File No. 33186

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JASON MICHAEL CORNELL

Appellant
(Appellant)

and

HER MAJESTY THE QUEEN

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

INTERVENER'S FACTUM
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INTERVENER

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

1. When Binnie J. wrote in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 14, that "[t]he midnight knock on the door is the nightmare image of the police state", he cannot be faulted for assuming that even the Gestapo would knock. A legal tradition almost a millennium old has deeply ingrained in our notion of civilized police conduct the principle that the police must announce their presence before entering a home. This principle has become known as the "knock and announce rule".

2. While this Court has yet to expressly affirm that the knock and announce rule has constitutional force, the Crown appears to concede that it does (see respondent's factum, para. 66). As a result, this case will turn on the shape, not the existence, of the rule, and on the consequences that ought to follow when the police fail to abide by it. Because the police here had no evidence that announcement would enhance the risk of violent behaviour, nor any reason to believe that announcement coupled with a reasonable wait time would have resulted in the destruction of evidence, the knock and announce rule was broken, and s. 8 of the *Canadian Charter of Rights and Freedoms* was thereby breached.

3. The more difficult question is whether the s. 8 breach should lead to exclusion of the evidence, given that the constitutional violation here arises not from the *fact* of the search (which was authorized by a valid warrant, and which could properly have led to the discovery of the drugs), but from the *manner* in which the search was conducted. In these circumstances, the Supreme Court of the United States has held that the evidence should not be excluded: *Hudson v. Michigan*, 547 U.S. 586 (2006), *per* Scalia J. In Canada, following the approach recently set out by this Court in *R. v. Grant*, 2009 SCC 32, a different result is appropriate here.

A. The Key Facts

4. The Calgary police knew that Lorraine Cornell and her son Jason Cornell lived in the Marlborough Drive residence (trial judge, p. 3 (references are to the Record of the Appellant ("AR"), Volume 1)) – not Henry Nguyen, and not Tuan Tran. Neither Jason nor Lorraine Cornell had any criminal history (trial judge, p. 7).

5. On November 30, 2005, the day of the search, the Cornell residence was under surveillance from the morning until just before 6:00 p.m., when the warrant was executed (O'Brien J.A., para. 67). Mr. Nguyen was arrested one hour before the police searched the Cornell home (trial judge, p. 4). Mr. Tran, for his part, had never been observed entering or leaving the Cornell residence, and was known to live elsewhere (Mr. Tran's residence was the subject of a separate and simultaneous search: see trial judge, p. 4).

6. The police did not attempt to obtain a warrant to search the Cornell home for evidence of possession of firearms, and indeed there was no evidence, before or after the search, that it contained firearms. Acting Sergeant Barrow, the officer who swore the Information to Obtain a Search Warrant for the Cornell home, described in the Information the reasons for his belief that resort to the "Tactical Unit" was necessary:

> The CPS Tactical Unit will be required to enter the residences in order to avoid the destruction of evidence by potential occupants and for the safety of both public and police because of Henry Le NGUYEN and Tuan Minh TRAN's history of violence an[d] association to the known organized crime group "Fresh Off the Boat" (FOB's). [O'Brien J.A., para. 65]

However, Sergeant Barrow testified that he was not responsible for developing the Tactical Unit's operational plan, and that he provided no information to any member of the Tactical Unit (trial judge, pp. 6-7). It appears from the evidence of Sergeant Smolinski, who assumed command of the Tactical Unit "very late", that it was Acting Staff Sergeant Wallace who decided upon the method of entry, but for personal reasons was not available to carry it out (see AR, Vol. 2, pp. 203, 207-210). Acting Staff Sergeant Wallace did not testify on the *voir dire*, leaving us without evidence of why the methods at issue were chosen.

PART II – POINTS IN ISSUE

7. This factum will advance five points:

(1) The appellant has standing to complain about the manner of the search, by reason that he maintains a privacy interest in the home that was the subject of the search.

(2) Properly understood, the knock and announce rule strikes a reasonable balance between the interest of the state in effective law enforcement, and the privacy,

dignity, and property interests of the citizen. As a result, violation of the knock and announce rule gives rise to an "unreasonable search" under s. 8.

(3) On the facts of this case, s. 8 was violated because there was no tangible evidence, particular to the circumstances of this case, that announcement would lead to risk of injury or destruction of evidence.

(4) *Hudson v. Michigan* should not be followed. Section 24(2) does not contain a rule that there must be a causal connection between the *Charter* breach and the discovery of evidence, in order for that evidence to be excluded.

(5) Here, the s. 8 breach was both serious and largely unexplained by the Crown. The impact on *Charter*-protected interests was profound. Application of the *Grant* factors favours the exclusion of the evidence obtained by the search.

PART III: ARGUMENT

A. Standing

8. The Crown submits, relying on *R. v. Edwards*, [1996] 1 S.C.R. 128, that the appellant does not have standing to complain about the manner in which his home was searched. The Crown says that although the appellant maintains a reasonable expectation of privacy in his home, the fact that the appellant was not at home when the search took place means that none of his protected interests were harmed or threatened by the search (respondent's factum, para. 39).

9. There are three problems with that argument. First, it is premised on a serious misconception about the nature of s. 8's protection. Section 8 guarantees "everyone" the right to be free from "unreasonable search or seizure". But not everyone is protected from all unreasonable searches that produce evidence against them. Rather, to assert a violation of s. 8, an individual must show that he or she has been *the subject of* an unreasonable search. The "reasonable expectation of privacy" analysis developed in *Edwards* is intended to provide the mechanism by which courts may determine whether search of a particular space amounts in law to a search of a particular person. This is what is meant when it is said that s. 8 "protects people not places". So while the Crown is right to submit that *Edwards* does not permit the vicarious assertion of the privacy rights of others, there is nothing vicarious about the assertion that one's own home ought not to have been unconstitutionally searched. Crucially, in *R. v. Collins*, [1987] 1 S.C.R. 265, this Court held that in order to be "reasonable" for purposes of s. 8, a search must

be conducted in a reasonable manner. This means, in sum, that to search a home in an unreasonable manner is to unreasonably (and unconstitutionally) search *all those who live there*. Thus do the principles established by this Court in *Collins* and *Edwards* permit Jason Cornell to complain about the treatment of his brother, Robert Cornell, and about all other steps taken by the police in the course of the search.

10. The second problem with the Crown's theory is that it would create an unprincipled distinction between an accused's ability to complain about *Charter* breaches relating to warrantless searches, on one hand, and *Charter* breaches relating to the manner in which an authorized search is conducted, on the other. One need not be at home at the time of search to complain that one's home should not have been searched without a warrant, any more than one need be crammed inside a rented locker to complain that it should not have been opened by the authorities (see *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 18-24). And, *per Collins*, an unreasonably conducted search is just as unconstitutional as a warrantless search. Yet the Crown's theory would have the presence or absence of the accused be determinative in the former instance, but not the latter.

11. Third, the Crown's standing submission was expressly rejected in *Edwards* itself. This Court held then that once a reasonable expectation of privacy is established, the reasonableness of the manner of the search must be tested *generally*, not simply with reference to the manner in which the accused's person was treated. At para. 36, Cory J. said for the majority that "[t]he intrusion on the privacy rights of a third party may however be relevant in the second stage of the s. 8 analysis, namely whether the search was conducted in a reasonable manner."

B. The Knock and Announce Rule

12. There can be little doubt at this point that the knock and announce rule is the minimum that the constitution requires of the police before they force entry into a home. In a majority of Canadian jurisdictions, courts have considered that failure to abide by the rule breaches s. 8.[1] This Court's s. 8 jurisprudence, like its ss. 9 and 10 jurisprudence, has "draw[n] heavily on the

[1] Some cases have found breaches and some have not, but the consensus appears to be that failure to comply would be a breach. See *R. v. Schedel*, 2003 BCCA 364 (British Columbia), *R. v. Damianakos* (1997), 121 C.C.C. (3d) 293 (Manitoba), *R. v. Nguyen*, 2007 ONCA 645 (Ontario), *R. v. Perry*, 2009 NBCA 12 (New Brunswick), *R. v. DeWolfe*, 2007 NSCA 79 (Nova Scotia), and *R. v. Penney* (2007), 281 Nfld. & P.E.I.R. 127 (Newfoundland and Labrador).

U.S. Fourth Amendment jurisprudence" (*Grant*, *per* Binnie J., at para. 156), so it is noteworthy that the Supreme Court of the United States held in *Wilson v. Arkansas*, 514 U.S. 927 (1995), that the knock and announce principle is a requirement imposed by the Fourth Amendment.

13. The constitutional status of the rule is informed by its deep historical roots While *Semayne's Case* (1604), 77 E.R. 194 (K.B.) is usually cited as the source of the rule, Sir Edward Coke's report of that case indicates that the principle's origins date back to a statute enacted in 1275 (see p. 196). For over 400 (if not 700) years, then, it has been the law of the Commonwealth that "the house of everyone is to him as his castle and fortress", and that before "the sheriff may break the house", "he ought first to signify the cause of his coming, and make request to open the doors". While it has often proved to be the case that the *Charter* requires *more* protection than the common law provided (see, for instance, *R. v. Feeney*, [1997] 2 S.C.R. 13, overruling the common law's acceptance of warrantless searches of homes), surely the *Charter* was intended to afford no *less* protection than Britons enjoyed 400 years ago.

14. In this Court, however, the rule has never been absolute. In *Eccles v. Bourque*, [1975] 2 S.C.R. 739, Dickson J. held, for a unanimous Court, that police must announce prior to entry, *except in exigent circumstances*. He continued:

> There are compelling considerations for this. An unexpected intrusion of a man's property can give rise to violent incidents. It is in the interests of the personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entrance for search or arrest, that a police officer identify himself and request admittance. […] Minimally, they should request admission and have admission denied although it is recognized there will be occasions on which, for example, to save someone within the premise from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required. [pp. 746-747]

15. So framed, the "knock and announce" rule provides a limited and basic protection for privacy in the home, and associated dignity and property interests. The rule offers occupants a brief opportunity not only to prepare and compose themselves for police intrusion, but also to admit the police consensually, thereby avoiding unnecessary property damage.

16. More fundamentally, and as Dickson J. highlighted, the rule exists to save lives. The courts have learned from experience that unannounced entry can pose a serious risk both to the occupant (see *Glover v. Magark*, 1999 CanLII 6636, aff'd 2001 BCCA 390, in which a television remote control was mistaken for a gun, and the plaintiff was shot by police), and to the police themselves (see *R. v. Parasiris*, 2008 QCCS 2460, in which the police were mistaken for a rival gang). Naturally, not all the evidence points the same way. The Crown has managed to unearth two judicially-recorded instances in which police have faced a violent or risky situation after announcing (see fn. 78 to the respondent's factum). On this basis, the Crown says that a "dynamic unannounced entry… assures the safety of the police, the suspect, and anyone else" (para. 70). What that submission overlooks is that Justice Oppal of the Supreme Court of British Columbia (later Oppal J.A., then Attorney General of B.C.), sitting as a Commissioner of Inquiry, heard the expert evidence on this subject and reached the opposite conclusion. In his 1994 report entitled *Closing the Gap: Policing and the Community*, Justice Oppal found:

> The knock-notice rule also reflects past experience, which indicates that <u>when it is followed, the vast majority of people submit to the authority and presence of the police</u>. The common law has long recognized that avoiding violent incidents advances both the personal safety of the householder and the police. With knowledge of the identity, authority and purpose of those who seek to enter, the householder is prepared to be detained and searched, rather than to respond instinctively and defensively, perhaps aggressively and violently, to the unknown danger represented by the forcible invasion of unidentified intruders. […]
>
> In general, <u>the safety of the police is also enhanced by compliance with the knock–notice rule</u>. People are much less likely to act violently toward police when, before entering, they announce their presence, authority and purpose. [quoted in para. 45 of *Schedel*, *supra* fn. 1; emphasis added]

Moreover, as Justice Oppal aptly noted, the *Criminal Code* affirmatively *authorizes* the use of force to expel intruders (see s. 40). The fact that a violent response to the intrusion of unannounced police could be *lawful* in Canada lends significant weight to the view that announcement is the safe way forward, for all concerned. See also *Schedel*, at para. 46, and *Launock v. Brown* (1819), 106 E.R. 482, *per* Abbott C.J. (unannounced police entry "an aggression on [a party's] private property, which he will be justified in resisting to the utmost").

17. The bottom line is that absent exigent circumstances, knocking and announcing is the reasonable thing for the police to do, in no small part because it is the safer thing to do. The problem for present purposes is that *Eccles* leaves unspecified the standard by which the presence or absence of exigent circumstances will be measured. How much evidence of exigent circumstances need the police possess to justify departing from the general rule that the police must announce?

18. The Supreme Court of the United States' answer to this question is that the police may only force entry unannounced where the police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence": see *Richards v. Wisconsin*, 520 U.S. 385 (1997) (emphasis added). The Court rejected the contention that felony drug cases require an exception that would "dispens[e] with case by case evaluation", and accept generalizations "based on the 'culture' surrounding a general category of criminal behavior" (p. 392).

19. For present purposes, what should be taken from *Richards* is that the exigent circumstances exception requires evidence that is *particular to the circumstances*. Generalized apprehensions arising from the nature of the offence at issue will not suffice. This limit on the exception is needed to strike the right balance between the interests of the state in effective law enforcement, and the privacy, dignity, and safety interests that the knock and announce rule (and, in many ways, the *Charter* as a whole) protects. Hunches and generalized suspicions are unacceptable elsewhere in this Court's s. 8 jurisprudence (see *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 35 (investigative detention), and *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at para. 16 (*per* LeBel J.) and para. 21 (*per* Binnie J.) (use of sniffer dogs)), and there is no reason to demand less of the police where the sanctity of the home is at stake. As Stevens J. observed in *Richards*, at p. 393, generalizations are usually overgeneralizations, with undue cost to the zone of privacy protected by s. 8, and unacceptable risk to the lives of police and populace alike. Unless the police are confronted with evidence particular to the circumstances before them, reasonably indicating the existence of a real danger that would result from announcement, the police must knock.

20. This Court's jurisprudence on the subject bears out this conclusion. Evidence that a drug sale was ongoing and that the front door was barricaded (presumably to prevent police entry) will amount to a showing of exigent circumstances: see *R. v. Gimson*, [1991] 3 S.C.R. 692. Evidence that there are drugs in the house, and that the drugs might be linked to gangs, will not: see *R. v. Genest*, [1989] 1 S.C.R. 59.

21. An apprehension that evidence may be destroyed will not suffice to permit the police to entirely forego announcement. For the sake of privacy and safety, the police must endure *some* risk that *some* evidence will be destroyed during the period following the police announcement. It is, however, a limited risk. The state's obligation is only to wait a reasonable time, after which it may be said that a reasonable apprehension of evidence destruction has ripened, thereby justifying forced entry: see *United States v. Banks*, 540 U.S. 31 (2003) (a drug case that upheld forced entry after a 15-20 second wait).

C. <u>There was no Evidence of Exigent Circumstances in this Case</u>

22. This case is like *Genest*, and unlike *Gimson*. Apart from generalized apprehensions based on the evidence that drugs were in the home, the police possessed no evidence of a safety risk that would arise from announcement. None of the occupants of the home had any criminal record or history of violence, and Mr. Nguyen (the home's sole link to violence) had already been apprehended at the time of the search. Nor can the police rely on the potential for destruction of evidence to justify their course of conduct. Because the police failed to wait even a few seconds in order to permit the risk of destruction to ripen, that ground for unannounced entry is unavailable to the Crown here. In the absence of exigent circumstances, the method of police entry chosen here was in direct violation of s. 8.

23. The error of the trial judge lies in his conclusion that "there was no hard evidence which suggested that the police could afford to employ a knock-and-announce approach to the execution of the search warrant" (p. 18). That gets the legal test backwards. In the absence of evidence particular to the circumstances that would lead a reasonable officer to conclude that an unannounced entry is required, then the police *must* announce. The absence of evidence redounds to the benefit of the citizen, not the state.

24. The majority of the Court of Appeal's error was somewhat different. They embraced approach whereby generalized apprehensions about the destruction of evidence and the risk of violence (see paras. 22-25) were enough to override the knock and announce rule. The apprehensions on which Slatter J.A.'s judgment depends will often be present in drug cases, and in that sense his reasoning is at odds with both *Richards* and *Genest*. On this view, the knock and announce rule will be swallowed almost entirely by its exception. The judgment comes precariously close to giving the police *carte blanche* to choose whatever methods they deem most effective in drug cases. The Crown's argument suffers from the same defect. It hinges entirely on the assertion that this is a case of "guns and gangs", in the face of the fact that there was never any evidence that the Cornell home contained guns *or* gangs at the relevant time.

25. A further point requires mention. The problems with this search do not stop with the method of entry. The police decision to wear masks and proceed with guns and rifles drawn aggravates their failure to announce. For the same reasons why announcement was necessary, it was entirely unnecessary for the police to take the risks associated with a guns-drawn entry: see *Schedel*, at para. 46. And as Ritter J.A. apprehended (see paras. 50-53), the "indiscriminate" use of masks, particularly for reasons that are nonsense (to achieve an "overwhelming sensory uniformed kind of appearance" – see para. 49), unduly worsens the dangers already faced by the police, and serves only to terrify those who are within the home.

D. *Hudson v. Michigan* and the American Inclusionary Rule

26. The focus of the Crown's s. 24(2) argument is that a breach of the knock and announce rule bears "no causal relationship" with the discovery of the evidence, and that this Court should follow the Supreme Court of the United States' lead and admit the evidence. The fact that the evidence would have been discovered had the search been conducted properly may factor into the determination of the impact of the breach on the accused: see *Grant*, at para. 122. But an approach to s. 24(2) that would *require* a causal relationship between breach and discovery would be at odds with both the plain language of s. 24(2) and this Court's jurisprudence.

27. Section 24(2) refers to "evidence obtained in a manner that infringed" the *Charter*. Where a search is unconstitutional (whether by reason of the fact of the search or the manner of the search), all evidence obtained thereby was "obtained in a manner that infringed" the *Charter*

(see also *Hudson*, at pp. 18-19, *per* Breyer J., dissenting), therefore necessitating a full inquiry into the impact of admission on the administration of justice. In *R. v. Silveira*, [1995] 2 S.C.R. 297, the police unconstitutionally entered a home without a warrant, but did not search the home until a warrant had been obtained. Nevertheless the usual s. 24(2) analysis was required before the evidence could be admitted. As Cory J. held for the majority, "there can be no artificial division between the entry into the home by the police and the subsequent search of the premises made pursuant to the warrant" (para. 40). Thus must this case turn, like *Silveira*, on the impact of admission on the administration of justice, based on an application of all of the *Grant* factors.

E. The Evidence Should be Excluded

28. The home engages a high expectation of privacy, making illegal intrusions by the state automatically of a serious nature: *Grant*, at para. 113. While the trial judge found that the police acted in good faith (p. 22), the significance of that finding is diminished by the Crown's failure to tender evidence from Acting Staff Sergeant Wallace that would explain the reasons for his chosen method of entry, and establish that the police turned their mind to the relevant *Charter* considerations. In the event, the breach had a serious impact on the Cornell home and on the dignity and security interests of Mr. Cornell's brother Robert.

29. In sum, while the cocaine is reliable physical evidence, the first two *Grant* factors favour exclusion of the evidence. That makes this case resemble *R. v. Harrison*, 2009 SCC 34, in which seriousness of the police conduct and its impact on the accused sufficed to require the exclusion of 35 kilograms – a massive haul – of cocaine.

PART IV – SUBMISSIONS CONCERNING COSTS

30. The BCCLA does not seek costs, and asks that costs not be awarded against it.

PART V – ORDER SOUGHT

31. The appeal should be allowed, and the cocaine excluded from the evidence. The BCCLA asks that it be permitted to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of October, 2009.

_____	_____
Ryan D.W. Dalziel	**Daniel A. Webster, Q.C.**

PART VI – TABLE OF AUTHORITIES

CASE	PARAS. CITED
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PART VII – STATUTES

Criminal Code, R.S.C. 1985, c. C-46, s. 40

Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

***

Quiconque est en possession paisible d’une maison d’habitation, comme celui qui lui prête légalement main-forte ou agit sous son autorité, est fondé à employer la force nécessaire pour empêcher qui que ce soit d’accomplir une effraction ou de s’introduire de force dans la maison d’habitation sans autorisation légitime.