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Triggering the Right to Counsel: "Detention" and Section 10 of the Charter

Steven Penney[*]

I. INTRODUCTION

Section 10(b) is one of the most important — and most frequently litigated — legal rights in the *Canadian Charter of Rights and Freedoms*.[1] Its language is deceptively simple: "[e]veryone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right . . .". From this single sentence, the Supreme Court of Canada has over the past 25 years constructed an elaborate regulatory scheme that, broadly speaking, requires police to provide suspects with: (i) detailed, practical information about their rights and how they can effectively exercise them; and (ii) a reasonable opportunity to talk to a lawyer, should they express a desire to do so.[2] Police are not required to do any of these things, however, for suspects who have not been either arrested or detained. It is thus crucial for police and courts to have clear and sensible understanding of the meaning of arrest and detention.

Arrest is almost always straightforward. In the vast majority of cases, it will be obvious whether a person is arrested.[3] Arrestees, moreover, must always be afforded the right to counsel. Unfortunately, the issue of detention is not nearly as simple. The reason for this is twofold. First, the courts have defined detention in a highly variable fashion. As discussed in detail below, individuals may in some cases be detained

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

[2] See Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 307-11.

[3] See, generally, *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at paras. 24-25 (S.C.C.); *R. v. Whitfield*, [1969] S.C.J. No. 66, [1970] S.C.R. 46 (S.C.C.); James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225, at 230-32.

even though they are neither physically restrained nor legally obliged to cooperate with the authorities. In other situations, conversely, persons may not be detained despite the fact that their liberty is obviously restrained or they are involuntarily subjected to questioning or searches. Second, courts have recognized a number of situations where detainees may be denied their right to counsel under section 10(b). As we will see, this has been accomplished either by interpreting the right restrictively or by justifying its infringement under section 1 of the Charter.

For the most part, the courts are not to be blamed for this state of affairs. Like most Charter provisions, section 10(b) is concise. It is not a detailed regulatory code. It must nonetheless be interpreted and applied in disparate circumstances. Courts have accordingly found creative ways of reconciling its plain meaning with the exigencies of police questioning. They can be criticized, however, for failing to provide good answers to two important questions:

(1) In what circumstances does a detention arise when a suspect is neither physically restrained nor under a legal duty to comply with police?

(2) Must police comply with section 10(b) in exercising their power of investigative detention?

These failures stem, at least in part, from a reluctance to interpret section 10(b) in light of the pragmatic realities of police questioning. For the Supreme Court, the purpose of the right to counsel is to give criminal suspects a fair opportunity to exercise their right to silence and refrain from incriminating themselves. While this interpretation is intuitively appealing (lawyers advise their clients to remain silent, after all), it is largely misguided. Section 10(b)'s main purpose is to help deter abusive interrogation practices, including those apt to produce false confessions. If more attention were paid to his objective, it would be easier to craft bright-line rules dictating when section 10(b) applies and when it does not. This approach would also achieve a more optimal accommodation between the police's need to obtain reliable evidence and suspects' interests in avoiding inhumane treatment and wrongful convictions.

This argument will proceed as follows: Part II details the Supreme Court's general approach to detention under section 10 of the Charter; Part III further examines and critiques its interpretation of the purpose of the right to counsel; Part IV looks at the case law on the three types of detention (legal psychological restraint, non-legal psychological restraint

and physical restraint) and makes suggestions for reform; and Part V concludes.

II. THE GENERAL APPROACH TO DETENTION

The Supreme Court of Canada set out the general test for detention under section 10 of the Charter very early on. In *Therens*,[4] it considered whether a driver required to participate in a roadside alcohol screening test was detained within the meaning of section 10.[5] The Court had previously held that such demands did not trigger a detention under section 2(c)(ii) of the *Canadian Bill of Rights*,[6] which provides the "right to retain and instruct counsel without delay" to persons "arrested or detained".[7] The fact that it is an offence to refuse to comply did not mean that persons subject to the demand were legally detained.[8] Detention, the Court concluded, is limited to situations of "actual physical restraint".[9]

This reasoning was rejected by Le Dain J. in *Therens*,[10] who viewed detention under section 10 of the Charter in much broader terms. In addition to physical constraint, he asserted, a detention also arises when police assume "control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel".[11] Though this would have been enough to dispose of the appeal, Le Dain J. went a step further, holding that a detention may sometimes arise even when there is neither physical restraint nor "criminal liability for failure to comply" with a legal duty.[12] He explained:

> [I]t 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. . . .

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4 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

5 See *Criminal Code*, R.S.C. 1985, c. C-46, s. 254.

6 S.C. 1960, c. 44.

7 *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471 (S.C.C.).

8 *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471, at 478 (S.C.C.).

9 *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471, at 478 (S.C.C.).

10 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

11 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 642 (S.C.C.), Le Dain J., dissenting (on other grounds). All eight judges in *Therens* agreed that the accused was detained, however only three others expressly adopted Le Dain J.'s reasoning. Justice Le Dain's approach in *Therens* was endorsed by a unanimous court, however, in *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 649 (S.C.C.).

12 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 644 (S.C.C.).

> Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.[13]

To summarize, a detention occurs when police either physically or psychologically restrain suspects in situations where they might require access to counsel.[14] The category of psychological restraint may be further subdivided into two types: (i) situations where suspects face legal liability for refusing to comply with police directives; and (ii) situations where, despite the absence of such liability, they reasonably believe that compliance is mandatory.[15] As discussed below, each of these types has generated interpretive challenges. Before examining this doctrine, however, it will be useful to further examine the purpose of the constitutional right to counsel.

III. THE PURPOSE OF SECTION 10(b)

The Supreme Court of Canada's understanding of the purpose of the right to counsel in section 10(b) is best expressed as follows:

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

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[13] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 644 (S.C.C.).

[14] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 641-42 (S.C.C.), Le Dain J., dissenting; *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 648-49 (S.C.C.).

[15] See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 642-44 (S.C.C.), Le Dain J., dissenting; *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 649 (S.C.C.).

> against self-incrimination and to assist him or her in regaining his or her liberty. . . . [T]he right to counsel . . . is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.[16]

This statement is fine as far as it goes. Like its progenitor — the *Miranda*[17] warning — section 10(b) of the Charter does help to prevent self-incrimination and mitigate the disadvantage that suspects face in confrontations with police. But neither *Miranda* nor section 10(*b*) forbid self-incrimination; nor do they prohibit police from pressuring suspects to speak.[18] Section 10(b) requires that detainees be informed of their rights; it does not demand that they talk to a lawyer.[19] Indeed, detainees very frequently decline the opportunity to talk to a lawyer, and many (irrationally) choose to make incriminating statements.[20] The Supreme Court of Canada has held that they are free to do so as long as they demonstrate a "limited cognitive capacity to understand the process and communicate with counsel".[21] Suspects need not be capable of exercising "analytical reasoning" or making a decision that "best serves [their] interests".[22]

Detainees who invoke their right to counsel, moreover, need only be given a "reasonable opportunity" to do so.[23] There is no requirement that they actually talk to a lawyer. And once detainees have been given this opportunity, police are permitted to convince detainees to disregard their lawyer's advice, so long as they are not unduly persistent and do not denigrate the integrity of counsel.[24]

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16 *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 191 (S.C.C.).

17 See *Miranda v. Arizona*, 384 U.S. 436 at 444 (1966) (a person subject to custodial interrogation 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").

18 See Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280; Steven Penney, "Theories of Confession Admissibility: A Historical View" (1998) 25 Am. J. Crim. L. 309.

19 See *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.).

20 See Joseph R. Grano, "Introduction — The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy" (1989) 22 U. Mich. J.L. Ref. 395, at 406-408; Louis Michael Seidman, "Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences" (1990) 2 Yale J.L. & Human. 149, at 165.

21 *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 933 (S.C.C.).

22 *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 933-34, 941-42 (S.C.C.).

23 *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.).

24 See *R. v. Burlingham*, [1995] S.C.J. No. 39, [1995] 2 S.C.R. 206, at para. 13 (S.C.C.); *R. v. Gormley*, [1999] P.E.I.J. No. 80, 140 C.C.C. (3d) 110 (P.E.I.S.C.(A.D.)) (police permitted to

The limited protection offered by section 10(b) against self-incrimination can be seen even more plainly in the Supreme Court's approach to the compulsory taking of bodily substances. The Court has maintained that such takings involve self-incrimination,[25] and held that police must comply with section 10(b) before obtaining samples to use as evidence at trial.[26] So long as police comply with the sampling power's procedural requirements, however, suspects have no right to refuse to cooperate. Giving them a right to talk to a lawyer thus does very little to prevent self-incrimination.

If section 10's effect in preventing self-incrimination is so limited, what is its point? The answer is buried beneath the Court's cryptic reference in *Bartle*[27] to ensuring "fair treatment" and rectifying the "disadvantage" that suspects face *vis-à-vis* police.[28] As with the *Miranda*[29] rule, section 10's main purpose is to deter investigative techniques that are either inherently abusive or apt to produce false confessions.[30] Police are most likely to use such methods against suspects who are reluctant to speak. The section 10(b) caution proclaims or reinforces the notion (in the minds of both suspects and police) that suspects are not required to cooperate with police.[31]

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question suspect for almost four hours despite suspect repeatedly refusing to answer questions on the basis that his lawyer told him to remain silent); *R. v. Roper*, [1997] O.J. No. 305, 98 O.A.C. 225 (Ont. C.A.) (police permitted to continue questioning of suspect after he consulted counsel and counsel advised police that the suspect intended to exercise his right to silence); *R. v. Kerr*, [2000] B.C.J. No. 611, 32 C.R. (5th) 359 (B.C.C.A.) (same); *R. v. Mayo*, [1999] O.J. No. 714, 133 C.C.C. (3d) 168 (Ont. C.A.) (police permitted to question suspect after he had talked to a lawyer despite his insistence that he did not want to talk in absence of counsel); *R. v. Ekman*, [2000] B.C.J. No. 1363, 146 C.C.C. (3d) 346 (B.C.C.A.) (same); *R. v. Friesen*, [1995] A.J. No. 770, 101 C.C.C. (3d) 167 (Alta. C.A.), leave to appeal denied, [1995] S.C.C.A. No. 539 (S.C.C.) (police permitted to question accused after he had talked to a lawyer); *R. v. Russell*, [1998] A.J. No. 569, 62 Alta. L.R. (3d) 87 (Alta. C.A.), leave to appeal refused, [1998] S.C.C.A. No. 363 (S.C.C.) (same); *R. v. Plata*, [1999] J.Q. no 586, 136 C.C.C. (3d) 436 (Que. C.A.) (same). See also *R. v. Singh*, [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.) (no violation of s. 7 right to silence when police continued questioning despite accused asserting 18 times that he did not wish to speak).

[25] See *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at paras. 80-89 (S.C.C.).

[26] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[27] *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.).

[28] *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 191 (S.C.C).

[29] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[30] See Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 312-21.

[31] See Richard Leo, "The Impact of *Miranda* Revisited" (1996) 86 J. Crim. L. & Criminology 621, at 679.

By setting out bright-line rules for police, section 10(b) also avoids the ambiguity inherent in the voluntary confession rule, which is the other chief limitation on official questioning. If a suspect can show that police did not issue a proper caution or did not comply with a request to talk to a lawyer, any ensuing confession will likely be excluded whether or not there is evidence of actual coercion. Section 10 therefore reduces the likelihood that police will employ abusive tactics to induce confessions from contumacious suspects.[32] In the course of examining the jurisprudence on the three categories of section 10 detention (legal psychological restraint, non-legal psychological restraint and physical restraint), I make suggestions for reform to better achieve this objective.

IV. THE SUPREME COURT'S DETENTION JURISPRUDENCE

1. Legal Psychological Restraint

The Supreme Court concluded in *Therens*[33] and *Thomsen*[34] that drivers subjected to breath sample demands are detained within the meaning of section 10 of the Charter. The Court later held that a detention occurs when vehicles are stopped for any purpose.[35] It has also found, however, that police need not comply with section 10(b) in exercising powers to briefly detain motorists to investigate driving-related offences. Specifically, the right to counsel may be denied to drivers subject to breath alcohol screening demands,[36] asked questions about their alcohol

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[32] This is not to say that the Supreme Court's s. 10(b) doctrine does as much as it could to achieve this objective. See Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era — Part II: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 312-21.

[33] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[34] *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C).

[35] *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at para. 31 (S.C.C.). See also *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.) (stopping of vehicles a detention within the meaning of s. 9 of the Charter); *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 66 (S.C.C.), Binnie J., concurring (same). These detentions presumably fall under the "legal psychological" category as provincial highway traffic statutes typically make it an offence for a driver to fail to stop when directed to do so by police. See, *e.g.*, *Traffic Safety Act*, R.S.A. 2000, c. T-6, ss. 157 and 166; *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 216.

[36] *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 650-56 (S.C.C.). Section 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 permits police, on the basis of reasonable suspicion, to demand that a motorist provide a sample of breath for analysis by an approved screening device ("ASD"). To be legally effective and constitutionally sound, this demand must generally be made immediately, *i.e.*, before there is a reasonable opportunity to contact counsel. A positive result does not prove liability, but will typically give police the reasonable and probable grounds they require

consumption[37] or asked to perform physical sobriety tests.[38] Such limitations on the right to counsel are justified under section 1 of the Charter.

To justify a *prima facie* infringement of a Charter right, the Crown must show that the limitation is both "prescribed by law" and "reasonable . . . in a free and democratic society". It will be prescribed by law if it "is expressly provided for by statute", arises by "necessary implication from the terms of a statute or from its operating requirements" or results from the "application of a common law rule".[39] In *Thomsen*,[40] the Court held that denying the right to counsel during roadside alcohol screening tests is both "prescribed by law" (because the denial arises by necessary implication from the *Criminal Code*'s[41] alcohol testing regime) and "reasonable" (because conferring a right to counsel at this stage would unduly diminish the deterrence of impaired driving).[42] For the same reasons, the denial of the right to counsel to drivers questioned about their alcohol consumption or asked to perform physical sobriety tests was upheld in *Orbanski*; *Elias*.[43]

These cases raise questions about reading in limits to the right to counsel that are not expressly set out in legislation.[44] But the underlying policy question should not be controversial. Had the Court held in

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to demand a breathalyzer sample, which precisely determines the alcohol concentration in a person's blood. See *Criminal Code*, s. 254(3); *R. v. Woods*, [2005] S.C.J. No. 42, [2005] 2 S.C.R. 205, at paras. 13-15, 30-32, 43-44 (S.C.C.); *R. v. Latour*, [1997] O.J. No. 2445, 116 C.C.C. (3d) 279 (Ont. C.A.).

37 *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at paras. 54-60 (S.C.C.). Police do not have the power to compel motorists to answer questions or perform sobriety tests. They must therefore seek motorists' voluntary cooperation. However, as mentioned in footnote 35, they do have the power to stop motorists to seek their cooperation, and this stopping power is a form of legal psychological detention.

38 *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.). See also *Berkemer v. McCarty*, 468 U.S. 420 (1984) (*Miranda v. Arizona*, 384 U.S. 436 (1966) does not apply to motorists subject to brief roadside questioning as such questioning does not constitute "custodial interrogation").

39 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 645 (S.C.C.). See also *Retail, Wholesale and Department Store Union, Local 580 [RWDSU] v. Dolphin Delivery Ltd*., [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at 599 (S.C.C.) (Charter applies to the common law).

40 *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

41 R.S.C. 1985, c. C-46.

42 *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 650-56 (S.C.C.). See also *R. v. Grant*, [1991] S.C.J. No. 78, [1991] 3 S.C.R. 139 (S.C.C.).

43 *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at paras. 54-60 (S.C.C.).

44 This issue was the focus of the debate between the majority and minority concurring reasons in *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.). See also Tim Quigley, "Annotation: *R. v. Orbanski*" (2005) 29 C.R. (6th) 205; Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 303-304.

Thomsen[45] or *Orbanski; Elias*[46] that the police's failure to comply with section 10(b) was not "prescribed by law", the provinces would have responded with legislation specifically authorizing the infringement, and the courts would have found it to be a reasonable limitation under section 1 of the Charter.[47] The reason for this is simple: complying with section 10(b) in these circumstances would prolong suspects' detention and frustrate the investigative process; yet it would do little to advance the objectives of the right. In the case of ASD demands, so long as police follow the rules, suspects must either provide a breath sample or risk criminal punishment for refusing to do so. In the vast majority of cases, talking to a lawyer does not alter this situation.

More importantly, providing a right to counsel at this point would do little to deter abusive interrogation practices. Brief roadside questioning is not likely to involve cruel interrogation methods or generate false confessions.[48] As the United States Supreme Court observed in *Berkemer*,[49] the brevity and public nature of most traffic stops substantially mitigate the risk of overreaching.

The situation is different for breathalyzer tests. These are usually carried out at the police station and may involve a detention lasting several hours. As with roadside screening tests, talking to a lawyer will rarely prevent the compulsion of incriminating bodily substances. But

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[45] *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

[46] *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.).

[47] In fact most provinces now have legislation that does specifically authorize police to stop, detain, and conduct inquiries of motorists in the course of driving-related investigations. See, *e.g.*, *Highway Traffic Act*, C.C.S.M. c. H60, s. 76.1(1); *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 48(1).

[48] This is not to say that the courts have entirely ignored the issue of self-incrimination in the context of roadside detentions. The Supreme Court suggested in *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at paras. 58-59 (S.C.C.), that, as a result of concerns over compelled self-incrimination, the violation of s. 10(b) during roadside detentions might not be justified if the Crown attempted to prove impairment by adducing evidence created by the accused, such as the results of ASD tests and answers to questions about consumption. See also *R. v. Milne*, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118, at 121 (Ont. C.A.); *R. v. Coutts*, [1999] O.J. No. 2013, 136 C.C.C. (3d) 225, at paras. 15-18 (Ont. C.A.); *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 61 (Ont. C.A.), leave to appeal allowed, [2007] S.C.C.A. No. 150 (S.C.C.). This position is curious. If evidence created by drivers during roadside detentions is admissible for the purpose of demonstrating the existence of reasonable and probable grounds (which it is), and such grounds provide the basis for breathalyzer demands (the results of which are admissible), then this evidence must be "self-incriminating" in any realistic sense of the phrase. It is thus difficult to understand why evidence collected from drivers during roadside detentions should not be admissible to prove impairment; or, putting the same point slightly differently, why s. 1 of the Charter justifies denying the right to counsel when such evidence is admitted to establish grounds for the breathalyzer demand on the *voir dire* but not when it is admitted to prove impairment at trial.

[49] *Berkemer v. McCarty*, 468 U.S. 420, at 438-39 (1984).

as in other custodial settings, the caution may help to deter abusive questioning practices. Complying with section 10(b) in these circumstances, moreover, is not likely to either substantially prolong the detention or detract from the police's ability to obtain reliable evidence of guilt. The *Therens*[50] Court thus rightly concluded that drivers subject to breathalyzer demands must be informed of their right to counsel under s. 10(b).[51]

The Court has taken a different approach in the customs and immigration context. Customs officials have broad powers to detain, search and question people entering and leaving Canada.[52] As in the case of vehicle stops, failure to cooperate constitutes an offence.[53] The Court has found, however, that people subject to routine questioning and searches at border crossings are not detained within the meaning of section 10(b).[54] Detention arises only when people are suspected of having committed an offence and subjected to lengthier and more intrusive inquiries.[55]

While this approach has been rightly criticized for stretching the plain meaning of "detention" beyond its breaking point,[56] the Court could have reached the same result under section 1 of the Charter. As with roadside detentions, there is little to be gained (and much to be lost) in providing the right to counsel to people subject to preliminary, routine inquiries at border crossings.

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[50] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[51] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.). See also *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at para. 57 (S.C.C.) ("there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the *Charter* right to counsel"). See also *R. v. Woods*, [2005] S.C.J. No. 42, [2005] 2 S.C.R. 205, at paras. 35-36 (S.C.C.).

[52] See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), ss. 98, 99.1-99.3; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 16.

[53] See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 153.1; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 127, 128.

[54] See *R. v. Simmons*, [1988] S.C.J. No. 86, [1988] 2 S.C.R. 495 (S.C.C.); *R. v. Jacoy*, [1988] S.C.J. No. 83, [1988] 2 S.C.R. 548 (S.C.C.); *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] S.C.J. No. 38, [1993] 1 S.C.R. 1053 (S.C.C.). See also *R. v. Vandenbosch*, [2007] M.J. No. 346 (Man. C.A.) (applying customs detention jurisprudence to prison visitors).

[55] See *R. v. Simmons*, [1988] S.C.J. No. 86, [1988] 2 S.C.R. 495, at 521 (S.C.C.) (detention arose when suspect strip searched); *R. v. Jacoy*, [1988] S.C.J. No. 83, [1988] 2 S.C.R. 548, at 557-58 (S.C.C.) (detention arose when decision made to strip search suspect if necessary).

[56] See Eric Colvin & Tim Quigley, "Developments in Criminal Law and Procedure: The 1988-89 Term" (1990) 1 S.C.L.R (2d) 187, at 224-25; Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed., looseleaf (Toronto: Thomson Carswell, 2005) at § 5.3(c)(i).

2. Non-legal Psychological Restraint

The second category of psychological detention — situations where people reasonably believe that they must cooperate with police — is more perplexing. In some circumstances people are "detained" under section 10 even though their liberty is not limited by law. Despite their (reasonable) belief that they must comply with police requests, in other words, they have no legal obligation to do so. This situation almost always arises in the context of police questioning. With few exceptions, while police are free to question criminal suspects, suspects are not required to answer.[57]

How have we arrived at this paradoxical situation? We can imagine a legal regime that would clarify whether people approached by authorities must cooperate. Before questioning, for example, police could be required to tell people that they are either: (i) being detained under law for a particular purpose (with an explanation as to what they are legally obliged to do and what they are free to refuse to do); or (ii) not detained under law and are free to refuse any requests.[58] But for better or worse, Parliament and the courts have sanctioned a much murkier regime. In many situations, police may approach people and ask them questions without informing them of their legal status.

Given this legal milieu, it is not surprising that the Supreme Court has recognized that people often (reasonably but mistakenly) assume that they must comply with police requests.[59] Nor is it surprising, given the imbalance of power and potential for abuse inhering in such situations, that the Court has found that the protections of section 10 of the Charter should be afforded to some suspects who are not actually "detained" in the strict legal sense of the word. That said, it is neither necessary nor desirable to caution all persons questioned by police.[60] Unfortunately, there is no obvious way to decide when section 10 should apply and when

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[57] See, generally, Ed Ratushny, *Self-incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), at 185-86.

[58] See Law Reform Commission of Canada, *Arrest* (Report 29) at 20 (Ottawa: The Commission, 1986); Stephen Coughlan, "Police Detention for Questioning: A Proposal" (1986) 28 Crim. L.Q. 64 and 170; Alan D. Gold, "Perspectives on Section 10(*b*): The Right to Counsel under the *Charter*" (1993) 22 C.R. (4th) 370, at 374.

[59] See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[60] See *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 19 (S.C.C.); *R. v. Grafe*, [1987] O.J. No. 796, 60 C.R. (3d) 242 (Ont. C.A.); *United States of America v. Alfaro*, [1992] J.Q. no 831, 75 C.C.C. (3d) 211, at 236 (Que. C.A.); *R. v. Elshaw*, [1991] S.C.J. No. 68, [1991] 3 S.C.R. 24, at 53-70, L'Heureux-Dubé J., dissenting.

it should not.[61] The Supreme Court's "reasonable belief" test provides only limited guidance.

The lower courts have adopted a variety of approaches. For some, detention under section 10 arises whenever police question a person suspected of having committed a crime.[62] Others have asserted that detention occurs only when this suspicion is "crystallized", *i.e.*, when police intend to charge the suspect and conduct the interview to obtain self-incriminating evidence.[63] Most courts, however, have concluded that no single factor is determinative.[64] On this approach, all of the circumstances must be considered in deciding whether a suspect reasonably concluded that cooperation with police was mandatory.[65] The leading case is the Ontario Court of Appeal's decision in *Moran*,[66] where Justice Martin set out the following list of relevant factors:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;

2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;

3. whether the accused left at the conclusion of the interview or whether he or she was arrested;

4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in

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[61] See, *e.g.*, *Gaudette c. R.*, [2006] J.Q. no 8112, 2006 QCCA 1004, at para. 35 (Que. C.A.); *R. v. Voss*, [1989] O.J. No. 1124, 50 C.C.C. (3d) 58, at 73 (Ont. C.A.).

[62] See *R. v. Mickey*, [1988] B.C.J. No. 2585, 46 C.C.C. (3d) 278 (B.C.C.A.).

[63] See *R. v. Hawkins*, [1992] N.J. No. 174, 14 C.R. (4th) 286 (Nfld. C.A.), revd [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157 (S.C.C.).

[64] See *R. v. Johns*, [1998] O.J. No. 445, 14 C.R. (5th) 302, at para. 23 (Ont. C.A.); *R. v. Caputo*, [1997] O.J. No. 857, 114 C.C.C. (3d) 1, at 11 (Ont. C.A.); *R. v. H. (C.R.)*, [2003] M.J. No. 90, 174 C.C.C. (3d) 67, at paras. 27-30 (Man. C.A.); *R. v. Amyot*, [1990] J.Q. no 1061, 58 C.C.C. (3d) 312 (Que. C.A.); *R. v. V. (T.A.)*, [2001] A.J. No. 1679, 48 C.R. (5th) 366, at para. 18 (Alta. C.A.); *Gaudette c. R.*, [2006] J.Q. no 8112, 2006 QCCA 1004, at para. 37 (Que. C.A.); *R. v. Ancelet*, [1986] A.J. No. 426, 70 A.R. 263 (Alta. C.A.); *R. v. C. (S.)*, [1989] N.J. No. 81, 74 Nfld. & P.E.I.R. 252 (Nfld. C.A.).

[65] See *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225, at 258-59 (Ont. C.A.), leave to appeal refused [1988] 1 S.C.R. xi (S.C.C.).

[66] *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

> its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
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> 5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
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> 6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
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> 7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.[67]

Though the Supreme Court has yet to issue a detailed opinion on the question, it appears to favour the *Moran* approach.[68]

This is unfortunate. *Moran*[69] does not provide sufficient guidance to police, who must often make quick decisions in pressure-filled environments.[70] There are too many factors to consider and no one factor is determinative. Like other *ex post facto*, "totality of the circumstances" tests, *Moran* is likely to produce too many errors. Fearing that a court will later determine that a detention arose, police may issue the section 10 warning when it was not required. In some of these cases, evidence that would have been acquired in the absence of the warning (such as a confession) will not be discovered, potentially thwarting the conviction of factually guilty suspects. Innocent suspects may also be detained for an unnecessarily lengthy period of time and suffer the stigma and anxiety associated with criminal accusation. In other cases, conversely, police will incorrectly decide not to issue the caution. As a result, suspects may

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[67] *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225, at 258-59 (Ont. C.A.). Some courts have held that another factor to consider is whether the police have made a clear and unequivocal statement that the suspect is not under arrest or detention. See *R. v. Rajaratnam*, [2006] A.J. No. 1373, at para. 14 (Alta. C.A.).

[68] I glean this from the Court's two-sentence, fact-based reversal of the Newfoundland Court of Appeal in *R. v. Hawkins*, [1992] N.J. No. 147, 14 C.R. (4th) 55 (Nfld. C.A.), revd [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157 (S.C.C.), and its equally unelaborated approval of the Ontario Court of Appeal's decision in *R. v. Hicks*, [1990] S.C.J. No. 7, [1990] 1 S.C.R. 120 (S.C.C.), affg [1988] O.J. No. 957, 64 C.R. (3d) 68 (Ont. C.A.).

[69] *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

[70] See David M. Tanovich, "*Elshaw* — Rethinking the Meaning of Detention: The Doctrine of 'Preliminary Investigatory Detention' Is Not Appropriate" (1992) 7 C.R. (4th) 374, at 380.

be subjected to abusive questioning, unreliable confessions may be admitted (perhaps leading to the conviction of the factually innocent) and reliable evidence may be excluded (perhaps leading to the acquittal of the factually guilty).

Moran[71] also trades too heavily on the concept of voluntariness. The application of section 10 of the Charter should not turn on whether a suspect (reasonably or unreasonably) believes that compliance with the authorities is mandatory. It is likely that many people approached by police and asked to answer a few general questions believe that they have a legal obligation to (at least) stop and listen. As mentioned, it would be counterproductive to warn such persons of the right to counsel. Conversely, at least some people subjected to prolonged, intense questioning know (without being told) that they are free to remain silent and walk away. As discussed, however, issuing the section 10(b) caution in such circumstances may help to minimize the potential for abuse and false confessions.[72]

The test for non-legal, psychological detention under section 10 should thus accomplish two objectives. First, it should set out a bright-line, *ex ante* rule telling police when they must comply with section 10.[73] And second, it should ensure that the protections of section 10 are given to people who really need them, while avoiding any undue burden on police in conducting general investigative questioning.

These goals are best achieved by requiring compliance with section 10 only when police *identify a suspect as a likely perpetrator and attempt to elicit incriminating statements*.[74] It is these suspects who need the protection that the right to counsel provides. Requiring police to warn anyone they suspect of criminal activity, in contrast, casts the net too wide. It could require police to caution anyone they remotely suspect of

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[71] *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

[72] See Aman S. Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment (2001) 45 Crim. L.Q. 198, at 214-15.

[73] Alan D. Gold, "Perspectives on Section 10(b): The Right to Counsel under the *Charter*" (1993) 22 C.R. (4th) 370.

[74] This is essentially the test proposed by the Newfoundland Court of Appeal in *R. v. Hawkins*, [1992] N.J. No. 147, 14 C.R. (4th) 55 (Nfld. C.A.), revd [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157 (S.C.C.). But I would omit from the test any reference to the intention of police to arrest or charge suspects. Police may single out suspects as likely perpetrators without necessarily intending to arrest them at that time. See also David M. Tanovich, "*Elshaw* — Rethinking the Meaning of Detention: The Doctrine of 'Preliminary Investigatory Detention' is not Appropriate" (1992) 7 C.R. (4th) 374; Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005), at 326-27; Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed., looseleaf (Toronto: Thomson Carswell, 2005-), at § 5.3(c)(ii). The test proposed is also very similar to that used in the United States to determine whether an interrogation is "custodial", thus triggering the *Miranda v. Arizona*, 384 U.S. 436 (1966) right to counsel. See *Berkemer v. McCarty*, 468 U.S. 420 (1984).

wrongdoing. This could prevent them from obtaining valuable information and evidence when there is little danger of abuse.

The test I have proposed is far from perfect. It will sometimes be difficult (for both police and courts) to decide whether someone is a "likely perpetrator" or whether the main purpose of the inquiry is to elicit incriminating evidence. While the subjective state of mind of both the suspect and the police may be relevant, ultimately the question must be approached objectively: would the reasonable observer conclude that the questioning was akin to a "custodial interrogation", *i.e.*, questioning designed to elicit incriminating statements from the likely perpetrator?[75] Many of the factors listed in *Moran*[76] will be germane to this inquiry. But by focusing on the degree of suspicion attaching to the suspect and the nature of the questioning, it should be easier to determine whether the section 10 caution should be (or should have been) given.[77] The test should also do a better job than *Moran* of fulfilling the chief purposes of section 10: preventing abusive interrogations and false confessions.

3. Physical Restraint

As noted in *Therens*[78] and *Thomsen*,[79] persons subject to any kind of physical restraint are detained within the meaning of section 10 of the Charter. In some situations, however, they may not be entitled to the right to counsel under section 10(b). This issue typically arises in the context of investigative detention. Drawing on the Ontario Court of Appeal's decision in *Simpson*,[80] in *Mann*[81] the Supreme Court of Canada recognized a common law power to detain persons on the basis of reasonable suspicion. This power allows police to briefly detain suspects

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[75] See *Stansbury v. California*, 511 U.S. 318, at 323 (1994) ("the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned"). Canadian courts have correctly held that police telling a suspect that he or she is free to leave does not necessarily mean that there was no detention within the meaning of s. 10. See *R. v. Johns*, [1998] O.J. No. 445, 14 C.R. (5th) 302, at para. 28 (Ont. C.A.); *R. v. Teske*, [2005] O.J. No. 3759, at para. 55 (Ont. C.A.).

[76] *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

[77] Some appellate courts, while purporting to follow the "totality of the circumstances" approach from *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.), have in fact focused almost exclusively on the factors proposed above. See, *e.g.*, *R. v. Dolynchuk*, [2004] M.J. No. 135, 184 C.C.C. (3d) 214, at paras. 28-32 (Man. C.A.).

[78] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[79] *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

[80] *R. v. Simpson*, [1993] O.J. No. 308, 12 O.R. (3d) 182 (Ont. C.A.).

[81] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

for questioning and conduct pat-down searches for weapons. The Court expressly declined to decide, however, whether persons subject to investigative detention must be warned of their right to counsel.[82]

It must be stressed, however, that before there can be an investigative detention there must be a detention. Following the Supreme Court's categorization scheme, an investigative detention can thus arise in only three circumstances: (i) when police physically restrain a suspect (*e.g.*, by performing a frisk search[83] or using force to prevent escape); (ii) when there is legal liability for non-compliance (*e.g.*, failing to heed a police order to stop a vehicle); or (iii) when the test for non-legal psychological restraint is met (*i.e.*, where the suspect reasonably believes that compliance is mandatory, or, as I have proposed, where police have identified the suspect as the likely perpetrator and initiate questioning with a view to eliciting incriminating statements). If none of these circumstances is present, there is no detention ("investigative" or otherwise) and police need not comply with any aspect of section 10 of the Charter.

If one of these circumstances is present, and the situation otherwise fulfils the requirements of a lawful investigative detention, the question becomes whether there is any reason to relieve the police of their usual responsibility to comply with section 10(b). In the case of non-legal psychological detention, the answer should be an emphatic "no". Since the test for this form of detention (however conceived) is designed to single out situations in which the benefits of conferring the right to counsel outweigh the costs, there can be no justification for failing to issue and implement the section 10(b) caution. Indeed, as detailed below, the kind of questioning triggering a finding of non-legal psychological detention will usually be incompatible with the exercise of the investigative detention power. Prolonged, custodial interrogations of persons identified as likely perpetrators should be found to exceed the limits of investigative detention, which is intended to be brief and relatively non-intrusive. Questioning of this kind should proceed only under the auspices of

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[82] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 22 (S.C.C.). The Court did confirm that police must comply with s. 10(a) of the Charter and inform suspects of the reason for their detention. *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 21 (S.C.C.).

[83] See *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, at 1146 (S.C.C.); *R. v. V. (T.A.)*, [2001] A.J. No. 1679, 48 C.R. (5th) 366, at para. 21 (Alta. C.A.); James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1, at 28.

voluntary cooperation[84] or arrest. In either case, suspects should be informed of their rights under section 10(b) of the Charter.

The circumstances are very different, however, for investigative detentions based on physical or legal psychological restraint. In practice, these types of detention usually arise when pedestrians are detained during incidental searches or drivers are stopped for reasons other than the investigation of motor vehicle offences.[85] Since these intrusions obviously constitute section 10 detentions,[86] one would have thought that the question would be whether failing to afford the right to counsel is justified under section 1 of the Charter. As in the roadside screening and customs contexts, there is little danger of abuse or false confessions when police question suspects in the course of a brief investigative detention.[87] The chief effect of affording the right to counsel in these circumstances would be to prolong the length and intrusiveness of detentions and diminish law enforcement effectiveness.[88] It would thus not be difficult to justify the denial of this right under section 1.

As yet there is a paucity of authority on this question.[89] But in the leading case, *Suberu*,[90] the Ontario Court of Appeal surprisingly declined

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[84] By "voluntary" in this context I mean only that the police have no power to compel the suspect to answer or even submit to questioning. I recognize (especially if the "reasonable belief that compliance is mandatory" test is taken literally) that many suspects in this situation may wrongly believe that they must cooperate with police.

[85] Police stopping vehicles to investigate driving-related offences need not rely on the investigative detention power as such stops may be made in the absence of individualized suspicion. See *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.). The scope of such investigations must be limited to driving-related inquiries, however. See *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.). Any further detention for general investigative purposes would have to be justified by at least reasonable suspicion.

[86] See *R. v. V. (T.A.)*, [2001] A.J. No. 1679, 48 C.R. (5th) 366, at para. 20 (Alta. C.A.). See also *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 522 (S.C.C.).

[87] See *Berkemer v. McCarty*, 468 U.S. 420, at 339-40 (1984).

[88] See James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 376-77; Lesley A. McCoy, "Liberty's Last Stand? Tracing the Limits of Investigative Detention" (2002) 46 Crim. L.Q. 319, at 327.

[89] See *R. v. Schrenk*, [2007] M.J. No. 154, 2007 MBQB 93, at paras. 35-38 (Man. Q.B.) (following the reasoning in *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)); *R. v. V. (T.A.)*, [2001] A.J. No. 1679, 48 C.R. (5th) 366, at para. 32 (Alta. C.A.) (suggesting, without engaging in a s. 1 analysis, that s. 10(b) does not apply to brief investigative detentions); *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305, at paras. 82-85 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 522 (S.C.C.) (raising but not resolving question of whether brief investigative detention requires compliance with s. 10(b)); *R. v. Campbell*, [2003] M.J. No. 207, 175 C.C.C. (3d) 452, at paras. 44-52 (Man. C.A.) (police violated s. 10(b) by failing to immediately warn a driver of his right to counsel during an investigative

to consider section 1. Instead, Doherty J.A. held that the reference to "without delay" in section 10(b) contemplated a "brief interlude" between the initial investigative detention and the point at which police must advise suspects of the right to counsel.[91] During this period, police may make "a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted".[92] Justice Doherty elaborated as follows:

> The police activity during the brief interlude contemplated by the words "without delay" must be truly exploratory in that the officer must be trying to decide whether anything beyond a brief detention of the person will be necessary and justified. If the officer has already made up his or her mind that the detained person will be detained for something more than a brief interval, there is no justification for not providing the individual with his or her right to counsel immediately.[93]

On this view, investigation detentions may consist of two phases. In the first, police have a brief opportunity to assess whether a further (less brief) detention is warranted. During this period, the suspect's right to counsel is held in abeyance. If police decide that there is no basis to continue the detention, the suspect must presumably be set free. If continued detention is warranted, then before making further inquiries police must warn the suspect of the right to counsel and facilitate access to counsel if the right is invoked.

This is surely a strained reading of "without delay".[94] It will also likely have unfortunate effects when applied by police on the ground. Fearing that a court would later find that they overestimated the length of the "brief interlude", many police officers are likely to caution suspects almost immediately after detention. This will prolong the

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detention; no consideration of s. 1); *R. v. Lewis*, [1998] O.J. No. 376, 122 C.C.C. (3d) 481 (Ont. C.A.) (police required to comply with s. 10(b) during investigative detention involving search of luggage).

[90] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[91] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[92] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[93] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 54 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[94] The Supreme Court has consistently held that the s. 10 caution must be given *immediately* after detention or arrest, unless it is necessary to first gain control over a dangerous situation. See *R. v. Strachan*, [1988] S.C.J. No. 94, [1988] 2 S.C.R. 980 (S.C.C.); *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, at 1146, Lamer J. and 1163-64, Wilson J. (S.C.C.); *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13, at para. 56 (S.C.C.).

detention of the innocent and make it more difficult to obtain reliable, incriminating evidence from the guilty. As the Supreme Court noted in *Mann*[95] (in a passage cited by Doherty J. in *Suberu*[96]), mandatory compliance with section 10(b)'s requirements "cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that . . . must be of brief duration".[97] The investigative detention power must not, in other words, become "a *de facto* arrest".[98] The Court of Appeal's approach, however, would have precisely this effect.[99] Further, it would permit the prolonged detention of suspects on the basis of a standard (reasonable suspicion) that is markedly lower than the grounds required for arrest (reasonable and probable grounds).

The better approach is to justify the denial of the right to counsel for the duration of investigative detentions under section 1 of the Charter.[100] This will help to keep such detentions brief and allow police to conduct

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[95] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

[96] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[97] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 22 (S.C.C.); *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.).

[98] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 35 (S.C.C.).

[99] Justice Doherty (remarkably) appears to concede this in *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 54 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.) ("If the officer has already made up his or her mind that the detained person will be detained for something more than a brief interval, there is no justification for not providing the individual with his or her right to counsel immediately . . . [I]n those cases, the investigative detention is a *de facto* arrest.") See also James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 373-76 (noting the lack of guidance that courts have provided in defining the maximum duration of investigative detentions).

[100] As pointed out in James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 378, it is unusual (and perhaps unseemly) for the courts to uphold limitations on Charter rights that they themselves have imposed under the common law. This may explain why the court went to such lengths to avoid a s. 1 analysis in *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.). But as long as the courts are prepared to recognize new police powers, it seems inevitable that some of them will have to be justified under s. 1 of the Charter. As noted, the Supreme Court has held that common law rules are "prescribed by law" within the meaning of s. 1: *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 645 (S.C.C.). It has also upheld Charter-limiting common law rules (including newly recognized ones) in other contexts: see *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.) (upholding common law of criminal contempt); *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) (upholding judicially created reverse onus for defence of extreme intoxication); *R. v. Stone*, [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.) (upholding judicially created reverse onus for automatism defence). If the Court is to be criticized on this point, it is in its frequent failure to subject common law Charter violations to the full analytical scrutiny of the *Oakes* test (*R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.)): see *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.), Binnie J., concurring.

preliminary questioning in situations where the risk of abuse is low. This does not mean, of course, that the right to counsel will never apply to suspects who are not arrested. As discussed, when police identify a person who was initially subject to investigative detention as the likely perpetrator and initiate questioning with a view to eliciting incriminating statements, they must comply with section 10(b) regardless of whether or when they make an arrest.

V. CONCLUSION

The "purposive" approach to statutory interpretation, and especially Charter interpretation, is now deeply entrenched in Canadian law. As a result, the outcome of the interpretive enterprise often hinges on the court's characterization of the law's objective. The main purpose of the right to counsel in section 10(b) of the Charter, as the Supreme Court of Canada sees it, is to protect criminal suspects against self-incrimination. Informing detainees of their right to talk to a lawyer, the Court believes, will help to prevent them from being unfairly taken advantage of by the state's powerful law enforcement machinery.

This interpretation of section 10(b) is largely mistaken. Informing suspects of their right to counsel is a roundabout and often ineffectual way of preventing self-incrimination. Section 10(b) is better understood, like the *Miranda*[101] rule that inspired it, as a prophylactic against abusive interrogation methods (some of which are apt to produce false confessions and wrongful convictions). It by no means serves as a guarantee against these harms. But in concert with other prophylactics (such as the confession rule), it can help to minimize them while still allowing police a reasonable measure of access to reliable, self-incriminating evidence.

With these ends in mind, I have proposed two modest reforms to the law on the application of section 10(b) of the Charter. First, the test for non-legal psychological restraint should be simplified to find detention only when police identify a suspect as the likely perpetrator and attempt to elicit incriminating statements. As compared with the prevailing "totality of the circumstances" approach, this test is easier for police to understand *ex ante*, easier for courts to apply *ex post*, and achieves a more optimal accommodation between the interests of suspects and law enforcement. Second, the courts should clarify that, in the vast majority of circumstances, police do not have to comply with section 10(b) at any

[101] *Miranda v. Arizona*, 384 U.S. 436 (1966).

point during an investigative detention (because the infringement of the right to counsel is justified under section 1 of the Charter). At the same time, they should confirm that investigative detentions must be brief and limited to preliminary inquiries only.