"Free to go": Detention after *Grant* and *Suberu*

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In *R. v. Grant*[2] and *R. v. Suberu*[3] the Supreme Court of Canada expanded on the concept of detention and established a framework to assist courts in determining when detention arises.[4] Since these decisions were released in 2009, much has been written about the revised legal framework.[5] Given the existing academic commentary on the issue, this paper will only briefly touch on the current law governing detention. This paper will focus on recent case law and assess how courts have understood and applied *Grant* and *Suberu* in making findings of detention.

Part I: The law on detention: *Grant and Suberu*

(a) Defining detention

Co-writing the majority judgment, Chief Justice McLachlin and Justice Charron grounded their analysis of detention in the concept of "choice": they emphasized that the "general principle of choice" underlies the determination of whether or not detention has arisen.[6] Accordingly, "[w]here this choice [whether or not to walk away from the police] has been

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[2] [2009] 2 S.C.R. 353 [*Grant*].
[3] [2009] 2 S.C.R. 460 [*Suberu*].
[4] The majority judgment was co-written by the Chief Justice and Justice Charron. Justices Binnie and Deschamps delivered separate, partially concurring reasons in *Grant* and Justices Binnie and Fish delivered dissenting reasons in *Suberu*.
[5] See, for example, Jennifer Woolcombe, "*Grant, Suberu and Harrison*: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts" (2010) 51 S.C.L.R. (2d) 479 [Woolcombe]; Hamish Stewart, "The Grant Trilogy and the Right Against Self-incrimination" 66 C.R. (6th) 97; Steve Coughlan, "Great Strides in Section 9 Jurisprudence" 66 C.R. (6th) 75; Steven Penney and James Stribopoulos, "'Detention' Under the Charter after *R. v. Grant* and *R. v. Suberu*" (2010) 51 S.C.L.R. (2d) 440 [Penney and Stribopoulos]; and David M. Paciocco, "What to Mention about Detention: How to Use Purpose to Understand and Apply Detention-Based *Charter* Rights", [2010] Vol. 89 66 [Paciocco]; and Jonathan Dawe and Heather McArthur, "Charter Detention and the Exclusion of Evidence after *Grant, Harrison* and *Suberu*" [2010] 51 S.C.L.R. (2d) 381 [Dawe and McArthur].
[6] *Grant, supra* note 2 at para. 27.

removed – whether by physical or psychological compulsion – the individual is detained."[7] The removal of the "choice to do otherwise" but comply with a police command is what makes the right to counsel under s. 10(b) of the *Charter* so indispensable.[8] This logic, in addition to concerns about compelled self-incrimination and liberty, is likely what drove the majority to conclude that an individual's s. 10(b) right to counsel arises at the outset of any detention, investigative or otherwise.[9]

(b) The revised framework

The majority summarized its conclusions with respect to detention as follows:

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 they would reasonably be perceived by the individual: whether the police were providing general assistance;

[7] *Grant, supra* note 2 at para. 21.
[8] *Ibid.* at para. 28.
[9] *Suberu, supra* note 3 at para. 2.

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.[10]

There are thus three possible routes that lead to a finding of detention: 1) significant physical restraint; 2) significant psychological restraint based on a legal obligation to comply with the restrictive request or demand; and 3) significant psychological restraint based on, *inter alia,* factors (a), (b), and (c).

These three routes to finding detention were identified by Le Dain J. in *R. v. Therens.*[11] Given that they were upheld by the majority in *Grant,* the broad legal framework for finding detention does not seem to have undergone a significant change.[12] The factors that the majority identified as relevant to a finding of psychological detention where there is no legal obligation (see (a), (b) and (c) above) also incorporate a number of the factors previously set out in *R. v.*

[10] *Grant, supra* note 2 at para. 44; *Suberu, supra* note 3 at para. 25.
[11] [1985] 1 S.C.R. 613 [*Therens*]. See *Grant, supra* note 2 at paras. 25 and 28.
[12] However, Penney and Stribopoulos suggest that the Court "subtly narrowed" the scope of the definition of detention by stating that "not every trivial or insignificant interference with liberty attracts *Charter* scrutiny", a statement absent from *Therens*, and by emphasizing that "only the person whose liberty *is meaningfully* constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation." See Penney and Stribopoulos, *supra* note 5 at p. 445.

Moran,[13] an Ontario Court of Appeal decision that had become the authority on psychological detention pre-*Grant*.

It is notable that the majority in *Grant*, in stating the test for psychological detention, opted to omit some of the factors that the court in *Moran* had identified as relevant.[14] For example, the majority did not find whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated or whether the police had decided that a crime had been committed and the accused was the perpetrator or involved in its commission to be important factors in determining psychological detention, although these factors had previously been considered by courts applying *Moran.* The failure to include these factors in the test governing psychological detention ultimately became the subject of Justice Binnie's dissent. He was of the view that an inquiry into psychological detention should not be exclusively focused on the accused's state of mind, the position adopted by the majority, but should also take into account the police perspective.[15]

(c) Significance of detention

A finding of detention is crucial for two main reasons. First, a finding of detention is the starting point for the determination of whether there has been an "arbitrary detention" pursuant to s. 9 of the *Charter.* Second, detention is a trigger for the right to be informed promptly of the reasons for the detention (s. 10(a) of the *Charter*) and the right to retain and instruct counsel without delay and to be informed of that right (s. 10(b) of the *Charter*).[16]

[13] [1987] O.J. No. 794 [*Moran*].
[14] For more on this issue see Dawe and McArthur, *supra* note 5 at p. 400.
[15] See Justice Binnie's dissent in *Grant*, *supra* note 2 at paras. 150-184.
[16] See Penney and Stribopoulos, *supra* note 5 at p. 439.

The law with respect to detention being briefly set out above, the next section will examine recent case law and comment on how courts have addressed each of the three avenues for finding detention.

Part II: Applying the principles set out in *Grant and Suberu*

(a) Physical Restraint

One would assume that determining whether an individual has undergone significant physical restraint would be straightforward. It seems obvious that handcuffing or placing an individual in a locked room or police vehicle[17] amounts to physical detention.[18] However, determining what other interactions reach the threshold of significant physical restraint has proved to be more difficult.

A review of some recent case law demonstrates that courts are not often asked to find detention based on physical restraint and when they are asked to do so, the factors that they find important to this determination are not clearly articulated or distinguished from those relevant to findings of psychological detention. To some degree this blurring between physical and psychological detention may be attributable to *Grant* itself as the majority held that "the use of physical contact" was a relevant factor to be considered in making a finding of psychological detention and it also discussed placing a hand on an individual's arm or a "fleeting touch" in the context of finding psychological detention.[19]

[17] In *R. v. Carter*, 2012 NWTTC 3, the court held that being locked in the back of a police vehicle was an "element[]" of physical detention [*Carter*].
[18] See Paciocco, *supra* note 5 at p. 76 where he sets out examples of physical detention.
[19] *Grant*, *supra* note 2 at paras. 42 and 45.

In *R. v. Corea*,[20] the investigating officer stopped the vehicle in which the accused was a passenger to investigate a loud muffler. The officer approached the passenger side window and attempted to make "small talk" with the accused. The officer had difficulty understanding him so he asked him to roll down the window farther and he leaned into the vehicle. At that point the officer could smell a very strong odour of marijuana. He asked the accused to exit the vehicle and accompany him to the front bumper to "isolate the smell". The accused complied with that request. When Mr. Corea exited the vehicle the officer observed that he had red-coloured, glassy eyes and walked with a bit of a stagger; he also appeared to have a dry mouth and pasty lips. The officer could smell a strong odour of marijuana emanating from his person. The officer then handcuffed and arrested Mr. Corea for possession of a controlled substance.

One of the issues on the *voir dire* was whether Mr. Corea was detained prior to his arrest. The court found that once the officer embarked on the drug investigation the accused was neither free to leave nor free to decline to comply with the request to exit the vehicle.[21] Citing *Therens*, the court found that from the time of the commencement of the drug investigation, the accused was physically and psychologically detained. It is not clear what elements led the court to conclude that the accused was physically as opposed to psychologically detained.

In *R. v. Aulakh*[22] the accused was charged with two driving offences. One of the issues on the *voir dire* was whether the accused was detained at the scene by a police officer who happened to be a witness to the motor vehicle accident and moved the two drivers to the sidewalk to await the arrival of other officers. The court concluded that there was no physical restraint in this case because the police officer had "never touched [the accused] or handcuffed

[20] 2011 BCPC 27 [*Corea*].
[21] *Ibid*. at para. 8.
[22] 2010 BCPC 277 [*Aulakh*].

him or, for example, directed him to wait inside his unmarked car or indeed inside his own car." While the officer asked the accused to wait on the sidewalk, he did not restrain his movements, by preventing him from entering his own car or speaking with another man who came out of a nearby residence.[23] The court also noted that the officer did not stand within touching distance of the accused and there was no evidence that he told the accused that he was not free to go or to talk to anyone. The court also concluded that there had been no psychological detention and gave additional reasons supporting this conclusion.

In *R. v. Robinson*[24] the accused was charged with obstruction of justice in the context of a motor vehicle accident. One of the issues on the *voir dire* was whether Mr. Robinson had been detained prior to his arrest. When one of the police officers arrived on the scene, she observed a man standing by one of the vehicles that had been involved in the collision. She moved toward the man, indicating that he could not be there, and the man identified himself as the driver. Because she wanted to talk with him further, the constable said "Let's head over to the police car". She gestured towards the police car and walked side by side with the accused. She did not touch him. The officer noticed that the accused was pale, dry mouthed and smacking his lips; she also smelled alcohol and observed that his eyes were slightly unfocused. She opened the back rear passenger door of the police car and gestured for him to have a seat inside. Mr. Robinson complied. The door remained open and the accused sat sideways with his feet outside of the car. When Mr. Robinson requested medical attention the officer moved away from the vehicle and allowed the medical personnel to attend to him. After he had received medical attention, the officer arrested him for impaired driving causing death. In this case, the court

[23] *Ibid.* at paras. 100-101.
[24] 2012 BCSC 272 [*Robinson*].

concluded that the accused was never under any physical restraint prior to the arrest nor was he under any legal compulsion or psychological detention.

These three cases highlight some of the difficulties that exist in determining what constitutes physical detention. In *Aulakh* the police direction to move out of the vehicle and wait on the sidewalk was not sufficient to constitute physical detention whereas in *Corea* a similar direction was sufficient for a finding of physical detention. In *Carter* (see footnote 18), being locked in the back of a police vehicle was found to be an "element[]" of physical detention but in *Robinson*, sitting in the back of an open police vehicle did not amount to physical detention. It can also be observed that in *Aulakh* and *Robinson* there was no finding of any type of detention whereas in *Corea* and *Carter* there were findings of both physical and psychological detention. While this is only a small sample of cases, they suggest that courts are tempted to couple findings of physical and psychological detention.

While this conflating between physical and psychological detention does not seem to be problematic at first glance, there are reasons that the two inquiries should remain distinct. For instance, it may be more difficult for a particular accused, one with a high level of sophistication or maturity, to demonstrate that he or she was psychologically detained absent any legal obligation because the Crown may suggest that his or her high level of sophistication militates against any finding of detention. Given that a determination of physical detention is a purely objective inquiry, involving no consideration of the accused's personal circumstances, being able to show physical detention remains an important avenue for some accused. It is hoped that the factors important to findings of physical detention will continue to be refined in future cases, providing additional guidance on this issue.

(b) Psychological restraint – Legal Obligation

The majority in *Grant* identified a roadside breath sample as an example of a situation where an individual is legally required to comply with a police direction or demand.[25] One issue highlighted in recent cases is whether *Grant* and *Suberu* overruled the Supreme Court decisions in *R. v. Orbanski* and *R. v. Elias.*[26] In *Orbanski* and *Elias*, the Court held that while motor vehicle stops involve detention and thus engage s. 10(b) rights, the police are not required to advise the detainee of the right to counsel because this is a justifiable limit prescribed by law.

Post-*Grant* courts have consistently held that *Orbanski* and *Elias* remain good law: see *R. v. Grunwald*[27], *R. v. Perjalian*[28] and *R. v. Humphrey*.[29] In *Grunwald* the B.C. Court of Appeal remarked that the majority of the Supreme Court had expressly confirmed this limitation on the right to counsel by referring to the decision in *Orbanski* as a reasonable limit on a detainee's s. 10(b) right.[30] So while *Grant* recognizes that detention arises when an individual is legally obligated to comply with a restrictive request or demand, like a roadside breath sample, police are not required to provide the detainee with his or her s. 10(b) rights during this detention. Courts have been clear, however, that if the nature of the investigation changes, for example from a traffic offence to a drug investigation, police must immediately advise the accused of his or her right to counsel: see *Perjalian, supra* at para. 58.

[25] *Grant, supra* note 2 at para. 30.
[26] [2005] 2 S.C.R. 3 [*Orbanski* and *Elias*].
[27] 2010 BCCA 288 at para. 26 [*Grunwald*].
[28] 2011 BCCA 323 [*Perjalian*].
[29] 2011 O.J. No. 2412.
[30] See *Suberu, supra* note 3 at para. 45. See also *Grunwald, supra* note 27 at para. 27.

With the exception of roadside stops, not many post-*Grant* courts have addressed other legal obligations that can give rise to a finding of detention. It remains to be seen how the case law will develop in this area.

(c) Psychological restraint – Other Factors

The final issue to be examined is what courts have found to be important in making findings of psychological detention where there is no legal obligation to comply. This route to finding detention has generated the most judicial consideration since *Grant.* Three issues will be briefly considered: i) the statement that a subject is "free to go"; ii) the significance of sophistication and iii) the importance of an accused's testimony.

i) Subject is "free to go"

One interesting issue is the judicial treatment of a police direction that an individual is "free to go". In *R. v. Schrenk,*[31] the police conducted a routine traffic stop and after engaging in a conversation with the accused, the officer said "You're free to leave, Mr. Schrenk, have a safe trip." While waiting for the accused to put his driver's licence away, the officer stated "Mr. Shrenk, could I ask you a couple of questions? You don't have to answer if you don't want to." The accused replied "Yeah, sure" but did not make eye contact.[32] This second exchange resulted in the accused being detained for a drug investigation. In this case the Manitoba Court of Appeal maintained the trial judge's conclusion that the accused was not psychologically detained. While the Court of Appeal adverted to the difficulty inherent in a police officer stating "you are free to

[31] 2010 MBCA 38 [*Schrenk*].
[32] *Ibid*. at para. 12.

go", it found it important that the police had returned all of the accused's documents to him so he need not have answered the officer's questions.[33]

In contrast, the court in *R. v. Nakamura*[34] rejected the Crown's submission that the fact that the police officer told the accused Vincent, in the context of giving a statement, that the door was open and that he could leave at any time was a clear indication that he was not detained.[35] The court stated that "this [was] not the law" and proceeded to find that the accused was psychologically detained based on a number of other factors.[36]

In *R. v. Way*[37] the Nova Scotia Court of Appeal explained that in *Grant*, the majority of the Court gave police investigators a "tool" to ensure the line between detention and investigation remained clear. The Court of Appeal stated: "Where there is uncertainty, the police may choose to "inform the person that he or she is under no obligation to answer questions and is free to go" or otherwise they risk the possibility that "a detention may well crystallize" requiring the need to advise the person of his or her s. 10(b) rights."[38] The Court of Appeal "pause[d] to add" that there may be situations where the police advise an individual that he or she is free to go that would still result in a finding of psychological detention but it held that "detention will certainly be much more difficult to establish when such information has been genuinely provided."[39]

These cases demonstrate the different effects that a police statement that an individual is "free to go" may have. The court's comment in *Way* - that "detention will certainly be much

[33] *Ibid*. at para 60.
[34] 2011 BSCS 1443 [*Nakamura*].
[35] *Ibid.* at para. 46.
[36] *Ibid*. at para. 46.
[37] 2011 NBCA 92 [*Way*].
[38] *Ibid*. at para. 39.
[39] *Ibid*. at para. 40.

more difficult to establish when such information has been genuinely provided" - is somewhat troubling because it could be seen as suggesting that police can immunize their interactions with individuals from any finding of detention simply by stating that the subject is "free to go".[40] The *Schrenk* decision is also difficult to understand as it seems that a police "request" to ask further questions, directly following other police questioning, could be quite easily characterized as a detention. This result may actually have less to do with the police conduct and more to do with the accused's level of sophistication, an issue that will be canvassed in the next section.

ii) Sophistication

Some of the decisions previously discussed demonstrate the significance of an accused's level of sophistication in a court's determination of psychological detention. In *Schrenk*, the Court of Appeal observed that the accused was "mature and sophisticated" and noted that he was employed by the Government of British Columbia.[41] In that case the trial judge had indicated that the accused knew he could say no to the police because he later refused a consent search.[42] There was no finding of detention in that case. Similarly, in *Robinson*, the trial judge found it important that the accused was "a very experienced police officer who would have known the nature of [the officer's] duties in th[e] situation, along with his rights under the law."[43] As in *Schrenk*, there was no finding of detention.

[40] Dawe and McArthur state that "[i]t is essential that trial judges not treat this kind of police assurance as a prophylactic, but continue to examine *all* of the circumstances when considering whether there has been a detention", *supra* note 5 at p. 402.
[41] *Schrenk, supra* note 31 at para. 58.
[42] *Ibid.*
[43] *Robinson, supra* note 24 at para. 23.

In *Nakamura*, the court noted that the power imbalance between the accused and the police officer was great as the accused was an "unsophisticated, short, slightly built 19 year old from Gold River".[44] The court concluded that the accused (Vincent) had been detained.

The level of sophistication of the accused was identified by the majority in *Grant* as one of the factors courts could consider in making a determination of psychological detention. While none of the courts canvassed have stated that an accused's level of sophistication is a determinative factor in making a finding of detention, this factor has seemed to play a significant role in courts' conclusions with respect to detention. It is wholly appropriate to place weight on this factor but it is suggested, with respect, that courts continue to be mindful of the fact that even sophisticated and mature accused may be unclear as to their rights under the law and/or have difficulty resisting police authority. Accordingly, this factor alone ought not to take on a disproportionate level of importance when courts are determining detention.

iii) Accused's Testimony

A final observation concerns the impact of an accused's testimony on a finding of detention. The majority in *Suberu* said that "the failure of the applicant to testify as to his or her perceptions of the encounter is not fatal to the application".[45] One commentator has suggested, however, that given the claimant-centered perspective adopted by the majority, "one would expect courts to draw a negative inference against any accused who fails to testify on the *voir dire*."[46] Fortunately, courts do not seem to have interpreted *Grant* in this fashion and many have found detention absent any testimony from the accused.

[44] *Nakamura, supra* note 34 at para. 7.
[45] *Suberu, supra*, note 2 at para. 28.
[46] See Woolcombe, *supra* note 5 at p. 489.

For example, in *R. v. Reddy* the majority found that the only conclusion stemming from an objective assessment of the facts was that the accused was detained, notwithstanding the fact that the accused did not testify. [47] *R. v. Yamka*[48] provides another example of a case where an accused did not testify yet the court found detention. While it is up to the accused to prove detention on a balance of probabilities, these cases rightly demonstrate that doing so is possible even if the accused does not give evidence.

The majority decisions in *Grant* and *Suberu* provided much needed guidance with respect to the law on detention and established a framework to guide courts in making these determinations. While it will take more time to evaluate the impact of these decisions, this paper has aimed to provide a preliminary review of some emerging trends and to suggest areas that are likely to be the subject of further judicial consideration.

[47] 2010 BCCA 11 at para. 61.
[48] 2011 ONSC 405.