1 An Overview of the Rights Under Sections 9 and 10 of the Charter

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TABLE 1.1

CHARTER SECTION 9	Everyone has the right not to be arbitrarily detained or imprisoned.
CHARTER SECTION 10	Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

I. Introduction

The title of this textbook refers to three topics: detention, arrest, and the right to counsel. These topics go hand in hand with the rights guaranteed under sections 9 and 10 of the *Canadian Charter of Rights and Freedoms*.[1] Section 9 protects everyone against arbitrary detention or imprisonment, and section 10 outlines the rights that arise upon a person's detention or arrest, including the right to consult with counsel. This introductory chapter will lay a foundation for the chapters that follow on detention (Chapters 2-4), arrest (Chapters 5-7), the grounds needed to detain or arrest a person (Chapter 8), and the rights that are triggered upon detention or arrest (Chapters 9-11).

It is essential that everyone engaged with the criminal justice system understands the scope and mechanics of the rights under sections 9 and 10 of the Charter. Law enforcement, lawyers, and the judiciary are all called upon to consider and address these Charter rights in the course of administering justice. With respect to section 9, the sovereignty of the individual lies in the balance. Section 9 protects the liberty to make decisions without unjustified police interference, which is the backbone of a free society under the rule of law. Relatedly, the societal expectation of effective policing demands that the police be capable of determining the bounds of their authority in real time. Stated plainly, the stakes are "undeniably high."[2] And when a person's liberty is indeed curtailed by virtue of a detention or arrest, the rights enshrined in section 10 serve to level the playing field between the superior power of the state and the inherent vulnerability of a detainee. In particular, the police must inform the detainee of the reasons for their detention and of their right to consult with counsel. If the detainee invokes their right to counsel, then the police must facilitate their

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

2 *R v Le*, *infra* note 56 at para 153.

reasonable opportunity to consult with counsel. Through the rights enshrined by section 10, a detainee can maintain contact with the outside world, obtain advice that is relevant to their specific situation, and challenge the lawfulness of their detention.[3]

Of all the legal rights enshrined in the Charter,[4] those in sections 9 and 10 are the most likely to arise in everyday situations. To start with, every interaction between a police officer and a member of the public has the potential to engage section 9. These interactions are a regular occurrence in our lives.[5] And in many ways, they should be. To be effective at their jobs, the police are expected to interact with the public, from maintaining order at the scene of a motor vehicle accident to taking statements from witnesses of a bank robbery. The Supreme Court of Canada has recognized that the police must be equipped to act in a manner that fosters the cooperation of the public.[6] However, officers must walk a fine line to ensure that their conduct respects a person's agency to decide whether to cooperate. Section 10, for its part, arises regularly because it is triggered by every detention and arrest. The police must always inform a detainee of the reasons for their detention under section 10(a). And even though the right to consult with counsel under section 10(b) is suspended during certain detentions, the period during which the right can be suspended is brief.[7] The police must always be cognizant of whether the situation has evolved and caused the suspension of section 10(b) to lapse.

The rights enshrined in sections 9 and 10 existed in Canada prior to the advent of the Charter. Section 2(a) of the *Canadian Bill of Rights*,[8] which was passed in 1960 and applies to federal statutes, is akin to section 9 of the Charter. It holds that "no law of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person." And section 2(c) is worded very similarly to what is now section 10 of the Charter. Canada is also a signatory to the *International Covenant on Civil and Political Rights*,[9] which came into force in 1976. Article 9(1) includes, "No one shall be subjected to arbitrary arrest or detention." And article 9(2) reads, "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." All these provisions provide insight into the drafting of sections 9 and 10 of the Charter. But it was not until these rights were enshrined in the Charter that courts began to interpret them

3 *R v Bielli*, 2021 ONCA 222 at para 85.

4 The legal rights are contained in ss 7-14 of the Charter.

5 Chapter 4 will explore how some groups experience a disproportionate level of regular interaction with the police.

6 *R v Grant*, *infra* note 55 at para 39; *R v Tessier*, 2022 SCC 35 at para 76.

7 See Chapter 10, Section II.A, "Suspension or Inapplicability of the Right to Counsel."

8 SC 1960, c 44.

9 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

generously,[10] which has led over time to a much broader definition of detention and more robust access to consulting with counsel. Today, criminal law practitioners can limit their attention to the jurisprudence under sections 9 and 10 of the Charter.

Charter rights do not exist in a vacuum. It is critically important to achieve a balance between individual and societal interests.[11] When developing the scope of a Charter right, the courts must remain mindful of the state and societal interests in the effective investigation of crime. The Charter protects individuals against the state and its superior resources. At the same time, the Charter does not exist merely to frustrate society's legitimate interest in effective law enforcement.[12]

The section 9 framework seeks to strike the appropriate balance between the protection of individual liberty from state interference and the societal need for the state to detain and arrest people who threaten the liberty of others. The protection of individual liberty celebrates the autonomy of the individual by championing a person's freedom to go where and when they please without state interference. At the same time, the state protects the community's interest by providing an environment where this individual liberty can be safely exercised. As Wakeling JA stated in *Can v Calgary (Police Service)*, "liberty is less valuable if private and public places are not safe when others choose to exercise their liberty by engaging in unlawful acts. … Unlawful acts may diminish the benefits freedom represents to the community."[13] As a result, our society grants law enforcement officers the power to temporarily limit a person's freedom of movement if that person displays markers of criminality before a court has made a final determination on whether they have engaged in criminal acts.

A similar balance must be struck in the context of section 10(b). An individual's detention or arrest places them in a vulnerable position, and they need the opportunity to receive legal advice on how to navigate their restriction of liberty and legitimately resist police efforts to obtain incriminating evidence. Legal advice that accounts for the person's particular situation, conveyed in a manner that they can understand, is what allows section 10(b) to meaningfully redress the power imbalance between the state and the detained individual. However, the courts have also recognized that a detainee is an important source of information for the police. In *R v Singh*, Charron J, speaking for the majority, stated, "[p]rovided that the detainee's rights are adequately protected, including the freedom to choose whether to speak or not, it is in society's interest that the police attempt to tap this valuable source."[14] In the famous words of Lamer J (as he then was), "the investigation of crime and the detection of criminals is

10 See *R v Therens*, *infra* note 53 at 638-39.

11 *R v Singh*, *infra* note 14 at paras 43, 45; *R v Sinclair*, *infra* note 34 at para 63; *R v Singh*, 2024 ONCA 66 at paras 63-66.

12 See *R v Hebert*, [1990] 2 SCR 151 at 180, 1990 CanLII 118.

13 2014 ABCA 322 at paras 117-18.

14 2007 SCC 48 at para 45.

not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit."[15]

II. Purposive Interpretation

Before delving into the mechanics of sections 9 and 10, it is first necessary to set out the purpose of each right. The purpose of a Charter right "must always be the dominant concern in its interpretation."[16] The interpretation must also be generous, instead of technical or narrow, to ensure that everyone enjoys robust Charter protections.[17] Still, generous interpretation is subordinate to purposive interpretation: "While a narrow approach risks impoverishing a *Charter* right, an overly generous approach risks expanding its protection beyond its intended purposes."[18] Dedication to the purposive approach balances society's interest in effective policing with robust protection for constitutional rights.[19]

A. Purpose of Section 9

The purpose of section 9, in a nutshell, is "to protect individual liberty from unjustified state interference."[20] Put even more simply, section 9 protects "liberty of choice."[21] The rights guaranteed by section 9 are a manifestation of the general section 7 principle that the state cannot curtail a person's liberty except in accordance with the principles of fundamental justice.[22] "Liberty," in this context, is not restricted to freedom from physical restraint but also encompasses the right "to make decisions of fundamental importance free from state interference."[23]

The question of detention will often arise in the context of a police–civilian encounter. In these situations, section 9 guards against unjustified intrusions on a person's liberty to choose whether to cooperate with the police or to go about their day. In *R v Thompson*, Jamal J, then of the Ontario Court of Appeal, quoted with approval

15 *Rothman v The Queen*, [1981] 1 SCR 640 at 697, 1981 CanLII 23.

16 *Grant*, *infra* note 55 at para 17. See also *Therens*, *infra* note 53 at 641.

17 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 23.

18 *Grant*, *infra* note 55 at para 17.

19 *R v Suberu*, *infra* note 40 at para 24; *R v Thompson*, *infra* note 24 at para 29.

20 *Grant*, *infra* note 55 at para 20.

21 *Suberu*, *infra* note 40 at para 28. See also *Grant*, *ibid* at para 44.

22 *Grant*, *ibid* at para 54.

23 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49; *Grant*, *ibid* at para 20.

this articulation of section 9's purpose: "[w]hat is given protection, essentially, is the right to choose whether to stay or leave when interacting with state agents."[24]

Like all issues of statutory interpretation, interpreting section 9 requires a contextual approach. That context includes section 9's connection to the protections under section 10. When the police detain someone under section 9, it triggers their duties to inform the person of the reasons for their detention under section 10(a) and to provide them with their rights to counsel under section 10(b). This is not to say, however, that sections 9 and 10 share the same purpose.[25] For example, guarding an individual against legal jeopardy or consequences is *not* included among the purposes of section 9. *Whether* someone is detained is distinct from their needs *when they are* in fact detained and thus under state control. At that point, the purpose of section 10 is engaged to address the power imbalance between the state and the individual.[26]

B. Purpose of Section 10(a)

Section 10(a) requires the police to tell a detainee the reasons for their detention or arrest. In assessing whether the police have satisfied this requirement, what governs is the substance of what the person could reasonably be supposed to have understood in all the circumstances.[27] This right serves a couple of purposes. First, by telling the person the reasons for the detention or arrest, the person is better positioned to decide whether to submit to the police.[28] Few people would take fondly to the police being able to arrest them without explanation. Second, the information conveyed under section 10(a) is designed to support the consultation with counsel under section 10(b).[29] A person can only meaningfully consult with counsel if they know the extent of their jeopardy.[30] Counsel cannot provide tangible advice if they do not know the nature of the charges. For example, the advice that counsel provides will be quite different during an impaired driving case as compared to a homicide investigation. If the police supply inaccurate information under section 10(a), then it taints counsel's ability to give meaningful and responsive advice.[31] When interpreting the scope of section 10(a), the courts must consider this double rationale underlying the right.[32]

24 *R v Thompson*, 2020 ONCA 264 at para 30, citing David M Paciocco, "What to Mention About Detention: How to Use Purpose to Understand and Apply Detention-Based Charter Rights" (2011) 89:1 Can Bar Rev 65 at 71.

25 See *Therens*, *infra* note 53 at 642.

26 *Grant*, *infra* note 55 at para 22.

27 *R v Evans*, [1991] 1 SCR 869 at 888, 1991 CanLII 98; *R v SEV*, 2009 ABCA 108 at para 22.

28 *Evans*, *ibid* at 886-87; *Regina v Kelly*, 17 CCC (3d) 419 at 424, 1985 CanLII 3483 (CA).

29 *Evans*, *ibid* at 887.

30 *R v Black*, [1989] 2 SCR 138 at 152-53, 1989 CanLII 75.

31 *Bielli*, *supra* note 3 at para 85.

32 *Evans*, *supra* note 27 at 887.

C. Purpose of Section 10(b)

At a high level, section 10(b) imposes three obligations on the police when detaining or arresting someone. First, the police must advise the person of their right to consult with counsel. Second, the police must facilitate the consultation. Third, the police must not elicit evidence from the detainee until they have had a reasonable opportunity to consult with counsel. The second and third obligations are only operative if the person "invokes" their section 10(b) right by electing to consult with counsel. Additional section 10(b) obligations that the police must fulfill may arise depending on the circumstances.

The courts have identified various purposes of section 10(b) and crafted corresponding obligations that the police must respect and implement. As the courts continue to identify the purposes of section 10(b), additional obligations will be created and imposed on the police. The central purpose of section 10(b), which has long been recognized by the courts, is to provide detainees with an opportunity to be informed of their rights and obligations under the law and to obtain advice on how to exercise those rights and fulfil those obligations.[33] The Supreme Court of Canada in *R v Sinclair*[34] explained the purpose of the right simply: to give detainees the opportunity to access legal advice relevant to their legal situation. In the context of a custodial interrogation, for example, the detainee is afforded the opportunity to receive legal advice relevant to their decision on whether to cooperate with the police. "Section 10(b) does not guarantee that the detainee's decision [to cooperate] is wise; nor does it guard against subjective factors that may influence the decision."[35]

Courts have articulated additional purposes that flow from the central thread of providing a detainee with legal advice to navigate their detention. A detention involves a significant deprivation of liberty, which leaves the detainee vulnerable to the exercise of state power. Courts have recognized that section 10(b) is meant to counter this power imbalance between a detainee and the state.[36] Along this theme, Doherty JA in *R v Rover*[37] noted a "lifeline" purpose to section 10(b). Through the lifeline of consulting with counsel, detainees obtain "not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained."[38] The Supreme Court of Canada has since affirmed this purpose of section 10(b).[39]

Finally, the Supreme Court of Canada in *R v Suberu* described the purpose of section 10(b) in these terms: "the right to counsel is meant to assist detainees regain

33 *R v Manninen*, [1987] 1 SCR 1233 at 1242-43, 1987 CanLII 67.

34 2010 SCC 35 at paras 24-26.

35 *Ibid* at para 26.

36 *Suberu*, *infra* note 40 at para 40.

37 2018 ONCA 745.

38 *Ibid* at para 45. See also *R v Tremblay*, 2021 QCCA 24 at para 40.

39 *R v Dussault*, 2022 SCC 16 at para 56.

their liberty, and guard against the risk of involuntary self-incrimination."[40] The latter, self-incrimination component is a broader articulation of the purpose, stated above, that the detainee requires advice about whether to speak to the police. Not only does the detainee need advice about whether to give a formal statement, but they might also need to be told that anything they say, including spontaneous utterances, could be used by the state to build a case against them. While the police are well-advised to warn or caution a detainee about these principles upon their detention or arrest, it is not a constitutional requirement. Turning to the liberty component articulated in *Suberu*, it is less apparent how section 10(b) serves the purpose of helping every detainee regain their liberty. The police are in control of the detainee's liberty and must observe the legal rules that require them to restore that liberty within a set period of time. In the case of a detention, the police can only detain a person for a brief period, and the *Criminal Code*[41] sets out the time limits for the duration of an arrest. If the police are *not* holding a person for court, then they must release the person "as soon as practicable" pursuant to section 498(1). If the police *are* holding the person for court, then they must ordinarily take the person before a justice "without unreasonable delay" and within 24 hours.[42] But in some cases, consulting with counsel might assist a person in regaining their liberty because counsel will facilitate the provision of information to the police that demonstrates the person's innocence (or at least deprives the officer of grounds to believe that the person committed an offence). For example, counsel might advise the person on how to give an exculpatory statement. Counsel can also push the police to release a person (or to bring them into bail court more quickly), educate the person about the release procedures, including the bail provisions, and start putting plans in motion to secure the person's release at a bail hearing.[43]

BOX 1.1 PRACTICE POINTS

Counsel litigating a Charter issue should frame their arguments in a manner that advances and respects the purpose of the Charter right at issue. The purpose of section 9 is to protect a person's liberty to choose whether to cooperate with agents of the state. The purpose of section 10(a) is to allow the person to decide whether to submit to the detention and to furnish them with the information required to allow a meaningful consultation with counsel. And the central purpose of section 10(b) is to provide detainees with an opportunity to be informed of their rights and obligations under the law and to obtain advice on how to exercise those rights and fulfil those obligations.

40 *R v Suberu*, 2009 SCC 33 at para 40.

41 RSC 1985, c C-46.

42 See Chapter 5, Section V.A, "Duration of the Arrest," for more information.

43 *R v O'Brien*, 2023 ONCA 197 at para 49; *R v Whittaker*, 2024 ONCA 182 at para 51.

D. Purpose of Section 10(c)

There is a third right guaranteed under section 10 that seldom receives attention during criminal proceedings. Section 10(c) enshrines a detainee's right to have the validity of their detention determined by way of *habeas corpus* and to be released if the detention is not lawful. At common law, an application for *habeas corpus* provided the means for a detainee to seek judicial review of their confinement. The superior courts have exercised the jurisdiction to issue writs of *habeas corpus* for centuries.[44] *Habeas corpus* initially provided an avenue for ensuring that the defendant in an action was physically brought before the court. Over time, the writ has transformed into a vehicle for reviewing the justification for a person's imprisonment.[45] An application for *habeas corpus* proceeds in three steps. First, the applicant must establish that they have been deprived of their liberty. Second, the applicant must raise a legitimate ground upon which to question the legality of their deprivation of liberty. Third, if the applicant has satisfied the first two steps, then the onus shifts to the authorities to show that the deprivation of liberty is lawful.[46] For more information about the mechanics of a *habeas corpus* application, see chapter 6 of *Charter Remedies in Criminal Cases*.[47]

Section 10(c) is rarely litigated during criminal proceedings because other Charter rights and *Criminal Code* provisions fulfill its purpose. The primary ground for denying *habeas corpus* relief is that the legislature already provides "a complete, comprehensive and expert scheme … that is at least as broad and advantageous as *habeas corpus* with respect to the challenges raised by the *habeas corpus* application."[48] Put in other words, *habeas corpus* is "an extraordinary and discretionary remedy and should not be granted where adequate alternative remedies are available."[49] In the context of criminal prosecutions, adequate substitutes are provided in the procedures for bail, bail review, and appeals against conviction and sentence. For example, *habeas corpus* is not available to seek bail[50] nor to challenge the conditions of release if granted bail.[51] *Habeas corpus* is available, however, when challenging the constitutionality of the bail provisions.[52] Also, it is worth noting that section 10(c) does not impose

44 *Heiser v Bowden Institution*, 2022 ABCA 300 at para 17.

45 *Mission Institution v Khela*, 2014 SCC 24 at para 27 (internal citations omitted).

46 *Ibid* at para 30.

47 Matthew Asma & Matthew Gourlay, *Charter Remedies in Criminal Cases*, 2nd ed (Toronto: Emond, 2023).

48 *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 40.

49 *Armaly v Canada (Parole Service)*, 2001 ABCA 280 at para 2.

50 *R v Passera*, 2017 ONCA 308 at paras 16-20.

51 *R v Barbour*, 2016 ABCA 161 at paras 18, 19.

52 *R v Pearson*, [1992] 3 SCR 665 at 681, 1992 CanLII 52.

any obligations on the police. For example, the police are not required to inform a detainee of their right to have the validity of their detention determined by way of *habeas corpus*.

BOX 1.2 PRACTICE POINTS

Habeas corpus applications are commonly encountered in the prison context where an inmate is challenging their security classification, a significant reduction in residual liberty, or a decision by the parole board to revoke their parole. In the context of an arrest, the police are required to bring a person before the courts for a bail hearing within a specific timeframe, at which point the court will, in effect, determine the validity of an ongoing detention and, if ongoing detention is not warranted, order the person released. If counsel determine that a statute or common law rule deprives a person of their right to have a court determine the validity of their detention, then counsel could bring a notice of constitutional question under section 10(c) of the Charter.

III. Meaning of Detention

The Supreme Court of Canada's post-Charter detention jurisprudence starts with its decision in *R v Therens*,[53] which transformed the meaning of "detention" by introducing the concept of psychological compulsion. Frameworks to analyze detention-related issues arrived decades later with the Court's decision in *R v Mann*,[54] followed by the decisions in *R v Grant*[55] and *Suberu*, all of which synthesized a variety of principles that had emerged over the years. The Court continues to build on and refine these analytical frameworks through its decisions in cases such as *R v Le*[56] and *R v Lafrance*.[57]

"Detention" is an umbrella category that captures all restrictions on liberty. If someone is arrested or imprisoned, then they are necessarily detained. However, the reverse is not true. When someone is detained, they are not necessarily arrested or imprisoned.[58] Much of the litigation under sections 9 and 10 focuses on the initial phases of the police–civilian encounter and, specifically, whether the police conduct triggered a detention. In a common fact pattern that comes before the courts, the

53 [1985] 1 SCR 613 at 644, 1985 CanLII 29.

54 2004 SCC 52.

55 2009 SCC 32.

56 2019 SCC 34.

57 2022 SCC 32.

58 This was not always the case. It used to be that "detention" required a person to be detained by due process of law in association with actual physical restraint: *Chromiak v The Queen*, [1980] 1 SCR 471 at 478, 1979 CanLII 181.

police will start by detaining the accused; then arresting them; and finally imprisoning them—for example, by holding the accused for a bail hearing. Although the police in this scenario tightened the restrictions on the accused's liberty as the investigation progressed, the accused was "detained" throughout.

BOX 1.3 PRACTICE POINTS

If a person is arrested, then they are also detained. Although the express language of section 9 does not refer to a person being "arrested," the section applies with equal vigour to protect individuals against an unlawful detention *or* an unlawful arrest.

The police must know with certainty whether they have detained a person. Once a detention has crystallized, the police must assess whether the detention is lawful under section 9, inform the person of the reasons for their detention under section 10(a), and provide them their rights to counsel under section 10(b). The police must conduct these responsibilities immediately after triggering a detention. In addition, while not a Charter responsibility, the police should also caution the person on their right to remain silent and warn them that anything they say could be used as evidence in court. The absence of a caution could prove fatal to the Crown proving at trial the voluntariness of anything that the person may end up saying.[59]

The definition of detention aligns closely with section 9's purpose. Detention refers to "a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state."[60] In some situations, the imposition of restraint might be obvious, such as where the police exercise physical control over the individual or where the individual has a legal obligation to comply with a restrictive request or demand.[61] In ambiguous situations, the test is whether a reasonable person in the individual's shoes would have concluded, by reason of the state conduct, that they had no choice but to comply.[62] "It is the perceived loss of choice which creates a psychological detention."[63]

Not every interference with liberty will attract Charter protection. To interpret detention too broadly would trivialize the section 9 right and overshoot its purpose: "Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the Charter to people in that situation."[64] While the

59 *Tessier*, *supra* note 6 at para 79.

60 *Lafrance*, *supra* note 57 at para 21; *Suberu*, *supra* note 40 at para 21.

61 See *Therens*, *supra* note 53 at 642.

62 *Grant*, *supra* note 55 at para 44(1).

63 *R v Saretzky*, 2020 ABCA 421 at para 32.

64 *Grant*, *supra* note 55 at para 26.

word "detention" is sometimes used colloquially to describe situations where people are inconvenienced and prevented from being where they want to be, in the Charter context, "detention" does not cover "the simple act of being slowed down, kept waiting, or even stopped by the state."[65]

In addition, to constitute a detention for Charter purposes, the deprivation of liberty must attract potential legal consequences. Situations where the person's rights "are not seriously in issue" do not constitute a detention, such as when the police are acting in a non-adversarial role or assisting members of the public.[66] Limiting detention's scope to adversarial situations makes sense given that detention triggers the right to consult with counsel. People do not require the benefit of counsel when their rights are not in issue.

Defining "detention" is relatively straightforward. Determining whether someone is detained is trickier and is addressed in Chapter 2.

IV. Arbitrary Detention Is Unlawful Detention

Section 9 provides the right to not be "arbitrarily" detained. For decades, this word choice by the drafters of the Charter led courts to decipher whether an "unlawful" detention was necessarily an "arbitrary" detention. Examined literally, the words "unlawful" and "arbitrary" are not synonymous.[67] As a result, courts initially concluded that an unlawful detention or arrest, which fell "just short" of the grounds necessary to restrict a person's liberty, was not arbitrary under section 9.[68] To determine whether an unlawful detention was arbitrary, the trial court needed to determine the extent of the insufficiency from the requisite grounds, as well as the honesty and basis of the officer's belief that they possessed grounds for their actions.[69] Detentions that were "capricious, despotic or unjustified" would be arbitrary. Detentions where the police had "near grounds" or a sufficient articulable basis would not.[70]

Practitioners today have it easier. There is no longer any need to distinguish between an arbitrary or unlawful detention. Courts have now decided that an unlawful detention will always be arbitrary under section 9. Relatedly, a lawful detention will not be arbitrary unless there is a successful challenge to the law authorizing the detention.[71] This point was confirmed by the Court in *Grant*, which equated "unlawful"

65 *R v Reid*, 2019 ONCA 32 at para 24.

66 *Grant*, *supra* note 55 at paras 29, 36.

67 *R v Simpson*, 79 CCC (3d) 482 at 488, 1993 CanLII 3379 (ONCA).

68 See *R v Campbell*, 2003 MBCA 76 at para 42; *R v Duguay, Murphy and Sevigny*, 18 CCC (3d) 289 at 296, 1985 CanLII 112 (ONCA); *R v Ingle*, 2007 BCCA 445 at para 26.

69 *Duguay, Murphy and Sevigny*, *ibid*.

70 *Campbell*, *supra* note 68 at para 42.

71 *Grant*, *supra* note 55 at para 54. See also *R v Tim*, 2022 SCC 12 at para 22.

and "arbitrary" by drawing from the entrenched frameworks under section 8 of the Charter.[72] Much like a search must be authorized by law to be reasonable, a detention must be authorized by law to be non-arbitrary.[73] The rest of the detention analysis also mirrors the section 8 framework. Namely, the law authorizing a detention must be non-arbitrary and the detention must be carried out in a reasonable manner. This issue is addressed further in Chapter 3.

BOX 1.4 PRACTICE POINTS

Although section 9 protects against "arbitrary" detentions, counsel litigating a detention issue can focus on whether the police conduct was "lawful." The jurisprudence has now settled on the fact that "arbitrary" and "unlawful" are synonymous when examining a detention or arrest.

V. Bringing a Charter Application

If a case ends up before the courts, defence counsel can bring a Charter application to allege that the state breached the accused's rights under section 9 or 10 (or both) and seek an order under section 24(2) to exclude the evidence that was obtained in the manner of the breach. Other remedies, including a stay of proceedings, can be sought under section 24(1).

A. The Accused Must Establish a Breach by the State

The accused, as the applicant on the Charter motion, normally bears the onus of establishing a breach of section 9 or 10.[74] In the context of section 9, if the defence wants the court to find that the police did in fact detain the accused, then the defence must establish on a balance of probabilities that the accused was effectively deprived of their liberty of choice at a particular point during the investigation.[75] The test is objective. The contention that the police significantly restrained the accused's liberty must be supported by evidence, although it is not necessary for the accused to testify.[76] If the detention commenced with a formal arrest or a statutory demand—for example, for the accused to provide a sample of their breath during an impaired driving investigation—then the Crown should agree that the accused was detained at that point. The question might then turn to whether the detention was lawful.

72 "Everyone has the right to be secure against unreasonable search or seizure."

73 *Grant*, *supra* note 55 at para 56.

74 *R v Cornell*, 2010 SCC 31 at para 17.

75 *Suberu*, *supra* note 40 at para 28; *Reid*, *supra* note 65 at para 23.

76 See also *R v Furlong*, 2012 NLCA 29 at paras 23, 26.

There is an exception to the accused bearing the onus of establishing a section 9 breach. It arises when section 9 intersects with the right against unreasonable search and seizure under section 8. The Crown bears the onus of establishing that a warrantless search was lawful under section 8. Where the lawfulness of the search is itself predicated on a lawful detention or arrest—for example, a search incident to arrest—the Crown also bears the onus of establishing that the detention or arrest was lawful.[77] In other words, while the burden ordinarily falls on the accused to prove an unlawful detention or arrest, "[w]arrantless searches are presumptively unreasonable, and where … the Crown seeks to rebut that presumption by claiming a search was lawfully conducted incident to an arrest, the Crown must show that the arrest was lawful."[78] Some courts have held that the burden also shifts to the Crown to prove the lawfulness of a detention or arrest regardless of whether the detention or arrest led to a warrantless search.[79] Although some courts have cited the Supreme Court of Canada's decision in *R v Chehil*[80] for the proposition that the Crown must prove the objective grounds for a detention or arrest, the *Chehil* decision was not about section 9. Rather, the decision concerned a search under section 8.[81] Even if *Chehil* is not the best foundation for this proposition, it stands to reason that the Crown, as a practical necessity, must adduce evidence to establish the subjective and objective grounds required to justify a detention or arrest. The police will be the sole guardians of this information, and the defence should be entitled to cross-examine the officers on their grounds.[82]

In the context of section 10, the accused again bears the burden of establishing a breach.[83] To establish that the police violated their implementational obligations under section 10(b), for example, the accused must prove that their right to retain and instruct counsel without delay was breached. In discharging that onus, the accused must also prove that they acted with reasonable diligence in the exercise of their right to choose counsel.[84] However, if the accused demonstrates that there was a delay in implementing their rights to counsel, then the burden flips to the Crown to show that the delay was reasonable in the circumstances. The reasonableness of the delay is a

77 *R v Gerson-Foster*, 2019 ONCA 405 at para 75; *R v Besharah*, 2010 SKCA 2 at paras 32-35; *R c Lafleur*, 2021 QCCQ 3961 at para 134.

78 *Gerson-Foster*, *ibid*.

79 *R v Orr*, 2021 BCCA 42 at para 44; *R v Lotfy*, 2017 BCCA 418 at para 32. But see *R v Nartey*, 2013 ONCA 215 at para 14.

80 2013 SCC 49.

81 *Ibid* at para 45, cited in *R v Amare*, 2014 ONSC 4119 at para 83(3).

82 *R v Pavlik*, 2019 SKCA 107 at para 41; *Besharah*, *supra* note 77 at para 35.

83 *R v Duerksen*, 2018 BCCA 46 at paras 25-41; *R v Gardner*, 2021 ONSC 3468 at para 62; *R v Bassi*, 2015 ONCJ 340 at para 10.

84 *R v Van Binnendyk*, 2007 ONCA 537 at para 11.

factual inquiry.[85] Some courts have also held that if the accused establishes that they asserted their right to obtain advice from a specific lawyer, then the Crown carries the burden of proving that the accused subsequently agreed to speak to duty counsel instead of their counsel of choice.[86]

Unlike a trial, the *W (D)*[87] principles do not apply to the assessment of credibility issues in a Charter application. Since the onus is not on the Crown in a Charter application to meet its burden beyond a reasonable doubt, the defence will not establish a Charter breach by merely raising a doubt in the Crown's evidence. When the court receives two competing versions of the events, only one of which would establish a Charter breach, then the defence must persuade the court on a balance of probabilities to accept its version of events.[88] If the court is unsure of which version to accept, then the defence will have failed to meet its burden. If the onus has flipped to the Crown, then the Crown bears that burden on a balance of probabilities.

The Charter only applies to state action.[89] With respect to a detention issue, a private actor cannot be said to have detained someone under section 9 unless the defence can show that the person was acting at the request or direction of a state authority, in which case the private actor is considered a state agent. Regular cooperation between a private actor and the police is insufficient. So too is general encouragement by the police for private citizens to participate in the detection of crime. To qualify as state action, it must be that the private actor would not have acted but for the specific state intervention in that case.[90] In most instances, section 9 is only engaged if the accused was detained by an active member of law enforcement, such as a police officer. The Charter does not apply to private security guards even though they may stop and detain people on a regular basis. Even if they frequently contact and work with the police, security guards are private actors absent evidence that they acted on instructions from the police in a specific case.[91] Nightclub bouncers,[92] bank employees,[93] doctors and nurses,[94] and off-duty auxiliary police constables[95] are all considered private actors.

85 *R v Taylor*, 2014 SCC 50 at para 24.

86 *R v Wannamaker*, 2019 ONSC 6459 at para 32.

87 See *R v W (D)*, 1991 CanLII 93 (SCC).

88 *R v Stewart*, 2019 ONCJ 78 at paras 8, 9; *R v Ram*, 2014 ONCJ 788 at para 84.

89 Section 32 of the Charter; *Fraser v Canada (AG)*, 2020 SCC 28 at para 165; *McKinney v University of Guelph*, [1990] 3 SCR 229 at 261-62, 1990 CanLII 60.

90 *R v Buhay*, 2003 SCC 30 at paras 25-31; *R v Randall*, 2020 ABCA 52 at para 41.

91 *Buhay*, *ibid* at paras 28-31.

92 *R v Nguyen*, 2016 BCCA 32 at paras 56-58.

93 *Royal Bank of Canada v Welton*, 2009 ONCA 48 at paras 16-23.

94 *R v Dersch*, [1993] 3 SCR 768 at 776-77, 1993 CanLII 32; *Singh*, *supra* note 11 at para 102 (cited to ONCA).

95 *R v McElroy*, 2009 SKCA 77 at paras 11, 14, 15.

Relatedly, only state actors can breach section 10(b). Neither duty nor private counsel can breach section 10(b) by failing to provide effective legal advice during their client's detention. The effective assistance of counsel protects an accused's fair *trial* rights and the reliability of the *verdict*. It ensures that the accused is competently represented at trial.[96] But a consulting lawyer's intention to deliver "effective" legal advice cannot be converted into a right that is guaranteed by section 10(b). The Charter protects individuals by regulating the state and its agents. Providing effective advice falls outside police control as they cannot monitor the consultation.[97] While the advice that counsel chooses to impart supports the right's purpose of advising detainees on how to exercise their rights in an informed manner,[98] whether the detainee in fact received "effective" advice cannot be considered under section 10(b).

B. Considerations When Bringing an Application

Defence counsel reviewing a file should consider the following issues that may inform whether to bring a Charter application under section 9 and, if so, what arguments to advance:

- Can it be established that the people who restricted the accused's liberty were active members of law enforcement or otherwise acting as state agents? (Chapter 1, above)
- At what point did a detention crystalize? Did a detention crystallize before the accused was arrested? Would a reasonable person conclude, by reason of the state conduct, that they had no choice but to comply? (Chapter 2)
- What evidence will be necessary to establish that the police detained the accused? (Chapter 2)
- If the accused was detained, was the detention lawful? Was the state conduct authorized by statute or the common law? (Chapter 3)
- If the detention was initially lawful, was it carried out in a reasonable manner? (Chapter 3)
- Did the police have sufficient grounds to effect the detention? (Chapter 8)
- Were the police acting, consciously or subconsciously, on an oblique or ulterior motive? (Chapter 4)
- Is there evidence to support an allegation that the police detained the accused based on their race? (Chapter 4)

96 *R v Joanisse*, [1995] OJ No 2883 (QL) at paras 63-66, 74, 1995 CanLII 3507 (CA).

97 *R v Willier*, 2010 SCC 37 at para 41. See also *R v Beierl*, 2010 ONCA 697 at paras 2, 3.

98 *R v Bartle*, [1994] 3 SCR 173 at 193-94, 1994 CanLII 64.

- Did the police arrest the accused? If so, was the arrest with or without a warrant? Did the police use an appropriate level of force during the arrest? Was the duration of the arrest lawful? (Chapter 5)
- If the accused was arrested without a warrant, was the arrest authorized by a statutory power? (Chapter 6)
- If the accused was arrested with a warrant, was the warrant properly issued and executed? (Chapter 7)
- Did the police have sufficient grounds to make an arrest? (Chapter 8)

It is common for defence counsel to advance additional Charter breaches in conjunction with a section 9 claim because restrictions on liberty attract a host of downstream consequences. Two situations are most common.

First, when the police detain someone, they must immediately inform the person of the reasons for the detention under section 10(a) and provide them their rights to counsel under section 10(b). But if the police, in that moment, did not believe that they had detained anyone, then they probably did not provide any detention-related rights. The Charter application would thus claim violations of sections 9, 10(a), and 10(b). Alternatively, the application may only claim breaches of sections 9 and 10(b) if the police informally complied with section 10(a) based on their conversations with the accused.

The second situation relates to section 8. The police have access to various search powers following a lawful detention or arrest if certain preconditions are met. (For example, Chapter 3 addresses the power to conduct a search incident to investigative detention.) The lawfulness of the search is predicated on a lawful detention or arrest. Even if the search was otherwise lawful, if defence counsel alleges that the detention or arrest underpinning the search was unlawful, then the Charter application would claim violations of sections 8 and 9.[99]

At other times, defence counsel may not allege a breach of section 9 but rather claim a standalone breach of section 10. The alleged breach might relate to sections 10(a), 10(b), or both. Defence counsel should consider the following issues that may inform whether to allege a section 10 breach and, if so, which arguments to advance:

- Did the police inform the accused of the reasons for their detention or arrest immediately upon the detention or arrest pursuant to section 10(a)? (Chapter 9)
- Did the police convey sufficient information such that the accused could reasonably be supposed to have understood the reasons for their detention or arrest? (Chapter 9)

99 See *Tim*, *supra* note 71 at paras 48-50.

- Did the police immediately inform the accused of their rights to counsel upon their detention or arrest pursuant to section 10(b)? If not, were the rights under section 10(b) suspended in the circumstances? (Chapter 10)
- Did the police inform the accused of their right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel? (Chapter 10)
- Were there "special circumstances" that could have interfered with the accused's understanding of their rights? (Chapter 10)
- If the accused invoked their right to consult with counsel, did the police provide the accused with a reasonable opportunity to exercise the right? Did the police facilitate the access to counsel in a private space at the first reasonably available opportunity? (Chapter 11)
- Did the police hold off eliciting evidence until the accused had a reasonable opportunity to consult with counsel? (Chapter 11)
- Did the accused elect to consult with duty counsel or a private lawyer? Did the police take sufficient steps to reach or facilitate access to the chosen lawyer? (Chapter 11)
- After consulting with counsel, was there a change in circumstances that gave rise to an obligation on the police to offer an opportunity to re-consult with counsel? (Chapter 11)

C. Procedural Requirements for the Application

Defence counsel must consult the rules applicable to their jurisdiction and level of court for the procedural requirements that govern a Charter application. The application must be brought in the manner and timeframe dictated by the rules of the applicable court. In the ordinary course, a written notice of application must be filed a certain number of days before the hearing.[100] Non-compliance with the rules could result in summary dismissal of a Charter application.[101] Before summarily dismissing a Charter claim because of non-compliance with the rules, a judge must consider all relevant circumstances, including the argument that counsel is seeking to advance, potential prejudice to the other party, and explanations for non-compliance.[102] The judge should give counsel an opportunity to make submissions on whether the application should be summarily dismissed for non-compliance with the rules. The judge

100 See e.g. the Superior Court of Justice of Ontario where the defence must provide notice 30 days before the first day scheduled for the pre-trial motions or trial: *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, *infra* note 110, r 31.04(1).

101 *R v Greer*, 2020 ONCA 795 at para 112. Apart from non-compliance with the rules, a court's ability to summarily dismiss a Charter application based on its prospects of success is addressed later in this chapter.

102 *R v Blom*, 2002 CanLII 45026 at para 22 (ONCA).

also has discretion to receive an application after the evidence is complete when warranted by the interests of justice, such as where a potential Charter breach only became known because of something a witness said during their testimony.[103]

The application materials must provide "real and meaningful notice" of the alleged Charter breaches and the evidence that the defence intends to elicit in support.[104] The notice must be explicit.[105] Charter litigation by ambush "diminishes the necessary standard of equilibrium" in the adversarial system.[106] Adherence to the rules promotes the constructive use of judicial resources.[107] Since the accused bears the overall burden of proving a Charter infringement,[108] requiring the defence to provide particulars does not derogate from the presumption of innocence.[109] Aside from the rules, it is good advocacy for counsel to provide the court with a precise and detailed roadmap on the facts and law that, according to counsel, will make out a Charter breach. The roadmap primes the judge to follow along during the hearing and improves the odds that the judge will be receptive to counsel's arguments.

BOX 1.5 PRACTICE POINTS

To provide an example of the procedures that govern Charter applications, rule 31.03(2) of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*[110] requires the notice of application to include:

- a detailed description of the presumptively admissible evidence that the applicant seeks to exclude in the proceedings;
- a precise, case-specific statement of the basis and grounds upon which the evidence is said to be inadmissible;
- a detailed summary of the evidence or other material upon which the party seeking exclusion relies and a statement of the manner in which the applicant proposes to introduce the evidence; and
- an estimate of the time required to introduce the evidence and other material to be relied upon in support of the application.

103 *R v Gundy*, 2008 ONCA 284.

104 *R v Tash*, 2008 CanLII 1541 at para 15(5) (ONSC); *R v Brodersen*, 2012 ABPC 231 at paras 45-50. See also *R v Kutynec*, 70 CCC (3d) 289 at 301, 1992 CanLII 7751 (ONCA).

105 *Greer*, *supra* note 101 at para 104.

106 *Tash*, *supra* note 104 at para 15(5); *R v Starmer*, 2010 ONCJ 135 at para 25.

107 *R v Sadikov*, 2014 ONCA 72 at para 36.

108 *Orr*, *supra* note 79 at para 44.

109 *Tash*, *supra* note 104 at para 15(4).

110 SI/2012-7.

An application to exclude evidence pursuant to sections 9, 10, and 24(2) of the Charter will customarily be heard by the trial judge.[111] The judge enjoys wide discretion to decide on the procedure for hearing the application, including whether witnesses will testify *viva voce*.[112] "[T]here is no automatic entitlement to an evidentiary *voir dire* in a Charter claim."[113] Judges are also encouraged to use their case management powers to minimize delay, which includes dismissing applications that are "manifestly frivolous" without proceeding to a *voir dire* or dismissing the application mid-hearing if it is apparent that it will fail to pass this threshold.[114] To be "manifestly frivolous," the inevitable failure of the application should be obvious. If the frivolity of the application is not obvious on the face of the record, then it should be heard on its merits.[115] Judges must not summarily dismiss a Charter claim on the basis that it is frivolous without first asking the defence to summarize the anticipated evidentiary basis for its claims.[116] A motion for summary dismissal is intended to be brief. It is premised on allegations and supported by the artifice of assuming the facts asserted by the applicant to be true.[117] The manifestly frivolous standard does *not* apply when a party seeks to summarily dismiss an application to *re-open* an application that was already decided on its merits.[118]

The default procedure is for the Charter claim to be heard within a *voir dire*, which is separate from the trial of the substantive charges and is often conducted in advance. In trials without a jury, counsel should consider the potential efficiencies of a blended hearing that combines the Charter *voir dire* and the trial proper into one hearing. A blended hearing is often preferred when the witnesses needed for the *voir dire* are also needed for the trial proper. A typical example is where the police officers who are said to have detained or arrested the accused are the same officers who discovered or generated the evidence that the Crown intends to tender at trial. If the case will proceed in a blended fashion, it is important for the court to maintain the burdens on the respective parties—that is, the onus is on the accused to establish a Charter breach and remedy, while the onus is on the Crown to prove guilt beyond a reasonable doubt. It is the court that decides whether the Charter and trial hearings will be blended.[119]

111 *R v Menard*, 2008 BCCA 521 at para 42.

112 *R v Kenmatch (SD)*, 2010 MBCA 18 at para 43; *R v Cody*, 2017 SCC 31 at para 39; *Greer*, *supra* note 101 at para 113.

113 *Orr*, *supra* note 79 at para 46.

114 *R v Haevischer*, 2023 SCC 11 at paras 41, 62, 66, 71, 89. See also *Cody*, *supra* note 112 at para 38.

115 *Haevischer*, *ibid* at paras 67, 69, 71.

116 *Greer*, *supra* note 101 at para 111.

117 *Haevischer*, *supra* note 114 at paras 52-54, 60, 100-1.

118 *R c Vanier*, 2023 ONCA 545 at paras 25, 26.

119 *R v La*, 2018 ONCA 830 at para 30.

Even in a blended hearing, the judge may need to provide their reasons on the Charter application before the accused is put to their decision on whether to testify or call evidence on the trial proper.[120]

In a blended hearing, the Crown may resist calling every witness and being forced to question them under the rules of examination-in-chief. If the hearing is not blended, the defence is ordinarily required to call the witnesses in chief to establish the evidentiary foundation for the breach.[121] The parties may consider an agreement to ensure that a blended hearing is fair to all parties. For example, the Crown may be given more leeway to lead in examination-in-chief or to address new issues in re-examination while still providing the defence with a full ability to cross-examine each witness. This compromise maintains the accused's right to a fair trial by providing the defence with an opportunity to challenge the state actors who are alleged to have breached the Charter.[122] Whatever the specifics of the arrangement, counsel should cooperate to achieve trial efficiencies without sacrificing fairness for all parties.[123]

120 *Ibid* at para 32.

121 See *Brodersen*, *supra* note 104 at paras 69-80.

122 See *Besharah*, *supra* note 77 at para 37.

123 *Furlong*, *supra* note 76 at para 28.