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Deconstructing Investigative Detention

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Case Commented On: *R v Rowson*, 2014 ABQB 79

Crime scenes are often intense and dynamic environments. This presents a challenge to investigators who – prior to making an arrest – must collect enough evidence to satisfy the standard of 'reasonable and probable grounds.' The recent case of *R v Rowson*, 2014 ABQB 79 displays this hurdle. The scene of the alleged crime – a motor vehicle collision – was attended by paramedics, firefighters, the police, and an air ambulance helicopter. Collecting enough evidence to make an arrest was not the police's immediate priority. To mitigate the challenge that inevitably arises in situations such as this, police are armed with the common-law power of investigative detention. This post will deconstruct this power.

The common law power of investigative detention was developed incrementally and recognized by the Supreme Court of Canada in *R v Mann*, 2004 SCC 52. This case involved two police officers who, while responding to a break and enter, encountered an individual who matched the description of the offender. The individual, Mr. Mann, was stopped and made subject to a pat-down search during which one of the officers felt a soft object in his pocket. Upon reaching inside the pocket, the officer found 27.55 grams of marijuana and a number of small plastic baggies. Mann was subsequently arrested; prior to this he had only been under a state of detention. At trial, Connor Prov. Ct. J. held that while the police were justified in searching Mann for security reasons, reaching into the appellant's front pocket after feeling a soft item therein was not justified in the circumstances. The conduct thus contravened s. 8 of the *Charter,* the right to be secure against unreasonable search or seizure. On appeal, the Manitoba Court of Appeal held that it was not unreasonable for the police to continue the search inside of the pocket. This was further appealed to the Supreme Court of Canada.

Iacobucci J., writing for the majority, recognized "a limited police power of investigative detention" (at para 18). The scope of the term 'detention' within ss. 9 and 10 of the *Charter* was held to cover only delays that involve "significant physical or psychological restraint" (at para 19). Section 9 of the *Charter* provides that everyone has the right "not to be arbitrarily detained." Since a lawful detention is not arbitrary, an investigative detention that is carried out in accordance with the common law power recognized in *Mann* will not infringe an individual's *Charter* rights (at para 20).

To make a warrantless arrest an officer must have reasonable and probable grounds to believe the individual has committed an indictable offence, or the officer must have found the individual

committing a criminal offence, or the officer must have reasonable and probable grounds to believe that a warrant is in force for arrest (s. 495(1) of the *Criminal Code*, RSC 1985, c C-46). It is important to note that the *Criminal Code* uses the term 'reasonable grounds,' rather than 'reasonable and probable grounds.' However, *R v Loewen,* [2011] 2 SCR 167 confirms that the standard of 'reasonable grounds' as prescribed by s. 495(1) actually requires 'reasonable and probable grounds.' Thus the two phrases can be used interchangeably in the context of a warrantless arrest.

In contrast to the standard required to make a warrantless arrest, what is the threshold test for lawful investigative detention? The first articulation of such a test occurred in the English Court of Criminal Appeal case of *R v Waterfield and Another*, [1964] 1 QB 164 (cited in *Mann* at para 24). A police officer's conduct is *prima facie* an unlawful interference. To be deemed lawful, a two-pronged test emerges: it must be asked if the detaining officer's conduct first fell "within the general scope of any duty imposed by statute or recognised at common law, and, secondly, if the conduct did so fall, whether it involved an unjustifiable use of powers associated with the duty" (*Mann* at para 24*)*. The first branch is derived from the nature and scope of police duties, including the common law duty to preserve the peace, prevent crime, and protect life and liberty, subject to reasonableness (*Mann* at para 26). The second branch was elaborated upon by the Ontario Court of Appeal in *R v Simpson* (1993), 12 OR (3d) 182 (CA), holding that the detaining officer must have "some 'articulable cause' for the detention," a concept borrowed from American jurisprudence (*Simpson* at para 58). This threshold is both lower than reasonable and probable grounds, being closer to that of 'reasonable suspicion,' and involves the objective and subjective aspects established by *R v Storrey*, [1990] 1 SCR 241 (*Simpson* at para 61).

Despite considering the 'articulable cause' standard, the majority in *Mann* preferred the phrase 'reasonable grounds to detain' (at para 33). The test is articulated as follows (at para 34):

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individuals to be detained and a recent or ongoing criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular investigation is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference.

In other words, the officer must have reasonable grounds to believe there is a nexus between the individual detained and a criminal offence. The detention must also be reasonably necessary and assessed against the totality of the circumstances as reasonable. It should remain brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police (*Mann* at para 45).

Where does 'reasonable grounds to detain' figure into the myriad of standards associated with arrest, search, and detention? The majority left out the term 'probable,' possibly because with 'reasonable and probable grounds' the officer could make an arrest. However, the problem with making the above assumption is that it is possible that the Court used the term 'reasonable grounds to detain' but meant 'reasonable and probable grounds to detain.' *Mann* occurred before *Loewen* confirmed that the two articulations are interchangeable. Deschamps J., writing for the

dissent in *Mann*, adds some clarity to this quandary. The dissent in *Mann* prefers the term 'articulable cause' to 'reasonable grounds to detain' primarily because "'[r]easonable grounds' has traditionally been employed to describe the standard which must be met in order to give rise to the power to arrest a suspect . . . Using this term in the present context could lead to the erroneous conclusion that the same degree of justification is required for a detention as is required in order to carry out an arrest. This cannot be the case. It would undermine the very purpose of the common law power to detain, which is to provide police with a less extensive and intrusive means of carrying out their duties where they do not have sufficient grounds for arrest" (at para 64). Therefore the standard of 'reasonable grounds to detain' must be interpreted as somewhere below 'reasonable and probable grounds' and closer to that of 'reasonable suspicion.'

The true issue in *Mann* was not whether the investigative detention was lawful, but rather whether the pat-down search was lawful as a search incident to investigative detention. In the context of an arrest, the Supreme Court has held that police officers are empowered to search without a warrant for weapons or to preserve evidence (*R v Golden*, [2001] 3 SCR 679 at par 94). *Mann* recognizes that the common law police power of search incident to arrest applies to search incident to investigative detention (at para 38). This is again subject to the test articulated in *Waterfield*. The first prong of the test recognizes search incident to investigative detention as arising from the general scope of police duty (at para 38). The second prong limits the first to searches that are reasonably necessary (at para 39). In reference to a pat-down search, the Court explicitly states that such a power to search does not exist as a matter of course, but rather only if the detaining officer has reasonable grounds to believe his or her own safety or the safety of others is at risk (at para 40). In the context of the facts in *Mann*, it was reasonable for the officers to conduct a pat-down search because there "was a logical possibility that the appellant, suspected on reasonable grounds of having recently committed a break-and-enter, was in possession of break-and-enter tools, which could be used as weapons" (at para 48).

An officer making an investigative detention does not only have to comply with the appropriate standard and refrain from making unreasonable searches, he or she must also comply with s. 10 of the *Charter*. To do this, he or she must first advise the detained individual of the reasons for the detention, as s. 10(a) of the *Charter* provides (*Mann* at para 22). Section 10(b) of the *Charter,* the right to retain and instruct counsel without delay and to be informed thereof, is not strictly adopted by the Supreme Court; the Court instead held that it "must be purposively interpreted," and left further articulation to the lower courts, noting only that mandatory compliance cannot be turned into an excuse to prolong the detention, which must remain brief (at para 22).

R v Orbanski; R v Elias, [2005] 2 SCR 3 further articulates the s. 10(b) requirement in relation to investigative detention. The issue in this case centered upon whether an officer may ask questions about alcohol consumption and request a driver perform sobriety tests prior to complying with s. 10(b) (at para 22). The Court held that in the context of investigating a driver's sobriety at the roadside, s. 10(b) is suspended. However the scope of s. 10(b) rights in the broader context of investigative detention was left unanswered.

The Court in *R v Suberu*, [2009] 2 SCR 460 held that subject to a few conditions, s. 10(b) rights arise immediately upon detention. Paragraph 42 of *Suberu* states:

> In our view, the words 'without delay' mean 'immediately' for the purposes of s. 10(b). Subject to concerns for officers or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.

Despite the strict interpretation in *Suberu*, one's thoughts must turn to the potential remedy. In *Rowson*, the police placed Mr. Rowson under investigative detention for dangerous and possibly impaired driving. At a *voir dire* on the *Charter* issues, it was conceded that the detaining officer did not inform Rowson of his right to counsel at this time, but rather a few minutes later when he was placed under arrest. In terms of remedy for the breach of s. 10(b), it was held that statements made by Rowson were to be excluded up until he was informed of his right to counsel. The investigative detention remained lawful, however.

Breath samples obtained after Rowson was informed of his right to counsel were found to be admissible, and he was convicted of a number of impaired driving related charges following a trial. The Crown advises that the accused is pursuing an appeal.