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Court File No. 23178

IN THE SUPREME COURT OF CANADA

(On Appeal from the Appeal Division of the
Supreme Court of Nova Scotia)

B E T W E E N:

CYRIL PATRICK PROSPER

Appellant
(Accused)

-and-

HER MAJESTY THE QUEEN

Respondent

Court File No. 23312

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for Prince Edward Island)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

-and-

1062
ROSS NELSON MATHESON

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FACTUM OF THE INTERVENOR,
THE CHARTER COMMITTEE ON POVERTY ISSUES

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**FACTUM OF THE INTERVENOR,
THE CHARTER COMMITTEE ON POVERTY ISSUES**

PART I - THE FACTS

1. The Charter Committee on Poverty Issues ("CCPI") intervenes in these appeals pursuant and subject to the Order of the Honourable Mr. Justice Sopinka, dated February 10, 1994.
2. CCPI is a national coalition of low income activists and equality advocates, including all major anti-poverty coalitions in Canada. The mandate of CCPI is to ensure

that the rights of people who live in poverty are recognized in the courts' interpretation and application of the law, and in particular the Canadian Charter of Rights and Freedoms.

3. CCPI accepts the facts as stated in the Facta of the parties to these appeals that are agreed between the parties, and takes no position on any disputed facts herein.

PART II - POINTS IN ISSUE

4. CCPI's submissions on this appeal are limited to the following point in issue between the parties in both appeals.

Does the right to counsel on arrest or detention guaranteed by the Charter include the right to be provided access to the advice of state-funded counsel?

5. CCPI submits that, on a purposive interpretation of ss. 10(b) of the Charter, especially when read together with the requirements of fundamental justice and the principles of equality underlying ss. 7 and 15, this question should be answered in the affirmative. Specifically, CCPI's position in these appeals is that the right on arrest or detention to retain and instruct counsel without delay, which is constitutionally protected by these provisions of the Charter, includes the right to have access to state-funded counsel free of charge, at least where the person detained does not have the financial means to retain counsel privately.

PART III - THE ARGUMENT

A. THE RIGHT TO STATE-FUNDED COUNSEL IN SS. 10(b) OF THE CHARTER

6. Subsection 10(b) of the Charter provides:

10. Everyone has the right on arrest or detention

...

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

7. It is clear that there are two components to ss. 10(b): a substantive right "to retain and instruct counsel without delay"; and, in addition, a right to be informed as to the availability of that right. Moreover, this Court has determined that the former, substantive right imposes at least two correlative duties on the arresting police officers: to give the accused or detained person a reasonable opportunity to exercise the right; and to refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity.

R. v. Manninen, [1987] 1 S.C.R. 1233, at 1241
R. v. Brydges, [1990] 1 S.C.R. 190, per Lamer J. (as he then was) at 203

8. Further, in *R. v. Brydges*, the Court held that the information component of the right includes, among other things, the right to be informed of the availability of state-funded counsel. The question before the Court is whether this right also carries with it a substantive duty to make state funded counsel actually available.

9. The Attorneys General of Nova Scotia ("Nova Scotia"), respondent in the *Prosper* appeal, and of Prince Edward Island ("P.E.I."), appellant in the *Matheson* appeal, say that this right to be informed about access to state funded counsel only applies where such programs exist, and that ss. 10(b) does not constitutionally guarantee the existence or require provision of such programs. CCPI submits that the interpretation put forward by Nova Scotia and P.E.I. is totally at odds with the approach consistently taken by this Court to the interpretation of Charter rights.

10. In *R. v. Big M. Drug Mart Ltd.*, this Court held that the proper interpretation of a Charter guarantee is a purposive one, to be determined in light of the interests it is meant to protect, the larger objects of the Charter, the language chosen to articulate the specific right, its historical origins, and to the meaning and purpose of other specific rights and freedoms with which it is associated.

R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, at 344

11. It is respectfully submitted that the interpretation put forward by Nova Scotia and P.E.I. is quintessentially the sort of approach, involving crabbed and formalistic interpretation, more suited to the interpretation of wills or commercial documents than to the construction of fundamental human rights and freedoms, that this Court specifically rejected in *Hunter v. Southam Inc.*, when it adopted the suggestions of Lord Wilberforce that interpretation of a constitutional guarantee should be based upon a "broad purposive analysis", and the protected rights and freedoms given:

"... a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of the fundamental rights and freedoms referred to."

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at 156, citing from *Minister of Home Affairs v. Fisher*, [1980] A.C. 319 at 328

12. The "right to counsel" should not be reduced to a mere privilege accorded to individuals according to their means. As was stated by Chief Justice Dickson in *R. v. Morgentaler*, any approach which results in constitutionally guaranteed rights becoming "illusory" is to be rejected. Deficiencies in the scheme of government service administration which effectively exclude individuals from the equal benefit of fundamental rights, cannot pass constitutional muster.

R. v. Morgentaler, [1988] 1 S.C.R. 30, per Dickson C.J.C. at 63-73

13. It is the position of CCPI, set out more fully below, that the right to retain and instruct counsel on arrest or detention is a cornerstone of the fair and effective operation of our adversarial system of criminal justice. Lack of effective access to the assistance of counsel at this stage of initial contact with the justice system jeopardizes other touchstones of that system, including the right to silence, the right to a fair trial, and the right to make full answer and defence. Allowing differential access to this fundamental right, on the basis of disadvantaging characteristics such as poverty, is inconsistent not only with the principles of fundamental justice, but also with the guarantees of equality "before and under the law", and especially of the "equal protection and equal benefit of the law" set out in s. 15 of the Charter.

14. Not only is the interpretation urged by Nova Scotia and P.E.I. inconsistent with these broader purposes of the Charter, it is also inconsistent with a purposive interpretation of the ss. 10(b) itself. It is submitted that there is simply no valid purpose supporting an interpretation which, in effect, taunts people living in poverty with the information that, if they only had the financial means, they would be entitled to consult with counsel, and that if their provincial government were only disposed to provide an appropriate program, then that substantive right might also extend to them. On this interpretation, a significant proportion of Canadians will be obliged, in addition to the other social and economic disadvantages they suffer, to make fundamental decisions about their defence of criminal charges without the benefit of legal advice.

15. Such an interpretation of the right is also inconsistent with the right to counsel as it is generally recognized and understood in Canadian society today. In *R. v. Brydges*, this Court noted that the general understanding of this right includes at least two components, in addition to the right to retain counsel privately. The first is a general "right to have access to counsel free of charge where the accused meets certain financial criteria". The second is "the right to have immediate, although temporary, advice from state funded duty counsel, irrespective of financial status".

R. v. Brydges, above, per Lamer J. at 215
Report of the Joint Committee on Legal Aid in Ontario (1965)

16. CCPI respectfully submits that its interpretation of the right to counsel is consistent with the practice of free and democratic governments. The predominant practice in Canada appears to be to provide poor people with state-funded counsel on arrest or detention, and the issues before the Court in these appeals have arisen only in PEI and Nova Scotia.

17. This predominant practice among Canadian governments is consistent with the practice of other free and democratic governments with which Canada has significant international relations. For example, the United States Supreme Court has interpreted the

"right to counsel" in the Sixth Amendment to the U.S. Constitution, as including the right to state-funded counsel on arrest or detention of indigent persons. Under that Court's rulings, there is scope for a variety of systems of representation to be established by State governments, but the Court retains the ability to review the quality and effectiveness of the representation provided, within prevailing professional norms, as a counter to problems of underfunding and the lack of government-imposed standards.

Johnson v. Zerbst, 304 U.S. 458 (1938)

Miranda v. Arizona, 384 U.S. 436 (1966)

Strickland v. Washington, 466 U.S. 668 (1984)

P. Drechsel, "The Crisis in Indigent Criminal Defense" (1991), 44 *Arkansas L. Rev.* 363

18. Similarly, recognition of the right to state-funded counsel for those in financial need is consistent with the requirements of Article 14(3) of the *International Covenant on Civil and Political Rights*, to which Canada and other countries are signatory. Article 14(3) provides:

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(d) ... to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. (Emphasis added)

International Covenant on Civil and Political Rights 99 U.N.T.S. 171, Article 14(3)

19. A majority of this Court in *Slaight Communications Inc. v. Davidson* has accepted that ss. 10(b) of the Charter should be presumed to provide at least the same protection as Article 14(3). Dickson C.J.C. that:

"The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the Charter's protection'. I believe that the Charter should generally be presumed to provide protection at least

as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038, per Dickson C.J.C. for the majority, at 1056, citing *Reference re Public Service Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 349

20. Similarly, this Court's approach to the interpretation of the guarantee of Charter rights in s. 1 acknowledges that the practice of free and democratic governments may provide an indication of the scope and permissible limits on Charter rights.

R. v. Oakes, [1986] 1 S.C.R. 103, at 136

21. As a matter both of fundamental justice and of equality, CCPI submits that this Honourable Court should now hold that the right to counsel upon arrest or detention protected by the Charter includes the right to state-funded counsel free of charge, as a matter of constitutional entitlement, where the accused is otherwise financially unable to retain a lawyer privately.

R. Moon, "The Constitutional Right to State-Funded Counsel on Appeal" (1989), 14 *Queen's L.J.* 171 at 177 ff.

22. To hold otherwise would be to deprive poor people of the equal benefit and protection of this vital constitutional right. It would be to hold that no opportunity at all to retain and instruct counsel on arrest or detention is a "reasonable" opportunity. To accept this approach would wholly negate both the substantive components of the right to counsel on arrest or detention in the case of people living in poverty in Canada. It would not only fail to fulfil the purposes of this Charter right for Canada's most disadvantaged people, it would also perpetuate and exacerbate the disadvantage which they suffer.

23. This interpretation is also supported by an emerging line of authority which affirms the power of the courts to require the appointment of state-funded counsel for an accused in financial need, once charges have been laid. These cases recognize that the right

involves a duty on governments to pay for the counsel appointed. They also accept that criteria of financial need, independent of the eligibility provisions of provincial legal aid plans, can be developed by the courts in construing and applying our notions of the right to counsel under the Charter. These cases link the court's remedial power to appoint counsel with concerns respecting the fairness of the proceedings, particularly at trial. In so doing, they confirm that the right to counsel is a component of the rights protected by ss. 7 and 11(d) of the Charter, as well as ss. 10(b).

R. v. Rowbotham (1988), 35 C.R.R. 207 (Ont. C.A.), especially at 239:
 "[I]n cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial."

Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan Legal Aid Commission, [1989] 2 W.W.R. 168 (Sask. C.A.) at 171-172

R. v. Robinson and Doleis (1989), 100 A.R. 26 (Alta. C.A.) at 45

R. v. Rockwood (1989), 42 C.R.R. 369 (N.S.C.A.)

24. It is respectfully submitted that these decisions show a sensitivity to poverty and to the principle of removing barriers to fundamental justice and fairness which may result from the poverty of an accused. They are consistent with, and support the interpretation of the right to counsel on arrest or detention which is put forward by CCPI.

25. It is respectfully submitted that ss. 10(b) of the Charter must be interpreted as requiring governments to provide state-funded counsel free of charge to persons who are arrested or detained. In particular, CCPI submits that this interpretation is supported by the following principles, derived from the judgments of this Honourable Court.

- (1) Ss. 10(b) should be interpreted in light of the purposes of the right to counsel, and particularly, given the relationship between ss. 7 and 10(b), in light of those "principles of fundamental justice" which underlie the essential functioning of our Canadian criminal justice system in the context of pre-trial arrest and detention of suspects: in that light, the substantive content of this right cannot be limited to the mere opportunity to retain counsel privately.

- (2) The right conferred by ss. 10(b), and individuals' access to that right, must also be interpreted in light of the principles of equality, both internal to ss. 7 and 10(b), and derived from s. 15 of the Charter: those principles further support, and indeed require, that ss. 10(b) embrace a positive right to the assistance of state-funded counsel for people in financial need.
- (3) Charter rights frequently impose positive obligations and attendant budgetary and fiscal constraints upon governments: a variety of Charter rights have been so interpreted, and the particular context and wording of ss. 10(b), and the underlying values derived from ss. 7 and 15, all support such interpretation of the right to counsel on arrest or detention.

These arguments will be developed in turn in the following sections of this Factum.

B. The Right to Counsel and the Requirements of Fundamental Justice

26. CCPI respectfully submits that a purposive approach to the interpretation of "legal rights" guaranteed by ss. 10(b) requires an appreciation of the role of defence counsel in circumstances of arrest or detention of a suspect. Specifically, it requires consideration of the role of counsel in our adversarial system of criminal justice in ensuring that proceedings against the accused accord with the "principles of fundamental justice" referred to in s. 7 of the Charter. Read together, ss. 7 and 10(b) shed light on the nature of the right to counsel on arrest or detention.

27. This Court has long established that the specific rights enumerated in ss. 8-14 of the Charter, including the right to counsel in ss. 10(b), are to be viewed as illustrations of the general right set out in s. 7, and as such provide specific instances of our notions of "fundamental justice". As stated by the majority of this Court:

"Sections 8 to 14 address specific deprivations of the 'right' to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of 'principles of fundamental justice'; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

... Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves."

Reference re s. 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, per Lamer J. for the majority at 512-513; and see 500-504

28. The courts have interpreted the requirements of "fundamental justice" at other stages of the criminal process to include a requirement that personal circumstances of poverty must not disadvantage individuals in terms of their treatment by the criminal justice system. For example, it has been held that imprisonment in default of payment of fines cannot validly be imposed solely because a person is poor.

R. v. Hebb (1989), 89 N.S.R. (2d) 137 (N.S.S.C.-T.D.) cited with approval by this Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 712-714
R. v. Nickel City Transport (Sudbury) Ltd. (1993), 14 O.R. (3d) 115 (C.A.), per Arbour J.A. at 147

29. In the specific context of s. 10 of the Charter, the triggering circumstances of "arrest or detention" constitute, *prima facie*, a serious limitation of the right to "liberty and security of the person", usually without prior recourse to any judicial process. Accordingly, it is submitted that the "principles of fundamental justice" are brought to bear in this context both to protect an individual who is subject to the superior powers of the state, and to maintain the repute and integrity of our system of justice.

R. v. Therens, [1985] 1 S.C.R. 613, at 641-644
R. v. Hebert, [1990] 2 S.C.R. 151, per McLachlin J. for the majority at 179-181

30. In considering the requirements of fundamental justice in this context, CCPI respectfully submits that the Court should be mindful that counsel's role in protecting the accused and in preserving his or her rights against potential violation by the police, is critical to the realization of other rights and freedoms which are crucial to our system of criminal

justice, particularly the right of an accused to remain silent. In *R. v. Hebert*, the majority stated:

"The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is the right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature."

R. v. Hebert, above, at 176; and see 163-164 and 174-177

R. v. Manninen, above, at 1242-1243

31. These observations underline the point that one of the central purposes underlying the "principles of fundamental justice" in Canadian criminal law is the protection, particularly of vulnerable individuals, from the unequal power of the state as prosecutor. As a majority of this Court has recognized, the indigent and disadvantaged in our society are both the people "most often subject to interrogation", and the least aware of their rights and of the schemes set up by the state on their behalf to secure those rights.

R. v. Brydges, above, at 212, citing *Miranda v. Arizona*, above

32. The second, and equally crucial, role of counsel on behalf of the accused during arrest or detention involves a positive function, for example in preserving evidence which might assist in the defence of the accused. The effective representation of counsel in these early stages of a criminal proceeding is essential to assure the ultimate right of the accused to make full answer and defence if charges result. The Court has clearly recognized this relationship both in its substantive jurisprudence on s. 11(d) of the Charter, and also in its jurisprudence under ss. 24(2) dealing with the admissibility of evidence obtained through breaches of Charter rights. These considerations underline the point that the failure to give adequate scope to the right to counsel potentially undermines the entire scheme of Charter protections in relation to the criminal justice system for people in poverty.

R. v. Dubois, [1985] 2 S.C.R. 350, per Lamer J. at 365:

"To allow the prosecution to use, as part of its case, the accused's previous testimony would ... permit an indirect violation of the right of the accused to be presumed innocent and remain silent until proven guilty by the prosecution, as guaranteed by s. 11(d) of the *Charter*. Our constitutional *Charter* must be construed as a system where 'Every component contributes to the meaning as a whole, and the whole gives meaning to its parts'..."

R. v. Mellenthin, [1992] 3 S.C.R. 615, at 626-629

33. Our notions of fairness to an accused in the criminal justice system are not limited to considerations of procedural regularity and testimonial immunity. CCPI submits that "fundamental justice" also necessarily requires that an accused person understand what his or her options are at every stage of the proceedings, and that the accused have an effective opportunity to participate in the process. CCPI respectfully submits that, in serving this essential value the "right to counsel" is to be likened to the "right to the assistance of an interpreter" in s. 14: it is essentially a right to the assistance of others to ensure effective participation.

34. CCPI submits that a common theme or purpose underlies each of these principles of "fundamental justice". It is that circumstances of poverty and disadvantage should not be a barrier which would deny access to fundamental rights and fairness in our system of justice, including the right to effective representation by counsel.

35. Poor people already suffer special disadvantage in their interaction with the justice system. That disadvantage has a number of components or causes. Frequency of contact with the criminal justice system is higher for poor people, in part because homelessness and other effects of poverty lead to confrontation with the police even where no criminal conduct is initially involved. Poor people are also less likely to challenge the authority of the police, or to assert their rights, lacking awareness of those rights and the means to assert them effectively. Moreover, general societal stereotypes and attitudes of hostility and discrimination towards poor people result in poor people being more likely to be singled out for hostility and adverse treatment by the police. For example, a recent

survey in Toronto found that one out of ten homeless people reported being physically assaulted by police during the preceding year.

E. Aubresio et al., The Street Health Report May 1992 especially at p. 28
 Jean Swanson "The Impact of Laws" *Legal Perspective* Vol. 15, No. 2 (December, 1990)

Royal Commission on the Donald Marshall, Jr. Prosecution, 1989, Volume 1 (Report), Chapter 2.5 pp. 193-221 and Chapter 2.6; Volume 2 (Research Study on Public Policing in Nova Scotia), especially Part 9, pp. 119-126
Report of the Aboriginal Justice Inquiry of Manitoba, Volume I (The Justice System and Aboriginal People), Chapter 4 pp. 90-96, and Chapter 16

36. It is respectfully submitted that access to fairness and fundamental rights in the criminal justice system regardless of wealth is one of the most basic "principles of fundamental justice" in ss. 7-14 of the Charter. CCPI respectfully submits that the interpretation of the right to counsel offered by Nova Scotia not only fails to address these conditions of disadvantage affecting poor people in their interaction with the justice system, it reinforces and perpetuates barriers to justice faced by people living in poverty.

C. Equality and Access to the Right to Counsel

37. CCPI submits that the interpretation of the right to counsel advanced by Nova Scotia and P.E.I. results in affording unequal protection of the law for people in poverty, contrary to the fundamental values of equality and equal dignity of individuals, which this Court has said underlie all Charter rights, and contrary to the express guarantees of equality in s. 15 of the Charter, which this Court has said is the "broadest of all guarantees", which "applies to and supports" all other rights guaranteed by the Charter.

R. v. Oakes, above, at 136
Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, at 185

38. The purpose of s. 15 is to promote equality in both the substance and administration of the law, and to alleviate the effects of disadvantage and discrimination.

Andrews v. Law Society of British Columbia, above, at 171

39. There is considerable support for viewing poverty as a ground of discrimination "analogous" to those enumerated under s. 15. Applying the criteria laid down by this Honourable Court, people in poverty can be identified as a group that has consistently been the subject of historical and continuing disadvantage, stereotyping, and discrimination.

Andrews v. Law Society of B.C., above

M. Jackman, "Poverty as a Protected Ground under Charter and Canadian Human Rights Law", unpublished seminar, February 1, 1993, Faculty of Law, University of Victoria, at 18-23

Sparks v. Dartmouth/Halifax County Regional Housing Authority (1993) 101 D.L.R. (4th) 224 (N.S.C.A.), especially at 233-235

Federated Anti-Poverty Groups of B.C. v. A.G.B.C. (1991), 70 B.C.L.R. (2d) 325 (S.C.)

Schaff v. The Queen, unreported, Tax Court of Canada, August 5, 1993

40. Prejudices against poor people, like those against racial minorities, take the form of derogatory and stereotypical assertions that they are "lazy", "genetically inferior", "have too many children", or simply "make undesirable neighbours". These cases and other authorities confirm that discrimination against poor people takes the form of exclusion, both constructively and directly, from society and from the political and governmental processes in Canada. Accordingly, it is essential that poor people's claims to the equal benefit of the Charter's protections be advanced and upheld by the courts.

Federated Anti-Poverty Groups of B.C. v. A.G.B.C., above, at 344

"It may be reasonably inferred that because recipients of public assistance lack substantial political influence, they comprise 'those groups in society whose needs and wishes elected officials have no apparent interest in attending'."

Quebec (Commission des Droits de la Personne) v. Whitton, unreported, Tribunal des Droits de la Personne, December 21, 1993

People on Welfare for Equal Rights v. Spurr, unreported, Nova Scotia Police Review Board, October 15, 1991, at 3

J. Taggart, "Overcoming Myths about Public Housing", (1993), 9 *Public Housing*, No. 4, at 4

R. Rosenblatt, "Social Duties and the Problem of Rights in the American Welfare State", in Kairys Ed., *The Politics of Law*, (2nd. Ed., 1990) at 102
J.K. Galbraith, *The Affluent Society* (Boston, 1958) at 323-324

41. People in poverty often suffer intersecting disadvantages and discrimination based on race and other grounds, enumerated in s. 15. Recent Royal Commissions and other studies clearly document discrimination in their interaction with the justice system as the experience of poor people generally, but recognize that these problems reach critical proportions in the case of groups of people living in poverty who also experience disadvantage and discrimination on grounds of their racial or ethnic origin. The studies, particularly involving urban Black communities and aboriginal peoples, cited at paragraph 37 of this Factum clearly identify poverty as a ground of disadvantage which brings individuals in these communities into conflict with the police and the justice system. CCPI notes that in the *Prosper* appeal, the appellant is in fact an aboriginal person.

42. This Honourable Court has repeatedly found concepts of equality, and of equal access or benefit, to be part of the definition of other Charter rights. In *Mahe v. Alberta*, above, the Court noted that the quality of educational provision for minority language education, and the level of public financial support for such services, must be on the basis of equality with the majority system in order to meet the requirements of s. 23 of the Charter. Similarly, this Court has interpreted the right to vote in s. 3 of the Charter to include the notion of equality of voting power between individuals.

Mahe v. Alberta, [1990] 1 S.C.R. 342, at 378; see also 369
Reference re Electoral Boundaries Commission Act (Sask.), [1991] 2 S.C.R. 158,
per McLachlin J. for the Court on the point at 183-186

43. An interpretation of Charter rights to include notions of equality of access specifically for Canadians in poverty is also consistent with Canada's international human rights commitments, and in particular with Canada's ratification of the United Nations' International Covenants. By that ratification, Canada has affirmed its commitment to the underlying value of social justice and equality through its provision of services: an

affirmation which is submitted, should inform the meaning of the "full benefit" of the right to counsel protected by the Charter.

Slaight Communications Inc. v. Davidson, above, per Dickson C.J.C. for the majority, at 1056

44. Indeed, this Court has cautioned against a purely formal, negative conception of Charter rights, which may "simply become an instrument of better situated individuals", to the neglect and prejudice of less advantaged persons.

Edwards Books & Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, at 779

45. Prior to this Court's decision to adopt a positive, purposive approach to equality rights in *Andrews*, above, it had been documented that s. 15 of the Charter was being used primarily as an instrument of "better situated individuals". As the authors of one study concluded:

"A judicial policy of formal equality for all will not meet the needs of disadvantaged groups. Instead it will perpetuate and further entrench their inequality. Substantive equality problems require a substantive model of equality."

G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back*, (Ottawa, 1989), at 56, 117-119 and 198

46. In rejecting these earlier approaches, this Court has held that s. 15 of the Charter should be given a generous and purposive interpretation, as a measure designed to eradicate discrimination and to redress historical disadvantage. In particular, the Court has adopted the same broad, remedial approach to the interpretation of equality as a Charter right that it has applied in relation to human rights legislation, which is concerned with "redressing socially undesirable conditions quite apart from the reason for their existence", and "without regard to the motives and intention of those who cause them".

Andrews v. Law Society of B.C., above, at 172-176 and 179-182
McKinney v. University of Guelph, [1990] 3 S.C.R. 229, per La Forest J. for the majority at 278, and per Wilson J. dissenting on other grounds at 389-393
Robichaud v. The Queen, [1987] 2 S.C.R. 85, per La Forest J. for the majority at 90-91

47. CCPI respectfully submits that a "right to counsel" which is not, in some meaningful sense, equally available to all Canadians, regardless of financial means, is no right at all, but rather a privilege. That right cannot effectively play a role in eradicating discrimination and redressing historical disadvantage in the justice system, unless it is interpreted to include a right to state funded counsel for people in poverty who are unable to retain a lawyer privately.

D. The Right Imposes Positive Obligations on Governments

48. This Court has clearly held that the Charter must be interpreted as a whole, and that individual rights therein take on meaning and content in light of the other guaranteed rights. In particular, as shown in the preceding sections of this Factum, ss. 7 and 15 have been identified by this Court as providing an important interpretive aid to other Charter rights. CCPI respectfully submits that the language and context of ss. 10(b), and the considerations arising from both the principles of fundamental justice referred to in s. 7, and of equality in s. 15, all support the conclusion that the right to counsel is a positive right, which imposes on governments a correlative duty to provide state-funded counsel to people in financial need.

49. CCPI respectfully submits that many of the rights guaranteed by the Charter have been, and should continue to be interpreted in this manner, so as to provide services or resources to individuals in need who assert those rights, even where this may impose a budgetary or fiscal responsibility upon government.

50. For example, the language rights set out in ss. 17-20 of the Charter clearly require the provision of certain services and facilities, including the courts, in both official languages by the governments of Canada and New Brunswick. This Court has interpreted similar provisions of the *Manitoba Act, 1870* as imposing positive obligations on the government of Manitoba with respect to translation of its statutes. Similarly, in its interpretation of the minority language educational rights conferred by s. 23 of the Charter,

this Honourable Court has laid down clear standards for the provision of instruction and facilities for minority language education, which governments are required to meet to avoid infringement of these rights. CCPI respectfully submits that the source principles underlie the recognition that provision of certain services and facilities may be required in order to ensure that people in poverty have equal access to the right to counsel on arrest or detention.

Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721
Mahe v. Alberta, above

51. Turning specifically to the legal rights in ss. 7-14 of the CCPI submits that at least in criminal proceedings, the right to an interpreter in s. 14 must be a positive right to have this service provided by government. This Court has also made it clear that the obligations to provide a hearing as required by s. 7, and to establish a "tribunal" as required by ss. 11(d) of the Charter, fall on governments, notwithstanding their budgetary implications. Moreover, it is clear that the full range of legal rights accorded to accused persons, as interpreted by this Court, necessarily have a direct impact on the costs of provision, for example of judges who have a sufficient measure of independence and impartiality, or of court resources sufficient to ensure the right to trial within a reasonable time.

Singh v. Canada (Minister of Employment), [1985] 1 S.C.R. 177, at 231 and 239
R. v. Valente, [1985] 2 S.C.R. 673, at 704-708
R. v. Askov, [1990] 2 S.C.R. 1199, at 1225 and 1258

52. To the same effect, in its interpretation of s. 35 of the *Constitution Act, 1982* this Court has acknowledged that aboriginal and treaty rights mandate a positive obligation on governments to give priority to aboriginal peoples exercising those rights, in making decisions and developing programs about the allocation of rights and licenses to harvest fish, game, and other traditional resources.

R. v. Sparrow, [1990] 1 S.C.R. 1075

53. In the context of its interpretation of s. 24(1) of the Charter, this Court has specifically accepted that remedial authority granted to the courts include mandatory orders for government actions to redress infringements of Charter rights, and has stated that budgetary considerations do not preclude such orders.

"Any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money."

Schachter v. Canada, above, at 709

Singh v. Canada, above at 218-220

54. On its face, the substantive right "to retain and instruct counsel" is a right to the assistance of others: that is, a right to a service. Like most other sections of the Constitution creating such rights, ss. 7 and 10(b) are silent on the question of how that service is to be provided.

55. It is submitted that an obligation to make state-funded counsel available to persons in poverty should be viewed simply as one of a wide range of budgetary and service commitments that are attendant upon the positive duty of the government to enforce laws, generally. At the margins, governments have discretion as to whether to enforce laws in individual cases, and as to the manner of their enforcement, and these decisions will have consequential budgetary implications relating to police personnel and resources, provision of detention facilities, the availability of advice from Crown counsel, access to the courts, and other matters. However, it is submitted that budgetary considerations cannot justify a denial of fundamental rights and freedoms, including the right to have access to effective representation by counsel on arrest or detention.

56. Nor does the imposition of a positive obligation on government in this context require the court to design or supervise the implementation of state-funded counsel programs which accord with the requirements of ss. 7 and 10(b) of the Charter. There is a variety of program models already in existence across Canada, and governments may be accorded considerable latitude in choosing the manner in which they discharge their obligations under the Charter. Court supervision will properly take the form of review of

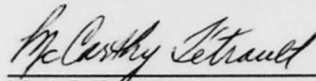
the effectiveness of the programs in individual cases, such as the present appeals, and the imposition of personal remedies when individuals are not accorded the full benefit and protection of the right to counsel.

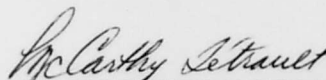
57. It is respectfully submitted that the desire of governments to avoid or limit costs should not be accepted by this Court as a basis for denying anyone under arrest or detention a reasonable opportunity to exercise the right to retain and instruct counsel without delay, as guaranteed by the Charter. In the case of people financially unable to retain a lawyer privately, it is submitted that this principle requires a finding that that right includes a positive obligation on governments to provide reasonable access to state-funded Counsel.

PART IV - ORDER REQUESTED

58. This Intervenor respectfully requests that the Court determine that the right to counsel guaranteed by the Charter includes the right of persons under arrest or detention who cannot otherwise obtain timely advice of counsel to be provided access to state-funded counsel.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.


Mark J. Freiman


M. Philip Tunley

Counsel for the Intervenor,
The Charter Committee on Poverty Issues

Date: February 15, 1994

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Service of a copy hereof admitted

this 15 day of February 1994

AGENT FOR

Cyril Patrick Prosper

Court File No. 23178

IN THE SUPREME COURT OF CANADA

(On Appeal from the Appeal Division of the
Supreme Court of Nova Scotia)

B E T W E E N:

CYRIL PATRICK PROSPER

Appellant
(Accused)

-and-

HER MAJESTY THE QUEEN

Respondent

Service of a copy hereof admitted

this 15 day of Feb 1994

AGENT FOR

A.E. of Nova Scotia

Court File No. 23312

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for Prince Edward Island)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

-and-

ROSS NELSON MATHESON

Respondent
(Accused)

Service of a copy hereof admitted

this 15 day of Feb 1994

AGENT FOR

Ross Nelson Matheson
and A.E. P.E.I.

FACTUM OF THE INTERVENOR,
THE CHARTER COMMITTEE ON POVERTY
ISSUES