September 25, 2017

R v Keror: Police Duties, Accused Duties, and the Right to Counsel of Choice

By: Alexandra Heine

Case Commented On: *R v Keror*, 2017 ABCA 273 (CanLII)

Introduction

Mr. Keror was accused of shooting and killing Philip Anny on September 30, 2012. A witness identified the accused as the shooter. He was arrested at 8:15 pm on October 1, 2012 by a member of the Calgary Police tactical team. At trial, the accused made an application to enter into a *voir dire*. He submitted that his s 10(b) rights under the Canadian Charter of Rights and Freedoms were violated. Justice E. A. Hughes of the Alberta Court of Queen's Bench found no s 10(b) breach (see *R v Keror*, 2015 ABQB 382 (CanLII)). A jury convicted Mr. Keror of second-degree murder. The accused then appealed this decision on five grounds. This commentary will focus strictly on grounds one through three. The first ground is as follows: Did the trial judge err by failing to consider whether there was a contextual or temporal link between any delay in facilitating access to counsel and the appellant's subsequent statement the next day? The second and third grounds of appeal are as follows: did the police violate section 10(b) when they interviewed the appellant before he spoke with his counsel of choice?

At the Alberta Court of Appeal, Justices Marina Paperny, Barbara Lea Veldhuis and Jo'Anne Strekaf held that the Calgary Police did not violate the appellant's right to consult with counsel of choice. Effectively, the peace officers complied with their duties under section 10(b) of the *Charter*. The first three grounds of appeal were dismissed on that basis. This decision gives us a glimpse into the struggle that our court system faces when assessing whether or not a person's section 10(b) rights have been violated.

History

Historically, the right to counsel was set out in section 2(c) of the *Canadian Bill of Rights*, SC 1960, c 44, which states that:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to […]
>
> (*c*) deprive a person who has been arrested or detained
>
> (ii) of the right to retain and instruct counsel without delay […]

The *Charter* superseded the section guaranteeing the right to counsel. Section 10(b) reads:

> Arrest or Detention
> 10. Everyone has the right on arrest or detention […]
> (*b*) to retain and instruct counsel without delay and to be informed of that right […] (emphasis added)

R v Therens, [1985] 1 SCR 613, 1985 CanLII 29 (SCC) was one of the first SCC cases to analyze and interpret the scope of one's *Charter* rights under s 10(b). Le Dain J, dissenting, stated that s 10(b) "guarantees not only the right to retain and instruct counsel without delay, as under s 2(c)(ii) of the *Canadian Bill of* Rights, but also the right to be informed of that right. This, in my opinion, shows the additional importance which the *Charter* attaches to the right to counsel" (*Therens* at para 48). One of the primary functions of the *Charter* in the Canadian legal system is the protection of minority interests. This is especially true in the context of an arrest or a detention and the subsequent right to counsel.

Ground #1

Once a person is arrested or detained, their right to liberty is affected. As Lamer CJ eloquently stated in *R v Bartle* [1994] 3 SCR 173, 1994 CanLII 64 (SCC), "when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself" (*Bartle* at para 17). A peace officer has a positive duty the moment an individual's right to liberty is suspended to inform the detainee of his/her right to retain and instruct counsel without delay (*Bartle* at para 191). At para 24 of *Bartle* the court held that a peace officer is also required to give information to detainees about their right and option to access legal aid and duty counsel. Additionally, the accused has the right to speak to counsel of choice (*R v Ross*, [1989] 1 SCR 3, 1989 CanLII 134 (SCC)). These components of a peace officer's duties are considered informational. The court in *R v Manninen*, [1987] 1 SCR 1233, 1987 CanLII 67 (SCC) at paras 1241-1242, held that s 10(b) imposes two additional duties. The first and relevant duty to this ground of appeal requires peace officers to facilitate access to a lawyer and to give a detainee a reasonable opportunity to exercise that right. This is considered implementational and it arises immediately upon the detainee's request to speak to counsel (*R v Suberu*, [2009] 2 SCR 460, 2009 SCC 33 (CanLII) at paras 41-42).

The Delay and the Contextual and/or Temporal Link

In the case of Mr. Keror, a constable immediately Chartered and cautioned him. Mr. Keror then asked to speak with a lawyer. Once this request was made, the peace officer had a duty to facilitate access to a lawyer and give him reasonable opportunity to exercise that right (*Suberu* at paras 41-42). Despite this, the accused experienced an hour and twenty-minute delay before the police gave him the opportunity to contact counsel. Since the Crown did not seek to present any evidence of the discussions between the accused and the police from the time of his arrest until he spoke to counsel later that evening, the trial judge made no findings as to whether or not the delay was reasonable.

The onus is on the Crown to prove that any delay to facilitate access to counsel upon arrest or detention was reasonable in in the circumstances (*R v Luong*, 2000 ABCA 301 (CanLII) at para 12). As mentioned previously, in *Keror* ABQB, the trial judge failed to indicate specific

discoveries about "whether the delay was unreasonable" (at para 28). Although appellate level courts generally give deference to trial judges on these types of issues, the Court of Appeal re-evaluated whether the delay was reasonable. The court found that a period of 17-18 minutes went unaccounted for. They also found that the Crown did not discharge its burden to prove that this delay was reasonable. However, they quickly dismissed this argument on the basis that it was a minor s 10(b) breach; therefore s 24(2) of the *Charter* was not engaged.

The trial judge found no causal connection between the delay on October 1st and the statement made on October 2nd. The Crown tendered the statement as evidence. Mr. Keror appealed this finding, stating that the trial judge ought to have considered whether there was a temporal or contextual link between the delay and the statement made on October 2nd (*Keror* ABCA at para 28).

The Court of Appeal found that there was no contextual or temporal link between the October 1st delay and the October 2nd statement. For this issue, the trial judge's failure to comment on the contextual and temporal links did not derive from legal error; therefore the justice gave deference to the trial judge's decision. The Court of Appeal stated that even if there were a connection, it would be too weak to engage s 24(2).

The Court of Appeal's reasons were compelling and in my view, correct. Had this been a case dealing with sections 253 to 258 of the *Criminal Code*, RSC 1985, c C-46, the court may have found that the Crown's failure to demonstrate that the delay was reasonable in the circumstances may have warranted exclusion of evidence. That is a discussion for another day.

Grounds #2 and #3

As mentioned above, the court in *Manninen* imposed additional duties on peace officers to follow the informational duty. We have dealt with the first duty. The second duty requires peace officers to abstain from prompting a detainee to provide evidence until they have had reasonable opportunity to retain and instruct counsel (*Manninen* at paras 1241-1242). The appellant in *Keror* ABCA claimed that the police violated his s 10(b) rights when they asked him to provide a statement, without giving him reasonable opportunity to retain and instruct counsel.

The appellant made additional correlated arguments: a) that the trial judge erred when she inferred that the appellant was satisfied with the advice he received from duty counsel, and b) that the appellant did not waive his right to consult with his counsel of choice when he chose to speak with duty counsel (*Keror* ABCA at para 39).

Right to Counsel of Choice

An accused or detainee has the right to speak to counsel of choice. In *Ross*, one of the appellants asserted his right to counsel of choice. Lamer J held that an accused or detained person indeed has the right to counsel of choice. In many cases, arrests are made at times outside "regular" office hours. This creates a significant problem for accused or detained people who wish to speak with counsel of their choosing, instead of duty counsel or legal aid. The court in *Ross* acknowledged this difficulty and held that "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" (at para 12).

Did Mr. Keror Waive his Right to Consult his Counsel of Choice?

This is where the facts of this case and the recorded conversations between the detectives and Mr. Keror are of the utmost importance and create some confusion as to what happened. In *Keror* ABQB, the trial judge stated, "it appears Mr. Keror wished to call Legal Aid, did not see the Legal Aid number so "that's why [he] tried to call [his own lawyer]" (at para 18). Objectively, looking at the transcribed conversation between the detective and Mr. Keror, it appears as though Mr. Keror's counsel of choice was Mr. David Chow. In *Keror* ABCA, the Court of Appeal summarized that the detective asked the appellant if he wished to speak with a specific lawyer, to which the appellant responded in the affirmative. He was left in the phone room. Subsequently, he left a message for Mr. Chow. The detective inquired as to whether the appellant felt he was provided with the opportunity to see the Legal Aid number. The detective then stated, before allowing Mr. Keror to re-use the phone room, "there's also Legal Aid". This created some confusion as to whether Mr. Keror's first choice of counsel was Legal Aid or Mr. Chow. The trial judge, upon hearing the evidence, found that Legal Aid was the accused's first choice of counsel.

It seems as though the Court of Appeal agreed with these observations of the conversation. In addition, an appellate court must give deference to a trial judge's findings of fact and can only intervene when a trial judge makes a "palpable and overriding error". In this regard the Court of Appeal stated, "Although the appellant initially wanted to speak with Mr. Chow, we cannot conclude that the trial judge erred when she found that […] the appellant changed his mind and voluntarily decided to receive advice from duty counsel instead" (at para 41). The Court of Appeal took Mr. Keror's voluntariness to speak to duty counsel as an indication of a change of mind and therefore a waiver of his right to consult his counsel of choice.

Does "Voluntariness" to Speak with Duty Counsel Imply a Waiver of Counsel of Choice?

In *R v Black*, [1989] 2 SCR 138, 1989 CanLII 75 (SCC), the accused was initially charged with attempted murder. She expressed a desire to contact her counsel of choice. She reached her counsel and they spoke for 30-40 seconds (at para 4). She hung up and soon thereafter, the police informed her that the victim was dead and she would now be charged with first degree murder. She became upset and asked to speak, once again, with her counsel of choice. She was unable to reach him. At no point did she expressly waive her right to counsel. Despite this, the police interrogated her on the events of the night and on the whereabouts of the knife used.

Similar to the facts in *Black*, Mr. Keror did not "expressly" waive his rights to counsel of choice, therefore any waiver must be implied by words or conduct. *Manninen* sets out the standard to be met when an accused implicitly waives their rights under s 10(b) (at para 1244). The court in *Manninen* refers to *Clarkson v The Queen*, [1986] 1 SCR 383, 1986 CanLII 61 (SCC) at paras 394-395, where the court stated, "the standard will be very high". In *Clarkson*, the respondent's conduct did not constitute an implied waiver. Neither court in *Keror* truly dealt with whether or not Mr. Keror implicitly waived his right to counsel when he spoke to duty counsel. Defence counsel submitted that the police should have told the accused about his right to reasonably wait for communication from his counsel of choice. The Court of Appeal dismissed this argument stating that there is no need to place an additional obligation on the police in these circumstances. The court stated that if Mr. Keror had told duty counsel of his concerns with the inability to reach Mr. Chow, duty counsel could have explained his right to speak with counsel of choice.

Another similarity in *Keror* to the facts in *Black* is that there was a lack of urgency on the part of the police to proceed with the interrogation. The detectives could have waited until noon for Mr. Keror to speak with Mr. Chow's office. Although this would have delayed the interrogation, it was held in *Ross* that a delay of approximately eight hours to wait to speak with counsel of choice is not unreasonable. In this case, the delay would have been longer than eight hours. However, considering the gravity of the charge Mr. Keror was facing as well as the lack of urgency, defence argued that the delay would have been reasonable in the circumstances.

It is true that placing additional obligations on the police in these types of circumstances may be unrealistic and difficult. However, if an accused implicitly waives his right to counsel of choice, it may be that the law ought to require a peace officer to diligently ensure that the accused is satisfied with their choice of counsel. This brings me to the next ground of appeal.

Was Mr. Keror Satisfied with the Advice He Received from Duty Counsel?

There are limits to a detainee or accused person's right to counsel under s 10(b). An accused or detained person must be "reasonably diligent in exercising" their right. If they fail to do so, a peace officer's additional duties under *Manninen*, to a) provide "reasonable opportunity" and b) "refrain from eliciting evidence" do not arise or are suspended (*R v Tremblay*, [1987] 2 SCR 435, 1987 CanLII 28 (SCC) at para 439). McLachlin CJ made an additional point in *R v Willier*, 2010 SCC 37 (CanLII), stating 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 an investigative review" (at para 42).

In this case, Mr. Keror did not explicitly say that he was dissatisfied with the advice he received from duty counsel. Nevertheless, he expressed his desire to speak with Mr. Chow on the morning of October 2nd, before speaking with law enforcement. The detective allowed him to call Mr. Chow's office. The office instructed Mr. Keror to call back around noon to speak with someone. While he was waiting, a detective started interviewing Mr. Keror and during this time, he made a number of statements and admissions (*Keror* ABCA at para 23). Around 12:49pm, Mr. Keror contacted another criminal defence lawyer from Mr. Chow's office: Tonii Roulston. He spoke to her for approximately 14 minutes.

Does Mr. Keror's request demonstrate he was dissatisfied with the advice he received from duty counsel? As mentioned above, in *Willier*, the court held that when an accused person fails to indicate "diligently and reasonably that the advice he or she received was inadequate, the police may assume that the detainee is satisfied […]" (at para 42). The detective ambiguously asked Mr. Keror "are you satisfied?" to which the appellant responded in the (somewhat) affirmative. Nevertheless, we cannot ignore the fact that after Mr. Keror spoke to Ms. Roulston, he was "noticeably less forthcoming during the second part of the interview, answering almost every question with 'no comment'" (*Keror* ABCA at para 25). His change in demeanour is arguably demonstrative that duty counsel either provided inadequate advice or, in the alternative and strictly based on speculation, that Mr. Keror failed to understand duty counsel's instructions.

The alternative to this argument is that s 10(b) does not require peace officers to monitor the quality of counsel advice (*Willier* at para 3). It would be impossible for peace officers to do so, due to fact that solicitor-client relationships are confidential and private. Imposing this duty would be harmful and unrealistic.

Was There a Need for Additional Consultation with Counsel?

In *R v Sinclair*, 2010 SCC 35 (CanLII), the Supreme Court held that "the police must give the detainee an additional opportunity to receive advice from counsel" (emphasis added) where:

> a) a police asks the detainee to participate in a "non-routine procedure";
> b) there is a change in jeopardy; and
> c) there is reason to believe that the first information provided was deficient. (at paras 50-52)

This list is non-exhaustive (*Keror* ABCA at para 41) and these are merely some suggestions as to when the need for additional consultation would arise. In *Black*, the court stated that the duties of a peace officer are contextual (at para 39). If an accused person does not understand his or her rights, or if they are in a difficult mental state, whether it be intoxication, mental illness or shock, a peace officer must take a step further to explain s 10(b) rights. In *Black*, Wilson J added that an individual can only exercise their 10(b) rights if they know the extent of their jeopardy. If the nature of the investigation changes, the police are required to reaffirm the accused's right to counsel (at para 30). (See also McLachlin J (as she then was) in *R v Evans*, [1991] 1 SCR 869, 1991 CanLII 98 (SCC)).

In *Black*, the court found that when the accused became charged with first degree murder, she no longer knew the extent of her jeopardy. Therefore the court held that she should have been entitled to contact her counsel of choice once again. The accused's personal circumstances were considered: her level of intoxication, her low level of education, and her unstable emotional state.

The facts in *Black* are similar to *Evans*, in which the accused was initially detained for possession and throughout the interrogation became the primary suspect in the killing of two women. When the nature of the investigation shifted, the police failed to reiterate the accused's right to counsel. The court allowed the appeal: the accused had the right to contact his counsel when the extent of his jeopardy became unclear or changed. The accused's personal circumstances were considered: he had "subnormal mental capacity" (at para 1).

These two cases give an idea of the circumstances that would allow someone to have the right to contact counsel a second time. The facts in *Keror* are significantly different than *Evans* and *Black.* It is unlikely that one of the factors laid out in *Sinclair* is relevant to the circumstances that Mr. Keror faced. Even though the list is non-exhaustive, the Court of Appeal stated that there was nothing in the facts that suggested the possibility of creating a new factor. The only possible argument was that Mr. Keror alluded to the fact that he may have been suffering from mental health concerns. He stated "My memory's not good man" and "I-I hear things and I take it in the way I think I understand right" (*Keror* ABQB at para 17). This may trigger the additional police duty explored in *Black* and *Evans* to take a step further in explaining and facilitating an accused or detainee's right to counsel. However, this is merely speculation, as neither the ABQB nor the ABCA judgement made reference to Mr. Keror being delayed or mentally unstable. Furthermore, the court in *R v Baig*, [1987] 2 SCR 537, 1987 CanLII 40 (SCC), stated that special circumstances indicating that a detainee may not understand s 10(b) include "a known or obvious mental disability" (at para 540). This does not appear to be the case for Mr. Keror.

Conclusion and Remedy

The *Charter* states:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

There are three factors to consider in deciding whether or not to exclude evidence under s 24(2) of the *Charter*, when dealing with a *Charter* rights violation. The Supreme Court of Canada in *R v Grant*, 2009 SCC 32 (CanLII), sets out these three factors:

i. The seriousness of the breach;
ii. The impact of the breach on the Applicant; and
iii. Society's interest in the adjudication of the case on its merits. (at paras 72-86)

The first factor is relatively self-explanatory, however it is important to note that in *R v Berger*, 2012 ABCA 189 (CanLII), the Alberta Court of Appeal stated that when an officer could have easily complied with the *Charter* rights of an accused person, yet failed to do so, the seriousness of the breach is heightened. Generally, the second factor is easily proven. The third factor deals with the public's confidence in the administration of justice. It is often asked if the long-term interest of society in the administration of justice strongly favours the exclusion of evidence obtained via a *Charter* breach. Furthermore, the court generally considers whether or not it should dissociate itself from investigations involving *Charter* breaches.

In order to meet the requirements for exclusion of evidence under s 24(2), there must not only exist a violation of a *Charter* right, there must be "some connection or relationship between the infringement or denial of the right or freedom in question and the obtaining of the evidence the exclusion of which is sought by the applicant" (*Therens* at para 20).

Based on case law surrounding s 10(b), if the Court of Appeal had found that the police violated s 10(b) when they interviewed the appellant before he spoke with Mr. Chow's office, it is likely that the evidence would not have been excluded under s 24(2) based on the factors in *Grant.*

It will be interesting to see how this decision affects right to counsel of choice cases in the future in Alberta.

This post may be cited as: Alexandra Heine "*R v Keror:* Police Duties, Accused Duties, and the Right to Counsel of Choice" (25 September, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/09/Blog_AH_Keror.pdf