File No.

IN THE SUPREME COURT OF CANADA

(On appeal from the Court of Appeal for the Province of Saskatchewan)

BETWEEN:

HIS MAJESTY THE KING

APPLICANT
(Respondent)

- and -

WAYNE LESTER SINGER

RESPONDENT
(Appellant)

APPLICANT'S MEMORANDUM OF ARGUMENT

Pursuant to Subsection 40(1) of the *Supreme Court Act*, RSC 1985, c S-26

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PART I: OVERVIEW AND FACTS

Overview

1. The police receive a complaint of a drunk driver speeding. They find the suspect vehicle, at midnight, sitting on a driveway with its headlights on and its engine running. They have no idea whose driveway this is. Can the police walk on the driveway to investigate the complaint? The Saskatchewan Court of Appeal's answer to that question is 'no.' In fact, if the police step on the driveway, see the driver passed out behind the wheel, knock on the window, and then proceed to open the door to the car and awaken the driver, they will have violated section 8 of the *Charter* so seriously that courts will need to dissociate themselves from police misconduct by entering a stay of proceedings.

2. The Court of Appeal reached this result by focusing on whether the police trespassed on private property. But the right to be secure against unreasonable search and seizure is not restricted in that manner. It seeks to strike a balance between the right of individuals to be left alone and society's interest in safety and security. The Court of Appeal's erroneous approach disregards public safety concerns and raises serious issues of public importance.

3. This Court has emphasized that the purpose of section 8 is to prevent unconstitutional searches before they occur. As a result, in situations such as this, where police in Saskatchewan receive complaints of an impaired driver and find the vehicle idling on a private driveway, they are prohibited from taking meaningful action. This means similar cases will not make their way to the courts, limiting the Crown's ability to revisit these issues within the Saskatchewan appellate system. It is important that this Court intervenes to stem the public safety implications of the Court of Appeal's decision.

Facts

4. At approximately 11 p.m. on March 20, 2019, a member of a Saskatchewan First Nations community called the police to report a crime in progress. Elaine Singer called the police to say

that the respondent was intoxicated and speeding. She described the vehicle to the police.[1] She suspected the respondent may have gone to Rosina Singer's residence.[2] Constables Lapointe and Fisher responded to the complaint.

5. Constable Lapointe attended the residence of Rosina Singer at 11:50 p.m. but the respondent was not there. The officer returned to the townsite and patrolled until she located a vehicle in the driveway of a house matching the description of the vehicle from the call. The truck's engine was running and the headlights were turned on, which caught the police's attention. The truck was readily visible from the public road.[3] The police did not know the respondent lived at that house and only became aware of this fact later.[4]

6. The officers could not see whether anyone was inside the vehicle from their vantage point on the public road. They walked up to the vehicle to investigate the impaired driving complaint. They saw the respondent in the driver's seat, leaning with his head towards the passenger door. Constable Lapointe knocked on the driver's window but did not receive a response. She then opened the driver's door and immediately smelled a strong odour of liquor inside the truck.[5]

7. Constable Fisher opened the passenger door and shook the respondent awake. The respondent appeared sleepy and had red, bloodshot eyes. There was a strong odour of alcohol on his breath. Constable Lapointe told the respondent she suspected he was in care and control of a vehicle with alcohol in his body and required him to provide a sample of his breath into an approved screening device. The officers escorted the respondent to the police vehicle for that purpose. The screening device returned a 'fail' result.[6]

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[1] Transcript of Oral Reasons for Judgment, October 19, 2021, Tab 1A ("Trial Transcript") at T159/20 – 25.

[2] Trial Transcript at T7/11 – 13.

[3] Trial Transcript at T159/27 – 38.

[4] Trial Transcript at T160/1 – 3; T162/41 – T163/1.

[5] Trial Transcript at T159/34 – T160/10.

[6] Trial Transcript at T160/12 – 25.

8. Constable Lapointe testified that without a 'fail' reading, she would not have had grounds to make a breath demand. Constable Lapointe arrested the respondent for having care or control of a motor vehicle with excessive blood alcohol level and read a breath demand in the prescribed form.[7] The officers then took the respondent to the police detachment where, after speaking to duty counsel, the respondent refused to provide a breath sample and was charged accordingly.[8]

9. Constable Lapointe was the Crown's sole witness at trial. The respondent did not testify. He argued the officers violated his rights under Section 8 of the *Charter* when they unlawfully entered his private property. As stated earlier, Constable Lapointe had subsequently learned this was the respondent's residence. Based on that testimony, the trial judge found the respondent had a subjective expectation of privacy in the property surrounding his residence at the time the police entered the driveway.[9]

10. However, the trial judge found the respondent's subjective expectation of privacy was not objectively reasonable. In reaching this conclusion, the trial judge relied on the following findings of fact:

- The vehicle was left running on the driveway and matched the description of a vehicle involved in a reported impaired driving offence;[10]
- The driveway was open to public view and visible from the main road;[11]
- There were no barriers to entry and the respondent did not ask the police to leave.[12]

11. Accordingly, the trial judge found the respondent did not have a reasonable expectation of privacy and dismissed the *Charter* application. Still, he noted that the factors under section 24(2)

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[7] Trial Transcript at T160/27 – 38.

[8] Trial Transcript at T161/23 – 162/9.

[9] Trial Transcript at T162/11 – T163/6.

[10] Trial Transcript at T163/9 – 11.

[11] Trial Transcript at T163/12 – 13.

[12] Trail Transcript at T163/14 – 18.

of the *Charter* would have favoured inclusion of the evidence even if the respondent's rights had been violated.[13]

12. Even though the trial judge did not conduct an analysis under section 24(2), he made factual findings throughout his decision that directly bore on section 24(2) factors such as the seriousness of police conduct and the impact of that conduct on the respondent's privacy interests, including that

- When the officers stepped foot on the driveway, they did not know the property belonged to the respondent;[14]
- The officers' incursion into private property, prior to finding the respondent, was brief and the officers did not search anything beyond the motor vehicle where the respondent was found sleeping or passed out;[15]
- The police did not know where the respondent lived. It was not as if the police had located the suspect vehicle by attending the respondent's address and proceeding to search the property;[16]
- The police were legitimately investigating an impaired driving complaint with nothing but a name and vehicle description to work on;[17]
- The officers were obligated to investigate in order to protect the public from impaired drivers.[18]

<u>The Court of Appeal Found a Breach of Section 8</u>

13. The respondent appealed his conviction to the Saskatchewan Court of Appeal, alleging errors in the trial judge's section 8 analysis. The Court of Appeal agreed. It reasoned that the

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[13] Trial Transcript at T165/3 – 7.

[14] Trial Transcript at T163/14 – 17.

[15] Trial Transcript at T163/18 – 21.

[16] Trial Transcript at T163/23 – 38.

[17] Trial Transcript at T164/39 – 41.

[18] Trial Transcript at T164/41 – 42.

respondent was in a parked vehicle in the driveway of his residence.[19] The doctrine of implied licence did not justify the officers' entry into the driveway because the police intended to gather evidence against the respondent as opposed to simply communicating with him. The officers were trespassing the moment they stepped foot on the driveway.[20]

14. The Crown urged that the issue was not about trespassing but had to do with whether the police conduct amounted to a search within the meaning of section 8. The Court of Appeal responded that the police conduct constituted a "sufficient intrusion on Mr. Singer's privacy to constitute such a search."[21]

15. The Court further reasoned that the search was not justified because there was no evidence the police were concerned with public safety.[22] The police infringed on the respondent's rights to be secure from unreasonable search and seizure by entering the driveway, opening his vehicle and awakening him.[23]

The Court of Appeal Excluded the Evidence

16. When it came to the question of remedy, the Court found the trial judge offered no reasons for his "opinion" that section 24(2) would have favoured the inclusion of evidence, which the Court found to have been "*obiter*" and therefore unworthy of any deference.[24]

17. The Court of Appeal found the *Charter* violation was so serious that the Court needed to distance itself from the police misconduct by excluding the evidence.[25] The trespass was not

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[19] Reasons for Judgment of the Saskatchewan Court of Appeal, 2023 SKCA 123, November 15, 2023, Tab 1C ("CA Reasons") at para 61.

[20] CA Reasons at para 63 – 66.

[21] CA Reasons at para 67.

[22] CA Reasons at para 69.

[23] CA Reasons at para 70.

[24] CA Reasons at para 72.

[25] CA Reasons at para 90.

minor.[26] The respondent was asleep in his truck, parked on his driveway with its doors closed and the officers opened the car doors to gather evidence against him.[27]

18. The police officers did not act in good faith because their actions were contrary to established law in the province,[28] including the Court's own decision in *R v Rogers*.[29] That case held that officers who attend the residence of the registered owner of a vehicle for the purpose of obtaining evidence against the occupant violate section 8 by knocking on the residence's door and observing the condition of the occupant.

19. The Court of Appeal found the police conduct had a serious impact on the respondent's privacy interests and strongly weighed in favour of exclusion of evidence. This was because the police formed grounds for a breath demand by opening the doors to the vehicle, shaking the respondent awake, questioning him and observing signs of impairment – all on the respondent's property.[30]

20. Society's interest in adjudicating the matter on the merits favoured the inclusion of evidence given the reliability of the evidence and the seriousness of the offence. But in the final balance, the Court excluded the evidence and entered an acquittal.[31]

PART II: QUESTIONS IN ISSUE

21. The proposed appeal raises the following issue of public importance concerning police's ability to protect the public against impaired drivers in a manner consistent with constitutional values:

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[26] CA Reasons at para 75.

[27] CA Reasons at para 85.

[28] CA Reasons at paras 87 – 88.

[29] *R v Rogers*, 2016 SKCA 105, leave to appeal to SCC refused, 37249 (20 April 2017).

[30] CA Reasons at paras 91 – 93.

[31] CA Reasons at paras 96 – 100.

A. Does the driver of a vehicle parked in the driveway of a dwelling house have a privacy interest protected by section 8 of the *Charter of Rights and Freedoms* such that police officers responding to a complaint of impaired driving are prohibited from approaching the vehicle, communicating with the driver and observing signs of impairment?

PART III: ARGUMENT

Section 8 Calls for Balancing Individual Liberty Against Society's Interests

22. Section 8 of the *Charter* guarantees the right of individuals to be secure against unreasonable search and seizure. Section 8 protects people, not places. The section is not restricted to the protection of property or the law of trespass.[32]

23. The nature of the place searched does not guarantee the outcome. Previous decisions from this Court demonstrate that a house guest or a passenger may lack a constitutionally protected privacy interest in a dwelling house[33] or a vehicle.[34] The law recognizes a heightened expectation of privacy in the home but as an analytical tool for evaluating the reasonableness of a person's expectation of privacy.[35]

24. Section 8 is fundamentally about values. It involves normative judgments about whether an individual's interest in being left alone must give way to the state's interest to advance goals such as safety, security and suppression of crime.[36] The framework under section 8 is designed to

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[32] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 at pp 158 – 159; *R v Tessling*, [2004] 3 SCR 432 at para 16.

[33] *R v Edwards*, [1996] 1 SCR 128.

[34] *R v Belnavis*, [1997] 3 SCR 341.

[35] *R v Gomboc*, 2010 SCC 55 at para 45; *R v Tessling*, 2004 SCC 67 at para 22.

[36] *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 at pp 159 – 160; *R v Tessling*, [2004] 3 SCR 432 at paras 17 – 18; *R v Wise*, [1992] 1 SCR 527 at pp 533 *f* – 534 *e*; see also *R v S.A.B.*, 2003 SCC 60 at para 43.

give effect to these countervailing interests and therefore considers the totality of the circumstances.

25. The analysis begins by asking whether a particular police investigative technique constitutes a search. The answer depends on whether the investigative technique intruded on an individual's reasonable expectation of privacy over a particular subject matter.[37] A person's subjective expectation of privacy must be objectively reasonable on the totality of the circumstances. To that end, this Court has offered non-exhaustive lists of factors that may apply in a given case.[38]

26. A person may be found to have a diminished expectation of privacy over a subject matter. In such cases, police require lesser justification to conduct a search and may proceed on a reasonable suspicion that a search will uncover evidence of an offence.[39] If police conduct constitutes a search within the meaning of section 8, the question becomes whether the search was reasonable. A search is reasonable if it is according to law, the law itself is reasonable and the search is conducted in a reasonable manner.[40]

27. The proposed appeal involves the Saskatchewan Court of Appeal's error in misreading a Supreme Court decision and applying section 8 in a way that almost exclusively focused on police trespassing on private property.

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[37] *R v Evans*, [1996] 1 SCR 8 at para 11.

[38] *R v Edwards*, [1996] 1 S.C.R. 128 at para 45; *R v Patrick*, 2009 SCC 17 at para 27; *R v Tessling*, [2004] 3 SCR 432 at para 32.

[39] *R v Gomboc*, 2010 SCC 55 at para 20; see also *R v Patrick*, 2009 SCC 17 at para 90 (per Abella J., concurring in the result).

[40] *R v Collins*, [1987] 1 SCR 265 at p 278.

The Saskatchewan Court of Appeal Continues to Misinterpret *R v Evans*

28. Section 8 cases typically turn on whether an individual has a reasonable expectation of privacy over a particular subject matter. The issue is seldom whether police conduct actually intrudes on those privacy interests. This Court's decision in *R v Evans* is one such rare instance.[41]

29. In *R v Evans*, the police concluded a fruitless investigation into residential marijuana cultivation by walking up to a residence and knocking on the door with the intent of smelling the air when the occupant opened the door. When the officers smelled marijuana coming from the inside, they arrested the occupant.

30. There was no question the officers were after something that was inside the house over which the occupant had a reasonable expectation of privacy. In other words, neither the subject-matter of the search nor the occupant's privacy interests were in doubt. The issue was whether the police's seemingly innocuous acts of walking to the door, knocking on the door and smelling the air constituted an intrusion on the occupant's undisputed privacy interests.[42]

31. It was in that limited context that this Court considered police conduct in determining whether a search had occurred within the meaning of section 8. It was in that context that this Court discussed the sanctity of the home, trespassing and the implied licence to knock – a principle that allows members of the public, including the police, to approach a residence and knock on the door for the purpose of communicating with its occupants.[43]

32. This Court held that the principle of implied licence to knock authorized activities that are reasonably associated with communicating with the occupants of a house. Police activities that fall outside this basic purpose constitute an intrusion.[44] The Court concluded that "where the

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[41] *R v Evans*, [1996] 1 SCR 8.

[42] See *R v Evans*, [1996] 1 SCR 8 at paras 12 (per Sopinka J.) and 48 (per Major J., concurring in the result).

[43] *R v Evans*, [1996] 1 SCR 8 at para 13.

[44] *R v Evans*, [1996] 1 SCR 8 at para 15.

police, as here, approach a residential dwelling for the purpose of securing evidence against the occupant, the police are engaged in a 'search' of the occupant's home."[45]

33. The Saskatchewan Court of Appeal has repeatedly missed the essential context of *R v Evans* and reasoned as if determining whether a search occurred depends almost entirely on whether police conduct amounted to intrusion by exceeding the bounds of the implied licence to knock principle.

34. The test for determining whether a search occurred is itself made up of two distinct parts: whether (1) police conduct invades or intrudes[46] (2) on a person's reasonable expectation of privacy.[47] Police conduct usually does not say anything about the existence of a privacy interest.[48] There is an exception. If the police need to trespass in order to get to what they seek, this may indicate that the privacy interest in question is objectively reasonable. But even there, the issue of trespass is only one factor and the court must consider the totality of the circumstances.[49]

35. In misreading *R v Evans*, the Court of Appeal has repeatedly confused police conduct with an individual's privacy interests and treated trespassing and the implied licence to knock principle as determinative factors in finding violations of section 8. As we discuss below, the Court of Appeal's error has serious implications.

36. In the 2016 Saskatchewan Court of Appeal decision of *R v Rogers*,[50] a police officer attended the residential address of the registered owner of a vehicle that was involved in an accident. The officer knocked on the door to the apartment. Mr. Rogers opened the door and slurred his words as he spoke to the officer. He offered to show the damage to his vehicle and

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[45] *R v Evans*, [1996] 1 SCR 8 at para 21.

[46] *R v Patrick*, 2009 SCC 17 at paras 28 and 69.

[47] *R v Patrick*, 2009 SCC 17 at para 27.

[48] *R v Edwards*, [1996] 1 SCR 128 at para 33.

[49] *R v Patrick*, 2009 SCC 17 at para 27, item 4.a.

[50] *R v Rogers*, 2016 SKCA 105, leave to appeal to SCC refused, 37249 (20 April 2017).

exited the apartment for that purpose. He stumbled and staggered as he walked. The police arrested Mr. Rogers whose blood/alcohol readings proved to be significantly above the legal limit.[51]

37. The Saskatchewan Court of Appeal found the police violated Mr. Roger's right to be secure from unreasonable search and seizure. In its view, the case turned on the proper application of the implied licence to knock principle.[52] Having restricted the analysis in that fashion, the Court did not identify the subject matter of the search.[53] It must have assumed the police were primarily interested in searching the house. The Court of Appeal barely mentioned the concept of reasonable expectation of privacy.

38. The Court relied on *R v Evans* to say that when a police officer knocks on the door to a residence for the purpose of securing evidence against the occupant, the officer is conducting a search within the meaning of section 8.[54] The Court interpreted *Evans* as standing for the principle that "exceeding the authority conferred by the implied licence constitutes a 'search.'"[55]

39. The Court did not discuss whether Mr. Rogers had a reasonable expectation of privacy in his appearance or manner of speaking after he opened the door and voluntarily spoke to the officer and showed the officer the damage to his vehicle.

40. The Crown sought leave to appeal *R v Rogers* to this Court. It argued Mr. Rogers had no reasonable expectation of privacy in his manner of talking and walking, which he knowingly exposed to public view when he chose to speak to the officer and walk to his car.[56] It argued that by misinterpreting *R v Evans,* the Court of Appeal created a precedent that stymied police's ability

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[51] *R v Rogers*, 2016 SKCA 105 at paras 6 – 10.

[52] *R v Rogers*, 2016 SKCA 105 at paras 26 and 54.

[53] See *R v Marakah*, 2017 SCC 59 at para 15; *R v Patrick*, 2009 SCC 17 at para 29.

[54] *R v Rogers*, 2016 SKCA 105 at paras 29.

[55] *R v Rogers*, 2016 SKCA 105 at para 34 (emphasis added).

[56] See *R v Tessling*, [2004] 3 SCR 432 at para 40.

to investigate criminal driving and to prevent the danger posed by impaired drivers. A divided panel of this Court declined to grant leave.[57] The Saskatchewan Court of Appeal has now taken the reasoning in *R v Rogers* to new heights.

41. In the case at hand, the Court of Appeal set out to apply *R v Evans* as interpreted by *R v Rogers*.[58] Once again, the Court conducted the analysis as if the case turned on whether the police trespassed on private property by exceeding the limits of the implied licence to knock doctrine. The Court referred to the concept of reasonable expectation of privacy but only by reference to abstract privacy interests in vehicles and houses, despite this Court's instruction that the subject matter of a search must be defined functionally and not just by reference to physical spaces.[59]

42. The Court of Appeal's reasoning may be summarized as follows:

- The respondent did not have a reduced expectation of privacy associated with moving vehicles because his vehicle was parked on the driveway of his house.[60]
- Just as there is no implied invitation for the police to approach the door of a residence and observe signs of intoxication (*R v Rogers*), there is no implied invitation for the police to enter a driveway and gather evidence from the occupant of the property.[61]
- The police officer trespassed the moment she stepped onto the driveway and she continued to intrude on the respondent's reasonable expectation of privacy.[62]
- Neither exigent circumstances nor concerns for public safety justified this intrusion.[63]

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[57] *Her Majesty the Queen v John Scott Rogers*, 37249 (20 April 2017), Moldaver and Côté JJ. dissenting.

[58] CA Reasons at paras 25 – 30.

[59] *R v Marakah*, 2017 SCC 59 at para 15; *R v Gomboc*, [2010] 3 SCR 211 at para 34.

[60] CA Reasons at paras 59 – 61.

[61] CA Reasons at paras 62 – 65.

[62] CA Reasons at paras 66 – 67.

[63] CA Reasons at paras 65, 68 – 69.

- Therefore, the respondent had a subjective reasonable expectation of privacy which was objectively reasonable and the police infringed on the respondent's right to be secure from unreasonable search and seizure.[64]

43. The Crown had urged that the analysis under section 8 was not limited to trespassing on private property. But the Court refused to apply the appropriate framework as laid down by this Court. As it had done in *R v Rogers*, the Court continued to define 'search' almost entirely in terms of trespassing and the intrusiveness of police conduct:

> As the Crown correctly notes, the issue is not whether the police were trespassing, but whether there was a search within the meaning of s. 8 of the *Charter*. If the police had simply walked up the driveway, we would not have concluded that there had been a sufficient intrusion on Mr. Singer's privacy to constitute such a search. However, things changed when they knocked on the window of the truck and, having failed to get a response, opened the door of the truck and roused him. They did so to observe and speak to Mr. Singer for the purpose of gathering evidence against him. That police conduct intruded on Mr. Singer's reasonable expectation of privacy. Walking up the driveway for the purpose of investigating the occupant and doing so by opening the truck's door and gathering evidence was a s. 8 search.[65]

44. The Court's reasoning closely follows that of *R v Evans* as interpreted in *R v Rogers*. From the Court's perspective, the implied licence to knock principle enabled police to walk on the driveway for the purpose of communicating with the respondent. But the police exceeded the bounds of the implied licence doctrine when they began gathering evidence. Their actions of walking up to the driveway for the purpose of investigating and gathering evidence constituted a search.

Defining the Search in Terms of Implied Licence Shaped How the Court Saw the Legality and Reasonableness of the Search

45. The Court's decision to define the search in terms of trespassing private property and the implied licence to knock had serious implications for the second stage of the analysis (whether the search was reasonable). The police were responding to a complaint that the respondent was driving intoxicated and speeding. The fact that they found the vehicle with its engine running on a

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[64] CA Reasons at para 70.

[65] CA Reasons at para 67 (emphasis added).

driveway late at night confirmed that the crime might still be in progress. When the police stepped onto the driveway, their actions fell within the common law[66] and statutory duties[67] of ensuring public safety and stopping or preventing crime.[68]

46. The trial judge found the police's interference with the respondent's rights was not significant.[69] The facts supported that conclusion. The intrusion onto the property, prior to locating the respondent, was brief. The police did not search anything beyond the motor vehicle where the respondent was found sleeping or passed out.[70]

47. The Court of Appeal saw the situation from the perspective of the implied licence to knock principle. Under that principle, the police were not allowed to gather evidence by knocking on the window and opening the door to the vehicle.[71] That narrow perspective misses the point. The police were responding to a complaint of an impaired driver. The suspect vehicle was left running on a driveway late at night. After the police stepped onto the driveway, they saw the respondent asleep or passed out and he did not respond to knocks on the window. Opening the door and shaking the respondent awake were the only reasonable actions the police could have taken.

48. The purpose of section 8 is to balance individual liberty with society's interests in safety, security and suppression of crime.[72] In contrast, the implied licence to knock doctrine is singularly concerned with stopping intrusion into private spaces. It is meant to stop trespassing, to stop the police from even intending to gather evidence on private property.[73] It is a poor substitute when

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[66] R v *Godoy*, [1999] 1 SCR 311 at paras 15 – 16.

[67] *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, s. 18.

[68] See Trial Transcript at T164/39 – 42.

[69] Trial Transcript at T165/1 – 2.

[70] Trial Transcript at T163/14 – 21.

[71] CA Reasons at para 67.

[72] *Hunter v Southam Inc.*, [1984] 2 SCR 145 at pp 159 – 160.

[73] *R v Evans*, [1996] 1 SCR 8 at paras 18 – 21.

it comes to determining a diminished expectation of privacy,[74] which we submit was the case here.[75] By giving the implied licence to knock doctrine an outsized role, the Saskatchewan Court of Appeal's decision almost guaranteed that society's public safety and crime prevention interests would be largely left out of the analysis.

The Court of Appeal's Misapplication of *R v Evans* Raises Issues of Public Importance

49. The Crown is asking this Court to correct the Court of Appeal's endemic misapplication of *R v Evans* and the implied licence to knock principle. The Crown does so for the following reasons, which are of public importance.

50. First, the decision is inimical to the purpose of section 8 in balancing individual rights against public interest and stymies legitimate police efforts in protecting the public. Second, the decision creates a 'sanctuary problem' and provides a way for impaired drivers to escape law enforcement. Third, the resolution of the issue at the Supreme Court is the only way to stem the public safety implications of the Court of Appeal's decision in a timely fashion.

1) The Decision Frustrates Legitimate Police Efforts in Protecting the Public

51. In *R v Rogers* and *R v Singer*, the Saskatchewan Court of Appeal made the implied licence to knock principle the focal point of the analysis and created a niche area of impaired driving jurisprudence that is immune to the balancing exercise at the heart of section 8. In *R v Singer*, the Court considered the state interest in protecting the public, only to say that there was no evidence the police had acted out of concern for public safety in this case.[76]

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[74] The implied licence to knock principle is only concerned with territorial interests, specifically those relating to the home, where privacy interests are presumptively high.

[75] See *R v Wise*, [1992] 1 SCR 527 at pp 533 *f* – 534 *e.*

[76] CA Reasons at paras 65, 68 – 69. Under s. 24(2), the Court recognized that "impaired driving is a serious offence that has a great impact on Canadian society": CA Reasons at para 95.

52. Impaired drivers can be dangerous in a parked vehicle just as they are on public roads.[77] This is reflected in Parliament's decision to treat offences of impaired driving and care and control as one and the same.[78] By ignoring that fact, the Court of Appeal reasoned as if the police had no legitimate interest in the prevention of an ongoing offence in circumstances where the risk of continued driving was a real one. This was contrary to the trial judge's findings.[79]

53. The Court of Appeal's decision needlessly restricts police's ability to intervene and stop impaired drivers. An officer who receives a complaint from a member of the community about a drunk driver and then finds the suspect vehicle idling on a driveway, will either have to turn a blind eye or wait to pursue the vehicle when it re-enters public roads and puts everyone in danger. These are not reasonable options. The police will not be able to obtain a warrant in these circumstances. Aside from time constrains, the police will often have a reasonable suspicion at this stage but not reasonable and probable grounds.

2) The Decision Creates a 'Sanctuary' Problem

54. In *R v McColman*, this Court addressed the 'sanctuary' problem, the idea that impaired drivers may pull onto private property to avoid law enforcement. *McColman* had to do with random sobriety stops under a provincial statute. As this Court noted, if the provincial government wished to authorize officers to conduct random sobriety stops on private property, it could enact laws to that effect.[80]

55. The 'sanctuary' problem comes up again in this case and will continue to pose public safety concerns. There was no evidence the respondent pulled into private property to avoid the police. But the law should not give impaired and dangerous drivers an incentive to try to reach home in order to escape the reach of the law. This would turn the *Charter* into a sword in the hands of impaired drivers as opposed to a shield against unconstitutional police conduct.

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[77] *R v Ndaye*, 2019 ONSC 4967 at para 70.

[78] *Criminal Code*, RSC 1985, c C-46, ss. 3201.11 "Operate," and 320.14(1).

[79] Trial Transcript at T164/39 – T165/2.

[80] *R v McColman*, 2023 SCC 8 at paras 49 – 50.

56. Unlike *McColman*, this case does not involve statutory considerations that would prevent this Court from commenting on the issue and its interplay with the privacy interests under section 8. A car parked in the driveway of a house also sits at the edge of public roads. It is important for this Court to clarify common law police powers when it comes to investigating drunk drivers parked on driveways, particularly in light of the fact that other courts have decided cases involving similar fact-patterns differently.[81]

3) The Issues in This Case Need to Be Resolved at the Supreme Court

57. From its earliest decisions on section 8, this Court emphasized that the fundamental purpose of that section is to prevent unconstitutional searches before they take place as opposed to determining, after the fact, whether the search ought to have occurred.[82] This has significant implications for the proposed appeal.

58. The Court in *R v Singer* found the police misconduct was so serious that the Court had to dissociate itself from that conduct by entering a stay of proceedings.[83] Accordingly, if the police in Saskatchewan receive a complaint about an impaired driver and then locate the vehicle on the driveway of a house, they cannot walk on the driveway and take measures (such as observing or speaking to the driver) that might be construed as gathering evidence. In light of *R v Singer,* the Crown is duty-bound to advise the police not to take any such 'intrusive' actions.

59. The combined effect of *R v Singer* and the preventative function of section 8 will stop comparable cases from reaching trial courts in Saskatchewan. The opportunity to revisit issues in *R v Singer* within the Saskatchewan court system will not come by easily. A hearing in this Court is required.

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[81] *R v Soal*, [2005] OJ No 319 (ONSC), aff'd [2005] OJ No 3543 (ONCA); *R v Lotozky*, 81 OR (3d) 335 (ONCA).

[82] *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at p 160.

[83] CA Reasons at para 90.

Other Issues the Crown Will Argue If Leave Is Granted

60. When it came to the question of remedy, the Court of Appeal stated the trial judge's "opinion" on the matter was "*obiter*" and worthy of no deference.[84] This enabled the Court of Appeal to wipe the slate clean and conduct the analysis under section 24(2) without regard to the trial judge's findings of fact.

61. The Court of Appeal's decision to do so violated a long-established principle of appellate review, which holds that a trial judge's underlying factual findings must be respected absent a palpable and overriding error.[85]

62. The trial judge found no *Charter* violation that would have necessitated an analysis under section 24(2). Still, he stated that the relevant factors would have favoured the inclusion of evidence.[86] This was not surprising. As we noted in our summary of the facts, the trial judge had made factual findings throughout his decision which related to the seriousness of the state conduct and its impact on the respondent's privacy interests. The Court of Appeal ought to have conducted its analysis under section 24(2) from the standpoint of those findings.

63. A trial judge's factual findings do not become worthy of deference on the condition that they tether to the right legal analysis. Findings of fact deserve deference because trial judges are in the best position to make those findings on the evidence they receive first-hand and because they possess expertise in evaluating evidence.[87] The Court of Appeal used the concept of *obiter dicta*, which did not apply here, to sidestep fundamental principles of appellate review.

64. The focus of section 24(2) is societal, aimed at broad effects on the administration of justice.[88] The Court of Appeal's error compounded the problems of a decision that had already

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[84] CA Reasons at para 72.

[85] *R v Grant*, 2009 SCC 32 at para 129.

[86] Trial Transcript at T165/3 – 7.

[87] *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 to 15.

[88] *R v Grant*, 2009 SCC 32 at para 70.

taken a narrow view of *Charter* rights. If granted leave, the Crown will also argue that the Court of Appeal committed errors in its analysis under section 24(2).

65. Given its conclusions on the *Charter* issue, the Court of Appeal did not consider the respondent's only other ground of appeal, which had to do with whether a miscarriage of justice was occasioned given that the Crown's sole witness was present during a conversation between the lawyers and the trial judge. The Court of Appeal has already received submissions on this ground and we do not propose to revisit that issue at the Supreme Court. Depending on the resolution of the proposed appeal, that issue should be sent back to be decided by the Court of Appeal.

PART IV: SUBMISSIONS AS TO COSTS

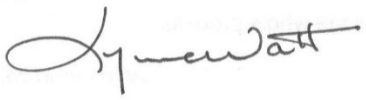
66. The Applicant makes no submissions on the issue of costs.

PART V: ORDER REQUESTED

67. The Applicant respectfully asks that the application for leave to appeal be granted.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of January 2024.



for:

Pouria Tabrizi-Reardigan

Agent of the Attorney General for the Province of Saskatchewan, Counsel for the Applicant, His Majesty the King

PART VI: TABLE OF AUTHORITIES & LEGISLATION

Cases	Cited at Paragraph
Her Majesty the Queen v John Scott Rogers, 37249 (20 April 2017).	40
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320.14(1) ENG – FR	52
Royal Canadian Mounted Police Act, RSC, 1985, c R-10 *Loi sur la Gendarmerie royale du Canada*, LRC 1985, c R-10	
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