

## ***Investigative Detention***

*“In our context, where our conservation officers are relying on statutory inspection powers, their temporary delays of individuals to effect those statutory powers are arguably mere “delays” as described by the majority SCC judgment, not Charter detentions. Therefore, unless and until the test for detention is at some point thereafter satisfied (i.e., considering the factors set out above – duration of the delay; nature of questioning; etc.), no right to counsel caution is required. There are instances where our officers are not relying on any statutory inspection powers (e.g., stopping an individual walking in the woods unarmed and the officers want to question him concerning abandoned game or a deposit on Crown lands); in such a situation, our officers would be very much in the position of the officers in Grant in the sense that none of our statutory inspection powers on those facts could legitimately be relied upon. They can stop and talk with the individual, insofar as it is a mere general inquiry delay, but they should keep in mind the test set out above if it develops into something beyond that”*

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### **OBJECTIVE**

- To be able to explain the law on *Investigative Detention*
- Be able to articulate in detail:
  - Subjective and objective grounds for suspicion
  - Reasons for the detention of an individual(s) for investigative purposes

- Subsequent search for officer safety; both in accordance with the *Charter* and case law.

## **BACKGROUND**

- Police have always had the ability to detain and investigate
- Ancillary power of police to investigate crime
- R. v. Simpson – constellation of discernable facts to cause a suspicion (articulable cause)
- R. v Mann formally recognized this power, gave it a name and established some boundaries for it

## **DETENTION DEFINED**

- Suspension of a person's liberty interest by a **significant** physical or psychological restraint
- Psychological Detention - the individual has a legal obligation to comply with request or demand, or a reasonable person would conclude by reason of the

police conduct that the suspect had no choice but to comply

## **REQUIREMENTS FOR DETENTION**

1. Reasonable suspicion to suspect an individual is connected to a particular crime prior to detaining them
2. You must be able to articulate in your notes the reasons why you are placing the person under detention
3. Must advise in clear and simple language the reason for the detention (*detention must be brief – based on the situation*)
4. **MUST provide R.T.C. without delay** (*subject to concerns for officer safety or justified under s. 1 Charter*) **R v. Suberu S.C.R., 2009**
  - a. **\*\*Substitute the word “detaining” in place of “arresting” for RTC**
5. **If reasonable grounds exist for officer safety – pat-down search for weapons only is permitted**  
**R v. Mann S.C.R., 2004**

## **SCOPE OF DETENTION**

- Detention must be conducted in a reasonable manner and should be brief
- No obligation on detained individual(s) to answer questions
- Investigative detention is a lower standard than arrest

## **PSYCHOLOGICAL DETENTION FACTORS**

- General police inquiries regarding a particular occurrence or singling out the individual for focused investigation
- Police conduct and language, location, presence of others, and the duration of the encounter
- Age, physical stature, minority status and level of sophistication of subject  
– *R. v. Grant S.C.R., 2009*

## **USE OF FORCE**

- *Criminal Code- Section 25(1)* Every one who is required or authorized by law to do

anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose

#### **FWCA**

##### **Inspection of firearms or ammunition**

88. For the purpose of this Act or the regulations, a conservation officer may inspect a firearm or ammunition in an area usually inhabited by wildlife, on a road leading to or from an area usually inhabited by wildlife or on the waters adjacent to an area usually inhabited by wildlife. 1997, c. 41, s. 88.

##### **Inspection of conveyance**

89. (1) A conservation officer may stop a conveyance if he or she has reasonable grounds to believe that stopping the conveyance would assist in determining whether there is compliance with this Act or the regulations. 2009, c. 33, Sched. 22, s. 2 (22).

##### **Operator to stop**

(2) On the conservation officer's signal to stop, the operator of the conveyance shall immediately stop and produce for inspection any wildlife, invertebrate, fish, document or other thing requested by the officer for the purpose of this Act. 1997, c. 41, s. 89 (2); 2009, c. 33, Sched. 22, s. 2 (23).

##### **Stop signals**

(3) For the purpose of subsection (2), signals to stop include,

- (a) intermittent flashes of red light, in the case of a vehicle;
- (b) intermittent flashes of blue light, in the case of a boat; and

(c) a hand signal to stop, in the case of a vehicle or boat. 1997, c. 41, s. 89 (3).

#### Inspection of places

90. (1) For the purpose of this Act or the regulations, a conservation officer may enter and inspect a building or other place in which the conservation officer believes on reasonable grounds there is any work or undertaking or any other thing to which this Act or the regulations apply, including,

- (a) a building or other place where licences are issued;
- (b) a building or other place that relates to wildlife, invertebrates or fish; or
- (c) a building or other place that relates to hunting, trapping or fishing or to the transport, buying or selling of wildlife, invertebrates or fish. 1997, c. 41, s. 90 (1); 2009, c. 33, Sched. 22, s. 2 (24).

#### Arrest without warrant

93. (1) A conservation officer may arrest without warrant a person that he or she believes on reasonable grounds is committing, has committed or is preparing to commit an offence under this Act.

#### Necessary force

(2) A conservation officer may use as much force as is necessary to make an arrest under this section.

#### Release

(3) If a conservation officer arrests a person under this section, he or she shall, as soon as practicable, release the person from custody, unless the officer has reasonable grounds to believe that,

(a) it is necessary in the public interest for the person arrested to be detained, having regard to all the circumstances, including the need to,

- (i) establish the identity of the person,
- (ii) secure or preserve evidence of or relating to the offence, or
- (iii) prevent the continuation or repetition of the offence or the commission of another offence; or

(b) the person arrested, if released, will not respond to the summons or offence notice or will not appear in court.

– Authority comes from Criminal Code s. 25(1)

## **SAFETY SEARCHES RELATED TO** **INVESTIGATIVE DETENTION**

- Grounds NOT based upon vague concerns, hunches or intuition regarding safety
  - Both objective and subjective grounds are required (*known facts and what those facts mean to the officer*)
  - Must articulate reasons for safety search – **search is not automatic with lawful detention**

## CASE STUDY

- It is late September at approximately 0100 hrs; you and your partner are on patrol on a remote gravel concession road and see a motor vehicle running parked on the side of the road. The location is remote, near open fields. You are aware that there have been a number of problems in the area, including night hunting, shot and left deer and untagged deer. As you drive by, you notice three individuals in the motor vehicle (driver, front passenger and in the rear seat behind the driver). All three look away and can be seen to be ducking, leaning or reaching down. All three appear to be wearing heavy clothing, and yet it is a relatively mild evening.
- You park directly behind the motor vehicle and investigate further. Your partner notifies PCC of the situation. You approach the driver's side and request the driver to step out of the car. After repeated requests, the driver complies and is brought to rear of the vehicle. The driver tells you that his name is Brad Chapman, and that they had planned to attend a bar in town.

The closest bar is some 35km away and you quickly learn that he gave a false name.

- Your partner commences a conversation with the occupants in the car and it is apparent that the three are lying about their identities and the reason that they are parked on the side of the road, they are vague about why they are there and eventually provide a different reason for being there. Your partner identifies the rear passenger. This passenger has a previous conviction for untagged deer. During the conversation, you direct the front passenger to exit the vehicle and while doing so, it is obvious that he is attempting to conceal an item under the front seat.
- Articulate the totality of circumstances why you are going to detain these individuals and investigate further.
- What further action will you take?

The following is some background reading.

### **Investigative Detention Legal Definition:**

*The brief detention of an individual by a police officer for investigative purposes.*

In R v. Clayton, Justice Rosalie Abella of the Supreme Court remarked that the appeal before the Court raised "serious issues of crime, public safety and civil liberties" and that "there does not exist in Canada a general police power of investigative detention. R. v. Mann so held."

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

In that 2004 decision of the Supreme Court of Canada, R v Mann, the same Court, with Justice Frank Iacobucci writing for the majority, used these words at ¶27-45:

"... a power of search incidental to **investigative detention** does exist at **common law**.

"The Court of Appeal for Ontario helpfully added ... in R. v. Simpson... that **investigative detentions** are only justified at common law if the detaining officer has some articulable cause for the detention, a concept borrowed from U.S. jurisprudence. Articulable cause was defined ... as ... a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.



"Articulable cause, while clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest is likewise both an objective and subjective standard....

"Justice (David) Doherty (of the Court of Appeal for Ontario, in (Simpson) limited the scope of common law investigative detention by explaining that the articulable cause requirement was only an initial step in the ultimate determination of "whether the detention was justified in the totality of the circumstances.... The power to detain cannot be exercised on the basis of a hunch, nor can it become a de facto arrest.

"To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case."

In his 2013 treatise, Alec Fiszaufer interprets the reasons of Justice Doherty in R v Simpson as relying on both American and Canadian authorities, much of which is taken from R v. Mann, to refer to an **investigative detention** as:

"... an ancillary, **common law** power to detain for investigation in circumstances where the detaining officer can articulate grounds for reasonable suspicion that the accused is involved in criminal activity.

"The test is based on a constellation of objectively observed facts and not a hunch or intuition."

#### REFERENCES:

- Fiszaufer, Alec, *The Law of Investigative Detention* (Toronto: LexisNexis, 2013).
- R. v. Clayton, 2007 SCC 32
- R v Mann, 2004 SCC 52
- R v Simpson, 79 CCC 3d 482 (ONCA)
- Terry v Ohio, 392 US 1 (1968). In R v Mann *op. cit*, Justice Iacobucci wrote of American law: "The United States Supreme Court held in Terry that a police officer may seize an individual reasonably suspected of imminent or on-going criminal activity, ask

questions of him or her, and perform a limited frisk search for weapons. Subsequent jurisprudence requires the totality of the circumstances to be taken into account when determining that sufficient reasonable articulable suspicion of criminal activity exists to justify the seizure (*United States v. Cortez*, 449 US 411 (1981)). The U.S. case law has evolved significantly since *Terry*. Police authority was expanded in *Adams v. Williams*, 407 US 143 (1972), beyond imminent violent offences to possessory offences reported by reliable informants. In 1980, *United States v. Mendenhall*, 446 US 544 (1980), the U.S. Supreme Court developed a no-seizure rule permitting brief detentions of individuals where reasonable suspicion is lacking. Five years later, in *United States v. Hensley*, 469 US 221 (1985), the U.S. Supreme Court extended *Terry* and *Adams* to permit detention and questioning of persons suspected of involvement in completed felonies, where the suspicion was grounded in specific and articulable facts, on the basis of a public interest in investigating crime and safeguarding the public."

### General Principles

The police have a common law right to detain people for investigative purposes. The investigation must be based on a "reasonable suspicion that the particular individual is implicated in the criminal activity under investigation" for it to be considered lawful.

An officer's grounds to believe an offence has been committed will fall short of being "objectively reasonable and probable" allowing for an arrest. If the officer instead has a "reasonable suspicion" that the suspect was involved in a criminal offence; it may be enough to justify investigative detention.

1. R. v. Mann, 2004 SCC 52, [2004] 3 S.C.R. 59 [1]
2. R. v. Cunsolo, [2008] O.J. No. 3754 (S.C.J.) - summary of rules of arrest and detention  
R. v. D.L.W., 2012 BCSC 1700 (CanLII) at para. 31

### Right Against Arbitrary Detention

Section 9 of the Canadian Charter of Rights and Freedoms provides that

9. Everyone has the right not to be arbitrarily detained or imprisoned.

The "purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference" Thus "a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9"

The burden is upon the applicant to prove that the accused was "detained" within the meaning of s. 9 which must be proven on a balance of probabilities.

1. R. v. Grant, 2009 SCC 32 at 20
2. R. v. Grant, 2009 SCC 32 at 55
3. R. v. Bush (2010), 259 C.C.C. (3d) 127 at para. 74 (Ont. C.A.)  
R. v. B.(L.) 2007 ONCA 596 (CanLII), (2007), 227 C.C.C. (3d) 70 at para. 60 (Ont. C.A.)

### Types of Detention

A person can be detained physically or psychologically.

Psychological detention has three elements:

1. a police direction or demand;
2. the individual's voluntary compliance with the direction or demand resulting in a deprivation of liberty or other serious legal consequences; and
3. the individual's reasonable belief that there is no choice but to comply<sup>l</sup>

Detention by police does not continue subsequent to release on terms of bail, and so entitlements such as the right to silence do not apply.

The purpose for detention can have concurrent reasons, such as conducting traffic enquiries while making observations of drug related offences.

An officer cannot detain a suspect on the basis of a hunch.

### Public Encounters

Stopping a person will not always amount to detention. It is only where there is either physical restraint or police direction.

### Answering Questions

There is no legal duty upon a person to identify himself to a police officer in *every* situation.

It is well understood that merely asking for ID alone does not amount to detention.

There should be a questioning that of suspected criminal activity that results in a "focused interrogation amounting to detention".

Where the obligation to answer questions, such as those related to identity, then the failure to do so may result in a charge of Obstruction of a Peace Officer under s. 129 of the Criminal Code.

### Rights Upon Detention

### **Right to be Informed of Reasons**

At point of detention the detainee must be immediately "advised, in clear and simple language, of the reasons for the detention."

A person can only exercise his right to counsel under s. 10(b) in a meaningful way if he knows the extent of his jeopardy.

The rights under s.10(b) have been met where the substance of what the accused can reasonably be supposed to understand in the context and circumstances of the case.

### **Canadian Criminal Procedure and Practice/Search and Seizure/Warrantless Searches/Incident to Detention**

#### **General Principles**

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There is a common law power to search incident to detention where "the officer ... believe[s] on reasonable grounds that his or her own safety, or the safety of others, is at risk." If the search goes beyond the purpose of officer safety and becomes investigative then a lawful search can become unlawful.

There is no general power to search bags or vehicles incident to detention.

#### **Vehicle Searches**

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A warrantless search of a vehicle may be reasonable where there are reasonable grounds to believe the vehicle contained illegal items. This however is limited to situations in which the vehicle could be moved "quickly" and there is a risk that the evidence may be lost if an attempt was made to get a search warrant first.

In *R. v. D. (I.D.)*, 1987 CanLII 206 (SK C.A.), the Court suggested the following requirements for a warrantless search:

1. that the vehicle be stopped or the occupants be detained lawfully;
2. that the officer conducting the search have reasonable and probable grounds to believe that an offence has been, is being or is about to be committed and that a search will disclose evidence relevant to that offence;
3. that exigent circumstances, such as imminent loss, removal or destruction of the evidence, make it not feasible to obtain a warrant;
4. that the scope of the search itself bear a reasonable relationship to the offence suspected and the evidence sought.

### **Canadian Criminal Procedure and Practice/Arrest and Detention/Right to Counsel**

#### **General Principles**

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Upon arrest or detention, an accused has a constitutional right to counsel under s. 10(b) of the Charter.

10. Everyone has the right on arrest or detention...

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

This right is divided into an informational component and an implementation component. These components impose a duty on the detaining or arresting officer to inform the accused that they have the right to counsel and to ensure that they have the opportunity to exercise the right.

The onus is upon the accused to establish they right s. 10(b) Charter rights were violated. This includes the burden to show that the accused acted diligently.

The police must inform the detainee of their right to counsel without delay and the availability of legal aid and duty counsel. If the detainee wishes to access counsel, the police must provide a reasonable opportunity to exercise that right and stop from taking any statements. The detained person must be reasonably diligent in exercising their right.

The judge must first determine whether, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel.

Where the detainee has invoked the right to counsel, the Crown has the onus of establishing that the detainee was provided with a reasonable opportunity to exercise that right.

There is no right to an accused to contact family members such as wife, even if it were for the purpose of contacting a lawyer. It is only where the accused informs the police that the purpose of the call is to assist in contacting a specific lawyer that the police should permit the phone call. However, the phone call would not be private or privileged.

The purpose of the right to counsel is to permit a detainee "to be informed of his rights and obligations" and "to obtain advice as to how to exercise those rights".

The goal of the right is to foster the "principles of adjudicative fairness".

### **Informational Component**

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The right can only be exercised where the accused fully understands the jeopardy that they are in and appreciate the consequences of the decision to speak to counsel. Thus, they must be informed of the offence as part of the informational component.

The informational duty requires the officer to inform the detainee of his right to retain and instruct counsel without delay. The police must also inform the accused of the availability of duty counsel and legal aid. As well was providing detail on accessing 24 hours duty counsel phone by giving a toll-free number to call.

The failure to provide a specific telephone number to Legal Aid is fatal to the fulfillment of the right.

Absent proof of circumstances showing that the accused did not understand his right to counsel when he was informed of it, then the onus is on the detainee to prove that he was denied an opportunity to ask for counsel at the time of detention.

There is a right to an opportunity to contact counsel of choice.

If the accused asks for a specific lawyer but that lawyer is not available, then they are expected to choose someone else.

The police have an obligation to hold off from questioning while the accused is given reasonable opportunity to contact a lawyer.

### **Implementation Component**

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The implementation component is engaged once the detainee indicates a desire to exercise the right to counsel.

The implementation component involves two aspects:

1. the officer must provide the detainee with reasonable opportunity to exercise the right to retain counsel without delay except in urgent or dangerous circumstances.
2. refrain from attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel except in urgent or dangerous circumstances.

The implementation component does not arise until there is an expressed desire to exercise those rights.

Once the accused has been informed of his rights, he has an obligation to pursue them.

The right to counsel includes the right to *counsel of choice* and that the counsel represent the accused throughout. This right is limited to counsel who are competent to undertake the retainer; willing to act; available to represent the accused within a reasonable time; and free of any conflicts.

If the chosen lawyer is not available within a reasonable amount of time, the detainee is expected to call another lawyer or else the police duty to hold off questioning. What amount to reasonable time depends on the circumstances.

The accused must possess an operating mind for the right to be properly exercised.

The right to be informed of the right to counsel does not go so far as to guarantee the appreciation of all the information given.

Police must allow the detainee to contact a third-party such as spouse, parent, neighbour, friend, etc., if it is for the purpose of facilitating contact with legal counsel.<sup>1</sup>

However, officer can be the intermediary in this contact and does not need to allow the accused to speak to the third-party directly, so long as the accused can properly exercise their right to contact counsel.

If the Implementational component was not satisfied then there is a breach of the Charter right.

### **Diligence of the Detainee**

The right to counsel is not an absolute right. The accused must be reasonably diligent to exercise it.

If the first part of the implementational duty is satisfied, the judge will only then consider whether the detainee has been reasonably diligent in exercising the right. The onus is on the accused to establish reasonable diligence.

If the detainee failed to be reasonably diligent in exercising their right, the implementational duties do not arise or are suspended and so there cannot be a violation.

### **Choice of Counsel**

The right to counsel includes a limited right to a choice of counsel. This right extends only to the point where the lawyer chosen cannot be made available after a reasonable delay at which time the detainee is expected to call another lawyer, including duty counsel.

The issue at all times is whether the officer provided the detainee with the necessary information and assistance to allow the detainee a reasonable opportunity to exercise his rights.

Where good faith efforts are made by the police, there cannot be a violation simply because the officer failed to do more where there was some feasible step the officer failed to take to arrange contact with counsel of choice.

A detained person must be reasonably diligent in exercising his right to choose counsel. If he fails to do so, then the related duties are suspended.

An accused who waits an hour after a failed attempt to contact a lawyer of choice and refuses to speak with duty counsel may have failed to be reasonably diligent, if the evidence requested by police has an expiry date of two hours. In this case, the accused was refusing to give a breath sample at a police station until speaking to his lawyer. His lawyer could not be contacted within an hour, and the appeal judge determined that the accused's 10(b) right was not infringed by his lack of choice. It is unclear how this impacts cases where there is no pressing expiration time.

### **Police Methods**

The police have a right to try to persuade a person to speak to them.

It is not permissible for a police officer to belittle or make inappropriate comments regarding defence counsel. Where police do so, it has the effect of nullifying the reliance the advice given. To rebut this nullification, it would be necessary to have the detainee be given a further opportunity to contact a lawyer.

### **Post-fulfillment**

The advice received is privileged and so police do not need to inquire about the adequacy of the legal advice the detainee received. If there is any issue with the advice given that is for the detainee to raise.

If the detainee is unsuccessful in reaching a lawyer, for example, if he receives a busy signal, no answer, disconnected phone, recorded message, or someone other than the lawyer, it is for the

accused to inform the police about so that they can fulfil their duty. It is not for the police to "play twenty questions".

Once the obligations have been fulfilled the police may undertake questioning at will and do not need to stop by further requests for a chance to speak with a lawyer. However, if counsel is on the way, they must wait for counsel to arrive.

Once the right to speaking with counsel has been fulfilled the officer need to cease the interview simply because the accused does not want to speak with them.

The police do not need to cease a lawful search while the accused seeks counsel.

### **Delay**

The degree of delay permitted is a matter of context.

The police wait of 10 minutes after a second failed attempt to contact counsel to conduct breath test breached s. 10(b) rights.

### **Examples**

Evidence obtained from a motorist's involvement in screening tests, without being given their right to counsel, should be excluded from evidence incriminating the driver.

### **Special Issues**

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Where there has been a breach of s. 10(b) right for a statement and then a later statement was taken that on its face may not be an independent breach, the subsequent breach may still be "tainted" by the earlier breach allowing for a potential remedy under s. 24(2).

The court have adopted a "purposive and generous approach" when considering tainting by earlier Charter breaches. The accused does not need to establish a strict causal relationship between the breach and subsequent statement. The statement is tainted where the breach and subsequent statement were "part of the same transaction or course of conduct. The connection is "temporal, contextual, causal, or combination of the three."

A "remote" or "tenuous" connection is not sufficient.

### **Change of Jeopardy**

While a detainee is in custody on charges and has received access to counsel, but at some point later the circumstances of the detention change and further charges are being investigated resulting in a change in jeopardy in the detainee, the accused must be given a further opportunity to consult with counsel on the new situation.

### **Communication difficulties**

Where a detainee may not understand the information being told to them, it cannot be resolved by simply reading the standard text.

Limited signs of comprehension of English can be enough for the court to find that the accused did not understand his rights.

Where the officer is aware that the person's first language is not English, then they should be cautious and slow when going through the instructions.



It should only be in exceptional circumstances where the officer is under an obligation to arrange for an interpreter to ensure that they understand their rights.

### Waiver of Right to Counsel

The onus is on the Crown to prove that there was a valid waiver of Charter rights.

A line of cases suggests that answers along the line of “no, not right now” are an equivocal answer due to its ambiguity of interpretation.

Answers such as “what will they do for me?” was equivocal and so was not sufficient.

However, several answers have been found to be unequivocal and so amount to a waiver:

- “No, I have no use to call one”
- “No, I’ll talk to one tomorrow”

In response to a comment such as “not right now”, if the officer explains how to engage the right at a later point--such as stating, “if you change your mind at any time tonight during this whole process”--then the waiver will be considered valid.

Wording such as “no, I don’t think so” will often turn on the wording used, including whether it was confidently said, quickly said, or subjectively showed some doubt to the officer.

### **Prosper Warning**

Where an accused is detained and asserts the right to counsel in a diligent manner and then changes their mind, the police must administer a “Prosper Warning”. This warning requires the officer to tell the detainee that he still has a right to a reasonable opportunity to contact a lawyer, and that during this time the police cannot take any statements until he had had a reasonable opportunity to contact a lawyer. If the officer fails to give the Prosper warning, there will be a Charter violation.

### Young Persons

Section 25(1) of the YCJA gives the youth a right to retain and instruct counsel without delay.

The basic adult rights regarding counsel are still in effect for a youth. However, section 146 creates additional benefits upon the young accused and obligations upon the police when providing the right to counsel. The additional rights not otherwise available to adults include:

- the youth will be given a reasonable opportunity to consult with a parent or responsible adult
- any statement *must* be given in front of a lawyer and parent or responsible adult unless the right is waived;
- the waiver of this right must be audio or video taped or be in writing.

Proof of compliance with these standards is proof beyond a reasonable doubt.

The reason for these additional protections and high standard of proof on the Crown is because of the constitutional requirement of a separate system arising from the youth's reduced moral

blame worthiness and culpability. More to the point youths are "far more easily impressed and influenced by authoritarian figures".

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Our File: Case Summary File

**PRIVILEGED AND CONFIDENTIAL**

August 25, 2004

**CASE SUMMARY: R. v. Mann**  
Supreme Court of Canada

Date of Decision: July 23, 2004

**ISSUE:** Can a police officer detain a person for investigative purposes and in what circumstances, if any, can the detainee be searched?

**FACTS**

Two police officers approached the scene of a reported break and enter. The accused, who was walking along nearby, matched the description of the suspect and was stopped. The accused identified himself and cooperated during a pat-down search of his person for concealed weapons. After detecting a soft object in the accused's pocket, the officer reached in and took possession of a plastic bag of marijuana. He also found a number of small plastic bags in another pocket. The accused was arrested and charged with possession of marijuana for the purpose of trafficking.

**COURT RULING**

The police were entitled to detain the accused for investigative purposes and to conduct a pat-down search to ensure their safety, but the search of M's pockets was unjustified and the evidence discovered therein must be excluded.

**KEY COURT PRONOUNCEMENTS**

1. Although there is no general power of detention, police officers may detain an individual if there are reasonable grounds to believe that in all the circumstances, the individual is connected to a particular offence and that the detention is reasonably necessary.
2. Individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for their detention.
3. Where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. A pat-down search is a "relatively non-intrusive procedure", the duration of which is "only a few seconds".
4. The investigative detention should be brief in duration and does not impose an obligation on the detainee to answer questions.

COMMENT

The law regarding search incident to arrest remains unaffected by this case and such a power continues to exist to guarantee officer safety, prevent escape and secure evidence including identity.

Future cases will clarify what are reasonable grounds to conduct a protective search, and what constitutes a reasonable search in the context of an investigative detention. Keep in mind the fact situation that was addressed in this case (soft object in pocket and search into pocket). The SCC concluded that under the circumstances, the search went beyond what was required to address concerns about the officer's safety. When the officer reached into the accused's pocket, the purpose of the search shifted from safety to the detection and collection of evidence.

As the decision makes clear there are other questions left unresolved by this decision, since they are not squarely raised by the facts of the case. For example, how long can a detention of brief duration be and how does the obligation to satisfy s.10(b) of the *Charter* (giving of rights to counsel) fit with the requirement that the detention be brief? Until such time as further direction is provided, the cautious conservative approach would countenance detentions of no more than several minutes and the provision of the s. 10(b) caution immediately upon being satisfied on a balance of probabilities that the detainee is connected to the offence.

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PRIVILEGED AND CONFIDENTIAL

July 23, 2009

CASE SUMMARY:

R/ v. SUBERU

Court: Supreme Court of Canada  
Date of Decision: July 17, 2009  
Reported at: 2009 SCC 33

Facts:

The police were called to an LCBO outlet where employees suspected that the accused and another man were attempting to use stolen credit cards. As one officer detained one of the suspects in the store, the accused left the store. Another officer arriving at the store in the parking lot came across the accused in the process of leaving the store (he had just entered his vehicle) and was uncertain as to his involvement. The accused said to the officer "He did this, not me, so I guess I can go." The officer said to the accused "Wait a minute. I need to talk to you before you go anywhere." He then asked the accused some questions and elicited that he was with the other suspect and that they had driven in the same van. The officer then received a police call indicating the licence plate of the suspect's vehicle, which matched the van. The officers soon after arrested the accused.

Issue:

When is a right to counsel caution required under s. 10(b) of the Charter in the context of "investigative detentions"?

Result and Analysis:

The Court of Appeal had determined that, in the context of investigative detentions, a "brief interlude" may occur before an officer needs to give a right to counsel caution, during which the officer makes a quick assessment of the situation to determine if a lengthier detention is warranted. The SCC has now overturned the Court of Appeal's "brief interlude" allowance. Under Charter s. 10(b), a right to counsel caution is to be provided "without delay" to an individual who is detained, and "without delay" means "immediately" - even if the detention is for investigatory purposes. The immediacy of this obligation is, however, subject to concerns for officer or public safety (E.g., diffusing a dangerous situation via a search incident to arrest may be effected first).

However, the SCC was also careful to stress that a Charter detention does not arise from mere "delays that involve no significant physical or psychological restraint." Not every interaction by state agents, even with a person who is under investigation for illegal activity, will amount to a Charter detention. The test from *Grant* is to be applied to all of the facts of the situation to determine whether and when a Charter "detention" has occurred.

Applying the *Grant* test to the facts of this case, the initial investigatory questioning and delay of the accused by the police officer fell short of a Charter detention. That detention happened only later, when the radio call came in indicating that the accused was probably involved in the offence and the officer determined that the accused could not leave -- a moment which, on the facts of the case, coincided with his arrest. Upon arresting the accused, the officer promptly and properly informed him of his right to counsel, so there was no s. 10(b) violation. His ~~position~~ was upheld.

This case in an application of the new *Grant* test for detention. It is clear that we can no longer argue that because a detention was an "investigatory detention" the s. 10(b) right to counsel was not triggered. Although we can take comfort in the fact that the SCC here stresses that mere "delays" and non-significant restraints do not amount to a Charter detention, our officers need to have regard to the types of factors recently set out by the SCC in *Grant* (see related Case Summary) in assessing whether or not a Charter detention has begun to occur. If there is any doubt, an officer should inform the suspect he is not detained, or, if he is detained, provide a s. 10(b) right to counsel..

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PRIVILEGED AND CONFIDENTIAL

July 23, 2009

CASE SUMMARY:  
R. v. GRANT [Charter Detention Analysis]

Court: Supreme Court of Canada  
Date of Decision: July 17, 2009  
Reported at: 2009 SCC 32

Facts:

Three police officers (two in plainclothes and one in uniform) were on patrol near schools with a history of crime. The plainclothes officer initiated a conversation with the accused, a young man, while the officer was standing directly in front of the accused's path forward on a sidewalk. The officer engaged the accused in general conversation, asking him "what was going on" and asking for his name and address, to which the accused responded by producing his provincial health card. The accused behaved nervously, adjusted his jacket, to which the officer asked him to "keep his hands in front of him". The two plainclothes officers then approached and identified themselves as police officers by flashing their badges, and they stood behind the uniformed officer, further obstructing the accused's path forward. The uniformed officer then asked the accused if he had anything he should not have, to which he answered "a small bag of weed" and a firearm. At this point, the officers arrested and searched the accused, seizing the marijuana and a loaded revolver, and advised him of his right to counsel. He was charged with several gun related offences.

Issues:

Was the defendant "detained" for the purposes of s. 9 (arbitrary detention) and s. 10(b) (right to counsel) of the Charter? What are the factors a court is to consider in assessing whether a Charter detention has occurred? [Note: this case also sets a new test for exclusion of evidence under s. 24(2) of the Charter – to be addressed in a separate Case Summary.]

Analysis:

The majority judgment clarifies the test for "detention" as set out in previous cases. It is not every trivial or insignificant interference with liberty that amounts to a "detention" under the Charter. Rather, there must be a "significant" physical or psychological restraint. The new test is an objective one, however taking into account the individual's circumstances. The court is not to conduct a minute parsing of words and movements, but rather is to undertake a realistic appraisal of the entire interaction at issue. The subjective intentions of the police are not determinative. Focused suspicion, in and of itself, does not turn an encounter into a detention. The length of the interaction may be a relevant consideration. All factors must be considered. The majority judgment provides a non-exhaustive list of factors (summarized at paragraph 44):

"In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia* (amongst other things), the following factors:

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a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual; whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.”

Applying the test to the case at hand, the majority determined that the accused was not detained when the uniformed officer approached him, directly in his pathway, and asked the preliminary general inquiries. However, in the circumstances of the case, when the accused was told to “keep his hands in front of him”, from this point forward he was detained. Although the officer was “respectful” in his questioning, the power imbalance was exacerbated by the accused’s youth and inexperience. The detention continued on through the tactical positioning of the two plainclothes officers, and the pointed questioning of the accused, who by then had become the object of particularized suspicion.

A detention not authorized by law is arbitrary and violates s. 9 of the Charter. In *Mann*, the SCC confirmed the existence of a common law police power of “investigative detention” allowing for brief detention based on “reasonable suspicion”. Applying that test to this case, the officers acknowledged at trial that they did not have a reasonable suspicion to detain the accused prior to his incriminating statements. Thus, they arbitrarily detained Grant in violation of s. 9 of the Charter.

The Court found that a section 10(b) right to counsel caution must be provided “immediately” upon detention, even in the context of an investigative detention (as here). As this caution was not provided to the accused until after he was arrested, there was a violation of his s. 10(b) Charter right.

#### Comment:

This case doesn't substantially change the law of detention so much as it establishes a clearer description of the factors to be considered in assessing whether or not a "detention" has taken place while making the point that no one factor is determinative.

In our context, where our conservation officers are relying on statutory inspection powers, their temporary delays of individuals to effect those statutory powers are arguably mere "delays" as described by the majority SCC judgment, not Charter detentions. Therefore, unless and until the test for detention is at some point thereafter satisfied (i.e., considering the factors set out above – duration of the delay; nature of questioning; etc.), no right to counsel caution is required. There are instances where our officers are not relying on any statutory inspection powers (e.g., stopping an individual walking in the woods unarmed and the officers want to question him concerning abandoned game or a deposit on Crown lands); in such a situation, our officers would be very much in the position of the officers in *Grant* in the sense that none of our statutory inspection powers on those facts could legitimately be relied upon. They can stop and talk with the individual, insofar as it is a mere general inquiry delay, but they should keep in mind the test set out above if it develops into something beyond that.

At one point, the SCC endorsed a proactive approach by officers in that an officer may provide a caution against any reasonable inference that a detention is taking place (“In those situations where the police may be uncertain whether their conduct is having a coercive effect on an individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go.”). This is an option worth employing. Beyond that, the cautious conservative approach would be to provide the s. 10(b) right to counsel caution once the officer is satisfied on a balance of probabilities that the person being questioned is connected to an offence.

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**Privileged and Confidential**

December 12, 2014

## CASE SUMMARY – R. v. Fearon

Court: Supreme Court of Canada

Date: December 11, 2014

Reported at: 2014 SCC 77

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### Facts

This case is an appeal of an Ontario Court of Appeal decision to affirm the trial court's finding that the search of a cell phone incident to arrest had not breached the defendant's s. 8 *Charter* rights. A merchant was robbed at gunpoint by two men while loading her car with jewelry. There was some urgency in the investigation to locate the gun and jewelry. Later that same day, the appellant, Fearon, was arrested by the police. The police conducted a pat-down search of Fearon's person incident to the arrest and found a cell phone. The police searched the cellphone at this time and again within less than two hours of the arrest. The cellphone contained an incriminating draft text message and photos of a handgun and photos of males. Fearon argued that the cellphone search violated his s. 8 *Charter* rights.

### Issue

Does the common law police power to search incident to a lawful arrest permit the search of cell phones or similar devices found on a suspect?

### Result and Analysis

By a 4:3 majority, the Supreme Court of Canada reformulated the common law test for searches incident to arrest specific to cell phones and other similar devices.

A search incident to arrest must be exercised in the pursuit of a valid purpose truly incidental to the arrest, such as public safety (e.g., locating the handgun), avoiding the loss of evidence (e.g., the stolen jewelry), and obtaining evidence of the crime (e.g., information linking the arrestee to the crime and locating potential accomplices). The Court found that there is a sense of urgency that can distinguish cell phone searches from the taking of bodily samples (*Stillman*) and strip searches (*Golden*).

The Court made three modifications to the common law power to search incident to arrest to address the specific privacy concerns associated with cellphones:

First, the scope of the search must be tailored to the purpose for which it may lawfully be conducted. Generally, the scope of a search incidental to arrest should be limited to recently sent or drafted emails, texts, photos or phone calls. There may be circumstances where a more comprehensive search is justified. Overall, the police must be able to explain what they searched and why. This is not a limitless authority to search the entire storage capacity of a cell phone.

Second, the search of cell phones or similar devices incidental to arrest for the purpose of the discovery of evidence must be treated restrictively. Only in circumstances where the investigation would be stymied or significantly hampered absent a timely search will the discovery of evidence be a valid law enforcement objective. Subsequently, cell phone searches are not permitted simply to discover additional evidence. The police must be able to explain why it was necessary to search the cell phone rather than waiting to obtain a warrant.

Third, the police must make detailed notes regarding any search of a cell phone incidental to arrest. The Court held that the obligation to keep a careful record of what is searched and how it was searched should be imposed as a matter of constitutional imperative. Generally, the notes should include the applications searched, the extent of the search, the time of the search, its purpose and duration.

The Court held that the framework for determining the legality of the search incidental to the arrest should be the same for all cellular devices irrelevant of their operating system or lack thereof. In other words, a flip phone from 1990 should be treated the same as an iPhone or computer. The Court also did not give much weight to whether the cell phone was locked or not when assessing an individual's privacy interests.

**In summary**, police officers will not be justified in searching a cell phone or similar device incidental to every arrest. Rather, such a search will comply with s. 8 where:

- (1) The arrest was lawful;
- (2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
  - a. Protecting the police, the accused, or the public;
  - b. Preserving evidence; or
  - c. Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incidental to arrest;
- (3) The nature and the extent of the search are tailored to the purpose of the search;  
**and**
- (4) The police take detailed notes of what they have examined on the device and how it was searched.

## Discussion

The SCC has slightly modified the test for the search of cell phones and other devices incident to arrest as it had been expressed most recently in *R. v. Fearon* at the Ontario Court of Appeal. It has confirmed the availability of a common law search power, although it isn't a broad-ranging limitless power. No longer is the presence or absence of password protection a factor for consideration, nor is the particular capacity of the cell phone. "Exigent circumstances" are not part of the test except where the prompt search of the cell phone is considered truly incidental to the arrest on the basis that it serves an immediate investigative purpose.

The Court also held that the search of cell phones or other similar devices incident to arrest is not applicable to all manner of investigations. Close regard should be had to paragraph 79 of the majority decision:

*"The law enforcement objectives served by searches incident to arrest will generally be most compelling in the course of the investigation of crimes that involve, for example, violence or threats of violence, or that in some other way put public safety at risk, such as the robbery in this case, or serious property offences that involve readily disposable property, or drug trafficking. Generally speaking, these types of crimes are most likely to justify some limited search of a cell phone incident to arrest, given the law enforcement objectives. Conversely, a search of a cell phone incident to arrest will generally not be justified in relation to minor offences."*

In light of this, it is only a limited subset of MNRF investigations for which the search of cell phones and similar devices can happen in the absence of a search warrant. In all other cases, there would be a need to seize the item and secure it for a search warrant search where its seizure is so available (e.g. where reasonable grounds exist under s. 92(1) of the FWCA).

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