Ontario Justice Education Network

Section 10 of the Charter

Section 10 of the *Canadian Charter of Rights and Freedoms* states:

Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

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

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Introduction

Section 10 is one of a group of *Charter* rights known as "legal" rights – rights people have when dealing with the justice system. These rights apply to "everyone" which means: only to natural people, and not to organizations or businesses; but also to everyone physically present within Canada – not just those with legal status, such as Canadian citizens or landed immigrants.

The first part of Section 10 specifically states that these rights only apply "on arrest or detention". An arrest is a formal police procedure and it is relatively clear and straightforward: to make a lawful arrest, police officers must identify themselves, must inform the person being arrested that they are being arrested and must charge the person with an offence. A detention, however, may be less straightforward.

What is Detention?

Whereas both arrest and detention involve a legal suspension of a person's liberty, detention differs from arrest in that police can detain someone without formally charging them with an offence. Typically, this occurs when police do not have sufficient grounds to charge someone with a specific offense, but do have reasonable enough suspicions about the person's activity that they want to obtain more information.

It is important to note that this does not mean that every time the police ask a person to stop, that person has been detained in the legal sense. Many kinds of fleeting delays or interferences, like requests for identification, preliminary questioning of bystanders where police believe a crime has recently been committed, or non-coercive exploratory questioning,[1] do not qualify as detention. Rather, detention must involve a more significant suspension of one's freedom. There are four types of detention: (a) physical detention, (b) lawful detention, (c) psychological detention and (d) investigative detention.

(1) Physical detention means that a person is subject to physical constraint in a manner that is more than trifling (ex. handcuffs, being placed in the police officer's vehicle, searching of body, clothing or personal belongings,[2] etc.)

(2) Lawful Detention means that there are legal consequences for the failure to comply with a police officer's demand (for example, refusing to blow into a breathalyzer)[3]

(3) Psychological detention can even occur when police have not detained someone, or may lack actual authority to detain a person. In essence, psychological detention means that police actions cause a person to believe that they are not free to leave, when in fact they are. This perception could result from a combination of the circumstances, the nature of police conduct, and/or the particular characteristics of the accused that would lead a reasonable person in that situation to conclude that they were "deprived of the liberty of choice" – that they couldn't just walk away – because of the actions of the police officers.[4]

(4) Investigative detention means that individual may be briefly detained where police have reasonable grounds to suspect a clear connection between the individual being detained and a recently committed or still unfolding criminal offence. An investigative detention does not impose a duty to answer the police's questions. Police are permitted to conduct a search for safety purposes, but are forbidden from looking for evidence.

When is a Psychological Detention Triggered?

Establishing or refuting claims of psychological detention can be complicated. In *Grant*, the Supreme Court listed a number of factors that may be considered in determining whether a reasonable person would conclude that they had no choice but to comply. The larger context

[1] *R v Suberu,* [2009] 2 SCR 460 at para 28.
[2] *R v Greffe*, [1990] 1 SCR 755 at 793-94; *R v Simmons* [1988] 2 SCR 495 at 521; *R v V (TA),* [2001] A.J. No. 1679 at para 21 ; *R v Rube*, [1992] BCJ No. 105.
[3] *R. v. Therens*, [1985] 1 SCR 613.
[4] *R v Grant* 2009 SCC 32.

for making this determination is the power imbalance between the detainee and the police officer may result in factors other than those listed below being relevant.[5]

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
d. Were the police singling out the individual for focused investigation?

As we move along the spectrum from general assistance to focused investigation, there is an increased possibility a reasonable person in the individual's circumstance would conclude they were unable to walk away from the encounter.

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 were unable to walk away from the encounter.

III. The particular characteristics of circumstances of the individual:

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 they were unable to walk away from the encounter.

In some situations, "a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed."[6]

If the accused fails to testify at trial about their "personal circumstances, feelings, and knowledge" in order to establish psychological detention then an appellate court will have a difficult time finding that there was a psychological detention since "there [will be] no

[5] *Grant, supra*.
[6] *Grant, supra.*

evidence as to whether [the accused] subjectively believed that he could not leave."[7] Remember that appellate courts don't usually hear new evidence.

Once Someone Has Been Detained, What Rights Does Section 10 Guarantee?

The *Charter* and the Courts seek to ensure that police officers have good reasons for arresting or detaining people and that those detained are aware of these reasons at the time of detention. The *Charter* also tries to account for the fact that if someone has been detained they are in a very vulnerable position, with the whole criminal justice system beginning to swing into motion against them. This is why provisions exist that allowing them to understand what they are being charged with, to refuse to answer questions and to get and talk to a lawyer (what "retain and instruct counsel" means in plain English). In particular, the right to legal counsel is understood as an essential tool to make sure that individuals accused of crimes can assert their rights. It is very important that anyone accused of a crime have the opportunity to be represented by a lawyer.

Before arguing that one of the rights under s. 10 was infringed, remember that they only apply if someone is arrested or detained, as was discussed above. It doesn't matter which of the two words the police officer uses, even though arrest sounds much more serious to a lay person,[8] or what type of detention it was.

(a) The right to be informed promptly of the reasons therefor;

A detainee should be informed of the reasons in clear and simple language.[9] The operation of the right requires that the accused <u>understand</u> the reasons for their arrest, rather than simply being <u>told</u> the reasons.[10] Knowing the reason for the arrest or detention allows individuals to make informed choices about how to deal with the situation, including the possibility of talking to a lawyer, as laid out under s.10(b).[11]

The standard of promptness can be described as immediately upon detention. A delay of 22 minutes has been grounds for finding a breach of this *Charter* right.[12]

Individuals don't only have this right once per arrest. If the reason for arrest changes, the accused has the right to be promptly informed of the new reason for your detention.[13] This right to know the reasons for detention also applies to the type of charges, such as knowing

[7] *Suberu, supra* at para 34.
[8] *R v Latimer,* [1997] 1 SCR 217.
[9] *R v Mann,* [2004] 3 SCR 59 at para 21.
[10] *R v Evans*, [1991] 1 SCR 869.
[11] *R v Black*, [1989] 2 SCR 138, at 152-53.
[12] *R v Mian*, [2014] 2 SCR 689.
[13] *Evans, supra*

that the person an accused is charged with shooting has subsequently died[14], as well as the number of charges: for example an accused being led to believe that they are being investigated for one sexual assault when they are really being investigated for more is a violation.[15]

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

Importantly, meeting section 10(b) rights requires that an accused's s.10(a) rights have not been infringed, because an individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy.[16] Put another way, a person cannot adequately instruct their legal representative if they do not know enough about the charges against them.

The Supreme Court has clarified that "without delay" means immediately.[17] A delay of 25 minutes has been grounds for finding a breach of this *Charter* right.[18]

Be careful to not confuse a Canadian's *Charter* rights under s. 10(b) with the American *Miranda* rights commonly seen on TV shows like *Law & Order*. While the idea is similar, the details are different. Especially important is the American rule that once the accused has asked for a lawyer, the police need to stop interrogation until the lawyer is physically in the interrogation room. Under Canadian law there is no right to have a lawyer present throughout an interrogation by police and a request to re-consult a lawyer, in the absence of other factors, need not be allowed by police.[19]

In Canada, police must stop interrogation until they are sure that the accused understands their s.10(b) rights, and has had an opportunity to exercise them. Once police provide private telephone access, they must give detainees a "reasonable opportunity" to talk to a lawyer of their choosing or duty counsel if their lawyer of choice is unavailable.[20]

(c) The right to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Habeas Corpus ad subjiciendum –which in Latin means, "You shall have the body"— existed in common law long before the *Charter,* dating back to at least the 1600's in England. It requires any authority that is detaining someone to bring them to court and prove that the

[14] *R v Smith*, [1991] 1 SCR 714.
[15] *R v Borden*, [1994] 3 SCR 145.
[16] *R v Manninen*, [1987] 1 SCR 1233.
[17] *Suberu, supra* at para 41.
[18] *Mian, supra*.
[19] *R v Sinclair*, 2010 SCC 35.
[20] *R v Willer,* 2010 SCC 37.

detention is lawful. At its most basic, that means that anyone who is detained has the right to ask a judge to look at their situation and decide if it complies with the law.

Writs of *Habeas Corpus* are infrequently used in Canada nowadays as there are many other options for people to access the legal system. But if someone is detained and has exhausted their other legal avenues to challenge the detention (such as Appealing) then it is still a legal option.

4. Very brief note about the relationship of s 10 to s 24(2).

If a violation of s.10 is determined to have occurred, there is not an automatic remedy. The *Charter* does not provide for the exclusion of all unconstitutionally obtained evidence. Instead, section 24(2) directs evidence to be excluded only if, after considering all the circumstances, the court concludes that admission of the evidence *would (or could)*[21] *bring the administration of justice into disrepute* (or society's confidence in the justice system). Factors to be considered include the following:

(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct),

(2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little),

3) society's interest in the adjudication of the case on its merits. [22]

Essentially, when police intentionally or negligently breach the *Charter* rights of the accused, the court is likely to exclude any evidence obtained. However, when police unintentionally make mistakes in applying legal standards (such as when a psychological detention has occurred) courts tend to be more forgiving by not excluding evidence using s. 24(2). The severity of the crime of the accused may factor into point #3: allowing a confessed murderer to walk free due to excluding their confession may be harder to justify than merely excluding evidence on some other charge.

[21] *R v Collins*, [1987] 1 SCR 265 at p.287
[22] *Grant, supra.*

Was There a Detention?
- Phyiscal
- Lawful
- Psychological
- Investigative

Which s. 10 Rights were Triggered?
- 10(a)
- 10(b)
- 10(c)

Were the Triggered Rights Violated?
- Promptly / Immediately
- Rights Understood
- Reasonable Opportunity

Leading Cases

R v Manninen, [1987] 1 SCR 1233
There may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel.

R v Brydges, [1990] 1 SCR 190
Section 10(b) imposes a duty upon the police to provide information and access to a legal aid lawyer if needed, including help in contacting them.

R v Prosper, [1994] 3 SCR 236
Merely reading the accused his or her rights is insufficient to discharge the right to counsel; the police must also provide the accused with access to legal aid or duty counsel, including informing the accused about the existence of legal aid or duty counsel.

R v Bartle, [1994] 3 SCR 173
The Court held that a police officer is required to hold off on their investigation upon arresting an individual until they have been informed of their rights and given sufficient information and access to contact a private lawyer or duty counsel. Established a positive duty on the part of police officers to provide detained persons with an opportunity to exercise their right to retain and instruct counsel. In this case, police officers informed Mr. Bartle of his right to counsel when they took him into custody for suspected impaired driving,

but failed to advise him of a toll-free number that he could call to speak with a duty counsel lawyer.

R v Suberu, [2009] 2 SCR 460

Absent exigent safety concerns, the section 10(b) caution must be given immediately to persons subject to the common law power of investigative detention.

Facts: A police officer attended at a liquor ("LCBO") store in response to reports that two suspects were attempting to use a stolen credit card. On entering the store, the officer saw another police officer speaking with a store employee and another man. At this point, Mr. Suberu walked past the officer towards the exit and told him, "he did this, not me, so I guess I can go." The officer followed Mr. Suberu outside and said, "Wait a minute. I need to talk to you before you go anywhere." While Mr. Suberu was seated in the driver's seat of a van, but turned outwards, facing the officer, there was a brief exchange during which the officer asked about Mr. Suberu's relationship to the man inside the store, where the two men had come from, and who owned the van. As they spoke, the officer received further information over his radio linking the van and Mr. Suberu to the use of a stolen credit card at other locations earlier in the day (a Wal-Mart and an LCBO store). The officer then asked for Mr. Suberu's identification and vehicle ownership. As he did so, he saw shopping bags inside the van from Wal-Mart and the LCBO and arrested Mr. Suberu. Applying the Grant factors, the Supreme Court upheld the trial judge's conclusion that Mr. Suberu was not detained before his arrest.

R v Grant, 2009 SCC 32

Police officers stopped the accused on the street without any reasonable grounds. This search violated s.8 of the Charter. Through the search, the police found that the accused was carrying a gun and marijuana. The Supreme Court created a new test for determining whether evidence obtained by a Charter breach should be excluded under s. 24(2) of the *Charter*, replacing the test from *R v Collins*. In this case, the SCC did not exclude the gun evidence because in all the circumstances, allowing the evidence would not bring the administration of justice into disrepute.

R v Mian, 2014 SCC 54

The accused, Mohammad Hassan Mian, was arrested for possession of cocaine for the purpose of trafficking, but not informed of the reason for his detention for 22 minutes, and not informed of his right to retain and instruct counsel for approximately 25 minutes. After cross-examining a number of police officers, defence counsel argued that police had violated Sections 10(a) and 10(b) of the *Charter of Rights and Freedoms*.

R v Chaisson, [2006] 1 SCR 415

Detention arose when accused complied with police direction to "get out" of his parked car

R v Sinclair, [2010] 2 SCR 310

The purpose of s. 10(*b*) is to support detainees' right to choose whether to cooperate with the police investigation or not, by giving them access to legal advice on the situation they are facing. This is achieved by requiring that they be informed of the right to consult counsel and, if a detainee so requests, that he or she be given an opportunity to consult counsel. Achieving this purpose may require that the detainee be given an opportunity to reconsult counsel where developments make this necessary, but it does not demand the continued presence of counsel throughout the interview process. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain free to facilitate such an arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement.

R v Mann [2004] 3 S.C.R. 59

Police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. Individuals who are detained for investigative purposes must be advised, in clear and simple language, of the reasons for the detention. Investigative detentions carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*. Investigative Detentions may or may not trigger s.10(b) protections for the detained individual. Investigative detentions do not impose an obligation on the detained individual to answer questions posed by the police. Where a police officer has reasonable grounds to believe that his safety or the safety of others is at risk, the officer may engage in a protective pat-down search of the detained individual. The investigative detention and protective search power must be distinguished from an arrest and the incidental power to search on arrest.