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# The *Grant* Trilogy and the Right Against Self-incrimination

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## Introduction

The *Grant* trilogy[1] significantly changes the law governing detention, the right to counsel, and the exclusion of evidence under the *Canadian Charter of Rights and Freedoms*. In this comment, I consider the extent to which these changes in the law affect the right against self-incrimination. The Court's approach to "detention" under s. 9 of the *Charter* and its recognition of a right to counsel on any detention are quite consistent with the central place of the principle against self-incrimination in Canadian criminal justice. But the Court's application of the concept of detention to the facts and its new test for the exclusion of unconstitutionally obtained evidence raise the possibility that the right against self-incrimination may receive less protection than before.

## The Right(s) Against Self-incrimination

The Supreme Court of Canada has described the right against self-incrimination as "the single most important organizing principle in criminal law"[2] and has recognized many different specific manifestations of that right under the *Charter* and at common law, including the pre-trial right to silence,[3] the confessions rule,[4] the relatively expansive interpretation of the use immunity guarantee in s. 13,[5] and the recognition of derivative use immunity under s. 7.[6] While the Court's application of these rights to specific fact situations has sometimes been disappointing,[7] the right against self-incrimination does provide an important overarching norm for various procedural aspects of criminal law and evidence.

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[1] *R. v. Grant*, reported *ante* p. 1; *R. v. Suberu*, reported *post* p. 127; *R. v. Harrison*, reported *post* p. 105.

[2] *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577, 29 C.R. (4th) 209 (S.C.C.).

[3] *R. v. Hebert*, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145 (S.C.C.).

[4] *R. v. Singh*, 2007 SCC 48, 51 C.R. (6th) 199 (S.C.C.).

[5] *R. v. Henry*, 2005 SCC 76, 33 C.R. (6th) 215 (S.C.C.).

[6] *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 36 C.R. (4th) 1 (S.C.C.).

[7] The decision in *Singh*, *supra*, and related rulings concerning the confessions rule are particularly troubling in this respect. See, among other commentaries, Dale E. Ives and

The purpose of the right against self-incrimination, broadly speaking, is to protect the autonomy of everyone who is subject to the investigative process by ensuring that they have a real choice about whether to provide the state with testimony. The right against self-incrimination does not prevent a suspect, a detainee, or an accused person from giving statements to the police or from testifying in his or her own defence; but it is meant to ensure that the individual's decision to do so is free, informed, and voluntary. This purpose is best forwarded by ensuring that the legal rules governing police investigations ensure that suspects, detainees, and accused persons can effectively choose whether to co-operate with the police and have effective remedies where this choice is denied.

### *Grant*: Linking the Definition of Detention to the Right Against Self-incrimination

Section 9 of the *Charter* provides everyone with the right "not to be arbitrarily detained". The *Grant* majority, reaching back to *Therens*,[8] defines "detention" as "a suspension of the individual's liberty interest by a significant physical or psychological restraint."[9] It appears that detention so defined can be aligned along two axes: first, whether the detention (lawful or not) is physical or psychological; and second, whether the person is legally obliged to comply with the (physical or psychological) restraint. Physical restraint is not at issue in *Grant* because the police did not physically restrain the accused until they had acquired grounds for arrest. But psychological detention is thoroughly discussed. A psychological detention may occur where the detainee has "a legal obligation to comply with the restrictive request or demand",[10] or where, despite the absence of any legal obligation, "a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply."[11] The reasonable person is taken to be aware of "generally understood" rights, including the general liberty to decline to co-operate with the police,[12] but even where the person retains that general liberty as a matter of law, the behaviour of the police may lead him or her to conclude that he or she has no choice but to comply. A num-

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Christopher Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2008), 51 C.R. (6th) 250; Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007), 44 San Diego L.R. 477; and Hamish Stewart, "The Confessions Rule and the Charter of Rights", forthcoming, *McGill Law Journal*.

[8] *R. v. Therens*, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97 (S.C.C.).

[9] *Grant*, *supra*, at para. 44.

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*, at para. 37.

ber of factors — including the "circumstances", the "nature of the police conduct", and "particular characteristics or circumstances of the individual where relevant, including . . . minority status [and] level of sophistication" are relevant to determining whether a detention in this sense has arisen.[13]

In light of the *Grant* definition, a detention can occur in any encounter with the police, depending on the exact circumstances. But what makes the detention arbitrary, so as to violate s. 9? On this point, the Supreme Court chose the relatively simple solution, parallel to the approach adopted long ago under s. 8,[14] of connecting arbitrariness with unlawfulness: "A lawful detention is not arbitrary within the meaning of s. 9 . . . unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9."[15] So after *Grant*, a physical or psychological detention that is not authorized by a specific legal rule, such as a statutory power of arrest or detention or the common law power of investigative detention,[16] will always be arbitrary and in violation of s. 9 because it will be unlawful.

Section 10 of the *Charter* provides a number of rights that arise "on arrest or detention". Previous cases had left open the question of whether these rights apply when a person is lawfully detained, short of arrest, for investigative purposes.[17] *Grant* and *Suberu* hold that the s. 10 rights, including the s. 10(*b*) right "to retain and instruct counsel without delay and to be informed of that right", apply to all detentions;[18] these rights will apply regardless of the legal source of the power to detain, and they will even apply when the detention is unlawful. In *Grant* itself, the police were obliged to advise *Grant* of his s. 10(*b*) right, even though the detention was unlawful and therefore arbitrary.

The Court's reasons for defining psychological detention as depending on a reasonable belief that one has no choice but to comply and for confirming that the right to counsel arises on any detention reflect the overarching norm against self-incrimination. When the individual is not psychologically detained, he or she knows, or at least is deemed to know, that he or she has no obligation to comply with police demands or to respond to their questions; he or she therefore retains the "ability to choose" that is central to the right to silence and does not need counsel to exercise his or her ability to choose whether to co-operate with the police. But when the *Grant* test for psychological detention is satisfied, the

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[13]*Ibid.*, at para. 44.

[14]*R. v. Collins*, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193 (S.C.C.).

[15]*Ibid.*, at para. 54.

[16]As defined in *R. v. Mann*, 2004 SCC 52, 21 C.R. (6th) 1 (S.C.C.).

[17]See, for instance, *Mann*, *supra*, at para. 22.

[18]*Grant*, *supra*, at para. 58; *Suberu*, *supra*, at para. 2.

individual reasonably believes that he or she has no choice but to comply with the directives of the police and to respond to their questions; at that point, he or she needs the advice of counsel to retain the ability to choose.[19]

In principle, the *Grant* definitions of "psychological detention" and the rights associated with it are appropriate to a system of criminal justice that is committed to the rule of law and the protection of individual autonomy. The test for detention is intimately linked with everyone's basic freedom to move around; the holding that the right to counsel arises on any detention is another way of protecting the right against self-incrimination; and the recognition that unlawful detentions are arbitrary is another instance of the Court's commitment to the rule of law. But how will these commitments play out in practice? Other elements of the *Grant* trilogy give some cause for concern.

### *Suberu*: When Is a Detention Not a Detention?

The *Grant* approach to arbitrary detention unquestionably raises the legal stakes in routine encounters between police officers and members of the public. Before *Grant*, it was arguably possible for a trial judge to find that an interaction between an officer and a suspect was a "detention" in the *Therens* sense, was not an investigative detention in the *Mann* sense, was not "arbitrary" under s. 9, and did not give rise to the right to counsel. Thus a trial judge could avoid finding a *Charter* violation in a situation realistically described as one of illegal detention. This solution is no longer available after *Grant*, and rightly so, because a detention not authorized by law is indeed arbitrary in the sense that there is no legal reason for it, and because persons who are detained need counsel. So, faced with police-citizen interactions that are difficult to characterize, trial judges may be forced to choose between finding that there was a detention and associated violations of ss. 9 and 10(*b*) and finding that there was no detention and no *Charter* violation. If trial judges are too often tempted by the second finding, much of the work done in *Grant* to apply the rule of law to police investigations and to protect the right against self-incrimination will be undone.

In *Suberu* itself, the majority appears to have succumbed to this very temptation. A police officer, responding to a call about the use of a stolen credit card at a liquor store, heard the accused remark, "He did this, not me, so I guess I can go." The officer followed the accused outside the store and said to him, "Wait a

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[19] *Grant*, *supra*, at paras. 22, 37-43. In light of *Singh*, *supra*, once the detainee has consulted counsel and has decided not to speak to police, the police would be entitled to disregard his or her stated desire not to speak and to continue questioning him or her, as long as the questioning did not deprive him or her of the ability to choose. For the *Grant* ruling concerning right to counsel on detention to be truly effective in protecting the right against self-incrimination, *Singh* needs to be revisited: see note 7 above.

minute, I need to talk to you before you go anywhere" as the accused was getting into his vehicle. The accused and the officer then had a brief conversation.[20] The trial judge found, and the appeal judge and the Ontario Court of Appeal agreed, that the accused was psychologically detained. The Supreme Court of Canada reversed this finding, holding that on a proper application of the *Grant* test to the facts found by the trial judge, the accused was not detained because "a reasonable person in the circumstances would have concluded that the initial encounter was preliminary investigative questioning falling short of detention."[21] As Binnie J. points out in his dissent, it is hard to accept the proposition that a reasonable person who was evidently suspected of involvement in a crime would think that a police officer would, after uttering those words, simply allow him to drive away;[22] yet that is the implication of the majority's holding. *Suberu* suggests that, notwithstanding the efforts made in *Grant* to protect the right against self-incrimination, the police will have considerable leeway to ask questions of individuals, including suspects, before those individuals are found to have been "detained" for s. 9 purposes; this leeway is likely to leave the right against self-incrimination inadequately protected.

### *Grant* and *Harrison*: Remedies

Evidence obtained in violation of the *Charter* is to be excluded under s. 24(2) where its admission would "bring the administration of justice into disrepute." Under the *Collins/Stillman* approach,[23] trial judges were to consider whether admission of evidence in the proceedings would make the trial unfair, whether the *Charter* violations were serious, and whether exclusion of evidence would have an adverse effect on the repute of the justice system. And, according to the controversial majority ruling in *Stillman*, exclusion under the first branch was virtually automatic if the evidence obtained was "conscriptive" (that is, self-incriminatory) or was derived from conscriptive evidence and was undiscoverable by constitutional methods.

In *Grant*, the *Collins/Stillman* approach is swept away. Henceforth, when deciding whether to admit evidence obtained in violation of the *Charter*, judges are to consider three factors: "(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for

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[20] *Suberu*, *supra*, at paras. 9–10.

[21] *Ibid.*, at para. 29.

[22] *Ibid.*, at paras. 54–58.

[23] *Collins*, *supra*; *R. v. Stillman*, [1997] 1 S.C.R. 607, 5 C.R. (5th) 1 (S.C.C.).

little), and (3) society's interest in the adjudication of the case on its merits."[24] There is much to be said for replacing the intricate *Stillman* approach with this straightforward balancing of factors that are obviously relevant to the repute of the justice system in the eyes of the reasonable person. But there is a danger that the new approach will reduce the remedial protection for the right against self-incrimination, the very right that properly animates much of the majority's analysis of the ss. 9 and 10(*b*) rights. All *Charter* violations are, in a sense, serious; but the *Collins/Stillman* approach recognized that some *Charter* violations had a self-incriminating quality that other violations lacked, and that this quality gave special force to the argument for exclusion. Tricking or forcing the accused to give up his right to silence and to provide the state with testimonial assistance in building a case against him runs contrary to the basic norms of the criminal justice system in a way that other *Charter* violations do not; a warrantless search of a vehicle, though normally a very serious *Charter* violation, could conceivably be authorized by law in a way that a forced confession could not, and does not implicate the person in the way a forced confession does.

This majority's discussion of exclusion of statements under the new approach recognizes this point. The majority comments that "[t]he preservation of public confidence in the justice system requires that the police adhere to the *Charter* in obtaining statements from a detained accused."[25] Violations of s. 10(*b*) are said to undermine "the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination."[26] Moreover, the majority recognizes that statements obtained in violation of the *Charter* may be unreliable.[27] Thus, all three *Grant* factors will in most cases weigh against admission of unconstitutionally obtained statements: the impact of the breach on the right will be significant and the interest in adjudication of the merits will not be greatly enhanced by admission.

Yet the significance of the majority's recognition of the need for a remedy for violations of the principle against self-incrimination is arguably weakened by its application of the test for exclusion to the facts. Grant's ss. 9 and 10(*b*) rights were breached, and the police discovered the gun on his person only because he told them it was there. There is little doubt that the gun, as non-discoverable evidence derived from conscriptive evidence, would have been excluded on a

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[24]*Grant*, *supra*, at para. 71.

[25]*Ibid.*, at para. 93.

[26]*Ibid.*, at para. 95.

[27]*Ibid.*, at para. 97.

proper application of the *Stillman* framework.[28] But under the *Grant* framework, the violation of the accused's right against self-incrimination is not effectively remedied. The Court finds that both *Charter* violations had a self-incriminatory quality, aggravated by "the fact that the evidence was non-discoverable."[29] The impact of the violations on his rights was "significant",[30] but "the police conduct was not egregious" and the gun itself was highly reliable and central to the Crown's case. The fact that the police "were operating in circumstances of considerable legal uncertainty . . . tips the balance in favour of admission".[31]

In *Harrison*, a majority of the Supreme Court excluded 35 kg of cocaine found in a vehicle rented by the accused following a series of *Charter* violations that "represented a blatant disregard for *Charter* rights"[32] and that constituted "a significant, although not egregious intrusion" on the accused's liberty and privacy interests.[33] But the Court does not note the fact that the *Charter* violations included a serious infringement of the right against self-incrimination. The accused and a passenger in his vehicle were questioned after detention, in violation of their s. 10(*b*) rights; the officer's suspicions about the two were stimulated by the fact that when "[q]uestioned separately, [they] gave stories that seemed to be contradictory."[34] In light of the weight given to the first *Grant* factor, this fact would have made no difference to the outcome; but the Court's failure to mention it at all is disquieting.

## Conclusion

The *Grant* approach to the definition of detention and to the rights associated with detention is consistent with the high value accorded in Canadian law to protecting the right against self-incrimination. But the application of the *Grant* test to the facts of *Suberu* suggests that the threshold for finding a psychological

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[28]The accused's statement that he had a gun was undoubtedly conscriptive. It seems unlikely that the gun would have been found by any means, constitutional or not, if the accused had not admitted having it on his person. It was therefore derivative evidence. There was no constitutionally permissible method of finding the gun. It was therefore derivative and non-discoverable. Compare the distinction between "derivative" and "discoverable" evidence drawn in *R. v. Feeney*, [1997] 2 S.C.R. 13, 7 C.R. (5th) 101 (S.C.C.), at paras. 68–69.

[29]*Grant, supra*, at para. 137.

[30]*Ibid.*, at para. 138.

[31]*Ibid.*, at para. 140.

[32]*Harrison, supra*, at para. 27.

[33]*Ibid.*, at para. 32.

[34]*Ibid.*, at para. 6.

detention may be too high to effectively protect the detainee's right to choose whether to speak to the police. And, at least on the facts of *Grant* itself, the new framework for the exclusion of unconstitutionally obtained evidence gives less remedial protection to the right against self-incrimination than the old framework. What might be called "low-level" coercion of detainees, leading to self-incriminatory statements, may not be recognized as coercion at all (as in *Suberu*) or may be characterized as not particularly serious (as in *Grant*). Perhaps we should take comfort from the Court's comment that police conduct similar to that in *Grant* "will be . . . less justifiable going forward."[35] Since the Court has clarified the law of detention, the police will be deemed to be aware of their obligation to rely on their lawful powers of detention and to provide detainees with the right to counsel; if they fail to do so, the balance may tip in favour of exclusion rather than admission of evidence obtained in violation of the right against self-incrimination.

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[35] *Grant*, *supra*, at para. 133.