Court File No. 31912

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)

- and -

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

Interveners
(Interveners)

FACTUM OF THE INTERVENER, THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(pursuant to Rules 42 and 55 to 59 of the *Rules of the Supreme Court of Canada*)

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PART I - STATEMENT OF FACTS

A. Overview of the Position of the Criminal Lawyers Association (Ontario)

1. This appeal raises significant issues regarding the meaning of the right to counsel in s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* in the context of an investigative detention, as well as the use that can be made at trial of evidence obtained during an investigative detention. The power of investigative detention is not a statutory power but a court-recognized common law police power. Accordingly, absent legislative intervention, it falls to the Court to order further legal developments and to clarify the scope and limits of the power. This Court has never before directly considered these questions.

2. The Criminal Lawyers Association (Ontario) (the "CLA") submits that the "brief interlude" approach to this issue, adopted by the Ontario Court of Appeal in *R. v. Suberu*, is incorrect and should not be affirmed. Rather, the context of investigative detention requires that this Court craft a balanced approach which adequately protects a detained person's fundamental right against self-incrimination at the same time as it allows for the flexibility needed to effectively conduct investigations.

3. The CLA submits that the appropriate approach for this Court to adopt is to permit investigative detentions without the right to counsel so long as the use of conscriptive evidence so obtained is limited to police investigative purposes. Such an approach would be consistent with the approach adopted by this Court in *R. v. Orbanski* on the question of the right to counsel in the context of roadside screening measures to assess the sobriety of drivers.

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

B. The Facts

4. The CLA adopts the facts as set out in the Appellant's Factum.

PART II - POINTS IN ISSUE

5. This appeal raises important questions regarding the application of s. 10(*b*) of the *Charter* in the context of investigative detentions. Specifically, the issue on this appeal is:

> (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?

6. The CLA submits that the reasons of the Court of Appeal are incorrect. Specifically, it is the position of the CLA that:

- The brief interlude approach of the Court of Appeal is unacceptable because it fails to give any meaningful protection to a detained person's s. 10(*b*) rights, is inconsistent with this Court's jurisprudence as to the meaning of without delay in s. 10(*b*), and fails to provide the police with meaningful guidance.

- This Court should only permit investigative detentions without the right to counsel if it also limits the use of conscriptive evidence so obtained to police investigative purposes. This conscriptive evidence should not be used at trial to incriminate the detained person. Such an approach balances the detained person's right against self-incrimination with the police's need for flexibility when conducting an investigation.

- There are three different ways for the Court to arrive at this position:

- by finding that the detained individual's right to counsel has been violated under s. 10(*b*) and that the evidence should be excluded under s. 24(2) of the *Charter;*

- by finding that the evidence should be excluded under s. 7 and s. 11(*d*) of the *Charter;* or

- by delineating the scope of the common law power of investigative detention to include an inherent restriction that any compelled evidence obtained during the detention in the absence of the right to counsel can only be used for investigative purposes.

PART III -STATEMENT OF ARGUMENT

A. Introduction

7. In *R. v. Mann,* relying on the two part test of the English Court of Criminal Appeal in *R. v. Waterfield,* this Court recognized a common law police power of investigative detention in the specific circumstances of that case. Iacobucci J., writing for the majority, held that such investigative detentions had to be "brief in duration" and based on "reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary." The Court explicitly left open the question of the application of s. 10(*b*) of the *Charter* in the context of investigative detentions.

> *R. v. Mann,* [2004] 3 S.C.R. 59 at paras. 17, 22, 45 [*Mann*].
> *R. v. Waterfield,* [1963] 3 All E.R. 659 [*Waterfield*].

8. Section 10(*b*) of the *Charter* provides:

> Everyone has the right on arrest or detention

> …
> (b) to retain and instruct counsel without delay and to be informed of that right.

9. At the heart of this appeal is the tension between the need for quick and effective police investigation, unconstrained by the practical or logistical difficulties of complying with s. 10(*b*) during an investigative detention and the right of a detained person to retain and instruct counsel without delay and to be informed of that right, which has been found to be central to protecting a detained person's right against self-incrimination. This tension requires the Court to balance these two objectives, without sacrificing the pre-eminence of the constitutional purpose.

10. It should be noted that this case is not about when an interaction between a police officer and a person suspected of an offence amounts to a detention for the purposes of s. 10(*b*). The Crown does not take issue with the trial judge's finding that the Appellant was detained. Rather, this case is about the scope of a detainee's s. 10(*b*) rights once an investigative detention has been established.

Ruling of the Ontario Court of Justice, Appellant's Record at pp. 7-8.

B. Why the "Brief Interlude" Approach of the Ontario Court of Appeal should be Rejected

11. At the Court of Appeal, Doherty J.A. held:

> [A] brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel under s. 10(b) during which the officer makes a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted, is not inconsistent with the requirement that a detained person be advised of his or her right to counsel "without delay".
>
> *Reasons for Judgment of the Court of Appeal of Ontario,* Appellant's Record at p. 36.

12. Applying this "brief interlude" approach to this case, Doherty J.A. found that there was no violation of s. 10(*b*), despite the fact that Suberu had been detained, had not been granted his right to counsel, and had made incriminating statements during the investigative detention. These statements were later used against him at his trial.

13. The Court of Appeal has followed this approach subsequently in *R. v. Nguyen,* an investigative detention case that raised both the right to counsel under s. 10(*b*) and the right to be informed of the reasons for detention under s. 10(*a*). Interestingly, the Court of Appeal did not apply the "brief interlude" approach to s. 10(*a*), holding that "the right against self-incrimination is fundamental to the spirit of s. 10 of the *Charter.*"

R. v. Nguyen (2008), 232 O.A.C. 289 at paras. 7, 21-22.

14. It is the position of the CLA that the "brief interlude" approach of the Court of Appeal is incorrect and should not be affirmed by this Court.

15. First, the Court of Appeal's approach fails to give any meaningful protection to a detained person's s. 10(*b*) rights. Despite recognizing 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," Doherty J.A. strongly favours flexible policing tools at the expense of the constitutional rights of detained persons.

16. Second, Justice Doherty's "brief interlude" approach is inconsistent with the plain language of s. 10(b). As this Court has repeatedly held, "without delay" should be interpreted to mean "immediately". For example, in *R v. Brydges,* a majority of this Court held:

> 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. (emphasis in the original)
>
> *R. v. Brydges*, [1990] 1 S.C.R. 190 at 206.

17. Similarly, in *R. v. Debot,* Lamer J, for the majority, explained that it is *immediately* upon *detention* that a detainee has the right to be informed of the right to retain and instruct counsel.

> *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1146.

18. Accordingly, there is no principled basis for suggesting that "without delay" should be interpreted less restrictively in the context of a detention as opposed to that of an arrest. Rather, a detained individual is equally at risk of self-incrimination and in need of legal counsel as is someone under arrest.

19. Third, the concept of a "brief interlude" fails to provide any meaningful guidance to the police as to the appropriate length of time before compliance with s. 10(*b*) is required. As demonstrated by American jurisprudence, the term "brief" in relation to investigative detentions has frequently proven to be a nebulous and flexible concept that can include detentions lasting for extended periods of time. Uncertainty born of overly vague language will invite an incremental erosion of the right to which the "brief interlude" is intended to be an exception.

> James Stribopoulos, "Investigative Detention: A Failed Experiment?" (2003) 41:2 Alta. L. Rev. 335 at 373-375, n. 211.

20. Contrary to the Crown's submissions, whether or not the questioning during a "brief interlude" is exploratory in nature does not assist in clarifying when an officer must advise a detainee of his or her right to counsel. As the Court of Appeal noted, "even exploratory questions like those asked [in the present case], may have an incriminatory potential." In such situations, a

detained individual's need for legal counsel in order to protect against the risk of self-incrimination is as great as in the context of an arrest.

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

C. A Balanced Approach: Investigative Detention without the Right to Counsel, So Long as Use of Evidence Limited

21. The preferred approach is to allow investigative detentions without the right to counsel so long as the evidence obtained is only used by police as an investigative tool to confirm or deny the existence of reasonable and probable grounds to make an arrest. Under this model, conscriptive evidence obtained during an investigative detention could not be used for trial purposes to incriminate or convict the detained individual.

(i) Policy Arguments Favour this Approach

22. In *R. v. White,* this Court recognized the importance of "balancing between society's goals 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." In *White*, this balance was achieved by finding that statements made under compulsion of the British Columbia *Motor Vehicle Act* were inadmissible in criminal proceedings against the declarant. The Court explained:

> [T]he grant of a use immunity permits the state to achieve the important objective of acquiring relevant information immediately…while protecting the individual against jeopardy from the use of that information against him or her in penal proceedings at a later time.
>
> *R. v. White,* [1999] 2 S.C.R. 417 at para. 71.

23. In the present case, allowing investigative detentions without the right to counsel but restricting the use of any conscriptive evidence at trial, would achieve a similar balance as in *White*.

24. This approach would provide partial protection to a detained person's s. 10(*b*) rights. In *R. v. Bartle,* this Court recognized that one of the central purposes of the right to counsel is protection against the risk of self-incrimination. Although detained individuals would not have the full protection of s. 10(*b*), including the opportunity to retain and instruct counsel, under the proposed approach they would at least have protection against self-incrimination.

> *R. v. Bartle*, [1994] 3 S.C.R. 173 at para. 16 [*Bartle*].
> See also *R. v. M. (M.R.),* [1998] 3 S.C.R. 393 at para. 67.

25. At the same time, this approach would address the practical and logistical difficulties posed by providing a right to counsel during an investigative detention and would give the police the flexibility they need to conduct quick and effective investigations.

26. Further, this approach, unlike the Court of Appeal's approach, would provide the police with clear guidance. It would enable them to conduct an investigative detention without having to be concerned with s. 10(*b*) so long as they limited their use of any evidence so obtained to investigative purposes and to establishing the reasonable and probable grounds needed to make an arrest.

27. Practically speaking, this approach does not impose any onerous obligations on the police. In this case, it would have merely required the investigating officer to ask Suberu again,

after he had been arrested and given his right to counsel, the same questions that had been posed during the initial investigative detention and that had resulted in the incriminating statements.

(ii) This Approach is Consistent With the Limited Purpose for which Investigative Detention was Created

28. The CLA's proposed compromise approach is implied by the fact that the common law power of investigative detention was created for a very limited purpose. When this Court first recognized this common law police power in *Mann,* Iacobucci J., for the majority, described it as "detention *for investigative purposes*" and noted that it was a "*limited* police power" (emphasis added). Similarly, Binnie J., in dissent in *R. v. Clayton,* described it as a "*narrowly targeted* police power…based on "individualized suspicion"" (emphasis added).

> *Mann, supra* at paras. 18, 20.
> *R. v. Clayton,* 2007 SCC 32 at para. 81 [*Clayton*].

29. Academic commentary has described this power as a "useful springboard to further police investigation" which can provide police with the "time and opportunity to formulate grounds to effect a formal arrest."

> Jason A. Nicol, ""Stop in the Name of the Law": Investigative Detention" (2002) 7 Can. Crim. L.R. 223 at 250.

30. All of these comments suggest that this common law police power was recognized by the Courts for a very limited purpose, namely to facilitate the police's ability to conduct an initial investigation into a crime and to help them determine whether or not they have the reasonable and probable grounds needed to make an arrest. Accordingly, it makes sense to limit the use of evidence obtained during an investigative detention to the same narrow purpose for which the police power was created.

31. This position also finds support in the fact that the standard necessary to justify an investigative detention is much lower than the reasonable and probable grounds standard required for making an arrest. In *Mann,* this Court described the applicable standard as "reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary." Such a low standard does not justify the gathering of incriminating evidence, in the absence of the right to counsel, which will be used against a detained person at trial.

Mann, supra at para. 45.

(iii) This Approach is Consistent with this Court's Jurisprudence Regarding Roadside Screening Measures

32. Adopting this proposed approach would allow for this Court's s. 10(*b*) jurisprudence to develop in a manner consistent with its jurisprudence regarding roadside screening tests for impairment.

33. In *R. v. Milne,* the Ontario Court of Appeal held that the evidence resulting from roadside screening tests for impairment could not be admitted at trial to prove impairment because it would render the trial unfair. Central to Moldaver J.A.'s analysis was the fact that the statutory police power in question was created for a limited purpose, namely "to provide police officers with the tools needed to effect the immediate removal of impaired drivers from the highway." Specifically, he noted that "these tests were not meant to provide the police with a means of gathering evidence that could later be used to incriminate and convict the motorist of impaired driving at trial."

R. v. Milne (1996), 28 O.R. (3d) 577 at 586-587 [*Milne*].

34. This reasoning in *Milne* was explicitly accepted by this Court in *Orbanski*. Applying a similar approach in the present case to the issue of the right to counsel during street-level investigative detentions would be consistent with the approach adopted by the Ontario Court of Appeal in *Milne* and this Court in *Orbanski.* Given that the statutory power regarding to roadside screening tests for impairment and the common law power of investigative detention were both created for a limited purpose, namely to provide the grounds for further investigative steps, there is no basis to apply different approaches to s. 10(*b*) in these two comparable contexts.

Orbanski, supra at paras. 58-60.

(iv) Three Options: How to Limit the Use of Conscriptive Evidence Obtained During Investigative Detentions

35. Although there are strong policy and legal reasons underlining this proposed approach, how exactly should the Court arrive there? Conceivably, there are three potential options for restricting the use of conscriptive evidence obtained during an investigative detention.

36. One option would be to find that the evidence should be excluded under s. 24(2) of the *Charter.* This section allows the Court to exclude evidence obtained in a manner that infringes any *Charter* right where its admission would bring the administration of justice into disrepute.

37. In this case, there was a clear violation of the s. 10(*b*) right to counsel. As noted by this Court in *Mann,* "[a] detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny." The fact that the investigative detention in this case was a detention within the meaning of the *Charter* is not disputed. The trial judge accepted that the Appellant was detained when the officer stopped him and told him that he wanted to speak with him. This finding was not challenged on appeal.

Mann, supra at para. 20.

38. Furthermore, the Appellant was not advised of his right to counsel at any point during the investigative detention. As discussed above, "without delay" in the context of s. 10(*b*) is best understood as meaning immediately upon detention or arrest. Accordingly, it follows that the Appellant's s. 10(*b*) rights were infringed.

39. As well, arguably, this violation is not justified under s. 1. In particular, it does not meet the proportionality test. In *Orbanski,* this Court accepted that a limitation on the right to counsel was justifiable under s. 1 precisely because the evidence obtained during roadside sobriety tests could "only be used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired." However, had those same tests been used to create self-incriminating evidence for trial purposes, the limitation on the right to counsel would not have been found to be justified. The same s. 1 analysis would apply to the present case.

Orbanski, supra at para. 58.

40. Having found an unjustified violation of the *Charter*, it would be open for this Court to exclude the evidence under s. 24(2). During the investigative detention, the Appellant provided the investigating officer with a number of conscriptive statements. As this Court noted in *R. v. Ross,* "[a]ny evidence obtained, after a violation of the Charter, by conscripting the accused against himself through a confession…would tend to render the trial process unfair." Arguably, the admission of the conscriptive statements in this case resulted in an unfair trial.

R. v. Ross, [1989] 1 S.C.R. 3 at 16.

41. Although this approach might be acceptable in this individual case, it is not satisfactory as an overall solution. Relying on s. 24(2) for every investigative detention would require the Court to sanction repeat violations of the *Charter.* Police would be told that they could detain for investigative purposes without providing a right to counsel, but then, after the fact, that action would be found to be a *Charter* violation, warranting exclusion of conscriptive evidence under s. 24(2).

42. Another way for the Court to limit the use of conscriptive evidence obtained during an investigative detention would be for this Court to rely on its residual exclusionary discretion found in s. 11(*d*) and s. 7 of the *Charter.* This approach, which does not require the Court to find that there has been a breach of the *Charter,* was recognized in *R. v. Harrer,* where Laforest J., writing for the majority, explained that it was open for him to:

> reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the *Charter*, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial.
>
> *R. v. Harrer,* [1995] 3 S.C.R. 562 at para. 21.

43. Notably, this same rationale was relied upon by Justice Moldaver in *Milne*, when he held that evidence from roadside sobriety tests should not be admitted at trial to prove impairment since, although the evidence was "not obtained unfairly or unconstitutionally," its admission would "render the trial unfair". As noted, *Milne* was adopted by this Court in *Orbanski.*

> *Milne, supra* at 586.
> *Orbanski, supra* at paras. 58-60.

44. Similarly, it is open for this Court to rely on its residual exclusionary discretion in s. 11(*d*) and s. 7 in the present case. However, as noted, using an exclusionary rule in this way to provide a blanket exemption for all conscriptive evidence obtained during an investigative detention is problematic. On the other hand, requiring an accused to apply after the fact to exclude evidence on this basis in the case of every investigative detention is also unacceptable since it fails to provide police with the guidance they require regarding when evidence from an investigative detention will be admissible at trial.

45. However, neither of these exclusionary rules need be relied upon by the Court in order to limit the use of evidence obtained from an investigative detention. A third and preferable approach is for this Court to define the scope of the common law power of investigative detention so that it includes an inherent limitation that any conscriptive evidence obtained during the detention can only be used for investigative purposes to determine whether the necessary grounds exist to make an arrest.

46. It is important to remember that the police power to detain for investigative purposes is not a statute based power created by the legislature. Rather, it is a common law power that has been recognized by the Court. Accordingly, the "judiciary is the proper forum for the…*ordering of further legal developments*, absent legislative intervention" (emphasis added). Because the legislature has failed to provide guidance on the meaning of the right to counsel in the context of an investigative detention, it is open for this Court, acting in its "custodial role", to step in and further refine and clarify the scope of this common law police power, including the uses to which evidence obtained during an investigative detention can be put.

Mann, supra at para. 18.

47. This approach requires that this Court delineate the scope of the power of investigative detention, in light of the denial of the right to counsel, by applying the two part test from *Waterfield.* The test was relied upon by this Court in both *Mann* and *Clayton,* as the basis for defining a common law power of investigative detention in the "particular context" of those cases. The test requires the Court:

> to consider whether (a) [the police] conduct [in question] falls within the general scope of any duty imposed by statute or recognised at common law and (*b*) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.
>
> *Waterfield, supra* at 661.
> *Mann, supra* at paras. 15-35.
> *Clayton, supra* at paras. 18-47.

48. Applying the first branch of the *Waterfield* analysis, the CLA accepts that the police officer was acting in the course of his duty to investigate and prevent crime, when he stopped and questioned the Appellant.

49. However, under the second branch of the *Waterfield* test, it is the position of the CLA that the investigative detention can only be a justifiable use of the power if the conscriptive evidence obtained during that detention is limited to investigative uses. As noted in *Dedman v. The Queen*:

> The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

In this case, the interference with liberty would be neither necessary nor reasonable if the police are able to use this power to obtain incriminating statements in the absence of the right to

counsel. The power to detain for investigative purposes can only be justifiable under the *Waterfield* test if its use is limited to that of a preliminary investigative tool.

Dedman v. The Queen, [1985] 2 S.C.R. 2 at 35.

50. Adopting this interpretation of the scope of the power of investigative detention would also insure that this power is consistent with s. 1 of the *Charter*. As noted, in *Orbanski,* this Court accepted that a limitation on the right to counsel was justifiable under s. 1 precisely because the evidence obtained during roadside sobriety tests could only be used as an investigative tool to confirm or reject the officer's suspicion. A similar s. 1 justification would apply to the present case.

Orbanski, supra at para. 58.

51. Although the issue of derivative evidence does not arise on the facts of this case, it should be noted that conscriptive evidence can include otherwise undiscoverable derivative evidence. As this Court explained in *R. v. Stillman,* derivative evidence is a subset of conscriptive evidence "whereby the accused is conscripted against himself (usually in the form of an inculpatory statement) which then leads to the discovery of an item of real evidence." It is the position of the CLA that evidence derived from conscripted statements obtained during an investigative detention should also be inadmissible at trial, unless it can be demonstrated that the evidence would have been otherwise discoverable. However, this approach would not apply to evidence obtained as a result of a lawful protective search incidental to the investigative detention, which has already been accepted by this Court in *Mann* and *Clayton,* given that such a search is non-conscriptive.

R. v. Stillman, [1997] 1 S.C.R. 607 at paras. 99 and 102.
Mann, supra at paras. 36-48.
Clayton, supra at paras. 48-49.

D. Conclusion

52. In conclusion, it is the position of the CLA that this Court should allow for investigative detentions without the right to counsel so long as any conscriptive evidence so obtained is *only* used by police as an investigative tool to confirm or deny the existence of reasonable and probable grounds to arrest. The Court should arrive at this approach by defining the scope of the common law power of investigative detention as including an inherent limitation on the use of conscriptive evidence obtained during the detention.

PART IV - NATURE OF THE ORDER REQUESTED

53. The CLA seeks leave to make oral submissions of not longer than 20 minutes.

54. The CLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 27, 2008

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PART V - TABLE OF AUTHORITIES

I. Cases Cited

II. Academic Commentary