



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Dussault, 2022  
SCC 16

**APPEAL HEARD:** December 3,  
2021

**JUDGMENT RENDERED:** April  
29, 2022

**DOCKET:** 39330

**BETWEEN:**

**Her Majesty The Queen**  
Appellant

and

**Patrick Dussault**  
Respondent

- and -

**Attorney General of Ontario, Criminal Lawyers' Association, Association  
québécoise des avocats et avocates de la défense and Association des avocats  
de la défense de Montréal-Laval-Longueuil**  
Intervenors

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,  
Kasirer and Jamal JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 58)

Moldaver J. (Wagner C.J. and Karakatsanis, Côté, Brown,  
Rowe, Martin, Kasirer and Jamal JJ. concurring)

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**Her Majesty The Queen**

*Appellant*

v.

**Patrick Dussault**

*Respondent*

and

**Attorney General of Ontario,  
Criminal Lawyers' Association,  
Association québécoise des avocats et avocates de la défense and  
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**Indexed as: R. v. Dussault**

**2022 SCC 16**

File No.: 39330.

2021: December 3; 2022: April 29.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer  
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Constitutional law — Charter of Rights — Right to counsel — Accused speaking with lawyer on telephone from police station — Call ending in belief that police had agreed to allow them to continue conversation at station — Police refusing to let accused meet with lawyer when he arrived at station — Police subsequently conducting interrogation resulting in accused making incriminating statement — Whether police required to provide accused with further opportunity to consult counsel before interrogation — Canadian Charter of Rights and Freedoms, s. 10(b).*

In August 2013, the accused was arrested on charges of murder and arson. The police informed him of his rights, including his right to counsel under s. 10(b) of the *Charter*. At the police station, the accused spoke to a lawyer on the phone who explained the charges against him and his right to remain silent. The lawyer was left with the impression that the accused was not processing or understanding his advice. He offered to come to the station to meet in person, and the accused accepted. The lawyer then spoke with a police officer, informed him that he was coming to the police station and asked that the investigation be suspended. The police officer responded that this would be no problem or no trouble. The lawyer spoke again with the accused. He confirmed that he was coming to the police station to meet with him and he explained that, in the interim, he would be placed in a cell. The lawyer also told him not to speak to anyone.

Subsequently, during a conversation between the police officer and the lead investigators on the file, it was decided that the lawyer would not be permitted to

meet with the accused. The police officer phoned the lawyer and informed him of this decision. The lawyer nevertheless came to the police station, but was not permitted to meet with the accused. The police officer later went to the accused's cell and told him that another officer was ready to meet with him. The accused asked whether his lawyer had arrived, to which the police officer responded that the lawyer was not at the police station. The accused was then subjected to an interrogation, during which he made an incriminating statement.

At trial, the accused moved to exclude the statement on the basis that it was obtained in violation of his *Charter* rights, notably his right to counsel under s. 10(b). The trial judge held that the incriminating statement was admissible. She found that the accused had exercised his right to counsel, and that the police could reasonably presume that he had done so in a satisfactory manner. The accused was convicted of murder, and appealed from the conviction on the basis that the trial judge erred in dismissing his motion to exclude the incriminating statement. The Court of Appeal unanimously allowed the appeal, quashed the verdict, and ordered a new trial. It concluded that the accused's phone call with the lawyer did not constitute a complete consultation for the purposes of s. 10(b) and that, as a result, the accused's right to the effective assistance of counsel was breached.

*Held:* The appeal should be dismissed.

In the unique circumstances of the instant case, the police were required to provide the accused with a further opportunity to consult counsel before questioning

him. There were objectively observable indicators that the police conduct had the effect of undermining the legal advice that the lawyer provided the accused during their telephone call. Therefore, even if the call was a complete consultation in its own right, the police were nevertheless required to provide the accused with a second opportunity to consult counsel. In failing to do so, they breached the accused's right to counsel under s. 10(b) of the *Charter*.

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. Stated at its broadest, the purpose of the right to counsel is to provide a detainee with an opportunity to obtain legal advice relevant to their legal situation. Police must inform detainees of the right to counsel (the informational duty) and must provide detainees who invoke this right with a reasonable opportunity to exercise it (the implementational duty). Failure to comply with either duty results in a breach of s. 10(b). Police can typically discharge their implementational duty by facilitating a single consultation at the time of detention or shortly thereafter. Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence.

There are, however, exceptions to this general rule. The law has thus far recognized three categories of changed circumstances that can renew a detainee's right to consult counsel: new procedures involving the detainee; a change in the jeopardy

facing the detainee; or reason to believe that the first information provided was deficient. For any of these changed circumstances to give rise to a right to reconsult, they must be objectively observable. As a specific example of the third category of changed circumstances, the right to counsel may be renewed if police undermine the legal advice that the detainee has received. Police can undermine legal advice by undermining confidence in the lawyer who provided that advice. A detainee's confidence in counsel anchors the solicitor-client relationship and allows for the effective provision of legal advice. When the police undermine a detainee's confidence in counsel, the legal advice that counsel has already provided may become distorted or nullified. Police are required to provide a new opportunity to consult with counsel in order to counteract these effects.

Undermining is not limited to intentional belittling of defence counsel. Police conduct can unintentionally undermine the legal advice provided to a detainee. The focus should remain on the objectively observable effects of the police conduct, rather than on the conduct itself. Where the 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. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it.

In the present case, two separate acts of the police officer combined to have the effect of undermining the legal advice provided to the accused. First, when the lawyer said that he was coming to the police station to meet with the accused and asked that the investigation be suspended, the police officer responded that this would be no problem or no trouble. In reasonable reliance on these words, the lawyer advised the accused that he was coming to the police station to meet with him and that, in the interim, he would be placed in a cell. The police officer's words therefore had the effect, albeit indirect, of causing the accused to believe that an in-person meeting would take place. In refusing to permit the lawyer to meet with the accused, the police effectively falsified an important premise of the lawyer's advice — i.e., that the accused would be placed in a cell until the lawyer arrived. Second, the police officer misled the accused into believing that his lawyer had failed to come to the station for their in-person consultation. During the interrogation, the accused repeatedly expressed that his lawyer had told him he would be there; he stated his belief that his lawyer had never actually arrived; he openly questioned why his lawyer had given him the advice that he had given; and he implied that his lawyer's failure to show up had left him feeling alone. When these statements are taken in their totality and in light of all the relevant circumstances, it is clear that there were objectively observable indicators that the legal advice given to the accused had been undermined.

### **Cases Cited**

**Applied:** *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; **considered:**



*R. v. Burlingham*, [1995] 2 S.C.R. 206; **referred to:** *Stevens v. R.*, 2016 QCCA 1707; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429; *R. v. Edmondson*, 2005 SKCA 51, 257 Sask. R. 270; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405; *R. v. McCallen* (1999), 43 O.R. (3d) 56; *R. v. Daley*, 2015 ONSC 7145; *R. v. McGregor*, 2020 ONSC 4802; *R. v. Taylor*, 2016 BCSC 1956; *R. v. Mujku*, 2011 ONCA 64, 226 C.R.R. (2d) 234; *R. v. Azonwanna*, 2020 ONSC 5416, 468 C.R.R. (2d) 258; *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135; *R. v. Tremblay*, 2021 QCCA 24.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 10(a), (b), 24(2).

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Bouchard and Healy JJ.A.), **2020 QCCA 746**, 388 C.C.C. (3d) 362, 63 C.R. (7th) 319, [2020] AZ-51690253, [2020] Q.J. No. 3677 (QL), 2020 CarswellQue 4948 (WL Can.), setting aside the conviction of the accused for second degree murder and ordering a new trial. Appeal dismissed.

*Justin Tremblay and Isabelle Bouchard*, for the appellant.

*Célia Hadid and Michel Marchand*, for the respondent.

*Davin Michael Garg* and *Natalya Odorico*, for the intervener the Attorney General of Ontario.

*Anil K. Kapoor* and *Victoria Cichalewska*, for the intervener the Criminal Lawyers' Association.

*Mairi Springate*, for the intervener Association québécoise des avocats et avocates de la défense.

*Jean-Philippe Marcoux* and *Jean-Sébastien St-Amand Guinois*, for the intervener Association des avocats de la défense de Montréal-Laval-Longueuil.

The judgment of the Court was delivered by

MOLDAVER J. —

I. Introduction

[1] Patrick Dussault was arrested on charges of murder and arson. He was read his rights and taken to the police station, where he spoke with a lawyer for roughly 10 minutes on the telephone. He and the lawyer ended the call in the belief that the police had agreed to allow them to continue their conversation at the station. When the lawyer came to the station, the police did not let him meet with Mr. Dussault. Before

Mr. Dussault spoke again with the lawyer, he was questioned and made an incriminating statement.

[2] At issue in this appeal is whether the police provided Mr. Dussault with a reasonable opportunity to consult counsel and, more particularly, whether they were required to provide Mr. Dussault with a further opportunity to consult counsel before interrogating him. The trial judge held that they were not required to do so because, in all the circumstances, they could reasonably presume that Mr. Dussault had exercised his right to counsel during the 10-minute telephone call with his lawyer. The Court of Appeal reached the opposite conclusion, holding that Mr. Dussault's telephone call did not constitute a "complete" consultation for the purposes of s. 10(b) of the *Canadian Charter of Rights and Freedoms*, and that the police were required to allow Mr. Dussault to continue this consultation at the station.

[3] For reasons that I will explain, in the unique circumstances of this case, I am satisfied that the police were required to provide Mr. Dussault with a further opportunity to consult counsel before questioning him. My reasons for reaching that conclusion, however, differ from those of the Court of Appeal. In my opinion, there were objectively observable indicators that the police conduct in this case had the effect of undermining the legal advice that the lawyer provided to Mr. Dussault during their telephone call. Therefore, even if the call was a complete consultation in its own right, the police were nevertheless required to provide Mr. Dussault with a second

opportunity to consult counsel. They failed to do so and thereby breached his s. 10(b) rights. I would dismiss the appeal.

## II. Facts

[4] The facts as summarized are based on findings made by the trial judge.

[5] On the afternoon of August 28, 2013, Gatineau police made a dynamic entry into the home of Mr. Dussault and arrested him on charges of murder and arson. The police informed Mr. Dussault of his rights, including his right to counsel under s. 10(b) of the *Charter*. Mr. Dussault indicated that he wished to speak to a lawyer.

[6] The police transported Mr. Dussault to the police station. They arrived at 2:36 p.m. Mr. Dussault was presented with a list of local defence lawyers. He chose Jean-François Benoît at random. He was placed in a small room with a telephone and told to wait for a call. When the phone rang, Mr. Dussault answered. Mr. Benoît was on the line.

[7] The two conversed for roughly nine minutes. Mr. Benoît explained the charges and Mr. Dussault's right to remain silent. He was left with the impression that Mr. Dussault was not processing or understanding his advice. He offered to come to the station to meet in person, and Mr. Dussault accepted. Mr. Benoît then asked Mr. Dussault to pass the phone to an officer. Mr. Dussault knocked on the door and handed the receiver to Detective Sergeant Pierre Chicoine.

[8] Mr. Benoît spoke with Officer Chicoine for roughly three minutes. He said that he was coming to the police station and asked that the investigation be suspended. Officer Chicoine responded [TRANSLATION] “[n]o problem” or “no trouble”: A.R., vol. V, at p. 141, and vol. VIII, at p. 18. Mr. Benoît asked Officer Chicoine to return the phone to Mr. Dussault.

[9] Mr. Benoît spoke again with Mr. Dussault for roughly one minute. He confirmed that he was coming to the police station to meet with Mr. Dussault and he explained that, in the interim, Mr. Dussault would be placed in a cell. He told Mr. Dussault not to speak to anyone. Mr. Dussault was reassured by this conversation. He believed that Mr. Benoît was coming to meet him.

[10] At 3:20 p.m., Officer Chicoine, accompanied by Detective Sergeant Ian Gosselin, spoke to the lead investigators on the file, reporting that the arrest went well and that Mr. Dussault had exercised his right to counsel. During the conversation, it was decided that Mr. Benoît would not be permitted to meet with Mr. Dussault. Officer Chicoine was told to inform Mr. Benoît of this decision.

[11] In line with these instructions, Officer Chicoine phoned Mr. Benoît and told him that there was no point in coming to the police station. He said that Mr. Dussault had exercised his right to counsel during the telephone conversation. He also emphasized that Mr. Dussault himself had not expressed a desire to meet his lawyer. According to Officer Chicoine, Mr. Benoît responded in a loud voice, seemingly attempting to influence or intimidate him.

[12] After this call, Officer Chicoine began to doubt himself. He reported to a lead investigator, who decided that a prosecutor from the office of the Director of Criminal and Penal Prosecutions should be contacted for advice. The prosecutor researched relevant case law, including this Court's decision in *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310. She concluded, based on the information provided to her, that Mr. Dussault was not entitled to meet with Mr. Benoît at the police station, and she advised the police accordingly.

[13] Mr. Benoît arrived at the police station at approximately 4:15 p.m. He was not permitted to meet with Mr. Dussault. At 6:30 p.m., he left to tend to family matters, leaving behind a handwritten note addressed to Officer Chicoine. In the note, Mr. Benoît indicated that, during his phone call with Mr. Dussault, he had only partially instructed Mr. Dussault on his rights, and that he wished to meet with Mr. Dussault to complete the advice before Mr. Dussault was interrogated. He stated that he would be available after 7:45 p.m. and asked Officer Chicoine to contact him as soon as possible. The note was delivered to Officer Chicoine.

[14] At 5:18 p.m. and again at 8:50 p.m., Officers Chicoine and Gosselin approached the cellblock supervisor to ask whether Mr. Dussault had spoken about his lawyer. The answer on both occasions was no.

[15] After their second check-in with the cellblock supervisor, the officers went to Mr. Dussault's cell. At 8:52 p.m., Officer Chicoine told Mr. Dussault that Detective Sergeant Frédérick Simard was ready to meet with him. Mr. Dussault asked whether

his [TRANSLATION] “lawyer arrived”: A.R., vol. V, at p. 183. Officer Chicoine responded with his own question: Was it Mr. Dussault who had asked the lawyer to come? Mr. Dussault answered that it was the lawyer who said that he would come, and that the lawyer wanted to be there during the meeting. Officer Chicoine told Mr. Dussault that the lawyer was not at the police station.

[16] Officer Simard commenced the interrogation shortly before 9:00 p.m. Mr. Dussault could not understand why he had not yet spoken to his lawyer. It is worth reproducing in full a number of the questions and responses between Officer Simard and Mr. Dussault on this subject:

[TRANSLATION]

Q. . . . [O]nce you were arrested, at 12 Trottier, is it true that [Detective Sergeant Chicoine is] the same man who brought you here, who read you your rights?

A. Yes.

Q. He had that form, in fact it’s a copy of his form.

A. That, my lawyer told me he was supposed to be here because he wanted to attend this interview, and he isn’t here, and they told me . . . he told me to wait till he was here, and he still hasn’t arrived.

Q. OK. We’re going to clarify that actually, that step, whether you got your rights with Mr. Chicoine. . . .

. . .

Q. OK. Well, I’ll tell you. We’re a team here, it’s like a big family. So how did things go with those two people, those two police officers?

A. It was fine.

Q. Yes?

A. But that, my lawyer, he told me to . . . why did he tell me to remain . . . He just told me to give my name, my things, and he told me to remain silent until he was here. Why did he tell me that?

Q. Why did he tell you that? He gave you advice, and it's privileged for you.

A. No, I know.

Q. I can't get involved in that conversation.

A. Yeah.

Q. It's because it's your privilege to consult a lawyer.

A. Because he told me he'd be here. Now I feel like I'm a bit on my own. He told me he'd be here to come . . .

. . .

Q. But what I want to clarify is: did you have a chance to speak to a lawyer?

A. Yes.

Q. Who was your lawyer?

A. It's . . . *fuck*, I don't have the name, but he's . . .

Q. If I tell you Mr. Benoît?

A. Yes.

Q. That's right?

A. Yes.

Q. Were you able to speak to him in confidence, alone?

A. Yes, and he told me to remain silent until he met with me.

. . .



Q. . . . So the right to counsel, I'm happy, you were able to exercise your right, that's perfect. You got advice and that's the number one thing. I will set that aside. [Underlining added.]

(A.R., vol. X, at pp. 10-11 and 14-17)

[17] After these exchanges, the interrogation proceeded, and Mr. Dussault made an incriminating statement.

### III. Decisions Below

#### A. *Voir Dire, Superior Court of Quebec (Di Salvo J.)*

[18] Mr. Dussault moved to exclude the statement on the basis that it was obtained in violation of ss. 7, 10(a), and 10(b) of the *Charter*. Only the last of these alleged violations is at issue in the present appeal.

[19] Defence counsel argued that *Sinclair*, and in particular para. 52 of this case, was the principal governing authority:

[TRANSLATION] So we'll get to the heart of the matter. And here I quote paragraph fifty-two (52), copying my friend. Paragraph fifty-two (52):

“More broadly, this may be taken to suggest that circumstances indicating that the detainee may not have understood the initial section ten (b) (10(b)) advice of his right to counsel impose on the police a duty to give him a further opportunity to talk to a lawyer.”

(A.R., vol. IX, at p. 67)

[20] Counsel argued that there had been objectively observable circumstances indicating that Mr. Dussault had not understood Mr. Benoît's initial legal advice. Two such circumstances stood out. The first was Mr. Benoît's handwritten note, and the second was Mr. Dussault's statement to the effect that his lawyer had said he was coming to meet with him. In counsel's view, these circumstances obliged the police to provide Mr. Dussault with a second opportunity to consult with Mr. Benoît.

[21] The trial judge rejected this argument and held that the incriminating statement was admissible. She made three significant findings in support of this conclusion:

- first, that Mr. Benoît adequately explained the right to silence;
- second, that Mr. Dussault understood Mr. Benoît's explanation of the right to silence;
- third, that Mr. Dussault did not mention to police that he did not understand the right to silence or his rights more generally.

Based on these conclusions, and in consideration of all the evidence, the trial judge found that Mr. Dussault had exercised his right to counsel, and that the police [TRANSLATION] "could reasonably assume" that he had done so in a satisfactory manner: *voir dire* decision, reproduced in A.R., vol. I, at p. 19. They were not obligated to provide a second opportunity.

B. *Court of Appeal of Quebec, 2020 QCCA 746, 388 C.C.C. (3d) 362 (Bich, Bouchard and Healy JJ.A.)*

[22] Mr. Dussault pled guilty to the charge of arson and was convicted by a jury on the charge of second degree murder. He appealed from the murder conviction on the basis that the trial judge erred in dismissing his motion to exclude the incriminating statement. The Court of Appeal unanimously allowed the appeal, quashed the verdict, and ordered a new trial.

[23] The central issue, as framed by the Court of Appeal, was whether Mr. Dussault's telephone call with Mr. Benoît constituted a complete consultation for the purposes of s. 10(b). If the answer was yes, the *Sinclair* framework would govern the appeal; Mr. Dussault could succeed only by showing that an objectively observable change in circumstances had "reviv[ed]" his right to counsel: para. 38. If, however, the telephone conversation was *not* a complete consultation, the Court of Appeal's decision in *Stevens v. R.*, 2016 QCCA 1707, would govern the outcome. The Court of Appeal in this case interpreted *Stevens* as standing for the proposition that s. 10(b) guarantees the right to, and requires police to facilitate, the "effective" assistance of counsel: para. 36.

[24] The court concluded that the telephone conversation was not a complete consultation and that the police "were fully aware that [Mr. Dussault] and his counsel expected the consultation to continue": para. 35. The police denied the effective assistance of counsel, and thereby breached Mr. Dussault's s. 10(b) right, when they

“determined not to permit a continuation of the consultation that began on the telephone”: para. 36. The court excluded Mr. Dussault’s incriminating statement under s. 24(2) of the *Charter* and ordered a new trial.

[25] The reasons of the Court of Appeal depart markedly from those of the trial judge in terms of their characterization of the conduct of the police. Whereas the trial judge concluded that the police could reasonably presume that Mr. Dussault had exercised his right to counsel, the Court of Appeal found that the police had deliberately and concertedly attempted to frustrate the effective exercise of that right: see, e.g., para. 40. This difference in view of the police conduct appears to result from their different legal conclusions about whether the police were entitled to presume that the right to counsel was exhausted at the end of the phone conversation.

#### IV. Analysis

[26] The only issue in this appeal is whether the factual findings of the trial judge support the legal conclusion that the police provided Mr. Dussault with a reasonable opportunity to consult counsel. This calls for an assessment of whether a legal standard was met and therefore amounts to a question of law that is reviewed for correctness: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20.

[27] In my opinion, the police failed to provide Mr. Dussault with a reasonable opportunity to consult counsel. I would therefore dismiss the appeal. My reasons for reaching this conclusion, however, differ from those of the Court of Appeal.

[28] For reasons which will become apparent, I find it unnecessary to decide whether the police were entitled to presume that the phone conversation constituted a “complete” consultation. Nor is it necessary to resolve the discrepancy between the characterization of the police conduct in the reasons of the trial judge and those of the Court of Appeal. Suffice it to say that I have serious reservations about the Court of Appeal’s characterization of the police conduct to the extent that it could be understood as suggesting that the police knowingly violated Mr. Dussault’s right to counsel.

[29] As I see it, the principles set out in *Sinclair* suffice to resolve this appeal. *Sinclair* states that the police must provide a detainee with a second opportunity to consult counsel where there are “objectively observable” indicators that their conduct has undermined the legal advice that was provided during the first consultation: para. 55. On the facts of the present appeal, there were objectively observable indicators that the conduct of the police had had the effect of undermining the legal advice that Mr. Benoît provided to Mr. Dussault during their telephone call. Therefore, even if the call was a complete consultation, this was one of those rare cases in which the police were obligated to provide a detainee with a second opportunity to consult counsel. In failing to provide that opportunity to Mr. Dussault, they breached his s. 10(b) rights.

A. *The Legal Principles*

(1) *Sinclair* and the Right to a Second Consultation

[30] 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”. Stated at its broadest, the purpose of the right to counsel “is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation”: *Sinclair*, at para. 24.

[31] Section 10(b) places corresponding obligations on the state. Police must inform detainees of the right to counsel (the informational duty) and must provide detainees who invoke this right with a reasonable opportunity to exercise it (the implementational duty). Failure to comply with either duty results in a breach of s. 10(b): *Sinclair*, at para. 27, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233.

[32] Police can typically discharge their implementational duty by facilitating “a single consultation at the time of detention or shortly thereafter”: *Sinclair*, at para. 47. In this context, the consultation is meant to ensure that “the detainee’s decision to cooperate with the investigation or decline to do so is free and informed”: para. 26. A few minutes on the phone with a lawyer may suffice, even for very serious charges: see, e.g., *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429.

[33] On this point, it is worth reiterating what the *Sinclair* majority made clear: Detainees do not have a right to obtain, and police do not have a duty to facilitate, the continuous assistance of counsel. Although other jurisdictions recognize a right to have counsel present throughout a police interview, that is not the law in Canada. Canadian courts and legislatures have taken a different approach to reconciling the personal rights

of detainees with the public interest in effective law enforcement: *Sinclair*, at paras. 37-39.

[34] Once a detainee has consulted with counsel, the police are entitled to begin eliciting evidence and are only exceptionally obligated to provide a further opportunity to receive legal advice. In *Sinclair*, McLachlin C.J. and Charron J., writing for the majority, explained that the law has thus far recognized three categories of “changed circumstances” that can renew a detainee’s right to consult counsel: “. . . new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the first information provided was deficient” (para. 2). Of course, for any of these “changed circumstances” to give rise to a right to reconsult, they must be “objectively observable”.

[35] As a specific example of the third category listed above, the majority explained, at para. 52, that the right to counsel may be renewed if police “undermine” the legal advice that the detainee has received:

Similarly, if the police undermine the legal advice that the detainee has received, this may have the effect of distorting or nullifying it. This undercuts the purpose of s. 10(b). In order to counteract this effect, it has been found necessary to give the detainee a further right to consult counsel. See [*R. v.*] *Burlingham* [, [1995] 2 S.C.R. 206].

(2) Undermining Legal Advice Includes Undermining Confidence in Counsel

[36] The majority in *Sinclair* did not expand on the type of police conduct that could “undermine the legal advice that the detainee has received” and thereby give rise to a renewed right to consult counsel. In this context, care must be taken in defining the term “undermine”. It is clear, for instance, that if this term is defined too broadly, it would prevent police from attempting in any way to convince a detainee to act contrary to their lawyer’s advice: see, e.g., *R. v. Edmondson*, 2005 SKCA 51, 257 Sask. R. 270, at para. 37. If this were so, police would effectively be required to cease questioning any detainee who said “my lawyer told me not to talk”. That is not the law in Canada: *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405.

[37] The reference to *Burlingham* at the end of para. 52 in *Sinclair* sheds light on the type of police conduct that can “undermine” legal advice in the *Sinclair* sense of that term. It suggests that, in this context, police can undermine legal advice by undermining confidence in the lawyer who provided that advice. In *Burlingham*, the accused was charged with one murder and suspected in a second. He was subjected to an intensive interrogation during which police repeatedly disparaged “defence counsel’s loyalty, commitment, availability, as well as the amount of his legal fees”: para. 4. A majority of the Court found that these “belittling” comments breached s. 10(b) because they were made with the purpose, or had the effect, of undermining the accused’s confidence in counsel:

... s. 10(b) specifically prohibits the police, as they did in this case, from belittling an accused’s lawyer with the express goal or effect of undermining the accused’s confidence in and relationship with defence counsel. It makes no sense for s. 10(b) of the *Charter* to provide for the



right to retain and instruct counsel if law enforcement authorities are able to undermine either an accused's confidence in his or her lawyer or the solicitor-client relationship. [para. 14]

[38] It is notable that *Burlingham* speaks of undermining confidence in counsel, whereas *Sinclair* speaks specifically of undermining legal advice. The implied premise of the *Sinclair* citation to *Burlingham* appears to be that undermining confidence in counsel and undermining legal advice, in this context, produce the same effect. I agree, they can.

[39] A detainee's confidence in counsel anchors the solicitor-client relationship and allows for the effective provision of legal advice: *R. v. McCallen* (1999), 43 O.R. (3d) 56 (C.A.). When the police undermine a detainee's confidence in counsel, the legal advice that counsel has already provided — even if it was perfectly correct at the time it was given — may become, as observed in *Sinclair*, “distort[ed] or nullif[ied]”. *Sinclair* requires police to provide a new opportunity to consult with counsel in order to counteract these effects.

(3) “Undermining” Is Not Limited to Intentional Belittling of Defence Counsel

[40] The most notable cases in this area of the law are those, such as *Burlingham*, in which the police expressly call into question the competence or trustworthiness of defence counsel. *Burlingham* and certain cases following it have characterized this type of conduct as the “belittling” of defence counsel. In cases of this

sort, it is difficult to view the police conduct as amounting to anything less than an intentional effort to undermine the legal advice provided to a detainee.

[41] The *Sinclair* analysis does not, however, distinguish between intentional and unintentional undermining of legal advice. The focus remains on the effects of the police conduct. Where the 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.

[42] This conclusion follows from a consideration of the basic principles that underlie the *Sinclair* framework. *Sinclair* mandates that police provide a second opportunity to consult counsel where “changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not”: para. 48. To focus on whether the police *intended* to bring about a change in circumstance would be to shift the inquiry away from the necessity for reconsultation and toward the fault of the police. This would distort *Sinclair*. The duty to facilitate reconsultation is not imposed on police as a punishment for ill-intentioned conduct.

[43] The case law also demonstrates that police conduct can unintentionally undermine the legal advice provided to a detainee: see, e.g., *R. v. Daley*, 2015 ONSC 7145, at para. 42 (CanLII), per Fairburn J. (as she then was); *R. v. McGregor*, 2020 ONSC 4802, at para. 194 (CanLII); *R. v. Taylor*, 2016 BCSC 1956, at para. 54

(CanLII). It is for this reason that the Court of Appeal for Ontario was correct to warn that “police tread on dangerous ground when they comment on the legal advice tendered to detainees”: *R. v. Mujku*, 2011 ONCA 64, 226 C.R.R. (2d) 234, at para. 36. The ground sometimes gives way, and the prohibited effect occurs, even where the intention to achieve it was absent.

[44] Nor is there any principled reason to think that police conduct must amount to the “belittling” of defence counsel in order to “undermine” legal advice in the *Sinclair* sense of that term. Recall that *Sinclair* described the “undermin[ing]” of legal advice as being conduct which “may have the effect of distorting or nullifying [that advice]”: para. 52 (emphasis added). Conduct other than the express belittlement of defence counsel may have this effect: see, e.g., *R. v. Azonwanna*, 2020 ONSC 5416, 468 C.R.R. (2d) 258, at paras. 122 and 148-49, in which police undermined the legal advice that a detainee had received by providing a misleading and incorrect summary of his right to silence. There would be no point, however, in trying to catalogue the various types of police conduct that could have the effect of “undermin[ing]” legal advice in this context. The focus remains on the objectively observable *effects* of the police conduct, rather than on the conduct itself.

[45] Simply put, the purpose of s. 10(b) is to provide the detainee with an opportunity to obtain legal advice relevant to their legal situation. As noted earlier, the legal advice is intended to ensure that “the detainee’s decision to cooperate with the investigation or decline to do so is free and informed”. The legal advice received by a

detainee can fulfill this function only if the detainee regards it as legally correct and trustworthy. The purpose of s. 10(b) will be frustrated by police conduct that causes the detainee to doubt the legal correctness of the advice they have received or the trustworthiness of the lawyer who provided it. Police conduct of this sort is properly said to “undermine” the legal advice that the detainee has received. If there are objectively observable indicators that the legal advice provided to a detainee has been undermined, the right to a second consultation arises. By contrast, the right to reconsult will not be triggered by legitimate police tactics that persuade a detainee to cooperate without undermining the advice that they have received. As *Sinclair* makes clear, police tactics such as “revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him” do not trigger the right to a second consultation with counsel: para. 60.

#### B. *Application*

[46] I am satisfied that the police conduct in this case had the effect of leading Mr. Dussault to believe, first, that an in-person consultation with Mr. Benoît would occur and, second, that Mr. Benoît had failed to come to the police station for that consultation. The effect of this was to undermine the legal advice that Mr. Benoît had provided to Mr. Dussault during their telephone conversation. Importantly, there were objectively observable indicators of this. In my view, these indicators triggered the police duty to provide Mr. Dussault with a second opportunity to consult counsel. The

police failed to discharge that duty and, in doing so, breached Mr. Dussault's right to counsel.

(1) The Police Misled Mr. Dussault

[47] In my opinion, two separate acts of Officer Chicoine combined to have the effect of undermining the legal advice provided by Mr. Benoît.

[48] The first act occurred during Officer Chicoine's first telephone conversation with Mr. Benoît. When Mr. Benoît said that he was coming to the police station to meet with Mr. Dussault and asked that the investigation be suspended, Officer Chicoine responded that this would be no problem or no trouble. In reasonable reliance on Officer Chicoine's words, Mr. Benoît advised Mr. Dussault that he was coming to the police station to meet with him and that, in the interim, he would be placed in a cell. Officer Chicoine's words therefore had the effect, albeit indirect, of causing Mr. Dussault to believe that an in-person meeting would take place.

[49] The second act occurred at 8:52 p.m. By this time, Mr. Benoît had come and gone. When Officer Chicoine told Mr. Dussault that Officer Simard was ready to meet with him, Mr. Dussault asked point-blank whether his [TRANSLATION] "lawyer arrived". Officer Chicoine responded that Mr. Benoît [TRANSLATION] "isn't at the front of the station": A.R., vol. VI, at p. 38.

[50] In oral argument before this Court, counsel for the Crown insisted that this was [TRANSLATION] “a particularly delicate situation” for Officer Chicoine: transcript, at p. 9. Counsel stated that Officer Chicoine could not tell Mr. Dussault that Mr. Benoît had come and gone without risking [TRANSLATION] “a certain denigration of the lawyer’s work”: p. 8. In response to this statement, counsel was asked whether it would not have been simpler for Officer Chicoine to tell Mr. Dussault that it was the police who had prevented Mr. Benoît from meeting with him. Counsel responded that this might have cast [TRANSLATION] “doubt on the quality of the advice” that Mr. Dussault had received: p. 9. Counsel was evidently of the opinion that Officer Chicoine averted these risks by telling Mr. Dussault that Mr. Benoît [TRANSLATION] “isn’t at the front of the station”.

[51] I do not agree that Officer Chicoine successfully extricated himself from this delicate situation. The most reasonable interpretation of Officer Chicoine’s response was that Mr. Benoît had not arrived at all. Indeed, Mr. Dussault’s statements during the interrogation indicate that this is precisely what he believed ([TRANSLATION] “he told me to wait till he was here, and he still hasn’t arrived”). Officer Chicoine’s statement misled Mr. Dussault into believing that Mr. Benoît had failed to come to the station for their in-person consultation. If Officer Chicoine was worried about denigrating counsel or casting a doubt on the quality of the legal advice that Mr. Dussault had received, I fail to see how the words that he chose were an improvement over telling Mr. Dussault that Mr. Benoît had come and gone.

(2) The Police Conduct Undermined the Legal Advice Provided to Mr. Dussault

[52] Two factors in particular support my conclusion that the above-described police conduct had the effect of undermining the legal advice that Mr. Benoît had provided to Mr. Dussault.

[53] The first is the content of the advice itself. Mr. Benoît advised Mr. Dussault that he was coming to the police station to meet with him in person; that, in the interim, Mr. Dussault would be placed in his cell; and that he — Mr. Dussault — should not speak to anyone. In refusing to permit Mr. Benoît to meet with Mr. Dussault, the police effectively falsified an important premise of Mr. Benoît’s advice — i.e. that Mr. Dussault would be placed in a cell until Mr. Benoît arrived. This is an example of the “distort[ion]” of legal advice that was warned against in *Sinclair*.

[54] The second is the evidence of what Mr. Dussault said during the interrogation itself. He repeatedly expressed that his lawyer had told him he would be there ([TRANSLATION] “That, my lawyer told me he was supposed to be here”); he stated his belief that his lawyer had never actually arrived (“he told me to wait till he was here, and he still hasn’t arrived”); he openly questioned why his lawyer had given him the advice that he had given (“But that, my lawyer, he told me to . . . why did he tell me to remain . . . He just told me to give my name, my things, and he told me to remain silent until he was here. Why did he tell me that?”); and he implied that his lawyer’s

failure to show up had left him feeling alone (“Because he told me he’d be here. Now I feel like I’m a bit on my own”).

[55] When these statements are considered in their totality and in light of all relevant circumstances, it is clear that they were objectively observable indicators that the legal advice given to Mr. Dussault had been undermined.

[56] In *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, Doherty J.A. described the right to counsel as a “lifeline” through which detained persons obtain legal advice and “the sense that they are not entirely at the mercy of the police while detained”: para. 45; see also *R. v. Tremblay*, 2021 QCCA 24, at para. 40 (CanLII). I agree. In this case, the conduct of the police had the effect of undermining and distorting the advice that Mr. Dussault had received. The police ought to have offered him a second opportunity to re-establish his “lifeline”, but they did not. In failing to do so, they breached his s. 10(b) rights.

### C. *Remedy*

[57] The Crown has conceded, in my view properly, that Mr. Dussault’s incriminating statement should be excluded under s. 24(2) of the *Charter* if it was obtained in violation of s. 10(b).

### V. Disposition



[58] For these reasons, I would dismiss the appeal.

*Appeal dismissed.*

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