Court File No. 41090

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

B E T W E E N:

HIS MAJESTY THE KING

Appellant

and

WAYNE LESTER SINGER

Respondent

and

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Interveners

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TABLE OF CONTENTS

Page

PART I – OVERVIEW

1. The Canadian Civil Liberties Association intervenes to make the following submissions:

(a) This Court's decision in *Evans* sets out the applicable framework to resolve the issues in this case. That framework rightly requires courts to consider the police's ***underlying purpose*** in coming onto private property when determining whether the owner or occupant of that property has a reasonable expectation of privacy. If the police's purpose is investigatory, then they exceed the terms of the implied licence. In other words, if the purpose is to investigate the owner's potential involvement in a crime, then the police exceed the terms of the owner's or occupant's limited waiver of their reasonable expectation of privacy.

(b) It follows from *Evans* that this Court should reject the Crown's position that the police do not exceed the scope of the implied licence to knock where they cross onto private property to gather evidence through "investigative questioning". There is no meaningful distinction between gathering evidence through "investigative questioning" and gathering evidence by "smelling the air emerging from the interior of the house" (as the Crown puts it in their factum).[1] Both exceed the terms of the implied licence.

(c) It also follows from *Evans* that this Court should decline the Crown's invitation to carve out an impaired driving exception to the implied licence doctrine on the basis that the state has an interest in protecting the public against impaired drivers.

[1] Factum of the Crown, at para 48.

> Granted, the State has an interest protecting the public against all. The Court in *Evans* did not distinguish between categories of offences. The Court's concern with police surreptitiously relying on the implied licence to approach the door and knock to investigate criminal activity is real regardless of the type of criminal activity at issue.

2. *Evans* leads to the inescapable conclusion that where the police cross onto property to secure evidence against the occupants, their conduct falls outside the scope of the implied licence to knock and they become trespassers. Absent a warrant or exigent circumstances, the search is unauthorized by law, and therefore, unreasonable.

PART II – QUESTIONS IN ISSUE

3. CCLA intervenes on the issues of (1) whether the police conducted a search within the meaning of s. 8 of the *Charter*; and (2) if so, whether the search was unreasonable.

PART III - ARGUMENT

A. The Framework from *R v Evans*, [1996] 1 SCR 8

4. The seminal case on the implied licence doctrine is *Evans*.

5. The Court in *Evans* rightly recognized that a "search" occurs where a person's reasonable expectations of privacy are diminished by an investigatory technique. In finding that the police conducted a "search" of the Evans' home, the Court first identified the subject matter of the search (approaching the Evans' home to "sniff" for marijuana).[2] The Court then considered whether the

[2] *R v Evans*, [1996] 1 SCR 8, at paras 1, 3, and 5.

Evans had a reasonable expectation of privacy in the approach to their home.[3] It is in that context that the implied license doctrine arose.

6. The Court found that an occupier generally has a reasonable expectation of privacy in the approach to the door of their dwelling. The invitation or implied license to knock acts as a waiver of that expectation of privacy, since that reasonable expectation of privacy does not encompass complete and total insulation from acquaintances, salespeople, strangers, or police officers.

7. The Court then went on to consider the scope of the doctrine. It held that the doctrine does not imply that all persons are welcome to approach the home regardless of the purpose of their visit.[4] It extends no further than is required to "permit convenient communication with the occupant of the dwelling."[5] Just like anyone else, where the conduct of the police goes beyond the scope of the implied license, the police are approaching the dwelling as trespassers.

8. Applying the law to the facts, the Court found that the actions of the police went beyond the implied license: they went on the accused's premises to secure evidence against him.[6] It held that the Evans had a reasonable expectation of privacy in the approach to their home, which was not waived to allow the police to approach to secure evidence against them. Accordingly, the Court found that when the police approached the home to investigate, they engaged in a "search".[7] That search, the Court found, was unreasonable as it was not authorized by law.

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[3] *R v Evans*, [1996] 1 SCR 8, at paras 7 and 15.
[4] *R v Evans*, [1996] 1 SCR 8, at para 7 (Sopinka J).
[5] *R v Evans*, [1996] 1 SCR 8, at para 8 (Sopinka J.)
[6] *R v Evans*, [1996] 1 SCR 8, at para 2.
[7] *R v Evans*, [1996] 1 SCR 8, at para 23.

B. The Crown's Interpretation and Application of the Framework in *Evans* Should Be Rejected

9. The Crown rightly recognizes in its factum that occupants do not waive their reasonable expectation of privacy by extending an implied invitation to knock on the door of their home to the police where the purpose of the police's approach is to secure evidence against them. Where the Crown falls into error is by arguing that the police are acting within the scope of the waiver when they approach to conduct "investigative questioning" of the occupant. This interpretation should be rejected.

10. The distinction that the Crown tries to draw between the "investigative technique of asking questions" to gather evidence (which the Crown argues is captured in the scope of the doctrine) and "other methods of gathering evidence such as smelling the air emerging from the interior of the house" (which the Crown admits falls outside the scope of the doctrine),[8] is a distinction without a difference. As explained, what matters is whether or not the police officers' primary or subsidiary purpose in approaching is to gather evidence against the occupant. Whether they seek to do so through questioning or sniffing does not impact the analysis. It is the evidence-gathering-to-substantiate-charges goal that causes the implied licence doctrine to cease to apply. That is because "[c]learly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them."[9]

11. This proposition flows not just from *Evans*, but also from this Court's more recent decisions in *Côté* and *Le*.

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[8] Factum of the Crown, at para 49.
[9] *R v Evans*, [1996] 1 SCR 8, at para 9.

12. In *Côté*, the police entered the accused's property, and searched the perimeter, the gazebo, and the inside of her dwelling-house. The Crown sought to justify the police conduct based on the implied invitation to knock and approach. This Court upheld the trial judge's findings that the police had expressly contemplated the possibility of recovering evidence against the accused when they went to her home, and thus that they approached the house as trespassers.[10]

13. In *Le,* this Court held that the police exceed the authorizing limits of the implied license doctrine where they had a subsidiary purpose in entering onto the private property, such as a speculative investigation or a fishing expedition.[11] The Court upheld Lauwers J.A.'s view that the law does not authorize police entry into property "***for investigative purposes***."[12] There is no meaningful difference between entering property "for investigative purposes" and entering property "for investigative questioning". Both exceed the implied licence.

14. The Crown's position is founded on the flawed premise that if the Court in *Evans* had only dealt with the police's plan to bluntly ask the occupant whether he was growing marijuana in the house, it would have found that the police did not exceed the implied licence to knock, even though such questioning would "certainly qualify as going to a dwelling house for the purpose of gathering evidence to substantiate a criminal offence."[13] The Court in *Evans* never addressed this issue explicitly because the police did not, in fact, bluntly ask the occupant if he was growing marijuana; rather, after they approached the house and identified themselves, they smelled the marijuana and "arrested the appellants immediately."[14] But the Court certainly addressed the issue implicitly by

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[10] *R v Côté*, 2011 SCC 46, at para 12.
[11] *R v Le*, 2019 SCC 34, at para 127.
[12] *R v Le*, 2019 SCC 34, at para 128 (emphasis added).
[13] Factum of the Crown, at para 48.
[14] *R v Evans*, [1996] 1 SCR 8, at para 31.

holding that "where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock."[15] By conceding that investigative questioning in the nature of bluntly asking an occupant if they are engaging in criminal activity "certainly qualif[ies] as going to a dwelling house for the purpose of gathering evidence", the Crown has doomed its argument.

C. This Court Should Not Exempt Impaired Driving Cases from the Application of *Evans*

15. The Crown invites this Court to find that police officers should be empowered to investigate impaired driving offences by relying on the impaired licence to knock rule because the state has an interest in protecting the public against impaired drivers. In so arguing, the Crown is advocating for an impaired driving exception to the rule.

16. Any such exception should be rejected. The concerns that animated this Court's decision in *Evans* were not limited to concerns about the police using the implied licence doctrine as a *carte blanche* to check homes for evidence of certain ***types*** of criminal activity.[16] The Court was concerned with the Orwellian vision of police conducting spot checks of private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock to investigate ***any*** criminal activity.[17]

17. The state does indeed have an interest in protecting the public against impaired drivers, as it does in protecting the public against drug trafficking, firearms offences, and many other

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[15] *R v Evans*, [1996] 1 SCR 8, at para 9.
[16] *R v Evans*, [1996] 1 SCR 8, at para 13.
[17] *R v Evans*, [1996] 1 SCR 8, at para 13.

offences. If this Court were to exempt impaired driving from the implied licence to knock rule in *Evans*, there would be no principled basis not to exempt other similarly placed or more serious offences, and the exceptions would swallow the rule.

D. Police Officers Engage in a Search Where They Cross onto Private Property to Obtain Evidence

18. As with any case involving s. 8 of the *Charter*, the first question to be decided is: what is the subject matter of the search? The subject matter of the search—personal, territorial or informational—helps define the nature of the privacy interests at stake.[18] Courts have consistently found that the subject matter of a search includes tangible or intangible things to be used as evidence of a crime, such as words spoken, a scent, heat emissions, drugs, or intercepted conversations through electronic monitoring.[19]

19. The second question is whether the accused has a reasonable expectation of privacy in the subject matter of the search. As noted, the Court in *Evans* found that individuals have a reasonable expectation of privacy in the approach to the door of their dwelling house. [20] This Court has also held that a reasonable expectation of privacy exists with regard to the perimeter space surrounding a dwelling house, and with regard to one's backyard and structures on one's property like gazebos.[21] Courts have also found that individuals have a reasonable expectation of privacy beginning at the entrance of their property, in the area of the property outside an apartment, in the

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[18] *R v Tessling*, 2004 SCC 67, at para 22
[19] *R v Sandhu* (1993), 82 CCC (3d) 236 (BCCA), at p 247; *R v Silveira* (1994), 16 OR (3d) 786, at p 797 (ONCA), upheld in *R v Silveira*, [1995] 2 SCR 297; *R v Evans*, [1996] 1 SCR 8; *R v Tessling*, 2004 SCC 67.
[20] *R v Evans*, [1996] 1 SCR 8, at paras 6 and 21.
[21] *R v Kokesch*, [1990] 3 SCR 3; *R v Grant*, [1993] 3 SCR 223; *R v Wiley*, [1993] 3 SCR 263; *R v Côté*, 2011 SCC 26; *R v Plant*, [1993] 3 SCR 281.

roof and fire lane of a commercial property, in unoccupied lands, and in their vehicle on their property.[22]

20. The third question is whether that privacy interest was waived due to the implied license doctrine. As explained, the police's intent or purpose in accessing the property is a key consideration in that analysis. If the purpose of the police is to communicate with the occupant in a normal manner, then proceeding from the street to "reach a point in relation to the house where he can conveniently" do so is permitted within the implied licence and the police are not intruding on the privacy interest of the occupant.[23] If, however, the police's purpose in coming onto an occupant or owner's property is investigatory—whether to secure evidence against the occupant by sniffing ***or*** by asking "investigative questions" —that will disqualify the police from relying on an implied licence, even where the purpose can also be described as convenient communication.[24] Where the police cannot rely on the implied licence doctrine, they are trespassers, which is "clearly relevant under s. 8, as it nullifies any 'consent' to the police entry."[25]

21. In the present case, the initial subject matter of the search was *territorial*: the police crossed onto Mr. Singer's property, looked into his car, observed him sleeping, knocked on the window, and then opened the door to the truck. All of these steps permitted the police to observe Mr. Singer

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[22] *R v Bradley*, 1999 CanLII 5756, at paras 18-26 (BCSC); *R v Van Wyk*, [1999] OJ No 3515, at paras 35-38 (ONSC); *R v Leblanc*, 2009 NBPC 2, at para 44; *R v Peequaquat*, 2020 SKQB 2 at paras 23-27; *R v Hugh*, 2014 BCSC 1426, at paras 51-56; *R v Millett*, 2004 NSPC 57, at paras 13-14; *R v Hussein*, 2016 ABQB 703, at paras 46-47; *R c Boodoo*, 2018 QCCM 183, at para 384; *R v Laurin* (1997), 113 CCC (3d) 519 (ONCA); *R v Lauda*, 1999 CanLII 970 (ONCA).
[23] *R v Evans*, [1996] 1 SCR 8, at para 15, citing *R v Bushman* (1968), 4 CR (ns) 13 (BCCA), at p 19; *R v LeClaire*, 2005 NSCA 165, at para 27.
[24] *R v Fowler*, 2006 NBCA 90, at para 31; *R v Rogers*, 2016 SKCA 105, at paras 51 and 54; *R v Parr*, 2016 BCCA 99, at paras 3, 44, 55, and 60; *R v Atkinson*, 2012 ONCA 380; *R v Mulligan* (2000), 128 OAC 224, at paras 24 and 31 (ONCA).
[25] *R v Le*, 2019 SCC 34, at para 128.

in a way they could not otherwise have done. The subsequent search was *bodily* and *informational*: the police roused Mr. Singer, questioned him, and noted that he appeared sleepy, had red eyes and a strong odour of alcohol on his breath. None of these visual, olfactory or aural observations could have been made without the police going onto Mr. Singer's property.

22. Further, if individuals have a reasonable expectation of privacy in the perimeter space surrounding a dwelling house with regard to one's backyard and structures on one's property like gazebos, beginning at the entrance of their property, in the area of the property outside an apartment, in the roof and fire lane of a commercial property, in unoccupied lands and in their vehicle on their property, then it follows that Mr. Singer had a reasonable expectation of privacy inside his vehicle, which was parked in his driveway, on his private property.

23. Finally, as the Crown concedes, the police's purpose in going onto Mr. Singer's property was to investigate the impaired driving that had been reported.[26] In making a "trespassory detour" on the property to secure evidence, the police acted outside the scope of Mr. Singer's waiver.[27]

24. Since Mr. Singer's reasonable expectation of privacy was not waived to allow the police to come onto his property, their actions constituted a "search".

E. Where the Police Trespass Without a Warrant and in the Absence of Exigent Circumstances, the Search is Unreasonable

25. In *Kokesch*, the police received information that the driver of a truck on the ferry to Vancouver Island was suspected of being involved in the cultivation of marihuana.[28] An officer

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[26] Factum of the Crown, at para 62; *R v Singer*, 2023 SKCA 123, at paras 63 and 65.
[27] *R v Van Wyk*, [1999] OJ No 3515.
[28] *R v Kokesch*, [1990] 3 SCR 3.

followed him for a few days. On the third day, two officers went to his house and walked up the driveway. When they were within feet of the dwelling-house, they made visual, olfactory and aural observations. They then used those observations to obtain a search warrant to enter the house. This Court held that in going onto the accused's property the first time to make observations prior to obtaining a warrant, the officers had conducted a search. The police had no authority to trespass onto the accused's property – neither statutory authority, nor authority under the common law. The initial trespass onto the property therefore constituted an unreasonable search and the evidence the police gathered (marijuana plants) was excluded.

26. Just like in *Kokesch*, the police in Mr. Singer's case had no statutory or common law authority to trespass on Mr. Singer's property. Accordingly, the search was not authorized by law, and unreasonable.

PART IV – SUBMISSIONS RESPECTING COSTS

27. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

28. The CCLA does not take a position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 22nd DAY OF JANUARY 2025

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TABLE OF AUTHORITIES

R v Rogers, 2016 SKCA 105	20
R v Sandhu (1993), 82 CCC (3d) 236 (BCCA)	18
R v Silveira (1994), 16 OR (3d) 786	18
R v Tessling, 2004 SCC 67	18
R v Van Wyk, [1999] OJ No 3515	19, 23
R v Wiley, [1993] 3 SCR 263	19

LEGISLATION	**Cited in paras.**
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) *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle* de 1982, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 (art 8,)	3, 18, 20