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# MEMO

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**To:** You (counsel for the Respondent Crown)

**From:** Senior Crown Attorney

**Date:** September 22, 2009

**Re:** *Stanley James Willier v. The Queen*

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We act for the Crown in this criminal appeal. I need you to write the factum and argue the appeal for me.

The appellant's factum is due on October 22, 2009. Counsel for the appellant Willier will provide you with a copy of their factum, so that we'll have an opportunity to respond to it in our factum. I recommend that you begin researching and writing our factum before you receive the appellant's factum – you can always revise your draft to address any additional issues the appellant raises that you didn't anticipate.

Our factum is due on Thursday, October 29, 2009 between 9:00 a.m. – 11:00 a.m. in Room 207.

The appeal will be heard during the week of January 25-28, 2010. I am scheduled to be out of town that week. You will need to check the Court's docket to determine the exact date and time of the appeal.

I've summarized the facts of the case below as found by the trial judge and set out the grounds of appeal to which we have to respond. Feel free to use any other facts mentioned in the lower courts' decisions, if you think they might be useful.

Good luck!

## Facts

Brenda Moreside was stabbed to death in her home in High Prairie, Alberta in February, 2005. She was the accused's common law spouse. Her body was discovered on February 25, 2005. Mr. Willier was arrested at his brother's home in Edmonton on

February 26, 2005, at 12:40 p.m. When he was arrested, Mr. Willier asked to speak to a lawyer.

He was in need of medical treatment, so he was first taken to hospital, where he was treated with an I.V. At about 5:40 p.m. on February 26, 2005, police advised him of his right to counsel for the first time. Mr. Willier said he did want to speak to a lawyer but would do so later. There is a transcript of this discussion in the Court of Appeal's reasons.

When Mr. Willier was discharged from the hospital in the early morning hours of February 27, 2005, police took him to the RCMP Detachment in Sherwood Park. His rights were read to him again and he indicated he wanted to speak to a lawyer. He was placed in the telephone room with various numbers and spoke to legal aid duty counsel for about three minutes. He was then returned to his cell.

At 7:50 a.m. on Sunday, February 27, Constable Lahaie had a discussion with Mr. Willier. He confirmed he'd spoken with duty counsel the night before, then asked to speak to Peter Royal, a well-known Edmonton criminal lawyer. The officer telephoned Mr. Royal but got an answering machine. The officer left the room and Mr. Willier left a message for Mr. Royal. He decided he wanted to speak to a legal aid lawyer again, and spoke to him for about a minute.

Just before 9:00 a.m. Sgt. Gillespie took Mr. Willier into an interview room and confirmed he'd spoken to counsel, then re-cautioned him. Mr. Willier said he was satisfied with the advice he'd received and was able to repeat the gist of the right to silence back to Sgt. Gillespie. Sgt. Gillespie told him he could ask to speak to a lawyer again if he wished, then proceeded to obtain a lengthy confession from Mr. Willier in which he admitted his involvement in his girlfriend's death.

Mr. Willier's counsel at trial objected to the admissibility of his statement to police on the basis that his right to counsel under s.10(b) of the *Charter* had been breached. The trial judge found that Mr. Willier's statement to police was voluntary, but found two *Charter* breaches: first, that Mr. Willier was not advised of his right to counsel when he was first arrested, but only hours later, when he was at the hospital. Since he did not give a statement during this time, this breach was considered only as context for the second, more serious breach.

The second breach found by the trial judge was that Mr. Willier was denied a reasonable opportunity to consult counsel of his choice before the interview with Sgt. Gillespie began. The trial judge found that Mr. Willier was actively discouraged from waiting for Mr. Royal to call him back, and immediately directed to legal aid. Sgt. Gillespie waited less than an hour on a Sunday morning for Mr. Royal to return Mr. Willier's call. Mr. Willier was facing a second degree murder charge and there was no urgency requiring that he be interviewed immediately. The police investigation would not have been compromised by waiting. Further, police knew that Mr. Willier was in poor health, had not taken his prescription medication, and had not slept well before the interview.

The trial judge found that Mr. Willier was diligent in exercising his right to counsel from the time of his arrest. The trial judge concluded that in this case, a reasonable opportunity to consult counsel of choice required the police to wait to see if Mr. Royal called back, or make another call to his office an hour or two later, or even wait until the next day (Monday) when his office would be open, before questioning Mr. Willier. The trial judge concluded that Mr. Willier's two calls to legal aid, totalling only four minutes, was not sufficient to allow him a "meaningful" opportunity to retain and instruct counsel.

The trial judge further found that Mr. Willier had not waived his right to speak to the counsel of his choice. He was unaware that he had a reasonable opportunity to do so, and unaware that the police had a duty to refrain from questioning him until he had a reasonable opportunity to consult counsel of his choice. The trial judge ruled Mr. Willier's statement inadmissible and acquitted him of second degree murder.

The Crown appealed. We were totally successful on the appeal. The Alberta Court of Appeal (ABCA) concluded that Mr. Willier's s.10(b) rights had not been breached. Further, he waived his right to remain silent and to further consult counsel. Admitting his statement would not render the trial unfair and even if a *Charter* breach was found, the statement should not have been excluded. The Court of Appeal found that the trial judge did not conduct a proper s.24(2) analysis. (As you know, after the *Willier* decision came down from the Court of Appeal, the Supreme Court of Canada rendered its decision in *R. v. Grant*, 2009 SCC 32, setting out a new framework for the s.24(2) analysis. You will want to apply the test from *Grant* in the factum.)

In concurring reasons, Madam Justice Bielby held that police should have waited until Monday to give Mr. Willier a reasonable opportunity to consult with his choice of counsel, Mr. Royal. When they did not do so, they breached Mr. Willier's s.10(b) rights. However, there was no evidence that the advice he received from legal aid counsel was different, or that he suffered any jeopardy by being questioned before Mr. Royal returned his call, which bears on the s.24(2) analysis. Further, the Crown had not met the burden of showing that Mr. Willier waived his right to counsel. She concurred in the result, because she agreed that the trial judge's faulty s.24(2) analysis meant that the matter had to be remitted for another trial.

Mr. Willier appealed to the SCC, but the court dismissed the appeal on essentially the same grounds articulated by the ABCA. He initiated a further appeal to the Supreme Moot Court of Dalhousie on these grounds:

**First Issue:**

- 1(a): Did the police breach Mr. Willier's s.10(b) rights?
- 1(b): Did Mr. Willier waive his right to consult with counsel of his choice?

**Second Issue:**

- 2: If there was a breach, should Mr. Willier's statement have been excluded under s.24(2) of the *Charter*?

## Sources

You will want to look at the Alberta Court of Appeal decision at 2008 ABCA 126.

The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to five cases on each issue (including the cases mentioned above), any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources (such as journal articles.) Lower court decisions in this matter do not count towards the five-case limit.