SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. W.F.*, 2023 NSSC 278

Date: 20210817
Docket: CRH-490540
Registry: Halifax

Between:

His Majesty the King

v.

W.F.

VUKELICH DECISION

Restriction on Publication: s.486.4, s.486.5, s.517(1), and s.539(1).

Judge:	The Honourable Justice John Bodurtha
Heard:	July 5, 2021, in Halifax, Nova Scotia
Oral Decision:	August 17, 2021
Written Decision:	August 31, 2023
Counsel:	William Mathers and Tiffany Thorne, Crown Counsel Jonathan Hughes, Defence Counsel

By the Court:

Overview

[1] During the proceedings in court, W.F. has expressed a preference of being addressed by first and last name. For the purposes of this decision and, in keeping with the publication bans in place, I will use initials only and gender-neutral pronouns throughout.

[2] Several months after the Crown closed its case, W.F. sought to bring a *Charter* application to exclude their police statement on the ground of police failure to adequately inform them of their right to counsel as required by section 10(b) of the *Charter of Rights and Freedoms*. The statement was admitted on consent before trial by previous defence counsel. The current defence counsel represented the applicant at trial, without revisiting the admissibility of the statement. After the Crown closed its case, however, defence counsel raised an alleged violation of the right "to retain and instruct counsel without delay and to be informed of that right" under section 10(b) of the *Charter*. Defence counsel confirmed at the hearing that the proposed remedy would be to exclude the statement pursuant to section 24(2).

[3] The Crown says the application should not be entertained on two grounds: a) the procedural and timing issues arising from the lateness of the *Charter* application, and b) the weakness of the potential *Charter* application ("*Vukelich*").

[4] In my view, the matter should be dismissed on the basis of the late filing alone, given the trial management and evidentiary implications of such a late motion, and given that this *Charter* application does not arise out of any trial development, but is simply the product of a revised assessment by counsel.

[5] The Crown's position is that if their *Vukelich* application discloses a possibility that the accused's *Charter* application could succeed, the Court should ignore the late filing and proceed to a *voir dire*. In my view, the success of the *Charter* application cannot be said to be an impossibility; however, I am not persuaded by the Crown that *Vukelich* requires such a stringent standard. In certain circumstances, an applicant could be required to show a likelihood of success and, I believe, a higher standard of that nature would be appropriate here

given all the other circumstances. As a result, in the alternative, I would also grant the Crown's *Vukelich* application.

Background

[6] The applicant was arrested at about 10 a.m. on February 14, 2018 by Cst. Rideout at a community college campus attended by W.F. The Crown argued the evidence will show that Cst. Rideout informed the applicant that they were under arrest and recited their *Charter* rights from memory, but did not give them the relevant phone numbers because he did not know them from memory. When they got into the police vehicle, Cst. Rideout read the applicant their rights from a card, including the business hours and after-hours phone numbers for Legal Aid. The applicant's response to the inquiry as to whether they wanted to speak to counsel was "not at this time."

[7] The applicant was taken to Halifax Regional Police headquarters on Gottingen Street, where they gave a statement to Cst. Smith, commencing at about 11:17 a.m. The following exchange occurred:

> Q: Okay. I know that you were read your rights by Cst. Rideout.
>
> A: Uh-huh.
>
> Q: But I want to go over those with you again verbatim.
>
> A: Sure.
>
> Q: Okay? And just to make sure you fully understand.
>
> A: Uh-huh.
>
> Q: So if you do have a question, just stop and ask me and I'm going to confirm those answers with you, okay?
>
> A: Sure.
>
> Q: All right. So you were arrested for sexual assault and sexual interference.
>
> A: Okay.
>
> Q: Okay? <u>You have the right to retain and instruct a lawyer without delay.</u>
>
> <u>A: Uh-huh.</u>
>
> <u>Q: You have the right to free and immediate legal advice from duty counsel. Do you understand that?</u>
>
> <u>A: Yeah.</u>
>
> <u>Q: So what does that mean to you?</u>

A: That means basically if I want to be quiet I can get counsel and talk to counsel.

Q: Yeah.

A: Yeah.

Q: Do you wish to call a lawyer now or get counsel now?

A: No, no.

Q: Okay. You have the right to apply … sorry, you have the right to apply for legal assistance with- … without cost to you through the Legal Aid program. Do you understand that?

A: Yeah.

Q: You … you do? So what does that mean?

A: It means if I want a lawyer and I can't afford it, contact Legal Aid and they'll assign one.

Q: Okay.

A: Eventually.

Q: What's that?

A: Eventually.

Q: Yeah, well … but today you can speak to somebody right now that's … that's …

A: That's fine. [Emphasis added.]

[8] A redacted version of the applicant's statement was admitted on consent. Cst. Rideout was available to testify had it been required.

[9] The applicant says the *Charter* cautions were insufficient to inform them of their rights pursuant to s. 10(b) of the *Charter*. W.F. says the statement should therefore be excluded pursuant to s. 24(2) of the *Charter*.

Late *Charter* Applications

[10] The principle that *Charter* applications should be brought in a timely manner was discussed in *R. v. Kutynec* (1991), 70 CCC (3d) 289 (Ont. CA). In *Kutynec*, the appellant had been charged with refusing to provide a breath sample. The trial judge refused a defence request to advance a section 9 challenge at the close of the Crown's case. Defence counsel had deliberately deferred the *Charter* motion until the close of the Crown's case, then sought exclusion of evidence that had already been heard. On appeal, Finlayson JA, for the Court held that the trial judge did not err in refusing to entertain the motion in the circumstances, but declined to endorse

a general rule suggested by the District Court judge that would require pre-trial notices of motion supported by affidavits for section 24 *Charter* issues. He said:

> 14 Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of an accused. The ex post facto exclusion of evidence, during the trial, would render the trial process unwieldy at a minimum. In jury trials it could render the process inoperative.
>
> …
>
> 16 As a basic proposition, an accused person asserting a *Charter* remedy bears both the initial burden of presenting evidence that his or her *Charter* rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a *Charter* violation. If the evidence does not establish whether or not the accused's rights were infringed, the court must conclude that they were not: [citations omitted]. It is obvious that counsel for the accused is not entitled to sit back, as he did in this instance, and hope that something will emerge from the Crown's case to create a *Charter* argument or assist him in one he is already prepared to make. The onus is on the accused to demonstrate on a balance of probabilities that he is entitled to a *Charter* remedy and he must assert that entitlement at the earliest possible point in the trial. Otherwise, the Crown and the court are entitled to proceed on the basis that no *Charter* issue is involved in the case.
>
> …
>
> 19… In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible *Charter* issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a *Charter* remedy. [Emphasis added.]

[11] The Court confirmed, however, that a trial judge has a discretion to entertain a late challenge:

> 20 I do not suggest that a trial judge can never consider, at a later point in the trial, the admissibility of evidence which has been tendered without objection. A trial judge has a discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant. For example, as in *R. v. Arbour* … a question as to the admissibility of evidence already before the trier of fact may arise from evidence given at a subsequent point in the proceedings. In such cases, a trial judge may well be obliged to consider the

> question of the admissibility of the earlier evidence and, if the circumstances warrant it, allow counsel to reopen the issue. [Emphasis added.]

[12] Doherty JA succinctly summarized the law respecting late-raised *Charter* exclusion motions in *R. v. Loveman* (1992), 71 CCC (3d) 123 (Ont CA), issued concurrently with *Kutynec*. Justice Doherty stated at para. 7:

> A trial judge may decline to entertain a motion where no notice, or inadequate notice, of the motion has been given to the other side. This must be so even when the motion involves an application to exclude evidence pursuant to s. 24(2) of the *Charter*. Clearly, where a *Charter* right is at stake, a trial judge will be reluctant to foreclose an inquiry into an alleged violation. There will, however, be circumstances where no less severe order will prevent unfairness and maintain the integrity of the process.

[13] In *Loveman* the defence raised the *Charter* challenge to the admission of breathalyzer results at the beginning of trial. The trial judge accepted the Crown's position that the application should not be entertained due to the lack of pre-trial notice. In allowing the appeal, the Ontario Court of Appeal held that the trial judge had not appropriately balanced the "accused's right to raise constitutional objections to the admissibility of evidence and the Crown's right to have an adequate opportunity to meet *Charter* arguments made on behalf of an accused" (para. 16). At paras. 17-20, the Court continued:

> 17 In balancing those interests in this case, the trial judge should have considered the absence of any statutory rule or practice direction requiring notice, the notice that was given to the Crown, the point during the trial proceedings when the appellant's counsel first indicated he intended to seek exclusion under s. 24(2) of the *Charter*, and the extent to which the Crown was prejudiced by the absence of any specific reference to a *Charter*-based argument in the notice given to the Crown. The trial judge also should have considered the specific nature of the *Charter* argument which counsel proposed to advance and the impact the application could have on the course of the trial.
>
> 18 This particular application would have had no effect on the course of the trial, save adding legal argument. This was not a case where the different onus arising in *Charter* applications need have had any effect on the manner in which the evidence was led. The evidence relevant to the *Charter* application was the same evidence which the Crown was obliged to lead in its effort to demonstrate compliance with the *Criminal Code*.
>
> 19 In my opinion, the trial judge did not properly balance the various interests. His ruling sacrificed entirely the appellant's right to advance a *Charter*-based argument. The other interests engaged did not require the order made by the

> trial judge. As Crown counsel suggested, there were other alternatives. The trial judge could have heard the entire case except the Crown's legal argument in reply to the *Charter* argument, and then, if necessary, (and it may well not have been necessary) allowed Crown counsel a brief adjournment to prepare his response to the legal issues flowing from the *Charter* argument.
>
> 20 This procedure would have better served the interests of the effective administration of justice by allowing the appellant to make his *Charter* argument while at the same time allowing the Crown to make an effective response to that argument. The procedure would have resulted in only a minimal, if any, delay in the ultimate disposition of the case and would not have significantly interfered with the orderly operation of the trial court.

[14] The same issues were considered in *R. v. Dwernychuk*, 1992 ABCA 316, leave to appeal denied, [1993] SCCA No 30. The defence argued for the exclusion of breathalyzer evidence on an over-80 charge under section 8 of the *Charter*, on the basis that there were no reasonable and probable grounds for the demand. The defence only raised the section 24(2) application at the close of the Crown's case. The trial judge found that reasonable and probable grounds existed, and did not deal with the *Charter* argument. The summary conviction Appeal Court and the Alberta Court of Appeal agreed that there were reasonable and probable grounds, and that the appeal should be dismissed. However, the Court of Appeal went on to consider the procedure appropriate to a section 24(2) *Charter* application. The Court remarked that "[t]he reasonable person would expect that defence counsel would make known to the prosecution, either before or at the commencement of the trial, that he or she intends to allege that there has been an infringement of a specific *Charter* right and to apply for the exclusion of evidence." The Court warned against permitting the defence to "lie in ambush", and said:

> 17 It might be argued that if the defence is permitted to raise a *Charter* issue for the first time after the Crown has closed its case, there is no harm done because the Crown may be permitted to answer the defence's evidence in reply. But such a procedure would, in effect, force the Crown to split its case, a way of doing things which our practice does not ordinarily permit the Crown to do voluntarily.

[15] The Court cited *Kutynec* and *Loveman*, and identified several principles drawn from them, including the following:

> 22 1. The defence should, generally, be expected to apply for exclusion of the evidence under s. 24(2) before the evidence is admitted, not after it has been accepted…

> 23 2. Once the evidence has been admitted, the trial judge may entertain an application to exclude the evidence only when, after the admission of the evidence, some event occurs which will entitle, perhaps even require, the judge to entertain a s. 24(2) application, in the interests of justice. When we speak of "some event", we do not include a situation in which the defence raises a *Charter* issue in a conscious way for the first time after the Crown has closed its case; what we have in mind, without intending to be exhaustive of the possibilities, is some development in the case which occurred after the close of the Crown's case — perhaps the acquisition of new information after the close of the Crown's case, or a fresh appreciation of the implications of known prosecution evidence after the close of the Crown's case…
>
> 24 3. Not only should the accused raise an objection to the admission of the item of evidence, invoking s. 24(2) and alleging infringement of a specific *Charter* right, but the accused should raise the issue at the earliest possible time in the trial. Otherwise the Crown and the court may quite reasonably assume that there is no *Charter* issue in the case. Of course, as to what is "the earliest possible time", the court may, in an appropriate case, extend latitude to the defence if defence counsel asserts that the point is being raised late in the trial because (for example) his client had no memory of what had occurred or the implications of the known facts did not become apparent until after the evidence had initially been admitted.
>
> 25 4. Indeed, it is preferable that defence counsel indicate before or, at the latest, at the commencement of the trial, whether he or she will be alleging the infringement of a *Charter* right and will be seeking the exclusion of evidence under s. 24(2). No universal rule of practice is meant by this. If defence counsel fails to give such an indication, then, if the point arises later, it is open to the judge to take that failure into account, together with all other circumstances, in deciding whether to entertain the application to assert a *Charter* remedy. [Emphasis added.]

[16] Accordingly, the appeal was also dismissed on the secondary ground that the *Charter* application had not been raised in a timely manner.

[17] In Nova Scotia, the *Kutynec* principles respecting notice were cited with approval by Roscoe JA, for the Court, in *R. v. Yorke* (1992), 115 NSR (2d) 426 (CA). In that case, the trial judge found that the accused had been detained and denied his section 10(b) rights. In holding that the trial judge erred in finding that the accused had been detained, Roscoe JA noted that “the Crown was not given notice by the defence that a s. 10(b) argument would be made and the first notice the Crown did have of that issue was during the final arguments after the conclusion of the evidence on the *voir dire*. The result was that the Crown did not

have a full opportunity to present evidence on that issue.": *Yorke, supra*, at para. 65.

[18] Duncan J (as he then was) took note of *Dwernychuk* in *R. v. Wiles*, 2009 NSSC 17, where the accused was charged with an over-80 and impaired driving causing bodily harm. On the over-80 charge, defence counsel submitted in closing arguments that there had been no reasonable and probable grounds for the demand, and the test results should be excluded. The Crown did not object to this argument being raised. Justice Duncan advised counsel that in his view this objection was answered by *R. v. Rilling*, [1976] 2 SCR 183, by which the certificate would be admissible regardless of the lack of reasonable and probable grounds. As such, any application to exclude the certificate would have to be framed as a section 24(2) *Charter* challenge. After hearing further submissions – in which, *inter alia*, the Crown waived its right to notice, and the parties agreed that no further evidence would be required on the *Charter* issue – Duncan J concluded that "[n]otwithstanding the restrictive philosophy expressed in *R. v. Dwernychuk* … I accept that it is in the interests of justice to consider the application in these circumstances, and that no prejudice to either the Crown or the accused results from this procedure.": *Wiles*, *supra*, at para. 13.

[19] In *R. v. Henneberry*, 2015 NSPC 96, the defence raised a *Charter* challenge to the applicable fisheries legislation and its alleged arbitrary enforcement, after trial evidence had concluded, but before closing arguments. The Crown brought an application to dismiss the *Charter* application on account of late filing. Chisholm Prov. Ct. J. summarized several factors drawn from *Loveman*:

> 18 In *Loveman, supra*, Justice Doherty referred to the following factors which a trial judge ought to consider on a motion such as the present:
>
> > 1) whether or not there is any statutory rule or practice direction requiring notice;
> >
> > 2) the notice which was given to the Crown;
> >
> > 3) the point during the trial proceedings when the appellants' counsel first indicated he intended to bring a *Charter* motion;
> >
> > 4) the extent to which the Crown was prejudiced by the absence of any specific reference to a *Charter*-based argument in the notice given to the Crown; and
> >
> > 5) the specific nature of the *Charter* argument which counsel propose to advance and the impact the application could have on the course of the trial.

[20] On weighing these factors, Judge Chisholm concluded:

> 30 I accept that the evidence of Fisheries Officer Vince Smith, relating to the factors considered when exercising charging discretion, was not known to Defence prior to trial and was not reasonably foreseeable. Further, I accept Defence counsel's statement that, until the issue of arbitrary enforcement arose, the question of the vagueness of the legislative provision was not identified. To that extent, I accept that the two issues are inter-related and arise out of the evidence at trial. I am persuaded that there is an "air of reality" to the Defence *Charter* arguments.
>
> 31 While I find that the lateness of the Defence *Charter* motion has caused prejudice to the Crown I am satisfied that the prejudice can be addressed by the granting of an adjournment to the Crown and permitting both Crown and Defence to re-open their case.
>
> 32 I am not persuaded that it would be a fair exercise of the Court's discretion to summarily dismiss the Defence *Charter* motions.

[21] I note that the Court in *Loveman* did not use the phrase "air of reality." The Court in *Henneberry* specifically sourced that term to *R. v. Bugden*, [2015] NJ No 161 (Prov Ct). In my view, the phrase "air of reality" is not an accurate description of the analysis derived from *Kutynec* and *Loveman* where the focus is more on the effect of the untimely application on the proceeding itself, and on balancing the parties' interests, than it is on the merits of the *Charter* challenge.

Analysis

[22] The Crown points to several circumstances that it says work against hearing the application at this time:

(a) the length of the delay;

(b) the impact on public confidence in the administration of justice;

(c) the prejudice to the Crown's case arising from the exclusion of an inculpatory statement several months after the Crown closed its case; and,

(d) the potential disruption to the trial process (on this point, the Crown raises the possibility that the applicant might resile from his stated position that he will not seek a mistrial).

[23] The applicant says this situation is one contemplated by *Dwernychuk*, in that defence counsel has come to "a fresh appreciation of the implications of known

prosecution evidence after the close of the Crown's case", rather than one like *Kutynec*, where the delay in giving *Charter* notice was intentional. As defence counsel frames the issue, the lateness of the application was not a tactical decision (which is not disputed), but arose from reviewing the transcript while preparing for trial and finding that the original admissibility determination rested on voluntariness, not on *Charter* considerations. However, I find the late application does not arise from any new evidence emerging – or from any other development at trial – but simply because the applicant's current counsel takes a different view of the strength of the *Charter* argument than did the applicant's previous counsel.

[24] In my view, this is not a situation where subsequent evidence casts new light on the admissibility of evidence already heard, or where there has been a new development in the case, such as the acquisition of new information or a fresh appreciation of the implications of evidence already heard. Rather, the defence has raised the issue "in a conscious way for the first time after the Crown has closed its case" (as per *Dwernychuk*), due to a re-assessment of the issue by counsel unrelated to any other development in the proceeding. In effect, what has happened is that after the close of the Crown's case, the defence has changed its mind as to whether to raise a *Charter* challenge that it was obliged to advance no later than the beginning of trial. Admittedly this has occurred after a change of counsel, but the obligation of timely notice of *Charter* issues is not waived simply because of a change of counsel.

[25] In addition, defence counsel took over carriage of the file on about December 16, 2020. The trial dates were February 22, 23, 24, 26, March 12, July 2, 5, and December 20, 2021. The *Charter* argument was not raised on the record until June 30, 2021.

[26] I decline to hear the application based on the principles drawn from *Kutynec* and the succeeding caselaw. To hear the application in these circumstances would suggest that it is open to the defence to revisit *Charter* issues at will. This does not end the inquiry, however, as I will now discuss the second issue before the Court.

Vukelich **and the Merits of the Application**

[27] As distinguished from the procedure and timeliness issues addressed by *Kutynec*, *Dwernychuk*, and similar cases, the Crown further seeks dismissal pursuant to the principles derived from *R. v. Vukelich* (1996), 108 CCC (3d) 193 (CA), where MacEachern CJBC stated, for the Court, that "[t]he trial judge must control the course of the proceedings, and he or she need not embark upon an

enquiry that will not assist the proper trial of the real issues." (para. 26). The focus on a *Vukelich* application is less on procedural issues than on the potential merits of the proposed *Charter* application. In the case before me, the gist of the Crown's submissions was to treat this hearing as a "blended" one, dealing both with whether the *Charter* application should be entertained under the *Kutynec* principles, and whether it can be summarily dismissed for being unlikely to succeed pursuant to *Vukelich*. As I understand its position, the Crown views the two issues as intertwined, and, if anything, the Crown emphasizes the *Vukelich* aspect of the application.

[28] In *R. v. Cody*, [2017] 1 SCR 659, the Court confirmed that a trial judge has the power to consider whether an application has a reasonable prospect of success before allowing an application to proceed. This screening function survives even where the application proceeds, empowering the Court to summarily dismiss an application when it becomes apparent it is frivolous. The Court cited both *Kutynec* and *Vukelich* in support of this case management power, as well as *R. v. Jordan*, 2016 SCC 27 (para. 38).

[29] Derrick, J. (as she then was) reviewed the procedure on a *Vukelich* application in *R. v. Hilchey*, 2015 NSPC 46. Derrick, J. remarked that "*Charter* motions that do not have any possibility of success or where the remedy being sought could not possibly be granted can be dismissed, avoiding the expenditure of valuable and limited judicial and court resources." (para. 13). The Court continued:

> 14 As stated in the often-cited case of *R. v. Kutynec*, [1990] O.J. No. 1077 (Ont. Dist. Ct.),
>
> > ...It would seem that a requirement that a defendant must make a substantial preliminary showing that he or she was the subject of the infringement or denial of a *Charter* right as a condition of granting an evidentiary *Charter* hearing would be an appropriate response to any concern that might exist relative to the time and cost of permitting *Charter* hearings as of right on the mere claim of constitutional violation which in turn results in time-consuming hearings to identify non-meritorious claims. <u>It may be appropriate for the court to be able to dismiss a motion for a s. 24 remedy without the necessity for an evidentiary hearing where the defence has failed to demonstrate by its notice of motion and offer of proof a high likelihood that if a hearing were held the defendant would succeed on the merits.</u> (paragraph 28)

> 15 *Vukelich* hearings are expected to be focused and efficient. They rely on the submissions of counsel and supporting documentation. Oral evidence may be called. (*Vukelich*, paragraph 17)
>
> 16 The British Columbia Supreme Court in *R. v. McDonald*, [2013] B.C.J. No. 2966 (B.C. S.C.) discussed *Vukelich* hearings in the following terms:
>
> > The rigour with which *Vukelich* is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual. Among the factors that will shape the exercise of that discretion are: the extent to which the facts or anticipated evidence underlying the alleged Charter breach are in legitimate dispute; the state and clarity of the law on the issue sought to be litigated; and the infinite variety of pragmatic considerations that will arise in a given case and suggest resolution of the application in one way or another. *What underlies the inquiry is the need to balance an accused's fair trial interests with the public interest in the management of criminal proceedings by foreclosing lengthy and unnecessary pre-trial applications in circumstances where the remedy sought could not reasonably be granted.* (paragraph 21) [Underlining added. Italics by Derrick Prov. Ct. J.]

[30] The *Vukelich* issue in this case turns on the law governing the informational component of the right to counsel under section 10(b). This issue has been canvassed in a line of decisions of the Supreme Court of Canada.

Decisions of the Supreme Court of Canada

[31] In *R. v. Brydges*, [1990] 1 SCR 190, the Court considered the extent of the police duty when the accused had expressed a concern about being able to afford counsel. The majority stated that the purpose of prompt access to counsel is to ensure that the accused can receive immediate advice respecting the right against self-incrimination. The police were obliged to make it clear to the accused that his inability to pay was not an obstacle to seeking immediate legal advice, and that legal aid and duty counsel were available. This information must be provided in all cases of arrest or detention as part of the standard section 10(b) caution (pages 206-209 and 211-215).

[32] Four years later, in *R. v. Bartle*, [1994] 3 SCR 173, the Court returned to the issue. The appellant was arrested for impaired driving at 1 a.m. The caution read by the arresting officer did not refer “to the specific availability of immediate, preliminary legal advice by duty counsel, or to the existence of the 24-hour, toll-free legal aid number which was printed on his caution card” (page 185). At the station, the officer conducting the breathalyzer analysis “asked the appellant if he

wanted to call a lawyer (again, no mention was made of the 1-800 number or of the availability of immediate, preliminary legal advice by duty counsel). The appellant declined to call a lawyer, and then agreed to take the two breathalyser tests, both of which he failed by a significant margin" (page 185). The appellant testified that he had refused to call counsel because he did not know who to call or who he would be able to reach. The appellant further testified he indicated to Constable Hildebrandt that he wanted to call a lawyer, but that he did not know who he could call. In response to Constable Hildebrandt's query of "Why?", the appellant indicated that he had said, "Well, I can't think of anybody to call; it's too late." He said that Constable Hildebrandt had no response to that comment, and that there was no indication that Constable Hildebrandt had heard him. Constable Hildebrandt, on the other hand, testified that the appellant simply answered "no" when asked whether he wanted to call a lawyer (pages 185-186).

[33] The appellant was convicted at trial. The conviction was overturned on the initial appeal on the ground of a section 10(b) violation, but was restored by the Ontario Court of Appeal. Lamer CJ, for the majority of the Supreme Court of Canada, framed the section 10(b) issue as follows: Do persons who are detained and arrested have the right, under the information component of s. 10(b), to be advised as a matter of routine of the existence of a service which provides free, 24-hour preliminary legal advice and can be reached by dialling a 1-800 (toll-free) telephone number? (page 184)

[34] In reviewing the purpose of section 10(b), Lamer CJ noted that "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 …" (page 191, emphasis in the original). He described the duties of a state authority who arrests or detains a person at pages 191-192:

> (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).

[35] The Chief Justice clarified that the "first duty is an *informational* one which is directly in issue here. The second and third duties are more in the nature of

implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel." (page 192, emphasis in original). He elaborated on the content of the informational duty at pages 192-194:

> Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a "timely and comprehensible" manner: *R. v. Dubois*, [1990] R.J.Q. 681 (C.A.), (1990), 54 C.C.C. (3d) 166, at pp. 697 and 196 respectively. Unless they are clearly and fully informed of their rights *at the outset*, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence… Moreover, in light of the rule that, absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible…
>
> Indeed, the pivotal function of the initial information component under s. 10(b) has already been recognized by this Court. For instance, in *Evans*, McLachlin J., for the majority, stated at p. 891 that a "person who does not understand his or her right cannot be expected to assert it". In that case, it was held that, in circumstances which suggest that a particular detainee may not understand the information being communicated to him or her by state authorities, a mere recitation of the right to counsel will not suffice. Authorities will have to take additional steps to ensure that the detainee comprehends his or her s. 10(b) rights. Likewise, this Court has stressed on previous occasions that, before an accused can be said to have waived his or her right to counsel, he or she must be possessed of sufficient information to allow him or her to make an informed choice as regards exercising the right...
>
> To conclude, because the purpose of the right to counsel under s. 10(b) is about providing detainees with meaningful choices, it follows that a detainee should be fully advised of available services *before* being expected to assert that right, particularly given that subsequent duties on the state are not triggered unless and until a detainee expresses a desire to contact counsel. In my opinion, the purpose of the right to counsel would be defeated if police were only required to advise detainees of the existence and availability of Legal Aid and duty counsel *after* some triggering assertion of the right by the detainee. Accordingly, I am unable to agree with the trial judge and the Court of Appeal below that information about duty counsel and how to access it need only be provided to detainees when they express some concern about affordability or availability of counsel. Indeed, in putting forward such a position, I can only conclude with respect that both the trial judge and the Court of Appeal erred in their interpretation and application of *Brydges*...

[*Italics in original/Underlining added*]

[36] Explaining the earlier judgment in *Brydges*, Lamer CJ stated that the effect of that decision was to add two new elements to the information component of section 10(b): "(1) information about access to counsel free of charge where an accused meets prescribed financial criteria set by provincial Legal Aid plans …; and (2) information about access to immediate, although temporary legal advice irrespective of financial status ..." (page 195). He added that, as indicated in the companion decision *R. v. Prosper*, [1994] 3 SCR 236, *Brydges* confirmed "that the specific nature of the information provided to detainees would necessarily be contingent on the existence and availability of Legal Aid and duty counsel in the jurisdiction …" (page 195). He summarized at page 198:

> To conclude, *Brydges* stands for the proposition that police authorities are required to inform detainees about Legal Aid and duty counsel services which are in existence and available in the jurisdiction at the time of detention. In case there is any doubt, I would add here that basic information about how to access available services which provide free, preliminary legal advice should be included in the standard s. 10(b) caution. This need consist of no more than telling a detainee in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer right away. Failure to provide such information is, in the absence of a valid waiver (which, as I explain *infra*, will be a rarity) a breach of s. 10(b) of the *Charter*... [Emphasis added.]

[37] In summary, the informational duty was to advise the detainee "of whatever system for free, preliminary legal advice exists in the jurisdiction and of how such advice can be accessed (e.g., by calling a 1-800 number, or being provided with a list of telephone numbers for lawyers acting as duty counsel)." (page 201). Lamer CJ held that the caution was deficient at pages 202-203:

> In my opinion, the s. 10(b) caution that the appellant received, both at the roadside and at the police station, failed to convey the necessary sense of immediacy and universal availability of legal assistance. First, when the appellant was arrested at the roadside, he was not told of the existence of the 1-800 number for duty counsel and that he would be allowed to call a lawyer as soon as he arrived at the police station where there were telephones. Although it was subsequently made clear upon arrival at the station that he could call "now", the appellant had, in the intervening period between detention at the roadside and arrival at the station, made a self-incriminating statement. Second, reference to Legal Aid was confusing in so far as it implied that free legal advice, while available, was contingent on *applying* for it *once charged* -- a process which takes time and for which there are qualifying financial requirements. The caution he received failed to communicate the fact that, at the pre-charge stage, a detainee

> has the opportunity by virtue of the scheme for immediate legal assistance set up by Ontario to speak to duty counsel and to obtain preliminary legal advice before incriminating him- or herself.
>
> The 1-800 number, or at least the existence of a toll-free telephone number, should have been conveyed to the appellant upon his arrest at the roadside even though there were no telephones available. Indeed, the police should have explained to the appellant that, as soon as they reached the police station, he would be permitted to use a telephone for the purpose of calling a lawyer, including duty counsel which was available to give him immediate, free legal advice. It can hardly be described as an undue hardship on police to require them to provide detainees with this basic information, especially when the toll-free number is already printed on their caution cards. I am satisfied that the 1-800 number was part of the informational requirement under s. 10(b) of the Charter. I agree with counsel for the appellant that, in today's highly technological and computerized world, 1-800 numbers are simple and effective means of conveying the sense of immediacy and universal availability of legal assistance which the majority of this Court in *Brydges* said must be conveyed as part of the standard s. 10(b) warning in jurisdictions where such a service exists. [Italics by Lamer CJ. Underlining added.]

[38] In one of *Bartle*'s companion cases *R. v. Pozniak*, [1994] 3 SCR 310, the accused expressed confusion about whether he should call a lawyer, and said he was unsure of how to contact his usual lawyer. He was not informed of the availability of, or the number for, a 24-hour toll-free legal aid duty counsel line. Lamer CJ, for the majority, summarized the principles from *Bartle*:

> As I state in *Bartle*, a detainee is entitled under the information component of s. 10(b) of the *Charter* to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and of how such advice can be accessed. I am satisfied in this case that the appellant suffered an infringement of his s. 10(b) rights. At the time of his arrest, Ontario had a 24-hour duty counsel system in place which could be reached by dialling a toll-free number. However, in cautioning the appellant, the police neglected to provide him with this information. Furthermore, the appellant did not waive his right to receive this information... [Emphasis added.]

[39] The requirements of s. 10(b) – and the meaning of the preceding caselaw – were considered again in *R. v. Latimer*, [1997] 1 SCR 217. The appellant in *Latimer* was "not specifically informed of the existence of a toll-free telephone number by which he could access immediate free legal advice by Legal Aid duty counsel." (para. 32). He argued that this was a violation of s. 10(b). Lamer CJC, for the Court, rejected this argument, holding at para. 32 that:

> 32…*Bartle* stands for quite a different proposition - that s. 10(b) encompasses the right to be informed of the means to access those duty counsel services which are available at the time of arrest. As we shall see, at the time of day when Mr. Latimer was arrested, the toll-free number in Saskatchewan was not in operation, and so it was unnecessary to inform him of that number. Moreover, he was made aware of the duty counsel service that was offered by the local Legal Aid office, which could be reached by a local phone call at no cost to him. Mr. Latimer's s. 10(b) rights were therefore not violated. [Emphasis added.]

[40] As for *Brydges*, the Chief Justice said:

> 34… *Brydges* only required that information be provided about the existence and availability of duty counsel; there is no doubt that the appellant was told about duty counsel here, and so *Brydges* is satisfied. *Bartle* imposed the additional requirement that persons be informed of the means necessary to access such services. However, whether the police have met this burden in a particular case must always be determined with regard to all the circumstances of that case, including the duty counsel services available at the time of arrest or detention. [Emphasis added.]

[41] *Bartle*, then, "required that persons be informed of toll-free telephone numbers to access duty counsel" – but only "where such numbers were in operation." (para. 35). The evidence showed that "toll-free access to duty counsel in Saskatchewan was only offered outside normal office hours …" (para. 36). Latimer had been arrested during office hours. As such, "the RCMP did not breach the informational component of s. 10(b) by failing to inform Mr. Latimer of the existence of a toll-free number." (para. 36). The Chief Justice continued:

> 37 I also have no doubt that the information that was provided to Mr. Latimer adequately apprised him of the means to contact the duty counsel service which was available at the local Legal Aid Office. Mr. Latimer was informed of that duty counsel service on two occasions - when he was arrested at his farm, and before the commencement of his interview at the police station. Admittedly, on neither occasion did the arresting officers verbally give Mr. Latimer the phone number for the local Legal Aid Office. However, s. 10(b) did not require the arresting officers to take that extra step, under the circumstances of this case. Where an individual is detained during regular business hours, and when legal assistance is available through a local telephone number which can easily be found by the person in question, neither the letter nor the spirit of *Bartle* is breached simply by not providing that individual with the local phone number. Mr. Latimer was perfectly capable of obtaining the number. He could have consulted a telephone book either at his farm, or at the police station if he had asked for one. Moreover, at either location, he could have obtained the number from Directory Assistance. There is nothing to suggest that had he asked the

> police for it, they would not have provided it. Finally, at the police station, there was a telephone sitting in front of Mr. Latimer, with a telephone number on it for Legal Aid. I also note that at both locations, Mr. Latimer was asked if he understood or had any questions about what he had been told. He replied in the negative on both occasions.
>
> 38 I hasten to add that there will be cases in which it will be necessary to provide more information to an accused or detained person than was provided to Mr. Latimer about the means to access duty counsel. For example, a young person, or even more obviously an individual who is visually impaired, may require more assistance from the police than Mr. Latimer. As well, someone whose facility in the language of the jurisdiction is not sufficient to understand the information provided about duty counsel may require more explicit information than was provided to Mr. Latimer. This list of examples should not be taken to be exhaustive.
>
> 39 Finally, I add another point. The principle that an accused or detained person must be provided with the information which is necessary to ensure access to counsel means that if an accused were arrested during normal office hours in a jurisdiction where duty counsel was accessible by a 24-hour toll-free service and was also available by a local call during the day, s. 10(b) would not require that the toll-free number be given, because that number is not necessary to ensure access to counsel. [Emphasis added.]

[42] In the case before me, the Crown points out that Cst. Rideout's *Charter* card indicates that two Legal Aid numbers were available, one for business hours, and the other for after hours. As noted earlier, the applicant was arrested during business hours.

Other Caselaw

[43] The parties have relied on a variety of older cases, which should be approached with caution. There is in fact a broader range of relevant and more recent caselaw on point, some examples of which will be discussed below.

[44] The applicant relies on *R. v. DeAbreu*, [1994] OJ No 2735 (Ont CA), where the court cited *Bartle* and *Pozniak* in endorsing the trial judge's decision that, "even though the person detained had been told he could make a call 'now' to Legal Aid, the failure of the police officer to advise the person detained of the 1-800 telephone number for Legal Aid was fatal to the fulfilment of the obligation to advise the person detained of his rights under s. 10(b) of the *Charter*." (para. 2).

[45] The Crown argues this blanket statement is difficult to reconcile with the later explanation of *Bartle* in *Latimer*. Further, the applicant concedes that in *R. v.*

Davis (1999), 117 OAC 81 (Ont CA), the Ontario Court of Appeal "relaxed … slightly" the standard set in *DeAbreu*. In *Davis* the Court said:

> 4 Contrary to the submission of the appellant, it was not incumbent on the police to instruct Davis that he could, if he wished, call the lawyer he had retained previously in connection with an unrelated charge. Assuming that the police were even aware of this information, a matter not free from dispute, Davis was told in no uncertain terms that he could speak to counsel of his choice or duty counsel, as he saw fit. In our view, the police were not obliged to go further to fulfil their mandate under s. 10(b) of the *Charter*.
>
> 5 As for the failure of the police to provide Davis with the toll free legal aid number, the trial judge found as a fact that Davis was informed that free legal aid was available on a 24-hour basis and that a legal aid number would be provided upon request in the event he wished to call counsel immediately. Nothing more was required of the police... [Emphasis added.]

[46] The Court did not find a s. 10(b) violation in *Davis*, where the police did not recite the phone number. The applicant says the police, nevertheless, did not meet the standard described in *Davis*, in that W.F. was not provided with the number, nor was W.F. advised that a toll-free number would be provided if they wanted to speak to counsel. The applicant says it is clear from the transcript that they did not appreciate that they could speak to "free and immediate" counsel before deciding whether to speak to the police. I find it arguable that the transcript can support this inference when read in its entirety. While the applicant expresses apparent confusion when they say Legal Aid would assign them a lawyer "eventually", Cst. Smith replies W.F. can speak to a lawyer "today … right now", to which W.F. replies "that's fine." I find that this is far from "clear" from the transcript that the applicant was confused at that point as to their ability to contact counsel immediately for free legal advice, and to subsequently obtain assistance from Legal Aid.

[47] The Crown cites *R. v. Poudrier* (1998), 105 BCAC 292 (CA), where the appellant was taken to a police station after failing a roadside screening test. After making the demand for a breath sample, the officer advised the appellant that "You have the right to retain and instruct counsel without delay which means you can get a lawyer if you wish. Do you understand?" The appellant said "he understood but he did not 'know anybody here'." (para. 6). The officer informed him that Legal Aid was available 24 hours a day, and that he did not then have the number, "but that the number was available at the R.C.M.P. office and that there was also a Legal Aid assistance plan in place. The appellant did not request the telephone

number when they arrived at the Watson Lake Detachment." (para. 7). The argument before the British Columbia Court of Appeal "largely turned around the alleged failure of the officer to refer the appellant to a 1-800 number which was available to furnish free Legal Aid to people who were in the position of the appellant." (para. 12). The appellant relied on *Bartle* and *Pozniak*, which Hall JA (for the court) distinguished:

> 14 It can be seen from the facts of that case that there was a failure there to really inform the individual about the ability to access Legal Aid. I would distinguish that sort of situation from the case at bar wherein the officer here told the individual about the existence of 24 hour legal advice and said that if he wished to pursue that option he would give him the telephone number and, of course, I have earlier adverted in my reasons to the fact that at the detachment there was a notice covering the right to retain and instruct counsel without delay.
>
> 15 It seems to me that all of these cases depend on the question of whether or not there has been a sufficient amount of information conveyed to an accused person concerning the then extant Legal Aid regime in an individual province to afford the person an informed choice of whether or not he or she should and can obtain legal advice.

[48] Hall JA cited the majority's remarks in *Bartle* to the effect that *Brydges* requires the police "to inform detainees about Legal Aid and duty counsel services which are in existence and available in the jurisdiction at the time of detention" and to tell "a detainee in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer right away." (para. 16). The caution given by the arresting officer closely tracked the phrasing from *Bartle*, and the Court held that there was no violation of s. 10(b) and dismissed the appeal (para. 17).

[49] In *R. v. Genaille* (1997), 116 CCC (3d) 459 (Man CA), the s. 10(b) caution indicated that the accused could "call any lawyer you wish or get free legal advice from Duty Counsel immediately. If you want to call Duty Counsel we will provide you with a telephone and telephone numbers. If you wish to contact any other lawyer, a telephone and a telephone book will be provided." (para. 31). The accused "replied that he understood what was said, and Brooker asked him if he wished to call duty counsel or any other lawyer. The accused replied, 'No, I don't need them.'" (para. 31). The trial judge distinguished *Bartle* and its companion cases, and rejected the argument that the failure to state "that Legal Aid was a system that allowed for free legal representation if the accused qualified, or … to

advise him that duty counsel was available on a 24-hour basis, amounted to a *Charter* breach." In dismissing the appeal, Helper JA said, for the Court:

> 34… Brooker informed the accused of his right to immediate free advice from duty counsel and his right to legal representation either by a lawyer of his choice or through Legal Aid. There was no misunderstanding by the accused of the extent of his rights. Not only did he fail to express a request to confer with a lawyer, the accused expressly stated he had no need or desire for legal advice prior to admitting his involvement.

[50] Helper JA did not accept the appellant's argument that *Brydges*, which the trial judge had not cited, called for a different conclusion:

> 36 Lamer J. (as he then was), in *Brydges*, did not say that a breach is proven each time some part of the informational component of a *Charter* caution is missed. He stated that there are two parts to the informational component of the s. 10(b) *Charter* caution. The first part relates to the right to consultation with duty counsel who provide immediate and free legal advice. The second part involves the right to legal representation either by a lawyer of one's choice or through the Legal Aid program. Brooker provided that information. It was unnecessary for Brooker to advise the accused that duty counsel was available on a 24-hour basis because the statement was given during normal working hours. Brooker's failure to use the word "free" when referring to Legal Aid did not, on the evidence, mislead the accused. [Emphasis added.]

[51] In *R. v. Wallace*, 2002 NSCA 52, the caution to the accused, given shortly after 4 pm on a Friday, was described as follows by the arresting officer at para. 7:

> I said to him, you have the right to retain and instruct counsel without delay. You may call any lawyer you wish and it is also my duty to inform you there is available at all times free immediate duty counsel through the Provincial Legal Aid Program or duty counsel system that can be provided you with legal and - I'm sorry - or duty counsel system that can provide you with immediate legal advice without charge. I asked him, do you understand, he indicated he did. And upon asking him if he wished to call a lawyer he said he did.

[52] The accused testified on the *voir dire* that he "did not know what 'duty counsel' meant" and that he did not call a lawyer when given access to a phone "because he thought he would be charged for the long-distance telephone call … From personal experience of being in the custody of police on prior occasions, he said it was his belief that they had an obligation to contact a lawyer on his behalf." (paras. 9-10 and 13). In holding that there was no violation of s. 10(b), the Court of Appeal distinguished *R. v. Chisholm* (2001), 191 NSR (2d) 369 (CA), where one

of the grounds for the violation of s. 10(b) was the failure to provide the duty counsel phone number. Saunders JA said, for the Court:

> 16 … Chisholm had not been properly informed of the informational component of the right to counsel, including provision of the telephone number of duty counsel. Further, the police officer was not aware of the difference between "Legal Aid" and "duty counsel" and could not verify exactly what he had told Chisholm when informing him of his right to counsel. Those distinct circumstances led the trial judge to conclude that Chisholm's *Charter* rights were violated, a decision upheld by this court.
>
> 17 In our view, nothing approaching those particular circumstances arises in this case. Here, after considering the evidence of the appellant and Cpl. Hudson on the *voir dire,* Carver, J. was satisfied that the police officer had clearly and fully informed Mr. Wallace of his right to free immediate counsel through either the provincial Legal Aid program or the duty counsel system and further, that when asked, the appellant said he understood. After asking the appellant whether he wished to contact a lawyer, he said that he did. It was only after driving to the detachment and upon entering the building that the appellant changed his mind and informed the police that he no longer wished to exercise his right to communicate with counsel.
>
> 18 Whereas, in *Chisholm*, *supra*, the accused's detention occurred after midnight in circumstances where he could not have known the number for counsel on duty, could not have looked it up in the telephone book, nor obtained it from Directory Assistance, nor seen it written on any notice posted near the telephone, here Mr. Wallace was detained during regular business hours and was found to have been properly advised of his *Charter* rights and fully informed of the means necessary to access such legal advice. He chose not to enter the room where he might avail himself of that opportunity and instead simply stood in the doorway and repeated his decision to the police officer that he had changed his mind, that he did not wish to contact a lawyer, and that he wanted to go home... [Emphasis added.]

[53] In the circumstances, Saunders JA concluded, if "what the officer told the appellant shortly after pulling him over in his truck was clear, correct and informative. It would have been pointless for the police to have imparted a telephone number or numbers to the detainee at that stage." (para. 20). He added:

> 21 As with any case, some measure of common sense ought to be applied when considering the circumstances surrounding the detention, the advice given and the detainee's declared intentions. On more than one occasion Mr. Wallace explicitly advised the police officer that he had changed his mind and no longer wished to exercise his right to counsel. The first declaration occurred as the officer and the appellant were entering the RCMP detachment. Mr. Wallace told Cpl. Hudson that he had decided not to take the breathalyzer test. Moments later, after being

> shown the room where he would be provided with the opportunity to telephone counsel, the appellant again told the officer that he had changed his mind and wished to go home…

[54] Saunders JA held that the accused had waived the right to counsel. He also said the accused's claim that he thought he would be required to pay for the call was immaterial and unconvincing, in part due to the evidence of his prior experience with criminal charges and with Legal Aid representation (paras. 21-24).

Other Caselaw

[55] The authorities cited by the applicant are relatively early decisions in the evolution of the section 10(b) analysis. In some instances, they include limited reasoning, or appear inconsistent with governing Supreme Court of Canada authority. Further, there are more recent decisions in this area that the parties have not cited. For instance, in *R. v. Grouse*, 2004 NSCA 108, leave to appeal denied, [2004] SCCA No. 495, the police told the applicant, "among other things, that he had '... the right to retain and instruct a lawyer without delay ...' but did not tell him in so many words that he had the right to retain and instruct counsel 'of his choice'." (para. 8). In affirming the trial judge's decision dismissing the section 10(b) application, Cromwell JA (as he then was) said:

> 13. Turning to the second point first, I am persuaded that the judge was right to find that Mr. Grouse understood from what he was told and how the police acted that he had the right to retain and instruct counsel of his choice. For reasons I will set out in a moment, the police, in my opinion, have no duty to be more explicit in the informational component as regards counsel of choice than to advise of the right to retain and instruct counsel. However, if I am wrong about that, the appeal would still fail on this ground.
>
> 14. <u>The question of whether Mr. Grouse was properly informed of his right to counsel should not be assessed simply by looking at the precise words in the formal statement which the police read to him. While the formal statement read to the detainee is of course very important, the informational component of s. 10(b) is not simply concerned with a ritualistic incantation, but with whether the substance of the right was adequately communicated in all of the circumstances</u>. Thus, as was said in *R. v. Latimer*, [1997] 1 S.C.R. 217 at 236, the question of whether the police have complied with their informational duty "... must always be determined with regard to all the circumstances of [the] case ...". In light of all of those circumstances, what must be considered is whether "the essence" of the detained person's right was "adequately communicated to him": *Bartle* per Lamer, C.J.C. at 202. [Emphasis added.]

[56] The cautions given to the applicant in *Grouse* included the following: "You have the right to retrain, retain and instruct a lawyer without delay and you also have the right to free and immediate legal advise okay. We can call ... duty Legal Aid on your behalf..." (para. 16). He told the police the name of his legal aid lawyer. Since it was early on a Sunday morning, the officer called duty counsel, and the applicant spoke to another legal aid lawyer (paras. 17-19). Cromwell JA held that the trial judge did not err in finding that the appellant understood his right to counsel, including his right to counsel of his choice, as indicated by his immediate identification of his lawyer and his assertion of his desire to speak to counsel. There was no requirement for a more explicit reference to counsel of choice, as argued by the appellant. Justice Cromwell continued:

> 23. The cases from the Supreme Court of Canada make it clear that there are three elements of the informational duty. The detained person must be told: (1) that they have the right to retain and instruct counsel without delay; (2) about access to counsel free of charge where the individual meets prescribed financial criteria set by provincial legal aid plans; and (3) about access to duty counsel and the means available to access such services... The additional requirement advocated by the appellant is not supported by authority.
>
> …
>
> 26. … The purpose of this informational component is to enable a detained person to make an informed choice about whether to exercise the right to counsel and other *Charter* rights such as the right to silence... The focus of the informational component, therefore, is the immediate need of the detainee for legal advice. The practical problem addressed by the cases is not that detainees fail to understand that they may hire a lawyer of their choice, but rather that they assume this right will be of no help in getting the sort of immediate advice they require upon detention…
>
> …
>
> 28. The law on the informational component has, for the most part, opted for simplicity rather than technicality, leaving the precise demands of the right to counsel in a particular case to be worked out as part of the implementational duties of the police rather than by insisting that detainees be given a detailed statement of what the right to counsel means. The cases requiring additional information beyond that contained in the words of the *Charter* itself have added information which the courts thought was essential to make the right meaningful in light of the detained person's need for immediate access to legal advice. These additions are designed to meet the practical needs of the detained person, not to assure that the detainee receives a minute exposition of the intricacies of the right itself. In my view, no such rationale can be advanced for the addition proposed by the appellant.

[57] Several additional more recent section 10(b) decisions illustrate the evolution of the analysis since the early Supreme Court of Canada cases. In *R. v. Liew*, 2012 ONSC 1826, appeal dismissed on other grounds, 2015 ONCA 734, the arresting officers did not read the 1-800 number of Legal Aid duty counsel in the section 10(b) caution. The accused argued that this was integral to the informational component. The Crown took the position that "it is sufficient if the arrestee is advised of the existence of a 1-800 number that will allow immediate access to free duty counsel. In other words, the actual 1-800 number is not, itself, a critical part of the information to be provided at the time of arrest." (para. 58). The Court said:

> 61 In my view, based on the ruling in *Bartle* and subsequent Court of Appeal cases, it is sufficient that a detainee be advised of at least the existence of a toll-free number to access free and immediate legal advice. The provision of this information will adequately inform the accused person that s/he is able to immediately access free legal advice.
>
> 62 In this case, the 1-800 number was not provided to either accused at the time of his arrest. Each was, however, assured that he would be provided with access to free legal advice, as that information was a part of the pre-printed forms recited by arresting officers. I am satisfied, in the circumstances, that the police complied with the informational component of the s. 10(b) rights of the accused…

[58] The Court added that it was nevertheless "poor practice" for the RCMP not to have the 1-800 number available at the time of the arrest (para. 62).

[59] In *R. v. Peterkin*, 2013 ONSC 165, the accused was detained, then arrested, between 3:15 and 3:20 am. The Crown conceded that there had been a section 10(b) violation. As described by the trial judge, at para. 69, the arresting officer

> failed to advise the accused of his right to immediately access counsel through a 1-800 telephone number, and the availability of free legal advice <u>at that time of the night</u>. Accordingly, the accused declined the opportunity to consult with a lawyer without being advised of all of the reasons for his detention and without accurately being apprised of the details of his right to a lawyer. [Emphasis added.]

[60] The trial judge held, however, that exclusion under section 24(2) was not justified. The Ontario Court of Appeal affirmed this decision: 2015 ONCA 8.

[61] The trial judge purported to follow *Peterkin* in *R. v. Ghotra*, [2015] O.J. No. 7328 (Sup. Ct.), where the appellant was arrested in the middle of a weekday on a charge of internet child luring. The trial judge said:

> 74 After being told he was under arrest and the officer telling the applicant not to say anything when his first comments was that he did not want his parents to find out he had been arrested, Constable McDonald said that they would get him in contact with a lawyer if he did not have one. The officer asked if he had one and the accused said, "No." Constable Artkin told the accused there was a duty counsel that they would call for him.
>
> 75 In *R. v. Peterkin* 2015 ONCA 8 the Court of Appeal affirmed breaches of s. 10(a) and (b) where the officers conducted an investigative detention telling the detainee that he was being detained from breaching the *Trespass to Properly Act* [sic] but failed to tell him that they were also investigating a 9-1-1 call in connection with the townhouse where he was located. The s. 10(b) informational component breach occurred when the officer failed to tell the detainee about the availability of duty counsel for immediate advice and provide him the toll free number.
>
> 76 Here, while the officer never suggested the above noted comments were *Charter* compliant, he did start down the rights to counsel path and did not provide the full informational component. There was no challenge to his stated motivation for delaying the rights. Nevertheless, the informational component was deficient at least in not telling the applicant he was entitled to speak to counsel "without delay," in not telling him that he could speak to any lawyer he wanted and in not providing the 1-800 number...[Emphasis Added]

[62] The trial judge's reference to *Peterkin* does not include the qualification – expressly noted in *Peterkin* – that the *Peterkin* arrest took place at night. The *Ghotra* arrest, by contrast, occurred mid-day on a weekday. As such, the trial judge's suggestion in *Ghotra* that not providing the number was a "deficiency" of the caution was not necessarily well-founded. This point does not appear to have been argued. The accused's focus was his assertion that he should have been told that he had the right to select his own lawyer, and should have been provided with a legal directory or Yellow Pages in order to do so. The trial judge had rejected this submission. The majority of the Ontario Court of Appeal affirmed the trial judge's decision, again focusing on the appellant's claim that he should have been provided with a directory from which to select his own lawyer: 2020 ONCA 373, affirmed at 2021 SCC 12 (*Ghotra*, Ont. CA, at paras. 33-41).

Analysis

[63] It is apparent from the line of caselaw commencing with *Brydges* and *Bartle* that information must be provided about, *inter alia*, duty counsel services available at the time of arrest or detention – specifically, that a phone number will be provided if the detained person wishes to speak to counsel. *Latimer* indicates that

a recitation of the number itself will not be required in every case and, particularly, will not be required where the arrest occurs during business hours where the arrested individual is able to obtain a number and contact counsel. Later decisions of the Nova Scotia Court of Appeal suggest a relatively non-technical approach. As Justice Cromwell said in *Grouse*, the arrested person must be informed "(1) that they have the right to retain and instruct counsel without delay; (2) about access to counsel free of charge where the individual meets prescribed financial criteria set by provincial legal aid plans; and (3) about access to duty counsel and the means available to access such services…" (para. 23).

[64] As I read the transcript of the exchange between Cst. Smith and the applicant, the applicant was informed (1) that he could receive "free and immediate advice from duty counsel", and (2) that he could apply for legal aid. His response indicated that he understood that he would not receive immediate assistance from Legal Aid; he used the word "eventually". Cst. Smith indicated confirmation of this, and added, "but today you can speak to somebody right now …" Both before and after this clarification, the applicant said he did not want to speak to counsel. This exchange was occurring during working hours. Based on my review of the caselaw, I find that the absence of a recitation of the duty counsel phone number would not be fatal at that time of day.

[65] Defence counsel says it is "clear" that the applicant "did not appreciate being able to speak to 'free and immediate' counsel before making the choice to speak with police." As noted above, I am not convinced that the transcript bears that interpretation. There is, at this point, no proposed evidence to that effect. The transcript might support the inference that W.F. did not initially understand that they could receive immediate advice, but it goes on to disclose Cst. Smith's attempts to clarify.

[66] At the hearing, defence counsel appeared to concede that the caselaw does not impose an absolute requirement to recite the 1-800 number, but submitted that the defect in the caution was Cst. Smith's failure to inform the applicant of the "means" by which he could receive legal advice. In my view, this amounts to the same thing. While Cst. Smith did not use the phrases "toll-free" or "1-800 number", he did use the phrase "free and immediate" and asked the applicant if they wanted to "call a lawyer now." Even when the response was in the negative, Cst. Smith persisted in attempting to clarify that the applicant could speak to lawyer immediately, not "eventually."

[67] Based on the evidence before me, I find that there are too many weaknesses in the defence position to establish a section 10(b) violation. I am aware that the caselaw suggests that it is at least possible that technical defects in the caution could establish a section 10(b) violation. However, in these circumstances, the applicant has not met that bar. Even though Cst. Smith's explanation of the right to counsel is broken up – in part by the Defendant's interruptions – and the explanation of the means of contacting counsel could be clearer. In my view enough was done to meet the requirements in *Grouse* and therefore, the Defendant has not convinced me that they have met the threshold to hear the *Charter* application.

[68] If the standard to be applied is that suggested by the Crown – one of mere possibility – then the appropriate outcome may be to proceed to a *voir dire*. However, the standard to be applied on a *Vukelich* screening has been described in various ways, as noted above (at paras. 27-30 above). In *Hilchey*, at para. 14, the Court cited *Kutynec*, at para. 28, where the Court observed that it "may be appropriate for the court to be able to dismiss a motion for a s. 24 remedy without the necessity for an evidentiary hearing where the defence has failed to demonstrate by its notice of motion and offer of proof a high likelihood that if a hearing were held the defendant would succeed on the merits." *Hilchey* also accepts that "The rigour with which *Vukelich* is applied and the way in which a trial judge exercises his or her discretion in relation to such an application is case-specific and highly contextual." (para. 16). This statement is consistent with the Supreme Court of Canada's emphasis on the case management powers of the courts, as referenced in *Cody* at paras. 36-39. In my view, the *Vukelich* application should be granted on the existing record, in these circumstances, the court requires something more than a mere possibility that a *Charter* complaint could be made out.

Conclusion

[69] I find that the obligation of timely notice of *Charter* issues is not waived simply because of a change of counsel. I decline to hear the Defendant's application in these circumstances, to do so would suggest that it is open to the defence to revisit *Charter* issues at will. The interests of justice do not warrant the hearing of the Defendant's late *Charter* application.

[70] In the alternative, I would grant the Crown's *Vukelich* application. The Defendant has not met the threshold inquiry to entitle it to a *Charter voir dire*.