Court file no. 31912

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MUSIBAU SUBERU

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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FACTUM OF THE RESPONDENT

INDEX

PART I – STATEMENT OF FACTS

A) Overview of the Respondent's Position

1. The circumstances that arose during the initial moments of the investigation in this case, and which form the factual basis for the issues in this appeal, are commonplace in criminal investigations. A police officer is dispatched to the scene of a crime in progress. As he arrives he learns that there are two suspects at the scene. The officer arrives to find a suspect being questioned by another officer and, as he approaches, a person at the scene attempts to leave, uttering, "It's him, not me, so I guess I can leave". Not knowing whether that person is a witness, bystander or potential suspect, the officer asks him to "hold on" and asks seven preliminary and exploratory questions in order to determine if that person has any involvement in the offence being investigated. The person is not physically detained, he is not searched, he is not compelled to respond, nor is he asked to identify himself during that brief period of time.

2. The trial judge found that an investigative detention occurred when the officer asked the Appellant to stop so he could talk to him, but that there was no need for the right to counsel until the officer had some reason to believe the Appellant was likely involved in a crime. Having found a detention, the issue was whether the right should have been afforded immediately. The Court of Appeal for Ontario concluded that s. 10(b) could be purposively interpreted to permit, in these circumstances, a brief interlude between the commencement of the detention and the requirement that the detainee be provided with the right to counsel.

3. The inquiry into when the obligation to provide the right to counsel arises during the course of an investigative detention requires a fact-specific assessment of all the circumstances, viewed through the lens of a purposive and contextual analysis of the right to counsel. This familiar assessment is typically conducted in the course of determining whether the interaction constitutes a "detention" within the meaning of s. 10(b) of the *Charter*. It is usually at that stage that the purpose of the right and the values, interests and freedoms it was designed to protect are considered. It is submitted that in the context of "investigative detentions", consideration of these values, interests and freedoms will, in certain circumstances, justify a brief delay in advising the detainee of the right to counsel.

4. The Court of Appeal's analysis and conclusion are correct and consistent with the jurisprudence relating to the right to counsel. A brief interlude between the commencement of the investigative detention and the advising of the detainee of the right to counsel, during which exploratory questions that are not designed to elicit incriminating evidence are asked, does not conflict with the purpose of the right to counsel and would protect the value of the pursuit of truth through effective policing. The suspension of the right to counsel for this brief interlude also ensures that the detainee's constitutional liberty and security rights are not impacted by a prolonged detention.

5. Alternatively, if it is determined that the right to counsel crystallizes upon the commencement of any investigative detention, it is the Respondent's position that a brief suspension of the right at the outset of the detention is a reasonable limit that is demonstrably justified in a free and democratic society.

6. It is the final position of the Respondent that, if this Honourable Court concludes that the Appellant's right to counsel was breached, the admission of the impugned evidence should nevertheless be admitted pursuant to s. 24(2) of the *Charter*.

B) The Facts

7. The Respondent relies upon the facts summarized in the judgment of the Court of Appeal, and emphasizes the following factual findings made by the trial judge, as articulated in his Ruling. These findings were not challenged on appeal.

i) The Detention

8. When Officer Roughley arrived at the liquor store in Cobourg he had no information or grounds to believe that the Appellant was in any way involved in the fraud being perpetrated, or any criminal offence. Officer Roughley had no knowledge of "what was going down" or the extent, if any, of the Appellant's involvement. After hearing the Appellant say, "He did this, not me, so I guess I can go" as he left, the officer wanted to determine whether the Appellant was involved in any way with the person alleged to have used a stolen credit card. His seven questions of the Appellant, asked over a very brief period of time, were to determine the identity

of the person in the liquor store: "who he was, where he was from and why the accused happened to be in Cobourg with him and who was the true owner of that van".

Ruling of the Ontario Court of Justice, Appellant's Record, p. 4, l. 10 – p. 5, l. 10

9. The trial judge found that the Appellant was detained when Roughley told him, "Wait a minute before you can leave. I want to talk to you", before any questions were asked. Officer Roughley followed the accused to determine if he was in any way involved.

Ruling of the Ontario Court of Justice, Appellant's Record, p. 7, ll. 7 – 22

ii) The Arrest

10. While Officer Roughley asked those preliminary questions of the Appellant, he received a radio transmission advising that the van in which the Appellant was sitting had been involved in a fraud committed earlier that day in Brighton. It was "then and only then" that Officer Roughley wanted to find out more about the van and the Appellant, the person who had control of the vehicle. He did not know the status of the vehicle at the time: who owned it, if the Appellant had the right to be in possession of that vehicle or if it was properly licensed.

Ruling of the Ontario Court of Justice, Appellant's Record, p. 5, ll. 5 – 25

11. Officer Roughley spotted the suspicious property in the van after he asked the Appellant for identification and ownership papers and while the Appellant was locating those documents. It was at that point that Officer Roughley formed the belief that the Appellant was "involved to some point" and that he could not let him leave without further investigation.

Ruling of the Ontario Court of Justice, Appellant's Record, p. 5, l. 27 – p. 6, l. 6

12. Officer Roughley immediately advised the Appellant that he was under arrest and explained why he was being arrested. The Appellant interrupted the officer, protesting his innocence. In response, Officer Roughley explained the reasoning process that led him to believe he was involved "to some extent" in a crime in Brighton, and possibly Cobourg, and asked whether he understood why he was being arrested. The Appellant asked "If he says it was just him, can I go?" Officer Roughley responded that he did not know yet if he could leave, and read him his right to counsel. The Appellant said he understood the right and he declined counsel. The Appellant was handcuffed and searched. Incriminating evidence was found in his pockets and in his purse. He was cautioned again but continued to provide statements.

Ruling of the Ontario Court of Justice, Appellant's Record, p. 6, ll. 8 – 20

PART II – POINTS IN ISSUE

13. The Respondent respectfully submits that the following issues arise in this appeal:

A. Did the Court of Appeal for Ontario err in concluding that the Appellant's right to counsel in s. 10(b) of the *Charter* was not infringed?

The Court of Appeal for Ontario correctly found that, in the circumstances of this case, a purposive interpretation of the terms of s. 10(b) permitted a brief interlude between the commencement of the detention and the obligation to advise the Appellant of the right to counsel.

B. If the Appellant's right to counsel in s. 10(b) of the *Charter* was infringed by the common law that permits brief investigative detentions, was this a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?

If the Appellant's right to counsel was infringed, then the common law imposes a limit on that right, during those brief moments, that is justified pursuant to s. 1 of the *Charter*.

C. If the Appellant's right to counsel was infringed, and the limit placed on his s. 10(b) rights cannot be justified, would the admission of the evidence obtained during that investigative detention bring the administration of justice into disrepute?

The statements made by the Appellant prior to his arrest are admissible pursuant to s. 24(2) of the *Charter,* as their admission would not bring the administration of justice into disrepute.

PART III – STATEMENT OF ARGUMENT

A) SECTION 10(B) OF THE *CHARTER*

1) Overview

14. There are an infinite variety of interactions that can occur between the police and citizens in the course of an investigation. In the broad spectrum of interactions that may be characterized as investigative detentions, not every detention involves significant physical or psychological restraint such that the detainee reasonably requires the assistance of counsel. The initial stop and questioning in this case was an investigative detention that fell at the least intrusive end of the spectrum, as the police officer did not, at the time, believe that the Appellant was a perpetrator of an offence, the questions asked were not designed to elicit incriminating evidence and the Appellant was not physically detained, asked to identify himself or subjected to a search.

15. In the context of investigative detentions, the determination of whether and when an officer must advise a detainee of the right to counsel should be made having regard to all the circumstances of the encounter and the purpose of the right to counsel as well as the values, interests and freedoms that the *Charter* protects. The interpretation of the words "without delay" is informed by the same considerations that have delineated the scope of the right to counsel and have provided meaning to the word "detention". When defined purposively, the words "without delay" do not necessarily mean "immediately" in the context of an investigative detention, as opposed to an arrest, and may permit a brief delay to allow the officer to quickly determine whether anything beyond a brief detention will be necessary and justified.

2) The Power to Detain for Investigative Purposes

16. Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the detainee is connected to a particular crime and that such a detention is necessary. Where the safety of a police officer or others is at risk, the officer may also engage in a protective "pat-down" search of the detained individual. Both the detention and the protective search must be conducted in a reasonable manner. The investigative detention must be brief and does not impose an obligation on the detained person to answer police questions. An investigative detention is not an arrest and cannot be treated as a *de facto* arrest by the police or by the courts.

R. v. Mann, [2004] 3 S.C.R. 59 at paras. 19, 34-35, 45
R. v. Therens, [1985] 1 S.C.R. 613 at paras. 47-50
R. v. Clayton, 2007 SCC 32

17. An obligation to advise the detainee of the right to counsel may not necessarily arise during an investigative detention. As this Honourable Court stated 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 the 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.* [emphasis added]

R. v. Mann, *supra*, at para. 19
R. v. Therens, *supra*, at paras. 47-50
R. v. Simmons, [1988] 2 S.C.R. 495 at para. 36

18. In other words, an interaction between police and a suspect will not automatically trigger s. 10(b) simply because it can, in some sense, be described as an "investigative detention". The Court made it clear that the question of whether the right arises is determined by a purposive interpretation of s. 10(b):

> Section 10(b) of the *Charter* raises more difficult issues. It enshrines the right of detainees "to retain and instruct counsel without delay and to be informed of that right". Like every other provision of the *Charter*, s. 10(b) must be purposively interpreted. Mandatory compliance with its requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration. Other aspects of s. 10(b), as they arise in the context of investigative detentions, will in my view be left to another day.

R. v. Mann, supra, at para. 22

3) The Purpose and Scope of Section 10(b)

19. Section 10 of the *Charter* provides:

> Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor[1];
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

[1] The Appellant has not alleged a breach of s. 10(a).

20. It is submitted that a proper reconciliation of the competing interests engaged by this case requires a purposive consideration of the right enshrined in section 10(b) of the *Charter*. The classic articulation of the purpose of the right to counsel is found in *Therens*, where LeDain J. held:

> The purpose of s. 10 of the *Charter* is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 – arrest and detention – are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> *R. v. Therens*, *supra* at para. 52
> *R. v. Manninen*, [1987] 1 S.C.R. 1233 at para. 23

21. Subsequently, in *Bartle*, Lamer C.J.C. identified two purposes underlying the police obligation to advise detained persons of their right to counsel. First, advising detained persons of their s. 10(b) rights gives them the opportunity to obtain legal advice in order to protect his or her right against self-incrimination. Second, requiring the police to issue the s. 10(b) caution to detained individuals facilitates access to legal advice to assist detained persons in regaining their liberty as soon as possible.

> *R. v. Bartle*, [1994] 3 S.C.R. 173 at para. 16

22. If a detained person chooses to exercise his or her right to counsel, the police must provide the detainee with a reasonable opportunity to contact and speak with counsel in private. The police must refrain from questioning the detainee until he or she has availed him or herself of that reasonable opportunity.

> *R. v. Bartle*, *supra* at para. 17

4) The Meaning of "Detention"

23. The term "detention" has been defined not only by reference to the words used but, also, by reference to the larger context within which the right exists and to the purpose of the right and the interests it is meant to protect. This interpretive exercise requires a balancing of competing

values: individual freedom, the assistance of legal advice, the protection of the public and the discovery of the truth through effective and efficient policing. This purposive method of interpretation is by now well known and has been briefly described in the following manner:

> In *Hunter v. Southam*, the Supreme Court of Canada first enunciated and applied the "purposive" method that has served as the standard approach in the elaboration of *Charter* rights and freedoms. This is a complex, value-laden exercise that draws upon a range of sources in the innovative spirit that the *Charter* demands. It calls upon the judge to reflect upon the purpose of and rationale for the *Charter* right at issue, in the light of the overall structure of the *Charter*, our legal and political tradition, our history, and the changing needs and demands of modern society.

Robert J. Sharpe, Katherine E. Swinton, Kent Roach, *The Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2002) at 52
R. v. Big M. Drug Mart, [1985] 1 S.C.R. 295 at paras. 116-117
R. v. Therens, *supra* at para. 51

24. The word "detention" has also been defined as involving significant physical or psychological restraint, where the individual may reasonably require the assistance of counsel. The purposes of the right to counsel - to protect a detainee's right against self-incrimination and to assist in regaining his or her liberty as soon as possible - inform the meaning of the word. This interpretation reflects the purpose of the right to counsel and is also a product of the careful balancing of all the interests and values protected by s. 10(b). In *Grant*, Laskin J.A., for the court, commented upon the interpretive process that defines "psychological detention":

> The definition of "psychological detention" reflects a judicial balance between competing values. On the one hand, the police have the duty and the authority to investigate and prevent crime in order to keep our community safe. In carrying out their duty, they must interact daily with ordinary citizens. Not every such encounter between the police and citizen amounts to a constitutional "detention." This court and other courts have recognized that police must be able to speak to a citizen without triggering that citizen's *Charter* rights.
>
> The main decision in this province affirming the police's right to question citizens is the judgment of Krever J.A. in *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 at 271:
>
> > The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, *Rice v. Connolly* [citation omitted]. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed.

See also the judgment of Osborne J.A. in *R. v. Hall* (1995), 22 O.R. (3d) 289 (C.A.)

On the other hand, ordinary citizens must have the right to move freely about their community. Thus, the police cannot detain a citizen for questioning unless they are authorized by law to do so. And whether questioning gives rise to a detention must be assessed in the light of the concern expressed by Le Dain J. in *Therens*: that most citizens are unaware of the limits of the police's authority and the concerns expressed by Iacobucci J. in *Mann* at para. 18 about "the potential for abuse inherent in such low-visibility exercises of discretionary power".

R. v. Grant (2006), 209 C.C.C. (3d) 250 (Ont. C.A.), leave to appeal to S.C.C. granted [2007] S.C.C.A. No. 99
R. v. Hall (1995), 22 O.R. (3d) 289 (Ont. C.A.)
R. v. Grafe (1987), 36 C.C.C. (3d) 267 (Ont. C.A.)
R. v. Mann, supra
R. v. Bartle, supra at para. 16

5) The Meaning of "Without Delay"

25. As noted by the court below, there is an obvious tension between the requirement to inform detained persons of their right to counsel "without delay" and the proper and effective use of brief investigative detentions. It is submitted that the Court of Appeal fairly resolved the tension by reference to the purpose of the right to counsel and the interests that the *Charter* seeks to protect. This purposive interpretation of the words "without delay", achieves the appropriate balance between the constitutional interests of the individual and the societal interest in efficient and effective policing.

Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record at p. 32
R. v. Mann, supra
R. v. Therens, supra
R. v. Manninen, supra
R. v. Bartle, supra
R. v. Grant, supra

26. As with the word "detention", the term "without delay" takes its meaning from the purpose of the provision, the interests it protects and the values it reflects. Thus, the words "without delay" generally mean "immediately" in the context of an arrest, where the detainee is physically restrained and is in immediate need of legal advice. In those circumstances, a delay in advising the detainee of the right to counsel may be justified by legitimate police safety concerns or "similar exigencies".

R. v. Debot, [1989] 2 S.C.R. 1140 at para. 42
R. v. Strachan, [1988] 2 S.C.R. 980 at para. 34
R. v. Manninen, supra at para. 22
R. v. Kelly (1985), 17 C.C.C. (3d) 419 at 424 (Ont. C.A.), leave to appeal to S.C.C. refused, 65 N.R. 320 n

27. The words "without delay" should be less restrictively interpreted in the context of an investigative detention, where, as in this case, the detention falls at the least intrusive end of the spectrum. In the court below, Doherty J.A. described the circumstances that would justify a brief delay in providing the right to counsel:

> [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". Allowing the police a brief opportunity to size up the situation and the detainee's status is consistent with the concern expressed by Iacobucci J. in *R. v. Mann, supra*, at para. 22 where he observed:
>
> > Like every other provision of the *Charter*, s. 10(b) must be purposively interpreted. Mandatory compliance with its requirement cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration.
>
> ....
>
> The police activity during the brief interlude contemplated by the words "without delay" must be truly exploratory in that the officer must be trying to decide whether anything beyond a brief detention of the person will be necessary and justified. If the officer has already made up his or her mind that the detained person will be detained for something more than a brief interval, there is no justification for not providing the individual with his or her right to counsel immediately.
>
> *Reasons for Judgment of the Court of Appeal for Ontario*, Appellant's Record at pp. 36, 38

28. This interpretation of the term "without delay" in the context of investigative detentions, 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. Provided that, during the brief detention, the detainee is not the subject of the investigation and is not being asked questions directed at eliciting incriminating statements, it cannot be said that the individual reasonably requires the assistance of counsel. Moreover, if the term "without delay" is defined to mean "immediately", the police power to briefly detain persons for investigative purposes would be rendered illusory and significant interference with the liberty and personal security of the detainee would ensue. As Doherty J.A., for the court, elaborated:

> Not only will most investigative detentions justify only a brief detention of the individual, most will occur "on the street" in dynamic and quickly 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. If the police are obliged to advise every person detained for investigative purposes of their right to counsel before asking any potentially incriminating questions, the police are presumably required to stop any questioning and facilitate contact with counsel if the detained person chooses to exercise his or her right to counsel. The delay inherent in this process, not to mention the redirection of police resources that would be required to comply with requests to consult with counsel, would render the police power to briefly detain persons for investigative purposes in aid of criminal investigations largely illusory.
>
> In addition to the negative impact on the ability of the police to effectively investigate crimes, a requirement that the police advise detained persons of the right to counsel immediately could seriously impair the liberty interests of detained persons. 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 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. The interpretation of s. 10(b) urged by counsel for the Appellant in the context of brief investigative detentions would inevitably result in significant additional interference with the liberty and personal security of those detained for investigative purposes.
>
> *Reasons for Judgment of the Court of Appeal for Ontario*, Appellant's Record at pp. 32-33

29. The broad interpretation of the words "without delay" adopted by the Court of Appeal, that permits a brief delay prior to advising the detainee of the right to counsel is fully justified by the purposive approach to s. 10(b) articulated by Iacobucci J. in *Mann* and finds support in the jurisprudence:

- In *Hall*, it was held that an officer investigating a driving offence who observed a hand rolled cigarette when he approached the car was entitled to ask an exploratory question to determine whether to conduct any further investigations into the cigarette before advising the detainee of the right to counsel. MacDonell J. concluded that the words "without delay" did not necessarily mean "immediately upon detention". He stated:

  > While a detainee's right to counsel is triggered by the detention, that is not to say that a failure to immediately inform the detainee of the right and to provide a reasonable opportunity to exercise it necessarily constitutes a violation of the right. Section 10(b)

states that the rights are to be afforded "without delay". It is well settled that those words do not mean "immediately upon detention": *R. v. Kelly* (1985), 17 CCC (3d) 419, at pp. 424-5 (Ont. C.A.). Whether there has been a delay that infringes the provision will depend on all the circumstances of the case, and will be informed by the interests that the right was meant to protect. One of those interests is that of not prejudicing one's legal position by something said or done without the benefit of legal advice: ibid, p. 424. However, the mere fact that a question was asked of a detainee prior to providing the required advice does not inexorably lead to the conclusion that s. 10(b) was infringed: *R. v. Kwok* (1986), 31 C.C.C. (3d) 196 at 208 (Ont. C.A.); leave to appeal refused, (1987), 86 N.R. 264 n.

R. v. Hall, [1998] O.J. No. 2607 at para. 7 (Ont. C.J.)

- In *Kwo*k, the court held that an immigration officer who had decided to detain the accused was entitled to ask questions relating to whether the accused knew the co accused before providing the right to counsel. Finlayson J.A., for the court, explained:

In my opinion, the Appellant was advised of the reason for his detention and of his right to counsel, all "without delay" as required by s. 10 of the Charter. The fact that some questioning preceded the required advice does not by itself render the answers provided subject to being ruled inadmissible. This court has previously held that the obligation to inform a person of his rights under s. 10(b) of the *Charter* is an obligation to inform "without delay" but that "without delay" does not mean "immediately": see *R. v. Kelly* (1985), 17 C.C.C. (3d) 419, 44 C.R. (3d) 17, 12 C.R.R. 354; *R. v. DeBot* , unreported, released October 8, 1986 [since reported 30 C.C.C. (3d) 207, 54 C.R. (3d) 120].

R. v. Kwok (1986), 31 C.C.C. (3d) 196 at 208 (Ont. C.A.), leave to appeal to S.C.C. refused, 86 N.R. 264 n
R. v. Kelly, *supra* at 424

- In *Sawatsky,* the court determined that an officer was entitled to ask exploratory questions about an unrelated offence raised by a detainee prior to reiterating the right to counsel. The court held that brief exploratory questions could be asked in order to determine whether further investigation into the unrelated matter was necessary and that the right to counsel is to be reiterated once an officer has a realistic indication that a detainee may incriminate himself or herself. The court stated:

The link between a detained person's need to understand the extent of her jeopardy; that is the nature and extent of her risk of self-incrimination, and the effective exercise of the right to counsel, provides the key to the determination of when the police will be required to reiterate the right to counsel in the course of an ongoing detention. If the risk of self-incrimination changes, the right to counsel must be restated so that a detainee can decide in the face of the new risk whether to exercise her right to counsel.

R. v. Sawatsky (1997), 118 C.C.C. (3d) 17 at para. 30 (Ont. C.A.)
R. v. Evans, [1991] 1 S.C.R. 869 at para. 48
R. v. Mann, supra

6) Sufficient Guidance

30. It is submitted that the approach taken by the Court of Appeal's approach in this case should not be rejected on the basis that it provides "no meaningful guidance", as the Appellant contends. The judgment provides the following guidance as to when an officer must advise a detainee of his or her right to counsel:

- The time limit imposed on the words "without delay" is a tight one and can accommodate only brief interludes between commencing an investigative detention and advising the detainee of his or her right to counsel;
- The police activity during the brief interlude must be truly exploratory in that the officer must be trying to decide whether anything beyond a brief detention is warranted;
- If the officer has already decided that the detained person will be detained for more than a brief interval, the right to counsel must be given immediately; and
- A delay of more than half an hour is clearly beyond the limits of the "without delay" requirement.

Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record at pp. 37-38

31. Further, the jurisprudence relating to the definition of "detention" in s. 10(b) of the *Charter* is replete with markers that provide guidance on this point. In addition to the factors identified by the lower court, guidance may also be found in the essential factors recounted by Martin J.A. in *Moran*, which include:

- The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
- The stage of the investigation: that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
- Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;

R. v. Hawkins (1992), 72 C.C.C. (3d) 524 at 542-543 (Nfld. C.A.), rev'd [1992] 2 S.C.R. 157
R. v. Moran (1987), 36 C.C.C. (3d) 225 at 258-259 (Ont. C.A.)

R.. v. Greaves (2004), 189 C.C.C. (3d) 305 (B.C.C.A.)
R. v. Grant, supra at para. 15

32. It is submitted that the application of these factors to the present case inexorably leads to the conclusion that the Appellant's s. 10(b) rights did not crystallize before Officer Roughley asked him a few exploratory questions:

- Officer Roughley had not determined that the Appellant was involved in the offence being investigated;
- Officer Roughley did not ask questions directed at obtaining incriminating statements;
- Officer Roughley did not believe there were reasonable and probable grounds to arrest the Appellant for the offence being investigated;
- Officer Roughley had not decided to take the Appellant into physical custody;
- Officer Roughley had not searched the Appellant;
- Officer Roughley's questions were of a general nature and did not involve the Appellant being confronted with evidence pointing to his guilt; and
- The detention lasted only moments.

R. v. Moran, supra
R. v. Mann, supra
R. v. Hawkins, supra at 542-543

B) SECTION 1 OF THE *CHARTER*

1) Overview

33. Given the infinite range of police-citizen encounters that may give rise to an investigative detention, it is the Respondent's position that that whether or not there has been a breach of the right to counsel and, correspondingly, whether evidence obtained in violation of the right should to be excluded, are questions best left answered on a case-by-case basis. However, should this Court determine that the Appellant's right to counsel crystallized the moment Officer Roughley stopped him and, therefore, that his s. 10(b) rights were infringed, it is the Crown's position that the infringement was justified under s. 1 of the *Charter* as a reasonable limit prescribed by law. Section 1 of the *Charter* reads:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2) The *Orbanski* Approach Does Not Apply

34. The Appellant asserts, at paragraph 48 of his factum, that "there is no principled basis upon which to distinguish this case from *Elias; Orbanski*" with respect to the approach to be taken to s. 1 of the *Charter*. He further contends that a limit placed on his right to counsel during the investigative detention would be justifiable pursuant to s. 1, as long as the statements he made prior to being advised of the right to counsel could not be used to incriminate him. The Respondent submits that the approach to the right to counsel and the exclusion of evidence articulated in *Orbanski* cannot be comfortably applied in the context of investigative detentions because that approach emanates from a fundamentally different context than that which exists in the present case.

R. v. Orbanski; R. v. Elias, [2005] 2 S.C.R. 3
R. v. Dedman, [1985] 2 S.C.R. 2
R. v. Hufsky, [1988] 1 S.C.R. 621
R. v. Ladouceur, [1990] 1 S.C.R. 1257
R. v. Milne (1996), 107 C.C.C. (3d) 118 at 127-28 (Ont. C.A.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 353
Criminal Code, R.S.C. 1985, c. C-46, ss. 253-260

35. First, the common law and statutory scheme that has developed with respect to impaired driving is designed to allow investigative steps (including the ability to compel the detainee to to blow into a roadside screening device, demand sobriety tests, and ask questions about how much alcohol a person has consumed) to inform the grounds for subsequent steps, which will ultimately inform the evidence at trial. In other words, the *purpose* of the initial investigative steps and, by necessary inference, the suppression of the s. 10(b) right, is to collect evidence to inform the officer's grounds for a breathalyzer demand. Once those grounds are formed, the officer can then *legally compel* the individual to take a breathalyzer test, the results of which *can* be used to incriminate him or her at trial.

Michal Fairburn, "Mann Oh Mann – We've Only Just Begun" (2005), 17 N.J.C.L. 171 at 195-97

36. By contrast, in the investigative detention context, there is no *ex post facto* scheme to rely on that is analagous to a breathalyzer test. If, for example, the detainee in *Mann* had, in response

to an exploratory question, blurted out, "You got me, I just came from the break and enter," the statement would arguably be inadmissible on the *Orbanski* analysis. This analysis could serve to immunize him from any further prosecution. It is the Respondent's position that this approach is untenable and should not be adopted. As long as the detention is brief and to the point, and the questions asked by the officer are truly exploratory and not directed at eliciting incriminating evidence, statements made by a detainee should not be categorically excluded from being used to prove guilt simply because they are made prior to the officer giving the s. 10(b) advice.

37. Second, in *Bernshaw*, this Court held that any driver stopped by a police officer is detained for the purposes of s. 10(b). In contrast, with respect to individuals on foot, not every person stopped by a police officer is detained within the meaning of s. 10(b). Furthermore, the level of compulsion that exists with respect to motor vehicle stops will not be present in most cases in which an officer stops an individual on foot. As held by the Court of Appeal for Manitoba in *R. v. H.(C.R.)*:

> ...[M]otor vehicle cases are not an appropriate analogy when determining whether a detention has occurred in a pedestrian-stopping case. In speaking to an individual on the sidewalk, a police officer does not obviously assume control over the movements of an individual in the same way as stopping the driver of a motor vehicle. More importantly, on the sidewalk, unless there is evidence to the contrary, as required by *Therens*, there is no compulsion to speak and one can walk away.[2]

R. v. Bernshaw, [1995] 1 S.C.R. 254 at para. 26
R. v. H.(C.R.) (2003), 174 C.C.C. (3d) 67 (Man. C.A.) at paras. 56-59
R. v. Thomsen, [1988] 1 S.C.R. 640 at paras. 12-14
R. v. Mann, supra at para. 19

38. Third, it must be remembered that the *Orbanski* analysis was developed in the context of of an aggressive statutory and common law scheme designed to combat the ills of impaired driving, where *random* roadside detentions are permitted. This scheme has the potential to impress itself upon an individual for no other reason than that they are using a highway (for example, in the case of a person pulled over for a R.I.D.E. stop). To the contrary, an officer must have reasonable grounds to suspect than an individual is connected to a particular crime before the individual can be detained for investigative purposes, thereby erasing the randomness of the detention.

R. v. Orbanski, supra
R. v. Dedman, supra
R. v. Hufsky, supra
R. v. Ladouceur, supra
R. v. Milne, supra

39. For the foregoing reasons, it is submitted that the approach developed in *Orbanski* should not be imported into the realm of investigative detentions. If the issue raised by this case is to be resolved by the application of s. 1, it is submitted that the following analytical approach should be adopted.

3) The Application of Section 1 of the *Charter* to Investigative Detentions

a) The Limit is Prescribed by Law

40. It is settled law that a prescribed limit within the meaning of s. 1 may be implied from the operating requirements of a statute or common law rule. In *Therens*, Le Dain J. described the meaning of the words "prescribed by law" as follows:

> Section 1 requires that the limit be prescribed by law, that it be reasonable, and that it be demonstrably justified in a free and democratic society. The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. *The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.*[3] [emphasis added]

R. v. Therens, supra at para. 56
R. v. Thomsen, supra at para. 15
R. v. Swain, [1991] 1 S.C.R. 933 at para. 50
RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573
B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214
R. v. Clayton, supra
R. v. Orbanski, supra

41. It is submitted that a prescribed limit on the Appellant's right to counsel in this case results by necessary implication from the operating requirements of the common law police

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[2] This passage was subsequently adopted by the Court of Appeal for Ontario in *R. v. B.(L.)* (2007), 86 O.R. (3d) 730 (Ont. C.A.) at para. 54.

[3] Although it settled that s. 1 can be applied when a common law rule is challenged under the *Charter*, in *R. v. Swain*, Lamer C.J., writing for the majority, held that if it is possible to reformulate a common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it is not be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1. If it is not possible to reformulate the common law rule so as to avoid an infringement of a *Charter* right, it is necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*: [1991] 1 S.C.R. 933 at para. 50.

power to detain individuals for investigative purposes. Requiring police officers to advise an individual subjected to an investigative detention of the right to counsel, and to allow the person to exercise that right prior to asking any questions, is simply incompatible with the requirement set out in *Mann* that investigative detentions be "brief". It is also incompatible with the requirement that police officers, in the execution of their duties, "must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing".

R. v. Mann, supra at para. 22

b) The Application of the *Oakes* Test

42. The test for determining whether a *Charter* violation can be justified under s. 1 involves the application of the well-known *Oakes* criteria. First, the Crown must establish that the objective or purpose of the impugned legislation or common law rule is sufficiently "pressing and substantial" to warrant overriding the constitutionally protected right. Second, the Crown must establish that the means adopted to achieve the objective are proportional to that objective. It must be demonstrated that the means chosen to achieve the objective: (i) are rationally connected to the objective and not arbitrary, unfair or based on irrational considerations; (ii) impair the guaranteed right as little as reasonably possible; and (iii) achieve proportionality between the deleterious and salutary effects of the measure that limits the *Charter* right.

R. v. Oakes, [1986] 1 S.C.R. 103
Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835
R. v. Orbanski, supra at para. 54

Pressing and Substantial Objective

43. Enabling police officers to respond quickly, effectively and flexibly to rapidly evolving dynamics, as they execute their duty to investigate crime and keep the peace, is a pressing and substantial objective.

i) Rational Connection

44. The rational connection stage requires the Crown to show a causal connection between the infringement of the right and the objective of the law that limits the right. The Court may find a causal connection between the infringement and objective on the basis of reason or logic,

without insisting on direct proof of a relationship between the infringing measure and the objective.

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at para. 154

45. It is submitted that there is a causal connection between the limit on the right to counsel and the objective of enabling effective law enforcement. Permitting police officers to pose exploratory questions prior to advising a detainee of the right to counsel, and facilitating contact with counsel, allows the police to execute their duties more quickly and flexibly. The limit also allows investigative detentions to be brief and avoids intrusion on other *Charter* rights..

ii) Minimal Impairment

46. At this step of the analysis, the Crown must show that the right being limited is impaired as little as reasonably possible in order to achieve the objective. The law must be carefully tailored so that the right is impaired no more than necessary. If the law falls within a range of reasonable alternatives, the court will not find it overbroad because it can conceive of an alternative which might better tailor the objective to the infringement. Context is extremely important at this stage of the *Oakes* test.

RJR-MacDonald Inc. v. Canada (Attorney General), supra at para. 160
R. v. Bryan, [2007] 1 S.C.R. 527 at para. 42
Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827 at paras. 33, 110

47. It is the Respondent's position that a brief suspension of an individual's right to counsel during an investigative detention will impair the right no more than is reasonably necessary provided that the following obligations are imposed on police officers:

- An officer must advise a detainee of his or her right to counsel upon deciding that the detained person will be detained for more than a brief interval;
- An officer must advise a detainee of his or her right to counsel upon determining that the detainee is likely involved in the commission of the offence being investigated and prior to conducting questioning directed at obtaining incriminating statements;
- An officer must advise a detainee of his or her right to counsel prior to confronting the detainee with evidence pointing to his or her guilt;
- An officer must advise a detainee of his or her right to counsel upon forming the belief that there are reasonable and probable grounds to arrest the detainee for the offence being investigated; and

- An officer must advise a detainee of his or her right to counsel upon deciding to take the detainee into physical custody.

48. In the present case, Officer Roughley did not run afoul of any of these proposed requirements while the Appellant was detained. The investigative detention was momentary and involved only seven exploratory questions; the Appellant was not in custody; Officer Roughley had not determined that the Appellant was likely involved in the commision of the offence and was not directing his questions at obtaining incriminating statements; and Officer Roughley immediately arrested the Appellant and advised him of his right to counsel upon forming the belief that the Appellant was involved in the fraud.

iii) Proportionality Between Salutary and Deleterious Effects

49. It is the Respondent's position that the salutary effects of briefly suspending an individual's right to counsel during an exploratory investigative detention outweigh the deleterious effects on the right. Not only does briefly suspending the right enable the police to effectively investigate crimes, but it also, in many cases, will prevent the liberty and security interests of detained persons from being seriously impaired. It is further the Respondent's position that satisfying the proportionality test does not require the adoption of an approach that categorically precludes all statements made by a detainee while the right is suspended from being used to prove guilt.

50. Proportionality is achieved as long as an accused can argue that the admission of incriminatory statements made before he was advised of the right to counsel would render his trial unfair. While the Court of Appeal held that an accused could make such an argument in the context of its finding that there was no infringement of s. 10(b) in this case, an accused could make the same argument if this Court resolves this appeal by resort to s. 1 of the *Charter*. As the Court of Appeal observed, nothing in the circumstances surrounding the Appellant's pre-arrest statements would have supported that argument.[4] As such, there is no reason for those statements to be excluded.

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[4] The issue of trial fairness is further addressed below at paras. 53-57 of the Respondent's factum in the context of s. 24(2) of the *Charter*.

Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record, p. 41
R. v. Harrer, [1995] 3 S.C.R. 562 at para. 21
R. v. Terry, [1996] 2 S.C.R. 207 at para. 25
R. v. White, [1999] 2 S.C.R. 417 at paras. 86-89
R. v. Hape, 2007 SCC 26 at para. 108-109
R. v. Milne, supra

C) SECTION 24(2) OF THE *CHARTER*

1) Overview

51. If the Appellant's s. 10(b) *Charter* rights were infringed, and the infringement cannot be justified under s. 1, the impugned statements are nevertheless admissible pursuant to s. 24(2) of the *Charter*.[5] In addressing admissibility under s. 24(2), it is helpful to begin with the language of that section:

> Where, in proceedings under s. 24(1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*, the evidence shall be excluded under s. 24(2) if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

52. The considerations that determine whether the admission of evidence would bring the administration of justice into disrepute have been organized under three categories: the effect of admission on the fairness of the trial; the seriousness of the *Charter* violation; and the effect of excluding the evidence on the administration of the justice.

R. v. Collins, [1987] 1 S.C.R. 265
R. v. Stillman, [1997] 1 S.C.R. 607
R. v. Buhay, [2003] 1 S.C.R. 631
R. v. Feeney, [1997] 2 S.C.R. 13
R. v. Orbanski, supra

2) Trial Fairness

53. The Appellant, at paragraph 47 of his factum, argues that the statements he made prior to being advised of his right to counsel should be excluded solely on the basis that they were conscriptive. Their admission, the Appellant contends, would render the trial unfair for this reason alone. It is the Respondent's position that the Appellant's statements that the suspect

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[5] The Appellant argued in the Court of Appeal that his pre-arrest statements *and* all of the evidence seized from his pockets and purse should have been excluded pursuant to s. 24(2) of the *Charter*. He now argues that only the pre-arrest statements should be excluded.

inside the store was his friend and that they had driven to Cobourg together in his girlfriend's van, should not be excluded simply because they are conscriptive. Their admission did not visit unfairness upon the Appellant.

54. While several judgments of this Court have held that the admission of conscriptive evidence obtained as a result of a *Charter* breach will often render an accused's trial unfair, LeBel J.'s concurring reasons in *Orbanski* made it clear that this Court has not adopted an automatic exclusionary rule with respect to this category of evidence:

> Our Court has remained mindful of the principle that the *Charter* did not establish a pure exclusionary rule. It attaches considerable importance to the nature of the evidence. It is constantly concerned about the potential impact of the admission of conscriptive evidence obtained in breach of a *Charter* right on the fairness of a criminal trial. Nevertheless, while this part of the analysis is often determinative of the outcome, *our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant.* [emphasis added]

R. v. Orbanski, supra at para. 93
R. v. Stillman, supra
R. v. Buhay, supra
R. v. Grant, supra[6]

55. Moreover, the admission of statements obtained in violation of an accused's right to counsel do not render the trial unfair where the Crown shows that the accused would not have acted any differently if his or her s. 10(b) rights had been respected. As Lamer C.J. held in *Bartle*:

> Section 24(2) applicants thus do not bear the burden of proving that they would have consulted counsel had their s. 10(b) rights not been infringed. Of course, *once there is positive evidence supporting the inference that an accused person would not have acted any differently had his or her s. 10(b) rights been fully respected, a s. 24(2) applicant who fails to provide evidence that he or she would have acted differently (a matter clearly within his or her particular knowledge) runs the risk that the evidence on the record will be sufficient for the Crown to satisfy its legal burden (the burden of persuasion).*

R. v. Bartle, supra at para. 55

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[6] The Respondent notes that a primary issue to be litigated in the *Grant* appeal, currently scheduled to be heard by this Honourable Court on April 24, 2008, pertains to the concept of trial fairness in the context of s. 24(2) of the *Charter*.

56. In the present case, it is submitted there is sufficient evidence to conclude on a balance of probabilities that the Appellant would *not* have acted any differently had his s. 10(b) rights been fully respected. When Officer Roughley arrested the Appellant and informed him of his right to counsel, the Appellant said he did not wish to contact a lawyer and continued to answer Officer Roughley's questions. It is submitted that it is, therefore, illogical to conclude that he would have declined to answer the much more innocuous questions that were asked at the commencement of the investigative detention had he been advised of his right to counsel prior to those questions being asked.

57. It is not the case that the Appellant had "given up" because of the answers he gave to the questions posed of him prior to being advised of his right to counsel. He continued trying to exculpate himself by insisting that the Wal-Mart shopping cards found in his possession belonged to his co-accused and claiming that Sarbjit Brar, the individual whose stolen credit card was used to perpetrate the fraud, was his friend. The Appellant did not provide any evidence that he would have acted any differently had he been advised of his right to counsel the moment he was stopped by Officer Roughley, as he did not testify on the *Charter voir dire* or at trial.

3) The Seriousness of the Breach

58. It is submitted the breach must be characterized as being minor and inadvertent for several reasons. First, there is no evidence to suggest Officer Roughley was acting in bad faith or intended to deprive the Appellant of his rights. Furthermore, the breach lasted only a matter of moments until Officer Roughley advised the Appellant of his right to counsel. During those few moments, Officer Roughley asked only seven exploratory questions as to the Appellant's association with the other male inside the store, where he was from, how he came to be in Cobourg, and who owned the vehicle he was getting into. Finally, when the Appellant requested to speak to duty counsel upon arriving at the police station, he was immediately given the opportunity to do so.

4) Effect on the Administration of Justice

59. It is submitted that in light of all the circumstances of this case noted above, the exclusion of the impugned statements would have a more serious impact on the repute of the administration of justice than their admission.

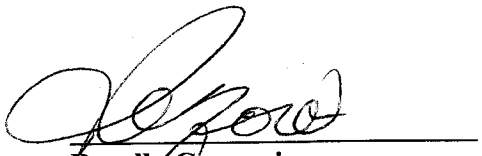
5) Effect on the Verdict

60. While it is the Respondent's position that the Appellant's pre-arrest statements should not be excluded if his right to counsel has been breached, it is submitted that the Appellant would inevitably have been convicted even if they had been excluded. The evidence against the Appellant is overwhelming: The Cobourg LCBO clerk saw the Appellant associating with his co-accused inside the store; Officer Roughley observed the Appellant getting into the van in which the stolen merchandise was found; Officer Roughley found Wal-Mart gift cards and receipts for some of the stolen property when he searched the Appellant's pockets; and a search of the Appellant's purse revealed an index card containing the name and personal information of the individual from who the credit card was stolen. The Appellant's conviction did not depend on his pre-arrest statements.

PART IV – ORDER REQUESTED

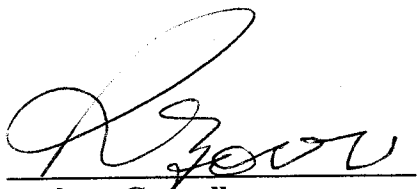
61. The Respondent respectfully requests that this appeal be dismissed.

ALL OF WHICH is respectfully submitted by,



Rosella Cornaviera
Deputy Director

Counsel for the Respondent



Andrew Cappell
Crown Counsel

Counsel for the Respondent

DATED at Toronto, this 11th day of February, 2008.

PART V – TABLE OF AUTHORITIES

I) CASES — **Cited at paragraph(s):**

II) ACADEMIC COMMENTARY