

Psychological Detention in *R v Lafrance*

What Would a “Reasonable Person” in the Shoes of an Indigenous Accused Perceive?

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What is Psychological Detention?

Under Charter section 9, all Canadians have a right not to be arbitrarily detained or imprisoned.¹

Detention typically results from a detainee being physically restrained; however, in some circumstances, suspects will be found to have been detained even without any physical restriction on their liberty.² Psychological detention occurs when a suspect is not psychically restrained but is deprived of their freedom because they reasonably believe they have no choice but to cooperate with the police.³

Canadian Courts have applied the test laid out in *R v Grant* to cases where an accused claims they have been psychologically detained by police.⁴ The *Grant* test was endorsed by the Supreme Court 10 years later in *R v Le*, whereby the majority stated that:

“even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused’s shoes would feel obligated to comply . . . and that they are not free to leave.”⁵

The *Grant* Test for Psychological Detention

The test for psychological detention assesses three lines of inquiry in determining the perceptions of a “reasonable person in the shoes of the accused,” including:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual:
 - whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- (b) The nature of the police conduct, including:
 - the language used
 - the use of physical contact
 - the presence of others
 - the place where the interaction occurred
 - the duration of the encounter
- (c) The particular characteristics or circumstances of the individual where relevant, including:
 - age
 - physical stature
 - level of sophistication
 - minority status¹²

R v Lafrance

Case Overview

Police suspected a young Indigenous man, Mr. Lafrance, was involved in a homicide and awoke Mr. Lafrance at 6:50 am to execute a search warrant at his residence. Police asked if he would attend the station to make a voluntary statement regarding the homicide. Mr. Lafrance agreed, and police drove him to the station in an unmarked police vehicle. Upon arriving at the police station, two officers accompanied Mr. Lafrance through two locked doors to an interview room at the back of the station. While explaining that he was free to leave, officers also explained that he would need to be chaperoned when he went to the washroom and for smoke breaks.¹⁵

Trial Decision

The Trial Judge neglected to consider the circumstances of a “reasonable person” of Indigenous heritage and how this background would impact their perceptions of an encounter with the police. The decision articulates the correct test, including the third *Grant* inquiry (“The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication”¹⁶) but the extent to which Mr. Lafrance’s minority status as an Indigenous person was considered was minimal at best: “I acknowledge Mr. Lafrance was youthful, indigenous and had minimal police exposure at that time.”¹⁷

Supreme Court Decision

The Supreme Court decision properly considered how Indigenous background may impact the “reasonable person’s” perceptions of the encounter. “...this Court acknowledged that, based on distinct experiences and particular knowledge, various groups of people may have their own history with law enforcement and that this experience and knowledge could bear on whether and when a detention has reasonably occurred. Thus, to truly engage in the “realistic appraisal of the entire interaction”, as required in *Grant*...courts must appreciate that individuals...may have different experiences and relationships with police ...and such may impact upon their reasonable perceptions of whether and when they are being detained.”¹⁸

The Role of Race in the *Grant* Test

“At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain.”¹³

“The point is not that *Grant* or *Le* leave no room for nuance in evaluating interactions between Indigenous people and the police; it is, rather, that trial judges must be alive to (1) “the relational aspect” between the police and Indigenous persons (*Le*, at para. 81), characterized as it has been by an overwhelming power imbalance and history of discrimination; and (2) the resulting possibility that their interactions would reasonably be perceived by Indigenous persons as depriving them of choice to cooperate.”¹⁴

Negative Events Impacting Indigenous Perceptions of Police

- The Indian Act** → The RCMP played a vital role in implementing Indian Act policies intended to assimilate Indigenous people into Euro-Canadian culture and society.⁶
- The Northwest Resistance** → The RCMP played a prominent role in suppressing the resistance and overthrowing the Plains Indigenous Peoples. The conviction and hanging of Metis leader, Louis Riel, would follow.⁷
- The Pass System** → The police enforced the pass system by arresting Indigenous individuals who had left their reserve without permission of an Indian agent.⁸
- The Residential School System** → RCMP officers helped forcibly remove Indigenous children from their families and take them to residential schools, where thousands were physically and sexually abused and stripped of their culture.⁹
- The “Starlight Tours”** → Police would pick up Indigenous “trouble-makers” at night and drive them to the outskirts of the city to find their way back in sub-zero temperatures. Numerous victims were left to freeze to death.¹⁰
- Missing and Murdered Indigenous Women and Girls** → Failure by police to take concerns and complaints of missing and murdered Indigenous women and girls seriously.¹¹

CONSTITUTION ACT, 1982 Canadian Charter of Rights and Freedoms



Detention or imprisonment
9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention
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.¹⁹

Sources

¹ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
² *R v Grant*, 2009 SCC 32 at para 44 [Grant].
³ *Ibid* at para 21.
⁴ *Ibid* at para 28.
⁵ *R v Le*, 2019 SCC 34 at para 26 [Le] [emphasis added].
⁶ Marcel-Eugène LeBeuf, *The Role of the Royal Canadian Mounted Police During the Indian Residential School System* (On behalf of the RCMP, 2011).
⁷ “Plains Indigenous Peoples in Canada | The Canadian Encyclopedia”, online: <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-peoples-plains>.
⁸ “Pass System in Canada | The Canadian Encyclopedia”, online: <https://www.thecanadianencyclopedia.ca/en/article/pass-system-in-canada>.
⁹ *Supra*, note 6.
¹⁰ Genevieve Carlton, “The Dark History of Canada’s ‘Starlight Tours’ That Saw Police Leave Indigenous People To Freeze To Death”, (19 April 2022), online: All That’s Interesting <https://allthatsinteresting.com/starlight-tours>.
¹¹ National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) et al, *Reclaiming power and place: the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019).
¹² *Grant*, *supra* note 2 at para 28.
¹³ *Le*, *supra* note 5 at para 75.
¹⁴ *R v Lafrance*, 2022 SCC 32 at para 58 [SCC *Lafrance*].
¹⁵ *Ibid* at paras 8-14.
¹⁶ *Grant*, *supra* note 4.
¹⁷ *R v Lafrance*, 2017 ABCJ 746 at para 79.
¹⁸ SCC *Lafrance*, *supra* note 14 at para 53.
¹⁹ Charter, *supra* note 1.