SCC File No. 40465

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

BETWEEN:

DWAYNE ALEXANDER CAMPBELL

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

-and-

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(Interveners)

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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

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PARTS I & II: OVERVIEW AND INTERVENER'S POSITION ON APPEAL

1. When applied rigorously, the urgency criterion under the doctrine of exigent circumstances can meaningfully protect civil liberties. This Court should confirm that the police cannot fabricate or manipulate that urgency. The police cannot stop a crime in progress, then participate in the continuation of the same crime, and later claim its commission was nevertheless inevitable and imminent. This amounts to an ersatz emergency for the purposes of exempting investigative steps from *Charter* scrutiny.

2. The British Columbia Civil Liberties Association (BCCLA) takes no position on the outcome of this case. But as an intervener, the BCCLA has an interest in ensuring that the police respect the boundaries of exigent circumstances. It advances the following submissions:

a) In the absence of prior judicial authorization, it falls to the police to ensure their own intrusions into private spaces remain accountable to *Charter* standards. The "urgency" criterion described in ***Paterson*** acts as a brake on potential abuse. Urgency exists where there is an imminent threat to public safety that demands a *contemporaneous* state response.

b) Urgency must be independent of the police. The police cannot create or maintain an urgent circumstance to justify acting without a warrant. The doctrine of exigent circumstances does not contemplate the police *participating* in maintaining urgency for investigative purposes.

c) The public health emergency created by the opioid crisis cannot overwhelm the analysis. The nature of fentanyl impacts the gravity of the risk to public safety. But the risk itself must still be *imminent* before the police can act without a warrant.

3. In sum, the BCCLA advocates in support of shielding the doctrine of exigent circumstances from police abuse. ***Paterson*** was never intended to permit the police to facilitate and incubate urgent circumstances to skirt the prior judicial authorization process. The emergency must be *bona fide* and marked by a degree of immediacy that overrides the accused's privacy interests and the state's obligation to apply for a warrant.

PART II: STATEMENT OF ARGUMENT

I. EXIGENT CIRCUMSTANCES ARE A *BONA FIDE* EMERGENCY

A. Police Accountability Rests on Urgency

4. The BCCLA is concerned with the overall implications of the Ontario Court of Appeal's decision on police accountability. Exigent circumstances are *emergencies* that justify dispensing with the requirement for prior judicial authorization under s. 8 of the *Charter*. By their nature, exigent circumstances are extraordinary.[1] But if courts take an unduly generous approach to the doctrine of exigent circumstances, this may dilute its exceptional nature and signal to police officers that the prior judicial authorization process will routinely yield to a broad range of "emergencies."

5. As with all warrantless state action, police conduct is held against constitutional standards *after* the state has pierced an individual's sphere of privacy. As such, the day-to-day responsibility of balancing civil liberties against law enforcement interests devolves to the police. This Court should firmly enforce the limits of exigent circumstances, because as James Stribopoulos observed (writing extra-judicially in 2005), an open-ended framework of common-law police powers is vulnerable to misunderstanding and abuse:

> [W]hen courts give new powers to the police, they are overly optimistic about the degree to which the police will understand the limits of those powers and deploy them appropriately. This is especially problematic given that police powers carved out be the courts are usually open-ended and therefore susceptible to misuse.[2]

6. As Brown J. held in ***Paterson***, the critical limit here is *urgency*.[3] When we unpack the content of urgency in the context of exigent circumstances, it demands that the targeted risk be imminent such that the police must react on the sudden.[4] In other words, the danger to public safety must be (1) imminent, and (2) *contemporaneous* to the police reaction to that very danger.

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[1] ***R. v. Kelsy***, 2011 ONCA 605 at para 35.
[2] James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 49-50, online: https://ssrn.com/abstract=1582979 (emphasis added).
[3] ***R. v. Paterson***, 2017 SCC 15 at para 33.
[4] *Ibid* at paras 32 and 33.

There is no urgency — as that term is understood in ***Paterson*** — when the risk to public safety is temporally disconnected from the police decision to intrude on a person's civil liberties.

7. Therefore, urgency under the doctrine of exigent circumstances is marked by contemporaneity between the public threat and police interference. The requirement for immediacy means that the danger to public safety must actualize at the time the police intrude upon a zone of privacy without a warrant. A threat to public safety that might emerge at an unknown point on the arrow of time is simply insufficient to be exigent.

8. In addition, the *possibility* of a risk to community safety cannot ground a police officer's claim of exigent circumstances.[5] Speculation is insidious because it is immune to interrogation. Cross-examining a police officer on speculative inferences and conclusions is a fool's errand, as questioning an officer on what they believed might have or would have occurred will descend into dilatory debate. Allowing speculative risks to justify warrantless searches and seizures would make it all but impossible to hold the police accountable to any objective standard.

9. There have been reports that police officers are not consistently educated about court rulings and usually face no formal consequences for flagrantly committing serious *Charter* violations.[6] Regrettably, many officers appear to testify in court unaware that their actions are improper. In ***Parwar***, the officer testified he believed that exigent circumstances allowed him to enter a home without a warrant to remove individuals, and that, faced with similar circumstances, he "would do it again."[7] It was his past experience — not the law — that governed his decision to eschew the prior judicial authorization process.

10. There is a greater chance that police officers will hold themselves accountable to constitutional standards when their powers to act without prior judicial authorization are clear and tightly circumscribed. Indeed, rather than resorting to an opaque repository of past "training and experience" that can sometimes frustrate judicial review,[8] the police must plainly measure the urgency of the circumstances to justify skirting the warrant process. The urgency must be so

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[5] ***R. v. Feeney***, 1997 CanLII 342 (SCC) at para 52.
[6] See, e.g., Rachel Mendleson & Steve Buist, "Canadian police repeatedly violating citizen rights: judges," Toronto Star (June 9, 2022).
[7] ***R. v. Parwar***, 2020 BCCA 251 at para 18.
[8] See e.g., ***R. v. Nguyen***, 2012 ABQB 199 at paras 27 and 78.

pressing as to override the interest in protecting individual privacy. Only then would the circumstances constitute a *bona fide* emergency calling for immediate police action.[9]

B. Urgency Must Be Independent of the Police

11. The police cannot be permitted to participate in creating or maintaining urgent circumstances to justify a warrantless search or seizure.[10]

12. It should be uncontroversial that the police cannot author their own exigent circumstances in order to conduct a search or seizure without a warrant. Indeed, the Crown appears to have conceded this, describing this prohibition as a "safety valve."[11] For example, by choosing to arrest two individuals leaving a dwelling-house and revealing the drug investigation to the "public", the police cannot then enter that house without a warrant to prevent the remaining occupant from continuing the offence of trafficking or destroying any evidence.[12]

13. But additionally, the police cannot "maintain" urgent circumstances for investigative purposes. In this case, Trotter J.A.'s endorsement of the trial judge's reasoning on the issue of exigent circumstances reveals that Mr. Campbell would have "aborted" the pending drug transaction but for the police officers' *choice* to intervene:

> In my view, it is clear from the underscored portion in the excerpt above that the trial judge was focused on public safety. This was a finding that was available to him on the evidence. It was open to the trial judge to accept the evidence of the officers that they believed that, had this drug transaction already in progress not been rerouted **in the manner they chose**, the appellant would have aborted the operation. The drugs would have been outside the reach of the police and sold to someone else **at another time**, ultimately reaching users on the street.[13]

14. In other words, the urgency demanded by ***Paterson*** would have dissipated because the police had already arrested the person on the other end of the drug transaction. It was only due to

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[9] ***Paterson*** at para 37.
[10] ***R. v. Silveria***, 1995 CanLII 89 (SCC) at para 53, per La Forest J. in dissent, cited with approval in ***R. v. Phoummasak***, 2016 ONCA 46 at para 14; ***R. v. Hobeika***, 2020 ONCA 750 at para 49; ***Kentucky v. King***, 563 U.S. 452 (2011).
[11] Respondent's Factum at para 101.
[12] ***R. v. Damianakos***, 1997 CanLII 4334 (MBCA).
[13] ***R. v. Campbell***, 2022 ONCA 666 at para 83 (emphasis added).

the police assuming Mr. Gammie's identity and re-engaging with Mr. Campbell that the pending drug transaction remained alive *and* imminent.

15. The risk that a person might sell drugs to someone else at another unspecified and unknown time, not only engages in reasoning too remote or speculative, but is entirely untethered to any imminent risk to public safety. A potential drug transaction "at another time" simply does not cause the police to "react on the sudden."[14] The mere possibility that a person might traffic drugs in the broader community cannot justify the police surreptitiously inserting themselves in a pending drug transaction without a judicial authorization in order to induce that person to follow through with a criminal offence. And of course, the fact that the person ultimately committed the offence is irrelevant, given that an *ex post facto* justification cannot corrupt the analysis under s. 8 of the *Charter*.[15]

16. The Crown's submissions employ language that attempts to broaden the scope of urgency in ***Paterson*** to include police investigative expediency:

a) "it would have taken too long to obtain a warrant and the deal would have been lost."[16]

b) The police used the phone "to continue a drug transaction that was already underway."[17]

c) The police communicated "for the limited purpose of facilitating the transaction that had already been arranged and was underway."[18]

d) The police have a "legitimate aim" to save lives[19] and are "called to act."[20]

17. There is no dispute that the police have a general duty to protect life and public safety. However, if the police had to *facilitate* the drug transaction to keep it alive so that *the deal* was

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[14] ***R. v. MacDonald***, 2014 SCC 3 at para 32**.**
[15] ***Hunter et al. v. Southam Inc.***, [1984] 2 S.C.R. 145 at 160.
[16] Respondent's Factum at para 9(C) (emphasis added).
[17] Respondent's Factum at para 30 (emphasis added).
[18] Respondent's Factum at para 43 (emphasis added).
[19] Respondent's Factum at para 99.
[20] Respondent's Factum at para 101.

not lost, then the police *participated* in maintaining urgency for investigative purposes. In the Crown's construction, the emergency was losing a drug deal, not interdicting an imminent drug transaction that existed independent of the police.

18. The lower courts, too, expanded the bounds of urgency by concluding that "without immediate action, the transaction and the drugs were at risk."[21] This evinces less of a concern for public safety and more of a concern about protecting avenues of police investigation. But the police had other investigative measures available, such as embarking on a traditional undercover operation, now armed with a reasonable suspicion that "Dew" was a drug trafficker.

19. It may have been inconvenient to resort to traditional methods. But those methods would have been lawful. Investigative expediency is not the foundation for permitting warrantless searches in exigent circumstances.[22] Where the police have no legal way to obtain evidence, "they must leave the suspect alone"[23] — not commandeer someone else's identity and engage in a private text conversation for the purpose of gathering evidence in the absence of judicial authorization. Where the common law and *Charter* constrain police powers, "it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been 'in the execution of my duties.'"[24]

C. The Opioid Crisis Cannot Overwhelm the Analysis

20. At present, the opioid crisis gripping the country is undoubtedly a national public health emergency. But a public health emergency is not, in and of itself, an *imminent* threat within the narrow corridors of exigent circumstances. A broad public safety risk should not dominate a framework that is meant to afford a rare exception to the requirement for prior judicial authorization under s. 8 of the *Charter*.

21. In this case, the Court of Appeal noted that "a key point concerned the type of drug" involved, as the trial Crown argued that exigent circumstances would only exist if the police

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[21] ***Campbell*** at para 78.
[22] ***Paterson*** at para 39.
[23] ***R. v. Kokesch***, [1990] 3 S.C.R. 3 at 29.
[24] *Ibid* per Sopinka J at 34.

believed that Mr. Campbell was in possession of fentanyl.[25] Hence, aside from the urgency of losing the drug transaction, the lower courts considered the "notoriously harmful" nature of the fentanyl to conclude that the police were acting in exigent circumstances.[26]

22. In cases involving drug trafficking related offences, the nature of the drug may certainly assist in gauging the magnitude of risk to public safety. But courts must exercise care that the societal challenges related to the harm flowing from the illicit fentanyl trade do not blur the requirement for *imminent* risk.

23. Before the fentanyl crisis of recent years, the death toll from the heroin and crack cocaine epidemic in the 90's caused a similar health emergency across the country.[27] Despite the passage of time, these drugs continue to cause overdose deaths today. Yet, had the police in this case believed that Mr. Campbell was about to traffic heroin *without* containing fentanyl, the Crown would not have tried to prove exigent circumstances. In other words, the gravity of the danger, not its timing, was determinative for the Crown.

24. There are limits to how much a *generalized* risk to public safety arising from the nature of a particular controlled substance should inform the *specific* urgency in a given case where the police invoke the doctrine of exigent circumstances. A mere possibility or "general concern" for public safety caused by fentanyl is insufficient to establish exigent circumstances.[28] And while the fentanyl crisis is very real, it bears noting that Canada once considered cannabis as dangerous as heroin.[29]

25. The nature of the drug that was at play in this case was a key question of fact which determined whether the Crown would rely on the doctrine of exigent circumstances. But the nature of fentanyl alone does not answer the question of whether there was urgency rendering it

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[25] ***Campbell*** at para 76.
[26] *Ibid* at para 83.
[27] Maryse Zeidler, "Vancouver's drug crises of days past," CBC (September 25, 2016).
[28] See, e.g., ***R. v. Crocker***, 2009 BCCA 388 at para 94; ***R. v Mackay***, 2017 BCSC 1393 at para 138.
[29] See ***R. v. Hauser***, [1979] 1 S.C.R. 984 at 998.

impracticable for the police to apply for judicial authorization. The risk to public safety must be imminent. It must be independent. And its elimination must be undeniably urgent.

PARTS IV & V: COSTS, ORDERS SOUGHT AND CASE SENSITIVITY

26. The BCCLA seeks no costs or orders and makes no submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November 2023.

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PART VI: TABLE OF AUTHORITIES

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