Ontario Justice Education Network

Section 9 of the *Charter*

Section 9 of the Canadian Charter of Rights and Freedoms states: *Everyone has the right not to be arbitrarily detained or imprisoned.*

A. Introduction

Section 9 of the *Charter* is part of a group of rights[1] that are referred to as "legal rights." These rights balance the state's legitimate powers to investigate offences with the equally legitimate rights of individuals to be free from unjustifiable state interference.

Section 9 guarantees the right to be free from "arbitrary detention." Accordingly, in order to apply s. 9 it is important to understand what both "arbitrary" and "detention" mean. If there is no detention, the question of whether or not the detention was arbitrary is irrelevant. Therefore, it is best to begin with the question of whether or not there was a detention.

B. Framework for a Section 9 Analysis

Stage 1: Was there a detention?

There are three types of detention: (a) physical, (b) lawful, and (c) psychological detention. Fleeting delays or interferences do not qualify as detention as there is no significant physical or psychological restraint.

[1] Specifically, sections 7-14.

- ***Physical Detention:*** The accused was subject to physical constraint
- ***Lawful Detention:*** The accused would suffer legal consequences for failure to comply with a police officer's demand
- ***Psychological Detention:*** The accused reasonably concludes he/she has been deprived of the liberty of choice

Stage 2: Was the detention arbitrary?

Detention is not arbitrary if it is: (a) authorized by law, and (b) the law itself is not arbitrary. If there is no authorizing legal authority the detention is arbitrary.

- ***Authorized by Law:*** There is a statutory or common law authority authorizing the detention
- ***Arbitrariness:*** The statutory or common law authority that that authorizes the detention is not arbitrary; it is be governed by express or implied criteria

Stage 3: Can the arbitrary detention be saved under section 1 of the *Charter*?

An arbitrary detention (an infringement of s. 9) can potentially be saved by s. 1 of the Charter.[2] This is the primary manner that common law police powers are established.[3]

C. Analysis

Stage 1 - "Detention"

The definition of "detention" was addressed in the case of *R. v. Therens*.[4] *Therens* involved an accused being stopped for a breathalyzer test by the police. The accused claimed that he had the right to consult a lawyer before taking the test, because he had been detained. When deciding *Therens* the Supreme Court set out the three types of detention relevant to s.9 of the *Charter*:

(1) Physical detention, where a person is subject to physical constraint (ex. handcuffs, being placed in the police officer's vehicle, etc.)

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[2] For more information, see "In Brief: Section 1 of the Charter and the *Oakes* Test" available at http://ojen.ca/resource/980.
[3] See, for example, *R v Hufsky* [1988] 1 SCR 621 and *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53.
[4] *R v Therens*, [1985] SCJ No 30, [1985] SCR 613.

(2) Detention by lawful compulsion, where there are legal consequences for the failure to comply with a police officer's demand (as there were in *Therens*)
(3) Psychological detention, where the police have no actual authority to detain a person, but as a result of the circumstances, the nature of police conduct, and/or the particular characteristics of the accused, a reasonable person in the circumstances of the accused would conclude they were compelled to remain

While the first two types of detention are clear, psychological detention is a much more ambiguous concept. The application of "psychological detention" was clarified in *R. v. Grant*.[5]

Psychological Detention

Psychological detention tends to arise in one of two circumstances. First, a person attends at a police station and is questioned. In that circumstance it is often unclear whether they went willingly or if they felt compelled to do so. Second, a police officer engages a person on the street in conversation, which can lead to more intrusive searches.

The Court's approach measures whether the reasonable person in the accused's circumstances would conclude that he/she had be deprived of their liberty of choice. In other words, there is psychological detention when a reasonable person would think they had no choice whether or not to comply as a result of state action(s). In *Grant,* the Court listed a number of factors that should be considered in determining whether a reasonable person would conclude that they had no choice but to comply:

I. **The circumstances that gave rise to the encounter:**
    a. Were the police providing general assistance?
    b. Were the police maintaining general order?
    c. Were the police making general inquiries about a particular occurrence?
    d. Were the police singling out the individual for focussed investigation?

[5] *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353.

As we move along the spectrum from general assistance to focussed investigation, there is an increased possibility a reasonable person in the individual's circumstance would conclude they had no choice but to comply.

II. **The nature of the police conduct:**
   a. Language used
   b. Use of physical contact
   c. Place where the interaction occurred
   d. Presence of others
   e. Duration of encounter

If the police use aggressive language, physical contact, isolate the detainee, or a combination of those factors, there is an increased possibility a reasonable person in the individual's circumstance would conclude they had no choice but to comply.

III. **The particular characteristics of circumstances of the individual, where relevant:**
   a. Age
   b. Physical stature
   c. Minority status
   d. Level of sophistication

If the accused is a minor or elderly, small, a minority, uneducated, or a combination of those factors, then there is an increased possibility that a reasonable person in the individual's circumstance would conclude that they had no choice but to comply.

Exemptions

Fleeting delays or interferences do not meet the definition of "detention." Section 9 is not engaged by delays that that involve no significant physical or psychological restraint. This includes, for example, a request for identification.

Case Law

R v Grant, [2009] 2 SCR 353

Grant was stopped by two plain-clothes officers who thought he looked suspicious. Grant was told to keep his hands in front of him while he was questioned by a third uniformed officer. All of the officers were larger than Grant and surrounded him throughout the questioning. Grant was first asked for identification, but later admitted he had a small amount of marijuana and a small revolver. The Court held that Grant was psychologically detained by the officers given the circumstances and the fact that he was an unsophisticated 18-year-old. Regardless, the revolver was ultimately deemed to be admissible evidence.[6]

Stage 2 - "Arbitrary"

A lawful detention is not arbitrary unless the statute or common law authorizing the detention is itself arbitrary. If a detention has no legal basis in a statue or common law rule, it is arbitrary and violates s. 9. Broadly, this means that police officers must have an explicit statutory or common law power that authorizes them to detain an individual.

Determining whether the legal authority is arbitrary is the most difficult part of a s.9 analysis. The definition of "arbitrary" is somewhat convoluted and yet to be completely developed by the courts. The existing definition was set out by the Supreme Court in *R. v. Hufsky.*[7] In *Hufsky*, the Court stated that a detention or the law authorizing it is arbitrary "if there are no criteria, express or implied, which govern its exercise." Accordingly, a law authorizing random stops at a police officer's discretion would likely infringe s. 9 as it would not be governed by any particular criteria. Although, it is important to remember that such a law could potentially be saved by s. 1.[8]

The difficulty with the definition is it focuses on *any* criteria, rather than *proper* criteria. Seemingly, a stop based on racial profiling would not be arbitrary as it was based on certain criteria. Clearly, such an approach would be unacceptable and this is reflected in subsequent decisions. Generally, detention will not be held to be arbitrary where it is based on express or implied criteria which are not discriminatory or improper, as suggested by the Court's comments in *R v Storrey.*[9] In *Storrey* the Court commented that a valid arrest could potentially be invalidated as arbitrary if the police officer was biased towards a person of different race, nationality, or colour, or if there was a personal hostility between the police officer and the person being arrested. Note that although these could be classified as criteria, they are not proper criteria.

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[6] Note that evidence gathered via an unlawful detention is not automatically excluded. Rather, this engages the remedy analysis under s. 24(2) of the Charter. For more information, see "In Brief: Section 24(2) of the Charter - Exclusion of Evidence" available at http://ojen.ca/resource/7911.
[7] *R v Hufsky*, [1988] 1 SCR 621.
[8] See note 2.
[9] *R v Storrey* (1990), 75 CR (3d) 1.

Case Law

R v Hufsky, [1988] 1 SCR 621

Hufsky relates to the random stopping of a motorist to check their driver's licence, proof of insurance, and sobriety. The random stopping of a motorist, even for a relatively brief duration, meets the definition of detention. As a result of the random stop, the officer assumes control over the movement of the motorist and there are criminal consequences for refusing to comply. The lawful authority for random stops is the *Highway Traffic Act*. The statute is arbitrary as stops are left entirely to discretion of the officer with no governing criteria. However, given the importance of highway safety, random stops are a reasonable limit prescribed by law which can be saved by s. 1 of the *Charter*.