

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WILFRED LAWRENCE BUGGINS

RULING ON VOIR DIRE

[1] Mr. Buggins is charged with second degree murder in the death of his brother with his jury trial scheduled to commence March 3, 2014. This *voir dire* was held in respect of two statements that the Crown seeks to rely on as part of its case. The first statement was made by Mr. Buggins to Constable Wallace on February 5, 2011. The second statement was made by Mr. Buggins to Constable Woodfine on February 6, 2011. The issues are whether the statements were made voluntarily and whether Mr. Buggins' rights under sections 7 and 10(b) of the *Canadian Charter of Rights and Freedoms* were breached.

Background

[2] On Saturday, February 5, 2011 at approximately 6:00 a.m., the R.C.M.P. in Hay River began an investigation into an alleged homicide involving a firearm. About an hour later they located Mr. Buggins and arrested him for the murder of his brother. Soon after that, he was lodged in cells at the local detachment. He had interactions with various police officers from the time he was located until he was

interviewed by Constable Wallace at approximately 10:10 p.m. on February 5, resulting in one of the statements at issue.

[3] At approximately 8:00 p.m. the following day, February 6, 2011, a second statement was obtained from Mr. Buggins, along with his participation in a re-enactment of the events leading to his brother's death. That is the second statement at issue.

[4] On February 8, 2011, Mr. Buggins was escorted to Yellowknife to appear in the Territorial Court. From the time of his arrest until he arrived in Yellowknife, Mr. Buggins did not speak with legal counsel, despite having initially indicated a wish to do so.

[5] Mr. Buggins did not testify or call any other evidence on the *voir dire*, however the evidence is that he told the police he is (at the time of arrest) 66 years old and has a grade 3 education. I have no reason to doubt that, given his appearance and how he communicates as revealed in the evidence before me. All of Mr. Buggins' relevant interactions with police officers were audio-recorded and the two statements at issue were also video-recorded. Where anything I have quoted in these reasons is different from the transcripts filed as an aide to the recordings, it reflects what I heard on the recordings.

[6] In addition to the testimony of several police officers, an Agreed Statement of Facts was filed outlining the observations of various cell guards.

1. The first statement

[7] The first encounter the police had with Mr. Buggins was at approximately 7:00 a.m. on February 5, 2011. Both arresting officers, Corporal Gallant and Sergeant Buchanan, testified that Mr. Buggins was under the influence of alcohol and showed obvious signs of intoxication. Sergeant Buchanan testified that Mr. Buggins was alternately quiet, then loud, that he had poor balance and had to lean on things for support. He also noted that Mr. Buggins gave inappropriate responses to some of the questions he was asked.

[8] Mr. Buggins was told that he was under arrest for the murder of his brother. Before putting Mr. Buggins in the police vehicle, Corporal Gallant told him, "... Right now you could call a lawyer if you want and if you don't have a lawyer there's

a legal aid number that we gotta provide to you. And you don't have to say nothing to us. Do you understand Wilfred?..." It is not clear from the evidence what, if any, response Mr. Buggins gave to this information.

[9] It is clear from the audiotape that Mr. Buggins was at times angry, in part about being handcuffed. After being placed in the police vehicle he was verbally combative with Corporal Gallant and made contradictory statements, at times denying that he shot his brother and at times saying that he would plead guilty for it. At one point after complaining about the handcuffs, he said something about a lawyer; his words are difficult to decipher, but I find they were "... for, get me a lawyer". The latter would make sense in light of Corporal Gallant's response which was, "Yes, you're entitled, that's what I'm gonna try to read to you here".

[10] Once in the police vehicle, Corporal Gallant again told Mr. Buggins that he was under arrest for murder and he read Mr. Buggins his rights from a card as follows:

Now you have the right to obtain and instruct counsel in private without delay. You may call any lawyer you want. There's a twenty four hours legal aid number available. This advice is given without charge and a lawyer can explain the legal aid plan to you. If you wish to contact a legal aid duty lawyer, I can provide you with a telephone number. Do you understand?

[11] Mr. Buggins' response was, "You're not a fucking judge, you, you're not going to tell me what to do". When asked a second time whether he understood the information, Mr. Buggins replied, "Yeah" according to Corporal Gallant.

[12] Corporal Gallant then asked whether Mr. Buggins wanted to call a lawyer now. Mr. Buggins' response was, "What the hell for?" He was told that it was his right to do so. Mr. Buggins then told Corporal Gallant to call his sister and tell her to get him out of jail. After some further conversation about the name of the sister, Corporal Gallant said that he was trying to determine whether Mr. Buggins understood his right to a lawyer or legal aid, to which Mr. Buggins responded, "Doesn't fucking matter, didn't shoot him".

[13] At that point, Corporal Gallant asked Mr. Buggins several times whether he wanted to call a lawyer. Mr. Buggins responded by talking about the possibility of someone else having shot his brother or by asking that the police take the handcuffs

off him. Finally, Mr. Buggins stated that he wanted them to get Mr. MacDonald, a local lawyer.

[14] Corporal Gallant then read the standard police caution to Mr. Buggins:

Ok. Now this is a police warning. You are detained, you are arrested with respect to murder. You need not say anything, you have nothing to hope from any promise or favor and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence. Do you understand?

[15] When asked whether he understood, Mr. Buggin's first response was inaudible. When Corporal Gallant asked again, Mr. Buggins replied, "Yeah". Because there had been some conversation between Sergeant Buchanan and Mr. Buggins, Corporal Gallant also read the secondary caution or warning to the effect that any promises or threats made by another officer were no longer in effect. When asked whether he understood the secondary caution, Mr. Buggins answered, "Yeah". When asked by Corporal Gallant what he had just read to him, Mr. Buggins answered, "You're not my lawyer" and began talking about the handcuffs. When asked by Corporal Gallant what he wanted to do with the secondary warning, Mr. Buggins stated, "Not guilty boy".

[16] Corporal Gallant testified that he was satisfied that Mr. Buggins understood the cautions and that he did not want to explain the secondary caution because the Corporal was not his lawyer. Sergeant Buchanan also testified that he was satisfied that Mr. Buggins understood his rights. He acknowledged that Mr. Buggins did not always answer appropriately, but thought that was simply an "avoidance" on Mr. Buggins' part. He testified that he believed that Mr. Buggins knew that he was in a legal situation because of his statement "You're not my lawyer" and because he asked for Mr. MacDonald. In my view, however, it is not at all clear that Mr. Buggins understood the interplay between obtaining legal advice and deciding whether to speak to the police or the consequences of speaking to the police. His response "What the hell for?" when asked whether he wanted to speak to a lawyer indicates that he did not understand the purpose or advisability of doing so.

[17] From the audiotape itself, in addition to the observations made by the police officers, I find that Mr. Buggins was intoxicated. On arrival at the detachment, he spoke in a rambling manner. As Corporal Gallant was searching him, Mr. Buggins made joking comments about parts of his body that were even more inappropriate considering the situation he was in.

[18] After searching him, Corporal Gallant reminded Mr. Buggins that he had said he wanted to speak to Mr. MacDonald or his sister. Corporal Gallant explained the procedure for making a phone call from the telephone room at the detachment, in response to which Mr. Buggins complained about his wallet being seized and stated that he wanted to sleep.

[19] Mr. Buggins was taken to the telephone room. He acknowledged that he understood that he was under arrest for murder. He answered in the affirmative when Corporal Gallant asked if he remembered being read his rights, however when Corporal Gallant asked, "What did I read to you?", Mr. Buggins became aggressive and accused the Corporal of lying. He also asked whether Mr. MacDonald was at the detachment and said that he wanted to talk to him. He made reference to what he was going to tell Mr. MacDonald about the murder charge.

[20] Corporal Gallant attempted to reach Mr. MacDonald by telephone at his office number but was only able to connect with an answering machine. He was unable to locate a home number for Mr. MacDonald. He asked Mr. Buggins whether there was any other lawyer he would like to call and received a negative response. He told Mr. Buggins that there was a legal aid number available, to which Mr. Buggins responded, "I don't need one". Corporal Gallant then asked Mr. Buggins whether his sister could provide a number, to which Mr. Buggins responded that his sister does not have a lawyer. Throughout this conversation, Mr. Buggins kept saying that he wanted to sleep.

[21] Corporal Gallant told Mr. Buggins that he would be put in a cell and, "any time that you wanna call a lawyer you - you still have that, that option there, ok". Mr. Buggins' response was to ask about a blanket and mattress for the cell; I find that he was preoccupied with concern about where he would sleep, whether he would be put in the drunk tank and that the police would "rip me off" by seizing his clothing. At times he expressed thanks to Corporal Gallant and at times he was rude and angry, all of which I find confirms that he was very intoxicated.

[22] Corporal Gallant's testimony was that Mr. Buggins was still under the influence of alcohol during the interactions described above, his eyes were bloodshot and glassy, he was staggering and his speech was slurred. Notwithstanding that, Corporal Gallant was of the view that Mr. Buggins appeared to understand what was happening.

[23] Mr. Buggins was put in a cell of which he was the only occupant. It had a cement bench he could sit or lie on. The evidence is that the lights in the cell were kept on all the time. One of the lights was directly above the bench, shining down on it. Corporal Gallant told Mr. Buggins that he could not cover his head with a blanket.

[24] After putting Mr. Buggins in the cell, Corporal Gallant swabbed his hands for gunshot residue at approximately 8:00 a.m. Mr. Buggins was observed sleeping approximately half an hour after that, but at 8:55 a.m., Corporal Gallant returned to the cell to swab Mr. Buggins' face. From 9:33 a.m. until 1:18 p.m., a guard observed Mr. Buggins sleeping. At 1:45 p.m. he was observed spitting, coughing and eventually throwing up on the floor.

[25] At 1:55 p.m., Constable Zrymiak entered Mr. Buggins' cell. He had been told that Mr. MacDonald, the lawyer, had contacted the detachment. Constable Zrymiak testified that it was his task to ensure that Mr. Buggins was aware of his right to contact a lawyer.

[26] Constable Zrymiak testified that he observed Mr. Buggins to be quiet, laying on the cement bench in the cell. He saw vomit on the floor. Although Constable Zrymiak testified that he did not note any signs of intoxication, he had not dealt with Mr. Buggins previously and had nothing to use for comparison. However, another witness, Constable Wallace, testified that Constable Zrymiak told him that Mr. Buggins was slurring his words and that he, Constable Zrymiak, was concerned that he might still be intoxicated.

[27] Constable Zrymiak told Mr. Buggins that Mr. MacDonald had contacted the detachment. Mr. Buggins acknowledged to Constable Zrymiak that he had wanted to talk to Mr. MacDonald, but now said that he would not talk to him or anyone else. On being told "you have the right to talk to a lawyer at any point", Mr. Buggins stated that he felt sick. After some discussion about how he was feeling, Constable Zrymiak asked if he understood that he can talk to a lawyer at any time, to which Mr. Buggins responded "Okay". Constable Zrymiak told him to let them know and asked if he needed to go to the hospital, to which Mr. Buggins replied, "I might have to, I don't know".

[28] Constable Zrymiak then left the cell. He concluded that Mr. Buggins was declining counsel, although he stated in his testimony that he thought that Mr. Buggins wanted to speak with a lawyer but later, not then. Half an hour after this interaction, the constable left a message for Mr. MacDonald stating that Mr. Buggins no longer wanted to speak to him. He did not include in the message any information about Mr. Buggins being sick.

[29] At 2:38 p.m., a guard observed Mr. Buggins sleeping in the cell. Thereafter, the guard observed him sometimes awake, sometimes laying down and sometimes asleep. I find from the evidence that although he was laying down much of the time until Constable Zrymiak returned to his cell, it is not clear how much sleep he actually had and any sleep he did get was intermittent. He also complained to the guard that he was going to get sick again.

[30] At approximately 7:20 p.m., Constable Zrymiak returned to Mr. Buggins' cell to address the issue of counsel. Mr. Buggins indicated that he was not feeling good. Constable Zrymiak asked him whether he wanted to talk to a lawyer. I find his response to that question was not clear, despite what was transcribed from the audiotape, but when Constable Zrymiak asked "No?", Mr. Buggins replied "No". Constable Zrymiak then asked Mr. Buggins if he understood why he was there, to which Mr. Buggins replied in the affirmative. Then there was the following exchange between Constable Zrymiak and Mr. Buggins:

[Constable Zrymiak] Q: You understand. Okay, do you understand it's a pretty serious offence right?

[Mr. Buggins] A: Oh yeah.

Q: Um, now is there anywhere I could put you in touch with?

A: I don't know.

Q: Okay it's definitely not a bad idea.

A: Hey?

Q: It's not a bad idea um. Are you able to walk around or anything, Wilfred?

A: I think I'm going to have a heart attack pretty soon.

Q: Do you need to go to the hospital?

A: I don't know ah.

Q: Well if you do make sure you let us know okay cause we want to make sure that you're okay right. That's very important to us. Um, could I get you to just come to the phone room and you know maybe you'll change your mind?

A: Sure.

Q: Okay.

A: Where's that?

Q: Just a, it's about six steps out of your cell here and there's a chair in there as well.

A: No, I don't want to talk to nobody I told you.

Q: Don't want to talk to anybody, eh?

A: No.

Q: Ah ...

A: The only one I want to talk to is a doctor, holy Christ.

Q: Talk to a doctor?

A: Yeah.

[31] Mr. Buggins went on to say that he wanted to talk to a doctor "if I feel any worse".

[32] Immediately after the exchange quoted above, Constable Zrymiak asked whether Mr. Buggins understood that he had the right to talk to a lawyer, to which Mr. Buggins responded that he would talk to a lawyer "when I'm good and ready". Constable Zrymiak then told him he could talk to a lawyer at any time and read him his s. 10(b) rights. He asked Mr. Buggins what it meant to him, and received the response, "I can understand it like I said, I told you I'm just too sick right now". He said the officer could take him to the hospital in the morning and indicated that his chest and back were sore, but that he had no problems breathing. Constable Zrymiak testified that Mr. Buggins appeared to be in some pain, however as he had

no problem breathing, the Constable did not feel that Mr. Buggins needed immediate medical attention. He told Mr. Buggins to ask if he needed anything. The entire exchange between Constable Zrymiak and Mr. Buggins lasted about 3 minutes, at the end of which Constable Zrymiak concluded that Mr. Buggins had declined counsel.

[33] From the guards' observations it appears that between the time Constable Zrymiak left his cell and 10:10 p.m., when Constable Wallace took Mr. Buggins to an interview room, Mr. Buggins may have slept for approximately half an hour. This would have been just before Constable Wallace came to speak with him.

[34] Constable Wallace testified that when he first spoke with Mr. Buggins, he could not tell what his state of intoxication was, but as the interaction progressed, he noted no indicia of intoxication and came to believe that Mr. Buggins was sober, but hung over. Constable Wallace was aware that Mr. Buggins had not yet spoken with legal counsel and that he had said he wanted to speak with Mr. MacDonald; Constable Wallace understood that Mr. Buggins had subsequently declined to speak with Mr. MacDonald.

[35] After stating that he had sobered up but was not feeling well and that he could not eat and had not slept, Mr. Buggins told Constable Wallace that he did not want to answer any questions. Constable Wallace read him his s. 10(b) rights and when asked whether he understood, Mr. Buggins said, "Yeah. I can do that on a day of my own choosing". Constable Wallace then told him that, "it's important if you wanted to talk to a lawyer that um you can get some preliminary legal advice okay. It's free. You can speak to them as, as short or as long as you want. .. And you can talk to them about there, your situation. ... So if you have any questions then you can talk to the lawyer about that. You understand that?".

[36] Mr. Buggins said that he understood, but that he did not feel like talking to anyone right then and asked to go back to his cell.

[37] Constable Wallace then said:

... I can very easily give you an opportunity to contact a lawyer right now and you can speak to one and, and talk to them and find out it's, if you don't want to that's your right, but and, and I can't tell you what to do but I can't give you any advice about anything, okay? And there's a process that's going to happen here okay? You're, you're, you can't just simply sit in your cell, there's gonna be some legal

things that are gonna happen right now. We're gonna look at talking, talking about you know whether you're released or held in custody, okay? ... I wanna give you every chance to tell me what your side of the story was. ... but before I do that I don't even wanna ... go there till ...

[38] Constable Wallace then asked again whether Mr. Buggins wanted to call a lawyer and reminded him that he had initially asked for Mr. MacDonald. Constable Wallace said that Mr. MacDonald does not practise criminal law but that other lawyers would speak to Mr. Buggins. Mr. Buggins responded to all this by saying that he did not want to talk to a lawyer, did not feel like doing anything, and asking for aspirin and to return to his cell.

[39] Constable Wallace then told Mr. Buggins to listen and stated:

... So you have the right to a reasonable opportunity to contact counsel. I will not take a statement from you or ask you to participate in any process which might provide evidence against you until you are certain about whether you want to exercise this right. ...

[40] When asked what that meant, Mr. Buggins replied that he did not know, that "I'm not thinking rightly". Constable Wallace then repeated the right to contact a lawyer without delay and said he could provide a list of lawyers. Mr. Buggins asked him to do it tomorrow. Constable Wallace said that the police were going to continue the investigation. Mr. Buggins kept reiterating that he did not want to call a lawyer right now, that he wanted some aspirin and to lay down.

[41] Constable Wallace then read the standard police caution and asked Mr. Buggins whether he understood, to which Mr. Buggins replied "Yeah". However when asked what it meant, Mr. Buggins' response was, "I haven't got a clue. I haven't been in this situation for a good many years". Constable Wallace then attempted to explain in layman's terms, which Mr. Buggins said he understood. He continued to talk about needing sleep and wanting to lie down. However Constable Wallace continued to speak and eventually Mr. Buggins said, "Let's get it over with okay". Constable Wallace spoke at some length of the importance of getting Mr. Buggins' side of the story, in response to which Mr. Buggins talked about feeling rough and asked to lay down. He asked for, and was given, some aspirin, after which he began to answer questions about the death of his brother, resulting in the statement that the Crown wishes to use as evidence.

[42] The videotape reveals that during much of the interaction with Constable Wallace, Mr. Buggins was leaning over a garbage can, into which he was spitting, retching or vomiting. He complained many times of feeling unwell.

Was the first statement voluntary?

[43] The first issue is whether the Crown has proven beyond a reasonable doubt that the first statement was voluntary. A confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness. These circumstances include threats and promises made by persons in authority, oppressive conditions, lack of an operating mind and police trickery that unfairly denies the accused's right to silence. The analysis must be a contextual one and the entire circumstances surrounding a confession must be considered: *R. v. Oickle*, [2000] 2 S.C.R. 3.

[44] Mr. Buggins does not contend that there is any evidence of threats or promises. I agree. Nor is there any evidence of police trickery. Nor is there evidence that Mr. Buggins lacked an operating mind at the time of the first statement. The argument advanced by Mr. Buggins is that the police created an atmosphere of oppression that continued from the moment of his arrest through the first and second statements.

[45] Crown counsel argued that there is no evidence that Mr. Buggins felt oppressed. Instead, Crown counsel says that on the evidence, Mr. Buggins slept, was given food and drink and aspirin, and did not complain to the guards about anything. Other than the vomit indicating that he threw up in his cell, the guards noted nothing out of the ordinary in relation to Mr. Buggins.

[46] In *Oickle*, the Supreme Court acknowledged that oppression has the potential to produce false confessions. If the police create conditions distasteful enough, or inhumane, a doubt may arise as to whether the suspect has made a confession in order to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he comes to doubt his own memory, believes the relentless accusations made by the police, and gives an induced confession.

[47] As I have already indicated, it is clear that Mr. Buggins was very intoxicated at the time of, and for some time after, his arrest. I also find from the evidence that

after his state of intoxication had worn off, Mr. Buggins was feeling unwell due primarily to a hangover caused by alcohol consumption, but also lack of sleep and pain in his chest and back. The evidence that he was unwell comes not just from what he told the police officers, but also the vomit found on the floor of his cell and the videotaped interview with Constable Wallace, in which Mr. Buggins is seen leaning over a garbage can, spitting and retching or vomiting. The evidence also indicates that although he had some sleep between the time he was first lodged in the cell and the interview with Constable Wallace, any such sleep was intermittent and adversely affected by the lights shining in the cell and the fact that Mr. Buggins was not feeling well.

[48] Despite the condition that Mr. Buggins was in, hanging over the garbage can exhibiting obvious signs of illness, pleading to go back to his cell, and despite his having said that he did not want to talk, Constable Wallace made it clear by continuing to question Mr. Buggins that he was not going to let that situation stand in the way of obtaining a statement from Mr. Buggins. Constable Wallace's manner of questioning was not aggressive, but considering the condition that Mr. Buggins was in, it did not have to be in order to wear him down and overcome his will not to talk. This is clear from Mr. Buggins' statement "let's get it over with" after his requests to lie down and his expressed wishes not to answer questions were disregarded.

[49] In *Oickle*, Justice Iacobucci said, "If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions" (at paragraph 58). In the case at hand, it is not merely the fact that Mr. Buggins complained of lack of sleep that persuades me that the conditions in which he was interviewed were distasteful to the point of being oppressive. The most significant fact is that he was retching into a garbage can, showing obvious signs of being unwell and unable to focus on what was going on. The circumstances as a whole leave me with a doubt as to whether Mr. Buggins simply caved in and answered Constable Wallace's questions just so that he would be allowed to return to his cell and lay down. Accordingly, I have a reasonable doubt as to whether the statement made to Constable Wallace was voluntary and I rule that it is not admissible.

Was there a breach of s. 7 of the Charter?

[50] Section 7 of the *Charter* provides for the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This encompasses the right of a person detained to remain silent, which must be balanced against state interest in law enforcement, which must respect the principles of fundamental justice. In *R. v. Singh*, [2007] 3 S.C.R. 405, the Supreme Court of Canada dealt with the intersection of a detainee's pre-trial right to silence under s. 7 of the *Charter* and the common law voluntary confessions rule as set out in *R. v. Oickle*. As the Court held in *Singh*, both the confessions rule and the constitutional right to silence are manifestations of the principle against self-incrimination. At the same time, *Singh* recognized that the right to remain silent does not mean that a person has the right not to be spoken to by the authorities and that interrogation of suspects is an important tool in the investigation of crime.

[51] In determining whether there has been a breach of the s. 7 right to silence, the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will. Although this is an objective test, the individual characteristics of the accused are relevant considerations in its application: *Singh*.

[52] Although the analysis under s. 7 is different from that under the common law confessions rule, the issues to be considered are similar and indeed, overlap. If the police persist in questioning a detainee, even after assertions by the detainee that he wishes to remain silent, then, depending on the circumstances, any statement obtained may be found involuntary and not the product of the exercise of a free will to speak to the authorities. In *Singh*, the Supreme Court recognized that in most circumstances the outcome of the analysis on voluntariness will be determinative of the s. 7 analysis and *vice versa*.

[53] For the reasons set out earlier as to why I am not satisfied beyond a reasonable doubt that the first statement, to Constable Wallace, was voluntary, I find that Mr. Buggins has demonstrated on a balance of probabilities that his right to silence was breached. Despite his being obviously ill and thus vulnerable to what might not otherwise be considered significant pressure from the police officer, Constable Wallace persisted in his questions notwithstanding Mr. Buggins' statements that he did not want to talk and asking to be left alone to lie down.

[54] That Mr. Buggins had not yet had any legal advice is also important in this connection. While the police cannot force a detainee to obtain legal advice, or to

follow it, they can, and should, do their utmost to ensure that a detainee understands the importance of his right to counsel where there are indications that he may not do so. The indications were present with Mr. Buggins right from the beginning when he responded “What the hell for?” to the question whether he wanted to contact counsel. There was also a positive indication that he did not understand the police caution when he told Constable Wallace “I haven’t got a clue [what it means]”. Despite efforts made by Constable Wallace to explain the right to counsel and the right to silence in layman’s terms, he never obtained an acknowledgement from Mr. Buggins in his own words as to what those rights meant; at most, he obtained the answer “yeah” when he asked whether Mr. Buggins understood, but that was inadequate in light of the indications that he did not in fact understand. That lack of understanding on Mr. Buggins’ part is, I find, apparent from the videotape of the interview. It further confirms, taking an objective view, that Constable Wallace’s conduct in questioning Mr. Buggins while he was ill, had the effect of depriving him of his right to make an informed choice whether to answer questions.

[55] For these reasons, I find that there was a breach of s. 7 of the *Charter*.

Were Mr. Buggins’ s. 10(b) *Charter* rights breached?

[56] Section 10(b) of the *Charter* enshrines the right of an individual on arrest or detention to retain and instruct counsel without delay and to be informed of that right. The onus is on Mr. Buggins to establish that this right was infringed or denied.

[57] Section 10(b) imposes both informational and implementational duties on the police. The informational duty is to inform the person detained or arrested of his right to retain and instruct counsel without delay and the existence and availability of legal aid and duty counsel: *R. v. Luong*, [2000] A.J. No. 1310 (C.A.).

[58] Mr. Buggins concedes that the police fulfilled the informational duty, although he argues that there is an issue as to whether he understood what he was told. I will address that issue further on.

[59] The implementational duty has two parts. The first part arose when Mr. Buggins indicated that he wanted to exercise his right to counsel by speaking with Mr. MacDonald. As set out above, Mr. Buggins first said he wanted to speak to Mr. MacDonald shortly after he was arrested, while he was being transported to the

detachment. At the detachment, when speaking with Corporal Gallant, he reiterated that wish. The police were then obliged, as the first part of the implementational duty, to provide him with a reasonable opportunity to exercise that right: *R. v. Bartle* (1994), 92 C.C.C. (3d) 289 (S.C.C.). In this case, there were no urgent or dangerous circumstances which could have relieved the police from this part of the duty, nor did Crown counsel claim that there were.

[60] The Crown has the burden of establishing that the police provided Mr. Buggins with a reasonable opportunity to exercise his right to counsel.

[61] The second part of the implementational duty obliged the police to refrain from eliciting evidence from Mr. Buggins until he had had a reasonable opportunity to exercise his right to counsel, assuming there was no urgency or danger: *Bartle*.

[62] Accordingly, the first question is whether, in all the circumstances, the police gave Mr. Buggins a reasonable opportunity to exercise his right to counsel. Mr. Buggins takes the position that because of the condition he was in, he was not given a reasonable opportunity. He says that initially because of his state of intoxication, he was not in a position to instruct counsel and receive advice and that once the intoxication had worn off, he was not up to speaking with counsel due to feeling unwell. In connection with this, Mr. Buggins points to evidence that indicates that he did not understand his right to counsel.

[63] Crown counsel argues that Mr. Buggins was given many opportunities to contact counsel but, after initially saying he wanted to, subsequently consistently refused.

[64] On this point, the purpose of s. 10(b) is relevant. The purpose is to require the police to communicate the right to counsel to the person detained. Where there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the detainee. They must take steps to facilitate that understanding: *R. v. Evans*, [1991] 1 S.C.R. 869.

[65] In my view, Mr. Buggins' responses and reactions to being told of his right to counsel by Corporal Gallant were such that there was an indication that he did not understand his right to counsel. Understanding the right to counsel must mean understanding more than just that one has the right to make a telephone call to a

lawyer. If an individual does not understand how talking to a lawyer can help him, or what the purpose of talking to a lawyer is, then there is no real understanding.

[66] Mr. Buggins' initial responses to Corporal Gallant reading him his right to counsel raise a concern that he did not understand the right. It will be recalled that his very first response was to the effect that the Corporal is not a judge and cannot tell him what to do; his second response was, "What the hell for?". Even though the latter was followed by an affirmative response when he was asked if he understood the right, the initial responses cast doubt on whether he actually understood that it would be to his benefit to obtain legal advice at that early stage.

[67] I take into account that during his interaction with Corporal Gallant, Mr. Buggins did ask to speak with Mr. MacDonald. Despite that, I find that Mr. Buggins' answers to questions about whether he wanted to speak to a lawyer indicate a lack of understanding about the purpose of contacting a lawyer at that stage of the police investigation. There is nothing in the responses that indicates that Mr. Buggins understood that the purpose of consulting with legal counsel is to obtain advice about whether to speak to the police or co-operate in their investigation. It is obvious that his responses were to some extent the result of his intoxication, but they may also have been affected by his lack of education or experience. Despite those responses, neither Corporal Gallant nor Sergeant Buchanan actually clarified for Mr. Buggins why it would be beneficial to speak to a lawyer.

[68] Subsequent to his interactions with Corporal Gallant, although Mr. Buggins was told of his right to counsel a few times, there is nothing in his responses that indicates that he understood the reason why he might want to call a lawyer. His response to Constable Wallace to the effect that he could call a lawyer on a day of his choosing suggests that Mr. Buggins did not understand the need for legal advice at the time he was being questioned by the police.

[69] Constable Wallace did give Mr. Buggins information that came close to telling him why he might want to speak to a lawyer then rather than later, but did not spell it out clearly. I am referring to when Constable Wallace told him that he would give him the opportunity to get advice and that the investigation and various processes would continue. In my view, however, what he said was not clear enough to indicate that Mr. Buggins would or could benefit from advice from a lawyer about whether to answer questions. Moreover, it was said at a time when

Mr. Buggins was ill as I have described above, and not in a condition in which one would expect he would understand and be able to make a reasoned choice as to what to do, particularly when one considers his lack of education.

[70] I am satisfied therefore that the evidence indicates that Mr. Buggins did not understand his s. 10(b) rights. Although I am satisfied that he understood that he could speak with a lawyer, there are clear indications that he did not understand the reason for speaking with a lawyer at that stage of the matter and the officers who dealt with him did not adequately clarify that for him. Accordingly, I find that s. 10(b) was not in substance complied with.

[71] I will go on to consider whether Mr. Buggins was given a reasonable opportunity to retain and instruct counsel.

[72] There is no issue that Mr. Buggins was entitled to a reasonable amount of time to allow for Mr. MacDonald to respond to the message that had been left for him. After Mr. MacDonald had spoken with or left a message with the police, the issue of contacting counsel was next raised with Mr. Buggins by Constable Zrymiak. The evidence indicates that during the Constable's two interactions with Mr. Buggins, Mr. Buggins felt ill and said that he did not want to speak with counsel at that time. There is also at least some doubt as to whether Mr. Buggins was still under the influence of alcohol at that time.

[73] Constable Zrymiak's testimony was clear that he understood Mr. Buggins to mean that he did not want to speak with counsel at that particular time. Constable Zrymiak concluded, however, that Mr. Buggins had declined counsel and when he left his message for Mr. MacDonald it was to that effect. That did not accurately reflect the situation, however it would be speculation to say what Mr. MacDonald might have done had he been told that Mr. Buggins was feeling sick and did not wish to speak with him at that particular time.

[74] When asked by Constable Wallace about speaking to counsel, Mr. Buggins said he did not want to speak with anyone. However, as I have already described, during that interview Mr. Buggins was clearly unwell and I accept that he was, as he said in the interview, "not thinking rightly", which is not surprising considering that he had been very intoxicated and was now retching into a garbage can. His refusing to speak with counsel at that time, and indicating that he did not want to speak with anyone, has to be viewed in that context. Mr. Buggins' statement that "I can do that

on a day of my choosing” in reference to speaking with counsel suggests that he still may not have understood the utility of speaking with a lawyer then, in other words, so as to get advice about how to respond to police questioning, and not just to help him deal with court proceedings arising from the murder charge.

[75] Given this situation, with Mr. Buggins sick and hungover, and there being no urgency or danger compelling the obtaining of information from him, in my view it was not reasonable for the police to take the position that by saying he did not want to speak to counsel then, he was declining counsel. In fact, Constable Wallace at one point indicated that he would give Mr. Buggins time to decide whether to contact counsel. In telling Mr. Buggins that he had the right to a reasonable opportunity to contact counsel, Constable Wallace also told him, “I will not take a statement from you or ask you to participate in any process which might provide evidence against you until you are certain about whether you want to exercise this right”. He did not, however, give Mr. Buggins time to recover from being ill and to make the decision whether he wanted to exercise the right, notwithstanding that Mr. Buggins’ response, when asked what the foregoing meant, was that he did not know, that he was “not thinking rightly”. Constable Wallace also refused when Mr. Buggins asked if he could wait until tomorrow.

[76] In these circumstances, I find that the police did not provide Mr. Buggins with a reasonable opportunity. Being given an opportunity to speak with counsel while in the condition he was in during the interview with Constable Wallace and in the time leading up to that does not, in my view, amount to a reasonable opportunity.

[77] The second implementational duty under s. 10(b) is to refrain from eliciting evidence from the detainee until he has had a reasonable opportunity to exercise his right to counsel: *Bartle*. Constable Wallace did not refrain. He went ahead and questioned Mr. Buggins about the events leading to his brother’s death. This was also a breach of Mr. Buggins’ s. 10(b) rights.

[78] Although it is not necessary to deal with the issue of waiver in light of my finding that the police did not give Mr. Buggins a reasonable opportunity to exercise his right to counsel, I will note that Crown counsel argued that Mr. Buggins was not diligent in exercising his right to counsel and that in any event, he waived that right.

[79] As to waiver of the right, Crown counsel relied on Constable Wallace’s statement, “So you have the right to a reasonable opportunity to contact counsel. I

will not take a statement from you or ask you to participate in any process which might provide evidence against you until you are certain about whether you want to exercise this right”. This is often referred to as a “Prosper warning” as set out in *R. v. Prosper* [1994] 3 S.C.R. 236.

[80] The police have an obligation to give a Prosper warning when a detainee who has asserted his right to counsel and is duly diligent in exercising it, having been given a reasonable opportunity to do so, indicates that he has changed his mind and no longer wants legal advice. The point of giving the warning is to ensure that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up: *Prosper*, at page 274.

[81] However, the opportunity that Constable Wallace gave to Mr. Buggins was to call a lawyer right then, when he was feeling ill, asking to lie down, and “not thinking rightly”. In the absence of any urgency, that in itself was not a reasonable opportunity and it was not unreasonable for Mr. Buggins, in those circumstances, to ask that he be given until the next day to contact counsel, a request that Constable Wallace refused. For that reason, despite the Prosper warning, there was no effective waiver by Mr. Buggins of his right to counsel.

The second statement

[82] After Constable Wallace concluded the interview, Mr. Buggins was returned to his cell at approximately 11:17 p.m. At 12:28 a.m. (it was by then February 6), a police officer entered the cell to serve him with a search warrant and he was observed to be awake At 1:43 a.m. and at 2:37 a.m., Mr. Buggins was observed throwing up. After that he was observed sleeping. At approximately 6:40 a.m., he was taken to an interview room for an appearance by telephone before a justice of the peace. He was returned to his cell, but at 7:00 a.m. was moved to another cell because the first had no water and the toilet was not working.

[83] The Agreed Statement of Facts indicates that Mr. Buggins spent about five hours sleeping in the early part of the day on February 6 and about three hours sleeping in the afternoon. At approximately 6:39 p.m. he complained that the floor was cold, that he had no socks and that he had pins in his ankle that were starting to hurt. Constable Wallace got him some socks.

[84] At 7:56 p.m. Constable Woodfine and another officer went to Mr. Buggins' cell. Constable Woodfine testified that it was his intention to follow up on the statement made to Constable Wallace by asking Mr. Buggins to participate in a re-enactment of the events leading to his brother's death. Constable Woodfine was aware that Mr. Buggins had not spoken to a lawyer. Constable Woodfine testified that although there was no urgency to the re-enactment, it seemed opportune to have it done while Mr. Buggins was in Hay River, before leaving for Yellowknife.

[85] On entering the cell, Constable Woodfine observed Mr. Buggins to be sober and coherent, but noted that he had not eaten much of the dinner provided to him. He asked whether Mr. Buggins had had a chance to talk to a lawyer yet, to which Mr. Buggins replied, "No I don't want to talk to a lawyer". When asked whether he would do a re-enactment, he answered in the negative. When asked why, he said that it was the second day that he hadn't slept. He referred to being "over tired". When asked if he understood that he has the right to talk to a lawyer he answered "Yeah". When asked if he understood that he did not need to say anything to the officers and that anything he did say may be used against him, he answered "Yeah" and then added, "We went through it a half, half a dozen time already".

[86] Constable Woodfine then read Mr. Buggins the secondary warning and asked if he understood. Constable Woodfine testified he did not remember the response he received and it is unclear from the audio and videotapes, however Constable Woodfine did go on to explain it in layman's terms. Mr. Buggins responded by saying he was thirsty. Constable Woodfine then asked him to go to the interview room and demonstrate what happened on the night his brother died. Mr. Buggins stated that he had already drawn a map and showed Constable Wallace. He stated that he had to go to sleep. When Constable Woodfine responded that it would take only a few minutes, Mr. Buggins replied, "I'm already up, let's get it over with". Constable Woodfine testified that Mr. Buggins walked out of the cell abruptly at that point.

[87] Constable Woodfine testified that because of Mr. Buggins' abrupt response, he was concerned that Mr. Buggins felt that he had to participate in the re-enactment and that he was not doing so voluntarily. In his testimony, Constable Woodfine said, "I wanted to hear from him that he wanted to proceed with this". He told Mr. Buggins, "I need you to understand one thing though partner, like if you do this it's voluntary okay. Do you understand that?" Mr. Buggins replied "Yeah". Constable Woodfine then asked, "Are you sure you want to do this?", to which Mr.

Buggins replied, "I don't really .." and talked about how he wanted to lay down and how he had not slept. At that point, Constable Woodfine continued to talk about how participation in the re-enactment had to be voluntary. Although he said that it was up to Mr. Buggins, he also pressed Mr. Buggins to say or acknowledge that he wanted to do it. Eventually, Mr. Buggins said, "It's alright. Let's go." and accompanied the police officers to the interview room and answered questions put to him by Constable Woodfine.

Was the second statement voluntary?

[88] I have decided that this second statement should also be excluded on the ground that it has not been proven beyond a reasonable doubt to be voluntary. Constable Woodfine candidly conceded that he was concerned that Mr. Buggins did not understand that he did not have to participate in the re-enactment. Constable Woodfine had watched as Constable Wallace conducted his interview on February 5 and he knew that Mr. Buggins had not spoken to counsel and would also have heard the comment about not having a clue what the police warning meant.

[89] Despite that, Constable Woodfine did not accept Mr. Buggins' statements that he did not want to participate. In my view it does not matter whether Mr. Buggins was truthful when he said lack of sleep was the reason; the point is he said that he did not want to do it. By then Mr. Buggins had been ill as shown in the videotape of the interview with Constable Wallace, he had thrown up a couple of times during the night, officers had come to his cell during the night and early morning hours. He had been sleeping on a mattress on a concrete bench with a light shining down on him, which is not likely to foster sleep, even for someone not ill or suffering the effects of a hangover. For much of the time while he was in custody, Mr. Buggins was in a cell where, for reasons Crown counsel conceded were not in evidence, the water was turned off and the toilet did not work, until he was moved early that morning. While the conditions were not as oppressive as they had been the day before, because Mr. Buggins was not as ill as he was the day before when Constable Wallace interviewed him, in my view there was a lingering atmosphere of oppression.

[90] I also find that by ignoring Mr. Buggins' statements that he did not want to participate in the re-enactment, but at the same time telling him that if he participates, it has to be voluntary, Constable Woodfine was giving him information that was unclear and contradictory. On the one hand, he was telling Mr. Buggins he

wanted him to participate even though Mr. Buggins was saying that he did not want to; on the other hand he was telling Mr. Buggins he had to want to participate, which is not much different from telling him that he had to participate. Considering that Mr. Buggins had already expressed a lack of understanding about the meaning of the police caution and therefore his right to silence and that there was never any real clarification as to whether he understood that he had that right, I find the words said by Constable Woodfine problematic.

[91] Viewing this in the context of what had happened the night before with Constable Wallace, Mr. Buggins would have had no reason to think that if he continued to say he did not want to participate, he would be given that option. So although Constable Woodfine was not aggressive in his interaction with Mr. Buggins, and Mr. Buggins gave in quite quickly, I am not satisfied beyond a reasonable doubt in all the circumstances that his participation in the re-enactment was voluntary and I rule it inadmissible.

Were there breaches of the *Charter* in relation to the second statement?

[92] For the same reasons as set out above, I find a breach of Mr. Buggins' s. 7 *Charter* rights.

[93] Constable Woodfine was appropriately concerned that Mr. Buggins had not spoken with counsel and that he did not want to participate in a re-enactment. Notwithstanding that Mr. Buggins said at the beginning of their interaction that he did not want to speak with a lawyer, I find it surprising that Constable Woodfine did not tell him in plain words that if he was not sure if he wanted to participate, he should get advice from a lawyer about that. It is clear from the videotape that Mr. Buggins is not a sophisticated individual. There was no positive indication in what he said to Constable Woodfine, or any other police officer, that he actually understood his right to silence or how a lawyer might assist him in understanding or insisting on that right. As I have pointed out above, there were indications that he did not understand. It would have been a simple matter of ascertaining whether Mr. Buggins knew what his rights meant, for example by asking him to say in his own words what, if anything, he understood. A good example of that is found in *R. v. Mercredi*, 2010 NWTSC 64, at paragraph [49], where, when asked to explain his rights, the accused stated to the police officer who was questioning him, "I have the right to remain silent, tell you nothing, tell you anything, not to speak to you."

[94] My finding that the statement and re-enactment obtained by Constable Woodfine has not been proven voluntary is enough to dispose of this matter. However, for the reasons set out above I also find that Mr. Buggins has fulfilled the burden of showing that his s. 10(b) rights were breached in that having expressed a lack of understanding as to his right to counsel, he was never provided anything more than a mechanical recitation of that right. Considering the condition that he had been in on the previous day, in my view the police should have started over again and fully advised him of his right to counsel and right to silence, ascertained that he understood by obtaining more than a “yeah” answer, and then given him a reasonable opportunity to consider his position and exercise the right to counsel if he wished to do so. This was not done.

Should the statements be excluded pursuant to s. 24(2) of the *Charter*?

[95] I will deal with both statements together under this heading.

[96] Breach of an individual’s *Charter* rights does not automatically result in exclusion of the evidence. Under s. 24(2) of the *Charter*, the Court is to exclude the evidence if its admission would bring the administration of justice into disrepute. There are three areas of inquiry the Court must consider in making the determination: the seriousness of the conduct that comprises the *Charter* breach, the impact of the breach on the *Charter*-protected interests of the accused, and society’s interest in the adjudication of the case on its merits: *R. v. Grant*, 2009 SCC 32; *R. v. Suberu*, 2009 SCC 33; *R. v. Harrison*, 2009 SCC 34.

[97] Although a statement obtained from an accused in breach of a *Charter* right is not automatically excluded, as is a statement not proven to be voluntary, it is presumptively excluded on the grounds that on balance it would bring the administration of justice into disrepute: *R. v. Grant* at paragraph [91]. There may, however, be circumstances that tip the balance against exclusion.

[98] The first area of inquiry is the seriousness of the infringing conduct. Throughout, the police showed concern about Mr. Buggins having the opportunity to speak to counsel, so this is not a case where the breach of Mr. Buggins’ s. 10(b) rights resulted from a complete disregard of his rights. However, where the police efforts fell short was in ensuring that Mr. Buggins, an obviously unsophisticated individual with little education, understood what his rights were and was in a condition to consider and exercise them. He had been arrested for one of the most

serious charges under our law. To expect that while intoxicated or hanging over a garbage can retching he would be able to make a reasoned decision about obtaining legal advice and answering questions is unrealistic and unfair. Constable Wallace conceded that there was no urgency in interviewing Mr. Buggins and he offered no real explanation for why he proceeded in the face of clear signs that Mr. Buggins was unwell. Similarly, Constable Woodfine had monitored the interview between Mr. Buggins and Constable Wallace, was aware of the condition that Mr. Buggins was in at that time and of indications that he did not understand the police caution and therefore his right to silence. Yet, he did little more to ensure that on February 6, Mr. Buggins, who was in a better condition at that time, was aware of and understood his rights.

[99] In the circumstances, I find that the breaches of s. 7 and 10(b) of the *Charter* are serious and do not displace the presumption in favour of exclusion of the statements.

[100] The second factor is the impact of the breaches on the rights of Mr. Buggins. The statements made were incriminatory. Mr. Buggins had the right not to incriminate himself. He had not had the benefit of legal advice and there are indications in the evidence that he understood neither the purpose of obtaining legal advice, nor his right to silence. The breaches are therefore related in a causal sense to the evidence obtained from him and this, too, supports exclusion of the statements.

[101] The third factor is society's interest in adjudication of the case on its merits. Crown counsel submitted that the evidence is important to the Crown's case, but did not go so far as to say that it is crucial. The Crown's ability to proceed with the case does not depend on the statements and so this factor does not tip the balance in favour of admission of the evidence under the s. 24(2) analysis.

[102] Considering all the factors, in my view the presumption against admission of the statements is not displaced.

[103] In the result, the statements are not admissible, because they were not proven to have been made voluntarily and also because Mr. Buggins' rights under the *Charter* were breached.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
21st day of November 2013

Counsel for the Crown: Mark Lecorre

Counsel for Wilfred Buggins: Caroline Wawzonek

S-1-CR-2011000143

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

WILFRED LAWRENCE BUGGINS

RULING ON *VOIR DIRE* OF
THE HONOURABLE JUSTICE V.A. SCHULER
