

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

MAYANK PATEL

**R E A S O N S   F O R   J U D G M E N T**  
**E X C E R P T   O F   P R O C E E D I N G S**

BEFORE THE HONOURABLE JUSTICE P. DOWNES

On May 14, 2018 at TORONTO, Ontario

APPEARANCES:

T. Edwards

Counsel for the Crown

J. Marchand

Counsel for M. Patel

ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

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**REASONS FOR JUDGMENT** ..... **1**

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Transcript Ordered: November 28, 2018

Transcript Completed: November 30, 2018

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Notified Ordering Party: December 3, 2018

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**Legend**

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

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MONDAY, MAY 14, 2018

R E A S O N S F O R J U D G M E N T

5 DOWNES, J. (Orally):

10 Returning to Mr. Patel's case, there are my reasons for Judgment. You can stay seated sir, while I read you this. To the extent that I make reference to any cases, I will only reference the case name to the extent that any detailed citations are required at a later date, I will insert them.

15 Mr. Patel is charged with drive over 80. The only issue at this trial is whether he has established on a balance of probabilities that his Right to Counsel, under section 10(b) of the *Charter* was violated because the arresting officer failed to adequately explain to him that he had the right to speak to a lawyer of his choice, and instead "defaulted" to contacting duty counsel.

25 Mr. Patel was pulled over at a RIDE stop in Scarborough. He admitted to consumption and failed a roadside screening device. He was arrested for drive over 80 and provided his Right to Counsel. The arresting officer, Sergeant Cohen, testified that after arresting Mr. Patel, he read him his Rights to Counsel from the back of his memo book. More

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particularly, Sergeant Cohen testified that he read the following:

I am arresting you for operation over 80 mg. It is my duty to inform you that you have the right to attain and instruct counsel without delay. You also have the right to telephone any lawyer you wish. You also have the right to free advice from a legal aid lawyer. If you are charged with an offence, you may apply to the Ontario Legal Aid Plan for assistance, 1-800-265-0451 is a number that will put you in contact with a legal aid duty counsel lawyer for free legal advice right now.

Sergeant Cohen testified that following these words he asked Mr. Patel, "Do you understand?" and he responded "Yes." He then said, "Do you wish to call a lawyer now?" Mr. Patel said, "Yes."

Following that, Sergeant Cohen facilitated a call to duty counsel. When asked why he called duty counsel, Sergeant Cohen testified that he was not provided with any other lawyer's name or anybody else. As an experienced traffic officer, Sergeant Cohen was aware that detainees will sometimes ask to speak to a particular lawyer or to a family member for assistance in contacting one. But in the absence of any indication that the detainee wished to do so,

Sergeant Cohen considered it sufficient if he put the detainee, in this case Mr. Patel, in touch with duty counsel.

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The qualified breath technician was the only other witness at this trial. He testified that at some point he overheard Mr. Patel tell Sergeant Cohen that he wished to speak to duty counsel. Sergeant Cohen did not testify that Mr. Patel uttered these words, only that he said he did wish to speak to a lawyer.

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In the course of the second breath test when asked by the qualified breath technician what time he had started drinking, Mr. Patel said, "Based on what my lawyer told me, I shouldn't answer any questions." He was asked no further questions by the officer.

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No defence evidence was called either on the *Charter* application or the trial proper.

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The purpose of the Right to Counsel is to provide an accused with legal advice and to ensure that he or she understands his or her right to silence, see *R. v. Sinclair*, [2012] 2 S.C.R. 310, *R. v. Willier*, [2010] 2 S.C.R. 429. The police have a duty to facilitate access to a lawyer immediately and that includes the right to counsel of choice, as well as the right to contact a third party to facilitate access to counsel, see *R. v. Taylor* [2014] 2 S.C.R. 495.

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In order to give full effect to the section 10(b) right, police have a number of obligations to the detained person. In *R. v. Bartle*, [1994] 3 S.C.R. 173, Chief Justice Lamer summarized these rights and obligations in terms of the duties imposed upon the police when detaining or arresting someone. Section 10(b) requires the police:

1. To inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel.

2. If a detainee has indicated a desire to exercise this right, to provide the detainee with 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 the cases of urgency or danger.

Section 10(b) makes no explicit mention of counsel of choice. As the Supreme Court of Canada said in *Willier*, the informational duty imposed on the police is relatively straight forward. However, should a detainee positively indicate that he or she does not understand his

or her Right to Counsel, the police cannot rely on a mechanical recitation of that right and must facilitate that understanding, see *R. v. Evans*, [1991] 1 S.C.R. 869 at para. 35.

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Additionally, there are specific narrowly defined circumstances in which section 10(b) prescribes an additional informational obligation on the police. These include circumstances where a detainee has exercised reasonable diligence in trying to reach counsel of choice but has been unable to do so. In those situations there is an additional informational obligation on the police if the detainee then indicates they no longer want to receive legal advice (that is the Prosper Warning).

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*Willier*, at para. 33 also reminds us that where a detainee chooses to exercise their 10(b) right by contacting a lawyer, then the police must facilitate a reasonable opportunity for him or her to do so. Again at para. 35, *Willier* describes a situation in which a detainee, "...opts to exercise the Right to Counsel by speaking with a specific lawyer.", in which case they must be given a reasonable opportunity to contact their chosen counsel.

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The question in this case is whether the informational component of 10(b) also requires the police to specifically ask a detainee who

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asserts a desire to speak to counsel whether they wish to speak to a lawyer of their choosing or to duty counsel. There is no doubt that in the face of any indication by a detainee that he or she wants to speak to a specific lawyer, or indeed to an individual who can put them in touch with a lawyer, or some indication that they have their own counsel, then the police must be reasonably diligent in following up on these assertions by the detainee.

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Absent any indication in all of the circumstances either that the detainee does not understand their right, or that they have a particular lawyer or person in mind, does section 10(b) as currently understood, impose such a further constitutional obligation on the police. In my view the weight of authority says that it does not. The 10(b) jurisprudence in this area consistently imposes additional obligations on the police only when they are triggered by something in the record that suggests either the detainee does not understand his or her rights, or wishes to call a particular lawyer or individual, see *Bartle*, *Willier*, *R. v. Manninen*, [1987] 1 S.C.R. 1233, *R. v. Badgerow*, [2008] O.J. No. 3416, *R.V. Ross* [1989] 1 S.C.R. 3, *R. v. Tremblay*, [1987] 2 S.C.R. 435, *R. v. Top*, [1989] A.J. No. 351 (C.A.)

Even those cases which give a broad reading to

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the 10(b) obligations such as *R. v. Della-Vedova*, [2018] O.J. No 1596 (C.J.) as referred to by both parties, are premised on evidence arising either from the accused or from the officers as to something the accused said at the time. The record in this case is bereft of anything along those lines. The officer read the 10(b) Caution. He had told Mr. Patel that he had the right to telephone any lawyer he wished and that he also had the right to free advice from a legal aid lawyer. He said he understood. Absent a reason to do so, the police were under no constitutional duty to probe the extent, or nature, of Mr. Patel's understanding. They were entitled to take him at his word.

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It is not lost on me that it is commonplace in drinking and driving trials to hear evidence that an officer does indeed ask a detainee who asserts a desire to speak to counsel, whether he wishes to speak to a lawyer of his or her choosing, or duty counsel. Invariably if the detainee has a particular lawyer in mind, they will say so. It would foreclose any argument on this issue if officers routinely decided to seek that clarification. But it does not elevate it to a constitutional imperative.

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As the Court of Appeal said in *Badgerow*:

Although the police cannot be expected to be mind-readers, they are not entitled to

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ignore statements by an accused that raise a reasonable prospect that the accused has not exercised his or her section 10(b) rights. Rather, where an accused makes such a statement, the police must be diligent in ensuring that an accused has a reasonable opportunity to exercise his or her rights and may not rely on answers to ambiguous questions as a basis for assuming that an accused has exercised his or her rights.

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The defence in this case says that the question to Mr. Patel, "Do you want to call a lawyer now?" was an ambiguous question which required Sergeant Cohen to clarify Mr. Patel's response. I disagree. While as I say, many officers will decide to follow up with such a question, I do not consider the binding authorities to require that they do so, particularly here where there is absolutely no evidence that Mr. Patel wanted to speak to a particular individual or did not understand his rights. In my view, the police were in full compliance with section 10(b). Mr. Patel has not discharged his onus of establishing any *Charter* violation and the *Charter* application is dismissed.

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I am satisfied that all of the other elements of the offence of drive over 80 have been established beyond a reasonable doubt. Mr. Patel is found guilty.

Certification

**FORM 2**

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*Evidence Act, subsection 5 (2)*

5 I, Laura Silverstein, certify that this document is a true and  
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