SCC File No.: 41090

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF SASKATCHEWAN)

B E T W E E N:

WAYNE LESTER SINGER

Appellant

- AND –

HIS MAJESTY THE KING

Respondent

- AND –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CONSTITUTION FOUNDATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES DE LA DÉFENSE

Interveners

FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. The Crown asks the Court to depart from over 30 years of precedent. The Court should decline the invitation.

2. The BCCLA intervenes on three issues. First, the implied licence is narrow in scope. It is not an investigatory tool for police. Second, there is no basis to transform the implied licence into an investigatory police tool through the doctrine of ancillary powers. Third, using this doctrine to bloat police powers in the manner requested will disproportionately impact marginalized individuals.

3. For decades, it has been settled that the police lack common law authority to trespass to conduct warrantless investigations. Even before the *Charter*, this Court held that the police have no legal authority to interfere with homeowner's private property rights. In *R v Evans*, this basic premise took on a constitutional dimension: individuals have a *Charter*-protected reasonable expectation of privacy in their homes and in the private property around their home. When police enter this area to gather evidence against the property's occupant, police are undermining that expectation and conducting a search. Because there is no authority for the search, the entry constitutes a trespass and is unlawful.

4. The BCCLA asks this Court to uphold *Evans* and *Kokesch* and decline the Crown's invitation to create a new police power. The Crown's proposed police power is broad in scope and incapable of meaningful review by the courts. If recognized, the proposed power will lead to arbitrary searches that will not often come before the courts. These police encounters, referred to as "low visibility encounters," will disproportionately affect members of marginalized, racialized and low-income communities that are already overpoliced.

5. The BCCLA takes no position on the facts.

PART II – BCCLA'S POSITION ON THE ISSUES ON APPEAL

6. There is no basis to bloat the implied licence doctrine. No new police power should be recognized. The BCCLA makes three submissions:

i. **The implied licence doctrine is narrow in scope.** It allows people to walk up to a residence door to communicate with its occupants. In the s. 8 context, the implied licence doctrine reflects a limited waiver of the recognized privacy interest

individuals have in their private property. Where police enter private property around a home to investigate the occupant there is no implied consent and therefore no privacy waiver. The police are conducting a search.

ii. **No new police power is needed.** The Crown proposes a police power permitting warrantless investigations on private property. This proposed power would roll privacy protections back decades. Even before the *Charter*, this Court recognized that police could only trespass on private property with express statutory authority. The Crown's proposed expansion of police powers would upset the established and delicate balance between citizens' rights and the police interest in investigating crime.

iii. **The proposed power would disproportionately impact marginalized people.** The Crown's proposed police power is not tethered to any objective standard. It would immunize police conduct from meaningful review and manufacture low visibility police interactions. This would disproportionately impact marginalized and racialized people.

PART III – STATEMENT OF ARGUMENT

1. The Scope of the Implied Licence Doctrine is Narrow

a) It is a Bright Line Rule that Police Cannot Trespass Onto Private Property to Investigate an Occupant

7. Individuals have a reasonable expectation of privacy in the approach to their home. It has been settled law since *R v Evans* that s. 8 presumptively protects against state trespass in these areas.[1] People are entitled to expect that the state will leave them alone in their residences and on the private property around their residences.

8. The implied licence does not meaningfully narrow the sphere of constitutional protection afforded to the home and its curtilage. In *Evans,* the Court confirmed that police could not avail themselves of the implied licence to enter the property around a residence to investigate its

[1] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 5, 7 & 14.

occupants without a warrant. The police, like other members of the public, have an implied licence to approach a residence and communicate with the occupant for a legitimate purpose. This purpose cannot be securing evidence against the occupant.

9. This Court never expanded the terms of the implied licence beyond Justice Sopinka's articulation in *Evans*.[2] There is no reason to do so now. This Court recently reaffirmed in *R v Le*, that *Evans* is the governing authority and that the implied licence is vitiated when the police have a subsidiary investigative purpose in crossing the property line. In *Le*, the purpose was to question the property's occupants as part of a speculative criminal investigation.[3]

10. The Court must continue interpreting the implied licence narrowly and to the resident's benefit. The implied licence is based on the presumption that an occupant would waive their right to exclude others from their property, but only when those others are seeking to communicate with the occupant in a normal way. The waiver must be interpreted narrowly, and for the purpose it was granted.[4] The waiver does not apply to communications that are clearly unwelcome.[5]

11. Warrantless investigations on private property are clearly unwelcome. It does not follow from the common-sense assumption that a resident invites a postal worker to walk up the driveway and leave an envelope, that the same resident also invites the police to walk up the driveway to try and incriminate them or their guests. Once the police have specifically averted to the possibility of gathering evidence against the occupant, they cannot rely on an implied licence or implied waiver.[6]

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[2] See eg: *R v MacDonald*, 2014 SCC 3 at paras 24 - 25.
[3] *R v Le*, 2019 SCC 34 at para 127.
[4] *R v Evans,* [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 11. See also: *R v LTH*, 2008 SCC 49 at para 41 - 43. A waiver of a *Charter* right must be clear and unequivocal. The standard for waiving a *Charter* right is very high.
[5] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 7.
[6] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 13.

b) Police Trespassing to Gather Information is a Search

12. The moment the police cross the property line with the purpose of investigating a property's occupant they are conducting a search. [7] This is because the police are entering a place over which the occupant has a reasonable expectation of privacy to gather information about the occupant. In these circumstances, the police are seeking something they cannot get from the roadway or a public place. As the Court held in *Evans*, speculative investigations on residential property are inherently invasive.[8]

13. The second component of the search arises when the police deploy additional investigative techniques to get the information they are after. Any steps the police take beyond the initial trespass to gather information about the property's occupant further undermine the occupant's reasonable expectation of privacy. Offending investigatory techniques may include anything from peering through a window, knocking on the door to ask questions or opening the door of a car parked in the driveway.

c) The Charter Places Limits on State Intrusion, Not Obligations on the Citizen

14. The Court should reject the Crown's submission that the implied licence doctrine necessarily allows the police to knock on a door to interrogate a suspect at their home. *Evans* holds that it constitutes a search for the police to trespass on a residence's curtilage to gather evidence against the occupant. The Court's decision in *Evans* that it was improper for police to approach the door to make olfactory observations was not an implicit acceptance that the police could trespass to conduct different types of warrantless investigations, including through interrogations.

15. In some cases, "asking questions" will be outside the scope of the implied licence doctrine. In *R v Le*, for example, the police entered a private yard to interrogate an occupant and his guests. This Court confirmed that the police's subsidiary purpose of collecting evidence and conducting a "fishing expedition" took them outside the scope of the implied licence doctrine. The implied licence is not intended to protect intrusive police conduct.[9]

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[7] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 13. See also for example, *R v Cote*, 2008 QCCS 3749 at para 182, affirmed in 2011 SCC 46 at para 41.
[8] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 13 – 14.
[9] *R v Le*, 2019 SCC 34 at para 127.

16. There is no rule that "asking questions" is not a search as the Crown suggests. This Court recognized that in certain circumstances, police questioning is a search.[10] As the Court of Appeal for Ontario held in *R v Harris*, answers to questions are information that can be improperly seized. As Justice Doherty put it, "police questions may or may not give rise to a section 8 claim."[11]

17. The Crown argues that police interrogation at the door of a house cannot be a search because it is the occupant's choice to open the door and "free will is critical." This is a departure from *Evans. Evans* could not be clearer – the police intent in crossing the property line is what makes their conduct a search, not the owner's response. The *Charter* imposes limits on the exercise of state power. The *Charter* does not permit the police to approach suspects' homes to conduct warrantless interrogations. The Crown's assertion that this unlawful conduct should be forgiven if a suspect *chooses* to open the door places the burden on individual rights holders to protect themselves from prying state agents. The lawfulness of the police conduct should not hinge on a suspect's split-second decision about whether to open the door and interact with police.[12]

18. Moreover, the fact that an occupant opens the door is not enough to assume that the occupant's "free will" has cured the unlawful police action. As the Court held in *Tessier*, it is presumed that a suspect's statement to the police is not voluntary if they have not been properly cautioned.[13]

19. Finally, the Court should not make a sweeping declaration that police "asking questions" at the door of a residence is permitted. In some circumstances, police questioning can engage sections 8, 9 and / or 10 of the *Charter*.

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[10] See for example *R v Mellenthin,* [1992] CanLII 50 (SCC).
[11] *R v Harris*, 2007 ONCA 574 at para 33 – 34.
[12] *R v Le*, 2019 SCC 34 at para 115. In this paragraph, the Court explains that the content of *Charter* rights should not be informed by the subjective views of citizens. It applies by analogy.
[13] *R v Tessier*, 2022 SCC 35 at para 83. *Tessier* is not a s. 8 case, but the principle applies by analogy. Justice Doherty explains in *R v Harris*, 2007 ONCA 574 at para 44 that voluntariness is a key consideration in determining whether police questioning is a search under s. 8.

2. No Expansion of Police Powers is Necessary

a) The Ancillary Powers Doctrine Should be Applied with Caution and Stringency

20. This Court approaches the expansion of police powers with extreme caution.[14] In attempting to enlarge the ability of the state to interfere with the citizen's liberty, the Crown must discharge a high burden. The test is stringent. The standard for exercising a police power must be commensurate with the fundamental liberty at stake.[15] Courts should only recognize powers reasonably required to protect the public.[16] Not only must any new police power be "reasonably necessary" to the exercise of a police duty[17], but the ancillary power must also be clearly defined.[18]

21. The proposed power in this appeal is neither reasonably necessary nor clearly defined.

b) Appellate Courts Have Already Determined that Police Power Should Not Be Expanded as Requested

22. At its core, the proposed power would authorize state trespass and the conduct of warrantless perimeter searches – a power this Court has consistently confirmed the police are not entitled to. Since before *Evans,* the Court has maintained constitutional balance by requiring either a warrant or exigent circumstances to justify this kind of police trespass. The Crown has not pointed to any new development in the law or in society that would justify the reversal of precedent.

23. This Court, and other appellate courts, eschewed this invasive state conduct as impermissible:

- In 1981, this Court made clear in *Colet v the Queen* that the *Criminal Code* and the common law do not permit the police to trespass for investigative purposes. The police could not justify their trespass by relying on the public interest in enforcing the criminal law. Indeed, the Court ruled that it would be dangerous to find that vague reliance on the public interest

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[14] *Fleming v Ontario*, 2019 SCC 45, paras 4 and 5
[15] *R v Clayton*, 2007 SCC 32 at para 21.
[16] *R v Clayton*, 2007 SCC 32 at para 26.
[17] *Fleming v Ontario*, 2019 SCC 45 at para 47.
[18] *Fleming v Ontario*, 2019 SCC 45 at para 57.

could justify intrusion on "the private rights of the individual to the exclusive enjoyment of his own property" without express authority.[19]

- In 1990, this Court in *Kokesch* rejected an argument similar to the one the Crown seeks to raise in this appeal. The police conducted a perimeter search around the suspect's home. They used information gathered to obtain a warrant. The Crown argued that the police had a common law power to trespass to investigate drug offences. The argument was dismissed as "without merit". Chief Justice Dickson reiterated that "the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language."[20]

- In 2021, in *McColman,* the Court of Appeal for Ontario declined to recognize a common law "power to pursue a vehicle off the highway and detain the driver to conduct a random sobriety check on a private driveway, where there are no grounds to suspect an offence has been or is about to be committed."[21] The Crown could not justify the proposed power given the expectation of privacy in one's property.[22]

c) There is No Basis to Depart From Precedent

24. The police have extensive investigatory powers for driving offences.[23] No new powers are needed.

25. The Crown argues that its proposed power to trespass and investigate impaired driving offences is reasonably necessary because there *may* be circumstances where they have received a

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[19] *Colet v the Queen*, 1981 CanLII 11 (SCC) at p. 10.
[20] *R v Kokesch*, 1990 CanLII 55 (SCC), p. 16. Chief Justice Dickson was dissenting, but only on s. 24(2). He was speaking unanimously on this point.

[21] *R v McColman*, 2021 ONCA 382. This case was appealed to the Supreme Court. The Supreme Court confirmed that there was no statutory authority to conduct a sobriety check on private property. They did not consider whether there was a common law power to conduct such checks.

[22] *R v McColman*, 2021 ONCA 382 at para 61.
[23] *R v McColman*, 2021 ONCA 382 at para 62.

complaint about drunk driving that they will not be able to investigate because they do not have grounds for a warrant.[24]

26. This hypothetical concern cannot trigger the Court to justify significant intrusions on liberty. If the police cannot justify their investigation under one of the several existing statutory powers, the answer is not to simply expand those powers using the common law. The answer is to leave the citizen alone. Holding otherwise would be to countenance arbitrary and speculative investigations. The requirement that the police obtain judicial authorization before trespassing to investigate adequately balances privacy and property rights with the need to solve crime. This balance has been struck by Canadian courts for decades. There is no compelling reason to depart from it here.

27. If we are to take privacy seriously, not all investigations can proceed on whatever terms the police unilaterally deem fit. It is a feature, not a bug of the *Charter,* that where the police have no constitutionally compliant way of furthering an investigation, they must leave the suspect alone.[25]

3. The Proposed Power will Disproportionately Impact Marginalized People

a) The Dangers of "Low Visibility" Encounters

28. The Crown's proposed power to trespass onto private, residential property to investigate drinking and driving offences will have an outsized impact on racialized and vulnerable groups. The proposed power allows the police to investigate on private property without a warrant or reasonable suspicion. It is by nature a proposed power to conduct arbitrary searches. In many cases, the exercise of this police power will not lead to an arrest and therefore will not be subject to review by the courts.

29. In *Evans,* Justice Sopinka clearly articulated the dangers of expanding the implied licence doctrine to include warrantless investigative work on private property around homes. Justice Sopinka noted that allowing the police to rely on the implied licence to investigate without a warrant could lead to random "spot checks" in high crime neighbourhoods. He described this result

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[24] Crown's Factum at para 85.
[25] *R v Kokesch*, 1990 CanLII 55 (SCC), p. 29.

as "Orwellian".[26] The power proposed by the Crown would result in the same "Orwellian" outcome.

30. Much like the proposed common law power dismissed by the Court of Appeal in *McColman*, the proposed power in this case would lead to "low visibility" police encounters. Indeed, it would permit random searches that may not result in the laying of charges. Expanding the state's power to conduct arbitrary perimeter searches is a licence for the police to generate more of these low-visibility encounters with citizens. This Court has repeatedly recognized that such encounters disproportionately impact racialized or marginalized people.[27] For example, in *R v Le*, the Court accepted that the police would be unlikely to brazenly enter private property to question people in their backyard in an affluent, less racialized community. Unchecked police discretion increases the likelihood that unconscious bias and racial profiling become factors in the state's exercise of power.[28]

b) The Proposed Power Lacks Clarity

31. The fact that a police power would be "evasive of review" is a strong reason against recognizing it.[29] The power proposed here would be impossible to review because the conditions for its exercise are unclear. The threshold for exercising the proposed power here is clearly below the well-known threshold of reasonable grounds. Low threshold powers are the easiest to abuse, wittingly or unwittingly. [30] The Court should view them with skepticism.

32. Moreover, the bounds of the proposed power are intolerably vague. The power to cross the property line and "investigate" impaired driving offences has no measurable content. The expansive character of the power is illustrated by the police conduct in this case. The Crown takes the view that its proposed power not only authorized the police to trespass, but that it also allowed the police to open a car door to wake and question its occupant (all while trespassing). The proposed power should be rejected because there is nothing that allows courts to ensure that it will be exercised fairly and with restraint.

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[26] *R v Evans*, [1996] 1 SCR 8, 1996 CanLII 248 (SCC) at para 13.
[27] See Concurring Reasons of Binnie J in *R v Grant*, 2009 SCC 32 at para 154; *R v Golden*, 2001 SCC 83 at para 154; *R v Le*, 2019 SCC 34 at para 87.
[28] *Procureur General du Quebec c Luamba*, 2024 QCCA 1387 at para 64.
[29] *Ontario v Fleming*, 2019 SCC 45 at para 84.
[30] *R v Pike*, 2024 ONCA 608 at para 66.

33. The Court should also be skeptical that the power will be limited to drunk driving investigations. If the power to trespass to conduct warrantless investigations around homes is accepted in the drunk driving context, it is likely to be expanded to permit investigations of the myriad of more serious offences in the *Criminal Code.* There are no clear boundaries on the Crown's vague proposed power. It should be rejected.

PARTS IV & V – ORDERS AND COSTS

34. The BCCLA seeks no costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF JANUARY, 2025.

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PART VI – TABLE OF AUTHORITIES

Caselaw	**Para #**
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