S.C.C. File No. 37971

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

BETWEEN:

TOM LE

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPELLANT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

GREENWOOD LAM LLP
65 Queen Street West, Suite 1240
Toronto, Ontario M5H 2M5
Tel: (416) 686-4612
Fax: (416) 362-3612

Emily Lam (emily@greenwoodlam.com)

ADDARIO LAW GROUP LLP
171 John Street, Suite 101
Toronto, ON M5T 1X3
Tel: (416) 649-5063
Fax: 1-866-714-1196

Samara Secter (ssecter@addario.ca)

Counsel for the Appellant, Tom Le

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4
Tel: (613) 482-2463
Fax: (613) 235-3041

Colleen Bauman

Ottawa Agent for the Appellant, Tom Le

ATTORNEY GENERAL OF ONTARIO
720 Bay Street
10th Floor
Toronto, Ontario
M5G 2K1
Telephone: (416) 326-4606
FAX: (416) 326-4656

Sandy Tse
Counsel for the Respondent, Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario
K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Nadia Effendi
Ottawa Agents for the Respondent, Attorney General of Ontario

PART I - OVERVIEW AND THE STATEMENT OF THE FACTS

1. Overview

1. This is yet another case involving police officers and marginalized youth.

2. One spring evening the Appellant was socializing with friends in the fenced backyard of the townhouse where one of his friends lived. Three police officers entered the backyard uninvited and began questioning the group – all young men of colour. The encounter culminated with the Appellant's arrest and the seizure of a firearm, currency, and drugs.

3. A majority of the Ontario Court of Appeal said the Appellant had no standing to object to the unlawful police entry into the backyard. It thought he had no reasonable expectation of privacy in his friend's backyard, and was thus disentitled to the protection of s. 8 of the *Charter of Rights and Freedoms*. Justice Lauwers disagreed. He thought the Appellant's expectation of privacy was the same as the occupant whose guest he was. He tied this to a purposive application of s. 8. He thought the police arbitrarily detained the Appellant. Lauwers J.A. would have excluded the evidence on the basis of police behaviour he characterized as "casually intimidating and oppressive."

4. The Appellant, appealing as of right on the dissent, submits that Lauwers J.A. was correct on all three points. With respect to s. 8, the Court must answer the following normative questions: do invited guests at backyard gatherings have a right to be left alone by the state? Is a homeowner entitled to extend his or her privacy 'umbrella' to invited guests? The Appellant submits the answer to both questions is yes.

5. Canadians do not give up their right to be left alone by the state when they leave their own residences to visit the homes of their friends. Although invited guests at another person's home cannot control entry by others to the same extent they can in their own homes, this is not dispositive in the privacy analysis. The majority's approach – which was to treat "reasonable expectations of privacy in respect of real property" as contingent on the 'ability to control those who can enter' – is a repackaging of the "risk analysis" rejected by this Court thirty years ago in *Duarte*. It should not be revived.

6. With respect to s. 9, the Appellant submits that Lauwers J.A. was correct to conclude that the police trespass into the backyard to gather information and observations about the Appellant and his friends was an "intimidating and oppressive" unlawful detention. These are exactly the kind of "low visibility" encounters between the police and marginalized communities that require this Court's scrutiny. It is incumbent on the Court to distance itself from this police misconduct by excluding the seized evidence under s. 24(2).

2. Summary of the Facts

7. On the evening of May 25, 2012, the 20-year-old Appellant was socializing with four friends in the fenced backyard of a townhouse in the Atkinson Housing Co-operative in Toronto.[1] One of his friends, 17-year-old Leraldo Dixon invited the Appellant and other young men to the backyard. His mother rented a townhouse in the Co-operative (the "Dixon residence").[2] The Appellant, Mr. Dixon, and the other young men have been friends since elementary school.[3] The Appellant is Asian and his friends are Black.[4] The Appellant and his four friends had spent their childhood and teenage years growing up in the Co-operative.[5]

8. The Atkinson Housing Co-operative is in the downtown area of Toronto. The Co-operative consists of various streets and residential complexes.[6] It is subsidized housing.[7] The police are in the community "a lot" and regularly ask people who reside or visit the area for their identification, what they are doing, and why they are there.[8]

9. Cst. Teatero was on duty that evening. He was at the Co-operative speaking with two security guards who were responsible for overall security at the housing complex.[9] Cst. Teatero inquired about two people (Nicholas Dillon-Jack and Jermaine Jackson) – not the Appellant or

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[1] Ruling on *Charter* Application, para. 1 [Appellant's Record ("AR") Vol. I, Tab 1]
[2] Ruling on *Charter* Application, para. 1, AR, Vol. I, Tab 1; Transcript of Proceedings, pg. 4 [AR, Vol. IV, Tab 26]
[3] Transcript of Proceedings, pg. 141, [AR Vol. IV, Tab 27]
[4] Ruling on *Charter* Application, para. 16, [AR, Vol. 1, Tab 1]
[5] Transcript of Proceedings, pp. 281 [AR Vol. III, Tab 25]; 4, 58, 99, 141 [AR Vol. IV, Tab 26, 27]
[6] Ruling on *Charter* Application, para. 1, [AR, Vol. 1, Tab 1]; Transcript of Proceedings, pg. 15 [AR, Vol. III, Tab 23]
[7] Transcript of Proceedings, pp. 134, 162-163 [AR Vol. III, Tab 24]
[8] Transcript of Proceedings, pp. 134 [AR Vol. III, Tab 24]
[9] Ruling on *Charter* Application, paras. 9-10, [AR, Vol. I, Tab 1]

any of his friends.[10] Security advised that Mr. Jackson had last been seen in the area two weeks prior to that night and that Mr. Dillon-Jack was not known to frequent the area.[11] According to Cst. Teatero, one of security guards added that a certain townhouse was a "problem address" and raised concerns of drug trafficking.[12] Security told Cst. Teatero that he could access that address by the footpath at the back of the address.[13]

10. Csts. Reid and O'Toole were acting in a uniformed capacity that night.[14] They met up with Cst. Teatero while he was talking to the security guards. The three officers decided to do a "walk-through" of the common area around the edge of Mr. Dixon's fenced backyard.[15] When the police arrived at the backyard, they could see that the young men were "just talking."[16] They were doing "nothing wrong".[17] Despite the absence of any investigative urgency, the police nonetheless decided to investigate what was happening beyond the fence.

11. In the absence of authority and without asking permission of the young men in the backyard, Csts. Teatero and Reid, strode into the backyard through an opening in the fence.[18] Cst. O'Toole moved along the fence to see what the young men were doing as the two other officers made their presence known.[19]

12. Csts. Teatero and Reid entered the backyard to investigate whether any of the young men were Jermaine Jackson or knew the whereabouts of Dillon-Jack, and to investigate whether the

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[10] Ruling on *Charter* Application, paras. 10-11 [AR, Vol. I, Tab 1]; Transcript of Proceedings, pp. 64-65 [AR, Vol. III, Tab 23]
[11] Ruling on *Charter* Application, para. 11, [AR, Vol. I, Tab 1]; Transcript of Proceedings, pp. 132 [AR, Vol. III, Tab 24]; Preliminary Hearing Transcript of Cst. F. Teatero, pp. 193 [AR Vol. I, Tab 18]
[12] Ruling on *Charter* Application, para. 11, [AR, Vol. I, Tab 1]; Constable Teatero attributed this comment to Fred Lalley, a security guard working that evening (Transcript of Proceedings, p. 192-193 [AR, Vol.I, Tab 18]). On Lalley's evidence, there had never been a complaint about the Dixon residence since the time he worked there; Preliminary Hearing Transcript of Fred Lalley, pp. 22-23 [AR, Vol. II, Tab 19]
[13] Ruling on *Charter* Application, para. 4, [AR, Vol. I, Tab 1]
[14] Ruling on *Charter* Application, para. 9, [AR, Vol. I, Tab 1]
[15] Ruling on *Charter* Application, para. 12, [AR, Vol. I, Tab 1]; Transcript of Proceedings, pp. 62-64, 77-81, 244 [AR Vol. III, Tab 23]
[16] Ruling on *Charter* Application, para. 16, [AR, Vol. I, Tab 1]
[17] Ruling on *Charter* Application, para. 16, [AR, Vol. I, Tab 1]
[18] Ruling on *Charter* Application, para.17, [AR, Vol. I, Tab 1]
[19] Ruling on *Charter* Application, para.18, [AR, Vol. I, Tab 1]

young men were trespassers.[20] The trial judge found that the police were pursuing "activities and/or individuals potentially in the Dixon backyard."[21]

13. The officers knew that they did not have authority to enter the backyard.[22] The officers knew that enforcing the *Trespass to Property Act* did not provide them with those powers.[23]

14. Csts. Teatero and Reid immediately started questioning the young men in the backyard, asking who they were, if they lived there, and what was going on.[24] The officers demanded that some of the young men produce identification. Cst. Reid approached Mr. Dixon, the 17-year-old, first.[25] He questioned Mr. Dixon about who lived at the home.[26] Mr. Dixon told the officer that he lived in the townhome with his family. Mr. Dixon produced his student card when asked.[27]

15. Cst. O'Toole, watching from outside the fence, directed one of the young men to put his hands in front of him.[28] Cst. O'Toole then jumped over the fence and entered the backyard. He entered the backyard in order to "get a better view and a better look at what was going on."[29]

16. Cst. O'Toole walked from the grassy area of the backyard closer towards the backdoor of the home.[30] He engaged one of the young men in conversation, and asked for his identification. While doing so, Cst. O'Toole testified that he saw the Appellant, near the backdoor, "blading himself" by turning away from the officers.[31] Cst. O'Toole interpreted this as an attempt to shield the shoulder bag the Appellant was carrying.[32] Cst. O'Toole said the Appellant was acting

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[20] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]
[21] Ruling on *Charter* Application, para. 70, 89[AR, Vol. I, Tab 1]
[22] Transcript of Proceeding, pp. 44-45, 88 [AR, Vol. III, Tab 23] (Reid); Transcript of Proceedings, pp. 165-166 [AR, Vol. III, Tab 23] (O'Toole); Exhibit 11, Preliminary Hearing Transcript of Cst. F. Teatero, pp. 195-197 [AR, Vol. I, Tab 18];
[23] Transcript of Proceedings, pp. 45, 88 [AR, Vol. III, Tab 23]
[24] Ruling on *Charter* Application, para. 17 [AR, Vol. I, Tab 1]
[25] Transcript of Proceedings, pp. 20-21 [AR, Vol. III, Tab 23]
[26] Transcript of Proceedings, pp. 85-86 [AR, Vol. III, Tab 23]
[27] Transcript of Proceedings, pp. 20-21 [AR, Vol. III, Tab 23]
[28] Ruling on *Charter* Application, para. 18-19 [AR, Vol. I, Tab 1]; Transcript of Proceedings, pp. 138-139, 155 [AR, Vol. III, Tab 24]
[29] Transcript of Proceedings, pp. 155 [AR, Vol. III, Tab 24]
[30] Ruling on *Charter* Application, para. 29 [AR, Vol. I, Tab 1]
[31] Ruling on *Charter* Application, paras. 3, 29 [AR, Vol. I, Tab 1]
[32] Transcript of Proceedings, pp. 141, 245 [AR, Vol. III, Tab 24 and 25]

nervous, and as a result, he asked the Appellant for identification.[33] The Appellant responded that he did not have any identification on him.[34] Cst. O'Toole asked the Appellant whether he had anything on him, and the Appellant replied he did not.[35] Cst. O'Toole then asked the Appellant what he had in his bag.[36] The Appellant responded to Cst. O'Toole's questioning by turning and running away. The Appellant testified at the *voir dire* that he ran because he did not think he could walk away, that the officer was going to take his bag, and that he did not think the officer was right in trying to search him.[37]

17. Two of the three officers ran after the Appellant and were able to tackle him to the ground nearby.[38] As Cst. O'Toole tackled the Appellant, he noted that the Appellant's bag was open a few inches.[39] Cst. O'Toole put his hand on the bag and realized it contained a gun.[40] The police seized the bag and the gun. During a pat down search, Cst. Reid found cash in the Appellant's pockets.[41] After his arrest, the police seized 13 grams of crack cocaine on the Appellant's person.[42]

(i) Ontario Court of Appeal, Doherty and Brown JJ.A

18. Justice Doherty, for the majority of the Court of Appeal, determined that the Appellant did not have a reasonable expectation of privacy in Mr. Dixon's backyard. On the authority of *Edwards*, he found no breach of the Appellant's s. 8 right. Doherty J.A. also concluded that the police did not breach the Appellant's s. 9 right against arbitrary detention. Doherty J.A. determined that the Appellant's detention was not arbitrary – the officer had reasonable grounds to suspect that the Appellant was armed. Justice Doherty held further that if the officers were trespassing, this had no impact on the lawfulness of the Appellant's detention.

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[33] Transcript of Proceedings, pp. 141 [AR, Vol. III, Tab 24]
[34] Transcript of Proceedings, p. 141 [AR, Vol. III, Tab 24]
[35] Transcript of Proceedings, p. 142 [AR, Vol. III, Tab 24]
[36] Transcript of Proceedings, p. 142 [AR, Vol. III, Tab 24]
[37] Ruling on *Charter* Application, para. 58 [AR, Vol. I, Tab 1]
[38] Ruling on *Charter* Application, paras. 35-41 [AR, Vol. I, Tab 1]
[39] Ruling on *Charter* Application, para. 37 [AR, Vol. I, Tab 1]
[40] Ruling on *Charter* Application, para. 37 [AR, Vol. I, Tab 1]
[41] Ruling on *Charter* Application, para. 49 [AR, Vol. I, Tab 1]
[42] Ruling on *Charter* Application, para. 5 [AR, Vol. I, Tab 1]

(ii) Ontario Court of Appeal, Lauwers J.A.

19. Justice Lauwers, dissenting, found that the police breached the Appellant's ss. 8 and 9 rights. He described the initial police entry into the backyard as an unlawful trespass that tainted everything that followed. He characterized the police behaviour as a speculative investigation and a fishing expedition. He concluded that the Appellant's status as an invited guest in his friend's backyard gave him standing to challenge the police entry into the backyard as infringing the Appellant's s. 8 rights. Lauwers J.A. further found that the police psychologically detained the Appellant within the meaning of s. 9 when they trespassed into the fenced backyard. Ultimately, he would have excluded the evidence seized under s. 24(2) given the police misconduct.

PART II - STATEMENT OF ISSUES

(1) Did the Appellant have a reasonable expectation of privacy in his friend's backyard, such that the unlawful police entry into the backyard violated his s. 8 *Charter* rights?

(2) Did the police arbitrarily detain the Appellant in violation of his s. 9 *Charter* rights?

(3) Together or individually, do these breaches of the Appellant's ss. 8 and 9 rights require exclusion of the seized evidence under s. 24(2) of the *Charter*?

PART III - STATEMENT OF ARGUMENT

A. The Police Violated the Appellant's Reasonable Expectation of Privacy

20. The Appellant submits that as a social guest invited to his friend's backyard, he enjoyed a reasonable expectation of privacy vis-à-vis the police. In support of his argument, he makes the following four points: (1) a purposive and normative approach to s. 8 recognizes the value of social interaction; (2) the majority of the Court of Appeal erred in determining that the "subject matter" of the search was exclusively territorial; (3) the majority of the Court of Appeal erred in relying on the "risk analysis"; and (4) *Edwards* requires reworking given this Court's more recent jurisprudence.

1. A Normative Approach to s. 8

(i) Section 8 Protects Privacy, Not Isolation

21. Section 8 of the *Charter* protects Canadians' privacy.[43] This Court equates privacy with the "right to be left alone by the state."[44] The key threshold questions in this case are:

a) Whether the Appellant has a right to be left alone by the state when socializing as an invited guest in a friend's backyard; and,

b) Whether the police violated that right when they illegally entered the backyard to gather information about the Appellant and his friends.

A normative approach to s. 8 demands affirmative answers to both questions. The proposition that invited guests on private property have no reasonable expectation of privacy is inconsistent with ordinary life in our free and democratic society.

22. The ability to socialize with friends in private spaces without state interference is vital to citizens' growth, the maintenance of society, and a free and healthy democracy. It ensures a zone of safety in which we can share personal information with the people that we choose, and still be free from state intrusion.[45] Recognizing a right to be left alone in private spaces to which we have been invited is an extension of the principle that we are not subject to state interference any time we leave our own homes.[46] The right allows citizens to move about freely without constant supervision or intrusion from the state. Fear of constant intrusion or supervision itself diminishes Canadians' sense of freedom.

23. Visiting a friend's backyard is a social custom that serves functions we recognize as valuable in our society. Backyards are places used for association, celebration, and debate. The guest is present with the permission of the host, who in turn, shares his privacy with his guest.

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[43] *R v. Spencer*, 2014 SCC 43, para. 15
[44] *R v. Jones*, 2017 SCC 60, para. 38; *R v. Orlandis-Habsburgo*, 2017 ONCA 649, para. 42 ;
[45] *R v. Marakah*, 2017 SCC 59, para. 37
[46] *R v. Duarte*, [1990] 1 SCR 30, para. 43; See *R v. Wong*, [1990] 3 SCR 36, para. 22; See also La Forest, J. in dissent, in *R v. Wise*, [1992] 1 SCR 527, para. 76 cited with approval by Cromwell J. in *R v. Spencer*, 2014 SCC 43, para. 43-44

The reasonable expectation of privacy analysis is bound by these social conventions – it reflects our societal values.[47]

24. A government that increases its intrusion in the lives of citizens makes those citizens more suspicious of their own expectations of privacy.[48] The *Charter* protects against this unilateral encroachment. In order to justify intrusions, the Court asks whether the particular form of unauthorized interference would see the amount of freedom remaining to citizens "diminished to a compass inconsistent with the aims of free and open society".[49] In this case, the Appellant submits that it would.

25. The reasonable expectation of privacy analysis ensures that citizens have meaningful choices about participating in society. The majority of the Court of Appeal removed "meaningful choice" from the Appellant. On the majority's analysis, the Appellant has to choose between attending social events where he should expect the state to interfere, or not attend social events at all. While joining a group of friends in a backyard necessarily means that we reveal private information to select people for select purposes, it does not invite the police into our backyards or those of our friends. This Court confirmed in *Jones*: "Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives."[50] Neither are they required to become physical recluses.

26. In this appeal, the Court is called on to reinforce normative values. The Appellant should be "cloaked" with the privacy of his host as an invitee. As the dissenting judge pointed out, the majority's approach requires the Appellant to shed his personal *Charter* protections when he leaves his home, unable to enjoy them until he returns.[51] The totality of circumstances test should recognize the importance of human interaction, not penalize it.

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[47] *R v. Tessling*, 2004 SCC 67, para. 42; Stewart, H. "Normative Foundations for Expectations of Privacy", (2011) 54 SCLR (2d) 335 at, pp. 342-343; *R v.Orlandis-Hagsburo*, 2017 ONCA 649, para. 41
[48] *R v. Patrick*, 2009 SCC 17, para. 14
[49] *R v. Wong*, [1990] 3 SCR 36, para. 12
[50] *R v. Jones*, 2017 SCC 60, para. 45
[51] Reasons of the Court of Appeal, Lauwers J.A. (dissent), para. 128 [AR, Vol. 1, Tab 2]

(ii) Privacy in Mr. Dixon's Home

27. The unauthorized presence of the state in one's home is "the ultimate invasion of privacy."[52] The home is so central to privacy concerns that this Court has also extended protection to its "perimeter areas,"[53] including a backyard. Police can use many legitimate avenues to seek information about activities taking place in the home.[54] They may not, as the police did here, trespass in order to get better information.

28. The problematic implications of the majority's decision are particularly acute as they relate to Mr. Dixon, the occupant of the home. This was a warrantless perimeter search of Mr. Dixon's residence. The police unlawfully entered his fenced backyard. The physical boundary of the fence was meaningless to the police – it was as if it did not exist.

29. The police respond to the incentive that judicial decisions create. The majority's reasons are an invitation to violate the *Charter*. As one American writer put it, the police "have everything to gain and nothing to lose if they search under circumstances where they know that at least one of the potential defendants will not have standing."[55] The police would be authorized to rely on a guest's presence for the purpose of conducting 'spot-checks' in the private homes of citizens.[56] To some extent this creates a convenient "work around" for all of the protections that this Court has given to homes (and their perimeter space).[57] So long as the police do not ultimately charge the residents, there is no effective remedy for those with standing. While the majority is not "legalizing" this behaviour, the police conduct is difficult to review.[58] The

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[52] *R v. Silveira* [1995] 2 SCR 297, para. 144-153; See also *Eccles v. Bourque,* [1975] 2 SCR 739
[53] See generally *R v. Kokesch,* [1990] 3 SCR 3
[54] *R v. Gomboc,* 2010 SCC 55, para. 47
[55] See Eulius Simien Jr., "The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches" (1988) 41 Ark. L. Rev. 487 at 539
[56] See David Schwartz, "Edwards and Belnavis: Front and Rear Door Exceptions to the Right to be Secure from Unreasonable Search and Seizure"(1998) 10 CR (5^{th}) 100 p. 4-5 (WL)
[57] See Jonathan Dawe, "Standing to Challenge Searches and Seizures Under the *Charter*: the Lessons of the American Experience and Their Application to Canadian Law" (1993) 52 UT Fac L. Rev. 39 at pg. 63 ["Standing to Challenge"]
[58] Relying on Mr. Dixon to bring a civil suit for *Charter* damages or trespass is unrealistic. See Dawe, Standing to Challenge, pg. 63

possibility that Mr. Dixon could later seek civil redress is not only an ineffective solution, it ignores the very purpose of s. 8: to prevent unreasonable searches *before* they occur.[59]

30. The majority's reasoning also degrades Mr. Dixon's right to use his space as he wishes. An adoption of the majority's position means a home-dweller will be placing his own privacy at risk should he choose to include a guest in his private space. On the majority's reasoning, to include a guest will in effect mean to include the state. It is beyond argument that Mr. Dixon, as an occupant, has a reasonable expectation of privacy in his backyard. This expectation derives from Mr. Dixon's power to exclude intruders but also to *include* guests. If we, as home-dwellers, cannot invite individuals into our spaces and cloak them with our privacy, we cannot truly do "as we wish" in our home. The value of our homes as places without state interference is significantly downgraded.

(iii) Privacy as Selective Sharing, Not Secrecy

31. Privacy relates to the ability to share information selectively.[60] The goal of the *Charter* is not to promote a society of hermits, but to create zones of privacy in which people can interact and share information with others without the state interfering.[61] The amount of privacy an individual reasonably expects in each zone will vary.[62] A reasonable but lesser expectation of privacy is still a reasonable expectation of privacy triggering s. 8 protection.[63] The backyard lies in the middle of the spectrum: it is not the interior of the home, nor is it a public space like a park or a restaurant.

32. Canadian courts have recognized that citizens are entitled to privacy even in *public* spaces. Citizens can participate in public without being identified, intruded upon or continually monitored by the state.[64] This is known as "public privacy." It allows the individual to be among people, know that he may be observed, but not be expected to identify himself or interfered with by the state. Public privacy ensures that the individual can "merge into the situational landscape"

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[59] *R* v. Côté, 2011 SCC 46, para. 84
[60] *R v. Marakah*, 2017 SCC 59, para. 39
[61] *R v. Wong,* [1990] 3 SCR 36, para. 22; See La Forest J. in dissent (but not on this point) in *Wise*, [1992] 1 SCR 527, para. 89
[62] *R v. Cole*, 2012 SCC 53, para. 9
[63] *R v. Cole*, 2012 SCC 53, para. 9
[64] *R v. Ward*, 2012 ONCA 660, para. 72; See generally *R v. Wise*, [1992] 1 SCR 527

– it maintains a "sense of relaxation and freedom that men seek in open spaces and public arenas."[65] As Doherty J.A. stated in *Ward*:

> If the state could unilaterally, and without restraint, gather information to identify individuals engaged in public activities of interest to the state, individual freedom and with it meaningful participation in the democratic process would be curtailed. It is hardly surprising that constant unchecked state surveillance of those engaged in public activities is a feature of many dystopian novels.[66]

33. In this case, the violation is more severe. The state unilaterally and without restraint entered into a *private* space to make observations, identify individuals, and collect evidence. If public privacy can exist, so too can private privacy. It would be an anomalous result to conclude that citizens can have privacy in public, but not in private.

2. The Appellant Had a Direct Interest in the Subject Matter of the Search

(i) In Invading the Backyard, What Were the Police "Really After"?

34. The first step in any reasonable expectation of privacy analysis is to identify the subject matter of the search.[67] In this case, it is challenging to draw boundaries around the subject matter of the search as the police were on a "fishing expedition."[68]

35. The police gave different reasons for entering the property. Cst. Reid said that he entered the backyard to enforce the *Trespass to Property Act*.[69] Cst. O'Toole entered the backyard to enforce the *Trespass to Property Act* and because he "wanted a better look at what was going on."[70] He said that the officers wanted to know "why [the young men] were hanging out there."[71] Cst. Teatero wanted to know "what was going on, who the [young men] were, and whether any of them lived there in the townhouse unit."[72] The trial judge found that the police wanted to investigate whether the young men were Jermaine Jackson, knew about Dillon-Jack, and whether

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[65] *R v. Ward*, 2012 ONCA 660, para. 73; citing Alan F. Westin, *Privacy and Freedom* (New York: Athenum, 1967)
[66] *R v. Ward*, 2012 ONCA 660, para. 74
[67] *R v. Marakah*, 2017 SCC 59, para. 14
[68] Reasons, Court of Appeal, Lauwers, J.A. (dissent) para. 107 [AR, Vol I, Tab 2]
[69] Transcript of Proceedings, p. 92 [AR, Vol. III, Tab 23]
[70] Transcript of Proceedings, p. 155 [AR, Vol. III, Tab 23]
[71] Transcript of Proceedings, p. 134 [AR, Vol. III, Tab 23]
[72] Ruling on *Charter* Application, para. 17 [AR, Vol. I, Tab 1]

they were entitled to be in the backyard.[73] He also found that the police were pursuing "*activities* and/or individuals potentially in the backyard."[74]

36. Based on the trial judge's findings, the subject matter of the search *at least* included: the backyard, observations about the individuals in the backyard,[75] identification of the individuals in the backyard and their residences,[76] their associations,[77] and what "activities" the young men were up to in the backyard.[78] That the police pursued drug trafficking or trespassing as the "activities" in the yard on not even a "scintilla of a hunch" is irrelevant to the privacy analysis.[79] Section 8 is "content neutral."[80]

(ii) The Subject Matter Involved Both Informational and Territorial Privacy

37. The subject matter of the search was *in part* territorial: the police entered the fenced backyard. Police entry into private spaces (particularly homes and their perimeters) is considered a search.[81] However, the majority in the Court of Appeal erred in too narrowly describing the privacy interest at stake as "exclusively territorial."[82] The search was also informational.

38. Privacy interests often overlap. Just as informational privacy may sometimes implicate territorial privacy, the reverse is also true. Indeed, the reason that territorial privacy is protected is in part because of the information that it discloses. In *Tessling*, Binnie J. explained that the rationale behind protection of our homes is that "the home is where our most intimate and personal activities often take place."[83] The home provides individuals with a space to talk freely, dress freely, and "live as they wish"[84]– all activities captured under informational privacy.

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[73] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]
[74] Ruling on *Charter* Application, para. 89, 70 [AR, Vol. I, Tab 1]
[75] Transcript of Proceedings, p. 155 [AR, Vol. III, Tab 23]
[76] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]
[77] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]
[78] Ruling on *Charter* Application, para. 17, 70, 89 [AR, Vol. I, Tab 1]
[79] Reasons, Court of Appeal (Lauwers), para. 107 [AR, Vol. I, Tab 2]
[80] *R v. Wong*, [1990] 3 SCR 36, para. 20-21
[81] See generally, *R v. Evans*, [1996] 1 SCR 8
[82] Reasons, Court of Appeal, Doherty J.A. para. 37 [AR, Vol I, Tab 2]
[83] *R v. Tessling*, 2004 SCC 67, para. 22;
[84] *R v. Silveira*, [1995] 2 SCR 297, para. 153

39. The overlap between territorial and informational privacy is most obvious when one is present in a home and the state intrudes. Here, the police wanted information about the space *and* those occupying the space. There is no evidence to suggest that the police would have entered the backyard but for the presence of the young men that night.

40. Territorial privacy is an analytical tool that protects places.[85] It is not a vault, intended to lock out other ideas or approaches to privacy. A purposive approach to s. 8 would ask about the location and its use. In the case of a residence, the desirability of having a space free from state intrusion is high "because of the nature of the *social interactions*" that occur there – births, marriages, sex, interactions with friends.[86] The majority's approach, reverting to pre-*Charter* case law that tied privacy to a proprietary interest in the home, is too narrow to satisfy the demands of s. 8. It disregards the conception that the *Charter* protects people, not places.

41. By entering the backyard, not only was the fenced perimeter of the Dixon house (the "territory") invaded and subject to search, the police gained the ability to get "a better look at what was going on" (the "information").[87] In so doing, the state had the opportunity to better hear the Appellant's conversations, see his belongings, smell the Appellant, make inferences about the Appellant's associations and activities, and check his identification. These are all the privacy interests "potentially compromised" by the state interference in this case.[88]

42. The Appellant and his friends, youth of colour, were in the backyard minding their own business. Although they could be seen from the walkway, they were not identified, their conversations were not overheard with clarity, the officers did not know "what was going on" in the backyard. The fence gave the Appellant and his friends a zone of privacy – the police could not enter to closely observe them, check their activities, look at their belongings, physically search them, or question them. The police ignored that buffer.

43. The unlawful police entry disturbed the Appellant's zone of privacy and his right to be left alone. He also had a direct interest in the information that the police were after: his identity, his place of residence, his associations, and what activities he was participating in in the

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[85] *R v. Tessling*, 2004 SCC 67, para. 22
[86] *R v. Dyment*, [1988] 2 SCR 417, para. 20
[87] Transcript of Proceedings, p. 155 [AR, Vol. III, Tab 23]
[88] *R v. Marakah*, 2017 SCC 59, para. 15 citing to *R v. Ward*, 2012 ONCA 660, para. 65

backyard. The Appellant also had a direct interest in the backyard itself given his presence. Just as a participant in an electronic conversation can have a direct interest in *the fact* of a conversation, a participant in a small backyard gathering can have a direct interest in that backyard and his presence therein.[89]

3. The Appellant Had a Subjective Expectation of Privacy

44. The Appellant had a subjective expectation of privacy in the backyard. He said that he believed his privacy would be the same as though he was in his own backyard. The trial judge also seems to have accepted that the Appellant had a subjective expectation of privacy with respect to the Dixon backyard.[90]

45. In any event, the subjective expectation requirement has never been a "high hurdle."[91] A requirement for a subjective expectation of privacy would not be consistent with the normative approach to s. 8.

4. The Appellant's Expectation of Privacy was Objectively Reasonable

46. Through the host's invitation into a private space, the social guest gains a reasonable expectation of privacy – the host's privacy shields the guest. A proper application of the normative approach demonstrates that the tenant or owner, as the controller of the backyard, has the right to extend the envelope of privacy he enjoys there to a guest, as his invitee.

(i) The Majority's Focus on Control Adopts the Discredited Risk Analysis

47. This Court's s. 8 jurisprudence from *Duarte* to *Marakah* has repeatedly rejected the "risk analysis." The "risk analysis" converts control into the determining factor of whether an individual can have a reasonable expectation of privacy in a particular subject matter. It puts the burden on the individual citizen to accept that surveillance and state intrusion are outside of their control and choose isolation over participation. In pointing out almost thirty years ago how inapt the risk analysis is to an expansive conception of privacy, La Forest J. said in *Duarte*:

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[89] See *R v. Wong*, [1990] 3 SCR 36, para. 22; *R v. Marakah*, 2017 SCC 59, para. 21
[90] Ruling on *Charter* application, para. 52 [AR, Vol. I, Tab 1]
[91] See *R v. Jones*, 2017 SCC 60, para. 20

> No justification for the arbitrary exercise of state power can be made to rest … on the fact that the risk of divulgation is a given in the decision to speak to another human being. On the other hand, the question whether we should countenance participant surveillance has everything to do with the need to strike a fair balance between the right of the state to intrude on the private lives of its citizens and the right of those citizens to be left alone.[92]

Similarly, the reasonable expectation of privacy analysis in this case cannot hinge on the risk that the host will invite the state into the backyard.

48. The majority of the Court of Appeal relied on that risk analysis by making the Appellant's reasonable expectation of privacy contingent on his ability to control entry to the space. In doing so, it erred. To accept the majority's analysis in this case, is to ignore the principles that have developed over the last thirty years of *Charter* jurisprudence.

49. A lack of control does not mean a surrender of privacy:

- In *Duarte*, the Court confirmed that an inability to control a tattletale does not invite a surreptitious state recording of a private conversation;[93]
- In *Wong*, the Court confirmed that sharing our private spaces with strangers is not a licence for state intrusion and surveillance;[94]
- In *Wise*, the Court recognized that even highly regulated public activities can attract a reasonable expectation of privacy;[95]
- In *Cole*, the Court confirmed that exclusive control over a computer is unnecessary for a reasonable expectation of privacy over the contents therein;[96]
- In *Spencer*, the Court confirmed that privacy is not about shutting others out, but rather about choosing for ourselves with whom our information is shared;[97]
- In *Quesnelle*, the Court accepted that privacy can exist in the absence of control over dissemination;[98] and,
- In *Marakah*, the Court outright rejected the notion that control would be an absolute indicator of a reasonable expectation of privacy.[99]

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[92] *R v. Duarte*, [1990] 1 SCR 30, para. 34
[93] *R v. Duarte*, [1990] 1 SCR 30
[94] *R v. Wong*, [1990] 3 SCR 36
[95] *R v. Wise*, [1992] 1 SCR 527; see also explanation in *R v. Spencer*, 2014 SCC 43, para. 43-44
[96] *R v. Cole*, 2012 SCC 53
[97] *R v. Spencer*, 2014 SCC 43
[98] *R v. Quesnelle*, 2014 SCC 46

50. All the Appellant seeks in this case is an application of the principles. Simply because the Appellant did not have control over the backyard, does not mean he has no reasonable expectation of privacy in it. Simply because there was a *risk* Mr. Dixon could allow the police into the backyard, does not mean that the Appellant must expect them to intrude without invitation. From the rejection of the risk analysis in s. 8 directly flows the rejection of control as a determinative factor. The majority's reliance on it was in error.

(ii) Edwards After Marakah and Jones

51. As the subject matter of the search was also informational, the Appellant submits that the test from *Marakah* applies. If *Edwards* is the appropriate authority, the Appellant submits it requires reconsideration in light of this Court's recent jurisprudence. Although a reasonable expectation of privacy should still be determined based on the "totality of the circumstances," the *Edwards* factors require reworking given their prominent focus on control.

52. In 1996, Calhoun Edwards claimed a reasonable expectation of privacy in his girlfriend, Ms. Evers', apartment. The police arrested Mr. Edwards when he was absent from the apartment.[100] Two officers later attended Ms. Evers' apartment and obtained entry.[101] Once inside, Ms. Evers directed the police to the drugs.[102] At trial and at the Court of Appeal Mr. Edwards denied any connection to the drugs.

53. In coming to its conclusion that Mr. Edwards had no reasonable expectation of privacy, the Court considered:

> (i) Presence at the time of the search;
> (ii) Possession or control of the property or place searched;
> (iii) Ownership of the property or place searched;
> (iv) Historical use of the property or item;
> (v) The ability to regulate access, including the right to admit or exclude others from the place;
> (vi) The existence of a subjective expectation of privacy; and,
> (vii) The objective reasonableness of the expectation.[103]

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[99] *R v. Marakah*, 2017 SCC 59
[100] *R v. Edwards*, [1996] 1 SCR 128, para. 3-4
[101] *R v. Edwards*, [1996] 1 SCR 128, para. 6-7
[102] *R v. Edwards*, [1996] 1 SCR 128, para. 7
[103] *R v. Edwards*, [1996] 1 SCR 128, para. 45

54. The Appellant submits that there are a number of issues with the test that require this Court's intervention.

55. First, Mr. Edwards' denial that the drugs were his own informed the Court's analysis of the issue.[104] The Court agreed that who owned the drugs was a "fundamentally important" aspect of the evidence.[105] The importance of this denial has changed. As a result of *Jones*, accused are now entitled to claim *Charter* protection on the theory of the Crown's case.[106]

56. Second, in developing the list, the Court relied on *Gomez*, a three-page decision from the Eight Circuit in the United States. *Gomez* involved a vehicle stop in Arkansas. Mr. Gomez did not know the owner of the vehicle, did not have permission from the owner to take the vehicle, and did not claim the contents of the vehicle (cocaine) as his own.[107] The facts of *Gomez* are markedly different than the facts in both *Edwards* and this case. This Court has already recognized that there is a lesser expectation of privacy on a public highway. It is difficult to apply a test developed in that factual context to a social guest in a private space, there under the owner's direct invitation.

57. Third, the *Edwards-Gomez* factors have attracted heavy criticism as being contrary to the general organizing principle of s. 8 jurisprudence: that the right "protects people, not places."[108] In particular, possession, ownership and the ability to regulate access focus on proprietary interests. As Dickson C.J. noted in *Hunter*, there is nothing in the language of s. 8 to restrict it to private law conceptions of privacy.[109] Even "presence," a normative factor on the list, is applied as an indicator of control. This case is a good example: the majority of the Court of Appeal found

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[104] *R v. Edwards*, [1996] 1 SCR 128, para 44.
[105] *R v. Edwards*, [1996] 1 SCR 128, para. 44
[106] *R v. Jones*, 2017 SCC 60, para. 19
[107] *United States of America v. Victor Manuel Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 255-256;
[108] *Hunter v. Southam*, [1984] 2 SCR 145, p. 159; Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's LJ 65 at 70-71; See Julia Lawn and Andrew Bernstein, "Primacy to Privacy? The Supreme Court and the Privacy Threshold in Edwards", (1997) 55:2 UT Fac. L Rev 341 at 342-346; See Don Stuart, "Eight Plus Twenty Four Two Equals Zero" (1998) 13 CR (5th) 50
[109] *Hunter v. Southam*, [1984] 2 SCR 145 at pg. 158

that the Appellant's presence at the time of the search was only relevant insofar as it indicated his ability to include or exclude.[110]

58. Fourth, the proprietary approach of *Edwards* may be suited for American Fourth Amendment jurisprudence, but it is not a north star for the development of Canadian constitutional law.[111] The Court accepts Fourth Amendment jurisprudence only with the greatest of caution: in part because the difference in wording as between the Fourth Amendment and our s. 8, and the absence of an internal remedial provision in America – the United States does not have a built-in s. 24(2).[112]

59. Finally, in placing heavy emphasis on control, the factors constitute a veiled re-introduction of the risk analysis that was rejected in *Duarte, Wong*, and *Wise*. If one is not an owner, in control of the property, and does not have the ability to admit or exclude individuals, the implication is that there is a risk in attending someone else's home. The *Edwards* factors imply that in attending someone else's property as an invited guest, we accept the risk that the state may also come into the home. The risk is not only that the individual who owns or controls the space might invite the state. The risk is also, as in this case, that the state can intrude without seeking permission from the owner, and that we, as an invited guest, have accepted that risk by attending social functions.

60. The effect of the risk analysis in a proprietary context means that citizens are shorn from their right to be secure against state intrusion the moment they leave their own dwellings. Their right to be secure will exist only places in which they control, own, or have the ability to exclude others.

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[110] Reasons, Court of Appeal (Doherty), para. 41-45, 54 [Vol. I, Tab 2]

[111] See Stuart, "Unfortunate Dilution", at pg. 70; *Hunter v. Southam*, [1984] 2 SCR 145, p.161; Dawe, "Standing to Challenge", p. 56;

[112] Even with these limitations, the United States Supreme Court recognizes that certain social guests have a reasonable expectation of privacy in the houses to which they are invited, regardless of their ability to exclude; See *Minnesota v. Olson*, 495 US 91 (1990) and Justice Kennedy's concurrence in *Minnesota v. Carter*, 525 US 83 (1998) at 99; See Edwin Butterfoss and Mary Snyder, "Be My Guest: The Hidden Holding of Minnesota v. Carter" (1999) 22 Hamline Law Review 501 at p. 502

(iii) Applying Marakah

61. Given that the subject matter of the search was both informational and territorial, the controlling authority is *Marakah*.

62. In *Marakah*, this Court developed a three-part test to determine whether or not an individual's expectation of privacy was objectively reasonable:

- The place where the search occurred;
- The private nature of the subject matter; and,
- Control over the subject matter.

a. <u>The Place of the Search</u>

63. In this case, the place of the search was private. Not only was it the perimeter of the home, it was in a fenced area. While it was outside, it was not public. It was an intimate gathering of friends, most of whom had known each other since elementary school. This gathering was more intimate than the gathering in *Wong*, in which the "general public…received an open invitation" to the gambling sessions and strangers were invited into the room.[113]

64. In *Marakah*, this Court confirmed that a reasonable expectation of privacy in places exists on a spectrum.[114] McLachlin C.J. noted:

> I may have a high expectation of privacy in my own phone, which I completely control, a lesser expectation of privacy in my friend's phone, which I expect her to control, and no reasonable expectation of privacy at all if I expect the text message to be displayed to the public. A reasonable expectation of privacy may exist on a spectrum or in a "hierarchy" of places.

65. While the Appellant might have a high expectation of privacy in his own backyard, he had a lesser but nonetheless existent expectation of privacy in his friend's backyard, which he expected Mr. Dixon to control. Mr. Dixon did not invite the police into his backyard that evening, they entered without regard to Mr. Dixon's wishes.

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[113] *R v. Wong*, [1990] 3 SCR 36, para.17, 22
[114] *R v. Marakah*, 2017 SCC 59, para. 29 citing to *R v. Tessling*, 2004 SCC 67 at para. 22

b. The Private Nature of the Subject Matter

66. As stated above, it is difficult to capture the subject matter of a search when the police are on a "fishing expedition." The police entered the backyard and therefore searched the backyard as a space. However, the police were after the identities of the young men, their residencies, their associations, and their activities that night – all of which attract a reasonable expectation of privacy.[115]

67. The police also disturbed the tranquility of the space, the Appellant's (and his friends') right to be left alone.

c. Control Over the Subject Matter

68. Control must be analysed in relation to the subject matter of the search. The cases clearly state that a person does not lose control of information for the purposes of s. 8 simply because another person possesses or accesses it. By sharing a backyard with a perimeter fence with only a few others, the Appellant was not inviting the state to question him or "make better observations" about his behaviour and activities while in the backyard. The Appellant chose to share information about his whereabouts and activities with the individuals in the backyard – not the police. The risk that Mr. Dixon could have, but did not, invite the state into his backyard does not eliminate the Appellant's control over the information that the state could glean from its unlawful entry.

69. All of these factors confirm that the Appellant's subjective expectation of privacy as an invited social guest in his friend's backyard was objectively reasonable.

(iv) Applying Edwards

70. If this Court determines that *Marakah* does not apply and *Edwards* is the only applicable authority, the Appellant submits that he still has a reasonable expectation of privacy in his friend's backyard. As Lauwers J.A. noted, the trial judge's application of the *Edwards* factors

[115] *R v. Marakah*, 2017 SCC 59, para. 20

was not reasonable because it was not purposive.[116] A purposive approach indicates a reasonable expectation of privacy in these circumstances.

71. Lauwers J.A. pointed out that the Appellant's "presence at the time looms large in the contextual reasonable expectation of privacy analysis."[117] As should the invitation by the individual to use the space. Shifting the emphasis from control to presence, and the nature of that presence (for example, an invited social guest), avoids falling into the traps of the risk analysis. It ensures that we carry *Charter* protection with us.

72. This Court in both *Wong* and *Belnavis* acknowledged that those who use property by invitation may have a reasonable expectation of privacy when in that space. In *Wong*, La Forest J. found that invited guests in hotel rooms may not expect their presence to go unnoticed by others in attendance, but that they would still have a reasonable expectation of privacy against the state in those hotel rooms.[118] Similarly, in *Belnavis*, the owner of the car invited the driver (Belnavis) to use it. This gave rise to a reasonable expectation of privacy.[119]

73. The Appellant's position is also distinguishable from Ms. Lawrence, the passenger in the *Belnavis* car. First, Ms. Lawrence did not have personal permission from the owner to use vehicle.[120] In this case, the Appellant had known Mr. Dixon since elementary school and was invited to his townhouse.[121] Second, in *Belnavis*, the owner of the car was not present when the car was stopped and searched. In this case, the occupant was present and did not invite the state's incursion.[122] Finally, there is a diminished expectation of privacy on roadways as compared to private homes. Although discussed under s. 24(2), the majority in *Belnavis* recognized the quality of privacy on a roadway as inherently different than a private home. Cory J. stated that while people can expect privacy in their homes, the same expectation does not attach to vehicles. He noted "vehicular traffic must be regulated, with opportunities for inspection to protect public

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[116] Reasons, Court of Appeal, Lauwers J.A. (dissent) at para. 126-127 [AR, Vol. I, Tab 2]
[117] Reasons, Court of Appeal, Lauwers J.A. (dissent) at para. 126-127 [AR, Vol. I, Tab 2]
[118] *R v. Wong*, [1990] 3 SCR 36, para. 22
[119] *R v. Belnavis*, [1997] 3 SCR 341, para. 19
[120] *R v. Belnavis*,[1997] 3 SCR 341, para. 5
[121] Transcript of Proceedings, pg. 141, [AR Vol. IV, Tab, 27]
[122] Ruling on *Charter* Application, para.24 [AR Vol. I, Tb 1]

safety."[123] He noted that from common experience and for public safety, a reasonable expectation of privacy, as compared to a home, will be greatly reduced.

74. Given the above, under either a *Marakah* or *Edwards* analysis, the Appellant's subjective expectation of privacy was objectively reasonable. The police intrusion onto the property, their observations, and their questioning constituted a search.

5. The Search Unreasonably Intruded on the Reasonable Expectation of Privacy

75. As the search of the Appellant was warrantless, it is presumptively unreasonable. The Crown must prove that the search was authorized by law, the law itself was reasonable, and the manner in which the search was carried out was reasonable.[124] The search in this case was neither authorized by law nor carried out in a reasonable manner.

76. The police entry was unlawful.[125] The *Waterfield* powers do not cover the unnecessary trespass in this case. There was no justification for the invasion: there were no grounds for the entry, no complaints that the young men were trespassing, no indication that property needed protection.[126] When the police arrived at the backyard, these "five young men appeared to be doing nothing wrong. They were just talking."[127]

77. The police had no implied licence to enter the backyard. The implied licence is a narrow power that the Court strictly curtails. It is a doctrine of necessity.[128] In this case, the majority and the dissent agreed that there was no need for the police to enter the property to make contact with

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[123] *R v. Belnavis*, [1997] 3 SCR 341, para. 39

[124] *R v. Marakah*, 2017 SCC 59, para. 51

[125] In the constitutional context, this Court has equated "unlawful" with "not authorized by law". See, for example *R v. Garofoli*, [1990] 2 SCR 1421, para. 66;

[126] See *R v. Mann*, 2004 SCC 52; See *R v. Simpson*, (1993) 12 OR (3d) 182 (CA); As there was no foundation for the police entry, there could be no justification for the police action; See, for example, Transcript of Proceedings, p. 61, 92, 97 [Vol. III, Tab 23], Preliminary Hearing Transcript, Cst. F. Teatero, p. 197 [Vol. I, Tab 18]

[127] Ruling on *Charter* application, para. 16 [Vol. I, Tab 1]; See *R v. Chehil*, 2013 SCC 49, para. 33

[128] *R v Evans*, [1996] 1 SCR 6 at para. 15

the occupier. The police could have communicated with the five young men in the backyard while standing on the other side of the fence.[129]

78. In *Evans*, Sopinka J. confirmed that the police cannot use the implied licence for the purpose of randomly checking private spaces for criminal activity. If this kind of implied licence were allowed:

> The police could enter a neighbourhood with a high incidence of crime and conduct surprise "spot-checks" of the private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock. Clearly, this Orwellian vision of police authority is beyond the pale of any "implied invitation". [130]

79. Sopinka J.'s "Orwellian vision" is a reality in this case. The police entered a high-crime neighbourhood. Despite the absence of grounds, the police conducted a spot check, by walking into Mr. Dixon's backyard. The implied licence cannot condone this kind of "fishing expedition."[131]

80. The Appellant submits that not only was the search not authorized by law, it was not carried out in a reasonable manner. Under this analysis, the Court can consider the intrusion caused by the search on the privacy rights of third parties. As Sopinka J. confirmed in *Thompson*, to ignore these intrusions "would be to ignore the purpose of s.8 of the *Charter*."[132] In this case, the privacy rights of all five young men in the backyard, and particularly, Mr. Dixon (the tenant), were ignored.

B. The Police Breached the Appellant's s. 9 Right

1. A Purposive Approach to s. 9

81. The prohibition of "arbitrary detention" is meant to protect individual liberty against unjustified state interference. Section 9 limits the state's ability to put intimidating and coercive pressure on citizens without adequate justification.[133] While citizens are free to do as they please absent a valid law to the contrary, the police can only act to the extent that the law empowers

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[129] Reasons, Court of Appeal, Doherty J.A., at para. 30 [Vol. I, Tab 2]
[130] *R v Evans*, [1996] 1 SCR 6, para. 20
[131] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 107
[132] *Thompson*, [1990] 2 SCR 1111, para. 112
[133] *R v. Grant*, 2009 SCC 32, para. 20

them.[134] Section 9 protects young people, like those in this case, from being harassed by "overly zealous elements in any police force."[135] In *Mann,* Iacobucci J. noted the Courts must protect against the "potential for abuse inherent in such low-visibility exercises of discretionary power."[136]

82. The majority and the dissent agreed that a detention did take place. Their disagreement is solely one related to timing. The majority accepted the trial judge's analysis that the detention only occurred when Cst. O'Toole asked the Appellant about the contents of his bag.[137] The dissent determined that the Appellant was under psychological detention as soon as the police "suddenly and without seeking permission barged into the backyard of the townhouse."[138]

83. In this case, the ss. 8 and 9 breaches overlap. The Appellant submits that his detention in the backyard was arbitrary. Cst. O'Toole derived his suspicion from the officers' violations of the Appellant's rights. The Appellant also submits that whether or not an individual is detained is an objective test. Based on that objective test, Lauwers J.A. correctly determined that the police detained the Appellant as soon as they entered the backyard.

2. The Detention Was Arbitrary

84. Regardless of when the detention arose, either at the police entry into the backyard or when the police directly engaged the Appellant, it was arbitrary.[139]

85. The police would not have been able to make the observations of the Appellant "blading" and any apparent nervousness but for their search in the backyard. As a result, the Court should discount any "objectively discernable facts" that Cst. O'Toole gleaned once in the backyard.[140]

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[134] *R v. Mann*, 2004 SCC 52, para. 15
[135] *R v. Belnavis*, [1997] 3 SCR 341, para. 65, per La Forest, J. in dissent
[136] *R v. Mann*, 2004 SCC 52, at para. 18
[137] Reasons, Court of Appeal, Doherty J.A., para. 61-62 [Vol. I, Tab 2]
[138] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 139 [Vol. I, Tab 2]
[139] Just as the police had no reason to enter the backyard, the police had no reason to detain the Appellant upon entry. Transcript of Proceedings, pp. 92 [Vol. III, Tab 23], p. 166, 193 [Vol. III, Tab 24]
[140] *R v. Cote*, 2011 SCC 46 at para. 62

Just as warrants based solely on information gleaned in violation of the *Charter* are invalid, the police cannot use their illegal acts to conjure up grounds for suspicion.[141]

86. Not only was there a temporal and contextual connection between the s. 8 breach and Cst. O'Toole's suspicion – there was a causal connection as well. The police entry into the backyard *created* the facts that led Cst. O'Toole to suspect the Appellant was armed. The trial judge made two findings in this regard. First, he found that the Appellant had been facing the officers "when they came into the backyard, but at [the] point [that he was engaged by Cst. O'Toole], he was turning his right side toward the building."[142] Second, the Appellant "*began*" behaving nervously when the police entered the yard.[143] It was the police entry itself that caused the Appellant to behave in the manner that he did.

87. Should the Court determine that there was no s. 8 breach, the Appellant submits that he was nonetheless arbitrarily detained at the point the police entered the backyard.

3. Detention is an Objective Test

88. The test for detention is objective.[144] The Court's focus will be on "the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.[145] An objective assessment is important because the police must know the point at which citizens require information about and implementation of their other *Charter* rights.[146]

89. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of liberty of choice, the Court may consider:

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance;

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[141] See *R v. Kokesch*, [1990] 3 SCR 3; See also, *R v. Gonzales*, 2017 ONCA 543 at para. 165
[142] Ruling on *Charter* Application, para. 32 [AR Vol. I, Tab 1]
[143] Ruling on *Charter* Application, para. 5, 119 [AR Vol. I, Tab 1]
[144] *R v. Grant*, 2009 SCC 32, para. 31-32
[145] *R v. Grant*, 2009 SCC 32, para. 31-32
[146] See Binnie J. concurring opinion in *Grant*, paras 153-165

maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.[147]

90. Regarding the circumstances giving rise to the encounter, the Appellant asks this Court to consider the following:

- The police in this case were not providing the parties in the Dixon backyard with general assistance, nor were they maintaining general order. While there was no particular occurrence at play, the police were conducting investigations into potential criminality. In doing so, three officers singled out five young men who were "just talking" and "doing nothing wrong" and demanded that they show their identification;

- Each officer singled out one or two men for investigation. Cst. Reid testified that he engaged Mr. Dixon.[148] Cst. Teatero began speaking with Mr. Aden.[149] Cst. O'Toole entered the yard and started engaging with Mr. Lewis and the Appellant.[150] The investigation of the Appellant resulted in him being asked what was in his bag;

- Prior to engaging with the Appellant, Cst. O'Toole told one of the young men sitting on the couch to put his hands in front of him, and the individual immediately complied.[151]

91. In relation to the second factor, the nature of the police conduct, this Court should consider the following:

- The police officers entered into a private backyard without permission; This was an indication that boundaries were meaningless to the police;

- The police were physically between the young men and the backyard's outdoor exit;[152]

- This was not a circumstance where the young men largely outnumbered the police. There were three police officers in the backyard area;

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[147] *R v. Grant*, 2009 SCC 32, para. 44
[148] Ruling on *Charter* Application, para. 28 [AR, Vol. I, Tab 1]
[149] Ruling on Charter Application, para. 27 [AR, Vol. I, Tab 1]
[150] Ruling on Charter Application, para. 29 [AR, Vol. I, Tab 1]
[151] Ruling on Charter Application, para. 19 [AR, Vol. I, Tab 1]
[152] Reasons, Court of Appeal Lauwers J.A. (dissent), para. 140; See also, for example, Preliminary Hearing Transcript of Cst. F. Teatero, p. 203 [AR, Vol. I, Tab 18]

- Both the Appellant and Mr. Dixon testified that they had assumed that the backyard was private. This makes the detention more obvious than a regular street-check. In a regular street-check or "community policing" detention, the police stop the individual from going from A to B. In this case, the concept that the Appellant was "free to walk away" is less meaningful. He was already in a private space that should not be subject to state interference;

92. In relation to the third factor, the particular characteristics of the individual, this Court should consider the following:

- The Appellant and his friends were all young men. The Appellant, at 20-years-old, was the eldest in the group;
- The Appellant and his friends were all members of visible minorities;
- The Appellant is small in stature. At the time of the detention he was roughly 5'5 and 140 lbs.[153]

93. A reasonable person in these circumstances would feel detained when the police entered into the backyard. Given that the test is objective, the Appellant's subjective belief as to his detention is a non-determinative factor. Despite the objective nature of the test, however, the majority of the Court of Appeal erroneously determined that the Appellant's testimony regarding his detention was conclusive of his *Charter* rights. Accordingly, it ignored the objective factors weighing in favour of detention. This puts too high a premium on the citizen's limited understanding of his rights. It also tips the analytic scale toward the police in these encounters.

94. The Appellant's testimony that he "didn't really need to stay around"[154] must be understood in context. The Appellant testified that he did not need to stay around at a specific period in time, not for the whole time that the police were in the backyard.[155] Contrary to the majority of the Court of Appeal, the Appellant testified that when he was dealing directly with the officers he did not feel that he, or anybody in the backyard could walk away. As soon as Cst. O'Toole engaged with the Appellant directly, he said he was unable to leave.[156]

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[153] Transcript of Proceedings, p. 169 [AR, Vol. IV, Tab 27]
[154]Ruling on *Charter* Application, para. 87 [AR, Vol. I, Tab 1]; Transcript of Proceedings, p. 157 [AR, Vol. IV, Tab 27];
[155] Transcript of Proceedings, p. 157 [AR, Vol. IV, Tab 27]
[156] Ruling on *Charter* Application, para. 87 [AR, Vol. I, Tab 1]; Transcript of Proceedings, p. 157 [Vol. IV, Tab 27]

95. Focusing exclusively on the Appellant's belief as to whether he could leave the backyard is of limited value. A member of the public should not be forced to correctly gauge whether the police are going to let them walk away in order to benefit from their *Charter* rights. The Appellant's testimony should be assessed in the context of his version of events. Even on the Appellant's version of events, it is clear that despite his belief, he was not free to walk away. He testified that before Cst. O'Toole directly engaged him, he believed he could exit the backyard by going through the door in the house. On his testimony, the Appellant attempted to step into the door of the house. He only took "half a step" because Cst. O'Toole grabbed his arm and pulled him out from the doorway.[157] Therefore, the Appellant's subjective belief was met with a response from the police that the Appellant was incorrect – he had to stay put and answer police questions. In other words, the Appellant's belief that he could walk away, and was therefore not detained, was patently wrong.

96. Making the rights claimant's subjective belief decisive on a s. 9 analysis places the individual in a catch-22. He is, in some ways, forced to "test" police behaviour. If subjective belief is determinative and the individual believes he is free to leave, he does not get the benefit of the rights that arise on detention. At the same time, his avoidance or departure from the interaction may provide police with grounds for reasonable suspicion. Although the police are not to use the exercise of *Charter* rights as the foundation of reasonable suspicion, the fact of the matter is that the assertion of one's right to walk away or avoid the police may itself be taken as evasive and sufficient to ground a suspicion.[158]

97. The majority of the Court of Appeal was wrong to allow the incorrect subjective belief of the Appellant to override the objective factual matrix of wrongful police conduct. The Appellant submits that the circumstances giving rise to the encounter, the nature of the police conduct, and

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[157] Ruling on *Charter* Application, para. 87 [AR, Vol. I, Tab 1]; Transcript of Proceedings, p. 156 [Vol. IV, Tab 27]

[158] For example, "flight" on its own is sufficient to create reasonable suspicion, but asserting one's right to walk away should not be (See *Chehil*, 2013 SCC 49 at para. 31 and 44). This kind of ambiguity works to the advantage of the police, and the disadvantage of racialized youth; See *Grant*, 2009 SCC 32 at para.154; Also see David Tanovich, "Applying the Racial Profiling Correspondence Test", (2017) 64 Crim LQ 359 at 366-367

the particular characteristics of the individuals in the backyard indicate that the police detained the Appellant and his friends as soon as the officers trespassed into the backyard.

C. The Evidence Should be Excluded Under s. 24(2)

98. Together, the *Grant* factors favour exclusion in this case. The Appellant submits that the trial judge erred on the constitutionality of the entry into the residence and his detention. As a result, no deference should be accorded to the trial judge' s. 24(2) analysis.[159]

99. The unreasonable search and detention led to the Appellant's flight, which led to the search of the bag, the arrest and the searches thereafter. But for the initial ss. 8 and 9 breaches, there would be no evidence. The evidence is temporally, causally, and contextually tied to the initial *Charter* breaches.[160]

100. The Appellant submits that having regard to all of the circumstances in this case, the admission of the evidence in the proceedings would bring the administration of justice into disrepute.

(i) The Charter-Infringing State Conduct was Serious

101. The three officers' misconduct in this case rests at the high end of the "scale of culpability."[161] The trespass was reckless *at best*.[162] On a "speculative criminal investigation," police approached the backyard.[163] Once there, they saw a group of young, racialized men just talking – doing nothing wrong. There was no urgency to enter the backyard.[164] They nonetheless took it upon themselves to insert their intimidating presence into a private space as trespassers.

102. The police here were not operating in "unknown legal territory."[165] The privacy of the backyard is not new law.[166] The police in this case understood the backyard to be private

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[159] *R v. Paterson*, 2017 SCC 15, para. 42
[160] See generally, *Pino*, 2016 ONCA 389 at para. 49; *R v. Wittwer*, 2008 SCC 33 at para. 21
[161] *R v. Paterson*, 2017 SCC 15, para. 43
[162] *R v. Paterson*, 2017 SCC 15, para 43, citing, *Grant* at para. 74
[163] Reasons, Court of Appeal, Lauwers (dissent), para. 107 [Vol. I, Tab 2]
[164] Transcript of Proceedings, p. 92 [Vol. III, Tab 23]
[165] *R v. Paterson*, 2017 SCC 15 para. 46
[166] See *R v. Kokesch*, [1990] 3 SCR 3

property.[167] Even if the police were acting in good faith, which the Appellant suggests that they were not, their behaviour could not be described as reasonable.[168] Moreover, these three police officers subjectively knew that they were not to enter onto private property for the purpose of enforcing the *Trespass to Property Act*.[169] The police misconduct in this case was "flagrant."[170]

103. Breaches of third parties' rights also contribute to the "seriousness" calculus. As McLachlin C.J.C. (as she then was) found:

> The police committed a serious breach of the *Charter* in examining Mr. Winchester's iPhone. That this was an infringement of Mr. Winchester's s. 8 right, not Mr. Marakah's, does not detract from its seriousness. Of course, the police also breached Mr. Marakah's s. 8 right directly when, in their search of Mr. Winchester's iPhone, they examined the contents of the electronic conversation between the two men.

The same reasoning applies to the Appellant. That the police entered the *Dixon* residence does not detract from the breaches' seriousness. The breaches still had a direct impact on the Appellant. Further, both the Appellant and his friends' ss. 8 *and* 9 rights were breached. Additional violations will exacerbate the overall seriousness of the police misconduct.[171]

104. Given that the police conducted a warrantless search in the backyard of a home that they knew they could not enter, without even "a scintilla of a hunch,"[172] their misconduct should be classified as serious.

(ii) The Impact on the Charter-Protected Interests of the Appellant was Severe

105. The second *Grant* factor also militates in favour of exclusion in this case. The right to be left alone in private spaces is a manifestation of the purpose behind s. 8. Similarly, the right to be free from arbitrary detention is a crucial facet of our liberty interests.

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[167] See for example, Transcript of Proceedings, pp. 45 [Vol. III, Tab 23]
[168] *Paterson*, at para. 54
[169] Transcript of Proceedings, (Cst.. Reid) pp. 44-45 [Vol. III, Tab 23], (Cst. O'Toole) pp. Transcript of Proceedings, pp. 165-166 [Vol. III, Tab 24], (Cst. Teatero) Preliminary Hearing Transcript of Cst. F. Teatero, pp. 195-197 [Vol. I, Tab 18]
[170] *R v. Harrison*, 2009 SCC 34 at para. 23
[171] See generally *R. v. Calderon*, 188 CCC (3d) 481, at para. 93;
[172] Reasons, Court of Appeal, Lauwers J.A. (dissent), at para. 107

106. First, the trial judge erroneously concluded that the impact of any breach of the Appellant's *Charter* rights was insignificant because the Appellant did not make inculpatory statements or provide the police with incriminating evidence that they would not have otherwise discovered.[173] This is incorrect. The police entry and detention led to the chase, arrest and the search thereafter. The incriminating evidence would not have been found but for the police misconduct.

107. Second, although the Appellant concedes that privacy rights exist in a hierarchy his ss. 8 and 9 rights were nonetheless significantly impacted.[174] The Appellant does not suggest that his privacy rights in Mr. Dixon's backyard, as a social guest, will always be the same as they would be in his own backyard. However, in this case, Mr. Dixon's and the Appellant's interests aligned. That Mr. Dixon did not invite the police into his backyard exacerbates the impact of the breach. In any event, to argue against exclusion on the basis that the Appellant did not control entry into Mr. Dixon's backyard is to re-invite into s. 24(2) the same risk analysis that this Court distanced itself from in *Duarte, Wise,* and *Marakah.*[175]

108. Third, even if this Court finds that there is a reduced expectation of privacy in one's friend's backyard as compared to one's own, this does not mean that an unjustifiable search is permissible. In *Mann,* Iacobucci J. noted that even minimally intrusive searches should be weighed against the absence of any reasonable basis for justification.[176] In this case, the search was intrusive *and* the police were on a fishing expedition. Five young, racialized men were "doing nothing wrong" in a backyard on a spring evening. The police chose to disturb that tranquility without foundation. This kind of police behaviour is demeaning to the dignity of the Appellant and his friends.[177]

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[173] Ruling on *Charter* Application, para. 107 [Vol. I, Tab 1]
[174] *R v.* Tessling, 2004 SCC 67, para. 22
[175] *R v. Marakah,* 2017 SCC 59, para. 68
[176] *R v. Mann,* 2004 SCC 52 at para. 56
[177] The trial judge did not accept the evidence from the five young men that they were racially profiled that evening. However, The Tulloch Report confirms that there is a prevailing perception that Black communities are over-policed, and these perceptions are "grounded in historical

(iii) Society's Interest in Adjudication on the Merits

109. The Appellant does not dispute that the evidence collected is reliable, physical evidence. It is integral to the Crown's case. The charges are serious. However, as explained in *Grant*, the seriousness of the offence cuts both ways.[178] This case is an opportunity to protect the longer-term repute of the administration of justice and its connection to minority youth. The short-term clamour for admission cannot deafen those concerns.

(iv) Exclusion is Necessary in this Case

110. This Court should not allow the final *Grant* factor to outweigh all other considerations.[179] This is particularly true when the impugned conduct is serious and substantially impacted not only the Appellant's *Charter* rights, but those of his friends.[180] Admission of the evidence in the circumstances of this case would send a message to police forces in racialized and socio-economically disadvantaged neighbourhoods that their baseless intrusions into private spaces are acceptable, so long as they continue to bear fruit. It would amount to condoning the police conduct in this case. Exclusion, on the other hand, will telegraph to the public that the Court takes police misconduct and individual rights seriously.[181]

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reality." See The Honourable Michael H. Tulloch, "Report of the Independent Police Oversight Review", May 31, 2017 (Part II, *Context of this Review,* paras. 25 and 26)

[178] *R v. Grant*, 2009 SCC 32 at para. 84
[179] *R v. Paterson*, 2017 SCC 15, para. 55
[180] *R v. Paterson*, 2017 SCC 15, para. 56
[181] See *R v. McGuffie*, 2016 ONCA 365 at para. 73 (cited in *R v. Paterson*, 2017 SCC 15, para. 55)

PART IV - COSTS AND ORDER REQUESTED

111. It is respectfully requested that the appeal herein be allowed, the evidence seized from the Appellant be excluded, and acquittals entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of April, 2018

Emily Lam

Samara Secter

PART V - TABLE OF AUTHORITIES

Cases	Paragraph(s)
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Legislation

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 8, s. 9, s. 24(2)

Charte canadienne des droits et libertés, partie I de la *Loi constitutionnelle de 1982*, *constituant l'annexe B de la Loi de 1982 sur le Canada (R-U)*, 1982, c 11, art. 8, art. 9, art. 24(2)

Trespass to Property Act, R.S.O. 1990, c. T.21

Loi sur l'entrée sans autorisation, L.R.O. 1990, chap. T.21