How Does the Definition of Detention Restrict the Police? A Comparative Analysis of Canada and the United Kingdom

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Abstract—This article provides a comparative analysis of how the courts in Canada and the United Kingdom define police detention, and how these restrict the police's ability to exercise their role. It draws on Miller's conception of the role of policing as the promotion of public order and protection of the public, even at risk to the officer's own safety. This understanding is used as a lens to view the jurisprudence of the Canadian and British courts. It argues that the courts' definitions of definition impose both direct restrictions, through the triggering of detainee's rights, and indirect restrictions, arising from the uncertainty in identifying when detention occurs in day-to-day policing. The article uses these judgments to understand how the courts themselves view the role of the police and how that affects their

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judgments. The article finds that British courts impose relatively limited restrictions, maintaining clearer thresholds for detention and exhibiting deference to authorities in their determinations. By contrast, Canadian courts impose more extensive direct and indirect restrictions on the police, driven by an understanding of the police owing a fiduciary duty to the public. While this approach enhances the protection of individual rights by giving the police greater responsibilities when exercising their detention powers, it often does so at the expense of clarity.

I. Introduction

This article will examine whether the definition of detention in Canada and the United Kingdom creates an excessive restriction on the role of the police. It seeks to unpack the paradigm between the law on paper and its practical effect on day-to-day policing.

In Part I, I establish the general definition of detention and the direct and indirect restrictions which arise, before exploring how each jurisdiction expands on this definition. I use Miller's definition of the role of the police as a comparator to demonstrate where restrictions on the police become excessive.

In Part II, I consider what the case law and previous analysis show about how the courts view the role of the police in these jurisdictions, to develop a deeper understanding of how their judgments were grounded, and for what purpose. While the UK conforms quite closely to Miller, with high levels of deference to the authorities, the Canadian court takes a different approach with a view that more closely aligns with the police owing a fiduciary duty to the public.

Overall, I conclude that the United Kingdom's approach does not provide excessive restriction on the police, while the Canadian approach does. The Canadian approach, in seeking to address inequities in the system, expands the role of the police, such that it encroaches upon that of the legislature and executive. In doing so, it exacerbates the direct and indirect restrictions on the police. By contrast, the UK's jurisprudence points towards an approach that gives the police significant discretion, utilising a detainee's rights to bridge informational gaps.

Part I: Understanding Detention in Canada and the UK

Detention, at its simplest, is 'mandatory restraint.'[1] When lawfully done, this will be at the behest of entities who are legally empowered to detain someone, such as the police. However, as this article will show, the way that Canada and the United Kingdom expand on this definition varies greatly.

Arbitrary detention, though, arises where the reason for detention is 'based alone upon one's will, and not upon any course of reasoning and exercise of judgment.'[2] It occurs where the reason for detaining an individual is not substantially founded in the law, or an otherwise clear rationale for justifying detention. There are many potential consequences of arbitrary detention, ranging from personal sanctions against officers and, more critically, to loss of important evidence in a prosecution. It is, therefore, an outcome that the police ought to avoid.

The Role of the Police

This article adopts Miller's definition of the role of the police, in which he describes their duties as follows:

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[1] Daphne Dukelow and Betsy Nuse, *The Dictionary of Canadian Law* (Thomson Professional Publishing Canada 1991) 279.

[2] 'arbitrariness' in Bryan A Garner (ed), Black's Law Dictionary (11th edn, Thomson Reuters 2019) 104. See also Carla Ferstman, *Conceptualising Arbitrary Detention: Power Punishment and Control* (Bristol University Press 2024)

> '[T]he police are individuals who use their powers in accordance with duties to (5) promote public order and (6) protect the public, (7) even at risk to the officer's own safety.'[3]

Miller builds this definition through the governance model of the police and describes the police as being 'executive agents delegated limited authority to restore public order whenever it is disturbed.'[4] They do so because the state, from which their power and authority stems, has a duty to govern and resolve social needs. The police are the state's resolution to the need to maintain public order and their unique powers, such as that to use force, satisfy that need.[5]

Miller's view stands in contrast with one of the most famous accounts of the police's role, developed by Bittner. Bittner emphasises the police's ability to use force and argues that 'policemen direct, control and discipline persons from all walks of life.'[6] The fundamental function of the police is to intervene where there is 'something-that-ought-not-to-be-happening-and-about-which-someone-had-better-do-something-now.'[7]

However, Miller demonstrates that Bittner's narrow view of the police ignores the scope and breadth of the police's

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[3] Eric J Miller, 'The Concept of the Police' (2023) 17 Crim L and Philosophy 573, 587 – 588 (emphasis added).

[4] Miller (n 3) 587 – 588.

[5] Miller (n 3) 579 – 579.

[6] Egon Bittner, *Functions of the Police in Modern Society* (National Institute of Mental Health 1970) 120; Miller (n 3) describes Bittner's conception of the police as a 'paramilitary bureaucracy'.

[7] Egon Bittner, 'Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police' in Tim Newburn (ed), *Policing: Key Readings* (Routledge 2005) 162.

practical function[8] and does not take into account the way that the police deal with social exigencies in practice, which often rely more on soft skills than force.[9]

A more unorthodox reading of the police's role is expounded by Galoob. Galoob draws an analogy of fiduciary duty from private law and applies this to the police's relationship with the public.[10] When the police exert coercive power, they have 'special duties that the fiduciary owes… in law, the paradigmatic fiduciary responsibility is the duty of loyalty, which prescribes the fiduciary's loyal behaviour and prohibits betrayal.'[11] Galoob continues that the police (the fiduciary) must act with correct motivation and must monitor and alter their behaviour to satisfy their duty to the public (the beneficiary), in light of the special powers that they possess and the potential for this power to be abused.[12] This is not incompatible with Miller, but puts a greater onus on the police to serve the public, rather than to simply promote public order and protect the public. As will later be shown, this aligns more closely with the Canadian approach.

For the purposes of this article, whether the detention threshold causes an excessive restriction on the role of the police will be a matter of determining the extent of its impediment to the police's ability to promote public order and protect the public, even at risk to an officer's own safety.

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[8] Miller (n 3), 586 – 587.
[9] See David H Baley, *Police For the Future* (OUP 1994) 34.
[10] Stephen Galoob, 'A fiduciary principle of policing' (2023) 17 Criminal Law and Philosophy 615.
[11] Galoob (n 10) 618.
[12] Galoob (n 10) 618.

This article will explore two separate, but interrelated ways in which the definition of detention restricts the role of the police.

Direct Restriction

In Canada and the UK, reaching the threshold of detention restricts the freedom of the police in their interactions with an individual. It places a direct restriction to respect the individual's rights and protections. Such rights protect the individual from self-incrimination, such as those relating to the acquisition of counsel and information of the charge for which they are suspected.[13]

Penny and Stribopolous argue that a definition of detention which too easily triggers the rights of the detainee would inhibit the ability of the police to engage in their duties, such as carrying out investigative enquiries.[14] They also argue that the law may cause the threshold for detention to be reached too easily and trigger an individual's rights before the police have been able to fully carry out their legitimate functions and enquiries, or before they have been able to reasonably ascertain that detention had occurred.[15] They give the example of the officer who has a suspicion that an offence is being committed, but do not yet have reasonable and probable grounds to detain the individual, as will be seen in the discussion of *Grant*.[16] Where the crystallisation of detention occurs too easily, the officers may be unable or

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[13] Canadian Charter of Rights and Freedoms, s.9 and s.10; Police and Criminal Evidence Act 1984, Code C, para 3.1.

[14] Steven Penney and James Stribopoulos, "'Detention" under the Charter after *R v Grant* and *R v Suberu'* (2010) 51 Supreme Court Law Review 439, 451.

[15] Penney and Stribopoulos (n 14) 468.

[16] *R v Grant,* 2009 SCC 32.

uncomfortable engaging in preliminary investigative enquiries even though doing so may be critical to protecting the public.

Indirect Restriction

It also creates an indirect restriction where the police act cautiously to avoid crossing the threshold into detention.

The police may find it difficult to determine when detention has crystallised where detention crystallises too easily, and complications may later arise, such as the evidence gained being rendered inadmissible. If the police are unable to easily ascertain when they have detained an individual, they risk unwittingly detaining an individual arbitrarily, or without providing that individual the rights they are entitled to.[17] In practice, this may occur where an individual had been *de facto* detained, but the officer was not aware that the circumstances they created amounted to a detention. This uncertainty also prevents them from carrying out legitimate enquiries that promote public order and protect the public, lest arbitrary detention manifest.

The combination of these restrictions can make day-to-day policing difficult, and, where they are particularly exaggerated, excessively restrictive. One workaround could be informing detainees early that they are not required speak to the police. However, as Woollcombe suggests, if the officer informs the individual that they need not interact with the police to avoid detention crystallising, this 'almost suggests that the person

[17] Carla Ferstman, Conceptualising Arbitrary Detention: Power Punishment and Control (Bristol University Press 2024) 51-82.

should leave.'[18] This would lead to the loss of valuable evidence that could be procured more easily absent these formalities, and may otherwise unnecessarily prolong interactions with a potentially innocent member of the public.[19]

That is not to say that individuals should have weaker rights or that the police ought not be cautious. The balance between the two, however, must be carefully tuned so the police can exercise their role within the parameters of the direct and indirect restrictions.

A. Canada

The Canadian jurisprudence represents the more expansive view this article will explore. The rights owed to the individual upon the crystallisation of detention are set out in the Canadian Charter,[20] while much of the definition for reaching this threshold is set out in Canadian case law.

Rights Owed to Detainees

The rights owed to a detainee are set out in sections 9 and 10 of the Canadian Charter of Rights and Freedoms.[21] These are tempered by section 1 of the Charter which allows for 'such reasonable limits prescribed by law as can be demonstrably

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[18] Jennifer Woollcombe, 'Grant, Suberu and Harrison: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts' (2010) 51 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 479, 488.
[19] Woollcombe (n 18) 468.
[20] Canadian Charter of Rights and Freedoms ('the Charter'), s 9 and s 10.
[21] Charter (n 20). See Penny and Stribopoulos (n 14) 451.

justified in a free and democratic society',[22] allowing the court to engage in balancing exercises of these rights. Section 9 of the Charter gives everyone 'the right not to be arbitrarily detained or imprisoned'.[23] When detention crystallises, the detainee becomes entitled to their section 10 rights to be informed (a) of the reasons for their detention[24] and (b) of their right to counsel.[25] As such, it is important that it is clear when detention arises and when these rights become applicable, so that the police are properly apprised of the direct restrictions placed upon them.

When Does Detention Arise?

Detention in Canada is not limited to physical detention. Per the Supreme Court of Canada (SCC) in *Therens,* detention crystallises 'when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.'[26] Detention, and its direct restrictions, also occurs when an individual is psychologically detained.

Psychological detention will crystallise when a 'reasonable person is likely to err on the side of caution…and comply with the demand'[27] because there is a 'reasonable perception of suspension of freedom of choice.'[28] *Therens*

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[22] Charter (n 20) s 1.
[23] Charter (n 20) s 9.
[24] Charter (n 20) s 10(a).
[25] Charter (n 20) s 10(b). See also *R v Suberu,* 2009 SCC 33. It was held here that the s 10(b) right to counsel must be communicated when detention has crystallised.
[26] *R v Therens,* 1985 CanLII 29 (SCC) [53].
[27] Therens (n 27) [57].
[28] Therens (n 27) [57].

establishes that this may arise even where there is no legal compulsion to comply. This recognises that many citizens do not know whether they are legally required to comply, especially given the inherent power imbalance in police interactions.[29]

As a result, the threshold of detention is lower than solely physical detention, but it is also more ambiguous. This increases the propensity of indirect restrictions, since the analysis is predicated on various contextual factors from the perspective of the reasonable person in that situation, which the police may find difficult to objectively assess and therefore be uncomfortable engaging in.[30] The analysis includes the characteristics of the person that may exacerbate power imbalances, such as their age, or how the officer's actions may be interpreted in their word choice and tone.

Arbitrary Detention: *Grant and Ladouceur*

In assessing whether a detention is arbitrary, the Canadian approach is formulated in *R v Ladouceur*.[31] The appellant was stopped by the police during random traffic stops to check the documentation of motorists and was charged for driving with a suspended licence. The appellant later asked the court to dismiss the evidence collected during this stop, as he had been placed under arbitrary detention in violation of section 9 of the Charter.

The SCC, by a narrow 5–4 majority, ruled that the stop amounted to an arbitrary detention, detailing that arbitrary detention arises where the discretion to stop is exercised with 'no

[29] Therens (n 27) [57].
[30] Therens (n 27) [57].
[31] 1990 CanLII 108 (SCC).

criteria, express or implied, which govern its exercise.'[32] Notably, the majority found the arbitrary detention to be part of a legitimate aim, justifiable under section 1 of the Charter as it could be 'reasonably and demonstrably justified in a free and democratic society'.[33] In doing so, they determined that random traffic stops satisfied the test set out in *Oakes,*[34] requiring that provisions that may violate Charter rights are proportional to addressing a 'pressing and substantial'[35] concern. The majority were convinced by evidence of high mortality rates on the highways for the former criteria to be satisfied, and the latter in being 'rationally connected'[36] to the aim, with minimal infringement on the individual's rights.

This was further seen in *Grant.*[37] Grant, a black teenager, was walking around the vicinity of a school at a time of increased police presence, due to high local crime levels. Grant was spotted acting suspiciously, looking nervously at officers and fidgeting. He was approached by a uniformed officer on the advice of plain-clothes officers nearby. The uniformed officer engaged him, asking him questions about his details, including his name and address. A crucial part of this interaction was when Grant was asked to put his hands in front of him after fidgeting with his jacket. Two other plain-clothes officers then identified themselves as the police before standing behind the uniformed officer. Following further questioning, Grant told the police he was transporting a firearm and a small amount of cannabis. The

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[32] Ladouceur (n 32) 1277.
[33] Ladouceur (n 32) 1278-88; Charter (n 20) s1.
[34] *R v Oakes* 1986 CanLII 46 (SCC) [1986] 1 SCR 103.
[35] Oakes (n 35) 105-106.
[36] Oakes (n 35) 105-106.
[37] *Grant* (n 16).

SCC held that the incriminating statements made by Grant were procured after the initiation of detention and before Grant was made aware of the rights associated with his detention, namely his section 10(b) right to counsel.[38] It was on this basis that the appellant sought to have the evidence against him dismissed.

In this case, the SCC held that detention crystallised when Grant was told to 'keep his hands in front of him.'[39] This was the point where he was due his rights, and direct restrictions on the police ought to have arisen. While the majority did not view this act to be conclusively indicative of detention, it utilised a holistic approach that viewed the entire context of the situation. This included the particular characteristics and vulnerabilities of the individual, the nature of the police's conduct in both language and actions, and the circumstances giving rise to the encounter, among other factors.[40] The SCC found that the uniformed police officer's initial approach and his preliminary questioning did not preclude the reasonable person from believing they may choose how to act. 'The sustained and restrictive tenor of the conduct'[41] that followed was a marked shift. Grant had been directed to 'keep his hands in front of him',[42] two other officers took 'tactical adversarial positions'[43] and the nature of the interaction morphed into an interrogation, with Grant experiencing a high level of intimidation.[44] The 'police had no information whatsoever that

[38] *Grant* (n 16) [58].
[39] *Grant* (n 16) [52].
[40] *Grant* (n 16) [45] – [57].
[41] *Grant* (n 16) [51].
[42] *Grant* (n 16) [52].
[43] *Grant* (n 16) [49].
[44] *Grant* (n 16) [49].

[Grant] may have been implicated in criminal activity',[45] barring suspicions emanating from his behaviour. Therefore, the detention was arbitrary as there was no justification for Grant to have been detained at that point.[46] Grant is a prime example of ambiguity in detention definitions, causing excessive indirect and direct restrictions. It is hard to see what more the police could have done to ascertain that Grant was transporting a firearm, without reaching the detention threshold arbitrarily. The police's actions here fulfilled their role of protecting the public, especially given the risk to themselves in the presence of a nervous individual possessing a firearm.

It is worth nothing that while the Court found a breach of Grant's Charter Rights, they did not exclude the physical evidence obtained.[47] Under section 24(2) of the Charter, the Court may exclude evidence that would bring the administration of justice into disrepute due to the manner in which it was obtained.[48] This is a three-part test that considers the seriousness of the Charter-infringing conduct, the impact on the interests of the defendant, and society's interest in the case being tried with the evidence.[49] They concluded that the breach of Grant's rights was 'significant, although not at the most serious end of the

[45] *Grant* (n 16) [182].
[46] *Grant* (n 16) [129] – [140].
[47] *Grant* (n 16) [129] – [140].
[48] Canadian Charter (n 20) s 24(2).
[49] *Grant* (n 16) [129] – [140].

scale',[50] the police's conduct was 'neither deliberate nor egregious'[51] and that the gun was 'highly reliable'[52] evidence.

As such, even if rights violations and arbitrary detention had occurred, the Courts, through section 1 or section 24(2), can still admit the unlawfully gathered evidence. While this lessens the impact of misconstruing the detention threshold, seemingly alleviating the indirect restriction that comes from ambiguity, I will show in Part II how this only creates more confusion and ambiguity that exacerbates the indirect restriction on the police's role.

B. The United Kingdom

Rights Owed to Detainees

In the United Kingdom, under the Police and Criminal Evidence Act 1984 (PACE), a detainee must be informed of their right to consult with a solicitor and their free availability, to have someone informed of their arrest, to be informed about the offence for which they are arrested, as well as their right to review the code of practice, and request an interpreter.[53] They will also be provided with a written notice of their rights and how to exercise them.[54] There is a further common law duty on the police to re-caution, and remind a detainee of their rights where the detainee is being considered for an offence greater than that for which they

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[50] *Grant* (n 16) [140].
[51] *Grant* (n 16) [133].
[52] *Grant* (n 16) [139].
[53] Police and Criminal Evidence Act (PACE) 1984, Code C, para 3.1.
[54] PACE (n 55) Code C, para 3.2.

were previously being considered.[55] Similarly, it is important for the police to understand when these direct restrictions arise.

Detention and Arbitrary Detention in the UK: *Gillan*

At the House of Lords, *Gillan* presented a challenge to statutory stop and search powers under the Terrorism Act 2000.[56] The appellant, in accordance with the Act, had been stopped and searched in a designated area for the police to prevent crime at protests.[57] The appellant had been stopped without reasonable suspicion and had his rucksack searched for 20 minutes.[58] The appellant argued that such a power was contrary to Article 5(1) of the European Convention on Human Rights that '[e]veryone has the right to liberty and security of the person',[59] prohibiting unlawful detention. Lord Bingham delivered the unanimous judgment which contended Gillan was not 'detained in the sense of confined or kept in custody, but more properly being detained in the sense of kept from proceeding or kept waiting'.[60] Lord Bingham disputed the idea that deprivation of liberty or detention arose, with the lack of the detainee being 'handcuffed, confined or removed'[61] contributing to that assessment. This language suggests the Court would expect detention to crystallise where the police had exercised significant and continued coercive power, rather than the momentary interruption of someone's

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[55] *R v Kirk* [2000] 1 WLR 567.
[56] Terrorism Act 2000, ss 44 – 47.
[57] R(Gillan) v Commissioner of Police of the Metropolis [2006] UKHL 12, [2006] 2 AC 307 [2].
[58] *Gillan* (n 59) [2].
[59] European Convention on Human Rights, art 5(1).
[60] *Gillan* (n 59) [25].
[61] *Gillan* (n 59) [25].

movement.[62] The latter not necessitating an individual require the protection of their rights.

Lord Bingham had not contested that the individuals were unable to leave, only that the manner in which it was conducted did not rise to the level of detention.[63] From this case, we can infer that the threshold for detention in the UK leans towards physical detention that results in a significant impediment on liberty.

Furthermore, the Lords in *Gillan* disagreed that the arising detention constituted arbitrary or unlawful detention.[64] The Lords recognised the wide and sweeping power the Terrorism Act confers on the police, however, they posited that the powers are sensibly moderated by checks and balances.[65] Namely, that the powers had to be approved by a senior police officer, where the power is expedient for the prevention of terrorism, with a limited spatial and temporal scope, among other safeguards.[66] As such, the Lords believed that the powers 'are very closely regulated'[67] and therefore retain their legality, as arbitrary or discriminatory use of the powers is unlikely, and such an issue could be remedied through civil litigation.

Of course, like Canada, where there is arbitrary detention or when the detainee's rights in relation to detention are breached,

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[62] One could also see this as the Court seeing the stop and search as an assessment of whether an individual needs to be detained, or a confirmation that an individual does not need to be detained.
[63] *Gillan* (n 59) [22] – [26].
[64] *Gillan* (n 59) [92].
[65] *Gillan* (n 59) [14].
[66] *Gillan* (n 59) [14].
[67] *Gillan* (n 59) [14].

the judiciary may exclude evidence under section 78 of the Police and Criminal Evidence Act.[68] This would, rightly, occur where the breach was 'significant and substantial'[69] and would affect the fairness of the trial.[70] This is less likely to cause clarity issues that cause indirect restrictions, as when detention and detainee's rights arise is sufficiently clear.

Insofar as the Lords are satisfied with the police operate within a sufficiently regulated framework—albeit one largely self-regulated by the police themselves—there is less indirect restriction and more certainty that detentions made in accordance with their powers will be valid.

By way of comparison, it appears that there are less significant direct and indirect restrictions on the police in the UK, compared to Canada.

Psychological detention in the Canadian approach, compared to a physical threshold in the UK, naturally, makes it easier for direct restrictions to arise, and less clear about when they do arise.

Whether a detention is arbitrary in the UK is dependent on whether it is prescribed by law. This affords the police considerably greater certainty and discretion, as compliance with the prescribed law is sufficient to insulate against a finding of arbitrariness, thereby reducing indirect restrictions. By contrast, the Canadian court looks beyond the mere existence of a legal basis and examine the underlying rationale for the particular

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[68] PACE (n 53) s 78.
[69] *R v Walsh* (1981) 91 Cr App R 161.
[70] PACE (n 53), s 78; *Scott v R* [1989] AC 1242 (PC).

detention, introducing a layer of evaluative uncertainty that the UK framework avoids.

Part II: The Courts' Perception on the Role of the Police

Drawing from the previous analysis, it is now easier to understand how the courts view the role of the police.

A. The United Kingdom

Deference to the Authorities

The UK's detention jurisprudence aligns closely with Miller's conception of the police's role: the pursuit of public order and public protection, even at risk to the officer's own safety. It achieves this alignment through a consistent posture of judicial deference to the authorities. This deference is of practical significance because the police can confidently rely on exercising the powers prescribed to them by law in day-to-day policing, resulting in clarity and fewer indirect restrictions.

This deference extends to the legislature and executive, who are afforded considerable latitude in determining which matters warrant police intervention and how the resulting powers should be exercised, as *Gillan* illustrates. It is worth noting that *Gillan* was decided shortly after the 7/7 bombings in London, which meant the Court was likely to be particularly receptive to the government's argument that the Terrorism Act was necessary

for safety.[71] This rationale and deference is made clearer when understanding the opposing ruling from the European Court of Human Rights (ECtHR).

The ECtHR disagreed with the Lords' assessment, and expressed concern over the 'breadth of the discretion conferred on the individual police officer'[72] by the Act. In the first instance, they indicated disagreement with the Lords' on what constituted deprivation of liberty. While they appreciate the short length of time of the search, they expressed the view that the appellants 'were obliged to remain where they were…if they had refused they would have been liable to arrest…. This element of coercion is indicative of a deprivation of liberty'.[73] Furthermore, they were dissatisfied with the safeguards and disagreed as to their sufficiency, fearing potential abuse, a critical divergence from the Lords'. The ECtHR were further unimpressed by the looseness of the Act's wording considering the extensive power it confers, and were of the opinion that such a lack of precision leaves available an arbitrary abuse of power.

The judgment from the ECtHR raises legitimate concerns about the Lords' justifications. They disagree both with the assessment that detention did not crystallise, and that the safeguards in place were sufficient.

This bolsters the idea that the Lords exercised deference to the authorities, since much of the differences between their

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[71] *Gillan* (n 59) [48] ;The Human Rights Act 1998 had only been in force for 8 years, and the 7/7 bombings had occurred in the year prior to the judgment.
[72] *Gillan and Quinton v United Kingdom* App No 4158/05 (ECtHR, 12 January 2010) [83].
[73] *Gillan and* Quinton (n 74) [57].

judgments can be seen as the Lords having greater trust in the authorities not only to act responsibly with these powers, but also to say that this is a power they ought to have, without being encumbered by the duties that arise from detention or the sanctions for arbitrary detention.

The fact that there is deference in the UK courts is no secret. Lord Justice Laws provides the guideline that 'greater deference will be due to democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility'[74] and that 'greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure.'[75] Detention, especially when considered in the context of terrorism legislation as it ultimately was, would fall into the responsibility of the 'democratic powers',[76] even more so as it was with regard to an Act of Parliament. [77]

As such, the police in the UK are less prone to overly burdensome indirect restrictions in their interactions with the public, as their caution is tempered by a confident understanding of when detention, and direct restrictions, will and will not arise.

Duties Placed Upon the Police

The degree to which detention arising becomes a significant inhibitor on the role of the police, would also be dependent on

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[74] International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158, [2002] 3 WLR 344 [85] – [86].
[75] International Transport Roth (n 76) [83].
[76] International Transport Roth (n 76) [85].
[77] See also Clive Walker, Blackstone's Guide to the Anti-Terrorism Legislation (3rd ed, OUP 2014) 109.

the scale of the duties that become incumbent on the police officer. Specifically, whether such duties are at the expense of the police's role and beyond the extent required to maintain the rights of the detainee. The extent of the direct restrictions incumbent on the officer is to inform, and does not rise to the level of being at the expense of the police's role.

A good example is *Kirk*,[78] where the Court of Appeal affirmed that the police 'must, before questioning or questioning further, either charge the suspect with the more serious offence…or at least ensure that he is aware of the true nature of the investigation.'[79] They consider this necessary for the detainee to make an informed choice of how to respond, and the legislation presumes that the detainee is aware of what they are being charged with.[80]

I see this as consistent with the court imposing fairly mild duties in favour of detainees. The obligation does not extend to placing further duties at the expense of the police's ability to exercise their role. Instead, it ensures that the detainee has the same level of information as the police and are given the opportunity to exercise their rights. Here, the rights of the detainee are protected, and the ability of the police to exercise their role is not compromised.

Overall, the impact of the police to promote public order and public safety even at their own risk is minimally restricted, directly and indirectly, by the duties arising from detention in the UK. The thresholds for detention and arbitrary detention are

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[78] *Kirk* (n 57).
[79] *Kirk* (n 57) 572.
[80] *Kirk* (n 57) 572.

generally favourable towards the police, due to the trust and deference UK courts afford the authorities. The main obligation of the police at the point of detention is to inform. The UK courts have resisted such obligations existing at the expense of the police's ability to exercise their role, the opposite of which can be found in the Canadian jurisprudence.

B. Canada

Canadian jurisprudence shows the courts taking a stronger approach to the rights owed to the individual, including both on the duties that become incumbent upon the police at the point of detention, and on defining detention. As such, I find the jurisprudence of the Canadian courts excessively restricts the police's role. The Canadian courts view the role of the police more closely as the police having a fiduciary duty to the public, as expounded by Galoob.[81] In many ways, this can be seen as the Canadian courts treating the police as a means of correcting deficiencies in the administration of justice, even at the expense of their ability to carry out their role.

Reconciling The SCC Case Law with The Police's Role: Fiduciary Duties

I argue that the SCC construes the police's role more consistently to Galoob's idea that there exists a fiduciary duty between the police and the citizenry, which 'impose requirements on both the behaviour and the cognition of police officers',[82] rather than a

[81] Galoob (n 10).
[82] Galoob (n 10) 616.

police force which ought to promote public order and protect the public, even at risk to themselves.

To show this, let us return to *Grant*. The court emphasises the officer telling Grant to 'keep his hands out in front of him'[83] as the moment when detention crystallised. However, it is unclear whether the intention of the officer here was to control Grant or was instead a knee-jerk reaction to ensure the officer's safety in light of Grant's fidgeting. The SCC does not take a firm position on the officer's intentions, but the majority considers that the reasonable person would have felt controlled and unable to leave the situation, but that is not wholly convincing. A young, visible minority in a high-crime area being questioned by a uniformed police officer was never likely to walk away; Grant's compliance despite being visibly nervous is sufficient to show this. While detention may have occurred, the SCC's emphasis on this particular moment is confusing.

I believe that it was at this point where the Court would be justified in saying the officer ought to have known psychological detention had arisen, and that the direct restrictions and fiduciary duties arose. This requires the police officer to have understood their actions, and when they crossed the threshold. The problem with this, is that it requires an objective standpoint to be assumed by the officer in the moment, in a job that necessarily puts them at risk, without a clear line for them to look out for. Vagueness is expected in a jurisdiction that recognises psychological detention, it will simply not be as clear as physical detention. Indeed, the majority here recognise that 'the point at which an encounter becomes a detention is not always clear, and

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[83] *Grant* (n 16) [52].

is something with which courts have struggled',[84] but the judgment in *Grant* does little to clarify this and instead only exacerbates this vagueness. Such a concern is alluded to by Deschamps J, who did not think that the police intentionally detained Grant and that he 'would not want what is said in this judgment to discourage [the police] from intervening.'[85] As such, the SCC gives officers significant responsibility, without clear guidance on how to exercise their powers to satisfy that responsibility, thereby exacerbating both direct and indirect restrictions.

Penney and Stribopoulos note that it is 'unrealistic to expect police to consider a host of situationally variable factors in deciding whether they have crossed the detention threshold', with the judgment likely to lead to increased errors in practical policing.[86] It exacerbates indirect restrictions, as it will either inhibit them from exercising their power due to them being unsure of whether their conversation would reach the threshold of detention, or it will lead to arbitrary detentions as the line, marred by vagueness, is easily crossed. This is not a concern lost on the SCC, which in *Suberu* does recognise a tension between the need for individuals to be informed about their right to counsel and the need for the police to undertake legitimate inquiries.[87]

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[84] *Grant* (n 16) 133.

[85] *Grant* (n 16) 193.

[86] Penney and Stribopoulos (n 14) 451.

[87] *Suberu* (n **Error! Bookmark not defined.**) [41]; part of the rationale for delivering such a clear and direct requirement in *Suberu* for the detainee to be informed of their right to counsel at the point of detention is that any temporal requirement would be ill-defined and lead to confusion and misunderstandings.

The Canadian court's tendency to imbue the police with significant responsibility, exacerbating direction restrictions, is further seen in *Prosper*.[88] *Prosper* addressed a detainee's right to counsel, when a detainee can waive this right, and when evidence may be gathered from a detainee. The appellant was arrested outside of normal working hours. He was informed of the availability of legal aid and was given a list of lawyers which he diligently searched through, but was unable to contact any and was unable to afford a private lawyer. He then waived his right to counsel and took a breathalyser test, which was to be taken in two hours, which he failed. The court dismissed the breathalyser evidence as Prosper's right to counsel had been violated, and that the violation necessitated this dismissal to avoid bringing the administration of justice into disrepute.[89][90] Of particular interest was that the Court took it to be the case that a detainee's section 10(*b*) rights took precedence over the statutory right of the Crown to rely on an evidentiary presumption,[91] dismissing the idea that the breathalyser evidence needed to be taken at that point. The majority attributed the loss of the time-sensitive breathalyser evidence to the State's failure to provide accessible duty counsel, and that insofar as the provision of accessible duty counsel was not taken up by the State, the State effectively forfeits the default presumption that there is urgency.[92]

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[88] R *v. Prosper* 1994 CanLII 65 (SCC).

[89] *Prosper* (n 88); *Charter* (n 20) s 24(2).

[90] In future, *Propser* warnings are given to detainees who exercise diligence but cannot contact counsel - 'an additional informational obligation on police is triggered once a detainee, who has previously asserted this right, indicates a change of mind and no longer wants legal advice.'

[91] *Prosper* (n 88) 25.

[92] *Prosper* (n 88) 25.

Notably, the majority in *Prosper* acknowledged that 'requiring police to advise detainees…increases the likelihood that detainees will seek legal advice and thereby be informed of their rights and obligations.'[93] They created a presumption that because this obligation would better the detainee's likelihood to invoke their rights, it ought to be done, and that the police ought to be the ones to do this.

Stuart notes the heavy burden this places on the police, especially where the police are helpless in providing further assistance for access to counsel when it is genuinely unavailable.[94] This view is persuasive. The police fulfilled all obligations incumbent upon them to assist the appellant. Even if it was not the fault of the appellant that they could not access counsel, it also was not the fault of the police. It was the fault of the state for not providing duty counsel, and the discounting of time-sensitive evidence worsens the ability of the police to fulfil their role of protecting the public. The SCC imposes a further direct restriction that occurs at the expense of the police's role.

Galoob's characterisation of the police's fiduciary duties aligns with the responsibilities that the Supreme Court of Canada intended to impose upon the police. This further responsibility placed on the police officer is an indicator of this fiduciary duty, by ensuring that the police take on the role of facilitating the rights of the detainees, even if it is beyond their role.

The expansive use of police powers for this purpose is not, in principle, objectionable. If the police are able to effectively

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[93] *Prosper* (n 88) 30.

[94] Don Stuart, *Charter Justice in Canadian Criminal Law* (7th ed, Thomson Reuters 2018) 428-452.

promote justice for detainees, they ought to. However, such expansive use of power should create duties that are compatible and complementary to the police's role, rather than those that are at the expense of the police's ability to exercise their role. The case law emerging from the SCC falls into the latter category, creating vague indirect restrictions on police power which generates further uncertainty about how they may carry out their role, with a lack of clarity on how to do so without infringing individual rights.

Flexibility on Exclusion of Evidence: A Remedy?

It could be argued that the revision of the exclusion of evidence test, and that violations of the Charter Rights that will not automatically lead to an exclusion of evidence under section 24(2), may lessen the concern of ambiguity and indirect restriction. Conversely, it creates another layer of ambiguity, not only for the police who will not know how their actions will be interpreted by the court due to the range of factors to consider, but it would also result in a large variance in judgments. Individuals will also have less clarity on what remedy they may achieve from a Charter violation.

The other potential consequence is that officers may feel indemnified against poor conduct if the case is serious enough. Cases after *Grant* exclude evidence because of how egregious the disregard for the appellant's Charter rights were. *Morelli* is a pertinent example of this confusion and ambiguity, as the evidence was excluded despite it being an extremely serious case concerning child pornography, due to the unlawful search and

seizure of the appellant's computer.[95] It begs a number of questions. Are Charter breaches permissible if the case is serious enough? Are Charter breaches permissible if people would be outraged that the evidence was excluded due to the nature of the case?

It appears that the balancing tests of section 1 and section 24 on whether to exclude evidence are a substitute for a lack of deference; in that instead of granting the police a wide berth as in the UK, it grants them a narrower one with potential for the courts to mitigate the restrictive effects of that narrow berth. However, it comes too late in the criminal process to not be an excessive indirect restriction in day-to-day policing.

II. Conclusion

To conclude, the definition of detention does cause an excessive restriction on the police in Canada, but not in the United Kingdom.

While the police in both jurisdictions do have to work around direct and indirect restrictions, in the United Kingdom, the police retain a lot of discretion about powers that are prescribed to them by law, as well as a clear threshold for detention set at the higher bar of physical detention. Furthermore, the rights for detainees are primarily informational. As a result, the arising direct restrictions are clearly laid out, thereby reducing the indirect restrictions which arise out of uncertainty. This aligns closely with Miller's conception on the role of the police.

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95 *Prosper* (n 88) 25*; R v Morelli* 2010 SCC 8, [2010] 1 SCR 253.

By contrast, the Canadian courts impose greater obligations on the police and more expansive direct restrictions, while simultaneously generating greater ambiguity that exacerbates indirect restrictions. The use of psychological detention generates this ambiguity and is furthered by unclear guidance from the SCC. Furthermore, the SCC imposes obligations on the police that are beyond informational, and instead, utilise the police to address inequities that are the usual reserve of the legislature and executive. As such, I demonstrate that the Canadian approach views the police more closely to Galoob in which the police owe fiduciary duties to the public.