

R. v. Cobham, [1994] 3 S.C.R. 360

Donald Edison Cobham

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Cobham

File No.: 23585.

1994: May 27; 1994: September 29.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Constitutional law -- Charter of Rights -- Right to retain and instruct counsel and to be informed thereof -- Free duty counsel -- Detainee refusing to blow for breathalyser test and arrested -- Rights as read informing of right to counsel and advising of availability of legal aid but not mentioning availability of free and immediate duty counsel and method of accessing this service -- Whether s. 10(b) of Charter includes right to be informed of duty counsel services and how to access that service -- Canadian Charter of Rights and Freedoms, ss. 10(b), 24(2) -- Criminal Code, R.S.C., 1985, c. C-46, s. 254(3)(a).

The appellant was charged with unlawfully refusing to comply with a breathalyser demand. He had been stopped in the early morning by a police constable, who, based on his observations of the appellant and the appellant's acknowledgement that he had had a few beers, requested a roadside breath test. The appellant failed the test. The constable advised the appellant that he was under arrest for impaired driving and informed him of his s. 10(b) rights by reading from a card. The constable did not refer to the existence of free and immediate preliminary legal advice from duty counsel even though such a service was in place in Alberta at the time. He then made two breathalyser demands, both of which the appellant refused to comply with because appellant did not think the roadside machine was accurate.

The appellant testified that, while he knew he could speak to a lawyer, he did not know that 24-hour, free legal advice from duty counsel was available to him. Had he been aware of this, he claimed he would have exercised his right to speak to duty counsel. The Crown did not cross-examine or otherwise challenge the appellant on this assertion.

The appellant was convicted. The summary conviction appeal judge allowed an appeal and entered an acquittal on the basis of a breach of s. 10(b) and exclusion under s. 24(2) of the *Canadian Charter of Rights and Freedoms* of the refusal evidence. The Court of Appeal allowed the Crown's appeal and restored the earlier conviction. At issue here was whether detainees have the right to be informed under s. 10(b) of the existence and availability of duty counsel services which provide free and immediate, preliminary legal advice.

Held: The appeal should be allowed.

The issues are decided as follows:

Section 10(b) of the Charter

Section 10(b) of the *Charter* was violated (unanimous).

Section 24(2) of the Charter

Admission of the evidence would bring the administration of justice into disrepute (unanimous).

(1) Section 10(b) of the Charter

Per Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ.: A detainee is entitled under the information component of s. 10(b) of the *Charter* to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction, if one indeed exists, and of how such advice can be accessed. The police need not provide detailed information about the system in place, provided they clearly inform the detainee of its existence and how it can be accessed. Since such a system was in place and since appellant was not informed of its existence or how to access it, the appellant's s. 10(b) right to counsel was infringed. The appellant did not waive this right.

Although the burden of establishing a violation of a *Charter* right always falls on the applicant, the applicant need not formally prove every single fact upon which his or her claim of a violation is based, including one which is not in dispute between the parties and should be common knowledge amongst members of the criminal bar and those on the bench. Here, the appellant did not need to prove the existence of duty counsel services. Duty counsel and legal aid services are an intrinsic part of the practice of criminal law in this country and, as such, courts are entitled to take judicial notice of the broad parameters of these services, such as their existence and how they are generally accessed. If there were, for some unusual reason, no duty counsel system available at the time of detention in a jurisdiction known to have such a system, the party alleging the exceptional circumstance, be it the Crown or the applicant, must prove that the ordinarily routine service was in fact not operational at the relevant time and place. It would be unjust to uphold a conviction on the narrow, technical basis that the appellant failed to prove that there was in fact a duty counsel service available to him.

Per La Forest J.: The reasons of Lamer C.J. were agreed with, subject to comments made in *R. v. Bartle*.

Per McLachlin J.: The caution given here failed to fulfil any of the three elements required to satisfy the informational component of s. 10(b) of the *Charter*. It did not sufficiently convey to the appellant that he was entitled to an opportunity to contact a lawyer immediately, prior to providing self-incriminating evidence. Nor did it adequately communicate to the appellant that his right to seek immediate legal advice was not dependent on his ability to afford private counsel.

As the minimum requirements of the informational component were not met, the violation of s. 10(b) was complete at this point. Even had these preliminary elements been satisfied, the police further failed to meet the additional duty in the circumstances to inform the appellant of the duty counsel system in place at the time.

Since the minimum requirements of the informational component of s. 10(b) were not met here, it was not strictly necessary to decide the evidentiary issue. Nevertheless, the existence of duty counsel services generally does not require independent proof by the appellant. Duty counsel and legal aid services are an intrinsic aspect of the criminal law process in Canada and courts accordingly are entitled to take judicial notice of their existence and of the means by which they are accessed.

(2) Section 24(2) of the Charter

Per Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ.: Admission of the impugned evidence would negatively affect the fairness of the trial. The appellant's refusal was self-incriminating evidence of a particularly serious nature in that it was evidence which itself constituted the crime. The direct connection between the incriminating refusal evidence and the offence creates a strong presumption that its admission would render the trial unfair: the appellant may not have refused to take the breathalyser test if he had been properly advised under s. 10(b) of his right to duty counsel. There is no basis in the evidence on which to conclude that the appellant would have persisted in refusing to take the test even if fully informed of his s. 10(b) rights. The better interests of the

administration of justice required that the evidence of refusal not be admitted under s. 24(2) of the *Charter*.

Per La Forest J.: The reasons of Lamer C.J. were agreed with, subject to comments made in *R. v. Bartle*.

Per McLachlin J.: Admitting the evidence of refusal to comply with the breathalyser demand would bring the administration of justice into disrepute. The evidence should be excluded under s. 24(2) of the *Charter*.

Cases Cited

By Lamer C.J.

Followed: *R. v. Bartle*, [1994] 3 S.C.R. 173; **referred to:** *R. v. Pozniak*, [1994] 3 S.C.R. 310; *R. v. Harper*, [1994] 3 S.C.R. 343; *R. v. Brydges*, [1990] 1 S.C.R. 190; *R. v. Harke* (1990), 110 A.R. 53; *R. v. Prosper*, [1994] 3 S.C.R. 236.

By La Forest J.

Followed: *R. v. Bartle*, [1994] 3 S.C.R. 173.

By McLachlin J.

Followed: *R. v. Prosper*, [1994] 3 S.C.R. 236; **referred to:** *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.

Statutes and Regulations Cited

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

Criminal Code, R.S.C., 1985, c. C-46, s. 254(3)(a).

APPEAL from a judgment of the Alberta Court of Appeal (1993), 135 A.R. 249, 33 W.A.C. 249, 80 C.C.C. (3d) 449, 15 C.R.R. (2d) 79, 44 M.V.R. (2d) 1, allowing an appeal from a judgment of McDonald J. (1992), 124 A.R. 136, 11 C.R. (4th) 122, 35 M.V.R. (2d) 176, allowing an appeal from summary conviction by Saks Prov. Ct. J. Appeal allowed.

R. S. Prithipaul, for the appellant.

Bart Rosborough, for the respondent.

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

LAMER C.J. -- The fundamental issue in this case is whether detainees have the right to be informed under s. 10(b) of the *Canadian Charter of Rights and Freedoms* of the existence and availability of duty counsel services which provide free and immediate, preliminary legal advice. Given that this issue is dealt with

in *R. v. Bartle*, [1994] 3 S.C.R. 173, and the related cases of *R. v. Pozniak*, [1994] 3 S.C.R. 310, and *R. v. Harper*, [1994] 3 S.C.R. 343, all of which were heard together and are handed down with judgment in this case, my comments here will be brief.

I. Facts

The appellant was charged with unlawfully refusing to comply with a breathalyser demand, contrary to s. 254(3)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46. At about 12:30 a.m. on March 24, 1991, he was stopped in the city of Edmonton by a police constable, who, based on his observations of the appellant and the appellant's acknowledgement that he had had a few beers, requested a roadside breath test. The appellant failed the test. The constable advised the appellant that he was under arrest for impaired driving and cautioned him by reading from a card. According to the constable's testimony, he told the appellant the following:

It's my duty to inform you you have the right to retain and instruct counsel without delay. You may contact Legal Aid and a Legal Aid lawyer will be supplied if you cannot afford one. Do you understand? And I received the response, Yes. Do you wish to call a lawyer, and I received the response, No.

The constable did not refer to the existence of free and immediate, preliminary legal advice from duty counsel even though such a service was in place at the time. The constable then made two breathalyser demands, both of which the appellant refused to comply with. When asked why he was refusing to take the breathalyser

test, the appellant indicated that he did not think the roadside machine was accurate.

The appellant testified that, while he knew he could speak to a lawyer, he did not know that 24-hour, free legal advice from duty counsel was available to him. Had he been aware of this, he claimed he would have exercised his right to speak to duty counsel. The Crown did not cross-examine or otherwise challenge the appellant on this assertion.

The appellant was convicted at his trial which took place on June 11, 1991. After hearing the appellant's appeal, the summary conviction appeal judge wrote to counsel and requested certain information regarding the duty counsel system in place in Alberta and the standard police warning in use in other jurisdictions. Neither side objected and supplementary memoranda were filed by the respondent and the appellant. On January 17, 1992, the appellate judge allowed the appeal and entered an acquittal on the basis of a breach of s. 10(b) and exclusion under s. 24(2) of the *Charter* of the refusal evidence. On March 22, 1993, the respondent's appeal to the Court of Appeal was allowed and the earlier conviction restored, with Conrad J.A. dissenting.

II. Judgments Below

Provincial Court (Criminal Division) (Saks Prov. Ct. J.)

Saks Prov. Ct. J. handed down judgment as follows:

I might say that because the police constable didn't make complete notes, has no bearing on this. He says he recalls, and I think that's the crux of the matter, he recalls. The [appellant] doesn't recall very much. He seems a little bit hazy. But the police constable says that he arrested the [appellant] for impaired driving. He read the rights and the caution and the Legal Aid requirement out to the [appellant] and the [appellant] said he did not wish to call a lawyer. A demand for a breathalyzer was read, and the response was, No, I won't. The [appellant] was again advised that he should provide this, and he was asked once more. The [appellant] considered it for a moment and then said, No, I won't. And the reason is I don't think that thing is right, indicating the Alco-Sur machine. On being questioned by the Crown, the [appellant] says he knew he had the right to call a lawyer, but he didn't ask at any time to use the phone or call a lawyer.

In my opinion, the constable did all that he was required to do, and there's absolutely no doubt whatsoever in my mind that the [appellant] is guilty as charged under this section.

Court of Queen's Bench (1992), 124 A.R. 136 (McDonald J.)

McDonald J. considered *R. v. Brydges*, [1990] 1 S.C.R. 190, and the warnings prescribed for use by police forces in Alberta since that case was decided in February 1990. Having asked counsel to ascertain exactly what the duty counsel system in place in the province at the time of the appellant's arrest was and having received supplementary memoranda from defence and Crown counsel, he noted that while there was no 24-hour or after-business-hours toll-free Legal Aid telephone number, each police force had a list of local lawyers who volunteer to accept telephone calls from persons detained or arrested, including after business hours and on weekends. He stated at p. 141 that, "I think that it is reasonable to describe the Alberta system as a 'Duty Counsel system' so long as, in its application by the police forces, the person detained or arrested is not limited to one phone call."

McDonald J. found at p. 141 that the appellant's s. 10(b) rights had been violated:

In my view, the purpose of s. 10(b) cannot be met by the words used by police to a person arrested or detained unless those words effectively explain the right to retain and instruct counsel without delay. Such an effective explanation, it is clear from *Brydges*, cannot occur unless the person arrested or detained receives an effective explanation of the fact that, if he cannot afford a lawyer, he may be able to obtain a lawyer's advice under the provincial Legal Aid plan, and that he can obtain free advice from a lawyer under whatever duty counsel system exists, at any time of the day or night. [Emphasis in original.]

He found that the police officer had not informed the appellant that he could obtain free advice immediately from a Legal Aid lawyer irrespective of whether he could afford a lawyer. What was said was, therefore, open to be understood as indicating that the appellant could obtain advice from a Legal Aid lawyer only if he could not afford a lawyer. In this respect, McDonald J. found at p. 146:

That was not only an inaccurate description of the "24-hour Legal Advice" plan that is and was then in effect in Alberta, but misleading information which effectively failed to comply with the requirement laid down in *R. v. Brydges* 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". The words used did not effectively communicate the required information.

Accordingly, he allowed the appeal and quashed the conviction, saying there was no point in ordering a new trial because the evidence of refusing to provide breath samples would be excluded under s. 24(2) of the *Charter*.

Court of Appeal (1993), 135 A.R. 249 (Fraser C.J.A. and Kerans and Conrad JJ.A.)

Kerans J.A. (for the majority)

Kerans J.A. interpreted *Brydges, supra*, as not imposing on governments a constitutional obligation to arrange for lawyers to offer free telephone advice to detainees, everywhere in Canada and at all hours. Rather, he interpreted *Brydges* as saying that if such a service is offered, then in the right circumstances, the detaining officer must offer the detainee enough information about the service to allow the detainee to take advantage of it.

Kerans J.A. suggested that this case is about the law of evidence, not constitutional law. He stated at p. 252: "It is now trite law that an accused who alleges that he was deprived of his constitutional rights must prove it." He noted that in order to prove deprivation of his right under s. 10(b) of the *Charter* to information about existing programs which provide immediate legal advice, either the appellant must by evidence show, or the trial judge must take notice of, the existence of such a program. He held that the appellant failed to establish at trial the preliminary fact that such a service existed at the time of his arrest. Kerans J.A. stated that he would not take judicial notice of the existence of any form of duty counsel at the material time. He also held that the decision in *Brydges* did not have the effect of binding judges to take notice of the existence of duty counsel. He suggested at p. 252 that the appellant:

... could only have sought to fill the hiatus with a fresh evidence motion on appeal. He did not do that before Queen's Bench, nor before us. I do not criticize the learned Queen's Bench appellate justice for raising the issue on his own motion. But he fell into error when he did not suggest to the [appellant] that a fresh evidence motion was the proper procedure. He compounded his error when he called upon the Crown to produce evidence. And he failed to apply the fresh evidence rules. I think he fell into this error because his focus was on what was

appropriate advice, not what was the established scheme. Nevertheless, as I have said, the former follows the latter and is dependent on it.

Kerans J.A., therefore, chose to ignore the evidence before the summary conviction appeal judge and to allow the appeal.

Conrad J.A. (dissenting)

With respect to the appeal judge's request for further evidence, Conrad J.A. concluded at p. 258 as follows:

While the judge has a discretion to admit evidence he must do so in accordance with established principles. The evidence here did not pass the fresh evidence rules. Moreover it was not considered by the justice with input from counsel. It was an error of law for the appellate court judge to become involved in the process and admit new materials at the appellate stage on the facts and circumstances of this case.

She then considered whether, without the fresh evidence, the appellant met the onus on him to prove a breach of s. 10(b) of the *Charter*. She agreed with the appellant's contention that the breach was proven because the words of the officer failed to state the "extended Brydges warning" adequately. She held at pp. 260-61:

I am satisfied that at a minimum there is a requirement to inform the detainee of the plan in existence in the jurisdiction. Failure to advise is a breach of s. 10(b). On its face the caution extended to [the appellant] did not advise of any duty counsel program, and proof of that fact satisfies the onus of proving a breach. In my view, it is not necessary for [the appellant] to prove that there is a duty counsel program in place in Alberta. Lamer, J., found in *Brydges* that there is a duty counsel system in place in every province. I am satisfied [the appellant] and the courts can rely on that.

[The appellant] was entitled to be advised of whatever system for free temporary advice did exist in Alberta at the time of his arrest. If

anything turns on the type of program in place (such as a plan which cannot be accessed until morning) surely it is for the Crown to raise. If they allege advice would not have made any difference because there was no duty counsel available at the particular time, or all the lawyers were on strike, or some other fact, it should be for them to prove. [The appellant] satisfies his onus by eliciting evidence that he was not given advice as to the system that was in place.

In the result, Conrad J.A. would have found a breach of s. 10(b) and ruled the evidence inadmissible under s. 24(2) of the *Charter*.

III. Analysis

(a) *Section 10(b)*

In *Bartle*, I make it clear that a detainee is entitled under the information component of s. 10(b) of the *Charter* to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction, if indeed one exists, and of how such advice can be accessed. There is no need for police to provide detailed information about the system in place. For instance, it is sufficient for the police simply to inform a detainee that there is a duty counsel system in place and that it can be reached, depending on the system, by dialling a toll-free number or by calling lawyers on a list provided by police.

Because I am satisfied that at the time of the appellant's arrest there was in place in Alberta a duty counsel system by which detainees could receive free and immediate, preliminary legal advice by calling lawyers who were on lists provided by police, and that the appellant was not informed of the existence of this system and how to access it, I find that the appellant's s. 10(b) right to counsel was

infringed. On its face, the *Charter* caution received by the appellant appropriately referred to the right to obtain legal assistance through Legal Aid. However, it failed to mention any right to immediate, albeit temporary, free legal advice irrespective of ability to pay, or that a list of lawyers to call would be provided for this purpose. Furthermore, the appellant did not waive his right to be fully informed of his s. 10(b) rights, as explained in *Bartle*, at pp. 203-7. Accordingly, I am unable to agree with the majority of the Court of Appeal that no s. 10(b) violation has been made out in this case.

In light of the importance attached by the Court of Appeal and by the Crown to the question of evidentiary burden, a few brief comments on this matter are in order. At the hearing of this appeal, the respondent conceded that there was in existence at the time and place of detention a system by which detainees could contact a lawyer immediately and without charge for preliminary advice. Quoting from p. 64 of the transcript of the proceedings before this Court, counsel for the Crown stated:

... I am not disagreeing with you with respect to the fact that the existence of the concept of 24-hour, immediate, free legal advice is an indisputable fact. It was admitted at trial and it was admitted on summary conviction, it was admitted in the court of appeal. [Emphasis added.]

The respondent nonetheless insisted that the burden of proving that duty counsel in fact existed falls on the appellant, as the party claiming that the caution received was inaccurate in terms of its description of available legal services. In short, I disagree.

Although it is, by now, well established that the burden of establishing a violation of a *Charter* right always falls on the applicant, this does not mean that the applicant must formally prove every single fact upon which his or her claim of a violation is based, including one which is not in dispute between the parties and is (or should be) common knowledge amongst members of the criminal bar and those on the bench. In my view, the existence of duty counsel services in this case was not a matter which required independent proof by the appellant. Duty counsel and legal aid services are an intrinsic part of the practice of criminal law in this country and, as such, courts are entitled to take judicial notice of the broad parameters of these services, such as their existence and how they are generally accessed. Moreover, as counsel for the appellant pointed out, there was at the time of the appellant's trial at least one reported decision in which a provincial court judge noted the existence in Edmonton, the place of the appellant's arrest, of a system capable of giving telephone advice to detainees: *R. v. Harke* (1990), 110 A.R. 53 (Prov. Ct.), at p. 58.

If there were, for some unusual reason, no duty counsel system available at the time of detention in a jurisdiction known to have such a system, perhaps because the bar had just gone on strike as in the case of *R. v. Prosper*, [1994] 3 S.C.R. 236 (released concurrently), then it is up to the party alleging the exceptional circumstance, be it the Crown or the applicant, to prove that the service that was routinely available was in fact not operational at the relevant time and place.

In other words, I do not agree with the Court of Appeal that the summary conviction appeal judge is to be faulted for asking counsel for exact

details regarding available duty counsel services in Alberta at the time of the appellant's arrest. Indeed, I would go further and note that, by proceeding as he did, the appeal judge avoided the necessity of ordering a new trial, thereby conserving court resources and avoiding further inconvenience to everybody involved.

Given the Crown's failure to challenge the existence of duty counsel at trial and to object to the appeal judge's request for further information, as well as the Crown's admission at all levels on appeal that duty counsel services were in place at the material time, it would be unjust to uphold a conviction on the narrow, technical basis that the appellant failed to prove that there was in fact a duty counsel service available to him. The breach of s. 10(b) in this case is clear on the face of the caution -- the appellant was not advised of his right to free and immediate, preliminary legal advice by duty counsel.

(b) *Section 24(2)*

In light of the violation of the appellant's s. 10(b) *Charter* right to counsel, it is necessary to decide whether the evidence of his refusal to comply with the breathalyser demand should be admitted under s. 24(2) of the *Charter*. In my view, this is a clear case in which admission of the evidence would negatively affect the fairness of the trial. The appellant's refusal is self-incriminating evidence of a particularly serious nature in that it is evidence which itself constitutes the crime. That is, unlike a confession which may only be some evidence upon which a conviction is based, a refusal to blow is itself commission of the offence of refusing to "blow" under s. 254(3)(a) of the *Code*. The direct

connection between the incriminating refusal evidence and the offence creates a strong presumption that its admission would render the trial unfair. This is because the appellant may not have refused to take the breathalyser test if he had been properly advised under s. 10(b) of his right to duty counsel. What would have happened thereafter is not a matter upon which I am prepared to speculate.

Moreover, there is no basis in the evidence on which to conclude that the appellant would have persisted in refusing to take the test even if fully informed of his s. 10(b) rights. Rather, he testified that he did not know free legal advice was available to him 24 hours a day and that, had he known it was, he would have exercised his right to contact duty counsel. The Crown did not cross-examine or otherwise challenge him on this assertion.

Accordingly and notwithstanding the undoubted good faith of the police officer in this case and the seriousness of impaired driving offences, I am of the opinion that it is in the better interests of the administration of justice not to admit the evidence of refusal under s. 24(2) of the *Charter*.

(c) *Conclusion*

The appellant's s. 10(b) *Charter* rights were violated. Under the circumstances of this case, I find that the repute of the administration of justice requires that the evidence of the appellant's refusal to comply with the breathalyser demand not be admitted under s. 24(2) of the *Charter*.

The appeal is, therefore, allowed and an acquittal entered in place of the conviction.

The following are the reasons delivered by

LA FOREST J. -- Subject to what I have said in *R. v. Bartle*, [1994] 3 S.C.R. 364, issued concurrently, I agree with the Chief Justice.

The following are the reasons delivered by

MCLACHLIN J. -- As in *R. v. Bartle*, [1994] 3 S.C.R. 364; *R. v. Pozniak*, [1994] 3 S.C.R. 310; and *R. v. Harper*, [1994] 3 S.C.R. 343 all of which are released concurrently with judgment in this appeal, I am in substantial agreement with the reasons of the Chief Justice. I wish to add some brief comments, however, in light of my reasons in *R. v. Prosper*, [1994] 3 S.C.R. 236.

The appellant was stopped by a police constable at approximately 12:30 a.m. on March 24, 1991. The constable, after observing and talking with the appellant, made a demand for a roadside breath test. The appellant failed the test, and was subsequently arrested for impaired driving. The police officer issued the appellant the following caution:

... you have the right to retain and instruct counsel without delay. You may contact Legal Aid and a Legal Aid lawyer will be supplied if you cannot afford one. Do you understand?

The appellant indicated that he understood the caution. When asked if he wanted to call a lawyer, he replied "No". He then refused to comply with two breathalyser demands. It is the admission of this statement of refusal which is in question on this appeal.

Applying the principles set out in my reasons in *Prosper, supra*, it is apparent that the caution in this case failed to fulfil any of the three elements required to satisfy the informational component of s. 10(b) of the *Canadian Charter of Rights and Freedoms* in these circumstances. The caution did not sufficiently convey to the appellant that he was entitled to an opportunity to contact a lawyer immediately, prior to providing self-incriminating evidence. Nor did it adequately communicate to the appellant that his right to seek immediate legal advice was not dependent on his ability to afford private counsel. As the minimum requirements of the informational component were not met, the violation of s. 10(b) was complete at this point. I note, however, that even had these preliminary elements been satisfied, the police further failed to meet the additional duty in the circumstances to inform the appellant of the duty counsel system which was in place in Alberta at the time of the appellant's detention, by which he could have received free and immediate, preliminary legal advice.

Because I have found that the minimum requirements of the informational component of s. 10(b) were not met on the facts of this case, it is not strictly necessary for me to decide the evidentiary issue. Nevertheless, for the purposes of future guidance, I agree with the Chief Justice's conclusion that the existence of duty counsel services generally will not require independent proof by the appellant. As the Chief Justice explains, duty counsel and legal aid services

are an intrinsic aspect of the criminal law process in Canada, and as such, courts are entitled to take judicial notice of the existence of these services and the means by which they are accessed.

For the reasons given by the Chief Justice, I agree that the admission of the evidence of refusal to comply with the breathalyser demand would bring the administration of justice into disrepute. The evidence should be excluded under s. 24(2) of the *Charter*.

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

Appeal allowed.

Solicitors for the appellant: Gunn & Prithipaul, Edmonton.

Solicitor for the respondent: The Attorney General for Alberta, Edmonton.