Court File No. 31912

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

BETWEEN:

MUSIBAU SUBERU

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL, AND CANADIAN CIVIL LIBERTIES ASSOCIATION

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OVERVIEW

1. In 1985, during the Charter's early days, this Court rendered its landmark decision in *R. v. Therens*. In *Therens*, Le Dain J. adopted the comments made by Tallis J.A. to the effect that the Charter is a living document, not to be "blunted or thwarted by technical or legalistic interpretations of ordinary words of the English language" because if Charter rights "are to survive and be available on a day-to-day basis we must resist the temptation to opt in favour of a restrictive approach".[1]

2. As a result of *Therens*, and so many other important early Charter cases, Canadians were put on notice that this Court, while certainly not ignoring the practical realities in which police operate, was prepared to give a suitably robust interpretation to the fundamental freedoms enshrined in the Charter. This approach was given life in this Court's subsequent jurisprudence on s. 10(b) of the Charter, in which it emphasized that the right to counsel is intimately bound up with the right against self-incrimination[2] and is fundamentally important to trial fairness.[3] Indeed, as Wilson J. held in *R. v. Strachan*, "an attempt to acquire incriminating evidence in the absence of counsel is, with respect, the very mischief that s. 10(b) was designed to prevent".[4]

3. Although the Charter is no longer in its infancy, the same cannot be said of the developing law in Canada regarding investigative detention. In *R. v. Mann*, Iacobucci J., in recognizing this limited police power, held that this Court was not purporting to address every issue that may arise in the course of its exercise. Many important issues, including the issue that arises in this appeal, were to be left for another day. Moreover, as the Court below properly recognized, the issues that arise in this appeal require the Court to balance "individual constitutional rights against the public interest in effective law enforcement".[5]

4. The Canadian Civil Liberties Association ("CCLA") respectfully submits that, in approaching the developing law respecting the operation of s. 10(b) in the context of investigative detention, this Court should adopt the same approach it has in respect of s. 10(b) generally – one that recognizes the fundamental importance of this right and the need for an

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1 [1985] 1 S.C.R. 613 per Le Dain J. (dissenting on other grounds), citing Tallis J.A., at pp. 632-33.

2 *R. v. Brydges*, [1990] 1 S.C.R. 190.

3 *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Mellenthin*, [1992] 3 S.C.R. 615.

4 [1988] 2 S.C.R. 980 at p. 1011.

5 *R. v. Suberu* (2007), 218 C.C.C. (3d) (Ont. C.A.) at p. 30, para. 1.

interpretation that is robust, not restrictive.

5. Specifically, in respect of the timing and scope of the 10(b) warning to be given upon an investigative detention, the CCLA submits that this Court should be guided by three factors.

6. First, this Court should be guided by the clear meaning of s. 10(b) of the Charter, which requires that the s. 10(b) warning be given "without delay" upon arrest or detention. As Wilson J. emphasized in *R. v. Debot*, this requirement "does not permit of internal qualification".[6]

7. Second, it is submitted that this Court should take into account the practical realities of investigative detention, which are different from those arising in the context of an arrest.

8. Finally, and perhaps of greatest importance, it is submitted that any standard to be applied to this issue must be clear and easily intelligible, both to the detainee and to the police officer called upon to make judgments "…'on the street' in dynamic and quickly evolving situations".[7]

9. The CCLA respectfully submits that the solution adopted in the Court of Appeal, which allows police officers to "briefly delay" the giving of a s. 10(b) warning while they ask questions of an "investigative nature" gives insufficient weight to the wording of s. 10(b) and does not provide police with a reliable *a priori* guide to lawful conduct.

10. In its place, the CCLA respectfully proposes an approach, set out more fully below, pursuant to which any failure to give an immediate s. 10(b) warning will amount to a *prima facie* breach of s. 10(b) of the Charter. However, this *prima facie* breach may be justified under s. 1 if: (1) immediately upon detention, the police make clear to the citizen that he or she is detained and provide an abbreviated s. 10(b) warning, and (2) any incriminating evidence discovered by the police from the time of the detention until the time a full s. 10(b) warning is given is inadmissible at trial except for the limited purpose of justifying certain subsequent police conduct, such as an arrest.

11. It is submitted that this approach is consistent with this Court's s. 10(b) jurisprudence, satisfies the exigencies of investigative detention, and is harmonious with this Court's jurisprudence in other detention cases involving traffic stops. It recognizes the reality of every day policing without sacrificing Charter rights at the alter of expediency. Most importantly, it

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6 [1989] 2 S.C.R. 1140 at pp. 1163-64.

7 *Suberu*, *supra* note 5 at p. 39, para. 41.

represents a fair and faithful application of *Therens* to new and evolving circumstances.

PART I - THE FACTS

12. The CCLA adopts and relies upon the facts as set out in the Appellant's factum.

PART II - QUESTIONS IN ISSUE

13. The CCLA proposes to address the following two issues:

(a) When during the course of an investigative detention are police obliged to advise the detainees of their s. 10(b) right to counsel?; and

(b) If s. 10(b) requires that the police advise the detainees of their right to counsel immediately upon detention, in what circumstances, if any, would a brief delay to allow police to ask "exploratory" questions be justified under s. 1?

PART III - ARGUMENT

INTRODUCTION: IMPORTANT CONTEXTUAL FACTORS AFFECTING THE APPROACH TO SECTION 10(b) OF THE CHARTER

14. Prior to considering the specific requirements of s. 10(b), it is submitted that five important contextual factors should be kept at the forefront of the analysis. These are: (1) that investigative detention is an exceptional power that arises in limited circumstances; (2) in the context of investigative detention there is a fundamental and significant power imbalance between the police and the detainee; (3) the right to counsel is inextricably linked to the right against self-incrimination and to trial fairness; (4) the police cannot initiate an investigative detention unless they have "reasonable grounds to detain" – therefore, by definition, every detainee is in a position of real legal jeopardy; and (5) perhaps most significantly, notwithstanding this Court's exhortations in *R. v. Mann*[8] and *R. v. Clayton*,[9] and in complete contrast with the traffic stop cases,[10] Parliament has not seen fit to pass *any legislation whatsoever* governing investigative detention, let alone any that would limit or delay, either explicitly or by necessary implication, a citizen's s. 10(b) rights in this context. In the absence of legislation, this Court should proceed cautiously before reading down Charter rights in response to a plea of police necessity.

A. Contextual Factor #1 – Investigative Detention is an Exceptional Power

15. First and foremost, it must be borne in mind that the common law power of investigative

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8 *R. v. Mann*, [2004] 3 S.C.R. 59 per Iacobucci J. at pp. 69-70, paras. 17-18.

9 2007 S.C.C. 32 per Binnie J. paras. 58, 71, 76.

10 *See e.g. R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3.

detention is exceptional in nature. As Iacobucci J. held in *Mann*:

> Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law.[11]

16. In other words, in a free country, the unalterable rule must always be that persons are free to do as they please, absent a law to the contrary, and not that persons are free only to the extent authorized by law.

17. Consistent with this principle, Iacobucci J. emphasized that:

> 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 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.[12]

18. Accordingly, Iacobucci J. described the new common law power of investigative detention as limited:

> Over time, the common law has moved cautiously to carve out a limited sphere for state intrusions on individual liberties in the context of policing. The recognition of a limited police power of investigative detention marks another step in that measured development.[13]

19. In *R. v. Greaves*, a case in which the British Columbia Court of Appeal was called upon to apply *Mann*, Lowry J. echoed Iacobucci J.'s comments in respect of the limited and exceptional nature of this power:

> The Supreme Court held in *Mann* that a common law investigative detention power does exist. … The power is not, however, a general power to detain whenever such a detention will assist the police in the execution of their duties. ...
>
> The primary purpose of the requirement that police have reasonable grounds to detain is to ensure that they do not have carte blanche to interfere with individual liberty and do not detain persons based on mere "hunches". It prevents the discriminatory or capricious exercise of police power.[14]

20. This statement also reflects the law pre-*Mann*. In *Brown v. Regional Municipality of Durham Police Services Board*, which involved the legality of police stops of suspected members of a motorcycle gang, Doherty J.A. held as follows in respect of the power of

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[11] *Mann*, *supra* note 8 at p. 69, para. 15.

[12] *Id.* at p. 77, para. 35.

[13] *Id.* at pp. 70-71, para. 18 [emphasis added]. Accordingly, in *Clayton*, *supra* note 9 at para. 58, Binnie J. stated that "[t]here does not exist in Canada a general police power of investigative detention" [emphasis added].

[14] (2004), 189 C.C.C. (3d) 305 (B.C.C.A.) at pp. 320, 324, paras. 33, 42 [references omitted].

investigative detention:

> In this case, the police chose to detain the appellants and their friends and associates in the belief that the detentions would diminish the risk that a situation would develop in which there would be an imminent risk of harm. In effect, the respondent would extend the common law power to arrest or detain to prevent an imminent breach of the peace to a power to detain whenever the detention would assist in keeping the public peace. The respondent would equate the police duty to keep the peace and the police power to take steps to keep the peace. This equation ignores the importance attached to individual liberties in our society. The common law ancillary power doctrine has never equated the scope of the police duties with the breadth of the police powers to interfere with individual liberty in the performance of those duties. Any interference with individual liberty must be justified as necessary. …
>
> The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police. In some situations, the requirement [of] … a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.[15]

B. Contextual Factor #2 – The Power Imbalance in the Police Detention Context

21. As Iacobucci J. recognized in *Mann*, investigative detentions amount to "low-visibility exercises of discretionary power" that give rise to a real "potential for abuse".[16]

22. This statement is consistent with this Court's jurisprudence, in which the realities underlying the relationship between police and citizens were recognized and underscored.

23. For instance, in *Therens*, Le Dain J. recognized the significant power imbalance between police and detainees in the following manner:

> Although it is not strictly necessary for purposes of this case, I would go further. 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 willful 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.[17]

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[15] *Brown v. Regional Municipality of Durham Police Service Board* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) per Doherty J.A. at pp. 29-30, paras. 78-79 [emphasis added; references omitted].

[16] *Mann, supra* note 8 at pp. 70-71, para. 18.

[17] *Therens, supra* note 1 at p. 644 [emphasis added].

24. The reality of the power imbalance between police and citizen was again recognized by this Court in *R. v. Mellenthin*, where Cory J. held that:

> It has been seen that as a result of the check stop the appellant was detained. The arbitrary detention was imposed as soon as he was pulled over. As a result of that detention, it can reasonably be inferred that the appellant felt compelled to respond to questions put to him by the police officer. In those circumstances it is incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search. There is no such evidence in this case. In my view the trial judge was correct in her conclusion that the appellant felt compelled to respond to the police questions.[18]

25. This reality has also been recognized in lower courts. For instance, in *R. v. Powell*, Lane J. applied this Court's reasoning in *Mellenthin* to the detention of pedestrians:

> Although the facts in *Mellenthin* referred to the stopping of vehicles, it is hard to see why the same approach would not apply to pedestrians. The "ordinary right of movement of the individual," the right to move about in the community on foot without interference, is a fundamental right. It is more significant than "the liberty" or "the qualified right" to drive a motor vehicle which is "a licensed activity that is subject to regulation and control for the protection of life and property": If motorists can be presumed to feel compelled to respond to questions from police, it can reasonably be assumed that pedestrians stopped by the police feel the same compulsion. If as MacDonnell J. indicated in *Orellana*, "most people, faced with the kind of polite request made by (the officer), would speak to the police ... because it was the proper thing to do," it is hard to see why this "moral or social duty" is not considered a form of compulsion. Whatever the correct categorization of such responses, the Supreme Court in *Mellenthin* found that, rather than the applicant being required to show that he felt oppressed (as in the *Moran* cases), the burden shifted to the crown to provide evidence that he was aware of his rights to refuse to answer the questions or to consent to the search.
>
> … In the context of an interference with freedom of movement at the behest of the police followed by questioning, however, *Mellenthin* stands for the principle that compulsion to respond to police questions should be presumed, unless the crown can show evidence of informed consent. More important, because of the public policy interest in encouraging the public to cooperate with the police, persons who do answer questions without information about their rights should not be punished for their actions, nor taken to have waived their rights.[19]

26. Finally, in this Court's recent decision in *R. v. Singh*, all judges agreed that when people are detained, there is a greater risk that they will feel, incorrectly, compelled to answer questions:

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[18] *Mellenthin*, *supra* note 3 at p. 624-25 [emphasis added].

[19] [2000] O.J. No. 2229 (C.J.) per Lane J. at paras. 31-32 [emphasis added; references omitted]. Although *Powell*, to the extent that it creates a presumption of compulsion, has not been followed in the Ontario and Manitoba Courts of Appeal (*R. v. B.(L.)* (2007), 227 C.C.C. (3d) 70 (Ont. C.A.) per Moldaver J.A. at p. 82, para. 47; *R. v. H.(C.R.)* (2003) 174 C.C.C. (3d) 67 (Man. C.A.) at pp. 82-84, paras. 53-57) it has been followed in Alberta (*R. v. T.A.V.*, [2001] A.J. No. 1679 (Alta. C.A.) at para. 20) and, it is submitted is not controversial to the extent that it recognizes that there is an unequal power dynamic at play in encounters between police and citizens.

> Although the confessions rule applies whether or not the suspect is in detention, the common law recognized, also long before the advent of the Charter, that the suspect's situation is much different after detention. ... After detention, the state authorities are in control and the detainee, who cannot simply walk away, is in a more vulnerable position. There is a greater risk of abuse of power by the police. The fact of detention alone can have a significant impact on the suspect and cause him or her to feel compelled to give a statement. The importance of reaffirming the individual's right to choose whether to speak to the authorities after he or she is detained is reflected in the jurisprudence concerning the timing of the police caution.[20]

C. Contextual Factor #3 – Section 10(b) is Fundamental to the Protection of the Right Against Self-Incrimination and to Trial Fairness

27. This Court has frequently pointed out the link between the right to counsel and the right against self-incrimination. The latter is of such importance as to constitute not only a principle of fundamental justice, but a "general organizing principle of the criminal law …".[21] Where incriminating evidence is unlawfully compelled, its admission will render the trial unfair.[22]

28. In *R. v. Brydges*, Lamer J. (as he then was) held on behalf of the majority that:

> A detainee is advised of the right to retain and instruct counsel without delay because it is upon arrest or detention that an accused is in *immediate need of legal advice*. … [O]ne of the main functions of counsel at this early stage of detention is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel.[23]

29. Likewise, in *R. v. Prosper*, Lamer C.J.C. once again emphasized that:

> [Section] 10(b) serves to protect the privilege against self-incrimination, a basic tenet of our criminal justice system which has been recognized by members of this Court to be a "principle of fundamental justice" under s. 7 of the Charter.[24]

30. In the Court below, Doherty J.A. indicated that there are two functions to the right to counsel: (1) to give detainees the opportunity to "obtain legal advice about their rights" including the right against self-incrimination and the right to silence, and (2) to obtain assistance to regain

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[20] 2007 S.C.C. 48 at para. 32 [emphasis added], citing *R. v. Young* (1997), 116 C.C.C. (3d) 350 (Ont. C.A.).

[21] *R. v. Jones*, [1994] 2 S.C.R. 229 per Lamer C.J.C. (dissenting on other grounds) at p. 249. See also *R. v. White*, [1999] 2 S.C.R. 417, per Iacobucci J. at p. 437, at para. 41.

[22] *Stillman*, *supra* note 3.

[23] *Supra* note 2 per Lamer J. (as he then was) at p. 206 [italics original; underlining added; references omitted].

[24] [1994] 3 S.C.R. 236 per Lamer C.J.C. at p. 271.

their liberty "as quickly as possible".[25] However, in *R. v. Hebert*, this Court made clear that:

> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.[26]

31. Likewise, in *R. v. M.(M.R.)*, this Court described the purpose of s. 10(b) not in terms of expediting the end of the detention but in terms of the right against self-incrimination:

> The right to counsel provided in s. 10(b) was designed to address the vulnerable position of an individual who has been detained by the coercive power of the state in the course of criminal investigation, and is thus deprived of his or her liberty and placed at risk of making self-incriminating statements.[27]

32. It is submitted that the direct link between s. 10(b) of the Charter and the right against self-incrimination is a further reason why this Court should be reluctant to grant any form of dispensation from its requirements except in cases of absolute necessity.

D. Contextual Factor #4 – Detainees are in Real Jeopardy

33. The fourth contextual factor that should guide the debate on this issue is the fact that persons who are the subject of a *Mann*-type investigative detention are potentially in very real legal jeopardy. To be valid, an investigative detention cannot be based upon mere suspicion or a "hunch". It should not be used as a screening device to ensnare all persons who may have helpful information. Resort may be had to this investigative power only where there are individualized "reasonable grounds to detain". In *Mann*, Iacobucci J. described the prerequisites to a lawful investigative detention as follows:

> The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. …
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> [P]olice officers may detain an individual for investigative purposes if there are

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[25] *Suberu*, *supra* note 5 at p. 40, para. 43.

[26] [1990] 2 S.C.R. 151 per McLachlin J. (as she then was) at p. 176 [emphasis added].

[27] [1998] 3 S.C.R. 393 per Cory J. at p. 429, para. 67 [emphasis added]. See also *R. v. Latimer*, [1997] 1 S.C.R. 217 per Lamer C.J.C. at pp. 235-36, para. 33.

> reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.[28]

34. It follows that, if the power of investigative detention is used properly, persons whom the police do not reasonably suspect to be "implicated in the criminal activity under investigation" or to be "connected to a particular crime" should not be detained. Persons are detained because there *is* just such a reasonable suspicion or connection. Therefore, such persons are in considerable jeopardy, notwithstanding that they have not yet been arrested or charged.

35. The Court below posited a dichotomy between the interest in ensuring that the detainee has the opportunity to obtain legal advice and thus preserve his or her right against self-incrimination, and the interest in ensuring that the detention is as brief as possible. When due recognition is given to the fact that persons subject to a *Mann*-type investigative detention are in legal jeopardy, it is clear that this dichotomy is false.

36. If persons could lawfully be detained at random, or as a screening measure, it might be conceded that allowing them to exercise their rights to counsel would only serve to "delay [them] and put them to unnecessary expense"[29] to no good end, since they would not be in any realistic legal jeopardy to begin with.

37. However, if one begins with the proper premise that persons who are detained *are* in legal jeopardy, it will follow that nothing is more likely to *increase* the time they spend in custody than the making of incriminating statements in response to purportedly "exploratory" police questions. Such statements are likely to lead to the person's arrest, not to mention potential conviction and imprisonment. Viewed against this backdrop, it can hardly be said that, *from the detainee's point of view*, exercising his or her right to counsel "comes with a significant cost" in that he or she "will almost inevitably end up suffering a longer detention and more intrusive state conduct than he or she would otherwise have endured".[30] Indeed, the very opposite is true.[31] In

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[28] *Mann*, *supra* note 8 at pp. 76, 81, paras. 34 & 45 [emphasis added].

[29] *R. v. Ellerman*, [2003] A.J. No. 150 (Alta. C.A.) at para. 11.

[30] *Suberu*, *supra* note 5 at p. 41, para. 45. In any event, there is reason to doubt whether the exercise of this right would be as disruptive as Doherty J.A. supposes. See the discussion at paras. 68-84, below.

[31] Objection may be taken to this argument on the basis that those most likely to benefit from the exercise of the right to counsel in such circumstances are the factually guilty. However, this spurious objection could be taken to the whole of this Court's s. 10(b) jurisprudence. This Court, quite properly, has never limited Charter rights on the basis that the right in issue may be of more benefit to the factually guilty than to those who may be wrongfully accused. This Court has recognized that, under the Charter, all are entitled to the benefit of law. See, for instance, *Feeney*, *supra* note 3 per Iacobucci J. at p. 69, para. 82 and *R. v. Burlingham*, [1995] 2 S.C.R. 206 per Iacobucci J. at

any event, it is submitted that it is for the individual to decide whether, if it becomes apparent that notwithstanding the good faith efforts by police to facilitate a call to counsel, the detention is becoming unduly prolonged, he or she wishes to continue to assert this constitutional right.

38. Viewed against this backdrop, it becomes clear that a person who is the subject of a *Mann*-type investigative detention is the very kind of person contemplated in *Therens* who "may reasonably require the assistance of counsel":

> The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10--arrest and detention--are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.[32]

39. The reality that a detainee is in a position of legal jeopardy also affects how this Court's jurisprudence in respect of when a detainee has to be "re-cautioned" fits in to the analysis.

40. The Respondent relies upon this Court's decision in *R. v. Evans*[33] in support of its position that brief exploratory questions are permissible before a detainee is advised of his or her right to counsel. This Court held in *Evans* that where the police detain or arrest a person in respect of an offence, the s. 10(b) caution must be given not only upon arrest or detention but also if, during the course of questioning, the investigation becomes focused on a different and significantly more serious offence. The rationale for the rule that the s. 10(b) advice must be reiterated when the focus of the investigation changes is that, as of that moment, the nature of the jeopardy in which the detainee finds him or herself has also changed.[34]

41. In this context, McLachlin J. (as she then was) provided the following qualification of the rule, upon which the Respondent appears to place significant reliance:

> I should not be taken as suggesting that the police, in the course of an exploratory

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p. 242, para. 50: "we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter".

[32] *Therens*, *supra* note 1 at pp. 641-42 [emphasis added].

[33] [1991] 1 S.C.R. 869.

[34] *Id.* at pp. 892.

> investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.[35]

42. The Respondent suggests that the underlined extract applies by analogy to the investigative detention context, and permits a brief delay for the purpose of asking exploratory questions.

43. In fact, when *Evans* is read as a whole, it becomes clear that the *ratio* of the decision is that the moment there is a change in the focus of the investigation to a different and significantly more serious offence, the s. 10(b) caution must be repeated. The duty arises when the shift in the investigation places the accused in a position of greater legal jeopardy. By way of contrast, an investigation may "touch on a different offence" without amounting to an investigation of that other matter. The extent of the detainee's jeopardy is not thereby affected.

44. A good example of the latter situation is found in the Court of Appeal for Ontario's decision in *R. v. Sawatsky*.[36]

45. The accused was detained and questioned in respect of a suspected arson in Peterborough. In the course of the interview, the accused brought up that she had set another fire in Kingston. The police had not been investigating the Kingston fire, of which they had not been aware.[37] The Court of Appeal held that:

> Where, as here, the detainee brings up other offences during an interview, the police will not be required to immediately advise the detainee of her s. 10(b) rights in relation to the other offences. If, however, the police embark on an investigation of the offences brought up by the detainee, they must restate the detainee's s. 10(b) rights before questioning her concerning those offences.[38]

46. Indeed, the Court went one step further and emphasized that, even where the detainee brings up other offences, exploratory questions will not be permitted "where the information provided is sufficiently specific and credible so as to provide reasonable grounds to take the information 'seriously' …". In such circumstances, "any further questions pass beyond the

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35 *Id.* at p. 893 [emphasis added].

36 (1997), 118 C.C.C. (3d) 17 (Ont. C.A.).

37 *Id.* per Doherty J.A. at pp. 24-25, para. 19.

38 *Id.* at p. 28, para. 33 [emphasis added].

exploratory stage and become an investigation of that different offence", such that an *immediate* s. 10(b) warning is required.[39] In other words, the caution need not be re-iterated until the detainee is in actual jeopardy in respect of the new matter.[40]

47. However, the context of a *Mann*-type investigative detention is fundamentally different. By definition, *from the outset* the detainee is in a position of jeopardy in respect of the offence for which he or she was detained. If not, the police could not have detained the person in the first place. *Evans* and *Sawatsky* are not authority for the proposition that the s. 10(b) warning may be delayed *after* a situation of real jeopardy has arisen.

E. Contextual Factor #5 – Parliament has not Required that the Section 10(b) Warning be Delayed in the Investigative Detention Context

48. In *Mann*, Iacobucci J. observed that:

> It is, of course, open to Parliament to enact legislation in line with what it deems the best approach to the matter, subject to overarching requirements of constitutional compliance. As well, Parliament may seek to legislate appropriate practice and procedural techniques to ensure that respect for individual liberty is adequately balanced against the interest of officer safety. In the meantime, however, the unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role.[41]

49. Likewise, in *Clayton*, Binnie J. emphasized that:

> Parliament is the appropriate body to consider and enact measures that lay down the particular circumstances in which investigative detention is permitted. However, Parliament has not yet enacted a law governing the police response to a situation such as we have in this case. Resort must therefore be had to the common law powers of the police, an area of the law beset with both uncertainty and controversy.[42]

50. Notwithstanding Iacobucci J.'s comments in *Mann* and Binnie J.'s exhortation in *Clayton*, Parliament has not enacted any legislation governing the power of investigative detention.

51. In this respect, this case is very different from the traffic stop cases, where the legislature had provided by necessary implication that s. 10(b) is to be delayed for a brief period. The Court was therefore in a good position to determine whether the legislation in issue amounted to a reasonable limit within the meaning of s. 1 of the Charter in light of the legislative scheme and of

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39 *Id.* at pp. 29-30, para. 38.

40 *Id.* at pp. 26-27, para. 28.

41 *Mann, supra* note 8 at pp. 70-71, para. 18.

42 *Clayton, supra* note 9 per Binnie J. at para. 58.

the measures chosen by the legislature to implement the scheme.[43]

52. By way of contrast, Parliament has not seen fit to enact any legislation that provides, either expressly or by necessary implication, that the s. 10(b) caution should be delayed in the context of investigative detention. Parliament's inaction belies the suggestion that a limitation of the s. 10(b) right to counsel in the investigative detention context is seen in Canadian society as a "pressing and substantial concern", let alone that it is necessary to allow the police to fulfill the public purpose of investigating crime.

53. Against the backdrop of these important contextual factors, the CCLA will now address the specific requirements of s. 10(b).

ISSUE #1: SECTION 10(b) REQUIRES THAT PEOPLE MUST BE ADVISED OF THEIR RIGHT TO COUNSEL IMMEDIATELY UPON DETENTION

54. It is respectfully submitted that, in seeking a solution to the conundrum posed by the right to counsel in the investigative detention context, this Court should not depart from its consistent jurisprudence to the effect that the words "without delay" in s. 10(b) mean, in effect, immediately. In *R. v. Debot*, Lamer J. (as he then was) held on this point that:

> The right to search incident to arrest derives from the fact of arrest or detention of the person. The right to retain and instruct counsel derives from the arrest or detention, not from the fact of being searched. Therefore immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel.[44]

55. In her concurring decision in *Debot*, Wilson J. made clear that she agreed with Lamer J. on this point and provided the rationale for this approach:

> Section 10(b) also instructs the police to inform a detainee of his or her rights to counsel "without delay". As I have stated elsewhere, the phrase "without delay" does not permit of internal qualification. As I pointed out in *R. v. Jacoy* and *R. v. Strachan*, the phrase does not mean "at the earliest possible convenience" or "after police 'get matters under control'", or even "without reasonable delay"; to which I add here that "without delay "likewise does not mean "after police have had a chance to search the suspect".[45]

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[43] *Orbanski, supra* note 10 per Charron J. at p. 22, para. 37. See also *R. v. Hufsky* [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257; *R. v. Saunders* (1988), 41 C.C.C. (3d) 532 (Ont. C.A.) per Cory J.A. (as he then was); *R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont. C.A.) per Moldaver J.A.; and *R. v. Campbell* (2003), 175 C.C.C. (3d) 452 (Man. C.A.) per Scott C.J.M. at pp. 468-470, paras. 44-51.

[44] *Debot, supra* note 6 at p. 1146 [emphasis added]. See also *Feeney, supra* note 3, at p. 55, para. 56.

[45] *Debot, supra* note 6 at pp. 1163-64 [emphasis added; references omitted]. The only exception that Wilson J. discussed was the situation where the police could not give the warning before subduing a detainee who posed an imminent risk to life or safety.

56. In urging the Court not to depart from its earlier jurisprudence on this point, the CCLA is not unmindful of the fact that, in *Mann*, this Court deliberately left for another day the issue of when a s. 10(b) warning might be required in the investigative detention context, thus leaving open the possibility that it might not be required "immediately".

57. However, the CCLA submits that, if any delay in the administration of the s. 10(b) warning is to be countenanced, the proper framework for this analysis is s. 1 of the Charter, not s. 10(b). This approach would be consistent with that advocated by Wilson J. in *Debot*:

> If there are to be limits on the right to counsel other than the limit required for the safety of the police, i.e., if there are to be qualifications put upon the words "without delay" in s. 10(b), then it seems to me that they must be supported under s. 1 of the Charter.[46]

58. Analyzing this issue under s. 1, as opposed to s. 10(b), would also be consistent with this Court's approach in the traffic stop cases. In *Orbanski*, this Court held that "the right to counsel is triggered <u>from the moment</u> a driver is 'detained' within the meaning of s. 10".[47] Accordingly, this Court considered the validity of the delay in the context of s. 1.[48]

59. Finally, conducting the relevant analysis under s. 1 places the onus of showing that a delay in administering the s. 10(b) warning is necessary to give effect to the common law police power of investigative detention squarely where it belongs: upon the entity making the claim of necessity and in the best position to adduce evidence to support this claim – the State.

ISSUE #2: <u>A BRIEF DELAY IN ADVISING DETAINEES OF THE RIGHT TO COUNSEL MAY BE JUSTIFIABLE UNDER s. 1, IN LIMITED CIRCUMSTANCES</u>

60. In the context of s. 1 of the Charter, the CCLA submits that there is a potential solution that would recognize the need for the new common law power of investigative detention to be exercised efficiently while not sacrificing the purposes underlying s. 10(b). In short, the CCLA submits that a brief delay in giving the full s. 10(b) caution may be justified provided that (1) the police make clear to the citizen that he or she is detained and provide an abbreviated s. 10(b) warning, and (2) any incriminating evidence discovered by the police from the time of the detention until the time a full s. 10(b) warning is given is inadmissible at trial except for the limited purpose of justifying certain subsequent police conduct, such as an arrest.

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46 *Id.* at p. 1165 [emphasis added].

47 *Orbanski, supra* note 10 per Charron J. at p. 20, para. 30 [emphasis added].

48 *Id.* at para. 33. See also the cases cited at *infra* note 66, where the same approach was adopted.

61. The CCLA submits that this solution may satisfy the *Oakes* test. With respect, the solution arrived at in the Court below does not.

A. Pressing and Substantial Objective

62. At paragraph 43 of its Factum, the Respondent Crown suggests that "enabling police officers to respond quickly, effectively and flexibly to rapidly evolving dynamics as they execute their duty to investigate crime and keep the peace is a pressing and substantial objective".

63. With respect, this states the objective too broadly. Indeed, it comes very close to the formulation objected to by Le Bel J. in his dissenting reasons in *Orbanski* to the effect that: "what the police need, the police get".[49]

64. Moreover, the fact that Parliament has chosen not to legislate in this area belies any suggestion of a societal recognition of a "pressing and substantial objective" of suspending s. 10(b) in the context of investigative detention.

65. However, given that this Court has recognized that a limited power of investigative detention exists in certain circumstances, it follows that there is a pressing and substantial concern that this power not be eviscerated by requirements that render its reasonable exercise impossible or completely impractical.

B. Proportionality

1. Rational connection

66. The CCLA agrees that there is a rational connection between slightly adjusting the timing and/or extent of the s. 10(b) warning and the objective of ensuring that the power of investigative detention can be carried out in a practical and efficient manner.

2. Minimal impairment

67. It is in respect of the minimal impairment requirement of the *Oakes* test that the solution adopted by the Court below is deficient.

68. With respect, the Court below erred by treating the s. 10(b) warning as an "all or nothing" proposition. Although the Court considered whether the timing of the warning could be postponed in the investigative detention context, it failed to consider a solution that impairs the right to counsel less: requiring an immediate s. 10(b) warning with an attenuated *informational*

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[49] *Supra* note 10 at p. 41, para. 81.

component.

69. This Court has held that s. 10(b) contains an appropriately robust informational component. Upon arrest or detention, a person must be advised not only of the right to counsel, but also of information about "access to counsel free of charge where the accused meets prescribed financial criteria set by provincial the Legal Aid plan" and of "information about access to immediate, although temporary legal advice [through duty counsel] irrespective of financial status".[50] If there is a 1-800 duty counsel service, the detainee must be provided with this information as well.[51] In Ontario, the Court of Appeal has also held that in some circumstances the detainee must be advised of the right to speak with counsel in private.[52]

70. Although the Respondent has not adduced any evidence, be it expert policing evidence or otherwise, to discharge its onus under s. 1, it may be conceded that, as a matter of common sense, the provision of the "full" s. 10(b) warning at the very outset of a brief *Mann*-type investigative detention may be impractical.[53]

71. However, there is no evidence before the Court, and it does not follow inevitably as a matter of common sense, that it would be impractical to provide an abbreviated s. 10(b) warning upon investigative detention. For instance, the officer could say words to the effect that "I am stopping you because I want to ask you a few questions. You do not have to answer. If you wish to, you may speak to a lawyer before deciding whether to speak with me. Do you understand?"

72. It must be emphasized that this warning, or some form of it (the CCLA does not propose that any specific script must be followed) would not have to be given to every person with whom the police wish to speak. The police may wish to ask a person questions without detaining them. In such circumstances, no warning need be given. It is only when the police choose to exercise the extraordinary power of investigative detention, in which, by definition, the person is in actual jeopardy, that an abbreviated warning is required.

73. Not only is there no evidence that such a solution would be impractical, there is evidence that such a warning can be given without subverting the purpose of investigative detention.

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50 *Brydges, supra* note 2 per Lamer J. (as he then was) at p. 215.

51 *R. v. Bartle*, [1994] 3 S.C.R. 173, per Lamer C.J.C. at p. 201; *Prosper, supra* note 24 at p. 279.

52 *R. v. Jackson* (1993), 86 C.C.C. (3d) 233 (Ont. C.A.) per Goodman J.A. at pp. 240-241.

53 *R. v. Ngo*, [2005] O.J. No. 2678 (C.J.) per B.W. Duncan J. at para. 29.

74. In *R. v. Lewis*, the police conducted an investigative detention at Pearson Airport upon receiving an anonymous tip that a traveler had drugs in his luggage. The Court of Appeal for Ontario, per Doherty J.A. held that the police violated s. 10(b) by failing to give a warning at the outset of the detention, although the Court did not wish to be taken to be deciding that "every investigative detention requires compliance with s. 10(b)".[54]

75. However, it is significant that, at the very outset of the detention, the police officer advised the detainee "that he was investigating a possible narcotics offence and that the respondent need not say anything, but that anything he might say could be given in evidence at a later time".[55] In other words, the officer was fully able to advise the detainee of his right to remain silent without compromising in any way his ability to carry out the investigative detention. If the police can advise detainees of their rights to silence in such circumstances, there is no reason whatsoever why the police could not also provide an abbreviated s. 10(b) warning.[56]

76. Likewise, the case of *R. v. Hanano*[57] involved an investigative detention at the door to a bus station, again in the context of a narcotics investigation. Immediately upon detention, the officers advised the detainee that "she was being detained for a drug investigation as they believed she was carrying drugs".[58] They then read her a quite detailed "Notice of Warrantless Consent to Search" that was part of "the formatted section of [the] police notebook".[59] The detainee expressed agreement to the search. Drugs were found and the detainee was arrested.[60]

77. Although the officers did not provide any s. 10(b) warning at the outset of the investigative detention, there was no suggestion that it would have been the least bit impractical to do so, let alone that doing so would somehow have defeated the purpose of the investigative detention. On the contrary, the officers testified that "<u>they were trained to provide the right to counsel and police caution upon detention and arrest</u>", but one constable testified that she simply "forgot to

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54 (1998), 122 C.C.C. (3d) 481 (Ont. C.A.) per Doherty J.A. at p. 493, para. 28.

55 *Id.* at p. 486, para. 6.

56 Likewise, the case of *R. v. Schrenk*, [2007] M.J. No. 154 (Q.B.) involved a roadside investigative detention during the course of which the accused was told that he did not have to answer the officer's questions: see para. 8. When, thereafter, the accused was detained for investigative purposes, he was advised immediately of his right to counsel, without any apparent adverse effect on the police operation: *id.*

57 [2007] M.J. No. 11 (Q.B.) per Spivak J.

58 *Id*. at para. 6.

59 *Id.* at para. 7.

60 *Id.* at paras. 8-9.

read those rights to Hanano [when] she was detained at the east exit doors".[61] Accordingly, the Crown could not show that the consent to the search was "truly informed and therefore valid".[62]

78. Once again, there is no reason to suppose that some form of s. 10(b) warning could not have been given. Indeed, the inference that arises out of the *Hanano* case is that the s. 10(b) warning would have been given had the officers remembered to do so.

79. *Hanano* also illustrates the reason why some form of s. 10(b) warning is required in the context of investigative detention. There is no doubt that the detainee was in considerable jeopardy. She had actually been physically detained, with the officers taking hold of her arms.[63] If she had been advised of her right to counsel, and chosen to exercise it, no reasonable lawyer receiving the call would doubt that "she may reasonably need the assistance of counsel". Had she done so, she would have been able to make an informed decision as to whether to allow the officers to search her bag. In short, s. 10(b) would have operated in precisely the manner contemplated by this Court in *Therens*.[64]

80. Moreover, it is doubtful that the exercise by a detainee of this right would be as disruptive as was supposed in the Court below. This Court can take judicial notice that, in 2008, a significant percentage of the population carry cell phones or other wireless devices and so could contact a lawyer with minimum fuss. Indeed, it is interesting to note that, in *Orbanski*, the investigating officer offered the detainee the use of a cell phone for this purpose.[65]

81. Certainly, in the absence of any evidence on this point, this Court should not assume that the exercise by detainees of their right to counsel will defeat the purpose of the detention. Indeed, the finding in the Court below that the exercise of the right to counsel would be incompatible with the purpose of the detention presupposes that the purpose of the detention is to obtain an incriminating statement from the detainee in circumstances where the detainee, who is in jeopardy, is not aware of his or her rights. Such a purpose cannot be valid.

82. In reality, there are any number of reasons why the police might choose to initiate an

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61 *Id.* at p. 4, para. 10 [emphasis added].

62 *Id.* at p. 10, para. 45.

63 *Id.* at p. 3, para. 6. Incidentally, this case stands as a direct refutation to the Crown's assertion at para. 37 of its factum to the effect that the detention of a pedestrian will generally involve less compulsion that a traffic stop.

64 It is submitted that the correct approach to s. 10(b) in the investigative detention context is also illustrated in the Manitoba Court of Appeal's decision in *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.).

65 *Orbanski, supra* note 10 at p. 11, para. 6.

investigative detention (assuming the existence of reasonable grounds to detain) including for the purpose of preventing a person from escaping a crime scene or conducting a warrantless search in exigent circumstances to prevent the imminent loss or destruction of evidence. None of these purposes depend on the making by the detainee of an uninformed incriminating statement.

83. Because the CCLA is proposing that only an abbreviated s. 10(b) warning need be given at the very outset of an investigative detention, it is submitted that there remains an attenuated risk that a statement may be given by a detainee who is not fully aware of the right to counsel. Accordingly, in order for this compromise to satisfy the minimum impairment branch of the *Oakes* test, it is submitted that a further safeguard is necessary.

84. Specifically, it is submitted that, if no s. 10(b) warning is given upon detention, no incriminating evidence obtained by the accused, or as a result of a search "consented to" by an accused prior to the giving of a full s. 10(b) warning should be admissible for any purpose. If the abbreviated s. 10(b) warning is given, evidence obtained prior to the giving of a full s. 10(b) warning may be admitted, but only for the purpose of justifying certain subsequent police conduct, such as an arrest. This further qualification is not new, but represents a slight modification of the law applicable to detention in the traffic stop context.[66]

3. Proportionality between objective and effects

85. In addition to satisfying the minimal impairment requirement, the CCLA's proposed compromise carries with it certain additional benefits.

86. First, it attenuates a significant flaw in the solution adopted in the Court below; namely the fact that the line between "brief exploratory questions" (which the Court held may be asked of a detainee without a s. 10(b) warning), and a more fulsome investigation (requiring a warning) will be difficult to draw, as "exploration flows seamlessly into investigation".[67] Although it would still be expected that the time between the giving of an abbreviated and a full s. 10(b) warning will be brief, at least the attenuated warning provides a measure of protection in the interim.

87. Second, it will place the onus upon the police to clarify when a person is detained, and not on the citizen to guess. This Court has recognized that in some cases "the precise moment when

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[66] *Orbanski, supra* note 10, at pp. 32-33, para. 58; *Milne, supra* note 43 at pp. 128-129; *Ellerman, supra* note 29 at p. 3, para. 12.

[67] *Sawatsky, supra* note 36 at p. 29, para. 35.

detention arises is by no means easy to ascertain".[68] In such circumstances, the onus should be on the police to clarify the situation, or bear the risk should it turn out that a person was detained and not given a proper s. 10(b) warning. If it is not the officer's intention to detain a person, the officer should tell the person that he or she is not detained. If the officer does wish to detain the person, the officer should so advise the person and give at least an abbreviated s. 10(b) warning.

88. Finally, it is not clear whether the Court below would suspend the right to counsel for a brief time during an investigative detention, or whether it is simply the right *to be advised* of the right to counsel which is to be briefly suspended. It is submitted that the latter must be the case since it is hard to see how the police could legitimately prevent a person from, for example, calling a lawyer on a cell phone prior to deciding whether to answer police questions. If this is correct, and the right to counsel remains in effect, then there is no policy reason to support a deliberate decision not to advise the detainee of this right. As Fish J. emphasized in *Singh*:

> Neither of these rights has been given constitutional protection *on the condition that it not be exercised*, lest the investigation of crime be brought to a standstill. On the contrary, the policy of the law is to facilitate, and not to frustrate, the effective exercise of both rights by those whom they are intended to protect. They are Charter rights, not constitutional placebos.[69]

89. It is submitted that the CCLA's proposed approach is consistent with the goal of "facilitating, and not frustrating the effective exercise" of the right to counsel, while at the same time not unduly hampering the duty of the police to investigate crime.

PARTS IV & V- COSTS SUBMISSIONS AND ORDER SOUGHT

90. The CCLA respectfully requests that this Court allow the appeal, set aside the conviction, and order a new trial, and that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of March, 2008

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Counsel to the Intervener, CCLA

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[68] *R. v. Schmautz*, [1990] 1 S.C.R. 398 per Gonthier J. at p. 415.

[69] *Singh*, *supra* note 20 at para. 87 [emphasis in original].

PART VI – TABLE OF AUTHORITIES

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10.	*R. v. Ellerman*, [2000] A.J. No. 150 (Alta. C.A.) (CCLA Book of Authorities, Tab 10)	36
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17.	*R. v. Hufsky*, [1988] 1 S.C.R. 621 (CCLA Book of Authorities, Tab 16)	51
18.	*R. v. Jackson* (1993), 86 C.C.C. (3d) 233 (Ont. C.A.) (CCLA Book of Authorities, Tab 17)	69

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19.	*R. v. Jones*, [1994] 2 S.C.R. 229 (CCLA Book of Authorities, Tab 18)	27
20.	*R. v. Ladouceur*, [1990] 1 S.C.R. 1257 (CCLA Book of Authorities, Tab 19)	51
21.	*R. v. Latimer*, [1997] 1 S.C.R. 217 (CCLA Book of Authorities, Tab 20)	31
22.	*R. v. Lewis* (1998), 122 C.C.C. (3d) 481 (Ont. C.A.) (CCLA Book of Authorities, Tab 21)	74, 75
23.	*R. v. M.(M.R.),* [1998] 3 S.C.R. 393 (CCLA Book of Authorities, Tab 22)	31
24.	*R. v. Mann,* [2004] 3 S.C.R. 59 (Appellant's Book of Authorities, Tab 8)	14, 15, 17, 18, 21, 33, 48
25.	*R. v. Mellenthin*, [1992] 3 S.C.R. 615 (CCLA Book of Authorities, Tab 23)	2, 24
26.	*R. v. Milne* (1996), 107 C.C.C. (3d) 118 (Ont. C.A.) (Appellant's Book of Authorities, Tab 9)	51
27.	*R. v. Ngo*, [2005] O.J. No. 2678 (C.J.) (CCLA Book of Authorities, Tab 24)	70
28.	*R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3 (CCLA Book of Authorities, Tab 25)	14, 51, 58, 63, 80, 84
29.	*R. v. Powell,* [2000] O.J. No. 2229 (C.J.) (CCLA Book of Authorities, Tab 26)	25
30.	*R. v. Prosper*, [1994] 3 S.C.R. 236 (CCLA Book of Authorities, Tab 27)	29, 69
31.	*R. v. Saunders* (1988), 41 C.C.C. (3d) 532 (Ont. C.A.) (CCLA Book of Authorities, Tab 28)	51
32.	*R. v. Sawatsky* (1997), 118 C.C.C. (3d) 17 (Ont. C.A.) (Appellant's Book of Authorities, Tab 11)	44, 45, 46, 86
33.	*R. v. Schmautz*, [1990] 1 S.C.R. 398 (CCLA Book of Authorities, Tab 29)	87
34.	*R. v. Schrenk,* [2007] M.J. No. 154 (Q.B.) (CCLA Book of Authorities, Tab 30)	75
35.	*R. v. Singh*, 2007 S.C.C. 48 (CCLA Book of Authorities, Tab 31)	26, 88
36.	*R. v. Stillman*, [1997] 1 S.C.R. 607 (Appellant's Book of Authorities, Tab 12)	2, 27
37.	*R. v. Strachan,* [1988] 2 S.C.R. 980 (CCLA Book of Authorities, Tab 32)	2
38.	*R. v. Suberu* (2007), 218 C.C.C. (3d) 27 (Ont. C.A.) (CCLA Book of Authorities, Tab 33)	3, 8, 30, 37

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40.	*R. v. Therens*, [1985] 1 S.C.R. 613 (CCLA Book of Authorities, Tab 35)	1, 23, 38, 79
41.	*R. v. White*, [1999] 2 S.C.R. 417 (CCLA Book of Authorities, Tab 36)	27
42.	*R. v. Young* (1997), 116 C.C.C. (3d) 350 (Ont. C.A.) (CCLA Book of Authorities, Tab 37)	26

PART VII – LIST OF STATUTES

1. *Canadian charter of rights and freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

B E T W E E N :

MUSIBAU SUBERU - and - HER MAJESTY THE QUEEN

Court File No. 31912

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

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