



LEGAL AID
RESEARCH SERIES

A REVIEW OF *BRYDGES*
DUTY COUNSEL SERVICES IN
CANADA



A REVIEW OF *BRYDGES*
DUTY COUNSEL SERVICES
IN CANADA

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for:
Department of Justice Canada

The views expressed in this report are those of the authors and do not necessarily reflect the views of the Department of Justice Canada.



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EXECUTIVE SUMMARY

Chapter 1: Introduction

The overarching purpose of this research project is to conduct a comprehensive analysis of the nature and scope of the *Brydges* services that are currently available to arrested or detained persons across Canada.

Chapter 2: The *Brydges* Decision And The Right To Counsel: A Review Of The Case Law

This chapter reviews the legal principles articulated by the Supreme Court of Canada in the *Brydges* case and examines the case law that has subsequently interpreted and developed these principles. The review of post-*Brydges* cases focuses on decisions made by the Supreme Court of Canada and the various provincial and territorial courts of appeal.

Supreme Court of Canada

- The police must inform an arrested or detained suspect of the existence and availability of the relevant systems of duty counsel and legal aid that are in operation in the jurisdiction concerned (*Brydges*).
- The police must provide an arrested or detained suspect with basic information about how to access the free legal services that are provided in the jurisdiction concerned. In particular, they must inform the suspect of the opportunity to call a toll-free number or to consult a list of the telephone numbers of duty counsel (*Bartle, Harper, Pozniak*).
- The nature and extent of the informational duty imposed on the police will vary from one jurisdiction to another, depending on the specific duty counsel and legal aid programs that are made available at any given time and place (*Cobham*).
- There is no constitutional duty imposed on provincial and territorial governments to provide free and immediate legal services upon request (*Matheson, Prosper*).
- So-called “*Brydges* services” consist solely of the provision of purely temporary access to duty counsel (free of charge) or the opportunity to obtain “instant” legal information through the medium of a 1-800 telephone service (*Prosper*).
- The police must specifically inform an arrested or detained suspect of the opportunity to access immediate, free legal advice (as from, for example, a 1-800 number). It is not sufficient to inform the suspect that, should he or she wish to contact duty counsel, the police officer will supply a telephone number (*Feeney*).
- The police do not have to inform the accused of a 1-800 number if the suspect is arrested or detained during regular working hours and is made aware of a local number that will contact the local legal aid office (*Latimer*).
- In six of the seven cases in which the Supreme Court found that there was a violation of section 10(b) of the Charter, the evidence obtained thereby was excluded under section 24(2).
- The majority of the cases in which the Supreme Court dealt with issues surrounding *Brydges* services involved impaired driving (five cases out of a total of nine).

Provincial and Territorial Courts of Appeal

The appellate courts have applied and interpreted the principles articulated by the Supreme Court of Canada in relation to *Brydges* services. The emerging case law incorporates the following principles:

- The majority of cases that raised issues concerning *Brydges* services involved charges related to impaired driving.
- The failure to provide specific information about the availability of *Brydges* services does not constitute a violation of section 10(b) if the accused person exercises the right to counsel and actually speaks to counsel.
- The police need provide an arrested or detained suspect with the actual toll-free number only at the moment when he or she wishes to take advantage of the right to contact the 24-hour duty counsel service.
- If an arrested or detained suspect has been fully informed of his or her rights under section 10(b) and knowingly waives the opportunity to contact counsel, it is not necessary for the police to provide him or her with the specific toll-free number.
- If a suspect in police custody is unable to contact the lawyer of his or her own choice and, instead, contacts duty counsel, there is no violation of section 10(b) – provided the suspect appears to accept the option of contacting duty counsel, and does not repeat the request to speak with counsel of his or her own choice
- If a detained or arrested suspect is diligent in seeking to make contact with the lawyer of his or her own choice, the police must provide the suspect with a reasonable opportunity to do so and must refrain from asking questions during this period.
- The police are not under a duty to help a suspect decide whether or not he or she should contact counsel.
- If a suspect does not give a clear answer to the question as to whether or not he or she will exercise the right to contact counsel, the police have a duty to delay questioning until they can obtain an unequivocal answer from the suspect. In such circumstances, they may be required to make further inquiries of the suspect and to offer additional assistance.
- While the police are under a duty to ensure that a suspect has the opportunity to contact counsel with “an adequate measure of privacy,” it is not clear whether the police are also under a duty to inform the suspect of his or her right to a reasonable degree of privacy.
- Where a suspect has been detained outside of the police station, and the police officer has informed the suspect of his or her section 10(b) rights, the officer may then issue a breathalyzer demand. If the suspect clearly indicates no desire to exercise the right to counsel, the police may transport the suspect to the police station and proceed to take the breath sample without repeating the section 10(b) caution.
- An additional informational obligation is imposed on the police when a suspect, who has previously expressed the wish to contact counsel, indicates a change of mind and states that he or she no longer wishes to exercise the right to counsel.
- The police are under a duty to provide a suspect who is in their custody with a reasonable opportunity to contact counsel, and to refrain from eliciting any evidence from the suspect in

the interim. If a suspect is reasonably diligent in requesting counsel, then he or she must be informed of the right to be granted a reasonable opportunity to do so.

- When a suspect in custody has unequivocally waived the right to counsel, the police are entitled to proceed immediately with interrogation or the administration of a breath test, etc.
- The police must inform arrested or detained suspects of their right to counsel in a timely manner.
- If there has been a significant change in the legal status of a suspect in police custody, the police must repeat the section 10(b) caution before proceeding with their investigation.
- When the appellate courts have determined that there has been a violation of an accused person's section 10(b) rights, the most likely outcome is exclusion of some – or all – of the evidence that has been obtained thereby.

Chapter 3: The *Miranda* Caution In The United States: American Experience With The Model Adopted By The Supreme Court Of Canada In The *Brydges* Case

- The landmark decision by the United States Supreme Court, in *Miranda v. Arizona* (1966), had a significant impact upon police practices in the United States. The *Miranda* decision imposed an informational duty on the police to inform an arrested or detained suspect of his or her right to counsel. If this duty is not performed, any evidence obtained by means of the violation of the suspect's rights may subsequently be excluded from his or her trial. In *Dickerson v. The United States* (2000), the United States Supreme Court ruled that the so-called “*Miranda* warnings” constitute federal constitutional requirements that cannot be overruled by an Act of the U.S. Congress. The empirical evidence suggests that there is universal compliance by the police with the *Miranda* requirements.
- The decision of the Supreme Court of Canada in *Brydges* (1990) is based on a constitutional model that is very similar to that which underlies the United States Supreme Court's ruling in *Miranda*.
- There are some significant differences between the judicial application of the *Miranda* decision in the United States, on the one hand, and the *Brydges* decision in Canada, on the other. The *Brydges* warnings are “more expansive” in scope, and are more lucid in relation to the need to inform the suspect of the right to telephone a lawyer. In Canada, courts have a broad discretion, under section 24(2) of the Charter, to exclude or admit evidence obtained in violation of an accused person's section 10(b) right to counsel. In most cases, Canadian courts exclude such evidence. In the United States, it was once thought that exclusion of evidence obtained in violation of the *Miranda* rules should be virtually automatic. However, the federal courts have developed a number of significant exceptions to the principle of automatic exclusion (for example, it has been held that physical evidence obtained in violation of the *Miranda* rules may be admitted into evidence).
- In *Davis* (1994), the United States Supreme Court held that the police are not under any constitutional duty to ask “clarifying questions,” if suspects are equivocal when indicating whether or not they wish to contact a lawyer. However, the Court stated that it would nevertheless constitute “good police practice to do so.” The notion that the police should ask clarifying questions, whenever there is some doubt as to the suspect's wishes or capacity to exercise the right to counsel, should be explored as a policy option that might be adopted in Canada.

- In the United States, the impact of the *Miranda* case upon police officers has been most striking. In particular, when a suspect invokes his or her *Miranda* rights, police interrogations generally come to a halt. The *Brydges* case has not had a similar impact on police investigative practices in Canada.

Chapter 4: The Capacity Of The Suspect To Understand The Contents Of A Police Caution

Legal Analysis

- In *Evans* (1991) and *Bartle* (1994), the Supreme Court of Canada ruled that, in those circumstances in which the police are aware that an accused person may suffer from a mental disorder, the police must ensure that the accused person actually understands his or her s. 10(b) rights.
- The Supreme Court of Canada has, however, set a comparatively low threshold for the purpose of determining whether or not accused persons have the capacity to understand their s. 10(b) rights (*Whittle* (1994)). The appropriate test is one of “limited cognitive capacity.” According to this test, it is sufficient when the accused has been shown to have “an operating mind” – rational comprehension is not one of the requirements for establishing that there exists sufficient capacity to understand one’s s. 10(b) rights.
- It would be open to the Canadian courts to impose a requirement that the police ask clarifying questions whenever there is a doubt concerning the capacity of the accused to understand a *Brydges* caution. However, to date, this approach has not been embraced by the appellate courts in Canada.

Review of the Empirical Literature

Offenders may suffer from a myriad of problems that might well affect their capacity to fully understand their legal rights. Empirical research conducted in Canada has found that some of the most prevalent problems are as follows:

1. **Substance Abuse.** A significant number of offenders have alcohol/drug dependence problems. **Alcohol abuse** is the most common drug problem. A Canadian study of arrestees found that the majority of the suspects were intoxicated at the time of their arrest and that a considerable number of charges were related to impaired driving. The mixing of alcohol with other drugs and the abuse of illicit drugs (such as cocaine) were also found to constitute a significant problem among the arrestees who were the subjects of this research. It is highly questionable whether suspects who are impaired by alcohol and/or other drugs have the capacity to understand the *Brydges* caution given to them by the police. Further, it is highly unlikely that accused persons who avail themselves of *Brydges* services fully understand the legal advice given by *Brydges* duty counsel.
2. A significant number of offenders suffer from **mental disorders**. Moreover, the prevalence of serious mental disorders within the offender population is considerably higher than is the case for the general population. Studies have found that there has been an increase in the

number of mentally disordered offenders who are entering the correctional system. Mental disorders may impair the capacity of suspects to comprehend their rights to counsel. Furthermore, the **traumatic effects of arrest/detention** may exacerbate the mental health problems that are experienced by offenders.

3. **Intellectual disabilities** are more prevalent among the prison population than is the case for the general population. Intellectual disabilities differ from mental disorders – they are permanent learning disabilities caused by brain damage. A significant example of an intellectual disability is **fetal alcohol syndrome**. Persons who suffer from fetal alcohol syndrome may not be able to understand the contents of a police caution. Although there are no national studies in which the incidence of this syndrome has been analyzed, it is estimated that there are thousands of individuals who suffer from this disorder, and who are likely to come into contact with the criminal justice system.
4. **Language barriers** may prevent suspects from fully understanding a police caution concerning their rights to counsel and/or the legal advice provided by *Brydges* duty counsel.
5. In England and Wales, there is a mandatory – “**Appropriate Adult**” – procedure that is designed to ensure that a mentally disordered or developmentally disabled suspect is provided with special assistance when he or she is taken to the police station. The appropriate adult monitors the fairness of police interrogation, and facilitates communication between the police and the mentally disordered or developmentally disabled suspect. The appropriate adult is generally a social worker or a family member, and is placed in a position where he or she can request an assessment by a mental health professional, should there be any doubt about the capacity of the suspect to understand his or her rights. The appropriate adult may work with the duty solicitor to ensure that the suspect’s rights are fully protected. The Appropriate Adult procedure might well be examined as a possible model for law reform in Canada.

Chapter 5: The Duty Solicitor Scheme In England And Wales: An Alternative Model For Delivering Legal Advice And Assistance To Suspects In Police Custody.

The duty solicitor scheme in England and Wales serves as an alternative model for the delivery of free, 24-hour legal services to suspects who are being held in police custody. The main elements of the duty solicitor scheme in England and Wales are as follows:

- The duty solicitor scheme is national in scope.
- The duty solicitor scheme was established by legislation: the *Police and Criminal Evidence Act 1984* (PACE), and its accompanying Codes of Practice.
- Since April 2001, all criminal legal aid services have been provided by the Criminal Defence Service, which is administered by the Legal Services Commission.
- All criminal legal aid services are provided in accordance with the “General Criminal Contract,” which contains measures that permit monitoring of the quality of the services provided.

- Legal advice and assistance are provided not only by solicitors, but also by “legal representatives.”
- Clients may choose free legal advice and assistance from their own solicitor, from a duty solicitor, or from a solicitor who is included on a list maintained by the police.
- Legal advice and assistance may be provided over the telephone and/or in person at the police station.
- A suspect is entitled to have a solicitor present during police interrogation.
- Where a duty solicitor is requested, the police must ring the Duty Solicitor Call Centre, which will allocate a lawyer from a rota or panel.
- In six jurisdictions, public defender offices have been established – on an experimental basis – to evaluate the performance of a “mixed model” of private and staff lawyers (the so-called “Canadian model”).
- There is a national system of accreditation for both duty solicitors and legal representatives.

Chapter 6: Methodology

A review of the Canadian jurisprudence and the empirical literature underscores the importance of the provision of *Brydges* services. Thus, the purpose of this report is to examine the extent and nature of the provision of *Brydges* services throughout Canada. The two major components of this study consist of (i) a literature review, and (ii) interviews.

The literature review The first component of the literature review consists of an analysis of the relevant case law that has interpreted and applied the decision of the Supreme Court of Canada in *Brydges* (1990). The case law analysis is limited to decisions of the Supreme Court of Canada and the various appellate courts of the provinces and territories.

The second component of the literature review consists of an examination of both empirical and theoretical materials that discuss the *Miranda* caution and its impact in the U.S.A.; the various factors that may impair a suspect’s capacity to understand a caution issued by the police; and the duty solicitor scheme in England and Wales.

Interviews The empirical component of the present research project consists of 101 interviews with various actors in the criminal justice process in the 10 provinces of Canada. A total of six standardized questionnaires were specifically developed for administration to the following groups of criminal justice actors: (i) legal aid administrators; (ii) police officers; (iii) judges; (iv) Crown counsel; (v) defence counsel; and (vi) accused persons being held in custody. The researchers incorporated both quantitative and qualitative approaches within the design of the project by including both open-ended and closed-ended questions.

The research project was divided into two, distinct phases. Phase I consisted of interviewing legal aid providers in order to ascertain whether or not they collected data on the provision of *Brydges* services. Phase II consisted of the administration of the standardized questionnaires. Telephone interviews were the predominant method of administering the questionnaires. Where feasible, face-to-face interviews were conducted. Owing to the small number of respondents in each province, it was decided that a purposive sample would be appropriate.

The data collected from the questionnaires was coded and analyzed using the SPSS program. Finally, the researchers followed the ethical principles that were incorporated in a protocol that was approved by the Research Ethics Committee of Simon Fraser University.

Chapter 7: Main Findings

All of the provinces provide *Brydges* services during the day. However, the provision of *Brydges* services on a 24-hours-a-day basis has been implemented in only eight of the ten provinces. In Alberta, after-hours *Brydges* services are provided on an informal basis by a roster of volunteer lawyers who accept telephone calls. In Prince Edward Island, there is neither a formal nor an informal system for the provision of *Brydges* services after hours.

Almost all key informants felt that, in addition to meeting formal Charter requirements, *Brydges* duty counsel have the undoubted ability to provide detainees with valuable information. An arrested or detained suspect may potentially acquire information concerning:

- their legal rights
- the basic elements of the legal process
- the nature of the criminal investigation
- important elements of their own case
- the potential advantages and disadvantages of giving evidence to the police

There are two main disadvantages associated with the delivery of *Brydges* services:

- 1) Significant delays in reaching duty counsel – namely:
 - difficulties reaching on-call duty counsel
 - lengthy delays in call backs when 1-800 services are utilized
- 2) Accused persons may not fully comprehend the information that is provided to them by the police:
 - This observation applies particularly to those accused that are not released but retained in custody.
 - In-custody accused may have limited capacity to understand legal advice – because of intoxication, mental disability or similar problems, compounded by stress, fear and confusion related to an arrest.

Brydges services that provide legal advice promptly work to the advantage of the justice system:

- Police can proceed with interrogation of the suspect.
- There is less likelihood of a subsequent adjournment when the case enters the court system.

Delays in the delivery of *Brydges* services may hinder the progress of the police investigation and, paradoxically, work to the advantage of accused persons:

- There is a time limit for some procedures, such as breathalyser tests.

The complete absence of *Brydges* services may benefit the accused:

- In bail hearings, adjournments will be ordered until the accused can speak to duty counsel.
- At a subsequent trial, incriminating evidence may be excluded.

However, receiving prompt *Brydges* advice can work to the disadvantage of the accused:

- If the suspect is intoxicated and *Brydges* advice is swiftly received, the police may immediately proceed to interrogate the individual – possibly to his or her disadvantage because of the impairment caused by intoxication.
- Key informants made the following suggestions for improving *Brydges* duty counsel services:
 - Implement basic 1-800-number telephone services serving all jurisdictions.
 - In provinces where there are no formal *Brydges* services, implement formal 24-hour services.
 - In provinces where the services are provided by on-call lawyers, implement 1-800 services on a 24-hour basis.
- Other suggestions for improvement, assuming that basic 1-800 services are in place were:
 - Duty counsel should be assigned to specific police stations that have a high volume of arrests.
 - Assure that multilingual *Brydges* services are offered in appropriate areas.
 - Ensure that call-backs occur within a guaranteed minimum period.
 - Provide regionalized services.
 - Ensure closer coordination or linkage between advice and assistance at arrest and subsequent representation of the accused at plea, show cause, and trial proceedings.
- A more effective system should be developed in order to more accurately assess the capacity of detainees to fully understand legal advice, and to take appropriate measures.

Chapter 8: Discussion And Conclusions

The impact of the *Brydges* case on provincial legal aid services Although the Supreme Court of Canada has not imposed a constitutional duty upon the provinces to implement *Brydges* services, the findings of this project indicate that the overwhelming majority of the provinces have implemented 24-hour *Brydges* services on a formal basis. However, the province of Alberta only provides after-hours *Brydges* services on an informal basis, whereby lawyers volunteer to provide these services. The province of Prince Edward Island does not have either formal or informal after-hours *Brydges* services.

In general, the interviewees in this project underscored the need to formally implement *Brydges* services in every jurisdiction and to ensure that these services are accessible, province-wide, through a toll-free telephone number.

The impact of the *Brydges* caution on police officers In Canada, it appears that police practices have been significantly altered by the *Brydges* case and subsequent court rulings. In general, police officers reported that they consistently fulfill the informational requirements imposed by the Supreme Court of Canada rulings. Moreover, police officers reported that they are well aware that failure to inform accused persons of the existence of *Brydges* services may operate to their disadvantage, since it may lead to the exclusion of incriminating evidence during subsequent trial proceedings.

The impact of *Brydges* services upon arrested/detained persons The majority of the respondents in this study reported that providing *Brydges* services constituted a major benefit for those suspects who were being held in police custody. However, it is of critical importance to note that there is a wealth of empirical literature that suggests that a considerable number of offenders suffer from a myriad of problems – such as substance abuse, mental disorders, intellectual disabilities, fetal alcohol syndrome, hearing impairment, and language barriers. Therefore, it is doubtful whether accused persons who are affected by such conditions have the capacity to fully understand the contents of a police caution and/or the legal advice provided by *Brydges* duty counsel.

It is disconcerting that some respondents stated that, in certain cases, the provision of *Brydges* services may work to the disadvantage of the accused person. For example, once the police have fulfilled their informational duties and the accused person has contacted *Brydges* duty counsel, the police effectively have a “green light” to continue with their investigation – even though the accused person may be intoxicated and, therefore, may not clearly recall the contents of a police caution and/or the legal advice given by *Brydges* duty counsel.

The need to ensure continuity in the delivery of legal aid services was advocated both by interviewees in this project and by a number of articles that were examined in the literature review.

The need to enhance the levels of funding for legal aid services was advocated by certain respondents and in a number of the articles that were examined in the literature review. Increasing the amount of funding would alleviate the shortage of lawyers who may be willing to work for legal aid programs.

The problem of language could be resolved, according to some participants in this project, by hiring multilingual lawyers who could be called upon when required.

The education and training of criminal justice officials should be enhanced in relation to the nature and impact of the various mental disorders, intellectual disabilities, and drug-related incapacities, which may afflict suspects in police custody.

Alternative models for the delivery of *Brydges* services Local jails have the potential to play a pivotal role in meeting the needs of offenders. They could serve as points of liaison between community services, which address health, housing, and drug-related problems, and the correctional system. If the role of duty counsel were to be expanded, lawyers could be assigned to specific police stations and lock-ups in order, not only to provide legal advice and assistance, but also to assist accused persons in contacting community services that may be of benefit to them. Such an expanded role for duty counsel would ensure that the system of legal aid would reflect a client-centered approach. Indeed, legal aid services should focus on a more **holistic approach** towards clients who are held in police custody. This does not necessarily mean that legal aid plans should actually provide the expanded services. Partnering or liaison arrangements between legal aid and other service providers might be possible.

Another model for delivering legal aid services would involve hiring paralegals and/or articling students to provide – at a lower cost – some of the basic services that are currently offered by lawyers.

Potential obstacles to change The overwhelming majority of the respondents did not offer any suggestions for the development of alternative measures for the delivery of *Brydges* services. Consequently, it may reasonably be anticipated that any proposals for the introduction of reforms to the existing system will encounter some fairly stout opposition.

The model implemented in England and Wales for the delivery of 24-hour legal aid services It is noteworthy that the duty solicitor model that has recently been implemented in England and Wales has significantly expanded the role of duty counsel, by providing ***Brydges*-type** services at the police station. Suspects may – without any charge – access not only a duty solicitor, but also a private lawyer of their own choice

Additional assistance is made available in England and Wales to suspects with disabilities. In such cases, at the police station itself, a police surgeon assesses a person's competency to undergo police interrogation. Furthermore, "appropriate adults" are required, by legislation, to assist persons with mental disorders or developmental disabilities while they are being detained in police custody.

Conveying information about Charter rights to suspects in custody The present research project has raised troublesome questions concerning the efficacy of the methods employed by the police in order to convey legal information to arrested/detained persons. Suggestions for improving the efficacy of the process of conveying legal information include the possibility of

showing suspects a video in which the legal caution is fully explained in simple terms (and in different languages, where required).

In terms of the potential reform of the existing *Brydges* duty counsel system in Canada, it may be worthwhile to explore the 24-hour duty solicitor model that has been implemented in England and Wales – that requires, for example, duty counsel to attend high-volume police stations in person in order to provide legal advice on a face-to-face basis. Moreover, the education of the public at large about their legal rights could be greatly enhanced by making “Plain-language” legal resources more widely available on the internet and by providing easily understandable pamphlets to suspects (in different languages, where appropriate).

1.0 INTRODUCTION

The decision of the Supreme Court of Canada in the *Brydges* case (1990) marked a significant watershed in the evolution of the right to counsel that is guaranteed by section 10(b) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court ruled that an individual, when arrested or detained by the police, has the right to 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” (p. 349). Where such information is not provided by the police at the time of arrest or detention, there is a violation of section 10(b) of the Charter, and any evidence obtained thereby may be excluded from a subsequent trial by virtue of the exercise of the discretionary powers that the courts have been granted by section 24(2) of the Charter.

The *Brydges* decision has undoubtedly had a significant impact on police practices, on the nature and structure of free legal services in Canada, on the admissibility of evidence at criminal trials, and on the treatment of arrested or detained suspects by the police and the courts. More dramatically, the *Brydges* decision focused attention on the delivery of 24-hour duty counsel services to suspects in the period immediately following their arrest or detention. In every jurisdiction, accused persons have long been entitled to apply for legal aid services. Whether or not they receive such services depends on a variety of factors, including the seriousness of the charge(s) and the size of their income. However, where 24-hour duty counsel services exist, they are provided immediately and without the need for an application. Furthermore, they are made available free of charge to all arrested or detained suspects, without regard to their ability to pay. These 24-hour duty counsel services became known as *Brydges* services, following the decision of the Supreme Court of Canada in the case that bears the same name.

“*Brydges* services” differ fundamentally from the other legal aid services that may be accessible to the accused. First, “*Brydges* services” consist of the provision of purely temporary access to duty counsel through the medium of 24-hour telephone service (including evenings, weekends, and holidays). Second, as previously noted, accused persons do not have to apply to receive this service, since it is provided free of charge and without reference to their income.

In *Matheson* (1994) and *Prosper* (1994), the Supreme Court of Canada ruled that the Charter did not impose a constitutional obligation on the provincial and territorial governments to provide *Brydges* services.: However, the Court did place the police under a constitutional duty to inform arrested or detained suspects about these services, **if they exist in their respective jurisdictions**, and to provide the necessary assistance to those suspects who indicate a desire to contact *Brydges* duty counsel.

Most provinces have implemented a formal system for the delivery of *Brydges* services across Canada. However, the implementation of *Brydges* services has by no means been uniform across the country. Therefore, the overarching purpose of this research project is to conduct a comprehensive analysis of the nature and scope of the *Brydges* services that are currently available to arrested or detained persons across Canada. In order to carry out the aforementioned objective, the researchers undertook the following:

1. Gathered basic descriptive data concerning the types of *Brydges* services that are available upon arrest/detention in each jurisdiction across Canada.
2. Conducted an extensive legal analysis of Supreme Court of Canada and provincial and territorial appeal court cases that have interpreted, developed and applied the decision in the *Brydges* case (1990).
3. Prepared a review of the literature that focuses on: (i) the parallel experience of the United States in relation to the landmark decision of *Miranda v. Arizona* (1996) and its relevance to the Canadian context; (ii) the capacity of arrested/detained persons to fully understand the contents of a police caution; and (iii) the nature and scope of the system for delivering 24-hour duty counsel services that has been implemented in England and Wales, and its potential to serve as a model for reform of the existing system of delivering *Brydges* services in Canada.
4. Conducted an extensive empirical analysis of the impact of the provision of *Bridges* services upon the following groups of persons:
 - a) legal aid service providers
 - b) police officers
 - c) Crown counsel
 - d) defence counsel
 - e) judges
 - f) arrested/detained persons.
5. Identified and discussed any perceived gaps in the current system for the provision of *Brydges* services.
6. Discussed and analyzed potential suggestions that may alleviate/resolve the gaps in *Brydges* services that were identified by various interviewees who participated in this project.

This report has been organized into eight chapters. Chapter One consists of a brief introduction and overview of the entire research project. Chapter Two offers an extensive analysis of the case law that has been generated by the Supreme Court of Canada and the various provincial and territorial courts of appeal in relation to the issues raised by the decision in *Brydges* (1990). Chapter Three examines the experience of the United States in connection with the landmark decision of *Miranda v. Arizona* (1996). It demonstrates how this experience may be of considerable value in the process of understanding the impact of the *Brydges* decision both on police practices in Canada and on the courts, which have the discretionary power to exclude evidence that has been obtained in contravention of an accused person's constitutional rights to counsel. Chapter Four furnishes a review of the literature that addresses the question of the capacity of arrested or detained suspects to fully comprehend the contents of a police caution or to decide whether or not to waive their right to contact legal counsel. Chapter Five discusses and analyzes the system of 24-hour duty solicitors that has been implemented in England and Wales and indicates the extent to which it may serve as a potential model for reforming the existing system for delivering *Brydges* services in Canada. Chapter Six documents the methodology that was employed in the present study, while Chapter Seven presents the major findings generated by this project. Finally, Chapter Eight concludes the report with a discussion of key issues, and the articulation of tentative conclusions concerning the provision of *Brydges* services at the present time in Canada.

2.0 THE *BRYDGES* DECISION AND THE RIGHT TO COUNSEL: A REVIEW OF THE CASE LAW

2.1 Introduction: The *Brydges* Decision

The right of arrested and detained persons to be informed by the state authorities of their right to seek the assistance of legal counsel has been entrenched in the *Canadian Charter of Rights and Freedoms*, section 10(b). In the landmark case of *Brydges* (1990), the Supreme Court of Canada attempted to fashion an interpretation of this fundamental right that is a meaningful one in light of contemporary developments in the provision of publicly funded legal aid services. In this respect, Justice Lamer noted in the majority judgment that,

... the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial legal aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status. These considerations, therefore, lead me to the conclusion 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.** [p. 349, emphasis added]

The outcome of the decision of the Supreme Court of Canada in *Brydges* (1990) is, therefore, that **any individual who has been arrested or detained has the right to be informed by the police of the availability of legal aid and duty counsel** (Verdun-Jones and Tijerino 2001).

The failure of the police to discharge the informational component of their duty under section 10(b) may lead to severe consequences (Renke 1996(a) and 1996(b)). Indeed, in the *Brydges* case itself, the accused had been charged with murder. He was duly informed of his right to retain and instruct counsel, but he expressed a concern that he would not be able to afford a lawyer. The Supreme Court of Canada ruled that the trial judge had acted correctly when, under the provisions of section 24(2) of the Charter, he had excluded certain statements made by the accused to the police after this dialogue had taken place. The accused was acquitted by the trial court, and the Supreme Court of Canada set aside a subsequent ruling by the Alberta Court of Appeal (ordering a new trial) and restored *Brydges*' acquittal.

As Justice Lamer indicated in the judgment of the majority of the Supreme Court of Canada, the provision of meaningful information about the availability of legal aid and the existence of duty counsel schemes that are offered free of charge constitutes an essential component of the duty that is imposed on the police by section 10(b) of the Charter:

On the specific facts of this case, the court is faced with the following question: when an accused expresses a concern that his inability to afford a lawyer is an

impediment to the exercise of his right to counsel, is there a duty on the police to inform him of the existence of duty counsel and the ability to apply for Legal Aid? In my view there is. I say this because imposing this duty is consistent with the purpose underlying the right to retain and instruct counsel. 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*. ... 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 a 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 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 question the detainee until he has had a reasonable opportunity to retain and instruct counsel. [pp. 342-343]

As a consequence of the ruling in the *Brydges* case, it is now clear that section 10(b) of the Charter will be interpreted by the courts as requiring that a police officer who arrests or detains a suspect must not only inform that person of his or her right to obtain legal representation, but must also:

- | |
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| <ul style="list-style-type: none">A) advise that person of the availability of legal aid and duty counsel – where available – and how to access these services;B) provide that person with a reasonable opportunity to contact duty counsel or his or her own lawyer; andC) cease questioning that person until he or she has had a reasonable opportunity to obtain legal advice. |
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2.2 Subsequent Decisions Of The Supreme Court Of Canada

2.2.1 The 1994 Decisions Interpreting *Brydges*

In a series of six cases decided in 1994, the Supreme Court of Canada carefully refined the nature and the scope of the duty of the police to provide the so-called “*Brydges* caution” to an arrested or detained person. Significantly, no fewer than five of these leading cases involved the interpretation of the right to counsel in the context of a demand that the accused submit to a breathalyzer test. In such cases, the accused is generally arrested or detained late at night or in the early hours of the morning and requires swift legal advice in response to a demand for the provision of a breath sample in the immediate future.

Perhaps the most important of the six cases is *Bartle* (1994). In this case, the accused had been duly informed of the right to retain and instruct counsel; that he had the “right to free advice from a Legal Aid lawyer,” and that, if he were charged with an offence, he would then have the right to apply for legal assistance from the Ontario Legal Aid plan. What the police failed to do was to inform Bartle of the 1-800 number that would have provided him with access to 24-hour legal advice from duty counsel. The Supreme Court of Canada ruled that, in light of the failure

to provide this specific information, there had been a serious breach of section 10(b) rights of the accused and that an incriminating statement and the results of a breathalyzer test should be excluded under section 24(2) of the Charter.

The Supreme Court adopted the view that a detainee is entitled to be fully advised of the availability of legal aid and duty counsel services before being expected to exercise his or her right to counsel. As Chief Justice Lamer indicated (1994, p. 300), “a person who is ‘detained’ within the meaning of s. 10 of the Charter is in *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty.” In order to meet this need, **the police must furnish the detained or accused person with basic information about how to access those free legal services that are available in any particular jurisdiction** for the benefit of persons who have been arrested or detained (for example, by calling a toll-free number or by being provided with a list of the telephone numbers of lawyers who act as duty counsel). Speaking for the majority of the Court, Chief Justice Lamer took the view that,

... because the purpose of the right to counsel under s. 10(b) is about providing detainees with meaningful choices, it follows that a detainee should be fully advised of available services *before* being expected to assert that right, particularly given that subsequent duties on the state are not triggered unless and until a detainee expresses a desire to contact counsel. In my opinion, the purpose of the right to counsel would be defeated if police were only required to advise detainees of the existence and availability of legal aid *after* some triggering of the right by the detainee. [p. 302]

In this respect, it is particularly noteworthy that Chief Justice Lamer noted (1994, p. 307) that empirical research has suggested that “the more fully people are advised of their rights under s. 10(b), the more likely they are to exercise these rights.”

To similar effect are the decisions of the Supreme Court of Canada in *Harper* (1994) and *Pozniak* (1994). In *Harper*, the police duly informed the accused that he had the right to retain and instruct counsel without delay and that, if he could not afford a lawyer, legal aid was available to him. However, Harper was not informed of the existence of the 24-hour, on-call service that was maintained by Legal Aid Manitoba. For this reason, Chief Justice Lamer held that Harper’s section 10(b) right to counsel had been infringed:

... a detainee is entitled under the information component of the right to counsel under s. 10(b) of the Charter to be advised of whatever system for free and immediate preliminary legal advice whatever system for legal advice which exists in the jurisdiction at the time and of how such advice can be accessed. [p. 427]

In *Pozniak*, the accused had been arrested for impaired driving at 4:00 a.m., and had been subjected to a demand for a breathalyzer test. The accused had been informed of the right of free advice from a legal aid lawyer but had not been told that there was a 24-hour, 1-800 Legal Aid number available in Ontario (even though the number was printed on the police officer’s caution card). The Court ruled that Pozniak’s section 10(b) rights had been infringed and concluded that

the introduction of the evidence of a breathalyzer test – obtained as a consequence of this infringement – would “bring the administration of justice into disrepute” (p. 479).

In *Cobham* (1994), the Supreme Court of Canada dealt with the problem that distinctive types of “*Brydges* duty counsel” systems existed in different jurisdictions across the country. The Court, therefore, took the opportunity to clarify how the precise content of the informational duty, imposed by section 10(b) of the Charter, should be adapted by the police to suit the reality of the diverse patchwork of *Brydges* services that exists across Canada. Cobham had been arrested for impaired driving just after midnight and was subsequently charged with failing to comply with a demand for a breathalyzer test. It was ascertained that, at the time of Cobham’s detention, there was no 24-hour, toll-free legal aid telephone number in operation in the jurisdiction concerned. However, each police force in Alberta maintained a list of local counsel who were willing to accept phone calls from detained or arrested persons outside of normal working hours. When he was advised of his right to counsel, Cobham was not informed of the existence of this scheme and, therefore, the Supreme Court of Canada ruled that his section 10(b) right had been infringed. As Chief Justice Lamer emphasized (p. 339), **“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.”**

Finally, in *Matheson* (1994) and *Prosper* (1994), the Supreme Court dealt with the important question as to whether or not provinces have been placed under a constitutional duty to provide so-called *Brydges* services. In *Matheson*, the accused had been arrested for impaired driving at 1:00 a.m. and was informed by the police of his right to counsel prior to a demand being made for a breathalyzer test. Matheson was informed of his right to retain and instruct counsel without delay, and that he had the right to apply for legal aid. However, at the time of the alleged offence, there were no *Brydges* duty counsel services available in P.E.I. In delivering the judgment of the majority of the Supreme Court of Canada, Chief Justice Lamer noted (194, p. 439) that s. 10(b) of the Charter “does not impose a positive obligation on governments to provide a system of *Brydges* duty counsel, or likewise afford all detainees a corresponding right to free, preliminary legal advice 24 hours a day.” Given the fact that there was no “system of 24-hour, on-call duty counsel” in place at the time, “it was not necessary or appropriate to advise [Matheson] of any right to duty counsel.” In these particular circumstances, the police had “complied with the informational requirements” articulated by the Supreme Court of Canada in the *Brydges* and *Bartle* cases.

Similarly, in *Prosper* (1994), the accused had been arrested in the late afternoon. He was arrested for car theft but was required to comply with a request for a breathalyzer test. He was subsequently charged with being in care and control while “over 80.” The accused had been informed of right to counsel prior to the breathalyzer demand. He was also told that he had the right to apply for free legal assistance through the provincial legal aid program. However, at the time of Prosper’s arrest, there was no duty counsel system in the Halifax/Dartmouth area that would have made available “immediate, although temporary, free legal advice after regular business hours” (p. 361). The Supreme Court of Canada ruled that **section 10(b) of the Charter does not impose a constitutional duty on governments to provide free and immediate preliminary legal services upon request.** As Chief Justice Lamer stated:

... 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...is simply not the same thing as a universal right to free, 24-hour preliminary legal advice. Moreover, there is evidence that the framers of the Charter consciously chose *not* to constitutionalize a right to state-funded counsel under s. 10 of the Charter ...

The *Prosper* case is also noteworthy insofar as the Supreme Court of Canada seized the opportunity to clarify the specific nature of “Brydges services.” According to the Court, it is of critical importance to note that “Brydges services” are quite different from the services that accused persons may obtain, when they are granted a legal aid counsel to represent them in court. “Brydges services” consist of the provision of purely temporary access to duty counsel (free of charge) or the opportunity to obtain “instant” legal information through the medium of a 1-800 telephone service. Indeed, in *Prosper* Chief Justice Lamer indicated that, in the (earlier) *Brydges* case, the Supreme Court of Canada had, in fact, drawn a clear distinction between legal aid and duty counsel:

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. [p. 367]

The Supreme Court of Canada’s decision in *Prosper* undoubtedly rejected the view that the Charter imposed a duty on the provinces and territories to provide arrested or detained persons with *Brydges* duty counsel. However, it is of considerable significance that Chief Justice Lamer stated (1994, p. 368) 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.”

2.2.2 The Supreme Court Of Canada Decisions In *Feeney* (1997) And *Latimer* (1997)

In *Feeney* (1997), the Supreme Court of Canada reiterated the principle that the police must provide an arrested or detained person with specific information about the availability of *Brydges* services. The caution administered by the peace officer to Feeney did refer to the availability of a legal aid duty lawyer but it did not mention a toll-free number. The officer said, “You can call any lawyer you want. A Legal Aid duty lawyer is available to provide legal advice to you

without charge and can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer, I can provide you with a telephone number.” (para. 9). In delivering the judgment of the majority of the Supreme Court, Justice Sopinka (para. 58) stated that the caution that the accused was ultimately given “did not satisfy the informational requirements of s. 10(b).” Apparently, **the accused should have been specifically informed of the “opportunity to access immediate, free legal advice, such as the existence of a 1-800 telephone number”** (para. 55). It is not sufficient for a police officer to inform an arrested or detained person that, should the latter wish to contact a legal aid lawyer, then the officer would provide a telephone number.

A new issue was raised before the Supreme Court of Canada in *Latimer* (1997). In this case, the accused asserted that his right to counsel, under section 10(b) of the Charter, had been infringed when the police did not inform him of the existence of a toll-free telephone number that would have provided him with access to immediate legal advice, provided by duty counsel. However, at the time of day when Latimer was arrested (**during normal working hours**), the toll-free number in Saskatchewan was not in operation and, in light of this particular circumstance, the Supreme Court of Canada ruled that the police were under no obligation to inform him of the number.¹ The Court also took into account the fact that Latimer had been made aware of the existence of the duty counsel service that was made available by the local Legal Aid Office. Latimer had been informed twice of the existence of the duty counsel service and, at the police station he had been sitting near a telephone that had the number for Legal Aid written on it. Although the police had not given Latimer the phone number for the local Legal Aid Office, the Supreme Court ruled that, “s. 10(b) did not require the arresting officers to take that extra step, under the circumstances of the case.” As Chief Justice Lamer noted, on behalf of the Court:

Where an individual is detained during regular business hours, and when legal assistance is available through a local telephone number which can easily be found by the person in question, neither the letter nor the spirit of *Bartle* is breached simply by not providing that individual with the local phone number. Mr. Latimer was perfectly capable of obtaining the number. [para. 37]

2.2.3 The Supreme Court of Canada and the Exclusion of Evidence Under Section 24(2) of the Charter

It is significant that the Supreme Court of Canada has taken the view that a failure to fulfill the informational requirements that constitute part of the right to counsel, under section 10(b) of the Charter, should be treated as a serious infringement of an arrested or detained person’s constitutional rights. As a consequence, the failure to furnish such a person with the appropriate information about existing *Brydges* services may well lead to the exclusion at their trial of any evidence that has been obtained in contravention of the provisions of section 10(b) of the Charter (Pacioco and Stuesser 1999, and Sharpe and Swinton 1998). Indeed, there have been seven cases

¹Chief Justice Lamer indicated that, if an individual is arrested – during normal office hours – in one of those jurisdictions in which duty counsel is made available through a 24-hour toll-free phone number and was also available by a local phone call during the day, then there is no obligation on the police to give the toll-free number to the accused: clearly, the toll-free number would not then be necessary in order to protect the individual’s right to counsel under section 10(b).

in which the Supreme Court of Canada has ruled that there had been an infringement of the accused's section 10(b) rights as a result of the failure of the police to include the appropriate information about the *Brydges* services that were available to the accused in his or her particular jurisdiction. In six of these cases,² the Court ruled that evidence obtained in violation of the accused person's section 10(b) rights should be excluded from consideration by the trial court because to admit it would "bring the administration of justice into disrepute." It is noteworthy that, in no fewer than five of this group of decisions by the Supreme Court of Canada, the results of a breathalyzer test were held to be inadmissible as evidence.³ *Harper* (1994) constitutes the only case in which the Supreme Court of Canada ruled that, although there had been a violation of the informational requirements of section 10(b), evidence obtained following such a breach should nevertheless be considered admissible at the trial of the accused. As Chief Justice Lamer noted in the judgment of the majority of the Court (p. 430), he was satisfied that the Crown had proved on the balance of probabilities that "the accused would not have acted any differently had the police fulfilled their informational duty." (For a summary of the aforementioned Supreme Court cases, please refer to Table 1.)

Case	Charge	Time	Issue Examined	Considered a s. 10(b) Breach?	Evidence Excluded
<i>Brydges</i> (1990)	Murder	After hours	Accused not informed of the availability of legal aid or any duty counsel scheme that was available in the jurisdiction.	Yes	Yes
<i>Feeney</i> (1997)	Murder	After hours	Accused informed of his right to free legal advice from a legal aid lawyer but was not informed of the existence of the 24-hour toll-free number	A new trial order	Yes
<i>Latimer</i> (1997)	Murder	Regular hours	Accused not informed of the toll-free number for immediate advice from duty counsel. However, this number was not in operation during regular working hours.	No	N/A
<i>Bartle</i> (1994)	Impaired driving	After hours	Accused informed of his right to free legal advice from a legal aid lawyer but was not informed of the existence of the 24-hour toll-free number	Yes	Yes
<i>Cobham</i> (1994)	Refusing breathalyzer demand	After hours	Accused was informed of his right to counsel and to legal aid but was not informed of the availability of free legal advice from the 24-hour <i>Brydges</i> duty counsel.	Yes	Yes

² *Brydges* (1990), *Bartle* (1994), *Cobham* (1994), *Prosper* (1994), *Pozniak* (1994) and *Feeney* (1997).

³ *Bartle* (1994), *Cobham* (1994), *Prosper* (1994), *Pozniak* (1994) and *Feeney* (1997).

Case	Charge	Time	Issue Examined	Considered a s. 10(b) Breach?	Evidence Excluded
<i>Harper</i> (1994)	Assault causing bodily harm	Time not stated	Accused informed of right to counsel and to legal aid but was not made aware of the existence of the 24-hour toll-free <i>Brydges</i> duty counsel service.	Yes	Evidence admitted
<i>Matheson</i> (1994)	Impaired driving	After hours	Accused informed of right to counsel and legal aid. No 24-hour <i>Brydges</i> services in PEI. Police are not required to provide further information.	No	N/A
<i>Pozniak</i> (1994)	Impaired driving	After hours	Accused informed of right to counsel and of legal aid. Police did not inform of the availability of 24-hour <i>Brydges</i> duty counsel.	Yes	Yes
<i>Prosper</i> (1994)	Impaired driving	Weekend	Accused informed of right to counsel and legal aid. However, no 24-hour <i>Brydges</i> duty counsel system was in place. Accused given list of home numbers of legal aid lawyers – no success in trying to contact lawyers. Police should hold off questioning.	Yes	Yes

2.3 Decisions Of The Provincial Appellate Courts

As is the case with the Supreme Court of Canada jurisprudence concerning *Brydges* services, the majority of the decided cases in the provincial appellate courts involve the investigation by the police of impaired driving, and their demands for breath and/or blood tests. This means that the case law that directly addresses issues relating to *Brydges* services revolves around a narrow set of circumstances. This is important for *Brydges* duty counsel since arrest or detention for impaired driving and the issue of a demand for breath and/or blood samples frequently occur outside of normal working hours. (For a summary of the appellate cases that are examined in this section, please refer to Table 2.)

2.3.1 The Nature Of The General Information That Must Be Furnished To The Suspect By The Police

The Supreme Court of Canada has clearly articulated the general nature of the information that must be imparted to a suspect, who has been arrested or detained. Indeed, in the case of *Feeney* (1997), Justice Sopinka, speaking for the majority of the Supreme Court, effectively summarized the combined effect of the *Brydges* (1990), *Pozniak* (1994) and *Bartle* (1994) cases, by stating that:

With respect to the informational component of a proper s. 10(b) caution ... the detainee must be informed of the applicable duty counsel and legal aid systems available in the jurisdiction ... [and] must be informed of any opportunity to access immediate, free legal advice, such as the existence of a 1-800 telephone number. [para. 55, emphasis added]

Various appellate cases have examined the adequacy of the right-to-counsel information that the police have presented to accused persons, at the time of their arrest or detention. For example, in *Nickerson* (2001), the police officer informed the accused of her right to instruct counsel without delay and of her right to apply for legal aid without charge. However, the accused was not made aware of the existence of the “24-hour Legal Aid duty counsel system” that was available to her. The Nova Scotia Court of Appeal held that this omission by the police constituted a violation of the section 10(b) right of the accused to counsel. As Justice Saunders stated, in delivering the judgment of the Court, there is an “important distinction between possibly qualifying for Legal Aid, or accessing immediate legal advice at no financial cost whatsoever” (para. 15). Saunders J.A. also took the opportunity to make the comment that:

It is disappointing so many years after the Supreme Court’s decisions in *R. v. Bartle* and *R. v. Brydges* ... , that concise, accurate, unambiguous wording cannot be printed on laminated cards for quick and easy reference by police officer when informing detainees of their right to counsel” [para. 16]

Similarly, in *R. v. Ferguson* (1997), the accused was detained for investigation of drunk driving. The police officer gave the accused a Charter caution based on memory, rather than reading a caution from a printed card. However, the officer failed to inform Ferguson of the availability of duty counsel or of the 24-hour, toll-free telephone number that was in operation in the province. Following this incomplete caution, the accused made some inculpatory statements concerning his driving and his state of intoxication. The B.C. Court of Appeal held that these statements should have been excluded from the trial because they had been obtained in violation of Ferguson’s section 10(b) right to counsel.

However, in *Genaille* (1997), the Manitoba Court of Appeal emphasized that, if the suspect is detained or arrested *during normal working hours*, then the police do not have to inform him or her of the availability of duty counsel on a 24-hour basis. The Court held that it was sufficient for the police officer to have told the accused that he was “entitled to free legal advice from duty counsel immediately” and that he had a right to “representation by a lawyer of his own choice or through legal aid” (p. 468). This outcome reflects the decision made contemporaneously by the Supreme Court of Canada in *Latimer* (1997).

The failure to provide full information about the availability of *Brydges* duty counsel is not necessarily disastrous, particularly in the situation where the accused does nevertheless exercise his or her section 10(b) right by actually speaking to counsel. For example, in *R. v. Moore* (1995), the defendant had been convicted at trial of impaired driving. A police officer in Red Deer, Alberta, had given Moore a “1-800” telephone number, indicating that it would connect Moore with duty counsel. In fact, this number belonged to a Calgary lawyer who was not serving as duty counsel. It appears that the police had not informed themselves of the existence

of a duty counsel system that had been established to deal with cases originating in Red Deer. Moore did speak to the private lawyer and received legal advice – although Moore stated at his trial that “he was not especially satisfied with the advice that he received” (para. 3). Although Moore claimed that the police officer had infringed his section 10(b) right to counsel, the Alberta Court of Appeal found that there was “no breach of the substantive rights of the accused whatsoever” (para. 7). Hunt J.A. stated that Moore had consulted counsel and “there was no suggestion from the evidence that he was misinformed about his legal rights” (para. 7). The Court of Appeal emphasized that Moore’s situation was completely different from that of the accused in the Supreme Court of Canada cases of *Cobham*, *Bartle*, *Prosper*, and *Pozniak* (1994) – cases in which none of the accused actually contacted counsel, and in which the police had not informed them of the existence of duty counsel.

Likewise, in *Mosher* (1992), after the accused had been detained in connection with an investigation of impaired driving, the police officer issued a breathalyzer demand and informed Mosher that he had the right to retain and instruct counsel without delay, and that he also had the right to apply for free legal assistance through Legal Aid. Mosher immediately indicated that he wished to speak to his own lawyer and he was permitted to call this lawyer – in private – from a telephone located in the police station. It was contended at Mosher’s trial that the police had not provided him with the information concerning duty counsel that was mandated by the Supreme Court of Canada’s decision in *Brydges* (1990). The Appeal Division of the Nova Scotia Supreme Court ruled that there had been no breach of Mosher’s section 10(b) rights because, after having been informed of the availability of legal aid, he had chosen to consult a private lawyer who did not work with Legal Aid.⁴ As Chief Justice Clarke noted, “[Mosher] got him within a reasonable time, presumably obtained his advice and had him present to observe the tests’ (p. 2).

2.3.2 Are The Police Required To Immediately Provide Suspects With The Actual Toll-Free Number For *Brydges* Services, Where They Exist?

A critical question that has been raised in the context of the implementation of the right to counsel under section 10(b) is whether the police are required, at the time of an arrest or detention, to immediately provide the suspect concerned with the actual toll-free number that will enable him or her to contact the 24-hours-a-day duty counsel? In this respect, the appellate courts have drawn a sharp distinction between the undoubted duty of the police to immediately inform the suspect that a toll-free number exists and the more onerous requirement that the police immediately inform the suspect of the actual telephone number. Furthermore, the appellate courts have espoused the view that that it is not necessary for the police to furnish a suspect with the toll-free duty counsel number at exactly the same time as the section 10(b) caution is administered to him or her.

In *Davis* (1999), the accused had been informed of his right to retain and instruct counsel and that he could speak to counsel of his choice or to duty counsel. Davis was clearly notified that “free legal aid was available on a 24-hour basis and that a legal aid number would be provided upon request in the event he wished to call counsel immediately” (para. 5). However, the officer

⁴ See, also, *Jones* (1993).

did not provide Davis with the toll-free telephone number at that particular time. In any event, Davis declined to take advantage of the opportunity to contact counsel immediately, and he then made some self-incriminating statements. At trial, Davis was convicted of a number of serious offences (including kidnapping and sexual assault with weapon). The Ontario Court of Appeal rejected Davis' appeal against conviction. One of the issues raised by Davis' counsel was an alleged infringement of his section 10(b) right to counsel. However, the Court of Appeal took the view that the failure of the police officer to immediately provide Davis with the toll-free number did not constitute a breach of his section 10(b) right to counsel. Davis had chosen to waive his right to counsel after he had been informed that he would be given the relevant number to contact legal aid – should he wish to contact counsel immediately. In the view of the Court of Appeal, “nothing more was required of the police” (para.5).

In a similar vein is the decision of the B.C. Court of Appeal in *Poudrier* (1998). At the time a demand for breath sample was made, the police informed Poudrier of his right to counsel. The officer indicated that legal aid was available on a 24-hours-a-day basis and that the telephone number was available at the RCMP station. Poudrier did not request the number when he arrived at the station. Poudrier was convicted of driving “above 80” and sought to appeal on the basis that his section 10(b) right to counsel had been infringed. The B.C. Court of Appeal ruled that the police had satisfied the informational requirements that had been articulated by the Supreme Court of Canada in *Bartle* (1994) – namely, that it is sufficient for the police to tell “a detainee 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” (para. 14).

On the other hand, it is clear that **the police must provide an arrested or detained suspect with the toll-free number at the moment when he or she wishes to take advantage of the right to contact the 24-hour duty counsel service.** This principle was highlighted in the case of *Chisholm* (2001). Here, a police officer had provided information concerning the right to counsel from memory rather than reading from a printed card. Chisholm had been charged with refusing to provide a breath sample and with impaired driving. The trial judge acquitted the accused, after having excluded certain evidence on the basis that it had been obtained in violation of the right of the accused to counsel under section 10(b) of the Charter. The police officer who informed Chisholm of his right to counsel at the time of his arrest admitted that he had “lost the card from which he read when advising” the accused, and that he could not be sure exactly what he said to Chisholm (para. 10). The trial judge found that the officer had notified the accused that “a lawyer can be contacted on your behalf to provide legal advice immediately without charge,” but that the officer had failed to provide Chisholm with the number for the duty counsel who was available to provide advice and assistance (para. 18). The Nova Scotia Court of Appeal rejected an appeal by the Crown against Chisholm's acquittal at trial. The Court agreed with the trial judge that there had been a violation of Chisholm's section 10(b) right to counsel. Significantly, the Court of Appeal discussed the decision of the Supreme Court of Canada in *Latimer* (1997), and found a critical difference between the situation that had arisen in Chisholm's case and the circumstances that existed in the case of *Latimer*. In delivering the judgment of the Court of Appeal, Saunders J.A, emphasized that:

... The major distinguishing factor in *Latimer* ... is that at the time of his arrest, Legal Aid counsel was available during normal business hours. *Latimer* was

arrested at 8:32 a.m. Thus, once he had been advised of the availability of Legal Aid Counsel and that he could call counsel immediately, his right to counsel had been satisfied. The Court observed that the number for Legal Aid was readily available, both from the telephone book and from Directory Assistance. In fact, Latimer was seated in front of a telephone that had the number for Legal Aid on it.

Latimer was arrested during business hours whereas Mr. Chisholm's detention was after midnight. In this case, Mr. Chisholm could not have known the number for counsel on duty that night. He could not look it up in the telephone book. He could not obtain it from Directory Assistance. It was not written on the wall or the telephone in the holding room.

The crucial difference between *Latimer* and this case is the availability of that telephone number. In cases where available legal counsel are on duty, only the police can provide that telephone number to the detained person. [paras. 28-30]

Since the police officer had not provided Chisholm with the number of duty counsel, the Court of Appeal concluded that the accused had not been "clearly and fully informed of his right to counsel" (para. 30).

If a detained or arrested suspect has been fully informed of his or her rights under section 10(b), and knowingly declines to pursue the opportunity to contact counsel, then it is clearly not necessary for the police to provide the specific toll-free number that will connect him or her with duty counsel. The Nova Scotia Court of Appeal applied this particular principle in the case of *Wallace* (2002). Here, the appellant had been convicted of refusing a breathalyzer demand and of impaired driving. Upon his appeal, Wallace argued that his right to counsel had been infringed. After requesting a breath sample, the police officer concerned had informed Wallace of his right to retain and instruct counsel without delay and of the immediate availability of duty counsel "without charge." The officer did not provide the 1-800 number for duty counsel, but asked Wallace if he wished to call a lawyer, and the accused said that he did. Wallace was taken to the police station during normal working hours, and taken to the entrance of a room that contained a desk, chair and telephone. On the wall opposite to the chair were two notices: one of these notices displayed the names and telephone numbers of private lawyers, while the other displayed two numbers for contacting after-hours duty counsel as well as the numbers for reaching the Legal Aid offices during normal business hours. Wallace had not entered the room and, while standing in the doorway, he informed the officer that he had changed his mind about calling a lawyer, and that he just wished to go home. Wallace then refused to blow into the breathalyzer apparatus. The Court of Appeal rejected the appellant's argument that the police had failed to provide the necessary information about the right to counsel and how to access legal services. Saunders J.A. emphasized that Wallace's case was very different from that of *Chisholm* (2001):

Whereas, in *Chisholm* ... the accused's detention occurred after midnight in circumstances where he could not have known the number for counsel on duty, could not have looked it up in the telephone book, nor obtained it from Directory

Assistance, nor seen it written on any notice posted near the telephone, here Mr. Wallace was detained during regular business hours and was found to have been properly advised of his Charter rights and fully informed of the means necessary to access such legal advice. He chose not to enter the room where he might avail himself of that opportunity and instead simply stood in the doorway and repeated his decision to the police officer that he had changed his mind, that he did not wish to contact a lawyer, and that he wanted to go home. [para. 18]

Moreover, the Court firmly rejected the argument that the police officer should have provided Wallace with a specific telephone number **at the time of his detention**: “it would have been pointless for the police to have imparted a telephone number or numbers to the detained at that stage” (para. 20). Wallace had been properly informed of his right to counsel and had been granted every opportunity to exercise it.” However, he had changed his mind and had effectively waived his right under section 10(b) of the Charter.

2.3.3 Are the Police Required to Ensure That a Suspect Contacts the Lawyer of his or her Own Choice?

Once a police officer has furnished an arrested or detained suspect with the necessary information concerning the right to counsel, the suspect may seek to immediately contact a private lawyer. If the suspect’s own lawyer is not available (which may well be the case if the suspect has been arrested or detained outside of regular working hours), then the question arises as to whether the suspect’s right to counsel has been violated if he or she is referred to duty counsel instead of the private lawyer of his or her own choice. The appellate courts have taken the view that there is no violation of the right to counsel if the suspect appears to have accepted the option of talking to duty counsel.

For example, in *Littleford* (2001), the accused had been arrested for impaired driving and was immediately advised of his right to counsel. Littleford indicated both that he understood the caution and that he already had his own lawyer. He was subsequently taken to a room in the police station in order to contact this lawyer. The arresting police officer called the number that was provided by Littleford. It was 12:53 a.m. and, since the officer contacted the lawyer’s office, there was no answer, so he left a message on the answering machine. At trial, the police officer admitted that he had not offered to look up the lawyer’s home number, nor had he provided the suspect with a telephone directory. The officer then contacted duty counsel and explained that, although Littleford had indicated that he did not wish to speak with duty counsel, he nevertheless was not able to contact his own lawyer. The officer then informed Littleford that duty counsel was on the line for him, and Littleford spoke with duty counsel. After speaking to duty counsel, the defendant agreed to take the breathalyzer test. He did not make any further request to contact his own counsel, and he did not make any complaint after speaking to duty counsel.

Ultimately, Littleford was convicted of driving “above 80,” and he appealed to the Ontario Court of Appeal on the basis that his section 10(b) right to counsel had been violated before he provided the breath sample. The alleged violation arose from the contention that Littleford had

not been given a reasonable opportunity to contact his own lawyer. The Court of Appeal emphasized that the onus of proving the breach of his right to counsel was placed on Littleford, and that he had not satisfied this onus.

The difficulty with the appellant's position in this case is that he did speak to duty counsel before taking the breathalyzer test. He neither raised any concern at the time, nor did he testify on the *voir dire* to suggest that he misunderstood his rights at the time or that the conduct of the police officer affected his ability to assert those rights. The trial judge made a finding that speaking to duty counsel "seemed to satisfy him at the time." There was no basis on the record to disturb that finding. [para. 8]

The circumstances were significantly different – although the outcome was similar – in the case of *Eakin* (2000). Here, the accused was convicted of sexual assault and robbery. He was later declared a dangerous offender and sentenced to an indeterminate sentence. However, the accused appealed against his convictions to the Ontario Court of Appeal. One of the grounds for the appeal was the assertion that Eakin's right to counsel had been infringed by the police. Eakin had been duly informed of his right to counsel and had indicated that he wished to speak to his own lawyer. The accused was given a telephone directory but was unable to locate his lawyer's number, even though the lawyer's name and number were in the telephone directory (and the lawyer was available at the time). A police officer was also unsuccessful in locating the lawyer's telephone number. The police then placed a request for duty counsel and refrained from further questioning of the accused. Duty counsel did call a little while later, and Eakin spoke to him for about twelve minutes. Eakin did not complain about speaking with duty counsel, and he did not renew his request to speak to his own lawyer. He subsequently gave samples of hair, saliva and blood. At trial, Eakin contended that he had not been furnished with the information that was necessary for him to contact his own lawyer. The trial judge rejected this contention.

The Ontario Court of Appeal upheld the ruling that Eakin's right to counsel had not been infringed in the particular circumstances of his case. In the view of the Court, Eakin had been properly informed of his right to counsel, had been given a reasonable opportunity to exercise that right and had appeared to accept duty counsel as an alternative to his own lawyer. Charron J.A. emphasized that it was important to take into account the specific facts that had been found by the trial judge in this case:

Some of the critical findings include the facts that the appellant had merely thumbed through the telephone book in a manner that was carefree, that he had made no earnest attempt to locate [his lawyer], and that he never pursued this request. While counsel for the appellant is correct in his submission that the police could have made greater efforts to locate [the lawyer], this fact does not detract from the trial judge's findings with respect to the appellant's own lack of diligence in his attempts to consult with counsel of his choice. [para. 8]

In *Eakin*, therefore, the police were not placed under a duty to assist the accused in finding the lawyer of his choice, because the accused himself had demonstrated a marked lack of diligence in this regard.

An important issue that may arise in the context of an attempt to exercise the right to counsel is the relevance of the suspect's language. For example, in *Girard* (1993), the accused had been acquitted of a charge of impaired driving. The trial judge had excluded the results of the breathalyzer tests on the basis that Girard's section 10(b) right to counsel had been violated when the police had failed to provide him with the French-speaking lawyer that he had requested. Girard had been arrested at 1:15 a.m. and was given the standard police caution concerning his right to counsel. When he arrived at the police station, he was given a telephone directory and a list of legal aid lawyers. Girard then indicated that he wished to contact a French-speaking lawyer. The arresting police officer called a couple of legal aid lawyers, but was not successful in obtaining help for the accused. Subsequently, Girard was provided with a translator who read, in French, the police caution, his Charter rights and the demand for a breathalyzer test. Girard subsequently notified the police that he did not wish to speak to a lawyer, and took the breath test. The Nova Scotia Court of Appeal allowed an appeal by the Crown against Girard's acquittal and entered a conviction, because the results of the breathalyzer tests should have been admitted at the trial. The nub of the decision appears to be the finding that Girard himself showed a complete lack of due diligence in seeking to contact a French-speaking lawyer, and, therefore, the police were under no obligation to undertake exceptional efforts to assist Girard to follow up on his initial request. Indeed, Chipman J.A. stated that:

The evidence discloses no attempt on the appellant's part to find a French-speaking lawyer ... His position was simply that the police had a duty to do all of this for him. The case of *Brydges* ... is at most authority for the proposition that the Charter imposes upon the police the obligation to advise the accused what is available to him by way of legal service and give him a reasonable opportunity to seek the advice of counsel. The Charter does not impose upon the police the obligation to provide the services. In the circumstances here the police did all that was reasonably required of them. There may be cases where affording a reasonable opportunity to consult counsel imposes a duty on the police to do more, but this is not one of them.

The respondent has failed to establish that he was unable to contact a French speaking counsel. He had the opportunity but made virtually no effort to do so. He elected to take the [breathalyzer] test. In my opinion, he has failed to satisfy the onus upon him of proving a Charter violation. [p. 3]

It is noteworthy that the Court of Appeal seized the opportunity to emphasize that there may well be other cases in which the police would be expected to take some further action as part of their duty to furnish a suspect with a reasonable opportunity to consult with the counsel of his or her choice.

2.3.4 Are The Police Required To Take Further Action To Protect The Right To Counsel If The Accused Appears To Be Uncertain As To Whether Or Not He Or She Should Talk To A Lawyer?

Once the police have duly notified an arrested or detained suspect of his or her section 10(b) right to counsel, and provided the latter with the necessary information about access to legal aid and 24-hour duty counsel, the question arises as to whether the police are placed under a duty to provide any further assistance to the suspect, should he or she ask them for advice. This issue was addressed by the Saskatchewan Court of Appeal in *Jutras* (2001), a case in which the accused had been detained in connection with an investigation into impaired driving, and subjected to a breathalyzer demand. Jutras was fully informed of his section 10(b) right to counsel, and the investigating officer made it clear that Jutras could telephone a lawyer from the police station, and that there were lawyers on duty for that purpose even though it was around 3:00 a.m. When the investigating officer offered Jutras the use of a telephone at the station, the accused declined the offer, and he appeared to understand what he was doing. When a second officer was preparing to administer the breathalyzer test to Jutras, the latter asked him, “What can a lawyer do for me?” and “What can a family member do for me?” (para. 12). Jutras was referred back to the investigating officer who permitted the accused to call his father. Unknown to the police, Jutras suffered from Attention Deficit Hyper Activity Disorder and was confused as to what he should do. His father advised him to submit to the tests without bothering a lawyer. Jutras then took the breathalyzer tests without consulting counsel. The Court of Appeal rejected the contention that Jutras’ section 10(b) right to counsel had been infringed by the failure of the police to help the accused to decide whether he should take advantage of the opportunity that had been provided to him to contact counsel. On behalf of the Court, Cameron J.A. stated (paras. 20-21) that:

... Constable Hesp properly informed Mr. Jutras of his right to counsel immediately upon demanding samples of his breath and then effectively afforded him an opportunity to exercise that right once at the police station. He did this at a time when Mr. Jutras was capable of understanding – and indeed understood – that it was open to him to take the advice of a lawyer before complying with the demand...

It was not for the constable, in meeting his duty of informing Mr. Jutras of his constitutional right or of aiding him in implementing that right, to give him advice about what he should or should not do. That was no part of the police officer’s duty.

However, the police may be under a duty to provide additional help to an arrested or detained suspect if he or she has not clearly stated a decision as to whether or not to contact counsel. This was the situation that existed in the case of *Wydenes* (1999). The accused, who was being interrogated in custody in connection with a case of arson, was informed of his section 10(b) right to counsel. When the officer asked Wydenes if he wished to call a lawyer, the accused said, “No, I guess not, I don’t know.” Before the B.C. Court of Appeal, Crown counsel conceded that the accused’s response was “sufficiently uncertain that it required the police officer who was present to engage in further enquiries and to seek further amplifications and to offer additional help” (para. 6). The Court of Appeal treated this circumstance as one of three violations of the accused’s section 10(b) rights that had taken place in the police station, and the Court set aside Wydenes’ conviction, ordering a new trial.

In *Small* (1998), the accused was detained in connection with an investigation into an alleged sexual assault. The accused was read his Charter rights, and he indicated that he did not wish to contact counsel. This was later interpreted as a waiver of his section 10(b) rights. At first, Small was not given any details about the allegation of sexual assault. However, the accused was subsequently taken to an interrogation room and provided with specific details of the allegation (including the identity of the complainant). At this point, Small asked the interrogating officer, “Do you think I should contact a lawyer?” (para.10). The officer actually suggested that “maybe he (Small) should (do so) due to the fact that it was a serious offence” (para. 10). However, the officer did nothing further to follow up the suggestion, but proceeded to take a statement from the accused. This statement was then introduced as evidence at the accused’s trial. Small appealed against his conviction to the Alberta Court of Appeal. It was contended by Small that his section 10(b) rights had been violated. One of the issues raised by Small’s counsel was that, when Small asked the police officer in the interrogation room whether he should contact a lawyer, Small had withdrawn any waiver of the right to counsel that he may have made after receiving the initial caution from the police. The Court of Appeal allowed Small’s appeal. It ruled that his right to counsel had been violated and that his statement should not have been admitted as evidence at his trial. The Court held that Small’s question to the officer (“Do you think I should phone a lawyer?”) constituted “either a request for an opportunity to contact counsel or, at least [was] ambiguous as to whether or not the appellant wished to exercise his s. 10(b) right.” In the view of the Court:

... in the face of the appellant’s question, the police officer was obliged to pursue this issue further and to either obtain a clear and unequivocal waiver or afford the appellant a reasonable opportunity to exercise his right to counsel. He did neither. Instead he proceeded to obtain the statement. [para. 34]

2.3.5 Are The Police Under A Duty To Inform A Suspect That He Or She Has The Right To Talk To Counsel In Conditions Of Privacy?

In *Bartle* (1994), the Supreme Court of Canada emphasized that, in addition to imposing a duty on the police to provide the requisite degree of information, section 10(b) of the Charter requires that the police actually facilitate the exercise of the right to counsel by a detained or arrested suspect. Once an arrested or detained suspect has expressed the desire to retain and instruct counsel, then the police are under a duty “to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)” (p. 301).

In *Kennedy* (1995), the Newfoundland Court of Appeal ruled that an important component of the duty to implement the suspect’s right to counsel is the provision by the police of “an adequate measure of privacy.” The accused had been transported to a hospital emergency room after his car had collided with a utility pole. The police made a demand for blood samples. After being informed of his right to counsel, Kennedy initially indicated that he wished to contact counsel. He was directed towards a telephone at the entrance to the emergency room. Two police officers, a physician and a nurse were in the immediate vicinity of the telephone. At this point, Kennedy decided not to contact counsel after all. The Court of Appeal affirmed the trial judge’s ruling that Kennedy’s section 10(b) right to counsel had been violated because of the lack of

privacy created by the presence of the individuals in the immediate vicinity of the telephone (p. 185).⁵

Since the right to counsel under section 10(b) includes a reasonable expectation of privacy, the question necessarily arises as to whether a police officer is required to inform a detained or arrested suspect that he or she has a right to contact counsel in circumstances of privacy. In *Parrill* (1998), the Newfoundland Court of Appeal declined to provide a definitive answer to this question, but Wells J.A. did offer “some guidance for the future.” In his judgment, Justice Wells stated that:

It may be beneficial and even desirable, in delivering a caution respecting the right to retain and instruct counsel, that police officers should advise arrested persons and detainees that should they decide to contact a lawyer they will be afforded an opportunity to do so in privacy, or at least in such privacy as the circumstances permit. It would involve little additional effort. It would be beneficial to the arrested or detained person in that any apprehensions the person might have about the right to consult a lawyer would be removed. It would also be beneficial from a police point of view in that the police would no longer have to be concerned with assuring themselves that there is nothing in the circumstances that make it necessary for them to go further in explaining the s. 10(b) rights, at least with respect to possible concerns about privacy. These comments are not, however, to be construed as a finding that the law, as it stands at the moment, so requires. [para. 37, emphasis added]⁶

⁵ However, the Court of Appeal in *Kennedy* also held that the violation was not sufficiently serious to warrant exclusion of evidence of the accused’s blood samples. Marshall J.A. took the view that “the disrepute that would ensue from exclusion of the impugned evidence in the circumstances of the case at bar is sufficient to overrule the serious concerns over the fairness of its administration” (p. 202).

⁶ In *Jones* (1999), the Ontario Court of Appeal found that there had been a breach of the accused’s right to private contact with counsel. However, the breach was considered “not serious” and statements made by the accused were admitted into evidence (para. 9).

2.3.6 Are The Police Under A Duty To Repeat The Section 10(B) Caution To A Suspect Who Has Been Detained Or Arrested And Subsequently Transported To A Police Station?

In *Leedahl* (2002), the accused had been arrested for impaired driving at 3:40 a.m. Leedahl was read his section 10(b) rights to counsel, and subjected to a breathalyzer demand at the scene of his arrest (a street in Saskatoon). The accused subsequently provided breath samples at the police station. The central issue in the case concerned the admissibility of the evidence of these breath samples, in light of the assertion of Leedahl's counsel that they had been obtained in violation of the requirements of section 10(b) of the Charter. At the scene of the arrest, the police officer had asked the accused whether he wished to "call a lawyer now." The arresting officer testified that – at the time of his arrest in the street – Leedahl had indicated that he understood his rights and that he did not wish to contact counsel. Some 15 to 20 minutes elapsed before Leedahl was transported to the police station. The police officer did not repeat the section 10(b) caution at the station. The Saskatchewan Court of Appeal ruled that there had been no violation of section 10(b), because there was no evidence that Leedahl had been misled into believing that he would be asked again if he wanted to contact counsel. Moreover, the Court stated that *there is* **"no general rule of law that says police officers must, in breathalyzer cases, where they've given the demand at the scene, specifically ask the accused if he wants to make a call when they get to the police station"** (para. 9, emphasis added).

2.3.7 The Additional Duty Placed On The Police If The Suspect Has Changed His Or Her Mind About Contacting Counsel.

The Supreme Court of Canada has emphasized that the police may be placed under an additional duty to provide information to an arrested or detained suspect in the situation where the latter has initially indicated a desire to retain and instruct counsel, but has subsequently informed the police that he or she has undergone a change of mind and no longer wishes to contact a lawyer. Indeed, in *Prosper* (1994), Chief Justice Lamer stated (pp. 274-275) that:

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 this 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. [emphasis in original]

The nature of the additional informational duty that was imposed on the police by the decision of the Supreme Court of Canada in the *Prosper* case was further explored by the Ontario Court of Appeal in *Smith* (1999). In this case, two police officers went to Florida to interview Smith, who had been charged with first degree murder in connection with two homicides that had occurred in Ontario. One of the officers notified Smith of his right to counsel, and the caution contained specific information about the toll-free number that was available for the purpose of putting the accused “in contact with a legal aid duty counsel for free legal advice right now.” At this point, Smith indicated that he wished to call that number and consult with duty counsel. The police officer indicated that he was not sure whether the 1-800 number would work in the United States, and that it might be necessary to call counsel in Ontario and request that they call them back. However, the officer clearly stated that he would be obliged to terminate the interview should Smith wish to speak to counsel. The accused then indicated that he wished to continue the interview without a lawyer, and that he did not wish to contact one at that moment. Shortly after, the accused provided the police with a potentially incriminating statement and a blood sample. The accused was convicted of first degree murder and appealed to the Ontario Court of Appeal, which dismissed the appeal. The Court rejected the argument made by Smith’s counsel, to the effect that the police had failed to comply with the “additional informational obligations” imposed on them by the Supreme Court of Canada in the *Prosper* case. Rosenberg J.A. highlighted the fact that this was not a case in which the accused had diligently attempted to reach counsel but had been thwarted in the attainment of his objective. Indeed, only a very short period had passed from the moment that Smith had been fully informed of his section 10(b) rights and the moment when he changed his mind, and indicated that he no longer wished to consult with a lawyer. Furthermore, the police had repeatedly indicated that the interview would be terminated should Smith wish to contact counsel. In the words of Justice Rosenberg:

[t]he circumstance of the detainee who has repeatedly attempted to access counsel and has been frustrated in that attempt over a significant period is entirely different from this case. Here we have an accused who changed his mind without making any attempt to be reasonably diligent and whom the judge had found to be “eager to broadcast” history. [para.26]

2.3.8 The Duty Of The Police To Provide A Reasonable Opportunity For The Suspect To Contact Counsel

If an arrested or detained suspect exercises a reasonable degree of diligence in asserting his or her right to counsel, then the police are undoubtedly required to provide a reasonable opportunity for the suspect to contact a lawyer and, in the meantime, to refrain from eliciting any evidence from the suspect. Furthermore, the police are required to inform the suspect of his or her right to be afforded a reasonable opportunity in which to contact counsel.

In *Luong* (2000), the Alberta Court of Appeal summarized the current jurisprudence in the following manner:

Once a detainee asserts his or her right to counsel and is duly diligent in exercising it (having been afforded a reasonable opportunity to exercise it), if the

detainee indicates that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, the state authorities have an additional informational obligation 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” (sometimes referred to as a “*Prosper* warning”) ... Absent such a warning, an infringement is made out. [para. 12]

The reasonable opportunity may well embrace a period during which the suspect may consult with more than one counsel, on more than one occasion. In *Whitford* (1997), for example, the accused was informed of his Charter rights after being arrested on a charge of sexual assault. At the police station, Whitford indicated that he wished to speak to a lawyer. The accused did talk to a lawyer by telephone and, “almost immediately thereafter,” he informed the police that he did not want to talk to them about the alleged offence “until I talk to legal aid” (p. 58). However, the police continued their questioning, and Whitford made a statement that the Crown was later permitted to introduce at the trial in order to impeach the credibility of the accused on cross-examination. The Alberta Court of Appeal ultimately ruled that the statement should not have been admitted, since it had been obtained in violation of Whitford’s section 10(b) right to counsel. Berger J.A. noted (p. 59) that the only reasonable interpretation of Whitford’s statement to the police – that he did not wish to be subjected to questioning “until I talk to legal aid” – was that “he still wished to pursue his s. 10(b) rights before he spoke to the police” and that “it does not follow that because an accused has contacted a law office, he has exhausted his s. 10(b) rights.” In Justice Berger’s view, Whitford had been reasonably diligent in exercising his right to counsel, and there was no rule of law that would restrict the section 10(b) right to one solitary phone call to a law office:

An accused who wishes to make two or three successive phone calls in the exercise and pursuit of his right to retain and instruct counsel must be permitted to do so unfettered by police questioning. The relevant inquiry after an initial phone call to a law office is not simply whether the accused did or did not speak to a lawyer. After all, the lawyer might tell the accused that he is too busy, too expensive, or simply not interested in acting for and advising the accused. He might even recommend that the accused contact Legal Aid. An accused is entitled to a reasonable opportunity to have meaningful contact and advice from counsel. [p. 59]

2.3.9 The Police May Proceed Immediately With Interrogation Of A Suspect Who Has Unequivocally Waived His Or Her Right To Counsel

If a detained or arrested suspect has unequivocally waived the right to counsel, the police are entitled to proceed immediately with questioning or the administration of a breathalyzer test (once the appropriate demand has been made). In *McKeen* (2001), for example, the accused had been detained (at 10:30 p.m.) in relation to an investigation of impaired driving. At the scene of

his detention, McKeen had been given three “complete Charter warnings,” that met all the section 10(b) informational requirements that had been specified by the Supreme Court of Canada in *Bartle* (1994). At no time did McKeen indicate that he wished to exercise his right to retain and instruct counsel. In fact, he was being “intentionally uncooperative” (para. 67). The police officer then issued a breathalyzer demand, which McKeen twice refused. After the accused had been transported to the cells at the police station, he asked to contact counsel, which he was permitted to do. After a telephone conversation with counsel, McKeen informed the police officer that he had changed his mind and now wished to take the breathalyzer test. The officer indicated that he had already accepted his refusal to blow, and McKeen was subsequently convicted of refusing a breathalyzer demand, contrary to section 254(4) of the *Criminal Code*. Before the Nova Scotia Court of Appeal, McKeen’s counsel asserted that there had been a violation of McKeen’s section 10(b) rights because the police officer had not given him a reasonable opportunity in which to speak to counsel before accepting his refusal. The majority of the Court rejected this assertion. In the view of Flinn J.A.:

... I would agree that if the appellant had given the constable any indication that he wished to consult with a lawyer, the constable, in the circumstances of this case, should have taken the appellant to the detachment, given him a reasonable opportunity to consult with a lawyer, and refrain from giving the breathalyzer demand until the appellant had that reasonable opportunity. However, I know of no authority for the proposition that where, as here, the appellant repeatedly refused to invoke his right to counsel, that the constable is required to wait until he gets the appellant to the detachment before he gives the breathalyzer demand, or before the appellant has to give his response to a breathalyzer demand. [para. 72, emphasis added]

Similarly, in *Gormley* (1999), the accused had been charged with second degree murder. After having been advised of his right to retain and instruct counsel without delay, Gormley indicated that he did not wish to contact a lawyer immediately. However, after approximately one hour of questioning by the police, the accused asked for the opportunity to contact counsel. The police assisted Gormley in contacting the lawyer of his choice by telephone. The accused spoke to the lawyer – in private – for about three minutes. Counsel informed Gormley of his right to silence and recommended that he say nothing to the police. The police then resumed the interrogation of the accused, who told them that he had been told to say nothing and to wait for the arrival of his counsel at the police station. The accused, nevertheless, made some oral statements before his counsel arrived at the station. Gormley was convicted of second degree murder. During his appeal to the Appeal Division of the Prince Edward Island Supreme Court, his counsel asserted that his section 10(b) rights had been violated, insofar as he had been denied a reasonable opportunity to consult legal counsel. However, the Court dismissed the appeal. Chief Justice Carruthers emphasized that Gormley had been given every reasonable opportunity to contact counsel by telephone. At first, he had knowingly declined that opportunity, but later he availed himself of it and spoke to his lawyer for some three minutes. Carruthers C.J. also ruled that there was no violation of section 10(b) during the interrogation that took place following the phone call and prior to the arrival of Gormley’s counsel at the police station:

The appellant exhibited a desire to talk to the police about certain matters despite the advice he had been given by [his lawyer]. There was no change in the circumstances that required the police to cease questioning the appellant until he had a further opportunity to consult with [his lawyer] when he arrived at the Detachment. The police did not employ any tactics to deny the appellant of his right of choice or to deprive him of an operating mind. There was, therefore, no violation of s. 10(b) of the Charter during the interrogation from the time of the call to [his lawyer] at 7:50 a.m. and [his lawyer's] arrival at the Detachment at 11:02 a.m. despite the fact that the appellant made several assertions during this period to the effect that he was not saying anything or that he had to wait for [his lawyer]. [para. 45]

2.3.10 The Police Must Inform Arrested Or Detained Suspects Of Their Section 10(B) Rights In A Timely Manner

In *Brunczlik* (2000)⁷, the Ontario Court of Appeal emphasized the importance of **the explicit section 10(b) requirement that an arrested or detained person be afforded the right to “retain and instruct counsel without delay and to be informed of that right”** (emphasis added). In this case, the accused, who apparently could communicate only in Hungarian, had been held in custody for almost five hours before he “was finally informed of his right to counsel in a meaningful way.” The Court of Appeal accepted the finding of the trial judge that Brunczlik’s section 10(b) right to counsel had been infringed:

The respondent had been held in custody and, because of the language barrier, held essentially incommunicado for an extended period of time. Had he been informed of his right to counsel in a timely way, he would have had a long period of time to consider whether to exercise his rights since the investigators did not intend to interview him for several hours. In our view, it is speculation that during this period the respondent would not have exercised his right to counsel and it was open to the trial judge to resolve this uncertainty in the respondent’s favour. [para 6]

In *Polashek* (1999), the accused was arrested for possession of marijuana. However, the police did not inform him of his rights under section 10(b) of the Charter until thirteen minutes after the arrest had taken place. In the interim, the police conducted a search of the trunk of his car and found a quantity of drugs. The Ontario Court of Appeal swiftly found that this delay constituted an infringement of Polashek’s rights under section 10(b). In support of this conclusion, Rosenberg J.A. referred to the decisions of the Supreme Court of Canada in *Debot* (1989) and *Feeney* (1997). In particular, Justice Rosenberg quoted (para. 27) a critical principle that had been articulated in the judgment of Lamer J. in *Debot* – namely, that, “immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel.”⁸

⁷ This case involved an appeal by the Crown against a verdict of not criminally responsible on account of mental disorder.

⁸ The Court ruled that the “real” evidence (the items found in the trunk) could be admitted as evidence, notwithstanding the violation of the right to counsel. However, it ordered a new trial to determine whether an inculpatory statement made by the

2.3.11 The Duty Of The Police To Repeat The Section 10(B) Caution Where There Has Been A Significant Change In The Suspect's Legal Status

It is important for the police to bear in mind the need to provide an entirely new section 10(b) caution to a suspect if there has been a significant change in his or legal status. For example, in *McIntosh* (1999), the accused took a polygraph test even though, at this stage in the investigation, he was not a suspect in the homicide that had been committed. After being informed that he had failed the polygraph test, the operator reminded McIntosh of his Charter rights. In a post-test interview, McIntosh then confessed to having pushed the victim over a cliff. Only after questioning the accused for some time did the operator inform him that he was under arrest for first degree murder. McIntosh then repeated the confession to another officer and, at that point, he talked with duty counsel. The Ontario Court of Appeal held that, after McIntosh had admitted to killing the victim, his legal status had changed dramatically and he was then in a state of detention – therefore, at this precise moment, he should have been re-read his rights under section 10(b) of the Charter. The failure of the police to issue McIntosh with such a caution, at the time when his legal status had changed so significantly, meant that McIntosh's later statements to the polygraph operator had been obtained in violation of his right to counsel.

On the other hand, in the case of *Boomer* (2001), the accused was detained for impaired driving following a serious accident. He was informed that his wife (who had been a passenger in his car) had been seriously injured in the accident, and a police officer read Boomer his section 10(b) right to counsel, from a printed card. Boomer indicated that he did not want to talk to a lawyer, and he admitted to drinking. After having been informed that his wife had died, Boomer provided breath samples. Boomer was convicted of impaired driving causing death. During his appeal against this conviction, he contended that he should have been re-advised of his rights under section 10(b) once the police learned of his wife's death. However, the B.C. Court of Appeal held that, since Boomer already knew that his wife was very seriously injured in accident, there was no change in his state of "jeopardy" and, therefore, there had been no violation of his right to counsel.

2.3.12 Exclusion Of Evidence Under Section 24(2) Of The Charter

Section 24(2) of the Charter furnishes Canadian courts with a considerable degree of discretion in reaching a decision on whether or not to exclude evidence that has been obtained as a consequence of a violation of an individual defendant's Charter rights (Stuart 2001, p. 456). More specifically, section 24(2) provides that such evidence "shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." In *Collins* (1987), the Supreme Court of Canada held that there are three sets of factors that should be given prime consideration in the application of the criteria articulated in section 24(2) of the Charter: (i) the fairness of the trial if the tainted evidence is admitted; (ii) the relative gravity of the Charter violation; and (iii) the

accused, between his arrest and the reading of his Charter rights, should be admitted in accordance with the requirements of section 24(2) of the Charter.

effect that the exclusion of the tainted evidence may have on the reputation of the administration of justice (Stuart 2001, p. 492).

Where there has been a violation of an accused person's section 10(b) right to be fully informed of the availability of *Brydges* services in his or her locality, appellate courts have – in most cases – excluded any evidence obtained as a consequence of such a violation. **For example, in *Wydenes* (1999), the accused was convicted of arson, and appealed against his conviction to the B.C. Court of Appeal. At the outset of his interview with the police, the accused had been informed of his right to counsel. However, the caution did not meet the informational requirements articulated by the Supreme Court of Canada in *Bartle* (1994). The Court of Appeal ordered a new trial on the ground that the trial judge should not have admitted certain statements made by the accused after his section 10(b) rights had been violated. Following the Supreme Court's judgment in *Bartle*, the B.C. Court of Appeal stated that an important consideration in the application of section 24(2) of the Charter to a case of this nature is “whether the accused would have acted any differently,” had there not been a violation of the right to counsel (para. 9). In allowing the appeal, Lambert J.A. emphasized (para. 12) that “the burden on the Crown was not discharged to show that the present appellant would have acted in precisely the same way even his rights had not been breached” (para. 9).**

A similar approach was embraced by the Nova Scotia Court of Appeal in *Nickerson* (2001), where the accused had been charged with failing to provide a breath sample, contrary to section 254(4) of the *Criminal Code*. The Court ruled that evidence of the accused's refusal should be excluded because she had not been informed of the *Brydges* services that were available to her. In delivering the judgment of the Court, Saunders J.A. (para.17) quoted a passage from Chief Justice Lamer's opinion in the Supreme Court of Canada's decision in *Cobham*(1994):

The direct connection between the incriminating refusal evidence and the offence creates a strong presumption that its admission would render the trial unfair. That is because the appellant may not have refused to take the breathalyzer test if he had been properly advised under s. 10(b) of his right to duty counsel.

Justice Saunders then proceeded to state that admission of the evidence of the accused's refusal would “bring the administration of justice into disrepute” (para. 19).

In *Whitford* (1997), the question arose as to whether section 24(2) should be employed to exclude evidence that the Crown wished to use solely for the purpose of attacking the credibility of the accused. Whitford had been convicted of the offence of sexual assault, and he subsequently appealed against his conviction to the Alberta Court of Appeal. Following his arrest, Whitford had indicated his desire to speak to “legal aid” but, soon after this request was made, he provided the police with a statement which the Crown later used to impeach him on cross-examination at his trial. The Court of Appeal held that the police had undoubtedly infringed Whitford's section 10(b) right when they failed to refrain from interrogating him before providing him with a reasonable opportunity to contact legal aid. In ordering a new trial for the accused, the Court held that the statement should not have been admitted. Speaking for the majority of the appellate court, Berger J.A. ruled (p. 62) that “incrimination evidence” and

“impeachment evidence” should be treated in exactly the same manner for the purpose of deciding whether such evidence should be excluded under section 24(2) of the Charter. Justice Berger then applied this principle to the case in hand:

I conclude that the Crown’s strategic choice at trial to use the evidence only for impeachment purposes does not lessen the standard for admissibility. Acceptance of a lesser standard would encourage Charter breach in order to achieve tactical advantage at trial. A statement obtained in breach of the Charter for impeachment purposes, it would be thought, is better than no statement at all. In the case at bar, the trial focus on the credibility of the complainant and the Appellant leads me to conclude that it would be unfair to admit the evidence for purposes of cross-examination. [p. 62]

There are relatively few cases in which evidence has been considered admissible at the accused’s trial even though it was obtained in violation of the duty of the police to inform him or her of the availability of *Brydges* services, where they exist. In *Fowler* (1996), the accused had been convicted on a charge of refusing to comply with a demand for a breathalyzer test. The accused had refused twice in response to demands from two different police officers. The first officer had advised the accused of his right to counsel, but had failed to inform him of the availability of legal aid. The accused refused to submit to a breathalyzer test, and indicated that he “wished to contact someone” (para. 3). Fowler was then permitted to use a telephone in private for approximately five minutes. The second officer, the breathalyzer technician, then made a demand for a breath sample and, again, the accused refused. Although the second officer informed the accused “informally” of his right to counsel, no mention was made of the accused’s right of access to duty counsel or to legal aid. The trial judge convicted the accused on the basis of the second refusal. In the view of the trial judge, although the failure to inform Fowler of the right to contact free duty counsel and to apply for legal aid constituted a violation of section 10(b) of the Charter, the evidence of the accused’s failure to provide the breath sample should not be excluded, because “he did avail himself of his right to counsel by making use of a telephone that was presented to him” (para. 5). Marshall J.A., of the Newfoundland Court of Appeal emphasized that, insofar as the applicability of section 24(2) of the Charter was concerned, the “telephone call is central to that inquiry and at the very nub of this appeal” (para. 15). The Court of Appeal held that it was reasonable for the second police officer to assume that Fowler had exercised his right to counsel, since he had taken advantage of the opportunity to use the telephone immediately after having been informed of his right to counsel. The police were under no duty to inquire whether the accused had, in fact, contacted counsel. It was sufficient if they had informed him of his right to counsel and had afforded him the opportunity to contact counsel in private (para. 5).

Justice Marshall warned that the purpose of the Charter was “not to provide a minefield or web of technicalities facilitating escape from responsibility to account for alleged potential acts of criminal activity” (para. 29). In his view, the purpose of section 10(b) is to assure that a suspect who has been detained is granted the opportunity to exercise the right to counsel. In supporting the decision of the trial judge to admit the evidence of the second refusal, Marshall J.A. stated (para. 33) that:

Having concluded that the finding at trial that Mr. Fowler had availed of his counsel right in the circumstances of this case is a sustainable inference to have been drawn and a redressment of the Charter breach in this case, the holding that the s. 10(b) infringement did not merit the evidence's exclusion under s. 10(b) must be accepted as reasonable.

Similarly, in *Dimic* (1998), the Ontario Court of Appeal ruled that the violation of the accused's section 10(b) right to counsel was "a minor one." Although Dimic had not been informed of the 1-800 number for legal aid assistance, he had been told by police that a call to a free lawyer could be arranged. Furthermore, the Court of Appeal stated that "the appellant did not wish to consult a lawyer but wanted to give his side of the story" (para. 3). The Court took the view that "the police's failure to fully comply with the informational requirements under s. 10(b) did not affect the appellant's behaviour" (para. 3) and held, therefore, that admission of his statement would not affect the fairness of the trial.

In *Russell* (1996), the accused had been advised of his right to counsel, but not his right to legal aid or the services of duty counsel. Surprisingly, the Saskatchewan Court of Appeal regarded this as only a "technical breach" of the duty mandated by the Supreme Court of Canada in the *Brydges* case (1990).⁹ In rejecting Russell's appeal against conviction for arson, the Court of Appeal ruled that the trial judge had been correct in concluding that she should not apply section 24(2) of the Charter so as to exclude the statements made to the police after the "technical violation" of Russell's rights under section 10(b). On behalf of the Court, Gerwing J.A. stated that:

The appellant continued to speak voluntarily to the police, after being informed 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. [para. 21]

...

... One must consider the fairness of the admission of the evidence and the seriousness of the Charter violation with the exclusion on the integrity of the judicial process to conclude the effect this would have on the repute of the administration of justice. It would appear that the admission would have little or no effect on trial fairness and the Charter violation is trivial, the relevant evidence is frequently admitted. [para. 24]

⁹ It is not entirely clear whether the *Russell* case constitutes a significant precedent insofar as Gerwing J.A. emphasized (para. 15) the fact that the Court could not retroactively apply the requirements articulated by the Supreme Court of Canada in its decision in *Bartle* (1994).

Case	Charge	Time	Issue Examined	Considered a s.10(b) Breach?	Evidence Excluded
Nickerson (2001)	Failing to provide breath sample	After hours	Police did not inform accused of 24 hr. <i>Brydges</i> system.	Yes	Yes
Ferguson (1997)	Impaired driving	After hours	Police did not inform accused of <i>Brydges</i> duty counsel or the 24-hr toll-free number.	Yes	Yes
Genaille (1997)	Robbery	Regular hours	Police did not inform accused of <i>Brydges</i> duty counsel.	No	N/A
Moore (1995)	Impaired driving	No time stated	Police provided the 1-800 number of private lawyer to whom accused actually spoke rather than the <i>Brydges</i> services number.	No	N/A
Mosher (1992)	Impaired driving	No time stated	Police did not inform accused of <i>Brydges</i> services since accused requested to speak to his own lawyer.	No	N/A
Jones (1993)	Impaired driving	After hours	Police did not inform accused of <i>Brydges</i> services since accused requested to speak to his own lawyer.	No	N/A
Davis (1999)	Kidnapping Sexual assault Robbery	No time stated	Police advised accused of existence of 24-hr toll-free number, and that if he wished to contact duty counsel, he would be given the number at police station.	No	N/A
Poudrier (1998)	Impaired driving	No time stated	Police advised accused of existence of 24-hr toll-free number but did not furnish the number.	No	N/A
Chisholm (2001)	Impaired driving	After hours	Police did not properly inform accused about duty counsel being free or provide number to contact counsel – therefore accused thought he would have to pay.	Yes	Yes
Wallace (2002)	Impaired driving Refusal	Regular hours	Police advised of existence of free duty counsel but did not provide the 24-hr toll-free number.	No	N/A
Littleford (2001)	Impaired driving	After hours	Police assisted accused in contacting <i>Brydges</i> duty counsel but made no extra efforts to contact accused private lawyer.	No	N/A
<i>Eakin</i> (2000)	Sexual assault Robbery	No time stated	Police assisted accused in contacting <i>Brydges</i> duty counsel but made no extra efforts to contact accused's private lawyer.	No	N/A
<i>Girard</i> (1993)	Impaired driving	After hours	Police assisted accused in contacting <i>Brydges</i> duty counsel	No	N/A

Case	Charge	Time	Issue Examined	Considered a s.10(b) Breach?	Evidence Excluded
			but could not find a French-speaking lawyer.		
<i>Jutras</i> (2001)	Impaired driving	After hours	After police properly informed accused of <i>Brydges</i> services, police did not further assist accused in determining whether or not to call counsel.	No	N/A
<i>Wydenes</i> (1999)	Arson	Regular hours	After police properly informing accused of <i>Brydges</i> services, police did not further assist accused in determining whether or not to call counsel.	Yes	Yes
<i>Small</i> (1998)	Sexual assault	After hours	After police properly informed accused of <i>Brydges</i> services, police did not further assist accused in determining whether or not to call counsel.	Yes	Yes
<i>Kennedy</i> (1995)	Impaired driving	After hours	Police did not provide privacy, therefore accused did not contact counsel.	Yes	No
<i>Parrill</i> (1998)	Impaired driving	After hours	Police did not inform accused of the right of privacy.	No	N/A
<i>Leedahl</i> (2002)	Impaired driving	After hours	Police properly advised accused of <i>Brydges</i> services, but did not repeat caution at the police station.	No	N/A
<i>Smith</i> (1999)	First degree murder	Regular hours	Police provided proper <i>Brydges</i> caution, but after accused asserted his rights and then changed his mind, police did not further assist accused in reaching <i>Brydges</i> counsel.	No	N/A
<i>Luong</i> (2000)	Impaired driving	Regular hours	Accused was given proper caution but did not call lawyer during a period of 15 minutes – police then asked to take breathalyzer test..	Sent for a new trial	N/A
<i>Whitford</i> (1997)	Sexual assault	Regular hours	Accused spoke to a lawyer, but stated that he wanted to further wait to talk to a legal aid lawyer before talking to the police – Police did not hold off questioning..	Yes	Yes
<i>McKeen</i> (2001)	Refusal to provide breath sample	After hours	Accused informed of duty counsel and offered 1-800 number to contact counsel – officer then made a breathalyzer demand.	No	N/A
<i>Gormley</i> (1999)	2 nd Degree murder	After hours	Accused spoke with counsel. Accused made self-incriminating statements before his counsel arrived at the police station.	No	N/A

Case	Charge	Time	Issue Examined	Considered a s.10(b) Breach?	Evidence Excluded
<i>Brunczlik</i> (2000)	No charge stated	Time not stated	Police failed to properly advise accused of s.10 (b) rights until five hours later.	Yes	Yes
<i>Polashek</i> (1999)	Possession of marijuana	Time not stated	Police failed to promptly inform accused of s. 10(b) rights. In the meantime, police conducted a search of his car and confiscated evidence.	Yes	Yes
<i>McIntosh</i> (1999)	1 st Degree murder	Regular hours	Police failed to repeat caution after there was a significant change in the nature of the charges.	Yes	Yes
<i>Boomer</i> (2001)	Impaired driving causing death	After hours	Police failed to repeat caution after the victim of the car accident died.	No	N/A
<i>Fowler</i> (1996)	Refusal to provide breath sample	No time stated	Accused not informed of legal aid or <i>Brydges</i> services – accused made a telephone call – police assumed accused contacted lawyer.	Yes	No
<i>Dimic</i> (1998)	Charge not stated	Time not stated	Accused not informed of toll-free number but was told that a call to a free lawyer could be arranged.	Yes	No
<i>Russell</i> (1996)	Arson	Regular hours	Accused not informed of existence of legal aid.	Yes	No
<i>Noel</i> (2001)	1 st Degree murder	Regular hours	Did the accused have the capacity to understand?	No	N/A

3.0 THE *MIRANDA* CAUTION IN THE UNITED STATES: AMERICAN EXPERIENCE WITH THE MODEL ADOPTED BY THE SUPREME COURT OF CANADA IN THE *BRYDGES* CASE

3.1 Introduction

The decision of the Supreme Court of Canada in *Brydges* (1990) established that the police have a duty to inform detained or arrested suspects not only of their right to retain and instruct counsel, but also of their right to gain access to legal aid and 24-hour duty counsel (where such a program exists). In addition, the *Brydges* case established that a failure by the police to provide this information constituted a violation of a suspect's right to counsel under section 10(b) of the *Canadian Charter of Rights and Freedoms* and, as a consequence, it was open to the courts to hold that any evidence obtained by means of such a violation could be excluded from the suspect's trial, under section 24(2) of the Charter. The underlying approach adopted by the Supreme Court of Canada in *Brydges* is strikingly similar to that which was espoused by the U.S. Supreme Court in the well-known case of *Miranda v. Arizona* (1966). Therefore, in order to develop a more complete understanding of the potential impact of the *Brydges* decision on law enforcement practices within Canada, it is necessary to undertake a brief examination of the American experience with the implementation of the *Miranda* decision over the past thirty years or so.

3.2 The *Miranda* Decision

In the case of *Gideon v. Wainwright* (1963), the Supreme Court of the United States established the right of accused persons, under the Sixth Amendment to the United States Constitution, to have counsel appointed for them if they are too poor to hire a lawyer for themselves (Jacobs 2001; 10; Pitts 2001; Uelmen 1995). Just three years later, in *Miranda v. Arizona* (1966), the Supreme Court turned its attention to the Fifth Amendment guarantees against self-incrimination, and established the right of persons who are in police custody to be specifically informed of their right to consult a lawyer, and of their right to have a lawyer appointed for them should they not have the financial means to hire one for themselves (Crawford 1995). The *Miranda* decision required that the police inform a suspect who has been arrested or detained of four key issues: the right to remain silent; the principle that anything the suspect says may be used in evidence against him or her in a court of law; the right to a lawyer; and, if the suspect cannot afford a lawyer, the right to have a lawyer appointed before an interrogation commences.

The *Miranda* decision represented a significant departure from the previously established jurisprudence concerning police interrogation. Before *Miranda*, confessions were ruled inadmissible only if they had been obtained involuntarily (by threats, coercion, or promises). After *Miranda*, confessions have generally been excluded as evidence if the appropriate warnings have not been given to the suspect (Hendrie 1997). *Miranda* is undoubtedly one of the most widely known decisions ever made by the Supreme Court of the United States. Indeed, in *Dickerson v. The United States* (2000), Chief Justice Rehnquist stated (at p. 443), that "*Miranda* has become embedded in routine police practice to the point where the warnings have become

part of our national culture.” Furthermore, it would seem that police officers in the United States routinely comply with the requirements articulated in the *Miranda* decision. For example, in one study, Leo (1996) found that detectives provided the necessary *Miranda* warnings in every case in which they were legally required to do so.¹⁰ Furthermore, Leo (1996) has suggested that the *Miranda* decision has led to an increasing degree of professionalization of the police in the United States¹¹ (see also, Leo 2001; Thomas and Leo 2001). The findings in the present study suggest that police officers in Canada believe that the *Brydges* caution is administered appropriately in all cases of arrest and detention, although suspects themselves may assert that the degree of compliance with the Supreme Court of Canada’s requirements is somewhat less than universal.

3.3 The *Miranda* Requirements As Constitutional Imperatives

In *Dickerson v. United States* (2000), the Supreme Court of the United States ruled that the *Miranda* warnings constituted constitutional requirements that could not be overruled by an Act of Congress. As Chief Justice Rehnquist stated at the beginning of the opinion of the Supreme Court (at pp. 431-432):

In *Miranda* ... we held that certain warnings must be given before a suspect’s statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petrowski (2001) has asserted that the *Dickerson* case will have little impact on law enforcement practices in the United States since the nature of the *Miranda* warnings has remained unchanged. Furthermore, he also suggests that, after *Dickerson*, those law enforcement officers who intentionally violate the *Miranda* requirements will now render themselves vulnerable to civil suits alleging a violation of rights under the federal Constitution. Nevertheless, it is noteworthy that, in both Canada and the United States, the highest court of the land has ruled that the police are required to furnish arrested or detained persons with certain, prescribed information about their right to counsel and that these requirements are constitutional imperatives.

¹⁰ Leo (1966) also found that suspects who waived their *Miranda* rights were twice as likely to have their case disposed of by means of a plea bargain than those suspects who resorted to their *Miranda* rights.

¹¹ There is some evidence that increasing professionalism on the part of the police may reduce the incidence of abusive conduct on the part of individual officers (Cao and Huang 2000).

3.4 Differences Between The Canadian And U.S. Jurisprudence

McCoy (2000, p. 635) has suggested that the warnings given to suspects in Canada, after the *Brydges* (1990) and *Bartle* (1994) cases, are “more expansive than *Miranda* warnings,” and that “the Canadian warnings are more clear in informing the suspect of their right to telephone a lawyer.” More specifically, the Canadian warnings include the question of whether a suspect wishes to call a lawyer “right now,” whereas the *Miranda* warnings “end with a suggestive question asking whether the suspect will answer questions without an attorney” (McCoy 2000, p. 635).

It is not entirely clear whether there is a significant difference *in practice* between the Canadian and U.S. jurisprudence, in relation to the thorny issue of whether an infringement of the right to counsel should be followed by the exclusion of any evidence that has been garnered as a consequence of such a violation. In the United States, it was initially believed that the violation of an accused person’s right to counsel under the Fifth Amendment should result in the *automatic* exclusion of any *statements* obtained thereby.¹² However, over time, a number of exceptions have been recognized to this principle, and it is by no means certain that a violation of the *Miranda* caution will prompt a trial judge to exclude statements obtained thereby (Philips 2001; Stuckey, Roberson and Wallace 2001, p. 62). On the other hand, in Canada, it is clear that the trial judge has a *discretionary power*, under section 24(2) of the *Canadian Charter of Rights and Freedoms*, as to whether or not to exclude evidence obtained in violation of the accused’s right to counsel (Harvie and Foster 1992). In general, it appears that Canadian courts are strongly inclined to exclude statements and other forms of “conscripted” evidence (such as breath and blood tests) where they have been obtained in violation of the accused’s section 10(b) rights.¹³

It is important to recognize that the federal right to counsel in the United States “does not apply to blood or breath tests that take place before the initiation of adversary judicial proceedings”¹⁴ (Latzer 2000, p. 158). However, under section 10(b) of the *Canadian Charter of Rights and Freedoms*, an individual who has been detained for the purpose of being subjected to a demand for a breath test, is considered to be “detained” within the meaning of the section and is, therefore, encompassed by the Charter right to counsel without delay (*R. v. Therens*, 1985).

¹² The exclusionary rule does not apply to *physical* evidence that is obtained by means of a *Miranda* violation. In *United States v. Sterling* (2002), the U.S. Court of Appeals for the Fourth Circuit ruled that the decision of the U.S. Supreme Court in *Dickerson* (2000) had not changed this basic principle of the law of evidence.

¹³ See review of the case law, *supra*.

¹⁴ There may, however, be such a right under the Constitution of an individual state (Latzer 2000).

3.5 *Miranda* And Clarifying Questions About The Waiver Of The Right To Counsel

In *Davis* (1994), the U.S. Supreme Court ruled that, where suspects are equivocal in indicating whether or not they want a lawyer, there is no requirement that the police cease questioning the suspect. However, in delivering the opinion of the Court, Justice O'Connor stated (1994, pp. 461-462) that:

... when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. ... Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

While the United States Supreme Court has apparently rejected the option of imposing a constitutional requirement that police officers ask "clarifying questions," when there is some doubt as to whether a suspect wishes to waive his or her right to counsel, the Court clearly recognizes that such questions constitute an important element of sound police practice. One of the findings of the present study is that, as far as Canada is concerned, there is some uncertainty as to whether suspects genuinely understand the *Brydges* caution, which is issued to them by the police at the time of their arrest or detention. The use of clarifying questions may well provide a basis for police officers to ensure that suspects have sufficiently comprehended the contents of the warning that is administered to them. For example, it is open to Canadian courts to establish a legal requirement that clarifying questions should be asked by the police – whenever there is any reason to apprehend that a suspect is severely impaired by drugs and or alcohol, developmentally disabled, mentally disordered, lacking fluency in English or French, or hearing-challenged.

3.6 Impact Of *Miranda* On Law Enforcement

The impact of the *Miranda* decision on the effectiveness of law enforcement practices has been open to some debate (Leo 1996; Thomas and Leo 2001). For example, Crawford (1995, p. 27) has suggested that, from a practical point of view, the consequence of administering a *Miranda* warning is that the police may be precluded from initiating any further interrogation of a suspect without the presence of counsel. In this respect, it is significant that a study by Leo (1996) reported that almost 25 percent of the suspects chose to invoke their *Miranda* rights, and thereby brought police interrogation to a close or prevented it from taking place altogether.

Cassell and Fowles (1998) have asserted that that the decision in *Miranda* effectively "handcuffed the police by imposing restrictions on their methods of interrogation." They point to a sustained fall in the national crime clearance rates as empirical evidence in support of this

view. Furthermore, Cassell and Hayman (1996, p. 871) reported that the confession rate fell from between 55 and 60 percent, prior to the *Miranda* decision, to 33.3 percent after *Miranda*.

In Canada, the impact of the *Brydges* decision on actual police practices and on clearance rates has not been subjected to empirical analysis. However, in the present study, it is significant that respondents did not refer to *Brydges* as an event that has placed onerous restrictions on the ability of the police to enforce the law. Part of the explanation for the absence of critical views of the *Brydges* case almost certainly lies in the fact that the right to be informed of the right to retain and instruct counsel without delay was entrenched as a constitutional right with the enactment of the *Canadian Charter of Rights and Freedoms* in 1982. The *Brydges* decision merely modified the content of the informational requirements imposed on Canadian police officers by the Charter. On the other hand, prior to the *Miranda* decision, the United States Supreme Court had not imposed a legal requirement that the police would provide suspects with specific information about the right to counsel before they attempted to interrogate them (Stuckey, Roberson and Wallace 2001, p. 60). It is scarcely surprising, therefore, that unlike the *Brydges* case, *Miranda v. Arizona* was widely perceived as bringing about a sea change in police practices in relation to the interrogation of suspects across the United States.

4.0 THE CAPACITY OF AN ARRESTED OR DETAINED SUSPECT TO UNDERSTAND THE CONTENTS OF A POLICE CAUTION

4.1 Introduction

Many of the individuals who are arrested or detained by the police are significantly impaired by the use of alcohol and/or other drugs, mentally disordered, developmentally disabled, or of limited education. Furthermore, the very process of arrest or detention is one that is likely to engender strong emotions, fear and – for many – a sense of disorientation. An arrest may involve the use of force (e.g., handcuffs) and a suspect may feel physically uncomfortable or may even have received injuries. Finally, the process of arrest may well generate a sense of profound embarrassment on the part of the suspect. In these circumstances, it is not entirely clear whether suspects have the capacity to fully comprehend the contents of a police statement about the availability of legal aid and access to duty counsel. Even if the right to counsel is restated by a peace officer in the confines of a police station, the effects of drug impairment, mental disorder, developmental disability, limited education, fear or disorientation may still be operating in a manner that renders it unlikely that the suspect will be capable of processing the information in a meaningful way. In particular, there is always a strong likelihood that a suspect who is involved in heavy substance abuse will suffer from amnesia and be unable to recall all – or parts – of any police caution delivered to him or her.

An important theme in the present study is the need to recognize that, even if there is absolute compliance by the police with the informational requirements of the *Brydges* caution, the right to counsel means very little in practice if a suspect does not adequately comprehend the contents of the warning read to him or her by the police. This chapter, therefore, examines the relevant Canadian jurisprudence and then proceeds to explore the empirical literature that bears on this critical issue.

4.2 The Canadian Jurisprudence

In the leading case of *Evans* (1991), the Supreme Court of Canada ruled that the police must inform suspects of their right to counsel **in terms that they can understand**. In *Evans*, the accused was “hampered by a mental deficiency bordering on retardation,” and the psychiatric evidence indicated that “the accused was easily influenced” (1991, p. 304). Although the police were aware of the accused’s mental condition, they failed to make reasonable efforts to ensure that he actually understood when – and how – he was entitled to exercise his right to counsel. The Supreme Court of Canada ruled that the accused’s section 10(b) rights had been infringed and, therefore, certain incriminating statements made to the police were excluded by virtue of section 24(2) of the Charter. In the words of Justice McLachlin:

A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to *communicate* the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. ... But where, as here, there is a

positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding. [p. 305]

This approach was later reinforced in the majority judgment of the Supreme Court of Canada in *Bartle* (1994), in which Chief Justice Lamer emphasized that the “authorities will have to take additional steps to ensure that the detainee comprehends his or her s. 10(b) rights” whenever they are aware of “circumstances which suggest that a particular detainee may not understand the information being communicated to him or her” (p. 302). However, this ruling has been interpreted as meaning that it is only when the police are actually cognizant of a defect in the capacity of a suspect to understand the information conveyed to them that they are under a duty to go beyond the mere articulation of a prescribed formula. For example, in *Kennedy* (1995), the accused had been taken to a hospital following a motor vehicle accident. A police officer made a demand for samples of Kennedy’s blood, and she simultaneously informed him of his right to counsel. The accused indicated that he understood this communication and gave the required sample. The attending physician indicated that he believed that Kennedy was “lucid at the time” and “knew what was being asked of him” (p. 176). However, there was also evidence to the effect that the accused complained of head injuries and his blood sample revealed a blood-alcohol concentration of 240 mg of alcohol in 100 ml of blood. For his part, the accused claimed that he had “no precise recollection of what transpired” after the police arrived at the scene of the accident. He stated that he had “a lot of pain in my head” and asserted that he could remember neither the demand for a blood sample nor the advice as to his right to counsel (p. 176). The trial judge dismissed the charge of “over 80” – in part – on the basis that the accused did not have an “adequate appreciation or understanding of his right to contact counsel” (p. 177). The Newfoundland Court of Appeal ultimately allowed an appeal by the Crown and ordered a new trial.

On behalf of the majority of the Court of Appeal, Marshall J.A. ruled that the trial judge had erred, insofar as he had focused exclusively on the question of the nature and extent of Kennedy’s understanding of the communication made by the police in relation to his right to counsel, rather than on the issue of whether the police officer had adequately performed her duty to inform the accused “in comprehensible terms of the essential substance of his right to counsel.” According to Justice Marshall:

The detainee’s right, therefore, is to be properly informed. **There is no absolute protection against a lack of appreciation of the information conveyed. The fulfillment of the informational component of the right to counsel does not hinge upon whether the detainee understood the communication but whether the essential elements of the right were adequately communicated.** It is not therefore, so much a question of whether the message was comprehended, but if it was comprehensible. [p. 181, emphasis added]

Justice Marshall did proceed to state that a suspect’s comprehension may be a “relevant factor” in determining whether the police had fulfilled their “informational obligation.” However, it should not be taken into account unless there are indications that should alert the police to the likelihood that the suspect has “not sufficiently understood or appreciated” the right to counsel.

In his view, “in the absence of signs of lack of comprehension, however, adequate communication will satisfy the requirements” (p. 182). Given the incontrovertible facts that the accused was severely intoxicated and complaining of a head injury, it is interesting to speculate how obvious the symptoms of impairment must be to the police before they are placed under an obligation to ensure that a suspect fully understands the nature of his or her rights to counsel under section 10(b) of the Charter.

It is also important to bear in mind that the Supreme Court of Canada has set a comparatively low threshold for the purpose of determining whether accused persons or suspects have sufficient understanding to exercise or waive their right to counsel under section 10(b) of the Charter. The leading case in this respect is *Whittle* (1994). Although *Whittle* was suffering from schizophrenia and experienced auditory hallucinations that drove him to make incriminating statements to the police, he was nevertheless considered to have the “*limited cognitive capacity*” that is required for a making a valid waiver of the right to counsel. The so-called “limited cognitive capacity” test had first been articulated by the Ontario Court of Appeal in *Taylor* (1991), a case raising the issue of the accused’s fitness to stand trial. However, in delivering the judgment of the Supreme Court of Canada in *Whittle*, Justice Sopinka ruled that judges should apply the same standard in determining whether accused persons have the mental capacity to exercise or waive *any* of their pre-trial rights (including the right to counsel). In the words of Justice Sopinka:

The operating mind test ... includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying. This includes the ability to understand a caution that the evidence can be used against the accused.

In exercising the right to counsel or waiving the right, the accused must possess the limited cognitive capacity that is required for fitness to stand trial. The accused must be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he or she can dispense with counsel even if this is not in the accused’s best interest. It is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence. The accused must have an operating mind as outline above. [p. 31, emphasis added]

In essence, provided there is an “operating mind,” it does not matter that the accused may act irrationally because of a mental disorder or may be lacking in the ability to analyze situations with any degree of mental acuity because of a developmental disability or brain damage. He or she will, nevertheless, be considered competent to waive the right to counsel. If the reasoning in the *Whittle* case is applied to the context of a police caution concerning the accused person’s right to retain and instruct counsel and the right to access whatever *Brydges* services are available, then it is clear that any duty that may be placed on the police, to ensure that the accused understands the contents of the caution, is not a particularly onerous one. In this respect, it is significant that an eminent Canadian legal authority, Don Stuart, has suggested (2001, pp. 287-288) that, in cases such as *Bartle* (1994), the Supreme Court of Canada should have grasped

the opportunity to expand the scope of the duty to require the police to “take steps to ensure that the detainee truly understands” the information communicated to him or her.

An instructive example of the consequences of setting such a low threshold for capacity to understand a police caution is provided by the case of *Noël* (2001). Here, the accused was charged with first degree murder. Before making incriminating statements to the police, Noël had been informed of his rights under section 10(b) of the Charter, and had declined to seek the services of counsel. The evidence was that Noel could neither read nor write, and even a Crown witness asserted that Noël had a “borderline” IQ of 75 (para. 102). The Québec Court of Appeal, nevertheless, upheld the trial judge’s finding that Noël had “sufficient cognitive capacity to understand the warning,” and that “he did understand and knowingly decided not to consult a lawyer before giving his statements” (para. 47).

There is an interesting suggestion in the judgment of Chief Justice Lamer in the Supreme Court decision in *Latimer* (1997), to the effect that there may be certain circumstances in which the police should be required to provide more specific information to an accused or detained person who manifests special needs. In this respect, the Chief Justice pointed to the examples of a visually impaired person or an individual, “whose facility in the language of the jurisdiction is not sufficient to understand the information provided about duty counsel” (para. 38). However, the Chief Justice did not appear to extend this duty to those suspects who have a developmental disability or a mental disorder. It might well be argued that the Supreme Court of Canada should move towards adoption of the legal principle that **the precise extent of the duty of the police to provide information should vary with the ability of the accused to take advantage of the information provided**. If such a principle were to be adopted, then the police would need to obtain the necessary training to ensure that disabled persons, and those who do not speak the language used by the police, fully understand the nature and scope of the *Brydges* services that may be available to them in any given jurisdiction.

In Chapter 3, the point was made that the Supreme Court of the United States had discussed the possibility of requiring police officers to ask “clarifying questions” whenever there is any doubt about the true intentions of a suspect who is apparently prepared to waive his or her right to counsel. There is undoubtedly some value in exploring the advantages and disadvantages of requiring the police in Canada to ask such clarifying questions whenever there is some uncertainty as to whether or not the accused fully understands the information conveyed by the police in the *Brydges* caution. It would certainly be open to the courts to expand the scope of the duty of police officers to provide suspects with information about their rights under section 10(b) of the Charter. A review of the empirical literature inexorably leads to the conclusion that the issue of an arrested or detained suspect’s capacity to understand a police caution is one that should by no means be taken lightly.

4.3 Review Of The Empirical Literature

4.3.1 Impact Of Substance Abuse

Substance abuse is considered to be one of the most common problems experienced by those who come into conflict with the criminal justice system. Indeed, the abuse of alcohol and other drugs may well cause neurological deficits that facilitate aggression and increase the risk that these individuals will commit acts that require the intervention of agents of the criminal justice system (Boland, Henderson and Baker 1998). Furthermore, if an individual engages in substance abuse and assumes care and control of a motor vehicle, then he or she is committing a serious criminal offence that is considered to be a major target for law enforcement operations in Canada.

The extent of substance abuse among offenders in Canada has been demonstrated to be consistently high. For example, a study conducted by Boland, Henderson and Baker (1998) found that at least two thirds of the federal inmate population in Canada suffers from substance abuse problems. Likewise, Brink et al. (2001) found that 75.7 percent of a sample of recently admitted federal inmates in Canada had a life-time history of substance abuse, and similar findings have been reported by Bland et al. (1990) and Roesch (1995) in relation to inmates of provincial correctional facilities in Canada.

Alcohol is the drug that is most likely to have been ingested by offenders immediately prior to the commission of a criminal offence (Pernanen et. al. 2002, p. 15), although it is important to recognize that alcohol is often taken in combination with other drugs – both legal and illegal (Pernanen et al. 2002, p. 72). The prevalence of alcohol use was examined by Pernanen et al. (2002), who found a high incidence (79 percent) of alcohol use among newly arrived federal inmates during a six-month period prior to arrest, while illicit drug use was found to have taken place to a lesser, but by no means insignificant, degree in 52 percent of the inmates in the sample (Pernanen et al. 2002, p. 49). Likewise, Brink et al. (2001, p. 349) found that, in their sample of newly-admitted federal inmates, 59.4 percent had experienced life-time alcohol abuse dependence, 31.7 percent cocaine dependence, and 10.9 percent opiate dependence.

Although there is a paucity of Canadian studies that have examined the prevalence of intoxication use among accused persons *at the point of their arrest or detention*, there is a recent Canadian study that has examined the issue in some depth. This study, conducted by Pernanen et al. (2002) examined a sample of individuals who had been arrested or detained in 26 communities across Canada during a one-month period (May to June 2000). The study involved questioning police officers as to whether specific arrestees were abusers of alcohol or other drugs. The researchers discovered that some 40 percent of male arrestees and 33 percent of female arrestees were considered to be alcohol abusers (Pernanen et al. 2002, p. 72). The following table briefly outlines the findings of the study:

Arrestees in 14 Canadian Cities: Proportions Assessed to be Abusers of Drugs or Alcohol by the Arresting Police Officer			
Assessed to be abuser of...	Males (1,544)	Females (334)	TOTAL (1,878)
Alcohol only	25	17	23
Drugs and Alcohol	15	16	16
Drugs only	15	15	15
Not assessed to be abuser	45	53	46
TOTAL	100%	101%	100%

* Based on assessments by the arresting police officer. The questions asked were “Is the arrestee an abuser of alcohol?” and “Is the arrestee an abuser of one or more illicit drug?”

Source: Pernanen et al. 2002, p. 72.

This study underscored the relationship between the significant number of impaired driving cases and the high percentage of alcohol abusers reported by the police (Pernanen et al. 2002, p. 73). In terms of the effects of alcohol, it is critical to recognize that it is well established in the literature that amnesia is a frequent symptom of intoxication (Coles and Jang 1996; Cunnien 1986; Wilkinson 1997). In light of the empirical knowledge that exists in relation to alcohol and drug abuse, it is certainly questionable whether a suspect who is impaired by alcohol and/or other drugs has the present mental capacity to understand the contents of the police caution. Equally concerning is the fact that it is highly unlikely that the suspect will be able to fully understand the legal advice provided by *Brydges* duty counsel. Clearly, this is of critical relevance, since the review of the Canadian case law, in which the *Brydges* caution constitutes a major issue, demonstrated that the majority of the cases involved suspects who were being investigated for impaired driving – cases that revolved primarily around alcohol abuse.

4.3.2 The Impact Of Mental Disorder

Another significant characteristic of the criminal justice system in Canada is the high rates of life-time **mental disorder** that have been discovered among prison inmates (Arboleda-Florez 1998; Bland et al. 1998; Brink, Doherty and Boer 2001; Ministry of Public Safety and Solicitor General 2001; and Zapf, Roesch and Hart 1996). It is also noteworthy that research has established that the rates of serious mental disorder are much greater among prison inmates than among members of the general population (Bland et al. 1998, p. 278 and Brink, Doherty and Boer 2001, p. 353).¹⁵ Similar findings have emerged in relation to the female inmate population in Canadian prisons (CSC 1998 cited in Mason 2001, p.135).

Considerable concern has been expressed about the increase in the number of mentally disordered individuals who are entering the Canadian correctional system (Bland et al. 1998, p. 277 and Porporino 1994, p.1). It appears that this increase is, in part, a result of the decrease in the availability of beds in those institutional facilities that provide ongoing hospital care to psychiatric patients (Bland et al. 1998, p. 277 and Endicott 1991, p. 8). Consequently, many of the persons who have been displaced from these institutional facilities may now be accessing

¹⁵ For example Brink et al. (2001, p. 349) reported the incidence of a rate of schizophrenia and other psychotic disorders of 8.4 percent among their sample as compared to a rate of only 0.5 percent in the general population. Similarly, the researchers discovered that 30.2 percent of the inmate sample had a lifetime mood disorder as compared with only 7.1 percent of members of the general population.

mental health resources through the criminal justice system, although it has been suggested that the so-called “criminalization hypothesis” constitutes only a partial explanation for the fact that correctional facilities are housing significant number of seriously mentally disordered individuals (Bland et al. 1998, p. 277; Brink et al. 2001; and Teplin 1990 and 2000, p. 12). Vitelli (1993, cited in Zapf, Roesch and Hart 1996, p. 436) has described the nature of the “criminalization hypothesis” in a succinct and forthright manner:

The correctional system may be acting as a gateway to medical, dental, and psychological services that are unavailable to the homeless, resulting in their developing a dependence on the criminal justice system to receive these services.

Motiuk and Porporino (1991) found a high national prevalence rate of mental disorders among federal offenders in Canada. Their study revealed the following DIS lifetime prevalence rates for the following major categories of mental disorder: “organic’ (4.3 percent); ‘psychotic’ (10.4 percent); ‘depressive’ (29.8 percent); ‘anxiety’ (55.6 percent); ‘psychosexual’ (24.5 percent); ‘antisocial’ (74.9 percent); ‘substance’ (52.9 percent); and ‘alcohol’ (69.8 percent).”

Offender -National Prevalence Rates According to the DIS Using Wide Criteria (Weighted)			
Disorder	Lifetime	Within One Year	Within Two Weeks
Organic	4.3	n/a	n/a
Psychotic	10.4	6.8	4.6
Depressive	29.8	15.6	9.1
Anxiety	55.6	34.8	15.4
Psychosexual	24.5	n/a	n/a
Antisocial	74.9	n/a	n/a
Substance	52.9	16.8	4.2
Alcohol	69.8	13.1	0.6

Source: Motiuk and Porporino (1991)¹⁶

Brink et al. (2001) found that the rates of *current* mental disorder were significant among their sample of newly admitted federal prison inmates. Indeed, 3.5 percent were actively psychotic, 17.3 percent were suffering from current anxiety disorders, and 8.4 percent were experiencing active mood disorders. Since most of these individuals had been tried and sentenced to federal institutions after a lengthy period had passed since they were arrested, it is likely that there was an even higher rate of current mental illness among these individuals at the moment of their arrest by the police.

The undoubted **traumatic effects** of arrest and the increased levels of stress generated by detention in police custody or local jails may exacerbate the mental health problems experienced by many suspects (Blaauw, E., Kerkhof, A. and Vermunt, R. 1998, p. 85). Persons with mental disorders may find jails to be a terrifying place (Nami 2002, p.2). The physiological impact that a traumatic event (such as arrest and detention) may have upon an individual has been briefly described by Herman (1992, p. 36, cited by McDonald 2000):

¹⁶ “Using wide diagnostic criteria (i.e., ignoring severity and exclusion) for meeting a particular DSM-III diagnosis provided us with upper-bound estimates of mental health problems among the federal male inmate population” (Motiuk and Porporino 1991).

They have an elevated baseline of arousal: their bodies are always on the alert for danger. They also have an extreme startle response to unexpected stimuli associated with the traumatic event.

Moreover, the physiological symptoms that an individual may experience when being subjected to a traumatic event are key factors that may well hinder the capacity to understand even relatively straightforward information that is presented to him or her (McDonald 2000):

An individual may experience panic attacks, including faintness, dizziness, shaking or feeling out of control and flashbacks to the trauma itself or to the feelings that the trauma caused.... This concern may distract or prevent the individual from learning. Finally, there may be health problems, such as depression, or physical problems. Trauma can affect one's physical health as well. Any of these effects may make it difficult or impossible to learn and trauma should be recognized as a potential source of learning disabilities.

4.3.3 Impact Of Disabilities

The capacity of a suspect who is held in police custody to adequately comprehend a police caution may also be impaired by various disabilities. For example, intellectual disabilities are more prevalent among the inmates of Canadian prisons than among the population at large (Endicott 1991, p. 20). It has been theorized that "handicapped" persons are more highly represented in correctional facilities because they are "more easily apprehended, more prone to confess, more likely to be convicted, and will probably be incarcerated longer than the [non-handicapped] offender" (Allen 1968, p. 25 cited in Endicott 1991).

Unlike mental disorders, which may be temporary or cyclical in nature, intellectual disabilities generally involve a permanent learning handicap (Endicott 1991, p. 16). According to Santamour and West (1982, cited in Endicott 1991), some of the more noticeable traits that are associated with intellectual disabilities include:

- low frustration tolerance
- inability to delay gratification
- poor impulse control
- low level of motivation
- anxiety to be accepted
- demanding of attention
- easily persuaded or manipulated

Significantly, an extensive empirical study conducted in the United States confirmed that mentally handicapped persons frequently do not understand the legal warnings that they are given by the police – in this particular study, the *Miranda* warning (Cloud et al. 2002, p.4).

One particular form of intellectual disability has given rise to intense scrutiny in recent years – namely, **fetal alcohol syndrome** (Boland, Henderson and Baker 1998). Fetal alcohol syndrome

may impair learning ability, which, in turn, may mar the capacity of individuals to understand the consequences of their conduct or to control their impulses (Boland et al. 1998, p. 16). Consequently, fetal alcohol syndrome is another factor that needs to be taken into consideration when assessing the capacity of a suspect to understand a *Brydges* caution. Although there are currently no national data that can lay the basis for an informed estimate as to the extent or prevalence of this condition, some researchers have estimated that there are tens of thousands of adults who suffer from this syndrome and continue to go undetected ("FAS: From Awareness to Prevention," 1992; Donovan 1992, cited in Boland, et al 1998, p. 10).

Finally, a suspect may suffer from a physical disability that may restrict his or her ability to understand a police caution and the legal advice given by *Brydges* duty counsel. For example, hearing impairment may prevent a suspect from being able to process information provided by the police and/or counsel at the time of arrest or detention. Indeed, Vernon, Steinberg and Montoya (1999) have demonstrated that many deaf suspects may lack the linguistic ability to understand the *Miranda* warnings. They contend (1999, p. 508) that between 85 and 90 percent of "prelingually" deaf persons lack the level of comprehension required to understand a written statement of their rights. Since "the average deaf person understands only about 5 percent of what is said to him by lipreading," it would not be feasible to administer the *Miranda* cautions verbally (1999, p. 508). While educated deaf persons may be able to understand a caution delivered by American Sign Language, an illiterate accused or one who reads below the level of grade six, will not be able to fully understand a caution (1999, p. 508). Vernon, Steinberg and Montoya (1999, p. 510), therefore, recommend that all administrations of the *Miranda* cautions to deaf defendants should be videotaped, and standardized tests should be employed to ascertain the degree to which the accused has the capacity to understand the *Miranda* cautions. Undoubtedly, similar considerations apply to the administration of *Brydges* cautions in Canada.

4.3.4 Impact of Language Barriers

There is little doubt that **language barriers** pose a serious problem, since a suspect who cannot properly understand English or French is highly unlikely to have the ability to fully understand a police caution and/or the legal information provided by *Brydges* duty counsel. Indeed, a Canadian study conducted by Currie¹⁷ (2000, p. 12) concluded that, in cases where the accused person lacks basic fluency in English or French, it is essential that the appropriate legal services are delivered in the person's own language.

4.3.5 The "Appropriate Adult" Procedure as a Potential Mechanism to Protect the Section 10(b) Rights of Suspects Whose Capacity to Understand a Police Caution May Be Severely Impaired

In England and Wales, specific steps have been taken to ensure that suspects in police custody who are mentally disordered or "mentally handicapped" are provided with the support of an independent person, known as the "appropriate adult". Studies undertaken in England and Wales have suggested that anywhere between 10 percent and 26 percent of persons detained by the

¹⁷ This study involved a pilot project for First Nations people where it was found that it was of essence to provide legal services in the Mi'Kmaq language in order to ensure that they fully understood their rights and court processes (Currie 2000, p. 12).

police have mental disorders or developmental disabilities (Bucke and Brown 1997, p. 7). The appropriate adult delivers immediate assistance to a suspect in the police station itself. Under the Codes of Practice associated with the *Police and Criminal Evidence Act 1984* (PACE), the police are legally required to provide an “appropriate adult” for “mentally disordered or mentally handicapped detainees” (Bucke and Brown 1997, p. 5).

It was found by Bucke and Brown (1997, p. vii) that 2 percent of detained suspects in their sample were initially treated as being mentally disordered or handicapped, and appropriate adults were present in approximately two-thirds of these cases. The authors also note that, of those appropriate adults who attended the police station, 60 percent were social workers, with the remainder consisting of friends/neighbours, parents or guardians (at p. 8). The appropriate adult is placed under a duty to ensure that the suspect comprehends the police caution that is administered and to request a legal advisor, if the suspect has not already done so on his or her own behalf (Nemitz and Bean 2001, p. 600). The appropriate adult is also required to monitor the propriety and fairness of any police interview and to “facilitate communication” with the suspect being interviewed (Nemitz and Bean 2001, p. 601).

The “appropriate adult” provisions clearly operate in conjunction with the duty solicitor scheme that ensures that suspects in police custody in England and Wales have access to a lawyer who attends the police station. Ideally, the appropriate adult and the duty solicitor may collaborate to ensure that the specific needs of mentally disordered and developmentally disabled suspects are addressed when they are detained by the police. In particular, the appropriate adult may ensure that the suspect is duly provided with legal assistance, and that sufficient care and attention are paid to the need to ensure that the suspect fully comprehends any information presented to him or her by the police. Where the suspect appears to lack such capacity, the appropriate adult may be in a position to ensure that an appropriate mental health professional assesses the mental condition of the suspect before the police may proceed with interrogation (Medford, Gudjonsson and Pearce 2000). Conversely, the duty solicitor should take care to ensure that, if there is any uncertainty concerning the mental status of a client, then he or she should initiate the procedures for appointment of an appropriate adult, if none has already been assigned. In addition, the duty solicitor should take the necessary steps to seek an assessment from the appropriate medical or mental health professional.

It is not clear that the current procedures associated with the “appropriate adult” scheme in England and Wales are completely effective (Medford, Gudjonsson and Pearce 2000). For example, Nemitz and Bean (2001, p. 604) have commented that “mentally disordered offenders in police stations are rarely identified or afforded treatment, let alone given the form of protection necessary.” A similar cautionary note has been struck by Laing (1996), who reports that the police have repeatedly expressed the concern that there has been a continuing increase in the number of mentally disordered suspects who land in their custody. Laing also suggests that there are insufficient numbers of trained mental health professionals who are capable of working in police stations to screen suspects for mental disorders and developmental disabilities. The presence of well-trained – and highly skilled – mental health professionals in the police stations could well prevent many such suspects from being trapped in the “revolving door” of homelessness, mental disorder, and incarceration within the criminal justice system. Laing (1996, p. 7), therefore, suggests that there should be “duty-psychiatrists,” charged with the task

of assessing detained persons in the police station. In order to meet the needs of mentally disordered and developmentally disabled detainees, it would be highly desirable for the duty solicitor to work effectively with the appropriate adult and the duty psychiatrist (if such a position were to be established in the future).

The combination of an “appropriate adult” scheme with the equivalent of the duty solicitor program that operates in England and Wales may provide the basis for a model that might be adopted in Canada to address the needs of those suspects who are in police custody and whose capacity to exercise their section 10(b) rights is impaired by various forms of disability. In the Canadian context, the appropriate adult might well be a social worker (Littlechild 1996) and duty counsel might be assigned to specific, high-volume police stations. The duty counsel would play a critical role in ensuring that, if the specific needs of their clients have not already been addressed by the police, proper medical and mental health assessments are carried out before police interrogation commences. Similarly, if an appropriate adult has not yet been assigned, duty counsel would be responsible for locating such an individual to assist the suspect. In high-volume police stations, duty psychiatrists would be available to conduct rapid assessments of suspects who appear to be suffering from mental disorder. Other forms of disability would need to be addressed by the appropriate professionals (hearing impairment by medical practitioners, intellectual disability by clinical psychologists, etc). Duty counsel might play a critical role in “channeling” the appropriate services to their clients and, to this end, it would be desirable for lawyers, who undertake this role, to receive appropriate training in the recognition of different forms of disabilities and the appropriate forms of intervention that should be made by external agencies and professionals.

5.0 THE DUTY SOLICITOR SCHEME IN ENGLAND AND WALES: AN ALTERNATIVE MODEL FOR DELIVERING LEGAL ADVICE AND ASSISTANCE TO SUSPECTS IN POLICE CUSTODY

5.1 Introduction

The *Police and Criminal Evidence Act 1984* (PACE) and its accompanying Codes of Practice have painstakingly delineated the nature of police powers in England and Wales. In particular, these legal instruments have clearly articulated the rules and procedures that should govern the manner in which the police deal with suspects in the course of their investigation of crime. The Codes of Procedure were significantly revised in 1995. One important provision concerns the requirement that all suspects who have been detained by the police be given a notice that provides information about their right to free legal advice and assistance (Code of Practice C 3.2).¹⁸ Moreover, PACE, s. 58(1) provides that “A person arrested ... shall be entitled, if he so requests, to consult a solicitor privately at any time.” Code of Practice C provides that this right also extends to individuals who attend a police station voluntarily (Sanders 1996, p. 256). In addition, under Code of Practice C 6.3, it is a requirement that every police station must prominently display an information poster “in the charging area” (Legal Services Commission 2002, p. 14).

In order to implement the right to legal assistance in police stations, a 24-hour duty solicitor scheme was established (Easton 1998, p. 111). This scheme made free legal advice and assistance available to all suspects without any reference to their private means. A distinctive feature of this system is that duty solicitors are not the only individuals who may give legal advice at the police station. Indeed, properly accredited “legal representatives” may also perform this function. According to Bucke and Brown (1997), “legal representatives” are defined as follows:

Legal representatives refers to a range of non-solicitor staff including articulated clerks, former police officers and employees of outside agencies supplying legal advice services on contract to solicitors. [p. 26]

However, it is important to recognize that the majority (approx 75 percent) of those individuals who are providing such legal advice are nevertheless duty solicitors (Bucke and Brown 1997, p. 26). Finally, the duty solicitor scheme must be viewed within the context of the right of a suspect in police custody in England and Wales to have his or her lawyer present during police interrogation.

¹⁸ It is worth noting that, in some Commonwealth jurisdictions, such as Queensland, the police are under no duty to inform suspects that they have a right to consult a solicitor (Edwards 1997, p. 227).

5.2 Description Of The Duty Solicitor Scheme In England And Wales.

The Duty Solicitor Scheme is a generous one, insofar as suspects are granted three options afforded under the *Duty Solicitor Manual*: they may choose to consult their own solicitor; the duty solicitor; or a solicitor from a list maintained by the police (Legal Services Commission 2002, p. 61 and National Equal Justice Library 2002, p. 4). Where the duty solicitor is requested, the police must ring the Duty Solicitor Call Centre, which will allocate a duty solicitor from a rota or panel (Legal Services Commission 2002, p. 15). Where the suspects chooses a specific solicitor (so-called “own client cases”), the police will call that individual directly and not deal with the Call Centre (Legal Services Commission 2002, p. 61). Different rules apply to “own client cases” and “duty solicitor cases” insofar as the use of representatives is concerned. These rules have been summarized as follows (Legal Services Commission 2002, p. 61):

9.4 Providing Initial Advice By Telephone For Police Station Cases:

1. For duty solicitor cases, only the duty solicitor may give the initial advice which may be provided over the telephone or, if more conveniently, at the police station.
2. For own client cases, initial telephone advice must be provided by a solicitor (who may or may not be a duty solicitor), or a probationary or accredited representative.

9.5 Attendance At The Police Station:

1. For duty solicitor work, once the duty solicitor has given preliminary advice, any attendance at the police station must be undertaken by the duty solicitor or an accredited representative.
2. For own client work paid by the CDS, initial attendance must be undertaken by a solicitor (whether or not a duty solicitor), a probationary or accredited representative

It is important to note that, as a consequence of the restructuring of the entire legal aid system in England and Wales, the duty solicitor scheme for police stations has recently been subjected to a series of significant changes. On April 2, 2001, the old system of criminal legal aid was replaced by the Criminal Defence Service (CDS), which was created by the *Access to Justice Act 1999*. The CDS is administered by the Legal Services Commission (2001, p. 1), and all legal aid services are now provided under the provisions of the so-called “General Criminal Contract” (Legal Services Commission 2001, p. 2). Within this detailed contractual framework, private solicitors’ firms that provide duty solicitor services are routinely monitored in order to “ensure that they continue to meet quality assurance standards.”

Prior to the establishment of the CDS, all legal aid services in England and Wales were provided by private firms of lawyers. However, the Legal Services Commission has started a four-year pilot project, under which six “public defender offices” have been established, and research will be conducted to investigate the advantages and disadvantages of a so-called “mixed” model for the CDA (private practice and staff lawyers) (Legal Services Commission 2001, p. 2). Salaried

public defenders will be allocated positions within the relevant police station duty solicitor schemes (Lord Chancellor's Department 2001(b), p. 6). However, it has been made clear that public defenders "will have to take their turn on the duty solicitor rotas and compete on a 'level playing field' with private suppliers in that area" (Lord Chancellor's Department 2001(b), p. 3). The U.K. Government has indicated (Lord Chancellor's Department 2001(a), p. 3) that it continues to support the principle that, in most circumstances, a suspect should have a right to choose his or her own lawyer who has a contract with the Commission.

Moreover, there is now an elaborate system of accreditation for duty solicitors who attend police stations, as well as a parallel system for the accreditation of legal representatives (Easton 1998, p. 115; Legal Services Commission 2002, p. 23; and Sanders 1996, p. 271). Duty solicitors themselves must meet a number of criteria, including the requirement of "12 months experience of police station and court work" (Legal Services Commission 2002, p. 30). Applications for accreditation as legal representatives must be made to an independent organization approved by the Legal Services Commission (2002, p. 27). The *Duty Solicitor Manual* (Legal Services Commission 2002, p. 23) states that:

An accredited representative can give preliminary advice and attend the police station in own solicitor cases and, in duty solicitor cases where the duty solicitor must always give the preliminary advice, attend the police station. The duty solicitor has an unrestricted right to delegate to an accredited representative ...

5.3 Empirical Research and the Duty Solicitor Scheme

The duty-solicitor scheme for police stations has recently been subjected to extensive reforms. It is important, therefore, to recognize that the academic research that has been conducted in relation to the "old" system might not paint an accurate picture of the scheme as it exists at the present time. However, there is a fairly substantial body of research that nevertheless provides some valuable insights into the operation of the duty solicitor scheme for police stations.

In general, research findings suggest that, over the past decade, there has been a significant increase in the number of detained persons contacting a lawyer while at the police station (Bucke and Brown 1997, p. 23). Although it is not entirely clear as to why there has been an increase in the request for legal advice by detained persons, it has been suggested that it may be the case that police officers are making more sustained efforts to ensure that accused persons contact a lawyer, or that there may have been an increase in the number of solicitor's representatives who are now available to offer advice at police stations (Bucke and Brown 1997, p. 23). It is significant that Phillips and Brown (1998, p. 77) found that those suspects who obtained legal advice were considerably more likely to maintain their right to silence (20 percent) than those who did not seek such advice (3 percent). The authors state (1998, p. 77) that "it is highly likely that those who plan to fight the case and who are not inclined to assist the police by answering questions are more likely to seek legal advice." In an earlier study, Brown, Ellis and Larcombe (1992) shed some light on the specific characteristics of those cases in which detained suspects exercised their right to request legal advice and assistance. The primary factors that influenced a detained suspect's decision whether or not to seek the assistance of a solicitor were: the nature

and serious of the offence; the time that he or she arrived at the police station; and his or her previous record. Significantly, 60 percent of those detainees who sought legal advice consulted with their own legal advisors, while 40 percent consulted the duty solicitor (Bucke and Brown 1997, p. 26).

In spite of these apparently positive findings, outlined above, the empirical research has nevertheless raised a number of weighty concerns. For example, the overall number of detained persons receiving legal advice is still relatively low and, in the majority of cases, suspects do not have a solicitor present while undergoing interrogation (Easton 1998, p. 112 and Sanders 1996, 273). Indeed, different studies have found that over half of the persons detained at a police station did not request legal advice (Bucke and Brown 1997, p.32). Phillips and Brown (1998) studied the duty solicitor scheme, as it functioned in ten police stations between late 1993 and early 1994 (4,250 detainees). The researchers found that only 37 percent of all persons detained by the police actually exercised their choice to seek legal advice (at p. 59). However, Phillips and Brown point out that this was an average figure and that there was a considerable degree of variation between police stations. The main reason why suspects did not seek legal advice was that they did not feel this course of action was necessary in the particular circumstances of their case (Bucke and Brown 1997, p. 28).

Another critical issue in the evaluation of the duty solicitor scheme must be the quality of the service provided. More specifically, researchers have questioned the quality of legal advice given by “unqualified legal representatives.” However, this concern is not confined to these individuals (Easton 1998, p. 112 and Sanders 1996, p.261). Moreover, the quality of legal advice furnished by many of the legal representatives may not be impartial. Indeed, many of them are former police officers – a circumstance that may mean that, instead of identifying with the suspect, they might sympathize more closely with the interest of the police (Easton 1998, p. 113). Time constraints may also have an impact upon the quality of information that is provided to detained persons. In the study by Bucke and Brown (1997), most consultations with solicitors were completed within the space of 15 minutes: indeed, only 1 percent of such consultations lasted for more than an hour (Bucke and Brown 1997, p. 29).

Furthermore, it appears that the type of legal consultation that is furnished to a detained person is largely dependent on the facilities available at the police station (Bucke and Brown 1997, p. 25). For example, in police stations where there was no designated room for legal consultations, a significant number of detained persons received legal advice only by the phone, while in police stations in which there was a designated room for legal consultations, legal advice was more likely to be given in person at the station (Bucke and Brown 1997, p. 25). For example, Sanders (1996, p. 261) found that up to 30 percent of detained suspects received legal advice only over the phone. Similarly, Phillips and Brown (1998, p. 65) discovered that approximately 20 percent of the group of suspects, who ultimately received legal advice, did so only over the telephone, and not in person. One of the problems that often arises when suspects receive legal advice only over the phone is that they may find it exceptionally difficult to follow the lawyer’s injunction to remain silent, whereas the physical presence of a duty solicitor may provide them with the encouragement that they need to refuse to answer police questions (Sanders 1996, p. 263).

Finally, it is a matter of considerable concern that some researchers have found that, in many cases where a lawyer is present during police interrogations, the latter remained passive and did very little – or nothing – during the police interrogation (Easton 1998, p. 113; and Sanders 1996, p. 263). This issue has even surfaced as a matter of grave concern in the courts. For instance, in *Glaves* (1993), the Court of Appeal sharply criticized defence lawyers by stating that “there is no point in a solicitor’s representative just going along and simply taking notes.” Furthermore, in *Miller* (1990), the Court stated that defence lawyers should act courageously and challenge improper police interrogations (Easton 1998, p. 113).

It might well be contended that duty solicitors can do very little to rectify the stark imbalance of power between the police and a suspect who is detained in their custody. Indeed, since duty solicitors are involved in an ongoing relationship with the officers in particular police stations, they are required to exercise a certain degree of cooperation with the police if they are to obtain the most desirable outcomes for their clients. In this respect, Sanders (1996, p. 273) has asserted that duty solicitors are placed squarely on the horns of a particularly uncomfortable dilemma:

... if solicitors wish to do the best for their suspects they have to compromise by becoming acceptable to the police; and if they wish to help their clients by retaining their adversarial purity, they forfeit cooperation and fail to do their best for their clients.

6.0 METHODOLOGY

A review of the Canadian jurisprudence and the empirical literature underscores the importance of the provision of *Brydges* services. Thus, the purpose of this report is to examine the extent and nature of the provision of *Brydges* services throughout Canada. The two major components of this study consist of (i) a literature review and (ii) interviews.

6.1 Procedure

This study was based on an extensive review of the relevant literature and case law as well as a series of focused interviews.

6.1.1 The Literature Review

The first component of the literature review consists of a legal analysis of all of the Canadian cases that referred to the Supreme Court of Canada's decision in the *Brydges* case (1990).¹⁹

Only cases decided in the Supreme Court of Canada and the provincial appellate courts were included in the analysis. The cases were identified by conducting a search of various electronic data bases that provided access to the decisions of the Supreme Court of Canada and the appellate courts of the provinces and territories – namely, Quicklaw; www.lexum.umontreal.ca; www.acjnet.org; and the Web sites of the various provincial and territorial courts of appeal. Where cases had been reported in *Canadian Criminal Cases (3rd Series)*, cases were retrieved from this source.

The review of legal and social/behavioural science literature dealing with the delivery of *Brydges* services and their equivalent in the United Kingdom was based on electronic searches of a broad range of data bases as well as the use of search engines such as Google (www.google.ca). The major electronic data bases that were searched included:

- Quicklaw
- Index to Canadian Legal Literature
- Criminal Justice Abstracts
- Humanities and Social Science Index
- PsycINFO
- Sociofile (Sociological abstracts)
- National Criminal Justice Reference Service (www.ncjrs.org)
- Access to Justice Network (www.acjnet.org)
- Government of the United Kingdom, Lord Chancellor's Department (www.lcd.gov.uk)
- Department of Justice Canada (www.canada.justice.gc.ca)

¹⁹ Since the decision by the Supreme Court of Canada in the *Bartle* case (1994) incorporated the legal principles articulated in *Brydges* (1990), the sample included all cases that referred to either *Brydges* or *Bartle* (or both).

6.1.2 Interviews

The empirical component of the present research project consisted of 101 interviews with various actors in the criminal justice process – in all 10 provinces. The specific research instruments, which were devised for the conduct of the interviews, consisted of five **standardized questionnaires** that were specifically adapted to the respective group of respondents in each Canadian province (namely, legal aid administrators, police officers, judges, Crown counsel, and defence counsel). An additional standardized questionnaire was designed for administration to a group of accused persons who were in custody in Vancouver, B.C. The standardized questionnaires comprised both open-ended and close-ended questions, and were administered over the telephone. Therefore, the researchers were able to adopt both **quantitative and qualitative approaches** to this project.

Delivery of Questionnaires were emailed to most respondents was predominantly by e-mail. Many of the participants stated that they preferred to receive the questionnaire in advance of the actual interview to be able to prepare their answers and reduce the amount of time spent on the telephone. In some cases, the respondents decided to answer the questions immediately, and simply sent their responses via electronic mail.

6.2 The Two Phases Of The Project

The research project was divided into two, distinct phases. **Phase I** consisted of interviewing legal aid providers in order to ascertain whether or not they collect data concerning the provision of *Brydges* services. The interviews during Phase I were conducted during the months of January and February, 2002.

Phase II consisted of the administration of the standardized questionnaires. The interviews during Phase II were conducted from May to July, 2002. The main issues that were examined during Phase II of this project were as follows:

- The advantages/disadvantages of *Brydges* services.
- Gaps in the provision of *Brydges* services.
- The impact of gaps in the provision of *Brydges* services upon the criminal justice system.
- Suggestions for improvement in the provision of *Brydges* services.
- Suggestions for alternative measures for delivering *Brydges* services.

Telephone interviews were the principal method employed in the administration of the questionnaire. The only exception to this procedure occurred in relation to the group of in-custody accused persons. For this group, the principal researcher conducted **face-to-face interviews** solely in Vancouver, British Columbia.

6.3 The Respondents

The present research project required that a small number of respondents be interviewed in each province of Canada. It was, therefore, decided that the choice of a **purposive sample** would be appropriate. The various groups of interviewees consisted of the following:

- Legal aid administrators of each province
- Police officers
- Judges
- Crown counsel
- Defence counsel
- Accused persons

The principal researcher successfully interviewed 101 out of the 110 participants who were selected for this project (approximately 92 percent of the target population). The goal of this project was to interview two police officers, two Crown counsel, two Defence counsel, and two judges in each province. In addition, it was decided that one legal aid provider would be interviewed in each province. Owing to the practical difficulties and projected expenses associated with the conduct of face-to-face interviews with accused persons being held in custody, the decision was made to interview twenty such persons in one location – namely, Vancouver, British Columbia.

6.4 Selection of the Respondents

In order to gain access to the respondents in this study, the following steps were taken:

1. The principal researcher gathered the names of police chiefs across Canada by searching the Internet. Police chiefs were then contacted and asked for permission to interview two of their officers.
2. The names of Crown and defence counsel were gathered by searching the Internet, under government listings. The principal researcher then contacted lawyers and asked them if they would be willing to participate in this project.
3. In order to interview arrested and detained persons, the principal researcher contacted the Director of the Vancouver Jail. The Director allowed the principal researcher to interview arrested or detained persons while they were being held in custody. The interviews were conducted during a one-week period.
4. The judges in the sample were identified following a request from the principal investigator to faculty members of universities across Canada. They provided the names of potential respondents in their local areas.

The following tables outline the number of participants who were interviewed during Phase I and Phase II:

Legal Aid Providers	
Alberta	1
B.C.	1
Manitoba	1
N.B.	1
N.S.	1
Nfld.	1
PEI	1
Ontario	1
Quebec	1
Sask.	1
TOTAL	10 / 10

	Legal Aid Providers	Police Officers	Judges	Defence Counsel	Crown Counsel	Accused Persons
Alberta	1	2	1	2	2	
B.C.	-	2	1	2	2	20
Manitoba	1	2	2	2	2	
N.B.	1	2	2	2	2	
N.S.	1	2	2	2	1	
Nfld.	1	2	2	2	2	
PEI	1	2	2	2	2	
Ontario	1	2	1	2	2	
Quebec	-	2	2	-	1	
Sask	1	2	2	2	2	
TOTAL	8 / 10	20 / 20	17 / 20	18 / 20	18 / 20	20 / 20

6.5 Statistical Analysis

The data collected from the questionnaires were coded and analyzed, using the SPSS program. In order to simplify the findings, the researchers developed a series of customized tables, which provide a quick and simple overview of the main findings (see Appendix A).

6.6 Ethics Approval

Ethics approval for the present research project was obtained from the Simon Fraser University Ethics Committee on April 24, 2002.

The researchers guaranteed absolute confidentiality to the respondents who participated in the present study. In order to achieve this critical objective, the principal researcher preserved the interview notes in a secure location. In accordance with the guiding principles of Simon Fraser

University ethics policy, the researchers provided the following forms to the participants in this study:

- 1) Consent form (see Appendix B)
- 2) Information sheet (see Appendix C)
- 3) Feedback sheet (see Appendix D)

7.0 MAJOR FINDINGS OF THE RESEARCH PROJECT

7.1 Positive Views Concerning *Brydges* Services

In general, the respondents to the questionnaires expressed favourable opinions concerning the provision of *Brydges* services. The following main themes were identified:

7.1.1 Accused Persons Acquire Basic, Yet Invaluable Knowledge

Most respondents suggested that accused persons acquire invaluable knowledge about the criminal justice process as a consequence of speaking with a *Brydges* duty counsel. More specifically, the respondents indicated that accused persons receive basic information concerning their legal rights, the structure and operation of the court process, the nature of the criminal investigation, and the important elements of their own cases. Most significantly, accused persons gain some rudimentary knowledge about the legal implications of the alleged offences and the desirability of giving statements to the police.

7.1.2 A Simple And Convenient Way To Obtain Quick And Timely Access To Legal Advice

Many respondents made reference to the fact that having the opportunity to access *Brydges* services enabled accused persons to obtain legal advice in a quick and timely manner. Additionally, many respondents observed that, since *Brydges* services are free, convenient and simple to access, accused persons have the ability to contact duty counsel as soon as possible at any time of the day or night.

7.1.3 The Provision Of *Brydges* Services Ensures That Charter Requirements Are Met And That Due Process Is Followed

A critical issue identified by the respondents concerns the legal rights of the accused that are entrenched in the *Canadian Charter of Rights and Freedoms*. In this respect, several interviewees asserted that the availability of the *Brydges* duty counsel system enabled criminal justice officials to fulfill Charter requirements.

7.1.4 Admission Of Evidence And Collection Of Evidence Following Access To *Brydges* Services

Several participants stated that, once *Brydges* services have been provided to the accused, the police are thereby empowered to proceed with their collection of evidence, and are able to undertake this task without facing the risk that such evidence might subsequently be declared inadmissible at trial.

7.1.5 *Brydges* Services Are Available On A 24-Hour Basis

A number of participants emphasized the importance of the fact that *Brydges* services are offered on a 24-hour basis. Accused persons may, therefore, access duty counsel at any time during the day or night, including during weekends and holidays. This also enables duty counsel to provide relevant assistance and advice at the most appropriate moment.

7.2 Gaps/Disadvantages In The Delivery Of *Brydges* Services

A significant proportion of the respondents (approximately 42 percent) stated that they did not believe that there were any gaps or disadvantages in the provision of *Brydges* services. However, others identified several issues of concern.

7.2.1 Delays In Reaching *Brydges* Duty Counsel

A considerable number of the participants asserted that the main gap/disadvantage in the provision of *Brydges* services consists of the lengthy delays experienced by those arrested or detained individuals who are trying to make contact with duty counsel – most particularly, after hours. In some cases, these delays stem from difficulties in locating an on-call duty counsel. In other cases, the delays may be traced to the lengthy call-back period that the arrested or detained person experiences before being contacted by the counsel working in connection with the 1-800 *Brydges* number.

7.2.2 Inadequate Numbers Of Duty Counsel

One of the main reasons identified for the significant delays is that there are not enough *Brydges* duty counsel to meet the needs of arrested and detained persons for legal advice and assistance.

7.2.3 Financial Constraints

Some of the legal aid providers identified inadequate levels of funding as a focal issue of concern. The costs associated with the provision of *Brydges* services have increased, yet, the service providers are nevertheless constrained to work within the confines of a limited budget.

7.2.4 Accused Persons' Lack Of Understanding Of Their S. 10 (B) Rights

Some interviewees expressed the concern that there are many accused persons who may lack the capacity to fully understand the police caution and the legal advice given by *Brydges* duty counsel. The most common example, referred to by the respondents, involves a scenario in which the suspect is severely intoxicated, and, therefore, cannot fully understand the nature and parameters of the right to counsel. Other examples that were mentioned by respondents involved language barriers or physical disabilities.

7.2.5 Inexperienced *Brydges* Duty Counsel

Several respondents expressed their disquiet in relation to the assignment of junior counsel to the task of providing *Brydges* services. Indeed, some respondents stated that lack of experience not infrequently translates into situations in which the *Brydges* duty counsel provide inaccurate information to their vulnerable clients.

7.2.6 *Brydges* Services May Be Perceived As Being More Useful To The Police Than To Accused Persons

Some of the respondents advanced the view that the provision of *Brydges* services may prove to be a more significant benefit to the police than to the accused persons themselves. This situation arises because, in many cases, once the accused has finished talking to the *Brydges* duty counsel, the police are, in effect, given a green light to continue with the investigation. The most common example involved a scenario in which a heavily intoxicated suspect does not fully understand the legal advice given, and yet, once he or she has completed the phone call to duty counsel, the police then proceed to interview him or her without any fear that the evidence that they collect may be ruled inadmissible at trial. Tables 4 and 5 present this information about the advantages and gaps in *Brydges* service in summary form.

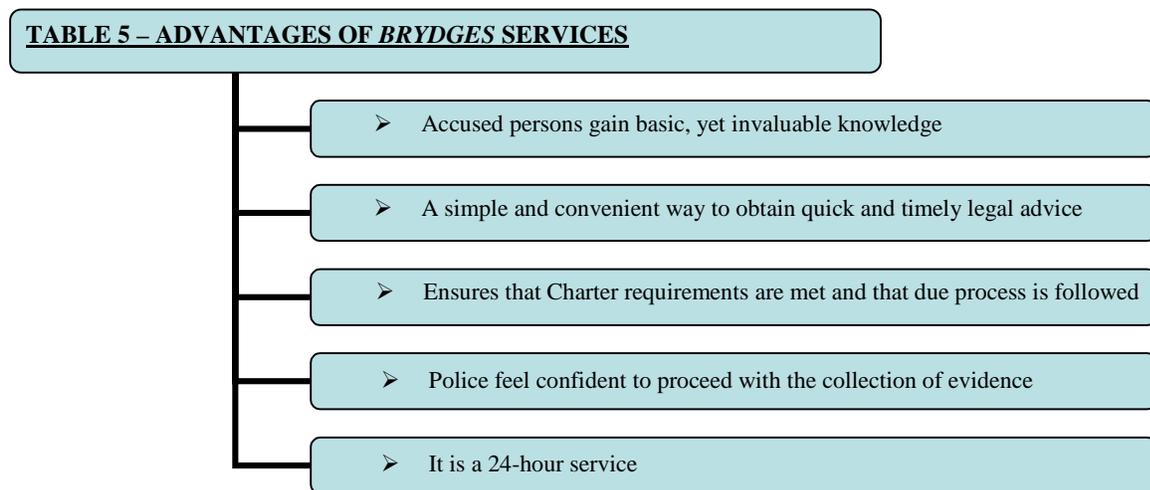


TABLE 6 – GAPS/DISADVANTAGES OF *BRYDGES* SERVICES

➤	Delays in contacting <i>Brydges</i> duty counsel
➤	Inadequate numbers of duty counsel
➤	Financial constraints
➤	Accused persons' lack of understanding of their s. 10(b) rights
➤	Inexperienced <i>Brydges</i> duty counsel
➤	More of a benefit to the police than to the accused

7.3 Impact Of Gaps/Disadvantages

As noted above, a significant number of respondents declined to identify any gaps/disadvantages in connection with the provision of *Brydges* services. Consequently, the views reported in this section were advanced by the relatively small number of respondents who actually listed any impacts that were associated with the perceived gaps/disadvantages of *Brydges* services.

7.3.1 Impact Of Delays

Delays May Benefit the Accused

Some of the respondents made the interesting observation that a number of the gaps/disadvantages that were identified may, in some fashion, provide benefit to accused persons, especially in relation to the delays that may be experienced before the accused makes contact with *Brydges* duty counsel. The accused benefits from such delays when the police are not able to complete an investigative procedure (e.g., a two hour limit for a breathalyzer test) within the prescribed time limit.

Delays May Hinder Police Investigations

From a police officer's perspective, the delays may prevent them from administering certain tests within a prescribed time. Moreover, some police officers expressed their concern that long delays in reaching duty counsel may slow down their work in general. Instead of returning swiftly to their normal duties, officers are tied up waiting for the call to duty counsel to go through.

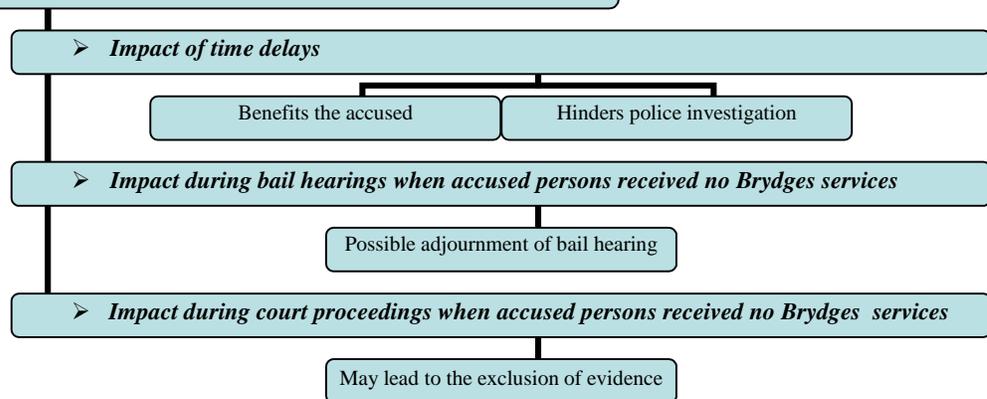
7.3.2 Impact When Accused Persons Do Not Receive *Brydges* Services During Bail Proceedings

Respondents indicated that only one significant problem may occur during a bail hearing when an accused person has not received any advice or assistance from *Brydges* duty counsel. The judge may adjourn the hearing until the accused person has been afforded the opportunity to speak with duty counsel.

7.3.3 Impact On Subsequent Court Proceedings When Accused Persons Do Not Receive *Brydges* Services

The participants identified a number of problems that may occur when accused persons do not receive *Brydges* services. There may be an increased need to exclude evidence. There might be an increased number of appeals, and more court time spent dealing with this issue. However, it is also interesting to note that several participants stated that the aforementioned impacts may actually benefit accused persons, by reducing the chance of convictions. Table 6 summarizes the impact of gaps in delivery of *Brydges* services and the disadvantages.

TABLE 7 – IMPACT OF GAPS/ DISADVANTAGES OF *BRYDGES* SERVICES



7.4 Suggestions And Alternatives

It is important to recognize that approximately 45 percent of the respondents did not offer any suggestions. Significantly, the majority of the individuals who fell into this category were police officers and accused persons in custody. Fully 70 percent of the police respondents declared that the *Brydges* services are working well, and declined to offer any suggestions for modifications. Similarly, 50 percent of the accused persons asserted that they did not wish to offer any suggestions for changes to be made. There is a degree of irony in this because the police and the detained accused constitute the two groups who are most directly affected as a result of any gaps in the provision of *Brydges* services. Insofar as the respondents in the other groups are

concerned (Crown counsel, duty counsel, judges, and legal aid service providers), it is worthy of note that 65 percent of them offered some suggestions for change. The following is a list of the main suggestions that were identified by the respondents.

7.4.1 Enhancing The Quality Of *Brydges* Services

In general, the principal theme running through the various suggestions offered by the respondents is the need to enhance the quality of *Brydges* services. The respondents targeted duty counsel as the main area for improvement of these services. Some of the suggestions involving duty counsel are as follows:

- Hire duty counsel with specific experience in Criminal Law.
- Hire bilingual or multilingual duty counsel.
- Provide better training programs for duty counsel.
- Provide a handbook describing regional practices.

7.4.2 Recommendations For Procedural Reforms

Some of the respondents made recommendations that would entail significant modifications to the existing procedures and practices associated with the delivery of *Brydges* services. The following constitutes a list of some of the procedural reforms that interviewees felt would significantly enhance the quality of *Brydges* services:

- Pass on feedback received from *Brydges* duty counsel to the lawyer(s) providing the client with other forms of legal aid service.
- Provide continuity of service (for example, the initial duty counsel representing the client at subsequent court appearances).
- Provide a guaranteed call-back time.
- Provide more interview time.
- Offer a regionalized service.

7.4.3 Structural Recommendations For Structural Reforms

Respondents revealed considerable diversity in their recommendations for structural reform. This is scarcely surprising given the differences in the provision of *Brydges* services across Canada. For instance, in provinces where there is no formal *Brydges* service, the recommendation was to implement a formal 24-hour *Brydges* system. In provinces where a formal system of *Brydges* services does exist, but only embraces a system whereby private lawyers are on-call by means of contacting a private telephone line, the recommendation was to implement a 1-800 toll-free number across the province in order to simplify the process. Finally, in provinces where a 1-800 toll-free number is in existence, there were suggestions to deploy duty counsel at every police station, hire multilingual duty counsel, and provide a regionalized service.

7.4.4 Modifications To Police Practices

Some respondents made the suggestion that police officers need to ensure that accused persons can actually access *Brydges* services. It is significant that a considerable proportion of those respondents who discussed police practices were drawn from the category of in-custody accused persons. The recommendations for modifications to police practices included the following:

- Police should provide more information about legal aid.
- Police should use clearer language when defining what the accused person’s rights are.
- Police should provide this information in a timely manner.
- Police should not obtain a confession before reading a suspect his or her rights.
- Police should call duty counsel themselves (as is the case in England and Wales).

Table 8 summarizes the suggested changes under the categories of quality of service, procedure and structure.

Table 8 Suggestions / Alternatives		
Better Quality of Service	Procedural Recommendations	Structural Recommendations
<ol style="list-style-type: none"> 1. Hire <i>Brydges</i> duty counsel who are more experienced in Criminal Law. 2. Hire bilingual or multilingual <i>Brydges</i> duty counsel. 3. Provide better training for <i>Brydges</i> duty counsel. 4. Provide a handbook describing regional practices. 	<ol style="list-style-type: none"> 1. Pass on the feedback received by <i>Brydges</i> duty counsel to lawyers providing other legal aid services. 2. Provide continuity in assistance by encouraging <i>Brydges</i> duty counsel to represent the client at subsequent stages of the court process. 3. Establish a guaranteed call-back time. 4. Provide more interview time. 5. Offer a regionalized service. 	<ol style="list-style-type: none"> 1. Provinces with No formal <i>Brydges</i> service: <ul style="list-style-type: none"> • Implement a formal <i>Brydges</i> system. 2. Provinces with a formal <i>Brydges</i> service, but no toll-free number: <ul style="list-style-type: none"> • Implement a 24-hour 1-800 toll free number. 3. Provinces with a 1-800 #: <ul style="list-style-type: none"> • Have duty counsel at every police station. • Hire bilingual <i>Brydges</i> counsel. • Provide regionalized services.

7.5 Apparent Discrepancies Between The Perspectives Of In-Custody Accused Persons And Police Officers – Tentative Findings

7.5.1 Provision Of Information

The police respondents consistently stated that they always give accused persons the requisite information about the right to counsel and access to legal aid (including *Brydges* services).

However, according to the in-custody accused persons who were interviewed, they did not all receive the prescribed information about their legal rights. In the present study, only 60 percent of the in-custody accused persons indicated that the police had advised them of their right to counsel. Furthermore, only 45 percent of them stated that the police had informed them specifically about the existence of *Brydges* duty counsel.

Nevertheless, these findings must be interpreted in light of the fact that 10 percent of the in-custody accused respondents claimed that, owing to their state of severe intoxication at the relevant time, they could not remember if they were given any information about their legal rights. Moreover, it is important to take into account that there are some apparent contradictions among the responses made by the in-custody accused persons who were interviewed. For example, 10 percent of those accused who stated that they were not given any information about their rights also stated that the police had given them access to a phone in order to contact duty counsel.

7.5.2 Amenities Available – Opportunity To Contact Duty Counsel

Not only is it vital that accused persons receive the requisite information concerning their right to counsel, it is equally critical that they be afforded an effective opportunity to contact duty counsel. As a result, access to a telephone is imperative – clearly: *Brydges* duty counsel may only be contacted by this means. In-custody accused persons and police officers were asked if there were any amenities available for accused persons to contact duty counsel. According to the in-custody accused, 35 percent did not have access to a telephone. However, all of the police officers stated that all those suspects who expressed a wish to contact duty counsel were offered access to a telephone, and use of a private room for this specific purpose. These findings highlight significant discrepancies between the responses of in-custody accused persons and police officers.

8.0 DISCUSSION AND CONCLUSIONS

8.1 Impact Of The *Brydges* Case On Provincial Legal Aid Services

Although the Supreme Court of Canada has unequivocally declined to impose a constitutional duty upon the provinces to implement (what have come to be known as) “*Brydges* services,” it was found in the present research project that eight provinces have indeed established such services on a formal basis. In these provinces detained persons are provided with access to *Brydges* duty counsel through a centralized 24 hour telephone system or a regular roster of lawyers available by telephone. Nevertheless, it was also revealed that the implementation of *Brydges* services across Canada has, by no means, been uniform. In Alberta, *Brydges* services have not been implemented on a formal basis – instead, lawyers who work on a volunteer basis, accept telephone calls after hours. Similarly, in Prince Edward Island, there is neither a formal nor an informal system for the provision of *Brydges* services after hours.

A major finding of the present research project is that participants emphasized the view that there is a need to formally implement *Brydges* services in every jurisdiction, and that these services should be accessible, province-wide, through a toll-free telephone number. The following table provides a brief overview of the types of *Brydges* services that are offered by the ten provinces examined in this project:

Province	<i>Brydges</i> services	Method of delivering <i>Brydges</i> services	Who provides <i>Brydges</i> services?
Alberta	Yes	A roster of lawyers volunteering to be on duty to provide <i>Brydges</i> services for adults has been organized. <i>Brydges</i> service for youth is provided by staff lawyers in Calgary and Edmonton.	Private lawyers.
British Columbia	Yes	A 24-hour <i>Brydges</i> telephone line has been implemented.	Private lawyers/agency has been contracted to provide service 24 hours a day.
Manitoba	Yes	A 24-hour <i>Brydges</i> telephone line has been implemented.	A combination of private lawyers and staff lawyers provide this service.
New Brunswick	Yes	A roster of lawyers provides 24-hour <i>Brydges</i> services over the phone and get paid per call.	Private lawyers – except in Edmonston where staff lawyers provide this service.
Nfld.	Yes	A 24 hour <i>Brydges</i> telephone has been implemented.	Staff lawyers.
Nova Scotia	Yes	<ol style="list-style-type: none"> 1. Regular hours: Local legal aid telephone line provides <i>Brydges</i> services. 2. After hours: A <i>Brydges</i> telephone line has been implemented. 	<ol style="list-style-type: none"> 1. Regular hours: Staff lawyers. 2. After hours: Private lawyers.

Province	<i>Brydges</i> services	Method of delivering <i>Brydges</i> services	Who provides <i>Brydges</i> services?
Ontario	Yes	A 24-hour <i>Brydges</i> telephone line has been implemented.	Private lawyers/agency has been contracted to provide service 24 hours a day.
Prince Edward Island	Yes, but only during regular hours.	1. Regular hours: Local legal aid telephone line 2. After hours: There is no formal <i>Brydges</i> service.	1. Regular hours: Staff lawyers. 2. After hours: Any lawyer who accepts a call.
Quebec	Yes	A 24-hour <i>Brydges</i> telephone line has been implemented.	Staff lawyers.
Sask.	Yes	1. Regular hours: Local legal aid telephone number. 2. After hours: A <i>Brydges</i> telephone line has been implemented.	A combination of private and staff lawyers provide this service.

Source: Legal aid providers interviewed during this research project.

8.2 The Impact Of The *Brydges* Caution On Police Officers

In the *Brydges* (1990) case (and the subsequent cases that clarified it), the Supreme Court of Canada significantly altered police practices by imposing a constitutional duty upon police officers to inform accused persons of the availability of 24-hour duty counsel or similar resources, wherever they exist. In essence, police officers are now required to inform accused persons of the following section 10(b) rights:

- 1) The right to counsel.
- 2) The right to apply for legal aid.
- 3) The right to immediately access free legal advice and assistance, 24 hours a day, wherever these services are provided in Canada.

The findings of the present study indicate that police officers reported that they consistently fulfilled the informational requirements mandated by the *Brydges* decision. In fact, police officers reported that, in order to ensure full compliance with this constitutional duty, they routinely read this information from a printed card. Moreover, the officers stated that they were cognizant of the fact that a failure to satisfy these informational requirements would ultimately work to their disadvantage. For example, they indicated that they were well aware that, if there has been a violation of a suspect's section 10(b) rights, then it is very likely that – should the case go to trial – the court will exclude some or all of the evidence obtained thereby.

In the United States, the empirical literature suggests that the invocation by suspects of their *Miranda* rights frequently brings the police investigation to a halt. However, Canadian police officers reported that the conscientious fulfillment of their duty to properly inform suspects of

their rights to counsel actually facilitates their investigation. For example, once the police officer has fulfilled the various informational requirements and the suspect actually contacts duty counsel, or unequivocally waives his or her right to counsel, the police officer are effectively given a “green light” to proceed with their investigation.

8.3 The Impact Of *Brydges* Services On Arrested Or Detained Suspects

The majority of the respondents in the present study expressed the opinion that the provision of *Brydges* services constituted a major benefit for suspects who were being held in police custody. Nevertheless, it is important to recognize that, if suspects are to gain access to “*Brydges* services and to fully benefit from this service,” they need to fully understand the contents of the police caution and the legal advice given to them by *Brydges* duty counsel. In this respect, it is highly germane to refer to the extensive body of empirical literature that examines those characteristics of offenders that affect their capacity to comprehend information that is presented to them. A considerable number of studies have found that accused and convicted persons may suffer from a myriad of problems, such as substance abuse, mental disorders, intellectual disabilities, fetal alcohol syndrome, hearing impairment, and language barriers. Any or all of these conditions may prevent individuals from fully understanding the nature and scope of their legal rights. In addition, the traumatic circumstances surrounding an arrest or detention may well serve to exacerbate underlying mental health problems, and they may rapidly escalate into acute episodes of mental disorder. It is certainly noteworthy that the majority of accused persons interviewed in the context of the present research project asserted that they did not recall having been informed by the police about the existence of *Brydges* duty counsel.

Furthermore, the review of the Canadian jurisprudence emanating from the decision of the Supreme Court of Canada in *Brydges* (1990) suggests that many of the cases that raise *Brydges* issues involve charges of impaired driving or refusal to provide a breathalyzer sample. This circumstance suggests that these cases, by definition, involve accused persons who were seriously impaired by alcohol at the time of their arrest or detention. Alcohol can interfere with the capacity of an individual to understand even simple information and, in many cases, has the effect of inducing either full or partial amnesia – thus making it impossible for the individual to recall all – or part – of any *Brydges* caution. In circumstances of this nature, the *Brydges* caution may work to the distinct disadvantage of the accused – because a conscientious reading of the accused’s rights effectively gives the police the green light to continue with their investigation, and to collect incriminating evidence. The fact that, by virtue of severe intoxication, the accused is incapable of fully comprehending the police caution and/or the legal advice given by *Brydges* duty counsel has somehow been overlooked by the courts.

While it may well be the case that police officers consistently fulfill the informational requirements mandated by the Supreme Court of Canada in *Brydges* and subsequent cases, it is nevertheless clear that many of those suspects who are held in police custody lack a complete understanding of their rights to counsel. Furthermore, it stands to reason that individuals whose capacity to understand a police caution is impaired are less likely to avail themselves of *Brydges* services. Equally concerning is the fact that, in cases where suspects avail themselves of the

legal advice provided by *Brydges* duty counsel, their understanding of such advice may be quite limited.

8.4 The Need To Ensure Continuity In The Delivery Of Legal Aid Services

Participants in the present project also asserted that *continuity* in the delivery of services may well improve the *quality* of the legal advice and assistance provided to accused persons: this viewpoint is shared by the Ontario Legal Aid Plan Report (1998, p. 15). According to proponents of this perspective, the duty counsel who first comes into contact with an accused person routinely collects relevant information during the first interview and might well be able to represent the accused in court, if the case is relatively simple in nature. Alternatively, there could be better transfer of information between the lawyer providing *Brydges* service and the lawyer who appears for the accused in court, particularly in cases where significant issues about interrogation arise. It has been suggested that such an expanded role for duty counsel would enhance the quality of not only the client-lawyer relationship, but also the relationship of duty counsel with the Crown (Ontario Legal Aid Plan 1998, p. 17). Although this particular suggestion refers to the “regular” duty counsel system, which operates within the courts during the day, it would certainly be feasible to consider expanding the proposal so as to include the *Brydges* duty counsel services that are operated outside of regular working hours.

8.5 The Need To Enhance The Levels Of Funding For Legal Aid Services

According to many of the participants in the present study, there is a need to increase the levels of funding to legal aid service providers. Other studies have confirmed this observation. For example, some studies have found that an increasing number of lawyers are declining to work for the legal aid system in Canada, as a consequence of acute funding problems (Bala 1998; and B.C. Legal Services Society 2002/2003, p. 9). It is increasingly the case that only junior lawyers are willing to accept low legal aid fees, while more experienced counsel are choosing not to work for the government legal aid plan (Bala 1998). Consequently, it has been asserted that the quality of legal representation is being compromised, in exchange for reduced costs (Bala 1998).

8.6 Resolving The Problem Of Language

Participants In The Present Study Suggested That Problems Of Language Could Be Addressed By Hiring Lawyers Who Have The Capacity To Provide Legal Advice In Several Languages. This Recommendation Has Also Been Advanced By Durno (1994, P. 3), Who Has Ventured The Observation That The *Brydges* Telephone Line Should Be Organized So As To Compile A List Of Duty Counsel Who Speak More Than One Language, And Who Could Be Called Upon When Required.

8.7 Education And Training

It has been suggested that criminal justice officials at all levels need education related to the various health problems, mental disorders and disabilities that may affect suspects who have just been taken into police custody (Boland et al. 1998). Certainly, police officers require special training regarding the incidence and nature of mental disorders, so that they may make appropriate referrals of suspects to the mental health system (Nami 2002, p. 1 and Teplin 2000, p. 13). However, they also need to receive some training designed to assist them in identifying those individuals who may lack the capacity to understand a police caution and to encourage them to delay interrogation of such persons until any uncertainty about their mental status has been reviewed by an expert in the appropriate field. Expecting police officers to ask “clarifying questions,” when it is unclear whether a suspect is competent to waive the right to counsel, should become a routine aspect of sound police practice in Canada.

8.8 Alternative Models For The Delivery Of *Brydges* Services

Since local jails and police lock-ups constitute the entry point into the criminal justice system, these institutional facilities constitute a pivotal location for both the identification of the needs of accused persons and the coordination of the various agencies that might address these needs through the provision of services in relation to mental health, housing, substance abuse, and corrections (Nami 2002, p.1; and Zapf, Roesch and Hart 1996, p. 439). In particular, the delivery of legal services at local jails and police lock-ups might well be integrated with these other services. Duty counsel might be deployed more frequently at the jail or police lock-up and assume the responsibility of ensuring that their clients are swiftly assessed by an appropriate professional if there is any question concerning their mental health or medical status. In addition, duty counsel may assist in the coordination of the response to their clients’ needs by different health, mental health, criminal justice and social agencies (Buckley 2000, p. 80). Finally, through more frequent attendance at the location where their clients are held in custody, duty counsel might be expected to more actively protect clients who suffer from mental disorders or intellectual disabilities from over-zealous investigative activities on the part of the police.

Naturally, increasing the expectations that are placed on the shoulders of duty counsel would necessitate significant changes in the system of legal education and, perhaps, the development of specific training programs for lawyers who wish to develop an officially recognized expertise in the delivery of duty counsel services. In addition, the system of legal aid would need to be modified to reflect a client-centred, rather than a lawyer-centred approach (Currie 1999, cited in Buckley 2000, p. 72). Indeed, legal aid service providers would be delivering “*Holistic Justice Services*,” insofar as they would be collaborating closely with other agencies that deliver community services to which accused persons could be referred (Currie 1999, p.33). This approach is succinctly captured in a quotation from Griffiths (1980, cited in Johnsen 1999):

We do not rectify legal problems by legal services alone. Law merely constitutes one of the several problem strategies available.

For example, the goal of achieving a greater degree of coordination between the activities of different service providers might well be accomplished by hiring a social worker, who would be located in local jails or lock-ups, and who would coordinate the delivery of mental health and correctional services for detained persons who are affected by mental disorders and other social problems (Zapf, Roesch and Hart 1996, p. 429). Duty counsel could play a critical role in facilitating the work of such a social worker by supporting the latter in advocating for the provision of critical services to his or her client, and by assisting in the resolution of the legal problems that may complicate access to such services. Over time, it is possible that a new breed of professionals will emerge as advocates for those who find themselves in police custody. As Cahn and Cahn (1972 cited in the National Council of Welfare 1995, p. 3) have noted:

Not every injury requires a surgeon; not every injustice requires an attorney. We need what is, in effect, a new profession – a profession of advocates for the poor made up of human beings from all professions, committed to helping others who are in trouble. That job is too big – and I would add, too important – to be left only to lawyers.

In light of the profound difficulties associated with the need to satisfy increasing demands for legal aid services, at a time when most jurisdictions are attempting to restrict any growth in expenditures, it is certainly an opportune time to explore alternative models for the delivery of such services across Canada. One such model involves hiring paralegals to provide – at lower cost – some of the basic services that are currently offered by lawyers. In addition, since it is frequently difficult to persuade lawyers to offer services in remote northern areas, paralegals may be drafted in to fill this unfortunate vacuum (National Council of Welfare 1995, p. 2).

The provinces of Saskatchewan and Ontario have employed paralegals to perform legal tasks that were previously undertaken solely by lawyers (Lancaster 1999, p. 7; and interview with legal aid provider, June 2002.). However, neither Ontario nor Saskatchewan currently employ paralegals to provide *Brydges* duty counsel services. Another alternative measure has been implemented in Manitoba, where articling students have been deployed to fulfill some of the functions of a fully certified lawyer. Most significantly, these articling students have been hired to provide 24-hour *Brydges* services in those areas where they are needed (interview with legal aid provider, June 2002.).

8.9 Potential Obstacles To Change

The results of the present research project strongly suggest that there may well be significant resistance to the call for the implementation of alternative measures. Indeed, the majority of the criminal justice officials interviewed – and, in particular, lawyers – declined to offer any suggestions for the development of alternative measures for the delivery of *Brydges* services. It may be inferred from this finding that respondents of this project favoured maintenance of the status quo. Consequently, it may reasonably be anticipated that any proposals for the introduction of reforms to the existing system for the delivery of legal aid services will encounter some fairly stout opposition (Currie 1999, p. 4). Undoubtedly, many of the major players in the criminal justice system have vested interests of one kind or another in maintaining the existing legal aid régime (2000, p. 4).

Certain parallels may be drawn with the circumstances examined in a study undertaken by McDonald (2000). Indeed, the following quotation neatly illustrates the manner in which professional self-interest may influence lawyers' perceptions of the needs of their clients:

I suggest that many lawyers do not question their practices. Lawyers who represent disadvantaged people, while aware of and sensitive to their powerless position, will assume that, as their clients have acted upon their own volition to arrive at the lawyers' offices, they will also act to maximize their own interests while there. I also believe that there is a general paternalistic attitude towards these clients and the lawyers genuinely believe that they know best. The lawyers are not explicitly aware of the dominance, nor the dependency created in the lawyer/client relationship, or else if they do recognize the damage it inflicts, they have come to accept it as a necessary evil that is part of doing their job.

Moreover, McDonald later asserts that:

Because of legal training, public image and the profession's investment in the law, the law is accordingly predominant in lawyers' initiatives for social justice.

On the other hand, it is important not to exaggerate the impact of professional self-interest on the evolution of legal aid policy and practice. This view has certainly been emphasized by commentators on the legal aid system in England and Wales. Indeed, Wall (1996, p. 549) has suggested that, in that jurisdiction, the reforms to the legal aid system that occurred in the mid-1990's were fuelled by the misguided notion that the lawyers themselves were primarily "responsible for inflating both the overall level of demand for legally aided services and also expenditure on legal aid through, for example, over-billing." However, according to Wall, "the business dynamics of private lawyering" are not the only source of rising legal aid costs and he warns (1996, p. 564) that any proposals that are primarily designed to "control the delivery of legally aided criminal services threaten even (the) minimal functions of legal aid and threaten to throw criminal justice into a greater legitimization crisis than already exists." Ultimately, for some commentators, there is an ever-present danger that the popular values of "consumerism" and "efficiency" may ultimately trump the more traditional values of due process and justice. As Raine and Wilson (1996, p. 507) have emphasized, "it is vital that consumerist considerations, or

those of administrative convenience, do not (and are not perceived to) take precedence over those of justice and public responsibility.”

8.10 The Model Implemented In England And Wales For Delivery Of 24-Hour Legal Aid Services

The newly minted model implemented in England and Wales for the delivery of 24-hour legal aid services undoubtedly furnishes a useful starting point for modifying the various 24-hour duty counsel systems that currently exist in Canada. The main features of note are:

1. Significantly expanded role of duty counsel, choice for the client, and an independent call centre:
 - Legal aid services are provided, on a national basis, 24 hours a day.
 - Duty solicitors increasingly provide *Brydges*-type services by attending in person at the police station.
 - Duty solicitors routinely attend police interrogation of their clients.
 - Suspects may access a private lawyer of their choice or a duty solicitor – free of charge.
 - The police contact an independent call centre that assigns a duty solicitor from a rota or panel.
2. Additional assistance is made available to suspects with disabilities
 - A police surgeon routinely visits police stations and determines whether or not a person is capable of understanding his or her legal rights and is competent to undergo interrogation.
 - “Appropriate Adult” legislation has been implemented. This provides for the attendance of a social worker, family member or friend, to be present during police interrogation of a mentally disordered or intellectually impaired suspect, to monitor what transpires in that process, and to generally assist the suspect.
3. Alternative measures have been implemented:
 - Legal advice and assistance may also be provided by “legal representatives,” who are not solicitors.
 - Legal representatives are required to pass through a rigorous training and accreditation process operated by an independent agency.

8.11 Conveying Information About Charter Rights To Suspects In Custody

The present research project has raised troublesome questions concerning the efficacy of the methods the police use to convey legal information to suspects who have been recently arrested or detained. It may well be the case that particular attention should be paid to the development of more effective and innovative methods for conveying legal information to suspects who are being held in police custody.

In light of the evidence that many accused persons suffer from conditions that may impair their capacity to understand an oral caution by the police, it might be useful to explore the possibility of showing suspects a video in which the legal caution is fully explained in simple terms. The advantage of this option would be that detained or arrested persons could listen to the video at their own pace and replay passages that are unclear on a first hearing. A less “high-tech” approach might involve providing the accused with a printed card that explains his or her Charter rights in plain language. Both the video and printed card could be presented in different languages.

These alternative techniques for conveying information about the right to counsel may be readily employed in the context of the police station. Clearly, they would not be applicable to a caution given in a police cruiser or on the street. Wherever feasible, however, it would constitute sound policing practice to repeat the caution once the suspect has been transported to the police station. At this location, the video or printed card options could be employed within a brief period after the suspect’s arrival.

Following the basic elements of the 24-hour legal aid system that has been implemented recently in England and Wales, it might be appropriate to explore whether it might be feasible – in the Canadian context – to deploy duty counsel in a manner that would ensure that they attended high-volume police stations in person, and that they offered legal advice and assistance on a face-to-face basis with their clients. Another issue that should be considered is whether or not duty counsel should be expected to be present during police interrogation of their clients (a common occurrence in England and Wales).

As a general issue of social policy, it might be appropriate to undertake a program that is designed to educate as many of the members of the public as possible about their legal rights and obligations. If citizens acquire a degree of familiarity with the nature and scope of their legal rights, they should be able – other things being equal – to make use of that knowledge if they are arrested or detained by the police. For example, information about the right to counsel and access to legal aid and 24-hour duty counsel may be widely distributed through use of the Internet. The B.C. Legal Services Society (2002/2003, p. 14) has proposed, for example, the establishment of a public Web site, which would enable members of the public to browse through self-help materials, to locate community services, and to access self-help clinics (however, at present, this proposal is limited to the area of family law). Another innovative project, sponsored by the B.C. Law Courts Education Society, involves “assisting self-represented accused” by handing them – in the court house – written materials that explain, in simple terms, such concepts as arraignment, diversion, bail hearings, etc (Verdun-Jones and Tijerino 2001).

In the specific context of the *Brydges* decision, it might be considered beneficial to print “user-friendly” pamphlets that explain a suspect’s section 10(b) rights to counsel in a simple and clear manner. Furthermore, these pamphlets could include the numbers for gaining access to the relevant legal aid offices as well as the 24-hour toll-free numbers (where such a service is in place). Police should grant suspects a reasonable opportunity in which to read – and absorb – the contents of such a pamphlet before proceeding with their investigation. Finally, another potential advantage of distributing such a pamphlet is that it could be made available in a number of different languages.

REFERENCES

- Arboleda-Florez, J. "Mental illness and violence: An epidemiological appraisal of the evidence." *Canadian Journal of Psychiatry* 43 (1998): 989-996.
- Bala, N. *Young Offenders Law*. Ontario: Irwin Law, 1998.
- Blaauw, E., Kerkhof, A. and Vermunt, R. "Psychopathology in police custody." *International Journal of Law and Psychology* 21 (1998): 73-87.
- B.C. Legal Services Society. 2002/2003-2004/2005. Service Plan. Retrieved Jun. 4, 2002, from <http://www.lss.bc.ca>
- Bland, R., Newman, S., Thompson, A. and Dyck, R. "Psychiatric disorders in the population and prisoners." *International Journal of Law and Psychiatry*. 21,3 (1998): 273-279.
- Boland, F., Burrill, R., Duwyn, M. and Karp, J. *Fetal alcohol syndrome: Implications for correctional service*. Correctional Service of Canada, 1998. Retrieved Aug. 20, 2002, from <http://www.csc-scc.gc.ca/text/rsrch/reports/r71/r71e.shtml>
- Boland, F., Henderson, K. and Baker, J. *Case needs review: Substance abuse domain*. Correctional Service of Canada, 1998. Retrieved Aug. 20, 2002, from <http://www.csc-scc.gc.ca/text/rsrch/reports/r75/r75e.shtml>
- Brink, J., Dohery, D. and Boer, A. "Mental disorder in federal offenders: A Canadian prevalence study." *International Journal of Law and Psychology*, 24 (2001): 339-356.
- Brown, D., Ellis, T. and Larcombe, K. *Changing the Code: Police detention under the PACE codes of practice*. London: HMSO, 1992.
- Bucke, T. and Brown, D. *In police custody: Police powers and suspects' rights under the revised PACE codes of practice*. London: Home Office, 1997.
- Buckley, M. *The legal aid crisis: Time for action*. Canadian Bar Association, 2000.
- Cassell, P.G. and Hayman. "Dialogue on *Miranda*: Police interrogation in the 1990's: An empirical study of the effects of *Miranda*." *UCLA Law Review* 43 (1996): 839.
- Cassell, P.G. and Fowles, R. "Handcuffing the cops? A thirty-year perspective on *Miranda*'s harmful effect on law enforcement." *Stanford Law Review* 50 (1998): 1055-1172.
- Cao, L. and Huang, B. "Determinants of citizen complaints against police abuse of power." *Journal of Criminal Justice* 28 (2000): 203-213.

- Cloud, M., Sheperd, G., Nodvin Barkoff, A. and Shur, J. "Words without meaning: The constitution, confessions, and mentally retarded suspects." *University of Chicago Law Review* 69 (2002): 495-624.
- Coles, E.M. and Jang, D. "A psychological perspective on the legal concepts of 'volition' and 'intent.'" *Journal of Law and Medicine* 4 (1996): 60-71.
- Crawford, K. "Invoking the *Miranda* right to counsel." *FBI Law Enforcement Bulletin* 64 (1995): 27-33.
- Cunnien, A.J. "Alcoholic blackouts: Phenomenology and legal relevance." *Behavioral Sciences and the Law* 4 (1986): 73-85.
- Currie, A. "Legal aid delivery models in Canada: Past experience and future Developments." The International Legal Aid Conference, 1999, Vancouver, British Columbia.
- Currie, A. *The New Brunswick aboriginal duty counsel project*. Ottawa: Department of Justice Canada, 2000. Retrieved July, 2, 2002, from <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-12a-e.pdf>
- Durno, B. *President's Report*. Ontario Criminal Lawyers Association Newsletter, Vol. 4 (1994): 1-3. Retrieved July, 2, 2002, from <http://www.criminallawyers.ca/>
- Easton, S. *The case for the right to silence*. Aldershot: Ashgate Publishing Company, 1998.
- Edwards, A. "The exercise of police powers in Queensland: The defendant's perspective." *Australian and New Zealand Journal of Criminology* 30 (1997): 217-236.
- Endicott, O. *Persons with intellectual disability who are incarcerated for criminal offences: A literature review*. Correctional Service of Canada, 1991. Retrieved Aug. 20, 2002, from <http://www.csc-scc.gc.ca/text/rsrch/reports/r14/r14e.shtml>
- Harvie, R. and Foster, H. "Different drummers, different drums: The Supreme Court of Canada, American jurisprudence and the continuing revision of Criminal Law under the Charter." *Ottawa Law Review* 24 (1992): 39-115.
- Hendrie, E.M. "Beyond *Miranda*." *FBI Law Enforcement Bulletin* 66 (1997): 25-33.
- Jacobs, J.B. "The evolution of U.S. criminal law." *Issues of Democracy, IIP Electronic Journals* 6 (2001): 6-15.
- Johnsen, J. *Studies of legal needs and legal aid in a marker context*. The International Legal Aid Conference, 1999. Retrieved Aug. 20, 2002, from http://flair.law.ubc.ca/ilac/Papers/11_percent20Johnsen.html

- Laing, J.M. "The police surgeon and mentally disordered suspects: An adequate safeguard?" *Web Journal of Current Legal Issues* 1 (1996). Retrieved July 31, 2002, from <http://webjcli.ncl.ac.uk/1996/issue1/laing1.html>
- Lancaster, J. "Saskatchewan." The International Legal Aid Conference, 1999. Retrieved, June 6, 2002, from http://flair.ubc.ca/ilac/Papers/13_percent20Lancaster.html
- Latzer, B. "State constitutional developments." *Criminal Law Bulletin* 36 (2000): 148-163.
- Legal Services Commission. *The Criminal Defence Service*. London: Legal Services Commission, 2001. Retrieved August 4, 2002, from <http://www.legalservices.gov.uk/cds/index.htm>
- Legal Services Commission. *The duty solicitor manual*. London: Legal Services Commission, 2002. Retrieved August 4, 2002, from http://www.legalservices.gov.uk/cds/duty_solicitor_manual
- Leo, R.A. "The impact of *Miranda* revisited." *Journal of Criminal Law and Criminology* 86 (1996): 621-693.
- Leo, R. A. "Questioning the relevance of *Miranda* in the twenty-first century." *Michigan Law Review* 99 (2001): 1000-1029.
- Littlechild, B. *The social worker as appropriate adult under the Police and Criminal Evidence Act 1984*. Birmingham: The British Association of Social Workers, 1996.
- Lord Chancellor's Department (2001(a)). *Criminal Defence Service: Choice of representative consultation paper*. London: Lord Chancellor's Dept., 2001. Retrieved August 5, 2002, from <http://www.lcd.gov.uk/consult/saldef/chrepsp.htm>
- Lord Chancellor's Department. (2001b). *Criminal Defence Service: Establishing a salaried defence service*. London: Lord Chancellor's Dept., 2001. Retrieved, August 5, 2002, from <http://www.lcd.gov.uk/consult/saldef/saldefresp.htm>
- Mason, A. "Canada." In Dirk van Zyl Smit and Frieder Dunkel, eds. *Imprisonment today and tomorrow: International perspectives on prisoners' rights and prison conditions*. Hague: Kluwer Law International, 2001.
- McCoy, R. "Note: Is there a need for *Miranda*: A look at Australian and Canadian interrogation." *Arizona Journal of International and Comparative Law* 17 (2000): 627-649.
- McDonald, S. "The right to know: Women, ethnicity, violence and learning about the Law." Ph. D. thesis. Ontario Institute for Studies in Education, University of Toronto, 2000.

- Medford, S., Gudjonsson, G. and Pearce, J. *The identification of persons at risk in police custody*. London: Institute of Psychiatry at the Maudsley, 2000.
- Motiuk, L. and Porporino, F. *The prevalence, nature and severity of mental health problems among federal male inmates in Canadian penitentiaries*. Correctional Service of Canada, 1991. Retrieved Aug. 20, 2002, from <http://www.csc-scc.gc.ca/text/rsrch/reports/r24/r24e.shtml>
- Ministry of Public Safety and Solicitor General. "The expanding role of corrections." British Columbia, 2001. Retrieved July 31, 2002, from http://www.pssg.gov.bc.ca/corr/strategic_plan/expand.htm
- Nami (2002). *The criminalization of people with mental illness*. Retrieved August 14, 2002, from <http://www.nami.org/update/unitedcriminal.html>
- National Council of Welfare. *Legal aid and the poor: How can legal aid be improved*. Access to Justice Network, 1995. Retrieved Nov. 23, 2001, from <http://129.128.19.162/docs/poor3.html>
- National Equal Justice Library. *Legal aid in England*. Washington, D.C.: Washington College of Law, American University, 2002. Retrieved August 4, 2002, from <http://www.equaljusticelibrary.org.cnhost.com/international/english.asp>
- Nemetz, T. and Bean, P. "Protecting the rights of the mentally disordered in police stations: The use of the appropriate adult in England and Wales." *International Journal of Law and Psychiatry* 24 (2001): 595-605.
- Ontario Legal Aid Plan. "Proposed pilot projects: Final Report." Ontario, 1998. Retrieved, April 18, 2002, from http://www.lsuc.on.ca/services/legal_aid_pilot_en.jsp
- Paciocco, D.M. and Stuesser, L. *The Law of Evidence*. 2nd ed. Toronto: Irwin Law, 1999.
- Pernanen, K., Cousieau, M., Brochu, S. and Sun, F. "Proportions of crimes associated with alcohol and other drugs in Canada." Canadian Centre on Substance Abuse, 2002. Retrieved Aug. 2, 2002, from <http://www.ccsa.ca/>
- Petrowski, T.D. "Miranda revisited." *FBI Law Enforcement Bulletin* 70 (2001): 25-33.
- Philips, R. "Big 6: Lawful Exceptions to *Miranda*." *Law Enforcement Quarterly* 30 (2001): 16-19.
- Phillips, C. and Brown, D. *Entry into the criminal justice system: A survey of police arrests and outcomes*. London: Home Office, 1998.

- Pitts, D. "The Scottsboro boys and fundamental rights." *Issues of Democracy, IIP Electronic Journals* 6 (2001): 29-35.
- Porporino, F. *The prison careers of offenders with mental disorders*. Correctional Services of Canada, 1994. Retrieved Aug. 20, 2002, from <http://www.csc-scc.gc.ca/text/rsrch/reports/r33/r33e.shtml>
- Raine, J.W. and Wilson, M.J. "The court, consumerism and the defendant." *British Journal of Criminology* 36 (1996): 498-508.
- Renke, W.N. (1996(a)). "By-passing the tell-tale heart: The right to counsel and the exclusion of evidence." *University of British Columbia Law Review* 30 (1996): 99-136.
- Renke, W.N. (1996b). "Flappers to rappers: Criminal Law in 1921 and 1996." *Alberta Law Review* 35 (1996): 80-116.
- Roesch, R. "Mental health interventions in jails." In Davis, G., Lloyd-Bostock, S., McCurran, M., and Wilson, C., eds. *Psychology, law and criminal justice* (pp. 520-531). New York: Walter de Gruyter, 1995.
- Sanders, A. "Access to justice in the police station: An elusive dream?" In Young, R. and Wall, D. eds. *Access to criminal justice* (pp. 254-275). London: Blackstone Press, 1996.
- Sharpe, R.J. and Swinton, K.E. *The Charter of Rights and Freedoms*. Toronto: Irwin Law, 1998.
- Stuart, D. *Charter justice in Canadian criminal law*. 3rd ed.. Toronto: Carswell, 2001.
- Stuckey, G.B., Roberson, C. and Wallace, H. *Procedures in the justice system*. 6th ed. Upper Saddle River, N.J.: Prentice-Hall, 2001.
- Teplin, L. "The prevalence of severe mental disorders among male jail detainees: comparison with the Epidemiological Catchment Area Program." *American Journal of Public Health* 80 (1990): 663-669.
- Teplin, L. "Keeping the peace: Police discretion and mentally ill persons." *National Institute of Justice Journal* (2000): 1-15.
- Thomas, G. and Leo, R.A. "The effects of *Miranda v. Arizona*: Embedded in our national culture?" In M. Tonry, ed. *Crime and Justice: A review of research, crime and justice*. Vol. 29. Chicago: University of Chicago Press, 2001.
- Uelmen, G.F. "2001: A train ride: A guided tour of the sixth amendment right to counsel." *Law and Contemporary Problems* 58 (1995): 13-2.

- Verdun-Jones, S.N. and Tijerino, A.A. *An assessment of the B.C. Law Courts Education Society Pilot Project for Unrepresented Defendants: A legal and qualitative analysis*. Ottawa; Department of Justice Canada, 2001.
- Vernon, M., Steinberg, A.G. and Montoya, L.A. "Deaf murderers: Clinical and forensic issues." *Behavioral Sciences and the Law* 17 (1999): 495-516.
- Vitelli, R. "The homeless inmate in a maximum-security prison." *Canadian Journal of Criminology* 35 (1993): 323-331.
- Wall, D.S. "Legal aid, social policy, and the architecture of criminal justice: The supplier induced inflation thesis and legal aid policy." *Journal of Law and Society* 23 (1996): 549-569.
- Wilkinson, J.S. "The possibility of alcoholic automatism: Some empirical evidence." *Canadian Criminal Law Review* 2 (1997): 217-238.
- Zapf, P., Roesch, R. and Hart, S. "An examination of the relationship of homelessness to mental disorder, criminal behaviour, and health care in pretrial jail population." *Canadian Journal of Psychiatry* 41 (1996): 435-440.

COURT CASES CITED

SUPREME COURT OF CANADA

- R. v. Bartle* (1994), 92 C.C.C. (3d) 289.
- R. v. Brydges* (1990), 53 C.C.C. (3d) 330.
- R. v. Cobham* (1994), 92 C.C.C. (3d) 333.
- R. v. Collins* (1987), 33 C.C.C. (3d) 1.
- R. v. Debot* (1989), 52 C.C.C. (3d) 207.
- R. v. Evans* (1991), 63 C.C.C. (3d) 289.
- R. v. Feeney* (1997), 115 C.C.C. (3d) 129.
- R. v. Harper* (1994), 92 C.C.C. (3d) 423.
- R. v. Latimer* (1997), 112 C.C.C. (3d) 193.
- R. v. Matheson* (1994), 92 C.C.C. (3d) 434.
- R. v. Pozniak* (1994), 92 C.C.C. (3d) 472.
- R. v. Prosper* (1994), 92 C.C.C. (3d) 353.
- R. v. Whittle* (1994), 92 C.C.C. (3d) 11.
- R. v. Therens* (1985), 18 C.C.C. (3d) 481.

PROVINCIAL AND TERRITORIAL APPELLATE COURTS

- R. v. Boomer* (2001), 154 C.C.C. (3d) 425 (B.C.C.A.).
- R. v. Brunczlik*, [2000] O.J. No. 116 (Ont. C.A.), online: QL (O.J.).
- R. v. Chisholm*, [2001] N.S.J. No. 58 (N.S.C.A.), online: QL (N.S.J.).
- R. v. Dimic*, [1998] O.J. No. 2666 (Ont. C.A.), online: QL (O.J.).
- R. v. Eakin*, [2000] O.J. No. 1670 (Ont. C.A.), online: QL (O.J.).

- R. v. Davis*, [1999] O.J. No. 141 (Ont. C.A.), online: QL (O.J.).
- R. v. Ferguson*, [1997] B.C.J. No. 342 (B.C.C.A.), online: QL (B.C.J.).
- R. v. Fowler*, [1996] N.J. No. 318 (Nfld. C.A.), online: QL (N.J.).
- R. v. Genaille* (1997), 116 C.C.C. (3d) 459 (Man. C.A.).
- R. v. Girard*, [1993] N.S.J. No. 67 (N.S.C.A.), online: QL (N.S.J.).
- R. v. Gormley* (1999), 140 C.C.C. (3d) 110 (P.E.I.C.A.).
- R. v. Jones*, [1993] A.J. No. 212 (Alta. C.A.), online: QL (A.J.).
- R. v. Jones*, [1999] O.J. No. 577 (Ont. C.A.), online: QL (O.J.).
- R. v. Jutras* (2001), 160 C.C.C. (3d) 113 (Sask. C.A.).
- R. v. Kennedy* (1995), 103 C.C.C. (3d) 161 (Nfld. C.A.).
- R. v. Leedahl*, [2002] S.J. No. 14 (Sask. C.A.), online: QL (S.J.).
- R. v. Littleford*, [2001] O.J. No. 2437 (Ont. C.A.), online: QL (O.J.).
- R. v. Luong* (2000), 149 C.C.C. (3d) 571 (Alta. C.A.).
- R. v. M.K.A.*, [1993] A.J. No. 153 (Alta. C.A.), online: QL (A.J.).
- R. v. McIntosh* (1999), 141 C.C.C. (3d) 97 (Ont. C.A.).
- R. v. McKeen*, [2001] N.S.J. No. 44 (N.S.C.A.), online: QL (N.S.J.).
- R. v. Moore*, [1995] A.J. No. 1059 (Alta. C.A.), online: QL (A.J.).
- R. v. Mosher*, [1992] N.S.J. No. 512 (N.S.C.A.), online: QL (N.S.J.).
- R. v. Nickerson* (2001), 160 C.C.C. (3d) 300 (N.S.C.A.).
- R. v. Noël* (2001), 156 C.C.C. (3d) 17 (Qué. C.A.).
- R. v. Parrill*, [1998] N.J. No. 322 (Nfld. C.A.), online: QL (N.J.).
- R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.).
- R. v. Poudrier*, [1998] B.C.J. No. 784 (B.C.C.A.), online: QL (B.C.J.).

- R. v. Russell*, [1996] S.J. No. 59, online: QL (S.J.).
- R. v. Small* (1998), 123 C.C.C. (3d) 560 (Alta. C.A.).
- R. v. Smith* (1999), 134 C.C.C. (3d) 453 (Ont. C.A.).
- R. v. Taylor* (1991). 77 C.C.C. (3d) 551 (Ont. C.A.).
- R. v. Wallace* (2002), 165 C.C.C. (3d) 84 (N.S.C.A.).
- R. v. Whitford* (1997), 115 C.C.C. (3d) 52 (Alta. C.A.).
- R. v. Wydenes* , [1999] B.C. J. No. 794 (B.C.C.A.), online: QL (B.C.J.).

AMERICAN CASES

- Davis v. United States*, 512 U.S. 452 (1994).
- Dickerson v. United States*, 530 U.S. 428 (2000).
- Gideon v. Wainwright*, 372 U.S. 335 (1963).
- Miranda v. Arizona*, 384 U.S. 436 (1966).
- United States v. Sterling*, 283 F. 3d 216 (4th Cir. 2002).

ENGLISH CASES

- R. v. Glaves*, [1993] Crim. L.R. 685 (C.A.).
- R. v. Miller* (1990) Crim L.R. 572

APPENDIX A SUMMARY OF MAJOR FINDINGS

Accused Persons								
#	Time of Arrest / detention	Right to counsel caution	Legal Aid info	How were you informed	Access to a phone	Called 1-800 #	Spoke to Brydges lawyer	Saw duty counsel (the next day)
1	Regular hours	No	No	N/A	Yes	No	N/A	Yes – but not helpful
2	Regular hours	Yes	No	Verbally	Yes	Yes	Yes – helpful	Yes – helpful
3	After- hours	CR – Can't remember – intoxicated	CR	N/A	Yes	Yes	No	Yes – helpful
4	After- hours	No	No	N/A	No	No	N/A	Yes – helpful
5	After-hours	Yes	Yes	Verbally	Yes	No	N/A	Yes – helpful
6	After-hours	CR – Can't remember intoxicated	CR	N/A	Yes	No	N/A	Yes – helpful
7	After-hours	No	No	N/A	No	No	N/A	Yes – but not helpful
8	After-hours	Yes	Yes	Verbally	Yes	No	N/A	Yes – but not helpful
9	After-hours	No	No	N/A	No	No	N/A	Pending
10	After-hours	No	No	N/A	Yes	Yes	No	Pending
11	Regular hours	Yes	Yes	Verbally	Yes	Yes	Yes – helpful	Yes – helpful
12	After-hours	Yes	Yes	Verbally	Yes	No	N/A	Pending
13	After-hours	Yes	Yes	Verbally	No	No	N/A	Pending
14	After-hours	No	No	N/A	No	No	N/A	Pending
15	Regular hours	Yes	Yes	Verbally	No	No	N/A	Pending
16	After-hours	Yes	Yes	Verbally	No	No	N/A	Yes – helpful
17	After-hours	Yes	Yes	Verbally	Yes	No	N/A	Yes – helpful
18	Regular-hours	Yes	No	Verbally	Yes	No	N/A	Yes – but not helpful
19	After-hours	Yes	Yes	Verbally	Yes	No	N/A	Yes – helpful
20	Regular hours	Yes	No	Verbally	NR	No	N/A	No – released

Accused Persons	
#	Suggestions
1	Yes – Provide access to a phone.
2	No – System is fine.
3	Speedup the process.
4	Yes – 1. Police should be more clear as to what your rights are. 2. More access to call a lawyer.
5	Yes 1. Better police treatment.
6	No
7	No – Doesn't care.
8	No
9	No
10	No
11	No
12	Yes – 1. Police should not coerce a confession before reading rights.
13	Yes – Provide bigger police cells.
14	No
15	No
16	Yes – Provide access to a phone.
17	No
18	Yes – Police should be more clear about what rights we have.
19	Yes – Keep mentally ill people separately.
20	Yes – Police should inform about legal aid.
	10 – Yes 10 – No

#	Time of Arrest / detention	Right to counsel caution	Legal Aid info	Access to a phone	Called 1-800 #	Spoke to Brydges lawyer	Saw duty counsel (the next day)
	14 – After 6 – Reg.	12 – Yes 6 – No 2 CR	9 – Yes 9 – No 2 – CR	12 – Yes 7 – No 1 – NR	4 – Yes 16 – No	2 – Yes 2 – No 16 – N/A	13 – Yes 6 – Pending 1 – No

Crown				
#	Province	Type of Court	Problems when no <i>Brydges</i> services were provided during bail hearings	Problems when no <i>Brydges</i> services were provided during court proceedings
1	Ontario	Provincial	Adjourn hearing	None
2	B.C.	Superior	None	None
3	Alberta	Provincial and Superior	None	None
4	Manitoba	Provincial and Superior	None	Evidence less likely to be admitted
5	PEI	Provincial and Superior	Adjourn bail hearing	Evidence less likely to be admitted
6	Ontario	Superior	None	Evidence less likely to be admitted
7	Quebec	Provincial	None	Evidence less likely to be admitted
8	PEI	Provincial and Superior	Adjourn bail hearing	None
9	Saskatchewan	Provincial	Adjourn bail hearing	Evidence less likely to be admitted
10	Alberta	Provincial and Superior	Adjourn bail hearing	Evidence less likely to be admitted
11	Newfoundland	Provincial	None	Evidence less likely to be admitted
12	Manitoba	Provincial and Superior	None	None
13	New Brunswick	Provincial and Superior	None	Evidence less likely to be admitted
14	New Brunswick	Provincial and Superior	None	None
15	B.C.	Provincial	None	Evidence less likely to be admitted
16	Nfld.	Provincial	None	None
17	Saskatchewan	Provincial and Superior	None	Evidence less likely to be admitted

Crown				
#	Province	Advantages	Gaps / Disadvantages	Suggestions
1	Ontario	1. Knowledge of legal rights	1. Language	1. Hire multilingual lawyers
2	B.C.	None	None	N/A
3	Alberta	1. Knowledge of legal rights 2. Knowledge about the case	1. Not enough volunteer duty counsel	None
4	Manitoba	1. Knowledge of legal rights 2. Knowledge about implications of actions and giving statements	None	1. Police should call duty counsel
5	PEI	1. More likely to get a conviction	1. Time – difficult to reach lawyers at night	1. Implement a 24-hour duty counsel service
6	Ontario	1. Fulfills Charter requirements 2. Knowledge of legal rights	1. Inexperience duty counsel 2. No services for the disable	1. Better training of duty counsel 2. Hire experienced counsel 3. Hire multilingual counsel
7	Quebec	1. Knowledge of legal rights 2. Makes things easier	None	None
8	PEI	1. Saves time – speeds up process	1. Time – Duty counsel not available 24 hours /day	1. Implement a formal 24-hour duty counsel system
9	Saskatchewan	1. Immediate legal advice 2. It is a 24-hour service	1. Coordination of services	1. Ongoing assistance from initial duty counsel lawyer
10	Alberta	1. Due process / upholds legal rights 2. Knowledge of legal rights	1. Time – Difficult to reach volunteer duty counsel after hours Financial – No compensation	1. Pay for duty counsel 2. Implement a formal 24-hour duty counsel
11	Newfoundland	1. Fulfills Charter requirements 2. Knowledge of legal rights	None	None
12	Manitoba	1. Saves time – early resolution of cases 2. Knowledge of legal rights	None	None
13	New Brunswick	1. Knowledge of legal rights	1. Time – delays in reaching duty counsel	1. Implement a formal 24-hour duty counsel system
14	New Brunswick	1. Knowledge of legal rights	1. Time – delays in reaching duty counsel after hours	1. More pay for duty counsel 2. More duty counsel
15	B.C.	1. Due process / Upholds legal rights 2. Unlikely to lose evidence	None	None
16	Nfld.	1. Immediate legal advice	1. Time – During the day is hard to reach duty counsel	1. Implement a formal 24-hour <i>Brydges</i> service
17	Saskatchewan	1. Knowledge of legal rights 2. Knowledge about implications of actions and giving statements	None	None

Duty Counsel			
#	Province	Advantages	Problems when no <i>Brydges</i> services received
1	N.B.	1. Knowledge of legal rights 2. Knowledge about process	1. Accused provide self-incriminating evidence without knowing the ramifications
2	MB	1. Knowledge of legal rights 2. Knowledge about process	1. Accused provides self-incriminating evidence without knowing ramifications 2. Challenge admissibility of evidence
3	PEI	1. Knowledge of legal rights 2. Counsel gets info from police	None
4	PEI	1. Knowledge of legal rights 2. Counsel gets info from police	None
5	SK	1. Knowledge of legal rights 2. Knowledge about process	None
6	MB	1. Fulfills Charter requirements 2. Due process -Fairness	None
7	AB	1. None	1. Challenge admissibility of evidence
8	SK	1. Consistent practice 2. Knowledge of legal rights	1. Challenge admissibility of evidence
9	NB	1. Knowledge of legal rights 2. Knowledge about process 2. Provision of impartial info	None
10	B.C.	1. Knowledge of legal rights 2. Knowledge about implications of actions and giving statements	None
11	Ont.	1. Knowledge of process 2. Knowledge about implications about actions and giving statements	None
12	AB	1. Free and immediate legal advice	1. Accused provides self-incriminating evidence
13	Ont.	1. Knowledge of legal rights 2. Knowledge about implications of actions and giving statements	1. Problems with police tactics eliciting evidence 2. Challenge the admission of evidence
14	NS	None	1. None
15	NS	1. Knowledge of legal rights 2. Knowledge about implications of actions and giving a statement 2. Early release	1. Challenge admissibility of evidence
16	Nfld.	1. Knowledge of legal rights 2. Knowledge of the nature of investigation 2. 24-hour service	1. Challenge admissibility of evidence
17	Nfld.	1. Due process /upholds legal rights 2. Integrity of the state is maintained	1. Challenge admissibility of evidence
18	B.C.	1. 24-hour service 2. Immediate legal advice	None

Duty Counsel			
#	Province	Gaps/Disadvantages	Suggestions
1	N.B.	1. Time – Difficult to reach duty counsel after hours 2. Inexperienced counsel	1. More pay for counsel 2. More duty counsel 3. Hire more experienced counsel
2	MB	1. Accused not being informed by police about 1-800 #	1. Police should inform about 1-800 # 2. Police should call duty counsel
3	PEI	1. Time – Difficult reach duty counsel after hours	1. Implement a 24-hour toll free 1-800 #
4	PEI	1. Time – Difficult to reach duty counsel after hours	1. Implement a 24-hour toll free 1-800 #
5	SK	None	None
6	MB	None	1. Have an articling student in every police station
7	AB	1. Time – Difficulty in reaching duty counsel after hours	1. Increase pay 2. More volunteer duty counsel after hours
8	SK	None	None
9	NB	1. Lack of coordination between <i>Brydges</i> services and other legal aid services 2. Little financial pay for counsel 3. Language problems	1. Recruit bilingual lawyers 2. pay lawyers appropriately
10	B.C.	1. Lack of access to a phone	1. Person-to-person duty counsel 24 hours/day
11	Ont.	1. Lack of coordination between <i>Brydges</i> and other legal aid services	1. Feedback from 1-800 lawyer
12	AB	1. Time – Difficult to reach duty of counsel after hours	1. Have a 24-hour duty counsel system 2. Offer financial compensation for after-hours services
13	Ont.	1. Lack of coordination between <i>Brydges</i> and legal aid lawyers 2. Questionable legal advice given by <i>Brydges</i> counsel	1. Coordinate feedback 2. Handbook describing regional practices
14	NS	1. Accused's lack of understanding police caution 2. <i>Brydges</i> services appear to be more of a service to the police since they can continue with their investigation	1. Police should call duty counsel
15	NS	None	None
16	Nfld.	1. Not enough duty counsel	1. More duty counsel – on call to answer phone 2. Better pay for duty counsel
17	Nfld.	1. Police not giving info immediately	1. Police should provide info in a timely manner
18	B.C.	1. Time – Delays in call-back time from duty counsel	1. More duty counsel – answering 1-800

Judges				
#	Province	Type of Court	Problems During Bail Hearings	Problems During Court Proceedings
1	Saskatchewan	Provincial Court	Adjourn bail hearing	None
2	Saskatchewan	Provincial Court	Increased likelihood of remand	1. Increased need to exclude evidence
3	Manitoba	Superior Court	Adjourn bail hearing	1. Increased need to exclude evidence
4	Quebec	Provincial Court	None – that I have experienced	1. Increased need to exclude evidence
5	New Brunswick	Provincial Court	None – that I have experienced	1. Increased need to exclude evidence
6	New Brunswick	Superior Court	Adjourn bail hearing	1. Increased need to exclude to evidence 2. Greater number of appeals
7	Nova Scotia	Provincial Court	None – that I have experienced	1. Increased need to exclude evidence
8	Nova Scotia	Superior Court	None – that I have experienced	None – that I have experienced
9	PEI	Provincial Court	Adjourn bail hearing	1. More defences to the accused
10	Nfld.	Provincial Court	None – that I have experienced	1. Increased need to exclude evidence 2. Greater number of appeals
11	Nfld.	Provincial Court	None – that I have experienced	None
12	Ont.	Provincial Court	None – that I have experienced	1. Increased need to exclude evidence 1. More defences to the accused – claim did not understand caution
13	B.C.	Provincial Court	None	1. Increased need to exclude evidence
14	Alberta	Provincial Court	Adjourn bail hearing	1. Increased need to exclude evidence
15	PEI	Superior Court	None	1. Increased need to exclude evidence
16	Manitoba	Provincial Court	Adjourn bail hearing	1. Increased need to exclude evidence 2. More court time

Judges				
#	Province	Type of Court	Gaps/Disadvantages	Suggestions/Alternatives
1	Saskatchewan	Provincial Court	None – The system is working well	None
2	Saskatchewan	Provincial Court	None	None
3	Manitoba	Superior Court	None	N/A
4	Quebec	Provincial Court	None – the service is quite satisfactory	No
5	New Brunswick	Provincial Court	1. Inexperienced duty counsel 2. Not enough duty counsel	1. Hire experts on criminal law 2. More funding to hire more duty counsel
6	New Brunswick	Superior Court	1. Inexperienced counsel	1. Increase funding
7	Nova Scotia	Provincial Court	None	1. Examine what accused persons are saying about <i>Brydges</i> services 2. Duty counsel at every police station
8	Nova Scotia	Superior Court	1. Inexperienced counsel	1. Hire experts on criminal law
9	PEI	Provincial Court	None	None
10	Nfld.	Provincial Court	1. Limited services 2. Lack of coordination of services – no continuity between <i>Brydges</i> services and legal aid counsel 3. Inexperienced counsel	1. Hire experts on criminal law
11	Nfld.	Provincial Court	None – the system is working fine	None
12	Ont.	Provincial Court	1. Inexperienced duty counsel 2. Police not providing Info	1. Better quality of service
13	B.C.	Provincial Court	1. None	1. Hire articling students
14	Alberta	Provincial Court	1. Geographical gaps – harder to contact duty counsel after hours in rural areas than urban 2. Time – difficult to reach duty counsel after hours	1. Implement a 24-hr 1-800 numbers
15	PEI	Superior Court	1. Time – lack of duty counsel after hours	None
16	Manitoba	Provincial Court	1. Not enough duty counsel	1. Hire more duty counsel

Legal Aid Providers				
Province	Model	Brydges Services – After hours	Who Provides Brydges Service	Types of Cases
Saskatchewan	Staff Model – yet it employs private counsel	1-800 #	1. Private lawyer	Summary and Indictable
Ontario	Primarily judicare (80 percent) with some staff lawyers (20 percent)	1-800 #	Private duty counsel	Summary and Indictable
Manitoba	Primarily judicare (60 percent) with some staff lawyers (40 percent)	1-800 #	Private duty counsel	Summary and Indictable
Alberta	Judicare model	Volunteer – Roster of Lawyers on call	Private duty counsel	Summary and Indictable
New Brunswick	Primarily judicare model with some staff lawyers	Paid – Roster of Lawyers on call	Private duty counsel	Summary and Indictable
Nova Scotia	Primarily staff model with some private lawyers	Paid – Roster of private lawyers	Private duty counsel	Summary and Indictable
PEI	Primarily staff	No formal after hours service	-	-
Newfoundland	Staff model	1-800 #	Legal aid counsel	Summary and Indictable

Legal Aid Providers				
Province	Number of Calls	Method of Payment	Source of Funding	Total Cost
Saskatchewan	10,561 calls	Flat rate	Provincial/Federal	\$65, 000
Ontario	50,759	Flat rate	Provincial/Federal	\$730,000
Manitoba	4,141 calls	Flat rate – private lawyers Hourly rate – staff lawyers	Provincial/Federal	Not available
Alberta	Does not know	-	-	-
New Brunswick	Data not available	\$25 / Call	Provincial /Federal	\$70-80,000
Nova Scotia	3468 (After hours only)	Flat rate	Provincial /Federal	\$30,068. (For after hours service only)
PEI	Data not available	Flat rate during the day No funding at night	Provincial /Federal	Not available – can't distinguish from other legal aid services
Newfoundland	Data not available	Flat rate	Provincial /Federal	\$65-70,000
Quebec				
B.C.				

Legal Aid Providers	
Province	Advantages
Saskatchewan	1. Quick and timely access to legal advice 2. Consistent and good quality service
Ontario	1. Police provide good background info to duty counsel
Manitoba	1. Quick and timely access to legal advice
Alberta	If there was a formal 1-800 system: 1. Simple access to duty counsel
New Brunswick	1. Fairness/ beneficial to all in justice system 2. Knowledge of legal rights 3. Knowledge about implications actions and giving statements
Nova Scotia	1. Fairness/ beneficial to all in justice system
PEI	For daytime <i>Brydges</i> services: 1. Quick and timely access to legal advice
Newfoundland	1. Quick and timely access to legal advice
Quebec	-
B.C.	-

Legal Aid Providers			
Province	Gaps/Disadvantages	Impact of Gaps	Suggestions / Alternatives
Sask.	1. Lack of coordination between <i>Brydges</i> services and other legal aid services 2. Difficult to assess effectiveness of <i>Brydges</i> services when accused persons drunk 3. It might be more of a service to the police, since after accused persons talk to duty counsel police continue with the investigation	1. Clients do not know that this service is different from legal aid – that they still need to apply for legal aid	If it was possible: Britain has duty counsel at the police station which ensures that they can provide a more meaningful legal service than a phone call.
Ontario	1. Lack of coordination between <i>Brydges</i> services and other legal aid services	1. It is hard to monitor the private company that provides this service	1. Ensure that better training is provided 2. Hire more experienced counsel 3. Increase funding 4. To provide more interview time
Manitoba	1. Financial constraints – The costs have increased over time	None	None
Alberta	1. Time – we have good services during the day, but it is difficult to have enough volunteer duty counsel after hours	1. Accused persons are not given the opportunity to contact a lawyer and get legal advice in a timely manner	1. Implement a 1-800 #
New Brunswick	1. Time – Sometimes it is difficult to contact duty counsel during the day 2. Financial constraints – when you are working with a small budget	1. It affects the police, the accused and legal aid. 2. In some cases it might benefit the accused since police might not be able to do a breathalyzer test in a timely manner or the evidence is not admitted in court	1. Increase funding – in order to be able to provide different services
Nova Scotia	None	None	None
PEI	1. Time – no formal after hours service If there was an after hours <i>Brydges</i> service: 2. Difficult to assess effectiveness of <i>Brydges</i> services when accused persons are drunk	1. It has an impact upon those who are arrested at night, but the majority are intoxicated	None
Newfoundland	None	N/A	None
Quebec	No response		
B.C.	Interview not completed		

Police					
#	Rank	Province	Appropriate Caution Given (duty counsel, legal aid and 1-800 where applicable)	How Info is Delivered	Amenities Available
1	Sgt.	AB	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Lawyers #s
2	Staff. Sgt.	AB	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Lawyers #s
3	Sgt.	SASK.	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Legal aid #s 5. 1-800 #
4	Const.	SASK	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Legal aid #s 5. 1-800 #
5	Staff Sgt.	MB.	Yes	Told orally – read from a card	1. Phone 2. Private room 3. Lawyers #s 4. 1-800 #
6	Const.	Ont.	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Call 1-800
7	Const.	Ont.	Yes	Told orally – read from a card	1. Phone 2. Private room 3. call 1-800
8	Sgt.	Quebec	Yes	Told orally – first from memory and then read from a card	1. Phone 2. Private room 3. Duty counsel # 3. Call 1-800
9	Const.	Quebec	Yes	Told orally – read from a card	1. Phone 2. Private room 3. Duty Counsel # 3. 1-800 #
10	Const.	N.B	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Legal aid #s
11	Sgt.	N.B	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Legal aid #s

Police					
#	Rank	Province	Appropriate Caution Given (duty counsel, legal aid and 1-800 where applicable)	How Info is Delivered	Amenities Available
12	Const.	N.S	Yes	Told orally – read from a card	1. Phone 2. Private room 3. Legal aid #s 4. Call 1-800
13	Const.	N.S		Told orally – read from a card	1. Phone 2. Private room
14	Detective	MB		Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. 1-800 #
15	Const.	PEI	Yes–	Told orally – read from a card	1. Phone 2. Phone book 3. Private room
16	Const.	PEI	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room
17	Sgt.	B.C.	Yes	Told orally – read from a card	1. Phone 2. Private room 3. Legal aid # 4. 1-800 #
18	Const.	Nfld.	Yes	Told orally – read from a card	1. Phone 2. phone book 3. private room 4. Lawyers #s 5. 1-800 #
19	Inspector	Nfld.	Yes	Told orally – read from a card	1. Phone 2. Phone book 3. Private room 4. Lawyers #s 5. Call 1-800
20	Const.	B.C.	Yes		1. Phone 2. Phone book 3. private room 4. Legal aid Lawyers 5. 1-800 #

Police		
#	Province	Advantages
1	Alberta	None
2	Alberta	1. Fulfills Charter requirements
3	Saskatchewan	1. Fulfills Charter requirements 2. prevents risk of having case thrown out of court
4	Saskatchewan	None
5	Manitoba	1. Helps collect evidence faster 2. Saves time – expedient manner 3. Saves money
6	Ontario	1. Saves time – police not spending time looking for lawyers
7	Ontario	1. Free legal information 2. Ensures police assist accused contact lawyer
8	Quebec	None
9	Quebec	1. Fulfills Charter requirements 2. It is a 24- hour service
10	New Brunswick	1. Knowledge of legal rights 2. Lawyers are available after hours
11	New Brunswick	1. Prevents losing evidence at trial 2. Knowledge of legal rights
12	Nova Scotia	1. Fast access to duty counsel 2. It is a 24-hour service
13	Nova Scotia	1. Free legal advice 2. Saves time – can continue with investigation
14	Manitoba	1. Fast access to duty counsel 2. Convenient – Easy access through the 1-800
15	PEI	If a 1-800 # was in place: 1. Good for investigation 2. Fast access to duty counsel 3. It is a 24-hour service
16	PEI	If a 1-800 system in place 1. Fast access to duty counsel 2. It is a 24-hour service
17	B.C.	1. Free legal advice
18	Nfld.	1. fast access to duty counsel 2. Prevents losing evidence at trial
19	Nfld.	1. Convenient – Easy access to duty counsel 2. Saves time – Speeds up investigation
20	B.C.	1. Saves time – Speeds up investigation 2. Fast access to duty counsel 3. Convenient – simplifies process

Police				
#	Province	Gaps in <i>Brydges</i> Services	Impact of Gaps	Suggestions/Alternatives
1	Alberta	1. Time – Duty Counsel not available after hours	1. Slows work – It affects the timeliness 2. Hinders investigation – thoroughness of the investigations	1. None
2	Alberta	1. Time – Difficult to reach duty counsel after hours	1. Hinders police investigation – i.e., after breathalyzer tests have a 2 hr. timeline	1. Having duty counsel available 24 hours/day 2. Duty counsel at every police station
3	Saskatchewan	None – They can get advice quickly over the phone	N/A	None
4	Saskatchewan	None – with the 1-800 24-hours/day there is always duty counsel	N/A	None
5	Manitoba	None – The way it is set up now it certainly works well	N/A	None
6	Ontario	1. Time – Long delays in call back time from duty counsel at certain times of the week (weekends)	1. Slows work 2. Ties up officers –can't get back on the road	1. A guaranteed call back time
7	Ontario	1. Inaccurate info given by duty counsel 2. Time – delays in reaching counsel	1. Slows work	None
8	Quebec	None	N/A	None
9	Quebec	None – services is well in place and fully functional	N/A	None
10	New Brunswick	None – during the night we can depend on calling a lawyer	N/A	None
11	New Brunswick	None – <i>Brydges</i> services are available and it is working fine	N/A	None
12	Nova Scotia	None – We get a pretty good call back time	N/A	None
13	Nova Scotia	None	N/A	None
14	Manitoba	None – Haven't had any problems with accessing duty counsel	N/A	None
15	PEI	Time – Can't reach duty counsel after	1. Hinders the investigation	1. Implement a 24 hour telephone system

Police				
#	Province	Gaps in Brydges Services	Impact of Gaps	Suggestions/Alternatives
		hours		
16	PEI	Time – can't reach duty counsel after hours	1. Slows work – Delays the investigation since it is time consuming trying to reach a lawyer after hours	1. Implement a 24 hours telephone system
17	B.C.	1. Time – long delays in call back time from duty counsel – it happens quite often 2. Language – we have a lot of minorities who don't speak English	1. Accused not getting convicted 2. Ties up officers waiting around to hear from duty counsel	1. Regionalized duty counsel service 2. having more duty counsel available 3. Having bilingual staff or translator available
18	Nfld.	None – quite satisfied with the service	N/A	None
19	Nfld.	None – The service is adequate	N/A	None
20	B.C.	1. Time – Long delays in call back time from duty counsel	1. Slows work 2. Hinders investigation – ie: timeline for breathalyzer tests	1. Having more duty counsel available

APPENDIX B

INFORMED CONSENT BY SUBJECTS TO PARTICIPATE IN A RESEARCH PROJECT OR EXPERIMENT

The University and those conducting this project subscribe to the ethical conduct of research and to the protection at all times of the interests, comfort, and safety of subjects. This form and the information it contains are given to you for your own protection and full understanding of the procedures. Your signature on this form will signify that you have received a document which describes the procedures, possible risks, and benefits of this research project, that you have received an adequate opportunity to consider the information in the document, and that you voluntarily agree to participate in the project.

Any information that is obtained during this study will be kept confidential to the full extent permitted by law. Knowledge of your identity is not required. You will not be required to write your name or any other identifying information on the research materials. Materials will be held in a secure location and will be destroyed after the completion of the study. However, it is possible that, as a result of legal action, the researcher may be required to divulge information obtained in the course of this research to a court or other legal body.

Having been asked by Adamira Tijerino of the School of Criminology of Simon Fraser University to participate in a research project experiment, I have read the procedures specified in the document.

I understand the procedures to be used in this experiment and the personal risks.

I understand that I may withdraw my participation in this experiment at any time.

I also understand that I may register any complaint I might have about the experiment with the researcher named above or with the director of the School of Criminology, Dr. Rob Gordon, of Simon Fraser University.

I may obtain copies of the results of this study, upon its completion, by contacting: Jeff Latimer at (613) 957-9589.

I have been informed that the names of the participants will be held confidential by the Principal Investigator.

I understand that my supervisor or employer may require me to obtain his or her permission prior to my participation in a study such as this.

I agree to participate by responding to the questionnaire presented by the researcher as described in the document referred to above.

NAME: _____ **Date:** _____

ADDRESS: _____

SIGNATURE: N/A as consent will be recorded over the phone.

APPENDIX C

INFORMATION SHEET FOR PARTICIPANTS

*** This form and the information it contains are given to you for your own protection and full understanding of the procedures.*

Purpose

The purpose of this research study is to examine the extent and nature of the provision of *Brydges* services across Canada.

Findings

The findings of this research will be used by the Department of Justice in order to further our knowledge on this issue (*Brydges* services) and assist the Department of Justice Canada in guiding policy. The findings of this project will also be used for the dissertation of the principal researcher.

Participation

Your participation in this research project is completely voluntary. Additionally, you can terminate the interview at any point in time. Moreover, you can decline to answer any question that you do not wish to answer.

Potential harm or risks

To the extent of the knowledge of the researcher, participation in this project does not involve any physical, psychological or any harmful consequences to the participants.

Confidentiality and Anonymity

You are not required to submit your name or any other identifying information on the research materials. Therefore, you are guaranteed absolute anonymity.

Contact Person

Should you have any questions or concerns regarding this research project, please feel free to contact:

Jeff Latimer
Senior Research Officer
Research and Statistics Division
Department of Justice
(613) 957-9589

APPENDIX D

SUBJECT FEEDBACK FORM

Completion of this form is **OPTIONAL**, and is not a requirement of participation in the project. However, if you have served as a subject in a project and would care to comment on the procedures involved, you may complete the following form and send it to the Chair, University Research Ethics Review Committee. All information received will be treated in a strictly confidential manner.

Name of Principal Investigator: _____

Title of Project: _____

Dept./School/Faculty: _____

Did you sign or verbally consented before participating in the project? _____

Were there significant deviations from the originally stated procedures? _____

I wish to comment on my involvement in the above project which took place:

(Date) (Place) (Time)

Comments: _____

Completion of this section is optional

Your name: _____

Address: _____

Telephone: (w)_____ (h)_____

This form should be sent to the Chair, University Research Ethics Review Committee, c/o Office of the Vice-President, Research, Simon Fraser University, Burnaby, BC, V5A 1S6.