



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Le, 2019 SCC 34

**APPEAL HEARD:** October 12, 2018  
**JUDGMENT RENDERED:** May 31, 2019  
**DOCKET:** 37971

**BETWEEN:**

**Tom Le**  
Appellant

and

**Her Majesty The Queen**  
Respondent

- and -

**Director of Public Prosecutions, Criminal Lawyers' Association of Ontario,  
Canadian Muslim Lawyers Association, Canada Without Poverty, Canadian  
Mental Health Association, Manitoba and Winnipeg, Aboriginal Council of  
Winnipeg, Inc., End Homelessness Winnipeg Inc., Federation of Asian Canadian  
Lawyers, Chinese and Southeast Asian Legal Clinic, Canadian Civil Liberties  
Association, Scadding Court Community Centre, Justice for Children and  
Youth and Urban Alliance on Race Relations**  
Intervenors

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Brown and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** Brown and Martin JJ. (Karakatsanis J. concurring)  
(paras. 1 to 166)

**DISSENTING REASONS:** Moldaver J. (Wagner C.J. concurring)  
(paras. 167 to 311)

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R. v. LE

**Tom Le**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

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**2019 SCC 34**

File No.: 37971.

2018: October 12; 2019: May 31.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Arbitrary detention — Remedy — Exclusion of evidence — Police entering private backyard where five young men were gathered without warrant or consent — Police questioning men and requesting documentary proof of identities — Accused fleeing backyard and caught in possession of firearm, drugs and cash — Whether encounter between police and accused infringed accused's right to be free from arbitrary detention — If so, whether admission of evidence would bring administration of justice into disrepute warranting its exclusion — Canadian Charter of Rights and Freedoms, ss. 9, 24(2).*

One evening, five young racialized men, including the 20-year-old accused, were gathered in the private backyard of a townhouse at a Toronto housing co-operative when three police officers arrived. The young men appeared to be doing nothing wrong. They were just talking. Two officers entered the backyard, without a warrant or consent. They immediately questioned the young men and requested documentary proof of their identities. The third officer patrolled the perimeter of the property, then stepped over the low fence enclosing the backyard and directed one of the men to keep his hands where he could see them. One officer questioned the accused, demanding that he produce identification and asking him what was in the satchel he was carrying. At that point, the accused fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash. At his trial, the accused sought

the exclusion of this evidence under s. 24(2) of the *Charter* on the basis that the police had infringed his constitutional rights to be free from unreasonable search and seizure and from arbitrary detention, contrary to ss. 8 and 9 of the *Charter*. In convicting the accused, the trial judge held that he lacked standing to advance a s. 8 claim, that he was detained only when the officer asked him about the contents of his bag, that the detention was not arbitrary, and that had a breach of *Charter* rights occurred, the evidence would be admissible. A majority at the Court of Appeal agreed and dismissed the accused's appeal from his convictions.

*Held* (Wagner C.J. and Moldaver J. dissenting): The appeal should be allowed, the evidence excluded, the convictions set aside and acquittals entered.

*Per* Karakatsanis, **Brown** and **Martin JJ.**: The circumstances of the police entry into the backyard effected a detention that was both immediate and arbitrary. This was serious *Charter*-infringing police misconduct, with a correspondingly high impact on the accused's protected interests. It was precisely this sort of police conduct that the *Charter* was intended to abolish. On balance, the admission of the evidence would bring the administration of justice into disrepute. Since the appeal can be disposed on the basis of ss. 9 and 24(2) of the *Charter*, there is no need to resolve the s. 8 issue.

The prohibition of arbitrary detention in s. 9 of the *Charter* is meant to protect individual liberty against unjustified state interference. It limits the state's ability to impose intimidating and coercive pressure on citizens without adequate

justification. Not every police-citizen interaction is a detention within the meaning of s. 9; a detention requires significant physical or psychological restraint. Psychological detention by the police can arise in two ways: (1) the claimant is legally required to comply with a direction or demand by the police; or (2) a claimant is not under a legal obligation to comply with a direction or demand, but a reasonable person in the subject's position would feel so obligated, and conclude that they were not free to go. Therefore, even absent a legal obligation to comply with a police demand or direction, and 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 with a police direction or demand and that they are not free to leave.

In determining the point of detention for the purposes of s. 9 of the *Charter*, it is essential to consider all of the circumstances of the police encounter. The Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, adopted three non-exhaustive factors that can aid in the analysis. In the instant case, each of these factors support the conclusion that the accused's detention began the moment the police entered the backyard and made contact with the young men.

The first factor — the circumstances giving rise to the encounter as they would reasonably be perceived by the individual — supports a finding of detention arising prior to the officer's inquiry about the contents of the accused's satchel. The conduct of the police exceeded the norms of community policing, there was no obvious cause for any police presence in the backyard, the police never expressly

communicated to the young men why they were there, they immediately started questioning them, and the height of the fence allowed full interaction without entry. Therefore, a reasonable person would not perceive the police entry into the backyard as merely assisting in meeting needs or maintaining basic order.

The second factor — the nature of the police conduct — supports the conclusion that a detention arose as soon as the police officers entered the backyard and started asking questions. Many considerations influence the analysis under this factor. When the police enter a private residence as trespassers, as they did here, it both colours what happens subsequently and strongly supports a finding of detention at that point in time. The actions of the police and the language used may show that the police are immediately taking control of a situation. Here, the contemporaneous actions of the police and the language employed illustrate they were exerting dominion over the individuals in the backyard from the time of entry. There was physical proximity and the officers positioned themselves in a way to question specific young men apart from the others, in a manner to block the exit. Furthermore, with respect to the place where the interaction occurred and the mode of entry, the nature of any police intrusion into a home or backyard is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public. Coming over the fence to enter a private residence conveys a show of force. Living in a less affluent neighbourhood in no way detracts from the fact that a person's residence is a private and protected place. The reputation of a particular community or the frequency of police contact with its residents does not in any way

license police to enter a private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime. Here, there was a tactical element to the encounter and the mode of entry involving three uniformed officers suddenly occupying a backyard and taking control over the people in it late at night would be seen as coercive and intimidating by a reasonable person. The police conduct towards others would also likely have an impact on how a reasonable person in the accused's shoes would perceive the unfolding situation. Witnessing a repeated sequence of command and compliance would lead a reasonable person to believe that they are not free to leave and that even their physical movements are subject to police control. In addition, the overall duration of an encounter may contribute to the conclusion that a detention occurred, although a detention can occur within a matter of seconds, depending on the circumstances. What the accused in this case saw occurring to others likely increased the perception and reality of coercion, as the others simply did what the police told them to do. Although the interaction lasted less than a minute, the impact of the police conduct in that short space of time would lead any reasonable person to conclude that it was necessary to comply with police directions and commands, and that it was impossible to leave or walk away without the permission of the police once they entered the backyard.

With respect to the third factor — the particular characteristics or circumstances of the individual —, a reasonable person imbued with the experiences that accompany the accused's particular circumstances would conclude that there was a detention from the moment the officers entered the backyard and started asking

questions. Courts must appreciate that individuals in some communities may have different experiences and relationships with police than others and such may impact upon their reasonable perceptions of whether and when they are being detained. At the detention stage, the analysis takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in the shoes of the accused is presumed to be aware of this broader racial context. Evidence about race relations that may inform whether there has been a detention under s. 9, like all social context evidence, can be proved in legal proceedings by direct evidence, admissions, or by the taking of judicial notice. Because the focus is on how the combination of a racialized context and minority status would affect the perceptions of a reasonable person in the shoes of the accused and not on what motivated the officers to act as they did, a finding that there has been no racial profiling has therefore little bearing. While the accused's level of sophistication could also bear on the timing of a detention, merely because an individual has had repeated interactions with the police does not mean that the individual has acquired a level of sophistication in dealing with the police. A reasonable person who has been stopped by the police on multiple prior occasions would more likely perceive that it is necessary to simply submit to police demands. What a reasonable person may perceive may also be influenced by age and the knowledge, life experience and discernment associated with that age group. The focus of the s. 9 analysis should not be on what was in the accused's mind at a particular moment in time, but rather on how the police behaved and, considering the totality of the circumstances, how such behavior would be reasonably perceived



by a person imbued with the experiences that accompany the accused's particular circumstances. In this case, the documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused. Research studies have established that racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them. We have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities. Indeed, it is in this larger social context that the police entry into the backyard and questioning of the accused and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions.

Where a detention is established, a court must consider whether the detention is arbitrary. The detention must be authorized by law, the authorizing law must not be arbitrary, and the manner in which the detention is carried out must be reasonable. Since no statutory or common law power authorized the accused's detention at the moment the police entered the backyard and made contact with the young men, it was an arbitrary detention that infringed the accused's *Charter* right. First, the police were trespassers. The implied licence doctrine, which allows the police, or any member of the public, on legitimate business to proceed from the street to the door of a house so as to permit convenient communication with the occupant of the dwelling, does not apply to excuse the police presence in the backyard because even if communication was the officers' purpose, it did not necessitate their entry

onto private property. The police also had a subsidiary purpose — a speculative criminal investigation —, which exceeds the authorizing limits of the implied licence doctrine. Second, the police had no legal authority to detain the accused. No statute authorized the police officers to detain anyone in the backyard, and the common law power to detain for investigative purposes could not be invoked. The latter only allows the police to detain an individual for investigative purposes where, in the totality of circumstances, there are reasonable grounds to suspect a clear nexus between the individual and a recent or still unfolding crime. A suspect's presence in a so-called high crime area is not by itself a basis for detention and the mere presence of non-suspects in an area frequented days or weeks earlier by a person of interest cannot furnish such a basis. The receipt of general information about contraband in relation to an address does not, without more specificity, give rise to reasonable suspicion in relation to recent or ongoing criminal activity.

Where evidence is obtained in a manner that infringes a *Charter* right or freedom, s. 24(2) provides that such evidence must be excluded if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. While the exclusion of evidence may provoke immediate criticism, the focus is on the overall repute of the justice system, viewed in the long term by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights, and not on the impact of state misconduct upon the criminal trial. It is the sum, and not the average, of the seriousness of the *Charter*-infringing conduct and the impact of the breach on the *Charter*-protected

interests of the accused that determines the pull towards exclusion. The more serious the state-infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion. Where these inquiries, taken together, make a strong case for exclusion, society's interest in an adjudication of the case on its merits will seldom if ever tip the balance in favour of admissibility.

When considering the first line of inquiry — the seriousness of the *Charter*-infringing conduct —, for state misconduct to be excused as a good faith (and, therefore, minor) infringement of *Charter* rights, the state must show that the police conducted themselves in a manner consistent with what they subjectively, reasonably and non-negligently believed to be the law. Here, good faith cannot be ascribed to these police officers' conduct. Their own evidence makes clear that they fully understood the limitations upon their ability to enter the backyard to investigate individuals. This was serious police misconduct and weighs heavily in favour of a finding that admission of the resulting evidence would bring the administration of justice into disrepute.

The second line of inquiry — the impact on the *Charter*-protected interests of the accused — entails asking whether and to what extent, in the totality of the circumstances, the *Charter* breach actually undermined the interests protected by the right infringed. Here, when weighed against the absence of justification to investigate the young men at all, the impact of this police misconduct is heightened considerably. The discovery of the evidence was only possible because of the serious

s. 9 breach in this case. This line of inquiry also strongly favours a finding that admission of the evidence in this case would bring the administration of justice into disrepute.

The third line of inquiry — society's interest in adjudication of the case on its merits — typically pulls toward inclusion of the evidence. Courts must be careful to dissociate themselves and their trial processes from the violation of longstanding constitutional norms reflected in the Court's *Charter* jurisprudence that has emphasized the importance of individuals' liberty interests. On balance, in this case, this line of inquiry provides support for admitting the highly reliable evidence.

In this case, in view of the application of the three *Grant* lines of inquiry, admission of the fruits of the police conduct would bring the administration of justice into disrepute, and as such, the evidence must be excluded.

*Per* Wagner C.J. and **Moldaver** J. (dissenting): The appeal should be dismissed. While the appellant was arbitrarily detained, resulting in a breach of his s. 9 *Charter* rights, admission of the evidence would not bring the administration of justice into disrepute.

The fundamental principles that govern the nature and scope of appellate review include the principle that fact finding is reserved to trial courts. The threshold for interfering with a trial judge's factual findings and findings of credibility is stringent. Appellate intervention is justified only where the trial judge has made a

palpable and overriding error. Given that, before the Court, the appellant does not allege that any of the trial judge's findings of fact were tainted by palpable and overriding error or were unreasonable and there is no challenge to the trial judge's credibility assessment, the Court must perform its legal analysis based on the factual foundation laid by the trial judge. It would be inappropriate for the Court to substitute its own findings for those of the trial judge.

The police entry into the backyard was unlawful. The police were trespassers from the moment they set foot on the property, given that the implied licence doctrine could not apply in the present case. This doctrine, which allows police officers and other members of the public, on lawful business, to enter onto private property and approach the door of the residence in order to speak with the owner or occupier, could not apply for the sole reason that the police could readily make contact with the potential owner/occupier from outside the property. Nonetheless, the trial judge's finding that the police had legitimate investigatory purposes for entering the backyard is entitled to deference. Even if the police were not justified in entering the backyard in order to investigate whether the young men were trespassers, two valid investigatory objectives remained: (1) to investigate whether any of the young men were a known suspect or knew the whereabouts of another known suspect; and (2) to investigate potential drug trafficking in relation to the property.

The appeal can be disposed of without finally deciding whether the unlawful entry by the police into the backyard resulted in a breach of the appellant's s. 8 *Charter* rights. That said, it is doubtful that the appellant's s. 8 argument could withstand scrutiny, as there is no compelling basis on which to conclude that his informational privacy interests were engaged to any significant degree, and the Court's decisions in *R. v. Edwards*, [1996] 1 S.C.R. 128, and *R. v. Belnavis*, [1997] 3 S.C.R. 341, cast serious doubt on his territorial privacy argument. Even if it is assumed for the sake of argument that his s. 8 rights were breached, any such breach was both inadvertent and insignificant in terms of its impact, thereby making it inconsequential from a s. 24(2) perspective.

Section 9 of the *Charter* protects the right to be free from arbitrary detention or imprisonment. Detention under s. 9 refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Whether a psychological detention has occurred is determined objectively, having regard to all the circumstances. The onus is on the applicant to show that in the circumstances, he or she was effectively deprived of his or her liberty to choose whether to stay or leave. While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in determining whether a reasonable person in the circumstances would perceive himself or herself as not being free to go. The factors in determining whether and when a psychological detention has occurred include the circumstances giving rise to the encounter as they would reasonably be perceived by the individual, the nature of the police conduct, and the

particular characteristics or circumstances of the individual where relevant. The determination of whether and when a detention has occurred based on a trial judge's underlying findings of fact is a question of law subject to the standard of correctness. In the present case, it is not disputed that a detention occurred; the question is one of timing.

Applying the relevant factors with a view to determining the point at which the appellant was detained, beginning with the circumstances giving rise to the encounter, the trial judge found that the police had at least two valid investigatory purposes; the police encounter in the backyard therefore took place in the context of a legitimate police investigation and the young men had no reason to believe otherwise. The trial judge's findings make clear that this was not a fishing expedition, and it is not open to an appellate court to substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes. The interaction began with a series of general inquiries, rather than an attempt by the police to single out any particular individual for focused investigation. This militates against the conclusion that the detention was immediate.

Turning to the nature of the police conduct, the following principles expressed by the majority are endorsed: if it can be shown that the police conduct at issue was aggressive, then that would be a significant factor in the analysis; police conduct towards third parties can influence how a reasonable person in the claimant's shoes would perceive his or her own freedom of movement; the setting in which the

police interaction takes place is a relevant consideration — in particular, a police intrusion into a private space may reasonably be perceived as communicating some measure of control over the occupants; the duration of the police encounter is a relevant consideration; and an unlawful police entry can generally be expected to have an intimidating effect and may therefore cause a reasonable person to be less inclined to believe he or she is free to walk away.

In this case, the trial judge was presented with two strikingly different accounts of what occurred on the night in question. He accepted the account provided by the police and rejected that of the appellant and his friends. Thus, on the trial judge's findings, this was not a shakedown, an instance of racial profiling, or a mere fishing expedition. Rather, it was a legitimate investigation performed by the police, and there was no finding of bad faith. In concluding that the police were aggressive, that they were engaged in a fishing expedition, and that their conduct demonstrated that they were exerting dominion over the individuals in the backyard from the time of entry, the majority has recast the record in a manner that is inconsistent with the positive findings of fact that the trial judge made in favour of the police. It is not open to an appellate court to recharacterize police conduct based on its own appreciation of the evidence to arrive at its own view of how a reasonable person in the circumstances would perceive that conduct.

Turning to the particular characteristics and circumstances of the individual, there is agreement with the majority on a number of points, including the



following: a person may experience a police interaction differently depending on his or her age, race, life experience, and other personal characteristics, and these factors should be taken into account in the s. 9 analysis; the judicially constructed reasonable person must reflect and respect racial diversity, as well as the broader state of relations between the police and various racial groups; credible reports, studies, and other materials on race relations may assist courts in understanding how racialized persons may experience police interactions differently, and while it is generally preferable that all relevant materials be placed before the trial judge and made the subject of submissions from the parties, courts may take judicial notice of such materials where the test set out in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, is met; and a young person of small physical stature like the appellant may reasonably perceive a greater power imbalance vis-à-vis the police, as compared to how a larger, more mature person might perceive the situation.

The appellant is an Asian-Canadian man of slight build who was 20 years old at the time of the incident. The trial judge expressly anchored his analysis in the perspective of a reasonable person in the position of the appellant, and he took into account the visible minority status of the appellant and his friends. The appellant testified that he considered himself free to go until the police engaged him directly. The claimant's own perception of whether and when he or she was detained is not determinative, but it may be a relevant consideration. Here, the appellant's testimony suggests that a reasonable person in the circumstances would not have considered himself detained from the moment the police set foot in the backyard.

Finally, in determining the timing of the appellant's detention, the Court's decisions in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, make clear that as a general rule, only when the police move from general questioning to focussed interrogation will a detention result. General neighbourhood policing and preliminary or exploratory questioning are generally insufficient to effect a detention. In the case at hand, at the initial stage of the interaction, the police officers were simply orienting themselves to the situation and engaging in pre-detention exploratory interaction. While it can be difficult to ascertain with any degree of certainty the point at which a psychological detention occurred, it could reasonably be said that the appellant was detained, at the earliest, when the third officer entered the backyard and directed one of the young men to keep his hands in front of him, an order which he complied with immediately. In all the circumstances, upon seeing this clear exercise of police authority and his friend's immediate compliance, it is realistic to conclude that a reasonable person in the appellant's circumstances would have considered himself effectively deprived of his liberty of choice, even though he did not consider himself to be detained at this point.

The detention in this case was arbitrary. At the moment when the appellant was detained, the police had not yet developed reasonable grounds to suspect he was armed — a prerequisite to a lawful investigative detention. This resulted in a breach of the appellant's s. 9 *Charter* rights. However, the arbitrary detention was momentary, lasting mere seconds before the police developed

reasonable grounds to suspect the appellant was armed, thereby transforming the arbitrary detention into a lawful one.

Since the conclusion on the *Charter* breach issues differs from that of the trial judge, a fresh s. 24(2) analysis must be undertaken, accepting the trial judge's underlying factual findings absent any suggestion that they were tainted by a palpable and overriding error. The first line of inquiry to be considered is the seriousness of the *Charter*-infringing state conduct. This involves a consideration of whether admission of the evidence would send a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law. The court must fix the police misconduct on a spectrum ranging from the minor and inadvertent to the wilful or reckless. As an appellate court, the Court cannot simply substitute its own view of the police conduct for that of the trial judge or recharacterize the evidence. Here, the trial judge concluded that there was no evidence suggesting that the officers were engaged in racial profiling. Nor were the police abusing their powers in any other manner. On the trial judge's findings, it is clear that any breach of the appellant's *Charter* rights was technical and inadvertent, and there was no finding of bad faith on the part of the police. Although the police trespassed, they did not do so wilfully or deliberately. Rather, the trespass was inadvertent and committed in the course of performing legitimate investigatory duties. The s. 9 breach was far from egregious. The seriousness of the *Charter*-infringing conduct falls on the low end of the spectrum. Admission of the

evidence would not send the message that the justice system condones serious state misconduct.

The second line of inquiry focuses on the impact of the *Charter* breaches on the *Charter*-protected interests of the applicant. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact, the greater the risk that admission of the evidence may signal to the public that *Charter* rights are of little avail, thereby bringing the administration of justice into disrepute. In addition, the discoverability of the evidence is a relevant consideration in assessing the impact on the individual's *Charter*-protected interests. The impact of the s. 9 breach on the appellant's liberty, dignity, bodily integrity, and autonomy was reduced in terms of its significance because the arbitrary detention was fleeting in duration, did not result in any physical detention, and did not involve any aggressive or demeaning conduct on the part of the police. On the other hand, with respect to the discoverability of the evidence, the s. 9 breach set in motion a series of events that led to the discovery of the evidence. This is a consideration that must be weighed in the balance. However, that factor alone cannot be allowed to overwhelm the analysis and require near-automatic exclusion of the evidence. Moreover, the impact on the appellant's *Charter*-protected interests should be considered in light of the fact that no evidence was obtained during the momentary arbitrary detention; rather, it was discovered only after the police had the grounds needed to perform an investigative detention, and only after the appellant decided to run from the police. In

light of all the circumstances, the impact on the appellant's *Charter*-protected interests was not so great as to clearly overwhelm competing considerations.

The third line of inquiry considers society's interest in the adjudication of the case on its merits. Society generally expects that a criminal allegation will be adjudicated on its merits, and it has a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. The third *Grant* line of inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. The reliability of the evidence, its importance to the Crown's case, and the seriousness of the offences are all factors to be considered. Here, society's interest in the adjudication of the case on its merits is exceedingly high. The fact that a fully loaded, semi-automatic handgun is implicated is no minor consideration. It is essential to both the rule of law and the attainment of the rights enshrined in the *Charter* that Canadians feel safe and secure in their communities. The reality that many Canadians live under the constant threat of gun violence and the evils of drug trafficking and look to the police for protection must not be lost in the s. 24(2) analysis. The evidence in this case is real, reliable, and essential evidence of very serious criminal offences. Exclusion of the evidence would gut the Crown's case. This line of inquiry pulls strongly in favour of admission.

In this case, considering all the circumstances, it is clear what must be done to maintain the good repute of the administration of justice: the evidence must

be admitted. Given that the seriousness of the *Charter*-infringing conduct falls on the low end of the spectrum and society's interest in an adjudication on the merits is exceedingly high, the impact on the appellant's *Charter*-protected interests is insufficient to tip the scale in favour of exclusion. The majority's approach does nothing to recognize that the three police officers, in the course of carrying out a legitimate investigation, put their lives on the line for the good of the community. The chambered bullet in the appellant's semi-automatic handgun could have ended the life of an innocent bystander or one of the police officers as they struggled to wrest control of the bag containing the weapon from the appellant. Reasonable and well-informed members of the public would regard a decision to exclude the evidence as intolerable.

### **Cases Cited**

By Brown and Martin JJ.

**Applied:** *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:** *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *Chromiak v. The Queen*, [1980] 1 S.C.R. 471; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. MacMillan*, 2013 ONCA 109, 114 O.R. (3d) 506; *R. v. Wong*, 2015 ONCA 657, 127 O.R. (3d) 321; *R. v. Koczab*, 2013 MBCA 43, 294 Man. R. (2d) 24, rev'd 2014 SCC 9, [2014] 1 S.C.R. 138; *R. v. Therens*, [1985] 1 S.C.R. 613; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2

S.C.R. 789; *Peart v. Peel Regional Police Services Board* (2006), 43 C.R. (6th) 175; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Brown* (2003), 64 O.R. (3d) 161; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Mackenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. O.(N.)*, 2009 ABCA 75, 2 Alta. L.R. (5th) 72; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Reeves*, 2018 SCC 56; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Washington*, 2007 BCCA 540, 248 B.C.A.C. 65; *R. v. Mack*, [1988] 2 S.C.R. 903; *Dorset Yacht Co. Ltd. v. Home Office*, [1970] 2 All E.R. 294.

By Moldaver J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Lauwers and Brown JJ.A.), 2018 ONCA 56, 360 C.C.C. (3d) 324, 402 C.R.R. (2d) 309, [2018] O.J. No. 359 (QL), 2018 CarswellOnt 756 (WL Can.), affirming a decision of Campbell J., 2014 ONSC 2033, [2014] O.J. No. 1515 (QL), 2014 CarswellOnt 4078 (WL Can.). Appeal allowed, Wagner C.J. and Moldaver J. dissenting.

*Emily Lam and Samara Secter*, for the appellant.

*Sandy Tse and Amy Rose*, for the respondent.

*Janna A. Hyman and Carole Sheppard*, for the intervener the Director of Public Prosecutions.

*Jonathan Dawe* and *Sherif M. Foda*, for the intervener the Criminal Lawyers' Association of Ontario.

*Faisal Mirza*, for the intervener the Canadian Muslim Lawyers Association.

Written submissions only by *Byron Williams*, *Allison Fenske* and *Dayna Steinfeld*, for the interveners Canada Without Poverty, the Canadian Mental Health Association Manitoba and Winnipeg, Aboriginal Council of Winnipeg, Inc., and End Homelessness Winnipeg Inc.

*Gerald Chan* and *Lindsay Board*, for the interveners the Federation of Asian Canadian Lawyers and the Chinese and Southeast Asian Legal Clinic.

*Kate Robertson*, *Danielle Glatt* and *Sean Lewis*, for the intervener the Canadian Civil Liberties Association.

*Tina Lie*, for the intervener the Scadding Court Community Centre.

Written submissions only by *Mary Birdsell* and *Jane Stewart*, for the intervener Justice for Children and Youth.

Written submissions only by *Julian N. Falconer* and *Anthony N. Morgan*, for the intervener the Urban Alliance on Race Relations.

The judgment of Karakatsanis, Brown and Martin JJ. was delivered by

BROWN AND MARTIN JJ. —

I. Introduction

[1] One evening, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. The young men appeared to be doing nothing wrong. They were just talking. The backyard was small and was enclosed by a waist-high fence. Without a warrant, or consent, or any warning to the young men, two officers entered the backyard and immediately questioned the young men about “what was going on, who they were, and whether any of them lived there” (2014 ONSC 2033, at para. 17 (CanLII) (“TJR”)). They also required the young men to produce documentary proof of their identities. Meanwhile, the third officer patrolled the perimeter of the property, stepped over the fence and yelled at one young man to keep his hands where the officer could see them. Another officer issued the same order.

[2] The officer questioning the appellant, Tom Le, demanded that he produce identification. Mr. Le responded that he did not have any with him. The officer then asked him what was in the satchel he was carrying. At that point, Mr. Le fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash. At trial, he sought the exclusion of this evidence under s. 24(2) of the *Canadian Charter*

*of Rights and Freedoms* (“*Charter*”) on the basis that the police had infringed his constitutional rights to be free from unreasonable search and seizure and from arbitrary detention, contrary to ss. 8 and 9 of the *Charter*.

[3] In convicting Mr. Le, the trial judge held that he lacked standing to advance a s. 8 claim, there being no objective reasonableness to any subjective expectation of privacy that he might harbour as “a mere transient guest” (TJR, at para. 81). As to s. 9, the trial judge held that, while Mr. Le was detained when he was asked about the contents of his satchel, the detention was not arbitrary as the police had reasonable grounds to suspect he was armed. A majority at the Court of Appeal for Ontario agreed, accepting that, had it found breaches, it would not have excluded the evidence as any breach would have been “technical, inadvertent, and made in good faith” (2018 ONCA 56, 360 C.C.C. (3d) 324, at para. 76, quoting TJR, at para. 106). In dissent, Lauwers J.A. would have found Mr. Le’s ss. 8 and 9 rights were breached and he would have excluded the evidence under s. 24(2).

[4] This appeal, therefore, presents several issues: (1) whether this encounter between the police and Mr. Le infringed his right to be free from arbitrary detention; and (2) whether an invited houseguest enjoys a reasonable expectation of privacy while on the host’s premises. Further, depending on its determination of each of these issues, the Court may have to consider whether the admission of the evidence obtained as a result of the police conduct in this case would bring the administration of justice into disrepute warranting its exclusion under s. 24(2) of the *Charter*.

[5] We are content to dispose of this matter on s. 9 grounds. For the reasons that follow, the circumstances of the police entry into the backyard effected a detention that was both immediate and arbitrary. This was serious *Charter*-infringing police misconduct, with a correspondingly high impact on Mr. Le's protected interests. Indeed, it was precisely this sort of police conduct that the *Charter* was intended to abolish. On balance, the admission of the evidence would, in our view, bring the administration of justice into disrepute. We would, therefore, allow the appeal, exclude the evidence seized from Mr. Le, set aside his convictions and enter acquittals.

## II. Overview of Facts

[6] At approximately 10:40 p.m. on May 25, 2012, five young men, including the 20-year-old appellant and his host L.D., gathered together in the backyard of L.D.'s townhouse, which is part of a Toronto housing co-operative ("L.D. townhouse"). Three police officers — Csts. Teatero, Reid and O'Toole — entered the backyard after the following sequence of events.

[7] Cst. Teatero was speaking with the security guards who patrol the housing co-operative about a specific individual, N.D.-J. He showed the security guards a picture of N.D.-J., asked them if they had seen him at their housing co-operative, and was told that they had not. Cst. Teatero testified that this meant his presence at the housing co-operative was no longer required for that purpose (A.R., vol. I, at p. 193).

[8] The security guards, however, volunteered two pieces of information. First, that an unrelated individual, J.J., had been seen at the back of the L.D. townhouse days or weeks earlier (A.R., vol. III, at p. 16). Secondly, that the L.D. townhouse was, in one of the security guard's opinion, a "problem address", because "there were concerns of drug trafficking in the rear yard" (TJR, at para. 11).

[9] Towards the conclusion of this conversation, Cst. Teatero was joined by two other officers — Csts. Reid and O'Toole — and they decided to go together to the rear of the L.D. townhouse. There, they observed five young men, including Mr. Le, in a small backyard. As they approached, they observed the young men who "appeared to be doing nothing wrong. They were just talking" (TJR, at para. 16). They also observed that a fence, which was described by the trial judge as "a waist-high wooden fence" (para. 14), surrounded the backyard. The fence had an opening that allowed ingress into the backyard and then into the house. While the officers testified in a way that minimized the stature of the fence (calling it a "little two-foot fenc[e]" or a "little mini fence" (A.R., vol. I, at p. 196)), each acknowledged its significance. That is, all officers understood the backyard was private property that was part of a private residence and was not public property or a common area to the co-op (for Cst. Teatero, see A.R., vol. I, at p. 196; for Cst. Reid, see A.R., vol. III, at p. 45; for Cst. O'Toole, see A.R., vol. III, at p. 161).

[10] Nonetheless, without warning by way of gesture or communication to the backyard occupants, Csts. Reid and Teatero simply entered the backyard through the

opening in the fence. Cst. Teatero asked them “what was going on, who they were, and whether any of them lived there”. Cst. Reid engaged in a similar line of questioning. Each of the young men were asked to produce identification. This common police practice of asking individuals who they are and demanding proof of their identities for no apparent reason has its own name. It is known as “carding” (Justice M. H. Tulloch, *Report of the Independent Street Checks Review* (2018), at p. xi).

[11] Rather than follow Csts. Reid and Teatero into the backyard, Cst. O’Toole initially patrolled the length of the fence to get a “better angle and better view of everybody” (A.R., vol. III, at p. 135). He testified that a few moments later he stepped over the fence to enter the backyard (A.R., vol. II, at p. 67). Cst. Reid thought he may have been patrolling the fence line for “officer safety . . . to keep a view of both [constables] and . . . the males [being] investigat[ed]” (A.R., vol. III, at p. 80) and agreed in cross-examination that Cst. O’Toole jumped over the fence when he entered the backyard (A.R., vol. III, at p. 81).

[12] Once inside the backyard, Cst. O’ Toole noticed one of the men sitting on a couch with his hands behind his back. He directed the young man to “put his hands in front of him, and th[e] individual immediately complied” (TJR, at para. 19).

[13] Indeed, Cst. Teatero testified that Cst. O’Toole “yelled at him too to keep his – keep his hands where he can see them” (A.R., vol. I, at p. 230). Cst. O’Toole



was not the only one who ordered the young man to keep his hands visible. Cst. Teatero also did so.

[14] At this point, Cst. O'Toole went towards the rear door of the house to question Mr. Le and his friend. After carding Mr. Le's friend (who provided identification), Cst. O'Toole noticed that Mr. Le had a satchel slung across his body and that he appeared nervous, and "bladed" away from him (blading is a term of art used by police to refer to when they believe persons are angling their bodies in such a way as to conceal something — such as, in this case, the satchel). Cst. O'Toole demanded identification from Mr. Le (who responded that he did not have any). When asked by Cst. O'Toole what was in the satchel, Mr. Le fled. Csts. O'Toole and Reid pursued, caught and arrested him on a nearby street. After the arrest, Mr. Le and his bag were searched, which led to the discovery of a loaded firearm and cash. Later, while being searched at the police station, he handed the police 13 grams of cocaine that he had in his possession.

[15] Mr. Le was charged with ten offences including the unlawful possession of a gun, cocaine for the purposes of trafficking, and proceeds of crime. He pleaded not guilty and sought to exclude the evidence on the basis that the police acted unconstitutionally and breached his rights under ss. 8 and 9 of the *Charter*.<sup>1</sup>

### III. Judicial History

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<sup>1</sup> The parties agreed that if the evidence is admissible, either because there was no violation of Mr. Le's *Charter* rights or because the evidence is admissible under s. 24(2) of the *Charter*, then Mr. Le's guilt will be considered to have been proven beyond a reasonable doubt.

[16] Since we are content with disposing of this appeal on the basis of ss. 9 and 24 of the *Charter*, there is no need to delve into the judicial history of s. 8 in this case. In what follows, then, we outline the judicial history on the ss. 9 and 24 issues only.

A. *Superior Court of Justice (Campbell J.)*

[17] In relation to s. 9, the trial judge found that Mr. Le was first detained only when Cst. O’Toole asked him about the contents of his bag. Prior to Cst. O’Toole’s inquiry, no officer had physically restrained Mr. Le or made any demand or direction to him; Mr. Le was not physically stopped or delayed by the officers; and Mr. Le believed he was free to leave. Further, and as to the arbitrariness of the detention, Cst. O’Toole reasonably suspected that Mr. Le was armed with a gun at the moment that he was asked about the contents of his bag because he appeared “nervous”, was “fidgeting” and was “blading” his body away from the officer. Relatedly, the trial judge was also of the view that the implied licence doctrine authorized police entry onto the property.

[18] The trial judge turned in the alternative to consider whether, had a breach occurred, the evidence would be admissible under s. 24(2) of the *Charter* and applied the framework established by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. As to the seriousness of the *Charter*-infringing conduct, the trial judge held that any breach of the *Charter* in this case was “technical, inadvertent, and made in good faith”. The impact of the *Charter*-infringing conduct was not “especially significant”

because Mr. Le “did not make any inculpatory statements or provide the police with any incriminating evidence that they would not have discovered otherwise” (para. 107). Finally, society’s interest in adjudicating the case on its merits was significant — the evidence was reliable and formed an essential part of the Crown’s case. The *Grant* lines of inquiry, according to the trial judge, weighed in favour of admission.

B. *Court of Appeal for Ontario (Doherty J.A., Brown J.A., and Lauwers J.A. (dissenting))*

[19] Writing for the majority of the Court of Appeal for Ontario, Doherty J.A. dismissed the appeal and held that the trial judge did not commit any errors in the ss. 9 and 24(2) analyses. In support of the trial judge’s determination of when the detention arose, he held that Mr. Le’s “own evidence is significant” because “he believed he was free to leave the backyard after the police had entered and began questioning the young men,” meaning he did not believe he was detained (para. 62). While recognizing that the determination of whether and when a person is detained is objective, he was of the view that individuals’ “perception that [they are] in fact free to leave . . . must be an important consideration in determining” whether and when they are detained by the police (para. 63). Doherty J.A. further held that Mr. Le’s perceptions are of particular importance because “he is no stranger to street-level encounters with the police” (para. 63). The trial judge’s conclusion that the detention was not arbitrary was not disturbed.

[20] The majority also admitted the evidence, accepting that: any breach was “technical, inadvertent, and made in good faith”; its impact was minimal; the encroachment on Mr. Le’s liberty interest was momentary; and the evidence was highly reliable and the crimes very serious.

[21] For three reasons, Lauwers J.A., dissenting, would have held that Mr. Le’s detention occurred at the moment the police entered the backyard. First, the police were uninvited, did not seek or obtain permission or consent to enter the backyard, had no grounds for a warrant, and created a physical barrier blocking the exit. Second, “the atmosphere the police created by their questioning would lead a reasonable person in the appellant’s position to believe that he had no choice but to comply with their demands” (para. 141). Such an atmosphere arose not only because of the “pointed questions” that were put to the five young men, but also because the police demanded one of them to keep his hands where they can be seen (para. 141). Third, “the appellant’s young age, minority status, and his comparatively small physical stature” support a finding of detention at the moment the police entered the backyard (para. 142).

[22] Applying s. 24(2) of the *Charter*, Lauwers J.A. would have found that the admission of this evidence would bring the administration of justice into disrepute. The police conduct in this case constituted a serious *Charter* breach because the officers unlawfully entered private property on mere speculation regarding possible criminal conduct. Further, the impact of the breach was significant because it led to

the discovery of evidence that the police would not otherwise have discovered. While recognizing the reliability of the evidence and its importance to the Crown's case, Lauwers J.A. was of the view, after balancing all of the relevant inquiries, that "the kind of casually intimidating and oppressive misconduct involved in the unlawful police entry into a private backyard must be condemned by the court" (para. 163).

#### IV. Analysis

##### A. *Standard of Review*

[23] Before engaging in any analysis in this appeal, it is necessary to identify the applicable standard of review. Questions of law on an appeal attract a standard of correctness (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 18). Questions of fact attract a palpable and overriding error standard (para. 18). The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd*, at para. 20; *Grant*, at para. 43).

[24] In this judgment, we have respected, and used, the trial judge's findings of fact to assess whether the lower courts were correct in their assessment of when a detention occurred. Here, the timing of the detention turned on when a reasonable person would perceive they were under compulsion and not free to leave. An appeals court is entitled to have a different view of the impact that police conduct would have on a reasonable person in the shoes of the accused. This is not, contrary to our

colleague's view, recasting the record, but rather engaging in the same type of legitimate review routinely conducted by appeals courts across this country.

B. *Section 9 of the Charter*

[25] Section 9's prohibition of "arbitrary detention" is meant to protect individual liberty against unjustified state interference. Its protections limit the state's ability to impose intimidating and coercive pressure on citizens without adequate justification (*Grant*, at para. 20). Before the *Charter*, a person was *not* "detained" absent a "compulsory restraint . . . by due process of law" (*Chromiak v. The Queen*, [1980] 1 S.C.R. 471, at p. 478). Section 9 of the *Charter* changed this by altering the law's conception of "detention" in a substantial manner. Specifically, in *Grant*, this Court held that a *psychological* detention by the police, such as the one claimed in this case, can arise in two ways: (1) the claimant is "legally required to comply with a direction or demand" (para. 30) by the police (i.e. by due process of law); *or* (2) a claimant is not under a legal obligation to comply with a direction or demand, "but a reasonable person in the subject's position would feel so obligated" (para. 30) and would "conclude that he or she was not free to go" (para. 31).

[26] Even, therefore, absent a legal obligation to comply with a police demand or direction, and 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 with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may,

depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request (see S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (2nd ed. 2018), at p. 83).

[27] Having said that, not every police-citizen interaction is a detention within the meaning of s. 9 of the *Charter*. A detention requires “significant physical or psychological restraint” (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19; *Grant*, at para. 26; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 3). Even where a person under investigation for criminal activity is questioned, that person is not necessarily detained (*R. v. MacMillan*, 2013 ONCA 109, 114 O.R. (3d) 506, at para. 36; *Suberu*, at para. 23; *Mann*, at para. 19). While “[m]any [police-citizen encounters] are relatively innocuous, . . . involving nothing more than passing conversation[,] [s]uch exchanges [may] become more invasive . . . when consent and conversation are replaced by coercion and interrogation” (Penney et al., at pp. 84-85). In determining when this line is crossed (i.e. the point of detention, for the purposes of ss. 9 and 10 of the *Charter*), it is essential to consider all of the circumstances of the police encounter. Section 9 requires an assessment of the encounter as a whole and not a frame-by-frame dissection as the encounter unfolds.

[28] In this case, it is common ground that the young men were *not* “legally required to comply with a direction or demand” by the police. This is important because it underscores that these young men were not legally required to answer the

questions posed by the police, produce their identification, or follow directions about where they could place their hands. The officers had no legal authority to force them to do these things. Therefore, our analysis in this case will focus on the second way a psychological detention arises: whether a reasonable person, who stood in the appellant's shoes, would have felt obligated to comply and would not have felt free to leave as the police entered the backyard and made contact with the men.

[29] There is no dispute, whether among the courts below or the parties to this appeal, that Mr. Le was detained *at some point* in the backyard. What we must decide is when this occurred and whether it was arbitrary. This is because the analysis of whether s. 9 of the *Charter* has been infringed proceeds in two stages. The first stage inquires into whether the claimant was detained at all. If that leads to the conclusion that the claimant was detained, the second stage of analysis inquires into whether the detention was arbitrary. Both stages attract a correctness standard of review.

[30] In our respectful view, the trial judge and the majority of the Court of Appeal for Ontario erred at both stages by concluding that the detention crystallized only when Mr. Le was asked what was in his satchel. Rather, he was detained when the police entered the backyard and made contact. Since no statutory or common law power authorized his detention at that point, it was an arbitrary detention.

(1) Timing of Detention



[31] The sometimes murky line between general questioning (which does not trigger a detention — see *Suberu*) and a particular, focussed line of questioning (which does) led this Court in *Grant* to adopt three non-exhaustive factors that can aid in the analysis. These factors are to be assessed in light of “all the circumstances of the particular situation, including the conduct of the police” (*Grant*, at para. 31):

- (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 focused investigation.
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication. [Emphasis added; para. 44.]

[32] As we explain below, each of these three factors support the conclusion that Mr. Le’s detention began the moment the police entered the backyard and made contact with the young men.

- (a) *Circumstances Giving Rise to the Encounter as They Would Reasonably Be Perceived*

[33] The circumstances giving rise to the encounter between the officers and the young men in the backyard of the L.D. townhouse support a finding of detention arising prior to Cst. O'Toole's inquiry about the contents of the appellant's satchel.

[34] We accept that officers have wide powers to police communities and often do so by walking around. The conduct of the police in this case, however, exceeded the norms of community policing. Not only did three police officers enter a small private backyard in which five young men were standing around, talking, and "appeared to be doing nothing wrong", the officers immediately questioned the young men about "what was going on, who they were, and whether any of them lived there". They also required the young men to produce documentary proof of their identities and gave instructions about where to place their hands. It is common ground that the police had no legal authority to force the young men to do these things and the young men were under no legal duty to comply.

[35] Based on the relevant considerations in *Grant* and the officers' own evidence, the police were not called to the backyard to provide general assistance, maintain order, or respond to unfolding events. No assistance was requested or required by the young men and no specific complaint had been received from a third party about trespassing or any form of disturbance. No order needed to be maintained as the young men were "just talking". Nor were the police responding to any particular occurrence. The circumstances were simply that the officers themselves chose to walk to, and then into, that particular backyard.

[36] The trial judge found (at para. 23) that the police officers had two specific investigative purposes: (1) the officers were investigating whether any of the young men were J.J. (or knew the whereabouts of N.D.-J.) and (2) the officers were investigating whether any of the young men were trespassers. The trial judge would later note (at para. 70) that the police were pursuing a third investigative purpose as well: the L.D. townhouse was a “problem address” in relation to suspected drug trafficking.

[37] These investigative purposes are important when assessing whether the detention was arbitrary and whether the police were acting in good faith. However, when determining whether a detention has occurred, the circumstances giving rise to the encounter are assessed based on how they would reasonably be perceived. The subjective purposes of the police are less relevant in this analysis because a reasonable person in the shoes of the putative detainee would not have known why these police officers were entering the property.

[38] Thus, the determination of the timing of the detention is not advanced by repeating that the police officers had “legitimate investigatory purposes”, “valid investigatory objectives”, “legitimate investigative aims”, “valid investigatory purposes” and were conducting a “legitimate investigation” (for example, see Moldaver J.’s reasons, at paras. 213, 237-39 and 242). The legitimacy of any investigation in the context of s. 9 is measured against whether these objectives give

rise to reasonable suspicion or not. We conclude that they did not and that the detention was therefore arbitrary.

[39] On the facts of this case, there was no obvious cause for any police presence in the backyard and the police never expressly communicated to the young men why they were there. For example, the police officers did not tell the occupants of the backyard that they were looking for J.J. or N.D.-J.

[40] In such a situation, a reasonable person would know only that three police officers entered a private residence without a warrant, consent, or warning. The police immediately started questioning the young men about who they were and what they were doing — pointed and precise questions, which would have made it clear to any reasonable observer that the men themselves were the objects of police attention (*R. v. Wong*, 2015 ONCA 657, 127 O.R. (3d) 321, at paras. 45-46; *R. v. Koczab*, 2013 MBCA 43, 294 Man. R. (2d) 24, at paras. 90-104, per Monnin J.A. (dissenting), adopted in 2014 SCC 9, [2014] 1 S.C.R. 138). Further, the police demanded their identification and issued instructions, which would have made it clear to a reasonable observer that the police were taking control over the individuals in the backyard.

[41] Even if such conduct is seen as consistent with a concern over trespassing, the reasonable observer would understand that if the police simply wanted to make inquiries, the height of the fence allowed full interaction without entry. The officers could have simply asked their questions from the other side of the fence with an undiminished ability to see and hear any responses. Instead, they

entered the backyard without any consent, without an apparent or communicated purpose, and immediately engaged with the occupants in a manner that demonstrated they were not in fact free to leave.

[42] Regardless of the intentions of the officers as they approached the backyard, or the legitimacy of their investigative purposes, a reasonable person would not perceive their entry into the backyard as merely “assisting in meeting needs or maintaining basic order” (*Grant*, at para. 40).

(b) *Nature of the Police Conduct*

[43] The nature of the police conduct takes into account many considerations. A distinctive feature of the police conduct in this case was that the police were themselves trespassing in the backyard. This bears on the question of whether the detention occurred before the officer asked Mr. Le what was in his satchel. Other considerations that influence the analysis include: the actions of the police and the language used; the use of physical contact; the place where the interaction occurred and the mode of entry; the presence of others; and the duration of the encounter.

(i) The Police Officers Were Trespassers

[44] The police entered the property as trespassers. Our colleague accepts this conclusion. The judicially constructed reasonable person must be taken to know the law and, as such, must be taken to know that the police were trespassing when they

entered the backyard (Moldaver J.'s reasons, at para. 257). While not determinative, when the police enter a private residence as trespassers, it both colours what happens subsequently and strongly supports a finding of detention at that point in time.

(ii) The Actions of the Police and the Language Used

[45] The language used may show that the police are immediately taking control of a situation through loud stern voices, curt commands, and clear orders about required conduct. However, the power dynamic needed to ground a detention may be established without any of that. In our view, in the overall circumstances of this case, the actions of the police and the language used supports a finding of detention when the officers entered the backyard and made contact with the men.

[46] Our colleague makes much of the fact that the trial judge said that the police spoke “cordially” when they first entered the backyard. “Cordially” was the label chosen by the judge and was not a descriptor used by any witness. The only evidence comes from one of the young men who said that the police asked “how are you guys doing?” as they entered the backyard. There was no evidence about the tone of voice employed, but only a recollection of the words used.

[47] In our view, even accepting that there was a cordial greeting, the contemporaneous actions of the police and the language employed immediately after that statement illustrate the police were exerting dominion over the individuals in the backyard from the time of entry. In many instances, and this is one of them, actions

speak louder than words. The nicest of hellos could not mask the fact that the three persons entering onto this private property were uniformed police officers acting without permission, consent or legal authorization. Any momentary “cordiality” must also be placed in perspective and in the context of events as they actually unfolded. The language subsequently used by the police involved questioning the young men, asking for identification and telling one young man to keep his hands visible. One officer said his partner “yelled” this instruction and the young man complied immediately.

[48] Our colleague says we have changed the trial judge’s factual determination when we use the word “yelled” as the trial judge used the word “told” to describe the same encounter. This is not the case. We are quoting from the testimony of Cst. Teatero who stated: “I told him to keep his hands out and somebody – I think Constable O’Toole – yelled at him too to keep his – keep his hands where he can see them” (A.R., vol. I, at p. 230). The trial judge accepted this officer’s testimony in full. The trial judge chose to use another word, at a different level of abstraction, to describe what the officer said.

[49] There is no mischief here. Indeed, courts of appeal, including this Court, must be able to explain and expand on what has occurred or did not occur in a given case as long as there is an evidentiary foundation to do so on the record before them and the explanation or expansion does not contradict what the trier of fact has found. For example, a trier of fact may say that it was hot on a certain day. Courts of appeal

may expand on that description by pointing out that the temperature, according to accepted evidence, was 45 degrees. Similarly, a trier of fact may find that an event occurred at night. A court of appeal may provide more specificity by providing the actual time the event occurred. In both of these examples, the added explanation or expansion does not contradict what the trier of fact has found. The addition, in other words, does not overturn the findings of fact — it simply elaborates and provides more precision. Courts of appeal have access to a full evidentiary record for a reason. We do not accept that providing more detail or precision undermines the fact finding functions of trial courts.

(iii) The Use of Physical Contact

[50] There is no evidence the police made any physical contact with the young men. There was, however, physical proximity: once the officers entered the backyard, there were eight people in a small space. Each of the officers positioned themselves in a way to question specific young men apart from the others. Lauwers J.A. observed that the officers positioned themselves in a manner to block the exit. This type of deliberate physical proximity within a small space creates an atmosphere that would lead a reasonable person to conclude that the police were taking control and that it was impossible to leave.

(iv) The Place Where the Interaction Occurred and the Mode of Entry



[51] There is an important relationship between the fact that this encounter took place at a private residence and the mode of entry employed by the police. The nature of any police intrusion into a home or backyard is reasonably experienced as more forceful, coercive and threatening than when similar state action occurs in public. People rightly expect to be left alone by the state in their private spaces. In addition, there is the practical reality that, when authorities take control of a private space, like a backyard or a residence, there is often no alternative place to retreat from further forced intrusion.

[52] The private nature of this backyard diminishes the significance of the trial judge's observation that the nature of the police conduct was attenuated because Mr. Le was asked *only* for identification, was not delayed on his way anywhere, and had the freedom to either comply or "walk away". These were factors recited by this Court in *Mann*, at para. 19, in describing circumstances in which a detention does *not* arise. But, the police conduct in *Mann* occurred on a downtown street, not at a private residence. In the circumstances of this appeal, *to where*, precisely, was Mr. Le expected to "walk away"? And *from what* was he being "delayed" when he was socializing at a friend's house? In our view, such considerations have limited, if any, relevance when applied to police conduct at a private residence.

[53] The mode of entry involved three uniformed officers suddenly occupying a backyard and taking control over the people in it late at night. Our colleague alleges we have mischaracterized the actions of the officers as they entered the backyard and

how they would have been reasonably perceived. As one example, he points to the manner in which Cst. O'Toole entered the backyard, insisting that the trial judge found nothing intimidating or potentially coercive in this action.

[54] To be clear, Cst. O'Toole's testimony was as follows: "I entered to the right, okay. I came – I didn't come through the gate when I entered the yard. I stepped over the fence 'cause that's where I was" (A.R., vol. II, at p. 67). Whether he "went over", "stepped over", or "jumped over" the fence, we are simply explaining how Cst. O'Toole entered the backyard on the basis of the police officers' evidence.

[55] However, where a trial judge concludes that this mode of entry was not intimidating or coercive, they are addressing how a reasonable person would perceive that act for the purposes of determining whether there has been a detention under s. 9 of the *Charter*. This is reviewable on a correctness standard. We take, and are entitled to take, a different view of whether a reasonable person in the accused's shoes would, based on this mode of entry, feel they were not free to leave and would feel obligated to comply with a police direction or demand.

[56] The mode of entry would be seen as coercive and intimidating by a reasonable person. Two officers came in immediately. The fact that a third officer first walked the perimeter before entering over the fence would convey to a reasonable person that there was a tactical element to the encounter. Further, a reasonable person would interpret Cst. O'Toole's decision to enter by coming over the fence as demonstrating a sense of urgency. In these circumstances, we accept the

submission of the intervener the Scadding Court Community Centre that the use of such tactics by the police to enter a private residence communicates an exercise of *power* and would be so understood by a reasonable person.

[57] In viewing these actions as tactical, we are not, as our colleague suggests, recasting the record. We are simply articulating how the entry would be reasonably perceived — which is what this Court did in *Grant* when it held that the taking of tactical positions by police supports a finding of detention. Significantly, the trial judge in *Grant* did not mention tactical positioning at all. This Court, however, did not hesitate to describe the police conduct as tactical because doing so involved reasonable characterizations, not findings of fact. While our colleague prefers to characterize the jump over the fence as a likely outcome of convenience, it is not clear how the convenience to the police has *any* impact about how it is perceived by a reasonable person. We are of the view that the entry over the fence conveyed a show of force.

[58] Each officer understood that the backyard was part of a private residence. Yet, their mode of entry displayed indifference towards the legal significance of the “little mini fence”. The officers treated the backyard as if it were a common area that was free to all to come and go as they please, which would suggest to the reasonable person that they were now under police control.

[59] Placing the mode of entry aside, we agree with Lauwers J.A.’s observation that it was unlikely that the police officers would have “brazenly entered

a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community” (para. 162). Living in a less affluent neighbourhood in no way detracts from the fact that a person’s residence, regardless of its appearance or its location, is a private and protected place. This is no novel insight and has long been understood as fundamental to the relationship between citizen and state. Over 250 years ago, William Pitt (the Elder), speaking in the House of Commons, described how “[t]he poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter! — all his force dares not cross the threshold of the ruined tenement” (House of Commons, *Speech on the Excise Bill* (March 1763), quoted in Lord Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (1855), vol. I, at p. 42).

[60] The trial judge noted that this neighbourhood of Toronto experiences a high rate of violent crime. The officers themselves testified to routinely patrolling this housing co-operative. But, the reputation of a particular community or the frequency of police contact with its residents does not in any way license police to enter a private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime. Indeed, that a neighbourhood is policed more heavily imparts a *responsibility* on police officers to be vigilant in respecting the privacy, dignity and equality of its residents who already feel the presence and

scrutiny of the state more keenly than their more affluent counterparts in other areas of the city (Canadian Muslim Lawyers Association's factum, at p. 9).

[61] It follows, and as Lauwers J.A. pointed out, "[m]ost people would be utterly shocked and appalled by the sudden appearance of police officers in their backyard or the front hall of the[ir] house in the absence of emergent circumstances" (para. 112). There is no reason why this statement does not apply in full effect to these events in the backyard of the L.D. townhouse.

(v) The Presence of Others

[62] The police conduct towards others in the backyard would likely have had an impact on how a reasonable person in Mr. Le's shoes would have perceived the unfolding situation.

[63] In this case, the presence of others would likely increase, not decrease, a reasonable person's perception that they were being detained. Each man witnessed what was happening to them all. The presence of others clearly did not prevent the police entry in the first place or provide any privacy, security or protection against incursions thereafter. Each man saw that the police asked each of them who they were and what they were doing. They watched the police demand and receive identification from others, illustrating that these were not polite requests to be considered, but were treated as orders to be obeyed. When one of the men was told to keep his hands visible, the trial judge said he "immediately complied". Compliance connotes an

order. Witnessing this repeated sequence of command and compliance would have led a reasonable person to believe that they were not free to leave and that even their physical movements were subject to police control.

[64] The police did not tell any of the young men in the backyard that they were free to go and/or were not required to answer their interrogatories. What Mr. Le saw occurring to others likely increased the perception and reality of coercion. The others simply did what the police told them to do — consistent conduct, which strongly suggests what a reasonable person would also have thought and done in these circumstances. A reasonable person would have thought they had no alternative, but to remain and obey.

(vi) The Duration of the Encounter

[65] As to the duration of the encounter, although the interaction lasted less than a minute, the impact of the police conduct in that short space of time would lead any reasonable person to conclude that it was necessary to comply with police directions and commands, and that it was impossible to leave or walk away without the permission of the police once they entered the backyard. The duration of the encounter is simply one consideration among many.

[66] In some cases, the overall duration of an encounter may contribute to the conclusion that a detention has occurred (i.e. the simple passage of time demonstrates how the person came to believe they could not leave). In other cases, however, a

detention, even a psychological one, can occur within a matter of seconds, depending on the circumstances. For example, the detention of the accused in *R. v. Therens*, [1985] 1 S.C.R. 613, existed from *the outset* of an interaction where police read the accused a breathalyzer demand at the roadside and he accompanied the officer to provide samples of his breath at the station. As this Court held in *Grant*, “a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed” (para. 42). In this case, the qualifying single forceful act or word occurred when the officers entered the property asking questions.

[67] Our colleague, consistent with the courts below, emphasizes that the encounter was short in duration and that weighed against a finding of detention prior to Cst. O’Toole’s inquiry of Mr. Le. Although this interaction lasted less than a minute, things can and do happen very quickly. The primary focus remains on the perception of a reasonable person in the circumstances. The impact of the police conduct in that short space of time would lead any reasonable person to conclude that it was necessary to comply with police directions and commands and that it was impossible to leave or walk away without the permission of the police.

[68] In sum, the nature of the police conduct here was, in one word, and our word, aggressive. This is an accurate and appropriate adjective to capture how a reasonable person would perceive the police conduct, conduct which it is accepted may be experienced as more forceful, coercive, and threatening because it occurs on

private property like a residence. Considered individually and in combination, these aspects of their conduct support the conclusion that a detention arose as soon as the police officers entered the backyard and started asking questions.

(c) *Particular Characteristics or Circumstances of the Accused*

[69] Under this *Grant* factor, courts may, when relevant, take into account the particular characteristics or circumstances of the individual. In this case, Mr. Le was the eldest of the group and he is described as being 20 years old, of Asian descent, and of small stature.

[70] The trial judge identified the appellant's minority status, level of sophistication, age, and physical stature as the relevant personal characteristics that could bear on the timing of a detention (para. 85). To this list, the majority of the Court of Appeal for Ontario further considered Mr. Le's subjective perceptions of the unfolding events to be an important consideration in the detention analysis. The misunderstandings and errors in the treatment of the appellant's personal circumstances were not only important in their own right, they expose larger problems related to the sources of evidence that may be relevant in assessing whether a reasonable person would have felt detained as the officers entered this backyard and made contact with, and demanded identification from, five racialized young men.

[71] We first set out the general principles applicable to the consideration of the personal circumstances of the accused in the detention analysis. We will then turn



to the differences between the assessment of race and minority status as a consideration in the detention analysis and the separate, and distinct, inquiry of whether the police were engaged in racial profiling. Evidence about race relations relevant to the detention analysis, like all evidence of social context, can be derived from “social fact” or the taking of judicial notice. The information necessary to inform the reasonable person can take the form of reliable research and reports that are not the subject of reasonable dispute; and, rarely, direct, testimonial evidence. In this appeal, other than noting that he took a “realistic appraisal of the entire transaction” (para. 89), the trial judge did not consider the reasonable person in his analysis. This led to further error in the courts below in the assessment of Mr. Le’s level of sophistication and his subjective perceptions of the unfolding events. We will also briefly address how a claimant’s age and stature weighs in the analysis.

(i) General Principles

[72] An important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community in Canada. Binnie J. in *Grant* found that “visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive” (paras. 154-55 and 169 (per Binnie J., concurring); see also, *Therens*, at p. 644 (per Le Dain J, dissenting) on whether citizens truly have a “choice” to obey the police’s commands).

[73] In *Grant*, this Court recognized how the legal standard on which a detention is measured is based on a reasonable person in like circumstances and that this norm needs to account for diverse realities. By expressly including the race of the accused as a potentially relevant consideration, 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* (at para. 32), courts must appreciate that individuals in some communities may have different experiences and relationships with police than others and such may impact upon their reasonable perceptions of whether and when they are being detained.

(ii) Differences Between Race and Racial Profiling Under Section 9 of the Charter

[74] It is important, at the outset, to understand both the place and purpose of race as a consideration in the detention analysis and how it differs from the concept of racial profiling.

[75] 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. The s. 9 detention analysis is

thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.

[76] In contrast, the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment (Ottawa Police Service, *Racial Profiling* (June 27, 2011), Policy No. 5.39 (online), at p. 2).

[77] This Court adopted the following definition of racial profiling in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789:

Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.

Racial profiling [also] includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed. [Emphasis deleted; para. 33.]

[78] Thus, racial profiling is anchored to an internal mental process that is held by a person in authority — in this case, the police. This means that racial profiling is primarily relevant under s. 9 when addressing whether the detention was arbitrary because a detention based on racial profiling is one that is, by definition, not based on reasonable suspicion. Racial profiling is also relevant under s. 24(2) when assessing whether the police conduct was so serious and lacking in good faith that admitting the evidence at hand under s. 24(2) would bring the administration of justice into disrepute.

[79] For this reason, a finding that there has been no racial profiling has little bearing on the timing of the detention where the focus is on what a reasonable person in the shoes of the accused would perceive and not on what motivated the officers to act as they did.<sup>2</sup>

[80] At trial, the issue of racial profiling arose under s. 24(2). The trial judge rejected that and found that there was no racial profiling in this case. Even though as early as 2006, Doherty J.A. noted that there is now “an acceptance by the courts that racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it” (*Peart v. Peel Regional Police Services Board* (2006), 43 C.R. (6th) 175 (Ont. C.A.), at para. 94), it is still open to a trial judge to determine that something that often occurs did not actually happen in the particular case before

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<sup>2</sup> It may be that a finding that there was racial profiling may affect how a reasonable person experiences the police interaction at issue. But the trial judge found there was no racial profiling here, and therefore racial profiling is not a relevant consideration in *this* detention analysis.

them. Neither of the parties have contested the trial judge's conclusion and we are not taking issue with the trial judge's determination.

[81] To repeat, however, the conclusion that there was no racial profiling addresses the police motivation and not the separate and specific question of the impact race may have had on the perception of the reasonable person in the shoes of the accused. While racial profiling looks inwards at what motivated the police interaction with a person, the racial context analysis relevant to the timing of the detention under s. 9 is not inward-looking, but rather focuses on the relational aspect between the police and racialized communities in order to discern what a reasonable person in the circumstances would perceive. The focus under s. 9 is thus on what a reasonable person in the shoes of the accused would perceive and it is to that question we now turn

(iii) Race and the Timing of Detention

[82] A reasonable person in the shoes of the accused is deemed to know about how relevant race relations would affect an interaction between police officers and four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative.

[83] Evidence about race relations that may inform whether there has been a detention under s. 9, like all social context evidence, can be proved in legal proceedings by direct evidence, admissions, or by the taking of judicial notice. The

realities of *Charter* litigation are that social context evidence is often of fundamental importance, but may be difficult to prove through testimony or exhibits. To be sure, social context evidence is a type of “social fact” evidence, which has been defined as “social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case” (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 57).

[84] In most cases, the knowledge imputed to the reasonable person comes into evidence as a social fact of which the judge may take judicial notice. In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, McLachlin C.J. held that a court may “take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy” (para. 48). These two criteria are often referred to as the Morgan criteria (see E. M. Morgan, “Judicial Notice” (1944), 57 *Harv. L. Rev.* 269).

[85] In *Spence*, however, Binnie J. clarified that the taking of judicial notice is more nuanced and depends on the role such facts will play in the disposition of a given case — the more they become dispositive of an issue in dispute, the more pressing it is to meet the two Morgan criteria (para. 63). In circumstances where social facts will merely paint the background to a specific issue, then courts will usually take judicial notice of them and the threshold is lower. However, in cases that fall between these two ends of the spectrum, Binnie J. remarked:

When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such “fact” would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute . . . . [para. 65]

[86] The context of race relations operates in the middle ground discussed by Binnie J.; it is neither dispositive of when Mr. Le was detained, nor mere background information. The race relations context is one consideration, among many, aiding in the analysis and interpretation of events that are crucial to this appeal.

[87] In *Grant*, Binnie J. took judicial notice of how race could affect a s. 9 detention analysis when he observed how experience tells the courts that “[a] growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified ‘low visibility’ police interventions in their lives” (para. 154; see also, *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83; *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.), at para. 9).

[88] To use Binnie J.’s test and terminology in *Spence* in this case: What would reasonable people, who have taken the trouble to inform themselves on the topic of race relations between the police and various racialized communities, know about the type of interaction that occurred in the backyard? What facts would be accepted as not being the subject of reasonable dispute?

1. *Reliable Reports on Race Relations*

[89] The information necessary to inform the reasonable person is readily available from many sources and authorities which are not the subject of reasonable dispute. Many authoritative studies, research and articles were cited to the Court to help establish the social context of the relationship between the police and racialized communities. In their submissions to this Court, multiple interveners made arguments on the basis of reliable studies and reputable reports that predate this appeal. This information about race and policing plays a crucial role and may also inform many issues, including fact finding, credibility assessments, determining what evidence is accepted as persuasive, assessing if there has been a detention and whether it is arbitrary under s. 9, and whether evidence should be admitted under s. 24.

[90] Members of racial minorities have disproportionate levels of contact with the police and the criminal justice system in Canada (R. T. Fitzgerald and P. J. Carrington, “Disproportionate Minority Contact in Canada: Police and Visible Minority Youth” (2011) 53 *Can. J. Crimin. & Crim. Just.* 449, at p. 450). In 2003, the Ontario Human Rights Commission (“OHRC”) issued a report titled *Paying the Price: The Human Cost of Racial Profiling* (online). The OHRC summarized then existing research studies, which established that racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them. The following excerpt demonstrates the extent, breadth, and reliability of reports which began to chronicle the issues in the 1970’s:



...there have been numerous studies which have confirmed differential treatment of racialized groups in different contexts. The African Canadian Legal Clinic has identified at least 15 reports issued since the 1970s dealing with police/minority relations in Canada. Early Ontario reports included those of the Walter Pitman Task Force (1977) and a 1979 Report by Gerald Emmett Cardinal Carter to the Civic Authorities of Metropolitan Toronto and its Citizens.

In 1988, the Solicitor General of Ontario appointed Clare Lewis as chair of the Race Relations and Policing Task Force. The Task Force's 1989 report concluded that visible minorities believed they were policed differently: "They do not believe that they are policed fairly and they made a strong case for their view which cannot be ignored." The Task Force found that racial minorities would like to participate in law enforcement and crime prevention but are "denied integration into community life when labelled as crime prone." The report noted that the worst enemy of effective policing is the absence of public confidence and emphasized that police reliance on a "bad apple theory" to explain incidents does not help solve police race relations problems. The Task Force presented 57 recommendations to the Solicitor General covering monitoring, hiring and promotion, race relations training, use of force and community relations.

Stephen Lewis' 1992 *Report to the Premier on Racism in Ontario* on the issue of police/visible minority relations concluded that visible minorities, particularly African Canadians, experienced discrimination in policing and the criminal justice system. Stephen Lewis recommended that the Task Force on Race Relations and Policing be reconstituted owing to perceived inadequacies with the implementation of the 57 recommendations in its 1989 report. A second report of the Task Force was published in November 1992 which examined the status of the implementation of the recommendations from the 1989 report and offered additional recommendations.

In 1992, the Ontario government also established the Commission on Systemic Racism in the Ontario Criminal Justice System. This Commission studied all facets of criminal justice and in December 1995 issued a 450 page report with recommendations.

To date, this is the most comprehensive report on the issue of systemic racism in Ontario's criminal justice system. The review confirmed the perception of racialized groups that they are not treated equally by criminal justice institutions. Moreover, the findings also showed that the concern was not limited to police.

In addition to the various task forces, social scientists, criminologists and other academics have studied racial profiling using different social science research methods. Some have used qualitative research techniques and field observations while others have employed quantitative research and examined official records. Regardless of the method used, these studies have consistently showed that law enforcement agents profiled racial minorities. [Footnotes omitted; pp. 9-10.]

(See also Fitzgerald and Carrington, at p. 450.)

[91] The most recent report of the OHRC, entitled *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service*, was issued in November 2018. It is the latest in what the OHRC says is its 15-year commitment to removing race based discrimination and was an interim report of its year-long inquiry into the relationship between the Toronto Police Service (“TPS”) and the Black community. In this report, the OHRC used quantitative and qualitative research methods to understand the experiences of members of the Black community with policing (p. 16).

[92] The report covers the period of time between January 1, 2010 and June 30, 2017.

[93] Overall, the OHRC expressed serious concerns. The study revealed that “Black people are much more likely to have force used against them by the TPS that results in serious injury or death” and between 2013 and 2017, a Black person in Toronto was nearly 20 times more likely than a White person to be involved in a police shooting that resulted in civilian death (p. 19). The OHRC report reveals

recurring themes: a lack of legal basis for police stopping, questioning or detaining Black people in the first place; inappropriate or unjustified searches during encounters; and unnecessary charges or arrests (pp. 21, 26 and 37). The report reveals that many had experiences that have “contributed to feelings of fear/trauma, humiliation, lack of trust and expectations of negative police treatment” (p. 25).

[94] More recently, after the appeal was heard, Justice Michael H. Tulloch, of the Court of Appeal for Ontario, issued the Tulloch Report. The report focuses on the historical practice of carding in Ontario and the regulation entitled *Collection of Identifying Information in Certain Circumstances — Prohibition and Duties*, O. Reg. 58/16. It documents how, over time, the practice of carding evolved to no longer solely target persons of interest to detectives, but rather anyone the police deemed “of interest” during the course of their duties (pp. 38-39). The Tulloch Report is relevant because it focuses on the *perceptions* of those subject to police encounters similar to the kind that occurred here. Justice Tulloch notes that “[h]istorically, Indigenous, Black and other racialized communities have different perspectives and experiences with practices such as street checks and carding” (p. 37). Not only do these communities have fundamentally different perceptions and experiences with carding, the impact of carding on minority youth, especially those who live in less affluent communities, is acute. As Justice Tulloch notes (at pp. 41-42):

Youth, especially Indigenous, Black and other racialized youth, and youth in low-income housing, are disproportionately impacted by street checks. “[W]hile the ‘street’ constitutes a meaningful part of everyday life for many marginalized youth, their presence and visibility in that

space makes them ready targets for heightened police surveillance and intervention”. A street check is often a young person’s first contact with the police. [Footnote omitted.]

[95] The impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience. Carding takes a toll on a person’s physical and mental health. It impacts their ability to pursue employment and education opportunities (Tulloch Report, at p. 42). Such a practice contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization (see N. Nichols, “The Social Organization of Access to Justice for Youth in ‘Unsafe’ Urban Neighbourhoods” (2018), 27 *Soc. & Legal Stud.* 79, at p. 86; see also Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (2017), at pp. 31-40).

[96] These reports represent the most current statement on the relevant issues, and they originate from highly credible and authoritative sources. They are the product of research that included the time period at issue in this case. More importantly, they document actions and attitudes that have existed for a long time. A striking feature of these reports is how the conclusions and recommendations are so similar to studies done 10, 20, or even 30 years ago. These reports do not establish any new fact, but they build upon prior studies, research and reports and present a clear and comprehensive picture of what is currently occurring. Courts generally

benefit from the most up to date and accurate information and, on a go-forward basis, these reports will clearly form part of the social context when determining whether there has been an arbitrary detention contrary to the *Charter*.

[97] We do not hesitate to find that, even without these most recent reports, we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities (see D. M. Tanovich, “Applying the Racial Profiling Correspondence Test” (2017), 64 *C.L.Q.* 359). Indeed, it is in this larger social context that the police entry into the backyard and questioning of Mr. Le and his friends must be approached. It was another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions. The documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused. When three officers entered a small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a Toronto housing co-operative, these young men would have felt compelled to remain, answer and comply.

## 2. *Testimonial Evidence*

[98] The findings of these reports are more than sufficient to inform the reasonable person, standing in the accused’s shoes, of the social context to this encounter in the backyard of the L.D. townhouse. We stress that direct, testimonial

evidence is usually not necessary to inform the reasonable person analysis. But, where appropriate, direct, testimonial evidence may be elicited.

[99] This is what occurred in this case. Mr. Le and the other men testified to being regularly stopped by police, asked where they lived, required to produce identification, and being forced to submit to a search (TJR, at paras. 112-13). One young man testified that he was stopped by the same officer three times in the same day at the Scadding Court Community Centre, Kensington Market and his friend's backyard (A.R., vol. III, at pp. 290-91).

[100] L.D., who lived at the townhouse, testified that, in addition to frequent stops in which he was asked a "bunch of questions" and to produce identification, several years previously, he was about to open the door to enter his home when an officer came up quickly on a bicycle and told him to stop, not to enter the home, and to lift up his shirt. When L.D. lifted his shirt, he was then told by the officer that he could go inside. L.D. said he had just been walking home and that this encounter was intimidating and frightened him. He felt that he had to comply "[c]ause there was no reason for [the officer] to just come to [him] when [he] was right in front of [his] door" (A.R., vol. IV, at p. 7).

[101] Another young man testified that:

Q. On any of these times when you stopped and, and demanded of information or searched, were you ever, did it ever result in a charge?

A. No.

Q. The times that were stopped and searched and demanded information from, how did it make you feel?

A. Well, I mean, we couldn't, well, I couldn't walk around and not get bugged pretty much.

Q. But how did that make you feel?

A. I guess that's just....

Q. Pardon?

A. It became regular, so I didn't really feel anything.

Q. And how did that feel that it felt like nothing?

A. Pretty bad. I just became accustom to that.

Q. Did you ever feel you could not answer their questions?

A. You couldn't not answer. You always have to answer them.

Q. Did you ever feel you could walk away and not be searched?

A. No.

Q. Why not?

A. 'Cause always it would be, you, it was, like, an unspoken rule to not. You would have to just give up your ID or you would just keep on getting harassed 'til you gave your ID, so you'd always have to comply with them.

Q. And what, where did this unspoken rule, how did that come to be in your mind as a rule?

A. It just happened so much that I just got used to it.

Q. And what do you think would happen if you didn't?

A. God knows. I'm not sure.

Q. Well, something good or something bad?

A. Probably bad. Most likely bad.

Q. Why bad?

A. I don't think there's any other way to go about it.

(A.R., vol. IV, at pp. 103-4)

[102] Mr. Le testified that when he was about 13 or 14 he was stopped frequently by police patrolling in cruisers, bicycles and on foot:

They would ask us where are going, . . . , ask if we live in the area. Or if a bike officer stopped us, they actually get in our face, get off our bikes, basically, make a perimeter with their bikes so we can't really run away, and they would ask us, what's our names, what are we doing around here, a little frisk.

(A.R., vol. IV, at p. 148)

[103] Mr. Le testified that in these encounters he did what was required of him. He heard stories of police violence against others, saw some physical violence himself, and feared such violence would be turned towards him if he refused or resisted.

[104] The trial judge found unpersuasive the testimony of the young men that they were repeatedly stopped, asked for identification, and always simply complied with various demands. Their experiences were seen as manufactured because their testimony was too consistent and their explanation about what had happened over various years lacked specifics, such as dates and the names of the officers involved. He stated:



... most of this evidence struck me as manufactured. While the testimony of these defence witnesses was strikingly similar in content, as if they had practiced their evidence in this regard together, it was steeped in the generic description of non-specific historical events that allegedly took place with frequency and regularity over a period of years. No specific dates were ever identified. No specific police officers were ever mentioned. Factual details that might identify a particular incident and distinguish it from another were entirely absent. In short, I found this body of evidence quite unpersuasive. [para. 116]

[105] No one has challenged this assessment. When the trial judge rejected their evidence, there was no testimony on the issue of race in the detention analysis.

[106] That does not, however, end the matter. The absence of testimonial evidence does not obviate the trial judge's obligation to take into consideration what a reasonable person would know about how race may affect such interactions. The trial judge's conclusion that these young men did not have the past experiences they described means only that he has rejected their evidence about how their personal history with the police may have affected their subjective perceptions of what they thought was happening to them when the police entered the backyard. However, the s. 9 inquiry requires an objective assessment of what *a reasonable person in the shoes of the accused* perceived about whether they were free to leave. In the absence of testimonial evidence, which is what happens when such is either rejected or was never tendered, there is still a need to inquire into how the race of the accused may have impacted the s. 9 analysis. There is no indication that the trial judge employed, in any adequate or substantive way, the perspective of the reasonable person in *Grant* who had informed themselves about community perspectives on race and policing.

The need to consider the race relations context arises even in cases where there is no testimony from the accused or any witness about their personal experience with police. Even without direct evidence, the race of the accused remains a relevant consideration under *Grant*.

(iv) Level of Sophistication

[107] The failure to consider the reasonable person was further exacerbated by Doherty J.A.'s observation that Mr. Le "is no stranger to street-level encounters with the police" and that his experience speaks to his level of sophistication as well as to how race is relevant to the detention analysis. The implication is that Mr. Le's prior street-level interactions with the police somehow supports an inference that he is familiar with the dynamics in such interactions and that this familiarity would lead a reasonable person in Mr. Le's circumstances to conclude that there had been no detention. That is to say that a reasonable person with a similar experiential history would view what happened as merely another police interaction or, to put it simply, "business as usual".

[108] We note that this statement appears to accept Mr. Le's evidence that he was repeatedly stopped and detained in the past, even though the trial judge found his evidence to be unbelievable. Despite this contradiction, our main disagreement is with the general principle. We see no good reason for the conclusion that *more* frequent encounters with the police make it *less* likely that a person feels "detained" when police approach. Such reasoning is flawed and is premised on a non-sequitur:

that familiarity with police encounters breeds familiarity with the scope of police entitlement to detain and with one's *Charter* right to be free from arbitrary detention. As the interveners the Federation of Asian Canadian Lawyers and the Chinese and Southeast Asian Legal Clinic observed (transcript, at p. 55), this is "a legal fiction" because such knowledge presupposes that, if something incriminating is discovered as a result of the police encounter, charges are laid, the accused person brings a *Charter* claim, the claim is adjudicated, the accused person receives the reasons, they read the reasons carefully, and then adapt their future behaviour accordingly. Experience tells the courts this is not the reality.

[109] Merely because an individual has had repeated interactions with the police does not mean that the individual has acquired a level of sophistication in dealing with the police. Indeed, in our view, it is more reasonable to anticipate that frequency of police encounters will typically foster *more*, not *less*, "psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice" (*Therens*, at p. 644). Individuals who are frequently exposed to forced interactions with the police more readily submit to police demands in order to move on with their daily lives because of a sense of "learned helplessness" (M. E. P. Seligman, "Learned Helplessness" (1972), 23 *Annu. Rev. Med.* 407, at p. 408, as discussed in *R. v. Lavallee*, [1990] 1 S.C.R. 852). That is, when individuals have repeated exposure to unwanted experiences from a more powerful source, they learn to simply acquiesce and try to get through the unwanted experience by getting it over with as quickly and peaceably as possible.

[110] In this case, Mr. Le's experience with the police tends to *support* a finding that he *was* detained when the police entered the backyard. While most Canadians have infrequent or no experience with police encounters, we ought not to be naïve to the reality that others' encounters with police will not only be frequent, but also unpleasant. Any previous experiences would not attenuate the power imbalance or reduce the coercive force of multiple police officers entering a private backyard without explanation or authority. A reasonable person who has been stopped by the police on multiple prior occasions would more likely perceive that it is necessary to simply submit to police demands. We accept Lauwers J.A.'s characterization of this encounter as "casually intimidating and oppressive" (para. 143). In our view, Mr. Le's level of sophistication supports a conclusion that a detention arose as soon as the police entered the backyard.

(v) Mr. Le's Subjective Perceptions

[111] In our respectful view, the courts below erred when they gave priority to Mr. Le's personal view that at one point in time he felt free to leave the backyard and try to enter the house. This transformed the detention analysis from an objective into a subjective inquiry.

[112] After finding the police entry was authorized by law, the trial judge said (at para. 87):

Indeed, the accused himself testified that he thought that he was free to leave the backyard area. More particularly, the accused explained that he went to go inside the townhouse through the back door because he did not think he needed to remain in the backyard, as no police officer was talking directly to him.

In affirming the trial judge's findings on this point, the majority of the Court of Appeal for Ontario, while noting that the test is objective, nonetheless grounded its analysis on considerations subjective to Mr. Le (at paras. 62-64):

I see no error in the trial judge's analysis. Nor can his findings be characterized as unreasonable. In assessing the reasonableness of the trial judge's findings, the appellant's own evidence is significant. The appellant testified that he believed he was free to leave the backyard after the police had entered and began questioning the young men. In other words, he did not think he was detained. . . .

. . .

The appellant's perception of the ongoing dynamic between himself and Constable O'Toole could reasonably be taken by the trial judge as a strong indication of how that dynamic would be reasonably perceived. More to the point, I cannot characterize as unreasonable, the trial judge's conclusion as to the timing of the detention when that conclusion reflects the appellant's own testimony about his perception of when his detention began.

[113] In *Grant*, this Court emphasized how the detention analysis is *objective* in nature and takes into consideration "all the circumstances of the particular situation, including the conduct of the police". The Court also allowed that "the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police" in the overall reasonableness analysis (para. 32 (emphasis added)).

[114] Before this Court, the Crown has argued that claimants' subjective perceptions about whether or not they were detained are "highly relevant". We do not accept this argument. It remains, and should remain, that the detention analysis is principally objective in nature. Prior to *Grant*, the objective nature of the test may have been unclear. For example, in *Therens*, this Court held that a detention will arise when an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (p. 644) — a statement that may have suggested that the analysis focuses on the reasonableness of an individual's subjective perceptions. But in *Grant*, this Court clarified that the analysis is objective.

[115] Undue focus on subjective perceptions detracts from the underlying rationales for adopting an objective test, of which there are at least three. First, as this Court held in *Grant*, the objective nature of the analysis enables the police "to know when a detention occurs [and, therefore,] allow[s] them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections" (para. 32). Second, the objective nature of the analysis ensures that the rule of law is maintained in the sense that the claims of all individuals will be subjected to the same standard. That is, the objective standard ensures that all individuals will be treated equally and enjoy the same *Charter* protections regardless of their own subjective thresholds of psychological detention or their individual perceptions of police interactions. In other words, the objective nature of the analysis leads to some level of uniformity in applying the *Charter* to police conduct. Third, and relatedly, the

objective nature of the analysis accounts for the reality that some individuals will be incapable of forming subjective perceptions when interacting with the police.

[116] The focus of the s. 9 analysis should not, therefore, be on what was in the accused's mind at a particular moment in time, but rather on how the police behaved and, considering the totality of the circumstances, how such behavior would be reasonably perceived. To find otherwise puts the onus on the claimant to gauge correctly when they are detained and when they are not. This very problem arises in this case. Mr. Le testified that he was not permitted by the police to go into the house and was physically prevented from doing so. If one accepts Mr. Le's full account of events, then his subjective perception, howsoever fleeting, that he *could* go into the house was simply wrong. Further, if, as our colleague concludes, the detention occurred when the officer told the young man to keep his hands visible, Mr. Le's subjective perception would have arisen only after the detention had already begun. Even accepting that there may be cases in which the subjective perception of the accused is relevant, this case cannot be one of them.

[117] In addition, the "particular circumstances and perceptions" referred to in *Grant* were to be used to determine whether there was a power imbalance, not whether there was in fact a detention. Every indication is that the perceptions of accused persons were intended to play a very limited role — something that did not occur in this case.

[118] Aggravating the trial judge's erroneous treatment of Mr. Le's subjective account was his inconsistent treatment of that account. Specifically, the trial judge first *rejected* Mr. Le's evidence about why he turned his body away from Cst. O'Toole (to go inside the house), but then later *relied on* this rejected evidence to support his finding that Mr. Le felt he was free to leave the backyard. To be sure, Mr. Le did give this evidence by testifying that he was not "blading" his body and he was not acting nervously or fidgeting. He also stated that he tried to head into the house when Cst. O'Toole asked for identification because (1) he thought he was free to leave and (2) he did not like the way the police were treating him and his friends. As mentioned above, Mr. Le also testified, however, that when he tried to go into the house, Cst. O'Toole grabbed him by the shoulder, turned him around, and questioned him on where he was going and why he was trying to get inside.

[119] Yet, in addition to stating his general disbelief of Mr. Le (at para. 63), the trial judge also specified (at para. 65) that he *rejected* his testimony "that he was not . . . 'blading' his body [during the police encounter in order] to keep his bag . . . away from the officers, but rather was only turning to try to step inside the house". The difficulty is that, in support of his conclusion that Mr. Le was not detained until he was asked about the contents of his bag, the trial judge *relied upon* the selfsame evidence: "the accused explained that he went to go inside the townhouse through the back door because he did not think he needed to remain in the backyard". This is not a case in which a trial judge is accepting just some of the accused's testimony. This is a case of treating the same evidence in two inconsistent ways — first, by rejecting it



and then by relying on it and using it against Mr. Le. Given this inconsistency, the trial judge erred.

[120] These errors aside, we harbour a more general concern about the trial judge's assessment of how Mr. Le would reasonably have perceived the police conduct, relative to his sense of obligation to comply with a police direction or demand. In our view, it is not appropriate to find that he did not feel detained and then to use his view as evidence of how the reasonable person would have reacted.

[121] While the s. 9 analysis is objective in the sense that it inquires into how a reasonable person would have perceived the police encounter (and not, in this case, how Mr. Le perceived it), the reasonable person whose standpoint is determinative and whose mind is sought to be read is one who stands *in the accused's shoes* — that is, one who is imbued with the experiences that accompany the accused's particular circumstances. In other words, the reasonable person must live in the same world, so to speak, as the accused. In considering whether an encounter with police amounted to a detention, therefore, a court must consider *all* relevant circumstances *particular to the accused*. Such a reasonable person would in our view conclude that there was a detention from the moment the officers entered the backyard and started asking questions.

(vi) Age and Stature

[122] We add that we agree with the trial judge that Mr. Le's age and stature were relevant personal circumstances. What a reasonable person may perceive may be influenced by age and the knowledge, life experience and discernment associated with that age group. The young often do not perceive the world in the same manner as mature adults. As the intervener Justice for Children and Youth argued in its factum, "[w]hile the law may define adulthood as beginning at age 18, [scientific research shows that] the psychological and neurological development characteristic of adolescence in fact extends into a young person's twenties" (para. 5). In these circumstances, we have no doubt that a reasonable mature adult would likely have concluded that there was no freedom to leave as soon as the police entered the backyard in the manner in which they did. In the same vein, a reasonable 20-year-old would even more readily conclude that he was detained in such circumstances. Indeed, his relative lack of maturity means the power imbalance and knowledge gap between citizen and state is even more pronounced, evident and acute.

[123] As to stature, the trial judge found that Mr. Le had a small physical stature and said he took this consideration into account when concluding that his detention only began when he was questioned about the contents of his bag. While it is not clear *how* this consideration was taken into account, we are of the view that a reasonable person with the same physical stature would likely be profoundly intimidated when three police officers entered the backyard in the manner in which these officers did. In such a circumstance, a person of small stature may be more likely to feel overpowered and conclude that it is not possible to leave the backyard.

Such a person may think it more necessary to comply with the police commands and directions. This element, then, supports a conclusion that a detention arose at the moment the police entered the backyard.

(2) Arbitrariness of Detention

[124] Where a detention is established, a court must consider whether the detention is arbitrary. This Court's decision in *Grant* provides guidance (at paras. 54-56), drawing from the three-part test stated in *R. v. Collins*, [1987] 1 S.C.R. 265, for assessing unreasonable searches and seizures under s. 8. Specifically, the detention must be authorized by law; the authorizing law itself must not be arbitrary; and, the manner in which the detention is carried out must be reasonable. In our view, the detention of Mr. Le was not authorized by law, and was, therefore, arbitrary. None of the investigative purposes found by the trial judge authorized the officers' actions, and they were themselves trespassers.

(a) *The Police Were Trespassers*

[125] The trial judge was of the view that the police entry into the backyard was authorized by the implied licence doctrine. Where it applies, this doctrine allows the police, or any member of the public, on legitimate business to proceed from the street to the door of a house so as "to permit convenient communication with the occupant of the dwelling" (*R. v. Evans*, [1996] 1 S.C.R. 8, at para. 15, per Sopinka J.).

[126] We agree with Lauwers J.A. at the Court of Appeal for Ontario, as does our colleague, that the doctrine does not apply in this case and that it was the police officers themselves who were the trespassers. Simply put, the implied licence doctrine does not apply to excuse the police presence in the backyard because even if “communication” was the officers’ purpose, it did not necessitate their entry onto private property — they could easily have spoken with the young men over the “little two-foot fence”.

[127] More fundamentally, in entering the backyard, the police also had what Sopinka J. in *Evans* referred to as a “subsidiary purpose”, which exceeds the authorizing limits of the implied licence doctrine (para. 16). In *Evans*, the subsidiary purpose that vitiated any “implied licence” was the hope of securing evidence against the home’s occupants (by sniffing for marijuana). Here, the subsidiary purpose was, in our view, correctly identified by Lauwers J.A. (at para. 107): “the police entry was no better than a speculative criminal investigation, or a ‘fishing expedition’”. It has to be recalled here that the police had no information linking any of the backyard’s occupants whose identities were unknown to them to any criminal conduct or suspected criminal conduct. The doctrine of implied licence was never intended to protect this sort of intrusive police conduct.

[128] The conclusion that the police officers were trespassing is clearly relevant under s. 8, as it nullifies any “consent” to the police entry. Its role elucidating whether, under s. 9, the police had the lawful authority to detain an individual who is

also on the property is less clear. Lauwers J.A. was of the view that if a law does not authorize police entry into property for investigative purposes, the law similarly does not authorize the detention of individuals for investigative purposes (para. 143). As ss. 8 and 9 protect different (if sometimes inter-related) interests and each have separate standards and considerations (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 36), we leave for another day the relationship between trespassing and detentions discussed in the Court of Appeal for Ontario judgment.

(b) *No Legal Authority to Detain*

[129] The trial judge found that the police had three purposes in coming to the backyard: checking to see if the young men were trespassing; looking for persons of interest; and checking an area they were told was a problem area for drugs. None of these purposes provide legal authority for the detention.

[130] No statute authorized these police officers to detain anyone in the backyard. At trial, the police invoked the *Trespass to Property Act*, R.S.O. 1990, c. T.21, as a source of authorization to enter to assess whether the young men were trespassing. However, as a matter of law, the Act does not authorize the police to engage in investigative detentions on private property. Rather, it provides authorization only for the police to arrest individuals where there are reasonable and probable grounds to believe that they are trespassing (s. 9). No such grounds existed.

[131] Similarly, the common law power to detain for investigative purposes could not have been invoked. This power allows the police to detain an individual for investigative purposes where, in the totality of circumstances, there are reasonable grounds to suspect a clear nexus between the individual and a recent or still unfolding crime (*Mann*, at paras. 34 and 45). Here, no such grounds existed. Any questions about persons of interest did not require entry into the property or detention and there was no nexus between the address and any recent or ongoing complaint about trespassing.

[132] The trial judge concluded that the police were “duty-bound” to attend at the backyard based on the reports of the security guards that J.J. “frequents” the area and that the backyard was a “problem address” (para. 67). Even if these generalized concerns were to provide a reason for the police to approach the backyard, they fall far short of the threshold for justifying an investigative detention. As this Court said in *Mann*, a suspect’s presence in a “so-called high crime area” is not by itself a basis for detention (para. 47). Similarly, the mere presence of *non*-suspects such as Mr. Le in an area frequented “days or weeks” earlier by a person of interest cannot furnish such a basis. As the Court of Appeal of Alberta said in *R. v. O.(N.)*, 2009 ABCA 75, 2 Alta. L.R. (5th) 72 (at para. 40):

The officer’s evidence about the location and type of building where such events occurred was too vague to contribute to reasonable grounds to detain. He did not specify the size of the “area” or the types or numbers of apartment blocks in it. With such specificity, there may be other facts when a detention could be justified. But on these facts, such a general approach gives rise to a grave risk of police interference with lawful

activities. As Iacobucci J. stated in *Mann*, the high crime nature of a neighbourhood, alone, is not enough. Even though some apartment buildings in a neighbourhood may be known to the police as havens of drug activity, that does not mean that anyone who enters any apartment building in an ill-defined area or neighbourhood can objectively be suspected of criminal activity. [Emphasis added.]

Similarly, the receipt of general information about contraband in relation to an address does not, without more specificity, give rise to reasonable suspicion in relation to recent or ongoing criminal activity.

[133] It follows from the foregoing discussion that Mr. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a s. 9 claim. This detention, therefore, infringed Mr. Le's s. 9 *Charter* right.

[134] Since the detention in this case was not authorized by law, there is no need to analyze whether that law is arbitrary or whether the detention was carried out in a reasonable manner.

### C. *Section 8 of the Charter*

[135] While our colleague says he is not deciding the s. 8 issue in a definitive manner, he expresses doubt about whether Mr. Le had standing to challenge the

search as an invited guest on the property of another individual. We agree that, clearly, the protective scope of s. 8, as applied to house guests, is not being decided in this case. However, we also do not wish to be seen as endorsing the analysis tentatively put forward by our colleague. While the issue remains to be decided, the approach to privacy put forward by Moldaver J. does not take into consideration two fundamental points that ought to inform the s. 8 analysis.

[136] First, at its core, s. 8 is concerned with the point at which “the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals” (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60). The lens through which this analysis is conducted must always be normative and not categorical. That is, the analysis does not proceed with the assumption that a categorical factor, like control, will have a dominating impact on whether a person has a reasonable expectation of privacy. Rather, the inquiry is always driven by the question of whether a privacy claim ought to “be recognized as beyond state intrusion absent constitutional justification if Canadian society is to remain a free, democratic and open society” (*R. v. Reeves*, 2018 SCC 56, at para. 28). Second, it is possible for an individual to have a diminished or qualified reasonable expectation of privacy while still retaining the benefit of s. 8 protection (*R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 8-9; see also *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 29, citing *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22). Guests’ expectations may be qualified by the knowledge that their host could invite others in, including the



state. However, it may still be objectively reasonable for a guest present on private property to expect that the state will not enter uninvited.

[137] We are of the view that a case can be made that invited guests can, in some circumstances, have reasonable expectations of privacy in their host's property. The determination of when, and to what extent, these guests have a reasonable expectation of privacy will be fact and context specific. However, the analysis must always focus on s. 8's fundamental concern with the public being left alone by the state, the normative approach to discerning the parameters of privacy rights, and the fact that s. 8 provides protection to those who have diminished or qualified reasonable expectations of privacy.

D. *Section 24(2) of the Charter*

[138] Having come to a different conclusion than the trial judge on the timing and constitutionality of Mr. Le's detention, we owe no deference to his "alternative" conclusion regarding exclusion of evidence under s. 24(2) of the *Charter* (*Grant*, at para. 129; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 42).

(1) General Principles

[139] Section 24(2) of the *Charter* provides that, where evidence was obtained in a manner that infringed a *Charter* right or freedom, that evidence *shall* be excluded if it is established that, having regard to all the circumstances, its admission *would*

*bring the administration of justice into disrepute.* While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, that is not the question to be decided. Rather, it is whether the administration of justice would be brought into disrepute by its admission (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 42). If so, there is nothing left to decide about exclusion: our *Charter* directs that such evidence *must* be excluded, *not* to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the “integrity of, and public confidence in, the justice system” (*Grant*, at paras. 68-70).

[140] Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon *the criminal trial*, but upon *the administration of justice*. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing *the reputation* of the administration of justice — such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court’s caution in *Grant*, at para. 68, that, while the exclusion of evidence “may provoke immediate criticism”, our focus is on “the overall repute of the justice system, viewed in the long term” by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights.

[141] In *Grant*, the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a *Charter* breach would bring the administration of justice into disrepute: (1) the seriousness of the *Charter*-infringing conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. While the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion. More particularly, it is not necessary that *both* of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. Of course, the more serious the infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the case for exclusion (*R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, at para. 62). But it is also possible that serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interest, will *on its own* support a finding that admission of tainted evidence would bring the administration of justice into disrepute. It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion.

[142] The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction — that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34), we

emphasize that the third line of inquiry cannot turn into a rubber stamp where *all* evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (*Paterson*, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

(a) *Seriousness of the Charter-Infringing Conduct*

[143] This Court has previously observed that, when considering the seriousness of the *Charter*-infringing conduct, a court's task is "to situate that conduct on a scale of culpability" (*Paterson*, at para. 43). The operating premise here is that inadvertent, technical or otherwise minor infringements impact less upon the rule of law and, therefore, upon the reputation of the administration of justice than wilful or reckless disregard of *Charter* rights (*Grant*, at para. 74; *Harrison*, at para. 22). Further, as this Court held in *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59, and *Paterson*, at para. 44, a "good faith" error on the part of the police must be reasonable and is not demonstrated by pointing to mere negligence in meeting *Charter* standards. In other words, the reputation of the administration of justice

requires that courts should dissociate themselves from evidence obtained as a result of police negligence in meeting *Charter* standards.

[144] While the trial judge understood this distinction — had he found a breach of s. 9, he would have assessed the seriousness of the *Charter*-infringing conduct to be at the low end, being “technical, inadvertent, and made in good faith” — in our respectful view this assessment is manifestly indefensible.

[145] The question of whether the officers acted in “good faith” arose at trial when the accused argued that the police engaged in racial profiling and were not, therefore, acting in good faith under s. 24(2). We note that courts have certainly gained a great deal of knowledge about racial profiling. We have come a long way from the early days in which a trial judge asked the accused to apologize to a police officer for suggesting that certain police conduct was in part based on the accused’s race. In that case, the Court of Appeal for Ontario would later hold that racial profiling is a reality in policing in Canada that is “supported by significant social science research” (*Brown*, at paras. 7-9 and 98). This was accepted by Binnie J. in *Grant*.

[146] As we have previously discussed, the trial judge rejected the argument that the police were engaged in racial profiling and concluded that the officers had not been acting in bad faith. It is, of course, open to a trial judge to determine that, even though something like racial profiling may often happen, it did not actually happen on the particular facts of an individual case. The appellant has not challenged the trial

judge's assessment. The police cannot, therefore, be found to be in bad faith on the basis that, consciously or unconsciously, the race of the young men was a consideration in how the police treated them.

[147] But an absence of bad faith does not equate to a positive finding of good faith and the officers were not acting in "good faith" simply because they were not engaged in racial profiling. Rather, for state misconduct to be excused as a "good faith" (and, therefore, minor) infringement of *Charter* rights, the state must show that the police "conducted themselves in [a] manner . . . consistent with what they subjectively, reasonably, and non-negligently believe[d] to be the law" (*R. v. Washington*, 2007 BCCA 540, 248 B.C.A.C. 65, at para. 78).

[148] So understood, good faith cannot be ascribed to these police officers' conduct. Their own evidence makes clear that they fully understood the limitations upon their ability to enter the backyard to investigate individuals. Csts. Reid and Teatero each acknowledged having no authority to enter into private residences (which, Cst. Reid acknowledged, includes backyards) to investigate for trespassing and Cst. O'Toole acknowledged having received no complaint connecting the L.D. townhouse with trespassing. As Cst. Reid testified, their purpose was clear: "we enter[ed] . . . the rear yard . . . to speak to the, well, to investigate the young men who [were] there" (A.R., vol. III, at p. 18) — young men who, *as the trial judge found*, "appeared to be doing nothing wrong" and were "just talking".

[149] The circumstances of Mr. Le’s detention did not take the police into uncharted legal waters or otherwise raise a novel issue about the constitutionality of their actions. Indeed, the authority of police to detain individuals is governed by settled jurisprudence from this Court, as is the (in)capacity of police to enter a private residence without prior judicial authorization or some exigent circumstance. And, as this Court has previously cautioned, “[w]hile police are not expected to engage in judicial refection on conflicting precedents, they are rightly expected to know what the law is” (*Grant*, at para. 133). We see no good reason to dilute the force of these authorities where the police have disregarded them in the course of effecting an unconstitutional detention.

[150] We, therefore, agree with Lauwers J.A. (at para. 156) that “[t]his was serious police misconduct”. This Court, in considering similar police misconduct in *Grant*, could not have been clearer (at para. 133): “the Court’s decision in this case will be to render similar conduct less justifiable going forward”. We are compelled, then, to conclude that this *Charter*-infringing conduct weighs heavily in favour of a finding that admission of the resulting evidence would bring the administration of justice into disrepute.

(b) *Impact on the Charter-Protected Interests of the Accused*

[151] The second *Grant* line of inquiry requires us to consider whether, from the standpoint of society’s interest in respect for *Charter* rights, admission of evidence tainted by a *Charter* breach would bring the administration of justice into

disrepute. This entails asking whether and to what extent, in the totality of the circumstances, the *Charter* breach “actually undermined the interests protected by the right infringed” (*Grant*, at para. 76). Like the first inquiry under *Grant*, this entails answering a question of degree of seriousness: “[t]he more serious the impact on the accused’s protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute” (*Grant*, at para. 76).

[152] What interests, then, of Mr. Le are protected by s. 9 of the *Charter*? This question was answered by this Court in *Grant*, at para. 20: “[t]he purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference” (emphasis added). Such interference extends not only to “unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention . . . from being applied to people without adequate justification” (para. 20). Underlying this purpose is an uncontroversial principle that is inherent to a free society founded upon the rule of law: “government cannot interfere with individual liberty absent lawful authority to the contrary” (J. Stribopoulos, “The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning” (2008), 40 *S.C.L.R.* (2d) 211, at p. 231). Absent compelling state justification that bears the imprimatur of constitutionality by conforming to the principles of fundamental justice (*Grant*, at para. 19), Mr. Le, like any other member of Canadian society, is entitled to live his life free of police intrusion.



[153] The stakes are, therefore, undeniably high when a court is presented with a breach of s. 9. The “interest” to which courts must be attuned is not merely in walking into a house, or down the street. These activities are but manifestations of the interest in one’s *liberty* to make decisions, including decisions of fundamental importance, free from state interference (*Grant*, at para. 20). These freedoms are to be equally enjoyed by everyone.

[154] How, then, are we to understand the impact of this police misconduct on Mr. Le’s *Charter*-protected interest in his liberty from unjustified state interference? The majority at the Court of Appeal for Ontario described any impact on that interest as “momentary and minimal” (para. 76). In a similar vein, the trial judge found that any impact was reduced because Mr. Le “did not make any inculpatory statements or provide the police with any incriminating evidence that they would not have discovered otherwise” (para. 107). With respect, we do not see these considerations as compelling nor as properly accounting for the harm effected in this case.

[155] It is, of course, true that the length of Mr. Le’s detention was brief. But it does not necessarily follow that the impact on his liberty was trivial (*Grant*, at para. 42). Even trivial or fleeting detentions “must be weighed against the absence of any reasonable basis for justification” (*Mann*, at para. 56 (emphasis in original)). And, when weighed against the absence of justification to investigate the young men *at all*, the impact of this police misconduct is heightened considerably. That this show of police force took the form of an intrusion into private residence — which, as we have

already explained, informs the assessment of whether and when Mr. Le was detained — is also pertinent to the impact on his *Charter*-protected interests. Retreat to a private residence (even if not one’s own residence) will sometimes be the only practical way for individuals to exercise their right to be left alone — particularly in the circumstances of this housing development the common areas of which were said at trial to be the subject of frequent police patrols.

[156] As to the trial judge’s suggestion that the impact on Mr. Le’s *Charter*-protected interests was minor because he did not provide any inculpatory statement and because the evidence was discoverable in any event, we agree with Lauwers J.A. that the firearm and drugs were not discoverable, absent a breach. Discovery required an unconstitutional detention, which had the effect, on the trial judge’s own finding, of prompting Mr. Le to change his behaviour, which in turn provided police with grounds to chase him and pursue an investigative detention. Regardless of how it is framed, there simply were no grounds, let alone reasonable grounds, to suspect any criminal wrongdoing was committed or being committed by the young men in the backyard. The discovery of the evidence was only possible because of the serious s. 9 breach in this case.

[157] This serious breach, moreover, had a significant impact upon Mr. Le’s protected interest under s. 9 in his liberty from unjustified state interference. It is difficult to imagine, absent actual physical constraint, a greater impact upon the practical ability of Mr. Le — “[a] person in the . . . position [of having] every

expectation of being left alone” (*Harrison*, at para. 31) — to make an informed choice between walking away or speaking to the police. This line of inquiry also strongly favours a finding that admission of the evidence in this case would bring the administration of justice into disrepute.

(c) *Society’s Interest in Adjudication of the Case on its Merits*

[158] While we have observed that the third line of inquiry under *Grant* typically pulls towards inclusion of the evidence on the basis that its admission would not bring the administration of justice into disrepute, not all considerations will pull in this direction. While this inquiry is concerned with the societal interest in “an adjudication on the merits” (*Grant*, at para. 85), the focus, as we have already explained, must be upon the impact of state misconduct upon the reputation of the administration of justice. While disrepute may result from the exclusion of relevant and reliable evidence (*Grant*, at para. 81), so too might it result from admitting evidence that deprives the accused of a fair hearing or that amounts to “judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies” (*Collins*, at p. 281). An “adjudication on the merits”, in a rule of law state, presupposes an adjudication grounded in legality and respect for longstanding constitutional norms.

[159] The charges against Mr. Le are obviously, like most criminal offences, serious, and the evidence seized is also highly reliable. At the same time, courts must be careful to dissociate themselves and their trial processes from the violation of

longstanding constitutional norms reflected in this Court's *Charter* jurisprudence that has emphasized the importance of individuals' liberty interests. On balance, this line of inquiry provides support for admitting the evidence.

(2) Would the Admission of the Evidence Bring the Administration of Justice Into Disrepute?

[160] In view of our application of the three *Grant* lines of inquiry to the facts of this appeal, and with great respect to the courts below, we do not find this to be a close call. The police crossed a bright line when, without permission or reasonable grounds, they entered into a private backyard whose occupants were “just talking” and “doing nothing wrong”. The police requested identification, told one of the occupants to keep his hands visible and asked pointed questions about who they were, where they lived, and what they were doing in the backyard. This is precisely the sort of police conduct that the *Charter* was intended to abolish. Admission of the fruits of that conduct would bring the administration of justice into disrepute. This Court has long recognized that, as a general principle, the end does not justify the means (*R. v. Mack*, [1988] 2 S.C.R. 903, at p. 961). The evidence must be excluded.

[161] Our colleague states that “reasonable and well-informed members of the public would regard a decision in this case to exclude the evidence and exonerate an admitted drug dealer who was prepared to reach for a loaded weapon during a violent struggle with the police as not merely alarming, but intolerable” (para. 306).

[162] We do not understand this sentiment, and do not share this fear. We observe, in response to our colleague, that great care is required so as not to fall into the trap of making and justifying special rules for neighbourhoods that are thought to have higher crime rates. As was said in the 1989 Solicitor General of Ontario's Race Relations and Policing Task Force report (at p. 23) and, more recently, in the Tulloch Report (at p. 45 (footnote omitted)): "[t]he worst enemy of effective policing is the absence of public confidence." The Tulloch Report went on to say that, "[w]hen a segment of society believes that it has been unfairly targeted by the police, it will de-legitimize the police in their eyes" (p. 45 (footnote omitted)). Effective law enforcement depends upon the co-operation of the public and the police must act in a manner that fosters co-operation and contributes to the public's perception of police legitimacy.

[163] To the extent that our colleague emphasizes in the s. 24(2) analysis that Mr. Le is "dangerous" and an "admitted drug dealer", we note that Mr. Le was found by the sentencing judge, who was also the trial judge, to be an intelligent young man, with durable family support, positive prospects for rehabilitation, and the potential to be a valuable and contributing member of society (2014 ONSC 4288, at paras. 14 and 40-41 (CanLII)). Our criminal justice system emphasizes rehabilitation, especially for young persons — and we should not allow our views about the wrongfulness of his conduct (which we obviously share), to obscure the sentencing judge's important findings about Mr. Le's prospects for rehabilitation.

[164] We also do not accept that the result compelled by our Constitution “can only be described as demoralizing and discouraging” (Moldaver J.’s reasons, at para. 309). From the standpoint of constitutionalism, s. 24(2), *by design*, excludes evidence obtained by a *Charter* infringement where its admission would bring the administration of justice into disrepute. As we have explained, the admission of this evidence — in the circumstances of this police conduct — *would* bring the administration of justice into disrepute. However, those who feel this is the wrong result should understand that “[t]his unpalatable result is the direct product of the manner in which the police chose to conduct themselves” (*McGuffie*, at para. 83; *Paterson*, at para. 56) — and not of an indifference on the part of this Court towards violence, drugs, or community safety.

[165] Requiring the police to comply with the *Charter* in *all* neighbourhoods and to respect the rights of *all* people upholds the rule of law, promotes public confidence in the police, and provides safer communities. The police will not be demoralized by this decision: they, better than anyone, understand that with extensive powers come great responsibilities. We share the view of the House of Lords, when rejecting the idea that imposing liability on the police would have similar consequences, that “Her Majesty’s servants are made of sterner stuff” (*Dorset Yacht Co. Ltd. v. Home Office*, [1970] 2 All E.R. 294, at p. 1033, per Lord Reid).

[166] We would, therefore, allow the appeal, exclude the evidence seized from Mr. Le, set aside his convictions, and enter acquittals.

The reasons of Wagner C.J. and Moldaver J. were delivered by

MOLDAVER J. —

I. Overview

[167] I have read the reasons of my colleagues and I am unable to agree with their analysis or conclusion. With respect, my colleagues have recast the trial record in a manner that is inconsistent with the positive findings of fact that the trial judge made in favour of the police. This, in turn, is what enables them to portray the officers in question as a group of aggressors who, on the night in question, entered a private backyard without a hint of justification and ran roughshod over the rights of five racialized young men in what they describe as a “fishing expedition” (para. 127).

[168] Let me be clear: if the record as recast by my colleagues accurately reflected the police behaviour, I would be the first to exclude the incriminating evidence found on Mr. Le. Police misconduct of such an egregious nature would be intolerable, if not abhorrent, to our society. It would have serious long-term effects on the repute of the administration of justice and would be deserving of this Court’s swift and unequivocal sanction.

[169] But that is not this case. The case actually before us is one in which the trial judge, after reviewing the evidence in painstaking detail, accepted the police

officers' evidence as credible (2014 ONSC 2033, para. 65 (CanLII)) and made important findings of fact, including that the police entered the private backyard to communicate with the young men for "appropriate investigative purposes" (paras. 70 and 117) and that there was "simply no evidentiary basis in support of any potential argument that [the] three police officers were engaged, consciously or unconsciously, in any exercise of racial profiling" (*ibid.*). Moreover, the trial judge's detailed and thorough reasons disclose no basis on which to conclude that the officers acted with wilful or reckless disregard for the accused's rights under the *Canadian Charter of Rights and Freedoms*, nor that they were motivated by anything other than a genuine desire to perform their investigatory duties, maintain peace and order, and protect the residents of a neighbourhood that, in the trial judge's words, had been "plagued by a high incidence of violent crimes associated with guns and drugs" (para. 3). To the contrary, he found that "any potential breach of the *Charter* rights of the accused" was "technical" and "inadvertent" (para. 106), and there was no finding of bad faith on the part of the police. In short, he concluded that the police were performing their duties with integrity and to the best of their ability.

[170] With respect, for reasons that follow, I cannot accept my colleagues' approach and the outcome to which it leads — namely, the factually and legally untenable acquittal of an admitted cocaine dealer who, after fleeing from the police and engaging in an "all-out street fight" with one of the officers (trial judge's reasons, at paras. 36 and 43), was found to be in possession of 13 grams of crack cocaine, cash derived from a drug sale, and a fully loaded semi-automatic handgun with a



chambered bullet ready to fire. Far from fostering the good repute of the administration of justice, whether in the short-term or the long-term, the exclusion of the evidence in this case — evidence which, as my colleagues acknowledge, is real, reliable, and essential to the prosecution of serious criminal offences — can serve only to bring the administration of justice into disrepute in the eyes of a reasonable and well-informed member of the public. I would therefore dismiss the appeal.

## II. Facts as Found by the Trial Judge

### A. *Police Conversation With the Security Guards*

[171] On the night of May 25, 2012, Cst. Teatero of the Toronto Police Service was on patrol at the Atkinson Housing Co-operative, a subsidized housing complex in downtown Toronto. At around 10:40 p.m., two more officers, Csts. Reid and O’Toole, joined him. At the time, Cst. Teatero was speaking with two security guards working at the housing complex. Initially, Cst. Teatero inquired about a man named N.D.-J., who was wanted by the police for violent crimes, but the security guards said they thought he “hung out” at another location (para. 11). However, one of the security guards advised that another individual, J.J., who was also wanted by the police for violent crimes, had been seen in the area and “frequented” or “hung out” at the backyard of a particular townhouse on Vanauley Walk (“L.D. townhouse”), along with members of a local gang (*ibid.*). Cst. Teatero knew of J.J. but did not know what he looked like. The security guard added that this particular property was a “problem

address” for them and that there were concerns of drug trafficking taking place in the backyard (*ibid.*).

B. *Police Arrival and Entry Into the Backyard*

[172] Following their conversation with the security guards, the three officers decided to perform a walkthrough of the area. They followed a paved footpath that went behind the townhouses and eventually arrived at the L.D. townhouse. The backyard of the property was surrounded by a short wooden fence that had an opening to the footpath rather than a gate.

[173] In the backyard were five young men, all racialized persons. The accused, Tom Le, then 20 years old, was among them. He had been invited there by his friend L.D., then 17 years old, who lived in the townhouse with his mother. The five young men were talking and relaxing, most of them on couches — they appeared to be doing nothing wrong.

[174] Without having sought a warrant or permission from the young men to enter, Csts. Teatero and Reid walked into the backyard through the opening in the fence. Accepting the evidence of the police on this point, the trial judge found that in entering the backyard to communicate with the young men, the officers had three purposes. He first identified the following two purposes: “to investigate whether the young men were [J.J.] (or knew the whereabouts of [N.D.-J.]), and to investigate whether the young men were entitled to be in the backyard or were trespassing on the

property” (para. 23). He also observed that the police entered the backyard for the further purpose of pursuing their investigation in relation to potential drug trafficking on the property (para. 70). With respect to the second purpose for the police entry, the trial judge noted the officers’ testimony that the police had a mandate from the housing co-operative’s management to enforce provincial trespass legislation within the complex.

C. *Initial Conversation in the Backyard*

[175] The trial judge found that after entering the backyard, Cst. Teatero “cordially greeted” the young men (at paras. 24 and 68) and asked them “what was going on, who they were, and whether any of them lived there in the townhouse unit” (para. 17). The police officers heard only a negative response to this third question. At no time did the officers hear any of the young men object to their entry or presence in the backyard.

[176] Csts. Teatero and Reid then started speaking more directly to two of the young men seated on a couch and asked for their IDs. At this time, Mr. Le was standing by the back door of the townhouse. He testified at trial that at that point, he felt he was free to walk away, noting that: “no officer was talking directly to me, so I felt I didn’t really need to stay around” (A.R., vol. IV, at p. 157).

D. *Conversation Between Cst. O’Toole and Mr. Le*

[177] Cst. O’Toole, who had initially remained outside the fence, entered the backyard in order to ensure officer safety. He stood in the grassy area for a bit, simply observing, before approaching the young men. At one point, he saw one of the young men seated on the couch put his hands behind his back, and he told him to keep his hands in front of him. The young man complied. Cst. O’Toole then made his way to the patio, adjacent to the back door of the townhouse, and started talking to Mr. Le and another young man. Cst. O’Toole asked the latter for his ID, which he supplied.

[178] While holding the ID, Cst. O’Toole noticed Mr. Le, who had a small black bag on his hip hanging from a strap that went across his body, “blading” himself — that is, positioning himself so as to hide the bag from sight — and “acting very nervous, fidgeting and moving” about (para. 29). According to Cst. Teatero, who also observed Mr. Le’s behaviour, Mr. Le was concealing the bag and pulling it towards his body, “exhibiting the characteristics of an armed gunman” (para. 32). Cst. O’Toole then asked Mr. Le for his ID. Mr. Le said he had none on him. Cst. O’Toole “then pointed at the bag and asked, ‘What’s in the bag?’” (para. 31), at which point Mr. Le bolted.

[179] The entire transaction, from the police entry to Mr. Le’s flight, took less than a minute. Direct police interaction with Mr. Le lasted only a few seconds before he fled.

#### E. *Chase and Struggle*

[180] Cst. O'Toole gave chase, followed by the other two officers. The pursuit culminated in an "all-out street fight" between Cst. O'Toole and Mr. Le (para. 43). During the struggle, Mr. Le attempted to reach inside his bag, where a fully loaded, semi-automatic handgun was secreted, with a chambered bullet ready to fire. However, Cst. O'Toole managed to prevent him from getting to the gun and eventually, with the help of his fellow officers, subdued Mr. Le and placed him under arrest.

#### F. *Evidence Seized and Criminal Charges*

[181] Searches at the scene of the arrest and later at the police station yielded the handgun, 13 grams of crack cocaine,<sup>3</sup> and a considerable sum of cash.<sup>4</sup> Mr. Le was charged with a long list of firearm and drug offences.<sup>5</sup>

### III. Decisions Below

#### A. *Ontario Superior Court of Justice (Campbell J.) (2014 ONSC 2033)*

[182] The main issues before the trial judge, Campbell J., were whether the gun, cocaine, and cash were obtained in a manner that breached Mr. Le's *Charter*

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<sup>3</sup> Mr. Le admitted in his testimony that he intended to sell the cocaine (see para. 57).

<sup>4</sup> Mr. Le admitted in his testimony that the cash was derived from a drug sale he made the day before (see para. 57).

<sup>5</sup> Ten in total: possession of a firearm without a licence; possession of a firearm knowing he was not the holder of a licence; possession of a loaded firearm without having an authorization, licence, or registration certificate; careless storage of ammunition; carrying a firearm in a careless manner; two counts of breaching orders prohibiting him from possessing a firearm; possession of cocaine for the purpose of trafficking; possession of cocaine; and possession of the proceeds of crime not exceeding \$5,000 (see para. 6).

rights under ss. 8 and 9, and if so, whether that evidence should be excluded under s. 24(2).

(1) Credibility Findings

[183] The trial judge heard oral testimony from two of the three police officers (and reviewed preliminary hearing testimony from the third), the five young men in the backyard, and one of the security guards. He found the police officers to be credible witnesses and accepted their evidence. By contrast, he found that Mr. Le was “not an impressive or credible witness” and was both “cavalier and arrogant” (para. 63). He further found that where the evidence of the police officers differed from that of Mr. Le and the four other young men who testified, he preferred the officers’ evidence (see para. 65).

(2) Lawfulness of the Police Entry

[184] The trial judge first considered whether the police entry into the backyard was lawful. Relying on the implied licence to knock doctrine, he concluded that it was. In his view, the officers clearly had a lawful reason to enter the backyard and speak to the occupier: “[t]hey were pursuing an investigation of a wanted man who, they had been told, frequented that backyard area and had been seen hanging out there”, and they were also investigating potential drug trafficking, having been advised that the L.D. townhouse was a “problem address” for drug trafficking (para. 70). As such, he reasoned, the officers were not trespassers.

(3) Section 8 — Right to Be Free From Unreasonable Search and Seizure

[185] The trial judge went on to conclude that even if the police officers were trespassers, “it would be very difficult for the accused, a mere transient guest in the [L.D.] backyard, to persuasively complain of any violation of *his* constitutional rights under s. 8 of the *Charter* by virtue of this trespassing” (para. 81). Applying the criteria set out by this Court in *R. v. Edwards*, [1996] 1 S.C.R. 128, he was inclined to the view that Mr. Le had no standing under s. 8, though he held it was unnecessary to finally decide the issue given his conclusion that the officers were not trespassing.

(4) Section 9 — Right to Be Free From Arbitrary Detention

[186] The trial judge then considered Mr. Le’s submission that he was arbitrarily detained in violation of his s. 9 *Charter* rights as soon as the police entered the backyard. Applying the principles set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, he concluded that Mr. Le was not detained until Cst. O’Toole asked him about the contents of his bag, which came just moments before Mr. Le fled the backyard.

[187] Having determined the timing of the detention, the trial judge turned to whether it was arbitrary. He held that it was not. Rather, in his view, the detention was based on a reasonable suspicion that Mr. Le had a gun. He reached this conclusion based on the evidence of Mr. Le’s “blading”, pulling his bag towards his body, and acting very nervous. Accordingly, he held there was no s. 9 breach.

(5) Section 24(2) — Admissibility of the Evidence

[188] In light of his conclusion that there were no *Charter* breaches, the trial judge observed that it was not necessary to perform a s. 24(2) analysis. However, for the sake of completeness, he proceeded to do so using the test set out in *Grant*, and reached the following conclusions:

- (1) Seriousness of the *Charter*-infringing state conduct: Any breach of Mr. Le's *Charter* rights was "technical, inadvertent, and made in good faith", and therefore any *Charter*-infringing state conduct was "not particularly serious" (para. 106).
- (2) Impact on the accused's *Charter*-protected interests: Any *Charter* violations "did not have an especially significant impact" on Mr. Le's *Charter*-protected interests, as he did not make any inculpatory statements or provide any incriminating evidence that police would not otherwise have discovered (para. 107).
- (3) Society's interest in an adjudication on the merits: The evidence was "reliable", "objective", and "essential to the determination of the merits of this case" (para. 109). Society's interest in a trial on the merits would be "seriously undermined if this kind of highly reliable



and essential evidence was excluded”, and thus this third inquiry “clearly favour[ed] the admission of the evidence” (*ibid.*).

[189] Since all three *Grant* lines of inquiry pointed towards admission, the trial judge concluded that even if Mr. Le’s *Charter* rights had been breached, the evidence should still be admitted.

(6) Other Alleged Police Misconduct

[190] Finally, the trial judge considered the evidence led by Mr. Le and his friends aimed at demonstrating police misconduct and racial profiling. The trial judge found this body of evidence “quite unpersuasive” and unhelpful in resolving the issues before him (para. 116). He wrote:

. . . at the end of the day, there is simply no evidentiary basis in support of any potential argument that these three police officers were engaged, consciously or unconsciously, in any exercise of racial profiling. The three police officers who were involved in the investigative activities in the present case were not drawn into the [L.D.] backyard to communicate with the young men present in that location because there were four black males and one Asian male in that backyard. The evidence is clear that the three police officers were directed to the [L.D.] backyard for perfectly justified and appropriate investigative purposes. The racial composition of the young men in the [L.D.] backyard was no more relevant to the investigative aims of the three police officers than the racial composition of the three-man investigative team of police officers<sup>6</sup>. [para. 117]

(7) Conclusion

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<sup>6</sup> One of the police officers was black, while the other two were white (see para. 53).

[191] In the result, the trial judge admitted the evidence. Mr. Le's conviction followed accordingly.

B. *Ontario Court of Appeal (Doherty, Lauwers (Dissenting), and Brown JJ.A.) (2018 ONCA 56, 360 C.C.C. (3d) 324)*

[192] A majority of the Ontario Court of Appeal dismissed Mr. Le's appeal. Justice Lauwers dissented. My colleagues have summarized the majority and dissenting reasons on the s. 9 and s. 24(2) issues, and I see no need to replicate their work. I will therefore focus on the majority and the dissent's respective analyses on the s. 8 issue.

(1) Majority Reasons

[193] In discussing the lawfulness of the police entry into the backyard, the majority questioned whether the implied licence doctrine was applicable in the circumstances of this case. In its view, the implied licence doctrine was meant to address a problem that did not arise on the facts: the police had no need to enter the backyard in order to make contact with the occupier, a condition which the majority was inclined to view as a prerequisite to any lawful uninvited entry onto the property for the purpose of communicating with the occupant. Without reaching a firm conclusion on the matter, the majority assumed for the purpose of its s. 8 analysis that the police entry was unlawful.

[194] Turning to s. 8, the majority concluded that Mr. Le had failed to establish a reasonable expectation of privacy in the backyard. This conclusion flowed from both an application of this Court's decisions in *Edwards* and *R. v. Belnavis*, [1997] 3 S.C.R. 341, and a normative assessment of Mr. Le's privacy claim.

[195] By way of background, in *Edwards*, the police searched the apartment rented by the accused's girlfriend and found illegal drugs. The accused stayed at the apartment from time to time, though he did not live there, nor was he present at the time of the search. He did, however, keep personal belongings there and had a key to the apartment. Writing for the majority, Cory J. held that the accused had no reasonable expectation of privacy in relation to the apartment. He described the accused as an "especially privileged guest" in the apartment (at para. 47) and noted that apart from historical use, none of the main factors for assessing territorial privacy claims were present. Those factors include: (1) presence at the time of the search; (2) possession or control of the property or place searched; (3) ownership of the property or place; (4) historical use of the property or item; (5) the ability to regulate access; (6) the existence of a subjective expectation of privacy; and (7) the objective reasonableness of the expectation (see para. 45(6.)).

[196] In *Belnavis*, a passenger in an automobile driven by a friend of the owner of the vehicle was found not to have a reasonable expectation of privacy in the vehicle despite her presence at the time of the search. This was because, among other things, she did not own the vehicle and was merely a passenger; there was no

evidence that she had any control over the vehicle, that she had used it in the past, or that she had any relationship with the owner or driver that would establish some special access to, or special privilege relating to, the vehicle; and she did not demonstrate any ability to regulate access to the vehicle.

[197] The majority observed that apart from Mr. Le's physical presence in the backyard when the police entered, none of the criteria identified in *Edwards* were engaged: in particular, Mr. Le had no possession or control of any kind over the backyard; there was no evidence of his historical use of, or connection with, the property; and he had no means by which to regulate access to the property. The majority further stressed that while *Edwards* identifies control as a key factor in assessing a territorial privacy claim, Mr. Le had no control whatsoever over the backyard. As the trial judge put it, he was "a mere transient guest in the [L.D.] backyard" (C.A. reasons, at para. 41, citing trial judge's reasons, at para. 81).

[198] In addition, the majority noted that the accused's claim in *Edwards* was "far superior" to that of Mr. Le, and the accused passenger in *Belnavis* "had at least as strong a privacy claim" as did Mr. Le (at para. 50), yet in both cases the accused's claim failed. Moreover, the majority rejected the notion that *Edwards* could be distinguished on the basis that the occupier of the property, the accused's girlfriend, purportedly consented to the search of her apartment, as the police used lies and tricks to obtain that consent and it had been unnecessary to decide whether the girlfriend had consented to the search (para. 46).

[199] Turning to a normative assessment of Mr. Le's privacy claim, the majority stressed that the ability to exercise control is a key factor in assessing a reasonable expectation of privacy in real property. It reasoned:

Personal privacy equates with a person's right to require that the state leave him or her alone, absent reasonable grounds to justify interfering with that person's privacy. The right to be left alone, when exercised in relation to real property, must, in my view, include some ability, either as a matter of law, or in the circumstances as they existed, to control who can access and/or stay on the property. One cannot realistically talk about a reasonable expectation of privacy in respect of real property without talking about an ability to control, in some way, those who can enter upon, or remain on, the property.

We were referred to no authority to suggest that as an invited guest, the appellant had any legal power to prevent the police or anyone else from coming onto the property or remaining on the property. There may well be circumstances in which an invited guest has the *de facto* power to control who can access or stay on a property. In those situations, the visitor may well have a reasonable expectation of privacy in the property. There is no such evidence in this case. [paras. 52-53]

[200] The majority also observed that although Mr. Le was physically present in the backyard, that presence did not, on the particular facts, support a finding that he had any control over the property.

(2) Dissenting Reasons

[201] The dissenting judge concluded that Mr. Le had a reasonable expectation of privacy in the backyard. He distinguished *Edwards*, noting that in that case, the occupant had given the police permission to enter and the accused was not physically present on the property when the search was performed. Furthermore, he considered

the trial judge's application of the *Edwards* factors to be "not reasonable in significant measure because it was not purposive" (para. 126).

[202] Ultimately, the dissenting judge concluded that "[Mr. Le's] invited presence alone is sufficient to give rise to a reasonable expectation of privacy" (para. 127); "[a]s an invited guest, [Mr. Le] had a reasonable expectation of privacy in his friend's home while he was there" (para. 128); and any contrary conclusion "must be rejected as utterly inconsistent with ordinary life in our free and democratic society" (*ibid.*). He stressed that it would be hard to imagine any citizen would accede to the propositions that (1) "while his host [L.D.] would have full *Charter* protection, as his guest, [Mr. Le] had none"; and (2) "[Mr. Le] left his personal *Charter* protections at home and could not resume them until he returned there" (*ibid.*).

#### IV. Issues

[203] This appeal raises three *Charter* issues:

- (1) Were Mr. Le's s. 8 rights breached?
- (2) Were Mr. Le's s. 9 rights breached?
- (3) If Mr. Le's *Charter* rights were breached, should the evidence be excluded under s. 24(2)?

## V. Analysis

### A. *Standard of Appellate Review — Findings of Fact and Credibility*

[204] The rules governing appellate interference with a trial judge’s findings of fact are well established and have been consistently reaffirmed by this Court in a long line of cases spanning several decades (see, e.g., *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746). The trite principle that fact finding is reserved to trial courts was succinctly stated in *H.L.*:

Fact finding . . . involves a series of cerebral operations, some simple, others complex, some sequential, others simultaneous. The entire process is generally reserved in Canada to courts of first instance. In the absence of a clear statutory mandate to the contrary, appellate courts do not “rehear” or “retry” cases. They review for error. [para. 52]

[205] Similarly, it has been said that “[t]he appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the

appellate court thinks the evidence establishes on its view of the balance of probabilities” (*Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, quoted in *Housen*, at para. 3). In brief, when it comes to the facts, the trial is the “main event”, not a mere “tryout on the road” (*Housen*, at para. 13, citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75).

[206] The threshold for interfering with a trial judge’s factual findings is stringent. It is not enough that there is a difference of opinion with the trial judge, nor is it sufficient to show that the trial judge’s findings were tainted by an error *simpliciter*. Rather, appellate intervention is justified only where the trial judge has made a “palpable and overriding error” (*Housen*, at para. 10). Such an error is one that is “plainly seen” (*ibid.*, at para. 6) and is “shown to have affected the result” (*H.L.*, at para. 55). The same standard applies in respect of a trial judge’s findings of credibility (see *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10).

[207] There are good reasons for the high level of deference accorded to a trial judge’s factual and credibility findings. As summarized in *Housen*, three general policy rationales predominate: (1) limiting the number, length, and cost of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise of the trial judge and his or her advantageous position (see paras. 15-18). Regarding this third rationale, Iacobucci and Major JJ. wrote:

. . . comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in “Appellate Review of Findings of Fact” (1991-92), 13 *Advocates’ Q.* 445, at p. 446:



The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

...

The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected. [Emphasis in original; paras. 14 and 18.]

[208] These fundamental principles govern the nature and scope of appellate review. With this in mind, I return to the case at hand.

B. *Lawfulness of the Police Entry — Implied Licence Doctrine*

[209] Relying on the implied licence doctrine, the trial judge concluded that the police entry into the backyard was lawful. Respectfully, for reasons that follow, I cannot agree.

[210] The implied licence to knock doctrine allows police officers and other members of the public, on lawful business, to enter onto private property and approach the door of the residence in order to speak with the owner or occupier (see *R. v. Evans*, [1996] 1 S.C.R. 8, at paras. 13 and 15, per Sopinka J. writing for a plurality; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 26-27; *Robson v. Hallett*, [1967] 2 All E.R. 407 (Q.B.)). It aims to facilitate convenient communication by “enabl[ing] the police officer to reach a point in relation to the house where he [or she] can conveniently and in a normal manner communicate with the occupant” (*Evans*, at para. 15, quoting *R. v. Bushman*, [1968] 4 C.C.C. 17 (B.C.C.A.), at p. 24). It “extends no further than is required to permit convenient communication with the occupant” and “only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized” (*Evans*, at para. 15).

[211] Where, as here, the police can readily make contact with a potential owner/occupier from outside the property, it is reasonable to expect that they would first attempt to gain permission before entering in reliance on the implied licence doctrine. This requirement guards against unnecessary intrusions on the owner/occupier’s property and privacy rights. Therefore, in my view, the implied licence doctrine could not apply in the circumstances of this case, at least not until the police attempted, from outside the fence, to ask the young men, one of whom was in fact an occupier, for permission to enter. Consequently, the police were trespassers from the moment they set foot on the property.

[212] To be clear, however, this is the sole reason why the implied licence doctrine could not apply in the present case. Although the implied licence doctrine does not permit the police to “approach a dwelling with the intention of gathering evidence against the occupant” (*Evans*, at para. 16), these words should not, in my view, be read as creating a general prohibition against police approaching a dwelling in order to question the owner/occupier for the purpose of furthering a lawful investigation. The trial judge in the present case found as a fact that the police had three investigatory purposes for entering the backyard: (1) to investigate whether any of the young men were J.J. or knew the whereabouts of N.D.-J., both of whom were wanted by the police; (2) to investigate potential drug trafficking in relation to the property, having been advised that it was a “problem address” for drug trafficking; and (3) to investigate whether the young men were trespassers on the property. This is made clear in the trial judge’s reasons:

First, when Csts. Teatero and Reid entered the backyard through the open gate their purpose was twofold – to investigate whether any of the young men were [J.J.] (or knew the whereabouts of [N.D.-J.]), and to investigate whether the young men were entitled to be in the backyard or were trespassing on the property. That was, in effect, the evidence of the police officers, and I accept it, especially given their initial purpose in attending at the housing complex and the information they had been provided by the security guards about the problems associated with the backyard area of this particular townhouse unit.

...

. . . the police officers clearly had a lawful reason to enter the backyard property and speak to the occupier. They were pursuing an investigation of a wanted man who, they had been told, frequented that backyard area and had been seen hanging out there. Further, the police had been told that the [L.D. townhouse] was a “problem” in relation to suspected drug trafficking. In fulfilling their professional duties, the police were

lawfully entitled to enter this backyard area in an effort to ascertain if any of the young men was an occupier of the residential premises there, and to pursue their investigations in relation to [J.J.] and potential drug trafficking. [paras. 23 and 70]

[213] Accepting that the police entry was not justified under the implied licence doctrine due to the absence of a need to facilitate convenient communication, the trial judge's finding that the police had legitimate investigatory purposes for entering the backyard and speaking to the young men is nonetheless entitled to deference. This is so even if, as my colleagues maintain, the police were not justified in entering the backyard in order to investigate whether the young men were trespassers (see paras. 130 and 133). Be that as it may, two valid investigatory objectives remain: (1) to investigate whether any of the young men were J.J. or knew the whereabouts of N.D.-J.; and (2) to investigate potential drug trafficking in relation to the property.

[214] Moreover, unlike in *Evans*, the police here were not employing the implied licence doctrine as a mere ruse to gather evidence against the owner/occupier. There is simply no indication that the police were investigating the owner/occupier of the L.D. townhouse, as opposed to unlawful activity said to be taking place in the backyard.

[215] In these circumstances, the police trespass cannot be viewed as wilful or deliberate. Instead, it was inadvertent and committed in the course of performing legitimate investigatory duties — as the trial judge found.

[216] Finally, I would emphasize that the police cannot enter upon private property without lawful authorization. Where the police can readily ask for the owner/occupier's permission to enter upon the property, that prior consent (or some other form of authorization such as a warrant) is essential. The public's faith in the police rests in part on their belief that the police will not intrude unnecessarily on their property and privacy rights. As such, the police should always be mindful of and respect the owner/occupier's rights. Doing so is essential to fostering public trust in the police.

[217] Having determined that the police entry into the backyard was unlawful, I now turn to the *Charter* issues raised on appeal.

C. *Section 8 — Right to Be Free From Unreasonable Search and Seizure*

[218] For reasons that will become apparent, I am of the view that this appeal can be disposed of without finally deciding whether the unlawful entry by the police into the backyard resulted in a breach of Mr. Le's s. 8 *Charter* rights. However, as I will explain, given this Court's decisions in *Edwards* and *Belnavis*, I am doubtful that Mr. Le's s. 8 argument could succeed.

[219] Section 8 of the *Charter* protects a person's right to be secure against unreasonable search and seizure. Its core purpose is to safeguard an individual's reasonable expectation of privacy — his or her reasonable right to be left alone (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 159).

[220] As the majority in the court below explained, “[a] reasonable expectation of privacy does not exist in the air or in the abstract. One has or does not have a reasonable expectation of privacy in respect of a specified subject matter in specified circumstances” (para. 35). In this regard, the jurisprudence distinguishes between different categories of privacy interests protected by s. 8, including personal privacy, territorial privacy, and informational privacy (see *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 20; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). These categories serve as “analytical tools” for “identifying the nature of the privacy interest or interests at stake in particular situations” (*Spencer*, at para. 35). The nature of the privacy interest engaged is “an important factor in assessing the reasonableness of an expectation of privacy” (*ibid.*, at para. 34). While each category raises distinct considerations, they may overlap in any given case (see *ibid.*, at para. 35; *Tessling*, at para. 24).

[221] Informational privacy, the first category Mr. Le seeks to invoke, has been defined in one sense as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling*, at para. 23, citing A. F. Westin, *Privacy and Freedom* (1970), at p. 7; *Spencer*, at para. 40). Historically, it has generally focused on information of a “personal and confidential nature”; it “protect[s] a biographical core of personal information” that includes “information which tends to reveal intimate details of the lifestyle and personal choices of the individual” (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293). The closer the information sits to the “biographical

core of personal information”, the stronger the accused’s claim of a reasonable expectation of privacy (see *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46).

[222] Territorial privacy, the second category Mr. Le seeks to invoke, consists of a hierarchy of physical places in which persons may have a reasonable expectation of privacy (see *Tessling*, at para. 22). At the top of this hierarchy sits the person’s own home (see *ibid.*). A person’s home enjoys this privileged status because it is “where our most intimate and private activities are most likely to take place” (*ibid.*) — it is “the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish” (*R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 148). While s. 8 is a personal right that protects “people, not places” (*Hunter*, at pp. 158-59; see also *Edwards*, at paras. 29 and 45(2.)), the concept of territorial privacy is not inconsistent with this principle. Rather, it uses the notion of place as an analytical tool for assessing the *reasonableness* of a person’s expectation of privacy (see *Tessling*, at para. 22).

[223] As a general rule, the reasonable expectation of privacy relied on must be that of the accused, not a third party (see *Edwards*, at paras. 34 and 52-56). Whether the accused has a reasonable expectation of privacy is to be determined on the “totality of the circumstances” (see *Edwards*, at paras. 31 and 45(5.); see also *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 62 per Lamer C.J., concurring; *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 54). The “totality of the circumstances” in territorial privacy cases includes, but is not restricted to, the accused’s presence at the time of the

search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation of privacy, and the objective reasonableness of the expectation (see *Edwards*, at para. 45(6.)).

[224] With these principles in mind, and without finally deciding the matter, I am doubtful that Mr. Le's s. 8 argument could withstand scrutiny. I say this for two main reasons: (1) there is no compelling basis on which to conclude that Mr. Le's informational privacy interests were engaged to any significant degree and (2) this Court's decisions in *Edwards* and *Belnavis* cast serious doubt on Mr. Le's territorial privacy argument. I will address these points in turn.

[225] On the first point, Mr. Le maintains that this is, at least in part, an informational privacy case — an argument raised for the first time in this appeal. I readily accept that different categories of privacy interests may overlap in any particular case (see *Spencer*, at para. 35). However, on these particular facts, I am of the view that there is no compelling basis on which to conclude that Mr. Le's informational privacy interests were engaged to any significant degree. Recall that, at its heart, informational privacy “protect[s] a biographical core of personal information” that includes “information which tends to reveal intimate details of the lifestyle and personal choices of the individual”. In this instance, it cannot be said that, in the course of their general questioning, the police were seeking or obtained any information sitting close to this “biographical core of personal information” about



Mr. Le. Had the questioning continued to a point where more intimate details were revealed about Mr. Le, his informational privacy interests might have been meaningfully engaged, but Mr. Le fled the backyard before that could happen. The absence of any significant informational privacy interest distinguishes this case from *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, which involved private text conversations recovered on another person's cell phone.

[226] On the second point, without finally deciding the issue, I find the reasons given by the majority in the court below for rejecting Mr. Le's territorial privacy claim, reasons which relied primarily on *Edwards* and *Belnavis*, to be compelling. Contrary to what my colleagues state at para. 137 of their reasons, I do not foreclose the possibility that an invited guest may, in some circumstances, have a reasonable expectation of privacy in a host's property. My reasons simply reject the assumption that a police trespass against a host necessarily implicates the s. 8 rights of his or her invited guests.

[227] That said, I need not finally decide whether Mr. Le's s. 8 rights were breached as a result of the police trespass. Even if I were to assume for the sake of argument that they were, I am of the view that any such breach was both inadvertent and insignificant in terms of its impact, thereby making it inconsequential from a s. 24(2) perspective.

[228] Finally, before leaving this matter, it is worth clarifying that contrary to what the dissenting judge in the court below suggested, Canadians do not leave their

s. 8 rights behind when they leave their homes. Section 8 enshrines a personal right that Canadians carry with them in their back pocket; it protects a reasonable expectation of privacy wherever they go, whether to work, to the grocery store, or to a backyard gathering. While what is objectively reasonable will vary with the circumstances, including the specific location where the individual is situated, s. 8 continues to apply whether or not the individual remains at home. This is also true whether the privacy interest in question is personal, informational, or territorial (or some combination thereof).

D. *Section 9 — Right to Be Free From Arbitrary Detention*

[229] Mr. Le submits, and my colleagues accept, that he was arbitrarily detained the moment Csts. Teatero and Reid entered the backyard and that, as a result, his s. 9 rights were breached. Respectfully, for reasons that follow, I cannot accept that contention.

(1) Section 9 Framework

[230] Section 9 of the *Charter* protects the right to be free from arbitrary detention or imprisonment. Its purpose is to “protect individual liberty from unjustified state interference” (*Grant*, at para. 20). As my colleagues note, the s. 9 analysis proceeds in two stages: first, the court must determine whether and when the applicant was detained; second, if the applicant was detained, then the court must determine whether that detention was arbitrary (para. 29).

(a) *Timing of the Detention*

[231] “Detention” under s. 9 of the *Charter* refers to “a suspension of the individual’s liberty interest by a significant physical or psychological restraint” (*Grant*, at para. 44(1.); see also *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 19; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 66; *Suberu*, at paras. 3, 21 and 24). Thus, as the majority stated in *Suberu*, “not . . . every interaction with the police will amount to a detention for the purposes of the *Charter*, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police” (para. 23; see also *Mann*, at para. 19).

[232] As the Ontario Court of Appeal recently observed in *R. v. Reid*, 2019 ONCA 32, determining whether and when a detention has occurred requires striking a balance between protecting individuals against unjustified state interference and preserving society’s collective interest in effective policing. Writing for the court, Fairburn J.A. stated:

The need for a detention to involve a significant physical or psychological restraint reflects a purposive approach to s. 9, one that strikes an important balance between ensuring that individuals are protected from unjustified state interference, while at the same time making sure that the societal interest in effective policing is not threatened: *Grant*, at paras. 19-21; *Suberu*, at para. 24. A failure to consider whether the police-citizen interaction involves a “significant deprivation of liberty” may result in both overshooting the very purpose of the *Charter* provision and undervaluing the public’s interest in effective policing: *Suberu*, at para. 24. The purpose of s. 9 is not to make individuals inviolate from state contact, but to ensure that, where the state actually detains an individual (within the legal meaning of that term), the detention can be justified upon appropriate grounds: *R. v. Grafe* (1987),

36 C.C.C. (3d) 267 (Ont. C.A.), at p. 271; *R. v. L.B.*, 2007 ONCA 596, 86 O.R. (3d) 730 at paras. 51-59; *Grant*, at paras. 26, 35-41. [para. 26 (CanLII)]

[233] In arguing that a detention has occurred at a particular point in time, the onus is on the applicant to show that in the circumstances, he or she was effectively deprived of his or her liberty of choice (see *Suberu*, at para. 28). Whether and when a detention has occurred is determined objectively, having regard to all the circumstances (see *Grant*, at para. 31). A detention can be effected through either physical or psychological compulsion (see *ibid.*, at paras. 21, 25 and 44(1.)). Psychological restraint amounting to a detention may be established where, for example, “the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand” (*ibid.*, at para. 31). While the test is objective, the individual’s particular circumstances and perceptions at the time may be relevant in determining whether a reasonable person in the circumstances would perceive himself or herself as not being free to go (see *ibid.*, at para. 32).

[234] The factors in determining whether and when a psychological detention has occurred include, but are not limited to, the following:

- (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 place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

(*Ibid.*, at para. 44(2.))

[235] While a trial judge's underlying findings of fact are entitled to deference absent palpable and overriding error, the determination of whether and when a detention has occurred based on those findings of fact is a question of law subject to the standard of correctness (see *ibid.*, at paras. 43 and 45; *Reid*, at para. 18). The basic principle is that an appellate court must approach a trial judge's decision on the question of detention "with appropriate deference" (*Grant*, at para. 45).

[236] In the present case, it is not disputed that a detention occurred; the question is one of timing. With that in mind, I will apply the factors outlined above with a view to determining the point at which Mr. Le was detained.

- (i) Circumstances Giving Rise to the Encounter as They Would Reasonably Be Perceived by the Individual

[237] Beginning with the circumstances giving rise to the encounter, as I have already explained, the police had at least two valid investigatory purposes based on the trial judge's findings of fact: (1) to investigate whether any of the young men were J.J. or knew the whereabouts of N.D.-J.; and (2) to investigate potential drug

trafficking in relation to the property. The trial judge's findings on this point do not dissipate simply because he failed to recognize that the police were trespassing.

[238] While Mr. Le was not made aware of these valid investigatory purposes, he had no reason to perceive the police encounter as being illegitimate or motivated by anything but a genuine desire to gather information that would assist in maintaining peace and order within the community, which was in fact their objective. Furthermore, the officers' requests for ID were consistent with their legitimate investigative aims: the IDs of the young men — which of course would display their names — would indicate whether any of them were named “[J.J.]”.

[239] While my colleagues make much of the fact that none of the officers asked the young men any questions about J.J., N.D.-J., or potential drug trafficking in the backyard, this is little more than a veiled attempt to subvert the trial judge's clear finding that the police had at least two valid investigatory purposes for entering the backyard and speaking to the young men. In any event, it bears repeating that the interaction in the backyard lasted less than a minute before Mr. Le fled, bringing the questioning to an abrupt halt. This unexpected turn of events left the police with little opportunity to ask the young men about the matters that brought them there in the first place.

[240] Furthermore, despite my colleagues' contention to the contrary (paras. 38 and 133), it does not follow necessarily that if the police lacked grounds to effect a lawful detention at the beginning of the interaction, the investigation must have been

illegitimate. And given that the first factor to be considered in assessing whether and when a detention occurred is “[t]he circumstances giving rise to the encounter as they would reasonably be perceived by the individual” (*Grant*, at para. 44(2.)), it can scarcely be contended that the inquiry into the timing of the detention is “not advanced” by recognizing that the police encounter in the backyard took place in the context of a legitimate police investigation and the young men had no reason to believe otherwise (majority reasons, at para. 38). More pointedly, the interaction began with a series of general inquiries, rather than an attempt by the police to single out any particular individual for focused investigation. As in *Suberu*, their initial questioning was “of a preliminary or exploratory nature” (para. 31). This militates against the conclusion reached by my colleagues that the detention was immediate.

[241] Ultimately, my colleagues adopt the description of the police entry given by the dissenting judge in the court below: “[t]he police entry was no better than a speculative criminal investigation, or a ‘fishing expedition’” (para. 127, citing C.A. reasons, at para. 107). Respectfully, this new finding — made for the first time on appeal — is incompatible with the trial judge’s findings, which make clear that this was not a “fishing expedition”. Rather, it was a police inquiry directed towards at least two identifiable and legitimate investigatory objectives. Again, it is not open to an appellate court to “substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes”.

(ii) Nature of the Police Conduct

[242] Turning to the nature of the police conduct, the trial judge was presented with two strikingly different accounts of what occurred on the night in question. On the one hand, the police gave evidence that they were pursuing a legitimate investigation when they entered the backyard, and throughout the interaction they did nothing untoward. On the other hand, the young men testified that the police entered the backyard over their protests, herded them into a corner, arbitrarily manhandled Mr. Le as he tried to escape into the townhouse, and then attempted to grab and take away his bag without a whiff of suspicion. One of the young men went so far as to say that an officer declared, “We can do anything we want, we’re the police” (trial judge’s reasons, at para. 20). According to the young men, this was nothing short of a racially motivated shakedown.

[243] After considering all the evidence, the trial judge accepted the account provided by the police and rejected that of Mr. Le and his friends. In so doing, the trial judge found that to the extent Mr. Le’s evidence conflicted with that of the officers, the officers’ evidence should be preferred (at para. 65); that they were directed to the backyard for “appropriate investigative purposes” (para. 117); and that there was “simply no evidentiary basis in support of any potential argument that [the] three police officers were engaged, consciously or unconsciously, in any exercise of racial profiling” (*ibid.*). Thus, on the trial judge’s findings, this was not a shakedown, an instance of racial profiling, or a mere fishing expedition. Rather, it was a legitimate investigation performed by the police, and there was no finding of bad faith.



[244] Before this Court, Mr. Le does not allege that any of the trial judge's findings of fact were tainted by palpable and overriding error. Moreover, during oral argument, counsel for Mr. Le expressly made the following concession: "[W]e accept the trial judge's finding that there was no racial profiling in this case" (transcript, at p. 24). As such, this Court must perform its legal analysis based on the factual foundation laid by the trial judge.

[245] With that background in mind, the following facts relating to the nature of the police conduct are salient:

- Three uniformed police officers interrupted a peaceful social gathering of five young men, all racialized persons, in a small private backyard at about 10:40 p.m.
- The premises were located within a subsidized housing complex located in downtown Toronto in a neighbourhood plagued by drugs and violence.
- The police entered the backyard without a warrant and without having sought prior permission from the young men to enter, though they did not hear any of the young men object to their entry or presence.
- Cst. Teatero "cordially greeted" the young men upon entry.

- The police engaged the young men directly and asked them questions and requested their IDs.
- Before Cst. O'Toole asked Mr. Le "What's in the bag?", he told another young man, after entering the backyard, to keep his hands in front of him.
- The police officers did not lay hands on any of the young men or tell them they were required to remain in place and answer their questions during the interaction, which lasted less than a minute.

[246] My colleagues, however, arrive at a different set of findings. They write: "The nature of the police conduct here was, in one word, and our word, aggressive" (para. 68). They describe the police entry into the backyard as "coercive and intimidating" and "braze[n]" (paras. 56 and 59), stress that Cst. O'Toole "yelled" at one of the young men to keep his hands where he could see them (at paras. 47-48), and find that the officers tactically "positioned themselves in a way to question specific young men apart from the others" and "in a manner to block the exit" (para. 50). Ultimately, they characterize the police conduct as "casually intimidating and oppressive" (para. 110), adopting the language used by the dissenting judge in the court below (C.A. reasons, at para. 143). In doing so, they maintain that it is open to an appellate court to recharacterize the police conduct based on its own view of how a reasonable person in the circumstances would perceive that conduct (see para. 55).

[247] Respectfully, for a number of reasons, I consider my colleagues' approach to be incompatible with both the trial judge's factual findings and the proper role of an appellate court.

[248] First, my colleagues have recharacterized the nature of the police conduct based on their own appreciation of the evidence. As my colleagues rightly note, the question of whether and when a detention has occurred is a question of law subject to correctness review (para. 29). But this does not, in my view, give appellate courts licence to revisit the trial judge's underlying findings of fact as to the nature of the police conduct. Factual determinations such as whether the police acted in a manner that was "aggressive", "cordial", or somewhere in between are in my view best left to the trial judge, who receives the evidence first-hand and as a result is best positioned to properly characterize the nature of the police conduct.

[249] Second, in line with the foregoing, the words "aggressive", "casually intimidating", and "oppressive" appear nowhere in the trial judge's reasons. What *does* appear in the trial judge's reasons is a factual finding that Cst. Teatero "cordially greeted" the young men upon entering, which simply does not square with my colleagues' recharacterization of the police conduct. And while my colleagues question this finding, stressing that "[c]ordially" was the label chosen by the judge and was not a descriptor used by any witness" (para. 46), I know of no rule barring trial judges from making findings couched in language that did not come directly from the mouth of a witness. Such a rigid rule would overlook the reality that a

witness's evidence is not limited to the words that appear on a transcript — it also includes the way in which the witness *communicated* those words in the courtroom through their body language, their tone of voice, and other intangible aspects of communication. In this case, based on the way in which the officers' evidence came across in the courtroom, it was open to the trial judge to infer that the interaction was “cordial”, even if the police did not use that word specifically. This Court is not in a position to second-guess the trial judge's assessment of the evidence in all its textures, both verbal and non-verbal. Accordingly, absent a palpable and overriding error, it would be inappropriate for this Court to substitute its own findings as to the tenor of the interaction for those of the trial judge.

[250] Third, while Mr. Le's testimony would certainly support a factual finding that the police conduct was “aggressive”, and indeed Mr. Le used the word “aggressive” in his testimony when describing the police conduct, the trial judge found that Mr. Le was “not an impressive or credible witness”, that his evidence was “largely manufactured”, and that he “did not believe much of his evidence” (para. 63). There is no challenge to the trial judge's credibility assessment in this case. Accordingly, Mr. Le's evidence cannot be used as a basis for concluding that the police were “aggressive”.

[251] Fourth, the trial judge made no finding that the officers tactically “positioned themselves in a way to question specific young men apart from the others” and “in a manner to block the exit”; nor do my colleagues point to any

evidence in the record supporting this new finding. The trial judge found that Csts. Teatero and Reid “started talking to the young men” (para. 17) and Cst. O’Toole “simply stood in the grassy area observing” (para. 18). Had the trial judge been satisfied that the officers tactically positioned themselves in the adversarial manner suggested by my colleagues, he would surely have stated so in his reasons. He clearly would have understood the significance of such positioning given his frequent references to *Grant*, a case in which this Court identified the “tactical adversarial positions” taken by the officers as a factor to be considered in determining whether and when a detention occurred (para. 49). The absence of any similar finding in the trial judge’s reasons can be taken as an indication that, in his opinion, no such conduct occurred in this case. Further, as indicated, he explicitly rejected the evidence of the accused that the officers “herded” him and his friends into a corner of the backyard (para. 65).

[252] Fifth, while my colleagues maintain that Cst. O’Toole’s decision to enter the backyard by stepping over the “little two-foot fence” or “little mini fence” (para. 9) “demonstrat[ed] a sense of urgency” (para. 56) and constituted a “show of force” (para. 57), the trial judge again made no such factual finding. Nothing in the record suggests that Cst. O’Toole’s decision to go over the little two-foot fence instead of using the walkway was anything more than a simple matter of convenience, as opposed to a tactical decision conveying a sense of urgency and a show of force.

[253] Sixth, my colleagues' finding that Cst. O'Toole "yelled" at one of the young men to keep his hands in front of him differs from both the trial judge's finding that Cst. O'Toole simply "told [the young man] to put his hands in front of him" (para. 19 (emphasis added)) and Cst. O'Toole's own testimony to that effect. This suggests a less aggressive interaction than my colleagues depict.

[254] In sum, I am respectfully of the view that my colleagues have exceeded the proper role of an appellate court. In concluding that the police were "aggressive", that they were engaged in a "fishing expedition", and that their conduct demonstrated that they were "exerting dominion over the individuals in the backyard from the time of entry" (para. 47), my colleagues have not "respected, and used, the trial judge's findings of fact" as they maintain (para. 24). The trial judge made no such findings. Instead, they have recast the record in a manner that is inconsistent with the positive findings of fact that the trial judge made in favour of the police, at times without providing any evidentiary support. And while my colleagues cite *Grant* in support of their approach (at para. 57), it should be recalled that in *Grant*, this Court found that the trial judge's conclusion on the question of detention was "undermined by certain key findings of fact that [could not] reasonably be supported by the evidence", making it "necessary to revisit the issue" (para. 45). The same cannot be said here. Indeed, before this Court, Mr. Le has not challenged any of the trial judge's findings of fact as "unreasonable".

[255] My colleagues underscore the fact that the interaction took place at a private residence, and with this in mind they ask, “*to where*, precisely, was Mr. Le expected to ‘walk away’?” (para. 52 (emphasis in original)). The answer, in my view, is that Mr. Le was lawfully entitled to enter the townhouse or to simply walk out of the backyard through the opening in the fence. At the time of the police entry, the officers had no grounds on which to arrest or detain Mr. Le, nor was he bound to answer any of their questions (see *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at para. 55). Thus, he would have been well within his rights to simply walk away in either direction.

[256] Having expressed these concerns, I agree with my colleagues on a number of points relating to the analysis performed under the rubric “Nature of the Police Conduct”. In particular, I would endorse the following principles expressed by my colleagues in assessing whether and when a *Charter* applicant was psychologically detained:

- If it can be shown that the police conduct at issue was aggressive, then that would be a significant factor in the analysis.
- Police conduct towards third parties can influence how a reasonable person in the claimant’s shoes would perceive his or her own freedom of movement, and in this case it was significant that before Cst.

O'Toole asked Mr. Le "What's in the bag?", he told another young man to keep his hands in front of him.

- The setting in which the police interaction takes place is a relevant consideration (see *Grant*, at para. 44(2.)). In particular, a police intrusion into a private space, as opposed to a public space, may reasonably be perceived as communicating some measure of control over the occupants. In addition, the fact that a police interaction takes place in a small, enclosed space may influence a reasonable person's perception of whether he or she is free and able to leave.
- The duration of the police encounter is a relevant consideration.

[257] Furthermore, though we arrive at this conclusion for different reasons, I agree with my colleagues that the police entry was unlawful, and as a result the police were trespassers in the backyard. In my view, the judicially constructed reasonable person must be taken to know the law. As such, a reasonable person in Mr. Le's shoes must be taken to know that the police were trespassing when they entered the backyard.

[258] With that in mind, I am of the view that a reasonable person would perceive an unlawful police entry very differently from a lawful one. An unlawful police entry can generally be expected to have an intimidating effect and may



therefore cause a reasonable person to be less inclined to believe he or she is free to walk away. However, this intimidating effect will generally be felt more strongly where the trespass is aggressive, which was not the case here based on the trial judge's findings of fact.

(iii) Particular Characteristics and Circumstances of the Individual

[259] As for Mr. Le's particular characteristics and circumstances, Mr. Le is an Asian-Canadian man of slight build who was 20 years old at the time of the incident. In terms of his subjective experience of the events in question, Mr. Le testified that he considered himself free to go until the police engaged him directly and the trial judge noted that testimony in his reasons (para. 87).

[260] I agree with my colleagues on a number of points under the rubric of "the Particular Characteristics and Circumstances of the Individual", including the following:

- A person may experience a police interaction differently depending on his or her age, race, life experience, and other personal characteristics, and these factors should be taken into account in the s. 9 analysis.

- The judicially constructed reasonable person must reflect and respect racial diversity, as well as the broader state of relations between the police and various racial groups.
- Credible reports, studies, and other materials on race relations may assist courts in understanding how racialized persons may experience police interactions differently, and courts may take judicial notice of such materials — which qualify as “social context” evidence — where the test set out in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, is met. Further, I do not dispute the accuracy of the materials my colleagues take judicial notice of, nor do I challenge their reliance on these materials. I would simply note that as a procedural matter, it is generally preferable that all relevant materials be placed before the trial judge and made the subject of submissions from the parties, rather than raised by interveners for the first time on appeal. While it will not always be possible to follow this general practice (particularly where the materials did not come into existence until after the trial judge issued his or her decision), it should be followed wherever possible. Doing so ensures fairness to the parties; assists trial judges by providing them with all relevant materials, as well as submissions on how the teachings contained in those materials should be applied in the case at hand; and mitigates the risk that the record,

the issues, and the parties' arguments will take on a materially different complexion on appeal.

- A young person of small physical stature like Mr. Le may reasonably perceive a greater power imbalance vis-à-vis the police, as compared to how a larger, more mature person might perceive the situation.

[261] Despite these points of agreement, I respectfully take a different view on the significance of Mr. Le's testimony that he considered himself free to go until the police engaged him directly.

[262] I agree with my colleagues that the determination of whether and when a detention arises "is principally objective in nature" (para. 114). Without a doubt, the claimant's own perception of whether and when he or she was detained is not determinative. Reducing the analysis to a purely subjective inquiry would result in a near-infinite number of legal standards for detention, varying with each individual. Injecting this level of uncertainty and variability into the analysis would be unsatisfactory, to say the least.

[263] However, as stated in *Grant*, the claimant's subjective perception may be a relevant consideration (para. 32; see also *R. v. N.B.*, 2018 ONCA 556, 362 C.C.C. (3d) 302, at para. 117). To be clear, this does not give the court licence to transform what is principally an objective inquiry into a subjective one. Rather, it simply

recognizes, as common sense would suggest, that in assessing how a reasonable person in the circumstances would have perceived the situation, it may be helpful to look to how the person who was *actually in the circumstances* perceived the situation.

[264] Applying this well-established doctrine to the present case, I am of the view that while Mr. Le's subjective perception must not be permitted to overwhelm the analysis, his testimony that he considered himself free to go until the police engaged him directly is revealing. In particular, it suggests that a reasonable person in the circumstances would not have considered himself or herself detained from the moment the police set foot in the backyard, despite my colleagues' conclusion to the contrary.

[265] My colleagues reject the relevance of Mr. Le's subjective perception, stressing that the trial judge could not have it both ways: he could not reject Mr. Le's evidence about what happened in the backyard, yet rely on his evidence about his subjective perception (para. 118).

[266] However, it should be recalled that the trial judge "did not believe much of [Mr. Le's] evidence". It is well established that a trier of fact is entitled to accept all, part, or none of a witness's testimony (see *R. v. François*, [1994] 2 S.C.R. 827, at p. 837); he or she is not required to adopt an "all-or-nothing" approach to the evidence. Evidently, although the trial judge rejected "much" of Mr. Le's evidence, he accepted some of it, including Mr. Le's testimony about his subjective perception. Even if the trial judge did not accept Mr. Le's version of events, he was entitled to

accept Mr. Le’s testimony about his subjective perception, which made clear that he did not consider himself immediately detained upon the police entry. This is particularly so in the present case because on the version of events that the trial judge *did* accept — namely, the police officers’ version of events — Mr. Le had even *greater* reason to believe he was free to go until the police engaged him, as that version of events did not reflect the sort of aggressive and brazen conduct to which Mr. Le testified. Finally, Mr. Le had no ulterior motive to testifying as he did. This was a candid admission that went against his own interest in a finding that he was detained immediately upon the police entry. In these circumstances, his evidence is all the more compelling.

[267] Finally, while my colleagues criticize the trial judge on the basis that he “did not consider the reasonable person in his analysis” (para. 71), I would simply point out that he expressly anchored his analysis in the perspective of a “reasonable person in the position of the accused” at paras. 85, 87, and 88 of his reasons, and among other things he took into account the “visible minority status of the accused and his friends” (para. 89). There is nothing to suggest that he failed to take into account the impact of race and race relations on how a reasonable person in Mr. Le’s circumstances would have perceived the police interaction. The fact that his reasons do not contain a detailed review of the literature on race relations — such as the one contained in my colleagues’ reasons — suggests that the parties simply did not put this body of literature before him and ask him to consider and apply it. Indeed, there is nothing in the record before us to indicate that any of these materials were raised

before the trial judge. It therefore comes as no surprise that he did not canvass this literature in his reasons — trial judges who engage in their own independent research are routinely chastised by appellate courts for straying outside the record and the parties’ submissions.

(iv) Overall Assessment

[268] In determining the timing of Mr. Le’s detention, this Court’s decisions in *Grant* and *Suberu*, the two leading cases in this area of the law, are instructive.

[269] In *Grant*, a police officer, Cst. Gomes, approached Mr. Grant, an 18-year-old black man, on a sidewalk and blocked his path. He asked what was going on and requested his name and address. Mr. Grant provided ID and then began behaving nervously and adjusting his jacket, prompting the officer to ask him to “keep his hands in front of him” (para. 48). Two other officers approached, flashing their badges and taking “tactical adversarial positions” behind the initial officer (para. 49). The initial officer then asked whether Mr. Grant had been arrested before and whether he “had anything that he should not” (para. 49).

[270] This Court held that Mr. Grant was not detained when the police officers stopped him and made general inquiries about his name and where he lived. Nor was the directive to “keep his hands in front of him” by itself sufficient to effect a detention. It was only when a series of elements coalesced — one of the officers told Mr. Grant to “keep his hands in front of him”, the other two officers took “tactical

adversarial positions”, and one of the officers embarked on a pointed line of questioning about whether he had anything on his person that he should not — that a detention crystallized. The majority explained this shift as follows:

Two other officers approached, flashing their badges and taking tactical adversarial positions behind Cst. Gomes. The encounter developed into one where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant’s identity to determining whether he “had anything that he should not”. At this point the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.

Although Cst. Gomes was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant’s youth and inexperience. Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. We agree with Laskin J.A.’s conclusion that Mr. Grant was detained. In our view, the evidence supports Mr. Grant’s contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.

The police conduct that gave rise to an impression of control was not fleeting. The direction to Mr. Grant to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of Mr. Grant. The sustained and restrictive tenor of the conduct after the direction to Mr. Grant to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond.

We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed line of questioning. At this point, Mr. Grant’s liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.  
[Emphasis added; paras. 49-52.]

[271] In *Suberu*, the police were called to a liquor store where Mr. Suberu and his associate were suspected of using a stolen credit card. When a police officer arrived, Mr. Suberu exited the store past the officer, saying words to the effect of “he did this, not me, so I guess I can go” (para. 9). The officer followed Mr. Suberu out of the store and said, “Wait a minute. I need to talk to you before you go anywhere” (*ibid.*). He briefly questioned Mr. Suberu as he sat in his parked car in the parking lot. The officer asked who he was with, where he was from, why he was in town, and whose van he was driving.

[272] A majority of this Court upheld the trial judge’s conclusion that this encounter was of a “preliminary or exploratory nature” (para. 31) and that the officer was “orienting himself to the situation rather than intending to deprive Mr. Suberu of his liberty” (para. 32). Mr. Suberu’s expressed desire to leave (“I guess I can go”), the specified direction from the police that he needed to “[w]ait a minute . . . before you go anywhere”, and the fact that the police were investigating a specific crime were insufficient to amount to a detention. Instead, this Court concluded that a detention did not result until the officer formally placed Mr. Suberu under arrest and cautioned him as to his right to counsel, which occurred after the officer received further information by radio and requested Mr. Suberu’s ID and vehicle ownership documents. Until that point, Mr. Suberu was not deprived of his liberty of choice.

[273] The majority also emphasized that it would be “unreasonable” to require that a suspect be advised of his or her right to counsel under s. 10(b), which arises



upon arrest or detention, “the moment the police approach any suspect in the process of sorting out the situation” (para. 32).<sup>7</sup> The majority also noted that “Mr. Suberu did not testify” as to his perception of the situation, thereby implicitly confirming the relevance of the applicant’s own subjective perception in determining whether and when a detention has occurred (para. 32).

[274] Respectfully, my colleagues’ conclusion that Mr. Le was detained “when the police entered the backyard” (para. 133) — a conclusion which they arrive at in part on the basis of factors that arose only *after* the police entered the backyard (e.g., the requests for ID and the direction given to one of the young men to keep his hands in front of him) — is difficult to square with *Grant* and *Suberu*. There are, of course, factual differences between the present case and these two precedents, including the fact that the latter cases played out in public spaces, rather than private ones. Nonetheless, *Grant* and *Suberu* make clear that as a general rule, only when the police move from general questioning to focussed interrogation will a detention result. While “[t]he line between general questioning and focussed interrogation amounting to detention may be difficult to draw in particular cases” (*Suberu*, at para. 29), it remains an essential distinction. “[G]eneral neighbourhood policing” (*Grant*, at para. 49) and “preliminary or exploratory” questioning (*Suberu*, at para. 31) are normally insufficient to effect a detention. As this Court stated succinctly in *Grant*, “general inquiries by a patrolling officer present no threat to freedom of choice” (para. 41).

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<sup>7</sup> The parties did not address s. 10(b) in the present appeal.

[275] In the case at hand, at the initial stage of the interaction, the police officers were simply “orienting” themselves to the situation and engaging in the type of pre-detention exploratory interaction described in *Grant* and *Suberu*. Indeed, in light of these two cases, there is a compelling argument that it was not until the police asked Mr. Le “What’s in the bag?” — a focused interrogation rooted in police suspicion — that a detention occurred. That said, whereas the interactions in *Grant* and *Suberu* took place in public spaces where the police were lawfully situated, the interaction in the present case took place in the context of a police trespass onto private property.

[276] While it can be difficult to ascertain with any degree of certainty the point at which a psychological detention occurred, I am prepared to find that Mr. Le was detained, at the earliest, when the third officer entered the backyard and directed one of the young men to keep his hands in front of him, an order which he complied with immediately. In all the circumstances, upon seeing this clear exercise of police authority and his friend’s immediate compliance, it is realistic to conclude that a reasonable person in Mr. Le’s circumstances would have considered himself effectively deprived of his liberty of choice — even though Mr. Le did not consider himself to be detained at this point.

[277] Finally, with respect, my colleagues’ conclusion that the detention crystallized immediately upon the police entering the backyard is based on an analysis that maximizes the importance of factors that support their position and

minimizes the importance of factors that do not. For example, while the fact that the police were trespassing is viewed by my colleagues as almost determinative of the timing of the detention, the fact that Mr. Le himself testified that he did not consider himself to be detained at the moment of entry is relegated to playing a “very limited role” in the analysis (para. 117). In my view, this approach does not reflect a realistic assessment of *all* the relevant factors.

[278] Having determined the timing of the detention, I move to the question of whether it was arbitrary.

(b) *Arbitrariness of the Detention*

[279] I agree with my colleagues that the detention in this case was arbitrary. At the moment when Mr. Le was detained, the police had not yet developed reasonable grounds to suspect he was armed — a prerequisite to a lawful investigative detention (*Mann*, at paras. 33-34; *Grant*, at para. 55). Accordingly, the detention was unlawful and hence arbitrary, resulting in a breach of Mr. Le’s s. 9 *Charter* rights (see *Grant*, at paras. 55 and 57).

[280] That said, the arbitrary detention was momentary, lasting mere seconds before the police developed reasonable grounds to suspect Mr. Le was armed, thereby transforming the arbitrary detention into a lawful one (see *Mann*, at para. 45; *Grant*, at para. 55). The fleeting duration of the detention is a factor, among others, to be considered in the s. 24(2) analysis, to which I now turn.

E. *Section 24(2) — Admissibility of the Evidence*

[281] Section 24(2) of the *Charter* provides that “[w]here . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”.

[282] The trial judge held that the police did not trespass when they entered the backyard and there was no breach of Mr. Le’s *Charter* rights. I have reached a different conclusion: the police did trespass, and Mr. Le’s s. 9 rights were breached. For purposes of the s. 24(2) analysis, I will also assume that Mr. Le’s s. 8 rights were breached.

[283] It is clear that the evidence was “obtained in a manner” that violated Mr. Le’s *Charter* rights. Considering the entire chain of events, it cannot be doubted that the seizure of the evidence was sufficiently connected to the *Charter* violations (see *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 649, per Le Dain J., dissenting; *R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 1005-6; *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21).

[284] Since my conclusion on the *Charter* breach issues differs from that of the trial judge, I will undertake a fresh s. 24(2) analysis, accepting the trial judge’s

underlying factual findings given the absence of any suggestion that they were tainted by a palpable and overriding error (see *Grant*, at paras. 86 and 129).

(1) Seriousness of the Charter-Infringing State Conduct

[285] The first *Grant* line of inquiry requires the court to consider whether admission of the evidence would “sen[d] a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law. . . . The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct” (para. 72). In performing this inquiry, the court must fix the police misconduct on a spectrum ranging from the minor and inadvertent to the wilful or reckless (para. 74). At the end of the day, “[p]olice conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights. . . . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct” (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 23, quoting *R. v. Kitaitchik* (2002), 161 O.A.C. 169, at para. 41).

[286] As an appellate court, this Court cannot simply “substitut[e] its own view of the police conduct for that of the trial judge” or “re-characteriz[e] . . . the evidence” (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 51). Having carefully reviewed the evidence — including evidence from the three police officers, the five young men, and one of the security guards — the trial judge concluded that

there was not a scrap of evidence suggesting that the officers were engaged in racial profiling (para. 117). Nor were the police abusing their powers in any other manner: there was no flagrant or wilful misconduct, deliberate flouting of the law, wilful disregard for or ignorance of the young men's *Charter* rights, attempt to abuse Mr. Le's status as an invited guest to skirt his *Charter* rights, or baseless "fishing expedition". Had some or all of these factors been present, the police conduct would have taken on a decidedly sinister character, thereby presenting a strong case for exclusion of the evidence. But none was present.

[287] Rather, on the trial judge's findings, it is clear that any breach of Mr. Le's *Charter* rights was "technical" and "inadvertent", and there was no finding of bad faith on the part of the police. The officers entered the backyard to speak to the young men for "appropriate investigative purposes" and greeted the young men "cordially" in doing so. Upon entry, they asked the young men "what was going on, who they were, and whether any of them lived there in the townhouse unit" (para. 17), thereby demonstrating their sincere desire to ascertain who, if anyone, was the owner/occupier of the property and to carry out their investigatory objectives. Having asked whether any of the young men lived there, they heard no positive response, and at no point did they hear the young men express any objection to the police entry or presence in the backyard. None of these factual findings dissipates as a result of the trial judge's erroneous conclusion that the police entry was lawful.

[288] In this regard, although the police trespassed, they did not do so wilfully or deliberately. Rather, the trespass was inadvertent and committed in the course of performing legitimate investigatory duties. As such, the officers' mistake here was far from egregious. Nor would I view this case as one in which the police clearly ought to have known they were trespassing. To the contrary, their mistake was understandable. After all, a practised trial judge with years of experience in criminal law matters considered the police entry to be lawful. In my view, it would be both unfair and unreasonable to hold the police to a higher standard of legal acumen than we hold experienced trial judges. It can scarcely be contended, as a matter of principle or policy, that placing such a burden on the police is necessary to ensure the long-term integrity of the justice system and the public's confidence in it.

[289] With these points in mind, I am of the view that any s. 8 breach occasioned by the police entry was inadvertent. Similarly, the s. 9 breach was far from egregious: the detention occurred in the course of efforts by the police to perform their valid investigatory duties. Therefore, my colleagues' contention that this case involved "serious police misconduct" (para. 150) — indeed "precisely the sort of police conduct that the *Charter* was intended to abolish" (para. 160) — is overstated. To the contrary, the police conduct sits on the less serious end of the spectrum described in *Grant*. Admission of the evidence would not, in my view, "send the message the justice system condones serious state misconduct" (*Grant*, at para. 71).

(2) Impact of the Breaches on the Charter-Protected Interests of the Applicant

[290] The second *Grant* line of inquiry focuses on the impact of the *Charter* breach or breaches on the *Charter*-protected interests of the applicant (see para. 76). Just as the first *Grant* line of inquiry contemplates a spectrum, so too does the second. The impact of a *Charter* breach may range from “fleeting and technical” to “profoundly intrusive” (*ibid.*). Obviously, the more serious the impact, the greater the risk that admission of the evidence may signal to the public that *Charter* rights are of little avail, thereby bringing the administration of justice into disrepute (see *ibid.*). In addition, the discoverability of the evidence is a relevant consideration in assessing the impact on the individual’s *Charter*-protected interests (see *ibid.*, at paras. 122 and 137; *Cole*, at para. 93).

[291] Assuming there was a s. 8 breach, for reasons already explained, any such breach was minimal in terms of its impact on Mr. Le’s privacy, dignity, and bodily integrity.

[292] Turning to the s. 9 breach, there is no doubt that the interests protected by s. 9 are vitally important, as my colleagues convincingly demonstrate. However, because the arbitrary detention was fleeting in duration (lasting only a few seconds before it became a lawful detention), did not result in any physical detention, and did not involve any aggressive or demeaning conduct on the part of the police, the impact



on Mr. Le's liberty, dignity, bodily integrity, and autonomy was reduced in terms of its significance.

[293] On the other hand, turning to the discoverability of the evidence, had the police not arbitrarily detained Mr. Le and proceeded to engage him directly, he would have had no reason to act nervously or "blade" his body, the police would not have developed a reasonable suspicion that he was armed, and his flight would never have been prompted by the question, "What's in the bag?" Hence, the s. 9 breach had a cascading effect: it set in motion a series of events that led to the discovery of the evidence. This is a consideration that must be weighed in the balance.

[294] That said, I do not accept that a strict "but for" approach should be taken to the admissibility of evidence under s. 24(2). While I agree that the fact that evidence would not have been discovered "but for" a *Charter* breach may play a role in assessing the impact on the applicant's *Charter*-protected interests, that factor alone cannot be allowed to overwhelm the analysis and require near-automatic exclusion of the evidence — particularly where, as here, the *Charter* breach was inadvertent and did not otherwise have any significant effect on the accused's *Charter*-protected interests. In my view, *Grant* requires a more nuanced, contextual approach, one that involves a realistic appraisal of the situation in light of all the circumstances (see paras. 64-65).

[295] Turning to the specific context of this case, in assessing the impact on Mr. Le's *Charter*-protected interests, it should be borne in mind that the police *did*

develop reasonable grounds to suspect Mr. Le was armed before asking him “What’s in the bag?” As already mentioned, this turned what was previously an arbitrary detention into a lawful one, as the police are permitted to perform brief investigative detentions based on a “reasonable suspicion” (see *Mann*, at para. 45; *Grant*, at para. 55). Accordingly, the impact on Mr. Le’s *Charter*-protected interests should be considered in light of the fact that no evidence was obtained during the momentary arbitrary detention; rather, it was discovered only after the police had the grounds needed to perform an investigative detention, and only after Mr. Le decided to run from the police.

[296] In sum, considering the impact on Mr. Le’s *Charter*-protected interests in light of all the circumstances, I am of the view that the impact was not so great as to clearly overwhelm competing considerations.

(3) Society’s Interest in the Adjudication of the Case on Its Merits

[297] As stated in *Grant*, “[s]ociety generally expects that a criminal allegation will be adjudicated on its merits” (para. 79). Society has a “collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law” (*R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20). Accordingly, the third *Grant* line of inquiry “asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (para. 79). In performing this inquiry, the court must consider not only the impact on the repute of the administration of justice of *admitting* the

evidence, but also the impact of *excluding* the evidence (see *ibid.*). The reliability of the evidence, its importance to the Crown's case, and the seriousness of the offences are all factors to be considered (see *ibid.*, at paras. 81-85).

[298] Here, society's interest in the adjudication of the case on its merits is exceedingly high. The evidence consists of 13 grams of crack cocaine, cash, and a handgun — more precisely, a fully loaded, semi-automatic Ruger pistol with no safety and a bullet sitting in the chamber. The fact that a fully loaded, semi-automatic handgun is implicated is no minor consideration, particularly given the trial judge's finding that the neighbourhood in question has been "plagued by a high incidence of violent crimes associated with guns and drugs". As the Ontario Court of Appeal recently observed, "[t]he pervasiveness of gun violence in Toronto has become ever-present and ever-concerning. The public has an obvious interest in curtailing that form of crime" (*Reid*, at para. 67).

[299] The serious danger to the public posed by guns is made strikingly evident in this case. After fleeing the backyard, Mr. Le attempted, during a violent struggle on the ground with one of the police officers, to reach inside his bag where the loaded gun was secreted (see trial judge's reasons, at paras. 36-44). He was unsuccessful in retrieving the weapon only because Cst. O'Toole, who yelled "Gun!" after spotting an extended magazine in the butt of the gun almost sticking out of the bag, managed to bring Mr. Le under his control while delivering periodic forearm strikes to him on the

ground. Had Mr. Le succeeded in retrieving the loaded gun, the consequences may well have been fatal.

[300] As a majority of this Court observed in *Grant*, the term “administration of justice” under s. 24(2) “embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole” (para. 67). In my view, it is essential to both the rule of law and the attainment of the rights enshrined in the *Charter* — including the right to life, liberty, and security of the person guaranteed by s. 7 — that Canadians feel safe and secure in their communities. The harsh reality, however, is that many Canadians in communities like the one in question live under the constant threat of gun violence and the evils of drug trafficking — a lethal combination to be sure. Members of these communities look to the police to protect them from the lurking presence of guns, drugs, and the harm they bring. In my view, this reality, and the perspective of those Canadians who live in communities marred by gun violence and drugs, must not be lost in the s. 24(2) analysis.

[301] Society at large has a strong interest in a trial on the merits: Canadians rightly expect that persons who commit serious offences and imperil our safety and security will be brought to justice. But while the broader community has a strong interest in an adjudication on the merits, the immediate community’s interest is even stronger. As the Alberta Court of Appeal stated in *R. v. Chan*, 2013 ABCA 385, 561 A.R. 347: “we consider society’s interest in the adjudication of the merits to be greater where the offence is one that so literally involves the safety of the

community” (para. 49). The effect of a decision to exclude evidence of serious criminal misconduct may be to return a dangerous individual to the streets, without any legal sanctions or conditions, thereby putting at risk the safety and security of community members. A decision by the trial judge in this case to exclude the evidence would have done precisely that. And while Mr. Le has since been released after serving his sentence, my colleagues’ decision to exclude the evidence will have the effect of exonerating him and removing the lifelong firearms ban imposed by the sentencing judge (see 2014 ONSC 4288, at para. 48 (CanLII)). It goes without saying that this does nothing to hold Mr. Le accountable for his actions or respond to the scourge of violence and drugs that currently afflicts the neighbourhood in question. In my view, this is simply unacceptable.

[302] Finally, as my colleagues acknowledge, the evidence in this case is real, reliable, and essential evidence of very serious criminal offences. Exclusion of the evidence would gut the Crown’s case.

[303] For these reasons, the third *Grant* line of inquiry pulls strongly in favour of admission.

(4) Balancing

[304] “The words of s. 24(2) capture its purpose: to maintain the good reputation of the administration of justice” (*Grant*, at para. 67). The phrase “bring the administration of justice into disrepute” is to be understood “in the long-term sense of

maintaining the integrity of, and public confidence in, the justice system” (*ibid.*, at para. 68). Section 24(2)’s focus is “societal” (*ibid.*, at para. 70); it is aimed not at “punishing the police or providing compensation to the accused”, but rather at “systemic concerns” (*ibid.*).

[305] In this case, considering all the circumstances, it is in my view clear what must be done to maintain the good repute of the administration of justice: the evidence must be admitted. Given that the seriousness of the *Charter*-infringing conduct falls on the low end of the spectrum and society’s interest in an adjudication on the merits is exceedingly high, the impact on the accused’s *Charter*-protected interests is in my view insufficient to tip the scale in favour of exclusion.

[306] It is equally clear that *exclusion* of the evidence would swiftly and irreparably bring the administration of justice into disrepute. In my view, reasonable and well-informed members of the public would regard a decision in this case to exclude the evidence and exonerate an admitted drug dealer who was prepared to reach for a loaded weapon during a violent struggle with the police as not merely alarming, but intolerable. Our society — which is what s. 24(2), this Court, and the justice system as a whole are each meant to serve — deserves better.

## VI. Conclusion

[307] My colleagues and I agree that when the police obtain incriminating evidence by running roughshod over the *Charter* rights of racialized persons,

admission of the evidence cannot be condoned — not by the *Charter*, not by the courts, and not by Canadian society. The point on which we differ is whether the facts of this case place it within that category.

[308] The trial judge found that this was not a case of egregious police misconduct; rather, it was a case of three police officers performing legitimate investigatory duties. Those findings have not been shown to have been tainted by any palpable and overriding error. Indeed, Mr. Le has not argued that any palpable and overriding error exists. Therefore, it is not open to an appellate court to recast the record and decide a different case.

[309] Respectfully, my colleagues' approach raises a number of concerns. Doctrinally, it ignores the longstanding principle that a trial judge's findings of fact and credibility cannot be upset absent palpable and overriding error. Analytically, it allows police trespass, committed inadvertently in the context of a legitimate investigation, to dominate the s. 24(2) analysis. Practically, it guts the prosecution of serious criminal offences and exonerates a dangerous drug dealer, thereby releasing him from conditions aimed at protecting members of the public. Finally, it does nothing to recognize that the three police officers in this case, in the course of carrying out a legitimate investigation, put their lives on the line for the good of the community. The chambered bullet in Mr. Le's semi-automatic handgun could have ended the life of an innocent bystander or one of the police officers as they struggled to wrest control of the bag containing the weapon from Mr. Le. For both the police

and law-abiding members of the public, the result reached by my colleagues can only be described as demoralizing and discouraging.

[310] The *Charter*, and s. 24(2) in particular, seeks to balance the rights and interests of the state and the individual through the lens of what is best for Canadian society as a whole. At the end of the day, I respectfully cannot agree with my colleagues that excluding the evidence would serve our society. To the contrary, in my view, it would bring our justice system into disrepute.

[311] Accordingly, I would dismiss the appeal.

*Appeal allowed, WAGNER C.J. and MOLDAVER J. dissenting.*

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