

# The Fine Art of Purging



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February 14, 2021

## **Predicting and Limiting Detention Issues in Non-custodial Interviews**

It is said that the present is more important than the future, as it is what you do in the now that often controls what happens later. The best investigators I have met would agree with this statement, and ensure that they had considered the future ramifications of all their decisions. When choosing a course of action, they would ask themselves what a defence lawyer or judge would say about the decision. They would also ask themselves what an accused might say about it at trial. Would he raise a valid defence argument? Would he be able to convince a judge that he had misunderstood something you had told him? Would he be able to show the Court that you had been vague or ambiguous? Amazingly enough, there is a way to predict what an accused might say about the process in which you had involved him, and it is the same way you would find out what potential medication your child had just ingested; induce vomiting. Now, as an interviewer, I have always been prone to using metaphors and analogies to make my point, so please don't add a puke bucket to your interview preparation list. I simply mean that you must ask questions and have a meaningful discussion with your suspect about his thoughts and feelings related to thoughts of detention. By getting him to tell you what he was thinking at that moment, you would commit him to a position that could be used later by the prosecution, should he take the stand to give evidence inconsistent with what he had said in the interview. Let me introduce you to the fine art of purging.

## Overview:

One definition of purge is: “to rid of whatever is impure or undesirable” (*dictionary.com*). In the example above, it was to have a child empty her stomach content after having ingested medication that would be harmful if left there. In the world of interviewing, it would be to rid a suspect of any thoughts of being detained. It is a conversation with the purpose of inviting the suspect to clearly and unequivocally illustrate that he understood he was free to go, and didn’t have even an inkling of a doubt about it. If done properly, particularly when video recorded, you would be able to confidently express to the Court that the interview had been, in fact, non-custodial; thereby, precluding the legal obligation to inform the suspect of his Charter Rights to counsel (*R. v. Oickle 2000 SCC 38*). When this purging has been done effectively, it would reduce the opportunity for the suspect to give evidence that could convince the Court that he had been detained, simply because he had believed he had not been free to go (*R. v. Grant 2009 SCC 32*).

The art of purging is far from being a black and white process; it lives more within the realm of grey area. How and with whom it is done, would depend on a multitude of variables such as, but not limited to, the location of the interview, and the sophistication and intelligence of the suspect. Any number of factors, often contextually-based, could make a suspect reasonably believe he were, in fact, not able to be the only person who could decide whether he stayed. As an interviewer, it is incumbent upon you to purge the suspect of any doubts of detention, so that his words could be used as evidence of comprehension at trial should he say otherwise. You may refer to a checklist for topics to be covered during the detention purging, but flexibility and understanding the principles of perceived detention would allow you to be more effective. The remainder of this paper will deal with areas of concern that could fall prior to the interview (the invitation, the location, and travel to that location), and during the interview itself. Success would be determined by whether you had recognized the topics that should have been discussed, and the level of detail that would have been required for the unique person being interviewed and the circumstances of the interview. To better understand the dependent nature, here are a few generalizations:

1. As no two interviews or interviewees will be the same, don’t expect to be able to use a cookie-cutter approach
2. When in doubt about whether a suspect believed he were detained, explain more
3. Never assume that your suspect perceives detention in the same way you do
4. Embrace the *Charter of Rights and Freedoms* by not cutting corners. Expedience is your enemy
5. If you told a suspect he was free to go, let him go without a challenge if he decided to leave
6. Consider the following variables:
  - a. The person being interviewed (intelligence, education, sophistication, language issues, culture)
  - b. The location and set up of the interview location (would the suspect have an unfettered ability to leave?)

- c. The severity of the offence being investigated (would you let him leave if he confessed?)
  - d. Would you, the suspect, or a reviewing judge believe that the suspect had in fact been detained at any point (if you could answer yes to any of these, continue to purge, or inform of the Rights to counsel)
  - e. Is your interview confrontational? (If so, this could lead to an involuntary utterance which would be considered inherently unreliable, and potentially lead to a belief in detention)
  - f. Does your interview become accusatory at some point? (If so, this could make the suspect believe he were no longer free-to-go, which could trigger the Charter Rights to counsel)
7. If, after the purging, you had any doubt about whether you or the suspect believed he were unconditionally free-to-go, provide him both the informational and implementational components of the Rights to counsel

Since the goal of purging is to be able to use it later at trial, all efforts should be made to video record the entire interview process and any other contact you had with the suspect. The more you record, the less you would have to explain later. If you enjoy having to unnecessarily spar with defence lawyers about details such as what you said or how you said it, please feel free to ignore the advice in this paragraph.

### **Pre-Interview Considerations:**

#### **The invitation**

Whether in person or over the phone, engage the suspect in a meaningful conversation about what his choices were. Arguably, any decision he made about taking part in the interview, would begin during the invitation phase. Involve him in the process, specifically allowing him input into the interview location and how he would get there (*R. v. Grant 2009 SCC 32*). The final decision on these important issues would be based on a yardstick of reasonableness. If ignored, the suspect could take the stand later and say he had felt detained as he had not been involved in these important decisions as a truly free person would have.

Understand that there is a difference between being reasonable and being foolish. If any of the suspect's input would increase the risk of danger to any person, you would not have to accept it. For example, if he wanted to do the interview in his house and you could articulate that it would be dangerous for you, you would not have to do it there. The same would apply for other factors such as privacy, for example, if the setting could detract from the goal of the interview. This means that you would not have to readily accept doing the interview in a house full of screaming children. However, you would also have to be careful of being viewed as crafty by trying to always hold it in your office, rationalizing that it would be optimal because of the video recording equipment.

For him to be able to make an informed decision to take part in the interview, he must first fully understand the jeopardy he faced, a fancy word for the alleged offence(s) for which he was being investigated. It would rarely hurt to let him know that:

1. it was his choice alone whether to take part in the interview process and that he could leave at any time (detention issue);

2. regardless of what happened in the interview, he would not be arrested or detained (detention issue); and,
3. it was his choice whether to say anything if he did take part, and that if he did it could be given in evidence in court (voluntariness issue).

This would allow him to feel empowered to attend the interview, with confidence that he could leave at any time, even if he were to choose to remain silent. Although it might appear counterintuitive to think a suspect would choose to be interviewed after this spiel, it is more likely he would take part when believing that he had absolute control of his own destiny. He would be more apt to back away if, at any time, the interviewer were cagy and appeared overly self-serving. As mentioned earlier, you and the investigation would benefit from using a recording device to capture the entire invitation. Be candid about the recording and explain why you do it as anxiety is often reduced through discussion and de-mystification.

### **The interview room location**

As with real estate sales, the quote, “*location, location, location*” (Harold Samuel, 1944), would apply to non-custodial interviews. Where it took place could affect the suspect’s perception of his freedom, as some buildings inherently connote more of an atmosphere of detention than others. For example, for some people, being in a police station might make them feel detained; whereas, a community hall might not. Again, while there are few absolutes, government buildings with inherent secure areas, requisite access cards, and maze-like hallways, provide many reasons a suspect might feel detained while inside. If he believed he could only leave with your assistance, he might be detained.

A general rule-of-thumb would be that government buildings, particularly those that are associated with detention such as police stations, would require more detailed purging. For example, whereas a suspect’s house might require little more than the “*no adverse inference purge*”, and telling him you would leave if and when asked, the same interview in a police station would probably require a multitude of examples to overcome thoughts of detention. For this reason, it would be wise to consider park benches (if privacy could be afforded) or hotel rooms for high stakes investigations. To fully grasp this concept, go through the following exercise:

Pretend you are being interviewed in a large municipal police station, and you are the most corrupt, cunning and crafty suspect possible. The interviewer tells you simply that you are neither detained nor arrested, and are free to go at any time. You take part in the interview and make incriminating remarks.

Now, imagine you visit your lawyer a week later and he asks you to come up with reasons that you had believed you couldn’t have left the interview, regardless of whether you had felt that way during the interview. Make a list of as many reasons possible that you believed you were not free to go.

Now, do the same exercise for different locations and see which ones allow for more excuses.

You’ll see later in the *Purging During the Interview Proper* segment, that this exercise should be considered when anticipating and planning which purge topics should be covered during your real interviews. The secret is to think like a suspect or defence lawyer, and not to get caught in the “*me trap*”. This preparatory

brainstorming will help you to prudently implement the purging process according to the variables of each unique interview session.

### **The setup of the interview room**

If you chose to do the interview in a building, your first consideration should be whether the location would be conducive to a non-custodial atmosphere, or if it would present inherent reasons for perceived detention. If possible, arrange the chairs so the suspect would be the closest person to the door, so he could not say he had felt confined because you had been intentionally blocking his ability to leave.

Should the optimal room setup not be feasible, purge any thoughts of detention posed by the seating arrangement by telling the suspect that you were not intentionally blocking his exit, and that he could just walk around you should he want to leave. In some situations, it would not hurt to mention that you would gladly change positions but the camera location made it difficult (for those interview rooms where the camera, that should be focussed on the suspect's front, had been placed above the exit)

Should you choose to do the interview in a vehicle, make sure the suspect was positioned to leave with the least amount of assistance required from you. This may entail having him seated with an open door beside him. Should this not be possible, you would have to purge perceived detention by explaining what he could do to leave, such as showing that the doors were unlocked, or simply asking you to open the door, particularly if he were in the rear seat of a police car where the doors don't have inner handles. Never assume he wouldn't be prepared to justify his detention using these arguments later, when his life and freedom depended on it.

### **Purging During the Interview Proper:**

The following potential topics tend to fall into two categories; those often needed at the beginning of the interview, and those commonly found later in the process. They would be best explained though an example of what an interviewer might say to purge a suspect of the perceived thoughts of detention. Remember that the inclusion and order are the choice of the interviewer depending on the circumstances and context off the interview. Moreover, with some people, depending upon their sophistication and intelligence, you might be able to successfully purge using only the words in the titles below; whereas with others, you should be prepared to have a longer, more meaningful discussion. For the purpose of this paper, I will provide the longer version.

### **Beginning Topics:**

#### **Free to go at any time**

*Jim, I want you to clearly understand something that is super important today and that is that you are not under arrest and you are not what we call detained. This means you are free to go at any time. You are the only one who can decide whether you stay or leave. It also means that you are free to change your mind at any time. You could choose to stay at the beginning and leave at any time later; in a minute, five minutes or even an hour. It is your choice and your choice alone. I'm going to speak more to this in a minute as I don't want you to misunderstand this important point or be confused at all. But, before we go any further, could I get you to show you understand what I just said about being free to go at any time, please?*

**Legal Obligations to establish voluntariness**, as required: (for interviews in Canada. Adjust for your jurisdiction)

*Jim, as I just mentioned, you are free to go, but (Jeopardy) I want you to understand that you are also under investigation for the theft we talked about. The reason I brought this up again is I want you to be able to make informed choices today, and I want to go over some of the choices.*

(Police Warning) *The first part is that you don't have to say anything to me or anyone else about this. The second part is that, if you choose to talk about it at all, what you say or do could be given in evidence in Court.*

This should be followed by the *Secondary Warning* to enhance the likelihood of proving any subsequent utterance to be free of threats, promises, or other forms of coercion. As with any other legal obligation, establish that the suspect had unequivocally understood the content by following the acronym R.E.A.D. (*Pitt-Payne 2010*)

**R** – read the warning from a card or script, if required

**E** – explain the warning using language appropriate to the person being interviewed

**A** – assess the suspect's understanding by asking him to repeat it in his own words

**D** – discuss the content until you were certain the suspect had understood it all

The depth and breadth of your explanation of the legal obligations, would obviously depend on what you had discussed earlier in either the invitation or preliminary stages of the interview, and whether these parts had been recorded.

### **Doesn't need to ask permission to leave**

*Jim, I've spoken to people that have remained seated longer than they had wanted to, because they were shy and didn't want to ask me for permission to leave. I want to be clear that you do not have to ask me to leave. You can just get up and walk out, if you want.*

### **No adverse inference drawn**

*I have also spoken to people who thought that I would think they were guilty of something if they didn't want to take part in the interview. That isn't how I work. I fully understand that there are many reasons you might not choose to stay here and take part, and I wouldn't ever assume it was because you had something to hide.*

### **Already decided not to arrest**

*Jim, you may not know this, but there are many situations that do not require a suspect to be arrested or detained, even if they did what they were alleged to have done. I want you to understand that I have already decided that this is the sort of allegation that does not need an arrest, regardless of what happens in this interview. I guarantee that you will be walking out of this room regardless of what takes place. If it*

*turns out that you did do this, I could give you a document to get you to court; thereby, taking away the need for an arrest.*

If appropriate, consider releasing on a document compelling him to attend court and asking if he would be willing to stay for an interview. This would reinforce your decision not to arrest as you wouldn't be able to of you wanted to.

*Jim, since I have served you this Appearance Notice that has a court date, I cannot lawfully detain you for this matter. You are a free man. Having said that, I would like to chat with you, if you are willing to do that. Because you are a free man, you could leave at any time. On top of that, it is completely up to you whether or not you want to say anything to me, and, if you do decide to talk to me, what you say could be used as evidence in Court.*

### **Door unlocked**

*You'll notice that the door is closed, but I want you to know that it is not locked. I encourage you to get up and open it if you would like to.*

### **Not blocking your exit**

*Jim, because the camera is set up above the door, I have to sit here so my back is to it and not yours. Unfortunately, this has made some people think that I was trying to block their exit. I want you to understand that this is not the case. I want to reassure you that you may get up at any point and walk past me and out the door. I won't get in your way.*

### **Won't be challenged**

*I was interviewing a person once who thought that he wasn't free to leave because he thought he would be jumped or challenged by an officer because this was a secure area. This won't happen as I would get up and go with you and take you to the exit.*

### **You'll show him the way**

*I'll also show you how to get out of this building as it could be like a bit of a maze to you. I will use my card to make the elevators work and won't try to get you to talk about this while you're leaving.*

### **You'll arrange for him to get home, if necessary**

*Jim, I don't want you to think that you have to stay here and take part in this interview because that's the only way I'll give you a ride home. You asked me to drive you hear, so I will drive you home, even if you told me now that you didn't want to take part and wanted to leave right now.*

or,

*Jim, I will pay for a taxi to get you home, and give you the money before we start, so you know you can walk out at any time, and not feel like you have to stay even a moment longer to get the fare money from me.*

or,

*Jim, since we just seized your truck from the parking lot, I don't want you to think you have to take part in this interview. I'll drive you home, regardless of your decision.*

#### **Ask if he believes you when you say he is free to go**

*We have spent some time now making sure you understand you are not detained and will not be regardless of what happens today. Do you believe me when I tell you you're free-to-go?*

#### **Ask if there is anything that still makes him feel he was not free to go**

*Jim, I want you to think hard and tell if there is anything that still makes you believe you are not free to go at any time.*

### **Later Topics:**

#### **Periodically, ask if he is okay to continue the interview**

*Jim, thank you for telling me what happened. Before we go any further, are you still okay to stay here and continue?*

#### **Re-emphasize free to go before switching to accusatory**

*Jim, I want to switch gears a bit and explain to you why I believe you were actually the one who took that chocolate bar. In fact, there's actually no doubt in my mind. Before we go any further, I want to be clear that you are still free to go. That has not changed a bit.*

#### **Let him go for a break and choose to return to the interview**

During the interview: *Jim, I have to step out for a few minutes to review what you just told me, so I can come up with some intelligent questions. While I'm gone, I'll take you to the front so you can go outside for some fresh air (or, to have a cigarette). When you're ready to come back in, just grab a seat in the lobby, and I'll bring you back to this room if you're okay with continuing the interview.*

After the break: *Thanks for coming back in Jim. Are you okay to come with me back to the interview room?*

Once back in the room: *Jim, when you were out of this room, did anyone tell you that you had to come back here and talk to me more? (purging any new and unknown voluntariness issues)*

#### **What if the suspect tells you to stop the purging as he understands he is clearly free to go?**

Suspect: *Bruce, I'm not stupid! I get it! I'm free to go!*



Interviewer: *Jim, sorry for going overboard. I don't think you're stupid at all, but I have spoken to some very smart people who didn't get it. My bad. Do you want to move right into the actual interview part then?*

The fact that it had been the suspect who had initiated the end of the purging process could allow the Court to later refrain from criticizing the interviewer for a lack of diligence.

### **Danger Zones:**

#### ***"The truth will set you free"***

Be careful that common expressions like this, might be used later by a suspect to successfully explain that he interpreted it to have meant that he had indeed been in custody during the interview. Using simple logic, a person could not be set free unless he were, in fact, detained in some way.

#### ***"You're free to go, but let's chat a bit while we wait for the exhibit custodian to bring you your shoes"***

Beware of thinking that someone was free to go while he had no choice but to wait for an item or a process unrelated to the interview. Arguably, he would not be truly free to go as his choices would not be unfettered.

### **Exceptions:**

Arguably, there are situations where no amount of purging would make a suspect believe or perceive himself to be free:

1. Where the suspect did not have the intellectual capacity to understand the concepts of detention and freedom;
2. Where the suspect were in custody for an unrelated matter at the time you wanted to interview him as a suspect on yours. For example, if you wanted to interview him as a suspect for a minor theft, when he was either in prison or in police station cells for a domestic violence assault. Even if he were to walk out of the interview room, he would still be in custody.

Both these situations would suggest that you inform him of his Rights to Counsel and provide him a reasonable opportunity to implement those rights.

## **Conclusion**

I hope that the idea of purging became less disgusting as this paper progressed from discussing bodily functions to non-custodial interviewing. Planning, preparation and practice would allow these essential conversations to become meaningful, engaging, and easily understandable, while being neither offensive nor condescending. Although it is clear under Canadian law that the obligation to inform a suspect of his Rights to Counsel is triggered by detention, and not when a person becomes a suspect, some investigators lack the confidence to make appropriately informed choices. This leads to an inability to make decisions that are definitive and commensurate with the spirit of the legislation.

Have the courage to follow the legislation and case law that says you must give the rights upon arrest or detention (*R. v. Oickle* 2000 SCC 38) and that they are not a continuous right (*R. v. Sinclair* 2010 SCC 35). Additionally, if the suspect were neither arrested nor detained, refrain from giving the rights (*R. v. Grant* 2009 SCC 32). Even if you want to err on the side of caution and give the Rights to Counsel when they weren't needed (prior to actual detention), remember that you might be successfully accused by defence of detaining the suspect, with the argument that the Rights to counsel could only be triggered by detention. Should this be proven to have been a wrongful detention, the subsequent interview might be ruled inadmissible. Although the law is contextually-applied, and discretion is often available, this should not be misrepresented by ignorance of the legislation or being afraid to live within its spirit.

Additionally, you shouldn't cut corners when purging because you were scared your suspect would walk out. Remember that he had not been caught by you in the first place, so if he were to walk out, you would not have lost anything. To think otherwise would be tantamount to believing that you had lost a fish that had never been hooked. Some people might choose to leave, but that is not necessarily because you had done anything wrong; it could be because they had a Constitutional Right to choose to leave. Rather than thinking you had done something wrong, accept that you had truly embraced the *Charter of Rights and Freedoms* and its application to non-custodial interviews. Anecdotally, it would not be the uninformed that chose to stay; it would often be the person who truly believed he could take part and leave at any time, even if it had been because he believed he might have learned something from the interviewer in the process. Giving him a reason to feel safe, would make it a "win-win" situation for both of you.