Court File No: 37971

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TOM TUAN LE

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE INTERVENER
SCADDING COURT COMMUNITY CENTRE

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Section 9 of the *Charter* protects individuals from arbitrary detention, both physical and psychological. Determining whether a psychological detention has occurred requires a consideration of all of the circumstances of the police encounter. The question, at its core, is whether a reasonable person in those circumstances would conclude that they have been deprived of their liberty. If so, then the inquiry shifts to whether the detention was arbitrary.

2. In answering these questions, the intervener, Scadding Court Community Centre (the "Centre"), makes the following submissions.

3. First, an accused's subjective perception that they were free to leave at a particular moment in time should not be determinative of whether a psychological detention has occurred. Perceptions can change over the course of a police interaction. Section 9 requires an assessment of the encounter as a whole, not just a single moment in time. Moreover, the focus should not be on what was in the accused's mind, but rather how the police behaved and how that behaviour would be reasonably perceived. To find otherwise puts the onus on the accused to determine correctly when they are the subject of a detention and when they are not.

4. Second, the reality is that some communities are more heavily policed than others. However, it is a mistake to assume that an accused's history of police encounters would give them a heightened sense of awareness of whether they are being detained (as the majority of the Court of Appeal for Ontario appears to have done in this case). The opposite may well be true. Instead, such experiences are factors that should be considered in the overall analysis.

5. Third, unlawful police conduct, including trespass, may be relevant in determining both if a detention has occurred and if that detention was arbitrary. The fact that the police feel empowered to enter unlawfully a property is relevant in assessing if a reasonable person in the accused's position would perceive that they are at liberty to leave. Moreover, any detention that may occur during a police trespass cannot be lawful, even if the police later develop a reasonable suspicion that a crime has been committed. To suggest otherwise risks denying *Charter* protection to the very communities that need it the most.

B. Statement of Facts

6. The Centre is a non-profit multi-service agency located in the Alexandra Park neighbourhood in Toronto, Ontario, a short walk from the backyard in the Atkinson Co-op in which the police encounter with the appellant took place. The Centre has an extensive history of advocating for legal and social reform based on the needs and concerns of local residents, and has devoted significant efforts to understanding and improving the relationships between police and racialized youth in the neighbourhood through community consultation, engagement, education, and law reform.

7. The Centre accepts the statement of facts set out in the factum of the appellant.

PART II. STATEMENT OF ISSUES

8. In determining if an accused has been psychologically detained for the purposes of s. 9 of the *Charter*, the court should take a holistic approach. A number of factors are relevant, none of which are determinative but all of which should be considered and weighed against one another. In the context of this appeal, the Centre submits that, in applying the test under s. 9 of the *Charter*: (a) an accused's perception that they are free to leave at a particular point in time should not be determinative; (b) frequent police encounters and presence in a heavily policed community are relevant under the test for detention; and (c) unlawful police conduct is relevant both in determining if a detention has occurred, and if so, if that detention was lawful.

PART III. STATEMENT OF ARGUMENT

A. An accused's perception that they are free to leave at a particular point in time should not be determinative

9. In *R v. Grant*, this Court held that the test for psychological detention under s. 9 of the *Charter* is "whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand."[1] It stated:

> The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs in order to allow them to fulfil their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. […] While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power

[1] *R v. Grant*, 2009 SCC 32 at para. 31 (per McLachlin C.J.C. and Charron J., majority).

> imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go.[2]

10. In this way, this Court confirmed that the test for psychological detention must be considered objectively, having regard to all of the surrounding circumstances and the circumstances of the accused. While an accused's "perceptions at the time" may be relevant, this Court has found that those perceptions are not determinative in two scenarios: (a) when the accused testifies that they believed they were detained;[3] and (b) when the accused does not provide any testimony as to their own perception of detention.[4]

11. In the instant case, the appellant testified that, when he turned to go back into the house, he felt that he "didn't really need to stay around" because no officer was talking directly to him; however, when he was dealing with the police before that moment, he did not feel that anybody in the backyard could walk away.[5] The majority of the Court of Appeal for Ontario found that the appellant's perception that he was free to leave "must be an important consideration in determining how the encounter between the officer and the appellant would be reasonably perceived" and proceeded no further in the inquiry to consider whether that perception was reasonable applying the relevant factors in the context of the overall interaction.[6]

12. However, there is no authority to suggest that the test for psychological detention stops being objective when an accused provides exculpatory – as opposed to inculpatory or no – evidence for potentially *Charter*-violating police conduct. In the Centre's submission, there are three reasons the test must remain objective even in such circumstances.

13. First, to base the analysis entirely on an accused's admission that they believed that they were free to leave at a particular moment in time fails to recognize that an individual's

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[2] *R v. Grant*, 2009 SCC 32 at para. 32 (per McLachlin C.J.C. and Charron J., majority).
[3] *R v. Suberu*, 2009 SCC 33 at para. 28 (per McLachlin C.J.C. and Charron J., majority).
[4] *R v. Grant*, 2009 SCC 32 at para. 50 (per McLachlin C.J.C. and Charron J., majority).
[5] Transcript of Proceedings, p. 157 [Record of the Appellant, Vol. IV, Tab 27].
[6] *R v. Le*, 2018 ONCA 56 at paras. 63-64 (per Doherty J.A., majority).

perceptions can change in the course of a police encounter. At one moment, an individual may feel as though they are detained (for example, when the police are talking directly to them); at the next, they may believe they are free to walk away (for example, when the police turn their attention to someone else); and then, another moment later, they may believe, once again, that they cannot leave (for example, when the police's attention is turned back to them). The "entire interaction" and the "circumstances of an encounter as a whole" must be considered.[7] In the Centre's submission, the majority's focus on the appellant's perception at a particular point in time overlooks the holistic analysis that is required, and instead engages in the "minute parsing of words and movements" that this Court specifically cautioned against in *Grant*.[8]

14. Second, this Court has found that "the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops".[9] To elevate an accused's perception at a particular moment in time to "an important consideration" (rather than just another factor) in the detention analysis shifts the focus away from the potentially coercive conduct of police to the inner workings of the accused's mind.

15. Indeed, the test for psychological detention is objective because the police should be able to ascertain when a detention occurs, and if they are uncertain about the effect of their conduct on the individual, the onus should be on them to inform the individual that they are under no obligation to answer questions and are free to go.[10] As Binnie J. noted in his concurring reasons in *Grant* (in which he advocated for the adoption of a less claimant-centred approach):

> The unsuspecting suspect may fatally compromise his or her position simply through ignorance of his or her rights and the fact that the police have now adopted an adversarial position. At that point […] "a person may reasonably require the assistance of counsel" […], but may not have any idea of the perilous turn of events.[11]

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[7] *R v. Grant*, 2009 SCC 32 at para. 32 (per McLachlin C.J.C. and Charron J., majority); *R v. Suberu*, 2009 SCC 33 at para. 22 (per McLachlin C.J.C. and Charron J., majority).
[8] *R v. Grant*, 2009 SCC 32 at para. 32 (per McLachlin C.J.C. and Charron J., majority).
[9] *R v. Grant*, 2009 SCC 32 at para. 31 (per McLachlin C.J.C. and Charron J., majority).
[10] *R v. Grant*, 2009 SCC 32 at para. 32 (per McLachlin C.J.C. and Charron J., majority).
[11] *R v. Grant*, 2009 SCC 32 at para. 178 (per Binnie J., concurring).

16. Third, as the appellant argued in his factum, focusing on the subjective belief of the accused puts the onus on them to determine accurately whether the police will let them walk away. However, if they guess incorrectly and try to leave, the police may consider the act of walking away itself as evasive and sufficient to ground a suspicion.[12] Put simply, the onus should not be on an individual to guess correctly if they are the subject of a detention.

17. Maintaining an objective test – even if the individual believes subjectively that they are free to walk away at a particular point in time – ensures that the focus remains on the conduct of the police, and most importantly, that that conduct does not cross the line into a detention without invoking the individual's *Charter* rights.

B. Frequent police encounters and presence in a heavily policed community are relevant factors under *Grant*

1. An accused's history with police encounters should not be used against them

18. The majority of the Court of Appeal for Ontario reasoned that "the appellant's perception [that he was free to go] is particularly significant as he is no stranger to street-level encounters with the police".[13] The Centre is concerned about the potential impact of such a finding on the *Charter* rights of people who live in communities with a significant police presence – such as the Alexandra Park neighbourhood. The suggestion that those individuals who are "no stranger to street-level encounters with the police" are expected to have a heightened sense of awareness of whether they are being detained risks diluting the protection afforded by the *Charter* to the communities that need it the most.

19. Frequent police interactions can impact upon the dignity of an individual and their sense of self-worth. If an individual is stopped by police more frequently, it does not necessarily follow that they will have a better understanding of whether or when a detention has occurred (and therefore that their subjective perceptions should be given greater weight). In fact, the opposite may well be true. Individuals, and particularly racialized youth, who are more frequently stopped

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[12] Appellant's Factum at paras. 95-96; see *R v. Grant*, 2009 SCC 32 at para. 169 (per Binnie J., concurring).
[13] *R v. Le*, 2018 ONCA 56 at para. 63 (per Doherty J.A., majority).

by police are likely to be more inclined to feel as though they are not free to leave and must stay to answer the police's questions.[14]

2. Frequent police encounters and the community in which the encounter took place are relevant considerations under **Grant**

20. That is not to say that an accused's experience with police is irrelevant to the analysis. In *Grant*, this Court established three sets of factors for assessing if a detention has occurred:

> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual; whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.[15]

21. In applying these factors, the court should not ignore the reality that individuals in lower income and/or racialized communities, such as the Alexandra Park neighbourhood, are stopped by police more frequently than their peers in more affluent and less racialized communities.[16] Justice Lauwers put it aptly in his dissenting reasons as follows: "I doubt that the police would

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[14] In *R v. Grant*, Binnie J. accepted that "[a] growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified 'low visibility' police interventions in their lives", and accepted that "visible minorities may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive": *R v. Grant*, 2009 SCC 32 at paras. 154-155, 169 (per Binnie J., concurring). See also *R v. Therens*, [1985] 1 SCR 613 at para. 57 (per Le Dain J, dissenting) on whether citizens truly have a "choice" to obey the police's commands. See also *R v. R.(J.)*, 2011 ONCJ 463 at paras. 40-42 on the experience of the accused, a young person living in "a world full of police 'stops'".

[15] *R v. Grant*, 2009 SCC 32 at para. 44 (per McLachlin C.J.C. and Charron J., majority).

[16] See *R v. Grant*, 2009 SCC 32 at para. 154 (per Binnie J concurring).

have brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community."[17] The Centre shares that doubt.

22. Rather than consider the frequency of an accused's encounters with the police in assessing the weight to be given to their perceptions (as the majority did in this case), the Centre submits that frequent police stops in the community are relevant under the *Grant* factors.

23. As a first step, it is important to recognize that the line between a non-adversarial police encounter and a detention may be difficult to draw,[18] particularly in the context of community policing. As this Court found in *Grant*:

> A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice.[19]

24. However, not all communities, and not all forms of community policing, are created equal. A police encounter in an affluent and less racialized neighbourhood with little to no regular police presence may be reasonably perceived by an individual in that community as friendly and non-adversarial. Similarly, individuals who are infrequently stopped by police may have no reason to believe that they are under suspicion and being detained.

25. On the other hand, a reasonable person may perceive the same police encounter very differently if it were to take place in a lower income, more racialized and heavily policed community. Individuals, particularly youth, who are "no stranger to street-level encounters with the police" in neighbourhoods such as Alexandra Park may reasonably perceive the next encounter with suspicion, fear and/or self-doubt. If they felt as though they were detained in previous incidents, they may be more inclined to believe that the police are detaining them once again.[20] In this way, the line between being free to walk away and being subject to a detention can be blurrier for some communities than it would be for others.

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[17] *R v. Le*, 2018 ONCA 56 at para. 161 (per Lauwers J.A., dissenting).
[18] *R v. Suberu*, 2009 SCC 33 at para. 29 (per McLachlin C.J.C. and Charron J., majority).
[19] *R v. Grant*, 2009 SCC 32 at para. 40 (per McLachlin C.J.C. and Charron J., majority).
[20] See *R v. Grant*, 2009 SCC 32 at paras. 154-155, 169 (per Binnie J., concurring)

26. To be clear, the Centre does not propose a change to the *Grant* test. Rather, the Centre submits that the above should be considerations under the current factors. In particular:

(a) The circumstances giving rise to the encounter should take into account the subtleties that exist in community policing scenarios, which can take an encounter from pro-active and non-adversarial policing across the line into a detention;

(b) The nature of the police conduct should consider the community in which the conduct took place, and how that might affect the reasonable perceptions of the individuals involved; and

(c) The particular characteristics or circumstances of the individual should take into account their minority status and any history with the police in the community that may impact upon their reasonable perceptions of what is happening.

27. Only by acknowledging the reality that individuals in some communities may have different experiences and relationships with police than others, which may impact upon their reasonable perceptions of whether they are being detained, can the court truly engage in the "realistic appraisal of the entire interaction as it developed" required by this Court in *Grant*.[21]

C. Unlawful police conduct is relevant both in determining if a detention occurred and if it was lawful

28. There is an open question on this appeal about whether the police lawfully entered the backyard in which the police encounter with the appellant took place. The Centre takes no position on whether a trespass occurred. Significantly, however, the majority of the Court of Appeal for Ontario found that, even if the police were trespassers, the trespass was irrelevant to the s. 9 analysis because it "had no impact on any facet of the appellant's liberty".[22] In the Centre's submission, such a finding takes too narrow a view of the s. 9 inquiry.

29. The s. 9 test asks two questions: (1) Has a detention occurred; and (2) If so, was the detention arbitrary. The Centre submits that unlawful conduct by the police, including trespass, particularly in communities that have a significant police presence, should be taken into account in both stages of the analysis.

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[21] *R v. Grant*, 2009 SCC 32 at para. 32 (per McLachlin C.J.C. and Charron J., majority).
[22] *R v. Le*, 2018 ONCA 56 at para. 72 (per Doherty J.A., majority).

1. Unlawful police conduct in determining if a detention has occurred

30. While the alleged trespass may not have had a direct impact on the appellant's liberty at the time, the Centre submits that it is relevant to the question of whether a reasonable person in the appellant's circumstances would conclude that he had been deprived of his liberty (and specifically, to the assessment of the nature of the police conduct under the second set of *Grant* factors). A trespass is a show of power: if the police walk onto private property without permission or lawful authority and start making unilateral demands of its occupants, a reasonable person would be less inclined to believe that they are free to walk away.

31. Indeed, the concept of being "free to walk away" is complicated when the police are trespassers. If an individual is stopped by police on a public sidewalk, they may feel as though they are free to keep walking. However, if the same encounter took place on private property, that individual may feel that they have nowhere else to go. After all, why should it be up to the individual – who is on the property lawfully – to decide that they should be the one to leave?

2. Unlawful police conduct in determining if a detention was arbitrary

32. In the Centre's submission, in determining if a detention was arbitrary, the focus should be on whether the detention was authorized by law,[23] not the potential impact of any unlawful conduct on the accused's liberty (as the majority held in this case).

33. In the instant case, even if the police had reasonable grounds to detain the appellant, the detention was not authorized by law if the police obtained those grounds while breaking the law. The Centre agrees with Lauwers J.A.'s analysis in this respect:

> [W]hen police enter a property as trespassers, they act outside the bounds of their lawful authority. In my view, the detention of the appellant was, on its face, an arbitrary detention. It was not authorized by law because the police were not entitled to exercise any of their investigative powers, including the common law power to detain for investigative purposes, while they were trespassers on the property. What I see here, to be blunt, is casually intimidating and oppressive police misconduct.[24]

34. In the Centre's submission, the majority's finding that the trespass does not affect the lawfulness of the detention has the potential to lead to unintended and troubling consequences. It

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[23] *R v. Grant*, 2009 SCC 32 at paras. 55-56 (per McLachlin C.J.C. and Charron J., majority).
[24] *R v. Le*, 2018 ONCA 56 at para. 143 (per Lauwers J.A., dissenting).

would effectively empower the police to trespass onto private property without fear of infringing the s. 9 rights of its occupants. On the one hand, if the police develop a reasonable suspicion and detain an individual while they are trespassing, they will not have violated the individual's s. 9 rights, notwithstanding the trespass.[25] On the other hand, if the police trespass on the property and find nothing suspicious, no *Charter* violation will ever be raised.

35. Communities with a significant police presence, such as the Alexandra Park neighbourhood, are particularly vulnerable to unlawful police conduct. The protection of *Charter* rights in such communities requires a consideration of the on-the-ground realities for those living in these communities. To find that a trespass has no bearing on the s. 9 rights of those individuals risks denying *Charter* protection to those who need it the most.

PART IV. SUBMISSION ON COSTS

36. The Centre does not seek costs, and asks that no costs be awarded against it.

PART V. ORDER SOUGHT

37. The Centre takes no position on the disposition of the appeal, but submits that the appeal should be decided in a manner that recognizes the factors identified above in the test under s. 9 of the *Charter*. The Centre was granted permission to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of August, 2018.

Tina Lie / Lauren Pearce

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Counsel for the intervener,
Scadding Court Community Centre

[25] The respondent's proposal to deal with any unlawful conduct under s. 24(2) of the *Charter* is unworkable as it relates to the trespass: see Respondent's Factum at paras. 91*ff*. If the court determines that the trespass does not affect the lawfulness of the detention and concludes that there was thus no breach of s. 9, there is nothing to remedy under s. 24(2).

PART VI. TABLE OF AUTHORITIES

Authority	Paragraph Reference
R v. Grant, 2009 SCC 32	9, 10, 13, 14, 15, 16, 19, 20, 21, 22, 23, 25, 26, 27, 30, 32
R v. Le, 2018 ONCA 56	11, 18, 21, 28, 33
R v. R.(J.), 2011 ONCJ 463	19
R v. Suberu, 2009 SCC 33	10, 13, 23
R v. Therens, [1985] 1 SCR 613	19