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Supreme Court of Canada Finally Addresses Racial Profiling by Police

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Cases Commented On: *R v Le*, 2019 SCC 34 (CanLII); *R v Ahmad*, 2020 SCC 11 (CanLII)

Nine minutes. This is the length of time that a police officer pressed a knee to the neck of George Floyd in the United States, while he lay on the ground immobilized, pleading, stating he couldn't breathe. Nine minutes is a shockingly long time for Constable Chauvin to have exerted deadly force on a human being whom he had already rendered vulnerable. He could only do this without interference because of the power provided to him by the state. He could only do this because violent race-based state conduct is nothing new – far from it.

Our current Canadian protests expose the local experience of abusive and racist police tactics, both systemic and overt, against Black, Indigenous, and other racialized Canadians. These protests and the action urged by them have the potential to mobilize and enact change. The criminal justice system is reactionary, but it can still send a message denouncing unlawful conduct with the aim of preventing it from recurring. Recently, the Supreme Court of Canada has given us new tools in this fight, by addressing racial profiling twice in the past year in *R v Le*, 2019 SCC 34 (CanLII) and *R v Ahmad*, 2020 SCC 11 (CanLII). It has taken an exceptionally long time for our highest court to give us these tools. Although these judgments are a start, unquestionably there is still much work to be done, both in and out of the courts.

As a criminal defence lawyer I represent racialized accused persons and am keenly aware that my clients get stopped and searched by police for things that I would never be given a second glance for. I have no safety concerns when I get stopped for speeding; my clients can't always say the same. I am a White person, with all the systemic privilege this status grants me. For this justice system to change, all participants have to work to rebuild it. In the courts, it can't fall only to my racialized colleagues to stand up against racial profiling and other manifestations of systemic racism. We all have a part to play in continuing to build a more equitable society.

In this post, I will focus largely on *Le*, a Supreme Court of Canada decision that may provide an impetus for the change needed to end discriminatory practices such as racial profiling embedded in the justice system. Racial profiling occurs by police when an officer, consciously or unconsciously, subjects a person to heightened scrutiny or differential treatment based on racist stereotype, rather than reasonable grounds or suspicion (*Le* at paras 76-78). Both *Le* and *Ahmad* reference and call out racial profiling as an unacceptable policing practice that leads to improper and impermissible uses of state power. Defence lawyers, academics, and most importantly those impacted by it have cried out about racial profiling for years with little success before the courts. Now, our highest court has weighed in.

R v Le and Arbitrary Detention

In *Le*, the Supreme Court of Canada repeatedly called out racism and ultimately overturned a conviction that came as a result of police violations of Mr. Le's rights under the *Canadian Charter of Rights and Freedoms*.

Le began in the backyard of a Toronto housing co-operative in May 2012. Similar to many experiences voiced on social media at the moment, the case began with five young men of colour – four Black men and one Asian man (20-year-old Mr. Le) – hanging out, minding their own business in a townhouse backyard. Suddenly, two police officers entered the backyard and began to question the occupants. They demanded their identification and asked the men what was happening and whether they lived there. A third officer did a perimeter patrol of the property. Two of the officers ordered the men to keep their hands where they could see them. The officers questioned the young men and engaged in what the Supreme Court majority described as "carding", which is a "common police practice of asking individuals who they are and demanding proof of their identities for no apparent reason" (para 10, citing Michael. H. Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018), emphasis added). Carding is a harmful practice with acute impact on racial minorities, particularly youth, as noted by the majority (at para 94). In this case, either police were engaged in the harmful practice of carding, or worse, they targeted the men for an unwarranted and speculative investigation.

Mr. Le told the officer questioning him that he did not have identification on him. He had a satchel and "appeared nervous" (at para 14). The officer responded by asking Mr. Le what was in his satchel. Mr. Le then ran. Police gave chase and arrested him. A search followed. In Mr. Le's possession was a firearm, drugs (13 grams of cocaine), and cash. Charges were laid. On conviction, Mr. Le would have likely faced jail time in a penitentiary.

Before this incident took place, the police had arrived at the housing complex and asked the security guards about a specific individual related to an investigation. The guards did not recognize the person police were looking for. They offered that an unrelated person had been observed at one of the townhouses in the complex at some point in the recent past, and that this townhouse was a "problem address" with "concerns of drug trafficking in the rear yard" (at para 8). Police decided to go to the "problem" townhouse – a decision unrelated to their initial attendance at the housing complex. They had no specific information about any alleged crime taking place there. They observed the young men in the townhouse backyard, including Mr. Le, just talking. The events that followed, outlined above, led to Mr. Le's arrest.

Mr. Le took his case to trial, arguing that his *Charter* rights, specifically his section 8 right to be free from unreasonable search and seizure and his section 9 right to be free from arbitrary detention, were violated by police. The trial judge denied his applications.

Enter the Supreme Court of Canada, almost 7 years to the day after Mr. Le and the four other young men were accosted by the police. The majority of the Court, in a decision authored by Alberta Justices Sheilah Martin and Russell Brown, focused its reasons on the claim of arbitrary

detention. At trial, racial profiling only arose under the section 24(2) *Charter* analysis, which deals with the admission of evidence. In that analysis, the trial judge concluded that racial profiling didn't occur. Yet despite that conclusion, racial profiling became the touchstone in the Supreme Court's decision on the matter years later.

Finding a Detention Occurred

The first step in a section 9 analysis is to determine whether a detention occurred at all. An individual approached by police usually has the option to end the interaction and leave. When that option is removed, they are "detained" for the purpose of section 9.

In *R v Grant*, 2009 SCC 32 (CanLII), the Supreme Court of Canada highlighted that it may not always be clear whether someone has been detained by police through psychological, rather than physical, restraint. Where it is unclear, the court may consider a number of contextual factors in the determination of whether a detention occurred. Notably, Mr. Grant was a young Black man stopped and carded by police in Toronto while he was walking down the street, partly because he "stared" at them in an "unusually intense manner." This interaction ultimately led to an admission by Mr. Grant that he had a small bag of marijuana and a firearm in his possession. The majority of the Court held that in all of the circumstances, Mr. Grant had been detained by police, and that the detention was arbitrary. They stated that there was "no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices" (at para 133). This may well have been different in a post-*Le* world.

In *Le,* all parties agreed that Mr. Le was detained. The question for the Court was *when* that detention began, and whether it was lawful. (*Le* at para 30)

Applying the factors from *Grant*, the majority in *Le* emphasized the characteristics and circumstances of the accused, including his race. The majority held that the trial judge erred in the treatment of Mr. Le's personal circumstances, which exposed "larger problems related to the sources of evidence that may be relevant in assessing whether a reasonable person would have felt detained as the officers entered this backyard and made contact with, and demanded identification from, five racialized young men" (at para 70).

In coming to this finding, the majority reviewed general principles that included the consideration of the "reasonable person" in like circumstances, and how that individual would perceive the interaction with police. Race may be relevant, as various groups have their own history with law enforcement which can influence their perceptions of whether they are being detained by police. The majority did not mince words when it stated that courts must appreciate this impact of history on a person's reasonable perceptions. The inquiry as to whether a detention occurred involves a wide-ranging analysis, which "takes into consideration the larger, historic and social context of race relations between the police and the various groups and individuals in our society" (at paras 72-73, 75). This was one area where the minority (in reasons written by Justice Michael Moldaver) largely agreed with the majority (at para 260).

The overarching question is whether a reasonable person in the shoes of the accused at the time of the alleged detention would have perceived that they had no choice but to comply with police.

The majority stated unequivocally that this reasonable person is one deemed to have knowledge of how race relations would impact the interaction; someone who has "taken the trouble" to inform themselves on race relations between law enforcement and racialized communities (at paras 82, 88).

Evidence of race relations with police can be proved in a variety of ways. In this case, the majority accepted a variety of reports on the Canadian relationship between police and racialized communities, which establish that:

- Members of racial minorities have disproportionate levels of contact with both the police and the criminal justice system;
- Racial minorities are treated differently by the police, and minority members notice this differential treatment;
- Black people in Toronto are significantly more likely to have police use force against them, resulting in serious injury or death, including a much higher risk of being involved in a police shooting where a civilian dies as compared to a White person;
- Experiences of Black Torontonians include recurring police stops, questioning and detention without legal basis, illegal and inappropriate searches conducted by police, and unnecessary charges and arrests;
- The impact of carding on minority youth is significant, and is often a young person's first contact with police. Carding can impact a person's health and the opportunities available to them. It "contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization" (at para 95); and
- There is disproportionate policing of racialized and low-income communities.
  (paras 89-97, citations omitted)

The majority further commented that many of the recent reports reached conclusions that were similar to those reached decades ago (at para 96). Despite the repeated evidence of racial profiling and its resulting evils, courts have still been reluctant to find that racial profiling occurred in specific cases, which is why the comments in *Le* are so noteworthy.

The reports provided a sufficient evidentiary basis for the majority to find that the five men in the backyard would have felt compelled to submit to police – by remaining in the backyard, answering police questions, and complying with their demands.

However, in *Le,* at the trial level, direct evidence was also adduced from Mr. Le and the other young men that were in the backyard. As such, the majority reviewed portions of their testimony. The young men had testified to being frequently stopped by police, carded, and searched. They explained that it was a regular occurrence where no charges were laid, that they became used to it, and that they had no choice not to comply, otherwise "god knows" what would happen (at para 101). Mr. Le specifically testified that he feared police violence if he refused or resisted in these police encounters. These reflections are shared by many racialized Canadians – similar experiences have been expressed and amplified by thousands of voices in recent weeks.

The trial judge in *Le* found this testimony unpersuasive, as it was generic and "too consistent" between the witnesses. The fact that the testimony seemed consistent between witnesses is surely supportive of shared experiences rather than collusion in these circumstances. In any event, the majority emphasized that race is relevant in the inquiry, even without direct testimony, to consider the reasonable person's perspective "after informing themselves about community perspectives on race and policing" (at paras 98-106).

The Detention was Arbitrary and Unlawful

After finding that Mr. Le and the other young men were detained in the backyard, the majority held that this detention was arbitrary, as it was not authorized by law. The police who had entered the backyard were themselves trespassing. Importantly, the majority noted that not only were the police entering without authorization, they were entering for a "subsidiary purpose" – a "fishing expedition" (at para 127).

The police had no reasonable grounds to suspect that there was a connection between an individual and a recent or ongoing crime. Regarding the security guards' reports of the townhouse being a "problem address," the majority cautioned once again that "a suspect's presence in a 'so-called high crime area' is not by itself a basis for detention" (at para 132). "High crime areas" are typically inner-city neighborhoods where poverty rates are high. Consider that the detention in *Le* took place in a Toronto housing co-operative, whose purpose in part is to provide affordable housing for people with moderate incomes. Even putting aside the systemic discrimination contributing to higher poverty rates which can contribute to higher crime rates in certain neighborhoods, consider the problem of over-policing in areas of higher minority representation. If higher crime rates are caused, even in part, by higher police presence and intrusion in specific neighborhoods, it would be circular reasoning for police to determine that their detention of an accused is authorized by the fact that they are in a higher crime area.

It is also notable that the trial judge had held that the detention of Mr. Le was not arbitrary as it was based on reasonable suspicion that Mr. Le had a gun. This was partly based on Mr. Le pulling his satchel towards his body and acting "nervously" when confronted by the police.

The inclusion by the trial judge of "nervousness" as grounds for reasonable suspicion is important – it arises in many cases in which police state they had reasonable suspicion to detain or search. Police need reasonable suspicion to order a drug dog sniff search of a vehicle following a traffic stop, for example, which is another common area in which racial profiling occurs. Thankfully, "nervousness" is not always accepted by the courts as a factor on which to determine whether an objective person in the shoes of the officer would have reasonable grounds to suspect a crime is being committed. There are solid reasons for this, and most relevant to this discussion is that if people are nervous around police, they have good reason to be, regardless of whether they are committing a crime.

Police represent an institution with extraordinary control over our lives. If a police officer decides to detain or charge someone, that person can lose their liberty to the state. If the reasonable person is informed of the history of police and racialized communities, presumably they have also informed themselves of the systemic racism permeating the various stages of the

criminal justice system. Add to this the racist and violent police practices experienced and observed by Black, Indigenous, and other racialized persons in Canada. That they may be nervous is an understatement – a young Black man being detained by a police officer might be terrified for his safety. There is a long list of occurrences where Black, Indigenous, and racialized people were killed during police investigations, detentions, and mental health calls (see, for example, Desmond Cole, Remembering 27 Black, Indigenous, and racialized people killed by Canadian police, and since then, Regis Korchinski-Paquet and Chantel Moore, who both died after police interactions during wellness checks, followed by Rodney Levi, who was shot by an RCMP officer during a barbecue). "Nervousness" is a specious ground on which to base any objective reasonable suspicion.

The majority rightly rejected the grounds for detention in this case.

Systemic Racism, Racial Profiling and Arbitrary Detention

The majority in *Le* also addressed racial profiling and how it differs from the consideration of race in the analysis of a detention, as outlined above. It emphasized that race can be considered as relevant to detention regardless of whether racial profiling has been made out, as the inquiries are distinct (at paras 78-81).

Racial profiling, as noted by the majority, occurs when police action is taken based on the internal police motivation to select a suspect, or treat a suspect in a particular manner. It involves the conscious or unconscious use of stereotypes about offending or dangerousness in selection or treatment of a subject (at para 76, citing Ottawa Police Service, *Policy No. 5.39: Racial Profiling* (June 27, 2011) at 2). The majority noted that racial profiling is "anchored to an internal mental process that is held by a person in authority – in this case, the police" (at para 78). The result is the disproportionate application of a measure to a segment of the population based on their racial background as opposed to factual grounds or reasonable suspicion (at para 77, citing *Québec (Commission des droits de la personne et des droits de la jeunesse) c Bombardier Inc*, 2015 SCC 39 (CanLII)).

Racial profiling is relevant to the section 9 inquiry because a detention based on such profiling is inherently arbitrary – it is not based on *reasonable* suspicion, but rather the "internal process" of police, which is based on stereotypes (at para 78). The majority in *Le* further emphasized that since at least 2006, courts have accepted that racial profiling occurs as a "day-to-day reality in the lives of those minorities affected by it" (at para 80, citing Doherty JA in *Peart v Peel (Regional Municipality) Police Services Board*, 2006 CanLII 37566 (ON CA), 43 CR (6th) 175 at para 94).

That "internal process" is created by systemic racism. It has been acknowledged by appellate courts since at least *R v Parks,* 1993 CanLII 3383 (ON CA), 15 OR 3d 324, that overt and subconscious racism towards Black people still exists in Canada (at para 54). Last year, in *R v Barton,* 2019 SCC 33 (CanLII) at para 200, the majority of the Supreme Court of Canada mandated that "our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on." The majority in *Barton* repeated

from the Court's previous judgments the recognition that Indigenous persons have suffered a long history of colonialism in Canada, and that widespread racism against Indigenous people within our criminal justice system continues to have detrimental effects (at paras 198-200).

There is no question that systemic racism exists in Canada, and that it permeates law enforcement, regardless of what segments of the RCMP might say. The impacts are obvious to criminal justice system participants and can have horrific consequences for racialized Canadians. This includes assumptions of danger based on stereotype, more frequent police stops based on prejudice, more frequent searches during those stops, violence during these interactions, more criminal charges, and overrepresentation in the jails. This is nothing new.

The discussion of racial profiling in *Le* was especially significant in the circumstances because the trial judge found that in this case there was no racial profiling, and this was not a ground of appeal before the Supreme Court of Canada. The majority still took the opportunity to make some important and strong comments on the issue.

Moreover, the majority left the door open for when evidence on race relations may inform many issues in litigation, including credibility assessments and determining what evidence is accepted as persuasive (at para 89). This statement could be important to 'level the playing ground' in court. The evidence of police officers is often elevated, with a presumption that they have no reason to lie or mislead the court, despite that they are merely human and have wide-ranging and unique motivations for saying what they do under oath, as well as fallible memories like the rest of us. There is no special category of witness that police fall into. It is particularly important to remember this fact in claims of racial profiling, where it is often a credibility contest between an officer and an accused. It will be interesting to see how this comment is interpreted by trial courts down the line.

***The Conclusion in* Le**

Having found that Mr. Le's section 9 *Charter* right was violated by police, the majority considered whether the evidence found should be excluded pursuant to section 24(2) of the *Charter.* The overriding question on section 24(2) is whether the admission of the evidence would bring the administration of justice into disrepute.

The majority noted that the appellant had not challenged the trial judge's conclusion that the police officers were not acting in bad faith because of racial profiling. The majority reiterated that "racial profiling is a reality in policing in Canada that is supported by significant social science research" (*Le* at para 145*,* citing *R v Brown*, 2003 CanLII 52142 (ON CA), 64 OR (3d) 161, and *Grant*). That said, it is open to a judge to find that though racial profiling "may often happen, it did not actually happen on the particular facts of an individual case" (*Le* at para 146).

In *Le*, the police officers were not acting in good faith, as they understood the legal limitations on their power and nevertheless exceeded them to conduct an unlawful trespass and investigation on young men who were doing nothing but chatting amongst themselves in a backyard. The majority noted that the serious police misconduct in this case was "precisely the sort of police

conduct that the *Charter* was intended to abolish" (at para 160). The appeal was allowed, the evidence was excluded, and Mr. Le's long journey before the courts ended with an acquittal.

The exclusion of illegal drugs and a loaded firearm is an unpalatable result for some. But the experience of Mr. Le, of an unjustified police intrusion on his life for no legal reason, is a common one for many. For some, it can alter the trajectory of their lives significantly where it leads to criminal charges. Wherever police look hard enough and frequently enough, they will find criminal behavior. Over-policing and high crime areas go hand in hand. For others who are never charged with an offence, they might still be subject to a pattern of "low visibility" police conduct experienced over a lifetime that can result in humiliation, fear, and violence. This type of conduct can act as a reminder of ingrained biases and an unlevel playing field across institutions, contributing to inequality and systematic discrimination.

While *Le* did not drastically alter the state of the law on the test for arbitrary detention, it should enable significant change in the lower courts. The majority endorsed the use of social fact evidence of both racial profiling and race relations between police and minority communities. It gave the test for arbitrary detention some teeth when it comes to race-based policing. It further imbued all steps of the section 9 analysis of a psychological detention with racial considerations. It took a hard stance against police misconduct in a circumstance of flagrant overreach by police on the *Charter* rights of young racialized men.

The Ontario Court of Appeal has since commented on *Le* in *R v Dudhi*, [2019 ONCA 665 (CanLII)](), explaining that where a police officer's conscious or unconscious stereotyping contributes to suspect selection or treatment to any degree, racial profiling can be made out. Stereotyping need not be the only reason for the selection of the suspect, or specific treatment of the suspect, for the argument that a detention was arbitrary to succeed. The Court in *Dudhi* noted that racial profiling undermines effective policing, fuels harmful racial stereotyping, offends equality and human dignity, and "operates whenever race or racial stereotypes contaminate decision-making by persons in authority" (para 65).

The *Dudhi* decision shows that *Le* is already having an impact in lower court decision-making. The Supreme Court of Canada's endorsement of judicial notice in this area may greatly impact future racial profiling arguments before the courts by lessening the required reliance on credibility assessments of police officers. Indeed, where a detention is seemingly based on no grounds, it has to be considered whether it was based on these internal, yet difficult to prove, stereotypes.

R v Ahmad **and Entrapment**

The Supreme Court released *R v Ahmad* at the end of May of this year – one year after *Le* and just days after George Floyd was killed. *Ahmad* considers the entrapment doctrine. It too involves the right of all Canadians to be left alone by the police unless the police have reasonable grounds for their conduct. Important to this post is the heavy emphasis placed by both the majority and minority decisions on racial profiling. Hopefully, this signals a more robust approach by the courts in the consideration of race-based policing in various areas of criminal law going forward.

In *Ahmad,* the Supreme Court of Canada considered two appeals involving alleged entrapment by the police. With entrapment, the courts struggle with similar competing pulls as in *Charter* litigation – police must respect Canadian rights and freedoms, but are also obliged to conduct effective investigations. In order to investigate, police sometimes have direct involvement in the commission of an offence. For example, they can engage in conduct such as purchasing drugs that would, for any other citizen, be illegal. "Entrapment" occurs when this technique is used as an abuse, or a person is "entrapped" into committing an offence. Where entrapment is made out, an abuse of process has occurred, and courts will distance themselves from this conduct by staying the criminal charges. As stated in *R v Mack*, 1988 CanLII 24 (SCC), [1988] 2 SCR 903 and reaffirmed by the majority in *Ahmad,* "the state simply has no business unjustifiably intruding into individuals' private lives, randomly testing their virtue, and manufacturing crime" (*Ahmad* at para 17).

Ahmad involved "dial-a-dope" drug dealing. The majority (in reasons delivered by Justices Andromache Karakatsanis, Russell Brown and Sheilah Martin) held that reasonable suspicion, the well-known objective and subjective requirement in criminal law, requires more than a tip from an unverified source indicating that someone is dealing drugs from a specific phone number. There must be sufficient corroboration before the police can offer the person answering the phone an opportunity to traffic drugs. Without this, entrapment will be established.

What is particularly important, for this post, about *Ahmad* is that both the majority and minority decisions (the latter written by Justice Michael Moldaver) determine that the potential for racial profiling is ripe in cases of entrapment. This supports the need for objective reasonable suspicion of an officer before asking a suspect to buy drugs. An officer's reasonable suspicion must be capable of being articulated clearly so that courts can meaningfully review the suspicion and determine if it was objective. A purely subjective test would allow the personal conclusion of an investigating officer to determine whether there are sufficient grounds to provide a person an opportunity to commit crime. By making the reasonable suspicion requirement objective, the majority emphasizes the need to "avoid indiscriminate and discriminatory police conduct" (at para 25, citing *R v Chehil,* 2013 SCC 49, and other authorities on the well known reasonable suspicion standard). As it further explained:

> This is particularly critical in cases of entrapment, since entrapment is a "breeding ground for racial profiling" (D. M. Tanovich, "Rethinking the Bona Fides of Entrapment" (2011), 43 U.B.C.L. Rev. 417, at p. 432), and has "a disproportionate impact on poor and racialized communities" (pp. 417-18). Courts must be able to assess the extent to which the police, in seeking to form reasonable suspicion over a person or a place, rely upon overtly discriminatory or stereotypical thinking, or upon "intuition" or "hunches" that easily disguise unconscious racism and stereotyping (citations omitted). (at para 25)

The use of "coded drug language" to provide evidence of reasonable suspicion was also discussed. The majority noted that some people are simply familiar with the language of drugs (at para 55). The importance of this cannot be understated – a person may know about drug language and culture for many reasons, including that they live in a high crime / low economic

area, or that they use drugs. If that person desperately needs money, they could seize on the opportunity to sell drugs when it is presented by the police. This is the sort of fact pattern that leads to an abuse of process, and has potential to disproportionately impact those who are already disadvantaged by race, poverty, or other factors.

Also important in *Ahmad* is the majority's reminder, only a year after *Le,* that there will rarely be evidence of intentional racial profiling or targeting of marginalized or vulnerable persons (at para 28). This is why it is all the more important to create a test for abuse of process in entrapment cases that can be measured objectively based on what was known to the officer at the time the opportunity was provided. Demanding police have an objective suspicion prior to asking to buy drugs from someone, in the words of the majority,

> fosters…a sense of the importance of obtaining objective evidence of criminal activity *before* offering an opportunity to commit a crime, and of being alive to indicators that suggest that their intuitions or hunches may be wrong. And it compels police to disclose objective evidence that is amenable to exacting review, precluding them from relying on peremptory assertions of suspicion" (*Ahmad* at para 30, citing *R v Chehil,* 2013 SCC 49 (CanLII) at paras 33-34).

The Alberta Experience

In Alberta, the vast majority of reported cases in which racial profiling was alleged to have occurred resulted in a finding of lack of evidence of racial profiling (see for example *R v Kenowesequape*, 2018 ABQB 135 (CanLII); *R v Hoang,* 2017 ABQB 313 (CanLII); *R v Ameyaw,* 2011 ABPC 132 (CanLII)). In *R v Lam*, 2003 ABCA 201 (CanLII), our Court of Appeal made comments about the trial judge "understandably [being] left to wonder if [two accused] were not a target of racial profiling" where there were no reasonable grounds for a drug dog sniff search of a locker (at para 53). The Court noted that the officers had denied any racial profiling in cross-examination at trial. The comments on racial profiling post-*Le* may well have been different.

Despite the positive advance the *Le* and *Ahmad* decisions might generate, a serious local concern to Alberta practitioners is section 69.1 of the *Gaming, Liquor and Cannabis Act*, RSA 2000, c G-1 (*GLCA*), which provides police broad powers to exclude or remove persons from a licensed premise where police believe the person to be associated with a gang. The knowledge of the police officer required for this purpose can be as little as the officer having observed a person in the company of another person who they believe supports gang activities (s 69.1(2)). Police can rely on "symbols or other representations used by a gang" to come to their conclusions (s 69.1(4)(a)(ii)). Section 69.1 provides a legal excuse for police to come into contact with persons in licensed premises. This may lead to detentions and searches that may not have otherwise lawfully occurred without reasonable suspicion.

It should be obvious how the *GLCA* can be used to target members of minority communities. Conscious or subconscious racism contributes to identification of persons as gang members or gang affiliates, and gives police free rein to kick them out of restaurants, bars, casinos, and hockey games for this purpose.

Similarly to the lack of practical mechanisms to challenge *Charter* violations where no charges are laid, the police interaction is unlikely to be challenged or considered by a judge without the issuance of a ticket or a criminal charge that arises from the police intrusion (see for example *R v Young,* 2017 ABPC 238 (CanLII)). The *GLCA* legalizes the "low-level" police intrusions on daily lives that the Supreme Court of Canada cautions against. At least one constitutional challenge to the *GLCA* is pending.

Moving Forward

The problem with addressing unlawful state conduct in criminal matters with the goal of effecting change is that the criminal justice system is reactionary. Arguments about racial profiling in courts take place well after the racial profiling has occurred. Additionally, claims are only put forward by those who are charged with an offence; the courts don't see the many people who experience violations of their rights that do not result in criminal charges. Even if a person is charged, once they are on the justice system conveyor belt, minimizing risk to their future will often lead to jumping off before trial, for example by pleading guilty for a non- or low-custodial sentence rather than rolling the dice with a trial and arguing the issues, potentially leading to a conviction with a stiffer penalty.

The current reality is that, as supported by evidence of over-policing racial minorities, a large proportion of accused persons, complainants, and witnesses are racialized. Contrast this with a largely White judiciary and legal profession. Things are changing in the legal sphere, and more representation is demanded. But for many accused, sitting in the prisoner's dock, sometimes shackled in a nod to the slavery that predated overincarceration, looking out at a sea of White faces, there is little hope that racial bias will be acknowledged in the courts.

There is often a real hesitancy on the part of the accused person to take the stand and provide testimony in their case. The trial judge's comments in *Le* on the young men's testimony being too consistent is a good example of ways that accused persons can be damned if they testify and damned if they don't. If Mr. Le and the other young men testified to having widely different experiences with police, this undoubtedly would have been used to support a finding that over-policing was not a common experience. That their experiences were similar should have supported the proposition that this was a real lived experience for them.

It will be a rare police officer who will testify that they stopped, investigated, or arrested a person because of the colour of their skin. Likewise, no defence lawyer expects an officer to agree on the stand that their learned subconscious biases led to their detention of your client. These difficulties in obtaining direct evidence of racial profiling have been acknowledged by the Supreme Court of Canada in *Le* and *Ahmad*.

Further, systemic racism in the legal system is broad and multi-faceted. Racial profiling by police, normally occurring at the onset of a person's interaction with the justice system, is but one, albeit significant, challenge that we encounter when attempting to put a stop to years of injustice. Discrimination can happen at every stage of the process after a charge is laid – from the decision of whether an accused person is released on bail and if so on what conditions (*R v Zora*,

2020 SCC 14 (CanLII) at para 79), to the decision of whether a person can be judged by a jury that is actually representative of their community (*R v Kokopenace*, 2015 SCC 28 (CanLII)), to the continued attempts to address disproportionate levels of incarceration at the sentencing stage (*R v Jackson*, 2018 ONSC 2527 (CanLII)). And then after sentencing, the discrimination continues while serving sentences in jail (*Jackson* at paras 49-54).

Systemic change requires stopping racial profiling. This may be a lofty goal given how insidious systemic racism is, but there is no alternative where it is unquestionable that *Charter* rights must apply to all. One possible way to stop race-based policing is to reduce police presence and reallocate resources towards social services, as emphasized in recent calls to defund the police. Given the lack of progress in combating systemic racism thus far, this option is an attractive one. Central to this discussion must also be where those funds are reallocated, given bias in other state agencies. Systemic racism is certainly not limited to the police.

The criminal courts cannot and will not be the sole answer to stopping racial profiling by police. The importance of *Charter* jurisprudence lies in the messages sent by our highest court in acknowledging and denouncing this conduct. Though post-conduct scrutiny of police action doesn't remedy the initial violation, addressing misconduct at this level sends a message to police that the courts do not condone this conduct – it is not sanctioned by judges nor by the society they serve.

Condemnation by the courts also sends the message to White justice system participants that we are part of the problem, by participating in a society that acts this way or allows these actions to occur. And it tells racialized accused persons that what they experienced was wrong, and that their *Charter* rights have value. Further, successful legal arguments may lead to acquittals, preventing racial profiling from contributing to overincarceration of racialized persons.

The Supreme Court of Canada has acknowledged systemic racism in Canada and its impact on the justice system for decades, but there has been no concrete action from governments and police forces. *Le* provided us with enhanced tools when making racial profiling arguments. It sends the message to trial judges that racial profiling may occur frequently and that these issues need to be addressed, even where there may be a less contentious route available on which to decide the case.

The *Le* decision is a push to all counsel and the judiciary to take a hard look at the cases that are coming before them, and to recognize that the criminal justice system has been far too complacent in letting this police misconduct go on for years without remedy. While there are no reported decisions arising from Alberta on racial profiling on detention by police post-*Le,* it is expected that this decision will pave the way for successful *Charter* arguments where racial profiling is at play, and where racialized accused persons argue that they were psychologically detained. Where racial profiling is made out – hopefully an easier task post-*Le* than in the past – the accused may avoid a finding of guilt. In egregious cases, a stay of proceedings may result.

Whether the person charged is fully vindicated by an acquittal or a stay of proceedings is another story. It is a rare day in a criminal court where costs are successfully awarded, and most likely either the accused has now spent years of their life and thousands of their own dollars fighting

the charges, or our stretched legal aid system has paid the price. Consider Tom Le who waited 7 years from his charge to be acquitted. Many accused persons do not have the resources – financial or otherwise – to pursue a just result where there has been an error in the court below. And meanwhile, the policer officers who engage in racist behavior continue to detain, arrest, search, and intrude on such persons.

With the Supreme Court's consistent commentary over the year following *Le* on the impact of policy and jurisprudence on differential treatment by the justice system (see again, *Ahmad* and *Zora*), now may be the time for further meaningful change in this area. Decades ago, law professor David Tanovich suggested reforms to *Charter* arguments to meaningfully reduce racial profiling (see "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall LJ 145). Given the difficulty that the accused has of proving discriminatory intent by police, specifically in the context of race-based traffic stops, Tanovich suggested that an "enhanced litigation standard" be applied. This would shift the evidentiary burden on a section 9 arbitrary detention application from the defence to the Crown to establish that a traffic stop of a Black driver was not race-motivated. The Crown could discharge its burden by establishing the lawfulness of the stop, i.e. that it was not based on race. This approach could significantly impact the result in the many cases where the police conduct smells like racial profiling, but the accused can't prove it in court. In a time where calls to defund the police and reallocate government resources are gaining traction, it is also time to rethink whether shifting the evidentiary burden on a racial profiling argument is a radical move, as opposed to a practical alternative to waiting for a society to change that is resistant to doing so.

Many thanks to Professor Lisa Silver for her invaluable comments on an earlier draft of this post.

For practical and straightforward suggestions to work towards responsible policing and greater access to justice in Alberta, see the Criminal Trial Lawyers' Association's Open Statement Regarding Policing and Reevaluating Our Community Priorities here.

To support Canadian legal organizations representing the interests of BIPOC, see:
Black Legal Action Centre
Aboriginal Legal Services
Native Counselling Services of Alberta

This post may be cited as: Meryl Friedland, "Supreme Court of Canada Finally Addresses Racial Profiling by Police" (June 26, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_MF_RacialProfiling.pdf

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