

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Atwell*, 2023 NSSC 347

Date: 20230731

Docket: 522167

Registry: Kentville

Between:

His Majesty the King

v.

Darroll Murray Atwell

Decision: s.10(b) of the *Canadian Charter of Rights and Freedoms*

Judge: The Honourable Justice Gail L. Gatchalian

Heard: June 13, 15 and 16, 2023 in Kentville, Nova Scotia and
July 12, 2023, in Windsor, Nova Scotia

Oral Decision: July 31, 2023, in Kentville, Nova Scotia

Written Decision: October 31, 2023 in Kentville, Nova Scotia

Counsel: Peter Craig K.C. and Shauna MacDonald K.C., for the
Crown
Scott Brownell, for the Applicant

By the Court:

Introduction

[1] This is an application by the accused, Darroll Murray Atwell, to exclude certain statements he gave to the police from evidence at trial because he says that the statements were obtained in a manner that violated his right to counsel under s.10(b) of the *Canadian Charter of Rights and Freedoms*.

[2] Mr. Atwell was arrested on May 13, 2021. He was charged with, among other offences, accessory after the fact to the murder of Robert Campbell and criminal negligence causing the death of Mr. Campbell. He was also detained, but not charged, in relation to an investigation into the murder of Mr. Campbell.

RCMP Constable Brad Williams was one of the arresting officers. Cst. Williams informed Mr. Atwell of his right to retain and instruct counsel without delay. Mr. Atwell was taken to the RCMP detachment in New Minas. Cst. Williams facilitated Mr. Atwell's calls with counsel. Mr. Atwell first spoke with his lawyer of choice, Bernard Conway, on the phone. However, Mr. Conway was unable to assist Mr. Atwell, and advised him to contact duty counsel. Mr. Atwell then received telephone legal advice from Nick Hoehne, duty counsel with Nova Scotia Legal Aid. Mr. Atwell was later subjected to a police interview conducted by

RCMP Corporal Gerrard Rose-Berthiaume. Approximately six hours into the interview, Mr. Atwell gave an incriminating statement, agreed to participate in a re-enactment, and provided a “*KGB*” statement.

[3] Shortly after the police interview of Mr. Atwell began, Kenneth Greer, duty counsel with Legal Aid, called Cst. Williams. Mr. Greer said that he had been contacted by Mr. Hoehne. Mr. Greer offered to provide legal advice to Mr. Atwell in person. Mr. Greer referred to Legal Aid’s policy of providing in-person advice in cases involving wrongful deaths. Cst. Williams received direction from the investigative team only to call Mr. Greer back if there was a change in jeopardy. Mr. Atwell was not told that Mr. Greer had called and offered to provide him with in-person advice pursuant to Legal Aid’s policy.

[4] Mr. Atwell acknowledges that the advice he received from Mr. Hoehne was not deficient. However, he says that there were indications during the ensuing police interview that, objectively, raise questions about his understanding of the legal advice. Mr. Atwell says that this was a change in circumstances that entitled him to a further consultation with legal counsel. Mr. Atwell says that the failure of the police to provide him with a further opportunity to consult legal counsel, and to inform him that legal counsel had called and was willing to provide him with in-person advice, violated his rights under s.10(b) of the *Charter*.

[5] Specifically, Mr. Atwell says that, during the police interview, it was objectively observable that:

1. He mistakenly thought that he could have a lawyer present with him during police questioning.
2. He did not understand the detention and bail process, and
3. He was unaware that another Legal Aid duty counsel was available to provide him with further legal advice, either in person or on the phone and that it was the policy of Legal Aid to provide in-person legal advice in cases involving a wrongful death.

[6] Mr. Atwell relies on the following statements made during the police interview to assert that there was reason to question his understanding of the initial legal advice:

1. Mr. Atwell stated at least 22 times that he was waiting for a lawyer and that he wanted a lawyer present.
2. Cpl. Rose-Berthiaume told Mr. Atwell on numerous occasions that he did not have the right to have a lawyer with him during questioning.
3. When Cpl. Rose-Berthiaume confirmed with Mr. Atwell that he had a chance to speak with a lawyer, Mr. Atwell said, "I can't just speak to counsel five minutes before coming into the room and him just tell me not to say anything."
4. Mr. Atwell stated, "I don't know the process either but that is what I have to wait for. I know at some point in time in a proceeding like this when a guy gets charged with these types of charges, there's got to be a time I can talk to a lawyer."
5. Mr. Atwell indicated that his consultation with duty counsel was more focussed on bail.

6. Mr. Atwell indicated that his consultation with duty counsel had nothing to do with the case.
7. Mr. Atwell made statements that indicated he did not understand the detention and bail process.
8. Mr. Atwell stated that he had ADHD.

[7] Mr. Atwell also says that the police undermined the initial legal advice he received from Mr. Hoehne, triggering a right to further consultation with legal counsel, because:

1. the police did not tell him that there was another lawyer willing to provide him with advice, on the phone or in person, and
2. Cpl. Rose-Berthiaume told him a fabricated story, the purpose of which was to show the benefits of cooperating with the police.

[8] Mr. Atwell says that the statements he gave to the police on May 13, 2021, were therefore obtained in a manner that infringed his rights under the *Charter*. He asks that the court exclude those statements from the evidence at his trial.

[9] At the hearing of this application, Mr. Atwell called the following three witnesses:

1. Mr. Conway
2. Mr. Hoehne
3. Mr. Greer

[10] The Crown called the following three witnesses:

1. RCMP Staff Sergeant Gregory Vardy, who oversaw the interrogation of Mr. Atwell as Team Lead.
2. Cst. Williams
3. Cpl. Rose-Berthiame

[11] The parties tendered, on consent, copies of the audio and video recordings of Mr. Atwell's arrest and statements. They did not play the entirety of the recordings during the hearing. I have reviewed them in full in preparing these reasons.

[12] The onus is on Mr. Atwell to establish, on a balance of probabilities, that his rights under s.10(b) were violated. In order to determine whether Mr. Atwell had a right under s.10(b) to a further consultation with legal counsel, I will consider:

1. The purpose of s. 10(b) and when the right to further legal advice is triggered under that section.
2. The arrest of Mr. Atwell.
3. Mr. Atwell's consultation with Mr. Conway.
4. Mr. Atwell's consultation with Mr. Hoehne.
5. Mr. Atwell's comments to Cst. Williams about his consultation with Mr. Hoehne.
6. Mr. Greer's telephone conversation with Cst. Williams.

7. Comments by Mr. Atwell and Cpl. Rose-Berthiaume during the police interview.
8. Was there reason to question Mr. Atwell's understanding of the initial legal advice or did the conduct of the police undermine that advice?

The Purpose of s.10(b) and the Right to Further Legal Advice

[13] Section 10(b) of the *Charter* provides that everyone has the right, on arrest or detention, to retain and instruct counsel without delay and to be informed of that right.

[14] The purpose of s.10(b) is “to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation”: *R. v. Sinclair*, 2010 SCC 35 at para.24. More particularly, the purpose of s.10(b) is “to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights”: *Sinclair* at para.26. In the context of a custodial interrogation, s.10(b) seeks to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation [they are] facing:” *Sinclair*, para.32.

[15] Section 10(b) fulfils its purpose in two ways. First, it requires that the police advise detainees of their right to counsel. This is the informational component. Second, it requires the police to allow detainees to exercise their right to consult

counsel. This is the implementational component. See *Sinclair* at para.27. Implied in the second component is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel: *ibid.*

[16] Normally, the s.10(b) implementational component right is achieved by a single consultation at the time of detention or shortly thereafter: *Sinclair* at para.47. Section 10(b) does not require the presence of defence counsel throughout a custodial interrogation: *Sinclair* at paras. 2 and 34.

[17] However, the police must provide a detainee with a reasonable opportunity to consult counsel *again* if a change in circumstances or a new development makes this necessary to fulfill s.10(b)'s purpose of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so: *Sinclair* at para.53. Three non-exhaustive categories of “exceptional” circumstances trigger this duty:

1. The police invite the accused to take part in non-routine procedures that counsel would not consider at the time of the initial consultation.
2. There is a change in jeopardy that could affect the adequacy of the advice received during the initial consultation.
3. There is reason to question the detainee's understanding of his rights or reason to believe that the first information provided was deficient.

Sinclair at paras.2 and 49-52 and 57; *R. v. Dussault*, 2022 SCC 16 at para.34

[18] The change of circumstances must be objectively observable in order to trigger a right to a further consultation with counsel: *Sinclair* at para.55.

[19] Mr. Atwell relies on the third recognized category of changed circumstances.

[20] It is assumed that the initial legal advice received is sufficient and correct in relation to how the detainee should exercise his or her rights in the context of the police investigation: *Sinclair* at para.57. The failure to provide an additional opportunity to consult counsel constitutes a breach of s.10(b) “only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct”: *ibid*.

[21] The inquiry under this third category “is into *circumstances*, stated *broadly*,” requiring “an examination not merely of whether the detainee consulted legal counsel, but of the entire context in which the police-detainee interaction occurred,” “including the circumstances of the detainee”: *R. v. Lafrance*, 2022 SCC 32 at para.75 [emphasis in text]. Therefore, “an inquiry strictly into whether a detainee understood that he or she could remain silent is not sufficient”: *ibid*.

[22] The issue is not merely whether the detainee was advised, but rather whether the detainee may not have understood the legal advice he or she received,

including whether and how to exercise the right to silence, which includes “the benefits and drawbacks of cooperating” and “strategies to resist cooperation” where that is the detainee’s choice”: *ibid.* The exercise by accused persons of their s.10(b) right depends on access to legal advice regarding the particular situation they are facing, conveyed in a manner that they understand: *Sinclair* at para.32; *Lafrance* at para.76. It is only by ensuring that detainees obtain legal advice that accounts for the particular situation they face, conveyed in a manner they can understand, that s.10(b) can meaningfully redress the imbalance of power between the state (whose agents know the detainee’s rights) and the detainee (who may not): *Lafrance* at para.77.

[23] Another example of the third category of “changed circumstances” - reason to believe that the first information provided was deficient – is if police undermine the legal advice that the detainee has received: *Dussault, supra* at para.35, citing *Sinclair, supra* at para.52. Police can undermine legal advice by undermining confidence in the lawyer who provided the advice: *Dussault, supra* at para.37, citing *R. v. Burlingham*, [1995] 2 S.C.R. 206 at para.14.

[24] Where police conduct has the *effect* of undermining the legal advice given to a detainee, and where it is objectively observable that this has occurred, the right to

a second consultation arises. There is no need to prove that the police conduct was intended to have this effect: *Dussault, supra* at para.41.

[25] Mr. Atwell relies, in part, on the decisions of the Supreme Court of Canada in *Lafrance* and *Dussault*, as well as the Quebec Court of Appeal decision in *R. v. Stevens*, 2016 QCCA 1707, to support his position that the police violated his rights under s.10(b) when they failed to provide Mr. Atwell with a further opportunity to consult a lawyer and failed to disclose that Mr. Greer had called.

[26] Mr. Lafrance was arrested for murder. He had a chance to speak to duty counsel before he was questioned by police: *Lafrance, supra* at para.16. When he was asked by the police whether he understood the advice, he answered “yes”: at para.16. Several hours into the interview, Mr. Lafrance asked to speak with his father because that was his “only chance of getting a lawyer,” and said that Legal Aid told him to get a lawyer before he continued talking: at para.17. The majority in *Lafrance* held that these statements were “clear signs that either the legal advice he obtained was incorrect, or he did not understand how his s.10(b) rights applied to his current circumstances”: at para.84. The majority held that Mr. Lafrance “was obviously ignorant as to his rights,” and that there was “ample reason here to question [the accused’s] understanding of his s.10(b) right, bringing his circumstances within the third *Sinclair* category”: at paras.85-86.

[27] In *Dussault, supra* the Court held that, in the “unique circumstances” of that case, the police were required to provide Mr. Dussault with a further opportunity to consult counsel before questioning him: at para.3. Mr. Dussault had only received partial legal advice from a lawyer on the phone: at para.7. The lawyer secured an agreement from the police that they would hold off on questioning him until the lawyer had a chance to meet him in person: at para.8. The lawyer advised Mr. Dussault that he was coming to the station, that he would be placed in a cell, and not to speak to the police: at para.9. The police, however, began questioning Mr. Dussault, and failed to tell him that the lawyer had, in fact, showed up at the station seeking to speak with him, but that the police had not allowed him to do so: at paras.13-16. There were objective signs that the police conduct had undermined the legal advice received by Mr. Dussault: at paras.46-56. The Court found that this was one of those “rare cases” in which the police were obligated to provide a detainee with a second opportunity to consult counsel: at para.29.

[28] In *Stevens*, the investigative officer was aware that, after Mr. Stevens made his initial call to counsel, he was provided with the name of a criminal lawyer who he should call: at paras 51-52. The officer told Mr. Stevens that he was only entitled to one call, and failed to inform Mr. Stevens that the named criminal lawyer had contacted the police detachment and left messages for Mr. Stevens: at

paras.53-55. The Court held that the police must permit the effective implementation of the constitutional right to counsel by providing a reasonable opportunity to exercise this right: at para.6. When police officers have clear indications that the solicitor-client communication has not been sufficiently established, they may not refuse to fulfill their duty under the pretext that the accused is entitled to only one phone call: at para.6. In addition, police officers cannot knowingly deprive detainees of the information necessary to obtain access to legal counsel: at para.6. In Mr. Stevens' case, the Court concluded that there was a clear indication that Mr. Stevens had not yet had a reasonable opportunity to exercise his right to counsel: at para.78. Worse, the police officer misled Mr. Stevens by allowing him to believe that he was only entitled to one phone call, and by concealing the messages from the criminal lawyer: at paras.65 and 68.

The Arrest of Mr. Atwell

[29] Mr. Atwell was arrested at approximately 10:02 a.m. on May 13, 2021. Cst.

Williams promptly informed Mr. Atwell of the charges against him, which were:

1. Accessory after the fact to the murder of Robert Campbell, contrary to s.240 of the *Criminal Code*;
2. Criminal negligence causing death of Robert Campbell by use of firearm, contrary to s.220(a) of the *Criminal Code*;

3. Break and enter and committing the offence of robbery, contrary to s.348(1)(b) of the *Criminal Code*;
4. Home invasion, aggravating circumstances, contrary to s.348.1 of the *Criminal Code*;
5. Indignity to the dead body of Robert Campbell, contrary to s.182(b) of the *Criminal Code*; and
6. Arson, contrary to s.434 of the *Criminal Code*.

[30] Cst. Williams told Mr. Atwell that he was also being detained in relation to the investigation into the murder of Robert Campbell.

[31] Cst. Williams promptly informed Mr. Atwell of his right to retain and instruct counsel without delay. Mr. Atwell expressed his wish to speak to his counsel of choice, Mr. Conway.

Mr. Atwell's Consultation with Mr. Conway

[32] Once at the New Minas RCMP detachment, Cst. Williams arranged for Mr. Atwell to speak to Mr. Conway. Mr. Atwell spoke to Mr. Conway on the phone. Mr. Conway told Mr. Atwell that he could not assist him due to a recent personal tragedy. Mr. Conway advised Mr. Atwell to consult duty counsel.

[33] Mr. Atwell called Mr. Conway as a witness in this hearing. Mr. Conway testified that he and Mr. Atwell had a previous long-standing relationship. They

went to the same junior high school, and have known each other for many years.

Mr. Conway had represented Mr. Atwell in relation to previous criminal charges.

Mr. Conway testified that, during their conversation on May 13, 2021, he told Mr.

Atwell to “shut the fuck up.” Mr. Conway testified that he used that language with

Mr. Atwell so that there was no ambiguity about his advice that he not say

anything to the police. As a result, he had no reason to believe that Mr. Atwell did

not understand his advice.

Mr. Atwell’s Consultation with Mr. Hoehne

[34] When Mr. Atwell told Cst. Williams that Mr. Conway could not assist him

and that he wished to speak to duty counsel, Cst. Williams contacted the Nova

Scotia Legal Aid duty counsel telephone line. Cst. Williams was transferred to Mr.

Hoehne, who was located in Truro. Cst. Williams informed Mr. Hoehne of the

charges against Mr. Atwell, and that he was also being detained in relation to the

investigation into the murder of Mr. Campbell.

[35] Mr. Atwell then spoke to Mr. Hoehne on the phone for approximately 14

minutes, from approximately 11:26 a.m. to 11:40 a.m.

[36] Mr. Atwell called Mr. Hoehne as a witness in this hearing. Mr. Hoehne

testified that he advised Mr. Atwell of his right to silence, and advised him not to

make a statement. Mr. Hoehne told Mr. Atwell that it was likely that the police will want to take a statement. He told Mr. Atwell that there are no magic words, and to simply say that he is not going to give a statement. Mr. Hoehne gave Mr. Atwell advice with respect to the charges, the procedure, his rights, in particular his right to silence, and explained his right to silence fully. He advised Mr. Atwell that the police had to take him to court within 24 hours, and that the police would probably oppose bail. Mr. Hoehne had no concerns about Mr. Atwell's ability to understand the conversation. Mr. Atwell expressed no misunderstanding whatsoever.

[37] During the call, the seriousness of the charges became more evident to Mr. Hoehne. Therefore, after the call, Mr. Hoehne contacted Mr. Greer to inform him that there was someone in custody who would possibly be looking for help with a bail hearing.

[38] Mr. Atwell has no issue with the legal advice provided to him by Mr. Hoehne. He concedes that the legal advice was not deficient. He concedes that Mr. Hoehne did not mention the possibility of in-person legal advice.

Mr. Atwell's Comments to Cst. Williams about his Call with Mr. Hoehne

[39] After Mr. Atwell's phone consultation with Mr. Hoehne, Cst. Williams had the following conversation with Mr. Atwell:

BW: You all done, bud? Alright, just grab a seat in there, Darroll, for a minute.

DA: What's going on with things, so are you going to [inaudible] ... I was just talking to him and *he was saying you guys have a certain amount of time before you have to* ... [inaudible]

BW: Yeah, *we have a 24 hour period [inaudible] before we have to bring you to court*, it doesn't necessarily make it so ...

[BW appears to step out, short pause]

BW: ... I just want to make sure *that was a lawyer that you talked to that you got advice from?*

DA: [inaudible]

BW: Ok, alright.

... [long pause]

BW: I actually have a list of questions they want me to ask you, along the same lines as the question I just asked you, Darroll. *Was that your lawyer that you talked to?*

DA: *Yes.*

BW: I don't want to know what you talked about and I don't want to know the details, but *did you receive legal advice?*

DA: *Yes.*

BW: *Did you understand the advice that you received?*

DA: *Yes.*

BW: Ok, we'll try to get some answers for you in a few minutes, ok?

... [long pause]

BW: *Darroll, when you talked to your lawyer, did they say they were coming down here or they were talking to you on the phone?*

DA: *Yeah, [inaudible] down here because of COVID.*

BW: ... because of COVID, I'm just trying to make sure ...

DA: *This guy's going to get a hold of somebody in the District*

BW: Yeah

DA: *Legal Aid*

BW: OK

- DA: *Well, just because, I don't understand why, like that's all of it, and then they're going to get a hold of you, I just said to him, as long as I know somebody out there's trying to do something. Or I could also call my dad and get him to get start looking up good attorneys.*
- BW: *Are you satisfied with the advice you got from your lawyer?*
- DA: *Well, I just wanted to, I, yeah, pretty much.*
- BW: *I just need to know yes or no.*
- DA: *Well I don't know what's going, I need to know what's going on, like what my next steps are so he said he was getting a hold of somebody to get a hold of you guys.*
- BW: *Did he say, to call us?*
- DA: *I don't know, I thought you guys if you guys make a decision that you're going to detain me, right?*
- BW: *You are under arrest.*
- DA: *Yeah, but I mean, so but, or remand right, instead of like you lay the charges because they're significant charges you said like, you might not be saying ok well here I'm not a flight risk, I gotta farm and a business and I got people who work for me and a woman at home so like charge me and release me, or charge me and detain me which therefore then I have to go to court.*
- BW: *It's my understanding that due to the severity of the charges that I as a police officer can't release you a judge has to right?*
- DA: *Ok. So there, that's where we're at.*
- BW: *It's my understanding, I mean, I'm not in a position to give you advice, like I'm not a lawyer.*
- DA: *No, no, I'm just saying.*
- BW: *I'm a cop.*
- DA: *he was waiting for that info, I think.*
- BW: *OK, my impression ... were you satisfied with the advice you got from the lawyer?*
- DA: *For now.*

[emphasis added]

[40] Mr. Atwell concedes that, by itself, the above conversation between Mr.

Atwell and Cst. Williams is not a clear observable sign that Mr. Atwell did not

understand the initial legal advice. However, Mr. Atwell says that his ambiguous answers as to whether he was satisfied with the legal advice (“yeah, pretty much” and “for now”) should have caused the police officers to pay attention to ensure Mr. Atwell was satisfied with the legal advice he received.

Call from Duty Counsel Kenneth Greer

[41] Unbeknownst to Mr. Atwell, Mr. Greer called the detachment soon after police questioning began. Mr. Greer was located at the Legal Aid office in Kentville, much closer to the New Minas RCMP detachment than Mr. Hoehne’s office. Mr. Greer spoke to Cst. Williams.

[42] Mr. Atwell called Mr. Greer as a witness in this hearing. Mr. Greer believed that he received an email from Mr. Hoehne at approximately 12:00 p.m. on May 13, 2021. His understanding, which turned out to be incorrect, was that Mr. Atwell had not yet received legal advice. Mr. Greer obtained Cst. Williams’ number, and spoke to Cst. Williams on the phone. Mr. Greer told Cst. Williams that he would drop everything and go to the detachment. Mr. Greer told Cst. Williams that the Legal Aid policy of in-person advice applied, even though Mr. Atwell had not yet been charged with the wrongful death, but was only being detained. Cst. Williams told him that he had no problem with him coming in, but he would talk to his

supervisors. Mr. Greer was expecting a call back from the police. He did not receive a call back.

[43] On cross-examination, Mr. Greer agreed that, in the email he received from Mr. Hoehne, Mr. Hoehne wrote, “I just completed a duty counsel call with Mr. Atwell, who had been arrested on a number of charges surrounding the death of Robert Campbell ... They have not (yet) charged him with the murder.” Mr. Hoehne also wrote, “Mr. Atwell had already spoke [sic] to Bernie Conway ... and along with advice, Mr. Conway advised to call Nova Scotia Legal Aid to deal with his potential bail hearing ... Along with further advice, I told Mr. Atwell I would reach out to our closest office to advise you what was going on and that he may be before your court in the near future.”

Statements During Police Questioning

[44] Cpl Rose-Berthiaume’s custodial interview of Mr. Atwell began at approximately 11:44 a.m., and lasted approximately six hours and 47 minutes. Mr. Atwell began to make an incriminating statement at approximately 17:27, almost six hours into the interview, followed by a re-enactment and a “*KGB*” statement.

[45] I will summarize the relevant portions of the interview, and refer to the approximate time of those portions (actual time, as opposed to running time of the audio/video recording).

[46] Very soon after the interview began, Mr. Atwell told Cpl. Rose-Berthiaume that he was not going to say anything, and that he just needed to wait for a lawyer. Cpl. Rose-Berthiaume did not acknowledge the statement or ask Mr. Atwell why he needed to wait for a lawyer. (11:47:11)

[47] Cpl. Rose-Berthiaume confirmed with Mr. Atwell that Mr. Atwell had spoken with a lawyer that morning, that he had received legal advice, and that Mr. Atwell was under no obligation to say anything to Cpl. Rose-Berthiaume. (11:48:48 - 11:48:57) Mr. Atwell confirmed that he was exercising his right to remain silent. (11:49:04)

[48] The questioning continued. Mr. Atwell stated that he had no comment, that he had been advised not to talk, and that his lawyer advised him that even if he was asked what colour the sky was, his answer should be “no comment.” (11:51:23 – 11:51:35)

[49] Mr. Atwell reiterated that he was not going to say anything, and stated that he would rather just be in his cell until he heard from a lawyer. (11:52:25 –

11:52:35) When Cpl. Rose-Berthiaume sought clarification of that comment, Mr. Atwell responded that his lawyer wanted to know when he could set up a bail hearing, and that's all that Mr. Atwell was waiting for. (11:52:43 – 11:52:51)

[50] As the questioning progressed, Mr. Atwell reiterated, a number of times, that he was exercising his right to silence, stating “no comment,” “I can't talk,” and that he did not want to have a conversation about anything. (11:52:55 – 11:55:40)

[51] After Cpl Rose-Berthiaume spoke for a lengthy period of time, Mr. Atwell reiterated his choice to remain silent, stating that he had nothing to say, and asking how long they were going to stay in the interview room. (12:01:27)

[52] Mr. Atwell moments later reiterated his choice to remain silent, stating that he was not going to say anything, that he had to wait until he heard back from “the lawyer,” asking whether they had to sit in there (the interview room), stating that he did not want to talk, and asking if he could sit in the cell and wait. (12:02:10 – 12:03:20)

[53] When Cpl. Rose-Berthiaume asked Mr. Atwell whether he was responsible for Mr. Campbell's death, Mr. Atwell reiterated that he had no comment, and that he was going to “let the lawyers do their job” and let the lawyers deal with it. (12:20:26 – 12:23:31)

[54] Mr. Atwell restated that he was not willing to talk about anything, in response to a seemingly benign question about who was living with him at his place now. He stated that he was not going to say anything, and that he was going to keep saying it over and over again. (12:33:22 – 12:33:58)

[55] Mr. Atwell stated that he would have a conversation when his lawyer was there, that he would do whatever his lawyer told him to do, and that they would make more headway if he had his lawyer there and “everything situated.” When Cpl. Rose-Berthiaume re-confirmed that Mr. Atwell had already spoken to a lawyer, Mr. Atwell responded yes, and that the lawyer advised that even if he is asked what colour the sky is, he is not to comment. Mr. Atwell said that he should not be talking right now. Cpl. Rose-Berthiaume confirmed that this was good advice. Mr. Atwell stated that he was making the informed choice not to talk until he has a lawyer present. Cpl. Rose-Berthiaume told Mr. Atwell that he did not have the right to have a lawyer present during questioning. Mr. Atwell responded that he was therefore not going to say anything. (12:37:24 – 12:38:13)

[56] After stating again that he was not going to speak, that he had already said it a hundred times already, and that he had no comment, Mr. Atwell provided an explanation to Cpl. Rose-Berthiaume about a text and a cell phone. Cpl Rose-Berthiaume thanked Mr. Atwell for clearing that issue up. Mr. Atwell responded

that he was not supposed to be saying anything, that “it’s just stupid” for him to be talking, and that he should have his lawyer present. (12:38:30 – 12:41:50)

[57] Mr. Atwell told Cpl. Rose-Berthiaume that it was to his benefit to go over “this whole bullshit” with his lawyer, and then let his lawyer go over it with the police. He said that he would be more than happy to cooperate after speaking with his lawyer. Mr. Atwell said that he cannot cooperate, having just spoken to his lawyer five minutes before coming into the interview room and having been advised not to say anything. (12:42:35 – 12:42:59)

[58] Mr. Atwell then said that his lawyer told him that he would be detained and that the police were going to aggravate him for twenty-four hours, and “[s]o, I have to just go through this.” (12:43:00 – 12:43:05)

[59] Mr. Atwell reiterated that he would go over the details sought by Cpl. Rose-Berthiaume as soon as he got a lawyer. (12:43:15)

[60] When Cpl. Rose-Berthiaume asked him what his biggest fear was, Mr. Atwell responded that the matter was obviously going to go to trial and that when he “gets lawyered up,” everything will come out and he will talk about it then. He indicated that it was of no benefit to him to talk about anything now. (13:02:50 – 13:03:38)

[61] Cpl. Rose-Berthiaume then clarified with Mr. Atwell that he had already spoken with a lawyer that day. Mr. Atwell confirmed that he had, and that the lawyer told him not to say anything. (13:03:38 – 13:03:50)

[62] Mr. Atwell repeated that he was not going to say anything, that he had to wait until he could have a lawyer there, that the police would be privy to anything he knows through his lawyer, that he would go through all of these things when he got a lawyer, and that this was for his own protection. Mr. Atwell stated, “I didn’t do anything,” that he just needed a lawyer, that it was stupid for him to talk without a lawyer, that they would talk about it when he had a lawyer, and that he was not going to go against his lawyer’s advice. (13:08 – 13:09)

[63] Mr. Atwell again stated that he wanted to be “lawyered up” before speaking, and that he wanted his lawyer to be present. Cpl. Rose-Berthiaume again explained that Mr. Atwell had no right to have a lawyer present during questioning. Mr. Atwell stated that he must be able to have that right at some point. Cpl. Rose-Berthiaume said he did not. (13:10:03 – 13:10:22)

[64] Mr. Atwell responded that his lawyer told him not to say anything, that the lawyer was working on getting his bail hearing, and that he thought he was just going to sit in the cell and wait. (13:10:35 – 13:10:45)

[65] Mr. Atwell repeated that he was going to protect himself by not saying anything, until “this is obviously going to get brewed out in court.” (13:12:43 – 13:13:00)

[66] Mr. Atwell reiterated that he could not talk, that he was not going to say anything, that he was exercising his right to remain silent, and that his lawyer said not to say anything. (13:13:42 – 13:15:00)

[67] Mr. Atwell suggested that he knew it would probably take a couple of years before his case would go to court, and that he knew this because he has friends in remand who have been there for a couple of years. He then stated that he had no idea what to expect. (13:31:00 – 13:31:35)

[68] Shortly after that, Cpl. Rose-Berthiaume told Mr. Atwell a fabricated story about someone seen stealing cans of gas. The police charged the individual without talking to him. Had the police talked to him, they would have found out that he had run out of gas while driving his father to the hospital. Cpl. Rose-Berthiaume suggested to Mr. Atwell that the police would not have arrested the individual had the police heard his perspective first. (starting at 13:46)

[69] Mr. Atwell again stated that he wanted to have a lawyer before speaking. Cpl. Rose-Berthiaume again confirmed that Mr. Atwell already spoke to a lawyer

that day and received advice. Mr. Atwell then stated that he did not know what the next step was or how long it was going to take, but that the next step is what he had to wait for. (13:52:43 – 13:53:03)

[70] Mr. Atwell stated that when he found out who he was getting as a lawyer, they would go over things. When Cpl. Rose-Berthiaume again confirmed that Mr. Atwell had already spoken to a lawyer, Mr. Atwell stated that, when he spoke with duty counsel, it was only to try and find out how long it was going to take for a bail hearing, and that “then, from that point, then I'll seek counsel.” (13:54:45 – 13:55:38)

[71] Mr. Atwell stated that he did not know the process, and that he knew that there had to be a time when he could talk to a lawyer “about what’s going on,” given the nature of the charges. When Cpl. Rose-Berthiaume re-confirmed that Mr. Atwell already spoke to a lawyer, Mr. Atwell stated that Mr. Hoehne was not his lawyer, and that when he spoke to Mr. Hoehne, it was just to move him towards bail and to get him out of there. (13:55:53 – 13:56:20)

[72] In response to further questions from Cpl. Rose-Berthiaume, Mr. Atwell confirmed that Mr. Hoehne advised him to remain silent until he was notified by a

lawyer. Mr. Atwell told Cpl. Rose-Berthiaume that once he retained a lawyer, he would tell his lawyer to speak to Cpl. Rose-Berthiaume. (13:56:20 – 13:56:31)

[73] Mr. Atwell reiterated that he was going to listen to Mr. Hoehne's advice to remain silent, stating "...because of the advice, I'm not going to be a dummy and talk on my own behalf right now...", and that he was making a choice to remain silent. (13:56:41 – 13:56:48)

[74] Mr. Atwell stated, "[o]nce I get counsel, a lawyer, I know this, this, is going to be a process obviously" and "[s]o, we'll go through that step." When Cpl. Rose-Berthiaume asked Mr. Atwell if he had any questions, or whether he was confused by anything, Mr. Atwell answered "no." (13:57:57 – 13:58:22)

[75] Mr. Atwell then stated that he wished he could just go sit somewhere by himself and wait till he gets contacted. (13:58:29)

[76] Mr. Atwell again stated that he needed a lawyer there so that they could talk. When Cpl. Rose-Berthiaume confirmed that he had spoken to a lawyer and that his lawyer could not come down there, Mr. Atwell stated that there has to be some point in time in the case where he gets to talk to a lawyer. Mr. Atwell confirmed that he had received advice that day not to say anything, and that that is what he was going to have to do. (14:24:16 – 14:24:57)

[77] Mr. Atwell stated that something that Cpl. Rose-Berthiaume said did not make sense. When Cpl. Rose-Berthiaume asked him to explain, Mr. Atwell responded that he would explain once he had time to talk with a lawyer about the case, that when he spoke with Mr. Hoehne, it had nothing to do with the case, and that he cannot just talk to somebody within minutes of being arrested about a case that they have no idea about. Mr. Atwell then asked, “at what point in this whole procedure does that happen,” i.e. when does he get to speak to a lawyer. Mr. Atwell stated that he had been charged, that the police were obviously not dropping the charges, and that there was therefore going to be a court case. He said that he was not going to say anything, and that he wanted to go to the next step, which was to get a bail hearing. He said that he would then be as cooperative as he can be, but through counsel. (14:26:30 – 14:28:58)

[78] Cpl. Rose-Berthiaume observed that Mr. Atwell was fidgety. Mr. Atwell responded that he has ADHD. When Cpl. Rose-Berthiaume asked Mr. Atwell if he takes anything for ADHD, Mr. Atwell stated that he had been taking something for it, but was no longer taking anything. (14:29:38 – 14:36:25)

[79] After some further questioning, Mr. Atwell repeated that he wanted to wait for his lawyer, and that he was exercising his right to remain silent. (14:36:18 – 14:36:25)

[80] Soon after that, one of the investigators, Cst. Dayle Burris, entered the interview room and began sharing with Mr. Atwell some of the evidence gathered by the police, including witness statements and a video and audio message from Mr. Campbell's father to Mr. Atwell. Mr. Atwell repeated several times during the evidence presentation, when he was asked questions by Cpl. Rose-Berthiaume, that he had nothing to say, would talk about it once he had a lawyer, that he needed a lawyer, that he wanted to wait until he had his lawyer. Mr. Atwell stated, "let me get past this step whether I get the lawyer." (14:59:25 – 15:59:44)

[81] Mr. Atwell stated again that he was not going to say anything until he had a lawyer, and asked whether the next step was for him to go to cells or to Burnside (the correctional facility), and at what point would he get to go to either cells or remand. Cpl. Rose-Berthiaume stated that he would never have a lawyer there, and that he already received legal advice, which was not to say anything. Mr. Atwell reiterated his choice to remain silent, stating that he was not even going to engage in personal talk. (16:02:45 – 16:06:10)

[82] Mr. Atwell repeated, several times again, that he wanted to remain silent until he had a lawyer. At one point, he stated that he wanted to remain silent "until I get a lawyer to fucking figure this shit out." (16:07:43, 16:25:08, 16:25:39, 16:25:57 and 16:30:37 – 16:30:57)

[83] After a long monologue from Cpl Rose-Berthiaume, Mr. Atwell stated that he just needed to wait for his lawyer, and stated, “I gotta sit here for how many hours.” (16:48:59 – 16:49:07)

[84] At one point, Mr. Atwell stated, “No, I’m putting myself in my shoes, waiting for counsel.” (16:53:14)

[85] The investigator, Cst Burris came back in, and presented to Mr. Atwell more of the evidence the police had, including DNA and footprint evidence. The last item presented to Mr. Atwell before he made an incriminating statement was a letter that the police said was written by the deceased’s daughter. When Cst Burris said, “It’s hard to look at, I know, Darroll,” Mr. Atwell stated, “No, I understand what you’re saying, I just, I don’t know what the, what to do about my lawyer’s telling me to just wait.” (17:24:50 – 17:25:48)

[86] It was at that point that Mr. Atwell began to make a lengthy incriminating statement, followed by a re-enactment and then a *KGB* statement. (17:27:44 – 17:28:23).

Reasons to Question Mr. Atwell’s Understanding of his Rights or Did the Police Conduct Undermine the Initial Legal Advice?

[87] I will now consider whether, objectively, there is reason to question Mr.

Atwell's understanding of:

- his right to silence,
- that he did not have a right to have a lawyer present with him during questioning, or
- the detention and bail process.

[88] I will also consider whether there is reason to question Mr. Atwell's understanding of his rights given his reference to having ADHD.

[89] I will then consider whether the conduct of the police undermined the initial legal advice given by Mr. Hoehne.

Right to Silence

[90] For the following reasons, Mr. Atwell has not satisfied me that there is reason to question his understanding of his right to remain silent. Rather, I am satisfied that he fully understood his right to remain silent:

- Although Mr. Conway was unable to provide him with his full "right to counsel" advice, Mr. Conway advised Mr. Atwell to "shut the fuck up." Mr. Conway had no concerns that Mr. Atwell understood the advice to remain silent. Mr. Conway and Mr. Atwell had a longstanding personal and professional relationship on which Mr. Conway was able to base that assessment.

- Mr. Atwell's consultation with Mr. Hoehne lasted approximately 14 minutes. Mr. Atwell concedes that Mr. Hoehne's advice was not deficient. Mr. Hoehne fully advised Mr. Atwell with respect to the charges, the procedure, his rights, in particular his right to silence, and explained his right to silence fully. He advised Mr. Atwell that it was likely that the police would want to take a statement. He advised Mr. Atwell not to make a statement. He advised him to say that he was not going to give a statement. He advised Mr. Atwell that the police had to take him to court within 24 hours, and that the police would probably oppose bail. He had no concerns about Mr. Atwell's ability to understanding the conversation, and Mr. Atwell expressed no misunderstanding whatsoever.
- When Cst. Williams asked Mr. Atwell if he understood the legal advice he was given by Mr. Hoehne, Mr. Atwell answered, "yes." He was unequivocal.
- During the lengthy interview, it was evident that Mr. Atwell understood his right to silence. He referred to his right to silence a number of times, and repeatedly stated that he had no comment and did not wish to talk.

[91] It was also evident that Mr. Atwell had strategies to exercise his right to silence and to resist cooperation. In addition to repeating that he was exercising his right to silence and saying that he had no comment and did not want to talk:

- He stated that his lawyer had advised him that, even if the police asked him what colour the sky was, he was to say "no comment."
- He stated several times that he wanted to be taken to cells to wait.
- He stated that he did not even want to engage in personal talk.
- He stated that he did not want to have a conversation about anything.

[92] I find that, when Mr. Atwell informed Cst. Williams that Mr. Hoehne was going to contact a lawyer in the district who would then contact the police, this was not an objectively observable sign that Mr. Atwell did not understand the legal advice he received. Rather, Mr. Atwell was clearly speaking about a lawyer that he expected would be assisting him with a bail hearing. I come to this conclusion because:

- As noted, Mr. Atwell clearly received comprehensive advice from Mr. Hoehne and understood the advice regarding his right to remain silent.
- Mr. Atwell stated, later in the conversation with Cst. Williams, that the lawyer was waiting to learn whether or not the police would be detaining him, in which case he would have to go to court.
- Mr. Atwell made other statements during the interview with Cpl. Rose-Berthiaume indicating that he was waiting for a lawyer to assist him with a bail hearing, and would be retaining another lawyer to represent him in preparation for the trial.

[93] Mr. Atwell's statements during police questioning that his consultation with Mr. Hoehne was more focussed on bail and had nothing to do with the case are belied by the statements that he made that clearly demonstrated his understanding of his right to silence and how to resist cooperation.

No Right to Have Lawyer Present

[94] For the following reasons, Mr. Atwell has not convinced me that there were objectively observable indications that he mistakenly believed that he had a right to have a lawyer present during police questioning. Rather, it was evident that Mr. Atwell knew that he would be questioned by the police, that the questioning could last up to 24 hours, and that a lawyer would not be accompanying him during that time:

- He acknowledged to Cst. Williams that Mr. Hoehne would not be attending the detachment.
- His references to Mr. Hoehne contacting a lawyer in the district were, as I have found, references to a lawyer assisting him with a bail hearing.
- He acknowledged to Cpl. Rose-Berthiame that his lawyer had advised him that the police could “aggravate” him for 24 hours.

[95] I find that Mr. Atwell’s statements that he was waiting for a lawyer and that he wanted a lawyer present, considered in the entire context, demonstrate that:

- Mr. Atwell had certain strategies to exercise his right to silence and to resist cooperation, one of which was to say that he was waiting for his lawyer and that he would cooperate once he had a lawyer with him
- Mr. Atwell was conditioning his willingness to speak on having a lawyer present.
- Mr. Atwell was waiting for his bail hearing and was expecting that a Legal Aid lawyer would assist with the bail hearing.

- Mr. Atwell's plan or hope was to have a bail hearing and then retain another lawyer to discuss the case and prepare for trial, and it was that lawyer who Mr. Atwell asserted would represent him in discussions with the police.

[96] Moreover, well into the interview, when Cpl Rose-Berthiaume asked Mr. Atwell if he had any questions or was confused about anything, Mr. Atwell responded "no."

[97] As in *Sinclair*, Mr. Atwell's repeated requests to speak to a lawyer or to have his lawyer present, when considered in isolation, might have supported the allegation that he may have been confused about his rights and how he should exercise them: *Sinclair, supra* at para.71. However, considered in context, it was clear that Mr. Atwell never had any doubt about the choices the law allowed him and, in particular, his constitutional right to remain silent: *ibid.* at paras.71-73.

Understanding of Detention and Bail Process

[98] Mr. Atwell has not convinced me that, objectively, he lacked an understanding of the detention and bail process, because:

1. He told Cst. Williams that his lawyer advised him that the police had a certain amount of time before they had to bring him to court.
2. Mr. Atwell asked Cst. Williams whether, despite the seriousness of the charges, the police would decide to release him, or whether he would be remanded.

3. He indicated to Cst. Williams an understanding of some of the factors that might be relevant to bail: he said that he is not a flight risk, he has a farm and a business and people who work for him, and a woman at home.
4. He indicated to Cst. Williams that this was what the Legal Aid lawyer wanted to know: whether the police will remand him or release him.
5. He told Cpl. Rose-Berthiaume that his lawyer had told him that the police could “aggravate him” for 24 hours.
6. During the interview, he told Cpl. Rose-Berthiaume that he had friends in remand who had been there for a couple of years.
7. During the interview, he indicated his understanding that, if the police decided to remand him, he would be sent to the correctional facility.
8. He told Cpl. Rose-Berthiaume that Mr. Hoehne was going to contact a Legal Aid lawyer in the district to work on getting his bail hearing scheduled.

ADHD

[99] I am not satisfied that Mr. Atwell’s mere mention that he had ADHD, in response to Cpl. Rose-Berthiaume’s observation that he was fidgety, is reason to question his understanding of his rights or the initial legal advice. Mr. Atwell said that he was no longer taking medication for ADHD. As discussed, his understanding of his right to remain silent, how to exercise that right, and the detention and bail process was evident. Even if he had symptoms of ADHD, it was certainly not evident that it detrimentally affected his understanding of his rights.

Did the Police Conduct Undermine Mr. Hoehne's Advice?

[100] The fabricated story related by Cpl. Rose-Berthiaume could be interpreted by a detainee as demonstrating that cooperating with the police would be of benefit to him. However, in the context of Mr. Atwell's interaction with the police as a whole on May 13, 2021, I am not satisfied that it had the effect of undermining the initial legal advice. As I have found, Mr. Atwell understood his rights and how to exercise them, and repeatedly maintained his position that he was not going to cooperate for almost another four hours after Cpl. Rose-Berthiaume related the fabricated story.

[101] Mr. Atwell maintained his choice to remain silent during the very lengthy presentation of evidence. Objectively, Mr. Atwell chose to speak only after he read the letter from Mr. Campbell's daughter. I find that, based on all of the circumstances, Mr. Atwell made an informed choice to make a statement.

[102] In light of the fact that Mr. Atwell has failed to establish that there was reason to question his understanding of his initial legal advice or to question whether the police undermined that advice, I find that the police were not obligated to inform Mr. Atwell that Mr. Greer had called and offered to provide him with further legal advice either on the phone or in person. Mr. Hoehne's contact with

Mr. Greer was for the purpose of informing him that Mr. Atwell might be looking for help with a bail hearing. Mr. Greer was mistaken in his understanding that he was being asked to provide duty counsel to Mr. Atwell.

Cases Relied on by Mr. Atwell

[103] Mr. Atwell's circumstances are not analogous to those of Mr. Lafrance. Mr. Lafrance was described by the trial judge as a "youthful, [I]ndigenous and ha[ving] minimal police exposure" and by the Court of Appeal as "19 years old, Indigenous, [with] very limited prior exposure to the police and ... of much smaller stature than ... the armed and uniformed officers": *Lafrance, supra* at para.2. Mr. Lafrance had no previous experience of detention or custodial interviews, and had never had to speak with a lawyer before: *ibid.* at para.87.

[104] Mr. Atwell was 43 years old at the time of his arrest. He had a farm and a business and had employees. He had a lengthy criminal record. Mr. Conway had represented Mr. Atwell with respect to some of those previous charges. Unlike the situation in *Lafrance*, I am not convinced, having considered Mr. Atwell's comments contextually, and in light of his particular circumstances, that Mr. Atwell was ignorant as to his rights or that there is reason to question his understanding of his s.10(b) right.

[105] Mr. Atwell's situation is not analogous to those of Mr. Dussault or Mr. Stevens. The advice that Mr. Atwell received from Mr. Hoehne was objectively sufficient. Mr. Hoehne was not going to go to the detachment. Mr. Atwell was not expecting Mr. Hoehne to attend and told the police that he was not coming down. In the circumstances of this case, the police were not obligated to inform Mr. Atwell of Mr. Greer's call.

Conclusion

[106] Mr. Atwell's *Charter* application is dismissed.

Gatchalian, J.