests a serious breach.
- [131] While I have found that the police should have facilitated Mr. Willness' access to counsel sometime shortly after he was lodged in Cell 7, I accept that Constable Sutherland believed, in good faith, that it was appropriate to delay facilitating a call to counsel for the reasons he provided. He was trying to balance what he had seen and heard of Mr. Willness' emotional volatility and the potential risk that posed to both Mr. Willness and police officers if he was taken to the telephone room while still volatile with, on the other hand, facilitating Mr. Willness' right to counsel.
- [132] Further, while I have found that I cannot conclude that Mr. Willness spoke to a lawyer at 3:11 a.m., I accept that the police took the steps to facilitate a call at that time and they believed that they had done so successfully. Those mistakes were made in good faith.
- [133] So far as Detective Constable Anstey is concerned, he did everything he could to try to prevent Mr. Willness from speaking to him during the first statement.
- [134] There was no reckless or wilful disregard of Mr. Willness' rights at any stage, nor was there a systemic pattern of Charter-infringing conduct. In my view, the first line of inquiry tends to favour neither inclusion nor exclusion of the first statement.

- [135] Turning to the impact of the breach, the first statement occurred before Mr. Willness had spoken to a lawyer. However, he had been told his Charter rights by Constable Sutherland on two occasions and Detective Constable Anstey was endeavouring to do the same and to caution Mr. Willness, while Mr. Willness continued to interject.
- [136] Mr. Willness' comment that "I don't have to say shit" in the first statement clearly shows that he knew he was under no obligation to say anything to Detective Constable Anstey, but he chose to do so.
- [137] I find the police's failure to facilitate Mr. Willness' access to counsel before the first statement had a minimal impact on his Charter-protected right to remain silent. The second line of inquiry, therefore, favours inclusion of the first statement.
- [138] I turn to society's interest in an adjudication of the case on the merits. For the reasons I gave in considering the voluntariness of the statements, I find that the evidence Mr. Willness gave in the first statement is likely to be reliable. That evidence is not essential to the Crown's case, as it does not seek to admit the first statement as part of its case, but it would be helpful, perhaps including in relation to identity, which has not been admitted in this case.
- [139] Mr. Willness is charged with manslaughter. As noted in *Beaver* at para. 130, the public has a heightened interest in seeing serious offences such as manslaughter adjudicated on the merits. The third line of inquiry, therefore, supports admission of the first statement.
- [140] Balancing all of the lines of inquiry, I conclude that there is a compelling public interest in admitting the first statement. I conclude that admitting Mr. Willness' first statement would not tend to bring the administration of justice into disrepute. I, therefore, decline to exclude the first statement under s. 24(2).

The second statement - alternative analysis if it was obtained in a manner that infringed the Charter

- [141] In light of my earlier conclusion that the second statement was not obtained in a manner that infringed the Charter, it is not necessary to proceed to the second stage of the s. 24(2) analysis with respect to the second statement. However, in the event that I am wrong about whether the second statement was obtained in a manner that infringed the Charter, I would, for substantially the same reasons I have concluded the first statement should not be excluded, also decline to exclude the second statement. Indeed, the case is much stronger for the admissibility of the second statement, as it was obtained after Detective Constable Anstey had provided Mr. Willness with all of the information he ultimately did during the course of the first interview, and after Mr. Willness had spoken with counsel and obtained legal advice.

[142] Mr. Willness chose to give the second statement with full knowledge of his rights. There is a compelling public interest in its admission and it would not bring the administration of justice into disrepute if the second statement were admitted.

Conclusion

[143] In summary, I find that both the first and second statements were voluntary. I find that Mr. Willness' right to retain and instruct counsel without delay was infringed. I find that the first statement was obtained in a manner that infringed the Charter, but that its admission would not bring the administration of justice into disrepute, and that it should not be excluded under s. 24(2).

[144] I find that the second statement was not obtained in a manner that infringed the Charter and it is, therefore, admissible. If the second statement was obtained in a manner that infringed the Charter, I would hold that its admission would not bring the administration of justice into disrepute, and I would not exclude it under s. 24(2).

[145] That concludes my reasons on the voir dire.

"L.M. Lyster J."

LYSTER J.

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