Court File No. 27732

IN THE SUPREME COURT OF CANADA

(On Appeal From the Court of Appeal for the Province of Ontario)

B E T W E E N :

MUSIBAU SUBERU

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

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PART I - STATEMENT OF THE FACTS

I. OVERVIEW

1. The issue raised in this appeal is whether an individual who is subject to an investigative detention is entitled to the protection of s. 10(*b*) of the *Charter* and, if so, whether that right is subject to reasonable limits pursuant to s. 1 of the *Charter*.

2. On the afternoon of June 13, 2003, the Appellant was about to get into his car in Cobourg, Ontario when he was detained by a police officer who wished to question him with respect to a fraud investigation. The Appellant was not advised of his right to counsel at the time, and in responding to the questions he incriminated himself. The Crown relied on these incriminating statements at the Appellant's trial on charges of possession of property obtained by crime and related offences. The Appellant was convicted.

3. Had the Appellant been driving and detained by an officer investigating a drinking and driving offence, his incriminating responses could not have been used against him at his trial because of this Honourable Court's judgment in *R. v. Orbanski; R. v. Elias*. The Ontario Court of Appeal appears to have been of the view that the fact that the Appellant was walking, not driving, and was being investigated for fraud, not impaired driving, was significant when determining the applicability of s. 10(*b*). The Court held that the Appellant's s. 10(*b*) rights were not infringed because the term "without delay" in s. 10(*b*) of the *Charter* has a different meaning in the investigative detention context than it does in the arrest context. It is the Appellant's position that this approach is

inconsistent with the jurisprudence from this Court and inconsistent with a purposive interpretation of s. 10(*b*) of the *Charter*.

R. v. Orbanski; R. v. Elias, [2005] 2 S.C.R. 3

II. HISTORY OF THE PROCEEDINGS

4. On October 19, 2004, the Appellant was convicted of two counts of possession of property obtained by crime valued under $5000.00, contrary to s. 355(*b*) of the *Criminal Code* and one count of possession of a credit card obtained by crime, contrary to s.342(1)(*b*) of the *Criminal Code*[1] following a summary conviction trial in the Ontario Court of Justice at Cobourg before the Honourable Mr. Justice Purvis. On January 7, 2005, the Appellant was sentenced to imprisonment for three months and one year of probation.

Information, *Appellant's Record*, p.46

5. The Appellant appealed his conviction to the Summary Conviction Appeal Court. The appeal was heard in the Superior Court of Justice at Cobourg on March 1, 2006 by the Honourable Mr. Justice McIsaac. On May 17, 2006, the appeal was dismissed.[2]

Reasons for Judgment – Superior Court of Justice, *Appellant's Record,* p.10

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[1]The Appellant was also charged with an additional count of possession of property obtained by crime and one count of obtaining credit by false pretences. He was acquitted on those counts.

[2] A revised version of the Reasons for Judgment of the Summary Conviction Appeal Court was released on May 26, 2006. This is the version included in the *Appellant's Record*.

6. The Appellant's further appeal to the Court of Appeal for Ontario was heard on December 4, 2006 by a panel comprised of the Honourable Justices Doherty, Laskin and Armstrong. On January 31, 2007, the Court dismissed the appeal.

7. On August 16, 2007, the Appellant was granted leave to appeal to this Honourable Court and hereby appeals the decision of the Court of Appeal for Ontario.

Order of the Supreme Court of Canada, *Appellant's Record*, p.50

III. <u>THE EVIDENCE</u>

A. The Voir Dire

(i) <u>The Initial Investigative Detention</u>

8. On June 13, 2004, Cst. John Roughley of the Cobourg Police Service was dispatched to attend a Liquor Control Board of Ontario ("LCBO") store to investigate a male believed to be using a stolen credit card. While Cst. Roughley was on his way to the store, another officer, Cst. Bellemare, who had arrived there already, contacted him and advised him that there were *two* suspects and that they were inside the store.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.53-56

9. When Cst. Roughley arrived at the store, he entered and observed Cst. Bellemare standing near a cash register having a conversation with the cashier and a male party (who was later identified as William Erhirhie). Cst. Bellemare saw another male, later identified as the Appellant, walking away from the general area where Cst. Bellemare was. Cst. Roughley heard one of the store employees tell Cst. Bellemare that Erhirhie had attempted to purchase a bottle of liquor with a gift

certificate. The Appellant, who was by then passing Cst. Roughley on his way out of the store, said "He did this, not me, so I guess I can go," or words to that effect. The Appellant then left the store.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.56-57

10. Cst. Roughley, who had been advised that there were two suspects in the store, believed that the Appellant had been with Erhirhie when he had tendered the stolen card, but did not know what role, if any, the Appellant had played. He followed the Appellant out of the store and observed him walk towards a red Pontiac Montana van in the parking lot. The Appellant began to enter the driver's side door of the van and appeared to be about to leave. At that point, Cst. Roughley said to the Appellant: "Wait a minute. I need to talk to you before you go anywhere." During his evidence on the *voir dire*, Cst. Roughley explained why he said this:

> Q. Why did you say that to him?
>
> A. Because I wasn't sure if he was involved and if he was involved, how involved he might be.
>
> Q. So you wanted him to stay there until you could determine that?
>
> A. That's correct.

Cst. Roughley then proceeded to question the Appellant to "find out if he was involved at all."

Evidence of Cst. J. Roughley, *Appellant's Record*, vol. I, pp.57-58, 71, 81-82

(ii) *__Questioning Prior to Arrest__*

11. Cst. Roughley's questioning of the Appellant proceeded as follows:

> Q. Who's the guy inside you were with?
>
> A. A friend.
>
> Q. What is his name?

A. Willy.

Q. Where are you from?

A. Toronto.

Q. How did you come to be in Cobourg today?

A. Willy asked me to drive him.

Q. From Toronto to Cobourg?

A. Yes.

Q. Whose van is this?

A. My girlfriend's.

Q. Who's that?

A. Yvonne.

Cst. Roughley testified that he asked these questions because he was "exploring the situation" and was "looking into what's going on."

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.58-59, 72-75

(iii) *<u>The Arrest</u>*

12. Cst. Roughley then received information over his radio that suspects who had used a stolen credit card in Belleville had been seen leaving in a red Pontiac Montana van. He was also provided with a licence number, which matched the number on the Appellant's van. Cst. Roughley asked the Appellant for identification, and he produced his driver's licence. He also asked for the vehicle's ownership documents, which the Appellant provided and which indicated that the van belonged to a person named Yvonne. While the Appellant was retrieving the ownership documents from the van's glove compartment, Cst. Roughley looked inside the van and saw an LCBO bag, a box of beer,

some Wal-Mart bags, a television in a box, and some boxes that were "similar in size to the Playstation".[3] Over his radio, Cst. Roughley requested a CPIC check of the Appellant and learned that he had a criminal record dating back a few years.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.58-62

13. At that point, Cst. Roughley decided to arrest the Appellant for the following reasons:

> . . . I believed that ah, he was involved to the point where I couldn't let him leave the scene, um, there was the person that he was with and who he volunteered that he had driven to the scene, and he was with a person who had tendered a stolen card and there was obviously a lot . . . great deal of property in the vehicle. I didn't know how that property had been obtained so at that point I believed his involvement was sufficient for arrest because I believed him to be ah, involved in the offence.

Cst. Roughley advised the Appellant that he was under arrest for fraud. The Appellant then said that it was not him, it was his friend who was responsible. Cst. Roughley looked into the vehicle and asked the Appellant, "Well then whose stuff is all this?" The Appellant replied that some of it was his and some was his friend's.

Evidence of J. Roughley, *Appellant's Record*, pp.62-63

(iv) *Compliance With Section 10(b) and Subsequent Questioning*

14. Cst. Roughley then explained to the Appellant why he was being arrested. He said:

> Okay, so listen this vehicle had been involved in criminal activity today. A stolen credit card was used to purchase a gift certificate your friend had. You are with him. You have possession of a vehicle full of property; some his, some yours. I think you are involved so you're under arrest for fraud.

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[3] There is no evidence that any of these items were seized. None of them were tendered as exhibits at the Appellent's trial.

Cst. Roughley asked the Appellant if he understood why he was being arrested. The Appellant replied "Yes. But if he says it was just him can I go?" Cst. Roughley responded that he did not know. He then advised the Appellant of his right to counsel for the first time and asked the Appellant if he wished to call a lawyer. The Appellant said no.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.63-64

15. Cst. Roughley handcuffed the Appellant and searched him. In his pocket, he found some Wal-Mart receipts for the purchase of a Playstation, a television and an X-Box console, two Wal-Mart shopping cards and some cash.[4] Cst. Roughley placed the Appellant in his police car and then returned to the van. He seized a small "man's purse" from the van which contained an index card on which was written the name "Sarbjit Brar" along with an address and other personal information. It was later discovered that the stolen credit card used by Erhirhie belonged to this person.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.64-66, 68-69

16. Cst. Roughley returned to the police car, where he read the Appellant the standard caution from his memo book. The Appellant indicated that he understood. Cst. Roughley then questioned the Appellant:

> Q. Where did you get the blue Wal-Mart card that was in your pocket?
>
> A. My friend dropped it and I picked it up.
>
> Q. How about the other two cards that were in your pocket?
>
> A. I was holding them for him.
>
> Q. This black bag [referring to the man's purse], whose is this?

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[4]The receipts and shopping cards were tendered as exhibits at trial.

A. That's mine.

Q. Who's blue Wal-Mart card is this?

A. I was holding it for him too.

Q. Who is Sarbjit Brar?

A. That's my friend too.

Cst. Roughley then transported the Appellant to the police station.

Evidence of Cst. J. Roughley, *Appellant's Record*, pp.66-67

17. At the police station, the Appellant requested to speak to duty counsel, which was arranged.

Evidence of Cst. J. Roughley, *Appellant's Record*, p.68

B. Evidence at Trial

18. At trial, the Court heard evidence that William Erhirhie, who was in the LCBO store when Cst. Roughley arrived, had made purchases with a stolen credit card at a variety of stores in Belleville, Trenton and Cobourg earlier that day. On one occasion, after leaving an LCBO store in Belleville, the man was seen entering a vehicle which matched the description of the vehicle which the Appellant admitted was his girlfriend's. The Appellant was never seen using the credit card or purchasing anything. It was the Crown's theory that the Appellant was a party to the offences committed by Erhirhie. The Appellant's pre-arrest statements confirmed that the vehicle belonged to the Appellant's girlfriend and that the Appellant had been in Erhirhie's company throughout the day.

Reasons for Judgment, *Appellant's Supplementary Record*, pp.5-9

IV. JUDGMENTS IN THE COURTS BELOW

A. The Trial Court (Ontario Court of Justice)

19. The trial Judge's ruling on the Appellant's s. 10(*b*) *Charter* application was as follows:

> Now I am satisfied that there was, as was entirely necessary, a momentary investigative detention. He had to stop the man to find out if he was in any way involved. It was, in my view, an exploratory investigation in which Roughley was fully justified and duly bound to pursue a cursory questioning of Suberu. I find the introductory and preliminary questions were merely to determine if there was any involvement by this person before me. To this point I am satisfied that there was no need to provide the accused with his rights to counsel.

The trial Judge cited no authority in support of his conclusion that s. 10(*b*) does not apply to detentions that are effected in order to determine whether the detainee is involved in a crime under investigation.

Ruling – Ontario Court of Justice, *Appellant's Record,* pp.7-8

B. The Summary Conviction Appeal Court (Superior Court of Justice)

20. The Summary Conviction Appeal Court Justice concluded that if s. 10(*b*) were to apply to an investigative detention, the power of the police to effect such a detention would be "nullified." He held that s. 10(*b*) *never* applies to an investigative detention. He concluded that the dissent by L'Heureux-Dubé J. in *R. v. Elshaw* has somehow become a binding statement of the law on this issue.

Reasons for Judgment – Superior Court of Justice, *Appellant's Record*, pp.12-14;
R. v. Elshaw, [1991] 3 S.C.R. 24.

C. The Court of Appeal for Ontario

21. The Ontario Court of Appeal, *per* Doherty J.A., rejected the Summary Conviction Appeal Court's conclusion that s. 10(*b*) never applies to an investigative detention. Doherty J.A. noted that

there is "an obvious tension between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions." In the Court of Appeal's view, the best way to reconcile these competing interests is to give the phrase "without delay" in s. 10(*b*) of the *Charter* a "more expansive" interpretation in the investigative detention context than it is given in the arrest context. The Court held that a police officer is entitled to question a person subject to an investigative detention without complying with s. 10(*b*) provided that the questions are "exploratory" in nature and that the purpose of the questioning is so that the officer can determine whether anything more than a brief detention is necessary.

Reasons for Judgment of the Court of Appeal for Ontario, *Appellant's Record*, pp.32-38

PART II - POINTS IN ISSUE

22. The issue on this appeal is as follows:

(i) Did the Court of Appeal for Ontario err in concluding that an individual subject to an investigative detention is not entitled to the protection of s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* and that incriminating statements made in such circumstances are admissible in evidence at trial?

23. The Appellant's position is as follows:

(i) A person who is subject to an investigative detention is "detained" within the meaning of s. 10(*b*) of the *Charter* and is therefore entitled to be advised of his or her right to counsel. The Court of Appeal erred in concluding that the term "without delay" in s. 10(*b*) has a different meaning in the context of an investigative detention than it does in the arrest context.

(ii) Any concerns about the practical implications compliance with s. 10(*b*) may have on the ability of the police to conduct effective investigations should not be addressed by reinterpreting the meaning of s. 10(*b*). Such concerns should be addressed by resort to s. 1 of the *Charter,* if the Crown chooses to rely on it.

(iii) If there is a justifiable limit on the right to counsel in the context of an investigative detention, incriminating evidence obtained in the course of such a detention cannot be used by the Crown as evidence at trial.

PART III - ARGUMENT

I. THE ISSUE

A. The Competing Objectives

24. In *R. v. Mann*, this Court affirmed that the police have a common law power to detain individuals for investigative purposes. The Court left open issues pertaining to the applicability of s. 10(*b*) of the *Charter* in the context of investigative detentions. On a plain reading of s. 10(*b*), every "detention" triggers an obligation on the part of the police to advise the detainee of his or her right to counsel. The Appellant was clearly detained, as he was told by Cst. Roughley that he could not go anywhere until he spoke to the officer. The Appellant was not advised of his right to counsel. It follows that his s. 10(*b*) rights were infringed. It is submitted that his statements to the police constitute conscriptive evidence, the admission of which would render the trial unfair. They should have been excluded.

R. v. Mann, [2004] 3 S.C.R. 59

25. However, the Appellant recognizes that complying with s. 10(*b*) in the case of an investigative detention creates certain practical difficulties, as described by Professor Stribopoulos:

> The difficulty arises when an individual, upon being informed of that right, responds by asking to speak with a lawyer. Absent a situation of urgency, such a request obligates a police officer to facilitate contact with counsel and, in the interim, to hold off questioning. As a logistical matter, it would be impossible for counsel to be consulted during most investigative detentions, given that they usually take place on the street and must be kept "brief." As a result, it is difficult to reconcile the requirements of s. 10(*b*) with the investigative detention power.

In *R. v. Mann,* Iacobucci J., writing for a majority of this Court, warned that:

> Mandatory compliance with [s. 10(*b*)'s] requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration.

Thus, a determination of the proper applicability of s. 10(*b*) to investigative detentions requires the Court to balance two competing objectives. On the one hand, the *Charter* clearly protects those who are subject to detention by ensuring that they are advised of their right to counsel. On the other hand, the whole purpose of giving the police the power to effect brief detentions for investigative purposes may be thwarted if the police have to facilitate contact with counsel in each case before pursuing the type of brief questioning the common law power contemplates.

> *R. v. Mann*, *supra* at ¶ 22;
> J. Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335 at ¶ 78-84

B. Reconciling the Competing Objectives

26. There are three ways in which the competing objectives can be reconciled. The first is to accept that individuals subject to an investigative detention will not have the protection of the *Charter* and interpret s. 10(*b*) in such a way that it does not apply in such cases. This is the approach taken by the Court of Appeal in this case. For the reasons outlined below, it is the Appellant's position that this approach is wrong. The second approach is to accept that the police's ability to investigate will be compromised and require the police to comply with s. 10(*b*) notwithstanding the logistical difficulties this entails. This is the approach dictated by a plain reading of s. 10(*b*), which applies whenever there is a detention. The third approach is the type of compromise adopted by this Court in *R. v. Orbanski; R. v. Elias*, in which the right to counsel is justifiably limited under s. 1 of the *Charter*, but evidence obtained prior to compliance with s. 10(*b*) is inadmissible at trial.

> *R. v. Orbanski; R. v. Elias*, *supra*

27. It is the Appellant's position that the first approach, that taken by the Court of Appeal, is wrong for several reasons:

- It is inconsistent with the jurisprudence from this Honourable Court respecting the meaning of the term "without delay", as well as with the plain meaning of the term.
- It is inconsistent with a purposive interpretation of s. 10(*b*) of the *Charter*.
- It provides no clear guidance to police officers as to when and in what circumstances they are required to comply with s. 10(*b*) of the *Charter*.

28. If the Court of Appeal's approach is wrong, this leaves the second and third approaches outlined above. On the second approach, the Appellant's s. 10(*b*) *Charter* rights were violated. The evidence obtained was conscriptive and its admission would render the trial unfair. It ought to have been excluded.

29. On the third approach, the Appellant was denied his right to counsel, but there was a justifiable limit on that right, as this Court concluded in *R. v. Orbanski*; *R. v. Elias*. As in the case at bar, the concern in *Orbanski*; *Elias* was that compliance with s. 10(*b*) of the *Charter* gave rise to practical difficulties which made the exercise of s. 10(*b*) rights incompatible with the type of roadside screening techniques at issue in that case. This Court resolved the issue by holding that although s. 10(*b*) applies to this type of detention, as it does to all detentions, there is a limit on the right to counsel in the circumstances which is justified by s. 1 of the *Charter*, provided that the results of the roadside screening are not used in evidence at trial. In the case at bar, the Crown did not make a s. 1 claim in the Court of Appeal. Had the Crown done so, the Appellant would have conceded that this approach is a reasonable one. However, the Appellant's statements would still

have been inadmissible. From the Appellant's perspective, it does not matter whether this Court adopts the second or the third approach. From a policy perspective, the Appellant acknowledges that the third approach is preferable, should the Crown seek to rely on s. 1 of the *Charter*.

R. v. Orbanski; R. v. Elias, supra

II. <u>FLAWS IN THE APPROACH TAKEN BY THE COURT OF APPEAL</u>

A. Inconsistency With the Established Meaning of the Term "Without Delay"

30. As Doherty J.A. noted, there is no authority which offers direct support for his conclusion that the term "without delay" is sufficiently flexible to encompass a brief passage of time between when an individual is detained and questioned and when he or she is advised of his or her right to counsel. As Doherty J.A. also noted, this Court has interpreted the phrase "without delay" as meaning "immediately." However, contrary to what Doherty J.A. suggested, this Court did not restrict that definition to the arrest context. Rather, this Court's interpretation of the phrase "without delay" has been clearly held to be applicable in any case involving "arrest *or* detention." For example, in *R. v. Debot*, Lamer J. (as he then was), writing for the majority, stated:

> The right to retain and instruct counsel derives from the fact of *arrest or detention* of the person. Therefore, *immediately upon detention*, the detainee does have the right to be informed of the right to retain and instruct counsel. [Emphasis added].

Similarly, in *R. v. Feeney*, Sopinka J., writing for the majority, stated:

> The requirement that a person be informed of his or her s. 10(b) rights begins upon *detention or arrest*. According to *R. v. Therens* [*infra*], detention under s. 10 of the *Charter* occurs when a peace officer assumes control over the movement of a person by a demand or direction. [Emphasis added].

No authority from this Court supports the notion that the term "without delay" means one thing when a person is arrested and means something else when a person is subject to some other form of detention.

> Reasons for Judgment of the Court of Appeal for Ontario, *Appellant's Record*, p.38;
> *R. v. Debot*, [1989] 2 S.C.R. 1140 at ¶ 3, 42;
> *R. v. Feeney,* [1997] 2 S.C.R. 13 at ¶ 56;
> *R. v. Therens*, [1985] 1 S.C.R. 613 at ¶ 49-54

31. There are some dated authorities from the Ontario Court of Appeal which suggest that the phrase "without delay" does not mean "immediately." For example, in *R. v. Kwok*, in discussing a detention at a border crossing, Finlayson J.A, writing for the Court, stated:

> 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* [*infra*], *R. v. Debot* [*infra*].

Kwok and the cases cited therein all predate this Court's judgment in *Debot* and, it is submitted, are inconsistent with it. Indeed, in affirming the Ontario Court of Appeal's judgment in *Debot*, which was cited in *Kwok*, this Court expressly held that "without delay" means "immediately."

> *R.v. Kwok* (1987), 31 C.C.C. (3d) 196 at 208 (Ont. C.A.);
> *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 at 423-425 (Ont. C.A.)
> *R. v. Debot* (1986), 30 C.C.C. (3d) 207 at 226-229 (Ont. C.A.), aff'd *supra*.

32. Furthermore, the ordinary meaning of the term "without delay" is inconsistent with the interpretation used by the Court of Appeal. The *Oxford English Dictionary* defines "immediately" as "without delay, at once, instantly."

> *The New Shorter Oxford English Dictionary*, vol. 1 (New York: Oxford University Press, 1993) at 1315

33. The Court of Appeal's approach requires that the term "without delay" in s. 10(*b*) be given a meaning that is inconsistent with the meaning given in other contexts, inconsistent with the jurisprudence of this Court, and inconsistent with the plain and ordinary usage of the term. In contrast, the *Orbanski; Elias* approach recognizes that "without delay" means "without delay."

B. Inconsistency With A Purposive Interpretation of Section 10(b)

(i) The Purpose of the Section

34. A consideration of the purpose of s. 10(*b*) of the *Charter* also leads to the conclusion that the Court of Appeal's interpretation is wrong. That purpose was explained by Lamer C.J.C. in *R. v. Bartle* as follows:

> The purpose of the right to counsel guaranteed by s. 10(*b*) of the *Charter* is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations. This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the *Charter* is in *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty.

Thus, s. 10(*b*) is designed to ensure that a detained person's right against self-incrimination is protected and to assist him or her in regaining his or her liberty.

R. v. Bartle, [1994] 3 S.C.R. 173 at ¶ 16

35. A person who is subject to an investigative detention has the right not to incriminate him or herself. As this Court noted in *Mann*, such a person is under no obligation to answer questions.

However, the right not to answer questions is meaningless absent some mechanism whereby the individual can become aware of the right.

R. v. Mann, supra at ¶ 45

36. The Court of Appeal correctly noted that the first purpose of s. 10(*b*) identified in *Bartle* applies in the context of an investigative detention:

> The first of these two purposes – to advise detained persons of their rights – is operative in the context of a routine investigative detention. Persons who are detained for investigative purposes are usually questioned. Often, questions asked in the context of a routine investigative detention, even exploratory questions like those asked by Constable Roughley, may have an incriminatory potential. Access to legal advice in the course of an investigatory detention would give the detainee some protection against the risk of self-incrimination. That protection would, however, come with a significant cost.

The "significant cost" the Court referred to is presumably the practical difficulty that would be created if every person subject to an investigative detention is given the opportunity to consult counsel. It is the existence of this "significant cost" that led the Court of Appeal to formulate a new and expansive definition of the term "without delay."

Reasons for Judgment of the Court of Appeal for Ontario, *Appellant's Record,* p.34

37. The Court of Appeal dealt with the problem of the "social cost" of complying with s. 10(*b*) by re-defining the section in such a way that it no longer applies. It is submitted that the fact that the protection of a constitutional right carries with it a social cost is not a reason to re-define the right out of existence, as the Court of Appeal has done in this case. As this Court held in a different context:

> . . . [W]e must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection.

R. v. Zundel, [1992] 2 S.C.R. 731 at ¶ 31

(ii) *Sections 7 and 11(d) of the Charter*

38. The Court of Appeal's approach to the issue in this case fails to respect the primary purpose of s. 10(*b*), which is the protection of the right against self-incrimination. As the Court of Appeal acknowledged,

> It is possible, as occurred in this case, that persons will give incriminating answers to questions put to them during the brief interlude between the commencement of their detention and the obligation of the police to comply with s. 10(*b*).

The Court of Appeal's solution to the existence of this problem is to allow the accused to apply to exclude the statement under ss. 7 and 11(*d*) of the *Charter* in accordance with this Court's judgments in *R. v. Harrer*, *R. v. Terry,* and *R. v. White,* and the Ontario Court of Appeal's judgment in *R. v. Milne*. With respect to such an application, Doherty J.A. stated:

> The force of that argument would depend on the entirety of the circumstances surrounding the detention and taking of the statements. Factors such as the nature of the detention, the kinds of questions asked, and the age of the detained person would be among the relevant considerations.

In Doherty J.A.'s view, nothing in the circumstances surrounding the taking of the Appellant's statements would have justified exclusion.

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 ¶ 21-24;
R. v. Terry, [1996] 2 S.C.R. 207 at ¶ 25;
R. v.White, [1999] 2 S.C.R. 417 at ¶ 86-87;
R. v. Milne (1997), 28 O.R. (3d) 577 (C.A.)

39. In *Harrer* and *Terry*, this Court held that an accused person could rely on ss. 7 and 11(*d*) of the *Charter* to attempt to exclude evidence that was collected abroad by officials to whom the *Charter* did not apply. The need to resort to ss. 7 and 11(*d*) arose only because of the inapplicability of the *Charter*. In the case at bar, the *Charter* clearly applied to Cst. Roughley's actions.

R. v. Harrer, supra;
R. v. Terry, supra

40. *R. v. White* dealt with the admissibility of statements that were compelled pursuant to motor vehicle insurance legislation. This Court held that such statements are subject to use immunity. This use immunity exists regardless of the type of factors discussed by Doherty J.A., such as the nature of the questions asked and the age of the person involved. The reason for this type of blanket use immunity was described by Iacobucci J., writing for the majority, in the following terms:

> I would emphasize that creating an immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society's goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other.

Thus, the approach taken by this Court in *White* is consistent with the *Orbanski; Elias* approach, *not* the approach taken by the Court of Appeal. The need for the authorities to be able to investigate effectively is balanced with the individual's right against self-incrimination by allowing the authorities to collect information freely so long as the information is not used to incriminate the individual at trial.

R. v. White, supra at ¶ 71

41. Doherty J.A.'s reliance on *R. v. Milne* is, with respect, somewhat curious. The fact situation in *Milne* was virtually identical to that in *Orbanski*. In both cases, the courts held that the accused was detained and, consequently, s. 10(*b*) of the *Charter* applied. However, non-compliance with the section was justified by s. 1 of the *Charter*, provided that the evidence that was obtained was not relied upon by the Crown at trial. Neither the Ontario Court of Appeal in *Milne* nor this Court in *Orbanski; Elias* suggested that factors such as the nature of the detention, the kinds of questions asked, or the age of the accused were in any way relevant to the issue of admissibility. More importantly, neither Court suggested that the term "without delay" has any different meaning in the context of a detention short of arrest than it does in the arrest context.

R. v. Orbanski; R. v. Elias, supra;
R. v. Milne, supra

42. In *Orbanski; Elias*, Charron J., writing for the majority, held that in the context of the detention and questioning of the accused in that case, their claim under s. 10(*b*) of the *Charter* and their claim of a violation of the right against self-incrimination under s. 7 were essentially the same:

> It was argued that asking questions about alcohol consumption falls outside the scope of reasonable police screening measures because it introduces an added element of self-incrimination. For this reason, Elias raised the additional question of whether his rights under s. 7 of the *Charter* had been violated.... Compliance with the right against self-incrimination protected in s. 7 is essentially achieved by the police informing a detainee of his or her rights under s. 10(*b*). In effect, Elias's assertion that the roadside conduct of the police in this case violated his rights under s. 7 is a reassertion of his rights under s. 10(*b*). Nothing further would be gained by considering the driver's s. 7 rights.

Thus, in the context of self-incriminating statements made while a person is detained but not arrested, a s. 10(*b*) claim and a s. 7 claim are essentially the same. It follows that the Appellant cannot be allowed to make a s. 7 claim but not a s. 10(*b*) claim.

R. v. Orbanski; R. v. Elias, *supra* at ¶ 48

43. Thus, the Court of Appeal's approach is inconsistent with a purposive analysis in that it defines s. 10(*b*) in such a way that it no longer fulfills its central purpose – to protect the right of those who are detained against self-incrimination. In contrast, the *Orbanski; Elias* approach maintains the objective of s. 10(*b*) by ensuring that the detainee continues to be afforded protection against self-incrimination by limiting the use that can be made of evidence obtained in the absence of compliance with s. 10(*b*).

R. v. Orbanski; R. v. Elias, *supra* at ¶ 58

C. No Meaningful Guidance

44. The Court of Appeal held that a police officer need not comply with s. 10(*b*) provided he or she is asking the suspect "exploratory" questions, and provided that the officer has not already made up his or her mind that the suspect will be detained for something more than a "brief interval." However, this description offers little guidance to the conscientious police officer who wishes to respect the constitutional rights of the individual with whom he or she interacts. This is so for two reasons. First, the meaning of the term "brief" is unclear. One police officer's view of what constitutes a "brief interval" may differ from that of another officer. A police officer who does not know "how long is too long" cannot know when he or she must comply with s. 10(*b*).

L.A. McCoy, "Liberty's Last Stand: Tracing the Limits of Investigative Detention" (2002) 46 C.L.Q. 319 at 323-324;
J. Stribopoulos, *supra* at ¶ 78-84

45. Secondly, the distinction between questions which are "exploratory" and those which are not is often difficult to make, as Doherty J.A. himself noted in *R. v. Sawatsky*. In that case, the accused had been arrested for arson and was being questioned. At one point, the police began to question her with respect to another arson. The issue before the Court was whether or not the accused was entitled to be re-advised of her s. 10(*b*) rights. In that context, Doherty J.A. noted:

> The distinction between exploratory questions preceding an investigation and questions which are part of an investigation can be difficult to make. In many situations, there is no clear demarcation. Exploration flows seamlessly into investigation.

The lack of clear demarcation will often lead to one of two possibilities, both of which are undesirable. Either the police officer will fail to advise the suspect of his or her s. 10(*b*) rights when he should have, in which case the suspect's constitutional rights are violated. Alternatively, the cautious police officer may advise the suspect of his or her rights unnecessarily and, if the suspect then chooses to exercise the right, what should have been a brief detention is prolonged and the progress of the investigation is hindered.

R. v. Sawatsky (1997), 35 O.R. (3d) 767 at ¶ 35 (C.A.)

46. The practical difficulties presented by the Court of Appeal's approach do not arise with the *Orbanski; Elias* approach. Police officers are free to question individuals without being concerned about violating their rights. Once a police officer realizes that he or she has grounds for arrest and decides to effect an arrest, the individual can then be given his or her right to counsel and any further statements can be used in evidence.

III. CONSEQUENCES OF A CORRECT INTERPRETATION OF SECTION 10(B)

47. If the term "without delay" in s. 10(*b*) is given its usual interpretation, as the Appellant submits it should be, then the Appellant was clearly not advised of his right to counsel without delay when detained and his s. 10(*b*) rights were consequently infringed. It follows from this that his pre-arrest utterances constitute evidence "obtained in a manner that infringed or denied" the Appellant's rights and are therefore subject to exclusion pursuant to s. 24(2) of the *Charter*. The Appellant incriminated himself as the result of police questioning that took place after he was told by a police officer that he was not free to leave. This was conscriptive evidence, the admission of which would render the trial unfair. It should have been excluded.

R. v. Stillman, [1997], 1 S.C.R. 607 at ¶ 116-119

IV. SECTION 1 OF THE CHARTER

48. As mentioned earlier, the Crown chose not to rely on s. 1 in this case. Had it done so, it is submitted that there is no principled basis upon which to distinguish this case from *Elias; Orbanski*. On this analysis, Cst. Roughley would have been justified in questioning the Applicant without advising him of his right to counsel. He could have relied on the Appellant's responses as grounds to arrest him (which he in fact did), but the Crown could not have relied on the evidence at trial, as it did in this case. Regardless of whether s. 1 is applied, the evidence should not have been admitted.

V. EFFECT ON THE VERDICT

49. After vigorously opposing the exclusion of the Appellant's utterances at trial, the Crown then argued on appeal that this evidence was not necessary to prove the Crown's case and that the verdict

would inevitably have been the same without the evidence. It is submitted that this submission is unsustainable for several reasons:

- No witness ever saw the Appellant use the stolen credit card.
- With the exception of the LCBO store in Cobourg, the Appellant was not present when the stolen credit card was used at any of the other locations. He was not involved in any fraudulent purchase at the LCBO in Cobourg. Rather, he advised Erhirhie not to complete the purchase.
- Without the Appellant's pre-arrest utterances, there was no evidence as to how long the Appellant had been in Erhirhie's company on the day in question.
- Without the Appellant's pre-arrest utterances, there was no evidence that the Appellant had been driving the van when it was seen earlier in the day at the LCBO store in Belleville.

50. Furthermore, the trial Judge expressly relied on this evidence in convicting the Appellant:

> But the other issue was whether Mr. Suberu was wilfully blind to what Willy [Erhirhie] was engaged in. Well first of all in assessing all of the evidence which is essentially circumstantial and I'm fully aware of the onus in assessing the guilt or innocence of the accused and evidence beyond a reasonable doubt. *Firstly Suberu borrowed his girlfriend's van and drove Willy firstly to Belleville* and there his friend purchased six $100 Liquor Store certificates. Then they moved on to Trenton *with Suberu driving* to purchase gift certificates a total of $1800 with the stolen credit card. Then to Brighton and Cobourg buying a $3 can of beer with $100 gift certificate.
>
> Secondly, *Suberu was at the wheel of the van that took off very quickly* according to Ms. Bedard, took off quickly as she came running outside the Belleville store in order to record the licence number of the red van *driven by Suberu*. [Emphasis added].

The italicized portions of this excerpt all reflect findings based on the Appellant's pre-arrest utterances. In these circumstances, it cannot be said that the verdict would necessarily have been the same if the impugned evidence had not been admitted.

Reasons for Judgment, *Appellant's Supplementary Record*, pp. 9-10

PART IV - ORDER REQUESTED

51. It is respectfully requested that the appeal be allowed, the Order of the Court of Appeal for Ontario be set aside, and a new trial ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

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P. ANDRAS SCHRECK

Of Counsel for the Appellant

DATED at Toronto, this 28th day of November, 2007.

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the Rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

PART V - TABLE OF AUTHORITIES

	Cited at paragraph(s):
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