

# R v Willier (2010): Does the Right to Counsel Include a Right to a Specific Lawyer?

## INTRODUCTION

In *R v Willier*,<sup>[1]</sup> the Supreme Court of Canada considered the limits and scope of the *Charter of Rights and Freedoms* guarantee to a lawyer in the event of arrest or detention. The case was one of three cases<sup>[2]</sup> decided by the Supreme Court in October 2010 that dealt with different aspects of this issue.

Under section 10(b) of the *Charter*:

Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right.

In *Willier*, the Supreme Court addressed the question of whether this section 10(b) guarantee includes the right to speak with a *specific* lawyer of the individual's choosing.

## THE FACTS

In February 2005, Stanley Willier was arrested in High Prairie, Alberta on suspicion that he murdered his common law wife, Brenda Moreside.<sup>[3]</sup> Upon his arrest, he was informed that he had the right to "retain and instruct" a lawyer without delay.<sup>[4]</sup> He was then taken to an RCMP detachment in Sherwood Park for questioning.<sup>[5]</sup>

When he arrived at the police station, he had a 3-minute conversation with Legal Aid, a free legal service.<sup>[6]</sup> The next morning, Mr Willier told police that he wanted to speak with a specific lawyer, Mr Peter Royal. Mr Willier attempted to contact Mr Royal, but as it was a Sunday, his offices were closed.<sup>[7]</sup>

The police asked Mr Willier if he wanted to try to contact a different lawyer, telling Mr Willier that Mr Royal would likely not be available until the next day and that Legal Aid was available immediately.<sup>[8]</sup> As a result, Mr Willier decided to speak with Legal Aid a second time.<sup>[9]</sup>

Approximately one hour later, the police began to interrogate Mr Willier. Mr Willier was asked whether he wanted to contact a lawyer again but he declined, stating that he was "satisfied" with the advice he had received from his conversations with Legal Aid.<sup>[10]</sup> The interview continued and Mr Willier eventually confessed to the murder of Brenda Moreside.<sup>[11]</sup>

At trial, Mr Willier argued that his section 10(b) right to counsel was violated when police

did not hold off from questioning him until after he had the opportunity to speak with his chosen lawyer - Mr Peter Royal.

## **ISSUE**

The issue that the Supreme Court had to address in this case was whether Mr Willier's right to a lawyer, as outlined in *section 10(b) of the Charter*, had been infringed by the actions of the police at the RCMP station.

In particular, the issue for the Court was whether section 10(b) requires that the police hold off from questioning an individual who has received legal advice but has not yet had the opportunity to speak with a specific lawyer.

## **THE DECISION**

The Supreme Court concluded that section 10(b) of the *Charter* does not impose an obligation on police to hold off from questioning when an arrested or detained individual is unsuccessful in contacting a specific lawyer and so instead speaks with a different lawyer.

As a result, the Supreme Court ruled that Mr Willier's *Charter* rights had not been breached by the actions of police.[\[12\]](#)

## **CASE HISTORY: THE DECISIONS IN THE COURTS BELOW**

### ***The Trial Decision***

At trial, Mr Willier argued that his section 10(b) right was breached by the police. As a result, his confession should not be admitted into evidence.[\[13\]](#) The trial judge agreed.

In the trial judge's view, when Mr Willier was unsuccessful in contacting his preferred lawyer, the police had a duty to refrain from questioning him until he had a reasonable amount of time to try to reach his preferred lawyer.[\[14\]](#) In addition, the police should have informed Mr Willier that he had a reasonable amount of time to contact his lawyer before he would be required to contact another lawyer or be questioned by police.[\[15\]](#) The trial judge considered that the two short discussions with Legal Aid were inadequate, and that they did not amount to a "meaningful exercise of his right to counsel."[\[16\]](#)

As a result, the trial judge excluded the confession from evidence, and Mr Willier was acquitted.

### ***The Decision of the Alberta Court of Appeal***

The Alberta Court of Appeal overturned the trial judge's decision, finding no *Charter* violation.[\[17\]](#) The Court decided that there is no extra obligation on police when an arrested or detained individual cannot reach his or her own lawyer (or a lawyer of his or her choosing) and so opts to speak with another lawyer.[\[18\]](#) In addition, the Court believed that it is inappropriate for police to inquire into the *quality* of legal advice received, given the "privileged nature of the solicitor-client relationship," which means that there is a

relationship of privacy and trust between the lawyer and client.[\[19\]](#)

As a result of Mr Willier's multiple conversations with Legal Aid, and the fact that he expressed satisfaction with the advice he received, the police were entitled to begin the questioning.[\[20\]](#)

The Alberta Court of Appeal overturned the trial decision and ordered a new trial. Mr Willier appealed.

## **THE SUPREME COURT DECISION: ANALYSIS**

The Supreme Court agreed with the Alberta Court of Appeal, and ruled that there was no section 10(b) violation.[\[21\]](#) The Court reached this conclusion based on an analysis of:

- The text and purpose of the section 10(b) right to a lawyer upon arrest or detention; and
- The rights and obligations that arise out of the section 10(b) guarantee.

### ***The text and purpose of section 10(b)***

The issue in this case was not resolved conclusively by the text of section 10(b) of the *Charter* - the text does not explicitly mention a right to a lawyer of one's choosing.

The Court concluded that the purpose of the right to a lawyer contained in section 10(b) is to work together with the right to remain silent[\[22\]](#) "to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed."[\[23\]](#) Arrested or detained individuals have a right to seek legal advice in order to help them understand how best to proceed, and they also have the right to remain silent. This right includes the right not to participate in building the case against them. In particular, section 10(b) ensures that people who have been arrested or detained are made aware of their legal rights and obligations, and are given advice on how best to exercise those rights.[\[24\]](#) The section 10(b) right addresses the fact that people who have been arrested or detained are under the control of the state, and thus in a position of vulnerability.[\[25\]](#)

### ***What rights and obligations are engaged by section 10(b)?***

Section 10(b) has both an "informational" and an "implementational" component:[\[26\]](#)

1. *Informational component*: the requirement to inform a person who has been arrested or detained of his or her right to "retain and instruct counsel without delay", including the availability of free legal advice; and

2. *Implementational component*: the requirement that if a detainee chooses to exercise the right to counsel, that the detainee be given a reasonable opportunity to do so. The only exception to this requirement is if there are urgent or dangerous circumstances that prevent immediate access to a lawyer. In addition, this component requires that the police

refrain from questioning the individual until he or she has had that reasonable opportunity to speak with a lawyer.

However, there is a corresponding responsibility on the part of the arrested or detained individual. The individual must be reasonably diligent in attempting to contact a lawyer.<sup>[27]</sup> What is considered “reasonable” will vary with the circumstances.

There is an additional obligation on police that is triggered if a detainee states that he or she wants to contact a lawyer, but changes his or her mind before exercising this right. In these circumstances, the police are required to inform the individual that he or she has a reasonable opportunity to contact a lawyer, and that police cannot question the individual until this reasonable opportunity has passed. The purpose of this additional warning (called a “*Prosper*” warning) is to ensure that a person waiving the right to counsel “will know what it is that he or she is actually giving up.”<sup>[28]</sup>

Mr Willier argued that his situation should also require a *Prosper* warning.<sup>[29]</sup> The Court did not agree. The Court did not find the situations to be similar – here, Mr Willier exercised his right to a lawyer by speaking with Legal Aid.<sup>[30]</sup> In a *Prosper* warning situation, the individual is foregoing speaking with a lawyer altogether.

Mr Willier also argued that his conversations with Legal Aid were insufficient to provide him with *meaningful* legal advice because they were too brief, and thus his section 10(b) right was not fully exercised.<sup>[31]</sup> The Court also rejected this argument. The Court ruled that it is inappropriate for police to probe into the quality of an individual’s legal advice so that it “meets a particular qualitative standard.”<sup>[32]</sup> The police are not responsible for monitoring the quality of legal advice, and are required to respect the integrity of the confidential solicitor-client relationship.<sup>[33]</sup> The police are entitled to assume that arrested or detained individuals are satisfied with the legal advice that they have received, unless they indicate otherwise.<sup>[34]</sup>

### ***Applying the law to Mr Willier’s situation***

Mr Willier received legal advice from Legal Aid before being questioned by police. He gave no indication to police that the advice he received from Legal Aid was insufficient. On the contrary, he expressed satisfaction with the advice.<sup>[35]</sup>

As a result, the Court found that the police fulfilled their obligation to inform him of his right to counsel and therefore did not breach Mr Willier’s section 10(b) *Charter* rights. They were not required to provide Mr Willier with the opportunity to speak to a lawyer of his own choosing. The decision of the Alberta Court of Appeal was upheld, and Mr Willier’s case was sent back for another trial.

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<sup>[1]</sup> 2010 SCC 37, [2010] 2 SCR 429 .

<sup>[2]</sup> The other two companion cases were *R v Sinclair*, 2010 SCC 35, [2010] 2 SCR 310 ,

and *R v McCrimmon*, 2010 SCC 36, [2010] 2 SCR 402.

[3] *Willier*, *supra* note 1 at para 7.

[4] *Ibid* at para 9.

[5] *Ibid* at para 10.

[6] *Ibid*.

[7] *Ibid* at para 11.

[8] *Ibid*.

[9] *Ibid*.

[10] *Ibid* at para 12.

[11] *Ibid*.

[12] *Ibid* at para 6.

[13] He argued that the evidence should be excluded pursuant to section 24(2) of the *Charter*, which states: “Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

[14] *Willier*, *supra* note 1 at para 3.

[15] *Ibid* at paras 3, 16.

[16] *Ibid*.

[17] Justice Bielby, sitting *ad hoc*, concurred in the result but opined that there was a section 10(b) violation given the lack of reasonable opportunity given to Mr Willier to continue to try to reach his preferred counsel. Given the seriousness of the charge and the lack of urgency in starting the questioning, the police should have given him more time to contact his own lawyer.

[18] *Ibid* at para 4.

[19] *Ibid*.

[20] *Ibid* at para 19.

[21] The Supreme Court was unanimous with respect to the outcome of the case. However, there were two concurring decisions written: one by Justices LeBel and Fish, and one by Justice Binnie. Both concurring decisions agreed with the result of the case, but made their

decisions subject to their comments in their respective dissenting opinions in *Sinclair*. See *ibid* at paras 46-48.

[22] The right to remain silent is captured in section 7 of the *Charter*, which guarantees the right to “life, liberty and security of the person, except in accordance with the principles of fundamental justice.”

[23] *Ibid* at para 27, citing the companion case *Sinclair*, *supra* note 2 at para 25.

[24] *Ibid*.

[25] *Ibid* at para 28.

[26] *Ibid* at para 29.

[27] *Ibid* at para 33.

[28] *Ibid* at para 31, citing *R v Prosper*, [1994] 2 SCR 236 at 274.

[29] *Ibid* at para 37.

[30] *Ibid* at para 39.

[31] *Ibid* at para 37.

[32] *Ibid* at para 40.

[33] *Ibid* at para 41.

[34] *Ibid* at para 42.

[35] *Ibid*.