

**PROVINCIAL COURT OF NOVA SCOTIA**  
**Citation:** R. v. Steven Robert Benjamin, 2003 NSPC 62

**Date:** 20031218  
**Docket:** 1316816  
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Steven Robert Benjamin

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**LIBRARY HEADING**

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**Judge:** The Honourable Judge Alan T. Tufts

**Heard:** December 4, 2003 in Kentville, Nova Scotia

**Written Decision:** May 11, 2004

**Subject:** **Criminal Code of Canada s. 253(b) Breathalyzer demand. "Prosper Warning" requirements. Charter of Rights - waiver of right to counsel under s. 10(b)**

**Summary:** **Defendant charged under s. 253(b) of the Criminal Code. Police stopped defendant having suspicions of having consumed alcohol and telling him not to drive. Right to counsel properly given and defendant indicated he wanted to call a lawyer. Defendant indicated he wanted to call his father to obtain a telephone number.**

**The constable contacted the defendant's father on his behalf. The defendant emerged after three minutes and was again asked if he wished counsel. He indicated he did not and agreed to provide breath samples.**

**Issue:** **Whether the police were obliged to advise the defendant further of his right to counsel and of the police obligation during this time not to elicit incriminating evidence.**

**Result:** **Obligation for police to give "Prosper warning" arises when the detainee is unable to contact a lawyer after being duly diligent in attempting to do so and that inability is apparent to the police given all the circumstances**

**and at such time the detainee expressly or impliedly changes his mind regarding his or her desire to contact counsel.**

**Change of mind must be connected to inability to contact counsel after diligent efforts. Simple change of mind does not trigger full “Prosper warning”; waiver of right to counsel must still be clear and unequivocal; thorough review of authorities included.**

**Defendant was given full opportunity to contact counsel. Called father. No other calls made or asked for. No other efforts or requests to contact counsel. Cannot be said to have been reasonably diligent and therefore “Prosper warning” not required. Defendant waived his rights clearly and unequivocally. s. 10(b) Charter rights not violated, Certificate of Analysis admissible and found guilty.**

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
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