Uncertainty Abounds:

A Primer on Section 9 of the *Charter* and Police Detention and Arrest Powers

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UNCERTAINTY ABOUNDS: A PRIMER ON SECTION 9 OF THE *CHARTER* AND POLICE DETENTION AND ARREST POWERS[1]

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INTRODUCTION

At the title suggests, this paper is intended to provide a primer on section 9 of the *Charter*, the constitutional guarantee "not to be arbitrarily detained or imprisoned",[2] as well as police detention and arrest powers. As we shall see below, the two topics are closely connected. That is because the Supreme Court of Canada has recently made clear that any unlawful "detention" is necessarily arbitrary and will therefore run afoul of section 9 of the *Charter*.[3] As a result, knowing the scope and limits on police detention powers is essential to determining whether or not the police have run afoul of the *Charter*.

This paper draws heavily on *Criminal Procedure in Canada*,[4] in particular the chapter in that textbook that deals with the law governing detention and arrest. The book was published late in 2011. Despite this, very little has changed over the intervening eighteen months. To the extent that there have been a few significant developments relating to this important area of the law, these are referenced in this paper as well.

Unfortunately, the law governing this fundamentally important area of Canadians' civil liberties, the scope and limits on the right to move about freely, continues to remain steeped in much uncertainty. Recent developments, as we shall see, have only served to exacerbate this continuing trend. Hence, the title; uncertainty abounds.

THE MEANING OF "DETENTION" AND ITS CONSTITUTIONAL IMPLICATIONS

Whether or not there has been a "detention" is critically important for *Charter* purposes. Not only is detention a trigger for the constitutional protection provided by section 9, it is also one of the threshold requirements for engaging the safeguards found in sections 10(*a*) and 10(*b*)

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1 This paper draws extensively from Chapter 2 in Steven Penney, Enzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis, 2011).

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].\

3 See *R. v. Grant*, [2009] 2 S.C.R. 353 at para. 54.

4 See Steven Penney, Enzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis, 2011).

of the *Charter*, which only become operative "on arrest or *detention*." Consequently, when it comes to the constitutional regulation of the relationship between the individual and the state, especially in relation to street-level encounters, detention is the key to unlocking a host of important *Charter* rights.

Not surprisingly then, whether dealing with a suspect who is encountered on the street or at the stationhouse, the police will often have good tactical reasons for avoiding a detention as long as possible. Absent detention, police enjoy considerable freedom when interacting with and questioning suspects.[5] Questioning may produce evidence of wrongdoing, either because the answers are incriminating or they reveal the location of physical evidence or contraband. As a result, until they are ready to effect an arrest the police will often want to avoid a detention. It is the courts, however, not the police, which ultimately decide whether and when the detention threshold was crossed in a given case.

As a result, having a clear sense of what qualifies as a detention is crucial to understanding the potential *Charter* implications of street level encounters between the police and members of the public. Unfortunately, as we shall see, the law governing the meaning of "detention", as it has developed, is steeped in much uncertainty.

I. The meaning of "detention" under the *Charter*

It was a case involving section 10(*b*), the right to counsel, that first raised the meaning of detention before the Supreme Court. In *R. v. Therens*,[6] police subjected a motorist to a breath demand under the *Criminal Code*.[7] He was taken back to the police station, took and failed a breathalyzer test, and was arrested. At the time of the demand, police did not apprise him of his right to counsel, which section 10(*b*) requires on detention.

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5 Other than the *Charter*, the only significant restraint on police questioning of *adult* suspects stems from the common law voluntary confessions rule. See generally, *R. v. Oickle*, [2000] 2 S.C.R. 3. The voluntariness rule, however, is beyond the subject-matter of this paper. The questioning of youth is also subject to robust legislative protections that are triggered not simply where there is a detention or arrest but also in circumstances where there are "reasonable grounds for believing" that a young person has committed an offence. See *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 146(2). The special legal protections for youth area also beyond the subject matter of this paper.

6 [1985] 1 S.C.R. 613 [*Therens*].

7 *Criminal Code*, R.S.C. 1970, c. C-34, s. 235(1). Today, see *Criminal Code*, R.S.C. 1985, c. C-46, as amended, s. 254(3).