Indexed as:

R. v. Prosper

Cyril Patrick Prosper, appellant;
v.
Her Majesty The Queen, respondent, and
The Charter Committee on Poverty Issues, intervener.

[1994] 3 S.C.R. 236

[1994] S.C.J. No. 72

File No.: 23178.

Supreme Court of Canada

1994: March 2, 3; 1994: September 29.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Constitutional law -- Charter of Rights -- Right to retain and instruct counsel and to be informed thereof -- Free duty counsel -- Arrest made outside normal working hours -- Rights read to person under arrest mentioning availability of legal aid -- Appellant wishing to speak with lawyer and provided list of legal aid lawyers -- Appellant unable to contact legal aid lawyer and unable to afford private lawyer -- Breathalyser test taken and failed -- Whether s. 10(b) of the Charter imposing substantive constitutional obligation on governments to provide free and immediate preliminary legal advice upon request -- Whether appellant's s. 10(b) right was violated -- If so, whether the breathalyser evidence should be excluded under s. 24(2) -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 10(b), 24(2) -- Criminal Code, R.S.C., 1985, c. C-46, ss. 253(a), (b), 254(3), (5), 258(1)(c)(ii), (d), 503(1)(a).

Late one Saturday afternoon, two police officers observed the appellant driving erratically. Following a chase on foot, he was arrested and charged with car theft, with having care and control of a motor vehicle with a blood alcohol level above the legal limit contrary to s. 253(b) of the

Criminal Code, and with having the control of a motor vehicle while impaired contrary to s. 253(a). He had a strong smell of alcohol on his breath, bloodshot eyes, his speech was intermittent and slurred and he was swaying from side to side. A section 10(b) Charter caution was read to him from a card, advising of the right to apply for free legal aid. The appellant indicated that he wanted to speak with a lawyer. The police provided him with a list of legal aid lawyers and, when this search proved unsuccessful, gave him a telephone book to continue his search. The police did not at first realize that all but one of the lawyers on the list were currently unavailable outside regular office hours, but they informed the appellant of this fact upon learning of this situation. The appellant declined to call lawyers in private practice because he could not afford their services. He then agreed to take the breathalyser tests.

The trial judge dismissed the s. 253(a) charge on the ground that he had a reasonable doubt. The defence, while conceding that all elements on the s. 253(b) charge had been proved, successfully argued that appellant's s. 10(b) Charter rights had been infringed, that the breathalyser certificate should be excluded under s. 24(2) of the Charter and that the charge should be dismissed. The Court of Appeal allowed the Crown's appeal, substituted a conviction under s. 253(b) of the Code and remitted the matter back to the trial court for sentencing. At issue here were whether the s. 10(b) Charter right to retain and instruct counsel without delay imposed a substantive constitutional obligation on governments to ensure that duty counsel is available upon arrest or detention to provide free and immediate preliminary legal advice upon request, whether appellant's s. 10(b) right was violated, and if so, whether the breathalyser evidence should be excluded under s. 24(2) of the Charter.

Held (La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting): The appeal should be allowed.

The issues are decided as follows:

Section 10(b) of the Charter

Section 10(b) of the Charter does not impose a substantive constitutional obligation on governments to ensure that duty counsel is available upon arrest or detention to provide free and immediate preliminary legal advice upon request (unanimous). Section 10(b) was violated: per Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ. (La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting).

Section 24(2) of the Charter

The evidence should be excluded as its admission would bring the administration of justice into disrepute: per Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ. (La Forest, L'Heureux-Dubé and Gonthier JJ. dissenting). Major J. did not address this issue.

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(1) Section 10(b) of the Charter

Per Lamer C.J. and Sopinka, Cory and Iacobucci JJ.: It is not constitutionally sufficient for law enforcement authorities simply to repeat the words of the Charter by cautioning detainees of their right "to retain and instruct counsel without delay". Two additional elements to the information component of s. 10(b) are required: (1) information about access to counsel free of charge where an accused meets the prescribed financial criteria set by provincial Legal Aid, and (2) information about access to duty counsel (whether staff lawyers or in private practice) providing immediate, although temporary, legal advice irrespective of financial status. The information to be conveyed to detainees by police is to refer to services actually available within the jurisdiction.

The issue of whether the Charter guarantees a right to state-funded counsel at trial and on appeal did not arise here. It is neither appropriate nor necessary to find that s. 10(b) imposes a substantive obligation on governments to ensure that "Brydges duty counsel" is available to detainees, or likewise, that it provides all detainees with a corresponding right to such counsel. First, s. 10(b) does not, in express terms, constitutionalize the right to free and immediate legal advice upon detention. A clause expressly creating such a right was considered and deliberately omitted by the framers of the Constitution and it would be imprudent for this Court not to attribute any significance to this fact. Requiring governments to spend limited resources in providing such a service also weighed against this interpretation. Second, the implications of finding a constitutional obligation on governments to make "Brydges duty counsel" available and a violation of s. 10(b) for failure to do so would be far-reaching and should be avoided. Moreover, the Charter rights of detainees can be sufficiently protected by an obligation on police to "hold off" questioning detainees until they have been given a reasonable opportunity to contact counsel.

Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person. The existence of a "holding-off" period flows from the implementational duties. Once a detainee has indicated a desire to exercise the right to counsel, the state must provide that person with a reasonable opportunity to consult counsel and state agents may not elicit incriminatory evidence from the detainee until that opportunity has been given. What constitutes a reasonable opportunity depends on the surrounding circumstances, which include the availability of duty counsel services in the jurisdiction. The availability or unavailability of duty counsel services affects the length of the holding-off period.

Section 10(b) serves to protect the right against self-incrimination -- one of the principles of fundamental justice under s. 7 of the Charter. A holding-off period accommodates a detainee's right against self-incrimination.

The duty on state agents to inform individuals of their right to counsel does not arise until a person has been detained within the meaning of s. 10. Detention involves some form of coercion or compulsion by the state which results in a deprivation of liberty. Section 10(b) accordingly is, among other things, intended to safeguard the liberty interests of detainees which are

constitutionally protected under s. 7 of the Charter and to assist detainees in regaining their freedom. Any deprivation of liberty during a holding-off period would be minimal and in accordance with the principles of fundamental justice under s. 7. Any delay which is considered excessive can be challenged under s. 9 of the Charter which protects against arbitrary detention or imprisonment.

Courts must ensure that the right to counsel is not too easily waived. An additional informational obligation on police is triggered once a detainee, who has previously asserted this right, indicates a change of mind and no longer wants legal advice. The police must at this point tell the detainee of the right to a reasonable opportunity to contact counsel and of the obligation on the part of the police to hold off during this period. Any indication of a change of mind must be clear and the burden of establishing an unequivocal waiver is on the Crown. The waiver must be free and voluntary and must not be the product of either direct or indirect compulsion. The standard required for an effective waiver of counsel is very high. A person who waives a right must know what is being given up if the waiver is to be valid. The s. 10(b) right to counsel, however, must not be turned into an obligation on detainees to seek the advice of a lawyer.

Compelling and urgent circumstances may require that the police not hold off. In the context of impaired driving cases, however, the two-hour evidentiary presumption available to the Crown (under s. 258(1)(c)(ii)) does not, by itself, constitute such a compelling or urgent circumstance. Urgency is not created by mere investigatory and evidentiary expediency. A detainee's s. 10(b) rights must take precedence over the statutory right of the Crown to rely on an evidentiary presumption. Loss of this presumption is one of the prices to be paid for not implementing a system of "Brydges duty counsel". Consideration of s. 1 of the Charter is neither necessary nor appropriate here.

The appellant's s. 10(b) Charter rights were infringed in two respects. First, after asserting his right to counsel and trying repeatedly to contact a lawyer, the appellant was not informed when he changed his mind and agreed to take the breathalyser test that the police were required to hold off from their investigation until he had had a reasonable opportunity to contact counsel. Second, the police in fact failed to hold off administering the breathalyser tests and so failed to afford him this opportunity. There were no urgent or compelling circumstances which justified the police in proceeding so precipitously with the breathalyser tests. The appellant acted with due diligence in trying to contact counsel. To have expected more of him would have been unreasonable. He cannot be taken to have chosen to take the test with full knowledge of his s. 10(b) rights. The inference of fact that the appellant acted out of frustration when he finally submitted to the breathalyser demand should not be interfered with.

The appellant neither explicitly nor implicitly waived his right to counsel and could not be taken to have understood what he was giving up. The fact that the police advised the appellant of the broad parameters of the jeopardy in which he found himself was no substitute for legal advice from a lawyer.

Per McLachlin J.: Every person detained by the police has the right to retain and instruct counsel without delay and to be informed of that right. Every detainee, accordingly, is entitled to an opportunity to retain and instruct counsel without delay, regardless of the time and place of the detention or the fact that the detainee has no money.

The right consists of an informational component and an implementational component. Under the informational component, the police must inform all detainees that they are entitled to have an opportunity to contact counsel immediately, and that their right to do so is not dependent on their ability to afford a private lawyer. This must be done even where the means by which that right can be exercised may not seem at hand. In those jurisdictions which provide some system of free, preliminary legal advice, the police must also inform detainees of the existence and availability of these services and of the means by which such advice can be accessed.

Under the implementational component, s. 10(b) requires that the detainee be given an opportunity, or the means, to "retain and instruct counsel without delay". If the detainee chooses not to contact counsel, no breach results. If the legal system fails to provide the detainee with the opportunity to consult counsel without delay for whatever reason -- be it lack of facilities, information, willing counsel or some other impediment -- breach of s. 10(b) is established. If evidence is taken in contravention of this duty, its admissibility falls to be decided under s. 24(2) of the Charter.

A judicially imposed "holding-off" period is not required when counsel cannot immediately be made available. Nothing in the language of s. 10(b) authorizes the dilution of the right to counsel by the imposition of a "holding-off" period. The section clearly states that a detainee has the right to retain and instruct counsel without delay. It is problematic to suggest that courts can extend the period of "delay" for up to 48 hours or more.

While the police may choose to "hold off" they are not obliged to do so. Ultimately, whether or not they "hold off", if they take evidence from the detainee in violation of his or her rights, the authorities must be prepared to accept the risk that the evidence may not be admissible against the detainee at trial under s. 24(2) of the Charter. This applies in all cases, even where the Criminal Code prescribes that evidence must be taken within a stipulated time period, as for breathalyser tests. A detainee's constitutional rights are not attenuated simply because Parliament chooses to set a time limit for gathering a particular kind of evidence. At the same time, the urgency of the situation may be a factor weighing in favour of reception of the evidence when s. 24(2) is applied.

The requirements of the informational component of s. 10(b) were met here. The police were originally unaware of the Legal Aid lawyers' working to rule campaign when giving appellant the list of legal aid lawyers and they informed him of the campaign on learning of it.

The requirements of the implementational component of s. 10(b) were not satisfied here. The appellant clearly indicated a desire to speak to counsel prior to giving evidence and was diligent in pursuing his right. In the circumstances it would be unreasonable to expect the appellant to have done anything more than he did. Appellant did not waive his right to counsel when -- "out of

frustration" -- he finally agreed to submit to the breathalyser tests. He was prevented from exercising his right to counsel because of institutional conditions beyond his control. This violated s. 10(b) of the Charter.

Per L'Heureux-Dubé J. (dissenting): Section 10(b) of the Charter does not require the provinces to provide free and immediate duty counsel services to detainees. While there may be certain minimum levels of Legal Aid imposed by s. 7 in the context of an accused who is being tried for an offense whose penalty might result in the deprivation of the accused's life, liberty, or security of the person, access to 24-hour duty counsel services upon arrest or detention is clearly far above any such minimum threshold.

Arguments based on the "living tree" theory of constitutional development to the effect that the Constitution has evolved to the point where state-funded duty counsel should be constitutionally guaranteed must fail. The drafters of the Constitution considered and rejected such a proposal. The "living tree" theory has its limits and has never been used to transform a document completely or to add a provision which was specifically rejected.

The Chief Justice's "holding-off" proposal is also rejected. While a detainee must be provided with a reasonable opportunity, free from police questioning, to consult with counsel where he or she expresses a desire to do so, the duration of the "reasonable opportunity" should not depend on the existence or non-existence of duty counsel programs. The constitutional rights guaranteed under s. 10(b) of the Charter are uniform across the country and should not depend on the existence or non-existence of programs, such as 24-hour duty counsel services, that themselves are not mandated by the Constitution. Furthermore, even if s. 10(b) did impose a long "holding-off" period in provinces without duty counsel programs, such a holding-off period would not be required with respect to breathalyser tests. In urgent or dangerous circumstances, the police need not provide detainees with a reasonable opportunity to consult counsel before questioning them. Such urgency exists in the case of a breathalyser test. The test must be administered "forthwith" and the timing for efficacy of that test is two hours, a time frame also required by law.

Per La Forest J. (dissenting): The reasons of L'Heureux-Dubé J. regarding the alleged constitutional guarantee of state-funded duty counsel and the alleged breach of s. 10(b) of the Charter in the circumstances were agreed with.

Per Gonthier J. (dissenting): Notwithstanding agreement with Lamer C.J. as to the scope of the obligation of the police regarding disclosure of existing and available duty counsel services to those under arrest or detention, the reasons of L'Heureux-Dubé J. as to the reasonable opportunity to be given a detainee to retain and instruct counsel, particularly as applied to a demand for a breathalyser test, were agreed with.

Per Major J. (dissenting): The principles expressed by Lamer C.J. were agreed with. In the circumstances, however, the accused was properly advised and had a reasonable opportunity to contact counsel prior to taking the breathalyser test in accordance with his s. 10(b) rights.

(2) Section 24(2) of the Charter

Per Lamer C.J. and Sopinka, Cory and Iacobucci JJ.: The breath samples were conscripted evidence which might not have been obtained had the appellant's s. 10(b) rights not been infringed and should be excluded under s. 24(2) as capable of bringing the administration of justice into disrepute. The breach of the appellant's right to counsel went directly to his privilege against self-incrimination, and receipt of the breathalyser evidence resulting from this breach would undermine this privilege, thereby rendering the trial process unfair. Neither the undeniably good faith on the part of the police, nor the relative seriousness of the drinking and driving offence could compensate for the adjudicative unfairness that admission of the evidence would produce.

Per McLachlin J.: The admission of the breathalyser evidence would tend to bring the administration of justice into disrepute.

Per L'Heureux-Dubé J. (dissenting): Had there been an infringement of s. 10(b), the evidence should not have been excluded under s. 24(2) of the Charter. First, the factors concerning the fairness of the trial favour the admission of the evidence. Breathalyser tests cannot simply be characterized as self-incriminating evidence in the same way as a confession. Rather, they are indicia of an existing physical condition that could have been discovered by other means, whether or not the police denied the appellant his s. 10(b) rights. Second, the factors focusing on the seriousness of the violation of the Charter also militate towards admission rather than exclusion of the breathalyser results. A breach, if one occurred here, was not serious and the police acted in good faith. Finally, the offense of operating a motor vehicle while impaired is serious and therefore, in light of the nature of the Charter violation, had there been one, and its minimal incidence on the fairness of the trial, excluding the evidence would bring the administration of justice into disrepute.

Per La Forest J. (dissenting): It was in strictness unnecessary to comment on whether the breathalyser evidence should be excluded. The police officer here did everything possible to help the appellant obtain a lawyer.

Per Gonthier J. (dissenting): Appellant's s. 10(b) Charter rights were not infringed, and even if they had been, the breathalyser evidence should not have been excluded under s. 24(2).

Cases Cited

By Lamer C.J.

Applied: R. v. Bartle, [1994] 3 S.C.R. 173; considered: R. v. Brydges, [1990] 1 S.C.R. 190; referred to: R. v. Matheson, [1994] 3 S.C.R. 328; R. v. Pozniak, [1994] 3 S.C.R. 310; R. v. Harper, [1994] 3 S.C.R. 343; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; R. v. Manninen, [1987] 1 S.C.R. 1233; R. v. Evans, [1991] 1 S.C.R. 869; R. v. Ross, [1989] 1 S.C.R. 3; R. v. P. (M.B.), [1994] 1 S.C.R. 555; R. v. Jones, [1994] 2 S.C.R. 229; R. v. Hebert, [1990] 2 S.C.R. 151; R. v. Therens, [1985] 1 S.C.R. 613; Clarkson v. The Queen, [1986] 1 S.C.R. 383; R. v. Strachan, [1988]

2 S.C.R. 980; R. v. Burnison (1979), 70 C.C.C. (2d) 38; R. v. Deruelle, [1992] 2 S.C.R. 663.

By McLachlin J.

Considered: R. v. Askov, [1990] 2 S.C.R. 1199; referred to: R. v. Matheson, [1994] 3 S.C.R. 328; R. v. Bartle, [1994] 3 S.C.R. 173; R. v. Pozniak, [1994] 3 S.C.R. 310; R. v. Harper, [1994] 3 S.C.R. 343; R. v. Collins, [1987] 1 S.C.R. 265; R. v. Manninen, [1987] 1 S.C.R. 1233; R. v. Dubois (1990), 54 C.C.C. (3d) 166, [1990] R.J.Q. 681; R. v. Brydges, [1990] 1 S.C.R. 190.

By L'Heureux-Dubé J. (dissenting)

R. v. Bartle, [1994] 3 S.C.R. 173; R. v. Harper, [1994] 3 S.C.R. 343; R. v. Pozniak, [1994] 3 S.C.R. 310; R. v. Matheson, [1994] 3 S.C.R. 328; R. v. Robinson (1989), 73 C.R. (3d) 81; Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016; Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714; R. v. Manninen, [1987] 1 S.C.R. 1233; R. v. Tremblay, [1987] 2 S.C.R. 435; R. v. Strachan, [1988] 2 S.C.R. 980; R. v. Ross, [1989] 1 S.C.R. 3; R. v. Black, [1989] 2 S.C.R. 138; R. v. Smith (Joey Leonard), [1989] 2 S.C.R. 368; R. v. Brydges, [1990] 1 S.C.R. 190; R. v. Evans, [1991] 1 S.C.R. 869; R. v. Therens, [1985] 1 S.C.R. 613; R. v. Hufsky, [1988] 1 S.C.R. 621; R. v. Thomsen, [1988] 1 S.C.R. 640; R. v. Simmons, [1988] 2 S.C.R. 495; R. v. Jacoy, [1988] 2 S.C.R. 548; R. v. Debot, [1989] 2 S.C.R. 1140; R. v. Schmautz, [1990] 1 S.C.R. 398; R. v. Elshaw, [1991] 3 S.C.R. 24; R. v. Grant, [1991] 3 S.C.R. 139; R. v. Collins, [1987] 1 S.C.R. 265; R. v. Ladouceur, [1990] 1 S.C.R. 1257; R. v. Wilson, [1990] 1 S.C.R. 1291; R. v. Mellenthin, [1992] 3 S.C.R. 615.

By La Forest J. (dissenting)

R. v. Brydges, [1990] 1 S.C.R. 190; R. v. Bartle, [1994] 3 S.C.R. 173.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 9, 10(b), 24(2).
Constitution Act, 1982, s. 52.
Criminal Code, R.S.C. 1985, c. C-46, ss. 253(a), (b) [ad. R.S.C., 1985, c. 27 (1st Supp.), s. 36], 254(3), (5) [ad. idem], 258(1)(c)(ii), (d) [ad. idem], 503(1)(a).

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Lafontaine, Y. "Pourquoi au juste?" (1992), 32 Actif 32.

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Prairie Research Associates. Duty Counsel Systems: Technical Report (April 1993)
Statistics Canada. Canadian Centre for Justice Statistics. Courts Program. Legal Aid in Canada: Description of Legal Aid Operations. Ottawa: Statistics Canada, 1993.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1992), 113 N.S.R. (2d) 156, 75 C.C.C. (3d) 1, 38 M.V.R. (2d) 268, allowing an appeal from an acquittal by Sherar Prov. Div. J. and substituting a conviction. Appeal allowed, La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting.

Roger A. Burrill and Vincent Calderhead, for the appellant. John C. Pearson, for the respondent. Mark Freiman, for the intervener.

Solicitor for the appellant: Nova Scotia Legal Aid, Dartmouth.
Solicitor for the respondent: The Attorney General of Nova Scotia, Halifax.
Solicitors for the intervener: McCarthy, Tétrault, Toronto.

The judgment of Lamer C.J. and Sopinka, Cory and Iacobucci JJ. was delivered by

1 LAMER C.J.:-- This case was heard together with four other cases raising questions about the scope of the state's obligations with respect to duty counsel services under s. 10(b) of the Canadian Charter of Rights and Freedoms. These other cases, which consist of R. v. Matheson, [1994] 3 S.C.R. 328, from Prince Edward Island, R. v. Bartle, [1994] 3 S.C.R. 173, and R. v. Pozniak, [1994] 3 S.C.R. 310, from Ontario and R. v. Harper, [1994] 3 S.C.R. 343, from Manitoba, are handed down contemporaneously with judgment in this case. The specific issue raised here and in Matheson is whether s. 10(b) creates a positive constitutional obligation on governments to ensure that free and immediate preliminary legal advice is available upon arrest or detention, and if it does not, what state obligations, if any, exist in a jurisdiction where "Brydges duty counsel" is not available to detainees.

I. Facts

2 The appellant was charged with having care and control of a motor vehicle while his blood alcohol level was in excess of 80 mg of alcohol in 100 ml of blood, contrary to s. 253(b) of the Criminal Code, R.S.C., 1985, c. C-46, and with having the control of a motor vehicle while impaired, contrary to s. 253(a) of the Code. The appellant did not testify at his trial and no evidence

was called by the defence. The Crown called one witness, Constable Young, and tendered a breathalyser certificate.

3 The facts which emerged at trial are that the appellant was taken into custody late in the afternoon on Saturday, May 18, 1991, after two police officers saw a vehicle being driven in an erratic fashion by a person they did not believe to be the owner. They gave chase and the appellant abandoned the vehicle and fled on foot. When the police caught up with him, he showed indicia of impairment; a strong smell of alcohol on his breath, bloodshot eyes, intermittent and slurred speech and swaying from side to side. At approximately 3:40 p.m., Constable Young arrested the appellant for car theft and read him the following caution from a card:

> . . . you have the right to retain and instruct counsel without delay. You may call any lawyer you wish. You have the right to apply for legal assistance without charge through the Provincial Legal Aid Program.

Constable Young further advised the appellant that a list of Legal Aid lawyers' home telephone numbers would be provided to him should he wish. The appellant indicated that he understood. Constable Young then read the appellant the breathalyser demand, and asked him if he would like to take the breathalyser test or first talk to a lawyer. The appellant indicated that he would take the test, but that first he would talk to a lawyer.

4 The appellant was taken to a private cubicle at the Halifax police station and provided with a telephone and a list of Legal Aid lawyers. As it was outside regular business hours, the list contained home phone numbers. Constable Young waited outside while the appellant attempted to make phone contact with a lawyer. Although he made approximately 15 calls in total, some with the assistance of Constable Young, the appellant was unsuccessful in reaching any of the 12 listed lawyers. Unknown to Constable Young at the time, or to the appellant, Legal Aid lawyers had advised the Attorney General just a few days earlier that all but one of them would no longer take calls outside of regular working hours (unless from existing clients). Therefore, at the time in question, the Halifax/Dartmouth area had no established duty counsel system whereby those arrested and detained could receive immediate, although temporary, free legal advice after regular business hours. This continued to be the case at the time of hearing this appeal.

5 Upon exhausting the list of names after approximately 37 minutes, Constable Young asked the appellant if he wished to call other lawyers and provided the appellant with a telephone book. The appellant, however, told the Constable that he could not afford legal fees. At 4:30 p.m., Constable Young contacted the duty prosecutor for the Crown and discussed the release of the appellant. At this point, Constable Young became aware that Legal Aid lawyers in the area were no longer taking telephone calls at home. Shortly thereafter the appellant agreed to take the breathalyser tests. A certificate indicating that the appellant's blood alcohol ratio exceeded allowable limits was later drawn up and served on the appellant.

6 After argument on the impaired driving charge under s. 253(a) of the Code, the trial judge

dismissed this charge on the ground that he had a reasonable doubt. As for the breathalyser charge under s. 253(b) of the Code, counsel for the defence conceded that all the elements of the charge had been proved by the Crown, but argued that the appellant's s. 10(b) Charter rights had been infringed and that the breathalyser certificate should be excluded under s. 24(2) of the Charter and the charge dismissed. The trial judge found that the appellant's s. 10(b) rights had been violated and excluded the breathalyser evidence. He acquitted the appellant of impaired driving. The Crown's appeal was allowed by the Court of Appeal, which substituted a conviction under s. 253(b) of the Code and remitted the matter back to the trial court for sentencing.

II. Judgments Below

Ontario Court (Provincial Division) (Sherar Prov. Div. J.)

7 Sherar Prov. Div. J. reviewed the evidence and considered whether the unavailability of duty counsel violated the appellant's right to counsel under s. 10(b) and whether evidence obtained in light of that violation should be excluded under s. 24(2) of the Charter. He set out the principles enunciated in R. v. Brydges, [1990], 1 S.C.R. 190, and held that, on the facts, the appellant exercised due diligence in attempting to obtain legal counsel. He noted that the police officer was not to be faulted personally for the failure to reach counsel. He found that in finally agreeing to take the breathalyser test, the appellant did not explicitly or impliedly waive his right to counsel.

8 Sherar Prov. Div. J. observed that:

> Society, and the government in particular, has to make difficult decisions based upon the allocation of all finite resources.
>
> However, as, Lamer, J. states at [S.C.R., p. 213] of Brydges:
>
> > "The province has the responsibility to take reasonable measures to see that a lawyer is made available to the eligible persons without delay."
>
> At the date in question, it is apparent that the Attorney General's Department felt it was necessary and expedient to have a duty Crown Counsel available to advise the police and respond to the public interest in the administration of justice during non-business hours.
>
> Obviously crime is committed outside of normal business hours and thus the detection and prevention of crime must be carried out at all hours of the day

> and night. Crime doesn't take time off. Thus, citizens are processed through the criminal justice system at all hours of the day and night. If a citizen has a right to consult legal counsel, that legal counsel should be available, as well, upon the detention of the citizen at any such time.
>
> The cost of providing legal duty counsel for detained citizen[s] is not less important and worthwhile than the public cost of maintaining duty Crown Counsel or police for that matter.

9 Sherar Prov. Div. J. noted that in the aftermath of Brydges, the authorities had to advise of the existence of not only legal counsel, but also of Legal Aid. He noted:

> If a citizen has the right to know that legal assistance free of charge is available, doesn't the citizen have the right to obtain such legal assistance. The legal assistance should be available without a means test upon initial detention of the accused who then, armed with the knowledge of his rights and responsibilities, can make a reasoned decision as to his subsequent actions, including the retention of counsel of his choice.

He concluded that the appellant's s. 10(b) rights had been breached and that the breathalyser evidence should be excluded:

> I find that [the appellant] had a right to Legal Aid counsel on the date in question, that right was denied him, not by the actions of the police officer in question, but the system for whom the police officer was employed. That system had a reasonable time to develop a process of duty counsel and was unable or unwilling to do so and thus [the appellant's] legal rights were violated.
>
> In consequence of that violation self-incriminating evidence was obtained from [the appellant] which the Court determines should be excluded because to allow the evidence in this case, a certificate of breath analysis into evidence would bring the administration of justice into disrepute.

Court of Appeal (1992), 113 N.S.R. (2d) 156 (Freeman, Jones and Chipman JJ.A.)

Chipman J.A.

10 Writing for himself and Jones J.A., Chipman J.A. stated that in Brydges the majority of the Supreme Court of Canada stopped short of saying that if duty counsel are not available or cannot be found, the detainee has in all cases been effectively deprived of his right to counsel. He stated that Brydges is authority for the principle that, included in the reasonable opportunity which the police

must give the detainee to exercise his right to counsel, is that the police should inform him of the existence (where it does exist) and availability of legal aid and duty counsel. Brydges is not, he said at p. 162, "authority for the proposition that the state must necessarily provide such counsel".

11 Chipman J.A. described the issue raised in this case, at p. 162, as being about "the consequence of the simple unavailability of counsel -- for whatever reason". He then noted at p. 162 that:

> The [appellant] was arrested on a spring Saturday afternoon. As it happened, none of the 12 lawyers on the list provided by Constable Young could be reached. The [appellant] did not choose to try his luck with other lawyers to see if one might willingly give him some assistance on the telephone. It may well be that had he tried, he would have succeeded in contacting, within the two hours following his driving, somebody who would be willing to give him on the telephone the brief advice that he needed.

He suggested that there is some urgency involved in cases of breathalyser demands because the sample must be obtained within two hours in order to enable the Crown to have the benefit of the rebuttable presumption under s. 258(1)(d) of the Code (i.e., that readings taken during this period are proof of the blood alcohol level at the time the offence was committed).

12 Chipman J.A., therefore, concluded at p. 163 that the appellant had not been denied his s. 10(b) rights:

> Whenever counsel is not readily available, the question will arise whether, before questioning the detainee or attempting to get him to submit to any procedure which may incriminate him, there was afforded a reasonable opportunity to consult counsel. What is reasonable will depend on the circumstances. Where counsel cannot readily be obtained, it may simply be a matter of the police waiting until one can be found. This will often be the case where questioning is involved. Where, however, the breathalyser demand has been made, it is important that the Crown not lose the benefit of the presumption in s. 258(1)(d) of the Code.
>
> It is not necessary here to pursue this avenue to its end. Constable Young had provided the list of lawyers with home telephone numbers. He afforded privacy and even assistance in making the calls. Constable Young went further and provided the telephone book so that the [appellant] could call any lawyer other than the listed Legal Aid lawyers. Constable Young had not at any time during all this process attempted to elicit evidence from the [appellant]. It was the [appellant] who terminated the proceedings by volunteering to take the test. [Emphasis in original.]

13 Chipman J.A. further held at p. 163 that in agreeing to take the breathalyser test, the appellant expressly waived his s. 10(b) rights:

> There was, to use the language of Lamer J., in Ross, [infra], at [S.C.R., p. 11] "a clear indication that he had changed his mind" about consulting counsel before taking the test. This may have been prompted by frustration at his inability to obtain counsel, but in view of the fact that he was told the purpose of the demand and the consequences of refusal, it would be difficult to conclude that the [appellant] was not aware of the consequences of what he was doing. There is no evidence that he was not so aware. It is clear that the [appellant] changed his mind about wanting to speak to counsel before he took the test. The waiver was explicit, but if it could be said to be implicit, the high standard referred to by Lamer, J., has been met.

14 Turning to s. 24(2) of the Charter, Chipman J.A. addressed the question of exclusion of evidence in the event that the trial judge was correct. He concluded at p. 166 that the fairness of the trial would not be affected by the admission of the evidence.

> . . . while the breath sample is more correctly categorized as self-incriminating evidence than real evidence, it is to be distinguished from a confession which is truly a case of an accused being conscripted against himself and creating evidence which did not exist before and which he was not required to give. In the face of the very strong evidence of his impairment, Constable Young had reasonable grounds to demand the sample from the [appellant]. The [appellant] would in all probability be committing a criminal offence had he failed to provide [the sample]. He provided it pursuant to a statutory obligation. Had he received the advice of counsel he would have in all probability been advised to take the test in the circumstances of this case.

With respect to the seriousness of any breach, Chipman J.A. stated that the breach of Charter rights was technical in nature and that the conduct of the police had been beyond reproach. He added at p. 167 that the administration of justice would not be well served by the exclusion of the evidence: "Most reasonably dispassionate and fully informed persons would be appalled and dismayed at the exclusion of this evidence which so fully confirmed the officer's viva voce testimony of the [appellant's] impairment."

Freeman J.A. (concurring)

15 Upon his review of Brydges, supra, Freeman J.A. held that there was no constitutional right to state funded counsel. According to him, at p. 170, the right which courts have identified as applicable in the appellant's circumstances is the right to a "reasonable opportunity" to retain and instruct counsel. He found at p. 170 that, on the evidence, the police afforded the appellant a reasonable opportunity to consult counsel which "if vigorously pursued, might have resulted in

contact with the one Legal Aid lawyer who was still available". He also noted that there was no evidence that a lawyer in private practice would refuse advice to a detained person who had no prospect of paying for it. Freeman J.A. stated that, in any event, the appellant voluntarily declined to take further advantage of his opportunity to seek counsel so that the question as to how long police must wait to afford an accused a reasonable opportunity did not arise.

16 Freeman J.A. disagreed, at p. 170, with the trial judge's finding that the appellant was duly diligent in asserting his right to counsel and that he did not waive that right:

> [The appellant] did not pursue his right to seek counsel but agreed to take the breathalyser test voluntarily, and it is idle to speculate whether he chose that course from frustration or for other reasons. The burden was on him to prove an infringement of his right to counsel. He did not testify. There is no evidence from him that he did not have a reasonable opportunity to seek counsel, nor that his consent to take the breathalyser test was not a proper waiver of his right. In the circumstances it was reasonable for Constable Young to treat it as a waiver.

Freeman J.A. further observed that there was no conflict between the appellant's assertion of the right to counsel and any expressed urgency by the police to collect the breath samples within two hours, pursuant to the operation of the presumption in s. 258(1)(c) of the Code. According to Freeman J.A., the appellant was under no pressure to discontinue his efforts to reach counsel and there is no evidence that he believed himself to be. He concluded that, at the very least, the appellant ceased seeking to assert his rights with due diligence, which in the circumstances of the case was indistinguishable from actual waiver. In light of his finding that there had been no Charter infringement, he declined to consider s. 24(2) of the Charter and whether admission of the breathalyser certificate would bring the administration of justice into disrepute.

III. Points in Issue

17 This case raises three broad issues:

1. Does s. 10(b) of the Charter impose a substantive constitutional obligation on governments to ensure that duty counsel is available upon arrest or detention to provide free and immediate, preliminary legal advice upon request?
2. Was the appellant's right to retain and instruct counsel without delay under s. 10(b) of the Charter violated in this case?
3. If the appellant's rights under s. 10(b) of the Charter were infringed, should the breathalyser evidence obtained from him be excluded under s. 24(2) of the Charter?

IV. Analysis

(a) "Brydges Duty Counsel"

18 Section 10(b) of the Charter provides that,

> 10. Everyone has the right on arrest or detention
>
> . . .
>
> (b) to retain and instruct counsel without delay and to be informed of that right; . . .

In Brydges, supra, this Court was unanimous in concluding that the accused's s. 10(b) rights had been violated. The Court stated at p. 209:

> . . . in circumstances where an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer, it is incumbent on the police to inform him of the existence and availability of Legal Aid and duty counsel.

However, the majority of this Court went further and expanded the information component under s. 10(b), which is triggered by arrest or detention. It was no longer constitutionally sufficient for law enforcement authorities simply to repeat the words of the Charter by cautioning detainees of their right "to retain and instruct counsel without delay". The majority held at p. 212 that "information about the existence and availability of duty counsel and Legal Aid plans should be part of the standard s. 10(b) caution upon arrest or detention". As I explain in Bartle (released concurrently) at p. 195, Brydges had the effect of adding two new elements to the information component of s. 10(b): "(1) information about access to counsel free of charge where an accused meets prescribed financial criteria set by provincial Legal Aid plans ("Legal Aid"); and (2) information about access to immediate, although temporary legal advice irrespective of financial status ("duty counsel")".

19 As I discuss in Bartle, at pp. 195-96, a clear distinction between duty counsel and Legal Aid was drawn in Brydges. The term "duty counsel" was used to refer to a specific subset of legal services which are provided to persons who have been arrested or detained (i.e., "detainees"). Duty counsel in this context refers to the provision of immediate and free preliminary legal advice by qualified personnel, whether staff lawyers from Legal Aid offices, lawyers from the private bar, lawyers specifically hired for the purpose of fielding calls from detainees, or otherwise. Since the release of Brydges, I note that this service has been called "Brydges duty counsel" to distinguish it from other forms of summary legal advice and assistance which are provided to accused persons, often irrespective of their means, and which typically include plea advice, arranging adjournments, speaking to bail and sentence and negotiating dispositions with the Crown: Prairie Research Associates, Duty Counsel Systems: Summary Report (April 1993), and Prairie Research Associates, Duty Counsel Systems: Technical Report (April 1993) (the "P.R.A. Reports").

20 In Brydges, the issue of whether s. 10(b) imposes, either alone or in conjunction with other provisions of the Charter, a positive obligation on governments to ensure that duty counsel is available to detainees did not arise for consideration. In Manitoba, the province where the accused

in Brydges was arrested and first detained, a Legal Aid Plan and a form of duty counsel service were in existence and available at the relevant time. This was evident because, after some initial questioning by police, the accused asked to speak to a Legal Aid lawyer and one was eventually contacted by police. The record revealed that the Legal Aid lawyer who had been contacted attended at the police station and provided the accused with free summary legal advice. As a result, it was not necessary in Brydges to consider whether, in the absence of such assistance having been available, s. 10(b) imposes a constitutional obligation on governments to ensure that duty counsel services exist and are universally accessible to all detainees on an on-call, 24-hour basis. Moreover, at p. 217 of Brydges, the majority noted that the issue of whether there is a constitutional right to assistance and representation of counsel was not before the Court.

21 Importantly, although Brydges required that detainees be advised as a matter of course of their (statutory) right to immediate, although temporary, free legal advice, it made clear at p. 215 that the information to be conveyed to detainees by police was to refer to services actually available within the jurisdiction:

> . . . as part of the information component of s. 10(b) of the Charter, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel. [Emphasis added.]

This has subsequently been confirmed and reiterated in Bartle, where I say that, if there is in existence a 24-hour duty counsel service which can be accessed by dialling a toll-free number, as there is in Ontario, this must be communicated to all detainees as part of the standard s. 10(b) caution delivered by police. Obviously, it would make no sense to inform detainees of a service which does not in fact exist and which is, therefore, unavailable to them. The point of the information component under s. 10(b) is to enable detainees to make informed decisions about services which actually exist. Since Brydges was primarily concerned with the information component of s. 10(b), it should not be read as saying that s. 10(b) guarantees the existence of or requires the provision of duty counsel services for detainees across the country.

22 That being said, I would like to stress that in jurisdictions where "Brydges duty counsel" is in fact present, I believe that the interests of all participants in the criminal justice system are served in the fullest, simplest and most direct manner and, therefore, that it is a service which governments and the bar are well advised to implement and maintain. As the extrinsic evidence shows, requiring police to advise detainees of the existence of a universally available, 24-hour duty counsel service increases the likelihood that detainees will seek legal advice and thereby be informed of their rights and obligations under the law and how these should be exercised: e.g., see Bartle, at p. 200. In other words, the existence of such a service reduces the likelihood of detainees being left with the mistaken impression that legal assistance is not available to them due to the expense of hiring a lawyer, or to the fact that it is outside regular business hours. In addition, provision of duty counsel would seem to offer concrete benefits to law enforcement authorities and to the courts. That is, not

only does ensuring that legal advice is available at the outset save time and allow police to proceed more quickly with their investigatory work and with laying charges, but also it is likely to facilitate the admission into evidence of various statements made to police by detained persons. "Brydges duty counsel" is also likely, at least in the long run, to be cost efficient. It would decrease the overtime costs associated with having police "hold off" to provide the necessary "reasonable opportunity" to contact counsel and, by reducing the number of motions which centre around ss. 10(b) and 24(2) of the Charter, would help to save on court resources.

23 I would also note that duty counsel services do in fact exist in a variety of forms in most jurisdictions throughout this country. The clearest and most up-to-date overview of duty counsel systems in Canada is found in the P.R.A. Reports, which were commissioned and financed by the federal Department of Justice. It should be borne in mind, however, that these Reports do not include Quebec, which declined to participate, or the Yukon or the Northwest Territories, which were excluded for practical reasons. At pages 4.94-4.95 of the P.R.A. Technical Report, duty counsel services presently available to detainees are described in the following terms:

> The response to Brydges has varied considerably. Table 4-25 [found at p. 4-95 and reproduced below] shows the approaches currently in place in the jurisdictions included in this study. In general, during the day legal aid offices will accept calls from police and accused. Summary advice is provided by staff counsel and thereafter referrals are made to staff or private counsel. In British Columbia, a province-wide toll free number is used to handle all Brydges calls.
>
> After hours calls are handled in different ways. In Saskatchewan a toll free number is maintained under contract to Legal Aid. The accused who uses this number may receive summary advice, but is usually referred to local legal aid staff counsel, or recommends that private lawyers be consulted (from the Yellow Pages) if accused do not appear to qualify for legal aid. In many areas, police are informed of which lawyers are on duty counsel and accused are provided with these lists. In Ontario a toll free number is maintained in Toronto to provide summary advice at any time. Compensation for after hours calls is currently provided only in New Brunswick on a per call basis. Because duty counsel are private lawyers in Alberta and British Columbia and are allowed to assume accused as clients after duty counsel consultation, legal aid management believes this should be inducement enough. The recent elimination of the fee for after hours calls has caused some controversy in Alberta. In Nova Scotia, the use of staff counsel to handle after hours calls has prompted considerable acrimony with some lawyers refusing to accept any calls in the evening. Manitoba pays a weekly fee to a lawyer or articling student assigned to take after hours calls in Winnipeg only. In the smaller jurisdictions, legal aid staff and/or private lawyers have their phone numbers posted in police stations and correctional facilities.

These after-hours calls are not compensated, though the cases often result in a legal aid certificate.

TABLE 4-25

Summary of Brydges Duty Counsel or On-Call Services

Jurisdiction	Compensation for After Hours Calls	Access
Nova Scotia	Staff Counsel	-Legal Aid during day. -After hours police maintain lists of Legal Aid Lawyers.
Prince Edward Island	No	-Legal Aid during day. -After hours police may maintain lists.
Saskatchewan	Staff Counsel	-Legal Aid during day. -After hours province-wide toll free number.
Manitoba	No (except in Winnipeg -flat weekly fee paid)	-In Winnipeg a 24 hour on-call service maintained by Legal Aid Manitoba. -In rural areas, RCMP maintain complete lists of Legal Aid lawyers who can be called at anytime.

Newfoundland	No	-Toll Free 24 hours per day, usually route to St. John's Legal Aid office during day.
		-After hours, calls are routed by answering service to staff lawyers who accept calls on weekly stints.
		-Police also maintain lists of private lawyers.
Ontario	No	-Legal Aid offices during day.
		-Toll free 24 hour provincial wide line, staffed by three staff lawyers in Toronto.
		-Local police also maintain lists of Legal Aid lawyers and private bar willing to accept calls after hours.
Alberta	$15/call, Ceased July 93	-Toll free 24 hour line.
		-Police maintain lists of private lawyers.
British Columbia	No	-Toll free 24 hours assistance offered from Vancouver. Summary advice followed by referral to local bar.

New Brunswick	$25/call	-Legal Aid during day.
		-Local police have lists of private lawyers performing duty counsel after hours.

24 In Quebec, each administrative district offers a 24-hour, 7-day per week service for detained persons which can be reached by dialling a number to which long distance charges do not apply: Y. Lafontaine, "Pourquoi au juste?" (1992), 32 Actif 32, at pp. 35-36 and p. 38. With respect to the Yukon and the Northwest Territories, it is not possible to determine exactly the extent to which "Brydges duty counsel" is available to detainees. However, it appears that in the Yukon, or at least in Whitehorse, there may be an on-call lawyer available on weekends to give summary advice: Courts Program, Canadian Centre for Justice Statistics, "Legal Aid in Canada: Description of Legal Aid Operations", at p. 7.1.

25 The conclusion that can safely be drawn about the existence and availability of duty counsel services for detainees is that they exist in various forms throughout Canada, with the exception of at least part of Nova Scotia and of Prince Edward Island, where no formal after-hours service is available and the service that is available during business hours is contingent on eligibility for Legal Aid, and possibly the Northwest Territories and the Yukon, or at least the more remote parts of these two territories.

26 Where "Brydges duty counsel" exists, it does not appear to be a costly service to provide. According to the P.R.A. Reports, determining the precise cost of providing duty counsel services is difficult due to the variability in delivery systems across and within provinces and to the record-keeping methods which tend to be employed: P.R.A. Summary Report, at p. 41. However, I note that, in referring to Ontario's system of "Brydges duty counsel", one author has cited statistics showing that, between April 1, 1990 to October 31, 1990, 9,091 people were assisted by emergency duty counsel in Ontario at an average cost of $11.69 per person: Kathryn Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study (1992), 30 Osgoode Hall L.J. 547, at p. 565. I would also simply note that there are some jurisdictions where the private bar assumes the cost of providing free duty counsel service outside regular business hours. In return, lawyers are allowed to retain as clients those who they originally served as duty counsel: P.R.A. Technical Report, p. 5.28. Neither the Attorney General of Nova Scotia and the respondent in the case at bar, nor the Attorney General of Prince Edward Island for the appellant in the related case of Matheson, have adduced any concrete evidence as to the cost of establishing a "Brydges duty counsel" service in their provinces.

27 In sum, then, I am satisfied that various systems of duty counsel are widely available to detainees in this country and that they need not be costly to set up and maintain. As well, I would note that an effective duty counsel service does not have to be an elaborate one. For instance, it

need not consist of anything more than a basic service accessed by dialling a 1-800 (toll-free) number which provides free preliminary advice over the telephone, or the police providing up-to-date lists of lawyers, either from Legal Aid offices or from the private bar, who are prepared to serve as duty counsel at specific times (e.g., once the local Legal Aid office closes down for the day or the weekend).

(b) The Question of Substantive Obligation Under Section 10(b)

28 However, acknowledging the desirability from the point of view of fairness and administrative convenience of a system of preliminary legal advice universally available to all detainees upon request and free of charge, as well as recognizing its widespread availability across the country is far different from actually finding that there is a constitutionally entrenched obligation on governments to ensure that such a system exists. In the case at bar from Nova Scotia and the related case of Matheson from Prince Edward Island, the immediate, albeit temporary, free legal advice described in Brydges was not available to the two accused. As a result, it is now necessary to consider whether s. 10(b) imposes a positive constitutional obligation on governments to ensure that detainees have access to summary legal advice upon request, irrespective of financial status. To be absolutely clear, the issue of whether the Charter guarantees a right to state-funded counsel at trial and on appeal does not arise here.

29 I am of the view that it is neither appropriate nor necessary for this Court to find that s. 10(b) of the Charter imposes on governments a substantive obligation to ensure that "Brydges duty counsel" is available to detainees, or likewise, that it provides all detainees with a corresponding right to such counsel. Several factors lead me to this conclusion.

30 First, it is clear that s. 10(b) of the Charter does not, in express terms, constitutionalize the right to free and immediate legal advice upon detention. The right to retain and instruct counsel and to be informed of that right, or in French the right to "l'assistance d'un avocat et d'être informé de ce droit" is simply not the same thing as a universal right to free, 24-hour preliminary legal advice. Moreover, there is evidence which shows that the framers of the Charter consciously chose not to constitutionalize a right to state-funded counsel under s. 10 of the Charter: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (January 27, 1981). Specifically, a proposed amendment, which would have added the following clause to what is now s. 10 of the Charter was considered and rejected. (p:46:127):

> (d) if without sufficient means to pay for counsel and if the interests of justice so require, to be provided with counsel;

In Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, I stated for the majority that while these Minutes are admissible as extrinsic aids to the interpretation of Charter provisions, they should not be given "too much weight". However, it must be borne in mind that the Minutes at issue in the Re B.C. Motor Vehicle Act recorded the views of civil servants on the meaning that should be given to

the words "the principles of fundamental justice" found in s. 7 of the Charter, a task for which the courts are far better qualified.

31 The situation here is quite different: at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted. In light of the language of s. 10 of the Charter, which on its face does not guarantee any substantive right to legal advice, and the legislative history of s. 10, which reveals that the framers of the Charter decided not to incorporate into s. 10 even a relatively limited substantive right to legal assistance (i.e., for those "without sufficient means" and "if the interests of justice so require"), it would be a very big step for this Court to interpret the Charter in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation.

32 Second, if this Court were to hold that there is, under the Charter, an obligation on governments to make available "Brydges duty counsel" to all detainees, and that any provincial or territorial government (the level of government in charge of the administration of legal aid and duty counsel services) which fails to do so violates the s. 10(b) rights of detainees, the implications would be far-reaching. In effect, this Court would be saying that in order to have the power of arrest and detention, a province must have a duty counsel system in place. In provinces and territories where no duty counsel system exists, the logical implication would be that all arrests and detentions are prima facie unconstitutional. Moreover, devising an appropriate remedy under circumstances in which a government was found to be in breach of its constitutional obligation for failure to provide duty counsel would prove very difficult. Unless absolutely necessary to protect the Charter rights of individuals, I believe that a holding with implications of this magnitude should be avoided.

33 Fortunately, there is an alternative solution which avoids the problems and complications associated with finding that s. 10(b) imposes a substantive constitutional obligation on governments to make available "Brydges duty counsel" to all detainees, and which sufficiently protects the Charter rights and freedoms of detainees. This alternative, which I shall refer to as the obligation on police to "hold off" until a detainee has been given a reasonable opportunity to contact counsel, is fully consistent with the existing s. 10(b) jurisprudence of this Court. While this alternative may not be ideal from the Crown's perspective, and especially in terms of concerns it may have for administrative and evidentiary expediency, this is a trade-off that governments which persist in refusing to implement a "Brydges duty counsel" system, for whatever reason, will have to endure and accept.

(c) The Obligation to Hold Off

34 As this Court has stated on a number of occasions, s. 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person. (See Bartle, at pp.

192-94; R. v. Manninen, [1987] 1 S.C.R. 1233, at pp. 1241-42; R. v. Evans, [1991] 1 S.C.R. 869, at p. 890; Brydges, at pp. 203-4.) Once a detainee has indicated a desire to exercise his or her right to counsel, the state is required to provide him or her with a reasonable opportunity in which to do so. In addition, state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. As the majority indicated in R. v. Ross, [1989] 1 S.C.R. 3, at p. 12, once a detainee asserts his or her right to counsel, the police cannot in any way compel him or her to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In other words, the police are obliged to "hold off" from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel.

35 In my view, what constitutes a "reasonable opportunity" will depend on all the surrounding circumstances. These circumstances will include the availability of duty counsel services in the jurisdiction where the detention takes place. As the majority in Brydges suggested (at p. 216), the existence of duty counsel services may affect what constitutes "reasonable diligence" of a detainee in pursuing the right to counsel, which will in turn affect the length the period during which the state authorities' s. 10(b) implementational duties will require them to "hold off" from trying to elicit incriminatory evidence from the detainee. The non-existence of such services will also affect the determination of what, under the circumstances, is a "reasonable opportunity" to consult counsel. The absence of duty counsel in a jurisdiction does not give persons detained there more rights under s. 10(b) than those who are detained in jurisdictions which have duty counsel. It does, however, serve to extend the period in which a detainee will have been found to have been duly diligent in exercising his or her right to counsel. Similarly, if duty counsel exists but is simply unavailable at the time of detention, the "reasonable opportunity" given to detainees to contact counsel will have to reflect this fact.

36 In a situation such as the one in this case, where duty counsel services are available during regular office hours (although only to those eligible for legal aid) and a detainee expresses a desire to contact counsel and is duly diligent in exercising that right, but is prevented from doing so due to institutional factors beyond his or her control, s. 10(b) requires that the police hold off from trying to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. Similarly, the "reasonable opportunity" provided to detainees in jurisdictions lacking duty counsel might extend to when the local Legal Aid office opens, when a private lawyer willing to provide free summary advice can be reached, or when the detainee is brought before a justice of the peace for bail purposes and his or her needs can be properly assessed and accommodated. In determining what is a reasonable opportunity, the fact that the evidence may cease to be available as a result of a long delay is a factor to be considered.

37 The holding-off requirement described above flows logically from the two implementation duties. I am also satisfied that making the police hold off from trying to elicit incriminatory evidence from a detainee in jurisdictions where no duty counsel is available at the time of request,

and where the detainee has been sufficiently diligent upon being informed of the right to counsel to trigger and sustain his or her ensuing rights under s. 10(b), is consistent with the underlying purposes of s. 10(b).

38 It is now well accepted that s. 10(b) serves to protect the privilege against self-incrimination, a basic tenet of our criminal justice system which has been recognized by members of this Court to be a "principle of fundamental justice" under s. 7 of the Charter: R. v. P. (M.B.), [1994] 1 S.C.R. 555, and R. v. Jones, [1994] 2 S.C.R. 229. In R. v. Hebert, [1990] 2 S.C.R. 151, at pp. 176-77, the relationship between s. 10(b) and the right to silence was acknowledged by the majority, at p. 176:

> The first Charter right of importance in defining the scope of the right to silence under s. 7 of the Charter at the pre-trial stage is the right to counsel under s. 10(b) of the Charter.
>
> The scheme under the Charter to protect the accused's pre-trial right to silence may be described as follows. Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent. Section 10(b) requires that he be advised of his right to consult counsel and permitted to do so without delay.
>
> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.

This point was confirmed in Brydges, where the majority held at p. 206 that:

> A detainee is advised of the right to retain and instruct counsel without delay because it is upon arrest or detention that an accused is in immediate need of legal advice. [Emphasis in original.] As I stated in Manninen, supra, at p. 1243, one of the main functions of counsel at this early stage of detention is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that

> there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel. [Emphasis added.]

39 Making the police hold off in situations where a detainee has been reasonably diligent in exercising his or her right to counsel, including where appropriate trying to reach a private lawyer, and where "Brydges duty counsel" is not available would accommodate a detainee's privilege against self-incrimination. The police investigation with respect to evidence in the construction of which a detainee must necessarily participate (e.g., confessions, identification evidence, and breath and blood samples) would have to be held in abeyance until such reasonable time as a detainee is able to make contact with a private lawyer or whatever duty counsel service is in existence in the jurisdiction.

40 With respect to the liberty interests of detainees, it should be remembered that s. 10(b) of the Charter is triggered by an act of "detention" (which includes arrest) by the state. That is, the duty on state agents to inform individuals of their right to counsel does not arise until a person has been "detained" within the meaning of s. 10. As this Court explained in R. v. Therens, [1985] 1 S.C.R. 613, per Le Dain J., at pp. 641-42, detention involves some form of coercion or compulsion by the state which results in a deprivation of liberty. The physical constraint (or psychological perception of such constraint) which exists upon detention means that an individual loses his or her freedom of movement and, potentially at least, his or her access to services, including legal assistance, available in the wider community. Accordingly, it is clear that one of the purposes of the right to counsel under s. 10(b) is to safeguard the liberty interests of detainees, which are constitutionally protected under s. 7 of the Charter, and to assist detainees in regaining their freedom.

41 While it is true that detainees continue to be deprived of their freedom while the police hold off and they wait to be able to contact counsel, I am satisfied that any deprivation of liberty in these circumstances would be minimal and in accordance with the principles of fundamental justice under s. 7 of the Charter. I would further note that the bail provisions under the Code lay down a strict procedural code dealing with detention in custody and with release. For example, s. 503(1)(a) of the Code ensures that a person who is detained is brought before a justice "to be dealt with according to law" . . . without unreasonable delay" (emphasis added). Moreover, any delay which is considered excessive can be challenged under s. 9 of the Charter, which protects against arbitrary detention or imprisonment.

42 In sum, then, I find that s. 10(b) does not impose a positive obligation on governments to ensure that free, preliminary legal advice is available on a 24-hour, on-call basis. However, s. 10(b) does require, in situations where a detainee has asserted his or her right to counsel and been duly diligent in exercising it, that the police hold off in order to provide the detainee with a reasonable opportunity to contact counsel. It must also be noted that, although there is no constitutional obligation on governments to provide duty counsel services, the non-existence or unavailability of such services could, in some circumstances which I need not speculate on, give rise to issues of fair trial. Thus, in those situations, the state runs the risk of having evidence excluded under s. 24(2) of

the Charter.

43 In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the Charter-protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point, police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.

44 Given the importance of the right to counsel, I would also say with respect to waiver that once a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown: Ross, at pp. 11-12. Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This Court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high: Clarkson v. The Queen, [1986] 1 S.C.R. 383, Manninen, and Evans. As I said in Bartle, at pp. 192-94 and 206, a person who waives a right must know what he or she is giving up if the waiver is to be valid. That being said, it stands to reason that the right to counsel guaranteed under s. 10(b) must not be turned into an obligation on detainees to seek the advice of a lawyer.

45 Finally, I wish to point out that there may be compelling and urgent circumstances in which, despite a detainee's being unable to contact a lawyer due to the unavailability of a "Brydges duty counsel" system, police will not be required under s. 10(b) to hold off. However, in the context of impaired driving cases, I am satisfied that the existence of the two-hour evidentiary presumption available to the Crown under s. 258(1)(c)(ii) of the Code does not, by itself, constitute such a compelling or urgent circumstance. "Urgency" of the kind referred to by this Court in cases such as Manninen, supra, and R. v. Strachan, [1988] 2 S.C.R. 980, is not created by mere investigatory and evidentiary expediency in circumstances where duty counsel is unavailable to detainees who have asserted their desire to contact a lawyer and been duly diligent in exercising their s. 10(b) rights. A detainee's Charter-guaranteed right to counsel must take precedence over the statutory right afforded to the Crown which allows it to rely on an evidentiary presumption about what a breathalyser reading would have been at the time of care and control of a vehicle. Loss of the benefit of this presumption is simply one of the prices which has to be paid by governments which refuse to ensure that a system of "Brydges duty counsel" is available to give detainees free, preliminary legal advice on an on-call, 24-hour basis. In the circumstances presented in this case it is neither necessary nor appropriate to consider s. 1 of the Charter. However, if, for example, a

section of the Code was to be enacted which required a person to take a breathalyser test within a fixed time whether or not a lawyer had been consulted, then a court might well be required to consider, depending on the time allotted amongst other factors, whether such a provision could be justified under s. 1 of the Charter.

46 I would also note as an aside that where the Crown is unable to rely on the presumption under s. 258(1)(c)(ii) of the Code due to the unavailability of duty counsel, the Crown can still try and prove the "over 80" breathalyser charge by adducing expert evidence which seeks to relate later and lower test results back to the blood-alcohol level at the time of the offence: see, e.g., R. v. Burnison (1979), 70 C.C.C. (2d) 38 (Ont. C.A.). As this Court said clearly in R. v. Deruelle, [1992] 2 S.C.R. 663, where it considered the breathalyser scheme under the Code, evidence obtained more than two hours after the alleged offence is still admissible.

47 It may be that on some occasions a detainee's reasonable opportunity to contact counsel, and the corresponding holding-off period, will extend to the point at which it is no longer possible to obtain breathalyser readings that can be accurately extrapolated backwards to provide information about the accused blood alcohol level at the time of the alleged offence. The question of whether or not the imminent loss of the chance to obtain any meaningful breathalyser data might constitute an "urgent circumstance" sufficient to curtail the holding-off period does not arise on facts of this appeal. In the case at bar, breathalyser readings were obtained roughly an hour after the appellant was detained, well before any sense of urgency connected to the loss of the opportunity to obtain useful breathalyser data would have developed. It is, therefore, unnecessary to decide in this case whether, under different circumstances, the prospect of the loss of all opportunity to obtain breathalyser data might justify abridging the holding-off period. Moreover, this question could not, in my view, be decided without considering the statutory provisions upon which the police's ability to obtain breathalyser data rests. As I noted in Bartle, at p. 213, breathalyser evidence in impaired driving cases is often characterized as "statutorily compellable" by virtue of the fact that refusing to provide a breath sample in these circumstances is itself a criminal offence under s. 254(5) of the Code. The results of a breathalyser test are self-incriminatory evidence (Bartle, at pp. 213-14), and were it not for s. 254(5), a detainee would be free to choose not to assist the state's investigation by providing a breath sample. In my view, any consideration of the question of whether the state's interest in obtaining breathalyser readings was sufficiently pressing to constitute an "urgent circumstance" warranting the curtailment of a detainee's s. 10(b) rights would, by inference, require an examination of the constitutionality of s. 254(5), an issue that was not raised directly on this appeal. For these reasons, I prefer not to decide this question at this time.

48 I should note, however, that whether or not breathalyser data is available it is always open to the Crown to proceed with a straight impaired driving charge under s. 253(a), as was customary before the advent of breathalyser machines and Parliament's introduction in the late 1960's of the "over 80" breathalyser charge under s. 253(b) of the Code.

(d) Summary of Principles

49 Section 10(b) of the Charter does not impose a substantive constitutional obligation on governments to ensure that duty counsel is available, or likewise, provide detainees with a guaranteed right to free and immediate preliminary legal advice upon request. However, in jurisdictions where a duty counsel service does exist but is unavailable at the precise time of detention, s. 10(b) does impose an obligation on state authorities to hold off from eliciting evidence from a detainee, provided that the detainee asserts his or her right to counsel and is reasonably diligent in exercising it. In other words, the police must provide the detainee with what, in the circumstances, is a reasonable opportunity to contact duty counsel. While this holding-off requirement does not apply in cases of urgency, the evidentiary presumption under s. 258(1)(d) of the Code, which provides that readings taken within two hours of an alleged offence are proof of the blood alcohol level at the time of the offence, is not a sufficiently "urgent" factor to override a detainee's right to counsel under s. 10(b).

50 In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.

51 With respect to the initial information component of s. 10(b), I would reiterate what I said in Bartle, supra -- namely, that a detainee is entitled under s. 10(b) to be advised of whatever system for free, preliminary legal advice exists in the jurisdiction at the time and of how such advice can be accessed (e.g., by dialling a 1-800 (toll-free) number). Where no such duty counsel system exists, as was the case here and in Matheson, a detainee must nevertheless be advised upon detention of his or her right to apply for legal aid under the applicable provincial or territorial legal-aid plan. (e) Application

52 The appellant was arrested, cautioned and read the breathalyser demand late on a Saturday afternoon. He told the police that he wished to talk to a lawyer before taking the breathalyser tests. The police then took him to the Halifax police station and gave him a list of Legal Aid lawyers to call. Over a period of almost 40 minutes, the appellant tried, with the help of Constable Young, to reach the 12 lawyers on the list. The appellant failed to reach any of the lawyers because, just a few days earlier, they had announced a work-to-rule campaign in which they were refusing to accept any further after-hours calls from persons in detention. The appellant declined to make use of the telephone book which was offered to him by Constable Young, saying that he could not afford the legal fees of a private lawyer. The appellant agreed to take the breathalyser tests, both of which he failed.

53 I am satisfied that the appellant's s. 10(b) Charter rights were infringed in this case. Although the burden of establishing a s. 10(b) violation is always on the claimant of the right, I believe that Freeman J.A. below cast the burden too high when he stated at p. 170:

> The burden was on [the appellant] to prove an infringement of his right to counsel. He did not testify. There is no evidence from him that he did not have a reasonable opportunity to seek counsel, nor that his consent to take the breathalyzer test was not a proper waiver of his right.

If it is apparent on the record that a Charter violation has occurred, which in this case I find it is, then it is not necessary for the defence to adduce independent, corroborating evidence of the violation.

54 Although the police in this case complied fully with their initial informational obligation under s. 10(b) and behaved admirably throughout, the testimony of Constable Young, the arresting police officer and the Crown's only witness, reveals that the appellant's Charter-guaranteed right to counsel was breached in two respects. First, after asserting his right and trying repeatedly to contact a lawyer, the appellant was not informed when he changed his mind and agreed to take the breathalyser test that the police had to hold off from their investigation until he had had a reasonable opportunity to contact counsel. Second, the police failed in fact to hold off and provide the appellant with the reasonable opportunity to contact counsel to which he was entitled under s. 10(b). That is, the police failed under the circumstances, where the appellant had clearly expressed his desire to speak to a lawyer, to put off administering the breathalyser tests until either the appellant contacted a Legal Aid lawyer, or was taken before a justice of the peace for a bail hearing and his situation could be assessed.

55 There were no urgent or compelling circumstances which justified the police in proceeding so precipitously with the breathalyser tests. In other words, I must respectfully disagree with Chipman J.A. for the majority below who held that the two-hour evidentiary presumption under s. 258(1)(d) of the Criminal Code created a situation of urgency which served to override the appellant's s. 10(b) rights. In this case where the appellant had clearly asserted his right to counsel but was prevented from exercising it because of institutional conditions entirely beyond his control, it would be inappropriate to allow a statutory provision benefitting the prosecution to trump the appellant's Charter rights.

56 As to whether the appellant acted with reasonable diligence in exercising his right to counsel, I am in agreement with the trial judge, Sherar Prov. Div. J., that the appellant acted with due diligence in trying to contact counsel. In my opinion, both Chipman and Freeman JJ.A. imposed too high a due diligence obligation on the appellant. For instance, while Chipman J.A. suggested at p. 162 that the appellant should have "[tried] his luck" by calling lawyers listed in the telephone book, Freeman J.A. spoke at p. 170 of how "vigorous pursuit" by the appellant of the one Legal Aid lawyer still accepting after-hours calls might have resulted in contact. As the majority of this Court said in Ross, supra, at p. 11, what is reasonable diligence in the exercise of the right to counsel will depend on the context. In this case, the appellant not only made 15 fruitless attempts to contact a Legal Aid lawyer over a period of almost 40 minutes, but also expressed his inability to afford a private lawyer when handed the Yellow Pages. To my mind, the appellant acted with due diligence

in the circumstances and it would be entirely unreasonable to expect him to have done anything more than he did. To require the appellant, as a condition of safeguarding his s. 10(b) rights, to call at random lawyers listed in the Yellow Pages late on a Saturday afternoon and plead for free or cut-rate legal advice, as the respondent argues, would be excessive in a context where Legal Aid assistance exists, but not at the particular time in question.

57 With respect to waiver, I must again agree with the trial judge and disagree with the Court of Appeal. Sherar Prov. Div. J. found that when the appellant finally submitted to the breathalyser demand, he acted out of frustration. This is an inference of fact with which I am not prepared to interfere. As I have already emphasized above, in circumstances where a detainee asserts his or her right to counsel, the onus is on the Crown to establish that the detainee subsequently waived his or her right and the standard of proof will be high. Therefore, I cannot agree with the respondent's submission that, in the absence of any evidence suggesting the appellant did not change his mind and voluntarily agree to take the breathalyser test, the only reasonable inference is that the appellant chose to take the test with full knowledge of his s. 10(b) rights and with an appreciation of the consequences of waiving his right to counsel.

58 The record is unclear as to the exact circumstances surrounding the appellant's eventual submission to the breathalyser demand. Constable Young testified simply that, after he spoke to the duty prosecutor for the Crown and learned that Legal Aid lawyers were no longer taking after-hours calls, the appellant "agreed to take the breathalyzer test". This is the only evidence supporting the Crown's assertion of a valid waiver by the appellant. In light of where the burden of proof lies and given the state of the record, I am unable to agree with Chipman J.A., at p. 163, that "[i]t was the [appellant] who terminated the proceedings by volunteering to take the test" and "[i]t is clear that the [appellant] changed his mind about wanting to speak to counsel before he took the test". In addition, I respectfully do not agree with the Court of Appeal that, because the appellant had been told as part of the standard breathalyser demand delivered to him by the police approximately one hour before that, if he refused to comply with the demand he would be charged with the offence of refusal, one can safely draw the inference that the appellant must have understood the consequences of what he was doing when he agreed to take the test. The fact that the police advised the appellant of the broad parameters of the jeopardy in which he found himself is no substitute for legal advice from a lawyer whose duty it would have been to advise the appellant fully of his legal rights and obligations.

59 Moreover, given that the appellant was never properly informed of his rights under s. 10(b) when he changed his mind and indicated he was prepared to take the breathalyser tests without first speaking to a lawyer -- specifically of his right to have the police hold off in order to provide him with a reasonable opportunity to contact a Legal Aid lawyer -- one cannot say that he was in a position to know what he was giving up when he submitted to the breathalyser tests. In other words, the appellant cannot be said to have waived a right he did not know he had.

60 To conclude, I find that the appellant neither explicitly nor implicitly waived his right to

counsel. His s. 10(b) rights were infringed by the police in two ways: first, when he was not properly informed of the obligation on the part of the police to hold off upon his changing his mind about speaking to a lawyer; and second, when, after asserting his right to counsel and exercising it with due diligence, the police did not provide him with a reasonable opportunity to contact counsel and refrain from having him participate in a potentially incriminating procedure until he had had this opportunity. It is to the issue of whether the incriminating breath samples obtained from the appellant following the violation of his Charter-guaranteed right to counsel should be excluded under s. 24(2) of the Charter that I now turn.

(f) Exclusion of the Evidence

61 The procedure for determining whether evidence, and particularly breathalyser evidence obtained in the impaired driving context, should be excluded under s. 24(2) of the Charter is fully canvassed in my reasons in Bartle, which are released contemporaneously with these reasons. Accordingly, my comments here will be brief and to the point.

62 In my view, among the five s. 10(b) appeals heard together by this Court, the facts of this case present the most compelling basis for exclusion of evidence under s. 24(2). The breath samples were conscripted evidence which might not have been obtained had the appellant's s. 10(b) rights not been infringed. In other words, the breach of the appellant's right to counsel goes directly to his privilege against self-incrimination, and receipt of the breathalyser evidence resulting from this breach would undermine this privilege, thereby rendering the trial process unfair. Neither the undeniable good faith of the police, nor the relative seriousness of the drinking and driving offence with which the appellant was charged can compensate for the adjudicative unfairness which I find admission of the evidence would produce.

63 To conclude, I am fully satisfied that admission of the evidence in this case would adversely affect the fairness of the trial and bring the administration of justice into disrepute. The evidence was obtained by conscripting the appellant against himself and infringing his right against self-incrimination, a right which might have been protected had he been provided with a reasonable opportunity to consult a Legal Aid lawyer.

(g) Conclusion

64 I find that the appellant's right to counsel under s. 10(b) of the Charter was infringed and that, having regard to all of the circumstances of this case, the breathalyser evidence should not be admitted under s. 24(2) of the Charter.

65 Accordingly, the appeal should be allowed, the conviction quashed and a verdict of acquittal entered in its place.

The following are the reasons delivered by

66 LA FOREST J. (dissenting):-- I would dispose of this appeal as proposed by my colleague, Justice L'Heureux-Dubé, for the reasons she gives regarding the alleged constitutional guarantee of state-funded duty counsel and the alleged breach of s. 10(b) of the Canadian Charter of Rights and Freedoms in the circumstances. I find it unnecessary, for the purposes of this case, however, to comment on the definition previously given by this Court of the term "detention". It is also in strictness unnecessary for me to comment on whether the breathalyser evidence should be excluded, but I observe that the failure of the police officer to comply with the duty set forth in R. v. Brydges, [1990] 1 S.C.R. 190, which was what impelled me in R. v. Bartle, [1994] 3 S.C.R. 173, issued concurrently, to exclude the evidence, was not present here. The officer did everything he could do to facilitate the appellant's obtaining a lawyer.

The following are the reasons delivered by

67 L'HEUREUX-DUBÉ J. (dissenting):-- This case and the four other cases heard at the same time (R. v. Bartle, [1994] 3 S.C.R. 173; R. v. Harper, [1994] 3 S.C.R. 343; R. v. Pozniak, [1994] 3 S.C.R. 310; and R. v. Matheson, [1994] 3 S.C.R. 328) and in which judgment is handed down contemporaneously with this one, raise the issue of the scope of the guarantee provided for in s. 10(b) of the Canadian Charter of Rights and Freedoms, that is the right of everyone on arrest or detention to "retain and instruct counsel without delay and to be informed of that right". This case raises the particular issue of whether s. 10(b) of the Charter creates a positive constitutional obligation on governments to ensure that free and immediate temporary legal advice is available to all detainees. That question is raised here in the context of breathalyser tests administered to the appellant Prosper.

68 The appellant, who was acquitted at first instance, challenges his conviction by the Court of Appeal of Nova Scotia for the offence of having had care and control of a motor vehicle while his blood alcohol level was in excess of 80 mg of alcohol in 100 ml of blood, contrary to s. 253(b) of the Criminal Code, R.S.C., 1985, c. C-46, on the basis that the police officers did not inform him, before he was asked to submit to the breathalyser tests, of his right to free legal advice and of a toll-free number to receive such legal advice. It so happens that the province of Nova Scotia did not have a toll-free number available 24 hours a day. Hence, this query whether governments have a constitutional obligation to provide free and immediate duty counsel services to detainees.

69 I agree with the Chief Justice that there is no such constitutional obligation under s. 10(b) of the Charter. To this end, I am particularly persuaded by the fact that the drafters of the Charter left out the following proposed section:

> (d) if without sufficient means to pay for counsel and if the interests of justice so require, to be provided with counsel;

(See: Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, First Session of the Thirty-second Parliament, 1980-81, at pp. 46:125 and 127-135 (January 27, 1981).) In R. v. Robinson (1989), 73 C.R. (3d) 81,

at p. 113, McClung J.A., writing for the Alberta Court of Appeal, summarized the reasons underlying the rejection of s. 10(d) by the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada:

> [Section 10(d)] was rejected after the joint committee heard evidence and weighed the competing articles found in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms and the Sixth Amendment to the United States Constitution. It cannot be assumed that the committee was unmindful of the extended right-to-counsel jurisprudence of the U.S. federal courts that is relied upon by the applicants in this case, but which, as a Constitutional safeguard, has been consistently refused in Canada.

(Cited with approval by Freeman J.A. of the Appeal Division of the Supreme Court of Nova Scotia in R. v. Prosper, (1992), 113 N.S.R. (2d) 156, at p. 169.)

70 Before us, counsel for the appellant Cyril Patrick Prosper in Prosper, supra, and counsel for the respondent Ross Nelson Matheson in Matheson, supra, referred to the "living tree" theory and argued that the Charter had grown to the point where state-funded duty counsel should be constitutionally guaranteed. While the "living tree" theory would perhaps let us by-pass the will of the legislature, that theory is usually used to put right an interpretation which is no longer in accordance with the current socio-economic context (see, inter alia: Attorney General of Quebec v. Blaikie, [1979] 2 S.C.R. 1016, at pp. 1029-30 (per curiam); Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714, at p. 723 (Dickson J. (as he then was))). I doubt it can be used to interpret a constitutional document, such as the Charter, which is still in its infancy at a time when the socio-economic context has not evolved. Besides, the "living tree" theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country. Counsels' arguments regarding the "living tree" theory in the particular context of this case are not appropriate.

71 While one cannot ignore the plight of one of the most disadvantaged groups in society, the poor, on whose behalf The Charter Committee on Poverty Issues was granted intervener status in this case and in Matheson their concerns are alleviated by the availability of Legal Aid. However, the scope of services available through Legal Aid is generally not, in my opinion, for the courts to decide. The proper allocation of state resources is a matter for the legislature. In its choice of measures, given limited resources, a legislature may prefer to fund victims of crime rather than accused persons or vice versa -- or may wish to reduce rather than increase Legal Aid funding. However, I do note, without deciding, that there may be certain minimum levels of Legal Aid imposed by s. 7 in the context of an accused who is being tried for an offence whose penalty might result in the deprivation of the accused's life, liberty or security of the person. However, access to 24-hour duty counsel services upon arrest or detention is clearly far above any such minimum

threshold.

72 Therefore, I agree with the Chief Justice's conclusion that there is no constitutional obligation on governments under s. 10(b) of the Charter to provide free and immediate duty counsel services to detainees. There are no absolute rights, under the Charter or otherwise. This, in my view, should be the end of the matter and, consequently, the appeal should be dismissed and the conviction of the appellant under s. 253(b) of the Criminal Code upheld.

73 However, after having concluded that s. 10(b) does not require provinces to provide free and immediate duty counsel services, the Chief Justice went on, at p. 268, to adopt an alternative solution which he considered necessary in order to provide sufficient protection for the "the Charter rights and freedoms of detainees". In my opinion, this alternative solution, which the Chief Justice referred to as the obligation to "hold off", is neither warranted nor appropriate.

74 The Chief Justice bases his "holding-off" proposal on existing jurisprudence of this Court. This jurisprudence holds that, in order to comply with s. 10(b), the police must refrain from questioning a detainee who expresses an interest in consulting with counsel until such time as the detainee has had a reasonable opportunity to do so, provided, of course, that the detainee is duly diligent in attempting to contact counsel (R. v. Manninen, [1987] 1 S.C.R. 1233, at pp. 1241-44 (Lamer J. (as he then was)); R. v. Tremblay, [1987] 2 S.C.R. 435, at pp. 438-39 (Lamer J.); R. v. Strachan, [1988] 2 S.C.R. 980, at pp. 998-99 (Dickson C.J.); R. v. Ross, [1989] 1 S.C.R. 3, at pp. 10-13 (Lamer J.); R. v. Black, [1989] 2 S.C.R. 138, at pp. 154-55 (Wilson J.); R. v. Smith (Joey Leonard), [1989] 2 S.C.R. 368, at pp. 384-85 (Lamer J.); R. v. Brydges, [1990] 1 S.C.R. 190, at pp. 203, 206 (Lamer J.); R. v. Evans, [1991] 1 S.C.R. 869, at pp. 890-94 (McLachlin J.)).

75 However, the Chief Justice expands upon this principle in developing his requirement to "hold off" by stating that the length of the "reasonable opportunity" required under s. 10(b) will depend on whether or not free and immediate duty counsel services are available. As a result of this extension of the existing s. 10(b) jurisprudence, the required "reasonable opportunity" to consult with counsel will be longer in provinces without 24-hour duty counsel programs than in provinces with such programs. In fact, the Chief Justice concludes, at p. 270, that in provinces without 24-hour duty counsel services the reasonable opportunity to consult counsel can extend until such time as "when the local Legal Aid office opens, when a private lawyer willing to provide free summary advice can be reached, or when the detainee is brought before a justice of the peace for bail purposes and his or her needs can be properly assessed and accommodated". In other words, the result can be a very lengthy "hold off" period.

76 Consequently, the Chief Justice's "hold off" proposal effectively rings the death knell of the breathalyser as a device to help take drunk drivers off the roads in provinces that do not have 24-hour duty counsel service programs or their equivalent. If police have to "hold off" from requiring detainees to take breathalyser tests in such provinces, one can foresee that drivers, from 5 p.m. to 9 a.m. on weekdays and on weekends, would be free to drink and drive at leisure, with the

inevitable consequences of deaths and serious injuries on the roads (a carnage that the breathalyser device was designed to reduce substantially), all on the premise that they did not have access to 24-hour duty counsel, which, as I have already noted, is not even required by s. 10(b) of the Charter. In my view, the Charter was not enacted to produce such an aberrant result. To suggest that provinces which do not provide services which they are not constitutionally required to provide will be penalized in their means of promoting safety on their roads is to me unacceptable.

77 While I believe that the jurisprudence of this Court to date is correct, and that a detainee must be provided with a "reasonable opportunity" to consult with counsel where he or she expresses a desire to do so, I cannot accept that the duration of such a reasonable opportunity should depend on the existence or non-existence of duty counsel programs. The constitutional rights guaranteed under s. 10(b) of the Charter are uniform across the country and should not depend on the existence or non-existence of programs, such as 24-hour duty counsel services, that themselves are not mandated by the Constitution.

78 Furthermore, even if s. 10(b) did impose a long "holding-off" requirement in provinces without duty counsel programs, I do not believe that such a holding-off period would be required with respect to breathalyser tests. This Court has long recognized that in urgent or dangerous circumstances, the police need not provide detainees with a reasonable opportunity to consult counsel before questioning them (R. v. Manninen and R. v. Strachan). While, it goes without saying that it is not in every situation that urgent and dangerous circumstances will be present, I firmly believe that in the case of breathalyser tests there is such an urgency. The test must be administered "forthwith" and the timing for efficacy of that test is two hours, a time frame also required by law. I refer in particular to ss. 254(3) and 258(1)(c)(ii) of the Code: 254. . . .

> (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
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> (a) such samples of the person's breath as in the opinion of a qualified technician, or
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> . . .
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

> 258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
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> . . .
>
> (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
>
> . . .
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
>
> . . .
>
> evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses; [Emphasis added.]

79 For all of the reasons explained above, I conclude that the appellant's rights under s. 10(b) of the Charter were not violated. To hold otherwise would be to penalize society for failing to provide a service which is not constitutionally required.

80 In saying this, I am not in any way minimizing the importance of the s. 10(b) Charter guarantee. That guarantee is fully protected by providing the proper caution, as was done in this case, and by waiting a reasonable period of time before questioning a detainee who expresses a desire to consult with counsel. However, it is the detainee's responsibility to find counsel with whom to consult. The state is only required to provide the detainee with a reasonable opportunity to do so, which, was done in this case. Thus, I conclude that the appellant's s. 10(b) Charter rights were not violated.

81 I cannot resist noting, however, that many of the problems the Court currently faces and will continue to face with respect to the scope of the right to counsel under s. 10(b) are partially the result of this Court's interpretation of the notion of "detention" provided for in the Charter. (See: R. v. Therens, [1985] 1 S.C.R. 613, at pp. 630-44 (Le Dain J.); R. v. Hufsky, [1988] 1 S.C.R. 621, at pp. 630-33 (Le Dain J.); R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 647-50 (Le Dain J.); R. v.

Simmons, [1988] 2 S.C.R. 495, at pp. 517-22 (Dickson C.J.) and pp. 537-41 (L'Heureux-Dubé J., dissenting); R. v. Jacoy, [1988] 2 S.C.R. 548, at pp. 557-58 (Dickson C.J.); R. v. Debot, [1989] 2 S.C.R. 1140, at pp. 1161-62 (Wilson J.); R. v. Schmautz, [1990] 1 S.C.R. 398, at pp. 407-12 (Gonthier J.); R. v. Elshaw, [1991] 3 S.C.R. 24, at pp. 51-71 (L'Heureux-Dubé J., dissenting); and R. v. Grant, [1991] 3 S.C.R. 139, at pp. 148-51 (Lamer C.J.).) I share Professor Hogg's view, expressed in Constitutional Law of Canada (3rd ed. 1992), vol. 2, at p. 47-5, that:

> It is difficult to identify any civil libertarian values that are served by the definition of detention that is applied in Therens, Thomsen, Hufsky and Simmons. These cases introduce a right to counsel into every situation, however brief or routine, in which there is a duty to comply with a demand by a police officer (or other official). In every case, the detained person has no choice but to obey the demand, and legal advice could only confirm that duty to obey. There is nothing that counsel could do to protect the innocent, who will in any case be exculpated by the breath test or other inspection or search that he or she is required by law to undergo. The sole effect of the right to counsel seems to be to create opportunities for delay by those who have reason to fear the outcome of the demanded test. Either that delay must be filled by custodial requirements that absorb police resources or the police must take the risk that incriminating evidence will disappear. Would it not be better to restrict the term "detention" to those official restraints that are neither routine nor transitory and in which the detained person faces choices that could be assisted by legal advice?

82 On the facts of this case, had I agreed with the Chief Justice and McLachlin J. that the appellant's s. 10(b) rights were violated, I would have held that the breathalyser evidence should not have been excluded under s. 24(2) of the Charter for the following reasons.

83 On the basis of the factors set out in R. v. Collins, [1987] 1 S.C.R. 265, the Charter violation, had there been one, would not have been a serious one so as to mandate the exclusion of the evidence. Such exclusion rather than its admission, on the facts of this case, would bring the administration of justice into disrepute.

84 First, the factors concerning the fairness of the trial favour the admission of the evidence. I cannot agree with the Chief Justice, at p. 284, that "the breach of the appellant's right to counsel goes directly to his privilege against self-incrimination, and receipt of the breathalyser evidence resulting from this breach would undermine this privilege, thereby rendering the trial process unfair". As I said in Bartle, supra, the breathalyser tests cannot be simply characterized as self-incriminating evidence in the same way as a confession. Rather, they are indicia of a physical condition which existed and could have been discovered by other means, whether or not the police denied to the appellant his s. 10(b) rights. The following comments of Chipman J.A. of the Court of Appeal, at p. 166, are a proper statement of the law:

> In the present case, while the breath sample is more correctly categorized as self-incriminating evidence than real evidence, it is to be distinguished from a confession which is truly a case of an accused being conscripted against himself and creating evidence which did not exist before and which he was not required to give.

In these circumstances, the admission of the results of the two breathalyser tests would not render the trial unfair.

85 The second set of factors focusing on the seriousness of the violation of the Charter would also militate towards admission rather than exclusion of the appellant's breathalyser tests results. Chipman J.A. commented, at p. 166, on this aspect as follows:

> The breach was technical in nature.
>
> The conduct of the police in this instance was beyond reproach. Constable Young provided the [appellant] with the very service that the Legal Aid officers had directed the law enforcement agencies not to provide. He assisted the [appellant] in every reasonable way and put no pressure on him of any kind. Judge Sherar [the trial judge] said:
>
> > "In fairness, Constable Young is not to be faulted since personally he attempted, within the resources he had at his disposal to assist the [appellant] in obtaining legal assistance." [Emphasis added.]

I agree and mention that the Chief Justice himself recognizes, at p. 284, that the police acted with an "undeniable good faith". Therefore, the admission of the evidence is favoured by this second set of factors.

86 Finally, as to the disrepute to the administration of justice, the appellant was convicted of the offence under s. 253(b) of the Code, that is to have had the care and control of a motor vehicle while his blood alcohol level was in excess of 80 mg of alcohol in 100 ml of blood. The seriousness of the offence of operating a motor vehicle while impaired cannot be disregarded as this Court has pointed out in numerous occasions (R. v. Hufsky; R. v. Thomsen; R. v. Ladouceur, [1990] 1 S.C.R. 1257; R. v. Wilson, [1990] 1 S.C.R. 1291; and R. v. Mellenthin, [1992] 3 S.C.R. 615) and as I have reiterated in my reasons in Bartle. Given the nature of the Charter violation and its minimal incidence on the fairness of the trial, if any, the seriousness of offences against s. 253(b) of the Code militates in favour of the admission of the evidence rather than its exclusion. Its exclusion, in my view, would bring the administration of justice into disrepute. I agree with the following comments of Chipman J.A., at pp. 166-67:

> As to the third group of factors, I am satisfied that the exclusion of this evidence would bring the law into extreme disrepute in the eyes of any reasonable person, dispassionate and fully apprised of all of the circumstances. Among the factors that such a person would take into consideration are: (a) the reasonable and probable grounds which existed from making the breathalyzer demand; (b) had the [appellant] spoken to counsel, he would undoubtedly [have] been advised that it was an offence to refuse the breathalyzer samples; and (c) in view of Judge Sherar's dismissal of the impairment charge, no evidence other than that obtained pursuant to the statutory procedure was available to prove any offence arising out of the occurrence. While in view of the [appellant]'s waiver no urgency was involved, if this is not a case of waiver, then a degree of urgency arose as the two hour period began to draw a close.
>
> . . .
>
> That the respondent was a menace to himself, the police officers and any other user of the highway on the afternoon of May 18, 1991 is beyond question. Most reasonably dispassionate and fully informed persons would be appalled and dismayed at the exclusion of this evidence which so fully confirmed the officer's viva voce testimony of the [appellant]'s impairment. [Emphasis added.]

Accordingly, I would have had no hesitation in admitting the breathalyser evidence, had I found a breach of s. 10(b) of the Charter, which I do not.

87 In the result, I would dismiss the appeal and uphold the conviction of the appellant on the charge of violating s. 253(b) of the Code.

The following are the reasons delivered by

88 GONTHIER J. (dissenting):-- While I share the views of the Chief Justice as to the scope of the obligation of the police regarding disclosure upon arrest or detention of existing and available duty counsel services, I agree with the reasons of Justice L'Heureux-Dubé as to the reasonable opportunity to be given a detainee to retain and instruct counsel, particularly as applied in the case of a demand for a breathalyser test pursuant to s. 254 of the Criminal Code, R.S.C., 1985, c. C-46. Like her, I conclude that appellant's rights under s. 10(b) of the Canadian Charter of Rights and Freedoms were not infringed and would, in any event, hold that the breathalyser evidence should not be excluded.

89 I would therefore dismiss the appeal and uphold the conviction of the appellant.

The following are the reasons delivered by

90 McLACHLIN J.:-- This appeal, heard together with R. v. Matheson, [1994] 3 S.C.R. 328; R.

v. Bartle, [1994] 3 S.C.R. 173; R. v. Pozniak, [1994] 3 S.C.R. 310; and R. v. Harper, [1994] 3 S.C.R. 343, requires this Court to consider the ambit of the right of a detained person to "retain and instruct counsel without delay and to be informed of that right" guaranteed by s. 10(b) of the Canadian Charter of Rights and Freedoms. I agree with Chief Justice Lamer that the state is not constitutionally obliged to set up a state-funded duty counsel system. I also agree that when a duty counsel system exists, the authorities should advise the detained person of that fact. Thus I would answer what were styled as the main questions on the appeal in the same way as does the Chief Justice. The reasoning which leads me to these conclusions, however, differs somewhat from that of the Chief Justice.

I. The Ambit of the Right to Counsel in s. 10(b)

91 Section 10(b) guarantees the detained person the right "to retain and instruct counsel without delay and to be informed of that right". The right is conferred on every detained person, regardless of rank or wealth or the availability of counsel at a particular time and place.

92 By its express wording, s. 10(b) has two components: (1) an informational component, and (2) an implementational component. The informational component entitles the detainee to information as to the nature of his or her right to retain and instruct counsel. Having been informed of his or her right to counsel and having been provided with the information necessary to the effective exercise of that right, the accused has a further right to be given an opportunity in fact to retain and instruct counsel, whether by use of the telephone or other means. If either the informational or implementational requirements are not satisfied, a breach of s. 10(b) may occur. Any evidence taken before the breach is remedied may be rendered inadmissible under s. 24(2) of the Charter. The answers to the questions posed on this appeal flow from these simple propositions.

The Obligation to Provide Duty Counsel

93 The first question is whether this Court should hold that each province has a constitutional obligation under s. 10(b) of the Charter to establish a free system of duty counsel available to detainees at all times -- to ensure, as the Chief Justice puts it, at p. 247, "that free and immediate preliminary legal advice is available upon arrest or detention". I would answer this question in the negative, for two reasons. First, I find no power in the Court to make such an order. Second, such an order is, in my view, unnecessary.

94 First, I can see no authorization in the Charter for a judicial order requiring the provincial or federal government to adopt a program of duty counsel. The framers of the Charter carefully defined the remedial powers of the Court for Charter breaches. In the case of legislation which offends the Charter, the court may so declare, rendering the law invalid under s. 52 of the Constitution Act, 1982. In the case of evidence obtained in contravention of rights guaranteed by the Charter, the remedy lies under s. 24(2). The court may exclude such evidence, if it is satisfied that to receive it would bring the administration of justice into disrepute. The final power of the court is the granting under s. 24(2) of such remedy as the court may find appropriate and just in the

circumstances on the application of a person whose rights have been infringed.

95 None of these provisions empowers a court to require the government of a province or any other agency to set up a program aimed at avoiding Charter breaches. The remedy envisioned by the Charter for breaches such as those alleged in this case is a decision by a judge under s. 24(2) to exclude or admit the evidence obtained in contravention of the applicant's rights.

96 This brings me to the second reason for rejecting the submission that this Court should "compel" provinces to implement duty counsel systems. No such order is necessary because the Charter provides its own scheme of enforcement. It does not require governments to take anticipatory action to prevent Charter breaches, although in the spirit of lawful compliance they ordinarily do so. Rather, it sets up a scheme which puts governments to a choice. It defines the rights of each individual and stipulates the consequences of violation. The state may choose to take measures to prevent Charter breaches, knowing that as a consequence evidence obtained will be receivable against the accused, provided it meets general criteria of admissibility. On the other hand, if the state fails to take such measures and permits Charter breaches, it faces the prospect that the evidence obtained in violation of the Charter may be ruled inadmissible under s. 24(2). Only in this sense does the Charter impose "requirements" on the state. Since the prospect of being unable to adduce evidence against an accused often means that the prosecution cannot proceed, the net effect of the scheme which Parliament has set up in the Charter is substantial compliance.

97 This mechanism has worked well in other areas where the manner in which the administration of justice was operating tended systematically to produce breaches of the Charter. In R. v. Askov, [1990] 2 S.C.R. 1199, this Court concluded that the system of justice in some areas of the country was violating the rights of accused persons under s. 11(b) to be tried within a reasonable time. It was not suggested in that case that the solution lay in ordering provinces to comply. Rather, the solution lay in ordering a stay of proceedings in cases of abuse under s. 24(1) of the Charter. As a result, the time in which accused persons are brought to trial appears to have been dramatically reduced.

98 It will be seen that I do not see the need for a judicially imposed "holding-off" period when counsel cannot immediately be made available. In my view, there is nothing in the language of s. 10(b) that authorizes this Court to dilute the right to counsel by imposing a "holding-off" period. The words of s. 10(b) clearly state that a detainee has the right to retain and instruct counsel without delay. It is problematic to suggest that courts can extend the period of "delay" for up to 48 hours or more. For example, if an accused is arrested on a Friday evening, it cannot be said that "allowing" the detainee to wait in detention until the Legal Aid offices open on Monday morning provides the detainee with the opportunity to retain and instruct counsel "without delay".

99 While the police may choose to "hold off" -- for example, where it appears that counsel will become available shortly -- they are not obliged to do so. Ultimately, whether or not they "hold off", if they take evidence from the detainee in violation of his or her rights, the authorities must be

prepared to accept the risk that the evidence may not be admissible against the detainee at trial. The question of the receivability of such evidence is for the trial judge under s. 24(2) of the Charter, to be exercised in accordance with the principles generally applicable to s. 24(2) as outlined in R. v. Collins, [1987] 1 S.C.R. 265. This applies in all cases, even where the Criminal Code prescribes that evidence must be taken within a stipulated time period, as for breathalyser tests. A detainee's constitutional rights are not attenuated simply because Parliament chooses to set a time limit for gathering a particular kind of evidence. At the same time, the urgency of the situation may be a factor weighing in favour of reception of the evidence when s. 24(2) is applied.

100 The Charter thus places the authorities who detain a person in the following situation: if they wish to be certain that evidence obtained can be used subsequently against the detainee, they must take steps to ensure that the detained person is told of his or her right to retain and instruct counsel without delay, and, if a request for counsel is made, must provide the detainee with an opportunity to exercise that right. One way of ensuring the latter may be by instituting a system of free duty counsel. But other means may exist; for example, it may be that the provincial bar arranges for someone to be available at all times to accused persons, as we were told was the case in Alberta. If the authorities find it impractical or impossible to grant the detainee his or her right to counsel without delay, they run the risk that any evidence taken in the interim may be excluded under s. 24(2) of the Charter. They may as a consequence choose not to take evidence from the detainee in the interim. Or they may choose to do so, knowing that the evidence may be ruled inadmissible at the trial, and that they subsequently may be held to public account for such a result: see comments of Cory J. in Askov, supra, at pp. 1223-24.

The Informational Component of s. 10(b) of the Charter

101 The second question raised on this appeal is what s. 10(b) requires a detainee to be told about the right to retain and instruct counsel without delay. The answer to this question depends on the content of the right. Section 10(b) states that the detainee is entitled to be informed of "that right", referring back to the right to retain and instruct counsel.

102 As I noted earlier, the right to retain and instruct counsel without delay is conferred on every detained person, regardless of rank or wealth or the availability of counsel at a particular time and place. This does not mean that even detainees who can afford private counsel are constitutionally entitled to free legal advice on detention, nor does it mean that there is a constitutional obligation on the part of provincial governments to supply 24-hour duty counsel systems. Rather, it means that the Charter right to counsel cannot be denied to some Canadian citizens merely because their financial situation prevents them from being able to afford private legal assistance. The poor are not constitutional castaways. Nor can detainees be denied their s. 10(b) rights by reason of the time or place of their detention. A person arrested in a province in which no duty counsel system exists has the same rights under s. 10(b) as a person arrested in a province in which duty counsel can be contacted on a 24-hour basis. The scope and content of the right to retain and instruct counsel does not vary geographically. As a matter of practice, however, the actual availability of counsel may

vary from province to province. Where no system of free and immediate, preliminary legal assistance has been put in place, violations of the right to retain and instruct counsel without delay may occur.

103 This Court has emphasized that the purpose of s. 10(b) is to allow a detainee not only to be informed of his rights and obligations, but also to obtain advice as to how to exercise those rights: R. v. Manninen, [1987] 1 S.C.R. 1233, at pp. 1242-43. The detained person is entitled to this advice in a "timely and comprehensible" manner: R. v. Dubois (1990), 54 C.C.C. (3d) 166, [1990] R.J.Q. 681 (Que. C.A.). This suggests that to comply with the Charter, the caution given on detention must, at a minimum, convey the following information to a detainee about the scope of his or her right to counsel under s. 10(b):

(1) It must convey to the detainee that he or she has the right to contact counsel without delay. Phrases such as "You have the right to contact a lawyer immediately" or "You have the right to call a lawyer now" are examples of ways in which this aspect of the right might be communicated to detainees.
(2) It must convey to the detainee that his or her right to contact counsel immediately is a right which does not depend on the ability to afford private counsel.

104 This comprises the minimum information that must be given to all detainees in all jurisdictions, whether or not duty counsel actually exists in the jurisdiction at the time of detention. In jurisdictions where no such systems exist, the information component need only impart information about the right to retain and instruct counsel immediately and regardless of financial means. The detainee has the right to be informed of this right, even if it is apparent that there is no means by which it can be achieved. At very least, a detainee so advised will know that the police are thereafter acting in violation of his or her rights and be able to conduct him or herself accordingly.

105 The majority of this Court ruled in R. v. Brydges, [1990] 1 S.C.R. 190, that where a duty counsel system exists, the accused should also be informed of that fact. Thus, in those jurisdictions in which there exists some provision for free and immediate, preliminary legal advice, there is an additional requirement under the informational component of s. 10(b) to inform a detainee of the existence and availability of such services in the jurisdiction at the time of detention, including the means by which counsel can be accessed: see reasons of Lamer C.J. in Bartle, supra, released concurrently.

The Implementational Component of s. 10(b) of the Charter

106 Once the detainee has been informed of the right to retain and instruct counsel without delay and indicates that he or she wishes to retain counsel, we enter the "implementational" stage of s. 10(b). The Charter does not guarantee that the detainee will in fact consult counsel. It does, however, guarantee the detainee an opportunity to consult counsel. This must mean, if the words of

s. 10(b) are taken at their face value, that the detainee is to be afforded the means of consulting counsel. (The rights conferred by s. 10(b), unlike the right to be free from unreasonable search and seizure and the right to be tried within a reasonable time, are not conditioned by the word "reasonable" or any other limitation.) If the detainee does not avail himself or herself of these means, his or her rights are not breached. If, on the other hand, the means of retaining and instructing counsel without delay are denied the detainee, his or her s. 10(b) rights are breached.

107 There may be many reasons why a detainee, properly informed of his s. 10(b) right, is unable to implement it. The question of whether the accused has established this (the onus of establishing a Charter breach lies on the accused), is one of fact for resolution by the trial judge on all of the evidence. The question in each case is whether the detainee has been effectively informed of his or her rights and has been given the opportunity, or the means, to retain and instruct counsel without delay.

108 If a breach of s. 10(b) is established, the further question arises of whether any evidence taken before the breach was remedied should be excluded under s. 24(2) of the Charter. I agree with the Chief Justice's comments on s. 24(2). I would, however, add this. As Cory J. emphasized in Askov, supra, at p. 1225, "the lack of institutional facilities can never be used as a basis for rendering [a Charter] guarantee meaningless". To justify systematically the breach of a detainee's right to counsel on the basis that it is too difficult or too expensive to provide the means by which the right may be exercised would seriously undermine a right which the Charter enshrines.

Summary

109 Every person detained by the police has the right to retain and instruct counsel without delay and to be informed of that right. This means that every detainee is entitled to an opportunity to retain and instruct counsel without delay, regardless of the time and place of the detention or the fact that the detainee has no money.

110 The right consists of an informational component and an implementational component. Under the informational component, the duty of the police is to tell the detainee about his or her actual constitutional right, even where the means by which it can be exercised may not seem to be at hand. At the very least, police must inform all detainees that they are entitled to have an opportunity to contact counsel immediately, and that their right to do so is not dependent on their ability to afford a private lawyer. In those jurisdictions which provide some system of free, preliminary legal advice, the police must additionally inform detainees of the existence and availability of these services, as well as the means by which such advice can be accessed.

111 Under the implementational component, s. 10(b) requires that the detainee be given an opportunity, or the means, to "retain and instruct counsel without delay". If the detainee chooses not to contact counsel, no breach results. If the legal system fails to provide the detainee with the opportunity to consult counsel without delay for whatever reason -- be it lack of facilities, information, willing counsel or some other impediment -- breach of s. 10(b) is established. If

evidence is taken in contravention of this duty, its admissibility falls to be decided under s. 24(2) of the Charter. II. Application of the Law to the Facts of this Case

The Informational Component of s. 10(b)

112 The appellant was arrested for theft of a motor vehicle at 3:38 p.m. on a Saturday afternoon. The arresting officer, Constable Young, advised the appellant of his right to counsel, reading from a card as follows:

> . . . you have the right to retain and instruct counsel without delay. You may call any lawyer you wish. You have the right to apply for legal assistance without charge through the Provincial Legal Aid Program.

Constable Young further advised the appellant that a list of Legal Aid lawyers' home telephone numbers would be provided to him should he wish to contact one of them. The officer was unaware at the time of the detention that the Legal Aid lawyers had entered into a work-to-rule campaign two days earlier, refusing to take calls from detainees after regular office hours.

113 Following the primary caution, which the appellant indicated he understood, Constable Young observed signs of impairment and concluded that the appellant's ability to drive was impaired by alcohol. At this point he made a breathalyser demand on the appellant, and asked him whether he would take the test or if he would like to talk to a lawyer first. The appellant stated that he wanted to consult a lawyer prior to giving a breath sample.

114 In my view, the primary caution, combined with the secondary instructions which accompanied the breath demand, effectively communicated to the appellant that he was entitled to contact a lawyer immediately, and that his right to do so was not dependent on his ability to afford private counsel. Although there was no effective system of duty counsel in the jurisdiction at the time of the detention because of a work-to-rule campaign among Legal Aid lawyers, Constable Young was unaware of this fact at the time the demand was read. As such, he correctly informed the appellant that he would be given a list of Legal Aid lawyers' telephone numbers if such was requested. In all the circumstances, I would find that requirements of the informational component of s. 10(b) were met in this case.

The Implementational Component of s. 10(b)

115 Having been properly informed of his rights, the appellant promptly indicated a desire to speak to counsel. He was then taken to a cubicle, provided with a telephone, and given a list of home phone numbers of Legal Aid lawyers. After trying for approximately 37 minutes, the appellant was unable to reach any of the 12 lawyers on the list. Upon exhausting the list provided to him, the appellant was asked by Constable Young if he would like to try to contact other lawyers, and was offered a phone book. The appellant declined to use the telephone book, indicating that he could not afford a lawyer on his own. Shortly thereafter, the appellant agreed to take the

breathalyser tests. Both tests registered blood-alcohol readings well above the legal limit.

116 In my opinion, the requirements of the implementational component of s. 10(b) were not satisfied in this case. The appellant clearly indicated a desire to speak to counsel prior to giving evidence, and he was diligent in pursuing his right. He tried at length to contact a Legal Aid lawyer, eventually exhausting the list provided to him. When offered the use of the Yellow Pages, he declined, expressing his concern that he could not afford private counsel. I agree with Lamer C.J. that in the circumstances it would be unreasonable to expect the appellant to have done anything more than he did. I also agree with the Chief Justice's conclusion that the appellant did not waive his right to counsel when -- "out of frustration" -- he finally agreed to submit to the breathalyser tests. As Lamer C.J. puts it (at p. 281), the appellant was prevented from exercising his right to counsel, "because of institutional conditions entirely beyond his control". This violated s. 10(b) of the Charter.

Section 24(2)

117 Having concluded that the appellant's right to counsel was infringed, the question remains whether the breathalyser evidence obtained following the breach of the right to counsel should be excluded. For the reasons given by Lamer C.J., I am in agreement that the admission of the breathalyser evidence would tend to bring the administration of justice into disrepute.

118 Accordingly, I would dispose of the appeal in the same manner as Lamer C.J.

The following are the reasons delivered by

119 MAJOR J. (dissenting):-- I have read and agree with the principles expressed by the Chief Justice but disagree in his conclusion that the appeal be allowed.

120 I agree with the Court of Appeal for Nova Scotia that the accused in the circumstances was properly advised and had a reasonable opportunity to contact counsel prior to taking the breathalyser test in accordance with his s. 10(b) rights.

121 The police officers advised him of the legal aid program in Nova Scotia as they understood it. However, it was unknown to them at the time that lawyers forming the legal aid system in Nova Scotia were effectively on strike and unavailable for consultation.

122 Once aware of this the police officers provided the appellant with a list of lawyers not part of legal aid. The accused, as he was entitled to, chose not to attempt to reach any of them. That was a decision he was entitled to make and having done so is now precluded from alleging a breach of his s. 10(b) rights.

123 I would dismiss the appeal.