Charter Issues Update:

D. Sections 9 & 12 – Arbitrary Detention and Other Issues

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Impaired Driving – The Changing Landscape

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SECTIONS 9 & 12 – ARBITRARY DETENTION AND OTHER ISSUES

"Just like that time you got sent to the principal's office."

INTRODUCTION

Section 9 of the *Charter of Rights and Freedoms* sets out that "Everyone has the right not to be arbitrary detained or imprisoned." In the context of an impaired driving case, the focus often is placed on the initial detention, and whether or not the arresting officer had reasonable and probable grounds to affect a stop of the motor vehicle. The tension of this section seen in the courts lies between an individual's personal freedom and the broader societal goal of public safety.

Section 12 of the *Charter* states "everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Again, in the context of an impaired file, post-breathalyser detention may be a fruitful ground for a section 12 (in addition to a section 9) argument.

SECTION 9

What is the Purpose of Section 9 of the *Charter*?

The purpose of s.9 of the *Charter* is explained by the Supreme Court in *R. v. Grant,* [2009] S.C.J. No 32 at paragraph 20,

> "The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference…"[L]iberty", for *Charter* purposes, is not "restricted to mere freedom from physical restraint", but encompasses a broader entitlement "to make decisions of fundamental importance free from state interference". Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee's interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about."

The court goes on to say in the next paragraph (paragraph 21):

> "Once detained, the individual's choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence."

What is "Detention"?

As to what constitutes "detention", guidance has been given by the Supreme Court of Canada in *R. v. Grant*. At paragraph 44, the following summary is set out:

> "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 [page385] 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; 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."

R. v. Mann [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 at paragraph 19 states:

> '"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.'

Judge Fradsham in *R. v. Reid*, 2012 ABPC 109 (CanLII), considered the actions of the police "boxing in" a vehicle in a parking lot to be considered detention for the purpose of s.9:

> "I find that the accused was detained (as that word is used in s. 9 of the *Charter*) when the police vehicle was positioned directly behind the accused's vehicle for the purpose of preventing that vehicle from being moved."

What is "Arbitrary"?

Set out broadly, *R. v. Cayer*, [1988] O.J. No. 1120 (C.A.), leave refused [1988] S.C.C.A. No. 370 states that:

> "An arbitrary detention is a detention which is capricious, despotic or unjustifiable."