Great Strides in Section 9 Jurisprudence

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The perfect is the enemy of the good. Could the approach to section 9 laid out in *Grant* have been constructed differently? Yes. But are we, because of that decision, magnitudes of order clearer on how to approach section 9? Also yes. The Supreme Court's decision in *Grant*, seemingly the product of careful negotiation given the time it has taken for the judgment to be handed down in a fashion having a clear majority, has created what has for over 25 years been lacking with regard to arbitrary detention. Where before we had very few decisions, those decisions not easily reconcilable with each other, and lower courts forced to create their own doctrine on unresolved issues, we now have an overarching framework which can be applied. Questions remain unresolved, but it is now clear what approach to take in resolving them. *Grant* is to section 9 what *Hunter v. Southam* is to section 8.

Prior to this, there were very few clear rules around section 9. The Court had defined "arbitrary" as a discretion with "no criteria, express or implied, which govern its exercise". This was not merely one way of being arbitrary, it was offered and applied as the meaning of arbitrariness. Although this was the definition, however, lower courts frequently had to deal with situations in which powers to detain were misused: not applied without criteria, but applied based on improper criteria. Other Supreme Court decisions suggested in passing that improperly used powers could result in an arbitrary detention, though they did not reconcile this possibility with, or even mention, the "no criteria" definition. The difficulty here is that a stop based on something like racial profiling seems obviously to violate section 9, but it is not a detention based on no criteria — quite the opposite. Further related to the meaning of "arbitrary", it was not clear what the relationship between unlawfulness and arbitrariness was. It had been decided that a lawful detention was not arbitrary, though exactly how that rule

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1* *R. v. Grant*, reported *ante*, p. 1.


was to interact with the suggestion that misuse of a legal power could make a detention arbitrary had not been discussed. It had *not* been decided — indeed, it had been deliberately left undecided — whether an unlawful detention was by nature arbitrary. Many lower courts had concluded that a detention could fail to comply with the law but still not have been arbitrary: that something more than mere unlawfulness was needed to make a detention arbitrary. If that was true, it was not clear exactly what more was needed. If that was not true, it was unclear how one would relate two different rules, which might well conflict: "arbitrary equals no criteria" and "arbitrary equals unlawful".

On the "detention" half of "arbitrary detention" things were not much better. In Therens the Court very promisingly recognized the category of psychological detention. Since then, however, the Court had done little to create criteria for judging when a person could be said to be psychologically detained. The leading lower court decisions set out criteria that were useful in the context of individuals who were being questioned at a police station, but for the most part had little relevance to "on the street" encounters. The Court had, since Therens, handed down decisions which found particular accused to have been detained or not, but did so without establishing any general rules.

With Grant, all of this has changed. The Court has now created an analytical structure to be used in deciding section 9 cases. That is to say, they have addressed the long-standing needs to clearly define "arbitrary" and "detention", and have also set out (or at least begun to set out) a framework for analysis.

With regard to understanding arbitrariness, in very large measure the Court has simply adapted the approach already taken to section 8 cases, one which has on the whole proven to be quite workable. The Court's decision in Grant, therefore, is eminently sensible.

It is now firmly established that "arbitrary" and "unlawful" are to be equated: that is, if a detention was not supported by any legal power, then it was an arbitrary detention, without the need for any further criteria to be established. This had been said in Clayton, but essentially in passing and played no role in the decision there. Grant is the first case to state the rule and clearly intend it.

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Further, the Court has now held that a parallel to the approach from Collins\textsuperscript{11} for section 8 should be used in deciding section 9 cases. Collins created a three-step approach:

1) Is the search authorized by law?
2) Is the law itself unreasonable?
3) Is the manner in which the search was carried out unreasonable?

In Grant, the Court has quite explicitly adopted the first two of these steps: “for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary”.\textsuperscript{12} Although they do not explicitly state that the third step also applies in section 9 cases, they have, as noted above, previously suggested that an arbitrary use of non-arbitrary powers could result in a section 9 claim. In Storrey the Court held that if it was shown that “a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested”, then these factors “might have the effect of rendering invalid an otherwise lawful arrest”.\textsuperscript{13} One hopes, therefore, that future cases will make entirely clear that the approach to section 9 is now to ask:

1) Is the detention authorized by law?
2) Is the law itself arbitrary?
3) Is the manner in which the detention was carried out arbitrary?

This approach would allow all the loose ends from previous decisions to be tied together. Being a lawful detention is a minimum prerequisite for passing section 9 scrutiny. Hence, as in Grant itself, if an accused is detained by police in the absence of a power to do so, there is a section 9 violation. However, a detention could be lawful but based on no criteria (such as the roving random vehicle stop power in Ladouceur).\textsuperscript{14} In that event, the detention would pass the first stage of the analysis but fail at the second. Alternatively, an accused might have been arrested in circumstances where another person would not have been, based on some improper consideration such as race or simply for being belligerent. In that case the detention would be authorized by the law of arrest, and the law of arrest would not be arbitrary, but using that power on this occasion would have been arbitrary and the detention would fail the third stage of the analysis. The potential conflict between “arbitrary equals no criteria” and “arbitrary equals unlawful” would be resolved, because these rules would be relevant to different stages

\textsuperscript{12}Grant, supra, para 56.
\textsuperscript{13}Storrey, supra, para 19.
of the analysis. That the misuse of power for bad reasons does not meet the
definition "based on no criteria" also ceases to be a problem: again, they are
considerations at different stages of the analysis.

Had Grant only set out this structure, it would be the leading case on section 9.
In fact, that portion of the analysis is quite preliminary to the decision and occupi-
pies only a few paragraphs. The greater part of the section 9 analysis is devoted
to the second issue, creating a definition of "detention" which is useful in the
roadside encounter situation. Here too, Grant is very valuable. No doubt slightly
different definitions could have been offered and could have proved workable
(such as the Newfoundland Court of Appeal's position in Hawkins15 or Justice
Binnie's slightly different test in Grant), but the Grant approach is a valuable
addition.

The Court builds on the recognition in Therens that psychological detention is a
real phenomenon that must be accounted for. It also builds on the recognition in
Mann that the police should not be seen, for section 9 purposes, to have "de-
tained" every person they stop and ask a question. They acknowledge this poten-
tial ambiguity, but also correctly point out that there are many cases at each end
of the scale which are not actually likely to be ambiguous at all. A peace officer
attending at a medical emergency is not detaining the people she questions: a
person subject to legal consequences for leaving is clearly detained. A particu-
larly difficult situation, the Court notes, and the one that arose in Grant, is

in the context of neighbourhood policing where the police are not responding
to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the
potentially coercive police role of investigating crime and arresting suspects
so that they may be brought to justice. This is the situation that arises in this
case.16

The approach the Court takes to deciding this situation is to focus on the percep-
tion of the person potentially detained. One could have held that detention was
defined by the intention of the officers, or by a combination of that and other
factors, and no doubt plausible tests could have been created on those bases. In
fact the Court has decided that the important issue is "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".17 The Court has also offered

16Grant, supra, para 40.
17Ibid., para 44.
guidance on how to decide that question, indicating a number of relevant considerations:

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 focussed 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.¹⁸

There are many things to be said for a “detainee-centred” approach. The Charter is meant to protect individuals from the excessive exercise of state power. A person who feels detained, who feels that he is not able to leave, has had his freedom constrained by the state, whether any legal power to do so existed or not: the detainee-centred approach captures this. On the other hand, a person who genuinely feels free to leave but does not do so is acting voluntarily in staying. The detainee-centred approach, saying that this person cannot rely on section 9, also makes sense in this context: the Charter is meant to offer people protections, but not to force those protections upon individuals or to prevent cooperation.

Reducing (indeed, largely removing) an emphasis on the perspective of the police officer is quite appropriate. Justice Binnie raises the possibility that ignoring the police perspective means that as long as police can adequately deceive an individual about their real intentions, the person will not be detained. There is some force to this observation, of course. On the other side, however, in previous decisions from other courts, the fact that police have testified that they did not intend to arrest or to conduct an investigative detention has led to the conclusion that an accused was not detained, even though she seems to have felt unable to leave. Reliance on the police perspective has oddly seemed to lead to the result that individuals have been found not to be detained — i.e., not to have had their Charter rights violated — precisely because the police were acting without any legal authority to do so. No test can be perfect: that proposed by the majority here seems very promising.

There are of course issues that will remain to be resolved, but there is now a framework for their resolution. What is the significance of an accused failing to testify as to his subjective feeling? Clearly it is not essential — the test is an objective one, and Grant himself did not testify but he was found to be de-

¹⁸Ibid.
tained — but it seems likely patterns will emerge. What factors will become most significant? Will a request for identification be the sort of thing that pushes the objective test past the threshold? No doubt these issues will be worked out over time.

One sour note does arise from the application of *Grant* in *Suberu*.\(^{19}\) In *Grant* the bigger issue was detention for purposes of section 9, arbitrary detention. In *Suberu* the issue was detention for purposes of section 10(b), the right to counsel, but the same definition applies. The central issue in *Suberu* itself was whether a person subject to an investigative detention was entitled to the right to counsel immediately. The Court unanimously held that that was the case. However, the majority went on to conclude that Suberu, based on the test in *Grant*, had not actually been detained and so had no section 10(b) right.

Justice Binnie points out, dissenting in *Suberu*, that a broad test for detention combined with the conclusion that section 10(b) rights do arise immediately on an investigative detention removes flexibility from the police. Section 10(b) rights arise as soon as there is a detention, and exactly when a detention begins is not always discernible with precision. Accordingly, the possibility of section 10(b) violations is increased. Indeed, it is difficult not to agree with Justice Binnie’s suggestion that it is wrong to conclude that Suberu was not detained, and to share his fear that the approach to avoiding being forced into finding violations of the right to counsel will be to interpret the test for detention created in *Grant* too strictly. Certainly it is surprising that the majority should reach the conclusion that Suberu was not detained, given that the dispute in the courts below was over the consequences of his having been detained.

It would be unfortunate if a side effect of protecting section 10(b) rights in *Suberu* was to limit section 9 rights. It would, though, be roughly equivalent to what has occurred in the search context, where the rule “warrantless searches are prima facie unreasonable” has forced the analysis back to an early stage, and has resulted in courts saying “but this wasn’t a search at all”. *Suberu* could be the start of a similar trend: right to counsel on detention, of course, “but this wasn’t a detention”.

That need not be the case, though. There are a number of ways in which a proper balance can be maintained between the needs of the police to investigate and individual rights to be free from state interference. First, note that the law is not as “all or nothing” as it once was. Pre-*Mann*, the police either had reasonable grounds and could arrest, or did not have reasonable grounds and had no power. *Mann* has already created a middle ground, giving police some of the flexibility they need. That it should also be accompanied by *Charter* rights should not be

\(^{19}\)R. v. *Suberu*, reported *post*, p. 127.
seen as unreasonable, given that it is a power which reflects a diminution of individual liberty.

Second, note that there is a difference between detentions and investigative detentions. Section 10 applies to all detentions, lawful or not, while section 9 provides protection only in the case of unlawful detentions. This means that where the police stop someone unlawfully and also fail to give the right to counsel, there will be violations of both sections, whereas a proper investigative detention lacking a section 10(b) violation will violate only one right. Even applying the same definition in both cases, it is quite legitimate to see it as less serious to fail to provide the right to counsel in a Mann stop, or alternatively to see it as more serious to attempt a Mann stop on insufficient grounds. Given the more flexible approach to section 24(2) remedies also created in Grant, these will be relevant considerations at the remedies stage. Simply put, the strong detainee-centred section 9 approach of Grant could be vigourously maintained in the section 10(b) context, and yet there would be a principled basis to distinguish between the cases at the remedies stage.

Suberu is not the most hopeful start to the very promising framework laid down in Grant. Still, there is every reason to be optimistic that an overall workable structure has now been created around the right to be free from arbitrary detention.