

# The Supreme Court of Canada’s Justification of *Charter* Breaches and its Effect on Black and Indigenous Communities

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E L S A K A K A

## I. INTRODUCTION

Throughout my time in law school, I noticed that the criminal cases covered in my courses very rarely adequately dealt with how racism affected the ways in which the police investigated and arrested Black, Indigenous, and People of Colour (BIPOC).<sup>1</sup> Instead, I observed an expansion of police powers and a frightening trend of justifying *Charter* breaches that ultimately upheld systemic racism in policing – showing that racialized communities have very little recourse in addressing police misconduct.

I found it perplexing that a case like *R v Grant*, which is integral to our understanding of admitting evidence under section 24(2) despite *Charter* breaches, did not pay special consideration to the fact that Grant was Black

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<sup>1</sup> Throughout this paper, I will use the term BIPOC (Black Indigenous, and People of Colour) and focus on the treatment of these communities by the police. While the term “coloured people” was historically used to other, alienate, and discriminate against non-white people, the term BIPOC seeks to humanize and centre the experiences of Black and Indigenous peoples. Furthermore, the term BIPOC emphasizes the anti-Black racism in non-Black communities of colour and anti-Indigenous racism in settler communities that makes the lived experiences of BIPOC very different from those of non-Black and non-Indigenous People of Colour. The use of the term BIPOC is not meant to conflate the complex history of Indigenous peoples with those of Black people, but to highlight the ways in which the police treat these communities in particular. I acknowledge that Indigenous people are members of Nations with claims to territory and a history that pre-dates Canada. See Mahreen Ansari, “What is BIPOC and Why You Should Use It” (18 February 2020), online: *Her Campus* <[www.hercampus.com/school/umkc/what-bipoc-and-why-you-should-use-it](http://www.hercampus.com/school/umkc/what-bipoc-and-why-you-should-use-it)> [perma.cc/KA4A-92YB].

and determined to be suspicious by the police officers with very little rationale.<sup>2</sup> The Court found that the police's conduct was "not deliberate or egregious."<sup>3</sup> I challenge the relevance of whether it was deliberate and disagree with the Court's conclusion that the officers' conduct was not egregious. The judgments in these cases often do not offer any insight into the dangers of granting the police this much power, nor do they acknowledge the dangers that expansion of police powers could pose to BIPOC who have long been subjected to racism and brutalization at the hands of police officers in Canada.

Critical Race Theory is a theoretical framework in the social sciences that examines the interplay of race, law, and power.<sup>4</sup> As such, I believe that it is integral in determining the effect of these justified *Charter* breaches on BIPOC as it pertains to interactions with police. Critical Race Theory proposes that the law is used to preserve white supremacy and racism.<sup>5</sup> Therefore, it is through Critical Race Theory that I will be able to investigate the possibility of dismantling a white supremacist and racist system. If our laws do not strive to protect the most marginalized and over-policed, our legal system will continue to support institutionalized racism. Our courts must do a better job in limiting police powers in order to ensure the safety of all Canadians. I will show through an analysis of historical relations between the police and Black and Indigenous communities, police violations of *Charter* rights, and recent incidences of police violence that the Supreme Court of Canada's justification of certain *Charter* breaches and their erasure of race ultimately places more BIPOC in danger of police violence.

In this paper, I will employ Critical Race Theory in order to undertake an analysis of how multiple Supreme Court of Canada decisions pertaining to *Charter* breaches have allowed for an expansion of police powers that exacerbate the maltreatment of racialized communities by our criminal justice system. Part II of this paper will explore how these cases, which often lack insight into the experiences of Black and Indigenous peoples, lead to an erasure of race as a factor that influences interactions between the police

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<sup>2</sup> *R v Grant*, 2009 SCC 32 at para 5 [*Grant*].

<sup>3</sup> *Ibid* at para 133.

<sup>4</sup> Shanthi Elizabeth Senthe & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) 31:1 Windsor YB Access to Just 1 at 3.

<sup>5</sup> *Ibid* at 2.

and Black<sup>6</sup> and Indigenous communities. The decisions primarily discussed in this paper are *Grant*, *R v Mann*, *R v MacDonald*, and *R v Le*.

In Part III of this paper, I will discuss possible solutions to ensure that the legal system properly engages with race and promotes effective policing that recognizes the lived experiences of BIPOC. In order to compile a list of recommendations that address this issue, I intend to look at the Truth and Reconciliation Commission's Calls to Action as well as other reports published by Indigenous organizations that address the over-policing of Indigenous peoples. I will also incorporate Black Lives Matter Toronto's demands and critiques of the Toronto Police Service with the ultimate goal of articulating how we can ensure that the *Charter* rights of all Canadians are respected.

**Keywords:** Critical Race Theory; BIPOC; racialized; *Charter* breaches; racial profiling; investigative detentions; over-policing; public safety; mental health; race-related data; systemic racism

## A. Backgrounder: Historical Relations Between the Police and Black and Indigenous Communities

Black and Indigenous peoples are some of the most over-represented groups of people in the criminal justice system. Despite their differing histories, the legacy of slavery and the ongoing practice of settler colonialism has resulted in very similar forms of marginalization and oppression for Black and Indigenous communities — including their disproportionate rates of incarceration in federal institutions, over-representation in the child

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<sup>6</sup> Throughout this paper, I make the point of capitalizing 'Black', while I do not do the same with 'white'. The first reason I do so is because 'Black' is a proper name that describes the ethnic origin and ancestry of a group of people. As such, "Black" should be capitalized in the same way that Asian, Hispanic, Arab, etc. are. Furthermore, many Black people describe themselves simply as being Black while the white majority does not necessarily think of themselves in this way. The word 'white' does not describe a shared identity and experience in the same way that 'Black' does. See Kathy English, "Respect, Dignity and Fairness Conveyed in Capital Letters: Public Editor" (26 May 2017), online: *The Star* <[www.thestar.com/opinion/public\\_editor/2017/05/26/respect-dignity-and-fairness-conveyed-in-capital-letters-public-editor.html](http://www.thestar.com/opinion/public_editor/2017/05/26/respect-dignity-and-fairness-conveyed-in-capital-letters-public-editor.html)> [perma.cc/WUX5-S2GV]; Merrill Perlman, "Black and White: Why Capitalization Matters" (23 June 2015), online: *Columbia Journalism Review* <[www.cjr.org/analysis/language\\_corner\\_1.php](http://www.cjr.org/analysis/language_corner_1.php)> [perma.cc/XJ5Y-FQ7Q].

welfare system, and susceptibility to police violence.<sup>7</sup> Paying attention to the ways in which Black and Indigenous communities have been controlled and brutalized by police throughout history sheds insight on how their plight is made worse when the Supreme Court of Canada justifies or fails to address the problematic ways that police engage with these communities.

As of 2012, Indigenous peoples made up just under 4% of the total population of Canada, but approximately 28% of adults sentenced to federal custody.<sup>8</sup> Despite several inquiries and their resulting recommendations, the rates of incarceration for Indigenous peoples has actually increased: 35% for men and 86% for women between 2001–2002 and 2010–2011.<sup>9</sup> Indigenous peoples' criminalization is linked to the immense poverty and social disadvantage inflicted upon the community by a white supremacist system.<sup>10</sup> The polices' relationship with Indigenous communities has been tumultuous since the beginning of colonialism, and Indigenous communities have often dealt with being under-protected as well as over-policed.

There are countless examples of police officers failing to properly investigate crimes committed against Indigenous women, as was noted by The National Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>11</sup> The police have also been responsible for committing heinous acts against Indigenous peoples; often at the direction of the state. For example, the RCMP committed genocide against Indigenous communities when they ripped Indigenous children away from their families and forced them to attend Indian Residential Schools.<sup>12</sup> It was the police that enforced the confinement of Indigenous peoples to reserves, as per the *Indian Act*,

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<sup>7</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax & Winnipeg: Fernwood Publishing, 2017) at 454–55 (Kindle Edition).

<sup>8</sup> Statistics Canada, *Aboriginal Statistics at a Glance: Justice: 2<sup>nd</sup> Edition*, Catalogue No 89-645-X (Ottawa: Statistics Canada, last modified 24 December 2015) at 31, online: <[www.statcan.gc.ca/pub/89-645-x/2015001/justice-eng](http://www.statcan.gc.ca/pub/89-645-x/2015001/justice-eng)> [perma.cc/GQ3B-2YZR].

<sup>9</sup> Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Final Report) (Ottawa: OCI, 2012) at 16.

<sup>10</sup> Leah Combs, "Healing Ourselves: Interrogating the Underutilization of Sections 81 & 84 of the *Corrections and Conditional Release Act*" (2018) 41:3 *Man LJ* 163 at 168.

<sup>11</sup> "Chapter 4: Colonization as Gendered Oppression" in *Reclaiming Power and Place: The Final Report on The National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) 229 at 253.

<sup>12</sup> "RCMP 'Herded' Native Kids to Residential Schools", *CBC News* (29 October 2011), online: [CBC <www.cbc.ca/news/canada/rcmp-herded-native-kids-to-residential-schools-1.992618>](http://www.cbc.ca/news/canada/rcmp-herded-native-kids-to-residential-schools-1.992618) [perma.cc/MZ5X-WLHV].

restricting their mobility unless they received permission from an Indian agent.<sup>13</sup> There are also horror stories that include police dropping Indigenous peoples off at the outskirts of cities in the middle of winter, for what were infamously dubbed ‘starlight tours’, and expecting them to walk back without shoes or socks.<sup>14</sup> Many Indigenous peoples froze to death as a result.<sup>15</sup> The Saskatoon Police attempted to erase the history of ‘starlight tours’ when they removed the section addressing this practice from their Wikipedia page in 2016.<sup>16</sup>

Furthermore, many Indigenous peoples today express feelings that they are more harshly treated by police than their white counterparts. A study conducted by Toronto Aboriginal Support Services in 2011 revealed that 63% of Indigenous respondents believed that “Toronto police are more likely to lay more serious charges against Indigenous accuseds than against non-Indigenous accuseds.”<sup>17</sup> It is no wonder then that the violence perpetrated by police has resulted in a strained relationship with Indigenous communities.

In 2015, the RCMP commissioner, Bob Paulson, admitted before a group of First Nations leaders that there were racists in his police force and vowed to ensure that this would no longer be true.<sup>18</sup> However, a briefing note written for Public Safety Minister, Ralph Goodale, in December, 2017 revealed that the RCMP fatally shot 61 people across Canada from 2007–2017.<sup>19</sup> Of those 61 people, 22 were Indigenous and 12 of the deaths took place on reserve or in an Indigenous community.<sup>20</sup> In the note, the RCMP

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<sup>13</sup> Stephanie Cram, “Dark History of Canada’s First Nations Pass System Uncovered in Documentary”, *CBC News* (19 February 2016) online: <[www.cbc.ca/news/indigenous/dark-history-canada-s-pass-system-1.3454022](http://www.cbc.ca/news/indigenous/dark-history-canada-s-pass-system-1.3454022)> [perma.cc/78EK-VLVZ].

<sup>14</sup> Dan Zakreski, “Saskatoon police removed ‘starlight tours’ section from Wikipedia, student says”, *CBC News* (31 March 2016), online: <[www.cbc.ca/news/canada/saskatoon/saskatoon-police-starlight-tours](http://www.cbc.ca/news/canada/saskatoon/saskatoon-police-starlight-tours)> [perma.cc/K5H5-TKW2].

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Malini Vijaykumar, “A Crisis of Conscience: Miscarriages of Justice and Indigenous Defendants in Canada” (2018) 51 *UBC L Rev* 159 at 166.

<sup>18</sup> Susana Mas, “Bob Paulson Says he Doesn’t Want Racists Inside RCMP Ranks”, *CBC News* (9 December 2015), online: <[www.cbc.ca/news/politics/first-nations-bob-paulson-racism-mm1w-1.3357406](http://www.cbc.ca/news/politics/first-nations-bob-paulson-racism-mm1w-1.3357406)> [perma.cc/J86J-ULK5].

<sup>19</sup> Colin Freeze, “More Than One-Third of People Shot to Death Over a Decade by RCMP Officers Were Indigenous”, *The Globe and Mail* (17 November 2019), online: <[www.theglobeandmail.com/canada/article-more-than-one-third-of-people-shot-to-death-over-a-decade-by-rcmp/](http://www.theglobeandmail.com/canada/article-more-than-one-third-of-people-shot-to-death-over-a-decade-by-rcmp/)> [perma.cc/U8JT-UCS3].

<sup>20</sup> *Ibid.*

attempted to rationalize the numbers, stating that although the numbers “may appear disproportionately high”, 67% of RCMP detachments serve Indigenous communities.<sup>21</sup> Perry Bellegarde, the national chief of the Assembly of First Nations rightfully characterized the numbers as “totally unacceptable”, especially given the fact that Indigenous peoples make up only around 5% of the overall Canadian population.<sup>22</sup> Unfortunately, the memo did not provide further context on the number of Indigenous peoples the RCMP are responsible for policing because, as the RCMP explained, they do not keep detailed race-based statistics.<sup>23</sup>

This presents another problem. The lack of race-based statistics allows for incidences of police violence against Indigenous peoples to be understated. Past studies on police use of force in Ontario have shown that while in urban areas Black Canadians are over-represented, Indigenous populations are “hugely overrepresented” in rural areas.<sup>24</sup> This is not to say that Indigenous peoples are not also over-represented in urban areas. In Manitoba, where the largest Indigenous urban population is found, 11 out of 19 people killed by police from 2000–2017 were Indigenous.<sup>25</sup>

Matthew Dumas was 18 when he was killed by police.<sup>26</sup> He apparently matched the description given in a 911 call stating that there were “Native-looking” teens involved in an attempted robbery.<sup>27</sup> According to inquest documents, he appeared to be carrying a gun and was behaving suspiciously.<sup>28</sup> When he was approached by police he fled.<sup>29</sup> 30 minutes later, he was shot by police after allegedly confronting them with a weapon that was later revealed to be a screwdriver.<sup>30</sup> Further investigation also determined that he had no involvement in the robbery.<sup>31</sup> Matthew Dumas’

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Kristen Annable, “Most People Who Died in Police Encounters in Manitoba Were Indigenous, CBC Investigation Finds”, *CBC News* (6 April 2018), online: <[www.cbc.ca/news/canada/manitoba/deadly-force-manitoba-indigenous-1.4607383](http://www.cbc.ca/news/canada/manitoba/deadly-force-manitoba-indigenous-1.4607383)> [perma.cc/2632-RN]4].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

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

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

family believed that he was a victim of racial profiling.<sup>32</sup> In Winnipeg, Indigenous peoples make up more than 64% of people killed by police, even though they are only 10% of the population.<sup>33</sup> In April 2020, three Indigenous people were fatally shot by police in the span of 10 days: Stewart Andrews, Jason Collins, and a 16-year-old girl named Eisha Hudson.<sup>34</sup>

Canada has never reckoned well with its anti-Blackness. For many Canadians, anti-Black racism is a feature of the distant past or a different place altogether — such as the United States.<sup>35</sup> There is very little acknowledgement of the fact that slave-owners in Canada once held both Black and Indigenous peoples as property.<sup>36</sup> By the mid-1800s, after the abolishment of slavery, textbooks had managed to erase the presence of Black people in Canada.<sup>37</sup> There was no mention of racially segregated schools or the significant Ku Klux Klan membership in Canada.<sup>38</sup> This erasure of Black peoples' histories and experiences in Canada is still prevalent today. In 2016, shortly following the police killing of an un-armed, Somali-Canadian man named Abidrahman Abdi, the president of the Ottawa Police Association told the press that “it was ‘unfortunate’ and that he was ‘worried’ that Canadians would assume race could play a factor in Canadian policing, arguing that those issues were only pertinent in the United States.”<sup>39</sup>

Many scholars, such as Robyn Maynard, argue that Black lives in Canada have been subjected to “structural violence that has been tacitly or explicitly condoned by multiple state or state-funded institutions.”<sup>40</sup> Despite only making up 3% of Canada's population, Black people, in some parts of the country, make up around one-third of people killed by police.<sup>41</sup> Black Canadians are also more heavily targeted for arrest, which offers some explanation for their disproportionate imprisonment in federal institutions — a figure that is three times higher than the number of Black people in

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<sup>32</sup> *Ibid.*

<sup>33</sup> Pam Palmater, “Inquiry Needed into Violence Against Indigenous Peoples” (22 April 2020) online: *Canadian Dimension* <[canadiandimension.com/articles/view/inquiry-needed-into-police-violence-against-indigenous-peoples](http://canadiandimension.com/articles/view/inquiry-needed-into-police-violence-against-indigenous-peoples)> [perma.cc/B3984T93].

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

<sup>35</sup> *Supra* note 7 at 235–36.

<sup>36</sup> *Ibid* at 280–81

<sup>37</sup> *Ibid* at 283.

<sup>38</sup> *Ibid* at 285.

<sup>39</sup> *Ibid* at 288–89.

<sup>40</sup> *Ibid* at 296–97.

<sup>41</sup> *Ibid* at 305–06.

Canada.<sup>42</sup> Police departments throughout Canada have been involved in the racial profiling of Black people for decades. A 2003 study of students found that a third of Black students who had not been involved in criminal activity have been stopped by police, in comparison with a tenth of their white counterparts.<sup>43</sup>

Additionally, the Toronto Police Department is notorious for ‘carding’ Black people: the practice of “amassing the names, personal information, and movements of millions of people using ‘contact card’ stops for largely non-criminal encounters.”<sup>44</sup> Young, Black teenagers in Montreal have reported being told by police to disperse when two or more of them are gathered together, with scholars analyzing this as Black existence in public spaces being viewed as inherently criminal.<sup>45</sup> Racial profiling has been described as a form of violence that restricts Black peoples’ ability to move freely and without fear in public spaces.<sup>46</sup>

It is important to contextualize this history because it explains how frequently Black and Indigenous peoples are likely to be racially profiled by police and their apprehension in either complying with police or their likelihood to forego their *Charter* rights for the sake of self-preservation. This is highly significant as one begins to assess the behaviour of police and the accused in many *Charter* cases.

## II. EFFECTS OF THE LAW ON BLACK AND INDIGENOUS COMMUNITIES

### A. *Grant* and *Mann*: Racial Profiling and Investigative Detentions

*Grant* and *Mann* both involved Black and Indigenous accused. Although, at times, in each case, the Supreme Court did make some mention of the race of the accused, it does not adequately deal with how racial profiling factors into the polices’ choice to arbitrarily detain each accused and, therefore, how this impacts the *Charter* rights of the accused. Racial profiling is the practice of targeting people mainly on the basis of their race, and it rests on the assumption that particular racial groups are

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<sup>42</sup> *Ibid* at 307–08.

<sup>43</sup> *Ibid* at 1956–57.

<sup>44</sup> *Ibid* at 1961–62.

<sup>45</sup> *Ibid* at 1948.

<sup>46</sup> *Ibid* at 1945–62.



more prone to criminality.<sup>47</sup> In order to properly engage with the Charter breaches in these cases, which the Supreme Court failed to fully do, one must analyze the racial dimensions of investigative detentions.

On November 17<sup>th</sup>, 2003, in the Greenwood and Danforth area of Toronto, a young Black man named Donnohue Grant was stopped by three police officers because he behaved in a way that “aroused their suspicions.”<sup>48</sup> The officers were in the area for the purpose of monitoring and maintaining a safe student environment during the lunch hour, given that the area contained four schools and had a history of student assault, robberies, and drug offences.<sup>49</sup> As two of the officers, Worrell and Forde, had driven past Grant, they noticed that “the appellant ‘stared’ at them in an unusually intense manner and continued to do so as they proceeded down the street, while at the same time ‘fidgeting’ with his coat and pants.”<sup>50</sup>

The comments made by the officers regarding Grant’s behaviour are quite subjective, which honestly is to be expected. Police should be able to think on their feet and react quickly to a possibly dangerous situation. It is comprehensible that police are being relied upon to trust in their intuition and the experience that they have acquired while on the job. However, this intuitive decision making becomes problematic when it is rooted in racial biases and manifests in racial profiling, carding, and the over-policing of predominantly Black communities.

The problem lies in the fact that when police officers point out suspicious behaviour, this behaviour can also be deemed rather innocuous when analyzed through a “race-neutral lens.”<sup>51</sup> For example, a handshake between two Black men in a high crime area may be interpreted as a drug transaction when the same might not be said about two white men in the same situation or otherwise.<sup>52</sup> Furthermore, for a Black person who experiences or has an awareness of the history of police officers engaging in harassment of Black communities, it would be understandable that this Black person would want to avoid an approaching officer. Their evasiveness

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<sup>47</sup> David M Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall LJ 145 at 149 [Tanovich, “Profiling”].

<sup>48</sup> *Grant*, *supra* note 2 at paras 4-5.

<sup>49</sup> *Ibid* at para 4.

<sup>50</sup> *Ibid* at para 5.

<sup>51</sup> David M Tanovich, “The Colourless World of Mann” (2004) 21:6 CR Art 47 at 3 (WL).

<sup>52</sup> *Ibid*.

— “intense eye contact” or “fidgeting” — could be read as suspicious.<sup>53</sup> While the Supreme Court recognized the issues of evasiveness in *Grant*, it only discussed the issue within the context of detention, without holding the police accountable for engaging in racial profiling.<sup>54</sup>

Although the Court is able to engage in a complex analysis about whether a racialized person feels that they have been detained, it is disappointing that they seemingly refuse to hold police accountable for their actions. In fact, the Court in *Grant* actually states that “there was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices.”<sup>55</sup> Furthermore, Chief Justice McLachlin went on to say that while the police conduct was not in conformity with the *Charter*, it was not abusive.<sup>56</sup> I vehemently disagree. When people are marginalized and vulnerable to consistent harassment by police, the *Charter* can often be their only way to ensure that their rights are upheld. To say that the police’s conduct was not abusive completely disregards the lived experiences of Black people who consistently have their rights violated by the police. While the police may be a source of protection for many, it can be a completely different scenario for those who are Black.

It is honestly incredible how our courts continuously avoid scrutinizing whether the actions of police are racially motivated. Instead, there are many instances where the courts choose to focus on some other ground for discrimination because of an apparent apprehension to discuss racist policing. For example, in *R v W(K)*, two police officers who had approached a group of four men chose to focus their investigatory gaze on the two Black youth and let the two white men walk away, even though the two white men were known to them as drug dealers.<sup>57</sup> There was no discussion of the race of the Black accused who were detained. Rather, the trial judge focused on age as a prohibited ground for discrimination and spoke about how youth were “particularly vulnerable to unjustified street level detentions and accompanying searches.”<sup>58</sup> While this is true, race is also a factor that warrants discussion and, perhaps, was more the reason for their detention.

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 2 at paras 154–55.

<sup>55</sup> *Ibid* at para 133.

<sup>56</sup> *Ibid.*

<sup>57</sup> 2004 ONCJ 351 at para 5.

<sup>58</sup> *Ibid* at 64.

It is unclear why there is so much apprehension in the courts to discussing racial profiling. Tanovich suggests that it may be that counsel perceive judicial hostility towards such arguments.<sup>59</sup> But studies reveal that racial profiling arguments are not being raised regardless of who is presiding.<sup>60</sup> It is of the utmost importance that the courts start engaging in these conversations in order to hold police officers accountable and prevent further street harassment of BIPOC by police. Truthfully, however, this should not be done at the expense of a client's likelihood of having a successful trial. Another explanation for why these arguments are not being brought forth could be that many white lawyers lack the cultural competency to recognize when race is a factor in a case.<sup>61</sup> Often times, in today's racial climate, racism is not overt. As such, white people who are not racialized have difficulties recognizing when race is at play in a case.

This calls for appropriate cultural competency training so that lawyers can truly meet the needs of their clients and ensure that their clients have a fair trial. However, it may also be the case that highly competent criminal lawyers, who are usually sensitive to social and civil liberty issues like racial profiling, are having a difficult time factoring race and racial profiling into a framework of analysis under section 9 of the *Charter*.<sup>62</sup> Evidently, it was Grant's racialized characteristics and the surrounding circumstance that provoked the police's suspicion. This is but one example of how police discretion to stop and question people can produce racial inequality in the number and nature of such stops.<sup>63</sup>

The officers in *Grant* testified that they had approached Grant with the purpose of determining whether he was a student at one of the schools in the area or if he was headed to one of these schools.<sup>64</sup> The third officer, Gomes, who was dressed in uniform and parked at the end of the street, approached Grant asking him "what was going on" and requested his name and address.<sup>65</sup> Given that carding is common practice, it follows that the accused either did not know that he had to comply or chose to comply because he already felt detained. In response to the officer's request, Grant

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<sup>59</sup> David M Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38:6 CR Art 84 at 3 (WL) [Tanovich, "Erasure"].

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* at 4.

<sup>62</sup> *Ibid.*

<sup>63</sup> Benjamin L Berger, "Race and Erasure in *R v Mann*" (2004) 21:6 CR Art 58 at 58.

<sup>64</sup> *Supra* note 2 at para 5.

<sup>65</sup> *Ibid* at para 6.

handed over his provincial health card.<sup>66</sup> The officer then observed Grant to be acting nervously and adjusting his jacket, which prompted him to ask Grant to “keep his hands in front of him.”<sup>67</sup> At some point later, the two officers who had driven by Grant decided to join Gomes in his interrogation of Grant.<sup>68</sup> The exchange that followed revealed that Grant had a small bag of marijuana and a loaded firearm in his possession.<sup>69</sup> Subsequently, the officers arrested and searched the appellant, seizing the marijuana and the loaded firearm.<sup>70</sup>

The issues in *Mann* were determining whether the police had a power under the common law to detain individuals for investigative purposes and, if so, whether they had the power to search, incident to such investigative detentions.<sup>71</sup> Investigative detention is “a common law ancillary police power, which allows for police to temporarily detain a person suspected of criminal wrongdoing, with less than the reasonable and probable grounds required for an arrest.”<sup>72</sup> However, investigative detentions are still to be “premised upon reasonable grounds[,]... on an objective view of the totality of the circumstances, informing the officer’s suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence.”<sup>73</sup> The analysis of the legitimacy of an investigative detention can be further complicated when one considers the influence of race. The Supreme Court’s lack of analysis in *Mann* to this regard paints an unrealistic picture of the events that unfolded.

On December 23, 2000, shortly before midnight, two police officers were alerted to a break and enter occurring in a neighbourhood near downtown Winnipeg.<sup>74</sup> The person committing the break and enter was suspected by the witness to be “Zachary Parisienne” and was described as being “a 21-year-old Aboriginal male, approximately five feet eight inches tall, weighing about 165 pounds, clad in a black jacket with white sleeves.”<sup>75</sup>

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at para 7.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid* at para 8.

<sup>71</sup> *R v Mann*, 2004 SCC 52 at para 2 [*Mann*].

<sup>72</sup> C Tess, “Policing the Racialized: Is Investigative Detention a Race-based Practice?” (4 November 2018), online: *CanLii Connects* <[canliiconnects.org/en/commentaries/64717](http://canliiconnects.org/en/commentaries/64717)> [perma.cc/SZ5T-3WJX].

<sup>73</sup> *Mann*, *supra* note 71 at para 34.

<sup>74</sup> *Ibid* at para 4.

<sup>75</sup> *Ibid.*

When the officers reported to the scene of the crime they observed a person walking casually along the side-walk who they believed matched the description of the suspect “to the tee.”<sup>76</sup> This individual, who turned out to be Phillip Mann, was stopped by the police and asked to identify himself.<sup>77</sup> The police proceeded to search Mann, reaching into his pockets and finding a small plastic bag containing 27.55 grams of marijuana, a number of small plastic baggies, two Valium pills, and a treaty status card confirming the appellant's identity.<sup>78</sup> Mann was subsequently charged with possession for the purpose of trafficking marijuana contrary to section 5(2) of the *Controlled Drugs and Substances Act*.<sup>79</sup> At the Supreme Court of Canada, Mann was acquitted because the search was found to fall outside of what could be deemed permissible.<sup>80</sup> Although the officer searching Mann had felt a soft object in his pocket, he was not permitted to go beyond the pat-down search and reach into Mann's pocket because there was no basis to do so.<sup>81</sup> This was found to breach Mann's section 8 *Charter* right against unreasonable search and seizure and the evidence was excluded under section 24(2) of the *Charter*.<sup>82</sup> However, the Court ultimately held that the police were empowered to detain Mann for investigative purposes and search him for protective purposes.<sup>83</sup>

The issue with the Supreme Court's decision in *Mann* is that it reads as though there is no awareness of the social science pertaining to the racial dimensions of investigative detentions: that it effectively erases the racial aspects of the legal issue.<sup>84</sup> The Court should have recognized how ignoring race in this way actually offends the equality values embodied in the *Charter* because it does not consider racial discrimination.<sup>85</sup> When one examines the history of police violence and racial profiling, it becomes understandable that Indigenous peoples would feel pressured to comply with the police's demands. One example of how doing otherwise could go horribly wrong is the story of JJ Harper, an Indigenous leader from

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<sup>76</sup> *Ibid* at para 5.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 5(2).

<sup>80</sup> *Ibid* at para 3.

<sup>81</sup> *Ibid* at para 9.

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

<sup>83</sup> *Ibid* at para 3.

<sup>84</sup> Berger, *supra* note 63 at 59.

<sup>85</sup> *Ibid* at 60.

Manitoba, who was shot and killed after he refused to cooperate with a police officer's demands to see his I.D.<sup>86</sup> Because of stories like these, many Black and Indigenous families instruct their children on how to act when approached by police so as to not have their movements misinterpreted as dangerous or suspicious. Furthermore, the Court opted out of the opportunity to articulate the different ways in which racial profiling can occur. For instance, racial profiling can rarely be proven by direct evidence because determining whether it occurred requires inference from the circumstances.<sup>87</sup> It can occur even in circumstances where a police officer is not rude or hostile.<sup>88</sup> Had the Court actually considered the substantial racial dimensions of investigative detentions, the analysis might have been very different. Both *Grant* and *Mann* have shown that investigative detentions have significant racial effects.<sup>89</sup>

### **B. *R v MacDonald* and the “Safety of the Public”**

There are also cases involving white accused that can still have profound negative consequences for BIPOC. On December 28<sup>th</sup>, 2009, the police were called to MacDonald's apartment because of a noise complaint.<sup>90</sup> When the first police officer knocked on MacDonald's door and asked him to turn his music down, he swore at her and slammed the door shut.<sup>91</sup> The other police officer attempted to get MacDonald to answer the door by knocking on it, kicking it, and also shouting that he was from the Halifax Regional Police.<sup>92</sup> MacDonald finally opened the door – only by about 16 inches.<sup>93</sup> One of the officer's, noticing something “black and shiny” in MacDonald's right hand, asked MacDonald what it was that he was hiding behind his leg, but MacDonald did not respond.<sup>94</sup> In order to get a better look, the police officer pushed the door open a few inches further and

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<sup>86</sup> Tanovich, “Erasure”, *supra* note 59 at 5.

<sup>87</sup> Omar Ha-Redeye, “Using Systemic Racism for Exclusion of Evidence” (13 February 2017), online: *CanLii Connects* <[canliiconnects.org/en/commentaries](http://canliiconnects.org/en/commentaries)> [perma.cc/ZCQ8-Q2YD].

<sup>88</sup> *Ibid.*

<sup>89</sup> Berger, *supra* note 63 at 58.

<sup>90</sup> *R v MacDonald*, 2014 SCC 3 at para 4 [*MacDonald*].

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

<sup>92</sup> *Ibid* at para 5.

<sup>93</sup> *Ibid* at para 6.

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

discovered that MacDonald was holding a loaded restricted firearm.<sup>95</sup> MacDonald was subsequently charged with numerous offences pertaining to his possession of the restricted firearm.<sup>96</sup>

At the Nova Scotia Court of Appeal, it was held that while warrantless entry into a home is *prima facie* illegal, the Supreme Court's decision in *Mann* supported the "police power to search without a warrant where the safety of the public or the police is at stake."<sup>97</sup> This was determined to be the case in *MacDonald* because the police were acting within their general scope of authority by addressing the noise complaint, and they were determined to have acted reasonably in pushing the door open to see what MacDonald was hiding.<sup>98</sup> The Supreme Court of Canada affirmed this decision and also found that where a police officer has reasonable grounds to believe that a safety search is necessary for public safety and conducted reasonably, there is no section 8 *Charter* violation.<sup>99</sup>

The decision in *MacDonald* puts many Canadians' section 8 *Charter* right against unreasonable search and seizure greatly at risk. While the police officers were lawfully present and carrying out their duties, it should not be said that they acquired the power to intrude into MacDonald's home.<sup>100</sup> The officer who pushed open the door only stated that he saw something "black and shiny" in MacDonald's hand, not that he reasonably suspected that MacDonald was holding a firearm.<sup>101</sup> In the opinion of Justice Beveridge at the Nova Scotia Court of Appeal, this was "more akin to hunch or suspicion than reasonable grounds to believe."<sup>102</sup> Furthermore, the polices' actions go far beyond the polices' implied license to approach the door of a residence and knock, as established in *R v Evans*.<sup>103</sup> It can therefore be argued that the polices' actions infringed on MacDonald's section 8 *Charter* right. The overly broad application of police powers in this case can have immense consequences for BIPOC.

Determining whether a safety search is reasonably necessary falls on three factors; "the importance of the performance of the duty to the public

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<sup>95</sup> *Ibid* at paras 7-8.

<sup>96</sup> *Ibid* at para 9.

<sup>97</sup> *Ibid* at para 15.

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

<sup>99</sup> *Ibid* at paras 24, 35.

<sup>100</sup> *Ibid* at para 21.

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

<sup>102</sup> *Ibid*.

<sup>103</sup> *R v Evans*, [1996] 1 SCR 8 at para 21, 131 DLR (4th) 654 [*Evans*].

good, the necessity of the interference with individual liberty for the performance of the duty, and the extent of the interference with individual liberty.”<sup>104</sup> However, many instances have occurred in Canada where it is evident that police are not able to ensure the safety of individuals for the public good. Although protection of life and safety is supposed to lie at the very core of the existence of the police as a social entity,<sup>105</sup> the police have consistently failed in this regard when conducting wellness checks where the subject is a Black person with mental health issues. Intervention by the police in cases like these has frequently resulted in Black people being brutalized or murdered by police.

The police have shown over and over again their incompetence when engaging with people who are in midst of a difficult mental health episode. In Edmonton, Monica Biar, a woman of South Sudanese descent, expressed her regret in calling the police for help with her 24-year-old mentally ill brother because it resulted in him being viciously tackled and arrested by the police.<sup>106</sup> Monica had called the police a few weeks prior when her brother had a mental episode, and she expressed that police were peaceful, kind, and took her brother to the hospital.<sup>107</sup> The second time that Monica called for help with her brother, things were very different. Video of the arrest showed that the police assaulted and threatened to shoot him.<sup>108</sup> In regard to the incident, the police spokesperson stated that Monica’s brother had attacked the police, which was the reason they became violent.<sup>109</sup> Monica and her family disputed this claim, and video from the incident showed that her brother appeared to be surrendering by putting his hands up, which also impeded his ability to follow the polices’ direction to lie on his stomach.<sup>110</sup>

Other similar incidences have occurred throughout Canada. In Winnipeg, a 43-year-old South Sudanese man named Machuar Madut was shot and killed when police responded to an emergency call about a man

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<sup>104</sup> MacDonal, *supra* note 90 at para 37.

<sup>105</sup> *Ibid* at para 43.

<sup>106</sup> Jonny Wakefield, “Sister Questions Violent Arrest of Brother Captured on Video”, *Edmonton Journal* (29 March 2019), online: <[edmontonjournal.com/news/local-news/sister-questions-violent-arrest-of-brother-captured-on-video](http://edmontonjournal.com/news/local-news/sister-questions-violent-arrest-of-brother-captured-on-video)> [perma.cc/KTE8-66BD].

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

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*



with a hammer who was causing a disturbance.<sup>111</sup> Madut was struggling from mental health issues relating to being separated from his family and was upset over a rent dispute he was having with his landlord.<sup>112</sup> There is no doubt that neighbours were frightened by his behaviour, especially the neighbours whose apartment he was breaking into.<sup>113</sup> However, there were major concerns about the appropriateness of the polices' actions. Members of the South Sudanese community questioned why a mobile crisis unit was not called instead of the police.<sup>114</sup>

In Toronto, a South Sudanese man named Andrew Loku was shot and killed by police in an encounter that lasted seconds.<sup>115</sup> He was only 45 years old.<sup>116</sup> Andrew Loku was also suffering from mental health issues and used a hammer to pound at the walls and doors in his apartment building's hallway in order to express his frustration with the noise that had impeded his ability to sleep for months.<sup>117</sup> He was described by family and friends as a gentle man who was "ceaselessly helpful" to the other tenants in his building and even acted as the superintendent for two months.<sup>118</sup> He had also had a difficult life that caused him to have some sort of mental illness, likely post-traumatic stress disorder.<sup>119</sup> His work with the Red Cross in war-torn South Sudan led to his abduction by rebel groups who believed that he was siding with the government.<sup>120</sup> They beat and tortured him.<sup>121</sup> His suspected post-traumatic stress disorder caused him to hear bullets even

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<sup>111</sup> "Chief medical examiner calls inquest into death of South Sudanese man shot by police", *CBC News* (18 November 2019), online: <[www.cbc.ca/news/canada/manitoba/chief-medical-examiner-inquest-death-south-sudanese-man-shot-winnipeg-police-1.5363950](http://www.cbc.ca/news/canada/manitoba/chief-medical-examiner-inquest-death-south-sudanese-man-shot-winnipeg-police-1.5363950)> [perma.cc/DS6D-GQRN].

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

<sup>113</sup> *Ibid.*

<sup>114</sup> "It's devastating': South Sudanese condemn fatal police shooting of man with mental health issues" *CBC News* (25 February 2019), online: <[www.cbc.ca/news/canada/](http://www.cbc.ca/news/canada/)> [perma.cc/W7RU-YVAR].

<sup>115</sup> Richard Warnica, "The life and bloody death of Andrew Loku: Toronto police officer's face 'went white as a ghost' after shooting", *National Post* (17 July 2015), online: <[nationalpost.com/news/toronto/the-life-and-bloody-death-of-andrew-loku](http://nationalpost.com/news/toronto/the-life-and-bloody-death-of-andrew-loku)> [perma.cc/34XA-N9T9].

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

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

while he slept.<sup>122</sup> The lawyer representing his family told a coroner's inquest that Andrew Loku did not need to die, and that the police "shot him because they let their fear of a Black man with a hammer (8.5 metres) away overcome what should have been a compassionate and humane response."<sup>123</sup> One of the apartment building's tenants, the last non-police officer to see him alive, wondered if Andrew Loku even had a chance to drop the hammer before he was shot and if the police had even tried to talk him down.<sup>124</sup> Black Lives Matter Toronto responded to this act of violence by staging a protest at a meeting of the Toronto Police Services Board.<sup>125</sup> Rodney Diverlus, a co-founder of the group, described the multitude of issues that Black people in Toronto were facing at the hands of police, including carding, surveillance, physical violence, and death.<sup>126</sup>

These incidences demonstrate the risk of granting police the power to further infringe on a person's section 8 *Charter* right under the pretense of conducting a safety check. It is clear that in many incidences, the police are unqualified to do so. Unlike MacDonald, the Black men just mentioned did not have guns. Given the history of policing of racialized people, it is not far-fetched to presume that the police would be more threatened by a Black man with a hammer than a white man with a gun. These cases also demonstrate how vulnerable new immigrant communities are to police violence. Speaking from experience, there are many people in new immigrant communities who have had traumatic experiences that have led them to seek refuge in Canada. These traumatic experiences can manifest in serious mental health issues and substance abuse problems. Furthermore, it could be argued that immigrants in certain areas are particularly vulnerable to police violence because they were not racialized prior to entering Canada and do not have the lived experience of existing in a white supremacist society to help them navigate their interactions with police. Police should be required to take cultural competency training to properly protect and assist new immigrants who lack an understanding of the system or, in contrast, those who may be apprehensive towards police because of

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<sup>122</sup> *Ibid.*

<sup>123</sup> "Officers Shot at Andrew Loku in 'Fear of Black Man With a Hammer, Family's Lawyer Says", *CBC News* (26 June 2017), online: <[www.cbc.ca/news/canada/toronto/loku-inquest-closing-arguments-1.4178077](http://www.cbc.ca/news/canada/toronto/loku-inquest-closing-arguments-1.4178077)> [perma.cc/8MZD-ZLXX] [CBC News, "Loku"].

<sup>124</sup> Warnica, *supra* note 115.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

their experiences with authority in the sometimes-war-torn countries from which they originate.

### C. *R v Le* and the “Reasonable Person”

*Le* shows that there has been some progression in how the Supreme Court views the vulnerability of racialized people in their interactions with the police. In this 2019 case, the Asian accused, Tom Le, was in the backyard of a townhouse with three other young, racialized men, all of whom were Black.<sup>127</sup> The yard was enclosed by a waist-high fence, and the young men appeared to be doing nothing wrong.<sup>128</sup> Without warning, a warrant, or consent, two police officers who had been walking by entered the yard and began to question the young men about “what was going on, who they were, and whether any of them lived there.”<sup>129</sup> The police demanded documentary proof of identity from all of the young men in the yard.<sup>130</sup> When Le told the police officer questioning him that he had no documentary proof of identity on him, the police officer asked what he was carrying in his satchel.<sup>131</sup> This prompted the accused to flee.<sup>132</sup> Le was subsequently pursued, arrested and found to be in possession of a fire arm, drugs and cash.

While the Supreme Court would not decide definitively on whether or not there was a section 8 *Charter* violation, they did find that there was an arbitrary detention contrary to section 9 of the *Charter* starting at the point when the police entered the yard and made contact without proper authorization.<sup>133</sup>

Absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request.<sup>134</sup>

This illustrates the vulnerability of the young men who the police interrogat-

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<sup>127</sup> *R v Le*, 2019 SCC 34 at para 1 [*Le*].

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at para 2.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid* at para 33.

<sup>134</sup> *Ibid* at para 26.

ed. The police had no legal authority to force the young men to adhere to their demands.<sup>135</sup> Hence, the young men were not legally required to comply with the police.<sup>136</sup> But, because of the police's authority, the young men felt pressured to comply.

This case also begs the question of how we define the reasonable person as articulated in the analysis of whether psychological detention would arise in this case.<sup>137</sup> The idea of a "highly artificial 'reasonable person,' who is much more assertive in encounters with police officers than is the average citizen" was discussed in *Grant*.<sup>138</sup> But, it is clear that this model of the 'reasonable person' is based on a rather privileged, possibly upper-class, white man who can afford to behave in this way. In *Le*, the Supreme Court acknowledged that being a member of a racialized community is an important consideration when assessing when a detention occurred because the people of these communities cannot so easily disregard police directions.<sup>139</sup> Therefore, the question is "how a reasonable person of a similar racial background would perceive the interaction with the police."<sup>140</sup>

The dissent in *Le* viewed the police as acting respectfully and mistakenly entering the yard, which shows how even though the majority and dissent had similar understandings of what happened, they interpreted the events quite differently because of the different subjective factors that the witnesses described in their evidence.<sup>141</sup> While this was the dissenting view, it represents how judges can be out of touch when it comes to the lived experiences of racialized people. The mistake of police entering a yard without proper authorization cannot be taken so lightly when their actions can have such a profound impact on the people that they interrogate. Another issue of contention was whether the officers' tone was aggressive or respectful, which shows how different people "may have different understandings of things like tone and body language than the police

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<sup>135</sup> *Ibid* at para 28.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Supra* note 2 at para 169.

<sup>139</sup> *Supra* note 127 at para 72.

<sup>140</sup> *Ibid* at para 75.

<sup>141</sup> Steph Brown, "Setting the Scene: R v Le and the Importance of Context in s. 9 Analysis" (29 October 2019), online: *The Court.ca* <[www.thecourt.ca/setting-the-scene-r-v-le-and-the-importance-of-context-in-s-9-analysis/](http://www.thecourt.ca/setting-the-scene-r-v-le-and-the-importance-of-context-in-s-9-analysis/)> [perma.cc/MA6G-UP3M].

officers, and this is further complicated by factors such as the race or stature of the individual.”<sup>142</sup>

The polices’ entitlement in this case is also indicative of a culture that is more grounded in control than it is in protecting people. The police went far beyond acting within their duty when they entered the backyard, even though the young men “appeared to be doing nothing wrong”, told them where to place their hands, and proceeded to impose their beliefs about the young men’s ‘inherent’ criminality when they demanded information from them.<sup>143</sup> There was no reason that these young men should have ever been approached in a private yard and harassed by police. The actions of the police in *Le* demonstrate and perpetuate a mentality that confines racialized peoples’ existence to the spaces deemed appropriate by the police and, therefore, the state.

Sherene Razack writes about how “the official story of who Canadians are and who they are not, performed in Canadian courtrooms, parliament, media, classrooms, and elsewhere, is a story that depends on bodies of colour, both ideologically and materially.”<sup>144</sup> This means creating a dichotomy where bodies of colour are characterized as degenerate and uncivilized, while the dominant group is applauded for their heroism and ability to “correct and discipline people of colour all the while maintaining that racism does not exist.”<sup>145</sup> This ideology is at the root of the racial profiling and the arbitrary investigative detentions of BIPOC. Whether or not police officers themselves are white is irrelevant. Police officers are an extension of the state and, therefore, they function in the interests of the dominant group. It is in the interests of the dominant group to control the ‘othered’ groups who are stereotyped as being more prone to engage in criminal activity.

The law also functions in this way – upholding systemic racism under the guise of neutrality. The steadfast adherence to universal and “objectively-applied liberal social values” has the effect of dismissing the real lived experiences of BIPOC because it renders invisible the violence which is inherent in the regulation of Black and Indigenous bodies.<sup>146</sup> In order to

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Le*, *supra* note 127 at para 34.

<sup>144</sup> Sherene H Razack, “Making Canada White: Law and the Policing of Bodies of Colour in the 1990s” (1999) 14:1 *Can JL & Soc’y* 159 at 161.

<sup>145</sup> *Ibid* at 161, 166.

<sup>146</sup> Jennifer J Nelson, “The Space of Africville: Creating, Regulating and Remembering the Urban ‘Slum’” (2000) 15:2 *Can JL & Soc’y* at 164.

rectify these inequalities, it is important to consider context-specific details and do away with the assumption that legal actions are always carried out with fairness and objectivity.<sup>147</sup>

Dismantling the oppressive components of our legal system cannot be done without acknowledging the role that colonization plays in policing the bodies of Indigenous peoples. For example, the *Indian Act* was used to regulate the movements of racially mixed people in order to maintain the privileges that had been allotted to white people.<sup>148</sup> Allowing their free movement between white spaces and ‘Indian spaces’ was seen as a threat to the colonial project, which was “highly dependent on policing identity categories and ensuring that the boundaries between the reserve and white space remained secure.”<sup>149</sup> These methods have not disappeared. Instead, they have morphed into subtler behaviours that have, in some instances, come to include other groups of non-white people.<sup>150</sup> The construction of golf courses over the burial grounds of Mohawk people, the internment of Japanese-Canadians into work camps in British Columbia, and the destruction of Africville in Halifax are but a few examples that illustrate how Canada’s history is marred with accounts of white people benefitting from the violent subordination of Indigenous and racialized peoples.<sup>151</sup> Recognition of this history contextualizes how police conduct in many of these *Charter* cases is egregious and, at the macro-level, deliberate.

In so many of these *Charter* cases, the courts consistently fail to acknowledge how justifying some of these *Charter* breaches or avoiding discussions about racial profiling actually emboldens police to disrespect the rights of racialized people, therefore putting racialized people in danger. Hopefully, the future will see more insightful cases like *Le*. However, this one decision will not undo the many others that have expanded police powers and will not guarantee that all Canadians are treated fairly under the law.

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<sup>147</sup> *Ibid.*

<sup>148</sup> Sherene H Razack, “Law, Race and Space: The Making of White Settler Nation” (2000) 15:2 *Can JL & Soc’y* 1 at 5.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid* at 6–7.

### III. RECOMMENDATIONS

With the exception of statistics on Indigenous peoples in the corrections system, there is very little race-related data concerning the social characteristics of victims or offenders.<sup>152</sup> Therefore, it is very difficult to ascertain the numbers of different groups being processed in Canada's criminal justice system.<sup>153</sup> While it is true that many minority groups at first opposed the collection of justice statistics based on race, — concerned that this would be used to justify discriminatory policies — many minority groups now recognize the importance of collection and publication of this data in order to advocate against racial discrimination in the criminal justice system.<sup>154</sup> Other potential dangers of releasing race-related data are that this may lead to more stereotyping of a group and that police may use these statistics to justify increased policing of minority areas.<sup>155</sup> However, it has been shown that banning these types of statistics have “not shielded minorities from becoming criminalized in the public eye.”<sup>156</sup> For example, a poll conducted by the *Toronto Star* showed that respondents believed that twice as many visible minorities had criminal records, while minorities were actually underrepresented among those with a criminal record.<sup>157</sup> Therefore, releasing race-relevant statistics could help dispel some of these myths about the level of criminal involvement by members of minority groups.

Another argument against race-related statistics is that, since race is a social and biological construct, the social sciences research should not engage with it because it would only serve to legitimize the concept of race.<sup>158</sup> This is an irresponsible and over-simplistic argument. Although race is a social construct, many racialized people would attest to the fact that they experience the very real consequences of being a racialized person. Collecting race-related statistics could help racialized groups prove that they have been targets of racial profiling, a strategy that was successful for Black and Hispanic people in the United States.<sup>159</sup>

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<sup>152</sup> Akwasi Owusu-Bempah and Paul Millar, “Research Note: Revisiting the Collection of ‘Justice Statistics by Race’ in Canada” (2010) 25:1 Can JL & Soc’y 97 at 98.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid* at 97.

<sup>155</sup> *Ibid* at 100.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid* at 100–01.

<sup>158</sup> *Ibid* at 101.

<sup>159</sup> *Ibid* at 101–02.

The inquest into Andrew Loku's death resulted in a series of recommendations — recognizing that the actions of the police were inappropriate, especially in light of the fact that in the hour leading up to his death, six other people had interacted with Loku and were able to calm him down without using a weapon.<sup>160</sup>

The recommendations proposed by the inquest focused on “addressing [the] implicit bias and the intersection between race and mental health.”<sup>161</sup> The inquest recommended requiring the police to collect data for every incident where officers use force in regard to “perceived race, gender, and whether the person was believed to be in crisis.”<sup>162</sup> Furthermore, they proposed that the police chief “conduct a structural review and analysis to ensure the force has a clear policy on serving and protecting racialized people and those with mental health issues, and reinforce it through continuous training.”<sup>163</sup> The Inquest also recommended that police officers be better trained in de-escalation tactics, as well as equipping front-line officers with stun guns, suggesting that this could have saved Andrew Loku's life.<sup>164</sup>

In order to properly hold police officers accountable for racial profiling, our courts must also move away from the belief that an officer's intentions are deeply relevant to the extent of the harm done. In *Grant*, Chief Justice McLachlin argued that the police officers' actions were not “deliberate nor egregious.”<sup>165</sup> I would argue that this does not matter at all because for a person whose *Charter* rights are being breached, the impacts are the same. For example, Black men are often racially profiled while driving because of a police officer's conscious or unconscious beliefs that Black men are most often the perpetrators of drug or weapons crimes.<sup>166</sup> This is such a common occurrence that the apparent offence that warrants this criminal investigation has been dubbed “driving while Black” and police officers can often hide their true intent behind conducting racial profiling by premising it on their statutory power to regulate traffic and vehicle safety.<sup>167</sup> It makes no difference to BIPOC whether police officers intend or do not intend to

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<sup>160</sup> CBC News, “Loku”, *supra* note 123.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Supra* note 2 at para 133.

<sup>166</sup> Tanovich, “Profiling”, *supra* note 47 at 149.

<sup>167</sup> *Ibid.*



be racist, especially when they can so easily hide behind another reason for violating their rights. The impacts of racism are felt the same, regardless of whether or not there was an intention to be racist. One must also consider that many people hold biases that they have failed to unpack and unlearn. Therefore, the subjective intentions of the police are not a relevant point of discussion when determining whether or not a person's *Charter* rights were violated. Furthermore, the violation of a *Charter* right because of racism is most definitely egregious. It is alienating, degrading, and stands in opposition of the values championed by the *Charter*.

David Tanovich argues that devising enhanced *Charter* standards, through “the development of an equality-based conception of arbitrary detention”, may be what is necessary in order ensure equality and compliance with the *Charter*.<sup>168</sup> Most of the *Charter* violation cases that come before the court are the ones where the accused has actually been found in possession of contraband. As such, the courts are rarely involved in the cases of *Charter* violations where people have done absolutely nothing wrong.<sup>169</sup> Furthermore, many accused people plead guilty because of various pressures and, therefore, they forgo their right to challenge the constitutionality of the conduct of the police.<sup>170</sup> For these reasons, there should be more checks and balances implemented in our legal system to determine whether or not a detainment was constitutional, rather than allowing police to have such wide discretionary powers. The data supports the claim that this is a much bigger issue than what is actually coming before the courts, which is why courts must recognize the racial dynamics of every case that comes before them when it involves the potential *Charter* violations against a Black or Indigenous person by the police. This could be done by requiring the court to engage in a more complex analysis to establish whether a police officer had a ‘reasonable suspicion’ given that a ‘reasonable suspicion’ is a low standard of belief that depends on an officer’s experience and may be distorted by unconscious racism.<sup>171</sup>

Another strategy could be to enhance the way that these issues are litigated in court. Seeing as we are now more aware of the systemic racism that police engage in, we must also understand that it is very difficult for Black and Indigenous accused to prove that the police are engaged in racial

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* at 176.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at 183.

profiling, especially since the police are adept at making sure that their notes and testimonies meet expected standards of conduct, even if they are hiding behind false pretenses.<sup>172</sup> It would be helpful then, in certain circumstances, to place the evidentiary burden of proof for a section 9 violation on the Crown to establish that a detainment was not motivated by race.<sup>173</sup> The police cannot be presumed in all situations to be acting in an unbiased manner and with the goal of promoting public safety – not with the overwhelming evidence that they are consistently harassing people from Black and Indigenous communities. Although the police may argue that their interactions were consensual, a Black or Indigenous person who has repeatedly been harassed by police would likely feel otherwise.

The Truth and Reconciliation Commissions Calls to Action 27 and 28 call for both lawyers and law students to be trained in cultural competency of Indigenous clients, focusing on intercultural competency, human rights, conflict resolution, and anti-racism.<sup>174</sup> Given that the research has shown that lawyers are either apprehensive about bringing forth racial profiling arguments where relevant or they are unable to because of ignorance, it is important that courses in cultural competency actually properly equip lawyers and future lawyers to properly address the distinct needs of their clients.

The reality is that the *Charter* is only invoked where contraband is found, which means that many of the other cases of racial profiling and arbitrary detention go unchecked. Even then, if counsel is inept and if an accused person does not have a full grasp of their rights under the law, the violation may fly under the radar. Therefore, it is crucial that the courts take their duty to uphold the rights of Canadians seriously by condemning all actions of police brutality and racial profiling committed by police, no matter how difficult or uncomfortable. Our legal system has a responsibility to acknowledge the ways in which race plays into police interactions in order to not further marginalize the already marginalized.

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<sup>172</sup> *Ibid* at 181.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: TRCC, 2012) no 27–28.

#### IV. CONCLUSION

While some progress has been made in recent years concerning the acknowledgment by the Supreme Court of the lived experience of BIPOC as it pertains to their interactions with police, there is quite a long way to go in ensuring that police officers have a reasonable, non-racist basis for investigative detentions. Additionally, the recent deaths of BIPOC by police show how the expansion of police powers, by condoning *Charter* breaches, can put BIPOC in danger of police who often lack proper training and may hold conscious or unconscious racial biases.

The court must make a real, concerted effort to contextualize the lived experiences of BIPOC so that judges have the insight necessary to determine whether or not police actions are motivated by race. This can be aided by the use of statistics, but primarily lies in being cognizant of the power dynamics that BIPOC often face when interacting with the police. Tackling this immense issue head-on means rethinking the way these cases are adjudicated.

For racial profiling to be eradicated, there must be a collaborative effort between the police, the government, and the judiciary to address systemic racism. Black and Indigenous accused are at a significant disadvantage because of police perceptions. Our courts must be willing to fully engage with the racial dimensions of police interactions with Black and Indigenous peoples, while consistently and steadfastly holding the police accountable for violating the rights of all individuals. If not, our courts run the risk of continuing to give the police unfettered power and control over Black and Indigenous peoples, further compounding the oppression that these communities have experienced for centuries.