Prosper Warning: Part 1

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I. Executive Summary

It is a common occurrence for an arrested person to invoke the right to counsel by asking to consult with a lawyer then change his mind and waive the right before consulting with a lawyer. When this happens, the police have a mandatory obligation to read the "*Prosper Warning"* to the arrested person before interrogating him. Since the inception of the *"Prosper Warning"* in 1994, a string of case law derivatives have emerged including two recent decisions by the Saskatchewan Court of Appeal in *R. v. Basko* (2007)[1] and *R. v. Weeseekase* (2007)[2].

Both cases include:

(a) important points-of-reference for frontline police officers, and
(b) significant case law review for research purposes.

Prosper Warning Part 1 explains the *Basko* point-of-reference circumstances and its derivative cases. Part 2 will explain the *Weeseekase* point-of-reference and its derivative cases including how *Basko* is applied.

II. *Prosper Warning* Defined

The SCC, in *R. v. Prosper* (1994)[3], created a mandatory police instructional obligation as a solution to a specific situational problem.

The specific situational problem is:
an arrested person "asserts" the right to counsel and "is reasonably diligent in exercising it" after having been afforded a reasonable opportunity to exercise it, but changes his mind and "no longer wants to consult counsel."

The mandatory instructional police obligation that solves the problem is:
tell the arrested person of:

(a) *his or her right to a reasonable opportunity to contact a lawyer, and*
(b) *the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity.*

This mandatory obligation is called the "*Prosper Warning*."

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[1] *R. v. Basko* (2007) SKCA 111 (CanLII).
[2] *R. v. Weeseekase* (2007) SKCA 115 (CanLII).
[3] *R. v. Prosper* (1994) SCR 236, (1994) 118 DLR (4th) 154, (1994) CanLII.

Rationale: The purpose of the *Prosper Warning* is to ensure that the arrested person understands what is being given up when he waives the right to consult with a lawyer.

Onus/Elements of a waiver: The prosecution has the onus to prove that the arrested person waived the right to counsel. There are three elements of a waiver that have to be proved. The waiver must be:

(a) unequivocal (clear, explicit)
(b) voluntary
(c) free of direct or indirect compulsion

III. The *Basko* Circumstances

Offences: Impaired Driving, and Over 80 mgs

Circumstances: The accused was detained during a routine traffic stop where he displayed signs of impairment. At the scene, he was informed of the right to counsel and responded that he, "knew of his right to a lawyer and would love to talk to one."

Upon arrival at the police station, he was booked in. Five minutes later, he said he wanted to speak to Legal Aid. The police officer dialed Legal Aid three times within 8 minutes after the first request. The Legal Aid line was busy all three times. When the accused heard the busy signal after the third call, he said to the officer, "*I know what they are going to tell me, so I'll call one tomorrow*."

One minute later, the police officer asked, "*Would you like to try a different lawyer*?" The accused responded, *"No, let's get it over,*" referring to the giving of samples, which were then taken.

IV. *Basko* Trial

The trial judge acquitted the accused person.

Reasons:

1) The facts of the case were "almost directly on all fours with *Prosper,*" meaning "*where several judges of the Supreme Court and in the Courts below had described Prosper as being "frustrated" with attempts to get hold of a Legal Aid lawyer, when unbeknownst to all, Legal Aid had withdrawn services outside regular business hours*."
2) The accused was "obviously frustrated" because he had agreed to provide samples without speaking to a lawyer after only three attempts to make contact during the total time of 12 minutes after arrival at the police station.
3) The police did not give the *Prosper Warning,* resulting in a sec. 10(b) *Charter* violation. Subsequently, the breath samples and test results were excluded under sec. 24(2) *Charter*.

V. Summary Conviction Appeal

The Crown's appeal to the summary conviction appeal court was allowed.

Reasons:

1) The court emphasized that the actual circumstances and context of the *Prosper* decision have to be considered. *Prosper* specifically applied when "Brydges duty counsel" are not available. After *R. v. Brydges* (1990)[4], a 24-hour toll-free duty counsel was implemented in some jurisdictions and made available to all detained persons. The actual *Prosper* case involved:

   a situation where the accused was arrested for impaired driving in Halifax, Nova Scotia on a Saturday afternoon. The accused attempted to telephone Legal Aid lawyers more than 15 times over a 37 minute period, without success, no one being aware that Legal Aid duty counsel were unavailable and had recently gone on a work-to-rule campaign, as a form of protest. When this was discovered, Mr. Prosper was offered an opportunity to contact other lawyers, but he told the police officer he could not afford to retain private counsel. It was upon that set of facts that the Supreme Court of Canada outlined the police obligation to "hold off" from obtaining incriminating evidence from a detainee arose until a reasonable opportunity to reach counsel had been provided. [5]

   Consequently, the *Prosper Warning* and the police obligation to "hold off" is situational. It applies only when legal aid is unavailiable – in jurisdictions where legal aid doesn't exist. In Saskatchewan, "Brydges duty counsel" are available to arrested persons. Therefore, no obligation to "hold off" exists.
   The officer in this case had no obligation to give the *Prosper Warning.*
   Essentially, this court ruled that the *Prosper Warning* is not needed in Saskatchewan because Legal Aid exists.

2) Additionally, the Crown did prove that an unequivocal waiver was made. No sec. 10(b) *Charter* violation occurred. The breath test results should have been admissible.

VI. Saskatchewan Court of Appeal

The accused's appeal to the Saskatchewan Court of Appeal was denied. The decision of the summary conviction appeal court stood. A new trial was ordered.

The Sask. C.A. ruled that the *Prosper Warning* is:

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[4] *R. v. Brydges* (1990) 1990 CanLII 123 (S.C.C.), [1990] 1 S.C.R. 190.

[5] *R. v. Prosper* (1994) SCR 236, (1994) 118 DLR (4th) 154, (1994) CanLII.

(a) situational
(b) does not apply to all cases, and
(c) may apply in places where 24-hour toll-free legal aid exists but will not apply in every case.

VII. Case law review

The reasons given by the Sask. C.A. emerged from the following case law review that serves as an excellent review of the *Prosper Warning:*

R. v. Prosper: There is a key quote made by the SCC regarding the issue of 'reasonable opportunity to consult counsel;'

> *In my view, what constitutes a "reasonable opportunity" will depend on all the surrounding circumstances. These circumstances will include the availability of duty counsel services in the jurisdiction where the detention takes place. As the majority in Brydges suggested (at p. 216), the existence of duty counsel services may affect what constitutes "reasonable diligence" of a detainee in pursuing the right to counsel, which will in turn affect the length the period during which the state authorities' s. 10(b) implementational duties will require them to "hold off" from trying to elicit incriminatory evidence from the detainee. The non-existence of such services will also affect the determination of what, under the circumstances, is a "reasonable opportunity" to consult counsel. The absence of duty counsel in a jurisdiction does not give persons detained there more rights under s. 10(b) than those who are detained in jurisdictions which have duty counsel. It does, however, serve to extend the period in which a detainee will have been found to have been duly diligent in exercising his or her right to counsel. Similarly, if duty counsel exists but is simply unavailable at the time of detention, the "reasonable opportunity" given to detainees to contact counsel will have to reflect this fact. [Emphasis added]* [6]

Accordingly, the Sask. C.A. ruled:

> *Thus, the case [Prosper] can simply be considered as authority for the proposition that the "holding off" obligation and the corresponding Prosper Warning apply even in jurisdictions with 24-hour duty counsel, but the application of the Prosper principles depends entirely upon the circumstances.*

(In other words, the Prosper Warning may or may not apply in all cases.)

> *There is some "lingering uncertainty" about the meaning of a key quote by the SCC in Prosper under the heading "Summary of Principles": "if*

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[6] *R. v. Prosper* (1994) SCR 236, (1994) 118 DLR (4th) 154, (1994) CanLII (pp. 269-70).

duty counsel service does exist, but is unavailable at the precise time of detention"

Specifically the SCC wrote the following verbatim passage in the "Summary of Principles" at p. 278:

> *...in jurisdictions where a duty counsel service does exist but is unavailable at the precise time of detention, s. 10(b) does impose an obligation on state authorities to hold off from eliciting evidence from a detainee, provided that the detainee asserts his or her right to counsel and is reasonably diligent in exercising it. In other words, the police must provide the detainee with what, in the circumstances, is a reasonable opportunity to contact duty counsel. ... [Emphasis added]*
> *In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee."*
> *The ambiguity emerges from the fact that the word "unavailable" can mean unavailable in a broader sense, such as the facts of the Prosper case (i.e.: a work to rule campaign, or "some bureaucratic, systemic or other institutional obstacle where no amount of persistence on the detainee's part would have made contact with duty counsel"), or in a narrower sense of "temporarily and briefly unreachable", where the duty counsel service exists, but the personnel are simply occupied at the time of the accused's detention.*

<u>Prosper Derivatives</u>
Prosper derivative cases include the following:

***R. v. Jones* (2005)** [7]
The circumstances were similar to the Basko case, in a province (Alberta) that provides "Brydges legal aid."

The police arrested Jones for impaired driving, informed him of his right to consult a lawyer, and informed him of the availability of Legal Aid and duty counsel. Jones arrived at the police station at 12:19 a.m. A minute later, he was taken to a telephone room for the purpose of contacting counsel. Jones told the constable that he wanted to speak with his own lawyer, then stated the lawyer's name. The constable advised Jones that when he was done, he should knock on the door.

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[7] *R. v. Jones* (2005) ABCA 289 (CanLII) (2005) 201 C.C.C. (3d).

Seven minutes later, Jones knocked on the door. The constable asked whether he had been able to contact counsel. Jones responded that he had been unable to reach his lawyer. The constable then advised Jones of the "List of Legal Aid Lawyers." Jones told the constable that he wanted to speak only with his lawyer, whom he again identified by name. There was no further discussion about legal counsel, and the accused was taken for the purpose of providing a breath sample.

The accused's appeal was based on the argument that he was not given a *Prosper Warning* when he changed his mind about lawyer consultation before a BAT test. The Alberta Court of Appeal said the accused had waived his right to counsel. The Supreme Court of Canada dismissed the application for appeal. The SCC saw no reason to listen to the appeal and no reason to revisit the question.

***R. v. Luong* (2000)** [8]

The Alberta Court of Appeal's decsion, in the *Jones* case, that *Prosper Warning* was not required in the circumstances emerged from principles established in *R. v. Luong* (2000). In that case, the Alberta Court of Appeal ruled:

(a) that the onus is upon the detained person to establish that a breach of *Charter* rights has occurred, and
(b) set out steps to be followed in making that decision.

> *Section 10(b) of the Charter imposes two duties on police officers:"They must inform the detainee of his right to consult counsel without delay and of the existence and availability of Legal Aid and duty counsel. If the detained person wishes to consult counsel, the police must provide a reasonable opportunity for the detained person to exercise that right, and refrain from eliciting evidence until he or she has had that opportunity. Where the trial judge concludes that a reasonable opportunity has been provided by the police, the trial judge must consider whether the detained person was reasonably diligent in exercising that opportunity. The burden is on the person detained, not the police, to establish reasonable diligence. If the detained person is unable to reach counsel after reasonably diligent efforts (which requires some evidence) then the issue of waiver will arise and a "Prosper" warning may be required.*

Because *Jones* did not testify and did not call other evidence to support his application under s. 24(2) of the *Charter* for the exclusion of evidence the court stated:

> *... On the only evidence, the appellant knocked on the door because he had terminated his efforts and was ready to proceed to the next step. The police officer reasonably concluded from the appellant's actions that the appellant had terminated his efforts to try to call his own lawyer. In the circumstances, an inquiry about whether the appellant needed more time would have been redundant. As he knew that the appellant had been unable to reach his own lawyer, the police officer reminded the appellant*

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[8] *R. v. Luong* (2000) ABCA 301 (CanLII) (2000) 149 C.C.C. (3d).

that he could seek the assistance of legal aid counsel or other counsel. The appellant responded that he did not wish to do so.

The court noted the constable did not:

(a) interrupt Jones' effort to reach counsel, or
(b) interfere with the exercise of his right to consult his lawyer.

Consequently, in those circumstances, there was no duty on the police officer to ask why Jones was unable to contact his counsel, or if he wanted more time.

Regarding the waiver:

(a) "the exercise or waiver of the right to counsel is contextual, and
(b) in this case, the waiver was valid because;
    a. The police officer spent five minutes on the telephone, attempting unsuccessfully to contact a Legal Aid lawyer on the appellant's behalf.
    b. The accused said he knew what they were going to tell him and he'd call one tomorrow.

The accused simply changed his mind, gave a "cogent reason" (knowing what the lawyer would tell him), and was then afforded a reasonable opportunity to contact someone other than Legal Aid, which he refused in no uncertain terms, saying "No, let's get it over." At that point, the accused "clearly terminated his efforts to exercise his right to counsel, and indicated readiness to proceed to the next step."

VIII. Conclusion to Part 1

The *Prosper Warning* is not mandatory in all adult offender cases where the accused first invokes the right to counsel and then changes his mind.

To prove that the change of mind constitutes a waiver:

(a) record the offender's decision electronically or verbatim in your notebook, within the context of an entire verbatim dialogue. The concrete discussion and events that preceded the change of mind are crucial.
(b) Record the offender's reason for changing his mind. If he doesn't state a reason, ask why he changed his mind. The accused's reason is vital to proving that the waiver was unequivocal and voluntary.

Next month: Part 2 of the Prosper Warning.