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Grant, Suberu and *Harrison*: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts

Jennifer Woollcombe*

I. INTRODUCTION

In 2009, the Supreme Court of Canada released its much anticipated constitutional decisions in *R. v. Grant*,[1] *R. v. Suberu*[2] and *R. v. Harrison.*[3]

Much of what the Court says about what constitutes "detention" for the purpose of *Canadian Charter of Rights and Freedoms*,[4] is not really new and flows from the principles articulated years before in the Court's landmark decisions in *R. v. Therens*[5] and *R. v. Thomsen.*[6] The interesting aspect of the decisions from the perspective of "detention" is not the test itself, but rather how the Court applied its test to the factual scenarios in *Grant* and *Suberu*. The Court itself was not unanimous as to whether *Suberu* was detained. These decisions may well make it more difficult for police to know whether and when they are detaining those with whom they interact, and will certainly challenge courts that have to decide the issue later. We can expect this issue to be one that is much litigated.

One reason it is now so important to determine whether there has been any form of detention is that in these cases, the Court broke new legal ground in resolving the question it had specifically left open in *R. v.*

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1 [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) [hereinafter "*Grant*"].

2 [2009] S.C.J. No. 33, [2009] 2 S.C.R. 460 (S.C.C.) [hereinafter "*Suberu*"].

3 [2009] S.C.J. No. 34, [2009] 2 S.C.R. 494 (S.C.C.) [hereinafter "*Harrison*"].

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

5 [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

6 [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

Mann[7]: whether the right to counsel arises during an investigative detention. In unambiguous language, the Court overturned the unanimous judgment of the Court of Appeal for Ontario, and held that the right to counsel arises immediately upon any detention. This marks a significant change, and one that is likely to have a real impact on interactions between police and citizens on a day-to-day basis.[8]

The most dramatic aspect of these decisions lies in the manner in which the Court has re-articulated the criteria relevant to determining when evidence obtained by a Charter breach should be excluded under section 24(2) of the Charter. Emphasizing the importance of determining admissibility after considering "all of the circumstances", the Court has stripped away what had become the rigid application of certain rules and introduced, through three new lines of inquiry, what must be viewed as greater flexibility and discretion on the part of trial judges. It remains to be seen whether the effect of the decision will be to admit more evidence obtained in violation of the Charter.

II. THE COURT'S CONCLUSIONS ON DETENTION AND THE RIGHT TO COUNSEL

1. *R. v. Grant*

Donohue Grant was charged with a series of firearms offences relating to a gun that was seized from him by police following an encounter on a Toronto street. He sought to challenge the admissibility of the gun on the basis that there had been violations of sections 8, 9 and 10(b) of the Charter. It is important to understand the police evidence about the circumstances preceding the discovery of the gun.

Grant was a young black man walking in a high-crime area of Toronto. Two plainclothes officers, Worrell and Forde, were driving an unmarked police car in mid-day. They were on patrol to monitor the area and maintain a safe student environment for the four schools in the area.

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[7] [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 22 (S.C.C.).

[8] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.). The Court of Appeal held, at para. 50, that a

> brief interlude between the commencement of an investigative detention and the advising of the detained person's right to counsel under s. 10(b) during which the officer makes a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted, is not inconsistent with the requirement that a detained person be advised of his or her right to counsel "without delay".

A third officer, Gomes, was in uniform in a marked police car, intending to provide a visible police presence in the area. Worrell and Forde drove past Grant, and Worrell said that he stared at them intensely and was fidgeting with his coat and pants in a manner that caught their suspicion. Worrell decided to have a chat with him to see what he was up to. They suggested to Gomes that he approach Grant and have a chat. Gomes exited his car, approached Grant, and stood in his pathway. Gomes asked what was going on, requested the individual's name and address, and Grant provided his health card. He continued to behave nervously, prompting the officer to ask him to keep his hands in front of him. The other officers got a funny feeling by the way Grant was looking over at them and approached Grant and Gomes, flashing their badges and obstructing the way. Gomes asked Grant if he had anything he should not and Grant said he had a "small bag of weed" in his pocket. Upon further questioning about what he had, Grant said he had a firearm. He was arrested and searched, and the police discovered a loaded revolver.[9]

At trial, Grant did not testify, but argued that he was detained before he made the inculpatory statements that revealed the gun. He argued that the detention was arbitrary and required the police to advise him of his section 10(b) right to counsel. The trial judge concluded that there was no detention prior to arrest and that the questioning by police did not amount to a search for the purpose of section 8. In the Court of Appeal, Laskin J.A., for the Court, held that Grant was detained during his conversation with Gomes, that the detention was arbitrary, and that there was a section 9 violation. He found no section 8 breach and did not deal with the claim of a section 10(b) breach. In considering section 24(2), he admitted the evidence, notwithstanding that it was derivative evidence following a self-incriminating statement that would often be excluded on that basis alone.[10]

The Supreme Court was thus left to grapple with whether Grant was detained before his statements about the marijuana and the gun. Writing for the majority, McLachlin C.J.C. and Charron J. began their analysis by discussing the purpose of the rights linked to detention. They noted that individuals confronted by state authority have the option to choose to walk away and that where their choice to do so has been removed, either by physical force or by psychological pressure, that person is detained. In its effort to define detention, the Court noted that it had already rejected

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9 *Grant*, *supra*, note 1, at paras. 4-8.

10 *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250 (Ont. C.A.).

the extreme positions of "explicit control" over a person at one end of the spectrum, and "any interference", however slight, at the other end of the spectrum. Ultimately, the Court summarized that:

> 1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. 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*, the following factors:
>
>   (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.[11]

In determining whether Grant was detained prior to incriminating himself, the majority found that once officers Worrell and Forde approached him, flashing their badges and taking "tactical adversarial positions" behind Gomes, after Gomes had told him to keep his hands in front of him, Grant had been "singled out" and the nature of the questioning changed from questioning about his identity, to an interrogation where the police had "effectively taken control over the appellant and were attempting to elicit incriminating information". They noted that the power imbalance was heightened by Grant's youth and inexperience.

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[11] *Grant*, *supra*, note 1, at para. 44.

Although he did not testify, a reasonable 18-year-old faced with three officers in adversarial positions would have concluded that his right to choose how to act had been removed by the police. They held that from this point on he was detained as he was constrained and in need of the Charter protections associated with detention.[12]

Relying on its conclusion in *Suberu* that the right to counsel arises immediately upon detention, regardless of whether the detention is an investigative detention, the majority held that there was also a breach of Grant's section 10(b) right to counsel. In this case, therefore, they held that the police were required to advise Grant that he had the right to speak with a lawyer and to give him a reasonable opportunity to obtain legal advice if he chose before proceeding to elicit incriminating information from him.[13]

2. *R. v. Suberu*

Musibau Suberu was charged with offences related to his use of a stolen credit card. At trial, he brought an application seeking to exclude statements made by him, and evidence seized from him at the time of his arrest, on the basis that the evidence was obtained in a manner that infringed his section 10(b) right to counsel.

On June 13, 2003, staff at a Cobourg LCBO store were alerted that two individuals had been buying merchandise, pre-paid shopping cards and gift certificates using a stolen credit card and had bought $100 gift certificates in a nearby town. Musibau Suberu and William Erhirhie entered the Cobourg LCBO. When Erhirhie tried to buy a $3 bottle of beer with a $100 gift certificate, one employee called the police, while another tried to stall him. An officer arrived and spoke with the employee and Erhirhie. When Constable Roughley entered the store, Suberu walked past him and said, "he did this, not me, so I guess I can go." Roughley followed Suberu outside and said "Wait a minute. I need to talk to you before you go anywhere," while Suberu was getting into the driver's seat of a minivan.

Suberu and Roughley then had a brief exchange in which Suberu said that his friend's name was Willy, that they were from Toronto, that they had driven from Toronto to Cobourg that day and that the van belonged to his girlfriend Yvonne. Roughley received further information

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[12] *Id.*, at paras. 45-52.
[13] *Id.*, at para. 58.

over the radio, including the licence plate of the vehicle driven earlier in the day by the person who had used the stolen credit card, and asked to see Suberu's identification and vehicle documents. Roughley looked into the van and saw Wal-Mart and LCBO shopping bags between the front seats. Roughley had reasonable and probable grounds to arrest Suberu for fraud and did so.[14]

On the Charter application, Suberu did not testify, but argued that he had been detained from the time Roughley told him to "wait". The trial judge held that there had been a momentary investigative detention but that there was no obligation on police to provide section 10(b) rights. Suberu was convicted. The Court of Appeal also held that there had been an investigative detention, but found that the words "without delay" permitted a "brief interlude" between the beginning of an investigative detention and the requirement for the rights to counsel to be provided. Accordingly, it held that there was no section 10(b) violation.

The Supreme Court had to decide two issues: first, the point at which Suberu had been detained by the police and, second, the point at which a detainee must be provided with his or her right to counsel.

As a starting point, the majority seemed to have no difficulty rejecting the defence position that it was unfair to revisit the finding of detention when detention had been conceded in the courts below. In fact, the majority found that there was "no merit" in this contention, reasoning that the issue of whether there had been a section 10(b) violation had always been contested and on the facts of this case, that issue could only be resolved by determining when Suberu was detained. Because the trial judge found no section 10(b) breach, the majority held that effectively, the trial judge had found no detention before the time of the arrest.[15]

The majority reviewed some of the key principles in the *Grant* test. They emphasized that police may engage in preliminary questioning of bystanders without giving rise to detention. Further, they commented that "the line between general questioning and focused interrogation amounting to detention may be difficult to draw in particular cases", but that trial judges must assess the circumstances to determine "whether the line

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[14] *Suberu*, *supra*, note 2, at paras. 8-12.

[15] *Suberu*, *id.*, at para. 19. The majority's easy dismissal of the apparent change in Crown position was not commented upon directly by Binnie J., in dissent. However, he did note the apparent contradiction between the majority's stressing of the importance of deference to the trial judge's conclusion on detention issues and then reversal of the conclusion of the trial judge and the Court of Appeal on the issue of detention. See *Suberu*, at para. 57.

between general questioning and detention has been crossed".[16] Recognizing that this was not a case of physical restraint or legal obligation, the majority then applied the three-part analysis set out in *Grant*.

In considering the circumstances giving rise to the encounter as reasonably perceived by someone in Suberu's position, the majority noted that Roughley had tried to engage Suberu in order to acquaint himself with what had happened. They found that as a whole, the circumstances of the encounter supported a reasonable perception that Constable Roughley "was orienting himself to the situation rather than intending to deprive Mr. Suberu of his liberty".[17] Thus, the first factor did not suggest detention.

In considering the second *Grant* factor, the nature of the police conduct, the majority held that the question was whether the police conduct as a whole supported a reasonable conclusion that Suberu had no choice but to comply. While allowing that Roughley's words were open to more than one interpretation, the majority found it significant that Roughley made no move to obstruct Suberu's movement, and simply spoke to him. They concluded that as a whole, this was conduct that did not suggest detention.[18]

Finally, in considering the third *Grant* factor, the majority observed that consideration of the individual's personal circumstances is an objective test. The majority highlighted that Suberu did not testify and that there was no evidence that he subjectively believed he could not leave, and no evidence about his personal circumstances, feelings or knowledge. They also noted that Constable Roughley had said that Suberu never told him he did not wish to speak with him and that the conversation was not strained. The majority concluded that the *Grant* test led to a conclusion that Suberu was not detained when he spoke to the Constable Roughley in his van.[19]

It is noteworthy that in applying the *Grant* test, Binnie J. and Fish J. each reached a conclusion strongly at odds with that of the majority. Justice Binnie held that "no rational person in Mr. Suberu's position would have thought that he was free to walk away or that the police would have let him go, had he tried". Relying on the very conversation that the majority relied upon to conclude that the police made no more than "general

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[16] *Id.*, at paras. 25-31.
[17] *Id.*, at para. 32.
[18] *Id.*, at para. 33.
[19] *Id.*, at para. 34.

inquiries", Binnie J. concluded that Suberu was subject to an unjustified investigative detention.[20]

After finding that there was no detention in this case, the majority then addressed the novel issue that was before it: when section 10(b) rights must be given. They found that "a situation of vulnerability relative to the state is created at the outset of a detention", thus raising concerns about self-incrimination and interference with the liberty interests that section 10(b) seeks to protect. Accordingly, the majority held, without any discussion of the reasons advanced by the Court of Appeal, for a "brief interlude" before providing section 10(b) rights, that the phrase "without delay" must be interpreted to mean "immediately". They were of the view that permitting any delay "creates an ill-defined and unworkable test" for the application of section 10(b).[21]

The majority allowed little room for exception to this new rule. However, they did find expressly that this requirement is "subject to concerns for officer or public safety". Further, they held that the rule was also subject to "such limitations as prescribed by law and justified under section 1 of the *Charter*". However, when they turned to consider whether there was a section 1 justification for a general suspension of the right to counsel during the course of a short investigative detention, the majority was "not persuaded" that a case had been made out for a general suspension of the rights under section 10(b) for investigatory purposes, whether or not there was some form of "use immunity". They reasoned that the Crown's invitation to consider a section 1 suspension of the right to counsel was premised on a view of detention that was too wide and that detention, properly understood, gives police leeway to engage in exploratory questions without triggering rights that crystallize upon detention.[22]

III. SOME UNANSWERED QUESTIONS

1. How Does Anyone Know When There Is a Psychological Detention?

There are cases in which the obvious markers of physical restraint or legal obligation to comply with an officer's request are present. Those

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[20] *Id.*, at paras. 48-58.
[21] *Id.*, at paras. 37-42.
[22] *Id.*, at paras. 43-45.

obvious markers were absent in both *Grant* and *Suberu*. Thus, the Court had to determine whether a reasonable person in the individual's circumstances would have concluded that he was deprived by the state of the liberty of choice.

In many respects, it is difficult to reconcile why, if Grant was detained, Suberu was not.[23] In both cases, the Court makes clear that general questioning does not result in detention. It seems to have been the physical locations that the officers assumed, the change in the nature of their questioning, and their direction to keep his hands in front that, in *Grant*, tipped the balance. In addition, the Court was very mindful of the power imbalance between the young, inexperienced Grant and the three physically larger officers. By contrast, the majority in *Suberu* highlighted that the officer made no attempt to obstruct Suberu, that their discussion was brief, and that because Suberu did not testify, there was no evidence about his personal circumstances, feelings or knowledge.

If there is a way to reconcile the bottom line in these two decisions, it requires careful analysis of each of the relevant factors — a task courts may be well suited for (although interestingly members of the court in *Suberu* could not agree on whether there was a detention). However, this is not the sort of analysis that police officers are easily able to do quickly in the dynamic situations they are presented with on a daily basis. Police must know whether they are detaining a person so that they can comply with the Charter rights of the individuals with whom they interact. The officers in *Grant* did not think they had detained him. Nor did the officer in *Suberu*. How can we ensure that officers know?

In *Grant*, the Court appears to appreciate the importance of officers knowing when an individual has been detained. The suggestion is made that when officers are conducting a "pre-detention" investigation, and wish to ask exploratory questions, 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".[24] While unlikely to be dispositive of the issue, it seems probable that presented with a situation in which an individual, provided with this information, later asserts that he felt detained, a court would be hard-pressed to conclude that he was. Certainly, were

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[23] Indeed, Jonathan Dawe and Heather McArthur go much further and characterize the majority's decision that Suberu was not detained as "startling and troubling". See "The dawn of a new era: Pivotal decisions released by the Supreme Court", Ontario Criminal Lawyers' Association Newsletter, Vol. 30, No. 4, at 16 (2009) at para. 61 [hereinafter "Dawe & McArthur"].

[24] *Grant*, *supra*, note 1, at para. 32.

an officer to take up the Supreme Court's suggestion, the Crown argument that there was no detention is greatly enhanced.

The problem, of course, is that when police expressly tell those whom they have no basis to detain, and no intention of detaining, that they are free to go, the police ability to investigate is greatly undermined. This is so because many, if not most people, would become naturally suspicious of the situation and walk away. It hardly fosters trust, cooperation and conversation to say, "you don't have to talk with me and you are free to go, but please consider staying for a chat anyway." Such a caution, in these circumstances, almost suggests that the person should leave.

Is there a better alternative for the police? One alternative to expressly telling individuals that they can walk away may be for police to be very careful about how they conduct themselves in dynamic, pre-detention street encounters. *Grant* provides some good reminders. Police should think about the impact of their physical presence and position themselves mindful of the impact that their presence may have. They should think about the nature of the questions that they ask and be aware of when their questions move from general inquiries to questions intended to elicit incriminatory answers. They need to be particularly mindful of the potential for a power imbalance when the person with whom they are dealing is young, small, appears to be vulnerable or is outnumbered by police.[25] The majority in *Suberu* emphasized that police must have leeway to engage in non-coercive, exploratory questioning without triggering a detention. Police should feel free to continue to use that leeway, ever mindful of the impact that their words and actions can have on those with whom they speak. And, they must appreciate that situations can change very quickly.

What about courts assessing the question of detention after? How is a trial judge to balance all of the circumstances? As a starting point, *Grant* makes it clear that it is for the trial judge to determine whether there has been a detention on the basis of all of the evidence, and that deference is to be accorded to the trial judge's findings of fact.[26] Interestingly, in *Suberu*, while Binnie J. finds it odd that the majority effectively reversed

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[25] In some cases, it will be self-evident that the individual that the police are speaking with falls into one of these categories. In others, however, police are at a distinct disadvantage because they have no way of knowing many things, including, for example, the individual's age, whether the individual has particular vulnerabilities that are not immediately apparent, and what the person's level of sophistication is.

[26] *Grant*, *supra*, note 1, at para. 43.

the conclusions of the trial judge and the Court of Appeal in concluding that there was no detention,[27] the majority held that the trial judge effectively found that Suberu was not detained. We can take from these decisions that the decisions of trial courts will, for the most part, be determinative.

But, how does a trial judge, charged with the responsibility of balancing all of the circumstances to determine what a reasonable person would have thought, weigh the various factors? Having chosen to adopt the "claimant's perspective (as assessed by the 'reasonable person') as the lodestar",[28] it would seem that the evidence of the person alleging he or she was detained ought to take on a new level of significance. Where the issue is psychological detention, one would expect courts to draw a negative inference against any accused who fails to testify on the *voir dire*. While no court has ever held that there is a requirement for an accused to testify, numerous appeal courts, well before *Suberu*, have noted that the failure of an accused to testify may weigh against a claim of detention.[29] This only makes sense. How is a judge to know about the individual's feelings, vulnerabilities and impressions without evidence from the accused? The majority of the Court in *Suberu*, when considering the third *Grant* factor, placed significant weight on Suberu's failure to testify as it meant that the Court had no evidence as to his subjective beliefs, and no evidence of his personal circumstances, feeling or knowledge.[30] Of course, the Court chose not to analyze the significance of Grant's failure to testify. Time will tell whether this factor takes on the significance it should. That said, in its recent decision in *R. v. Reddy*,[31] the British Columbia Court of Appeal seems to pay only lip service to this factor.[32]

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[27] *Suberu*, *supra*, note 2, at para. 57.

[28] See *Suberu*, *id.*, at para. 53.

[29] See, for example, *R. v. B. (L.)*, [2007] O.J. No. 3290, 227 C.C.C. (3d) 70, at para. 60 (Ont. C.A.); *R. v. Grafe*, [1987] O.J. No. 796, 36 C.C.C. (3d) 267 (Ont. C.A.); *R. v. H. (C.R.)*, [2003] M.J. No. 90, 174 C.C.C. (3d) 67, at paras. 45-46 (Man. C.A.); *R. v. Burke*, [2006] O.J. No. 2185, at paras. 9-10 (Ont. C.A.).

[30] *Suberu*, *supra*, note 2, at para. 34.

[31] [2010] B.C.J. No. 49 (B.C.C.A.) [hereinafter "*Reddy*"].

[32] It appears that there is only one appellate decision post *Grant* and *Suberu* that really grapples with whether police direction resulted in detention. In *Reddy*, *id.*, while splitting on the result, the Court of Appeal was unanimous that the accused was detained when the officer, having learned that the accused driver was subject to a probation order with a condition that he not possess any cell phones or pagers, directed the driver to exit the vehicle so that he could check the car for phones and pagers. While the majority clearly adverted to the fact that the accused had not testified, neither the majority nor the dissent seems to have been influenced by this factor. See paras. 45-71 and 142.

Beyond this, it will be for trial judges to determine in individual cases how the *Grant* factors ought to be weighed. There is no bright line between pre-detention questioning and the point at which detention begins. This flexibility will, in all likelihood, lead to significant litigation on the issue of detention, particularly in the difficult arena of neighbourhood policing.

2. What Will Be the Impact of Requiring That Rights to Counsel Be Given Immediately upon Detention?

While choosing to inject considerable flexibility into the determination of whether there has been a detention, the Court left little flexibility when it comes to the issue of providing detainees with the right to counsel. The Court was of the view that the right to counsel "requires a stable and predictable definition".[33] The result will be that once the issue of detention is determined, it will be very clear, in most cases, whether there has been a breach of section 10(b).

The most troubling aspect of the Court's decision about the right to counsel is its seeming disinterest in engaging in any sort of analysis as to how, practically, providing rights to counsel to those stopped for a short investigative detention will play out. In his decision at the Court of Appeal, Doherty J.A. cautioned that requiring rights to counsel to be provided immediately during an investigative detention results in significant practical impacts on both the police and the detainee. As he noted, if police are obliged to provide every detainee with his or her right to counsel, they are also required to stop asking questions and facilitate contact with counsel if the detainee indicates that he or she wishes to exercise that right. The full panoply of rights associated with section 10(b) are necessarily engaged.[34] Not only does this delay the investigation and

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[33] *Suberu*, *supra*, note 2, at para. 42.

[34] The jurisprudence makes clear that the right to counsel is to allow a detainee not only to be informed of his rights and obligations under the law, but also to obtain advice on how to exercise those rights. Section 10(b) clearly imposes on state authorities who detain a person a duty to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel. This is an informational duty. In addition, there are implementational duties, triggered when a detainee indicates a desire to exercise his or her right to counsel. These include providing the detainee with a reasonable opportunity to exercise the rights and refraining from eliciting evidence from the detainee until he or she has had that reasonable opportunity. See *R. v. Bartle*, [1994] S.C.J. No. 74, 92 C.C.C. (3d) 289 (S.C.C.); *R. v. Manninen*, [1987] S.C.J. No. 41, 34 C.C.C. (3d) 385 (S.C.C.); *R. v. Evans*, [1991] S.C.J. No. 31, 63 C.C.C. (3d) 289 (S.C.C.); *R. v. Brydges*, [1990] S.C.J. No. 8, 53 C.C.C. (3d) 330 (S.C.C.); *R. v. Pozniak*, [1994] S.C.J. No. 75, 92 C.C.C. (3d) 472 (S.C.C.).

require a redirection of police resources, in some cases those detained may suffer significant deprivation of their liberty and personal security.[35]

Effectively, it may be that those who would have been very temporarily stopped for a short conversation with the police and then been on their way, will be detained for much longer. As the Court of Appeal for Ontario recently noted, most police officers who arrest someone and provide section 10(b) rights "are not standing with a telephone in their outstretched hand as they complete the s. 10(b) caution".[36] Frequently, while the informational component of the right to counsel is given wherever the arrest occurs, police cannot and are not required to facilitate the implementational duties at that location. Generally that occurs at a police station.

The same situation is likely to arise with investigative detentions as the likelihood is great that these detainees will not be able to exercise the right to counsel at the location of the detention. There are many legitimate impediments to having detainees exercise their right to counsel where detained. For example, the detainee or the police may or may not have a cell phone. Even if someone has a cell phone, cell phones do not work in every location, particularly in rural areas. Moreover, the right to counsel encompasses the right to private communication with counsel. Police may not be able to facilitate private communications during an investigative detention. A detainee may want his or her specific lawyer's number located, which police may not have access to. There may be a need to wait for a call to be returned by someone providing free legal advice through available services. Police always have to consider all of the circumstances, including their safety and the safety of the public, in determining when and where a detainee can begin efforts to access counsel. Moreover, those detained who might not have been subjected to a protective pat-down search for police safety as contemplated in *Mann*, will most certainly be subjected to a pat-down search before being transported by police to facilitate the right to counsel. In many circumstances, what might have been a short investigative detention may well result in a much longer period of more significant incursions on the detainee's liberty and personal security.

The Supreme Court chose not to comment on any of these unfortunate effects of its decision relating to section 10(b). Perhaps this sort of prolonged detention is a necessary evil if we are to ensure that

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[35] *R. v. Suberu* (Ont. C.A.), *supra*, note 8, at paras. 41-42.

[36] *R. v. Devries*, [2009] O.J. No. 2421, 244 C.C.C. (3d) 354, at para. 30 (Ont. C.A.).

individuals are protected from self-incrimination. But, it appears that the Court did not want to seriously consider alternatives.

Related to this is the interesting manner in which the Court responded to the section 1 argument that was advanced by at least some of the Attorneys General. While the argument appears not to have been pressed by Crown counsel in the Court of Appeal, Doherty J.A. summarized it:

> The s. 1 submission, drawing on the analysis of the majority in *R. v. Elias* (2005), 196 C.C.C. (3d) 481 (S.C.C.), argues that a police officer's right to briefly detain a person for investigative purposes as recognized in *R. v. Mann*, *supra*, is a reasonably justifiable limit prescribed by law on the detained person's right to counsel as described in s. 10(b). The s. 1 argument assumes that statements made by a person under investigative detention would not be admissible against that person at trial except to explain or justify police conduct.[37]

The majority of the Supreme Court of Canada was of the view that section 1 did not need to be invoked for police to effectively fulfil their investigative powers because the argument that section 1 was necessary was based on a view of detention that was "unduly expansive".[38] In dissent, Binnie J. commented that the section 1 argument was "not explored in evidence or in argument to the extent necessary to permit adjudication of the point". While in its earlier decision in *R. v. Orbanski; R. v. Elias*,[39] the Court had made clear that section 10(b) is not absolute and that there is room for a section 1 limitation on the right, it appeared unwilling to even engage in a full discussion about the availability of a section 1 justification delaying the right to counsel during an investigative detention in this case.

Over the coming months and years, we will see the impact of the decision that police must provide rights to counsel as soon as an investigative detention commences. There has already been some concern expressed that the obligation to provide the right to counsel immediately upon detention forces courts to later choose between finding a detention and the associated violations of sections 9 and 10(b), or choosing to find no detention and therefore no Charter violation.[40] Indeed, several authors have commented that this may explain the

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[37] *R. v. Suberu* (Ont. C.A.), *supra*, note 8, at paras. 64-65.

[38] *Suberu*, *supra*, note 2, at para. 45.

[39] [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.).

[40] See, for example, Hamish Stewart, "The *Grant* Trilogy and the Right Against Self-Incrimination" (2009) 66 C.R. (6th) 97.

otherwise surprising conclusion that Grant was detained but Suberu was not.[41] Obviously, no court should decide the issue of detention in order to produce a certain result under section 9 or section 10(b). Given that the Court crafted the *Grant* test and decided *Grant* at the same time as it decided *Suberu*, it seems unduly cynical to suggest that this, rather than an honest application of the *Grant* factors, was what motivated the majority.

IV. THE NEW APPROACH TO EXCLUSION OF EVIDENCE UNDER SECTION 24(2)

1. *R. v. Grant*

Having concluded that Grant was arbitrarily detained and that he was denied his right to counsel, the Supreme Court then had to consider whether the evidence that was obtained in a manner that violated his Charter rights should be excluded under section 24(2). The majority (McLachlin C.J.C. and Charron J., writing for five of the seven judges and concurred with in relation to the section 24 analysis by a sixth judge) began the section 24(2) analysis by acknowledging that while it had set out the test to be applied under section 24(2) in *R. v. Collins*[42] and then qualified that test under *R. v. Stillman*,[43] there were difficulties that warranted revising the approach to section 24(2).

In terms of overview, the Court held that the phrase "bring the administration of justice into disrepute" does not look at the individual case but, instead, at the overall reputation of the justice system in the long term, viewed from the objective perspective of a reasonable person informed of the relevant circumstances and values underlying the Charter. Section 24(2) is not to punish an accused or compensate an accused — it must consider the broad impact of the Charter breach on the reputation of the justice system.

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[41] See Stewart, *id.*; Tim Wightman & Dallas Mack, "A Death on the way to Rome: Has *Suberu* Marked the End of Investigative Detention?", September 7, 2009, Crown NetLetter Collection of Criminal Law Articles, CRWN/2009-148; Dawe & McArthur, *supra*, note 23, at para. 62.

[42] [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.). The well-known *Collins* test requires three factors to be considered: whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself; the seriousness of the breach; and the effect of excluding the evidence on the repute of the administration of justice.

[43] [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.). *Stillman* held that conscriptive evidence is generally inadmissible because of the concerns it raises in relation to trial fairness.

The majority made clear that in cases in which a trial judge has considered all of the proper factors, considerable deference should be accorded to his or her determination about admissibility under section 24(2).[44]

Grant identifies three interests to consider and balance when conducting a section 24(2) analysis. No rule governs how the balance is to be struck between them. These factors are:

(1) *Seriousness of the Charter-infringing state conduct*: This line of inquiry tries to place the conduct that resulted in the Charter breach along a continuum — from an inadvertent and minor breach at one end to a wilful and flagrant disregard of Charter rights at the other. The more serious the misconduct, the greater the need for the court system to distance itself from that conduct by excluding the evidence. However, factors such as good faith on the part of the police reduce the seriousness of the misconduct and lead towards admission.

(2) *Impact of the breach on the Charter-protected interests of the accused*: The second avenue of inquiry focuses on the impact of the breach on the accused. Again, there is a broad spectrum of impacts from a fleeting and minimally invasive breach to a powerfully intrusive breach. Courts must consider the interests engaged by the right that was infringed and the degree to which the violation impacted upon those interests.

(3) *Society's interest in the adjudication of the case on its merits*.

This arm of the inquiry looks at society's interest in adjudication of a criminal case on its merits. The Court held that the reliability of the evidence is an important factor in this line of inquiry. A related factor is the importance of the evidence to the prosecution's case. By this, the majority reasoned that the admission of evidence that is less reliable more adversely affects the administration of justice if it is central to the Crown's case and, conversely, the exclusion of highly reliable evidence negatively affects the administration of justice if it is the entire Crown case.[45]

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[44] *Grant*, *supra*, note 1, at para. 86.

[45] *Id.*, at paras. 72-87.

The majority went on to categorize types of evidence and provide some guidance as to how the three lines of inquiry might play out for these types of evidence.

(a) Statements of an Accused

While emphasizing that there is no "absolute rule" excluding Charter-infringing statements, the majority commented that these statements tend to be excluded. Because statements engage the principle against self-incrimination, and because police conduct in obtaining statements is constrained, the impression on the administration of justice if these statements are admitted is that the courts condone police misconduct. The first inquiry, therefore, supports exclusion of the statements. While the second inquiry usually will lead to exclusion, the majority noted that the extent to which an individual's interests are undermined depends to some extent on the circumstances, and that there may be cases in which the impact on an accused is less. The third inquiry, which requires consideration of having a fair trial on the merits, tends to lead to exclusion of the statement because of concerns about the reliability of the improperly obtained statement.[46]

(b) Bodily Evidence

Under *Stillman*, this evidence was characterized as conscriptive evidence and its exclusion was practically automatic because of the impact on trial fairness of admitting it. The majority noted that the *Stillman* approach had been criticized for, first, failing to consider "all of the circumstances", second, because bodily samples are not really analogous to statements in that they raise different issues in terms of the administration of justice, and, third, because the conscriptive test has led to anomalous results. Accordingly, the majority held that the conscription test should be replaced by a more flexible one based on all of the circumstances. The seriousness of the infringing conduct will depend on the factual scenario. The second inquiry, into the seriousness of the breach of the accused's rights, runs a spectrum from forcible taking of samples at the serious end of the spectrum to innocuous procedures like fingerprint-

[46] *Id.*, at paras. 89-98.

ing at the other end. The third inquiry will usually favour admission because of the reliability of the samples.[47]

(c) Non-bodily Physical Evidence

Under the three-part inquiry, the majority held that the seriousness of the conduct will usually depend on the extent to which the conduct was egregious or deliberate. The second inquiry usually means analyzing the impact of a section 8 breach. This turns on the extent to which an individual's reasonable expectation of privacy has been violated. The third inquiry will usually favour admission because of the absence of any reliability concerns with this type of evidence.[48]

(d) Derivative Evidence

Derivative evidence is complex because it may include both statements and physical evidence. The majority noted that the doctrine of discoverability was developed to differentiate between evidence obtained as a result of an accused conscripting himself or herself (which would be excluded) and evidence that would have been obtained by the police anyway (which was more likely admitted). While discoverability remains useful, the majority held that three lines of inquiry ought to be undertaken. The first step is to consider the police or state conduct that led to the statement being improperly obtained. At the second stage of inquiry where the impact of the breach is assessed, the focus is on the extent of the Charter breach. Here, the question of whether the evidence was independently discoverable is relevant. The third line of inquiry will usually favour admission because the evidence is usually physical evidence that raises no reliability concerns.[49]

2. The New Test Applied to the *Grant* Facts

The gun taken from Grant was derivative evidence because it was obtained as a result of his statement, which was made in violation of his Charter rights. The majority considered its three-part inquiry.

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47 *Id.*, at paras. 99-111.
48 *Id.*, at paras. 112-115.
49 *Id.*, at paras. 116-128.

- The police conduct was not abusive and their error in believing that Grant was not detained was "understandable". Because their breach was neither deliberate nor egregious, admitting the evidence would not seriously undermine public confidence in the rule of law.
- Under the second inquiry, the majority noted that the police had violated both Grant's section 9 and his section 10(b) rights. It characterized the section 9 breach as "not severe" but "more than minimal". The police questioning, in violation of Grant's right to counsel, was a search for incriminatory statements, and, when viewed with the section 9 breach, meant that there was a "significant" breach of Grant's rights.
- Under the third inquiry, the majority noted that the gun was reliable evidence and essential to the Crown's case.

Ultimately, while agreeing with the Court of Appeal that the case was "close", the majority resolved the balancing in favour of admitting the gun.[50]

3. *R. v. Harrison*

Released on the same day as *Grant*, the Court's decision in *Harrison* demonstrates just how seriously the Supreme Court views police misconduct in the section 24(2) analysis.

Bradley Harrison was stopped by police while driving with a friend near Kirkland Lake, Ontario. Police Constable Bertoncello testified that he saw the vehicle travelling at the speed limit in the opposite direction from him with a line of cars behind it. The car had no front licence plate, a requirement in Ontario. He turned around to follow the vehicle and activated his roof lights to pull it over. He then realized that because it was registered in Alberta, it did not require a front plate. He learned over his radio that the vehicle had been rented from the Vancouver airport. Although he had no grounds to believe that any offence was being committed, he pulled the car over as he thought abandoning the detention may have affected the integrity of the police in the eyes of observers.

Harrison identified himself to the officer and produced the vehicle registration, insurance and rental agreement. He was unable to find his driver's licence. The officer ran a computer check, learned that Harri-

[50] *Id.*, at paras. 129-140.

son's licence was suspended, and arrested him. The occupants were asked if there were drugs or weapons in the vehicle and they replied that there were not. Constable Bertoncello then searched the vehicle "incident to arrest" for the licence. The officer found two cardboard boxes that were taped shut and was told by the passenger that they contained dishes and books for his mother. The officer asked if there were drugs and weapons in the box and the passenger said "yeah". One box contained cocaine. The vehicle contained 35 kilograms of cocaine.[51]

It was common ground at all levels of court that there was a breach of Harrison's sections 8 and 9 rights as the detention was arbitrary and the search unreasonable. The issue was whether the cocaine should be admitted under section 24(2). The trial judge applied the *Collins* factors and admitted the cocaine. The Court of Appeal for Ontario split with the majority (O'Connor A.C.J.O. and MacPherson J.A.) affirming the trial judge's decision to admit the evidence and Cronk J.A., in dissent, excluding the evidence.

The Supreme Court considered the three *Grant* lines of inquiry. Noting that the trial judge had found the officer's conduct to be "brazen" and "flagrant", the Court agreed that the police conduct showed a blatant disregard for the accused's Charter rights, and that the officer's misleading evidence at trial aggravated his conduct. In trying to characterize the impact of the breaches on Harrison, the Court acknowledged the Court of Appeal's observations that there is a diminished expectation of privacy in a vehicle, that but for the incriminating evidence, the stop would have been brief, and that there was nothing that impacted on Harrison's dignity. However, the Court cautioned that an unjustified stop and search by police is "much more than trivial", resulting in a "significant, although not egregious" intrusion on the accused's rights. Finally, under the third line of inquiry, the Court noted that the evidence was reliable and critical to the Crown's case.[52]

Ultimately, in conducting the requisite balancing, the Court was clear that "dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system". However, in this case, the Court was clearly troubled by the police misconduct and found that "the price paid for an acquittal in these

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[51] *Harrison*, *supra*, note 3, at paras. 4-9.

[52] *Id.*, at paras. 21-34.

circumstances is outweighed by the importance of maintaining Charter standards". The evidence was excluded and Harrison acquitted.[53]

4. The Supreme Court since *Grant* and *Harrison*

Since its decisions in *Grant* and *Harrison*, the Supreme Court has released only two decisions in which there was any significant section 24(2) analysis.

In the first, *R. v. Beaulieu*,[54] an appeal as of right, the Court considered the admissibility of the evidence relating to a gun that police had discovered while installing judicially authorized listening devices in the car. The trial judge found a section 8 breach because the police exceeded the scope of the judicial authorization when they searched the vehicle as they did, but admitted the gun under section 24(2). The Quebec Court of Appeal divided, with the majority excluding the evidence, allowing the appeal and setting aside the conviction.

The Supreme Court issued a short, unanimous judgment. First, it emphasized what was said in *Grant*: that "considerable deference" is owed to a trial judge's assessment under section 24(2). Second, while noting that the lower courts did not have the benefit of *Grant*, the Court emphasized another point from *Grant*: that "the relevant factors have not changed" from *Collins*. Finally, the Court accepted that the trial judge did consider the *Grant* factors: the trial judge found that the breach was not serious, that the accused had a reduced expectation of privacy in a vehicle, that the search was minimally invasive and that the gun was reliable evidence. The Court allowed the Crown appeal and restored the conviction.

In the second case, *R. v. Morelli*,[55] the Court considered an accused's appeal from conviction for child pornography. A computer technician went to the accused's home to install a high-speed Internet connection. While there, he noticed that the "favourites" list on the web browser included links to both adult and child pornography. More than two months later, he reported what he had seen to social services and the matter was investigated by the RCMP. A search warrant was subsequently issued and the search revealed that the computer had child pornography images. The challenge to the search warrant was dismissed at trial and by a majority

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53 *Id.*, at paras. 35-42.

54 *R. v. Beaulieu*, [2010] S.C.J. No. 7, [2010] 1 S.C.R. 248 (S.C.C.).

55 [2010] S.C.J. No. 8, [2010] 1 S.C.R. 253 (S.C.C.) [hereinafter "*Morelli*"].

of the Court of Appeal, but proceeded to the Supreme Court on the basis of the dissent.

Writing for the majority, Fish J. found that there were no reasonable and probable grounds for the issuance of the search warrant. Accordingly, the search of the computer resulted in a section 8 breach. The majority then engaged in a section 24(2) analysis.[56] Noting that the search was in furtherance of a search warrant and that the police did nothing to wilfully or negligently breach the accused's Charter rights, the majority characterized the search and seizure as not particularly egregious. However, the Court was clearly unimpressed by the conduct of the officer who prepared the information to obtain a search warrant ("ITO") for the warrant. He was not diligent in his disclosure obligations and the drafting of the ITO was found to be "at best" improvident and careless. While not interfering with the trial judge's finding that there was no deliberate misconduct, there was significant unacceptable police conduct. In terms of the impact on the accused, the majority found the breach particularly important as there was a violation of the accused's home, of his personal computer and of his wife's laptop. The Court emphasized that computers contain intimate, personal details, and that it was "difficult to conceive of a s. 8 breach with a greater impact on the Charter protected privacy interests of the accused than occurred in this case". The third set of factors weighed against exclusion. In the balancing, the majority held:

> In my view, the repute of the administration of justice will be significantly undermined if criminal trials are permitted to proceed on the strength of evidence obtained from the most private "place" in the home on the basis of misleading, inaccurate, and incomplete Informations upon which a search warrant was issued.[57]

5. Where Does the New Test Leave Courts?

Not surprisingly, the section 24(2) avenues of inquiry have been considered by numerous provincial appellate courts across the country. It is too early for any sort of grand pronouncements about the extent to which the new test changes the result. However, a few observations are warranted.

First, there can be little dispute that the Supreme Court of Canada has intentionally provided trial courts with an increased degree of

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[56] The dissenting judges found no s. 8 breach and so did not engage in any s. 24(2) analysis.

[57] *Morelli*, *supra*, note 55, at paras. 98-113.

flexibility in its new test. Gone are the rigid rules that often operated to produce incongruent results, particularly in the area of conscriptive evidence. However, this new flexibility is not without fairly fulsome guidelines relating to each of the three lines of inquiry. These guidelines will significantly narrow the scope of judicial discretion and should assist judges in identifying each of the relevant factors to consider in any particular case. While there is obviously considerable discretion in the ultimate balancing, in many cases the three lines of inquiry should point in one direction or the other.

Justice Doherty recently characterized what the Supreme Court of Canada did in *Grant* as taking a "judicial wire brush to the 20 years of jurisprudential gloss that had built up around s. 24(2) and scrubbed down to the bare words of the section".[58] That may be so. Fortunately, it appears that the "new" test has been easily embraced and applied by provincial appeal courts. If these cases tell us anything, it is that the *Grant* factors are capable of being understood and considered, and that they give courts sufficient signposts to engage in the new test.[59] These cases read as thoughtful considerations of the very factors that should be relevant to deciding whether to admit evidence that was obtained in breach of an accused's Charter rights.

Second, it appears that one of the most important factors for courts to consider may be the conduct of the police. Flagrant and wilful breaches of an accused's Charter rights will not be tolerated and will result in the first *Grant* factor weighing strongly against admission. Less intentional conduct, like carelessness and sloppiness, will also weigh against admission and the balance will likely tip towards exclusion if the breach is particularly intrusive of the accused's Charter-protected rights. By contrast, in cases in which the police conduct themselves appropriately, act in good faith and cannot be faulted, the balance should tip towards admission. As a practical matter, the police rationale for what was said and done and why needs to be explored carefully in every Charter *voir dire*, as a trial judge's view of the officers' actions is likely to have a significant impact on the result under section 24(2).

Third, there remains a heightened concern for statements taken in violation of an accused's Charter rights and derivative evidence then

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[58] *R. v. Blake*, [2010] O.J. No. 48, at para. 21 (Ont. C.A.).

[59] See, for example, *R. v. Blake*, *id.*, at paras. 18-33; *R. v. Ngai*, [2010] A.J. No. 96, at paras. 26-53 (Alta. C.A.); *R. v. Chehil*, [2009] N.S.J. No. 515, at paras. 62-64 (N.S.C.A.); *R. v. Volk*, [2009] S.J. No. 774 (Sask. C.A.); *R. v. Crocker*, [2009] B.C.J. No. 1816, 247 C.C.C. (3d) 193 (B.C.C.A.); *Reddy*, *supra*, note 31, at paras. 89-108 and 120-146.

obtained. While there is no automatic rule excluding this sort of evidence, the Court held in *Grant* that the likelihood of exclusion remains high. That said, it should be remembered that Grant's gun was derivative of his statement taken in violation of his section 9 and section 10(b) rights. Yet, the majority admitted the highly reliable gun despite the "significant" breaches of sections 8 and 9, appearing to place considerable weight on the reliability of the gun and its importance to the case. There will be room for argument against exclusion even if an accused's statement is obtained in violation of his Charter rights. This may be one of the most important practical effects of the new analysis.

Fourth, while deference to a trial judge's conclusion under section 24(2) has been the law for some time, the importance of this was emphasized both in *Grant* and, recently, in *Beaulieu*. If a trial judge adverts to the *Grant* factors, appeal courts should be loath to interfere, just because they might have struck the ultimate balance differently. Trial courts that truly fail to consider the *Grant* factors, however, are not, and should not be, immune from review.

Finally, it will take time for patterns to emerge under the new section 24(2). In the short run, we can expect fulsome and creative arguments to test the bounds of the *Grant* test.