Court File No. 31892

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

B E T W E E N

DONNOHUE GRANT

Appellant (Appellant)

– and –

HER MAJESTY THE QUEEN

Respondent (Respondent)

– and –

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA
ATTORNEY GENERAL OF BRITISH COLUMBIA
CANADIAN CIVIL LIBERTIES ASSOCIATION
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Interveners

APPELLANT'S FACTUM IN RESPONSE

[*Rules of the Supreme Court of Canada,* Rules 29(4) & 35(4)]

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Ontario Court of Appeal found a violation of the Appellant's s. 9 *Charter* rights, but admitted the seized evidence under s. 24(2) and dismissed his appeal. The Respondent seeks to support this result by challenging the Court of Appeal's finding that there was a *Charter* breach.[1] Pursuant to Rules 29(4) & 35(4) of the *Rules of the Supreme Court of Canada,* the Appellant files this factum in response.

B. Statement of Facts

2. The relevant facts are summarized in paras. 3 to 4 of the Appellant's main factum, and accurately set out in greater detail in the Ontario Court of Appeal's Reasons for Judgment.

Reasons for Judgment (Ontario Court of Appeal), ¶ 19, *Appellant's Record,* Vol. I, pp. 47-50

PART II: QUESTION IN ISSUE

3. The Respondent frames the relevant issue as follows:[2]

> **Issue 1:** Whether in the context of community-based policing, a pedestrian is detained for *Charter* purposes when he or she is stopped by the police for the purpose of identification and interview?

The Ontario Court of Appeal did not suggest that all police-citizen interactions invariably give rise to a detention, but simply found a detention in the specific circumstances of this case. The narrow issue before this Court is whether the Court of Appeal was correct to find a detention on this set of undisputed facts. The Appellant submits that the Court of Appeal reached the right result on this issue, for the right reasons, and submits more generally that the Respondent's efforts to narrow the ambit of s. 9 in "street encounter" cases should be rejected. In particular, the *Charter* concerns raised by police "investigative questioning" should not be hidden from full *Charter* scrutiny under the anodyne label of "community-based policing".

4. The Respondent raises a second new issue, not argued or addressed in the courts below, submitting that any infringement of the Appellant's s. 9 *Charter* rights can be justified under s. 1.

---

[1] *Rules of the Supreme Court of Canada,* Rule, 29(3); *Respondent's Factum,* ¶ 2, 9, 12-57.

[2] Issues 2 and 3 in Part II of the *Respondent's Factum* correspond to Issues (i) and (ii) in the Appellant's main factum, and are addressed there.

The Appellant submits that this argument should be rejected. However, if it is accepted, it will become necessary for this Court to consider the ss. 8 and 10(*b*) *Charter* issues that were raised by the Appellant in the courts below.

PART III: ARGUMENT

A. Section 9 of the *Charter*

5. The s. 9 issue in this case must be approached in the context in which it occurred. The Appellant was exercising his basic, unregulated freedom to walk on a public sidewalk when the police stopped him, questioned him about whether he had anything illegal on him, and arrested him after he admitted that he did. This kind of police-pedestrian street encounter is commonplace, and raises concerns at the core of the s. 9 guarantee.

1) The Purpose of Section 9

6. Any inquiry into the scope of the s. 9 *Charter* right must begin with a consideration of "the underlying value which the right was designed to protect".[3] The prohibition of "arbitrary detention" is plainly meant to protect individual liberty and autonomy against unjustified state interference. "Liberty", for *Charter* purposes, is not "restricted to mere freedom from physical restraint", but encompasses a broader right to "make decisions of fundamental importance free from state interference".[4] It is a particularly grave encroachment upon liberty for the state to compel someone to incriminate himself or herself.[5] "Detention" affects "liberty" in all of these senses. As McLachlin J. explained in *R. v. Hebert, infra,* a detainee:

> … cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power.

Section 9 thus can be seen as having two intertwined purposes. Its immediate aim is to prevent unjustified state interference with physical liberty. It also safeguards against incursions on *mental* liberty by prohibiting the coercive pressures of detention from being applied to people without adequate justification. It thus augments the protections against self-incrimination

---

[3] *R. v. Hebert, infra* at p. 179.
[4] *Blencoe v. British Columbia, infra* at ¶49.
[5] *R. v. S.(R.J.), infra* at pp. 480-85

afforded by ss. 7 and 10 of the *Charter,* consistent with the principle that "[t]he *Charter* should be construed as a coherent system".[6]

R. v. Hebert, [1990] 2 S.C.R. 151 at p. 179 [*APPELLANT'S AUTHORITIES,* VOL. II, TAB 26]
Blencoe v. British Columbia (Human Rights Comm'n), [2000] 2 S.C.R. 307 at ¶ 49, *per* Bastarache J. [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 84]
R. v. S.(R.J.), [1995] 1 S.C.R. 451 at pp. 480-85, 561[*APPELLANT'S AUTHORITIES,* VOL. III, TAB 45]
Stribopoulos, J. "The Forgotten Right: Section 9 of the *Charter,* Its Purpose, and Meaning", (2008) 40 S.C.L.R. (2d) 1 at p. 17, 31 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 105]

7. This Court's ss. 9 and 10(*b*) *Charter* decisions recognize that "detention" must be understood in terms of a lack of free choice. In *R. v. Therens, infra,* Le Dain J., writing for the majority on this issue, stated:

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

In *R. v. Nolan, infra,* Dickson C.J.C. noted that "when a citizen is confronted with police authority, there is always a strong element of 'psychological compulsion' in any police demand". These concerns arise with particular frequency and force in the context of police-citizen "street encounters", and numerous lower courts have found "detentions" in this context.[7] Indeed, in *R. v. Mann, infra,* Iacobucci J. noted the "potential for abuse inherent in such low-visibility exercises of discretionary power."[8] At the same time, *Mann* indicates that not every person stopped by the police will be "detained" for *Charter* purposes. Accordingly, whether or not a "detention" arises in a specific case, while ultimately a question of law, depends heavily on the particular factual circumstances.

R. v. Mann, [2004] 3 S.C.R. 59 at ¶ 18-19 [*APPELLANT'S AUTHORITIES,* VOL. II, TAB 35]
R. v. Therens, [1985] 1 S.C.R. 613 at p. 644 [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 88]
R. v. Nolan, [1987] 1 S.C.R. 1212 at 1227 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 98]

---

[6] *R. v. S.(R.J.), supra* at p. 561.
[7] See Respondent's Factum, ¶37, footnote 44.
[8] Contrary to the Respondent's suggestion at footnote 23 of its factum, this "potential for abuse" is not limited to racial profiling and similar forms of discrimination, but includes concerns about improper coercion and use of force.

2) Defining the Relevant "Context"

8. It is well-settled that *Charter* provisions must be interpreted and applied contextually. Thus, for instance, there is no *Charter* "detention" when a person is subjected to routine questioning at the border,[9] or when a student is made to attend the principal's office.[10] However, this "contextual approach" recognizes that *Charter* protections apply with full vigour in the context of criminal investigations.[11] For instance, in the school detention case, *R. v. M.(M.R.), infra,* Cory J. noted that the *Charter* protected people subjected to "the coercive power of the state in the course of a criminal investigation", and might well have been engaged if the police had been actively involved in the student's detention.

10 *R. v. Simmons,* [1988] 2 S.C.R. 495 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 100]
Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 85]
R. v. M.(M.R.), [1998] 3 S.C.R. 393 at ¶ 67-68 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 97]
R. v. Fitzpatrick, [1995] 4 S.C.R. 154 at ¶30 [*APPELLANT'S AUTHORITIES,* VOL. I, TAB 21]

9. On its face, the case at bar fits squarely within the "criminal law" paradigm, where the *Charter*'s protections are at their highest ebb. The Respondent, however, contends that police actions should attract reduced *Charter* scrutiny when they are conducted in the name of "community-based policing".[12] There is no principled basis for this proposed distinction. "Community-based policing" is not fundamentally different from "regular" policing. Its
20 objectives – promoting "community safety" and social order, preventing crime, and enforcing the law – are what have always motivated police work, and what the criminal law as a whole is meant to serve. "Community-based policing" techniques are not new, but are consciously modelled on traditional police practices.[13] There is nothing novel about what happened in the case at bar: the police were patrolling an area in cars and decided to stop and question a person they thought looked "suspicious". The relevant "context" for *Charter* purposes must be determined by what the police actually did in <u>this</u> case, not through *a priori* categorization.

McKenna, P.F., *Foundations of Community Policing in Canada* [*RESPONDENT'S AUTHORITIES*, VOL. I, TAB 17]

---

[9] *R. v. Simmons, infra*, *Dehghani v. Canada, infra.*
[10] *R. v. M.(M.R.), infra.*
[11] See, *e.g., R. v. Fitzpatrick, infra* at ¶30
[12] See *Respondent's Factum,* ¶ 16, 20
[13] See, e.g., McKenna, *infra* at p. 11. In particular, the "directed patrol" is a direct descendant of the "ancient constabulary practice of stopping and questioning suspicious persons" while walking the beat: Young, *supra* at p. 336.

10. The questions the police put to the Appellant transparently signalled that he was under suspicion. As the Court of Appeal held, they "amounted to … 'demands'". The case reports are replete with examples of "community patrol" officers conducting similarly adversarial investigations. Indeed, it has been noted that "part of the purpose of proactive policing is to render … communities less attractive to potential criminals".[14] As Professor Young explains:

> … Far from being a benign intrusion to ensure peace on the streets, the modern street encounter that is premised upon law enforcement is primarily an attempt by the police to assert their authority and maintain order by ensuring compliance with their command. …

When police on "community patrols" set out to obtain incriminatory evidence against a suspect, their actions should be given the same *Charter* scrutiny that applies in every other criminal investigative context.

Reasons for Judgment (Ontario Court of Appeal), ¶29, *Appellant's Record,* Vol. I, p. 54
R. v. Carty, [1995] O.J. No. 2322 (C.J.), [*RESPONDENT'S AUTHORITIES,* VOL. I, TAB 32]
R. v. Peck, [2001] O.J. No. 4581 (S.C.J.), [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 74]
R. v. Burgher, [2002] O.J. No. 5316 (S.C.J.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 90]
R. v. B.(K.) (2004), 186 C.C.C. (3d) 491 (Man. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. I, TAB 22]
R. v. Ferdinand (2004), 21 C.R. (6th) 65 (Ont. S.C.J.) [*RESPONDENT'S AUTHORITIES,* VOL. I, TAB 45]
R. v. Sibblies, [2006] O.J. No. 2407 at ¶ 29-37 (S.C.J.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 99]
R. v. Williams, [2007] O.J. No. 4305 (S.C.J.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 101]
R. v. D.(J.), [2007]] O.J. No. 1365 (C.J.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 93]
Young, A., "All Along the Watchtower: Arbitrary Detention and the Police Function", 29 Osgoode Hall L.J. 329 at p. 338 (1991) [*RESPONDENT'S AUTHORITIES,* VOL. III, TAB 105]

11. There are strong policy reasons for ensuring that police-pedestrian "street encounters" continue to receive robust *Charter* scrutiny and judicial oversight. As Iacobucci J. observed in *R. v. Mann, supra,* "the potential for abuse inherent in such low-visibility exercises of discretionary power" provides a "pressing reason" for the courts to "exercise [their] custodial role". Professor Young notes that "the field interrogation probably … contributes negatively to police-public relationships more than any other policing technique."[15] Moreover, there is a widespread perception that this tactic is used disproportionately against visible minority youth. The 1995 *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* described pedestrian and vehicle stops as "a police practice that has probably done more than any other to exacerbate tensions and fuel mistrust" in minority communities. The Commissioners:

> … found considerable suspicion of community policing, especially among black and other racialized youths. Many feel excluded from the co-operative partnerships with the police that community policing envisages …

[14] *R. v. Williams, infra* at para. 2
[15] A. Young, "All Along the Watchtower", *supra,* at pp. 336-37.

The empirical data on this point confirms the reality of these perceptions. The 1995 Commission's survey indicated that black males in Toronto were more than twice as likely as white males to be stopped multiple times. A recent Kingston Police study revealed that:

> … black male residents of Kingston between the ages of 15 and 24 were three times more likely to be stopped and questioned by the Kingston police than people from other racial backgrounds.

Black over-representation in pedestrian stops was especially high. Although racial profiling was not argued in the case at bar,[16] the potential for this and other forms of abuse during discretionary police stops is a matter of great concern which should continue to shape the law in this area. It provides a further compelling reason to continue to subject street-level policing, whether "community-based" or otherwise, to full *Charter* scrutiny.

Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995), at pp. 337 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 35]
Closs, W. & P. McKenna, "Profiling a problem in Canadian police leadership: the Kingston Police data collection project", (2006) 49 Can Pub. Admin. 143 at pp. 145, 150-51 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 103]
Stribopoulos, "The Forgotten Right", *supra* at pp. 23-24
R. v. Ferdinand, supra at ¶46-49, 53-54

3) The Court of Appeal was Correct not to "Defer" to the Trial Judge's Conclusions on Section 9

12. The facts in this case were undisputed, and there were no issues of credibility for the trial judge to resolve. His sole task in relation to s. 9 was to decide whether, on these undisputed facts, the legal test for a *Charter* "detention" was met.[17] The Ontario Court of Appeal identified multiple errors in his analysis of this issue, and declined to defer to his conclusion that there was no s. 9 breach.[18] It is submitted that the Court of Appeal was correct to take this approach.

Reasons for Judgment (Ontario Court of Appeal), ¶ 22-27, *Appellant's Record,* Vol. I, pp. 51-52

13. At no point in his reasons did the trial judge instruct himself in accordance with this Court's judgment in *Therens, supra*. The three errors identified by Laskin J.A. can all be seen as flowing directly from this legal error. Alternatively, to the extent that the trial judge's holding on s. 9 involved "findings of fact", Laskin J.A. correctly concluded that these "findings" were unreasonable on the evidence. As Fish J. observed in *H.L. v. Canada, infra,* "unreasonable

[16] The Appellant is a black male, who was 18 years old at the time of his arrest. (Testimony of P. Worrell, *Appellant's Record,* Vol. II, p. 175; *Reasons for Sentence*, *Appellant's Record,* Vol. I, p. 32).
[17] It was common ground in the courts below that if the Appellant was "detained" before he made his inculpatory utterances, this detention was "arbitrary".
[18] The trial judge also purported to find, in the alternative, that the Appellant waived his *Charter* rights. The Ontario Court of Appeal agreed with the Crown's concession that this latter finding was unsupportable on the record.

findings of fact — relating to credibility, to primary or inferred 'evidential' facts, or to facts in issue — are reviewable on appeal because they are 'palpably' or 'clearly' wrong."

Reasons for Judgment (Ontario Court of Appeal), ¶ 22-26, *Appellant's Record,* Vol. I, pp. 51-52
L.(H.) v. Canada (Attorney General), [2005] 1 S.C.R. 401 at ¶ 56 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 87]

14. The Respondent complains that the Court of Appeal failed to "accord proper deference to the findings of fact and factual inferences made by the trial judge",[19] but mounts no defence of the specific errors Laskin J.A. identified. Instead, the Respondent argues that deference should have been paid to the trial judge on two other points: his conclusion that the Appellant had decided on his own "to cooperate all the way" with the police, and his opinion that PC Gomes was "justified" in demanding that the Appellant "keep his hands where [he] could see them".[20]

Reasons on Charter Application (Ontario Court of Justice), Appellant's Record, Vol. 1, pp. 16, 21, 25-26

15. Neither of these complaints has merit. The trial judge's "inference" that the Appellant had voluntarily chosen to incriminate himself flowed directly from his conclusion that the police did nothing coercive or intimidating. Having correctly found that this predicate finding was unreasonable, Laskin J.A. was under no obligation to "defer" to the trial judge's subsequent inferences. Further, the trial judge's purported "finding" that the Appellant had "never at any time remotely or otherwise attempted to avoid or evade" the police and "want[ed] to spill his guts out as fast as he could" was directly contrary to the undisputed police evidence about the Appellant's behaviour during the seven minutes of police questioning.[21] It is submitted that Laskin J.A. was correct to only not decline to "defer" to the trial judge's conclusions on this point, but to reach the opposite conclusion on the undisputed evidence. While the Respondent is correct that people sometimes confess for reasons other than police coercion, courts have always been sceptical of the voluntariness of confessions when, as here, the suspect has not been told that he or she is not obliged to answer police questions.[22]

Reasons for Judgment (Ontario Court of Appeal), ¶ 29, *Appellant's Record,* Vol. I, pp. 54-55
R. v. Hebert, supra at pp. 167-69

---

[19] *Respondent's Factum,* ¶ 45
[20] *Respondent's Factum,* ¶ 45-46, 53
[21] This purported "finding" was also central to the trial judge's conclusions on waiver, which the Crown conceded in the Court of Appeal was unsupportable.
[22] See, *e.g., R. v. Hebert, supra* at pp. 167-69. In all of the cases cited by the Respondent at footnote 77 of its factum, the suspect was either given an express "right to silence" caution or expressly advised of the right to refuse to consent to a search.

16. Further, the supposed "justifiability" of the police direction that the Appellant keep his hands in view was simply irrelevant to the s. 9 "detention" inquiry in this case. What mattered for s. 9 purposes was the effect this police exercise of authority would have had on a reasonable person's perception of the situation. Commands issued for "officer safety" reasons can have just as much of an impact as commands issued for other reasons. Conversely, the police cannot use officer safety as a bootstrap to justify a detention that is otherwise unjustified. The police had no grounds to conduct a *Mann* investigative detention of the Appellant, and cannot fill this gap by invoking "safety concerns" arising from their own decision to approach and question him. This does not mean that the police had to choose between exposing themselves to potential danger and triggering a "detention". The impact of their demand would have been neutralized if they had made it clear to the Appellant that he was still free to leave. They chose not to do so.

R. v. Harris (2007), 225 C.C.C. (3d) 193 at ¶ 17-22 (Ont. C.A.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 95]
R. v. Sibblies, supra at ¶111-12
R. v. Mann, supra

4) The Court of Appeal's Conclusions on Section 9

17. Having determined that appellate deference was unwarranted in view of the trial judge's errors, the Court of Appeal conducted its own examination of the undisputed facts in this case. Laskin J.A. cited eight factors, the "cumulative effect" of which led him to conclude that the Appellant had been detained. It is submitted that he correctly identified the relevant factors, correctly applied the law, and reached the correct result.

Reasons for Judgment (Ontario Court of Appeal), ¶ 29-30, *Appellant's Record,* Vol. I, pp. 52-55

a) PC Gomes's demand that the Appellant "keep his hands in front of him"

18. Laskin J.A. noted that PC Gomes's direction that the Appellant "keep his hands in front of him where [Gomes] could see them … amounted to a demand" which "established the atmosphere for the remainder of [the encounter]". As discussed above,[23] it is irrelevant to the s. 9 analysis that this demand may have been motivated by a genuine safety concern. Contrary to the Respondent's suggestion,[24] treating this demand as a relevant factor does not compel the police to "compromise their safety", but simply requires that any protective steps they take be considered in the analysis, like every other relevant fact. The Respondent would apparently

[23] Paragraph 16, *supra.*
[24] *Respondent's Factum,* ¶46.

prefer courts to pretend that police demands motivated by officer safety concerns were never made, and ignore their obvious impact. Section 9 detention issues should be decided on fact, not fiction. The Court of Appeal correctly treated the police demand in this case as a significant factor supporting the inference that there was, viewed objectively, a detention of the Appellant.

Reasons for Judgment (Ontario Court of Appeal), ¶ 29, *Appellant's Record,* Vol. 1, p. 13
R. v. Harris, supra at ¶ 17-22
R. v. Williams, supra at ¶ 10
R. v. Burgher, supra at ¶ 9-10, 41-42
R. v. Sibblies, supra at ¶ 29-37, 111-12
R. v. D.(J.), supra at ¶9-10, 26-30

b) The actions and positioning of the three officers

19. Laskin J.A. noted that PC Gomes initially stood in front of the Appellant, blocking his path on the sidewalk. About two minutes later the two plainclothes officers who had instructed Gomes to stop and question the Appellant pulled up their vehicle and joined Gomes on the sidewalk. Laskin J.A. held that this added to the "intimidating nature of the encounter", noting that the three officers "effectively formed a small phalanx blocking the path in which the appellant was walking". Laskin J.A. reasons on this point disclose no error.

Reasons for Judgment (Ontario Court of Appeal), ¶ 19, 29, *Appellant's Record,* Vol. 1, pp. 48-49, 53-54

20. The Respondent objects that "merely interfering with someone's path on a public sidewalk" cannot give rise to a detention "as this would have the farcical effect of requiring the police to approach individuals from behind or the side".[25] However, Laskin J.A. did not treat Gomes's angle of approach or positioning as dispositive but, rather, as merely one of a number of relevant factors that would affect a reasonable person's perception of the encounter. The fact that the Appellant's path was blocked by first one, and then three large police officers contributed to the reasonable perception that he was no longer free to leave, and that a refusal to cooperate would be met with more intrusive steps.[26]

R. v. H.(C.R.) (2003), 174 C.C.C. (3d) 67 at para. 31 (Man. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 50]

21. The Respondent next suggests that Laskin J.A. misapprehended the evidence concerning PC Gomes's movement during the interrogation.[27] Laskin J.A.'s statement that Gomes "moved

[25] *Respondent's Factum,* ¶ 44.
[26] Indeed, one of the plainclothes officers testified that he initially asked Gomes to stop and question the Appellant because he thought this would be "less intimidating" than if he and his partner did so themselves. (Testimony of R. Forde, *Appellant's Record,* Vol. II, pp. 276-79. 295-96).
[27] *Respondent's Factum,* ¶ 49.

… to maintain their relative position" accurately summarizes the officer's evidence on this point. Contrary to the Respondent's suggestion, Laskin J.A.'s reasons do not indicate that he believed Gomes moved from side to side, as opposed to rotating his body. In any event, nothing turns on this distinction. Laskin J.A.'s conclusions on s. 9 clearly did not hinge on the precise details of Gomes's movements. The important factor – which was undisputed – was that three police officers stood on the sidewalk blocking the Appellant from continuing in the direction he had been walking. The Respondent's further contention that Laskin J.A. "failed to appreciate that the appellant had commenced speaking to Cst. Gomes *before* Cst. Worrell and Cst. Forde decided to join them" is also incorrect, since Laskin J.A. expressly adverted to this undisputed fact. Again,
10 however, nothing significant turns on this point. It was clear from the evidence that all three officers were on the sidewalk when Gomes began questioning the Appellant about what he had in his possession, and the Appellant made his inculpatory responses. The relevant issue was whether the Appellant was "detained" at this point, and it did not matter precisely how much earlier this "detention" began.

Reasons for Judgment (Ontario Court of Appeal), ¶ 19, *Appellant's Record,* Vol. I, pp. 48-49
Testimony of P. Worrell, *Appellant's Record,* Vol. II, pp. 113-116, 150-51, 156-61
Testimony of J. Gomes, *Appellant's Record,* Vol. II, pp. 207-10, 229-36
Testimony of R. Forde, *Appellant's Record,* Vol. II, pp. 257B-258, 285, 298-99

c) PC Gomes's questions and the Appellant's answers

20 22. Laskin J.A. considered the nature of the police questions and the nature and manner of the Appellant's responses to be relevant considerations. It is submitted that he properly analysed these factors. While the Respondent is correct that "the mere fact that the police ask questions"[28] does not trigger a detention in every case, Laskin J.A. did not suggest otherwise. Rather, he held that the nature of the police questions in this case, considered along with the circumstances in which they were asked and the manner of the Appellant's response, supported the conclusion that the Appellant reasonably believed he had no choice but to incriminate himself.

Reasons for Judgment (Ontario Court of Appeal), ¶29, Appellant's Record, Vol. I, p. 14-15
R. v. Moran (1987), 36 C.C.C. (3d) 225 at p. 259 (Ont. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 68]

23. As discussed above, one of the overarching themes of the Respondent's argument is the
30 claim that police questioning "in the context of community-based policing" is necessarily

[28] *Respondent's Factum,* ¶ 28.

innocuous.[29] The Respondent suggests that the officers were simply attempting to "familiarize themselves" with the Appellant and "ascertain why he appeared so nervous", rather than single him out as a potential criminal suspect.[30] This suggestion is belied by the police evidence and how they questioned the Appellant. The plainclothes officers who ordered the stop did so because they thought the Appellant was acting "suspiciously". PC Gomes approached his assigned task by asking what were transparently investigative questions. He and PC Worrell agreed that the object of these questions was to elicit responses that would allow them to search and arrest the Appellant, which is precisely what happened. The inherently adversarial nature of this type of questioning is self-evident. As the New York Court of Appeals observed in *People v. Hollman, infra*:

> Once the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer's questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information.[31]

Laskin J.A. did not err by treating the nature of the police questions – one of the factors listed by Martin J.A. in *Moran, supra* – as one of the constellation of circumstances that led him to find a s. 9 "detention".

Testimony of P. Worrell, *Appellant's Record,* Vol. II, pp. 111-13, 132-36, 138-39, 167-69, 175-79, 187-90
Testimony of R. Forde, *Appellant's Record,* Vol. II, p. 292
Testimony of J. Gomes, *Appellant's Record,* Vol. II, pp. 237-40
People v. Hollman, 79 N.Y.2d 181 (1992) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 89]
People v. DeBour, 40 N.Y.2d 210 (1976) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 88]
R. v. Moran, supra at p. 259
R. v. Ferdinand, *supra* at ¶ 45-49
R. v. Peck, supra at ¶11,18
R. v. Lam (2003), 178 C.C.C. (3d) 59 at ¶ 75 (Alta. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 61]
R. v. Daley (2000), 156 C.C.C. (3d) 225 at ¶5, 22 (Alta. C.A.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 94]
R. v. Carty, supra at pp. 307, 315-20
R. v. H.(C.R.), supra at ¶ 31
R. v. Dolynchuk (2004), 184 C.C.C. (3d) 214 at ¶ 23 (Man. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. I, TAB 42]
R. v. B.(K.), supra at ¶ 27

24. The Ontario Court of Appeal also did not err in treating the manner and content of the Appellant's responses as an additional relevant circumstance. The Appellant hesitated and paced

---

[29] See paras. 9-11, *supra*; *Respondent's Factum,* ¶ 12, 15-20
[30] *Respondent's Factum,* ¶17.
[31] For this reason, the New York Court of Appeals has prohibited the police from approaching pedestrians at random and questioning them about their possessions, even in circumstances short of a Fourth Amendment "seizure of the person". The police may approach people and ask "basic, non-threatening questions regarding, for instance, identity, address or destination", but can only go further and ask "more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation" if they have "a founded suspicion that criminality is afoot" (*Hollman, infra*; *People v. DeBour, infra*).

nervously for several minutes before answering Gomes's questions and admitting that he was carrying "a bag of weed". After further questioning and further hesitation, he admitted that he also had a gun, which predictably resulted in his arrest. Laskin J.A. drew the obvious common-sense inference that the Appellant would not have reluctantly volunteered this incriminating information if he had thought he could simply end the conversation and walk away. It cannot readily be assumed that the Appellant, an unsophisticated youth, knew the precise limits on the police's legal authority to detain and question him. Indeed, the case law is replete with examples of street encounters where the police have purported to justify more intrusive physical detentions and searches – indeed, even arrests – on the basis that a person refused to answer a police question or moved away when approached. The police never told the Appellant that he had the right to remain silent and was free to leave. In these circumstances, Laskin J.A. was correct to draw the inference he did from the Appellant's behaviour.

R. v. Therens, supra at p. 505
R. v. Charley (1993), 22 C.R. (4th) 297 (Ont. C.A.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 92]
R. v. Johnson (1995), 39 C.R. (4th) 78 (Ont. C.A.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 96]
R. v. Ferdinand, supra
R. v. Peck, *supra*

5) The Respondent's Proposed Approach to Section 9

25. The Respondent appears to seek a radical recalibration of s. 9 that would give the police extraordinary leeway to conduct "field interrogations" free of any *Charter* scrutiny. According to the Respondent:

> The Court of Appeal's approach to psychological detention does not give due weight to the societal interest in crime prevention, particularly in the context of community policing. By overemphasizing individual liberty interests, the court applied a legal analysis that would turn most, if not all inquiries by police officers into detentions.[32]

The Respondent later suggests that a detention should only be found to arise during a street encounter if the police make an explicit "demand or direction", and should never be found to arise from the nature or manner of questioning:

> In the context of community based-policing, the police have the right and duty to approach any citizen and ask potentially incriminating questions provided those questions are not accompanied by a "demand or direction" to remain or accompany the officer of the purpose of answering. … In the absence of a "demand or direction", however, a psychological detention cannot be inferred simply from the questions asked or the answers given.[33]

[32] *Respondent's Factum,* ¶25.
[33] *Respondent's Factum,* ¶ 56.

Even when the police make an overt "demand or direction", the Respondent would have courts ignore it if it relates to officer safety.[34] Taking these points together, and notwithstanding the Respondent's stated opposition to "bright line" *Charter* rules,[35] the Respondent appears to be advocating a "bright line" standard in which a detention will be deemed never to arise during a street encounter unless the police expressly tell the suspect he or she is not free to leave.

26. Several responses can be made to the Respondent's submissions. First, the Respondent greatly overstates the impact of the Court of Appeal's judgment. Laskin J.A.'s s. 9 analysis will not turn "most, if not all inquiries by police officers into detentions". It will have no impact at all on the ability of the police to conduct genuinely "casual conversations" with citizens in order to foster good community relations or obtain background information about community matters. It will not affect their ability to seek information from witnesses. It will not curtail their existing common law power under *Mann, supra* and *R. v. Clayton, infra,* to conduct "investigative detentions" when they have "reasonable grounds". While it will place some limits on how they conduct confrontational "field interrogations" based on "hunches", this will be a salutary and long overdue development. As Professor Young has observed:

> The implicit effect of section 9 of the *Charter* is to favour reactive policing over proactive policing. It is clear that proactive mobilization of the police (that is, police action that is self-initiated and not in response to a complaint from a member of the public) provides the greatest opportunity for the police to undertake intrusions based upon the personal attributes of the individual.
>
> Preventative police activity such as a visible police presence or the cultivation of harmonious community relations would not be affected by an expansive interpretation of section 9 of the *Charter*. However, proactive policing in the form of investigative stops should be dramatically curtailed because this practice borders upon social control of the marginalized.

It must also be reiterated that the Court of Appeal's approach allows the police to avoid triggering a detention in many "street encounters" simply by telling people that they do not have to remain and answer questions. This would presumably have no impact on the behaviour of those people who genuinely choose to incriminate themselves "out of a sense of moral or social duty, or for other reasons wholly internal to [themselves]".[36] If some other people who do not wish to incriminate themselves choose to assert their rights, so much the better. It is antithetical to *Charter* values and the principles of fundamental justice to encourage the police to use tactics

---

[34] See ¶ 16 and 18, *supra*; *Respondent's Factum,* ¶ 45-46
[35] *Respondent's Factum,* ¶ 39-42
[36] *Respondent's Factum,* ¶ 56

that depend for their success on citizens remaining ignorant of their fundamental rights. As Professor Stribopoulos notes:

> When an individual remains in the presence of the police while questions are being posed he or she should be truly *choosing* to do so. Allowing such encounters to remain steeped in uncertainty may do a great deal to facilitate the important functions of law enforcement, but it does very little to ensure that such encounters are truly voluntary.

The Respondent seeks, in effect, to erect an irrebuttable presumption in which citizens are deemed to always know and advert to their rights *vis-à-vis* the police, contrary to both this Court's holding in *Therens* and to common sense. Adopting such an approach would represent a triumph of law enforcement expediency and legal fiction over *Charter* values.

R. v. Mann, supra
R. v. Clayton and Farmer, 2007 SCC 32 [*RESPONDENT'S AUTHORITIES,* VOL. I, TAB 35]
R. v. Therens, supra
Young, A., "All Along the Watchtower: Arbitrary Detention and the Police Function", *supra* at p. 338
Stribopoulos, "The Forgotten Right", *supra* at p. 30

27. Finally, as discussed previously,[37] this Court should reject the Respondent's suggestion that "community-based policing" requires a different balance to be struck between individual liberties and "the societal interest in crime prevention" than has been struck in every other criminal law context. The criminal law as a whole is a communitarian instrument. As Dickson C.J.C. observed in *Irwin Toy, infra,* in the criminal law context:

> [T]he government is best characterized as the singular antagonist of the individual whose right has been infringed. … [T]he state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice.

If the government believes that the "societal interest in crime prevention" requires the police to be given more extensive powers than they now have to detain people on the streets without individualized reasonable suspicion, it should enact legislation and attempt to justify it under s. 1. In *Mann*, *supra* this Court referred to "the delicate balance that must be struck in adequately protecting individual liberties and properly recognizing legitimate police functions", and struck what it considered to be the appropriate balance, having regard to the concerns raised by "the unregulated use of investigative detentions in policing". This Court should not now begin stripping away *Charter* protections in this area.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at p. 994 [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 86]
R. v. Mann, supra at ¶ 1, 15

[37] See ¶ 8-11, *supra*.

6) Conclusions re Section 9 of the *Charter*

28. It is submitted the Ontario Court of Appeal correctly concluded that the Appellant was arbitrarily detained, contrary to s. 9, before he made his inculpatory admissions, and that the admissibility of his statements and the derivative evidence (the gun) must therefore be decided under s. 24(2). The Appellant adopts Laskin J.A.'s reasons on the s. 9 *Charter* issue.

29. This Court has decided relatively few s. 9 *Charter* cases, and has only rarely considered the meaning of "detention". Only two of its prior s. 9 decisions, *R. v. Mann, supra,* and *R. v. Chaisson, infra,* involve police-citizen "street encounters",[38] and in both cases "detention" was conceded. The existing jurisprudence leaves a number of important questions unresolved. If this Court chooses to comment further on these matters, the Appellant submits that:

- The purpose of s. 9 should be identified as "the protection of individuals from unjustified state interference with their liberty," in the sense of both physical freedom of movement and the fundamental liberty not to be compelled to be a witness against oneself;
- It should be reiterated that police-citizen encounters, particularly those involving youth, raise serious concerns about abuse and lack of consent;
- Framed broadly, the test for whether a "detention" arises on particular facts should be whether a reasonable person in the accused's position would believe he or she was free to leave or decline to answer police questions. This Court should reaffirm its holding in *Therens, supra* and reiterate that this objective inquiry must be conducted in light of the reality that ordinary people usually do not understand the precise limits on police powers. It should also be reiterated that the detention inquiry is <u>objective</u>, and that there is thus no absolute requirement that the accused must testify. The relevance and importance of the accused's testimony will vary from case to case and depend on the strength of the other evidence. The accused's "failure" to testify should not be used as an excuse to avoid finding a detention that is otherwise established on the record;[39]
- When considering whether a detention arose in a particular case, courts should consider all the surrounding circumstances, including:

---

[38] The accused in *Chaisson* were seated in a parked vehicle, but the case appears to have been litigated and decided on the basis that the police highway traffic powers were not engaged.

[39] See Stribopoulos, *supra* at pp. 25-29. This issue was addressed inferentially in *Chaisson, supra,* in that this Court held that it was open to the trial judge to find a s. 9 *Charter* violation in a case where the accused had not testified.

- whether the police ever advised the accused that he or she was free to leave and did not have to stay and answer police questions;
- whether the police asserted control over the accused's movements, including making any orders or directions intended to address "officer safety" concerns;
- the nature of the police questions, including whether they were designed to elicit self-incriminatory information, or implied that the person would be physically searched if they refused to answer;
- the nature and manner of the accused's responses, and whether they support a reasonable, common-sense inference that the accused did not know that he or she had the right to end the interrogation and depart, or did not believe that this right would be respected.

R. v. Therens, supra
R. v. Mann, supra
R. v. Chaisson, [2006] 1 S.C.R. 415 at ¶ 3-4, 7, *rev'g* (2005), 200 C.C.C. (3d) 494 at ¶15-22 (Nfld. C.A.)
[*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 91]
Stribopoulos, "The Forgotten Right", *supra* at pp. 1-4, 25-32
R. v. Dolynchuk, supra at ¶20

B. Section 1 of the *Charter*

30. The Respondent argues in the alternative that any violation of the Appellant's s. 9 *Charter* rights in this case can be justified under s. 1.[40] This submission fails for two reasons. First, the threshold s. 1 requirement that infringements of *Charter* rights must be "prescribed by law" is not met. The general statutory mandate of the police in Ontario to prevent crime and enforce the law, to "provide community-oriented police services" and conduct "community patrols", and so forth, cannot reasonably be interpreted as authorizing arbitrary detentions or unreasonable searches, either directly or by "necessary implication". Further, the police have no common law power to detain or search people walking down the street, either at random or on a "hunch", without specific information that a crime has been or is being committed and, in most cases, "reasonable grounds" establishing a nexus between that crime and the suspect.[41] In *Mann, supra,* this Court specifically declined to create such a general common law detention power.[42] As Iacobucci J. explained:

> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the

[40] *Respondent's Factum,* ¶ 57. This issue was not raised in the courts below.
[41] *Mann, supra* at ¶ 34. In *Mann,* this Court held that there must be a "clear nexus between the individual to be detained" and the offence under investigation. In *Clayton and Farmer,* the Court relaxed the requirement that there be particularized suspicion of the detainee in certain cases, but continued to insist that there be specific information that a "serious offence" was being committed, and that there be a close temporal and geographic nexus between that offence and the location of a police roadblock.
[42] *Mann, supra* at ¶17.

> exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch … [Emphasis added.]

If the Appellant's *Charter* rights were breached in this case, these breaches were not "prescribed by any law", and were thus incapable of being justified under s. 1.

R. v. Therens, supra at p. 645
R. v. Thomsen, [1988] 1 S.C.R. 640 at p. 650[*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 89]
R. v. Mann, supra at ¶ 17, 34-35
R. v. Clayton, supra
Police Services Act, R.S.O. 1990, c. P.15, ss. 4(2), 41(1)(*c*), 42 [*RESPONDENT'S AUTHORITIES,* VOL. III, TAB 106]
Ontario Regulation 3/99, ss. 1(1), 4(2) [*RESPONDENT'S AUTHORITIES,* VOL. III, TAB 107]

31. Second, the evidentiary record in this case does not come close to satisfying the state's burden of proof under the *Oakes* proportionality test, which must be strictly applied in the criminal law context.[43] What is at issue is not whether the police can approach and question people on the street but, rather, whether they can do so in a manner that gives rise to a detention, even when they lack the reasonable grounds required by *Mann*. No evidence has been presented, either in this Court or in the courts below, that could serve to justify such a sweeping police power, the existence of which would eviscerate the s. 9 *Charter* guarantee.

R. v. Oakes, [1986] 1 S.C.R. 103 [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 71]
Irwin Toy, supra at p. 994
R. v. Mann, supra

C. Sections 8 and 10(*b*) of the *Charter*

32. The Ontario Court of Appeal's conclusion that the Appellant's s. 9 *Charter* rights were infringed was sufficient, on its own, to require the admissibility of the seized evidence to be decided under s. 24(2). The Court of Appeal held that the police questioning of the Appellant was a factor contributing to the conclusion that his s. 9 rights were infringed, but did not constitute a "search" for s. 8 purposes, and found it unnecessary to address s. 10(*b*).

Reasons for Judgment (Ontario Court of Appeal), ¶ 31-37, *Appellant's Record,* pp. 55-58

33. The Appellant's primary position is that his appeal can and should be decided in his favour on the basis of ss. 9 and 24(2) of the *Charter,* making it unnecessary for this Court to consider ss. 8 or 10(*b*). In particular, the Appellant acknowledges that in the circumstances of this case he cannot establish a violation of these other *Charter* rights if he was not also "detained". The case was litigated in the courts below on the basis that any "detention" of the

[43] See *Irwin Toy, supra.*

Appellant would necessarily be "arbitrary", and thus contrary to s. 9. However, the Respondent now suggests for the first time that a s. 9 infringement might be upheld under s. 1. If this contention is correct – that is, if there is a hitherto unrecognized police power allowing pedestrians to be detained in the absence of reasonable grounds, which survives s. 1 scrutiny[44] – it will be necessary for this Court to consider ss. 8 and 10(*b*) of the *Charter*.

1) Section 8

34. *Mann* establishes that when the police conduct a lawful "investigative detention" based on "reasonable grounds", they have no corresponding incidental power to search for evidence. Assuming, *arguendo*, that the police have a previously unknown power to detain pedestrians without *Mann* grounds, this new power also cannot trigger an incidental evidentiary search power, since it would be manifestly absurd for the absence of reasonable grounds to give the police more extensive search powers than they have with reasonable grounds. Accordingly, if the Appellant was subjected to an evidentiary "search" prior his inculpatory admissions, this search would violate s. 8 of the *Charter,* even if his detention was constitutional by virtue of s. 1.

R. v. Mann, supra at ¶ 36-45, 56

35. It is well-established that police questioning of a detainee can sometimes be a "search" for *Charter* purposes. In *R. v. Mellenthin, infra*, this Court held that police questioning of a motorist randomly detained at a highway checkpoint about the contents of a bag on the front seat constituted a "search". In *R. v. Simpson, infra,* the Ontario Court of Appeal held that the search of a detainee "commenced when [he] was initially questioned by the police officer" about his identity, his criminal record and whether he was in possession of a knife. Similarly, in *R. v. Young, infra,* the Court held that the accused was subjected to a "search" (and detention) when questioned, *inter alia,* about the contents of his pockets. In *R. v. Harris, supra*, the Court held that there was a search when a passenger was asked for identification during a traffic stop.

R. v. Mellenthin, [1992] 3 S.C.R. 615 [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 66]
R. v. Simpson (1993), 79 C.C.C. (3d) 482 at pp. 487, 506 (Ont. C.A.) [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 85]
R. v. Young (1997), 116 C.C.C. (3d) 350 at pp. 357-58 (Ont. C.A.) [*APPELLANT'S SUPPLEMENTAL AUTHORITIES,* VOL. VII, TAB 102]
R. v. Harris, supra at ¶ 34-44

36. In the case at bar, the police asked the Appellant to identify himself, questioned him about where he was coming from and where he was going, and then asked him if he "had

[44] As discussed at ¶ 30-31, *supra,* the Appellant's primary position is that no such power exists.

anything that he shouldn't". Laskin J.A. held that this questioning did not constitute a search, distinguishing *Mellenthin, Simpson* and *Young* on the grounds that the "nature of the police's question did not go [as] far [as in these cases] and … was asked in quite a different context", since PC Gomes did not have "an already formed intention to conduct a search". In *Harris, supra* Doherty J.A. distinguished *Grant* on the basis that the officer in *Harris* intended to conduct a further CPIC search once he obtained the detainee's name and biographical data.

Reasons for Judgment (Ontario Court of Appeal), at ¶ 32-37, *Appellant's Record,* pp. 56-58
R. v. Harris, supra at ¶ 43

37. It is submitted that the Court of Appeal's efforts to distinguish "search" from "non-search" questions based on the officer's uncommunicated intentions is analytically unsound and inconsistent with the earlier cases on this issue.[45] Whether questioning constitutes a "search" should be determined from the perspective of the detainee, who in most cases does not know how the police will respond to a refusal to answer. In the case at bar, the Court of Appeal inferred that the Appellant "did not believe he had the right to walk away and end the conversation, but rather believed that he had no choice but to answer [the police] questions". An obvious corollary to this conclusion is that the Appellant thought that if he refused to disclose what he "had on him", the police would find out for themselves by physically searching him – an entirely reasonable belief in the circumstances.[46] In this situation, it is submitted that police questioning about a detainee's possessions should be considered the equivalent of a physical search, as was the questioning in *Mellenthin, Simpson, Young* and *Harris, supra*.

R. v. Peck, supra
R. v. Williams, supra
R. v. Hopkins, [2004] O.J. No. 3273 (C.J.) [*RESPONDENT'S AUTHORITIES,* VOL. II, TAB 57]

2) Section 10(*b*)

38. The Ontario Court of Appeal declined to address the Appellant's s. 10(*b*) *Charter* argument, in part because the Court's conclusions on s. 9 made it unnecessary to do so, and in part because "whether even an investigative detention triggers s. 10(b) rights is an open

[45] Laskin J.A. misinterpreted the Court of Appeal's earlier holding in *Simpson,* by assuming that the "search" found in that case was limited to the questions put to Simpson after the officer touched his clothing and felt a "hard lump". In fact, the Crown had conceded that a search ensued with this touching, but argued that it was lawful. Doherty J.A. addressed this argument by holding that the officer's "initial questioning" before he touched Simpson was also a search, which was not justified by the law on which the Crown relied. This initial questioning was, if anything, *less* specific than the questioning of the Appellant in the case at bar.
[46] See, *e.g., R. v. Peck, infra*; *R. v. Williams, supra*.

question". If the Appellant's arbitrary detention was nevertheless lawful and, by virtue of s. 1, constitutional, as the Respondent now argues, it will become necessary to consider whether this new "law" contains a restriction on s. 10(*b*) rights that is itself a justifiable limit under s. 1 or, alternatively, whether the term "without delay" in s. 10(*b*) can be interpreted as allowing the police to continue to interrogate a detainee without providing an immediate s. 10(*b*) caution. A closely related issue, in the context of *Mann* "investigative detentions", is currently before this Court in *R. v. Suberu.*[47] Should it become necessary for this Court to consider the s. 10(*b*) issue in the case at bar, it is submitted that *Suberu,* once decided, is likely to be controlling.

Reasons for Judgment (Ontario Court of Appeal), ¶ 31, *Appellant's Record,* pp. 15-16
10 *R. v. Mann, supra* at ¶ 22

PART IV: SUBMISSIONS RE COSTS

39. The Appellant makes no submissions as to costs.

PART V: ORDER SOUGHT

40. It is respectfully requested that this Court confirm the Ontario Court of Appeal's holding that the Appellant's s. 9 *Charter* rights were infringed. If it becomes necessary to address s. 8 or 10(*b*) of the *Charter,* it is submitted that infringements of these *Charter* rights should also be found. In the result, it is requested that the appeal be allowed on the grounds set out in the Appellant's main factum.[48]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF MARCH, 2008.

20 

JONATHAN DAWE
Sack Goldblatt Mitchell LLP
20 Dundas St. West, Suite 1100
Toronto, Ontario, M5G 2G8

COUNSEL FOR THE APPELLANT

[47] Court File No. 31912. *Suberu* is scheduled to be argued on April 14, 2008, ten days before the Appellant's case.
[48] The Appellant agrees with the Respondent that it would be desirable for this Court to address the s. 24(2) issue regardless of the result on the *Charter* breach issues (*Respondent's Factum,* ¶ 57).

PART VI: AUTHORITIES TO BE CITED

Cases

10 **Articles and Texts**