SCC File No.: 39481

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

BRIAN JOHN LAMBERT

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener
(Continued)

JOINT REPLY FACTUM OF THE APPELLANTS,
BRIAN JOHN LAMBERT and JAMES ANDREW BEAVER
(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)

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ATTORNEY GENERAL OF ONTARIO

Intervener

SCC File No.: 39480

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

JAMES ANDREW BEAVER

Appellant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

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OVERVIEW

[1] This is the joint reply of the appellants, James Andrew Beaver and Brian John Lambert ("the appellants"), to the intervener factum of the Attorney General of Ontario ("AG Ontario"). It is the appellants' position that:

a. AG Ontario's factum does not comply with this Court's Order granting intervener status, as it raises a new issue by proposing to change the legal test for the threshold requirement of "obtained in a manner." This Court should not consider the argument where it exceeds the scope of the leave granted;

b. If AG Ontario's submissions on revising the temporal, contextual and causal connection test is considered by the Court, the proposed new threshold test should not be adopted; and

c. The application of AG Ontario's proposed test would, on the facts of this case, support the appellants' position – that the impugned evidence was obtained in a manner that infringed or denied their rights and the freedoms guaranteed by the *Charter*.

(1) AG Ontario Impermissibly Raises A New Issue

[2] This Court's October 6, 2021, Order granting AG Ontario leave to intervene explicitly prohibits the interveners from raising new issues, adducing evidence, or otherwise supplementing the record. The longstanding prohibition against interveners raising new issues is reflected in this Court's November 15, 2021, Notice to the Profession and Rule 59(1) of the *Rules of the Supreme Court*.

[3] AG Ontario's factum does not comply with the Order. It introduces a new issue in seeking to overturn and redefine the threshold test under s. 24(2) of the *Charter.* AG Ontario asserts the temporal, contextual and causal test for determining whether there is a sufficient connection between the *Charter* violation and the evidence obtained is unworkable and should be varied by this Court in these appeals.

[4] This is not an issue in dispute between the parties. The respondent explicitly agrees the test for threshold requirement is not at issue.[1] The issue in dispute between the appellants and respondent is whether the police can *sever* a connection by subsequent *Charter*-compliant conduct, not what is needed to establish such a connection in the first place.

[5] Nonetheless, AG Ontario asks this Court to abandon 30 years of consistent jurisprudence going back to *Strachan* affirming evidence is "obtained in a manner" that infringes or denies *Charter* rights where there is a temporal, contextual, or causal connection, or any combination of the three.[2] They ask the Court to adopt an entirely new definition for a "contextual nexus" to require the *Charter*-infringing conduct be part of "the same, specific investigative process."[3]

[6] The hypothetical and jurisprudential examples discussed by AG Ontario demonstrate the chasm between the new issues raised and those at the centre of these appeals. AG Ontario focuses on circumstances where there is no connection at all.[4] In these appeals, however, the presence of an identifiable nexus between the breaches and the statements is uncontested – the live question is whether subsequent *Charter*-compliant police action can sever the connection such that the evidence is no longer obtained in a manner that infringes or denies the appellants' *Charter* rights.

[7] AG Ontario impermissibly introduces a new issue, distracts from the true issues between the parties, and places an unfair burden on them. As such, the appellants assert these submissions should be given no consideration.

(2) The Proposed New Test Should Not Be Adopted

[8] If AG Ontario's argument does not raise a prohibited new issue, their submissions should be rejected because there is no evidence the purported problems with the current test exist in practice or go beyond the theoretical or academic. Furthermore, the proposed revised test:

a. does not promote a broad and purposive interpretation to the *Charter*;

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[1] Factum of the Crown Respondent, paras 73 & 80.
[2] ***R. v. Strachan***, [1998] 2 SCR 980.
[3] Factum of the Intervener, Attorney General of Ontario, filed November 17, 2021 at p. 1, para 1. ["AG Ontario Factum"]
[4] See, for example: AG Ontario Factum, para 9.

b. does not clarify or simply the law or its application; and

c. will encourage more litigation on the threshold question, rather than focusing court resources on the substantive *Grant* analysis.

[9] The existing "obtained in a manner" analysis is not unworkably complex. The flexibility of the current framework gives effect to the provision's broad purpose to protect the integrity of the justice system. The test provides analytical space to consider all potential connections between *Charter*-infringing conduct and evidence obtained. This is essential to ensure judicial consideration of whether the admission of evidence would bring the administration of justice into disrepute is not unduly restricted at the threshold stage of s. 24(2).

[10] Removing temporality as a potential nexus, like the AG Ontario proposes, would not simplify or clarify the threshold assessment. It will complicate litigation and increase the situations where evidence is immunized evidence from judicial scrutiny under s. 24(2). The best protection to the long-term integrity of the justice system is keeping the "obtained in a manner" gateway broad.

[11] None of the cases provided by AG Ontario support a conclusion that, under the current test, there is an epidemic of arbitrary outcomes or excluded evidence without a link to a *Charter* breach.[5] That evidence arises from "human-led investigations,"[6] or good faith exists in the minds of police officers, cannot justify reduced access to a substantive s. 24(2) inquiry. *Grant* already incorporates "real-world practicalities," and guides consideration and "accommodation" of such "imperfections" as factors that may ultimately favour the admission of evidence.[7] "Perversity" of remedial outcomes under *Grant* is not a problem borne out in the actual case law.[8]

[12] AG Ontario's argument forecloses access to the *Grant* analysis if the police have recognized and rectified their wrongdoing. This approach undermines two key purposes of s. 24(2) of the *Charter*: preventing or disincentivizing *Charter* breaches before they happen and ensuring

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[5] AG Ontario Factum, para 6.
[6] See: AG Ontario Factum, para 21.
[7] See: AG Ontario Factum, para 21.
[8] See: AG Ontario Factum, para 21.

meaningful judicial review of their impact once they occur. For example, as was illustrated in *Reilly,* subsequent *Charter*-compliant conduct by police will not mitigate disrepute to administration of justice where the police act contrary to well-established principles governing *Charter* protections. Constricting the gateway to s. 24(2) in a manner preventing full and proper assessment of such breaches undermines the very purpose of the *Charter*.[9]

(3) The Evidence Against The Appellants Must Be Considered Under s 24(2) Regardless Of The Test

[13] Even under AG Ontario's proposed new test, the evidence in this case was obtained in a manner that violated the appellants' *Charter* rights.[10] The statements were "secured as part of the same, specific investigative process in which at least one *Charter* violation occurred."[11] Consideration of the factors proposed by AG Ontario demonstrates:[12]

- *Police had the same tactical purpose and used similar techniques in breaching the Charter and gathering the impugned evidence:* officers unlawfully detained, searched and questioned the appellants for the purpose of transporting them for interrogation by homicide detectives;
- *The same personnel were involved, and no firewalls were attempted:* no personnel changes were made in response to the *Charter*-violating conduct. After discovery of the unlawful detention, the same investigators and interrogators stayed on the file. The two-minute decision to arrest and continue to question the appellants was made by the same primary officer.
- *Interrogating officers did not distance themselves from the breaches or inform the appellants of their existence or consequences:* the appellants were never advised of the police conduct that infringed their *Charter* rights. Instead, officers continued to minimize their change in circumstances and the jeopardy they faced.

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[9] ***R. v. Reilly***, 2021 SCC 38 and ***R. v. Reilly***, 2020 BCCA 369 at paras 77, 83, 84, 138, 146 and 147.

[10] AG Ontario Factum, paras 9 and 21.

[11] AG Ontario Factum, para 9. [Emphasis original]

[12] AG Ontario Factum, paras 9 and 21.

- *There was no opportunity to discuss the breaches with counsel:* having failed to inform the appellants that their rights had been violated, neither was able to seek advice from counsel regarding the impact of those breaches on their continued detention and right to silence.
- *Although improperly detained, the appellants were not released*: the appellants were not released despite officers recognizing the unconstitutionality of their detention.
- *Nature of the evidence sought thereafter:* police sought to elicit incriminating statements from the appellants – a category of evidence that is inherently more difficult to separate from preceding (and, in this case, compounding) breaches.

[14] Collectively, the analysis and factors proposed by AG Ontario operate in favour of finding the impugned evidence was obtained in a manner that violated the appellants' *Charter* rights.

CONCLUSION

[15] The submissions offered by AG Ontario should not be permitted to distract from the questions at issue between the parties to these appeals. Their factum impermissibly expands the appeal and raises a new issue. Any arguments exceeding the scope of the issues between the parties ought not to be considered. Further, the proposed revised test should be rejected as it adds no clarity and operates contrary to the broad and purposive approach required by "obtained in a manner" determinations.

[16] These appeals should remain focused on the s. 24(2) question at issue: whether subsequent *Charter*-compliant state conduct can prevent judicial consideration of whether the admission of subsequently obtained evidence would bring the administration of justice into disrepute, regardless of the multiple *Charter* infringements and pattern of disregard for the appellants' *Charter*-protected rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF NOVEMBER, 2021.

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