SECTION 10(b) RIGHT TO COUNSEL

"You have the right to retain and instruct counsel without delay. You may call any lawyer you wish. Legal Aid duty counsel is available to provide you with immediate legal advice free of charge. I can provide you with a number you can call free of charge. Do you understand? Do you wish to call a lawyer now?"

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BIOGRAPHICAL INFORMATION

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The statement which appears on the cover page of this paper, or one of the many variations of it, represents the first step in an accused person’s right to counsel as guaranteed by s. 10(b) of the Charter. This statement, and the accompanying duties and obligations that flow from it, have been developed by a series of judicial pronouncements. The description of the law as a “living creature” aptly applies to s. 10(b) of the Charter and I am certain that it has not stopped growing, yet.

Section 10(b) of The Charter of Rights and Freedoms states:

Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right,

In this paper I will review the current case law concerning the interpretation and application of section 10(b). I will refer to a couple of cases that deal with remedies available if there is a section 10(b) Charter violation, however, I will not be dealing with the section 24(2) considerations other than in passing reference to the cases referred to herein.

I. WHAT DOES SECTION 10(b) MEAN?

The most comprehensive definition of section 10(b), including reference to the underlying principles encompassed in section 10(b) of the Charter, is found in R. v. Brydges (1991), S.C.R. 190, 53 C.C.C. (3rd) 330. Lamer, C.J.C. states at pp. 340 to 341:

The Court has on numerous occasions stated that the proper approach to interpreting the meaning of the rights and freedoms guaranteed by the Charter is to adopt a purposive analysis: Hunter v. Southam Inc. (1984), 14 C.C.C. (3rd) 97, 11 D.L.R. (4th) 641 [1984] 2 S.C.R. 145 and R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3rd) 385, 18 D.L.R. (4th) 321 [1985] 1 S.C.R. 295. In respect of s. 10 of the Charter, this court has made clear that the right to counsel is, to cite the
words of Wilson, J. in Clarkson (supra) at pp. 217-8, aimed "at fostering the principles of adjudicative fairness", one of which "the concern for fair treatment of an accused person". It is of note that the right to counsel is triggered "on arrest or detention". Fair treatment of an accused person who has been arrested or detained necessarily implies that he be given a reasonable opportunity to exercise the right to counsel because the detainee is in the control of the police, and as such is not at liberty to exercise the privileges that he otherwise would be free to pursue. There is a duty, then, on the police to facilitate contact with counsel because, as I stated in R. v. Manninen (1987), 34 C.C.C. (3rd) 385 at p. 392, 41 D.L.R. (4th) 310, [1987] I S.C.R. 1233:

the purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights . . . For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

As a result, s. 10(b) of the Charter imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and second, the police must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity. The second duty includes a bar on the police from compelling the detainee to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until the person has had a reasonable opportunity to exercise the right to counsel: R. v. Ross (1989), 46 C.C.C. (3rd) 129, [1989] I S.C.R. 3, 67 C.R. (3rd) 209.

II. WHAT DUTIES OR OBLIGATIONS DO THE POLICE HAVE?

Based on Brydges there are three basic obligations imposed on authorities when they are detaining or arresting an accused.

1. The police have the duty to inform the detainee of his or her right to contact counsel and his or her ability to do so forthwith;

2. The police must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel; and
3. The police must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity.

Lamer, C.J.C. pointed out that the right to retain and instruct counsel must be exercised diligently by the detainee. If the detainee is not diligent, then the correlative duties on the police are suspended. In this regard he referred to R. v. Tremblay (1987), 37 C.C.C. (3rd) 565, 45 D.L.R. (4th) 445, [1987] 2 S.C.R. 435 and also quoted, at p. 341, R. v. Ross (1989), 46 C.C.C. (3rd) 129 (S.C.C.) at p. 135:

Reasonable diligence in the exercise of the right to choose one’s counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable delay that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.

Brydges was the first decision to impose a duty upon an arresting officer to advise the accused of the existence and availability of duty counsel and Legal Aid plans. Lamer, C.I.C. found that it is consistent with the purpose underlying s. 10(b) to impose that duty on the police in all cases of detention. He pointed out that there may be cases where the detainee does not explicitly ask for or about Legal Aid, but still expresses a concern about affordability of counsel. At the same time, there may be cases where the detainee says nothing about his inability to afford counsel because he believes it is a foregone conclusion that unless he can afford a lawyer, there is no other way to exercise the right to retain and instruct counsel. It was the view of Lamer, C.I.C. that the concern with respect to making police officers’ duties under the Charter clear and of ensuring that all detainees are made aware of the existence of duty counsel and Legal Aid, complement each other, and support the view 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.
Lamer, C.J.C. concluded by saying that the right to retain and instruct counsel, in modern society, has come to mean more than the right to retain a lawyer privately. It also includes the right to Legal Aid if one qualifies and the right to immediate, although temporary, advice from duty counsel irrespective of financial status. Because of these considerations he concluded that 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.

(A) RIGHT TO LEGAL AID AND DUTY COUNSEL

In R. v. Bartle (1994), 33 C.R. (4th) 1; 92 C.C.C. (3rd) 289 (S.C.C.) the Supreme Court of Canada dealt with the application of Brydges and the obligation to advise of the existence of Legal Aid. The majority in that case held that based on Brydges police authorities are required to inform detainees about Legal Aid and duty counsel services in existence and available in the jurisdiction at the time of the detention. The basic information about how to access available services which provide free preliminary legal advice should be included in the standard s. 10(b) caution. The detainee must be told in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer right away. Failure to provide such information is a violation of the s. 10(b) rights.

This right to be advised of Legal Aid has been considered in two decisions in Saskatchewan which on the face of it appear to be contrary to the principles enunciated in Bartle and Brydges.

In R. v. Latimer [1995], 8 W.W.R. 609 (Sask. C.A.) the accused was arrested. The accused was advised that he had a right to contact counsel and that if he wished to do so steps would be taken to allow him to do so, including access to a telephone and a telephone book for that purpose. He was not specifically informed about a toll free telephone number to obtain free legal advice. The question arose whether or not his right to counsel had been infringed. Tallis, 1A. for the court provided the following analysis after referring to Bartle, at p. 635:
This passage must be considered in the factual context under review in Bartle. In that case, the caution extended to the appellant, both at the roadside and at the police station, did not advise him of the existence and availability of any "duty counsel" service. It did not provide him with the toll-free telephone number by which the service could be accessed. However, Lamer, C.J.C. (at p. 202) emphasized that the Court must consider whether, despite the absence of precise words to this effect, the essence of the appellant's right to immediate and temporary free legal advice was adequately communicated to him, or, alternatively whether the appellant fully understood his rights and waived the right to counsel.

In the case before us the investigating police officers appreciated their responsibilities under the Charter and acted in accordance with the spirit of those constitutional guarantees. The officers emphasized the appellant's immediate right to counsel when they spoke to him at the farm and later in when in the office at North Battleford where there was a phone "in front of" the appellant. There is no suggestion that the appellant did not understand his right to phone if he so desired. Although the appellant did not give evidence on the voir dire or at trial, one can fairly conclude that the officers were not dealing with an unsophisticated person. Under the circumstances the omission to specifically mention a toll-free number, if such is required under Bartle and the companion cases, is not decisive when one weighs and considers all the circumstances surrounding the questioning.

In our opinion, the nature of the information supplied by the officers was such that the appellant would understand that if he wished to contact a lawyer then steps could and would be taken to do so and that access to a telephone and telephone number would be supplied to enable that to be done.

On that basis, the Court upheld the trial judge's ruling that the accused's right to counsel had not been infringed. The court did in obiter agree with the Crown's contention that Bartle and the companion cases do not operate retrospectively. Latimer has been appealed and the appeal will be heard by the Supreme Court of Canada this fall.

In R. v. Russell (L.G.) [1996] 132 Sask. R. 24 (C.A.) the Court dealt with a somewhat similar situation. The accused had been advised of his right to counsel but had not been informed of his right to Legal Aid. The trial judge ruled that although there had been a technical breach under s. 10(b) of the Charter the evidence ought to be admitted under s. 24(2).
Gerwing, l.A. for the Court held that Charter decisions like Bartle do not apply retroactively. However, she went on to hold that even though there had been a technical breach, she would admit the evidence and in doing so stated:

The admission of real evidence, which exists independently, which was initially suggested in Collins as one guideline is no longer rigorously applied. However, I am in agreement with the approach of the Ontario Court of Appeal in R. v. Hachez (1995), 4 C.R. (4th) 69 which suggests the converse is compelling; that is evidence, including testimonial evidence, may be admitted if the Crown could have obtained it irrespective of the Charter breach. The accused there confessed and made clear that he intended to continue to speak to the police conducting the interview. Similar facts prevail here. The appellant continued to speak voluntarily to the police, after being informed of all of his rights, save the existence of Legal Aid. He almost certainly, and probably to the knowledge of the investigating officers who were fully aware of his circumstances, would not have qualified for Legal Aid. Further, he was acquainted with a lawyer in the judicial centre, and because the telephone had been offered and the Charter violation took place during normal working hours, this lawyer was immediately accessible to him. This is confirmed by his subsequent conduct, when he did conclude he ought to call a lawyer, in, without hesitation, contacting that counsel.

It is respectfully submitted that the comments of Gerwing, l.A. missed the mark in that Brydges made it clear that an accused is to be informed of his right to counsel including the ability to contact counsel who can provide him with preliminary and immediate advice. This has nothing to do with "qualifying" for Legal Aid. Further, as noted by Lamer, C.l.C. in Brydges at p. 50, one of the most important pieces of advice an accused can receive is how to exercise his right to remain silent.

Two Supreme Court of Canada decisions R. v. Pozniak (1994), 3 S.C.R. 310, 92 C.C.C. (3rd) 472; and R. v. Mills (1995), 100 C.C.C. (3rd) 223 (S.C.C.) both would appear to make it clear that the failure to advise of Legal Aid, including advice concerning a toll-free number if it is available, does constitute a Charter breach which should result in exclusion of the evidence.

In Pozniak v. The Queen, [1994] 3 S.C.R. 310,6 M.V.R. (3rd) 113, the accused was arrested on a charge of impaired driving and was given a breathalyzer demand. He was advised that he had a
right to contact counsel and a right to obtain advice from a free Legal Aid lawyer. He was also

told if he was charged he could apply to the Ontario Legal Aid plan for assistance. He however

was never informed of the 24-hour toll-free number which provided access to free, immediate

and temporary advice from duty counsel. In his testimony the accused stated that had he been
told about the toll-free service he would have probably used it.

The accused was convicted at trial of driving while over 0.08 but his appeal to the Summary
Conviction Appeal Court was allowed on the basis that his rights under s. 10(b) had been

infringed. On further appeal by the Crown to the Ontario Court of Appeal the appeal was

allowed and the conviction was restored. The majority of the Supreme Court of Canada held that

failure to advise the accused of the toll-free number had resulted in a breach of his s. 10(e) rights

and further held that the evidence should be excluded. The comments of Lamer, C.J.C. for the

majority, although lengthy, are extremely important. He stated at p. 479:

As with Barlow, I am satisfied that admission of the evidence in this case would

bring the administration of justice into disrepute.

With respect to adjudicative fairness, I find that the breath samples obtained from

the appellant were in the nature of conscripted evidence and that their admission

would negatively impact on the fairness of the trial. I further find that it is unclear

from the evidence whether the appellant would have contacted duty counsel if he

had been properly informed of its existence and of the 1-800 number by which it

could be accessed. Therefore, as I explained in Barlow at pp. 30-5 [ante, pp. 313-

7], I must concluded that the Crown has not discharged its burden of proving, on a

balance of probabilities, that the evidence would have been obtained even if the

appellant's s. 10(b) rights had been fully respected.

The trial judge based his finding that s. 10(b) had not been infringed on the fact

that the accused had not specifically indicated an interest in consulting duty
counsel. As a result, he did not turn his mind to the question of whether the
breathalyzer evidence should be excluded under s. 24(2). As I have explained, the

trial judge (who, of course, did not have the benefit of the judgment of this court

now being rendered) was in error in this regard. When considering whether the
accused would not have behaved any differently if his s. 10(b) rights had not been
violated, however, it is unnecessary for this court to second-guess any findings of
the trial judge regarding the weight that should be attached to particular items of
the evidence before him. I am satisfied that the evidence on the record, even when
viewed in the light most favourable to the Crown, does not support a finding, on
the balance of probabilities, that the accused would not have acted any differently had he been informed of the existence of 24-hour duty counsel services. Even if it is accepted that the accused was "indecisive" about whether or not he was going to call his own lawyer, this does not support the inference that he would not have called duty counsel if he had known of the existence of the 1-800 number. To my mind, the fact that the appellant wanted to call his lawyer but was seen to hang up without dialing when in the phone booth, together with the fact that it was 4:00 a.m. at the time, suggests that he might have used the toll-free service if he had known about it. In light of the uncertainty which exists as to what the appellant would have done if his s. 10(b) rights had not been violated, I am compelled for the reasons I gave in Bartle at pp. 30-5 [ante, pp. 313-7] to find in favour of the appellant and against the Crown on the issue of trial fairness. In other words, the Crown has not satisfied me on a balance of probabilities that the appellant would not have behaved any differently if he had been properly informed of his right to duty counsel.

I would add that neither the good faith of the police in this case nor the relative seriousness of the offence with which the appellant was charged can override what I believe would be an unfair trial if the evidence were admitted. In other words, I am satisfied that admission of the impugned evidence would bring the administration of justice into disrepute and, therefore, it should not be admitted under s. 24(2).

It is significant to note that what the Court looked at was not the question of whether or not if the accused received legal advice he still would have taken the breathalyzer test and still would have blown over 0.08, but whether if he had received the proper information concerning his right to access counsel, he would have exercised that right.

In Mills, when the accused was asked to comply with the breathalyzer demand, he was informed of his right to free advice from a Legal Aid lawyer but no mention was made of a 24-hour toll-free number by which duty counsel could be accessed. With the consent of the Crown the decision of the Ontario Court of Appeal was set aside and it was held that the accused's right to counsel had been infringed and the admission of the breathalyzer results in the circumstances would effect the fairness of the trial. As a result, the evidence was excluded and an acquittal was entered. (See also: R. v. Cobham [1994] 3 S.C.R. 360)
In *R. v. Spencer*, [1995] 14 M.V.R (3rd) 55 (Sask. C.A.), the accused was not informed of his right to free legal advice from duty counsel prior to taking a breathalyzer test. In that case, although the accused was not advised of this prior to taking the test, he did contact counsel and receive legal advice. In the circumstances, the Court held that assuming there was a s. 10(b) violation, the evidence should be admitted in that the accused had failed to show he would have acted any differently if he had been told about Legal Aid.

It now seems clear that initially there is an onus on the accused to show that he has not received his Charter rights as defined by *Brydges* and *Bartle*. If he proves this on a balance of probabilities the onus will usually shift to the Crown to show that the accused would not have behaved any differently had he been properly informed of his right to counsel. This has to be considered in light of the Saskatchewan Court of Appeal pronouncements in *Spencer* and in *R. v. Bircham (J.M.*), [1995] 131 Sask. R. 247. There an accused was advised of his right to counsel but was not asked if he wished to call a lawyer because there was no lawyer available at the time his rights were given. There was no evidence that he was further informed of his right to counsel once a phone was available or was asked if he wished to use the phone. The accused himself did not give evidence. Wakeling, IA. for the Court rejected the defence argument that the onus was on the Crown to establish the full extent of the notice given by the detainee, including the nature of the efforts by the detainee to obtain counsel, but instead held that the onus was on the appellant to show "prejudice" arising from the failure of the authorities to give him the full warning.

**(B) HOW LONG IS TOO LONG?**

The Supreme Court of Canada has made it clear that an accused may take as long as is reasonably necessary, as determined by the circumstances of each particular case, to try and contact counsel. In *R. v. Prosper*, [1994] 92 C.C.C. (3rd) 353 (S.C.C.), Lamer, C.I.C. states:

> 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 p. 12-13; *R. v. Manninen*, [1987] 1 S.C.R. 1233 at
Once a detainee has indicated the 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.

In my view, what constitutes a "reasonable opportunity" will depend on all the surrounding circumstances ...

Lamer, C.I.C. does note in Prosper 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 duty counsel the police will not be required to hold off. However, he added that the Crown's ability to rely on the two hour presumption contained in s. 258(1)(c)(ii) of the Code did not constitute such a circumstance. In this regard, he stated:

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, the 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 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 breathalyzer reading would have been at the time of care and control of the 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.
Lamer, C.L.C. pointed out that even if the two-hour presumption was not available to the Crown, the Crown could still attempt to prove the accused was over 0.08 by adducing expert evidence.

In light of the decision, the Supreme Court of Canada in Prosper, it would now appear that some of the earlier decisions which restricted the time period in which an accused could contact counsel are no longer good law (see: R. v. Nelson, [1991] 28 M.V.R. (2nd) 4 (B.C.C.A.) an accused was unable to contact counsel after 20 minutes and was then compelled to take a breathalyzer test and it was held that his Charter rights had not been infringed). Other decisions which have held that there should not be a restriction on the accused's right to contact counsel where he continues to act diligently would now appear to be correctly decided (see: R. v. Lamb (1985), 41 Sask. R. 198 (Q.B.) and R. v. Dunnett (1990), 62 C.C.C. (3rd) 14 (N.B.C.A.).

The Supreme Court of Canada in R. v. Burlingham (1995), 97 C.C.C. (3rd) 385 once again had an opportunity to examine the obligation of the police to "hold off" attempting to elicit evidence from an accused until he has had an opportunity to obtain legal advice. In Burlingham the accused had spoke with his lawyer who advised him to not speak to the police. Nonetheless, interrogation continued with the police denigrating the role of defence counsel, suggesting that he did not have the accused interests at heart whereas the police did. The police further, with the authorization of Crown counsel, offered the accused an opportunity to plead guilty to second degree murder in exchange for information and this interrogation continued, which was taking place on a Friday, even though the police were aware that the accused's lawyer was not available over the weekend.

The Court held that the accused's right to counsel had been violated in three respects:

1. By the police continuing to question the accused, despite his repeated statements that he would not say anything absent consultation with his lawyer;
2. By the police belittling the accused's lawyer with the express goal or effect of undermining the accused's confidence in his relationship with defence counsel; and finally

3. By the police attempting to plea bargain with the accused without the accused first having an opportunity to consult with his lawyer.

Given the seriousness of the breach, the accused's statements as well as the derivative evidence obtained as a result of the statements all were excluded.

The key in Burlington is that the information given to the accused was designed to dissuade him from obtaining legal advice. Contrast the situation in R. v. Friesen (1995), 191 C.C.C. (3rd) 167 (Alta. c.A.) where an accused after speaking with counsel then indicated that he wanted counsel present when he gave his statement. The officer in charge advised the accused that he understood it was counsel's practice not to be present when an actual statement was given. He testified at the voir dire that this in fact was the case and that he was not in anyway attempting to dissuade the accused from obtaining counsel. The Court noted there was no evidence to contradict this and the accused himself did not indicate that he was dissuaded in anyway from obtaining counsel. As a result, it was held that his right to counsel had not been infringed. (An application for leave to appeal to the Supreme Court of Canada has been filed.)

(C) RIGHT TO PRIVACY

It is trite law that an accused's right to counsel includes his right to contact counsel in private. (See: R. v. Balkan, [1973] 6 W.W.R. 617 (Alta. S.C.-A.D.) The more difficult issue arises in trying to determine how far an accused must go in asserting the right to privacy.

In R. v. Kennedy (1995), 103 C.C.C. (3rd) 161 (Nfld. C.A.) an accused had been in a motor-vehicle accident. He was taken to the hospital and there the police made a demand for a blood sample. He indicated that he wished to contact a lawyer. The police, doctors and nurses all were
present in the vicinity of the emergency room telephone. He decided not to contact counsel. The Court of Appeal held that the trial judge had not erred in finding that there was a breach of the accused’s right to contact counsel in that there was a reasonable apprehension on the part of the accused that any conversation he had could be overheard. However, the Court then went on to hold that the trial judge had erred in excluding the evidence for two reasons. First, because the accused had not expressly advised the police of his concerns about privacy. And second, because of the seriousness of alcohol related driving charges, the disrepute that would ensue from the exclusion of the impugned evidence was sufficient to overrule the serious concerns over the fairness of the trial.

A somewhat similar decision was reached in R. v. Jackson, [1993] 86 C.C.C. (3rd) 233 (Ont. c.A.). The accused was advised he had a right to contact counsel and the police pointed out the telephone to him and telephone book. They remained seated and made no effort to leave the room. The accused testified that he believed he would have to speak to a lawyer while the officers were present. The Court of Appeal held in the circumstances the accused could reasonably believe that he did not have the right to retain and instruct counsel in private and the officer could reasonably know the effects such circumstances may have had upon the accused and under those circumstances his right to counsel were violated. The Court then held that notwithstanding the violation, the evidence of the results of the breathalyzer test should not have been excluded holding that here the accused was under a legal obligation to provide breath samples and there was no evidence to indicate he had a reasonable excuse which would justify the accused failing or refusing to provide a sample. The Court held that the violation was not deliberate, the officer was acting in good faith, reliable evidence was obtained and concluded that the admission of the evidence would not bring the administration of justice into disrepute. Jackson relied upon the Ontario Court of Appeal’s decision in Pozniak which was subsequently overturned by the Supreme Court of Canada. I believe in light of the comments of the Supreme Court of Canada in Pozniak that a Court today presented with similar factual situations to Kennedy and Jackson would exclude the breathalyzer test results. (See: R. v. Northop (W.N.) (1995) 132 Sask. R. 245 (Prov. Crt.)
The Supreme Court of Canada held in R. v. Thomsen (1988), 40 C.C.C. (3rd) 411 that although the failure to give an accused an opportunity to consult counsel when he has been detained for a roadside screening test does constitute a violation of s. 10(b) of the Charter, this is a necessary limitation on the right to retain and instruct counsel that is demonstrably justified in a free and democratic society having regard to the fact that the right to counsel will be available at the more serious breathalyzer stage.

This issue was commented on further by the Supreme Court of Canada in R. v. Bemshaw (1995), 95 C.C.C. (3rd) 193 (S.C.C.). The question was whether or not the police officer should have waited 15 minutes before administering the test as a result of the recent consumption of alcohol by the accused. The Court held that if an officer knows that the screening test will provide inaccurate results, for example as a result of recent consumption of alcohol, then a fail could not constitute reasonable and probable grounds for a breathalyzer demand. The Court went on to hold that in those circumstances an officer would be entitled to wait 15 minutes before administering the test and the test still would be considered to have been administered "forthwith". The Court also held that notwithstanding that the detention in those circumstances would be longer than what was originally anticipated and may now require an accused waiting with the police at least 15 minutes before taking the test that this was still a reasonable limit on the detainee's rights under s. 10(b) of the Charter and the accused was still not entitled to counsel prior to taking the roadside screening test. (See also: R. v. Grant (1991), 3 S.C.R. 139; 67 C.C.C. (3rd) 268)

The Supreme Court of Canada has not clearly pronounced on the question of whether an accused is entitled to counsel before submitting to a sobriety test. Instead, we are left with a series of somewhat conflicting decisions from Courts of Appeal across Canada.
R. v. Saunders (1988), 41 C.C.C. (3rd) 532 (ant. c.A.) and R. v. Bonin (1989), 42 c.c.c. (3rd) 230 (B.C.C.A.) leave to appeal to S.C.C. refused 50 C.C.c. (3rd) vi both held that considering each province's particular provincial legislation and, in particular, a provision permitting a 24-hour roadside suspension, that the administration of sobriety tests constituted a reasonable limit on the rights in s. 10(b) of the Charter. This was re-affirmed by the Ontario Court of Appeal in R. v. Smith, reported in the March 8, 1996 Lawyers Weekly.

In R. v. Gallant (1989), 48 C.C.C. (3rd) 329 (Alta. c.A.) leave to appeal to S.C.C. refused February 22, 1990, the Court noted in Alberta that there was no legislation comparable to that considered by the Courts in Ontario and British Columbia and there is no limit prescribed by law within the meaning of s. 1 of the Charter to justify the failure to inform a motorist of his right to retain and instruct counsel prior to complying with a sobriety test. The Court also concluded that the common law permitted an officer to request a sobriety test but a motorist was not bound to comply and as a result there was no limit on his right to counsel.

Similar decisions were reached in R. v. Baroni (1989), 49 C.C.C. (3rd) 533 (N.S.C.A.) and R. v. Hill (1990), 25 M.V.R. (2nd) 27 (P.E.I. c.A.) however the contrary result was reached in R. v. Sullivan (1989), 22 M.V.R. (2nd) 261 (C.M.A.C.) where it was held that the common law power to investigate offences can, like the statutes in Ontario and British Columbia, constitute a reasonable limit prescribed by the law within the meaning of s. 1 of the Charter and thus permit delay in informing the motorist of his right to counsel.

In Saskatchewan, Grosky, J. held in R. v. Pelletier (J.G.) (1994), 117 Sask. R. 303 (Q.B.) overturned (1995) 97 C.C.C. (3rd) 139 (Sask. C.A.) that when an accused was stopped and asked to perform sobriety tests in order to support a charge of impaired driving if the accused is not informed of his s. 10(b) Charter rights and afforded an opportunity to exercise that right prior to complying with the request then there has been a breach of the accused's s. 10(b) Charter rights and the results of those tests is not admissible in evidence.

The Saskatchewan Court of Appeal, without deciding the issue, allowed the Crown's appeal because the Charter application had not been raised at trial in a timely fashion and sent the matter back to be fully canvassed at a new trial. In his decision, Tallis, lA. for the Court stated that at trial the various s. 24 two considerations outlined in R. v. Collins (1987), 33 C.C.C. (3rd) 1 (1987) 1 S.C.R. 265 should be considered and in this regard made specific reference to both Bartle, supra and R. v. Harper (1994),92 C.C.C. (3rd)423 (1994) 3 S.C.R. 343, in considering the question of whether the Crown had discharged the burden of proving that the accused would have acted any differently if there had not been an infringement of his or her rights.

It is one thing to detain an accused for the purpose of examining his driver's licence, vehicle registration and so on and during that time being able to make observations about his state of sobriety and determining whether or not a roadside screening or breathalyzer demand should be made. The requirements of a roadside test are minimal and detention in those circumstances has already been held by the Supreme Court not to constitute a violation of an accused's s. 10(b) right. The administration of sobriety tests however is effectively conscripting an accused to provide evidence against himself which will be used both in deciding whether or not to make a breathalyzer demand and as evidence in an impaired driving charge which is always laid concurrently with a driving while over 0.08 charge. Once again, relying upon the Supreme Court of Canada's recent pronouncements in Pozniak, there does not seem to be any justification for not giving an accused an opportunity to first obtain advice from legal counsel before deciding whether or not to participate in this process.
III. WAIVER

Brydges now contains the classic statement concerning waiver. Lamer, C.J.C. stated at p. 341:

A detainee may, either explicitly or implicitly, waive his right to remain and instruct counsel, although the standard will be very high where the alleged waiver is implicit. A majority of this court in Clarkson (1986), 1 S.C.R. 383, concluded as follows in respect of a waiver of the right to counsel at p. 394, a passage that has been cited with approval in subsequent cases dealing with s. 10(b):

... it is evident that any alleged waiver of this right by an accused must be carefully considered and that the accused's awareness of the consequences of what he or she is saying is crucial. Indeed, this Court stated with respect to the waiver of statutory procedural guarantees in Korponey v. A.-G. Can. (1982), 65 C.C.C. (2nd) 65 at p. 74, 132 D.L.R. (3rd) 354 at p. 363, [1982] 1 S.C.R. 41 at p. 49, that any waiver

... "is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process".

The law as enunciated is now pretty clear. The problem arises however where there is an issue as to whether or not the accused has understood his right to counsel and whether he or she is waiving his or her right to counsel or are they simply not aware that the right to counsel exists.

In R. v. Anderson (1984), 10 C.C.C. (3rd) 417 (Ont. c.A.), Tarnopolsky, J.A. stated at p. 431:

I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but he was denied any opportunity to even ask for it. No such evidence was put forth in this case.

Anderson was quoted with approval by the Supreme Court of Canada in R. v. Baig (1987), 2 S.C.R. 537.
An example of where it was apparent in the circumstances that the accused did not understand his right to counsel is *R. v. Tam* (1995), 100 C.C.C. (3rd) 196 (B.C.C.A.) where the police failed to advise the accused his right to counsel in Cantonese until 11 and 1/2 hours after it was apparent that he did not understand his rights when they were read to him in English.

In *R. v. Whittle* (1994), 92 C.C.C. (3rd) II (S.C.C.) the accused had a history of mental illness. He was initially advised of his right to counsel. He appeared to be responsive and understand and appreciate what was told to him. He declined to speak to counsel at that time. He then gave the police further information and then was again informed of his right to counsel. At that time he asked to speak to a lawyer and did so and then following that gave further information.

At trial the defence led evidence to show that the accused suffered from schizophrenia. One issue which arose was whether or not the accused had the mental capacity to exercise his right to counsel. The trial court held that he did not. This was overturned by the Ontario Court of Appeal. The accused's appeal to the Supreme Court of Canada was dismissed. The Court held that the question was whether or not the accused's mental condition satisfied the operating mind test applicable to the common law confession rule. Sopinka, J. in speaking for the Court stated at p.31:

> Although different considerations may apply to states such as drunkenness or hypnosis, in the case of a person suffering from a mental disorder, I can see no reason for a higher standard of competency in exercising the right to counsel before trial than during trial. If an accused is competent to choose a lawyer, instruct the lawyer, decide how to plead, decide to discharge the lawyer and conduct his or her own defence, decide to give or not to give evidence, how can we say that he or she is incompetent to decide whether to seek the assistance of counsel during the investigation? There is nothing in s. 10(b) or related provisions requiring such a result. In my view, therefore the test is the same as that which obtains in respect of fitness to stand trial which I have set out above.

In assessing whether or not an accused has waived his right to counsel under s. 10(b) the Court will look to see if s. 10(a) of the *Charter* which requires the police to inform the detainee of the reason for the detention has been fully complied with. Failure to comply with s. 10(a), including
a circumstance where an accused is initially arrested on one charge and then not re-informed of his or her rights when a different charge is being contemplated, may result in the Court holding that there has been no waiver of the s. 10(b) rights: R. v. Black (1989), 50 C.c.c. (3rd) 1 (1989) 2, S.C.R. 138.

IV. REMEDIES

The usual remedy in a case where s. 10(b) has been violated is exclusion of evidence (see: Pozniak, Mills, Bartle, Prosper, and Cobham supra). In R. v. Stannard (1989), 52 C.C.C. (3rd) 544 (Sask. C.A.) the trial judge had found that there were breaches of the accused’s s. 8 and s. 10(b) Charter rights, but admitted the evidence. However on sentence, the trial judge expressed concerns about the Charter violations and as a result imposed a sentence of fifteen months imprisonment which he felt would adequately reflect society's disapproval of the Charter breaches. The Saskatchewan Court of Appeal refused the Crown leave to appeal holding that in all of the circumstances they were not persuaded that the trial judge was in error. (See: R. v. Charles (1987), 36 C.C.C. (3rd) 286, 61 Sask. R. 166 (C.A.).) Two recent decisions have commented on the appropriateness of reducing a sentence where a Charter violation has occurred.

In R. v. Glykis and Mangal (1995), 100 C.C.C. (3rd) 97 (Ont. C.A.) it was held that an accused’s right to counsel had been infringed where the accused was not permitted to consult with counsel until drugs that had been found on their person had been removed. The trial judge as a result reduced the sentence that he would have otherwise imposed from 18 months to 12 months. The Ontario Court of Appeal held that the trial judge erred in principle in reducing the sentence and stated that the only remedy to consider was whether or not the evidence should have been excluded.

In R. v. MacPherson (1995), 100 C.C.C. (3rd) 216 (N.B.C.A.) an accused was arrested after being found in possession of a stolen car. He was arrested on a Friday but was he was not taken before a judge until Monday. At that time the accused complained that his rights under s. 9 of
the Charter had been violated. The judge did not deal directly with the complaint and sentenced the accused to six months imprisonment on the possession charge and two months concurrent on a driving charge. The Appeal Court dismissed the appeal against conviction but to emphasize that a violation of the s. 9 Charter right was serious, the accused's application under s. 24(1) of the Charter was allowed and a sentence of six months imprisonment was set aside and a sentence of three months imposed.

The concern I have with Galykis and Mangal is that if you have a Charter breach and you do not exclude the evidence the Court seems to be effectively ruling out any other remedy. I hearken back to the comments of Tallis, J.A. in R. v. Therens (1983), 5 C.C.C. (3rd) 409, 23 (Sask. R) 81, affirmed 1985, 18 C.C.C. (3rd) 481 (S.C.C.), at p. 89 where he stated:

To have a right or freedom without an adequate remedy is to have a right or freedom in theory only -- a hollow or empty right.

I agree.

AARON A. FOX
V. LIST OF AUTHORITIES

3. R. v. Anderson (1984), 10 C.C.c. (3rd) 417 (Ont. c.A.);
20. R. v. Dunnett (1990), 62 C.C.C. (3rd) 14 (N.B.C.A.);
29. R. v. Jackson, [1993] 86 C.C.C. (3rd) 233 (Ont. C.A.);
31. R. v. Lamb (1985, 41 Sask. R. 198 (Q.B.);
32. R. v. Latimer, [1995] 8 W.W.R. 609 (Sask. C.A.);
33. R. v. MacPherson (1995), 100 C.C.C. (3rd) 216 (N.B.C.A.);
37. R. v. Mills (1995), 100 C.C.C. (3rd) 223 (S.C.C.);
44. R v. Prosper, [1994] 92 C.C.C. (3rd) 353 (S.C.C.);


47. R v. Saunders (1988), 41 C.C.C. (3rd) 532 (Ont. C.A.);


51. R v. Stannard (1989), 52 C.C.C. (3rd) 544 (Sask. C.A.);

52. R v. Sullivan (1989), 22 M.V.R (2nd) 261 (C.M.A.C.);

53. R v. Tam (1995), 100 C.C.C. (3rd) 196 (B.C.C.A.);

54. R v. Therens (1983), 5 C.C.C. (3rd) 409, 23 (Sask. R) 81, affirmed 1985, 18 C.C.C. (3rd) 481 (S.C.C.);

55. R v. Therens (1985), 1 S.C.R 613;


