

TAB 17

The Six-Minute Criminal Court Judge 2020

Section 24(2) - Can *R. v. Omar*, 2019 SCC 32
be reconciled with *R. v. Le*, 2019 SCC 34?

The Honourable James Stribopoulos
Superior Court of Justice

January 25, 2020



**Section 24(2) – Can *R. v. Omar*, 2019
SCC 32 be reconciled with *R. v. Le*,
2019 SCC 34?**

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Agenda:

- 1) Provide a basic summary of the *Omar* and *Le* cases.
- 2) Outline why they seem to be inconsistent, resulting in both confusion and controversy in their aftermath.
- 3) Address whether or not they are reconcilable and their potential significance going forward.

R. v. Omar (at trial):

- Street-level detention, TJ finds ss. 8, 9 and 10(b) *Charter* breaches.
- But, admits handgun, ammunition, and cocaine under s. 24(2).
- Under 1st prong of *Grant*, breaches at the less serious end of the spectrum due to police “good faith”.
- Officers did not believe they were crossing the psychological “detention” threshold, and the line is not always clear.

R. v. Omar, 2018 ONCA 975, per (majority):

- Case factually analogous to *Grant*, not “borderline” detention.
- TJ erred by equating “good faith” with honest police mistakes; “good faith errors must be reasonable”: *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 44.
- Error means no need for deference, conduct 24(2) analysis anew.

- After balancing three lines of inquiry under *Grant*, evidence excluded.
- Quote *R. v. McGuffie*, 2016 ONCA 365, at para. 63: “If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility.”
- Sharpe J.A. notes: “The limits of the judicial perspective also require judges to recognize that many unlawful police detentions and searches never come before the courts.” (Para. 58, citing *Grant*).

Brown J.A., in dissent:

- Facts resulting in “detention” materially different than in *Grant*.
- *Grant*’s multi-factor approach to detention ≠ bright-line rules.
- TJ did not error in characterizing breach as less serious, therefore deference owed to 24(2) analysis. “It follows that I would dismiss the appeal.” (para. 107)
- Arguably, the balance of Brown J.A.’s decision is *obiter*.

- Brown J.A. proceeds to “comment” on two aspects of majority decision:

1) Majority’s use of *McGuffie* incorrect, as ↑ seriousness + ↑ impact ≠ exclusion. This would be at odds with *Grant*, which:

- Eschewed categorical rules under s. 24(2);
- Directed that “all of the circumstances” be considered;
- Observed s. 24(2) ≠ mathematical precision.

2) Questions majority's treatment of third line of inquiry under *Grant*:

- Courts should take account of distinctive problem of illegal handguns.
- Community concerns about gun violence relevant to repute of administration of justice of admitting or excluding.
- Community expects police to abide by limits on their authority, but also to walk the streets “without finding themselves at the wrong end of an illegal handgun” (para. 137).

R. v. Omar (SCC):

- In a brief two-paragraph endorsement, court splits 4 to 3:

Majority – “allow the appeal, substantially for the reasons of Brown J.A. at the Court of Appeal.” *Obiter*: remedies under 24(1) beyond exclusion under 24(2)? (Wagner C.J., Moldaver, Côté, & Rowe JJ.)

Dissent – “substantially for the reasons of Sharpe J.A. at the Court of Appeal.” *Obiter*: should police have to tell those they stop and question they are free to leave? (Brown, Karakatsanis, & Martin JJ.)

R. v. Le, facts:

- Police enter the backyard of a home in a housing-cooperative, uninvited. Le and four other racialized young men are just talking.
- Police ask for their ID, including from Le, who says he has none. One man told to keep hands visible.
- Le is asked what he has in satchel, and responds by taking flight, is pursued and then arrested. Found in possession of loaded firearm, drugs and cash.

R. v. Le, 2014 ONSC 2033, & 2018 ONCA 56:

- TJ found no ss. 8 or 9 *Charter* breaches, implied license to enter the backyard, only detained when asked about contents of his bag.
- If there was a breach, TJ says evidence nonetheless admissible under s. 24(2)
- Majority at OCA (Doherty and Brown J.A.) agree with TJ., but Lauwers J.A. dissents.

R. v. Le, 2019 SCC 34:

- SCC divides 3 to 2 .
- Majority, Brown, Karakatsanis & Martin J.J., dissent in *Omar*.
- Dissent, Wagner C.J. & Moldaver J., part of majority in *Omar*.
- They disagree regarding both the analysis under ss. 9 and 24(2).

R. v. Le, majority:

- Re-affirm, and elaborate on three non-exhaustive factors from *Grant* for assessing psychological detention claims.
- All three groups of factors, (i) circumstances giving rise to encounter, (ii) nature of police conduct, and (iii) particular characteristics of the claimant, point towards “detention” from the time police entered into the backyard and began the interaction.

- Section 9 violated, as no legal authority for detention. TJ erred in concluding otherwise.
- Leave standing of guests under s. 8 of the *Charter* for another day.
- Section 24(2) analysis, cite *McGuffie*, at para. 62, noting: “the more serious the infringing conduct and the greater the impact on the *Charter-protected* interests, the stronger the case for exclusion.” (para. 141)

- Also observe it is possible for serious *Charter*-infringing conduct, even when coupled with a weak impact on the *Charter*-protected interest, *on its own* to support exclusion (para. 141).
- It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion (para. 141).
- Third prong particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence (para. 141).

- If first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility (para. 141).
- But, if the first two lines of inquiry together reveal weaker support for the exclusion of the evidence, third will most often confirm that admission will not bring the administration of justice into disrepute (para. 141).

- The violation was serious, no “good-faith” as police did not conduct themselves in a manner consistent with what they subjectively, reasonably and non-negligently believed to be the law.
- Impact on protected interests high; went to the core of interests protected by s. 9 (liberty).
- Application of three lines of inquiry favour exclusion in this case.

R. v. Le, dissent:

- Agree that entry into the backyard was unlawful, but question whether appellant enjoyed s. 8 *Charter* standing as just a guest.
- Agree that there was a “detention,” but not at the outset; only crystalized when another young man told to keep his hands visible; detention, at most, lasted seconds.
- Fresh s. 24(2) analysis, but with deference to TJ’s factual findings.

- Based on TJ's findings, under the first line of inquiry the breaches were technical and inadvertent.
- Impact on *Charter* protected interests minimal, as detention was fleeting before flight gave rise to grounds to detain.
- The third line of inquiry also strongly favours inclusion, as evidence was reliable (drugs, cash, and a handgun).

- Involvement of loaded-handgun “no minor consideration” (para. 298). Moldaver J. writes, at para. 300:

... it is essential to both the rule of law and the attainment of the rights enshrined in the *Charter* ... that Canadians feel safe and secure in their communities. [Members of communities plagued by guns and drugs] ... look to the police to protect them from the lurking presence of guns, drugs, and the harm they bring. ... the perspective of those Canadians who live in communities marred by gun violence and drugs, must not be lost in the s. 24(2) analysis.

Can *Omar* and *Le* be reconciled?

- No, not really; show a deep divide on SCC regarding s. 24(2). *Collins* led to *Stillman*, which in turn led to *Grant*. Are we due for another reconsideration of s. 24(2)?
- Core disagreement is about the concern that should dominate in assessing the impact on the reputé of the administration of justice:
 - Concern about low-visibility *Charter* violations that never result in evidence or charges; **or**
 - Concern about perils of guns and drugs in our communities.