IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Mensah, 2014 NSPC 51

Date: July 11, 2014

Docket: 2651298 - 2651300

Registry: Halifax

Between:

Her Majesty the Queen

v.

Tremayne Mensah

VOIR DIRE DECISION – RIGHT TO COUNSEL

Judge:	The Honourable Judge Anne S. Derrick
Heard:	June 30 and July 3, 2014
Decision:	July 11, 2014
Charges:	sections 268(1), 264.1(1)(a) x 4 of the *Criminal Code*
Counsel:	Susan MacKay, for the Crown
	Brandon Rolle, for Tremayne Mensah

By the Court:

Introduction

[1] Tremayne Mensah is charged with the aggravated assault of Liam Johnson on April 12, 2013 and with uttering threats against three other young men. He was arrested at home on the night of April 14 and taken into police custody. While at the police station, he gave a statement to Sgt. Perry Astephen. Shortly before Mr. Mensah was questioned by Sgt. Astephen, Noel Fellows, a friend who was an articled clerk in a criminal law practice, arrived at the police station and asked to speak to him. Sgt. Astephen refused his request because Mr. Fellows was merely an articled clerk and not a lawyer. Sgt. Astephen started questioning Mr. Mensah after Mr. Mensah had spoken with duty counsel on the telephone, a call that was arranged at Sgt. Astephen's direction.

[2] The evidence indicates that Mr. Mensah was advised, prior to being questioned by Sgt. Astephen, not to speak to the police. This advice was provided by Noel Fellows when Mr. Mensah spoke with him by telephone just before his arrest, reiterated by duty counsel, and communicated to Mr. Mensah by his mother as a message from Mr. Fellows whom she had seen when he arrived at the police station.

[3] The Crown wishes to enter Mr. Mensah's statement in evidence at his trial. Mr. Mensah seeks to have his statement excluded on the basis that his section 10(b) *Charter* rights were breached. The *voir dire* proceeded as a blended *voir dire*: the Crown bears the onus of proving that Mr. Mensah's statement was voluntary and the Defence bears the onus of establishing a *Charter* breach under section 10(b) and the exclusion of the statement under section 24(2).

[4] I will address the voluntariness issue after I have dealt with the section 10(b) issue.

[5] For Mr. Mensah's *Charter* application to succeed he must establish that he was denied his right to counsel when Sgt. Astephen refused to allow Noel Fellows to speak to him.

Mr. Mensah's Arrest

[6] Before Mr. Mensah surrendered to the police, he spoke with Mr. Fellows on the telephone. He testified that he asked Mr. Fellows if he could come and talk to him about being arrested. Mr. Mensah's Affidavit is more specific. It says he asked Mr. Fellows to attend the police station to assist him. *(Exhibit 3, Affidavit of Tremayne Mensah, May 1, 2014, paragraph 8)*

[7] It was Mr. Mensah's evidence that Mr. Fellows told him to remain calm, not to say anything, go to the police station and he would be arriving soon. Mr. Mensah testified that Mr. Fellows made it "very clear" he was coming to the police station. Indeed that is what happened.

[8] When Mr. Mensah was arrested, the arresting officer, Cst. Patrick Lennon, read Mr. Mensah the standard recital for right to counsel from his police notebook. This included Cst. Lennon telling Mr. Mensah, "I am arresting you for assault causing bodily harm and threats. You have the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice from duty counsel by making free telephone calls…" Cst. Lennon provided the relevant telephone numbers for duty counsel during business and non-business hours. He then asked Mr. Mensah if he understood and Mr. Mensah said, "Yes." Cst. Lennon asked Mr. Mensah: "Do you wish to call a lawyer?" Mr. Mensah again said, "Yes."

[9] Cst. Lennon then cautioned Mr. Mensah that he did not have to say anything but that anything he did say may be used as evidence. Mr. Mensah indicated he understood.

At the Police Station Prior to being Questioned by Sgt. Astephen

[10] Three police officers were present when Mr. Mensah was arrested at his residence on Waterloo Street and taken into custody. Cst. Lennon was one of two junior officers; Cst. Andrew Gordon was the other. Their supervisor was Sgt. Perry Astephen. On Mr. Mensah's arrival at the police station, Sgt. Astephen directed that he be given access to a phone call with duty counsel. Cst. Lennon dialed the call and Mr. Mensah was given the phone and left alone to have a private conversation. He spoke to duty counsel, Damian Penny, at 10:06 p.m. This was 20 minutes after he had been read his rights by Cst. Lennon at 9:46 p.m..

[11] The three police officers – Sgt. Astephen, Cst. Lennon, and Cst. Gordon - and Mr. Mensah do not agree on whether he told them prior to the police interview that he wanted to speak to Mr. Fellows. Mr. Mensah maintains he made numerous references to wanting to speak to Mr. Fellows. The police officers either deny that this happened or do not recall. For example, Sgt. Astephen testified that Mr. Mensah did not tell him directly that he wanted to speak to Noel Fellows and does not recall if Mr. Mensah may have mentioned Mr. Fellows' name when Cst. Lennon was about to read him his rights at Waterloo Street. Cst. Lennon does not recall Noel Fellows' name being mentioned by Mr. Mensah that night and it was Cst. Gordon's evidence that he first heard Mr. Fellows' name when he was monitoring Mr. Mensah's police interview.

[12] In Mr. Mensah's direct testimony he said that when he was arrested he asked to speak to Mr. Fellows, making this request of Sgt. Astephen and one of the two junior officers. However on cross-examination Mr. Mensah said he did not speak to the officers at Waterloo Street. It was his evidence that he can clearly remember who he spoke to at the police station, Sgt. Astephen and the shorter of the two junior officers. Cst. Gordon is the shorter officer. Cst. Gordon testified that he had no conversation with Mr. Mensah at any time.

[13] Mr. Mensah initially testified that he had spoken to Sgt. Astephen in the interview room about wanting to talk to Noel Fellows. The interview room where Mr. Mensah had been taken was being continuously video and audio-recorded. That video *(Exhibit 5)* shows that Mr. Fellows' name was never mentioned in the interview room to Sgt. Astephen by Mr. Mensah.

[14] Mr. Mensah then testified that he is sure he spoke with Sgt. Astephen before the interview about wanting to see Mr. Fellows. If that was so, it is difficult to understand why Mr. Mensah never mentioned Mr. Fellows to Sgt. Astephen when they were in the interview room together. It was Sgt. Astephen's evidence that he was never alone with Mr. Mensah.

[15] Mr. Mensah testified on direct examination that in response to his requests at the police station to speak with Noel Fellows, Sgt. Astephen retrieved Mr. Fellows' phone number from Mr. Mensah's cell phone and tried twice to call him, both times getting his "answering machine". Mr. Mensah testified that after Sgt.

Astephen's second failed attempt to reach Mr. Fellows, he told Mr. Mensah he had to speak to duty counsel.

[16] This evidence is inconsistent with Mr. Mensah's own Affidavit in which he said: "I was allowed to call Noel once and I got his voice mail…" *(Exhibit 3, Affidavit of Tremayne Mensah, paragraph 14)*

[17] In his Affidavit Mr. Mensah recalled asking Sgt. Astephen if "we could wait a few minutes and try Noel again. Sgt. Astephen said we could not wait and urged me to speak with Legal Aid duty counsel…" *(Exhibit 3, Affidavit of Tremayne Mensah, paragraph 15)*

[18] On cross-examination, Mr. Mensah testified that it was the taller of the two junior officers who made the unsuccessful calls to Mr. Fellows that preceded Mr. Mensah speaking to duty counsel. In other words, Mr. Mensah testified that it was not Sgt. Astephen but Cst. Lennon who tried to put him in contact with Mr. Fellows.

[19] Cst. Lennon and Sgt. Astephen both testified that they did not make any calls to Noel Fellows from the police station. Cst. Gordon testified he did not make any calls either. Mr. Mensah's evidence is in conflict with the evidence of the police officers and it is internally inconsistent. For reasons I am about to explain, I find the only reasonable inference is that it was Mr. Mensah who made an unsuccessful call to Mr. Fellows from the police station. I draw this inference notwithstanding Mr. Mensah's testimony that he did not make any additional calls to Mr. Fellows after the call when they spoke just before his arrest.

[20] Mr. Fellows' Affidavit indicates that when he was on his way to the police station, he missed a call from a blocked number. *(Exhibit 2, Affidavit of Noel Fellows, April 30, 2014, paragraph 8)* Cst. Lennon testified that the phone provided to Mr. Mensah for his duty counsel call was a phone from which outgoing calls could be made. I find it reasonable to infer that a phone call from such a phone at the police station would appear as a blocked number. As I have noted, Mr. Mensah's Affidavit indicates he tried to call Mr. Fellows "and got his voice mail." *(Exhibit 3, Affidavit of Tremayne Mensah, paragraph 14)*

[21] I find that Mr. Mensah's testimony about what happened while he was in the custody of the police is unreliable. I am unable to accept his claim that he made numerous requests to speak to Mr. Fellows. While I accept that the police officers themselves may not recall all the details of what was a routine and uneventful arrest, Mr. Mensah's inconsistent evidence leads me to conclude that his recollection cannot be relied upon.

[22] Cst. Lennon testified that he would have allowed Mr. Mensah to speak to another lawyer, in addition to duty counsel, had he asked to. It was Cst. Lennon's evidence that Mr. Mensah did not, either directly or in his presence, make a request to speak to anyone else after the duty counsel call.

[23] There is no record of how long Mr. Mensah spoke with duty counsel. He says it was "a short, brief call". Cst. Lennon estimated that the call took "approximately 15 minutes." Whatever the length of the call, which started at 10:06 p.m., not long afterwards, at 10:36 p.m., Sgt. Astephen began to interview Mr. Mensah with his mother present.

Noel Fellows Arrives at the Police Station

[24] Before starting his interview of Mr. Mensah, Sgt. Astephen encountered Noel Fellows at the police station. It was quickly established that Mr. Fellows was an articled clerk. Sgt. Astephen testified this drove his decision not to allow Mr. Fellows to speak with Mr. Mensah. He told Mr. Fellows that as he was an articled clerk and not a lawyer, he would not be permitted to see Mr. Mensah.

[25] During the discussion between Sgt. Astephen and Mr. Fellows, Mr. Fellows' principal, Kevin Burke, was mentioned. Sgt. Astephen does not recall the "specific conversation" with Mr. Fellows and made no notes of it. In Sgt. Astephen's words, Mr. Fellows' request to see Mr. Mensah was "a dead issue" in his mind. Sgt. Astephen regarded Mr. Fellows as irrelevant. He was not going to be permitted to speak to Mr. Mensah and that was it. Sgt. Astephen considered the "repercussions" of Mr. Fellows, who was not a lawyer, speaking to Mr. Mensah and giving him poor advice.

[26] Sgt. Astephen testified that he would have permitted Kevin Burke to speak to Mr. Mensah if Mr. Burke had showed up, because Mr. Burke is a lawyer,

although in responding to a question from the Crown, he could not remember if he had told Mr. Fellows this.

[27] Mr. Fellows does recall Sgt. Astephen raising this in their discussion. He says in his Affidavit that he "was informed that Mr. Burke could come and speak to Tremayne but that I was not allowed to." *(Exhibit 3, Affidavit of Noel Fellows, paragraph 13)*

[28] I accept Mr. Fellows's recollection that Mr. Burke's possible involvement was mentioned by Sgt. Astephen. It makes sense that Sgt. Astephen, who was alive to Mr. Mensah's right to counsel, would have said this to Mr. Fellows and it is consistent with what Sgt. Astephen testified he would have allowed if Mr. Burke had arrived at the police station.

[29] It was Sgt. Astephen's evidence that he has interrupted interviews when lawyers have arrived unexpectedly at the police station. He has stopped the interview to permit the detainee to speak to his lawyer and then resumed the interview once that has occurred.

[30] Mr. Fellows did not contact Mr. Burke at any time on the night of April 14. He testified that it was late on a Sunday night and he expected Mr. Burke would be asleep. Furthermore Mr. Burke lived outside the city and a trip in and back would have been one hour each way.

[31] Mr. Fellows waited awhile at the police station after he was unsuccessful in his efforts to speak with Mr. Mensah. He left after being told that Mr. Mensah was being charged. Sgt. Astephen informed him as he was leaving that Mr. Mensah had given a statement. *(Exhibit 3, Affidavit of Noel Fellows, paragraph17)*

Mr. Mensah Meets with his Mother in the Police Interview Room

[32] After speaking with Mr. Fellows, Sgt. Astephen took Mr. Mensah's mother upstairs to see her son in the police interview room. It was percolating in Sgt. Astephen's mind that Ms. Mensah might be an asset to him in the interview although he had not decided whether he was going to let her sit in. He left Ms. Mensah and Mr. Mensah alone for about four minutes. Before he stepped out of the room, Sgt. Astephen indicated that "everything is videotaped right there"

pointing to the camera, and "audiotaped right here" pointing to a microphone on the wall.

[33] During their four minutes alone, Ms. Mensah told her son that Mr. Fellows was at the police station. Ms. Mensah can be heard to explain to Mr Mensah: "…because he doesn't have his full lawyer's thing they wouldn't let him talk to you." She also said to him: "So Noel is downstairs. And he just told me to tell you not to say anything." *(Exhibit 5)*

Issues

[34] Mr. Mensah's *Charter* motion raises the following issues:

(a) Is an articled clerk "counsel" for the purposes of the right to counsel under the *Charter*?

(b) Having refused to allow Mr. Fellows to see Mr. Mensah, was there more Sgt. Astephen should have done to implement Mr. Mensah's section 10(b) right to counsel?

(c) Should Sgt. Astephen have permitted Mr. Fellows to speak to Mr. Mensah for the purpose of helping to facilitate contact with a fully qualified lawyer?

Analysis

[35] There are two components to the right to counsel, an informational component and an implementational component. (*R. v. Willier, [2010] S.C.J. No. 37, paragraph 30*) In Mr. Mensah's case, the informational component is not in issue.

[36] Mr. Mensah does not dispute that the informational component of his right to counsel was satisfied by Cst. Lennon reading him his rights on arrest. He contends that his section 10(b) rights were violated because prior to questioning him, Sgt. Astephen denied him the right to consult with Noel Fellows, his "counsel" of choice.

Is an articled clerk "counsel" for the purposes of the right to counsel under the Charter?

[37] Section 10(b) of the *Charter* provides that a detainee has "the right to retain and instruct counsel without delay." "Counsel", although not defined in the *Charter*, is defined in section 2 of the *Criminal Code* as "a barrister and solicitor, in respect of matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings."

[38] Section 10(b) accords a detainee a reasonable opportunity to contact counsel of choice prior to being questioned by police. (*R. v. Willier, [2010] S.C.J. No. 37, paragraph 35*) "Where the detainee opts to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles him or her to a reasonable opportunity to contact chosen counsel." (*R. v. McCrimmon, [2010] S.C.J. No. 36, paragraph 17*)

[39] Mr. Mensah testified that Noel Fellows was his "counsel" of choice. He had called Mr. Fellows before surrendering himself to the police and understood Mr. Fellows would come to the police station to assist him.

[40] In his Affidavit, Mr. Mensah stated: "Noel Fellows was the only person that I wanted to speak to on April 14, 2013 after being detained by police. I trusted that he would act in my best interests in either providing sound legal advice or if necessary, referring me to another lawyer." *(Exhibit 3, Affidavit of Tremayne Mensah, paragraph19)*

[41] Mr. Mensah testified about his understanding of Mr. Fellows' qualifications: he had "passed the Bar" and was "doing a bit of articling" and "just waiting to be sworn-in as a full-time lawyer." Mr. Mensah thought Mr. Fellows' passing the Bar meant he was "an official lawyer" and could help him in his case. He believed Mr. Fellows was a lawyer working under Mr. Burke. He thought all that was left for Mr. Fellows was "just a ceremony he had to go through." He testified he did not know the difference between an articled clerk and being a lawyer. "I thought it was the same thing."

[42] Noel Fellows was called to the Nova Scotia Bar in October 2013. In April 2013 he had been articling for approximately seven months at Burke Thompson with Kevin Burke, Q.C. as his principal. Mr. Fellows wrote the Bar Admissions exam in January 2013 and by April 2013 knew that he had passed.

[43] Mr. Fellows' work with Burke Thompson was mainly criminal. He attended court, reviewed files, met with clients, and did research and writing. There were a certain number of criminal and personal injury files he had carriage of, files that he worked on himself. He would attend court and sometimes meet with clients on his own in these less complex matters. In more complex matters, he worked with Mr. Burke whom he met with on a weekly basis.

[44] Although Mr. Fellows had been friends with Mr. Mensah and his family for 15 years, he went to the police station on April 14 to offer assistance to Mr. Mensah that included advice. He was also prepared to refer Mr. Mensah to Mr. Burke or another experienced criminal lawyer at Burke Thompson. *(Exhibit 3, Affidavit of Noel Fellows, paragraph16)* As the evidence indicates, he did not do so.

The Role and Status of the Articled Clerk

[45] The regulations under the *Legal Profession Act* S.N.S. 2004, c. 28 require a prospective articled clerk to provide the Executive Director with "an Articling Agreement in the prescribed form executed by the applicant and an approved principal…" *(section 3.3.1(j))* To be admitted to the Nova Scotia Bar, a typical articled clerk must work under an Articling Agreement for twelve months, including the Bar Admission Course, and pass the Bar Admission Course. (*section 3.4.1(a) and (b), regulations of the Legal Profession Act*)

[46] The requirements for a principal include: have an approved Articling Plan and "demonstrate a commitment and ability to provide articled clerks with an articling experience in which the educational component is of paramount importance [and] demonstrate a commitment and ability to provide supervision and feedback to articled clerks." (*section 3.5.2(i) and (j), regulations of the Legal Profession Act*)

[47] The Nova Scotia Barristers' Society Articling and Admission Guidelines, provided by the Defence for this *voir dire*, indicate that an articled clerk is "encouraged to ask Principals to allow them to be present at interviews with clients and the taking of instructions, giving of opinions, preparing witnesses for trial and so on." (*Obligations and Responsibilities of Articled Clerks, 3.1 General*)

[48] The Articling and Admission Guidelines also discuss the Articling Agreement, a document that "sets out the covenants of each party over the articling term and must be approved by the Executive Director. The Articling Agreement does not preclude any arrangements between the Principal and the Articled Clerk as to employment or such other terms as the parties may agree to in writing." (*NSBS, Articling and Admission Guidelines, 1.5 Articling Agreement*)

[49] The Articling Agreement between Kevin Burke, Q.C. and Noel Fellows was not put into evidence nor was Mr. Fellows asked about it.

[50] The Affidavit of Darrel Pink, the Executive Director of the Nova Scotia Barristers' Society was admitted into evidence by consent. Mr. Pink's Affidavit echoes what is found in the *Legal Profession Act* S.N.S. 2004, c.28, as amended, and its regulations. Mr. Pink notes that under section 16 of the *Act*, articled clerks are exempted from unauthorized practice. They are however not permitted to act on their own in legal matters. Mr. Pink states the following: "Articled clerks have no authority to take on matters on their own and conduct them without being under the direction of their principals. They are not personally insured but obtain their protection regarding professional liability under the principal's insurance, under whose direction and supervision they must be acting at all times*." (Exhibit 1, Affidavit of Darrel Pink, June 26, 2014, paragraph 6)*

[51] Mr. Pink also indicates: "Articled clerks are not the equivalent of lawyers…articling is meant to be primarily an educational experience and…articled clerks at all times are to be properly supervised." (*Affidavit of Darrel Pink, paragraphs 7 and 8*)

[52] There has been little judicial consideration of the status of articled clerks in the context of a detainee exercising his or her *Charter* right to counsel. The British Columbia Supreme Court in *R. v. Bhander* held that a detainee's section 10(b) right

to "counsel" can include within its ambit, the right to speak to an articled clerk. Dickson, J. made these comments:

> In my view, an articling clerk will generally be able to provide legal advice for purposes of s. 10(b) of the Charter. This is so because an articling student *acts under the direction and supervision of his or her principal in providing advice to a detained client.* The student's principal meets the definition of "counsel" in s. 2 of the Criminal Code. In many cases, the two operate together as a fully qualified Canadian legal team. (*R. v. Bhander, [2010] B.C.J. No. 1743, paragraph 68*) (emphasis added)

The Purpose of the Right to Counsel

[53] The purpose of section 10(b) is "to ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy." Specifically, the right to counsel "is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination." *(R. v. Suberu, [2009] S.C.J. No. 33, paragraph 40)*

[54] The *Charter* right to counsel is a "gateway" right. It serves to ensure that detainees are aware of their right to remain silent in the face of police questioning. "The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among them which is his right to silence." *(R. v. Hebert, [1990] S.C.J. No. 64, paragraph 52)*

Police Questioning and the Role of Counsel

[55] While not dispositive in this case and more from a policy perspective, I want to make the point that there are obvious limitations to what most articled clerks can bring to bear in the service of the objectives of section 10(b). Although in dissent, LeBel, J. and Fish, J. in *R. v. Sinclair, [2010] S.C.J. No. 35*, made some evocative points about police interrogation and the role of counsel:

> **166** Upon arrest, the suspect will be subject to skilled and persistent interrogation, as occurred in this case. Confronted by bits and pieces of incriminating "evidence", conjectural or real, the detainee may be wrongly persuaded that maintaining his or her right of silence is a futile endeavour: that the advice to remain silent originally provided by counsel is now unsound. Through ignorance of the consequences, the detainee may feel bound to make an incriminatory statement to which the police are not by law entitled. In what may seem counterintuitive to the detainee without legal training, it is often better to remain silent in the face of the "evidence" proffered, leaving it to the court to determine its cogency and admissibility, and forego the inevitable temptation to end the interrogation by providing the inculpatory statement sought by the interrogators.
>
> **167** Access to counsel is therefore of critical importance at this stage to ensure, insofar as possible, that the detainee's constitutional rights are respected and provide the sense of security that legal representation is intended to afford…In these circumstances, counsel's advice is not simply a matter of reiterating the detainee's right to silence, but also to explain *why* and *how* that right should be, and can be, effectively exercised. In other words, the lawyer not only tells the detainee not to speak but, perhaps more importantly, *why* he ought not to.

[56] I find nothing in the majority judgment in *Sinclair* that is in conflict with the LeBel/Fish view of police interrogations. Although far less descriptively, the majority acknowledged that there is more to the right to counsel than simply advising a detainee about his or her right to remain silent: "The s. 10(b) right to consult and retain counsel and be advised of that right supports the broader s. 7 right to silence…An important purpose of legal advice is to inform the accused about his right to choose whether to cooperate with the police investigation and how to exercise it [the right to silence.]" *(Sinclair, paragraph 29)*

[57] Advice provided pursuant to a detainee exercising his or her section 10(b) rights should, in serious cases, include not only advice about right to silence and the right not to cooperate with police but also warnings on "stratagems that the police might employ in an effort to obtain information…" *(R. v. Ashmore, [2011] B.C.J. No. 75 (C.A.), paragraph 65; Sinclair, paragraph 29)*

[58] So, while an articled clerk who has completed seven months' of articles with a very experienced criminal practitioner would likely have the capability to provide *some* advice to a detainee about an imminent police interrogation, there are distinct advantages to that advice coming from a lawyer practicing criminal law where that option is available. As noted by Binnie, J. in *Sinclair*, also in dissent, but on this point, not in conflict with the majority judgment: "The choice whether or not to cooperate with the investigation is up to the detainee – not the lawyer – but it should be an informed choice." *(Sinclair, paragraph 87)*

Was Mr. Fellows' "Counsel" for the Purposes of Mr. Mensah's section 10(b) Rights?

[59] In this case, the evidence indicates that, at the very least, Mr. Fellows knew Mr. Mensah had the right to remain silence. Mr. Mensah's evidence confirms he had informed him about this right before he was arrested. After that phone call, Mr. Fellows went to the police station where Mr. Mensah had been taken following his arrest. Was Mr. Fellows' status that of "counsel"?

[60] In my view, it was not. What was missing from Mr. Fellows' involvement in Mr. Mensah's situation was some measure of supervision and direction. I find that direction and supervision by an approved principal is an essential feature of articling. Without it, Mr. Fellows was nothing more than a better informed friend. His role could not be a "counsel" role in the absence of any involvement on the part of his principal.

[61] Although there is no explicit description in the *Legal Profession Act*, its regulations, or the Nova Scotia Barristers' Society *Articling and Admission Guidelines* of what supervision by a principal entails, I find, at a minimum, the principal must be aware of what legal work the articled clerk is doing. An articled clerk is not to act autonomously. Not only must the principal discharge a

supervisory role in relation to any work being done by the clerk, the principal is ultimately liable if the articled clerk makes a negligent mistake.

[62] The court in *Bhander* saw the principal-articled clerk relationship as one involving "direction and supervision" with the principal and clerk "operating together". There was no "operating together" by Mr. Fellows and Mr. Burke in this case as there was in *Bhander* where the articled clerk consulted with his principal when the police refused him access to the client. (*Bhander, paragraph 37*) And that is another important difference: Mr. Bhander was a client of the firm that employed the articled clerk whereas Mr. Mensah was not a client of Burke Thompson.

[63] Mr. Mensah makes the point that Sgt. Astephen's refusal to permit Mr. Fellows to see him prevented the possible development of a client relationship with Burke Thompson. Mr. Rolle, on Mr. Mensah's behalf, submitted that we don't know what may have happened if Mr. Fellows had been permitted to speak to Mr. Mensah. He described Mr. Fellows as "the perfect person" to facilitate getting Mr. Mensah a lawyer.

[64] Mr. Fellows may have been well-placed to facilitate Mr. Mensah speaking with a lawyer. But he didn't. What I know from the evidence is that when confronted with Sgt. Astephen's position, Mr. Fellows did not provide Ms. Mensah, who was going upstairs to see her son, with the name of a lawyer to call nor did he call a lawyer for Mr. Mensah. Mr. Fellows said in his Affidavit that had he been allowed to speak to Mr. Mensah, he would have referred him to either Mr. Burke or Mr. Craggs, both experienced criminal lawyers at Burke Thompson. That did not happen.

[65] I am not criticizing Mr. Fellows. The issue is not whether Mr. Fellows should have done more. The issue is whether Sgt. Astephen breached Mr. Mensah's section 10(b) rights. The responsibilities in a right-to-counsel analysis are borne by the police and by the detainee.

[66] There may be circumstances where preventing a detainee from speaking to an articled clerk could constitute a breach of section 10(b). However, it would not be appropriate for me to conjure up access-to-justice hypotheticals that might

produce such an outcome. I must determine Mr. Mensah's *Charter* application on the specific facts of his case. I find that Mr. Fellows was acting completely autonomously from his principal, Mr. Burke, in relation to a detainee who was not a client of the firm. In these circumstances he was not discharging the role of "counsel" for the purposes of Mr. Mensah's section 10(b) rights. I find that Sgt. Astephen's decision to prohibit Mr. Fellows from speaking with Mr. Mensah prior to the interview was not a violation of his obligation to facilitate Mr. Mensah's right to counsel of choice.

> *Having refused to allow Mr. Fellows to see Mr. Mensah, was there more Sgt. Astephen should have done to implement Mr. Mensah's section 10(b) right to counsel?*

[67] Sgt. Astephen tasked his junior officers, Csts. Lennon and Gordon, to ensure that Mr. Mensah was able to speak to duty counsel by telephone from the police station. Mr. Mensah had a private telephone conversation with duty counsel once Cst. Lennon made the call. How he treated that call and what use he made of it was Mr. Mensah's choice to make. *(Willier, paragraphs 41 and 42)*

[68] There is no evidence that the police put any pressure on Mr. Mensah to conclude the duty counsel call. I infer from Mr. Mensah's testimony that he took the amount of time talking to duty counsel that suited him. I understood from Mr. Mensah's testimony that he did not absorb the advice of duty counsel because he was waiting to speak to Mr. Fellows. It was Mr. Mensah's evidence that when he spoke to duty counsel he "refrained" from taking advice from him, telling him he knew that Noel Fellows was en route and that is who he wanted to speak to, "for counsel."

[69] Mr. Mensah's call with duty counsel started at 10:06 p.m. By 10:43 p.m. he was alone in the interview room with his mother. She told him the police were not going to permit him to speak with Mr. Fellows. He therefore knew this when Sgt. Astephen returned at 10:47 p.m. to start questioning him. He said nothing to Sgt. Astephen about not being able to speak with Mr. Fellows and did not ask to talk to another lawyer. If he did not know who he might call, and there is no evidence if he did or not, he could have asked that Mr. Fellows be permitted to pass along a

name. Mr. Mensah knew that Mr. Fellows was still at the police station. He did not make any such request to Sgt. Astephen.

[70] There is an obligation on a detainee to be "reasonably diligent" in the exercise of his section 10(b) rights. *(R. v. Tremblay, [1987] S.C.J. No. 59, paragraph 9; R. v. Brydges, [1990] S.C.J. No. 8, paragraph 24; R. v. Ross, [1989] S.C.J. No. 2, paragraph 13)*

[71] A detainee bears an onus to act diligently in exercising his or her right to counsel once the police have facilitated "a reasonable opportunity for the detainee to contact counsel." *(Willier, paragraph 33*) Reasonable diligence is required so that the investigation cannot be delayed "needlessly and with impunity." The right to counsel "must be exercised in a way that is reconcilable with the needs of society." …" *(R. v. Smith, [1989] S.C.J. No. 89, paragraph 33)*

[72] As the Supreme Court of Canada has said in *Ross*:

> …accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer. *(paragraph 13)*

[73] Moments after his mother was brought into the interview room by Sgt. Astephen, Mr. Mensah knew he would not be speaking with Mr. Fellows. He did not then ask to call duty counsel back or speak to another lawyer. From 10:47 p.m. to the end of the interview at approximately 11:08 p.m., Mr. Mensah never once expressed any interest in talking to another lawyer or made any such request. I find Sgt. Astephen was under no obligation in the circumstances to do more than he did to implement Mr. Mensah's section 10(b) rights.

[74] I will say that I think it would have been better if Sgt. Astephen had expressly asked Mr. Mensah before he started the interview if he was satisfied with the advice he received from duty counsel and understood he would not be speaking with Mr. Fellows. All he said to Mr. Mensah was the following when he started the interview: "…So you don't have to say anything. You talked to legal counsel and

they gave you advice. I don't even know…want to know what advice they gave you. Right? But you received a certain amount of advice."

[75] To be fair to Sgt. Astephen, the majority judgment of the Supreme Court of Canada in *Willier* states that: "…unless a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence the investigative interview." *(Willier, paragraph 42)* However, as the reported cases reveal, before they begin an interrogation police officers often ask detainees if they are satisfied with the advice received. I assume this is done because it is seen as a "best practice." That being said, Sgt. Astephen not making this inquiry of Mr. Mensah does not constitute a breach of section 10(b).

Should Sgt. Astephen have permitted Mr. Fellows to speak to Mr. Mensah for the purpose of helping to facilitate contact with a fully qualified lawyer?

[76] A detainee is entitled to exercise his or her section 10(b) *Charter* rights through the use of a third party intermediary who is not a lawyer, *(R. v. Tremblay, [1987] S.C.J. No. 59; R. v. Oester, [1989] A.J. No. 648 (Q.B.); R. v. Menard, [2010] B.C.J. No. 1979 (S.C.), paragraph 46)* but those are not the facts here.

[77] As I have noted, once Mr. Mensah knew he was not going to be speaking to Mr. Fellows he did not ask to have Mr. Fellows contact a lawyer for him. Sgt. Astephen told Mr. Fellows that Mr. Burke would be permitted to speak to Mr. Mensah. Beyond that, Sgt. Astephen was not responsible for sifting through what other role Mr. Fellows might have been able to play in assisting Mr. Mensah. Different circumstances involving a highly vulnerable, unsophisticated detainee might merit a different assessment of the options for facilitating the exercise of section 10(b) rights, but on the facts of this case, Mr. Mensah was fully capable of raising with Sgt. Astephen the alternative of Mr. Fellows being permitted to contact or suggest a lawyer for Mr. Mensah to speak with before the interview commenced. Mr. Mensah's affidavit confirms that he understood Mr. Fellows' could have referred him to another lawyer. *(Exhibit 3, Affidavit of Tremayne Mensah, paragraph19)*

[78] For the reasons I have just given, I find there was no breach of Mr. Mensah's *Charter* right to counsel.

[79] There is a final issue I will address. It is whether, if I am wrong in finding no section 10(b) breach, Mr. Mensah's statement to Sgt. Astephen should be excluded from evidence.

Section 24(2)

[80] The purpose of section 24(2) is

> …not to punish police misconduct or compensate an accused. Its purpose is to maintain the rule of law and the values of the *Charter*. Its focus is long-term, prospective and societal. The concern is more on the impact over time of admitting evidence obtained in violation of guaranteed rights and less with the particular case. That is the approach which must inform the court when *Charter*-guaranteed rights are violated, and it considers whether evidence should be excluded because its admission would bring the administration of justice into disrepute. (*R. v. Christie, [2013] N.B.J. 428 (C.A.*), *paragraph 53*)

[81] A section 24(2) analysis requires the assessment and balancing of "the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-guaranteed interests of the accused, and (3) society's interest in the adjudication of the case on its merits." (*R. v. Grant, [2009] S.C.J. No. 32, paragraph 71*) Considering all the circumstances, I would have to determine whether admitting the evidence will bring the administration of justice into disrepute.

The Seriousness of the Charter-infringing State Conduct

[82] As my reasons have explained, the crux of Mr. Mensah's *Charter* application was Sgt. Astephen's refusal to let Mr. Fellows speak to him because Mr. Fellows was only an articled clerk and had yet to be admitted to the Bar. In

most cases, the denial of a right to counsel would be a very serious matter. It is difficult to imagine it constituting a minor or technical breach or being in the nature of an "understandable mistake". (*R. v. Harrison, [2009] S.C.J. No. 34, paragraph 22*)

[83] However in this case, Sgt. Astephen was confronted by a situation where the person wanting to speak with the detainee was not obviously "counsel" for section 10(b) purposes. Mr. Fellows was not what Sgt. Astephen understood the *Charter* contemplated: a fully qualified lawyer. It was reasonable for Sgt. Astephen to believe that he had attended to Mr. Mensah's section 10(b) rights by ensuring he was able to speak to duty counsel. After speaking to duty counsel, Mr. Mensah did not indicate to Sgt. Astephen at any time that he felt his right to obtain advice from counsel had not been satisfied. During the entire time Mr. Mensah was in the interview room, the only reference he made to Mr. Fellows in Sgt. Astephen's presence was after he had given a statement. He then said to his mother, "Tell Noel to go because I don't want him waiting here for two hours." Two hours was the approximate length of time Sgt. Astephen had advised it was going to take for Mr. Mensah to be processed for release. *(Exhibit 5)*

[84] Where the police have conducted themselves "in good faith and without deliberate regard for or ignorance of Charter rights…the seriousness of a breach may be attenuated." *(R. v. Aucoin, [2012] S.C.J. No. 66, paragraph 50)*

The Impact of the Breach on the Charter-guaranteed Interests of the Accused

[85] The Supreme Court of Canada has held: "The more serious the impact on the accused's guaranteed interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute." (*Grant, paragraph 76*)

[86] In this case however, the evidence does not indicate that Mr. Mensah's inability to speak to Mr. Fellows constituted a "serious incursion" on his right to silence or his choice whether or not to speak to Sgt. Astephen. *(Grant, paragraph 77)* Mr. Mensah had received advice from duty counsel. I have no evidence

concerning what advice Mr. Fellows would have given Mr. Mensah that he had not already received, including from Mr. Fellows during their pre-arrest telephone call. Although it was Mr. Mensah's evidence that he did not understand he had the right to remain silent - "I was saying that to myself [that he had the right to not say anything to police] but I didn't know if I really I understood it" – I cannot accept that claim in light of what Mr. Mensah said before Sgt. Astephen began the interview. He told Sgt. Astephen, "I am going to hold my statement until I take further legal counsel. I was told by my lawyer." Once Sgt. Astephen left the room, Mr. Mensah told his mother: "They can't interrogate me if I don't want to give a statement. And my lawyer told me not to say anything. So I am going to withhold my statement." *(Exhibit 5)*

[87] Mr. Mensah showed a very keen appreciation of his right to remain silent and choose not to speak to police. The fact that Mr. Mensah did not "withhold" his statement was not, I find, as a result of failing to understand his right to remain silent. It was because Sgt. Astephen's tactics – low key and ostensibly empathetic – worked to get Mr. Mensah talking. Mr. Mensah chose to offer his version of events, accepting Sgt. Astephen's invitation to do so: "I know you want to tell me the story, I know you do. And I want to corroborate it, because I believe it to be true." *(Exhibit 5)*

[88] It was Mr. Mensah's evidence that he did not take in duty counsel's advice, advice to remain silent, because he was expecting to speak to Mr. Fellows. I find however that he did retain the advice, he just ultimately did not follow it. As I have noted, Mr. Mensah referred to his "lawyer" telling him not to say anything. Although Mr. Mensah's testimony was that this was a reference to Mr. Fellows, I find it was not. On the videotape *(Exhibit 5)* he referred to Mr. Fellows as "Noel". The exchange with Sgt. Astephen is revealing:

> Sgt. Astephen: You already spoke to legal counsel? (Obviously Sgt. Astephen means the duty counsel call.)
>
> Mr. Mensah: Yeah. I am going to hold my statement until I take further legal counsel. I was told by my lawyer.

[89] Right after that Mr. Mensah's mother tells him: "Noel is here" but Mr. Mensah does not make any comment about Mr. Fellows being his "lawyer" and does not request to see him or talk to him, then or at any time while he is in the interview room.

Society's Interest in the Adjudication of the Case on its Merits

[90] There is a broad societal interest in a criminal case being adjudicated on its merits, especially when the charges are as serious as aggravated assault and threats. (*Grant, paragraph 79*) In a section 24(2) analysis I would have to consider not only the negative impact of the admission of the evidence on the repute of the administration of justice, but also "the impact of *failing to admit* the evidence." (*Grant, paragraph 79, emphasis in the original*) The Supreme Court of Canada commented on this result in *Grant*: "…the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution." (*Grant, paragraph 83*)

Balancing the Factors to be Considered in the Section 24(2) Analysis

[91] The fundamental question I would have to address in a section 24(2) analysis is whether the admission of Mr. Mensah's statement would bring the administration of justice into disrepute. (*R. v. Harrison, [2009] S.C.J. No. 34, paragraph 21*) I just reviewed the three strands of inquiry that are relevant to determining this question.

[92] The rights enjoyed by Mr. Mensah that section 10(b) protects are fundamental rights, but on the facts in this case, if Sgt. Astephen's actions constituted a *Charter* violation, the nature of that violation and its impact on Mr. Mensah's *Charter*-guaranteed interests do not favour exclusion of the evidence. The significance of Mr. Mensah's statement to the Crown's case favours admission. I would have to weigh in the balance the evidence on each line of inquiry "to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute." The Supreme Court of Canada held in *Harrison* that, "In all cases, it is the long-term

repute of the administration of justice that must be assessed." (*Harrison, paragraph 36*)

[93] I find that the exclusion of Mr. Mensah's statement in this case would undermine the long-term repute of the administration of justice. Exclusion of this evidence would undermine the public's confidence in the trial's fairness. *(Grant, paragraph 81)* Had I found that Sgt. Astephen breached Mr. Mensah's section 10(b) rights by refusing to let Mr. Fellows speak to him, I would not have excluded the statement from evidence at Mr. Mensah's trial.

Voluntariness of the Statement

[94] Mr. Mensah did not concede that his statement was voluntary although he made no submissions on the issue other than to say he felt he had been "emotionally coerced" into talking by Sgt. Astephen whom he says was "misleading" and "not honest."

[95] The Crown bears the onus of proving that Mr. Mensah's statement to Sgt. Astephen was voluntary. I have reviewed the law that governs the admissibility of statements, notably *R. v. Oickle, [2000] S.C.J. No. 38* and other relevant jurisprudence from the Supreme Court of Canada, and I have found nothing in Sgt. Astephen's conduct of the interview with Mr. Mensah that raises any doubt about the voluntariness of his statement. I find the Crown has established beyond a reasonable doubt that Mr. Mensah's statement was voluntary and the product of an operating mind. Sgt. Astephen said nothing that could be remotely construed as a promise or a threat. Mr. Mensah was not questioned in circumstances that were oppressive. He underwent a relatively short interview during which Sgt. Astephen adopted a conversational approach and tone. And while Sgt. Astephen used effective tactics, including having Mr. Mensah's mother present - with her consent and Mr. Mensah's acquiescence - he employed no trickery in eliciting Mr. Mensah's version of events.

[96] For the foregoing reasons, Mr. Mensah's statement to Sgt. Astephen will be admitted as evidence at his trial.