SCC No.: 39531

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

LIAM REILLY

RESPONDENT
(Appellant)

APPELLANT'S REPLY TO THE RESPONDENT'S FACTUM ON THE ISSUE OF THE COURT'S JURISDICTION

(as permitted by order of Kasirer J. dated June 23, 2021)

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PART I – ARGUMENT

A. This Court has jurisdiction to address the issue whether the majority erred in their fresh analysis under s. 24(2) of the Charter

1. This is the Appellant's supplementary factum on the issue of this Court's jurisdiction in this as-of-right appeal, as permitted by order of Kasirer J. dated June 23, 2021.

2. The Respondent argues that there is no jurisdiction on this appeal as of right to address whether the majority of the B.C. Court of Appeal erred in their fresh s. 24(2) of the *Charter* analysis. He points out that Willcock J.A., the dissenting judge, did not dissent on this issue but instead stated that it was unnecessary to engage in a fresh independent s. 24(2) analysis. (Respondent's factum at para. 126)

3. Although Willcock J.A. did not opine on whether he agreed with the majority's fresh s. 24(2) analysis, he did disagree with the majority's conclusion that the trial judge erred in law in his s. 24(2) assessment. Accordingly, Willcock J.A. disagreed with the majority's decision to engage in a fresh s. 24(2) analysis at all.[1]

4. This Court does have jurisdiction to review the majority's fresh s. 24(2) analysis for error because the majority's fresh s. 24(2) analysis is inextricably linked to the two issues of law raised in Willcock J.A.'s dissent. The Respondent relies on *R. v. Keegstra*, [1995] 2 S.C.R. 381. That case does not assist the Respondent. Rather, it supports the Appellant's position that this Court does have jurisdiction. As Lamer C.J. stated at para. 31, an appellant who has a narrow right of appeal based on a dissent will be able to address all aspects of a question if an issue is "so inextricably linked" to the issues raised by the dissent "as to form two aspects of the same question of law."

5. The two issues of law raised by the dissent are the majority's conclusion that: (i) the trial judge erred in his assessment under s. 24(2) of the *Charter* by considering the totality of the police conduct in assessing the seriousness of the breach; and (ii) the trial judge erred in his overall balancing of the *Grant* factors (*R. v. Grant*, 2009 SCC 32) under s. 24(2). Having found

[1] BCCA Reasons, A.R., Vol. I, p. 103, ¶155-156.

those errors, the majority embarked on a fresh s. 24(2) analysis finding that the seriousness of the *Charter* violations, and the impact on the Respondent's *Charter*-protected interests pulled towards exclusion of the evidence and that the overall balancing required exclusion.[2]

6. The majority's fresh s. 24(2) analysis is so inextricably linked to the two issues of law raised by the dissent as to form two aspects of the same question of law. That is because, as stated in the Appellant's factum at para. 106, the two errors of law the majority wrongly attributed to the trial judge's analysis influenced their fresh s. 24(2) analysis and predetermined their decision to exclude the evidence. This is evident in the following comments made by the majority prior to embarking upon their fresh s. 24(2) analysis:

(i) The trial judge would have excluded the evidence if he had conducted "the correct analysis";[3]

(ii) Cst. Sinclair's "conduct alone was already at the serious end of the spectrum";[4] and

(iii) The trial judge's characterization and findings as to the seriousness of the police conduct were significant both as to the errors the majority identified in the trial judge's s. 24(2) analysis, and to the majority's fresh analysis under s. 24(2) of the *Charter* [5].

7. Willcock J.A. concluded that he "cannot say", as the majority had, that the trial judge would have excluded the evidence if he had conducted the "correct" analysis.[6]

8. By tethering the significance of the trial judge's errors to the outcome of their fresh s. 24(2) analysis, the majority inextricably linked the errors to their fresh s. 24(2) analysis. This in and of itself establishes this Court's jurisdiction to address whether the majority erred in their fresh s. 24(2) analysis.

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[2] BCCA Reasons, A.R., Vol. I, p.101, ¶148-149.
[3] BCCA Reasons, A.R., Vol. I, p. 94, ¶117.
[4] BCCA Reasons, A.R., Vol. I, p. 90, ¶97.
[5] BCCA Reasons, A.R., Vol. I, p. 82, ¶56.
[6] BCCA Reasons, A.R., Vol. I, p. 108, ¶181.

B. <u>This Court has jurisdiction to consider whether the majority erred in attributing no weight to the absence of a causal connection between the breaches and the seized evidence</u>

9. The Respondent argues that even if this Court has jurisdiction to address the issue of the fresh s. 24(2) analysis, there would be no jurisdiction to address the Appellant's argument challenging the majority's finding that there was a sufficient link between the Charter *violation*s and the seized evidence. The Respondent bases his argument on three flawed assertions that: (i) the Appellant (as the respondent at the Court of Appeal) argued in the Court of Appeal, as a threshold issue (i.e. whether there was a sufficient link between the breaches and the obtaining of the seized evidence to engage the evaluative analysis in s. 24(2)), that there was an absence of a causal, temporal or contextual link between the breaches and the seized evidence; (ii) the Court of Appeal unanimously rejected that argument; and (iii) the Appellant's argument in this Court that there was no causal link essentially rejects the Court of Appeal's unanimous finding that there was a sufficient link. The Respondent says that in arguing against the link the Appellant is not supporting the dissenting reasons of Willcock J.A. (Respondent's factum at paras. 126-128)

10. The Appellant's argument that the majority erred in their fresh s. 24(2) analysis, premised on the fact there was no causal link between the breaches and the seized evidence, does not reject or take issue with Willcock J.A.'s finding in which he agreed with the majority that on the threshold issue there was a sufficient link.

11. To put this issue in context, the Appellant (as the respondent at the Court of Appeal) argued on the threshold issue: (i) there was no causal link; but (ii) there was a temporal and contextual link, albeit too tenuous and remote to trigger s. 24(2).[7]

12. In finding on the threshold issue there was a sufficient link to engage the evaluative analysis in s. 24(2), the Court of Appeal disagreed with the now Appellant to the extent of finding there was a sufficient temporal and contextual link.[8] However, the Court of Appeal, including Willcock J.A., did not reject the now Appellant's argument that there was an absence of a causal link. Later, in their fresh s. 24(2) analysis, the majority did not dispute the now

[7] BCCA Reasons, A.R., Vol. I, p. 85, ¶70.
[8] BCCA Reasons, A.R., Vol. I, p. 88, ¶RJ 84.

Appellant's position that there was no causal connection, but attributed no weight to this critical factor in excluding the evidence. (Appellant's factum at paras. 108, 109)

13. The majority's failure to give any weight to the indisputable lack of a causal connection between the breaches and the seized evidence is the legal error made by the majority in their fresh s. 24(2) analysis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Mark K. Levitz, Q.C.
Counsel for the Appellant

June 28, 2021
Vancouver, B.C.

PART II – TABLE OF AUTHORITIES

Cases:	Para(s)
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