IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacLean, 2007 NSPC 74

Date: 2007 June 14
Docket:1710197;1710198
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Dale Robert MacLean

Decision - Charter Application

Judge:	The Honourable Judge John D. Embree
Heard:	May 1, 2007 in Port Hood, Nova Scotia
Date of Decision:	June 14, 2007 (orally) in Port Hawkesbury, Nova Scotia
Release of Decision In Writing:	January 4, 2008
Charges:	Section 253(b) Criminal Code of Canada Section 253(a) Criminal Code of Canada
Counsel:	Robin Archibald, for the Crown William Burchell, for the Defence

Embree, P.C.J. (Orally)

[1] The defendant is charged here with alleged offences under s. 253(b) and 253(a) of the **Criminal Code**. He is alleging that during his apprehension and the investigation that led to evidence being obtained concerning these charges, that his rights under s. 9 and 10(b) and **The Canadian Charter of Rights and Freedoms** were infringed or denied.

[2] Specifically, the defendant suggests that a police officer's hunch is not a sufficient basis for stopping a defendant's motor vehicle and detaining him. The defendant says there were no reasonable grounds to detain him and his detention was arbitrary contrary to s. 9.

[3] The defendant also submits that his s. 10(b) rights were not properly complied with in two ways. First, the informational component was deficient and should have more fully and precisely informed him that he had a right to counsel of his choice. Secondly, that in the implementational component, he was denied the right to counsel of his choice.

[4] The Court heard evidence on a voir dire conducted during the presentation of the Crown's case. The sole voir dire witness was Cst. McKenna. I accept those portions of his testimony related to the issues on this application.

[5] The relevant facts include the following. At approximately 1:45 a.m. on November 11, 2006, Cst. McKenna was engaged in a traffic stop of another motor vehicle on Highway 19 at Strathlorne. His patrol car was stopped with its emergency lights flashing. The officer was preparing a warning ticket when he observed the headlights of a motor vehicle coming around a bend in the road north of his location. As the vehicle came fully into the officer's sight, it slowed down, made a turn into a parking lot, turned, came back on the highway and headed in the opposite direction.

[6] Cst. McKenna re-entered his patrol car, turned and pursued this other vehicle. He was suspicious because it seemed this vehicle was trying to avoid him.

[7] He acknowledged that no laws had been broken by the manner in which the vehicle was being operated. He said he had a hunch based on his previous experience and he acted on that experience.

[8] He conducted a traffic stop of the vehicle, a red Chevy Lumina, at about 1:50 a.m. He recognized the driver and the driver was the defendant.

[9] A series of observations and events followed during which the officer read a roadside screening device demand to the defendant. That test was taken and on the third attempt, a proper breath sample was obtained. The result was a fail and the defendant was arrested for impaired driving.

[10] Cst. McKenna read to the defendant, from a card, the 10(b) **Charter** right information. The officer read the same information from the same card in Court as he read to the defendant that night and what he read was:

> You have the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice by calling, toll-free, 1-866-638-4889 during business hours or 1-800-300-7772 during non-business hours.

[11] Cst. McKenna asked the defendant, “Do you understand?” The defendant replied, “I have the right to an attorney. Right. Yeah.”

[12] The officer then asked the defendant, “Do you wish to call a lawyer now?” And the defendant responded, “I’m not sure. Maybe I should.”

[13] The constable says he took that to mean that the defendant wished to call a lawyer. Cst. McKenna then went on and read the following to the defendant from his card:

> You also have the right to apply to Nova Scotia Legal Aid for free legal representation if you are charged with an offence.

[14] The defendant was asked if he understood and he said yes. Cst. McKenna read the police warning and a breath demand under s. 254(3) to the defendant, both of which the defendant said he understood.

[15] After some steps were taken pertaining to the defendant’s vehicle, Cst. McKenna drove the defendant to the RCMP detachment in his patrol car which was a one kilometer drive. At the detachment, the officer asked the defendant if

he wished to speak to a lawyer and the defendant said yes. The defendant said nothing else on the subject of counsel or contacting counsel. He expressed no preference for any lawyer and did not ask that any particular lawyer be contacted.

[16] Cst. McKenna called duty counsel by dialing the after-hours number on his card. He spoke to duty counsel whom he identified as Cathy Briand. The officer gave duty counsel a brief outline of the relevant circumstances and passed the phone to the defendant. Cst. McKenna left the room, closed the door and gave the defendant privacy. The defendant spoke to duty counsel for 24 minutes.

[17] The constable could observe the defendant through a window in the door and he periodically checked on him to see if he was off the phone. On one of those checks, the officer observed that the defendant was off the phone and the defendant came to the door of the room.

[18] Cst. McKenna, who was a qualified technician, says he then administered the breath tests using a DataMaster C and the defendant provided samples of his breath.

[19] Cst. McKenna acknowledged that the defendant, in these circumstances, has the right to call any lawyer he wishes. Cst. McKenna agreed that he did not specifically tell the defendant that he had the right to a lawyer of his choice using those words. He also agreed that he did not provide the defendant with a telephone book.

[20] Based on all the evidence, I interpret that testimony to mean that Cst. McKenna did not, of his own accord, present the defendant with a telephone book. There is no evidence the defendant requested a telephone book.

[21] I will first address the alleged breach of s. 9.

[22] S. 9 of **The Canadian Charter of Rights and Freedoms** says: "Everyone has the right not to be arbitrarily detained or imprisoned."

[23] The defendant refers to the Supreme Court of Canada judgment in **The Queen** v. **Mann**, [2000] 3 S.C.R. 59. **Mann** dealt with an investigative detention associated with a reported break and entry and police search powers associated with such a detention. While **Mann** is an important decision, the Supreme Court

of Canada has specifically dealt with motor vehicle stops by police officers in the context of s. 9 in other cases which are more relevant authorities for me to apply here.

[24] I refer to **The Queen** v. **Hufsky**, [1988] 1 S.C.R. 621, **The Queen** v. **Ladouceur**, [1990] 1 S.C.R. 1257, **The Queen** v. **Wilson**, [1990] 1 S.C.R. 1291.

[25] These judgments were considered and applied in this province by our Court of Appeal in **The Queen** v. **MacLennan,** [1995] N.S.J. No. 77.

[26] Based on various provisions contained in the Nova Scotia **Motor Vehicle Act,** the Court of Appeal in **MacLennan** concluded that **Hufsky, Ladouceur** and **Wilson** were all binding authorities in this province.

[27] Mr. Justice Freeman, speaking for the Court of Appeal, held at paragraph 47 in **MacLennan** as follows:

> The conclusion the Supreme Court of Canada has consistently reached in the cases referred to above is that police are authorized, at least under the Alberta and Ontario legislation, to make random stops for the purposes of inspecting

> documents and with a view to detecting drinking drivers. These may be made within or without the context of publicized anti drunken driving campaigns, such as the Ontario R.I.D.E. program. Random stops are infringements of the s. 9 **Charter** right to be free of arbitrary detention, but they are saved by s. 1 of the **Charter**. If police do not go beyond what is reasonably justified for purposes of highway safety, s. 8 of the **Charter** is not infringed. I am satisfied that the Alberta and Ontario legislation is similar in material respects to that of Nova Scotia. Therefore the conclusions of the Supreme Court of Canada in the relevant cases have equal application in this province.

[28] He also said at Paragraph 61, and I quote:

> Police in Nova Scotia are justified in stopping vehicles at random, independently of any articulable cause or publicized enforcement program, for the purpose of controlling traffic on the highway by inspecting licensing, registration and insurance documents, the mechanical condition of vehicles, and to detect impaired drivers. Random stops are arbitrary detentions which infringe s. 9 of the **Charter** but which are saved by (sic) s. 1.

[29] Cst. McKenna needed no reasonable grounds to conduct the traffic stop of the defendant that he did. Even if the stop could be said to be random, it was still authorized by law and not contrary to the **Charter**.

[30] Based on the authority of **Wilson**, I would also say that the stopping of the defendant was not random. In **Wilson**, the police officer had no reason to believe the driver was doing anything unlawful. He stopped the vehicle there because it was a block away from a hotel, the hotel bars had just closed, there were three men

in the front seat, the vehicle had out-of-province license plates and he did not recognize the vehicle or the occupants.

[31] Justice Cory for himself and four other Justices, said that these facts might not be grounds for stopping a vehicle in Edmonton or Toronto but could be considered in a rural community. Where the police can offer grounds for a stop that are reasonable and can be clearly expressed, the stop is not random.

[32] The explanation of Cst. McKenna here is just as valid as that advanced in **Wilson**.

[33] I will now consider the alleged breach of s. 10(b).

[34] S. 10(b) of **The Canadian Charter of Rights and Freedoms** states: "Everyone has the right, on arrest or detention, to retain and instruct counsel without delay and to be informed of that right."

[35] I am mindful of the principles and requirements established by the leading authorities, namely: **The Queen** v. **Brydges**, [1990] 1 S.C.R. 190, **The Queen** v.

Bartle, [1994] 3 S.C.R. 173, **The Queen** v. **Prosper**, [1994] 3 S.C.R. 236, **The Queen** v. **Tremblay**, [1987] 2 S.C.R. 435.

[36] The Supreme Court of Canada has said that the right to counsel includes the right to counsel of one's choice. See **The Queen** v. **Ross**, [1989] 1 S.C.R. 3.

[37] The **Charter** advice given to the defendant does not include a clause stating: "You have the right to call any lawyer you wish." However, that information is still conveyed by the wording used in the **Charter** advice provided to the defendant here.

[38] The Nova Scotia Court of Appeal judgment in **The Queen** v. **Grouse**, [2004] N.S.J. No. 346 directly addresses this issue. See paragraph 8 and following.

[39] The Court in **Grouse** says at paragraph 24, and I quote:

> Moreover, the addition of a more explicit reference to counsel of choice as advocated by the appellant would add nothing to the information conveyed to the detainee. The right to retain and instruct counsel means, at least, the right to hire

> a lawyer of the detainee's choice. This is the understanding of the right on which the cases defining the informational requirements have been based.

[40] The informational component of the defendant's 10(b) **Charter** rights, as required by law, was fully and properly provided to him.

[41] I will now consider the implementational aspect of his 10(b) rights.

[42] There seems to be a growing body of jurisprudence on the subject of exercising the right to counsel of choice, particularly originating in jurisdictions where the police exercise control on a detainee's ability to use a phone to call counsel.

[43] The decided cases do not all reach the same result. A significant proportion of this case law deals with cases where a detainee's choice of counsel cannot be contacted and explains the responsibilities of the police and a detainee when this happens.

[44] While the circumstances before me do not involve counsel of choice being unavailable, some assistance can be found in such cases because contacting duty

counsel, which did occur here, is frequently an available alternative to contacting counsel of first choice.

[45] I have considered the decisions cited by counsel along with others. I refer to four Ontario Court of Appeal judgments where access to counsel of choice has been an issue: **The Queen** v. **Littleford,** [2001] O.J. No. 2437, **The Queen** v. **Richfield,** [2003] O.J. No. 3230, **The Queen** v. **Clarke**, [2005] O.J. No. 1825, **The Queen** v. **Zoghaib**, [2006] O.J. No. 1023, upholding the Summary Conviction Appeal Court at [2005] O.J. No. 5947.

[46] The facts in **Clarke** and **Zoghaib** closely mirror those before me. In particular, in each of those cases the defendant was informed of the right to counsel and decided he or she wished to speak to a lawyer. The defendant did not suggest the name of any counsel. The police officer contacted duty counsel. The defendant spoke to duty counsel without complaint. The defendant provided samples of breath.

[47] In both **Clarke** and **Zoghaib** it was held that no breach of s. 10(b) had occurred.

[48] A helpful review of recent case law on right to counsel of choice was conducted by Justice Ferguson of the Ontario Superior Court of Justice in **The Queen** v. **Blackett,** [2006] O.J. No. 2999 at paragraphs 3 through 25. I also refer to the Ontario Superior Court of Justice judgment in **The Queen** v. **Pickard,** [2006] O.J. No. 4123.

[49] Another case with very similar facts was **The Queen** v. **Atkinson,** [2005] B.C.J. No. 1422. There, the Provincial Court Judge says at paragraph 8, the following, and I quote:

> In order to effectively implement **The Charter of Rights** informational component, there is an onus upon the accused to express a desire to speak to a lawyer of his choice, other than Legal Aid duty counsel, if that is the case. Mr. Atkinson did not, at any time, say he wished to contact any particular lawyer. Unless he says something about so doing versus discussing the matter with freely available Legal Aid duty counsel 24 hours a day, he cannot later claim that his rights to counsel of his choice were somehow abridged or short circuited as a result of the officer, in good faith, placing a phone call on his behalf to the Legal Aid duty counsel.

[50] Another relevant British Columbia judgment comes from the British Columbia Court of Appeal in **The Queen** v. **Laird,** [2004] B.C.J. No. 307, upholding the Summary Conviction Appeal Court at [2003] B.C.J. No. 124. In

slightly different, but comparable facts to those before me, the Court reaches a result consistent with the Ontario Court of Appeal authorities.

[51] The following are significant factors from the evidence here.

1. The defendant was properly informed of his right to retain and instruct counsel. The wording of the 10(b) advice given to the defendant is different from that used in some other provinces but our Court of Appeal has said this advice is valid and sufficient. I consider it is the equivalent of 10(b) information provided in other provinces.

2. There is nothing in the evidence to suggest the defendant did not understand his 10(b) Charter rights as read to him. His counsel submits that the defendant did not know that he had the right to a lawyer of his choice. There is no direct evidence of what the defendant knew or did not know on that subject. Considering the evidence I do have, including evidence of what was said and done by the defendant on November 11, 2006, that submission is not supported by the evidence and I do not accept it. The defendant did not request to speak to a particular lawyer and he gave no indication that he had a preference about whom he spoke to.

3. Cst. McKenna called duty counsel in the defendant's presence. The defendant then spoke to duty counsel, uninterrupted and in private, for an extended period. When he was finished the call, the defendant came to the door of the room.

4. The defendant said or did nothing to indicate he was dissatisfied with his conversation with duty counsel. He did not ask to speak to another lawyer or seek any information, such as from a telephone book, that could assist him in contacting another lawyer.

5. The defendant provided samples of his breath for analysis.

[52] Considering the evidence, including these factors, and applying the authorities I have mentioned, I conclude the following.

[53] The defendant was not deprived of his right to counsel of choice. There is no indication he had a counsel of choice. The right to counsel must be exercised with reasonable diligence by the detainee. This includes the right to counsel of choice. Any wish to speak to a particular lawyer must be asserted with reasonable diligence.

[54] The defendant accepted the opportunity to speak to duty counsel without complaint and spoke to duty counsel for as long as he wished. The defendant's right to counsel was not interfered with in any way by Cst. McKenna.

[55] Cst. McKenna acted reasonably. There is no indication that he acted other than in good faith.

[56] The question is not whether this was the ideal way for Cst. McKenna to proceed, nor is it whether some other course was also feasible.

[57] The defendant was given a reasonable opportunity to retain and instruct counsel, including any counsel of his choice.

[58] No breach of s. 9 or 10(b) is established here. Consequently, this application is dismissed.

Dated at Antigonish, County of Antigonish, Province of Nova Scotia, this 4th day of January, 2008.

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The Honourable Judge John D. Embree