

TAB 23



THE SIX-MINUTE Criminal Court Judge 2016

Six Key Questions About Investigative Detention & Some (Very) Brief Answers

The Honourable James Stribopoulos
Ontario Court of Justice

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Six Key Questions About Investigative Detention & Some (Very) Brief Answers

Justice James Stribopoulos,
Ontario Court of Justice

Investigative detention power – in brief:

- Common law police power recognized by SCC using ancillary powers doctrine (*Waterfield* test).
- *Rationale*: police need a power to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing.
- *Threshold issue*: was there a “detention” and, if so, at what point in the interaction?
- If no “detention”, no need for lawful authority to justify encounter and section 9 of the *Charter* is not engaged.
- *Investigative detention power defined*: short of formal arrest (based on RPG), an individual may be *briefly* detained where police have reasonable grounds to suspect a clear nexus between the individual being detained and a recently committed or still unfolding criminal offence.

See:

- *R. v. Mann*, [2004] 3 S.C.R. 59 at paras. 20, 34, 45.
- *R. v. Grant*, [2009] 2 S.C.R. 353 at paras. 24-44.

Must there be a known crime?

- No. The power extends to crimes reasonably suspected, which allows police to respond to events that they observe while on patrol that give rise to a reasonably based suspicion that criminality may be afoot.

See:

- *R. v. Nesbeth*, 2008 ONCA 579 at para. 18, leave ref'd [2009] S.C.C.A. No. 10;
- *R. v. Yeh*, 2009 SKCA 112 at para. 84.

Just crimes, or provincial offences too?

- Ontario cases extend power to provincial offences, for example trespassing and driving offences.

See:

- *R. v. Amofa*, 2011 ONCA 368;
- *R. v. Peterkin*, 2015 ONCA 8;
- *R. v. Ellis*, 2013 ONSC 1494.

What does “reasonable suspicion” mean?

- Entails more than a sincerely held subjective belief, for that is mere suspicion. But involves something less than a belief based upon reasonable and probable grounds.
- Grounded in objective facts, unlike RPG, it engages the reasonable possibility, rather than probability, of crime.
- Therefore, reasonable suspicion need not be the only potential inference from the available evidence.
- Assessed based on totality of circumstances. Assessment is fact-based, flexible, and grounded in common sense and practical, everyday experience, applied through the eyes of a reasonable person equipped with the knowledge, training, and experience of the investigating officer.
- Derives its rigour from the requirement that it be based on objectively discernible facts, which can then be subjected to independent judicial scrutiny.
- Subject’s actions are focus, his/her immutable characteristics are irrelevant.
- Characteristics that apply broadly to innocent people are insufficient, markers only of generalized suspicion.
- Factors that “go both ways”, i.e. making or failing to make eye contact, on their own, insufficient.
- However, such factors can form a part of a constellation of factors that amount to reasonable suspicion.

See:

- *R. v. Mann*, [2004] 3 S.C.R. 59 at para. 27, 34;
- *R. v. Kang-Brown*, 2008 SCC 18 at paras. 75, 164-65;
- *R. v. Chehil*, 2013 SCC 49 at paras. 26, 27, 29, 31-34, 43-44;
- *R. v. MacKenzie*, 2013 SCC 50 at paras. 35, 38, 41, 72-73, 84;
- *R. v. Williams*, 2013 ONCA 772 at paras. 22-25.

Does flight equal reasonable suspicion?

- Any elements or factors considered as part of a reasonable suspicion analysis must respect *Charter* principles.
- Exercise of *Charter* rights, *i.e.* right to silence or to walk away (outside the context of a detention), does not furnish grounds for reasonable suspicion.
- But some factors, *e.g.* using false name or taking flight from police, may give rise to reasonable suspicion *on their own*.
- Even if a factor cannot on its own support reasonable suspicion, reasonable suspicion may be established when the same factor is simply one of a constellation of factors.
- The actions of a person after an initial encounter with the police are part of the circumstances to be considered in deciding whether the reasonable suspicion threshold has been crossed.

See:

- *R. v. Chehil*, 2013 SCC 49 at paras. 31, 43-44;
- *R. v. Nesbeth*, 2008 ONCA 579 at paras. 1-2 and 17-18;
- *R. v. Williams*, 2013 ONCA 772 at paras. 22-26;

A key question will often be whether or not a “detention” preceded an individual taking flight. For some examples, see:

- *R. v. Reddy*, 2010 BCCA 11;
- *R. v. Atkins*, 2013 ONCA 586 at paras. 7-13;
- *R. v. Moulton*, 2015 ONSC 1047 at para. 77;
- *R. v. Ford*, 2011 ONSC 5658 at paras. 58-67;

- *R. v. Guce*, 2011 ONSC 2331 at paras. 62-63.

Do section 10(a) and 10(b) apply?

- A person detained pursuant to the investigative detention power must be afforded their section 10(a) and (b) *Charter* rights immediately upon detention.
- Delay only justifiable when time required to obtain control over a potentially dangerous or volatile situation out of a concern for police and/or public safety.
- Both section 10(b)'s informational and implementational prongs are equally applicable.

See:

- *R. v. Nguyen*, 2008 ONCA 49 at paras. 16-22
- *R. v. Suberu*, 2009 SCC 33 at paras. 41-42;
- *R. v. Willier*, 2010 SCC 37 at paras 29-31;
- *R. v. Strachan*, [1988] 2 S.C.R. 980 at 998-999.

Are the police entitled to search?

- A protective search *may* accompany a *lawful* investigative detention.
- Officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. Vague safety concerns are insufficient.
- Limited to patting-down a suspect to ensure that he or she is not carrying weapons; it is a protective power, not a means of searching for and gathering evidence.
- However, courts have occasionally upheld protective searches beyond pat-downs, including searches inside bags that suspects are carrying or inside vehicles they are occupying. Safety concerns in particular context are key.

See:

- *R. v. Mann*, [2004] 3 S.C.R. 59 at paras. 26, 40;
- *R. v. MacDonald*, 2014 SCC 3 at paras. 39-42;
- *R. v. Plummer*, 2011 ONCA 350 at paras. 51-61, 74-79;
- *R. v. Batzer* (2005), 200 C.C.C. (3d) 330 at para. 16 (Ont.C.A.);

- *R. v. Lee*, 2014 ONSC 5435;
- *R. v. Thibodeau*, 2007 BCCA 489, leave ref'd [2007] S.C.C.A. No. 592.