

No. 19 – HCW 35

HIGH COURT OF WINDSOR

Her Majesty the Queen,
Appellant,

v.

Tom Le,
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

Interveners

OFFICIAL MOOT PROBLEM

**THE INAUGURAL LLOYD DEAN
MOOT COURT COMPETITION**

**PRESENTED BY:
BLACK LAW STUDENTS’ ASSOCIATION OF CANADA – WINDSOR CHAPTER
UNIVERSITY OF WINDSOR PRE-LAW STUDENTS’ SOCIETY
UNIVERSITY OF WINDSOR MOCK TRIAL ASSOCIATION**

**PROBLEM AUTHORED BY: NASHARA A.L. PEART, JD, JD, WINDSOR LAW ’18
UNDERGRADUATE MOOT CHAIR 2019-2020: KAYLA SMITH, JD CANDIDATE 2020**

MOOT QUESTIONS

Did the Supreme Court of Canada correctly find that:

- 1) The accused's s. 9 Charter right had been infringed?**
- 2) That admission of the evidence found during the police search would bring the administration of justice into disrepute?**

This moot **will not** address the question of an infringement of the accused's s. 8 Charter right.

SUMMARY¹

One evening, five racialized men, who were socializing in a private backyard and appeared not to be engaging in any illegal behavior, were approached by three police officers. Two officers entered the yard without a valid search warrant, and without requesting permission of any of the five young men. Another officer later stepped into the yard after patrolling the perimeter. One of the two officers originally present on the property questioned the accused and demanded that he produce identification. The officer also asked the accused what he was carrying in his bag. At that point, the accused fled. The officers pursued and the accused was arrested after the officers found that the accused was in possession of a firearm, drugs, and cash.

During his trial, the accused asked the Court to exclude the evidence under s. 24(2) of the *Charter of Rights and Freedoms*, and argued that the police had violated his rights under sections 8 and 9 of the *Charter*. The Court was not persuaded by the accused's arguments and he was convicted. The Court held that the accused did not have standing to advance a section 8 argument, and that because the officer did not detain the accused until he was asked about the contents of his bag, the detention was not arbitrary. The Court also held that had the accused's rights been violated, the evidence would still be admissible.

¹ This summary and portions of the following sections were produced with notes from [R. v. Le.](#)

The accused appealed his conviction to the Ontario Court of Appeals. The majority of that court agreed with the trial court's decision, and the accused's conviction was upheld. The accused then appealed to the Supreme Court of Canada. The Supreme Court held that the appeal should be allowed, the evidence should be excluded, and the accused's convictions should be set aside. The Crown now appeals the accused's acquittal to the High Court of Windsor for final determination as to the alleged *Charter* violations and admission of the evidence.

RELEVANT SECTIONS OF THE *CHARTER* AND IMPORTANT NOTES

SECTIONS

Detention or imprisonment 9.

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

Enforcement of guaranteed rights and freedoms 24.

(1) Anyone whose rights or freedoms, as guaranteed by this [Charter](#), have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), 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.

NOTES

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.

A court can find that evidence was obtained in violation of *Charter* rights, but can still allow the evidence to be considered. In order to be excluded, the evidence must bring the administration of justice into disrepute – in other words, if it would not tarnish the reputation of the justice system to allow evidence to be included, even if the rights of the accused were somehow infringed, Courts will allow evidence to be introduced on the record. Courts will consider all of the circumstances involved, i.e. the time of day, the age of the accused, the actions of the officer or officers involved, the accused's racial identity, and the actions of the accused, to determine whether the evidence was found in a way that discredits the justice system.

R. v. LE – SUPREME COURT DECISION

Citation: R. v. Le, 2019 SCC 34

The Supreme Court decided that the question could be determined based on analysis of *Charter* ss. 9 and 24(2) alone, and therefore declined to address the s. 8 issue.

The Court reviewed three non-exhaustive factors from *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R 353, to guide its analysis of whether there was detention in this case:

1. The circumstances giving rise to the encounter as they would reasonably be perceived by the individual

- a. The Court found that this factor supported a finding that the accused was detained even before the officer asked about the contents of his bag. There was no obvious cause for the police's presence in the yard, the young men were questioned immediately, the officers never announced to the young men who they were, and the officers could have remained outside of the yard while talking to the young men. The officers' entry into the yard and immediate questioning of the young men led the

Court to conclude that a reasonable person would not perceive that they were free to leave the situation.

2. The Nature of The Police Conduct

- a. The Court found that the detention arose as soon as the officers entered the backyard. The police effectively trespassed on the property when they entered to question the young men. The officers singled out the young men to question them individually, and blocked the young mens' path to exit the yard. Coming over the fence to enter the property demonstrated a showing of force. The officers issued orders to which they expected compliance.

3. The Particular Characteristics or Circumstances of the Individual

- a. The Court considered that individuals living in some communities have differing experiences and relationships with police, and may feel as though they are being detained in situations that might illicit different feelings from people from other communities. The Court acknowledged that when considering detention, the analysis must consider the larger, historic and social context of race relations between police and people of racialized backgrounds. A finding that there has been no racial profiling on the part of the police has little bearing – when considering the question of detention, it is the accused's perception of how their experience as a racialized person informs their current experience that bears the most weight.

The court also found that no statutory or common law power authorized the accused's detention, and that it was therefore an arbitrary detention that infringed the accused's *Charter* rights.

The Court considered three factors in its determination of whether the evidence should be excluded:

1. The Seriousness of the Charter Infringing Conduct

- a. for state misconduct to be excused as a good faith (and, therefore, a 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

2. The Impact of the Charter Protected Interests of the Accused

- a. Whether and to what extent, in the totality of the circumstances, the *Charter* breach actually undermined the interests protected by the right infringed.

3. Society's Interest in Adjudication of the Case on its Merits

- a. This factor 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.

R. v. LE – ONTARIO COURT OF APPEALS DECISION

Citation: *R. v. Le*, 2014 ONSC 2033

The Court analyzed the s. 8 argument, but for the purposes of this appeal, you will only analyze ss. 9 and 24(2).

The Court of Appeals highlighted additional facts: the incident took place in the Atkinson Housing Co-Operative, an area plagued with a high level of violent gang activity including guns and drugs. The officers were looking for two suspects in a case that was currently under investigation. The officers who interacted with the accused and his friends decided to investigate the area after private security guards in the complex pointed to that address as being part of a “problem area” associated with criminal activity. When the officers approached, they found the five young men in the backyard. The yard was surrounded by a waist-high fence that did not have a gate, but had a gap in the fence through which a public path continued.

The Court agreed with the trial court’s examination of the following three factors when considering whether there was a violation of the accused’s s. 9 rights.

1. How the Conduct of the Police Might Reasonably Have been Perceived by the Accused

- a. The accused testified that he believed he was free to leave the backyard after the police started questioning him. Accordingly, the trial judge found that the accused had not been detained until the police asked him what was in his bag, and therefore, that the detention was not arbitrary.

2. The Nature and Duration of the Police Interaction, Including how the Police Addressed the Accused.

- a. The interaction lasted less than a minute. Though the officers had properly detained the accused by asking what was in his bag, they were not able to continue with the lawful detention because the accused began to run from the yard.

3. The Young Age and Visibly Minority Status of the Accused and his Friends

- a. All of the young men were racialized – four were Black and the accused is Asian. The racialized status of the accused and his friends was not the motivating factor for the police to enter the yard.

The Court also held that the officers had the requisite reasonable suspicion to believe that the suspect was armed. “In assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person ‘standing in the shoes of the officer.’” This test takes into account the officer’s training and experience. The fact that the officers may have been trespassing did not impact the lawfulness of the detention because at the time, the police were not entering the backyard with the intention to detain anyone. Because the Court did not find a violation of the accused *Charter* rights, it did not provide a fulsome analysis of s. 24(2).

CASES TO CONSIDER

***R. v. Le*, 2014 ONSC 2033**

- This is the opinion in this case from the Ontario Superior Court of Justice. It was written following the accused's trial where it was found that his *Charter* rights were not infringed, where the evidence was initially allowed, and where the accused was convicted.

***R. v. Grant*, 2009 SCC 32**

- This case discusses the difference between physical detention and psychological detention and how the courts determine when detention has taken place. It is also instructive on the issue of when to exclude evidence under *Charter* s. 24(2).

***R. v. Mann*, 2004 SCC 52**

- Here, focus on the Court's considerations of when to admit evidence under s. 24(2). The violation in *Mann* is pursuant to s. 7 of the *Charter*, but the discussion surround s. 24(2) is instructive.

GROUND RULES

1. Teams of two will argue for the Appellant (Crown) and the Respondent (Le).
2. Teams will be assigned Moot Coaches who are upper-year Windsor Law students. As these coaches are student volunteers, they will provide support to Mooters at their discretion.
2. Each team will have 30 minutes for argument. The Appellant team will go first and speak for 25 minutes. The Respondent team will go second and speak for 30 minutes, including any rebuttal time. The Appellant team will then have 5 minutes for further rebuttal. [The Appellant team may choose to reduce its rebuttal time to allocate more time for their initial argument, and should inform the judges prior to the start of the moot if they are doing so.]
3. The time taken to answer questions from the judges will be part of the 30 minutes allotted to each team. Be precise and concise in your answers. Clerks will indicate timing throughout.
4. No written material will be submitted, and no additional research is required. Judges will be provided with copies of each of the cases to be considered found in this moot problem as well as the lower court judgements, all of which you may reference in your submissions.
5. Judges will score the competitors on the following basis: (1) Quality of Legal Argument 50% including organization, clarity, research, simplicity, persuasiveness and elegance and (2) Presentation 50% including presence, style, ability to respond well to questions, and familiarity with facts and legal policy issues.
6. The judges will then select the best Appellant team and the best Respondent team from the preliminary round. These two teams will compete in the championship round at the end of the afternoon. In spite of the results, all participants are highly encouraged to attend the final round.
7. An awards ceremony will directly follow the finals for all participants, where the award for best team in the championship round will be announced and presented, as well as other special recognitions. All participants are highly encouraged to attend.