

R v Le and How Race Factors into the *Grant* Test

Facts

At 10:40 p.m., five men, including Le, were gathered in the backyard of LD's townhouse when three police officers entered. Prior to this, a police officer talked with the housing security guards regarding an unrelated issue, the guards suggested that LD's house was a "problem address" and there were concerns of drug trafficking in the backyard. Three police officers entered the yard and confronted the individuals, who, by police admission, appeared to be doing nothing wrong. When the police entered the backyard, they confronted the individuals and ordered them to keep their hands visible.

One officer then moved toward Le, who appeared to be acting nervously and angled his body away from the officer, as to conceal something. When the officer asked Le what was in his bag, Le fled the scene and the officers pursued. When the officers caught Le, they arrested him, searched his bag, and charged him with 10 offences, including possession of a firearm, possession of cocaine for the purpose of trafficking, and proceeds of crime.

Le plead not guilty and sought exclusion of evidence on the basis that the police unconstitutionally breached his charter rights. The case was appealed to the Supreme Court of Canada (SCC), where the justices applied the *Grant* test to determine whether the evidence should be included or excluded.

The *Grant* test is as follows:

- 1) The seriousness of the *Charter*-infringing state conduct;
- 2) Impact of the breach on the *Charter* protected interest of the accused;
- 3) Society's interest in adjudicating the case on its merits.¹

Seriousness of the *Charter*-Infringing Conduct

The SCC stated that the *Charter* infringing conduct from the police in this case was serious and that it will weigh heavily on the fact that admitting the evidence seized from Le would bring the administration of

¹ *R v Grant*, 2009 SCC 32 at paras 72-85.

justice into disrepute.² The trial judge did not acknowledge any racial profiling and the appellant did not challenge this and as such the SCC found that the police did not act in bad faith on the basis of racial profiling.³ Despite this, the SCC concluded that police were not acting in good faith when they entered the backyard.⁴ During this discussion, however, they omitted a further analysis into race being an important factor in the circumstances.

Earlier in the decision, the SCC stated that the larger social context of racial profiling in policing should be infused throughout the *Grant* analysis.⁵ Le and his friends were in their private backyard when they were engaged by the police without warrant, consent, or warning, late at night, and were bombarded with questions. The Le case occurred in the larger social context of Toronto where racialized young men are being frequently targeted, stopped, and subjected to pointed questioning, a tactic that has become too familiar for this group of people.⁶ Given the social context of this breach we believe it should be measured on the highest end of the *Charter* infringement spectrum, higher than what the SCC concluded.

Impact on the *Charter*-Protected Interests of the Accused

In the second step of the *Grant* test, the court must ask to what extent, in the totality of the circumstances, the *Charter* breach undermined the *Charter* protected right.⁷ Le's *Charter* rights were clearly violated, and as a minority within the previously mentioned social context that Le inhabited in Toronto, this is a factor that may have contributed to the hasty escalation of events. This is not to say that racialized individuals have a higher level of *Charter* protection; however, the court must be cognizant that police routinely profile individuals who are members of racialized minorities. Minorities do not necessarily expect that their *Charter* rights will be infringed more often. Still they are aware that they are susceptible to these breaches more often than an individual who is not a member of a minority. In this case, both Le and the

² *R v Le*, 2019 SCC 34 at para 150.

³ *Ibid* at para 146.

⁴ *Ibid* at paras 148-149.

⁵ *Ibid* at para 97.

⁶ *Ibid*.

⁷ *Ibid* at para 151.

people he was within the yard were members of a historically marginalized group that were, and evidently still are, targeted by police.

The likely possibility of the individuals being racialized heightened the likelihood of the police pursuit that occurred. Even though the court did not find evidence of racial profiling, race was likely a factor that urged Le to change his behaviour and run, which in turn prompted the police to chase and arrest him. In our opinion, this entire encounter occurred in the social context of racial profiling and, therefore, must be found to have the most severe impact on the *Charter* rights of the accused.⁸ Had these individuals not been racial minorities, we believe that this encounter would have proceeded differently, and in a calm, reserved fashion without the heightened suspicion that was present.

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

The third step of the *Grant* test requires the court to consider whether the exclusion of evidence would undermine the truth-finding function of the trial process.⁹ In response to the public clamour for conviction and to maintain public confidence in the judicial system, the court generally finds that this step will pull towards admitting the evidence. The SCC stated that the charges against Le were serious, and the evidence seized was highly reliable.¹⁰ To conclude this step, the SCC noted that this line of inquiry supported admitting the evidence. However, we do not agree with the way the SCC conducted this step. The police seriously infringed the *Charter* with their conduct, and the impact on Le's *Charter*-protected interests was severe; but due to the SCC's significant emphasis on societies interest in adjudicating the case on its merits and the repute of the judiciary, this step of the test supported admitting the evidence.

Conclusion

Overall, the SCC made an appropriate decision by excluding the evidence. In light of the racialized context and the severe *Charter* breaches, admitting this evidence would put the justice system in disrepute.

⁸ *Ibid* at para 97.

⁹ *Supra* note 1 at para 79.

¹⁰ *Supra* note 2 at para 159.

Going forward, the court must be cognizant of the racial and social contexts that influence police conduct. In *Le*, the court emphasized a statement from *Grant* stating the decision was to deter similar police misconduct in the future.¹¹ Extra emphasis should be put on deterring racial profiling in policing as a result. In many cases, racial profiling is the driving factor for a *Charter* breach and therefore must be seen as an aggravating factor within the *Grant* analysis.

¹¹ *Ibid* at para 150.