File No. 31912

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

BETWEEN:

MUSIBAU SUBERU

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

-and-

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

Interveners

FACTUM OF THE INTERVENER – DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

Table of Contents

PART I – THE INTERVENER'S POSITION AS TO THE FACTS

A. Overview of the Position of the Director of Public Prosecutions

1. As this Court has recently noted, the police can hardly investigate crime without putting questions to persons who might have useful information, including the person suspected of having committed the crime.[1] As the Court below observed, however, there is a tension between this investigative imperative and the s.10(b) right to counsel. A rigid application of s. 10(b) in a dynamic investigative situation could seriously compromise both the investigation itself and the liberty interests of the persons being investigated.

2. It is the position of the Director of Public Prosecutions of Canada that this tension is best resolved by first recognizing, as this Court did in *R. v. Mann*, that not all interactions between individuals and the police are "detentions" in the sense in which that term is used in s. 10 of the *Charter*.[2] Where an interaction amounts to a detention in only the colloquial sense, there is no tension, as s. 10(b) is not engaged. Where the interaction amounts to a detention in the *Charter* sense, the tension is resolved by recognizing that investigative detentions do not trigger a right to counsel, having regard to the limited nature and scope of investigative detentions and the underlying purposes of s. 10(b). In the alternative, the inherent operational requirements of common law investigative detention constitute a reasonable limit on the s. 10(b) right to counsel pursuant to s. 1.

[1] *R. v. Singh*, 2007 SCC 48, at paragraph 28.
[2] *R. v. Mann,* [2004] 3 S.C.R. 59, 2004 SCC 52, at paragraph 19.

B. Facts

3. The Director of Public Prosecutions of Canada accepts as substantially correct the statement of facts set out in the factum of the Appellant.

PART II – THE INTERVENER'S POSITION ON THE POINTS IN ISSUE

4. The position of the Director of Public Prosecutions is as follows:

(i) Not all interactions between individuals and the police are "detentions" for s. 10 *Charter* purposes. A police interaction with an individual will be a true investigative detention, and will accordingly engage s. 10, only where there is "significant physical or psychological restraint." Interactions falling short of this standard do not engage s. 10.

(ii) Where there is a true investigative detention arising as a consequence of a significant physical or psychological restraint of the person, the right to counsel under s. 10(b) of the *Charter* is nonetheless **not** engaged. Having regard to both the restricted purpose and scope of investigative detentions, and the underlying purposes of s. 10(b), investigators are not required to provide individuals with a right to counsel before commencing an investigative detention.

(iii) Alternatively, the inherent operational requirements of investigative detentions constitute a reasonable limit on the s. 10(b) right to counsel pursuant to s. 1.

PART III – ARGUMENT

A. Not all interactions with the police amount to detentions under the *Charter*

5. This Court has drawn a clear distinction between detention for *Charter* purposes and detention in the merely colloquial sense:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so**, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview.** The person who is stopped will in all cases be "detained" in the sense of "delayed" or "kept waiting". **But the constitutional rights recognized by ss. 9 & 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.** [3] (bold emphasis added)
>
> …
>
> **It is not every delay occasioned by a communication between a person and a police officer or other state authority that will amount to a detention within the meaning of the *Charter***: see, for example, *R. v. Simmons* [cites omitted], and *Dehghani v. Canada (Minister of Employment and Immigration)* [cites omitted], where this Court found that "it would be absurd to suggest that routine questioning by a customs officer constitutes detention for the purposes of s. 10(b)".[4] (bold emphasis added)

6. This is a function of the more general principle that a qualification of a *Charter*-protected interest has to be *significant* before the *Charter* is actually engaged:

> I conclude that the appellant has suffered deprivation of liberty [for s. 7 purposes]. The next question is whether the deprivation is sufficiently serious to warrant *Charter* protection. The *Charter* does not protect against insignificant or "trivial" limitations of rights: *R. v. Edwards Books & Art Ltd*. [cites omitted]; *R. v. Jones* [cites omitted]; *Lavigne v. Ontario Public Service Employees Union* [cites omitted]; *Andrews v. Law Society of British Columbia* [cites omitted]. It follows that **qualification of a prisoner's expectation of liberty does not necessarily bring the matter within the purview of s. 7 of the *Charter*. The qualification must be significant enough to warrant constitutional protection**. To require that all changes to the manner in which a sentence is served be in accordance

[3] *R. v. Mann*, *supra*, at paragraph 19.
[4] *R. v. Elias; R. v. Orbanski*, [2005] 2 S.C.R. 3, 2005 SCC 37, at paragraph 30.

> with the principles of fundamental justice would trivialize the protections under the *Charter*. To quote Lamer J. in *Dumas, supra*, at p. 132, there must be a "substantial change in conditions amounting to a further deprivation of liberty".[5] (bold emphasis added)

7. In *Mann, supra*, this Court recognized that a police officer may briefly detain an individual for investigative purposes, if the police officer has reasonable grounds to suspect that there is a clear nexus between the individual and a recent or on-going criminal offence.[6] The purpose of the investigative detention is to provide the police officer an opportunity to ask questions aimed at quickly confirming or dispelling the suspicion.

8. However, the fact that a police officer may have reasonable grounds to detain an individual for investigative purposes does not mean that any interaction of the police officer with that individual amounts to a detention under the *Charter*. There must be a significant physical or psychological restraint, which cannot be presumed from the mere fact that the police officer stopped a person for investigative purposes.

9. As the Manitoba Court of Appeal noted in *R. v. H. (C.R.)*, the existence of significant psychological restraint cannot simply be presumed from the fact that there is an interaction with the police:

> [36] We have not yet reached a situation where a compulsion to comply will be inferred simply because the request comes from a police officer or that a compulsion to respond should be presumed unless the Crown can show

[5] *Cunningham v. The Queen*, [1993] 2 S.C.R. 143, at 151. See also *R. v. Edwards Books & Art Ltd*., [1986] 2 S.C.R. 713 (per Dickson C.J.C.), at 759; *R. v. Jones*, [1986] 2 S.C.R. 284, at 314; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at 259-260; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 168-169.
[6] *R. v. Mann, supra*, at paragraph 34.

> evidence of informed consent. It is true that the very nature of the police function and the circumstances which often bring the police into contact with individuals introduce an element of authority into a request made by a police officer. Certainly, there is a power imbalance between police and citizens, but that cannot mean that police can never ask questions. Instead, the power imbalance should be one of the factors to be considered in an analysis of the interaction and a consequent determination of whether there was a compulsion to comply.[7]

An evidentiary basis, which may require *voir dire* evidence of the accused, is required:

> [45] In most of the cases where a detention has been found, evidence of compulsion arises from the testimony of the accused on the *voir dire* . Although not conclusive, the testimony of the accused is often crucial to the question of whether there was a reasonable belief that a compulsion to reply was present …
>
> [46] I am not suggesting that there can never be a finding of detention in the absence of testimony from the accused, but such a determination would require stronger facts than exist in this case. The court must still have some evidence from which it can infer that the circumstances were such that the accused could reasonably have concluded that his freedom had been restrained. [8]

10. In other words, a stop of an individual for investigative purposes will only amount to a detention for *Charter* purposes, if the interference rises to the level of a significant physical or psychological restraint upon that person's freedom of movement.

B. Investigative detentions do not engage s. 10(b) of the *Charter*

(i) The purpose of s. 10(b) does not support its application to investigative detentions

11. As this Court observed in *R. v. Hebert*, the main purpose of s. 10(b) upon detention is to protect the right to silence:

> The scheme under the *Charter* to protect the accused's pre-trial right to silence may be described as follows. Section 7 confers on the detained person the right to choose whether to speak to the authorities or to remain silent. Section 10(b)

[7] *R. v. H.(C.R.)* (2002), 174 C.C.C. (3d) 67, at paragraph 36.
[8] *R. v. H.(C.R.), supra*, at paragraphs 45-46.

> requires that he be advised of his right to consult counsel and permitted to do so without delay.
>
> **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.[9] (bold emphasis added)

12. In the recent right to silence case *R. v. Singh*, this Court characterized detention in terms of state *control* over the individual, and endorsed a practical test for determining the point at which the right-to-silence caution is called for:

> [32] 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*. (As we shall see, the residual protection afforded to the right to silence under s. 7 of the *Charter* is only triggered upon 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. René Marin, in his text *Admissibility of Statements* (9th ed. (looseleaf)), at pp.2-24.2 and 2-24.3, provides a useful yardstick for the police on when they should caution a suspect:
>
> > The warning should be given when there are reasonable grounds to suspect that the person being interviewed has committed an offence. An easy yardstick to determine when the warning should be given is for a police officer to consider the question of what he or she would do if the person attempted to leave the questioning room or leave the presence of the officer where a communication or exchange is taking place. If the answer is arrest (or detain) the person, then the warning should be given.
>
> [33] These words of advice are sound. Even if the suspect has not formally been arrested and is not obviously under detention, police officers are well

[9] *R. v. Hebert*, [1990] 2 S.C.R. 151, at 176; see also *R. v. Bartle*, [1994] 3 S.C.R. 173, at 191.

> advised to give the police caution in the circumstances described by Marin. Of course, with the advent of the *Charter*, the s. 10 right to counsel is triggered upon arrest or detention. The right to counsel has both an informational and an implementational component. It seeks to ensure that **persons who become subject to the coercive power of the state will know about their right to counsel and will be given the opportunity to exercise it so they can make an informed choice whether to participate in the investigation against them**.[10] (italics in original; bold emphasis added)

13. The right to counsel also serves to provide an arrested or detained person a means by which he or she can seek to regain his or her liberty interest as soon as possible.[11]

14. However, investigative detentions and the permissible lines of enquiry under such detentions are qualitatively different from custodial detentions and interrogations. An investigative detention must be of brief duration; the police officer may only ask a moderate number of questions aimed at quickly confirming or dispelling the officer's suspicion; the person under investigation need not answer any of the questions posed by the officer. If the officer's suspicion is confirmed, the police officer may decide to arrest the individual and must then provide the right to counsel. If, however, the police officer chooses not to arrest the individual, or if the suspicion is dispelled or not confirmed, the police officer must permit the individual to leave.

15. Given the restricted nature and scope of investigative detentions, they do not give rise to the same concerns as custodial detentions and interrogations. Individuals under investigative detention, while they may be subject to significant physical or

[10] *R. v. Singh*, *supra*, at paragraphs 32-33.

psychological restraint, do not typically find themselves in the vulnerable position experienced by those undergoing custodial detention and interrogation.

16. The United States Supreme Court has held that "*Terry* stops" (the American equivalent to investigative detentions) do *not* engage the U.S. *Miranda* right, which is analogous to the *Charter* s. 10(b) right to be informed of the right to counsel, because of the relatively non-threatening nature of such detentions:

> In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court addressed the problem of how the privilege against self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:
>
> > **"[The] prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way**. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."
>
> …
>
> Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). "[The] stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" Ibid. (quoting *Terry v. Ohio, supra*, at 29.) **Typically, this means**

[11] *R. v. Bartle, supra*, at 191.

> **that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.**[12] (bold emphasis added)

17. Moreover, as this Court appears to have recognized in *Mann* a requirement that police provide the right to counsel at the outset of an investigative detention may well prolong a detention which is supposed to be of brief duration.[13]

18. A right to counsel during investigative detention is, therefore, not required to advance the underlying purposes of s. 10(b). The concern that individuals may be compelled to incriminate themselves, as a result of the coercion inherent in custodial detention, does not typically arise on investigative detention. And the individual's liberty interest would not be promoted, but rather undermined, if police officers were required to provide every individual under investigative detention with a right to counsel.

19. The foregoing analysis is not affected by the decision of this Court in *Mann* that individuals under investigative detention are entitled under s. 10(a) of the *Charter* to be informed of the reasons for the detention. The rights conferred under ss. 10(a) and 10(b) are distinct and serve different purposes. Compliance with the right under s. 10(a) can also readily be achieved without unduly prolonging investigative detentions.

[12] *Berkemer v. McCarty*, 468 U.S. 420 (1984). See also *California v. Beheler*, 463 U.S. 1121 (1983), *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004).
[13] *R. v. Mann, supra* at paragraph 22

20. The court below was, therefore, correct in interpreting the right conferred under s. 10(b) in a manner consistent with both a purposive analysis of s. 10(b) and the limited scope and purpose of investigative detention. The words "without delay" in s. 10(b) should not be read as imposing a requirement that the police advise persons who are subject to investigative detention of a right to counsel, and afford them an opportunity to exercise that right.

(ii) The right to silence during investigative detention is protected by other means

21. The fact that an investigative detention does not engage s. 10(b) does not leave the individual's right to silence unprotected. Firstly, he or she will have the independent protection of the common law confessions rule:

> [30] … [T]he confessions rule has a broader scope than the *Charter*. For example, the protections of s. 10 only apply "on arrest or detention". By contrast, **the confessions rule applies whenever a person in authority questions a suspect**. …
>
> [31] … [T]he *Charter* is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that **the law, whether by statute or common law, can offer protections beyond those guaranteed by the *Charter*. The common law confessions rule is one such doctrine**… [14] (bold emphasis added)

[14] *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38, at paragraphs 30-31.

22. There are a number of ways in which the confessions rule is broader in scope than the *Charter*. For example:

(i) The accused bears the burden of demonstrating a *Charter* breach on a balance of probabilities, whereas the prosecution must prove the voluntariness of a confession beyond a reasonable doubt.[15]

(ii) In the modern form of the confessions rule voluntariness is conceived broadly, with its focus "on the protection of the accused's rights and fairness in the criminal process."[16]

(iii) Reasonable doubt as to voluntariness may be raised by a variety of considerations: inducements, oppression, lack of an operating mind, or police trickery that unfairly denies the accused's right to silence.[17]

(iv) Unlike *Charter* violations, where the evidence is only excluded if its admission would bring the administration of justice into disrepute, a violation of the confessions rule always warrants exclusion.[18]

23. Secondly, as the Court of Appeal for Ontario noted in the decision below, the individual will also have the protection at trial of the *Harrer* line of cases, which allows for the exclusion of otherwise *Charter*-compliant inculpatory evidence if its admission would render the trial unfair.[19]

[15] *R. v. Oickle*, *supra*, at paragraph 30.
[16] *R. v. Oickle, supra*, at paragraph 69.
[17] *R. v. Oickle, supra*, at paragraph 69.
[18] *R. v. Oickle, supra*, at paragraph 30.
[19] Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record p. 41, at paragraph 61; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Terry*, [1996] 2 S.C.R. 207; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Milne* (1997), 28 O.R. (3d) 577 (C.A.).

24. Given the restricted nature and purpose of investigative detention, the right to silence during such detentions is adequately protected by the confessions rule and the *Harrer* line of cases. The blanket use immunity that the Appellant suggests is not required.

C. Alternatively, if investigative detentions engage s. 10(b) of the *Charter, they* are saved by s. 1

25. In the alternative, if investigative detentions do engage s. 10(b), the inherent operational requirements of such detentions are a reasonable limit under s.1 of the *Charter*. Requiring the police to provide the right to counsel "without delay" may have a serious adverse impact both on the investigation itself and on the liberty interests of the persons being investigated, in the ways in which both this Court and the Court below have identified.

26. Suppose there is a shooting in a club, for example, and the police seal the premises in order to prevent the escape of any suspects and to identify witnesses. The people who are sealed in are unquestionably detained in the *Charter* sense. To require the police to provide the right to counsel to each of them before asking any questions, however, would seriously hamper a truly urgent investigation, and could unduly and unnecessarily impair the liberty interests of the vast majority of the people detained. This is precisely the tension that the Court below recognized:

> [41] 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. Not only will most investigative detentions justify only a brief detention of the individual, most will occur "on the street" in dynamic and quickly evolving situations. The police must move quickly in these situations to react to the circumstances as they change and to new information as it becomes available. If the police are obliged to advise every person detained for investigative purposes of their right to counsel before asking any potentially incriminating questions, the police are presumably required to stop any

> questioning and facilitate contact with counsel if the detained person chooses to exercise his or her right to counsel. The delay inherent in this process, not to mention the redirection of police resources that would be required to comply with requests to consult with counsel, would render the police power to briefly detain persons for investigative purposes in aid of criminal investigations largely illusory.
>
> [42] In addition to the negative impact on the ability of the police to effectively investigate crimes, a requirement that the police advise detained persons of the right to counsel immediately could seriously impair the liberty interests of detained persons. … [T]he detention of that person will potentially be considerably longer than it would otherwise have been. … These lengthier detentions, accompanied in some cases by transportation to another location while in physical custody, could also necessitate personal searches of the detained persons that would not be appropriate in the context of a brief investigative detention. … [20]

This Court acknowledged the latter concern in *R. v. Mann*:

> Like every other provision of the *Charter*, s. 10(b) must be purposively interpreted. Mandatory compliance with its requirements cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration. [21]

27. This Court has recognized that the common law can provide the basis for a s. 1 limitation:

> The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, **or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.**[22] (bold emphasis added)

28. The necessary implication of the common law investigative detention power identified in *Mann* is that the detaining officer may make basic initial inquiries to

[20] Reasons for Judgment of the Court of Appeal for Ontario, Appellant's Record p. 32 *et seq*, at paragraphs 41-42.
[21] *R. v. Mann*, *supra*, at paragraph 22.
[22] *R. v. Therens*, [1985] 1 S.C.R. 613, at 645. See also *R. v. Thomsen,* [1988] 1 S.C.R. 640, at 650-651; *R. v. Elias; R. v. Orbanski, supra*, at paragraph 36.

determine identity, confirm or dispel the officer's initial suspicions, or narrow the scope of the investigation. This satisfies the *Oakes* test[23] for the following reasons.

The objective of the law is sufficiently important

29. As this Court noted in *R. v. Mann*, "[g]iven their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing."[24] In addition, in many cases the implicit common law limit on s. 10(b) will serve the liberty interests of persons being investigated, by not artificially prolonging those investigations.

There is a rational connection between the limit and the objective

30. As noted above, without the implicit common law limit a rigid application of s. 10(b) could seriously compromise not only police investigations but also the liberty interests of the persons being investigated. The limit rationally addresses and accommodates those interests.

The infringement of the right is no more than is necessary to meet the objective.

31. The scope of the authorized police measures is carefully limited to what is reasonably necessary to achieve the initial investigative purpose. The detention will be brief and minimally intrusive. If the initial investigation does not provide grounds for

[23] *R. v. Oakes,* [1986] 1 S.C.R. 103. For the application of the *Oakes* test in a context similar to the present case see *R. v. Elias; R. v. Orbanski, supra*, at paragraphs 54-60.
[24] *R. v. Mann, supra*, at paragraph 16.

arrest the individual will either be released or, if further detention is warranted, will at that point be advised of his or her right to counsel.

There is proportionality between the deleterious and salutary effects of the limiting measure

32. As in *R. v. Elias; R. v. Orbanski*, "it is not difficult to find proportionality in so far as the liberty interest of the detained [person] is concerned", because an investigative detention, like the roadside screening in *R. v. Elias; R. v. Orbanski*, "take[s] but a little time and cause[s] only minor inconvenience" to the person detained. [25] Unlike in *R. v. Elias; R. v. Orbanski*, however, the proportionality here extends not only to the detention but also to statements made during the detention. The concern in *R. v. Elias; R. v. Orbanski* was that the motorist was *compelled* to create self-incriminating evidence.[26] During an investigative detention, however, the individual is under no obligation to answer questions.[27]

33. It follows that, contrary to the Appellant's argument[28], the s. 1 justification in the investigative detention context is not dependent upon use immunity. The right to silence during investigative detentions is adequately protected by the confessions rule and the *Harrer* line of cases.

34. If, however, this Court is inclined to find that there is insufficient proportionality between the operational imperatives of investigative detentions and any infringement of the right to counsel under s. 10(b), the Director of Public Prosecutions submits that

[25] *R. v. Elias; R. v. Orbanski, supra*, at paragraph 58.
[26] *R. v. Elias; R. v. Orbanski, supra*, at paragraph 58.

imposing a rigid and inflexible rule of use immunity in respect of statements made during investigative detentions goes too far. If there is any disproportionality, it can be cured by simply requiring that police officers advise persons under investigative detention that they need not answer the questions posed by the police.

PART IV – POSITION ON COSTS

35. The Director of Public Prosecutions does not seek any costs and makes no submission regarding costs.

PART V – ORDER SOUGHT

36. This case should be disposed of in accordance with the reasoning advanced above. More particularly:

(i) A police interaction with an individual will be a true investigative detention, and will accordingly engage s. 10, only where there is significant physical or psychological restraint.

(ii) Where there is a true investigative detention, the right to counsel under s. 10(b) of the *Charter* is nonetheless **not** engaged. Having regard to both the restricted purpose and scope of investigative detentions, and the underlying purposes of s. 10(b), investigators are not required to provide individuals with a right to counsel before commencing an investigative detention.

(iii) Alternatively, the inherent operational requirements of investigative detentions constitute a reasonable limit on the s. 10(b) right to counsel pursuant to s. 1.

37. This intervener also requests the permission to present oral arguments at the hearing of this appeal.

[27] *R. v. Mann, supra*, at paragraph 45.
[28] See in particular Factum of the Appellant, paragraphs 40 and 48.

All of which is respectfully submitted.

Dated this day of March 2008.

_____ _____

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Counsel for the Director of Public Prosecutions

PART VI – TABLE OF AUTHORITIES

Cases **PARAGRAPH(S)**

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Interveners

FACTUM OF THE INTERVENER – DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA

(Pursuant to r.37 of the *Rules of the Supreme Court of Canada*)

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