File No. 31912

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

BETWEEN:

MUSIBAU SUBERU

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

**DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
ASSOCIATION DES AVOCATS DE LA DEFENSE DE MONREAL and
ATTORNEY GENERAL OF BRITISH COLUMBIA**

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PART I - STATEMENT OF FACTS

A. Overview

1. This appeal raises a question of fundamental importance to regulatory and criminal investigations across the country, namely, the applicability of s.10(b) of the *Canadian Charter of Rights and Freedoms* to "investigative detentions", as that term has been defined in ***R. v. Mann*, [2004] 3 S.C.R. 59**. The Court has not yet pronounced on the issue.

2. The Intervener Attorney General of British Columbia (AGBC) says that when a detention is established within the meaning of the *Charter* - irrespective of its statutory or common law basis – section 10(b) is fully engaged and the detainee must be advised immediately of the right to counsel. A failure to do so constitutes a breach, subject only to justification under s.1.

3. Within the context of an investigative detention, a limit or suspension of the right to counsel is justified under s.1 of the *Charter.* To fulfill their public mandate, police must "be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines": ***Mann*, para.16.** This includes making preliminary enquiries of a detainee without first having to comply with the informational and implementational duties mandated by s.10(b). Not infrequently, an investigative detention will arise in response to a risk of serious harm to person or property. A suspension of the right to counsel enables police to expeditiously investigate the threat, gather initial information from the detainee and determine whether further detention or an arrest is warranted. At the same time, it respects the liberty interests of the detainee by ensuring that police intrusion with liberty is no more than reasonably necessary in the circumstances. A constitutional compromise is achieved.

B. Facts

4. The AGBC relies upon the facts as set forth by the parties in their facta.

PART II - POINTS IN ISSUE

A. The Questions

5. The AGBC intervenes for the exclusive purpose of addressing three questions that arise out of this appeal:

(a) does s.10(b) of the *Charter* apply to "investigative detentions";

(b) if so, at what point must the detainee be informed of the right to counsel?

(c) if the answer to the second question is "immediately", is a suspension of the s.10(b) right justified within the context of an investigative detention?

B. The Answers

6. It is the position of the AGBC that the answers to these questions are as follow:

(a) s.10(b) is triggered by an investigative detention only once a "detention" within the meaning of the *Charter* reasonably arises;

(b) once s.10(b) is engaged, the detainee must be immediately informed of the right to counsel; and

(c) within the context of an investigative detention, a suspension of the right to counsel is justified under s.1 of the *Charter*.

PART III – ARGUMENT

A. A Different Approach

7. The AGBC approaches this appeal in a way that is somewhat different from the main parties. First, in their written materials, neither the Appellant nor the Respondent offer an in-depth analysis on the meaning of "detention" as a threshold requirement for the application of s.10(b). Instead, they appear to accept the finding of a psychological detention that was made in the Courts below and proceed from there: ***R. v. Suberu,* [2007] O.J. No.317 (Ont.C.A.), para.26.**

8. Although it is not the role of an Intervener to revisit the facts, the AGBC questions whether a detention for *Charter* purposes actually arose in the circumstances of this case. The finding of a detention for the purpose of s.10(b) appears predicated on little more than the fact that a police officer approached the Appellant at his vehicle and told him that he wanted to speak with him: ***Suberu,* paras.26-27.** The AGBC says something much greater is required before the *Charter* is engaged.

9. Not every investigative detention will amount to a "detention" sufficient to trigger the right to counsel. The fact that a person is approached and questioned by police does not mean that he or she has been detained for the purposes of the *Charter*, even where police have reasonable grounds to suspect that the individual is connected to a particular crime. Developing a full appreciation of what is necessary to establish a detention within the meaning of the *Charter* is a critical first step to answering the questions raised in this appeal.

10. Second, the AGBC departs from the Respondent Attorney General for Ontario in its interpretation of the right to counsel. The Respondent supports the construction of s.10(b) that was adopted by Doherty J.A. in the Court below, wherein the words "without delay" were broadly defined with specific reference to the investigative detention context. The AGBC says that once a detention within the meaning of sections 9 and 10 of the *Charter* is established, irrespective of its form, the words "without delay" equate with "immediately". To hold otherwise means that the constituent elements of s.10(b) are forever open to redefinition, depending on the context in which the right arises. This leaves the law on the right to counsel in a state of uncertainty.

B. The Meaning of "Detention" - A Necessary First Step

11. The right to counsel as guaranteed by the *Charter* arises only upon arrest or detention: "Everyone has the right on arrest or detention to (b) retain and instruct counsel without delay and to be informed of that right."

12. The means by which a detention might occur were explained in ***R. v. Therens*, [1985] 1 S.C.R. 640.** A detention for *Charter* purposes will arise in circumstances of physical restraint or confinement. It will arise with the assumption of control over physical movement or a demand or direction that may have significant legal consequences and impedes access to counsel. Finally, a detention is established when there is voluntary compliance with a direction given by police in the reasonable belief that there is no choice but to do so. This latter form of detention is known as a "psychological detention".

13. Irrespective of how the detention comes about, there is a fundamental characteristic that must be present in the interaction between the detainee and police before s.10(b) is actually engaged. ***Therens*** emphasized the need for "compulsion" or "coercion"on the part of the state. See also: ***R. v. Thomsen*, [1988] 1 S.C.R. 640, p.649.**

14. It was explained this way in ***R. v. H.(C.R.)* (2003), 174 C.C.C. (3d) 67 (Man.C.A.)**:

> The use of the word "detention" necessarily connotes some form of compulsory restraint. It involves the act of holding or keeping someone against his will for a period of indeterminate length. Conversation does not necessarily result in a detention within the meaning of the Charter. There must be something more. There must be a deprivation of liberty: **para.18, emphasis added.**
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> ...
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> The elements of a police demand or direction, coupled with a voluntary compliance that results in a deprivation of liberty, are essential to the existence of a psychological detention. These elements assure that a common thread - control over the movements of the individual - runs through all three types of detention identified in the Therens test. Without some control over an individual's movements, there is no detention - not even psychological detention. The only distinction is one of degree. In the third category of detention, the control emanates from the accused, who submits to a police demand or direction by restraining their own freedom of movement in the reasonable belief that they have no other choice: **para.21, emphasis added.**

15. The requirement for compulsion or coercion means that not every interaction between police and an individual will amount to a detention for the purposes of the *Charter*, even where a person is under investigation for criminal activity, asked questions or physically delayed by contact with the police. As noted in ***Mann:***

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss.9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed" or "kept waiting". But the constitutional rights recognized by ss.9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint: **para.19, emphasis added.**

See also:

> ***R. v. Simmons,* [1988] 2 S.C.R. 495; *Dehghani v. Canada (Minister of Employment and Immigration),* [1993] 1 S.C.R. 1053, p.1071.**

16. Whether a detention exists sufficient to trigger the application of s.10(b) will depend on the facts of each case. In some scenarios, a detention within the meaning of the *Charter* will be obvious. The element of compulsion or coercion will be palpable. A suspect is physically transported to the police station without his consent; police demand the production of a bodily sample; a person is surrounded by officers, told to lie on the ground and prevented from moving, despite her repeated requests to go free. In other cases, the existence of compulsion or coercion will not be clear. Rather, a more in-depth enquiry is needed, with a full appreciation of the surrounding circumstances, the dynamics between the parties and any perceptions that may have been held by the alleged detainee. The "concept of detention has evolved since the Charter came into force and it is not always easy to determine in given circumstances whether and when it legally occurs": ***R. v. Schmautz,* [1990] S.C.R. 398, p.415.**

17. Because of the language used to describe the common law authority to detain that was exercised in this case, it is often assumed that an investigative detention is a "detention" for *Charter* purposes, without any consideration of whether the "significant physical or psychological restraint" that was referenced in ***Mann*** actually exists.

18. The AGBC says it is wrong to approach the issue this way. Proceeding on the basis of assumption alone - without regard to the threshold requirements for a constitutional detention as established through the jurisprudence - undermines the significance of detention as a triggering mechanism for all of the rights embodied within s.10 of the *Charter.*

19. Ignoring the pre-requisite of compulsion or coercion is of particular concern to investigative detentions. It not only hampers police in the effective exercise of their law enforcement duties, but increases the potential for interference with individual interests beyond that which is reasonably necessary. An overly broad definition of "detention" means that practically every interaction between police and a suspect becomes subject to *Charter* scrutiny. It calls for the immediate application of the informational and implementational duties that are embodied within s.10(b), as established in ***R. v. Prosper,* [1994] 3 S.C.R. 236** and other decisions. Such will be the case even in the face of minimal physical or psychological restraint, or where only a very brief detention is required. This could not have been what the framers of the *Charter* intended.

20. In ***R. v. Grant* [2006] O.J. No.2179, para.10; leave to appeal granted [2007] S.C.C.A. No.99,** Laskin J.A. opined that police cannot effectively fulfill their law enforcement role unless they are able to speak with citizens (including suspects) without triggering *Charter* rights. The AGBC agrees. Making preliminary enquiries to determine whether an offence has been committed, what steps may be warranted in furtherance of an investigation or the level of intervention that may be necessary to protect against risk lies at the heart of proactive policing.

21. As exemplified by the following cases, there are many circumstances in which interaction with police has been found by appellate courts to not amount to a detention within the meaning of the *Charter:*

- The mere asking of questions at the start of a motor vehicle investigation from a person who may or may not turn out to be involved in criminal acts: ***R. v. Kay* (1990), 53 C.C.C. (3d) 500 (B.C.C.A.), p.506;**

- Asking someone to attend the police station for questioning, even on more than one occasion: ***R. v. Moran*** **(1987), 36 C.C.C. (3d) 225 (Ont.C.A.);**

- Stopping someone on her bike, asking questions and making a request to look inside her knapsack: ***R. v. Lawrence*** **(1990), 59 C.C.C. (3d) 55 (Ont.C.A.);**

- Approaching someone suspected of criminal activity and requesting that he produce identification: ***R. v. Nguyen*** **2004 BCCA 546;**

- Asking persons to provide identification or state their name and date of birth: ***R. v. Grafe*** **(1988), 36 C.C.C. (3d) 267 (Ont.C.A.);** ***R. v. Hall*** **(1995), 22 O.R. (3d) 289 (C.A.), p.7;** ***H.(C.R.),*** **paras.37-40;**

- Stopping a suspect to confirm identity or take his photograph: ***R. v. Acosta-Medina*** **2002 BCCA 33, para.9;**

- Asking questions even when there is no belief that an offence has been committed or there are reasonable grounds to detain: ***Grafe;*** ***R. v. L.B.*** **2007 ONCA 596;** ***Moran,*** **p.258;** and

- Staying with someone suspected of driving offences while confined to hospital for the purpose of maintaining continuity over him: ***R. v. Pedersen*** **2004 BCCA 64, para.46.**

22. These cases demonstrate that a finding of detention for the purpose of sections 9 and 10 of the *Charter* is not a *fait accompli* simply because someone is under investigation; curtailed by police in his or her movement; asked to produce identification; or made the subject of enquiries relating to an alleged offence. Rather, in line with the principled framework for assessing detention that was established in ***Therens,*** a much fuller enquiry is warranted - one that looks for an actual and significant deprivation of liberty brought about by state conduct involving an element of compulsion or coercion.

23. Instead of presuming a detention, the court must ask itself whether, on the circumstances as a whole, the requisite element of compulsion or coercion has been established and a detention made out. The party alleging a breach of s.10(b) bears the onus of establishing a detention on a balance of probabilities. Many cases have canvassed factors that a court might consider in this regard. They include:

- The language used by police in making their enquiries;
- The purpose or motive of police in speaking with the individual;
- The place at which the interaction occurred;
- Whether the person was given a choice to speak with police;
- Whether he or she was escorted somewhere for questioning;
- The presence of demands made of the person or directions given;
- Whether the person left after being spoken to;
- The stage of the investigation at which the enquiries were made;
- Whether the person was a prime suspect at the time of interaction;
- Whether the questions were designed to elicit incriminating responses;
- Whether the person reasonably believed that he or she was detained;
- The physical positioning of police in relation to the person;
- Physical contact between them;
- The actions of other officers at the scene;
- The rapport between police and the person being spoken to;
- Outward signs of the person feeling obliged to speak; and
- The duration of the encounter.

24. This list of factors is by no means exhaustive. The determination of whether a detention exists for the purpose of s.10(b) requires a contextual, fact-specific enquiry. There are no bright lines. This is an enquiry that will necessarily be informed by the circumstances in their totality, including the personal characteristics of the alleged detainee. Factors such as age, intelligence and the claimant's level of sophistication are open for consideration. No one factor is determinative. When it is a psychological detention that is being alleged, testimony from the accused on his or her subjective belief in having no choice but to answer enquiries made by police is likely critical to the analysis: ***Moran, H.(C.R.); Grafe; Grant; R. v. Rajaratnam,* [2006] A.J. No.1373 (C.A.); *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont.C.A.).**

25. It is only once this enquiry has been conducted and an element of compulsion or coercion found to exist, that the applicability of s.10(b) becomes a live issue. The law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information or identification: ***L.B.*, para.56**; ***Rajaratnam*, para. 13**; ***H. (C.R.)*, para. 36.**

C. Upon Detention, the s.10(b) Right Must be Provided Immediately

(a) The Meaning of "Without Delay"

26. The overall objective of s.10(b) is to ensure that persons who are rendered subject to the coercive power of the state "know of their right to counsel and are permitted the opportunity to use it, so that they may make an informed choice whether to participate further in the state's investigation of them".[1]

27. Section 10(b) imposes both informational and implementational duties on police. The detainee must be informed of the right to retain and instruct counsel without delay. The information must include mention of the availability of Legal Aid and whatever duty counsel service is then available. Police must inform the detainee of the right to access free, immediate preliminary legal advice through the applicable duty counsel service. They must provide the detainee with information on the means by which to do so, including any toll free number that might be available.[2]

28. Once the informational duty has been fulfilled, police have implementational obligations. The first of these is to provide the detainee with a reasonable opportunity to retain and instruct counsel. The second is to refrain from eliciting incriminatory evidence until there has been a reasonable opportunity to reach a lawyer, or the detainee has unequivocally waived the right to do so.

29. The content of the informational and implementational duties are not at issue in this appeal. Rather, the question before this Court is much narrower, namely, within the context of an investigative detention, do these duties crystallize at the moment the suspect is "detained" for *Charter* purposes or at some later point?

30. In the Court below, although Doherty J.A. acknowledged that s.10(b) can be triggered by an investigative detention, he held that within this same context, the words "without delay" as found in

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[1] The Honourable Mr. Justice David Watt., *Watt's Manual of Criminal Evidence,* Toronto: Thomson Carswell (2004), p.621.
[2] *Ibid,* p.630.

s.10(b) allow for a "brief interlude" between the commencement of the detention and advising the detainee of the right to counsel: ***Suberu,* para.50.**

31. The Respondent supports this construction of s.10(b), arguing that once the phrase "without delay" is defined purposively and with reference to the context of an investigative detention, it does not necessarily mean "immediately": ***Respondent's Factum,* para.15.** The Appellant disagrees. He takes the position that consistent with the way in which this phrase has been defined by the Court on prior occasions, the words "without delay" mean "immediately" and it matters not how the detention arises or the label that is attached to it: ***Appellant's Factum,* paras.30-31.**

32. The AGBC submits that for the purpose of s.10(b), the words "without delay" should be understood to mean "immediately" irrespective of the context in which the right arises. Once a detention within the meaning of the *Charter* is established, it is British Columbia's position that police must immediately advise the detainee of the right to counsel subject only to concerns about officer safety, or reasonable limitations that are prescribed by law and justified under s.1.

33. The leading case on the interpretation of the phrase "without delay" is ***R. v. Debot,* [1989] 2 S.C.R. 1140.** There, the meaning of these words was considered within the context of a detention that was brought about by a warrantless search for controlled drugs.

34. In her minority judgment, Wilson J. held that the phrase "without delay" does not permit of internal qualification. "Without delay" does not mean "at the earliest possible convenience"; "after police 'get matters under control'"; "without reasonable delay"; or "after police have had a chance to search the suspect": **para.42.** Unless concerns about police safety preclude an officer from providing the information required by s.10(b), detainees must be told of their right to counsel "immediately upon detention": **paras.42-43, emphasis added.** If "there are to be qualifications put upon the words "without delay" in s.10(b) ... they must be supported under s.1 of the Charter": **para.45.**

35. Lamer J., writing for the majority and concurring in result, referenced s.10(b) in similar terms:

"immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel": **para.3, emphasis added.**

36. The ***Debot*** construction of the phrase "without delay" has not been revisited by this Court. However, there have been subsequent decisions in which the language used in reference to s.10(b), as well as other issues, continues to equate the words "without delay" with the notion of immediacy.

37. In ***R. v. Feeney,* [1997] 2 S.C.R. 13,** for example, police were conducting a homicide investigation. Acting on tips, they entered the appellant's dwelling house without permission. The officer in charge had his gun drawn and pointing downward. He went to the appellant's bed, shook his leg and said "I want to talk to you". He asked the appellant to get out of bed and move into better light, so that he could inspect the appellant's clothes for bloodstains. Blood was noted. The appellant was told of his right to counsel and arrested. He was asked a couple of questions. His shirt was seized and the appellant was taken to the police detachment. Before he consulted with a lawyer, further statements and fingerprints were taken from him: **paras.4, 9-11.** The delay between the time that the officer grabbed the appellant's leg and the time the appellant was provided with his right to counsel was "no more than a few minutes": **para.182.**

38. One of the issues on appeal was whether police violated the appellant's s.10(b) rights. Sopinka J., writing for the majority, held that the right to counsel was breached because, amongst other things, police failed to inform the appellant of his s.10(b) entitlements upon commencement of his detention:

> The requirement that a person be informed of his or her s.10(b) rights begins upon detention or arrest. According to R. v. Therens, [1985] 1 S.C.R. 613, detention under s.10 of the Charter occurs when a peace officer assumes control over the movement of a person by a demand or direction. In the case at bar, upon entering the trailer with gun drawn, the police officer shook the appellant's leg and told him to get out of bed. I agree with the appellant that detention began once the officer touched the appellant's leg and ordered him to rise. The appellant was not given any caution at this time. Only after the appellant had been escorted to the light, where the bloodstains were seen, and was placed under arrest was any information regarding counsel provided. In my view, the appellant had his s.10(b) rights violated at the time of his initial detention: **para.56, emphasis added.**
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> ...

> While the trial judge found a violation of the appellant's s.10(b) rights only after he had been taken to the Williams Lake detachment, in my view these rights were violated from the moment of detention forward. The appellant was not cautioned in any way when he was first detained: **para.58, emphasis added.**

39. ***R. v. Woods,* [2005] 2 S.C.R. 205** provides another example. There, the Court was asked to determine whether a breath sample was provided "forthwith" within the meaning of s.254(2) of the *Criminal Code.* Fish J. held that the word "forthwith" means "immediately" or "without delay"": **para.13, emphasis added.** The concepts of immediacy and "without delay" were considered interchangeable.

40. In light of ***Debot*** and subsequent cases, the AGBC says that the phrase "without delay" as it appears in s.10(b) is properly equated with immediacy.[3] The informational and implementational duties mandated by this provision crystallize at the moment a detention within the meaning of the *Charter* arises and subject to officer safety concerns or s.1 limits, the detainee should be immediately informed of the right to counsel.

41. This construction of s.10(b) is consistent with the purpose of the right as defined in ***R. v. Bartle,* [1994] 3 S.C.R. 173** and other cases. The primary function of s.10(b) is to provide detainees with an opportunity to be informed of their rights and to obtain advice on how to exercise them. When a person is detained and put in a position of disadvantage relative to the state, he or she is in need of immediate legal advice to protect against self incrimination and to assist in regaining liberty: ***Bartle.***

42. Once it is understood that a detention within the meaning of the *Charter* necessarily involves an element of state compulsion or coercion (this is what makes it a "detention"), the concerns about self-incrimination and interference with liberty that s.10(b) seeks to address logically arise as soon as the detention is effected. In light of that reality, it makes little sense to interpret the phrase "without delay" as meaning anything other than "immediate". To hold otherwise undermines the efficacy of this all-important guarantee. Moreover, it delays or restricts access to the right without the state having to

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3 In the Court below, Doherty J.A. acknowledged that there is no authority which "offers direct support for [his] conclusion that the phrase "without delay" is sufficiently flexible to encompass a brief passage of time" between the start of a detention and informing the detainee of the s.10(b) right: **para.55.**

justify the limitation in accordance with its obligation to do so under s.1.

(b) The Constituent Elements of s.10(b) Should not be Re-defined

43. The Court of Appeal for Ontario found that there was no breach of s.10(b) in this case because the Appellant was unable to demonstrate that he was not advised of his right to counsel without delay: ***Suberu,* para.8.** Doherty J.A. noted that within the context of an arrest, the phrase "without delay" has justifiably been held to mean "immediately": **para.47.** However, he was of the view that a broader construction is necessary for the purpose of an investigative detention:

> In my view, a brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel under s.10(b) during which the officer makes a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted, is not inconsistent with the requirement that a detained person be advised of his or her right to counsel "without delay" ...: **para.50, emphasis added.**
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> ...
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> The words "without delay" are semantically capable of a broader meaning than "immediately" in the appropriate context ... **para.52.**

44. In his attempt to "balance individual constitutional rights against the public interest in effective law enforcement", Doherty J.A. allowed the meaning of the words "without delay" to be determined by the investigative detention context: **para.1.** The Respondent supports this approach, suggesting that the balancing of competing interests should take place within the four corners of the right: "This interpretation of the term "without delay" ... achieves the correct balance between the interests that the right to counsel was designed to protect and the community's interest in effective law enforcement": ***Respondent's Factum,* para.28.** With respect, the AGBC questions whether this is the best approach. When rigorous adherence to the informational and implementational duties mandated by s.10(b) prove functionally incompatible with the operational realities of policing, it is likely more constructive to balance the relevant interests under s.1 of the *Charter* so as to maintain certainty in the definitional parameters of the right.

45. Re-defining the words "without delay" to achieve compatibility with the nature of an investigative detention opens the door to reconsidering all aspects of s.10(b) based on the circumstances in which the right arises.

46. For instance, if the phrase "without delay" carries a different meaning for detainees than it does for persons placed under arrest, what about the words "retain and instruct counsel"? Generally, this phrase has been understood to convey a right of "consultation" or "communication" with a lawyer: **per McLachlin J (as she then was), concurring in result in *Prosper*, p.304; *R. v. Smith*, [1989] 2 S.C.R. 368.** Should it take on a different meaning depending on the nature of the interaction with police, the extent of a detainee's jeopardy or the seriousness of the investigation?

47. Allowing the component parts of s.10(b) to be defined by the nature of the detention in which the right is triggered (as compared to the overall purpose of s.10(b) and the context in which it is generally applied), introduces a level of relativity that renders the law on the right to counsel uncertain. With this approach, s.10(b) becomes amorphous. Its definitional parameters are forever capable of shifting, depending on the circumstances.

48. With broadly defined concepts such as "fundamental justice" or "fairness", as embodied within sections 7 and 11(d) of the *Charter*, maintaining an element of definitional fluidity is crucial. These concepts, by their very nature, mandate an individualized assessment of their meaning with reference to the specific context in which they arise. As held in ***United States of America v. Dynar*, [1997] 2 S.C.R. 462,** the "principles of fundamental justice guaranteed under s.7 of the Charter vary according to the context of the proceedings in which they are raised": **para.128**. In ***R. v. Harrer*, [1995] 3 S.C.R. 562,** it was explained that with "broad concepts like "fairness" and "principles of fundamental justice", one is not engaged in absolute or immutable requirements; these concepts vary with the context in which they are invoked": **para.14.**

49. The right to counsel, on the other hand, is a legal right that requires concrete and stable definition. Section 10(b) is triggered each time police affect an arrest or *Charter* detention. The right to

counsel is equally applicable to criminal and regulatory offences. It is asserted, exercised or waived an incalculable number of times per day across this country, in a wide variety of circumstances. Subject to limitations that may be justified under s.1, the exercise or waiver of this right is a necessary pre-requisite to the gathering of evidence from the detainee. Every incident of non-compliance with its informational or implementational components carries the potential to adversely impact the admissibility of evidence. For investigators in the exercise of their duties and the overall public interest in law enforcement, a breach of s.10(b) can have devastating consequences. Evidence of significant probative value may be rendered unavailable for proving the commission of an offence. In this light, a firmly established framework for application of the right is critical.

50. A second problem with the Ontario Court's approach to "without delay" is that its new definition creates an unworkable test for application of the s.10(b) right. Whereas the concept of immediacy leaves little room for misunderstanding, the notion of a "brief interlude" **(para.50)**, a "brief opportunity" **(para.50)**, or a "brief time span" **(para.51)** is harder to quantify. Doherty J.A. went on to say that the time limit for delaying provision of the right is "of necessity a tight one" and that "police activity during the brief interlude ... must be truly exploratory" **(paras.53-54).** However, even these refinements are broadly defined and what amounts to a "brief interlude" or "truly exploratory" activity for the purpose of a s.10(b) determination will invariably end up being fact dependent and subject to assessment on a case by case basis. This leaves police with little guidance on the application of s.10(b). Investigative detentions often occur in volatile, rapidly unfolding circumstances. Nebulous, multi-faceted threshold tests for the application of a right are not constructive – particularly a right that imposes specific obligations on police. Within the investigative detention context, "[j]udicial reflection is not a luxury the officer can afford": ***R. v. Golub*** **(1997), 117 C.C.C. (3d) 193 (Ont.C.A.), para.18.**

51. Over the years, this Court has developed a comprehensible and workable framework for assessing compliance with s.10(b). The framework establishes clear parameters for police. The informational component of the right has been defined. The implementational duties have been articulated in concrete terms. With reference to this framework, which includes the ***Debot*** definition of "without delay", police can reasonably understand what is expected of them once the right to counsel

has been triggered. This is true for both an arrest and a detention. The Court of Appeal's decision to re-define a constituent element of s.10(b) based on the investigative detention context, although understandable given the competing interests at stake, throws the framework into disarray.

D. A Suspension of the Right to Counsel is Justified Under Section 1

52. For the very reasons that Doherty J.A. broadly construed the phrase "without delay", the AGBC says that a suspension of the right to counsel in the investigative detention context is demonstrably justified under s.1 of the *Charter.*

(a) Limit Prescribed by Law

53. A limit prescribed by law for the purpose of s.1 can arise by necessary implication from the operating requirements of common law authority: ***R. v. Orbanski; R. v. Elias,* [2005] 2 S.C.R. 3, para.36; *Therens,* p.645.** The AGBC submits that compliance with the police duties mandated by s.10(b) is functionally incompatible with the operating requirements of an investigative detention. By necessary implication, the exercise of this common law power requires a limit on the right to counsel.

54. It is important to keep in mind that once s.10(b) is engaged, both the informational and implementational duties arise. It is not simply a question of telling the detainee about s.10(b). Rather, upon assertion of the right, police must immediately provide a reasonable opportunity to retain and instruct counsel. This includes facilitating contact with a lawyer and, in the absence of the detainee waiving the s.10(b) right, holding off with enquiries until contact with counsel has been established.

55. The s.10(b) process necessarily carries the potential for not only delaying furtherance of the investigation, but extending the duration of the intrusion with liberty:

> If the police are required to advise a person detained briefly for investigative purposes of his or her right to counsel before asking any questions and if the person exercises that right, the detention of that person will potentially be considerably longer than it would otherwise have been. The police may also be required to take the person into physical custody to transport that person to another location where he or she can effectively exercise the right to counsel. These lengthier detentions, accompanied in some cases by transportation to another location while in physical custody, could also necessitate personal searches of the detained persons that would not be appropriate in the context of a brief

investigative detention: ***Suberu,* para.42.**

This result is antithetical to the purpose and scope of an investigative detention.

56. As noted earlier, an investigative detention will not infrequently arise in response to a foreseeable risk of serious harm to the public, including things such as the public display of loaded firearms. In ***R. v. Clayton* 2007 SCC 32** the Court affirmed that police are "entitled to take reasonable measures to investigate the offence without waiting for the harm to materialize": **para.33, emphasis added**. Indeed, as the Ontario Court of Appeal acknowledged in that same case, the "law abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms and arrest those in possession of them": ***R. v. Clayton,* [2005] O.J. No.1078, para.41.**

57. At the same time, the power to detain for investigative purposes is "limited": ***Mann,* para.23.** The detention "must be of brief duration": **para.22.** It may only be used as an investigative tool when an officer reasonably suspects that a particular individual is implicated in the criminal activity under investigation: **para.34.** Police may conduct a pat-down search, but only if there are reasonable grounds to believe that the officer's safety, or the safety of others, is at risk: **para.40.** In establishing guiding principles for the use of this power, the Court was careful to limit the impact on liberty as much as possible. While the "police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order": ***Mann,* para.35.**

58. Doherty J.A. was correct to find that compliance with s.10(b) and the concept of an investigative detention are irreconcilable. The exercise of this common law power can only give full effect to the societal and individual interests that informed its creation if it carries with it an implied limitation on the right to counsel.

(b) Justification for the Limit

59. As affirmed by Charron J. in ***Orbanski,*** justification under s.1 of the *Charter* involves the

assessment of four criteria:

> (1) the objective of the law must be sufficiently important; (2) there must be a rational connection between the limit and the objective; (3) the infringement of the right must be no more than is necessary to meet the objective; and (4) there must be proportionality between the deleterious and the salutary effects of the measure that limits the right or freedom protected by the *Charter:* **para.54.**

60. The societal importance of the power to detain for investigative purposes has already been recognized by this Court: ***Mann; Clayton.*** It carries great significance to the public interest in effective law enforcement. It should be remembered, for this portion of the s.1 analysis, that the common law power to detain for investigative purposes has already survived rigorous scrutiny under the ancillary powers doctrine as established in ***R. v. Waterfield,*** **[1963] 3 All E.R. 659.** Investigative detentions have been found by this Court to constitute a justifiable use of police powers, notwithstanding their impact on individual interests.

61. The rational connection between a limit on the right to counsel and the objective of the investigative detention power is readily apparent. Temporally suspending compliance with s.10(b) is necessary to ensure that police have the ability to respond quickly and effectively in their investigative mandate, including cases that involve a risk of serious harm to the public. As noted by the Court below, most investigative detentions occur "on the street" in dynamic and evolving situations. The police must "move quickly in these situations to react to the circumstances as they change and to new information as it becomes available": ***Suberu,*** **para.41**. At the same time, the limit on s.10(b) respects the liberty interests of the detainee by ensuring that the detention is only as long as reasonably necessary.

62. The more controversial questions under s.1 are whether the limit on s.10(b) is no more than necessary and there is proportionality between its deleterious and salutary effects. It is the position of the AGBC that both of these criteria for justification are met, even where incriminatory evidence that is gathered during the course of the detention is subsequently admitted into evidence to prove the commission of an offence.

63. The investigative detention power, as defined in ***Mann,*** has been carefully circumscribed. The

detention must be brief. It "cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest": **para.35.** The detention must be reasonably necessary on an objective view of the totality of the circumstances: **para.34.** The power to search incidental to an investigative detention is extremely limited. The safety of police or others must reasonably be at issue. Finally, the detention must end once it is no longer reasonably necessary. At that point, the detainee's liberty is restored and he or she is no longer in jeopardy relative to the state. If information gathered by police provides reasonable grounds to effect an arrest, the investigative detention will similarly come to an end. Although the detainee is not free to leave once the arrest is effected, the suspension of s.10(b) is necessarily lifted and the informational and implementational duties are fully engaged. The detainee must be immediately advised of the right to counsel.

64. Cumulatively, these controls work to ensure that s.10(b) is impacted no more than is reasonably necessary to effect the common law objective of an investigative detention and proportionality is achieved. Moreover, this Court has made it clear that persons who find themselves subjected to an investigative detention are under no obligation to answer the enquiries made by police: ***Mann*, para.45**. An investigative detention does not authorize police to compel participation in an evidence-gathering process.[4] If admissions are obtained, they are protected by the safeguards embodied within the common law rule on voluntariness. Furthermore, although there might be a suspension of s.10(b), a person who is subject to an investigative detention retains the full force of the protections afforded through s.8 of the *Charter* (the right to be secure against unreasonable search or seizure); s.9 (the right not to be arbitrarily detained); and s.10(a) (the right to be informed promptly of the reasons for the detention): ***Mann*, para.21.** Finally, as Doherty J.A. noted in the Court below, if the admission of incriminatory evidence that is obtained during the course of an investigative detention reasonably raises fair trial concerns, the accused person may be in a position to advance an argument that the

4 The Appellant appears to concede that a suspension or abridgement of the right to counsel is justifiable under s.1 in the investigative detention context, as long as evidence gathered during the course of the detention is not admitted to prove guilt. He relies upon ***Orbanski*** as the basis for this position: ***Appellant's Factum*, paras.29, 48.** The AGBC notes that in ***Orbanski*,** it was the fact that the impugned evidence was obtained through "compelled direct participation" by the accused that warranted its restricted use, not the limit on s.10(b): **para.58.** In fact, this Court acknowledged that non-compelled evidence would still be admissible to prove an offence.

prosecution's use of the evidence to prove guilt violates fundamental justice in line with this Court's decision in ***Harrer.*** Suspending the s.10(b) right for the purpose of an investigative detention does not leave a detainee without constitutionally entrenched safeguards.

65. The AGBC recognizes that in determining the boundaries of police power, "caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy": ***Clayton,* para.26.** At the same time, this Court has acknowledged a strong public interest in "enabling the police to do what is reasonably necessary to perform their duties in protecting the public", particularly in circumstances involving a risk of serious harm: **para.26.** Limiting the right to counsel within the context of an investigative detention achieves a "proper balance".

PART IV – SUBMISSIONS ON COSTS

66. The AGBC makes no submissions on costs.

PART V – NATURE OF ORDER REQUESTED

67. The AGBC respectfully requests to present oral argument at the hearing of the appeal. It is the position of the AGBC that within the context of an investigative detention, a suspension of the right to counsel under s.10(b) of the *Canadian Charter of Rights and Freedoms* is demonstrably justified under s.1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Dated this 26th day of March, 2008
Victoria, British Columbia

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