S.C.C. File No. 37971

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

BETWEEN:

TOM TUAN LE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Part I – Overview and Statement of Facts

A. Overview

1. The Appellant asks this Court to "rework" twenty years of jurisprudence because he does not like how it applies to him.

2. Unlike digital technology or mobile devices, our backyards have not changed since *Edwards* was decided. There is no need to depart dramatically from the existing law on s. 8 standing to protect the privacy interests therein. Robust *Charter* protections already attach to backyards, their owners, and their owners' guests. These protections ensure that police cannot, without grounds, gather personal and intimate information about the property, the occupants of the home or anyone else with a meaningful connection to the property. These protections also guarantee that guests remain free from unreasonable search of their person or personal property and that they are not arbitrarily detained in another person's space.

3. These robust *Charter* protections do not, and cannot, prevent police, in the execution of their lawful duties, from briefly approaching a group of individuals in full view in an open yard to ask some preliminary questions. The police in this case were not conducting a random spot check. They did not happen upon the young men in the Dixon backyard and decide to confront them on a whim. They were continuing an investigation, which was advanced by their discussion with the security guards on duty that night, into the whereabouts of two individuals wanted for violent crimes. The police were specifically directed to the Dixon backyard, where they had been advised one of these individuals "frequented". The police were entitled – indeed, duty bound – to approach the group of men in the Dixon backyard and investigate.

4. Police approach Canadians at their homes and ask questions every day for a wide variety of reasons. They conduct neighbourhood canvasses to collect information in the wake of local crimes. They chase down leads about where wanted or missing individuals were recently spotted. They gather identification and other information to help solve crimes and protect the communities they are tasked with policing. These day-to-day investigative encounters are critical to their success.

5. The trial judge and the majority of the Court of Appeal for Ontario were applying long-standing and well-established jurisprudence from this Court and appellate courts across Canada when they concluded that the Appellant did not have standing to advance a s. 8 claim respecting police entry into someone else's backyard. The Appellant was a fleeting, one-time visitor, with no means to access the property on his own, no demonstrated past usage of the property, and no ability to control access to the property. By concluding that the Appellant lacked standing to challenge the police entry into the Dixon backyard, the lower courts did not strip him of his *Charter* protections. To the contrary, his right to be free from arbitrary detention in the Dixon backyard, and his right to be free from unreasonable search and seizure of his person and personal belongings after his flight from the Dixon backyard, were fully adjudicated in this case.

6. After careful consideration of these issues, both the trial judge and the majority of the Court of Appeal for Ontario concluded that the safety search of the Appellant's bag was justified and that he was never, at any point, arbitrarily detained. There is no basis upon which this Court should interfere with their conclusions. This appeal should be dismissed.

B. Concise statement of facts

7. On May 25, 2012, two individuals – Nicholas Dillon-Jack and Jermaine Jackson – were wanted by police in connection with violent crimes in downtown Toronto. Around 10:00pm that evening, three officers – Csts. Teatero, O'Toole, and Reid – attended at the Atkinson Housing Co-operative (the "Co-operative"). They spoke to two security guards. The security guards advised that Mr. Jackson had been observed in the area and "frequented" the backyard of a certain address in the Co-operative (the "Dixon backyard"). They further advised that the Dixon backyard was a problem address for drug trafficking.[1] The officers decided to walk through the housing complex to that area.[2]

8. When they arrived at the Dixon backyard, the police observed five young men inside the yard. The three officers walked through an opening in the fence and began talking to the men.[3] Their purpose was to investigate whether any of the young men were Mr. Jackson or knew the

[1] Ruling on *Charter* Application, paras. 9-11 [AR, Vol. I, Tab 2, pp. 88-89]
[2] Ruling on *Charter* Application, para. 12 [AR, Vol. I, Tab 2, p. 89]
[3] Ruling on *Charter* Application, paras. 17-18 [AR, Vol. I, Tab 1]

whereabouts of Mr. Dillon-Jack, and to verify that they were entitled to be in the backyard and not trespassing.[4] Cst. Teatero greeted the young men by saying, "How are you guys doing?" The officers asked whether any of them lived in the townhouse.[5] Some of the men did not respond, while others, including the Appellant, said "No".[6]

9. Csts. Teatero and Reid approached the two young men sitting on the couch, while Cst. O'Toole approached the Appellant and another young man by the patio.[7] Cst. O'Toole first asked the young man standing near the Appellant for identification.[8] He then requested identification from the Appellant.[9] Cst. O'Toole noticed that the Appellant was acting nervous and "blading" his body so as to conceal a bag he was carrying from the view of the officers. This behaviour is characteristic of someone who is armed.[10] The Appellant indicated that he did not have any identification on him. Cst. O'Toole asked, "What's in the bag?", at which point the Appellant immediately fled the yard.[11]

10. The officers yelled for the Appellant to stop and gave chase as he ran down a nearby laneway.[12] Cst. O'Toole caught up to the Appellant and managed to tackle him.[13] An "all out" fight ensued as Cst. O'Toole struggled to keep the Appellant on the ground.[14] As they wrestled, the Appellant tried to reach into the bag, at which point Cst. O'Toole observed the butt end of a gun sticking out.[15] Cst. O'Toole yelled "Gun" and tried to prevent the Appellant from grabbing the gun.[16] The officers were eventually able to subdue the Appellant and handcuff him. When the police searched his bag and his person, they discovered a fully-loaded .45 calibre semi-automatic Ruger pistol with the safety off, 13 grams of cocaine, and $650 in cash.

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[4] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]
[5] Ruling on *Charter* Application, para. 24 [AR, Vol. I, Tab 1]
[6] Ruling on *Charter* Application, paras. 17, 24 [AR, Vol. I, Tab 1]
[7] Ruling on *Charter* Application, paras. 27-29 [AR, Vol. I, Tab 1]
[8] Ruling on *Charter* Application, para. 29 [AR, Vol. I, Tab 1]
[9] Ruling on *Charter* Application, para. 30 [AR, Vol. I, Tab 1]
[10] Ruling on *Charter* Application, paras. 29, 32 [AR, Vol. I, Tab 1]
[11] Ruling on *Charter* Application, para. 30 [AR, Vol. I, Tab 1]
[12] Ruling on *Charter* Application, para. 33 [AR, Vol. I, Tab 1]
[13] Ruling on *Charter* Application, para. 35 [AR, Vol. I, Tab 1]
[14] Ruling on *Charter* Application, para. 36 [AR, Vol. I, Tab 1]
[15] Ruling on *Charter* Application, paras. 37-39, 65 [AR, Vol. I, Tab 1]
[16] Ruling on *Charter* Application, para. 39 [AR, Vol. I, Tab 1]

C. Trial judge's ruling

11. The Appellant's factual guilt was never in issue. However, he applied to exclude the firearm and the drugs under ss. 8, 9 and 24(2) of the *Charter*. In detailed and considered reasons, the trial judge, Mr. Justice Kenneth Campbell, dismissed his application in its entirety.

12. The evidence before the trial judge consisted primarily of the *viva voce* testimony of two of the police officers (Cst. Reid and Cst. O'Toole), the preliminary inquiry transcript of a third police officer (Cst. Teatero) and one of the security guards (Fred Lalley), and the affidavits and *viva voce* evidence of the five young men in the backyard, including the Appellant. The testimony of the defence witnesses differed from the testimony of the police officers in relation to the encounter in the backyard.

13. The trial judge largely favoured the evidence of the officers. For example, he found that Mr. Dixon had manufactured his evidence in order to help the Appellant when he testified that he had immediately identified himself as the occupant of the townhouse and told the police to leave.[17] With respect to the Appellant's evidence, the trial judge concluded:

> The accused was not an impressive or credible witness. I watched him carefully as he gave his testimony and I found him to be cavalier and arrogant. More importantly, I found the substance of his testimony to be largely manufactured and designed to support his *Charter* claims. I did not believe much of his evidence.[18]

1. The police did not violate the Appellant's s. 8 rights

14. In concluding that the Appellant's s. 8 rights were not violated, the trial judge determined that the police were lawfully justified in entering the Dixon backyard by the implied licence doctrine.[19] However, even if they were trespassing, the trial judge was inclined to the view that the Appellant – a "mere transient guest" – had no standing to advance a claim that the purported trespassing violated his s. 8 rights.[20] He noted that virtually none of the criteria set out by this Court in *Edwards*[21] were present in this case, apart from the Appellant's subjective expectation of

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[17] Ruling on *Charter* Application, para. 26 [AR, Vol. I, Tab 1]
[18] Ruling on *Charter* Application, paras. 63-64 [AR, Vol. I, Tab 1]
[19] Ruling on *Charter* Application, para. 66 [AR, Vol. I, Tab 1]
[20] Ruling on *Charter* Application, paras. 81-83 [AR, Vol. I, Tab 1]
[21] *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45 [*Edwards*]

privacy and his presence in the Dixon backyard.[22]

2. The police did not violate the Appellant's s. 9 right

15. In concluding that the Appellant's s. 9 right was not violated, the trial judge carefully set out the law governing a judicial finding of detention.[23] Conducting a thorough contextual analysis, the trial judge rejected the Appellant's argument that he was detained as soon as the police entered the Dixon backyard. He noted that, prior to Cst. O'Toole's inquiry about the contents of the Appellant's bag:

- None of the police officers physically restrained the Appellant;
- None of the police officers made any demand or direction to the Appellant;
- None of the police officers "stopped" or "delayed" the Appellant, who was not in transit at the time of the encounter;
- The Appellant himself believed he was free to leave the backyard area.[24]

16. In light of these circumstances, the trial judge determined that the Appellant was not detained until Cst. O'Toole asked him about the contents of his bag. He viewed that question as one a reasonable person in the position of the Appellant may well have interpreted as a tactical demand or direction.[25] In arriving at this conclusion, the trial judge specifically took into account:

- How the police conduct might reasonably have been perceived by the Appellant, including the fact that one of the investigations they were pursuing concerned activities and/or individuals potentially in the Dixon backyard;
- The nature and duration of the police interaction, including how the police addressed the young men in the Dixon backyard and that one officer told one of the young men to keep his hands in front of his body; and
- The young age and visible minority status of the accused and his friends, including the slight physical stature of the Appellant.[26]

17. With respect to the lawfulness of the detention, the trial judge noted that the officers observed the Appellant acting "very nervous" and "blading" his body to keep the bag on his right

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[22] Ruling on *Charter* Application, para. 82 [AR, Vol. I, Tab 1]
[23] Ruling on *Charter* Application, para. 85 [AR, Vol. I, Tab 1]
[24] Ruling on *Charter* Application, para. 87 [AR, Vol. I, Tab 1]
[25] Ruling on *Charter* Application, paras. 88-90 [AR, Vol. I, Tab 1]
[26] Ruling on *Charter* Application, para. 89 [AR, Vol. I, Tab 1]

hip away from Cst. O'Toole.[27] He was satisfied that based on these observations, which were corroborated by Cst. Teatero, Cst. O'Toole had acquired reasonable suspicion that the Appellant was armed with a gun by the time he was detained.[28]

3. In the alternative, the evidence was admissible under s. 24(2)

18. The trial judge was satisfied that the police conduct in this case did not breach the Appellant's constitutional rights. However, he went on to consider, for the sake of completeness, the admissibility of the evidence under s. 24(2).[29] The trial judge allowed defence counsel to lead evidence through each of the five defence witnesses about their history of police encounters in and around the Co-operative. This evidence was proffered in support of the defence argument that the evidence should be excluded under s. 24(2).[30]

19. The trial judge ultimately found this testimony unhelpful in resolving the issues.[31] He noted that most of the evidence struck him as manufactured: "While the testimony of these defence witnesses was strikingly similar in content, as if they had practiced their evidence in this regard together, it was steeped in the generic description of non-historical events…"[32] He also categorically rejected the proposition that racial profiling had played a role in this incident:

> [I]n the present case, at the end of the day, there is simply no evidentiary basis in support of any potential argument that these three police officers were engaged, consciously or unconsciously, in any exercise of racial profiling. The three police officers who were involved in the investigative activities in the present case were not drawn into the Dixon backyard to communicate with the young men present in that location because there were four black males and one Asian male in that backyard. The evidence is clear that the three police officers were directed to the Dixon backyard for perfectly justified and appropriate investigative purposes. The racial composition of the young men in the Dixon backyard was no more relevant to the investigative aims of the three police officers than the racial composition of the three-man investigative team of police officers.[33]

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[27] Ruling on *Charter* Application, para. 91 [AR, Vol. I, Tab 1]
[28] Ruling on *Charter* Application, paras. 91-93 [AR, Vol. I, Tab 1]
[29] Ruling on *Charter* Application, paras. 105-117 [AR, Vol. I, Tab 1]
[30] Ruling on *Charter* Application, paras. 111-14 [AR, Vol. I, Tab 1]
[31] Ruling on *Charter* Application, para. 114 [AR, Vol. I, Tab 1]
[32] Ruling on *Charter* Application, para. 116 [AR, Vol. I, Tab 1]
[33] Ruling on *Charter* Application, para. 117 [AR, Vol. I, Tab 1] [emphasis added]

20. The trial judge was satisfied that all three prongs of the s. 24(2) analysis favoured admission of the gun and the drugs.[34]

D. Judgment of the Court of Appeal for Ontario

21. The Appellant appealed to the Court of Appeal for Ontario, advancing the same *Charter* arguments rejected at trial.

1. Majority (Doherty J.A., Brown J.A. concurring)

22. Doherty J.A., writing for the majority of the Court of Appeal, dismissed the appeal. He explained at the outset of his reasons that, given the nature of the record in this case, the trial judge was required to evaluate the various witnesses' credibility and make factual findings on the basis of those credibility findings.[35] He set out the deferential standard of review afforded to such determinations by courts sitting in review, noting that an Appellant must demonstrate that they are tainted by legal error, flow from a material misapprehension of the evidence, or fall outside of the range of reasonableness available on the evidence.[36] He also observed that counsel for the Appellant did not challenge the trial judge's credibility assessments. Although he did take issue with several factual findings, he concluded that the Appellant's arguments went "no further than to suggest another interpretation of certain features of the evidence" and, in any event, were not sufficient to demonstrate that the trial judge's interpretation was unreasonable.[37]

23. With respect to the merits of the appeal, Doherty J.A. agreed that the police entry into the backyard did not breach the Appellant's s. 8 rights. Although he questioned whether the implied licence doctrine authorized the entry in this case,[38] he concluded that, even in the event the police were trespassing, the Appellant had failed to establish a reasonable expectation of privacy in the Dixon backyard. His conclusion flowed from both an application of this Court's decisions in *Edwards* and *Belnavis*[39] and a normative assessment of the Appellant's privacy claim.[40] This

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[34] Ruling on *Charter* Application, paras. 106-110 [AR, Vol. I, Tab 1]
[35] Reasons, Court of Appeal, Doherty J.A., para. 7 [AR, Vol. I, Tab 2]
[36] Reasons, Court of Appeal, Doherty J.A., para. 8 [AR, Vol. I, Tab 2]
[37] Reasons, Court of Appeal, Doherty J.A., para. 9 [AR, Vol. I, Tab 2]
[38] Reasons, Court of Appeal, Doherty J.A., paras. 26-31 [AR, Vol. I, Tab 2]
[39] *R. v. Belnavis*, [1997] 3 S.C.R. 341, para. 22 [*Belnavis*]
[40] Reasons, Court of Appeal, Doherty J.A., paras. 32-58 [AR, Vol. I, Tab 2]

determination was supported by the following undisputed facts:[41]

- The Appellant was not an owner or occupant of the Dixon backyard;
- The Appellant did not exercise any control in relation to the Dixon backyard;
- The Appellant established no historical use of or connection with the Dixon backyard;
- The Appellant could not regulate access to the backyard;
- The Appellant did not "hang out on a regular basis" with Mr. Dixon or any of the other occupants of the backyard;[42] and
- At the time of the police entry, the Appellant had only been in the Dixon backyard for about an hour.[43]

24. Noting that the Appellant had advanced an exclusively territorial privacy claim, Doherty J.A. explained that the ability to exercise control is a key factor in assessing a reasonable expectation of privacy in real property.[44] This followed from the normative proposition that "[p]ersonal privacy equates with a person's right to require that the state leave him or her alone".[45] As Doherty J.A. explained: "One cannot realistically talk about a reasonable expectation of privacy in respect of real property without talking about an ability to control, in some way, those who can enter upon, or remain on, the property."[46]

25. Doherty J.A. also agreed with the trial judge that the police had not breached the Appellant's s. 9 right. He found no error in the trial judge's analysis or findings that could be characterized as unreasonable. In particular, he was hard-pressed to characterize the trial judge's determination as to the timing of the detention as unreasonable "when that conclusion reflects the [A]ppellant's own testimony about his perception of when his detention began."[47] Doherty J.A. was also satisfied that the detention – however fleeting – was justified on the basis of the officers' reasonable suspicion that the Appellant was armed: "The [A]ppellant's movements simultaneously

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[41] Reasons, Court of Appeal, Doherty J.A., paras. 41, 48 [AR, Vol. I, Tab 2]; Ruling on *Charter* Application, para. 82 [AR, Vol. I, Tab 1]
[42] Transcript of Proceedings, p. 184 [AR, Vol. IV, Tab 27]
[43] Transcript of Proceedings, pp. 187-88 [AR, Vol. IV, Tab 27]
[44] Reasons, Court of Appeal, Doherty J.A., paras. 37, 45, 49, 52-53 [AR, Vol. I, Tab 2]
[45] Reasons, Court of Appeal, Doherty J.A., para. 52 [AR, Vol. I, Tab 2]
[46] Reasons, Court of Appeal, Doherty J.A., para. 52 [AR, Vol. I, Tab 2]
[47] Reasons, Court of Appeal, Doherty J.A., paras. 61-62 [AR, Vol. I, Tab 2]

aroused the suspicions of two police officers who, based on their training and experience, connected the appellant's movements to the possession of a weapon."[48] In his view, the lawfulness of the police entry into the backyard had no impact on the determination of either the timing of the detention or the arbitrariness of that detention, because the Appellant had failed to establish that any trespass had interfered with any facet of his liberty interest.[49]

2. Dissent (Lauwers J.A.)

26. Lauwers J.A., dissenting, found that "[t]he police entry was an unlawful trespass and this tainted everything that followed."[50] Despite accepting that the police had information that a wanted man had been seen in the Dixon backyard and that the property had been linked to suspected drug trafficking, Lauwers J.A. concluded that the police had entered the property as intruders – on a "fishing expedition" without "even a scintilla of a 'hunch'" "to conduct a random investigation of the backyard's occupants."[51]

27. In Lauwers J.A.'s analysis, the trial judge's application of the *Edwards* factors was problematic because those factors do not, apart from an accused person's presence, arise in circumstances when the accused person is a guest.[52] Rather, in his view, a reasonable expectation of privacy in the Dixon backyard ought to have flowed from the Appellant's "invited presence alone".[53] According to Lauwers J.A., to find otherwise would be to strip the Appellant of his personal *Charter* protections whenever he left his own home.[54]

28. With respect to the Appellant's s. 9 right, Lauwers J.A. concluded that the entry into the backyard and the detention occurred simultaneously and in "profoundly oppressive circumstances".[55] Lauwers J.A. did not address the relevance of the Appellant's own statement that he believed he was free to leave the backyard after the police had entered and began questioning the young men. He further concluded that the detention was "on its face" arbitrary

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[48] Reasons, Court of Appeal, Doherty J.A., para. 66 [AR, Vol. I, Tab 2]
[49] Reasons, Court of Appeal, Doherty J.A., paras. 70-75 [AR, Vol. I, Tab 2]
[50] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 79 [AR, Vol. I, Tab 2]
[51] Reasons, Court of Appeal, Lauwers J.A. (dissent), paras. 107, 110 [AR, Vol. I, Tab 2]
[52] Reasons, Court of Appeal, Lauwers J.A. (dissent), paras. 126-27 [AR, Vol. I, Tab 2]
[53] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 127 [AR, Vol. I, Tab 2]
[54] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 128 [AR, Vol. I, Tab 2]
[55] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 130 [AR, Vol. I, Tab 2]

because the police were not entitled to exercise their investigative powers while trespassing.[56]

29. Despite the gravity of the offences, and the reliability and importance of the evidence obtained by the police to the Crown's case, Lauwers J.A. determined that it should be excluded under s. 24(2).[57] Without addressing the trial judge's express finding that racial profiling had played no role in the police conduct in this case, he concluded that the officers would not have "brazenly entered a private backyard […] in a more affluent and less racialized community."[58]

Part II – Ontario's Position with Respect to the Appellant's Questions

30. The issues as stated by the Appellant are:

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?"

   No. The trial judge and the majority of the Court of Appeal correctly concluded that the Appellant had no reasonable expectation of privacy in the Dixon backyard and therefore had no standing to advance a s. 8 claim.

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

   No. The trial judge and the majority of the Court of Appeal correctly concluded that the Appellant was not detained until the police officers had acquired a reasonable suspicion that he was armed.

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*?"

   No. The trial judge and the majority of the Court of Appeal correctly concluded that all three lines of inquiry under *Grant*[59] favour admission in this case.

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[56] Reasons, Court of Appeal, Lauwers J.A. (dissent), at para. 143 [AR, Vol. I, Tab 2]
[57] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 147 [AR, Vol. I, Tab 2]
[58] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 162 [AR, Vol. I, Tab 2]
[59] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 [*Grant*]

Part III – Statement of Argument

A. The Appellant does not have s. 8 standing

31. The main issue to be decided in this appeal is whether the Appellant has standing to challenge the police's entry into the Dixon backyard. If the Appellant cannot demonstrate that he has standing, his s. 8 claim vanishes – whether or not the police entry into the backyard was a trespass.[60] Both the trial judge and a majority of the Ontario Court of Appeal held that the Appellant did not have standing and that there was no violation of the Appellant's s. 8 rights in this case. The Appellant argues that the majority erred in reaching this conclusion and, in doing so, asks this Court to reject its own longstanding jurisprudence on s. 8 standing.

32. The Appellant's position should be rejected because it:

1. Misconstrues the established law on standing;
2. Obscures the subject matter of the search;
3. Conflates the privacy interests in physical places with the privacy interests in electronic communications;
4. Asserts a bright-line proposition in what is supposed to be a contextual, fact-specific analysis; and
5. Advances an erroneous argument that the Respondent's position incentivizes the police to disregard *Charter* rights.

1. The Appellant misconstrues the established law on standing

33. The Appellant misconstrues the established law on standing by arguing that the test from this Court's decision in *Marakah*[61] applies.

34. *First, Marakah* did not signal a seachange in this Court's general approach to the determination of whether a reasonable expectation of privacy exists. Rather, it applied a refined "totality of circumstances" test from *Edwards* to a novel privacy interest: an accused person's text communications in a third party's phone. The three factors emphasized in *Marakah* – the place

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[60] *R. v. Felger*, 2014 BCCA 34, at para. 47, leave to appeal ref'd [2014] S.C.C.A. No. 120
[61] *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 511 [*Marakah*]

where the search occurred, the private nature of the subject matter, and the control the accused exercised over the subject matter – reflected the specific facts of that case.[62] This Court's discussion of "control" and its significance in the "totality of circumstances" analysis flowed from the nature of the privacy interest at stake: electronic communications.

35. *Second*, and relatedly, the privacy interests in this case are fundamentally different than the privacy interests at play in *Marakah*. Notwithstanding the Appellant's argument – raised for the first time before this Court – that his informational privacy is at issue, this is patently a territorial privacy case. The factors that must be considered in relation to cases about territorial privacy, first enunciated in *Edwards*, are long-standing and well-established. They strike the important balance inherent to all s. 8 claims between an individual's expectation of privacy and the competing, legitimate, collective public interest in law enforcement.[63] And they do not give this particular Appellant, in the specific circumstances of this case, standing to challenge the police entry into the Dixon backyard.

2. The Appellant obscures the subject matter of the search

36. The subject matter of the search, and therefore the nature of the privacy interest at stake, is critical to the standing analysis. The claimant's reasonable expectation of privacy is gauged relative to the specific subject matter of the search. As Doherty J.A. explained below, "[a] reasonable expectation of privacy does not exist in the air or in the abstract."[64]

37. The Appellant confuses this important first step by obscuring the subject matter of the search. Privacy interests may overlap or be multifaceted; however, a disciplined approach to identifying the subject matter of the search is required. Otherwise, there is a risk of losing sight of the rights being protected. Applying a disciplined approach to the standing inquiry, and going in reverse chronological order, the Appellant must be taken to assert three privacy interests: over <u>things</u> (the gun and drugs in his bag); over <u>information</u> about him ("a better look at what was going

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[62] *Marakah*, at para. 24
[63] *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 22 [*Araujo*]; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184-185 [*Cloutier*]; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 46 [*Golden*]
[64] Reasons, Court of Appeal, Doherty J.A., para. 34 [AR, Vol. I, Tab 2]

on",[65] as well as confirmation of his identification and place of residence); and over a place (his acquaintance's backyard). A close examination of his argument reveals that it fails on all three fronts.

a. The Appellant's "things" were seized pursuant to a lawful safety search

38. There is no dispute that the Appellant enjoyed a reasonable expectation of privacy in relation to the "things" at issue in this case – the gun and the drugs. In that important sense, the Appellant's right to be secure against state intrusion did not, as he suggests, cease to exist simply because he found himself in a place he did not control or own.[66] He was not "shorn" of his *Charter* rights upon leaving his own dwelling.[67] While Mr. Dixon could have consented to the police searching the area of his backyard, he could not have consented to the police searching the Appellant's bag or person simply because the Appellant was present in the backyard.

39. However, the Appellant does not – and, in the Respondent's submission, cannot – argue that there was an unreasonable state interference with his expectation of privacy in the contents of his bag. The Appellant does not contest that the gun and the drugs were seized pursuant to a safety search justified by his attempt to flee into the community with a loaded firearm.[68] As the trial judge noted, "[t]he danger to public safety that would have been caused by permitting the accused to run away is self-evident."[69]

b. This is not an informational privacy case

40. The Appellant argues that he enjoyed a privacy interest in the information about him that the police were able to gather or solicit through questioning when they entered the backyard. In

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[65] Appellant's Factum, para. 41
[66] Appellant's Factum, para. 60
[67] Appellant's Factum, para. 60
[68] *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 511, at para. 40 [*Mann*]; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 32-40 [*MacDonald*]; *R. v. Peterkin*, 2015 ONCA 8, at paras. 42-54; 60-62
[69] The trial judge rejected the notion that this Court's decision in *MacDonald* changed the legal threshold for "safety searches" from the traditional "reasonable suspicion" standard to "reasonable and probable grounds," but was satisfied on the facts of this case that the search was justified on either basis. Ruling on *Charter* Application, paras. 98-101[AR, Vol. I, Tab 1].

advancing this argument, he claims – for the first time before this Court – that this is both an informational and territorial privacy case. He contends that the majority of the Court of Appeal erred in failing to appreciate the informational aspect of the alleged search.[70]

41. In the Respondent's submission, neither the majority nor the dissent at the Court of Appeal addressed the Appellant's alleged informational privacy interest because none exists in these circumstances.

42. *First,* the fact that the police obtained general "information" by entering into the Dixon backyard does not transform this into an informational privacy case. Territorial privacy cases always involve some acquisition of "information" – what makes them territorial is that the information flows from an intrusion into a private, physical space. Indeed, as the Appellant recognizes, "the reason territorial privacy is protected is in part because of the information that it discloses."[71] Further, not all information about a person, even if it is obtained from a private space, attracts a reasonable expectation of privacy. In order to be properly characterized as an informational privacy case, the state intrusion must generally yield information close to an individual's "biographical core of personal information", such as "intimate details of [] lifestyle and personal choices."[72]

43. So what information were the police able to gather by entering the backyard in this case? At best, the police gained a slightly better vantage point to view the Appellant and his friends than they would have had from the other side of the fence. None of the "information" gathered by

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[70] Appellant's Factum, paras. 37-43

[71] Appellant's Factum, para. 38; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22 [*Tessling*]

[72] *R. v. Plant,* [1993] 3 S.C.R. 281 (S.C.C.), at pp. 292, 293 [*Plant*]; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46 [*Cole*]. *See e.g. Plant,* at p. 293 (no informational privacy interest in computer records showing residential energy consumption); *Tessling,* at para. 62 (no informational privacy interest in FLIR images showing heat distribution in a house); *R. v. Gomboc,* 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 43 (no informational privacy interest in records of home electricity use).

virtue of that better vantage point revealed anything intimate or personal about the Appellant.[73] To put it bluntly: if this is an informational privacy case, *every* s. 8 case is an informational privacy case.

44. *Second*, the Appellant has not offered any authority for the proposition that a voluntary request for identification or confirmation of residence is, in the absence of a detention, a search for the purposes of s. 8 of the *Charter.* As Code J. explained:

> There is nothing wrong with police officers asking questions, indeed, it is their job to ask questions. It is the power to "detain" that is regulated by s. 9 of the *Charter* and the fact of "detention" then triggers additional rights under s. 10 of the *Charter*. Merely questioning the passengers, short of "detention", does not engage **any** *Charter* rights.[74]

45. Where the police have not detained an individual, there is no compulsory state action in asking him preliminary, non-invasive questions. The individual can refuse to answer. Accordingly, there is no s. 8 search. This is true even where the questions are asked in a private or quasi-private space where a reasonable expectation of privacy arguably could be said to exist, such as a vehicle or a driveway.[75] Thus, even if this Court accepts that the Appellant had some diminished expectation of privacy in Mr. Dixon's backyard, which is disputed, that finding would not convert routine, voluntary questioning in the backyard into a s. 8 search.

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[73] The "information" gathered in this case can be contrasted with the type of deeply private information in which this Court has recognized an informational privacy interest: *see e.g. R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 51 [*Spencer*] (subscriber information corresponding to Internet activity); *Cole*, at para. 58 (Internet browsing history and contents of a hard drive on a computer used for personal purposes); *Marakah*, at para. 33 (text message conversations); *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 63 [*Fearon*] (content of cell phone).

[74] *R. v. Humphrey*, 2011 ONSC 3024, at para. 118 [emphasis added]. *See also R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.); *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.), at para. 19; *R. v. Hall* (1995), 22 O.R. (3d) 289 (C.A.), at paras. 26-28; *R. v. Harris*, 2007 ONCA 574, at paras. 33-44, 38, 42; *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at para. 22

[75] *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.), at para. 19; *R. v. Humphrey*, 2011 ONSC 3024, at paras. 123-125, 130

c. This is a territorial privacy case involving a physical place (the Dixon backyard)

46. As the examination of the Appellant's informational privacy claim above reveals, the majority of the Court of Appeal was correct in concluding that this *is* a case about territorial privacy. The crux of the Appellant's complaint is that the police entry into the Dixon backyard disturbed his zone of privacy and his right to be left alone *in that place*. It caused a rapid chain reaction resulting in him attempting to flee into the community and being discovered in possession of a loaded firearm and a significant quantity of drugs. In order to succeed on this ground of appeal, the Appellant must therefore establish a territorial privacy interest in the Dixon backyard.

3. The Appellant conflates the privacy interests in physical places with the privacy interests in electronic communications

47. In advancing his claim to a reasonable expectation of privacy in the Dixon backyard, the Appellant attacks the ongoing legitimacy of the *Edwards* test for standing. He argues that the emphasis on control among the *Edwards* factors requires "reworking" in light of this Court's recent jurisprudence. In doing so, he conflates the privacy interests in physical places with the privacy interests in electronic communications. This Court should reject his argument because: (a) physical places are not equivalent to electronic communications for s. 8 purposes; and (b) control remains, and should remain, a key factor in assessing a reasonable expectation of privacy in physical places.

a. Physical places are not equivalent to electronic communications

48. In digital information cases, "technological reality"[76] may deprive an individual of the ability to assert exclusive control over his or her personal information by "creat[ing] a record that is beyond our control".[77] As this Court explained in *Vu*, in the context of a computer search:

> The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search.[78]

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[76] *Cole*, at para. 54; *Marakah*, at para. 41
[77] *Marakah*, at paras. 86, 87
[78] *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 24 [emphasis added]

49. Accordingly, a majority of this Court has recently suggested that "control" may play a less determinative role in assessing whether an accused person has established a reasonable expectation of privacy in relation to electronic communications.[79]

50. This justification for a somewhat diminished emphasis on control simply does not apply to physical spaces like a backyard or the activities therein. Unlike electronic communications and mobile devices, backyards – and the privacy interests therein – have not changed since *Edwards* was decided. Nor have the activities that Canadians engage in in our backyards. There is no reason to depart from long-standing law in this area which, by taking a contextual, case-specific approach, and by attaching robust protections to one's reasonable expectation of privacy in one's own home and the curtilage of one's home, already ensures that Canadians can socialize with friends without the fear of unjustified intrusion or supervision.

b. Control remains a key factor in territorial privacy cases

51. As a majority of this Court recently affirmed in *Jones*, a claimant's ability to control and directly regulate access has always been considered particularly salient in territorial privacy cases.[80] This emphasis on control is not inconsistent with a purposive approach to s. 8, nor is it tethered to property law concepts. Rather, it reflects the practical reality that the ability to admit or exclude visitors – including police – coincides with a meaningful choice to be left alone by the state.[81] Put simply, an individual who has no authority to admit or exclude visitors from a physical space cannot, in any real sense, choose to be left alone in that space. As Côté J. recently explained, specifically addressing territorial privacy cases:

> In these traditional circumstances, it is meaningful to speak of direct control, access and choice in the same breath, since relinquishing control and giving others access to the subject matter of a privacy claim may indicate that it is unreasonable to expect privacy in that subject matter.[82]

52. Particularly where an accused person's ability to control a place, or information about them in that place, is not jeopardized by "technological reality", control should remain a key measure of his or her reasonable expectation of privacy. This is entirely consistent with this

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[79] *Marakah*, at para. 39
[80] *R. v. Jones*, 2017 SCC 60, [2017] 2 S.C.R. 696, at para. 40 [*Jones*]
[81] *Jones*, at para. 39
[82] *Jones*, at para. 40

Court's jurisprudence in relation to both territorial and informational privacy claims in the context of non-electronic data or investigative techniques:

> ***R. v. Law***: In determining whether an accused had a reasonable expectation of privacy in the contents of a safe reported stolen, this Court emphasized that keeping financial documents in a locked safe may reflect a choice to keep the information contained therein private.[83]
>
> ***R. v. Buhay***: In assessing the reasonableness of an expectation of privacy in a locked bus station locker, this Court found it relevant that the accused paid a fee for the right to exclusive use of the locker; had the ability to regulate access to the locker; and had control and possession of its contents through possession of the key.[84]
>
> ***R. v. Kang-Brown***: The accused asserted an informational privacy interest in the content of his travel bag that was sniffed by a drug dog. This court found it highly relevant that the accused carried the bag close to his body, did not abandon or leave it unattended, and took steps to control access to it.[85]
>
> ***R. v. Patrick***: In the context of an informational privacy claim over garbage bags set out for collection, a majority of this Court considered it a matter of prime importance that the accused did not manifest any continuing assertion of privacy or control over the bags or the information in them.[86] In *Jones*, citing *Patrick*, this Court noted that "relinquishing control over physical subject matter by putting it out for garbage collection, or by discarding it into a garbage can, may reasonably reflect a meaningful choice to abandon one's privacy interest in that subject matter."[87]

53. This is not to say, as this Court emphasized in *Jones*, that control is an "all or nothing concept[]".[88] The court must take a contextual, fact-specific approach. As the cases listed above demonstrate, a person may not exercise absolute control over something but still establish a reasonable expectation of privacy in it.

c. Emphasis on control does not revive the discredited risk analysis

54. Contrary to the Appellant's submission, emphasizing control in territorial privacy cases does not revive the risk analysis first discredited by this Court in *Duarte*. In *Duarte*, this Court reasoned that while we all bear the risk of the "tattletale" when we speak to others, the risk that the state will *surreptitiously intercept* our oral conversations and *create a permanent recording of*

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[83] *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, at para. 18; *see also Jones*, at para. 40
[84] *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 21 [*Buhay*]
[85] *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 175-176, 178
[86] *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 39 [*Patrick*]
[87] *Jones*, at para. 40
[88] *Jones*, at para. 41

them is a "risk of a different order."[89] In this case, there was no "risk of a different order" that materialized in the police conduct. The risk that the Appellant took in entering his friend's backyard – a space where he lacked control – was the very foreseeable and, indeed, likely possibility that other visitors, potentially law enforcement, would also enter the backyard. There is nothing in this Court's decision in *Duarte* which prevents it from taking into account this common sense "assumption of risk" argument in determining whether the Appellant enjoyed a reasonable expectation of privacy in this case.

4. The Appellant asserts a bright-line proposition in a contextual, fact-specific analysis

55. Perhaps recognizing the inherent frailties in his argument that he himself enjoyed a reasonable expectation of privacy in the Dixon backyard, the Appellant argues that an invited guest should automatically be "cloaked" with the privacy of his host. In doing so, he urges this Court to adopt the dissenting view at the Court of Appeal that an individual's "*invited presence alone* is sufficient to give rise to a reasonable expectation of privacy". There are three reasons this argument should be rejected.

56. *First*, this sort of bright-line proposition is anathema to settled s. 8 standing jurisprudence. The reasonable expectation of privacy is a context-specific concept that is not conducive to unbending rules.[90] The law must be flexible enough to recognize that invited guests come in all shapes and sizes. A long-term romantic partner who sleeps over two weeks of every month is an invited guest, but so is a door-to-door salesperson, a weekly gardener, or a pool maintenance person. Certain invited guests may well establish a reasonable expectation of privacy in another person's private property, depending on whether they can demonstrate an ability to make a

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[89] *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 48 [*Duarte*]. *See also R. v. Wong*, [1990] 3 S.C.R. 36, at p. 48 [*Wong*] where LaForest J. observed that "there is an important difference between the risk that our activities may be observed by other persons, and the risk that agents of the state, in the absence of prior authorization, will permanently record those activities on videotape"; and *R. v. Wise*, [1992] 1 S.C.R. 527 [*Wise*], where this Court distinguished between visual surveillance of a vehicle, which is permissible, and the installation and use of a tracker to allow the police ubiquitous surveillance of the movement of the vehicle.

[90] *R. v. White*, 2015 ONCA 508, at para. 44

meaningful choice to be left alone on that property. While a fleeting, one-time visitor like the Appellant will likely not be successful in asserting a privacy interest, a guest with a demonstrated, significant connection to a place likely will.[91]

57. *Second*, the approach advocated by the Appellant would fundamentally change the law of standing by, in effect, allowing an accused person to make a claim for *Charter* relief on the basis of a violation of another person's rights. This Court decided in *Edwards* nearly two decades ago that in any determination of a s. 8 challenge, the privacy right allegedly infringed must be that of the accused person who makes the challenge.[92] While breaches of third party rights may be relevant at the second stage of the s. 8 analysis, *Thompson* emphasizes that actual or potential infringements of third party rights must be "massive" in order to be constitutionally relevant to an accused's s. 8 claim.[93] Moreover, s. 8 of the *Charter* is all about balance.[94] It does not singularly protect an individual's expectation of privacy without consideration of competing, legitimate, collective state interests.[95] A rule against vicarious standing strikes the necessary balance between the vindication of the accused person's rights and the substantial social cost that attends the widespread exclusion of relevant and reliable evidence against those accused of crimes.[96]

58. *Third*, there is no normative justification for a categorical rule such as the one proposed by the Appellant and the dissenting judge at the Court of Appeal. Respectfully, the dissenting view of the Court of Appeal rested on faulty foundations. In concluding that the Appellant's status

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[91] *See e.g. R. v. Beaulieu*, 2013 BCSC 2525, at paras. 57-65 (occupant's brother who had key to apartment, stayed there one week a month, and kept personal items there has reasonable expectation of privacy, despite not paying rent); *R. v. Leong*, 2011 ONSC 3215, at paras. 20-23 (accused persons who came and went from property on their own, likely possessed keys, and were present at time of search have a reasonable expectation of privacy); *R. v. Odette*, 2013 ONCJ 62, at paras. 4-11 (accused person temporarily housesitting for his mother, in possession of a key, and present at time of search has a reasonable expectation of privacy).

[92] *Edwards*, at paras. 34-35

[93] *R. v. Thompson*, [1990] 2 S.C.R. 1111, at p. 1143

[94] *Araujo*, at para. 22; *Cloutier*, at p. 184-185; *Golden*, at para. 46

[95] *Cloutier*, at p. 183

[96] *Alderman v. United States*, 394 U.S. 165 (1969), at p. 174-75; *Rakas v. Illinois*, 439 U.S. 128 (1978), at p. 137

as an invited guest was alone sufficient to give rise to a reasonable expectation of privacy, Lauwers J.A. observed that any contrary conclusion would lead to two "intolerable" propositions. First, that Mr. Dixon would have full *Charter* protections while his guests "had none"; and second, that the Appellant left his personal *Charter* protections at home.[97] These propositions, if true, would indeed be intolerable. Yet the Appellant – like any other invited guest – enjoyed a whole host of *Charter* protections in the Dixon backyard that night, including *inter alia*: the right to be free from the unreasonable search and seizure of his person and his personal belongings; the right to be free from arbitrary detention in another person's space; the right to counsel upon investigative detention or arrest; and the right to silence in his subsequent dealings with police.

5. The Appellant advances an erroneous argument that the Respondent's position incentivizes the police to disregard *Charter* rights

59. Contrary to the Appellant's submission, the Respondent's position does not incentivize the police to disregard the *Charter* rights of homeowners or their guests.

60. Robust protections *already exist* to ensure that police do not unlawfully intrude on private property. It is well-established, for example, that police are not entitled to conduct warrantless perimeter searches[98] or to approach the entrance of a home under a pretext in order to gain better information about the inside of the house when the occupant opens the door.[99] The police must abide by these constitutional constraints whether or not there are guests present.

61. The Appellant's concern presumes the police will disregard their constitutional obligations in circumstances where they anticipate that the targets of their investigations will not have standing to challenge their conduct. This presumption is unfounded and belied by experience. In the 20-year wake of *Edwards*, police have not engaged in any widespread practice of unlawfully searching homes looking for incriminating evidence left behind by visitors. Nor has it been "open season" for unlawful police vehicle searches in the 20 years since a majority of this Court applied the *Edwards* factors in *Belnavis* and held that passengers will not always have standing to challenge the lawfulness of a vehicle search.

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[97] Ruling on *Charter* Application, para. 128 [AR, Vol. I, Tab 1]
[98] *R. v. Kokesch*, [1990] 3 S.C.R. 3 [*Kokesch*]; *Plant*; *R. v. Wiley*, [1990] 3 S.C.R. 263 [*Wiley*]; *R. v. Grant*, [1993] 3 S.C.R. 223 [*Grant (1993)*]
[99] *R. v. Evans*, [1996] 1 S.C.R. 8 [*Evans*]

6. Application to this case

62. As set out above, the Appellant must establish a privacy interest in the Dixon backyard to succeed on this ground of appeal. While the Respondent maintains that the Appellant's connection to the Dixon backyard was extremely tenuous, it does not dispute that he had a direct interest in the yard by virtue of his presence at the time of the alleged search. The Respondent also does not dispute that the Appellant testified to a subjective expectation of privacy in the Dixon backyard.[100] However, for the reasons set out by the trial judge and the majority of the Court of Appeal, following this Court's decisions in *Edwards* and *Belnavis*, the Appellant's subjective expectation of privacy was unreasonable in the circumstances of this case.

63. The Appellant was "a mere transient guest in the Dixon backyard".[101] He did not testify to having visited the property before, or storing personal items there, or having any means of accessing it independently. At the time of the encounter with the police, he had only been in the backyard for about an hour. There was no evidence that he had any relationship with the Dixon family which would establish some special access to or privilege in relation to the backyard. There was no evidence that he was able to exercise any control over or ability to regulate access to the Dixon backyard. The Appellant's presence in the yard is virtually the only *Edwards* factor favouring a reasonable expectation of privacy. Presence at the time of a search is only one of many factors to be considered and does not, without more, establish a reasonable expectation of privacy.[102] Had the Appellant been present alone in the yard, that might have suggested a certain degree of privilege in relation to the property. But he was not. He was present with the occupant and other guests.

B. <u>If the Appellant has standing, the "search" was reasonable</u>

64. If this Court disagrees with the Respondent's submission and concludes that the Appellant has standing in relation to the Dixon backyard, the Respondent submits that any "search" in this case was reasonable.

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[100] Ruling on *Charter* Application, para. 81 [AR, Vol. I, Tab 1]
[101] Reasons, Court of Appeal, Doherty J.A., at para. 41 [AR, Vol. I, Tab 2], quoting Ruling on *Charter* Application, para. 81 [AR, Vol. I, Tab 1]
[102] *Edwards*, at para. 45; *R. v. Reid*, 2016 ONCA 944, at paras. 14-18; *R. v. Murray #1*, 2018 ONSC 3053, at paras. 21-22

1. Any reasonable expectation of privacy was diminished

65. The reasonableness of the police conduct should be considered in relation to the nature of the privacy interest at stake. Here, there can be no dispute that any reasonable expectation of privacy in the Dixon backyard was exceedingly diminished. Even an owner's privacy interest in the perimeter of his or her home has been said to be "diluted".[103] In this case, the following factors further diminished any expectation of privacy:

- The backyard was surrounded by a waist-high wooden fence over which anyone approaching the backyard could see and hear any activity within the yard.[104] The expectation of privacy is low in an "open area visible to the public".[105]

- The backyard was adjoined to and accessible from a public, paved footpath which cut through the center of the housing complex.[106] Mr. Dixon, the occupant of the townhouse, testified that anyone wishing to visit his home could use either of the doors to the residence ("You can just come to the front or just knock at the back").[107]

- The trial judge found there was no make-shift gate or obstruction at the entrance way to the fence. There was an opening in the fence, providing a walkway from the paved footpath into the backyard. There were patio stones on this walkway leading to the back door of the townhouse unit.[108]

- There was no "No Trespassing" sign or other signage prohibiting entrance by a

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[103] *Tessling*, at para. 22. Notably, this distinction between the inside of a dwelling house and the curtilage of the dwelling house has been recognized in the arrest context. Police must, subject to limited exceptions, obtain a warrant to *enter* a dwelling house to arrest an occupant therein: *R. v. Feeney*, [1997] 2 S.C.R. 13; and s. 529 of the *Criminal Code*. However, several courts have concluded that there is no such requirement where the police make the arrest outside of the home but within the boundaries of the property: *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), leave to appeal ref'd [1997] S.C.C.A. 571 (S.C.C.); *R. v. Webster*, 2015 BCCA 286, at paras. 79-81, leave to appeal ref'd, [2015] S.C.C.A. No. 376; *R. v. Martin*, [2000] O.J. No. 5736 (S.C.J.), at paras. 25-26.

[104] *See* Exhibit #1 (Photo of inside of backyard bottom left entry area) [AR, Vol. I, p. 163]; Exhibit #15 (Contact Photo Sheet #03425) [AR, Vol. II, p. 135]

[105] *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.), at para. 32

[106] Ruling on *Charter* Application, para. 13 [AR, Vol. I, Tab 1]

[107] Transcript of Proceedings, p. 10 [AR, Vol. IV, Tab 26]

[108] Ruling on *Charter* Application, para. 65 [AR, Vol. I, Tab 1]; Exhibit #1 (Photo of inside of backyard bottom left entry area) [AR, Vol. I, p. 163]

member of the public to the backyard.

2. The police lawfully entered the backyard

66. The police were lawfully entitled to enter the Dixon backyard. They were not trespassers or intruders. The testimony of Mr. Dixon and the photos of the rear yard establish that the rear entrance was intended to serve as one route by which the public could approach the residence. Section 3(2) of the *Trespass to Property Act*[109] provides:

> (2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

67. The trial judge's conclusion that the police were authorized to enter the yard by the implied licence doctrine is also justified. The common law recognizes a limited, implied licence authorizing all members of the public on legitimate business, including the police, to approach the entrance of a residence to conveniently and in a normal manner communicate with the owner or occupant. Unless rebutted by some clear expression of intent, the implied licence waives the privacy interest that an occupant might otherwise have in the approach to the door of his or her residence. The implied licence ends at the door.[110]

68. There can be many reasons for police to approach a residence, including – but not limited to – ensuring an occupant's well-being, investigating suspected criminal activity, and preserving the peace. Police attend the residence linked to a vehicle licence plate after reports of impaired driving or a hit-and-run.[111] They canvass neighbourhoods after a crime has been committed to determine if there are any witnesses.[112] They attend at residences in order to serve summonses or subpoenas. In the non-exigent, investigative context, the police may approach a residence

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[109] *Trespass to Property Act,* R.S.O. 1990, c. T.21

[110] *Robson v. Hallett* (1967), 51 Cr. App. R. 307 (C.A.); *R. v. Tricker*, [1995] O.J. No. 12 (C.A.), leave to appeal ref'd (1996), 103 C.C.C. (3d) vi (note); *Evans*, at paras. 6-14; *MacDonald*, at paras. 26-27

[111] *See e.g. R. v. Desrochers,* 2008 ONCA 255, affirming [2007] O.J. No. 1482 (S.C.J.); *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.); *R. v. LeClaire*, 2005 NSCA 165, at para. 20, leave to appeal ref'd [2006] S.C.C.A. No. 63; *R. v. Petri*, 2003 MBCA 1; *R. v. Van Wyk*, [1999] O.J. No. 3515 (S.C.J.), aff'd [2002] O.J. No 3144 (C.A.); *R. v. Grotheim*, 2001 SKCA 116, leave to appeal ref'd [2002] S.C.C.A. No. 17; *R. v. Soal*, [2005] O.J. No, 319 (S.C.J.), aff'd [2005] O.J. No. 3543 (C.A.)

[112] *See e.g. R. v. Van Bui*, 2002 BCSC 289, at paras. 62-64, 67

simultaneously seeking to determine: whether a criminal offence has taken place, whether the occupant is a suspect or a victim, or whether an occupant-suspect is willing to make a statement.

69. There was no dispute in the Court of Appeal that the police are, as a general proposition, entitled to rely on the implied licence to approach a dwelling in order to question its occupants for the purposes of furthering a lawful investigation.[113] Doherty J.A. also appears to accept the trial judge's conclusion that the police officers in this case "clearly had a lawful reason" to enter the Dixon backyard.[114] In contrast, Lauwers J.A. saw no *bona fide* intention to question the occupant of the Dixon backyard.[115] And both the majority and the dissent seem to suggest, although Doherty J.A. does not decide the issue, that entry into the property must be "necessary" in order to be justified under the implied licence.[116]

70. The implied licence is not, as the Appellant submits, a "doctrine of necessity".[117] This submission misconstrues the foundation and scope of the implied licence. It arises by common law and is afforded to all persons, including police officers. It does not find its roots in the

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[113] Reasons, Court of Appeal, Doherty J.A., para. 28 [AR, Vol. I, Tab 2]; Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 103 [AR, Vol. I, Tab 2]. Any literal reading of Sopinka J.'s reasons in *Evans* to the contrary must be reconciled with his approval of *Bushman,* (1968) 4 C.C.C. 17 (B.C.A.C.), and *R. v. Tricker*, [1995] O.J. No. 12 (Ont. C.A.), leave to appeal ref'd (1996), 103 C.C.C. (3d) vi (note), two implied licence cases where police were held to be acting lawfully by entering onto private property in order to question occupants who were likewise clearly suspects. In *Robson v. Hallett* (1967), 51 Cr. App. R. 307 (C.A.) – the seminal English case on the implied licence – the police were "inquiring at a house about a crime that had been committed" (at p. 307). Read contextually, *Evans* stands for a limited proposition: the implied licence to knock cannot be employed as a ruse to gather evidence from the interior of a dwelling which would otherwise require a warrant. In *Evans*, the police specifically attended at the property in order to smell marijuana coming from inside the house and then, upon arriving at the front door, intentionally sniffed the air.

[114] Reasons, Court of Appeal, Doherty J.A., paras. 27-28 [AR, Vol. I, Tab 2]

[115] Reasons, Court of Appeal, Lauwers J.A. (dissent), paras. 107-110 [AR, Vol. I, Tab 2]

[116] Reasons, Court of Appeal, Doherty J.A., paras. 29-30 [AR, Vol. I, Tab 2]; Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 111 [AR, Vol. I, Tab 2]

[117] Appellant's Factum, para. 77

Waterfield ancillary powers available to police. There is no requirement of "reasonable necessity" as there is under the *Waterfield* test. That is not to say the implied licence gives the police unbridled authority to enter onto private property. Their conduct must be consistent with the purpose of the implied licence: to conveniently and in a normal manner communicate with the owner or occupant. Any "trespassory detours"[118] that are inconsistent with that purpose – for example, sniffing smells emanating from inside the house – will fall outside the scope of licence.

71. In this case, the police approached the Dixon backyard with a lawful investigative purpose and conducted themselves in a manner consistent with that purpose. They were continuing an investigation for a fugitive known to frequent the Dixon backyard. They were also aware that the Dixon backyard was known as a "problem area" in relation to suspected drug trafficking. As the trial judge properly concluded, given their professional obligations and this constellation of information, the police were likely duty-bound to attend at this location.[119]

72. Entering into the backyard was consistent with an effort to conveniently and in a normal manner communicate with the occupant. In the course of normal, day-to-day social contact, where an owner or occupant is visible in a yard or curtilage, neighbours cross the property line to socialize; couriers enter to deliver parcels; cottagers dock their boats and meet with their hosts. Mr. Dixon, the occupant, did not ask the police to leave.[120] They did not hear any objection at all to their presence in the yard.[121] This was not a perimeter search; the police did not enter the Dixon backyard to make observations or collect evidence about the property that they could not otherwise have made or seized without a warrant. They did not peer into windows,[122] or sniff exhaust vents,[123] or listen for the sound of unusual activity coming from within the dwelling.[124] There was nothing in the police purpose or conduct that exceeded the scope of the implied licence in this case.

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[118] *R. v. Van Wyk*, [1999] O.J. No. 3515 (S.C.J.), at para. 35, aff'd [2002] O.J. No 3144 (C.A.)
[119] Ruling on *Charter* Application, para. 67 [AR, Vol. I, Tab 1]. *See also Police Services Act*, R.S.O. 1990, c. P.15 (as amended), s. 42
[120] Ruling on *Charter* Application, para. 26 [AR, Vol. I, Tab 1]
[121] Ruling on *Charter* Application, para. 25 [AR, Vol. I, Tab 1]
[122] *Kokesch*, at p. 9; *R. v. Laurin*, [1997] O.J. No. 905 (C.A.)
[123] *Wiley*, at p. 267; *Plant*, at p. 286
[124] *Grant (1993)*, at p. 228

3. The "search" was minimally invasive

73. Any "search" which occurred in this case was minimally invasive of the Appellant's privacy interests. There are both common sense and judicially circumscribed limitations on the level of invisibility an individual can enjoy when they operate in the world. While s. 8 contemplates, to some extent, the notion of "public privacy",[125] it does not insulate an individual from the entirely foreseeable, non-intrusive, and ordinary observations that flow from a brief interaction with law enforcement.[126] The "search" alleged to have occurred here should be contrasted with the state conduct in the following cases from this Court, all of which involved an invasion of privacy on an entirely different order of magnitude:

- In *Duarte*, the state **surreptitiously recorded a private conversation**.[127]
- In the state **surreptitiously recorded private interactions in a hotel room**.[128]
- In *Wise*, the state **surreptitiously monitored the accused's movements over a period of days** by installing a tracking device in his vehicle.[129]
- In *Cole*, the state **reviewed the contents of a computer** used by an employee for personal purposes.[130]
- In *Spencer*, the state obtained subscriber information **linking the accused to his specific online activities**.[131]
- In *Marakah*, the state **reviewed the content of electronic communications**.[132]

74. In this case, the police officers passed through a waist-high fence into a backyard in full view of the public and engaged in routine questioning of the individuals therein. There was

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[125] *Spencer*, at paras. 43-44; *R. v. Ward*, 2012 ONCA 660, at paras. 71-74
[126] *See e.g. R. v. Drakes*, 2009 ONCA 560, at paras. 17-18, leave to appeal dismissed [2009] S.C.C.A. No. 381 (no reasonable expectation of privacy in observations concerning use of a parking spot in underground garage connecting user to specific unit in building); *R. v. Saciragic*, 2017 ONCA 91, at paras. 29-34, leave to appeal ref'd [2017] S.C.C.A. No. 106 (no reasonable expectation of privacy in observations of comings and goings from a unit in a building).
[127] *Duarte*, at para. 34
[128] *Wong*, at para. 5
[129] *Wise*, at paras. 57-58
[130] *Cole*, at para. 5
[131] *Spencer* at para. 2
[132] *Marakah*, at para. 2

nothing surreptitious or "Orwellian" about their conduct. The encounter was extremely brief. Nothing they did revealed any intimate details of the Appellant's lifestyle or touched on the biographical core of his personal information. The notion that this police conduct is comparable to reviewing or surreptitiously recording the Appellant's private conversation, or seizing the contents of his personal computer, or engaging in prolonged surveillance of his movements, or identifying him with specific activities online, stretches the bounds of s. 8 to its breaking point.

C. The Appellant's section 9 right was not breached

75. There is no dispute in this case as to whether a detention occurred. The question is in relation to the timing of the detention and its lawfulness. In the Respondent's submission, the trial judge and the majority of the Court of Appeal were correct in concluding that (1) the Appellant was not detained until Cst. O'Toole's inquiry about the contents of his bag; and (2) the detention, when it did occur, was not arbitrary.

1. The Appellant was not detained until Cst. O'Toole's inquiry about the contents of his bag

76. As the trial judge correctly pointed out, not every police-citizen interaction is a detention. Even where a person is under investigation for criminal activity and is asked questions, the person is not necessarily detained.[133] The encounter must involve "significant physical or psychological restraint."[134] Psychological restraint resulting in detention will only occur when an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist".[135]

77. The court must consider the entirety of a police-civilian interaction to determine if and when a detention crystallized. This inquiry requires balancing the need for the police to freely interact with citizens and the need to ensure that individuals remain free to move about in the community without being arbitrarily prevented from doing so. If the line for detention can be too easily crossed, the ability of police to engage in community policing would be impaired. This

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[133] *R. v. MacMillan*, 2013 ONCA 109, at para. 36; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 23 [*Suberu*]; *Mann*, at para. 19
[134] *Mann*, at para. 19; *Grant*, at para. 26; *Suberu*, at para. 3
[135] *R. v. Therens*, [1985] 1 S.C.R. 613, at para. 57 [*Therens*]; *Grant*, para. 28

Court has observed that "general inquiries by a patrolling officer present no threat to freedom of choice" and should not be susceptible to characterization as a "detention".[136]

a. The Appellant's subjective belief is highly relevant

78. The Appellant argues before this Court, as he did below, that he was psychologically detained the moment the police entered the backyard. This bald statement is belied by his own testimony that:

- after the police request for identification, he **physically opened the door and took a half-step inside** the townhouse;[137]
- he subjectively **believed himself to be free to leave** until the officer, on the Appellant's evidence, physically prevented him from entering the townhouse;[138]
- he **"slapped" the police officer's hand away** when the officer, on the Appellant's evidence, reached for the handbag.[139]

79. The Appellant's evidence does not paint a picture of an individual who has "submit[ted] or acquiesce[d] in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[140] The conduct he describes is not the behaviour of a person who is effectively under the control of police and therefore requires the constitutional protections – including the right to counsel – triggered by a finding of detention.

80. Beyond the Appellant's actions as he described them, his self-professed belief that he was not detained until Cst. O'Toole became focused on his bag weighs heavily against a finding of detention prior to that point. This Court has confirmed that an accused person's subjective belief as to whether or not he is detained is a relevant consideration in the overall analysis.[141] It is not determinative, and it was not treated as such by the trial judge or the majority of the Court of Appeal. Justice Doherty simply noted that he was hard-pressed to conclude that the trial judge's determination as to the timing of the detention was "unreasonable" when it reflected the

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[136] *Grant*, at para. 41
[137] Transcript of Proceedings, p. 156 [AR, Vol. IV, Tab 27]
[138] Transcript of Proceedings, p. 157 [AR, Vol. IV, Tab 27]
[139] Transcript of Proceedings, p. 160 [AR, Vol. IV, Tab 27]
[140] *Therens*, at para. 57
[141] *Grant*, at para. 31

Appellant's own testimony.[142] This flows from the obvious relevance of the Appellant's subjective view to the inquiry as to how a reasonable person *in the circumstances of the accused* would perceive the encounter. The objective nature of this inquiry does not inoculate an accused who chooses to testify against the logical implications of his own statements about the interaction.

81. Ignoring an accused's belief as to whether or not they were detained would detach the s. 9 analysis from its underlying purpose. The interest protected by s. 9 (and s. 10) is the individual's right to make an informed choice as to whether to walk away or speak to the police.[143] In other words, it guards against state compulsion. If the individual subjectively feels that he did, in fact, have the choice to walk away – or, in the Appellant's words, "didn't really need to stay around"[144] – then the interest being protected vanishes.

82. Contrary to the Appellant's submission, giving significant weight to an accused's subjective perception of an encounter does not force them to understand the law in order to benefit from their *Charter* rights.[145] The subjective belief of the accused – whatever it may be – will be given little weight if it has no basis in the objectively discernible circumstances of the police encounter. Nor does it "tip[] the analytic scale toward the police."[146] To the contrary, it ensures that the experience of the individual whose liberty interest is at stake is adequately reflected in the analysis. In the usual case, this evidence will accrue to the benefit of the accused, who will typically testify that they did, in fact, believe themselves to be detained. It would be incoherent for this Court to hold that the subjective belief of the accused person is relevant only where they believed a detention had occurred but not where they believed they were free to go.

b. The trial judge's and the majority's determination as to the timing of the detention is consistent with this Court's jurisprudence

83. The trial judge's and the majority's determination of when the Appellant was detained is consistent with a large body of case law, including this Court's jurisprudence, demarcating the line

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[142] Reasons, Court of Appeal, Doherty J.A., paras. 61-64 [AR, Vol. I, Tab 2].
[143] *Grant*, at para. 20
[144] Transcript of Proceedings, p. 157 [AR, Vol. IV, Tab 27]
[145] Appellant's Factum, para. 96.
[146] Appellant's Factum, para. 93.

between the type of preliminary questioning that occurred in this case and a true detention.[147]

84. *R. v. Grant:* In the seminal case on this issue, *Grant*, a police officer approached Mr. Grant on a sidewalk and blocked his path. He asked "what was going on" and requested his name and address. Mr. Grant provided a provincial health card. He began to behave nervously and adjusted his jacket, prompting the officer to ask him to "keep his hands in front of him". Two other officers approached, flashing their badges and taking tactical adversarial positions behind the initial officer. The officers then asked whether Mr. Grant had been arrested before and whether he "had anything on [him] that [he] shouldn't".[148]

85. This Court held that Mr. Grant was not detained by the officers stopping him and making general inquiries about his name and where he lived. As McLachlin C.J.C. explained, "[s]uch preliminary questioning is a legitimate exercise of police powers."[149] Nor was the directive to "keep his hands in front of him", standing alone, necessarily sufficient to indicate detection. It was only when a constellation of factors coalesced – the officer told Mr. Grant to keep his hands in front of him, the other two officers moved into position, and the officer embarked on a pointed line of questioning – that Mr. Grant's liberty was constrained. McLachlin C.J.C. described the shift as follows:

> The nature of the questioning changed from ascertaining the appellant's identity to determining whether he "had anything that he shouldn't". At this point the encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.[150]

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[147] *See e.g. Grant*, at para. 47; *Suberu*, at paras. 8-11, 30-32; *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.); *R. v. Hall* (1995), 22 O.R. (3d) 289 (C.A.), at paras. 26-28; *R. v. H.(C.R.)*, 2003 MBCA 38, at paras. 15-18, 31-33; *R. v. Daley*, 2015 ONSC 7367, at paras. 114-116. The same analysis has been applied where the accused person is approached by police in a private setting: *see e.g. R. v. Singh, Gunalingam, Jassal*, 2015 ONSC 6345, at para. 30 (questioning in accused's backyard).

[148] *Grant*, at paras. 5-7

[149] *Grant*, at para. 47

[150] *Grant*, at paras. 47-49

86. The detention only crystallized when "[t]he encounter developed into one where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers".[151]

87. *R. v. Suberu:* Similarly, in *Suberu*, the police were called to a liquor store where Mr. Suberu and his acquaintance were suspected of using a stolen credit card. When the police officer arrived, Mr. Suberu attempted to exit the store. The police officer followed Mr. Suberu out of the store and said, "Wait a minute. I need to talk to you before you go anywhere." He briefly questioned Mr. Suberu as he sat in his parked car in the parking lot. The officer asked who he was with, where he was from, why he was in town, and whose van he was driving. He then requested Mr. Suberu's identification and his vehicle ownership documents. This Court upheld the trial judge's conclusion that this encounter was of a "preliminary or exploratory in nature" and that the officer was "orienting himself to the situation rather than intending to deprive Mr. Suberu of his liberty."[152]

88. The interaction in this case closely tracks the encounters in *Grant* and *Suberu*. Until Cst. O'Toole asked the Appellant what was in his bag, virtually none of the hallmarks of a detention were present:

- The police did not single the Appellant out as the object of "particularized suspicion" or take "control over" him in an attempt "to elicit incriminating information."[153]
- The police did not run a criminal record check on the Appellant, ask about his criminal history, or ask him if he "had anything he shouldn't".
- The police did not circle or "herd" the Appellant and his friends.[154]
- The police did not demand that the Appellant do anything with his hands or body.
- The police did not touch the Appellant, handcuff him, or put him in a police cruiser.
- The police did not delay the Appellant for a prolonged period of time. The interaction was fleeting – the entire encounter lasted, by one of the officer's estimation, "less than a minute".[155]

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[151] *Grant*, at paras. 46-52
[152] *Suberu*, at paras. 8-11, 30-32
[153] *Grant*, at paras. 46-52
[154] Ruling on *Charter* Application, para. 65 [AR, Vol. I, Tab 1]
[155] Ruling on *Charter* Application, para. 31 [AR, Vol. I, Tab 1]

89. Prior to the question about the Appellant's bag, the police officers were "orienting" themselves to the situation and engaging in the type of pre-detention exploratory interaction described in *Grant* and *Subaru*. The fact that the police were on private property at the time of encounter does not bear on the timing of the detention. The boundaries of Mr. Dixon's backyard are not coterminous with the Appellant's s. 9 right. As Doherty J.A. explained, "[e]ven if the police were trespassers on the Dixon property, that trespass had no impact on any facet of the appellant's liberty."[156]

2. The detention of the Appellant was not arbitrary

90. The Appellant argues that, regardless of when the detention arose, it was arbitrary.[157] In making this submission, he does not dispute that the police officers acquired, in the course of their interaction with him in the Dixon backyard, reasonable grounds to detain him. Rather, he argues that the police were not entitled to rely on those grounds because they were "temporally," "contextually," and "causally connected" to the unlawful police entry into the backyard.[158] He, in effect, asks this Court to "excise" what he describes as unconstitutionally obtained facts in reviewing the lawfulness of the Appellant's detention.[159]

91. The Respondent disputes the notion that the police were unlawfully present in the backyard or that they breached his s. 8 rights by entering the backyard. However, if this Court disagrees and finds that the detention flowed from a s. 8 breach, the Appellant's remedy rests under s. 24(2). Section 24(2) is the mechanism for ensuring that the admission of evidence obtained in the course of transaction in which the police violated some *Charter* rights but not others is subject to review. It requires the court to examine the entire chain of events or course of conduct leading to the obtaining of the evidence, including any "temporal, contextual or causal" connections between an earlier breach of the *Charter* and any subsequently obtained evidence.[160] Insofar as evidence has been "obtained in a manner that infringed or denied <u>any</u> rights or freedoms", it is susceptible to exclusion at trial.

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[156] Reasons, Court of Appeal, Doherty J.A., para. 72 [AR, Vol. I, Tab 2]
[157] Appellant's Factum, para. 84
[158] Appellant's Factum, paras. 84-87
[159] Appellant's Factum, para. 85
[160] *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235 (S.C.C.), at para. 21

92. It would be unwise for this Court to supplant the function of s. 24(2) by extending the rule of automatic excision, which arises only in the warrant context, to its review of the Appellant's detention.

93. *First*, the Appellant points to no authority for the proposition that an excision-like approach applies in these circumstances, such that a violation of s. 8 renders a related but otherwise non-arbitrary detention unconstitutional. Instead, the Appellant relies on *Kokesch*, *Côté*, and *Gonzales*, all cases in which the impact of improperly obtained evidence is considered under s. 24(2).[161] For example, in *Gonzales*, Watt J.A., writing for the Court of Appeal for Ontario, considered the impact of an arbitrary detention (a vehicle stop) on the lawfulness of a subsequent arrest and vehicle search incident to arrest. Instead of finding that the police were not entitled to rely on grounds obtained during an arbitrary detention to justify an arrest, he explicitly reserved his consideration of the impact of the unconstitutionally obtained grounds to the s. 24(2) analysis.[162] He was satisfied that the arrest and search were lawful, notwithstanding that they were justified on grounds obtained during the arbitrary detention.[163]

94. *Second*, the rule of automatic excision is problematic, even in the narrow context of judicially authorized searches. The doctrinal source of the rule is unclear. No rationale was expressed in *Grant (1993)* beyond preventing the state from benefitting from the illegal acts of police officers without sacrificing otherwise valid search warrants.[164] Justice Code recently noted that the rule does not appear to be based in either the *Charter* or the common law.[165] It is also out of step with how exclusion of evidence is considered under the *Charter*. Unlike under s. 24(2),

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[161] *Kokesch*, at paras. 42-43; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 41-42; and *R. v. Gonzales*, 2017 ONCA 543, at para. 165 [*Gonzales*]

[162] *Gonzales*, at paras. 100, 110, 165

[163] *Gonzales*, at paras. 100-110. By way of contrast, the Respondent accepts that warrantless searches justified on the basis that they are incident to arrest or investigative detention can only be said to be lawful if the underlying arrest or investigative detention is lawful. That is because a lawful arrest or investigative detention provides the "requisite basis in law" for the subsequent search. *See R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, at para. 44; *R. v. McGuffie*, 2016 ONCA 365, at para. 55.

[164] *Grant (1993)*, at p. 245

[165] *R. v. Jaser*, 2014 ONSC 6052, at paras. 28-29

there is no contextual and balanced determination in automatic excision. Even if the improperly obtained facts were obtained as a result of a technical, inadvertent, and minor *Charter* breach, the court would have no choice but to deprive the state of their benefit despite a strongly countervailing public interest. In contrast, the very same evidence would only be excluded at the accused person's trial – where his guilt or innocence is at stake – after a careful balancing under s. 24(2).[166]

95. *Third*, whatever the merits of the rule of automatic excision in reviewing search warrants, a review of police conduct in a *Charter voir dire* involves an inquiry into what the police knew or reasonably should have known at the time of the events. The police cannot be expected to meet the same standards applicable to a review of a judicially authorized search.[167] The cool logic of excision (to the extent it remains relevant under the *Charter*) simply has no place in a court's review of the necessity and reasonableness of police conduct in dynamic and often dangerous situations.

96. *Finally*, it is in the public interest to reserve a consideration of unconstitutionally obtained grounds to s. 24(2). Police should be encouraged to detain individuals who pose a danger to the safety of the officers and the public. This Court has noted that "police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing."[168] They are often called upon to make quick operational decisions, at

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[166] *R. v. Chau*, [1997] O.J. No. 6322 (Gen. Div.), at para. 50, aff'd on other grounds (2000), 150 C.C.C. (3d) 504 (Ont. C.A.). Arguably, this Court's recent determination in *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 20, that an accused's statement may be admitted without proof of voluntariness in the context of a *Charter voir dire* "because of the limited purpose for which the evidence may be used" also militates against adopting an excision-like rule in the circumstances of this case.

[167] *See R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), leave to appeal ref'd [1997] S.C.C.A. 571 (S.C.C.), at para. 18 *per* Doherty J.A. ("Judicial reflection is not a luxury the officer can afford. […] The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.").

[168] *Mann*, at para. 16

times in risky circumstances, on the basis of their on-scene appreciation of the dynamics of an unfolding situation.[169] For this reason, the Court should be particularly wary of "dictating police tactics and techniques in the context of investigations and arrests".[170] There is a strong public interest in the police being empowered to detain someone they have reasonable grounds to believe is armed, even if a subsequent prosecution fails by virtue of s. 24(2).

D. The evidence should be admitted under s. 24(2)

97. If this Court finds a breach of the Appellant's rights, the evidence of the handgun, the cocaine, and the cash should nevertheless be admitted under s. 24(2). This is not a case in which the admission turns on the third *Grant* factor outweighing the other two. All three lines of inquiry under *Grant* favour admission, rather than exclusion.

98. Even in cases where the reviewing court finds a *Charter* breach when the trial court did not, deference is owed to the underlying factual findings made by the trial judge absent palpable and overriding error.[171] In particular, an appellate court is not entitled to recharacterize the evidence regarding the police conduct in such a way that it departs from express findings of the trial judge not tainted by any clear and determinative error.[172]

1. The *Charter*-infringing state conduct was not serious

99. The trial judge correctly characterized any potentially *Charter*-infringing police conduct in this case as "inadvertent" and "made in good faith."[173] His conclusion was supported by the following findings of fact regarding the encounter in the backyard:

- In attending at the Dixon backyard, the police were not engaged in a "random"[174] or "speculative criminal investigation".[175] Their purpose was twofold: to follow up on a tip that a wanted fugitive involved in "violent crimes" was known to "frequent" the Dixon backyard, a problem address for drug trafficking, and to confirm that all of the young men in the backyard were entitled to be there.[176] There was a clear nexus

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[169] *R. v. White*, 2007 ONCA 318, at paras. 53-54
[170] *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 123 *per* L'Heureux-Dubé J
[171] *Grant*, at para. 129; *Buhay*, at para. 48; *Fearon*, at para. 90
[172] *Côté*, at para. 51
[173] Ruling on *Charter* Application, para. 106 [AR, Vol. I, Tab 1]
[174] Reasons, Court of Appeal, Lauwers J.A. (dissent), para. 110 [AR, Vol. I, Tab 2]
[175] Reasons, Court of Appeal, Lauwers J.A. (dissent), paras. 107, 156 [AR, Vol. I, Tab 2].
[176] Ruling on *Charter* Application, para. 23 [AR, Vol. I, Tab 1]

between the police's lawful duties that night and the Dixon property.

- The police believed they were expressly authorized by the management of the Co-operative to enforce the provincial *Trespass to Property Act* in the townhouse complex.[177]

- The police did not hear any objections to their presence in the backyard.[178]

- The police did not herd the Appellant and his friends in the backyard, nor did they use any physical force on the Appellant or his friends.[179]

- The police did not ask any questions clearly designed to elicit incriminating information.

- The police were in the backyard extremely briefly – by one estimate, less than a minute – before the Appellant fled.[180]

- The race of the Appellant and his friends had no bearing on the police entry into the backyard.[181]

- The trial judge found the defence witnesses' evidence regarding prior alleged misconduct by the police to be largely "manufactured" and "unpersuasive".[182] However, even accepting that evidence, there was no indication that the police officers involved in this encounter were involved in any of the other alleged incidents.[183]

100. There was no evidence accepted by the trial judge to support Lauwers J.A.'s characterization of the police presence as "casually intimidating" or "oppressive."[184] Once present in the backyard, the officers' initial questions were general and non-threatening. They were the types of questions that are "normal in the context of good community policing."[185] Finally, there is no dispute that the search of the Appellant's bag and person was executed to ensure the safety of the officers, the Appellant, and the public.[186] It was justified based on the officers' reasonable suspicion or belief – ultimately vindicated – that the Appellant was carrying a firearm.

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[177] Ruling on *Charter* Application, para. 12 [AR, Vol. I, Tab 1]
[178] Ruling on *Charter* Application, para. 24 [AR, Vol. I, Tab 1]
[179] Ruling on *Charter* Application, para. 65 [AR, Vol. I, Tab 1]
[180] Ruling on *Charter* Application, para. 31 [AR, Vol. I, Tab 1]
[181] Ruling on *Charter* Application, para. 117 [AR, Vol. I, Tab 1]
[182] Ruling on *Charter* Application, para. 116 [AR, Vol. I, Tab 1]
[183] Ruling on *Charter* Application, para. 115 [AR, Vol. I, Tab 1]
[184] Reasons of the Court of Appeal, Lauwers J.A. (dissent), para. 81 [AR, Vol. 1, Tab 2]
[185] *R. v. Moulton*, 2015 ONSC 1047, [2015] O.J. No. 865 (S.C.J.), at para. 63
[186] Ruling on *Charter* Application, para. 104 [AR, Vol. I, Tab 1]

2. The impact on the Appellant's *Charter*-protected rights was minimal

101. The impact on the Appellant's *Charter*-protected rights was minimal. His interests were not the same as Mr. Dixon's, the occupant of the property. Any expectation of privacy the Appellant may have enjoyed in the Dixon backyard was extremely low. The Appellant did not keep any personal belongings there. There was no evidence that he spent time there in the past. He did not regularly socialize with Mr. Dixon or any of the other individuals in the backyard. He was not doing anything particularly private or intimate when the police entered the backyard. He had been there for only about an hour.

102. Any interference with the Appellant's privacy or liberty was "momentary and minimal."[187] The "search" consisted entirely of stepping into the backyard and engaging in a brief conversation with the individuals in the backyard. There was no conduct on the part of the police that demeaned the Appellant's dignity.[188] The "detention", whenever it commenced, was fleeting. In total, the police's contact with the Appellant at the Co-operative – including the encounter in the backyard, the subsequent chase, and the struggle for the firearm – lasted a matter of minutes.

3. Society has an interest in the adjudication of the case on its merits

103. The Appellant, a cocaine dealer, was discovered in possession of a fully-loaded .45 calibre semi-automatic Ruger pistol with the safety off and 13 grams of cocaine. These items are inherently reliable, physical evidence of the serious offences for which the Appellant is charged. If the Appellant is successful, the Crown's case would be gutted and a trial on the merits would be impossible. This outcome would bring the administration of justice into disrepute.[189] The events at issue in this case should be situated within the broader factual landscape. Rates of gun violence and drug trafficking in the area were high.[190] The Appellant himself testified that, at the time, he had safety concerns due to regular shootings and robberies in the neighbourhood.[191] Society has a strong interest in the prosecution of serious firearm and drug-related offences, which are a plague to these communities.

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[187] Reasons of the Court of Appeal, Doherty J.A., para. 76 [AR, Vol. 1, Tab 2]
[188] *Grant*, at paras. 76-78
[189] *Grant*, at paras. 79-84
[190] Ruling on *Charter* Application, para. 3 [AR, Vol. I, Tab 1]
[191] Transcript of Proceedings, pp. 188-189 [AR, Vol. IV, Tab 27]

Part IV – Submissions Concerning Costs

104. Ontario makes no submissions regarding costs.

Part V – Order Sought

105. Ontario requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 13th day of June, 2018.

Sandy Tse
Counsel for the Respondent

Her Majesty the Queen /
Attorney General of Ontario

Amy Rose
Counsel for the Respondent

Her Majesty the Queen /
Attorney General of Ontario

Part VI – Table of Authorities

RELEVANT STATUTORY PROVISIONS
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 constitutionelle de 1982*, *constitutant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982*, c 11, art. 8, art. 9, art. 24(2)
Criminal Code, R.S.C., 1985, c. C-46, s. 529 *Code criminel*, L.R.C. (1985), ch. C-46, art. 529
Police Services Act, R.S.O. 1990, c. P.15, s. 42 *services policiers (Loi sur les)*, L.R.O. 1990, chap. P. 15, art. 42
Trespass to Property Act, R.S.O. 1990, C. T.21, s. 3(2) *Loi sur l'entrée sans authorisation*, L.R.O. 1990, chap. T.21, art. 3(2)