Section 9 – Detention or Imprisonment

Section 9 of the *Canadian Charter of Rights and Freedoms* (*Charter*) states that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[1] According to the Supreme Court of Canada, the purpose of this provision is to "protect individual liberty against unlawful state interference."[2] To assess whether the provision has been violated, a court will ask two questions:

1. Was the individual detained or imprisoned by the state?

2. Was the detention or imprisonment arbitrary?[3]

Question 1: Was the Individual Detained or Imprisoned by the State?

Detention occurs when a person "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[4]

There are two types of detention: *physical* and *psychological*.

Physical detention or imprisonment is typically clear and includes things like being handcuffed, placed in a police car, or put in a prison cell.

Psychological detention occurs in two scenarios:

1. "[W]here [a person] is legally required to comply with a direction or demand."

2. "[W]here there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the [individual's] position would feel so obligated."[5] In other words, a person feels like they have no choice even though, legally, they do. Courts look at many factors to decide if someone was psychologically detained in this way, including the circumstances leading up to the potential detention, the nature of police conduct, and the characteristics and circumstances of the individual.[6]

An example of the first scenario of psychological detention would be when a person is pulled over by the police while driving. In *R v Grant*, the second scenario occurred when three police officers cornered and questioned an individual walking down a street.[7]

Question 2: Was the Detention or Imprisonment Arbitrary?

If a court finds that a person was detained or imprisoned, the next question it will ask is whether the detention or imprisonment was arbitrary. Arbitrariness will *not* exist if three criteria are satisfied:

1. The detention must be authorized by law.

2. The authorizing law must not be arbitrary.

3. The manner in which the detention is carried out must be reasonable.[8]

If the detention or imprisonment fails to satisfy any one of these criteria, then the court will find the detention to be arbitrary.

Detention Triggers Section 10

Once a person is subject to an arrest or detention under the above test, that person's section 10 rights under the *Charter* become engaged. These rights include (among others): the right to reasons for detention or imprisonment, and the right to counsel.[9]

Section 9 Rights Are Limited

As with all rights under the *Charter*, a person's section 9 rights are subject to limitation under section 1. Section 1 of the *Charter* states that the government can legally impose "reasonable limits" on an individual's *Charter* rights, provided that those limits are "prescribed by law" and can be "demonstrably justified in a free and democratic society."[10]

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

[2] *R v Grant*, 2009 SCC 32 at para 54 [*Grant*].

[3] *R v Hufsky*, [1988] SCJ No 30, 1 SCR 621 at paras 12-13.

[4] *R v Therens*, [1985] SCJ No 30, 1 SCR 613 at para 53.

[5] *Grant, supra* note 2 at para 30.

[6] *Ibid* at para 44.

[7] *Ibid*.

[8] *R v Le*, 2019 SCC 34 at para 124.

[9] *Charter*, *supra* note 1 s 10.

[10] *Ibid*, s 1.