

# Detained on Sight: The Socioeconomic Aspect of Social Context in *R v Le*

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## ABSTRACT

Reasonable-person psychological detention is an area of criminal law that has been subject to a number of jurisprudential innovations in the 21st century. This work responds to a current gap in the literature regarding the importance of socioeconomic factors to the crystallization of detention in accordance with s. 9 of the *Canadian Charter of Rights and Freedoms*. The thesis of this paper is that socioeconomic factors are foundational to understanding the social context in which police interactions sometimes crystallize into detention. The socioeconomic aspect of social context reveals the way police interact with individuals in a certain space. Racial aspects of social context are postulated to be tied to socioeconomic aspects insofar as the racialization of individuals tends to occur in certain spaces – namely, high-crime, low-income neighbourhoods.

The methodology of this work includes an analysis of trends in detention case law beginning with the 2009 decision of *R v Grant* and ending with the 2020 decisions of *R v Thompson* and *R c Dorfeuille*. Secondly, this work investigates the Honourable Michael H. Tulloch's *Report of the Independent Street Checks Review*. Thirdly, this work investigates a series of studies conducted by Yunliang Meng, a geography scholar who analyzed the Toronto Police Service's racialization of individuals as a function of space. In conclusion, this paper recommends modifications to police practices that require officers to make explicit statements at the outset of interactions with individuals which determine whether or not the individual is detained.

## I. INTRODUCTION

The killing of George Floyd and other tragedies of the 21st century in which racialized individuals have been arbitrarily killed by police officers demand a sea change in law. As such killings have become more publicized, society has started to organize in response to police violence against racialized minorities. In some ways, recent case law has suggested that the Canadian judiciary has begun to take notice.

*R v Le*<sup>1</sup> – a case in which a racialized youth was arbitrarily detained when police officers entered his friend’s private backyard – significantly affected the right against arbitrary detention under s. 9 of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> *Le*’s contribution to *Charter* detention jurisprudence largely derived from its recognition that social context is relevant to the question of whether a detention had crystallized despite a lack of physical coercion or legal obligation under the common law test developed in *R v Grant*.<sup>3</sup> According to *Le*, whether a detention has crystallized at any given moment is dependent upon racial and socioeconomical aspects of the state’s interaction with the individual. Namely, racialized and socioeconomically marginalized individuals have a different perspective on police interactions which must be a factor in the question of whether and when a detention has crystallized.

While *Le*’s racial implications have been addressed in academic literature, its socioeconomical implications have thus far been ignored. Unlike a racial investigation, a socioeconomical investigation reveals the significant influence of space – i.e., location – upon the perspective of a reasonable person. Namely, when a person is located in a heavily policed neighbourhood, their reasonable expectations of police interactions are different from when the same person is in a neighbourhood that is not heavily policed. Heavily policed neighbourhoods tend to be low-income neighbourhoods in which immigrant communities tend to cluster for socioeconomic reasons. As a result, overrepresentations of minorities in high-crime, low-income neighbourhoods create a racialization of inhabitants of neighbourhoods which police tend to dedicate a disproportionate number of resources.

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<sup>1</sup> 2019 SCC 34 [*Le*].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11, s 9 [*Charter*].

<sup>3</sup> 2009 SCC 32 at para 30 [*Grant*].

When analyzed in tandem with the socioeconomic marginalization that occurs in high-crime, low-income neighbourhoods, this racial profiling can be understood more deeply as “race-and-place” profiling.<sup>4</sup> That is, a socioeconomical investigation into police racialization reveals that such racialization occurs disproportionately in high-crime, low-income neighbourhoods in which police focus a majority of their resources through “hot spot” crime reduction strategies.<sup>5</sup> Thus, racialization and socioeconomic marginalization are inextricably intertwined, a reality which was recognized in *Le* and later jurisprudence but has thus far been unaddressed in the academic literature.

An investigation of race-and-place profiling – which reveals the importance of the socioeconomical status of the location in which police officers interact with individuals – is crucial to understanding the *ratio decidendi* of *Le* – namely, that the crystallization of a psychological detention is informed by its social context, consisting of both racial and socioeconomical aspects of interactions with police.

In *Le*, the social context of the police interaction with Tom Le revealed to the Majority of the Supreme Court of Canada that officers of the Toronto Police Service (TPS) were under an enhanced responsibility to individuals while it patrolled the high-crime neighbourhood in which Tom Le was located at the time of their interaction.<sup>6</sup> However, the Majority failed to apply this enhanced responsibility in its analysis insofar as it failed to guarantee Tom Le any protections beyond the protection against unlawful violations of the private property rights guaranteed to “everyone” in Canada.<sup>7</sup> That is, any enhanced responsibility the state might have in high-crime neighbourhoods could not possibly be fulfilled by the state’s observation of their standard responsibility to observe guaranteed private property rights in all of Canada’s neighbourhoods.

In conclusion, a socioeconomic investigation into *Le* reveals that police officers under an enhanced responsibility in a high-crime neighbourhood

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<sup>4</sup> Yunliang Meng, “Racially biased policing and neighborhood characteristics: A Case Study in Toronto, Canada” (2014) *Cybergeo: European J of Geography* at para 6 [Meng, “Racially biased policing”].

<sup>5</sup> Sunghoon Roh & Matthew Robinson, “A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops” (2009) 12:2 *Police Q* 137 at 138; Meng, “Racially biased policing”, *supra* note 4 at para 7.

<sup>6</sup> *Le*, *supra* note 1 at para 60.

<sup>7</sup> *Charter*, *supra* note 2, s 9.

who interact with an individual in circumstances that would lead a reasonable person to “conclude that his or her freedom to choose whether to cooperate or not has been removed”<sup>8</sup> are required to take a positive action which explicitly confirms whether or not an individual is detained to avoid the crystallization of an arbitrary detention under s. 9 of the *Charter*. As a result, Canadian police departments are recommended to develop statements to be read to individuals in locations in which the state assumes an enhanced responsibility to avoid detaining an individual against their rights under ss. 9 and 10 of the *Charter*.

## II. PROCEDURE OF INVESTIGATION

Firstly, this investigation will include a review of recent jurisprudence on the issue of reasonable-person psychological detention (RPP detention). This review of jurisprudence will reveal a trend of findings post-*Grant* that RPP detention may crystallize instantly as the result of a single act at the outset of an interaction with police. These findings of single-act crystallization are distinct from the gradual multi-factored crystallization which occurred in *Grant*. This post-*Grant* distinction is not the result of factual differences between *Grant* and *Le*. Instead, the distinction is the result of the Court’s finding in *Le* that social science evidence is relevant to the crystallization of RPP detention. This review of jurisprudence also confirms that the social context relevant to the crystallization of detention recognized in *Le* is not merely a question of racial factors but also of socioeconomic factors.

Secondly, this investigation will include an inquiry into the spatiality of police racialization. This second inquiry will analyze the sociological aspect of social context implicit in *Le*, which largely consists of the fact that *Le* occurred in low-income housing within one of the City of Toronto’s poorest neighbourhoods. This second inquiry will then explore empirical evidence that low-income neighbourhoods tend to include disproportionate levels of racialized individuals as well as disproportionate levels of crime. The effects of this spatial correlation between racialized individuals and crime in low-income neighbourhoods on police policy and practice are analyzed by reliance upon the *Report of the Independent Street Checks Review* by the Honourable Michael H. Tulloch (*Tulloch Report*), which explored the practice of “carding” utilized by the Toronto Anti-

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<sup>8</sup> *Grant*, *supra* note 3 at para 41.

Violence Intervention Strategy (TAVIS) in response to a spike in gun violence in the City of Toronto.<sup>9</sup> This second inquiry then explores the way in which carding became a tool for racial profiling in certain spaces by reliance on two studies by Dr. Yunliang Meng, a geography scholar, which analyzes the spatial dimension of TPS carding data. This second inquiry finally analyzes news reporting on Project Post, the specific project of TAVIS, which was responsible for the police interaction between TPS officers and Tom Le.

Thirdly, this investigation applies the findings of Dr. Meng's studies and the *Tulloch Report* to the findings in *Le*, seeking to understand how the socioeconomic aspect of social context alters the findings of the crystallization of RPP detention undertaken by the Majority. This third inquiry illustrates the Majority's failure to incorporate the socioeconomic aspect of social context into its detention analysis. The effects of this failure are explored, illustrating that the failure to incorporate the socioeconomic aspect of social context led to a misunderstanding of the perspective of a reasonable person in the circumstances and ultimately to a misunderstanding of the time at which the detention of Tom Le crystallized.

### III. REVIEW OF JURISPRUDENCE: REASONABLE-PERSON PSYCHOLOGICAL DETENTION

#### A. *R v Grant*

In 2009, the rules of detention under ss. 9 and 10 of the *Charter* were significantly advanced under *Grant*, which established that “[d]etention under ss. 9 and 10 and of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint.”<sup>10</sup> Psychological restraint may arise due to “a legal obligation to comply with the restrictive request or demand” or “where [...] a reasonable person [in the individual’s circumstances] would conclude by reason of the state conduct that he or she had no choice but to comply.”<sup>11</sup> This interference with an individual’s freedom triggers informational obligations

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<sup>9</sup> Ontario, The Honourable Michael H Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen’s Printer for Ontario, 2018) [*Tulloch Report*].

<sup>10</sup> *Grant*, *supra* note 3 at para 44.

<sup>11</sup> *Ibid.*

under s. 10 of the *Charter* – namely, the obligation to promptly inform the individual of the reasons for their detention and their right to counsel without delay.<sup>12</sup> If the state detains an individual without fulfilling its s. 10 *Charter* obligations, the detention is arbitrary under s. 9.<sup>13</sup>

The perspective of the reasonable person was assessed in *Grant* in accordance with three factors. According to *Grant*, an individual's interaction with police may "crystallize"<sup>14</sup> into a detention when the "circumstances giving rise to the encounter," the "nature of the police conduct," and the individual's "particular characteristics or circumstances"<sup>15</sup> would lead a reasonable person to conclude that they were not "free to choose to break off the encounter."<sup>16</sup> *Grant* thus established an analytical framework (*Grant* test) for RPP detention, which arises despite the lack of a legal obligation to comply with a police interaction.

In *Grant*, the Majority found that a detention crystallized due in part to the fact that officers had taken "tactical adversarial positions" behind the officer questioning him.<sup>17</sup> This tactical positioning consisted of the officers forming a "small phalanx blocking the path in which the appellant was walking."<sup>18</sup> However, in *Grant*, this tactical positioning intended to force Donnohue Grant to stop walking was not on its own sufficient to result in a detention. Instead, the tactical positioning of the officers was one of three factors that altogether created a detention, the other two being the embarking on "a pointed line of questioning" and an order to "keep his hands in front of him."<sup>19</sup>

## **B. *R v Omar***

In 2019, this three-factored approach was replicated in *R v Omar*,<sup>20</sup> in which a 20-year-old Black male was approached by officers while "walking down a street in Windsor, Ontario at around 1 a.m..<sup>21</sup> In *Omar*, the

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<sup>12</sup> *Supra* note 2, s 10.

<sup>13</sup> *Ibid*, s 9.

<sup>14</sup> *Supra* note 3 at para 10.

<sup>15</sup> *Ibid* at para 44.

<sup>16</sup> *Ibid* at para 173.

<sup>17</sup> *Ibid* at para 49.

<sup>18</sup> *Ibid* at para 183.

<sup>19</sup> *Ibid* at paras 52, 189.

<sup>20</sup> *R v Omar*, 2018 ONCA 975 at para 91 [*Omar* 2018]; *R v Omar*, 2019 SCC 32 [*Omar* 2019].

<sup>21</sup> *Supra* note 20 at para 5.

officers parked next to the accused, shone a flashlight at him, asked him to approach the police cruiser, and began asking him questions.<sup>22</sup> Detention arose in *Omar* as it did in *Grant* despite the fact that the officers' interaction with the accused was "material[ly]"<sup>23</sup> different in two ways. That is, the officers had not taken tactical adversarial positions, and the accused had not been singled out with questions of whether he "had anything" or if he had committed a crime.<sup>24</sup>

### C. *Grant* and *Omar*: Gradual Multi-Factored Detention

Despite and, indeed, through their factual distinctions, *Grant* and *Omar* establish a firm factual precedent for RPP detention consisting of tactical positioning, questioning, and an order to restrict the motion of one's hands. However, *Grant* noted that, in certain circumstances, "a single forceful act or word may be enough" to instantly crystallize an interaction into a detention.<sup>25</sup> Such an instantaneous crystallization was found in *Le*.

### D. *R v Le*

In 2019, *Le* made significant developments in the *Grant* test, finding that "the research now shows disproportionate policing of racialized and low-income communities" and "it is in this larger social context" that RPP detention must be analyzed.<sup>26</sup> *Le*'s significance is partly due to its recognition of the relevance of racial and socioeconomical aspects of social context to the *Grant* test. The *ratio decidendi* of *Le* - which held that the *Grant* test must take into account the empirically proven fact that "[y]outh, especially Indigenous, Black and other racialized youth, and youth in low-income housing, are disproportionately impacted by street checks" - thus took into account both racial and socioeconomic aspects of the social context of a police interaction to determine whether an RPP detention had crystallized.

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<sup>22</sup> *Supra* note 20 at para 8.

<sup>23</sup> *Supra* note 20 at para 105.

<sup>24</sup> *Omar* 2018, *supra* note 20 at paras 8-11.

<sup>25</sup> *Supra* note 3 at para 42.

<sup>26</sup> *Supra* note 1 at para 97 [emphasis added].

## E. *R v Thompson*

In 2020, the Court of Appeal for Ontario (ONCA) in *R v Thompson* found that police had detained an individual in his car before the officers had even left their cruiser.<sup>27</sup> In *Thompson*, “a black man sitting in his car at night in Brampton [...] was obstructed without apparent reason by two marked police cruisers.”<sup>28</sup> Specifically, the police officers “parked two police cruisers directly behind it – boxing in the appellant so he could not drive away.”<sup>29</sup>

In *Thompson*, the ONCA conducted the *Grant* test with explicit reference to *Le*.<sup>30</sup> Regarding the “nature of the police conduct,” the ONCA in *Thompson* found that the officers’ “physical proximity in blocking his car” contributed to the crystallization of detention.<sup>31</sup> In fact, the ONCA in *Thompson* found that the physical – that is, spatial – aspect of the police’s conduct alone crystallized detention “from the outset.”<sup>32</sup>

*Thompson*’s instant crystallization of detention derived from the “authoritative” nature of the police’s “obstructing the movement” of the appellant’s car.<sup>33</sup> This obstruction “[sent] the message that the appellant was not free to leave until the police decided otherwise.”<sup>34</sup> Notably, this messaging sent from the police was unrelated to “the officers’ intentions as they blocked the appellant.” Instead, detention crystallized because “a reasonable person would not perceive this action as “assisting in meeting needs or maintaining basic order” but instead as “singling out the individual for focussed investigation.”<sup>35</sup> In *Thompson*, the ONCA found that “a reasonable person would know only that the police showed up late at night and for no apparent reason obstructed the appellant’s car.”<sup>36</sup> Thus, *Thompson* held that the way that police position themselves in relation to an individual could itself potentially crystallize detention, regardless of the reason they position themselves in that fashion.

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<sup>27</sup> *R v Thompson*, 2020 ONCA 264 at para 63 [*Thompson*].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid* at para 2.

<sup>30</sup> *Ibid* at paras 54, 58–59, 63, 73–75.

<sup>31</sup> *Ibid* at para 58.

<sup>32</sup> *Ibid* at para 55.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at para 54; *Grant*, *supra* note 3 at para 44.

<sup>36</sup> *Supra* note 27 at para 54.



## F. *Le* and *Thompson*: Instant Single-Act Detention

In comparison to *Grant* and *Omar*'s gradual multi-factored crystallization, the detention in *Thompson* crystallized solely due to officers' physical positioning, which restricted the movements of Tom Le and O'Neil Thompson at the beginning of their interactions.<sup>37</sup> In this sense, the detention in *Thompson* factually departed from the detention in *Omar* and *Grant* in a significant way. In *Thompson*, as well as in *Le*, a detention crystallized instantly based solely on how a reasonable person would interpret the officers' physical positioning – that is, the spatial aspects of the interaction – at the interaction's "outset."<sup>38</sup> In other words, the way in which the officers in *Le* and *Thompson* entered the space surrounding Tom Le and O'Neil Thompson, respectively, instantly crystallized a detention.

Unlike *Grant* and *Omar*'s multi-factored crystallization, *Thompson*'s crystallization did not rely upon an authoritative order to "keep [your] hands in front of [you]"<sup>39</sup> in the context of focussed questions and tactical positioning. Instead, it merely analyzes the way a reasonable person would understand the police's "physical proximity"<sup>40</sup> at the "outset"<sup>41</sup> of the interaction. The ONCA in *Thompson* found that mere proximity, if it creates an "atmosphere that would lead a reasonable person to conclude that the police were taking control of the situation and that it was impossible to leave," may on its own crystallize detention.<sup>42</sup>

*Thompson*'s instantaneous detention factually reflects the detention in *Le*. Namely, the Court in *Le* found that Tom Le was detained before he "was asked what was in his satchel."<sup>43</sup> Instead, detention crystallized in *Le* when officers "entered the backyard and made contact."<sup>44</sup> Like in *Thompson*, where a detention crystallized due to a single forceful act of boxing-in an individual's car,<sup>45</sup> detention did not crystallize gradually in *Le* but instantly upon the officers' "single forceful act" of entering private property.<sup>46</sup> In that

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<sup>37</sup> *Ibid* at para 55.

<sup>38</sup> *Le*, *supra* note 1 at para 66.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Supra* note 27 at para 58.

<sup>41</sup> *Ibid* at para 55.

<sup>42</sup> *Ibid* at para 58, citing *Le*, *supra* note 1 at para 50.

<sup>43</sup> *Supra* note 1 at para 30.

<sup>44</sup> *Ibid* at para 30.

<sup>45</sup> *Supra* note 27 at para 48.

<sup>46</sup> *Supra* note 1 at para 66.

sense, the Court in both *Le* and *Thompson* found that detention may arise instantly based only upon the spatial layout of an interaction at its outset. While detention arose in *Thompson* upon officers boxing-in an individual's car,<sup>47</sup> detention arose in *Le* when officers entered a "small, private backyard, without warrant, consent, or warning, late at night, to ask questions of five racialized young men in a housing co-operative."<sup>48</sup>

Furthermore, in both *Thompson* and *Le*, the spatial aspect of the single forceful acts communicated to the persons affected that they were "not free to go."<sup>49</sup> In *Le*, the officer's entrance into private property "as trespassers" was sufficient to establish the "power dynamic needed to ground a detention."<sup>50</sup> When the officers in *Le* walked into a certain space, a detention crystallized through that act's communication of authority. In other words, an officer's act of trespass sent a clear message that the police were asserting control over Tom Le. In *Thompson*, the spatial aspect of the boxing-in of O'Neil Thompson's car communicated the necessary power dynamic by "eliminat[ing] his choice to drive away unless and until the police decided otherwise."<sup>51</sup> In other words, an officer's act of physically cutting off freedom of movement by car sent a clear message that the police were asserting control over O'Neil Thompson.

## **G. Comparing *Grant* to *Le* and *Thompson*: Social Science Evidence**

*Grant* was very similar factually to both *Le* and *Thompson* in the sense that Donnohue Grant's freedom of movement was also restricted – namely, by the first officer's "standing on the sidewalk directly in his intended path" and the other two officers' taking of "tactical adversarial positions" behind the first officer.<sup>52</sup> Despite the Court's recognition in *Grant* that a "single forceful act"<sup>53</sup> was sufficient to crystallize RPP detention, neither the first nor the second and third officers' acts of entering the space proximate to Donnohue Grant crystallized into detention on its own. Yet, these initial acts were more restrictive than those of the officers in *Le*, whose entrance

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<sup>47</sup> *Supra* note 27 at para 48.

<sup>48</sup> *Le*, *supra* note 1 at para 97.

<sup>49</sup> *Grant*, *supra* note 3 at para 31.

<sup>50</sup> *Supra* note 1 at paras 44–45.

<sup>51</sup> *Supra* note 27 at para 64.

<sup>52</sup> *Supra* note 3 at paras 6, 49.

<sup>53</sup> *Ibid* at para 42.

into private property was more clearly intentional than parking behind an individual's car. However, despite the particularly restrictive and forceful acts of the officers in *Grant*, even in comparison to those in *Le* and *Thompson*, detention did not arise instantly in *Grant*. The reason that detention arose in *Le* and *Thompson* but not in *Grant* was not due to a difference in the police action but instead due to the admission of social science evidence such as the *Tulloch Report*,<sup>54</sup> which advocated for the importance of systemic racialization in determining the social context of a police interaction.

The recognition of systemic trends such as systemic racialization through the admission of social science evidence thus changed the nature of the *Grant* test by seemingly lowering the threshold which single acts must meet before crystallizing a police interaction into a detention. The officers' entrance into a private backyard in *Le* and the officers' parking behind a car in *Thompson* were not factually more egregious than the officers' tactical positioning in *Grant*. However, the analysis in *Grant* did not take into account a social context of systemic racism which influenced police conduct. It is likely that, if systemic racism had been actively weighed as in *Le*, detention in *Grant* might have crystallized instantly when the first officer stood directly in Donnohue Grant's path.<sup>55</sup> A key distinction between *Grant* on one hand and *Le* and *Thompson* on the other hand was thus the recognition that systemic racism in police conduct had created a super-charged social context which was ripe for RPP detention. Unlike in *Grant*, *Le* and *Thompson* were decisions that recognized that Blacks were living with "feelings of fear/trauma, humiliation, lack of trust and expectations of negative police treatment" that would lead a reasonable person to expect negative police treatment in any interaction.<sup>56</sup> This recognition of systemic racism single-handedly altered the nature of the RPP detention analysis, recreating the notion of social context to reflect systemic truths which might only be revealed through the admission of social science evidence.

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<sup>54</sup> *Le*, *supra* note 1 at para 83.

<sup>55</sup> *Supra* note 3 at paras 6, 49.

<sup>56</sup> *Le*, *supra* note 1 at para 93.

## H. *R c Dorfeuille*: The Socioeconomic Aspect of Social Context

In 2020, the Court of Appeal of Québec (QCCA) in *R c Dorfeuille* recognized that *Le* incorporated both racial and socioeconomic aspects into the detention analysis by its appeal to Justice Binnie’s statement in *Grant* that “[t]he growing body of evidence and opinion tends to show that visible minorities and marginalized people are at greater risk of being subjected to unwarranted ‘covert’ police interventions.”<sup>57</sup> *Dorfeuille* also noted *Le*’s intent to incorporate both racial and socioeconomic aspects of the social context of a police interaction by its appeal to the *Tulloch Report*, which found that police “carding” practices disproportionately affect “Indigenous, Black and other racialized communities, as well as youth and people from lower socioeconomic groups.”<sup>58</sup>

However, while academics have rightfully noted *Le*’s “crucial sensitivity to the role of race,”<sup>59</sup> the socioeconomic aspect of the social context of a police interaction remains unaddressed in the literature. While the social context of the police interaction in *Le* had crucial racial aspects, it also had important socioeconomic aspects that yield distinct observations about social context. Unlike racial discrimination, which is often the drawing of an assumption based on the way that an individual appears, socioeconomic marginalization is often the drawing of an assumption based on where a person is located. Thus, whereas a racialization fits within the third factor of the *Grant* test – the “particular characteristics [...] of the individual” – a socioeconomic marginalization fits within “the place where the interaction occurred” and is thus a question of the “nature of the police conduct.”<sup>60</sup> As a matter of place, the socioeconomic aspect depends upon the socioeconomic status of the location of a police interaction.

## I. Summary

The evolution of the *Grant* test in *Le* thus consists of a factual precedent for single-act detentions, which crystallize not solely due to the actions taken by the police but instead due to the social context in which the

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<sup>57</sup> *Grant*, *supra* note 3 at para 154; *R c Dorfeuille*, 2020 QCCS 1499 at paras 39–40 [*Dorfeuille*] [emphasis added].

<sup>58</sup> *Supra* note 9 at 4; *Dorfeuille*, *supra* note 57 at para 40.

<sup>59</sup> Amar Khoday, “Ending the Erasure?: Writing Race Into The Story of Psychological Detentions – Examining *R. v. Le*” (2021) 100 SCLR (2d) 165 at 166.

<sup>60</sup> *Grant*, *supra* note 3 at para 44.

actions take place. The reality of single-act detention found by the Court in *Le* was confirmed in *Thompson*, solidifying a post-*Grant* trend towards the recognition of detentions which crystallize instantly when police interact with individuals in the midst of a certain social context. Post-*Le* jurisprudence has confirmed what was explicitly stated in *Le*, that the social context which may inform the RPP detention analysis has both racial and socioeconomic aspects. Furthermore, post-*Le* jurisprudence has also confirmed that the socioeconomic aspect requires distinct alterations to the RPP detention analysis of social context, namely, alterations which result in an analysis based upon not only the appearance of an individual affected by a police interaction but also the location in which a police interaction occurs. In *Le*, the socioeconomic aspect of the social context of Tom Le's interaction with TPS officers was recognized, but the Majority did not analyze its implications on the crystallization of detention. The recognition of the relevance of the socioeconomic aspect of social context, along with the failure to analyze that aspect, thus requires an inquiry into the implications of the socioeconomic aspect of the location in which the interaction between Tom Le and TPS officers took place.

#### IV. SPATIALITY OF RACIALIZATION

##### A. The Socioeconomic Aspect of Social Context in *R v Le*

On May 25, 2012, Tom Le was detained in the Atkinson Housing Co-operative (Atkinson Co-op) in the neighbourhood of Kensington-Chinatown in downtown Toronto.<sup>61</sup> In 2006, official municipal data found that Kensington-Chinatown had the fifth-highest rate of low-income families in the City of Toronto, with 38.4% of the population being of low-income status.<sup>62</sup> In the southern portion of Kensington-Chinatown, Atkinson Co-op was built in 1973, originally as a public housing project named the Alexandra Park Co-Operative.<sup>63</sup> In 2003, the Alexandra Park

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<sup>61</sup> *R v Le*, 2014 ONSC 2033 at para 1 [*Le* 2014].

<sup>62</sup> Ontario, Social Policy Analysis and Research, *Profile of Low Income in the City of Toronto* (Toronto: Social Development, Finance and Administration Division, 2011) at 10.

<sup>63</sup> "Our History" (last visited 21 December 2020), online: *The Alexandra Park Co-Operative* <[www.alexandrapark.ca/history.html](http://www.alexandrapark.ca/history.html)> [perma.cc/AMG2-U4PM].

Co-Operative converted from a public housing project into a tenant-managed co-operative and was re-named.<sup>64</sup>

Thus, the socioeconomic aspect of *Le* included the fact that Tom Le was detained in a low-income housing co-op within one of Toronto's poorest neighbourhoods. This socioeconomic status is presumably the exact type of status which *Le* meant to address, insofar as impoverished urban neighbourhoods are vulnerable. Assuming that the socioeconomic aspect in *Le* is thus relevant to the overall social context, how the socioeconomic aspect of social context relates to its racial aspect is a question that arises. The answer to this question is that the racial aspect of social context is heavily dependent upon the socioeconomic aspect. That is, the socioeconomic profile of a location dictates whether or not a racialized individual will be subject to disproportionate police interactions.

## **B. Spatial Clustering of Newcomers in High-Crime, Low-Income Neighbourhoods**

In large cities like Toronto, newcomer immigrant communities tend to spatially cluster in low-income neighbourhoods next to central business districts.<sup>65</sup> This clustering presumably represents the low-income status of many new immigrants and a desire to be close to public transportation and job opportunities. Urban, low-income neighbourhoods in which newcomers reside often tend to be those which feature crime “hot spots” – that is, neighbourhoods which feature relatively high crime rates.<sup>66</sup> Thus, neighbourhoods in which newcomers tend to settle are simultaneously low-income and high-crime neighbourhoods. As a result of this correlation, low-income neighbourhoods in urban areas tend to also be neighbourhoods housing disproportionate numbers of immigrants and featuring high levels of crime.

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<sup>64</sup> “Atkinson Co-op” (last visited 21 December 2020), online: *Co-operative Housing Federation of Canada* <chfcanada.coop/success-stories/atkinson-co-op/> [perma.cc/PB H3-6B4K].

<sup>65</sup> J David Hulchanski, *The Three Cities Within Toronto: Income Polarization Among Toronto's Neighbourhoods, 1970-2005* (Toronto: Cities Centre Press, 2010) at 26-27; Eric Fong, “Residential Segregation of Visible Minority Groups in Toronto” in Eric Fong, ed, *Inside the Mosaic* (Toronto: University of Toronto Press, 2006) 51 at 52.

<sup>66</sup> Roh & Robinson, *supra* note 5 at 138.

### C. Hot Spot Policing in High-Crime, Low-Income Neighbourhoods

Hot spot policing's focusing of resources towards high-crime areas results in more police patrols in high-crime neighbourhoods than in others.<sup>67</sup> As a result, a majority of police stops occur in high-crime areas.<sup>68</sup> Empirical evidence has suggested that low-income neighbourhoods tend to feature disproportionate levels of crime and thus, low-income neighbourhoods, which also happen to house disproportionate amounts of newcomers, tend to be heavily policed.<sup>69</sup> Accordingly, the heavy policing of newcomers is perhaps not a product of explicitly racist police strategy but, instead, the strategic focus of resources in high-crime areas. This correlation nonetheless systemically creates a racial disparity in policing – namely, that newcomer populations tend to be more heavily policed than other populations. Hot-spot policing, which results in disproportionate policing of racial minorities, is thus an example of systemic racism in the sense that such practices, by their very design, lead to disproportionate policing of racialized individuals.

### D. Summary

The socioeconomic aspect of social context in *Le* includes the fact that the interaction between Tom Le and TPS officers occurred in Atkinson Cop, a low-income housing complex in Kensington-Chinatown, one of Toronto's poorest neighbourhoods. Evidence suggests that low-income neighbourhoods such as Kensington-Chinatown tend to feature clusters of racialized individuals, as well as high levels of crime. The tendency of low-income neighbourhoods in Toronto to be crime hot spots has led TPS to focus resources on low-income neighbourhoods. As a result of TPS efforts to reduce crime by targeting high-crime neighbourhoods, TPS officers consequently police racialized individuals disproportionately. Thus, TPS officers' targeting of racialized individuals is not necessarily a result of individual racist beliefs but instead the result of the systemic policy of TPS. At its foundation, the tendency of TPS officers to target racialized minorities is therefore best understood as systemic racism instead of individual racism.

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<sup>67</sup> Meng, "Racially biased policing", *supra* note 4 at para 7.

<sup>68</sup> *Ibid*; Roh & Robinson, *supra* note 5 at 144.

<sup>69</sup> Roh & Robinson, *supra* note 5 at 138.

This systemic racism was recently the subject of two studies of police stop data from Field Information Reports – otherwise known as “208 cards” – between 2004 and 2008, the product of a police policy known colloquially as “carding.”<sup>70</sup>

## V. CARDING

The carding system, which originated in Canada after World War I as a means of tracking Bolsheviks and Nazis,<sup>71</sup> has since remained a fixture of Canadian policing tools. Carding is the police practice of filling out cards that contain information gathered at a police stop, including “contact ID, person ID, age, gender, place of stoppage, contact time, birth place, skin colour, and stop reason.”<sup>72</sup> Carding is a specific type of street check, the latter being, broadly, “information obtained by a police officer concerning an individual, outside of a police station, which is not part of an investigation.”<sup>73</sup> All street checks, including carding, are means of gathering intelligence in order to maintain a “safe and peaceful community.”<sup>74</sup>

### A. Carding Under the Toronto Anti-Violence Intervention Strategy

In response to a 2006 spike in gun violence in Toronto, TPS devised TAVIS, an “intensive community mobilization strategy” which used “intelligence-led policing information” to focus “high-visibility policing” in “high-crime and high-risk” neighbourhoods.<sup>75</sup> TAVIS employed and ultimately revolutionized the tool of carding by creating “208 cards.”<sup>76</sup> Under the TAVIS program, “[a]ny interaction that took place when TAVIS was in force constituted a valid reason for completing a 208 card.”<sup>77</sup>

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<sup>70</sup> Meng, “Racially biased policing”, *supra* note 4 at para 14.

<sup>71</sup> *Tulloch Report*, *supra* note 9 at 38.

<sup>72</sup> Meng, “Racially biased policing”, *supra* note 4 at para 14.

<sup>73</sup> *Tulloch Report*, *supra* note 9 at 36.

<sup>74</sup> *Ibid* at 37.

<sup>75</sup> Public Safety Canada, “Toronto Anti-Violence Intervention Strategy (Synopsis)” (last modified 1 August 2013), online: <[www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cn-mcs-plcng/ndx/snpps-en.aspx?n=72](http://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/cn-mcs-plcng/ndx/snpps-en.aspx?n=72)> [perma.cc/TWL5-B7BN].

<sup>76</sup> Roger Rowe, “Allegations of profiling: how much disclosure of investigative records is appropriate?” (last visited 21 December 2020) at 1, online (pdf): *Roger Rowe Law* <[www.rogerrowelaw.com/document/pdf/Cases/Buckley\\_Trial\\_Paper\\_by\\_Roger\\_Allegatins\\_of\\_Profiling.pdf](http://www.rogerrowelaw.com/document/pdf/Cases/Buckley_Trial_Paper_by_Roger_Allegatins_of_Profiling.pdf)> [perma.cc/S7MZ-L4Z6]; Public Safety Canada, *supra* note 75.

<sup>77</sup> *Tulloch Report*, *supra* note 9 at 38–39.



Accordingly, the tool of “carding” evolved from targeting Bolsheviks and Nazis to targeting “anyone who the police deemed ‘of interest’ during the course of their duties.”<sup>78</sup> Individuals stopped were often not suspected of committing a crime, and they were rarely acting suspiciously.<sup>79</sup> Essentially, the TAVIS carding system aimed to reduce gun violence in Toronto by randomly and indiscriminately stopping and questioning people in high-crime areas.

Carding statistics were utilized as an indicator to measure officers’ job performance. As a result, officers came under intense pressure to conduct more random stops and fill out more 208 cards.<sup>80</sup> In fact, the pressure put on officers to stop and question people was so “extraordinary” that one officer “collected names from tombstones in a cemetery and identified them as people that they had street checked in order to meet their performance targets.”<sup>81</sup>

### *1. Benefits*

The *Tulloch Report* recognized the benefits of the TAVIS carding system in high-crime areas, referencing evidence from New York City’s “stop, question, frisk program” (“stop-and-frisk”), which resulted in the removal of “50,000 guns from the streets in its first three years.”<sup>82</sup> This undeniable benefit for New York City, however, came at a cost. The “vast majority” of individuals stopped through stop-and-frisk were “young black and Latino men.”<sup>83</sup> This systemic racism “eroded trust of the police in black and Latino neighbourhoods,” ultimately leading a former mayor of New York City, Michael Bloomberg, to apologize for the vast expansion of the program under his tenure.<sup>84</sup> The *Tulloch Report* noted similar benefits in the TAVIS carding system.

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<sup>78</sup> *Ibid* at 38–39.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid* at 40.

<sup>83</sup> Ashley Southall & Michael Gold “Why ‘Stop-and-Frisk’ Inflamed Black and Hispanic Neighborhoods”, *The New York Times* (17 November 2019), online: <[www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html](http://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html)> [perma.cc/YN5A-459U].

<sup>84</sup> *Ibid.*

## 2. Costs

### i. Inefficiency

The *Tulloch Report* also noted that, regarding the TAVIS carding system, “the rate at which guns were found was extremely low in relation to the number of people stopped and searched.”<sup>85</sup> The TAVIS carding system, in other words, was recognized to be inefficient insofar as it required significant costs before the program’s benefits could be realized. In practical terms, this inefficiency derived from the fact that a massive number of innocent individuals needed to be stopped before a criminally involved individual could be identified. In fact, sorting through an entire community is the root strategy of carding. This inefficiency is thus unavoidable and, indeed, inherent in the TAVIS carding system.

### ii. Carding, Slave Pass, and Off-Reserve Pass Systems

Black persons described the TAVIS carding system as analogous to the “historic practice of the issuance and mandatory enforcement of slave passes,” which were slips that allowed slaves to leave their owner’s plantation for a limited time and travel to a limited area.<sup>86</sup> Indigenous persons described the system as analogous to the Off-Reserve Pass System, which prohibited such persons from leaving the reserve without the permission of an Indian Agent.<sup>87</sup>

Neither the carding system, the slave pass system, nor the Off-Reserve Pass system required an authority figure to have any minimum level of suspicion of wrongdoing to stop a racialized individual. On the contrary, these systems were all built upon the principle of “random indiscriminate requesting of personal identifying information by the state.”<sup>88</sup> The *Tulloch Report* noted that “random carding in its current form shared fear-inducing characteristics with these historic practices by showing Indigenous, Black, and other racialized people that their presence in certain spaces was always in question.”<sup>89</sup> This fear in all three cases was that an individual could be stopped on sight by an officer.

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<sup>85</sup> *Tulloch Report*, *supra* note 9 at 40.

<sup>86</sup> *Ibid* at 37.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid* at 35, 37.

<sup>89</sup> *Ibid* at 37.

## B. Race-and-Place Profiling in the TAVIS Carding System

In a series of studies in 2014 and 2017, an Assistant Professor of Geography at Central Connecticut State University gathered TPS stop data from 208 cards created between 2004 and 2008,<sup>90</sup> gathering the results of 7,062 drug-related 208 cards filled out by 6,595 individuals.<sup>91</sup> The studies found that racial disparity between Black persons and white persons in police stops in Toronto tended to be higher in areas where certain neighbourhood racial characteristics and crime patterns were also present.<sup>92</sup>

Specifically, these studies showed “a medium and positive spatial correlation between the racial disparity in police stops and the percentages of whites in the population and a statistically significant spatial correlation between the [racial] disparity in police stops and crime rate measured at the neighbourhood level.”<sup>93</sup> In other words, these studies found that “disproportionately more stops against blacks are more likely to happen in less racialized neighbourhoods and/or neighbourhoods with higher crime rates.”<sup>94</sup> The finding that carding happens disproportionately in certain locations or places in which certain demographics existed led the studies to refer to racial profiling instead as “race-and-place” profiling.<sup>95</sup> Race-and-place profiling thus suggests that the racialization of minorities by police does not occur equally in all places throughout a city. Instead, it tends to occur in certain places – namely, neighbourhoods which either have an abundance of crime or a relatively small presence of minorities. A racial minority thus would be more likely to be treated discriminately by police officers if they were located in a high-crime neighbourhood or a white-dominated neighbourhood.

### 1. *Statistical Distortions*

These studies noted that “[r]ace-and-place profiling of Blacks in Toronto could produce hidden distortions in crime statistics, since this

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<sup>90</sup> Meng, “Racially biased policing”, *supra* note 4 at para 14.

<sup>91</sup> *Ibid.*

<sup>92</sup> Yunliang Meng, “Profiling minorities: police stop and search practices in Toronto, Canada” (2017) 11:1 J of Studies and Research in Human Geography 5 at 14 [Meng, “Profiling minorities”].

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Meng, “Racially biased policing”, *supra* note 4 at para 6.

disproportionate number of stops may lead to more arrests.”<sup>96</sup> In other words, the fact that Black persons were stopped more often than non-Black persons led to more detection of crime among Black communities. Police data thus created the impression that Black communities committed more crime than white communities. In other words, TAVIS carding data created an illusory empirical basis for an inference that Black people were more likely to commit crime than white people.

## ***2. Psychological Effects***

These studies also noted that the TAVIS carding system resulted in psychological effects on Blacks in high-crime or white-dominated neighbourhoods. As police resources disproportionately targeted Black communities as potential criminals, Black communities responded with a lack of respect and trust for the justice system.<sup>97</sup> Additionally, the knowledge that police were targeting Black communities presented a real-life danger and threat to a Black individual’s freedom and produced anxiety.<sup>98</sup> Thus, by conducting indefinite random stops in high-crime neighbourhoods, the TAVIS carding program created psychological harm and mistrust of police among Black individuals.

## ***3. Systemic Racism***

These studies finally noted that race-and-place profiling of Blacks was “a department-wide phenomenon rather than the behaviour of few police officers.”<sup>99</sup> This systemic racism proliferated despite TPS’s “reasonable job” of ensuring that recruitments to the police force do not display “overt racial bias.”<sup>100</sup> Despite such anti-racist recruitment policies, the TAVIS carding system itself produced “unintentional and intentional forms of prejudice and discrimination.”<sup>101</sup> That is, the systemic production of racism is not a willful TPS strategy but instead is an undesirable by-product of systemic crime-reduction strategies.

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<sup>96</sup> *Ibid* at para 24.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid* at para 26.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

### **i. Race-and-Place Profiling by TPS Officers**

Furthermore, the studies found that “[f]or the police, race and socio-economic conditions [was] strongly tied to their knowledge of place” and “[s]uch knowledge [was] a resource for constructing the meaning of place.”<sup>102</sup> In other words, as officers spent a disproportionate amount of time patrolling high-crime neighbourhoods, they spent a disproportionate amount of time interacting with low-income racialized minorities. Over time, officers were presented with the fact that high-crime neighbourhoods tend to be occupied by low-income racialized minorities. This correlation thus created an opportunity for individual officers to draw an empirical observation that high-crime neighbourhoods are poor Black neighbourhoods and that, *vice versa*, poor Black neighbourhoods tend to be high-crime neighbourhoods.

### **ii. Circularity**

These findings suggest that, despite implementing anti-racist recruitment policies to prevent the hiring of individual officers with racist beliefs, Toronto police departments themselves gradually and systematically created individual racism by participating in the TAVIS carding system. Paradoxically, the hot spot strategy appeared to imbue anti-racist officers with racist beliefs, which were empirically founded on police data and experientially founded on a wealth of experience with poor Blacks in high-crime neighbourhoods. Officers then enacted these empirically founded racist beliefs in those same high-crime neighbourhoods. This empirically founded individual racism was observed by low-income communities that officers patrolled. Over time, Black persons in low-income neighbourhoods learned through experience that TPS officers were systematically targeting them and inherently suspected them of criminality. Thus, by enacting a policy of stopping an infinite number of individuals in low-income, high-crime neighbourhoods, the TAVIS carding system created a circular system in which individual racism was systematically generated and reinforced. This individual racism was a by-product generated by the practice of carding in crime hot spots and was produced regardless of – and indeed in spite of – the original beliefs of the TPS officers. As a result, Black individuals correctly learned over time that TPS officers were targeting them based on their race.

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<sup>102</sup> *Ibid* at para 5.

### C. Project Post: TAVIS Targets Atkinson Co-op

On Friday, May 25, 2012, at approximately 10:40 PM, 84 Vanauley Walk in Atkinson Co-op was a direct target within a TAVIS hot spot.<sup>103</sup> 84 Vanauley Walk, where Tom Le was detained, is a townhouse which sits at the end of a cul-de-sac on the southern end of Atkinson Co-op, the only entrance to the cul-de-sac being from the north.<sup>104</sup> Early in 2012, Atkinson Co-Op had seen “a marked increase in gun-related incidents,” leading to a “disproportionate amount of gun violence in that area.”<sup>105</sup> This violence derived from “a number of guns being discharged in the Vanauley Walk [...] area” related to two rival gangs – “Project Originals” and “Sic Thugs.”<sup>106</sup> In response to this uptick in gun violence, 14 and 51 Divisions of TPS set up a TAVIS initiative called “Project Post,” a concerted effort to increase street presence within Atkinson Co-Op and, specifically, on Vanauley Walk.<sup>107</sup> Residents of Atkinson Co-op were reportedly concerned that “ramped up police presence could create tension between teens and authorities” and that “the innocent are going to be targeted unnecessarily.”<sup>108</sup> Thus, the well-known existence of Project Post created an atmosphere of tension in Kensington-Chinatown between TPS officers and residents of Atkinson Co-op.

On May 25, 2012, TPS 14 Division officers were enacting Project Post in Atkinson Co-op by searching for Nicholas Dillon-Jack, an individual “associated with violent crimes” who “frequent[ed]” 84 Vanauley Walk as he “liked to hang out there with the [...] ‘Project Original Boys.’”<sup>109</sup> This specific action by TPS officers was the action that led to their interaction with Tom Le. In other words, the townhouse where Tom Le stood at the time *Le* occurred was a direct target of Project Post. As TPS officers walked

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<sup>103</sup> *Le* 2014, *supra* note 61 at paras 1, 9, 10.

<sup>104</sup> “Google Maps” (last visited 23 December 2020), online: Google <maps.google.com> [perma.cc/5JHB-G5P9].

<sup>105</sup> Justin Skinner, “Project Post aims to reduce crime-related activity in 14 Division”, *City Centre Mirror* (30 August 2012), online: <www.toronto.com/news-story/1309520-project-post-aims-to-reduce-crime-related-activity-in-14-division/> [perma.cc/9GS6-QXMK] [Skinner, “Project Post”].

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Justin Skinner, “Rising gun incidents spur police crackdown in Alexandra Park neighbourhood”, *City Centre Mirror* (14 June 2012), online: <www.toronto.com/news-story/78802-rising-gun-incident-spur-police-crackdown-in-alexandra-park-neighbourhood/> [perma.cc/WE7C-SEJD] [Skinner, “Rising gun incidents”].

<sup>109</sup> *Le* 2014, *supra* note 61 at paras 10, 11.

down the winding path of Vanauley Walk towards 84 Vanauley Walk, their purpose was to locate a known suspect at a location pinpointed as a drug trafficking hot spot. As they came into view of Tom Le at the southern end of a cul-de-sac deep within the heart of Atkinson Co-Op and away from the public eye, a question of how a reasonable person in his circumstances would have viewed the impending interaction arises. A reasonable person, according to interviews with members of the Atkinson Co-op community at the time, would likely have viewed TPS claims of taking a “measured approach” with “skepticism.”<sup>110</sup>

#### **D. Summary**

The RPP detention in *Le*, which the Majority recognized as having crystallized due to the racial aspect of its social context, occurred at a specific place with a crucial socioeconomic aspect. When *Le* occurred, Atkinson Co-op had been targeted by the TAVIS system’s Project Post, a program recognized as generating systemic racism against Blacks in high-crime neighbourhoods. The tendency of high-crime neighbourhoods to be low-income neighbourhoods reveals that the socioeconomic aspect of the social context of *Le* created the foundation for the racialization of Tom Le by TPS officers. In this sense, the racialization of Tom Le by TPS officers can be understood at a deeper level by an analysis of the socioeconomic status of the place at which it occurred. The socioeconomic aspect of *Le* grounds and informs its racial aspect by more deeply explaining how a reasonable person in Tom Le’s circumstances – that is, being a racialized individual located in a low-income, high-crime neighbourhood specifically targeted by TPS – would have behaved.<sup>111</sup>

The socioeconomic aspect of the social context in *Le* reveals that the interaction between Tom Le and TPS officers was the product of a specific project of a TPS strategy to respond to a spike in gun crime by stopping an indefinite number of individuals in certain neighbourhoods. This strategy, which yielded undeniable benefits in crime reduction, created racialization as a systematic by-product by requiring officers to interact disproportionately with, and thus detect more crime amongst, racial minorities. This discriminatory targeting produced police data which created racist statistical distortions, psychological effects among racialized

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<sup>110</sup> Skinner, “Rising gun incidents”, *supra* note 108.

<sup>111</sup> Grant, *supra* note 3 at para 44.

communities, and individual racist beliefs among TPS officers. In this sense, TAVIS created a bootstrapping system which generated a circularity of racism as it led to a reduction of gun crime in Toronto. This circular system of racism is only revealed through an analysis of the socioeconomic aspect of the social context of Tom Le's interaction with TPS officers. The Majority's recognition of the existence of a socioeconomic aspect of social context thus requires that an analysis of *Le* itself incorporates race-and-space profiling into a determination of when the detention of Tom Le by TPS officers occurred.

## VI. THE MAJORITY'S CONTRADICTION

A socioeconomic investigation which questions the impact of low-income housing is a question of "the place where the interaction occurred" and is thus a question of the "nature of the police conduct."<sup>112</sup> *Le*'s analysis, which includes a discussion of place under the nature of police conduct, analyzed the factor of place in two ways. First, the Majority observed that "[l]iving 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."<sup>113</sup> The Majority, in other words, recognized that the fact that Tom Le was located within a low-income neighbourhood did not reduce his right to be free from "brazen" warrantless entry of the police in a private backyard.<sup>114</sup> The Majority further recognized that, although Kensington-Chinatown "experiences a high rate of violent crime,"<sup>115</sup> police are not thereby licensed to "enter a private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime."<sup>116</sup> This was "no novel insight;"<sup>117</sup> this first insight merely held that s. 9 of the *Charter* gives individuals the same rights regarding detention regardless of the socioeconomic status or level of criminality in their neighbourhood. This first insight recognized that s. 9 of the *Charter* guarantees "[e]veryone"<sup>118</sup> the same standard of detention rights.

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<sup>112</sup> *Ibid.*

<sup>113</sup> *Supra* note 1 at para 59.

<sup>114</sup> *Ibid* at para 59.

<sup>115</sup> *Ibid* at para 60.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* at para 59.

<sup>118</sup> *Supra* note 2, s 9.



Second, the Majority noted that, in fact, officers policing a high-crime neighbourhood – one that is “policed more heavily” – have a “responsibility [...] 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.”<sup>119</sup> The Court in *Le* thus found that police have an enhanced responsibility in high-crime neighbourhoods which requires that officers behave differently than in other neighbourhoods. In high-crime neighbourhoods where the state has an enhanced responsibility under s. 9 of the *Charter*, officers must take a more cautious and measured approach.

### **A. Section 8 Property Rights**

In accordance with s. 8 of the *Charter*, police officers “cannot enter private property or take things from others unless they can show that they have a clear legal reason.”<sup>120</sup> Thus, the officers’ entry into private property in *Le* would have triggered detention in any neighbourhood and was not specific to the social context of *Le*. The crystallization of detention upon TPS officers’ entry into private property was not the product of an enhanced responsibility in high-crime neighbourhoods but was instead merely the product of protections offered by s. 8 of the *Charter*. Thus, the socioeconomic aspect of *Le*’s social context raises a question of how the enhanced responsibility that officers must observe when patrolling a high-crime neighbourhood affects the protections afforded to its residents. According to the Majority, TPS officers were not required to behave any differently than they would have in any other social context. Instead, the Majority took the position that the officers were merely required to observe the right of Canadians to private property.

### **B. Additional Onus of the State in High-Crime Neighbourhoods**

This contradiction in the reasoning of the Majority creates an issue in its detention analysis. If this enhanced responsibility of the state in high-

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<sup>119</sup> *Le*, *supra* note 1 at para 60 [emphasis in original].

<sup>120</sup> Government of Canada, “Guide to the Canadian Charter of Rights and Freedoms” (last modified 8 June 2020), online: <[www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html](http://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html)> [perma.cc/642U-U FQN].

crime neighbourhoods under s. 9 of the *Charter* has any value, it must require something additional of officers patrolling high-crime neighbourhoods. This enhanced responsibility is not fulfilled merely by refraining from warrantless entry onto private property because respect for private property is part of the state's standard responsibility to everyone in Canada. This enhanced responsibility also is not fulfilled merely by “inform[ing] the person that he or she is under no obligation to answer questions and is free to go,”<sup>121</sup> which is also required as part of the state's standard responsibility to everyone in Canada.

This enhanced responsibility under s. 9 of the *Charter* thus requires the observance of an additional onus in order to avoid a crystallization of detention when patrolling high-crime neighbourhoods. This additional onus of the state in high-crime neighbourhoods necessarily arises out of the recognition in *Le* of the socioeconomic aspect of social context because a reasonable person living in a high-crime neighbourhood which is “policed more heavily”<sup>122</sup> would be more likely to feel that they are not “free to go”<sup>123</sup> in a police interaction. Thus, the recognition of an additional onus on officers in high-crime neighbourhoods reveals that such an onus is required due to the necessary perception of individuals who reside in those neighbourhoods. That is, individuals residing in high-crime neighbourhoods, due to a history of disproportionate interactions with police and the observance of racism and socioeconomic marginalization, tend to have a more skeptical and wary perspective of the police in general. This tendency must therefore inform the perspective of a reasonable person of any police interaction which occurs in a high-crime neighbourhood. As a result, the socioeconomic aspect of the social context in *Le* must take into account the fact that an individual located in a low-income, high-crime neighbourhood would have certain presumptions about police officers.

### ***1. The Reasonable Person in Le***

At the time of *Le*'s occurrence, an atmosphere of tension between residents of Atkinson Co-op and TPS officers existed due to the well-publicized existence of TAVIS's Project Post. Individuals living in Atkinson Co-op stated that “ramped up police presence could create tension between teens and authorities” and that “the innocent are going to be targeted

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<sup>121</sup> *Grant, supra* note 3 at para 39.

<sup>122</sup> *Supra* note 1 at para 60.

<sup>123</sup> *Grant, supra* note 3 at para 39.

unnecessarily.”<sup>124</sup> This documented atmosphere of tension derived from the empirically guided belief that Black male youth were the exact targets of Project Post’s mission to address rival gang violence on Vanauley Walk. This atmosphere of tension would have informed the perspective of a reasonable person in the circumstances.

Furthermore, a reasonable person in the circumstances of Tom Le was, in fact, a reasonable racialized male youth who socialized at 84 Vanauley Walk, known to co-op management as a “problem address” with “concerns of drug trafficking in the rear yard.”<sup>125</sup> Such a reasonable person would know that he was standing in a location that may be “surgically”<sup>126</sup> targeted by TPS 14 Division. Such a reasonable person would thus know upon sight of TPS 14 Division officers that he had “been taken into the effective control of the state authorities.”<sup>127</sup>

In other words, such a reasonable person at 84 Vanauley Walk at 10:40 PM on a Friday night, upon sight of 14 Division officers, would not perceive the officers as conducting “general neighborhood policing” but instead as “effectively [having] taking control” of the cul-de-sac from which there was no exit. The spatial layout of Vanauley Walk, and the way officers positioned themselves in that space, created a situation in which Tom Le was effectively trapped.<sup>128</sup> Such a reasonable person in the circumstances would therefore presume that they were not free to go and were, in fact, detained upon sight by 14 Division officers. A reasonable person would also know that they were at the end of a cul-de-sac with one exit, which Division 14 officers were currently occupying.<sup>129</sup> Whether 14 Division officers actually were seeking to detain Tom Le would have been irrelevant to the perspective of such a reasonable person, who would have assumed that they were based upon an empirically grounded presumption.

## *2. Additional Onus of the State in Le*

Due to the perspective of such a reasonable person – that is, a reasonable racialized youth at 84 Vanauley Walk, who was within a super-

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<sup>124</sup> Skinner, “Rising gun incidents”, *supra* note 108.

<sup>125</sup> *Le* 2014, *supra* note 61 at para 9.

<sup>126</sup> Skinner, “Project Post”, *supra* note 105.

<sup>127</sup> *Grant*, *supra* note 3 at para 22.

<sup>128</sup> “Google Maps”, *supra* note 104; “Bing Maps” (last visited 23 December 2020), online: <[www.bing.com/maps](http://www.bing.com/maps)> [perma.cc/F3AW-QBBB].

<sup>129</sup> “Google Maps”, *supra* note 104; “Bing Maps”, *supra* note 128.

charged social context ripe for RPP detention – the additional onus of the state must have created some type of obligation on TPS 14 Division officers conducting a “walkthrough” down Vanauley Walk. This obligation must have required TPS 14 Division officers to do more than merely refrain from questioning Black male youth on an isolated cul-de-sac in the heart of Atkinson Co-op. Instead, TPS 14 Division officers’ duty to avoid crystallization of an arbitrary detention, which arose upon sight of a racialized male youth in an isolated cul-de-sac out of the public eye on Vanauley Walk, required some positive action. Such a positive action was required by the additional onus on the state in high-crime neighbourhoods in order to assure Tom Le that he was not being targeted by Project Post for questioning.

**i. When the State’s Additional Onus Arose**

This additional onus on TPS 14 Division officers must have arisen before the police’s standard duty – that standard duty merely requiring officers to tell an individual they are free to go during questioning, which might cross “the line between general questioning and focussed interrogation amounting to detention.”<sup>130</sup> That is, this additional onus must have arisen prior to any actual verbal interaction between TPS 14 Division officers and Tom Le. Instead, the obligation to take positive action required of TPS 14 Division officers arose at the moment that Tom Le came into view.

**ii. Form of the State’s Additional Onus**

This additional onus, which required positive action instead of mere restraint upon sight of Tom Le, required TPS 14 Division officers to state that Tom Le was not being detained. That statement could take one of two forms. Namely, the statement could confirm that Tom Le was detained or it could inform him that he was not detained. If a TPS 14 Division officer with this additional onus failed to make either statement as soon as Tom Le came into sight, Tom Le would thereby be detained upon sight.

In general, a super-charged social context in which socioeconomical and racial aspects would convince a reasonable person that they were presumed to be detained unless told otherwise by an officer creates an obligation on the state to take positive action in the form of a statement

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<sup>130</sup> *R v Suberu*, 2009 SCC 33 at para 23; *Omar* 2018, *supra* note 20 at para 79; *Omar* 2019, *supra* note 20.

that confirms whether or not the individual is detained. If such an individual is not explicitly informed by such an officer, an RPP detention will crystallize.

## VII. CONCLUSION

*Le*'s recognition of the "disproportionate policing of racialized and low-income communities" marked a crucial post-*Grant* development of the rules of detention under ss. 9 and 10 of the *Canadian Charter of Rights and Freedoms*.<sup>131</sup> While academics have rightfully discussed the racial implications of *Le*, its socioeconomic implications remain unexamined. This gap is out of step with the Majority's analysis in *Le*, which doubted that "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.'"<sup>132</sup>

To ignore the socioeconomic aspect of the social context of police interactions is to ignore the spatial foundation on which police engage in racialization. Socioeconomic marginalization occurs within certain locations – namely, high-crime, low-income neighbourhoods, which serve as areas or "jurisdictions" in which racialization occurs. In this sense, the socioeconomic status of the location in which an interaction occurs largely determines whether or not police officers will disproportionately stop racialized individuals.

Economic needs tend to drive newcomers immigrant communities to spatially cluster in downtown low-income neighbourhoods next to business districts, which leads to the overrepresentation of minorities in low-income neighbourhoods such as Kensington-Chinatown in Toronto.<sup>133</sup> Such low-income neighbourhoods also tend to be high-crime neighbourhoods and thus the focus of hot-spot policing.<sup>134</sup> As a result of this dedication of resources, minorities tend to be stopped more frequently by police, leading to more crime being detected among minorities. This tendency of racialization within certain socioeconomic spaces has been demonstrated in a series of studies that analyzed the TAVIS carding system. This very

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<sup>131</sup> *Supra* note 1 at para 97; *supra* note 2, ss 9, 10.

<sup>132</sup> *Supra* note 1 at para 59 [emphasis added].

<sup>133</sup> Hulchanski, *supra* note 65 at 52.

<sup>134</sup> Roh & Robinson, *supra* note 5 at 138; Meng, "Racially biased policing", *supra* note 4 at para 7.

same TAVIS initiative produced Project Post, a TPS hot-spot program intending to target Black male youth in response to a 2012 spike in Toronto gun crime.

The correlation between minority status and criminal activity, which results systemically from hot-spot policing strategies such as the TAVIS initiative, creates an empirically based illusion that racial minorities tend to engage in criminal activity more often than whites. By way of this correlation, systemic racism may transform into explicit racism as officers interact disproportionately with minorities in high-crime, low-income neighbourhoods. This presumption of criminality is notably similar to presumptions made against Indigenous persons off the reservation and slaves off the plantation. In all three cases, an individual's presence within a certain space is inherently in question until proven otherwise.

*Le*, followed by *Thompson*, recognized the relevance of racialization of minorities by police officers, finding that a social context with aspects of racism and socioeconomic marginalization can instantly crystallize a police interaction into a detention if, in such a super-charged context, officers enter space in proximity to an individual in a way which communicates that the individual is not free to leave. These single-act detentions are only possible because racial and socioeconomic trends in policing have created a context in which the potential for detention is particularly ripe.

In *Le*, which took place in a hot spot surgically targeted by TPS amid a spike in gang-related gun violence in 2012, socioeconomic trends in Toronto policing in 2012 were clearly significant. In fact, based on the newly minted Project Post, which targeted two rival gangs in response to spikes in gun violence in the City of Toronto, the potential for detention of racialized low-income persons was particularly ripe. The significance of hot spot policing of high-crime, low-income neighbourhoods to the social context – which *Le* itself recognized as relevant to the crystallization of detention – requires consideration of the socioeconomic environment in which Tom Le was detained by 14 Division TPS officers.<sup>135</sup>

The Majority in *Le* recognized that this super-charged social context required an enhanced responsibility from 14 Division Officers. However, the Majority failed to apply that enhanced responsibility by merely appealing to the state's standard responsibility not to arbitrarily enter private property. The Majority's application of the *Grant* test, which failed to account for the state's enhanced responsibility, therefore failed to analyze

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<sup>135</sup> *Le* 2014, *supra* note 61 at para 9.

how that enhanced responsibility would affect the crystallization of Division 14 TPS officers' interaction with Tom Le into a detention.

Due to the state's enhanced responsibility in the circumstances, the 14 Division Officers in *Le* had an onus deriving from s. 9 of the *Charter*. That onus could only require the 14 Division officers to do something that they would not otherwise be required to do in another context. In other words, this onus required positive action to discharge that additional responsibility. One simple way 14 Division officers could have discharged such an onus would have been to explicitly inform Tom Le either that he was detained and had rights under s. 10 of the *Charter* or else that he was not detained.

## VIII. RECOMMENDATIONS

Canadian police departments are recommended to prepare standardized statements which must be read during patrols within high-crime areas when, due to the specific spatial circumstances, a reasonable person might conclude that they are detained upon sight. Such circumstances may arise for reasons similar to those present in *Le* – namely, in a space isolated from public view where officers block the only exit. In such circumstances, a detention will or will not arise dependent upon the explicit choice made by the officer as communicated to the individual.

The main issue of this solution seems to be its creation of uncertainty for officers who cannot be entirely sure when a detention may crystallize in a super-charged social context. However, this ambiguity is not a result of this solution *per se* but instead is a feature of RPP detention itself. *Omar* described this inherent ambiguity when it held that “[u]ncertainty about when a detention occurs has existed throughout *Charter* jurisprudence, in large part because of the inclusion of the psychological element in the concept of detention.”<sup>136</sup>

Thus, the solution of requiring officers to explicitly state whether an individual is detained in a super-charged social environment does not create additional ambiguity and indeed addresses the ambiguity which is inherent in RPP detention. By requiring officers to state their intentions in contexts in which the potential for detention is ripe, the ambiguous question of whether a detention exists is thereby resolved.

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<sup>136</sup> *Supra* note 20 at para 5.

As such, requiring an explicit statement that either establishes a detention and fulfills informational obligations under s. 10 of the *Charter* or else explicitly informs an individual that they are free to go resolves some of the ambiguity inherent in RPP detention and, additionally, supports the *Charter* principle of the “rule of law”<sup>137</sup> by putting the onus on the state to ensure that its legal obligations under ss. 9 and 10 of the *Charter*<sup>138</sup> are fulfilled in super-charged social contexts where the potential for a crystallization of RPP detention is ripe.

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<sup>137</sup> *Supra* note 2, Preamble.

<sup>138</sup> *Supra* note 2, ss 9, 10.