



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Singer, 2026  
SCC 8

**APPEAL HEARD:** February 18, 2025  
**JUDGMENT RENDERED:** March 20,  
2026  
**DOCKET:** 41090

**BETWEEN:**

**His Majesty The King**  
Appellant

and

**Wayne Lester Singer**  
Respondent

- and -

**Director of Public Prosecutions,  
Attorney General of Ontario,  
Attorney General of British Columbia,  
Canadian Civil Liberties Association,  
Criminal Lawyers' Association (Ontario),  
Canadian Constitution Foundation,  
British Columbia Civil Liberties Association and  
Association québécoise des avocats et avocates de la défense**  
Intervenors

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

**REASONS FOR JUDGMENT:** Jamal J. (Wagner C.J. and Côté, Rowe and Kasirer JJ. concurring)  
(paras. 1 to 123)

**JOINT DISSENTING REASONS:** O'Bonsawin and Moreau JJ. (Karakatsanis J. concurring)  
(paras. 124 to 234)

**DISSENTING REASONS:** Martin J.  
(paras. 235 to 294)

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**His Majesty The King**

*Appellant*

v.

**Wayne Lester Singer**

*Respondent*

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*Intervenors*

**Indexed as: R. v. Singer**

**2026 SCC 8**

File No.: 41090.

2025: February 18; 2026: March 20.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,  
O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Constitutional law — Charter of Rights — Search and seizure — Reasonable expectation of privacy — Implied licence doctrine — Ancillary powers doctrine — Remedy — Exclusion of evidence — Police discovering truck matching description given in impaired driving complaint running in residential driveway — Police entering driveway, observing accused asleep or unconscious in driver's seat, and receiving no response after knocking on truck window — Police opening truck door, smelling alcohol and arresting accused — Accused arguing at trial that right to be secure against unreasonable search or seizure violated — Whether police conducted search — If so, whether search was unreasonable — If so, whether evidence obtained should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).*

Two RCMP officers were investigating a complaint of impaired driving made against the accused in a small community. They saw a running truck in plain view in a residential driveway matching the description in the complaint. The officers stepped onto the driveway to approach the truck, and saw the accused sleeping or passed out in the driver's seat. They knocked on the truck window, but the accused did not respond. The officers opened the truck door to rouse the accused and smelled a strong odour of alcohol coming from his breath. At the officers' request, the accused provided a roadside breath sample, which registered as a "fail". He was then arrested and taken into custody, where he refused to provide a further breath sample. He was charged with refusing to comply with a demand to provide a breath sample.

At trial, the accused argued that the police breached his s. 8 *Charter* right to be secure against unreasonable search or seizure by entering his driveway, where he had a reasonable expectation of privacy, without permission or a search warrant. The Crown claimed that the police had an implied licence at common law to step onto the driveway to investigate the impaired driving complaint. The trial judge agreed with the Crown, found no s. 8 breach, and entered a conviction. The Court of Appeal ruled that there is no implied licence to enter a driveway for the purpose of conversing with and observing the occupant to gather evidence that they are impaired and held that the police therefore infringed the accused's s. 8 *Charter* right. Given this conclusion, the court did not address the accused's second ground of appeal relating to trial fairness. It set aside the conviction, excluded the evidence under s. 24(2) of the *Charter*, and entered an acquittal.

*Held* (Karakatsanis, Martin, O'Bonsawin and Moreau JJ. dissenting): The appeal should be allowed, the judgment of the Court of Appeal set aside, and the case remitted to the Court of Appeal for determination of the outstanding ground of appeal.

*Per* Wagner C.J. and Côté, Rowe, Kasirer and **Jamal** JJ.: The police had an implied licence at common law to step onto the accused's driveway, approach his truck, and knock on the window to investigate a recent impaired driving complaint. This police conduct did not, on its own, constitute a "search" under s. 8 of the *Charter*. However, the police exceeded the scope of the implied licence and conducted a search under s. 8 of the *Charter* by opening the truck door. The search was unreasonable and

breached s. 8 of the *Charter*. Even so, the evidence obtained should not be excluded under s. 24(2) of the *Charter* given society's strong interest in prosecuting the serious offence at issue.

Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. The purpose of this guarantee is to protect individuals from unjustified state intrusions upon their privacy. Whether a claimant has a reasonable expectation of privacy is assessed based on a content-neutral and normative inquiry into the totality of the circumstances. An individual has a reasonable expectation of privacy in their home, where privacy is most protected, in its perimeter, where privacy is protected in diluted measure, and in a vehicle in the driveway of their property. A police investigatory technique is a search under s. 8 only if it intrudes upon a person's reasonable expectation of privacy.

The common law recognizes an implied licence for all members of the public, including police, on legitimate business to approach the door of a dwelling and knock. The occupier effectively waives the privacy interest that they might otherwise have in the approach to the door of their dwelling. The implied licence ends at the door of the dwelling. The purpose of the implied licence is to permit convenient communication with the occupant of the dwelling and to permit those activities reasonably associated with that purpose. Conduct falling within the scope of the common law implied licence is not a search under s. 8 of the *Charter*. Activities that go beyond the purpose of facilitating effective communication with the occupant of the

dwelling breach the implied conditions of the licence and the person conducting the unauthorized activity approaches the dwelling as an intruder. In such circumstances, police action constitutes a search.

The intention of the police is relevant in determining whether the police activity falls within the communicative purpose of the implied licence or whether it constitutes a search. Where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the occupant by knocking on the door, the police have exceeded the terms of the implied licence to knock. However, a conversation with the occupier of a dwelling, without more, is not a search. There is no general prohibition against the police approaching a dwelling to question the occupier for the purpose of furthering a lawful investigation. So long as the police officer is lawfully present, the use any of their senses of sight, hearing, or smell is not a search. There is therefore no basis to exclude from the implied licence the investigation of offences, such as impaired driving, for which ordinary communication might reveal evidence of impairment by using the police officer's senses, provided that the officer did not intend to conduct a search, and provided that the officer is not conducting a speculative criminal investigation or fishing expedition.

In the instant case, the police officers had an implied licence to step onto the driveway, approach the running truck, and knock on the window to facilitate convenient communication with the occupant. The trial judge correctly stated and applied the relevant law to his findings of fact. He found that the police were

legitimately investigating a complaint regarding a possible impaired driver under their obligation to protect the public; the truck was in plain view with no barriers to police entry; and the officers were not asked to leave the property. Merely walking onto the accused's driveway with the intent to conduct an investigation regarding the truck and its driver did not constitute a sufficient intrusion to be considered a search.

However, the implied licence extended only to the door of the accused's truck. By opening the door, the police conducted a search and intruded upon his reasonable expectation of privacy inside the vehicle.

A warrantless search is presumptively unreasonable. The Crown must establish, on a balance of probabilities, that the search was reasonable. A search is reasonable if it is authorized by a reasonable law and conducted in a reasonable manner.

The ancillary powers doctrine addresses whether a particular police power that *prima facie* interferes with individual liberty is authorized at common law. The analysis under this doctrine proceeds in two stages. First, the court asks whether the police action at issue falls within the general scope of a statutory or common law police duty. Second, the court asks whether the police action involves a justifiable exercise of police powers associated with that duty. The ancillary powers doctrine allows the courts to incrementally adapt common law rules where legislative gaps exist, but if there is no gap in the relevant legal rules, a court should tread softly before enlarging the powers of the police.

In this case, there is no need to recognize a new ancillary police power to protect public safety in the context of an impaired driving investigation. The police arguably had the necessary authority to open the door to the accused's truck under the established ancillary police power to conduct a safety search. A safety search will be authorized by law if the police officer has reasonable grounds to believe that the search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police. The Crown bears the burden of showing subjective and objective grounds for the safety search based on a balance of probabilities. In the instant case, there were objective grounds for the police to believe that the circumstances presented a public safety risk. An impaired driver behind the wheel of a running truck in a private driveway could easily re-enter a public road and pose a serious danger to the public and themselves. However, because the issue of ancillary police powers was not argued at trial, there was no direct evidence of the officers' subjective concern for public safety. Therefore, in the particular circumstances of this case, the warrantless search was not justified and the police breached s. 8 of the *Charter* by opening the truck door.

Whether the evidence obtained after the truck door was opened should be excluded under s. 24(2) of the *Charter* is determined by considering the impact of admitting this evidence on public confidence in the administration of justice over the long term, based on a balancing of three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on the merits. In the instant case, the first line of inquiry only weakly favours exclusion of the

evidence, because the evidence shows that the police arguably had reasonable grounds to believe that it was necessary to open the truck door to prevent an imminent risk to the safety of the accused and others. The police conduct was no more intrusive than necessary and at most reflects a reasonable misunderstanding about the law. Under the second line of inquiry, the impact of the police conduct on the accused's *Charter*-protected interests was not strong and only moderately favours the exclusion of the evidence. The accused was in a private vehicle parked in the perimeter around his home, resulting in a diminished expectation of privacy compared to that in a dwelling house. The third line of inquiry points strongly in favour of admitting the evidence, given the seriousness of the offence, and given that the evidence obtained by the police regarding the accused's state of intoxication was reliable and essential to the Crown's case. The cumulative weight of the first two lines of inquiry is outweighed by the compelling public interest in admitting the evidence.

*Per Karakatsanis, O'Bonsawin and Moreau JJ. (dissenting):* The appeal should be dismissed. By seeking to investigate for impaired driving when they entered the accused's property, the police exceeded the scope of the implied licence and conducted an unreasonable search. No statutory or common law police powers authorized this type of search, and no new ancillary police power should be recognized. Accordingly, the police's entry onto the accused's property violated s. 8 of the *Charter*. Given the serious nature of the violation and its impact on the accused's privacy interests, all evidence flowing from the breach should be excluded under s. 24(2) of the *Charter*.

Property owners have a common law right to exclude others — including police officers — from their property. Entering someone else's property without consent or lawful justification is a trespass at common law. In the context of residential property, the Court has also consistently affirmed that individuals have a strong reasonable expectation of privacy. The doctrine of implied licence may vitiate an otherwise reasonable expectation of privacy. If a licensee oversteps the ambit of a licence's terms, they will be on the land illegally and automatically become a trespasser. Trespass will be established if a person enters the perimeter of a dwelling with the purpose of engaging in some activity to which it is known or understood that the occupier would not have given consent.

The common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock. It has been construed as a waiver of the occupier's expectation of privacy in the approach to his or her home. The implied licence originates in property law and is reflective of the customary habits and usage of private land. The legal scope of an implied licence reflects social norms and customary practice which manifest through both temporal and spatial limits. Though it has been transposed into the criminal law context, it has not been divorced from its normative property law roots. Consistent with property law principles, when a purpose for entering private property is counter to the property owner's declared or impliedly intended use of the land, there is no licence in law. Thus, the crucial factor in determining the scope of an implied licence is the licensee's purpose when approaching the private property. The doctrine's application has been

limited to permitting convenient communication with the occupant of the dwelling; any action beyond this purpose is not authorized, and the licensee approaches the dwelling as a trespasser.

Because there is a strong expectation of privacy in the approach to one's home, police conduct that is not authorized by an implied licence constitutes a search for the purposes of s. 8 of the *Charter*. Police will exceed the bounds of an implied licence when their purpose for entering the property is to substantiate a criminal charge. This is based on the premise that no owner would permit access for such a purpose. Approaching a dwelling for the purpose of gathering evidence against the occupant falls squarely within the ambit of substantiating a charge. One mechanism by which police attempt to gather evidence during an investigation is through the use of their senses of smell, sight, and hearing. Police exceed the bounds of an implied licence when, prior to entering private property, they crystallize an intention to gather evidence against the owner through these senses. Entering private property for this purpose will accordingly amount to a search for the purposes of s. 8 of the *Charter*.

An implied licence is not a police power and should not be reconfigured to authorize a new form of warrantless entry for police. The doctrine of implied licence functions as a permission granted *in rem* to access private property and, in turn, a waiver of the landowners' privacy interest. Police powers are distinct state powers that authorize police to perform certain acts in furtherance of their duties that would otherwise be illegal. The implied licence accordingly does not entitle the police to act

in ways that materially differ from the general public. As a result, if the police enter private property under a grant of implied licence, the doctrine cannot be used to justify the exercise of police powers, such as conducting an arrest or a search. An implied licence may allow police to initially approach a dwelling, but a subsequent search or arrest requires independent authorization and will effectively extinguish the implied licence. In analyzing whether police have exceeded the bounds of the implied licence, it is essential to determine whether their purpose is to detain, search, or arrest, as such purposes are contrary to the permission granted under the implied licence. Police seeking to detain or search may have lawful authority through several distinct sources. Prior judicial authorization through a warrant remains the presumptive requirement, but there are certain exceptional circumstances which also enable police to lawfully enter property, such as the doctrine of hot pursuit and the safety and protective search powers.

In the instant case, the police exceeded the scope of the implied licence and triggered a search, as their conduct extended well beyond the purpose of convenient communication with the accused. The police's sole express purpose for entering the property was to conduct an impaired driving investigation in the hopes of securing non-communicative evidence against the accused through their senses of smell, sight, and hearing. A search of this nature will only be reasonable, and thus comply with s. 8 of the *Charter*, if it is authorized by law, the law is reasonable, and the search is carried out in a reasonable manner. The police's search of the approach to the accused's home was not authorized by law and was thus unreasonable. Beyond there being no implied

licence, no other existing legal authority authorized the police to enter the accused's property. The police only had the colour and the make of the vehicle from a call that contained no grounds or evidence to substantiate the claim that the driver was intoxicated, referring only to the vehicle speeding. Moreover, prior to entering the private property, the officers did not know whether a person was inside the vehicle, nor did they see the accused operate the vehicle at any point. The only evidence suggesting that the accused was intoxicated while in the care and control of a vehicle only arose after the officers opened the doors of the vehicle and conducted a search. Consequently, there were no reasonable grounds for a warrant, no reasonable suspicion of criminal activity, nor circumstances of exigency, and the police were not in hot pursuit.

Furthermore, the search was not authorized by a novel police power to enter private property with the intent to speak to the occupant and observe signs of impairment. The ancillary powers doctrine allows courts to recognize carefully defined common law police powers in circumstances where there is a legislative gap and the exercise of such powers is reasonably necessary. But great caution should be exercised in expanding common law police powers, on account of concerns going to the separation of powers, the minimum requirements of the *Charter* and the disproportionate impact of arbitrary police powers on marginalized communities. In this regard, there is agreement with the comments of Martin J. in her dissenting reasons. In the circumstances, the common law police power proposed by the Crown is best articulated as a power to conduct sobriety checks on private property absent reasonable grounds to suspect that the search will reveal evidence of a criminal offence. As this

power falls well below the minimum standards imposed by the *Charter*, its recognition should be firmly rejected.

The evidence obtained by the police should be excluded under s. 24(2) of the *Charter*. Section 24(2) provides that evidence obtained in a manner that infringes or denies a *Charter* right or freedom must be excluded if, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. The analysis requires examination of the impact of admitting evidence on the long-term integrity of, and public confidence in, the justice system through three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interests in the adjudication of the case on its merits. The conclusions on each of these lines of inquiry must then be weighed together to determine whether a reasonable person would conclude that the admission of the evidence would bring the administration of justice into disrepute. In this case, both the first and second lines of inquiry strongly favour exclusion of the evidence. The *Charter*-infringing conduct was on the more serious end of the spectrum: the police showed a careless disregard for the accused's *Charter* rights and there were no extenuating circumstances to attenuate the seriousness of the breach. Further, the impact of the *Charter* breach on the accused was significant, given it occurred on his private property, there was a lack of reasonable suspicion leading to the events, and he was subsequently detained. The impact of the breach must also be situated in the larger social context of the over-policing of Indigenous peoples and communities. The police officers' conduct in entering a private driveway on a First

Nation reserve without authority, late at night, would have had a severe impact on the accused as an Indigenous person. On balance, the admission of the evidence would bring the administration of justice into disrepute. Requiring the police to respect the *Charter* rights of all individuals in all neighbourhoods reinforces the rule of law, fosters public confidence and contributes to safer communities.

*Per Martin J. (dissenting):* The appeal should be dismissed. There is agreement with O'Bonsawin and Moreau JJ. that the police exceeded the scope of the implied licence in this case, that the search was unreasonable and therefore infringed s. 8 of the *Charter*, and that the resulting evidence should be excluded under s. 24(2) of the *Charter*. There is also agreement with the majority and with O'Bonsawin and Moreau JJ. that a new ancillary police power should not be recognized. Courts should tread lightly when asked to invoke the ancillary powers doctrine, as judicial restraint is warranted in this context.

The ancillary powers doctrine sets the standard for what must be proven before a new police power is recognized at common law. At the first stage of the two-part test, the court asks whether the police action at issue falls within the scope of a statutory or common law police duty. If it does, at the second stage, the court asks whether the police action is reasonably necessary to fulfill that duty. When the Crown invokes the ancillary powers doctrine, it is asking courts to grant powers to the police that the legislature has not conferred upon them. Such powers operate in tension with the *Charter* rights of those against whom they are exercised. Any request to expand

police authority through judge-made law merits caution because it engages fundamental concerns about the rule of law, the proper role of courts, and the need to safeguard constitutionally entrenched rights.

The Court's early jurisprudence after the enactment of the *Charter* signalled that it would not use the ancillary powers doctrine to recognize new police powers in the future. However, since 1999, the Court has used the doctrine to recognize several common law powers that are now used regularly in modern policing. While the ancillary powers doctrine has crossed the Rubicon into acceptability, concerns about its rationale, scope, and application have made the journey with it. Critiques of the ancillary powers doctrine generally fall into one of the following categories: (1) rule of law concerns; (2) the traditional role of courts as guardians of constitutional rights; (3) the limits of judicial law-making; and (4) disproportionate impacts on racialized groups and marginalized populations. These concerns underscore why caution and restraint are warranted when courts are asked to recognize new common law police powers.

The minimum standards set by the *Charter* apply to all police powers, whether their origin is a statute or the ancillary powers doctrine. There is a well-established methodology for assessing whether a law, such as a statutory police power, complies with the *Charter*, but the methodology for ensuring that judicially created police powers comply with the *Charter* is not as clear. The ancillary powers framework does not expressly require courts to consider whether a common law police power infringes the *Charter* and, if so, whether that infringement can be justified under s. 1,

and the Court's case law also does not explain the proper methodology. Because the *Charter* is part of the supreme law of Canada, its requirements must remain central when courts consider creating new police powers. Reconciling the ancillary powers framework with the *Charter* requires courts to expressly treat constitutional limits as a substantive constraint on the creation of new police powers. When courts apply the ancillary powers framework, they must do so with the understanding that a common law police power cannot be justified if, under the usual approach to *Charter* scrutiny, an equivalent statutory power would not pass constitutional muster. This approach ensures that the ancillary powers framework does not become a back door for authorizing state action that would otherwise be unconstitutional.

The following principles are suggested to help ensure that any invocation of the ancillary powers doctrine does not stray beyond its proper limits. First, the Crown must clearly define the scope of any power it seeks to have recognized at common law so that courts can meaningfully assess the power's compatibility with *Charter* standards and apply the ancillary powers framework. Second, courts should avoid recognizing new common law police powers in domains already governed by statute, as supplementing a detailed legislative framework with judge-made rules risks frustrating the legislature's intent and usurping its role. Third, courts should resist invitations to create new common law police powers simply because the Crown cannot satisfy the conditions of an existing one, as the ancillary powers doctrine is not a mechanism for side-stepping established legal standards. Fourth, where the recognition of a new police power could produce complex or unpredictable effects, courts should

defer to the legislature. Fifth, because courts must determine if a proposed police power is reasonably necessary rather than useful or expedient, any claim of reasonable necessity is undermined where reasonable, less intrusive alternatives are available. Finally, and crucially, any proposed common law police power must satisfy the requirements of the *Charter*. A proposed police power must fail the ancillary powers framework if an equivalent statutory power would not pass constitutional muster under the standard *Charter* analysis.

The case at bar is not a proper case to recognize a new common law police power. For one, the Crown has not defined the proposed police power with sufficient precision, which makes it difficult to determine the extent to which the power intrudes on individual liberty and, in turn, whether it is *Charter* compliant and reasonably necessary to fulfill a police duty. Assuming the proposed power was limited to authorizing the specific police conduct at issue in this case, it would not be reasonably necessary to fulfill a statutory or common law police duty as a less intrusive alternative was available: waiting to see if the vehicle would re-enter a public roadway. Even if this alternative was not reasonable, the Court has already recognized a police power to conduct a safety search where it is reasonably necessary to eliminate an imminent threat to the safety of the public or the police. However, the trial judge made no finding as to whether the police were subjectively motivated by a concern for public safety in opening the accused's truck door and it would be inappropriate to allow the Crown to sidestep the minimum requirements of the safety search power by creating a new common law police power with lower standards. Finally, the proposed power does not

comply with *Charter* standards. Individuals enjoy a strong expectation of privacy in the approach to their home and the presumptive standard is reasonable and probable grounds to believe the search will reveal evidence of an offence, which was not met in the instant case.

### Cases Cited

By Jamal J.

**Overruled:** *R. v. Rogers*, 2016 SKCA 105, 341 C.C.C. (3d) 502, leave to appeal refused, [2017] 1 S.C.R. xvi; **applied:** *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; **considered:** *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169; *R. v. Tricker* (1995), 21 O.R. (3d) 575; *R. v. Bushman* (1968), 4 C.R.N.S. 13; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Lotozky* (2006), 81 O.R. (3d) 335; *R. v. McColman*, 2021 ONCA 382, 407 C.C.C. (3d) 341, rev'd 2023 SCC 8, [2023] 1 S.C.R. 309; *R. v. Campbell* (1993), 36 B.C.A.C. 204; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Godoy*, [1999] 1 S.C.R. 311; **referred to:** *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Campbell*, 2024 SCC 42; *R. v. Mulligan* (2000), 142 C.C.C. (3d) 14; *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194; *Eccles v. Bourque*, [1975] 2 S.C.R. 739; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Wise*, [1992] 1 S.C.R. 527; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *Robson v. Hallett*, [1967] 2 All E.R. 407; *R. v. Moyles*, 2019 SKCA 72, [2019] 12 W.W.R. 416; *R. v. Peequaquat*, 2020 SKQB 2, 55 M.V.R. (7th) 21; *R. v. Babich*, 2017 SKQB 304, rev'd 2020 SKCA 139, 398 C.C.C. (3d) 457;

*R. v. Klevin*, 2017 SKPC 4, 375 C.R.R. (2d) 1; *R. v. Parr*, 2016 BCCA 99, 334 C.C.C. (3d) 131; *R. v. Crowley*, 2020 ONCJ 271, 464 C.R.R. (2d) 50; *R. v. Thibodeau*, 2023 ONCJ 308; *R. v. Michaud*, 2018 QCCM 104; *R. v. Atkinson*, 2012 ONCA 380, 110 O.R. (3d) 721; *R. v. Van Wyk* (1999), 6 M.V.R. (4th) 248; *R. v. Dhindsa*, 2013 ONCJ 32; *R. v. de Medeiros Arruda*, 2016 ONCJ 654; *Tremblay v. R.*, 2020 QCCA 1131, 67 C.R. (7th) 72; *R. v. Contant*, 2008 QCCA 2514, 253 C.C.C. (3d) 259; *Joseph v. R.*, 2008 QCCA 2515; *Hallé v. R.*, 2010 QCCA 2229; *Cotnoir v. R.*, [2000] R.J.Q. 2488; *R. v. Lafortune*, 2023 QCCM 48; *R. v. Vu*, 2004 BCCA 381, 201 B.C.A.C. 293; *R. v. Roy*, 2010 BCCA 448, 261 C.C.C. (3d) 62; *R. v. Petri*, 2003 MBCA 1, 171 C.C.C. (3d) 553; *R. v. LeClaire*, 2005 NSCA 165, 208 C.C.C. (3d) 559; *R. v. Fowler*, 2006 NBCA 90, 304 N.B.R. (2d) 106; *R. v. Silverfox*, 2022 YKSC 14; *R. v. Neugebauer*, 2009 NUCJ 28; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535; *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *R. v. Fleck*, 2020 ABPC 116; *Lanthier v. R.*, 2019 QCCM 58; *R. v. Collins*, [1987] 1 S.C.R. 265; *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621; *R. v. Bernshaw*, [1995] 1 S.C.R. 254; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718; *R. v. Soal* (2005), 14 M.V.R. (5th) 256, *aff'd* (2005), 19 M.V.R. (5th) 176; *R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157; *R. v. Ndaye*, 2019 ONSC 4967, 56 M.V.R. (7th) 137; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R.

353; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

By O'Bonsawin and Moreau JJ. (dissenting)

*R. v. Kleven*, 2019 SKQB 238, 53 M.V.R. (7th) 183; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. McColman*, 2021 ONCA 382, 156 O.R. (3d) 253; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Collins*, [1987] 1 S.C.R. 265; *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Edwards v. Attorney-General*, [1986] 2 N.Z.L.R. 232; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Le*, 2018 ONCA 56, 360 C.C.C. (3d) 324; *R. v. Lotozky* (2006), 81 O.R. (3d) 335; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202; *R. v. Maccooh*, [1993] 2 S.C.R. 802; *R. v. Hoffman*, 2025 SKCA 75, 4 C.R. (8th) 434; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Butchko*, 2004 SKCA 159, 192 C.C.C. (3d) 552; *R. v. McKenzie*, 2021 SKCA 150, 87 M.V.R. (7th) 21; *R. v. McColman*, 2023 SCC 8, [2023] 1 S.C.R. 309; *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Wilson*, 2025 SCC 32; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Beaver*, 2022 SCC 54, [2022] 3

S.C.R. 718; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Peequaquat*, 2020 SKQB 2, 55 M.V.R. (7th) 21; *R. v. Rogers*, 2016 SKCA 105, 341 C.C.C. (3d) 502; *R. v. Klevin*, 2017 SKPC 4, 375 C.R.R. (2d) 1; *R. v. Peequaquat*, 2018 SKPC 16, 26 M.V.R. (7th) 151; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Wise*, [1992] 1 S.C.R. 527; *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39; *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643; *R. v. Lafrance*, 2022 SCC 32, [2022] S.C.R. 393.

By Martin J. (dissenting)

*R. v. Waterfield*, [1963] 3 All E.R. 659; *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. McColman*, 2023 SCC 8, [2023] 1 S.C.R. 309; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Wong*, [1990] 3 S.C.R. 36; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Simpson* (1993), 12 O.R. (3d) 182; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v.*

*Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Paré*, [1987] 2 S.C.R. 618; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *R. v. Esposito* (1985), 53 O.R. (2d) 356; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Power*, 2024 SCC 26; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *Taylor v. Newfoundland and Labrador*, 2026 SCC 5; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Shubley*, [1990] 1 S.C.R. 3; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Schwann, Barrington-Foote and McCreary JJ.A.), 2023 SKCA 123, 431 C.C.C. (3d) 364, 542 C.R.R. (2d) 344, 92 C.R. (7th) 95, [2024] 4 W.W.R. 1, [2023] S.J. No. 406 (Lexis), 2023 CarswellSask 579 (WL), setting aside the conviction of the accused for failure or refusal to comply with a demand for a breath sample, and entering an acquittal. Appeal allowed, Karakatsanis, Martin, O’Bonsawin and Moreau JJ. dissenting.

*Pouria Tabrizi-Reardigan*, for the appellant.

*Thomas Slade* and *Cory Giordano*, for the respondent.

*Janna Hyman* and *Hugh Crawley*, for the intervener Director of Public Prosecutions.

*Matthew Morley* and *Dana Achtemichuk*, for the intervener Attorney General of Ontario.

*Micah Rankin, K.C.*, and *B. Keith Boland*, for the intervener Attorney General of British Columbia.

*Nader R. Hasan* and *Alexandra Heine*, for the intervener Canadian Civil Liberties Association.

*Anil K. Kapoor*, for the intervener Criminal Lawyers' Association (Ontario).

*Annamaria Enenajor* and *François Tanguay-Renaud*, for the intervener Canadian Constitution Foundation.

*Nikolas De Stefano* and *Samara Sectar*, for the intervener British Columbia Civil Liberties Association.

*Marie-Pier Boulet*, for the intervener Association québécoise des avocats et avocates de la défense.

The judgment of Wagner C.J. and Côté, Rowe, Kasirer and Jamal JJ. was delivered by

JAMAL J. —

## I. Overview

[1] Thirty years ago, in *R. v. Evans*, [1996] 1 S.C.R. 8, this Court affirmed that “the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock” (para. 13, per Sopinka J.). Under the implied licence doctrine, a police officer who has lawful business with the occupant of a dwelling may proceed from the street to the door of a house to communicate with the occupant (para. 15). The issue on this appeal is whether the police likewise possess an implied licence to step onto a private driveway to investigate a complaint of impaired driving when they observe, in plain view, a running vehicle matching the description in the complaint.

[2] Two RCMP officers were investigating a recent complaint of impaired driving made against the respondent, Wayne Singer, in a small Saskatchewan First Nations community. After investigating for about an hour, at around midnight, the officers saw a truck matching the description in the complaint in a residential driveway

on the community territory. The truck was running with its lights on. The officers stepped onto the driveway to approach the truck and saw a man sleeping or passed out in the driver's seat. The officers spent a few minutes knocking on the truck window, but the occupant, Mr. Singer, did not respond. When the officers opened the truck door to rouse Mr. Singer, they smelled a strong odour of alcohol coming from his breath. He seemed tired and had bloodshot eyes. At the officers' request, Mr. Singer provided a roadside breath sample, which registered as a "fail". He was then arrested and taken into custody, where he refused to provide a further breath sample. He was charged with impaired driving and refusing to comply with a demand to provide a breath sample.

[3] At trial before the Provincial Court of Saskatchewan, the only issue was whether the implied licence authorized the police to enter onto Mr. Singer's driveway. Mr. Singer argued that the police breached his right to be secure against unreasonable search or seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* by entering his driveway without permission or a search warrant. In response, the Crown relied on this Court's decision in *Evans* to claim that the police had an implied licence to step onto the driveway to investigate the impaired driving complaint. The trial judge agreed with the Crown, found no s. 8 breach, and entered a conviction for refusing to comply with a demand to provide a breath sample.

[4] The Court of Appeal for Saskatchewan set aside the conviction. The court ruled that there is no implied licence to enter a driveway "for the purpose of conversing with and observing the occupant to gather evidence that they are impaired" (2023

SKCA 123, 431 C.C.C. (3d) 364, at paras. 43 and 64-66). In the court's view, the police infringed Mr. Singer's s. 8 *Charter* rights and were trespassers from the moment they set foot on the driveway. The court excluded the evidence under s. 24(2) of the *Charter* and entered an acquittal.

[5] Before this Court, the Crown argued that the police were authorized to enter the driveway and to open Mr. Singer's truck door under the implied licence doctrine or, alternatively, under a new ancillary police power to protect public safety in the context of an impaired driving investigation.

[6] I would allow the appeal, set aside the judgment of the Court of Appeal, and remit the case to the Court of Appeal to determine the outstanding ground of appeal that it did not address. In my view, the police had an implied licence at common law to step onto Mr. Singer's driveway, approach his truck, and knock on the truck window. The police were entitled to do so on legitimate business: to investigate a recent impaired driving complaint. This police conduct did not, on its own, constitute a "search" under s. 8 of the *Charter*. The Court of Appeal's decision on this point was wrongly decided, and, as noted by the learned authors of *Drug Offences in Canada*, "the weight of authority [is] to the contrary" (B. A. MacFarlane, R. J. Frater and C. Michaelson, *Drug Offences in Canada* (4th ed. (loose-leaf)), at § 25:21).

[7] At the same time, the implied licence to enter the driveway and knock ended at the door of the truck. The police intruded onto Mr. Singer's reasonable expectation of privacy and conducted a search when they opened the truck door.

[8] In this case, there is no need to recognize a new ancillary police power to provide potential authority to open the truck door. This Court's decision in *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, already recognizes the common law power of the police to conduct a "safety search" when they have reasonable grounds to believe that the search "is reasonably necessary to eliminate an imminent threat to the safety of the public or the police" (para. 40). A safety search "will generally be conducted by the police as a reactionary measure" and "will generally be unplanned", since it is "carried out in response to dangerous situations created by individuals, to which the police must react 'on the sudden'" (para. 32).

[9] Here, there arguably were objective grounds to believe that the search was reasonably necessary to protect public safety. During the impaired driving investigation, the police found Mr. Singer asleep and unresponsive late at night in a running truck matching the description in the complaint. A running vehicle associated with an impaired driving complaint is effectively a weapon that can — and all too often does — kill both the impaired driver and innocent members of the public.

[10] However, there was no direct evidence that the officers were subjectively concerned for public safety when they encountered Mr. Singer asleep or passed out in the truck, as this issue was not raised at trial. Because the Crown bears the burden of justifying a warrantless search, and no such evidence was led, in the particular circumstances of this case I would conclude that the police breached s. 8 of the *Charter* by opening the truck door.

[11] Even so, I would not exclude the evidence under s. 24(2) of the *Charter*. The *Charter*-infringing state conduct was not so serious that the Court must dissociate itself from it. Nor did it have more than a moderate impact on Mr. Singer's *Charter*-protected interests. In the circumstances, these factors are outweighed by society's strong interest in prosecuting the serious offence of failing or refusing to comply with a demand to provide a breath sample.

## II. Facts

[12] At about 11:00 p.m. on March 20, 2019, Elaine Singer telephoned the police to report a crime in progress on Big Island Lake Cree Nation, a small First Nations community in Saskatchewan with a population of approximately 800 people. Ms. Singer reported that a community member, the respondent, Wayne Singer, was driving while intoxicated and speeding on the community's territory. She knew Mr. Singer and told the police that he was driving a white, single-cab Ford truck. She believed he was intoxicated based on how fast he was driving and was concerned he was going to see Rosina Singer, whom she believed he had previously threatened.

[13] Two RCMP officers, Constables Lapointe and Fisher, were dispatched in separate police vehicles to investigate the complaint. Cst. Lapointe, who commonly investigated intoxicated individuals, went to Rosina Singer's address, but the truck was not there. Cst. Lapointe spoke with Rosina Singer, who said that Mr. Singer had not been by that night. The officers then continued to patrol the community looking for the truck.

[14] At about midnight, roughly an hour after receiving the complaint, Cst. Lapointe saw a truck matching the description in the complaint parked in a driveway. The truck, which was readily observable from the public roadway, had caught Cst. Lapointe's attention because it was parked with its engine running and the headlights shining toward the street. Although the officers did not know this at the time, the truck was parked at Mr. Singer's home.

[15] Cst. Lapointe could not see whether anyone was in the truck from her position on the public road. Since there were no barriers to the police entry, both officers stepped onto the driveway and approached the truck. Cst. Lapointe testified that she did not consider getting a telewarrant because she was investigating an impaired driving complaint.

[16] Cst. Lapointe saw a man in the front driver's seat. He was leaning across the front seat with his head toward the passenger door and was either asleep or passed out. Cst. Lapointe knocked on the driver's window for a few minutes trying to wake him up, but he did not respond. She then opened the driver's door and smelled a strong odour of alcohol coming from the truck. She identified Mr. Singer because she had dealt with him before. Cst. Fisher then opened the passenger door and, when Mr. Singer remained unresponsive, shook him awake. Cst. Lapointe smelled a strong odour of alcohol coming from Mr. Singer's breath. His eyes were red and bloodshot and he seemed sleepy. At no time did Mr. Singer ask the officers to leave the property.

[17] Cst. Lapointe detained Mr. Singer and advised him that she had reasonable grounds to suspect that he had alcohol in his body and required him to provide a breath sample for analysis in an approved screening device. Mr. Singer complied and the sample returned a “fail” result. Cst. Lapointe then arrested Mr. Singer for having care or control of a motor vehicle with an excessive blood alcohol level. She read him his rights and a police caution and made a breath demand in the prescribed form. Cst. Lapointe testified that she would not have had grounds to make a breath demand without the fail reading on the approved screening device. At around this time, Cst. Lapointe learned that the truck was on Mr. Singer’s property.

[18] The officers took Mr. Singer to the police station where, after speaking with duty counsel, he refused to provide a breath sample. As a result, Mr. Singer was charged with refusing to comply with a demand to provide a breath sample and with impaired driving.

### III. Judicial History

#### A. *Provincial Court of Saskatchewan (Segu Prov. Ct. J.)*

[19] At trial, Mr. Singer argued that the police breached his rights under s. 8 of the *Charter* simply by stepping onto his driveway, where he had a reasonable expectation of privacy, without permission. The trial judge highlighted that Mr. Singer had “not suggested that the breach of privacy resulted from the knock on the window, or the opening of the door” (A.R., vol. II, at p. 165).

[20] The trial judge rejected Mr. Singer's argument. He ruled that the police entry onto Mr. Singer's driveway was "justified by the implied licence doctrine, which grants the public, including police officers on legitimate business, licence to enter onto private property" (p. 167). In the trial judge's view, "[m]erely walking onto Mr. Singer's driveway with intent to conduct an investigation regarding the vehicle and its driver . . . does not constitute a sufficient intrusion to be considered a search" (p. 166). He found that "the police were legitimately investigating a complaint regarding a possible impaired driver, with only a name and a vehicle description to work on" (p. 167). He also highlighted that the corollary of the police "obligation" to investigate the complaint was a duty, in the circumstances, "to protect the general public and their safety from potential impaired drivers" (p. 167). The trial judge found that "the officers entered onto the property on legitimate police business, and any interference with Mr. Singer's property rights was fleeting at best" (pp. 167-68).

[21] The trial judge added that had he found a breach of s. 8 of the *Charter*, he would have admitted the evidence obtained under s. 24(2) based on "the events flowing after the entry onto Mr. Singer's property" (p. 168). He therefore convicted Mr. Singer of failing or refusing to comply with a demand to provide a breath sample. The Crown had elected to stay the impaired driving charge after the evidence had been heard.

B. *Court of Appeal for Saskatchewan, 2023 SKCA 123, 431 C.C.C. (3d) 364 (Schwann, Barrington-Foote and McCreary JJA.)*

[22] The Court of Appeal for Saskatchewan allowed Mr. Singer's appeal, quashed the conviction, and acquitted him of failing or refusing to comply with a

demand to provide a breath sample. The court held that the police breached Mr. Singer's rights under s. 8 of the *Charter* by stepping onto his driveway and opening the truck door to investigate the impaired driving complaint, and excluded the evidence obtained under s. 24(2).

[23] The court ruled that Mr. Singer had a reasonable expectation of privacy while sleeping in his running truck in his driveway. The officers could not rely on the implied licence doctrine to step onto Mr. Singer's driveway to investigate the impaired driving complaint, because "[t]here was no evidence that the police entered the property for the purpose of knocking on the door of the residence or, for that matter, on the window of the vehicle" (para. 62). The officers could not see that Mr. Singer was in the truck, and thus there was "no evidence that they entered the driveway to conduct an investigation by communicating with him in the truck or in the driveway" (para. 63). The court ruled that the police have no implied licence to enter a driveway "for the purpose of gathering evidence against the occupant, by conversing with and using their senses to determine if the occupant exhibits signs of intoxication" (para. 64).

[24] The court stated that the evidence was "clear" that "the police intended to investigate by gathering evidence against Mr. Singer from the moment they set foot in the driveway" (para. 66). As a result, the police "did not have an implied licence to enter at all" (para. 66). Mr. Singer could not "be presumed to have invited the police to enter the driveway for the purpose of collecting evidence to enable them to substantiate

a criminal charge against him” (para. 66). Thus, “Constable Lapointe was a trespasser from the moment she set foot in the driveway” (para. 66).

[25] The court added that “[i]f the police had simply walked up the driveway, [it] would not have concluded that there had been a sufficient intrusion on Mr. Singer’s privacy to constitute such a search” (para. 67). At the same time, “things changed when [the police] knocked on the window of the truck and, having failed to get a response, opened the door of the truck and roused him” (para. 67). In the court’s view, the police “did so to observe and speak to Mr. Singer for the purpose of gathering evidence against him” (para. 67). This “police conduct intruded on Mr. Singer’s reasonable expectation of privacy. Walking up the driveway for the purpose of investigating the occupant and doing so by opening the truck’s door and gathering evidence was a s. 8 search” (para. 67).

[26] The court also ruled that the Crown could not rely on the ancillary powers doctrine to justify the police conduct. The court saw “no evidence that the police were concerned with public safety” or faced “exigent circumstances when they entered the driveway, or, for that matter, when they opened the door of the truck” (para. 69).

[27] Turning to s. 24(2) of the *Charter*, the court ruled that the police conduct involved “a serious violation of Mr. Singer’s privacy interests in the driveway of his residence” and had a serious impact on his privacy interests (paras. 90-91). The police “opened the doors to his vehicle, shook him awake, questioned him, and observed signs of impairment by alcohol” (para. 91). Although the evidence was reliable and essential

to the Crown's case, the "[i]nclusion of the evidence would do further damage to the long-term repute of the administration of justice" (para. 98). Accordingly, the court excluded the evidence and acquitted Mr. Singer.

[28] The court did not address Mr. Singer's second ground of appeal, which claimed that his right to a fair trial was infringed because the Crown's sole witness was briefly present in the courtroom when Mr. Singer's counsel made opening remarks at the beginning of the trial.

#### IV. Issues

[29] This appeal raises three issues:

1. Did the police conduct a "search" within the meaning of s. 8 of the *Charter*?
2. If so, was the search unreasonable and thus contrary to s. 8?
3. Should the evidence be excluded under s. 24(2) of the *Charter*?

#### V. Positions of the Parties

[30] The issues raised and the positions of the parties have evolved as the case has proceeded through the courts. This evolution provides important context for the findings of the trial judge, who addressed only what was raised before him.

[31] As already noted, at trial Mr. Singer argued that the only infringement of s. 8 of the *Charter* arose from the police unlawfully *entering* the driveway to his home. Mr. Singer’s notice of *Charter* application claimed that the police interfered with his privacy interest “by entering onto private property to investigate a potential impaired driving charge” (A.R., vol. I, at p. 39). The trial judge specifically recorded that Mr. Singer did *not* argue that the police breached s. 8 by knocking on the truck window or opening the door (A.R., vol. II, at p. 165). As a result, the trial judge addressed only the initial police action of stepping onto the driveway, and not the police action of knocking on the truck window or opening the door.

[32] Before the Court of Appeal, Mr. Singer argued that the trial judge erred in ruling that the “the officers had an implied invitation to enter onto the [private] property where [he] was found” and that “the entry onto the private property by the officers in this case did not constitute a search” (A.R., vol. I, at p. 43). At the same time, the s. 8 debate expanded to include whether the police could lawfully open the truck door. The court stated that “[i]f the police had simply walked up the driveway” of Mr. Singer’s property (para. 67), it would *not* have found a s. 8 breach. But, the court added, “things changed” when the police “knocked on the window of the truck and, having failed to get a response, opened the door of the truck and roused [Mr. Singer]” (para. 67) — conduct that Mr. Singer had *not* raised as part of his *Charter* challenge at trial.

[33] Before this Court, the parties’ submissions place in issue three aspects of the conduct of the police under s. 8: first, stepping onto Mr. Singer’s driveway and

approaching his running truck; second, knocking on the truck window; and third, opening the truck door to wake him. To analyze this conduct, the parties present the Court with essentially three “all-or-nothing” options: (1) none of the police conduct infringed s. 8, because all of it was justified under the common law implied licence doctrine (the Crown’s primary position); (2) none of the police conduct infringed s. 8, because all of it was justified under a new ancillary police power applicable when the police are conducting an impaired driving investigation (the Crown’s secondary position); or (3) all of the police conduct infringed s. 8 (Mr. Singer’s position).

[34] I respectfully disagree with this framing of the options before the Court. As I will explain, the Court must separately analyze the police conduct of stepping onto Mr. Singer’s driveway and knocking on his truck window on the one hand, and the later police conduct of opening the truck door on the other.

## VI. Analysis

### A. *Did Any of the Police Conduct Constitute a “Search” Under Section 8 of the Charter?*

[35] Section 8 provides that “[e]veryone has the right to be secure against unreasonable search or seizure.” The purpose of this guarantee is “to protect individuals from unjustified state intrusions upon their privacy” (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160).

[36] Whether a claimant has a reasonable expectation of privacy is assessed based on the “totality of the circumstances” (*R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 10). The inquiry is both content-neutral and normative, driven by s. 8’s purpose of protecting individuals from unjustified state intrusions onto their privacy, no matter what evidence may be uncovered as a result (*Hunter*, at p. 160; see also *R. v. Campbell*, 2024 SCC 42, at para. 47; *R. v. Mulligan* (2000), 142 C.C.C. (3d) 14 (Ont. C.A.), at para. 34). Section 8 is concerned with preventing state intrusions on an individual’s reasonable expectation of privacy, not with validating them after the fact.

[37] The common law traditionally viewed privacy in territorial terms. It recognized that a person has a high expectation of privacy in their home, exemplified in the famous statement in *Semayne’s Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, at p. 195, that “the house of every one is to him as his castle and fortress” (cited in *Eccles v. Bourque*, [1975] 2 S.C.R. 739, at pp. 742-43; see also *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169, at para. 49). The idea of territorial privacy has since developed “into a more nuanced hierarchy” that protects privacy in the home as the most protected area, but also protects in “diluted measure” the perimeter space around the home (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22). In addition, an individual has a reasonable, though diminished, expectation of privacy in a private motor vehicle (*R. v. Wise*, [1992] 1 S.C.R. 527, at p. 533; *R. v. Mellenthin*, [1992] 3 S.C.R. 615; *Tessling*, at para. 22). Thus, an individual has a reasonable expectation of privacy in their home, its perimeter, and in a vehicle in the driveway of their property.

[38] It is also settled that “not every investigatory technique used by the police is a ‘search’ within the meaning of s. 8” (*Evans*, at para. 10). A police investigatory technique is a search only if it intrudes upon a person’s reasonable expectation of privacy (para. 11; *Tessling*, at para. 18).

[39] I will consider next whether any of the police conduct of stepping onto the driveway, knocking on the truck window, or opening the truck door constituted a “search” under s. 8.

(1) The Police Did Not Conduct a Search by Stepping Onto Mr. Singer’s Driveway and Knocking on the Truck Window

(a) *There Is an Implied Licence to Approach the Door of a Residence and Knock*

[40] In *Evans*, Sopinka J. affirmed that “the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock” (para. 13). He cited in support the Court of Appeal for Ontario’s statement in *R. v. Tricker* (1995), 21 O.R. (3d) 575, that “[t]he law is clear that the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property. The implied licence ends at the door of the dwelling” (p. 579, citing *Robson v. Hallett*, [1967] 2 All E.R. 407 (Q.B.)). The implied licence can be “rebutted by a clear expression of intent” on the part of the occupant (*Evans*, at para. 13), such as by

“installing a locked gate at the entrance to the property, or posting signs to that effect” (para. 42, per Major J., dissenting, but not on this point).

[41] The implied licence doctrine originated in basic social norms and customs embedded in common law property principles relating to the law of trespass (see *Robson*, at pp. 412 and 414; *Tricker*, at p. 579; *R. v. Bushman* (1968), 4 C.R.N.S. 13 (B.C.C.A.), at p. 19). It has since been incorporated into the analysis conducted under s. 8 of the *Charter* (*Evans*; *MacDonald*). The occupier “effectively waives the privacy interest that an individual might otherwise have in the approach to the door of his or her dwelling” and “is deemed to grant the public permission to approach the door and knock” (*Evans*, at para. 13).

[42] The effective waiver of the resident’s privacy interest is limited by the *purpose* of the implied invitation, which is “to permit convenient communication with the occupant of the dwelling” and “those activities that are reasonably associated with the purpose of communicating with the occupant” (*Evans*, at para. 15). Sopinka J. quoted approvingly (at para. 15) the British Columbia Court of Appeal’s reasons in *Bushman*, at p. 19:

The purpose of the implied leave and licence to proceed from the street to the door of a house possessed by a police officer who has lawful business with the occupant of the house is to enable the police officer to reach a point in relation to the house where he can conveniently and in a normal manner communicate with the occupant.

[43] Sopinka J. highlighted that the intention of the police is relevant in determining whether their activity is a “search”. If the intention of the police were not a relevant factor, “the police would then be authorized to rely on the ‘implied licence to knock’ for the purpose of randomly checking homes for evidence of criminal activity” (*Evans*, at para. 20). They could conduct “surprise ‘spot-checks’ of the private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock” (para. 20). This “Orwellian vision of police authority [would be] beyond the pale of any ‘implied invitation’” (para. 20). The implied licence to approach and knock applies to all members of the public, including the police, but it is not a police power *per se* (para. 13).

[44] Sopinka J. summarized the essential elements of the implied licence doctrine as follows:

In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The “waiver” of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the “implied licence to knock”. Where the conduct of the police (or any member of the public) goes beyond that which is permitted by the implied licence to knock, the implied “conditions” of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.

(*Evans*, at para. 15)

[45] Almost 20 years later, in *MacDonald*, this Court unanimously affirmed Sopinka J.’s statement of the law and confirmed that police action exceeding the

conditions of the implied licence to approach and knock “constitutes a ‘search’” (para. 26, per LeBel J. for the majority, and at para. 66, per Moldaver and Wagner JJ., concurring on this point and in the result; see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at paras. 125-27, per Brown and Martin JJ., and at para. 210, per Moldaver J., dissenting, but not on this point).

[46] In the aftermath of *Evans*, courts of different provinces have disagreed about the reach of the implied licence doctrine. The Court of Appeal for Saskatchewan and several other courts have concluded that *Evans* holds that the police exceed the scope of the implied licence and conduct a search under s. 8 of the *Charter* whenever they approach a home to investigate and secure evidence against the occupant (see, e.g., *R. v. Rogers*, 2016 SKCA 105, 341 C.C.C. (3d) 502, at paras. 28-29 and 50, leave to appeal refused, [2017] 1 S.C.R. xvi, Moldaver and Côté JJ. dissenting; *R. v. Moyles*, 2019 SKCA 72, [2019] 12 W.W.R. 416, at paras. 50-54; *R. v. Peequaquat*, 2020 SKQB 2, 55 M.V.R. (7th) 21, at para. 26; *R. v. Babich*, 2017 SKQB 304, rev’d on other grounds 2020 SKCA 139, 398 C.C.C. (3d) 457; *R. v. Klevin*, 2017 SKPC 4, 375 C.R.R. (2d) 1, at paras. 18-26; *R. v. Parr*, 2016 BCCA 99, 334 C.C.C. (3d) 131, at paras. 3 and 36; *R. v. Crowley*, 2020 ONCJ 271, 464 C.R.R. (2d) 50, at paras. 39-44; *R. v. Thibodeau*, 2023 ONCJ 308, at paras. 75-77; *R. v. Michaud*, 2018 QCCM 104, at paras. 37-46).

[47] An example of this line of authority is the Saskatchewan Court of Appeal’s decision in *Rogers*. In that case, a police officer received a complaint that an impaired

driver had backed into a parked vehicle. The officer went to the driver's apartment and knocked on the door. The accused opened the door and slurred his words as he spoke to the officer. He offered to show the officer the damage to his car, stumbling and staggering as he walked. The police arrested the accused, whose blood alcohol reading significantly exceeded the legal limit. Relying on *Evans*, the Court of Appeal held that the officer conducted a search within the meaning of s. 8 by knocking on the accused's apartment door "*for the purpose* of securing evidence against the occupant" (para. 29 (emphasis in original)). As the court ruled, "[t]his principle applies equally to drinking and driving offences as well as to other offences where observing the person opening the door will give visual, auditory and olfactory clues about the person's participation in the crime under investigation" (para. 29).

[48] In the case under appeal, the Court of Appeal followed its earlier decision in *Rogers* and stated that there is no implied licence to enter a driveway "for the purpose of conversing with and observing the occupant to gather evidence that they are impaired" (para. 43; see also paras. 64-66).

[49] By contrast, other courts have interpreted *Evans* as accepting that the police act within the scope of the implied licence if their purpose is to communicate with the occupant, even if the police are investigating the occupant for an offence or if they secure evidence as a result. On this view, the police exceed the scope of the implied licence if they had no communicative purpose, were on a fishing expedition, or intended to conduct a search (see, e.g., *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.),

at paras. 18-19; *R. v. Atkinson*, 2012 ONCA 380, 110 O.R. (3d) 721, at paras. 72-75; *Mulligan*, at paras. 27-28, 31 and 34; *R. v. Van Wyk* (1999), 6 M.V.R. (4th) 248 (Ont. S.C.J.), at paras. 29-31 and 33-35; *R. v. Dhindsa*, 2013 ONCJ 32, at paras. 36-44; *R. v. de Medeiros Arruda*, 2016 ONCJ 654, at paras. 17-28; *Tremblay v. R.*, 2020 QCCA 1131, 67 C.R. (7th) 72, at para. 25, fn. 21, and at paras. 26-28; *R. v. Contant*, 2008 QCCA 2514, 253 C.C.C. (3d) 259, at paras. 33-36; *Joseph v. R.*, 2008 QCCA 2515, at paras. 32-34; *Hallé v. R.*, 2010 QCCA 2229, at paras. 24-32; *Cotnoir v. R.*, [2000] R.J.Q. 2488 (C.A), at para. 26; *R. v. Lafortune*, 2023 QCCM 48, at para. 9; *R. v. Vu*, 2004 BCCA 381, 201 B.C.A.C. 293, at paras. 24-26; *R. v. Roy*, 2010 BCCA 448, 261 C.C.C. (3d) 62, at paras. 30-33; *R. v. Petri*, 2003 MBCA 1, 171 C.C.C. (3d) 553, at paras. 21-23 and 27; *R. v. LeClaire*, 2005 NSCA 165, 208 C.C.C. (3d) 559, at paras. 13-20; *R. v. Fowler*, 2006 NBCA 90, 304 N.B.R. (2d) 106, at paras. 31-33; *R. v. Silverfox*, 2022 YKSC 14, at paras. 54-59; *R. v. Neugebauer*, 2009 NUCJ 28, at paras. 23-33).

[50] An example of this line of authority is the Ontario Court of Appeal's decision in *Lotozky*. In that case, the court held that police officers were entitled to walk onto a private driveway to investigate a suspected impaired driver. The police tapped on the window of the accused's car. When the driver exited the vehicle, they asked him to provide his driver's licence, ownership, and insurance. The accused showed signs of impairment when he spoke to the police. He had difficulty maintaining his balance, he looked disheveled, his eyes seemed watery, and there was a smell of alcohol on his breath. The Court of Appeal rejected the conclusion of the trial judge and summary

conviction appeal court that the police were not entitled to walk onto the accused's driveway to further their investigation. As Rosenberg J.A. stated:

. . . merely walking on to a driveway, even with an intent to conduct an investigation involving the owner, does not, in my view, constitute a sufficient intrusion to be considered a search. There must be something more, as in the perimeter search cases, peering in windows of the home and trying to detect odours from within. [para. 18]

[51] The trial judge in the case under appeal applied the reasoning in *Lotozky* (A.R., vol. II, at p. 167). However, the Saskatchewan Court of Appeal interpreted *Lotozky* narrowly, as applying only when the police already have *reasonable grounds* to suspect that the motorist is impaired (para. 57, citing *R. v. McColman*, 2021 ONCA 382, 407 C.C.C. (3d) 341, at para. 41, rev'd on other grounds 2023 SCC 8, [2023] 1 S.C.R. 309). It concluded that the police in this case only acquired such grounds after they opened the truck door (para. 57).

[52] I respectfully disagree with the Saskatchewan Court of Appeal's narrow reading of *Lotozky*. Although the presence of reasonable grounds to suspect impairment may show that the police are on the accused's property on legitimate business, such grounds are not required to enter property under an implied licence. In my view, *Rogers* and *Lotozky* present inconsistent interpretations of *Evans*. The present case requires this Court to resolve this inconsistency. Because the legitimate business of the police often involves investigative activity, defining the implied licence too narrowly could significantly hamper the police in performing their duty to investigate and prevent

crime and protect the public. At the same time, the implied licence must not be applied so broadly as to give the police effectively unconstrained investigative authority.

[53] I will first consider in greater detail how this Court applied the implied licence doctrine in *Evans*, along with the authorities that the Court cited approvingly in that decision. I will then consider several of this Court’s subsequent s. 8 rulings. As I will explain, in my respectful view, the court below erred in defining the scope of the implied licence to approach and knock based on an untenable distinction between “investigating” a potential criminal offence (which it said is permissible) and “securing evidence” against the home’s occupant (which it said is impermissible).

(i) *Evans Does Not Prevent the Police From Approaching a Home for the Purpose of Communicating With the Occupant*

1. *The Scope of Evans*

[54] This Court’s decision in *Evans* does not prevent the police from approaching a home to communicate with the occupant during a police investigation. The implied licence authorizes the police to do what other members of the public can do: approach a private dwelling to communicate with the occupant. Merely interacting with and talking to the occupant fits within the communicative purpose of the implied licence and is not a search. At the same time, police exceed the communicative purpose of the implied licence when their purpose is to conduct a search or a random “spot-check”.

[55] *Evans* involved what is known colloquially as a “knock-on” search, in which the police knock on the door of a home for the purpose of looking or smelling for evidence inside the home when the door is opened (MacFarlane, Frater and Michaelson, at § 25:21; D. Stuart, *Charter Justice in Canadian Criminal Law* (7th ed. 2018), at pp. 362-63; *LeClaire*, at para. 15, citing A. D. Gold, “Search and Seizure Evidence”, in National Criminal Law Program, *Criminal Evidence* (1997), vol. 2). In *Evans*, the police had unsuccessfully investigated an anonymous tip that individuals were growing marijuana in their home and, as a final step in their investigation, decided to knock on the front door and question the occupants. The police testified that they planned to visit the home to possibly “get a whif [*sic*] or a smell” of marijuana at the door (paras. 16 and 37). The police did in fact smell marijuana and immediately arrested the occupants.

[56] Sopinka J. stated the narrow question before the Court as “whether or not the conduct of the police in ‘sniffing’ for marijuana at the door to the appellants’ home constituted a ‘search’ within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms*” (*Evans*, at para. 8). He concluded that attending the home with the specific purpose of sniffing for marijuana — an olfactory search — was a “search” under s. 8 and exceeded the scope of the implied licence to communicate with the occupants. As Sopinka J. explained, “[s]ince the implied invitation is for a specific purpose, the invitee’s purpose is all-important in determining whether his or her activity is authorized by the invitation” (para. 18). The implied licence does not authorize police

to approach a private home and knock for the purpose of conducting a search to gather evidence against the occupant:

Clearly, 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. Any “waiver” of privacy rights that can be implied through the “invitation to knock” simply fails to extend that far. As a result, 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. [Emphasis added; para. 16.]

[57] Drawing on the common law property origins of the implied licence, Sopinka J. clarified that the implied licence is limited to entry onto the property for a purpose that it can reasonably be expected the occupant would permit. As Sopinka J. stated, “it would be ludicrous to argue that the invitation to knock invites a burglar to approach the door in order to ‘case’ the house” (*Evans*, at para. 14). He concluded that “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” (para. 16). As a result, “where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the accused through ‘knocking on the door’, the police have exceeded the authority conferred by the implied licence to knock” (para. 20; see also para. 16).

[58] Sopinka J. concluded that, “where the police, as here, purport to rely on the invitation to knock and approach a dwelling for the purpose, *inter alia*, of securing evidence against the occupant, they have exceeded the bounds of any implied invitation

and are engaging in a search of the occupant's home" (*Evans*, at para. 18 (emphasis in original)).

[59] In referring to "gathering" or "securing" evidence, Sopinka J. was not suggesting that the police exceed the terms of an implied licence whenever they approach a home to speak with the occupant for an investigative purpose. He affirmed that a conversation with a police officer, without more, is not a search, where the police officer approaches and knocks "for the purpose of facilitating communication with the occupant" (*Evans*, at para. 18, citing *R. v. Duarte*, [1990] 1 S.C.R. 30; see also *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, at para. 12; *Campbell*, at para. 70; *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, at para. 42, per Karakatsanis J.). In *Evans*, the purpose of the police was not simply to communicate with the occupant; it was to conduct an olfactory search of the interior of the home. As Sopinka J. explained, "[w]here members of the public (including police) exceed the terms of [the waiver under the implied licence], and approach the door for some unauthorized purpose, they exceed the implied invitation and approach the door as intruders" (para. 21). It was the admitted intent of the police to "sniff" the interior of the home from the doorstep that went beyond "those activities that are reasonably associated with the purpose of communicating with the occupant" (para. 15). On that basis, the police infringed s. 8 of the *Charter*.

[60] This reading of *Evans* is supported by the three Canadian appellate authorities that Sopinka J. cited in framing the implied licence doctrine: the British

Columbia Court of Appeal's decisions in *R. v. Campbell* (1993), 36 B.C.A.C. 204 ("*Campbell C.A.*"), and *Bushman*, and the Ontario Court of Appeal's decision in *Tricker*. It is also supported by several later decisions of this Court.

[61] Like *Evans*, *Campbell C.A.* involved a knock-on search. Police knocked on the door of the accused's home after receiving an anonymous tip about stolen furniture. They acknowledged that their purpose was "to make inquiries as a follow-up to the tip and to see if any stolen furniture was visible through the open front door when the occupant answered the knock" (*Evans*, at para. 19 (emphasis added), citing *Campbell C.A.*, at para. 11). The police conducted a search not by speaking with the occupants as part of their investigation, but by conducting a visual search of the inside of the home from the doorstep.

[62] In *Tricker*, the Ontario Court of Appeal held that the implied licence doctrine allowed a police officer to enter the driveway of a residential property to carry out their statutory mandate to obtain reasonable identification of a driver whom the officer had seen speeding on a residential street. The court rejected the argument that the police officer was a trespasser from the moment he set foot onto the driveway. The officer had "legitimate business to come on to the property" (p. 579), namely, the investigative purpose of speaking with the driver and obtaining his identification. The police conduct therefore fell within the scope of the implied licence.

[63] In *Bushman*, the police came to the accused's home to question him about a hit and run accident reported earlier that evening. The British Columbia Court of

Appeal held that the police had acted within the scope of the implied licence by approaching the home, walking through the yard, and passing through the porch to knock on the kitchen door. As the court explained, “[d]uty as a police officer” required the officer to question the accused at his home. The officer thus had “implied leave and licence to proceed from the street through the yard of the house and knock at a convenient outer door to draw the occupant’s attention to his presence” (p. 20).

[64] In light of these authorities that Sopinka J. cited approvingly in *Evans*, I respectfully disagree with the line of cases, including *Rogers*, that takes a restrictive view of the implied licence by holding that it is exceeded and that s. 8 of the *Charter* is engaged “[i]f the approach [to the dwelling on private property] is motivated by an investigative purpose” (*Parr*, at para. 3). I note that the Quebec Court of Appeal in *Tremblay* expressly declined to follow the reasoning of the Saskatchewan Court of Appeal in *Rogers* (*Tremblay*, at para. 25, fn. 21; see also *de Medeiros Arruda*, at para. 26 (“I would approach *R. v. Rogers* with caution”); *R. v. Fleck*, 2020 ABPC 116, at paras. 101-10; *Lafortune*, at para. 9; *Lanthier v. R.*, 2019 QCCM 58, at paras. 53-54). Instead, I agree with the line of cases cited above that interpret the implied licence as permitting an investigative purpose. Conduct of the police in entering a driveway under an implied licence to communicate with the occupant, even when intending to pursue an investigation, does not, without more, constitute a search.

## 2. Subsequent Decisions of This Court

[65] Subsequent decisions of this Court reflect the distinction between the police legitimately approaching a dwelling to communicate, even with an investigative purpose, and conduct that intrudes on a reasonable expectation of privacy.

[66] In *MacDonald*, this Court affirmed Sopinka J.'s ruling in *Evans* and held that police investigating a noise complaint had an implied licence to approach a home and knock on the door for the purpose of communicating with the occupant (para. 27). On the facts of *MacDonald*, a building concierge and police officer approached the accused's apartment to ask him to turn his music down. The accused swore at them and refused to do so. A more senior officer was called to the scene and knocked and kicked on the door, announcing that he was a police officer. Approximately five minutes later, the accused opened the door slightly and the senior officer noticed a "black and shiny" object in his hand. The senior officer then pushed the door open further to get a better view of the object, which he believed might be a knife, but turned out to be a handgun (para. 6). This Court held that while the senior officer's initial actions fell within the scope of the implied licence, he exceeded its terms by pushing open the door, thereby intruding upon the accused's reasonable privacy interest in his dwelling and conducting a search under s. 8 of the *Charter*. At the same time, this warrantless search did not infringe s. 8 because it was a "safety search" under the ancillary powers doctrine. I address this further below.

[67] In *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, the only issue before this Court was whether to exclude evidence under s. 24(2) of the *Charter*. The Court

described the evidence as having been obtained as a result of a “serious and systematic disregard for *Charter* rights” involving violations of “virtually every *Charter* right accorded to a suspect in a criminal investigation” (paras. 1-2). One of the many *Charter* violations conceded before this Court involved the police exceeding the terms of the implied licence to approach and knock. The police suspected that the accused had attempted to murder her husband and went to her residence late at night to seek her consent to conduct a warrantless search of her home. The trial judge found that the accused had retracted the implied licence to approach her house to knock by shutting off the lights in her residence. He also found that the police exceeded the terms of the implied licence by having “expressly contemplated the possibility of recovering evidence against the [accused] when they went to her home, illustrated by the fact that the police deliberately withheld from the [accused] the fact that [her husband] had been wounded by a bullet” (para. 12). This showed that the police specifically intended to gather evidence against the accused. The trial judge rejected the officers’ evidence that they had come to the accused’s residence in response to a 9-1-1 call received earlier that evening, finding that this was merely a pretext to enter and search the accused’s home without a warrant.

[68] In *R. v. Godoy*, [1999] 1 S.C.R. 311, this Court affirmed the power of the police to forcibly enter a dwelling in response to an emergency 9-1-1 call. The police arrived at the apartment where the call originated and knocked on the front door. The accused partially opened the door and the police asked him whether they could come in to investigate. When the accused tried to close the door, the police forcibly entered.

This Court ultimately held that the police officers' forced entry was a search but was justified by the ancillary powers doctrine. At the same time, it was never doubted that the police could approach the accused's home and knock to investigate a potential criminal offence, even though this might have allowed the police to gather evidence.

[69] In *Stairs*, this Court considered the police power to conduct a search incident to arrest inside a home. The police received a 9-1-1 call about a man repeatedly hitting a woman in a car, which the police found parked in the driveway of an unknown house. The police knocked on the front door and loudly announced their presence. When no one answered, the police entered the house without a warrant because they feared for the woman's safety. They soon saw a woman with fresh injuries on her face and arrested the accused. During a search incident to arrest, the police found drugs in plain view in the basement. Although the Court was divided on the power to search incident to arrest inside a home, there was again no question that the police could approach the house and knock to investigate the complaint, even though they might gather evidence against the occupant as a result.

[70] In each of the above cases, the Court accepted the principle that the implied licence permits all members of the public, including police, to proceed on legitimate business from the street to the door of a house to permit convenient communication with the occupant (*Evans*, at para. 15). In contrast, on Mr. Singer's interpretation of the implied licence doctrine, the police would be trespassers immediately upon their entry onto the private property to take a statement or respond to a complaint of intimate

partner violence or impaired driving. In my view, Mr. Singer's interpretation cannot be sustained. Convenient communication necessarily includes investigative questioning. The police may lawfully approach a private dwelling and knock as part of "a *bona fide* investigative inquiry" involving communication (R. M. Pomerance, "Parliament's Response to R. v. Feeney: A New Regime for Entry and Arrest in Dwelling Houses" (1998), 13 C.R. (5th) 84, at pp. 101-2; *Evans*, at para. 15).

[71] At the same time, as this Court affirmed in *Le*, the police questioning must relate to legitimate police business and must not involve a speculative criminal investigation or "fishing expedition". In *Le*, the issue was whether the police arbitrarily detained the accused contrary to s. 9 of the *Charter* by entering a private backyard where he and four other men were located, questioning them about who they were and why they were there, and asking for documentary proof of their identities. Both the majority and the dissent agreed that the entry of the police could not be justified under the implied licence doctrine. The majority affirmed *Evans*, but found that the police did not need to enter the private property to communicate with the men because the police could have spoken to them over the fence, which was only about two feet high (paras. 126-27). The majority also found that the police had a subsidiary purpose to engage in a "speculative criminal investigation, or a 'fishing expedition'", because "the police had no information linking any of the backyard's occupants whose identities were unknown to them to any criminal conduct or suspected criminal conduct" (para. 127). Moldaver J., dissenting, similarly affirmed the implied licence doctrine described in *Evans* and *MacDonald*. In his view, the police could not rely on the implied licence

doctrine until they attempted, from outside the fence, to ask the men for permission to enter (para. 211).

[72] Importantly, Moldaver J. explained that “[a]lthough the implied licence doctrine does not permit the police to ‘approach a dwelling with the intention of gathering evidence against the occupant’ (*Evans*, at para. 16), these words should not . . . be read as creating a general prohibition against police approaching a dwelling in order to question the owner/occupier for the purpose of furthering a lawful investigation” (*Le*, at para. 212). The majority in *Le* did not disagree with the latter statement, which is consistent with this Court’s decisions in *Evans*, *MacDonald*, *Godoy*, and *Stairs*, and with the earlier appellate decisions in *Tricker*, *Bushman*, and *Campbell C.A.*

(ii) The Implied Licence Authorizes Communication With the Occupant, Even if It Puts Evidence of an Offence in Plain View

[73] Mr. Singer nevertheless argues that the implied licence has a different scope when the offence under investigation allows the police to gather evidence merely by communicating with a suspect. He relies on *Rogers*, which was applied by the Court of Appeal below, to suggest that the offence of impaired driving differs from other offences because it “necessarily entails the potential to obtain evidence from conversing with or observing the person answering the door” (*Rogers*, at para. 29). As noted above, the court in *Rogers* stated that the authorities do not support “the proposition that when the police are investigating a drinking and driving offence, they

may knock on the door of a residence to gather grounds to make a breath demand or otherwise determine whether the driver has been drinking” (para. 51).

[74] I respectfully disagree with this reasoning. I see no basis to exclude from the implied licence the investigation of offences for which ordinary communication might reveal evidence of impairment by using the officer’s senses, provided that the officer did not intend to conduct a search (as with the knock-on searches in *Evans* and *Campbell C.A.*), and provided that the officer is not conducting a speculative criminal investigation or “fishing expedition” (*Le*).

[75] I would add that a conversation, without more, is not a search under s. 8 of the *Charter* (*Evans*, at para. 18; *Duarte*, at p. 57; *Fliss*, at para. 12; *Campbell*, at para. 70). In the normal course of a conversation, each person observes the other with their senses. Such observations are also not a search. As noted by Professors Hogg and Wright, “[a] person has no reasonable expectation of privacy in respect of things that are in plain view” (*Constitutional Law of Canada* (5th ed. Supp.), at § 48:14):

[It makes no] difference which of the senses has been used to detect something. A police officer does not engage in a search simply by hearing a gunshot or a cry for help. Nor is there a search if a police officer smells gunpowder or blood. So long as the police officer is lawfully present at the vantage point, the use of any of the senses of sight, hearing or smell is not a search; no warrant or other justification is required for the use of any of the senses. [Emphasis added.]

(See also J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (13th ed. 2024), at pp. 1410-14.)

[76] There is no reasonable expectation of privacy in a conversation just because it occurs on private property and later reveals evidence of an offence. A court cannot “focu[s] on the end result and reaso[n] backwards, rather than taking the objective legal standards governing the conduct of the police as the starting point” (*Mulligan*, at para. 34, per Sharpe J.A.). On the other hand, if the police approach a residence with the purpose of conducting a search, the fact that the police conduct is limited to a conversation with the occupant will not necessarily avoid a breach of s. 8 of the *Charter* (*Evans*, at para. 14; *MacDonald*, at para. 26).

[77] It is also important to underscore that the implied licence doctrine does not authorize all manner of entry by the police onto private property. In keeping with the normative approach to s. 8, the implied licence to approach and knock does not authorize random “spot-checks” of unwitting members of the public by the police, or communication as a ruse for a knock-on search. As Sopinka J. explained in *Evans*, all activities pursued under the implied licence must be consistent with its purpose, namely, “to permit convenient communication with the occupant of the dwelling” (para. 15) about “legitimate business” (para. 13, citing *Tricker*, at p. 579). Again, I stress that the implied licence doctrine does not create a new police power *per se*. Moreover, other constitutional limits on the conduct of a conversation with the police may be engaged under ss. 9 and 10 of the *Charter*, which consider whether the police arbitrarily detained the individual or overtook their free will (*Le*, at para. 128; *Tremblay*, at paras. 31-34). These grounds were not raised in this appeal.

[78] I therefore agree with the Crown that *Rogers* was wrongly decided in holding that a police interaction with a suspected impaired driver constitutes a search if the driver displays signs of impairment.

(iii) Summary

[79] The main principles regarding the common law implied licence doctrine may be summarized as follows:

1. The common law recognizes an implied licence for all members of the public, including police, on legitimate business to approach the door of a dwelling and knock (*Evans*, at para. 13; *MacDonald*, at para. 26; *Le*, at paras. 125 and 210). The implied licence ends at the door of the dwelling (*Evans*, at para. 13; *MacDonald*, at para. 27).
2. Under the implied licence, the occupier effectively waives the privacy interest that they might otherwise have in the approach to the door of their dwelling and is deemed to grant the public permission to approach the door and knock (*Evans*, at paras. 13-14).
3. The purpose of the implied licence is to permit convenient communication with the occupant of the dwelling and those activities reasonably associated with that purpose (*Evans*, at para. 15; *MacDonald*, at para. 26; *Le*, at paras. 125 and 210).

4. Conduct falling within the scope of the implied licence is not a “search” under s. 8 of the *Charter*. Activities that go beyond the purpose of facilitating effective communication with the occupant of the dwelling breach the implied conditions of the licence. The person conducting the unauthorized activity approaches the dwelling as an intruder. In such circumstances, police action constitutes a “search” (*Evans*, at para. 15; *MacDonald*, at para. 26).
5. The intention of the police is relevant in determining whether the police activity falls within the communicative purpose of the implied licence or whether it constitutes a “search”. For example, police are not authorized to: (a) randomly check dwellings for evidence of criminal activity by conducting “spot-checks” of unsuspecting citizens (*Evans*, at para. 20); or (b) conduct a speculative criminal investigation or “fishing expedition”, where the police have no information potentially linking any of the occupants to any criminal conduct or suspected criminal conduct (*Le*, at para. 127). In addition, (c) where the police approach for the purpose of “securing evidence against the accused” through a “knock-on” search, “the police [will] have exceeded the authority conferred by the implied licence to knock” (*Evans*, at para. 20; see also paras. 13, 16 and 18-21; *Le*, at para. 127). Where evidence clearly establishes that the police have specifically adverted to the possibility of securing evidence against the occupant by knocking on

the door, the police have exceeded the terms of the implied licence to knock (*Evans*, at paras. 16 and 20).

6. However, a conversation with the occupier of a dwelling, without more, is not a “search” (*Evans*, at para. 18). There is no general prohibition against the police approaching a dwelling in order to question the occupier for the purpose of furthering a lawful investigation (*Le*, at para. 212). So long as the police officer is lawfully present, the use of any of their senses of sight, hearing, or smell is not a search (*Hogg and Wright*, at § 48:14).

7. The implied licence can be rebutted or revoked at any time by a clear expression of intent (*Evans*, at paras. 13 and 42).

[80] I now address how the implied licence doctrine applies in this case.

(b) *The Police Had an Implied Licence to Step Onto Mr. Singer’s Driveway, Approach His Truck, and Knock on His Truck Window*

[81] In my view, Cst. Lapointe and Cst. Fisher had an implied licence to step onto Mr. Singer’s driveway, approach his running truck, and knock on the window to facilitate convenient communication with the occupant.

[82] The trial judge correctly stated and applied the relevant law to his findings of fact. He noted that the implied licence doctrine “grants the public, including police officers on legitimate business, licence to enter onto private property” (A.R., vol. II, p. 167). He found that “the police were legitimately investigating a complaint regarding a possible impaired driver” and had an “obligation to investigate . . . to protect the general public and their safety from potential impaired drivers” (p. 167). The truck was “open to public view” on the driveway with “no barriers to the police entry” (p. 166). Cst. Lapointe had seen the truck “from the main road, which is why she turned into the driveway in the first place” (p. 166). The trial judge also found that “[a]t no time were the officers asked to leave the property by anyone” (p. 166). There was thus no indication that the implied licence was revoked. Based on the trial judge’s factual findings, I see no basis to impugn his conclusion that “[m]erely walking onto Mr. Singer’s driveway with intent to conduct an investigation regarding the vehicle and its driver . . . does not constitute a sufficient intrusion to be considered a search” (p. 166).

[83] By contrast, the Court of Appeal saw “no evidence” that the police “entered the driveway to conduct an investigation by communicating with [Mr. Singer] in the truck or in the driveway” (para. 63). The court reached this conclusion because the officers “could not see that [he] was in the truck” from the street (para. 63). But the implied licence does not require the police to see the occupant from the street before they can approach and knock. In my respectful view, appellate deference was owed to the trial judge’s finding of fact that the police stepped onto Mr. Singer’s driveway “with

intent to conduct an investigation regarding the vehicle and its driver” (A.R., vol. II, at p. 166).

(2) The Police Did Conduct a Search by Opening the Door to Mr. Singer’s Truck

[84] Despite my conclusion that the police were lawfully present on Mr. Singer’s driveway under the implied licence, I would find that the implied licence extended only to the door of Mr. Singer’s truck, just as it would have extended only to the door of his home. An individual has a reduced but still reasonable expectation of privacy in a private vehicle, as compared to a private residence (*Mellenthin; Wise*). The police exceeded the terms of the implied licence when they opened the door to Mr. Singer’s truck and intruded on his reasonable expectation of privacy inside the truck. The police otherwise had no access to the information inside Mr. Singer’s truck, including the smell of alcohol on his breath. In this respect, this case is like *MacDonald*, where the police conducted a search by pushing open the front door to a residence where they were lawfully present under the implied licence. As a result, the police conduct of opening the truck door was a search under s. 8 of the *Charter*.

[85] The next issue is whether this search was “unreasonable” under s. 8.

B. *Was the Search Unreasonable?*

[86] A warrantless search is presumptively unreasonable. The Crown must establish, on a balance of probabilities, that the search was reasonable. A search is

reasonable if it is authorized by a reasonable law and conducted in a reasonable manner (*Campbell*, at para. 81, citing *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; see also *Evans*, at para. 23).

[87] Before this Court, the Crown argued that the police had authority to open the door to Mr. Singer's truck, either under the implied licence or alternatively under a new ancillary police power that applies in impaired driving investigations. I have concluded that the implied licence did not extend that far. That leaves the question of whether the police conduct was authorized under an ancillary police power, and if so, whether the search was conducted in a reasonable manner.

(1) The Ancillary Powers Doctrine

[88] In a free and democratic society, the police “are sometimes required to interfere with the liberty of individuals” in order to carry out their duties as law enforcement officers of the state (*Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519, at para. 38). Even so, it is “a fundamental tenet of the rule of law” that any interference should be limited “to the extent authorized by law” (para. 38, citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pp. 10-11).

[89] The ancillary powers doctrine addresses whether a particular police power that *prima facie* interferes with individual liberty is authorized at common law. The preliminary step in the analysis requires the court to define the police power being asserted and the liberty interests at stake. The analysis then proceeds in two stages:

first, the court asks whether the police action at issue falls within the general scope of a statutory or common law police duty; second, the court asks whether the police action involves a justifiable exercise of police powers associated with that duty (*Fleming*, at para. 46; *MacDonald*, at paras. 35-36; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 78).

[90] At the second stage, the court asks whether the police action is reasonably necessary to fulfill the police duty (*Fleming*, at para. 47, citing *MacDonald*, at para. 36; *Dedman*, at p. 35). Three factors must be weighed: (1) the importance of the performance of the duty to the public good; (2) the necessity of the interference with individual liberty for the performance of the duty; and (3) the extent of the interference with individual liberty (*Fleming*, at para. 47, citing *MacDonald*, at para. 37).

[91] This Court applied the ancillary powers doctrine in *Dedman* to recognize police authority to randomly stop vehicles in a spot check program to detect and deter impaired driving. Since then, this Court has recognized several ancillary police powers, including the power to search an individual incident to arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158); to enter a dwelling house without a warrant to investigate a 9-1-1 call (*Godoy*); to strip-search an individual incident to arrest (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679); to detain an individual for investigative purposes (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59); to set up a roadblock (*R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725); to use sniffer-dogs (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1

S.C.R. 456); to conduct a safety search (*MacDonald*); and to search a cellphone incident to arrest (*R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621).

[92] In *Fleming*, this Court highlighted a tension underlying the ancillary powers doctrine. On the one hand, “[e]stablishing and restricting police powers is something that is well within the authority of legislatures. Accordingly, the courts should tread lightly when considering proposed common law police powers” (para. 41). On the other hand, “the courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist” (para. 42).

[93] I pause to reiterate that the ancillary powers doctrine was not raised at trial. The only basis of Mr. Singer’s *Charter* challenge was that the police could not step foot onto his driveway under the implied licence doctrine, and thus the parties adduced evidence and made argument before the trial judge on that basis. Mr. Singer did not separately argue that the police could not open the truck door.

[94] Before the Court of Appeal, however, the Crown expressly relied on the ancillary powers doctrine and argued that “the police were faced with exigent circumstances, as there was a potential threat to public safety, and that they accordingly did the only thing they could to protect the community” (para. 68). The Court of Appeal recognized that the Crown’s argument was “based on the ancillary police powers doctrine”, but did not address this argument further because it saw “no evidence that the police were concerned with public safety or that they thought these were exigent

circumstances when they entered the driveway, or, for that matter, when they opened the door of the truck” (para. 69).

[95] On further appeal, the Crown now asks this Court to recognize an ancillary police power that applies in impaired driving investigations. The Crown says that the police should have “[t]he power to enter private property with the intent to speak to the occupant and observe signs of impairment . . . where they have reasonable grounds to suspect that individual is connected to a recent or ongoing criminal offence” (A.F., at paras. 83 and 86; see also I.F., Attorney General of Ontario, at para. 24). The Crown claims that such a power is reasonably necessary for the police to fulfill their duty to protect life and safety and prevent crime.

[96] At the first stage of the test, the Crown says that the police action of entering private property to speak to the occupant and observe signs of impairment falls within the general scope of the statutory and common law duty of the police to prevent crime and protect life and public safety (see A.F., at paras. 82-83, citing *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18; *Dedman*, at p. 11; *Godoy*, at para. 15; *MacDonald*, at para. 31).

[97] At the second stage of the test, the Crown says that such action is a justifiable exercise of police powers associated with the police duty. The Crown and several interveners claim that the police need this power to protect public safety. They say that the police should not have to “wait to pursue the vehicle when it re-enters public roads and puts everyone in danger” (A.F., at para. 85), emphasizing the “trail of

death, injury, heartbreak and destruction” caused by impaired driving (I.F., Attorney General of British Columbia, at para. 26, citing *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 16). In the Crown’s view, such an ancillary police power would authorize the police to enter private property and conduct a search by opening a car door whenever they are investigating impaired driving.

[98] Although I agree that impaired driving investigations raise significant public safety concerns, I see no need to recognize a new ancillary police power in this case because an existing ancillary power was arguably already available. The ancillary powers doctrine allows the courts to incrementally adapt common law rules “where legislative gaps exist” (*Fleming*, at para. 42). But if there is no gap in the relevant legal rules, a court should “tread softly” before enlarging the powers of the police (*Mann*, at para. 17; see also *Kang-Brown*, at para. 6). As Binnie J. cautioned in *Clayton*, at para. 80, in determining whether the police possess an ancillary power at common law, a court should start by “look[ing] at the existing jurisprudence”.

[99] As I explain below, in this case, the police arguably had the necessary authority to open the door to Mr. Singer’s truck under the established ancillary power to conduct a safety search. At the same time, because the issue of ancillary powers was not argued at trial, the trial judge made no express finding as to whether the police were subjectively motivated by a concern for safety in opening the truck door. Given the Crown’s burden to justify a warrantless search, in the absence of such an express

finding, I would find that the police breached s. 8 of the *Charter* by opening the truck door.

(2) The Ancillary Police Power to Conduct a Safety Search

[100] In *MacDonald*, this Court recognized that police have a common law ancillary power to conduct a safety search where such a search is “reasonably necessary to eliminate an imminent threat to the safety of the public or the police” (para. 40). A safety search will be authorized by law if the police officer has reasonable grounds to believe that the safety of the public or the police is at stake and that, as a result, it is necessary to conduct a search (para. 41).

[101] In the context of a safety search to protect public safety, the “public” necessarily includes the individual targeted by the safety search, who may pose a threat to themselves or others. Often, it may be unclear whether the threat of harm is to the subject of the investigation, a third party, or both. When an impaired individual is behind the wheel of a car, both the impaired driver and other members of the public face a realistic risk of serious injury (*Bernshaw*, at para. 17; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 3). In 2019 — the year Mr. Singer was found asleep in his running truck — impaired driving killed as many as 155 people in Canada, including 88 impaired drivers and 67 other road users (Statistics Canada, *Impaired driving in Canada, 2019* (July 2021), at p. 4).

[102] At the same time, whether the police are confronted with an imminent safety threat justifying a safety search must be evaluated in each case, not based on a general sense that impaired driving is dangerous. A safety search “cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on ‘reasonable and specific inferences drawn from the known facts of the situation’” (*MacDonald*, at para. 41, quoting *Mann*, at para. 41). The Crown bears the burden of showing subjective and objective grounds for the safety search on a balance of probabilities (*MacDonald*, at paras. 29 and 41; see also *R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 72, cited in *Campbell*, at para. 114).

[103] At the hearing before this Court, the Crown argued that the police faced an “extraordinary” situation that had evolved into “some sort of an exigency” and demanded police intervention (transcript, at pp. 5 and 8). The Crown submitted that when the police had found an individual sleeping or passed out behind the wheel of a running truck matching the description in the impaired driving complaint, they could not simply walk away (p. 5).

[104] I agree with the Crown’s submission that there were objective grounds for the police to believe that the circumstances presented a public safety risk. Indisputably, “[i]mpaired driving is a major public safety issue in Canada” (Statistics Canada, at p. 4). “There is a compelling public interest in detecting impaired drivers, and in preventing persons from driving while impaired” (*R. v. Soal* (2005), 14 M.V.R. (5th) 256 (Ont. S.C.J.), at para. 33, aff’d (2005), 19 M.V.R. (5th) 176 (Ont. C.A.)).

[105] As this Court has noted, an impaired person in the care or control of a motor vehicle poses “a realistic risk of danger in at least three ways”:

First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

(*R. v. Boudreault*, 2012 SCC 56, [2012] 3 S.C.R. 157, at para. 42)

[106] Impaired drivers can be just as dangerous to members of the public in a parked car as on a public street or highway (see, e.g., *R. v. Ndaye*, 2019 ONSC 4967, 56 M.V.R. (7th) 137, at para. 70). Parliament recognized this by treating the offence of operating a motor vehicle while impaired as including both “driv[ing]” and having “care or control” of the vehicle (*Criminal Code*, R.S.C. 1985, c. C-46, ss. 320.11 “operate” and 320.14(1)). This risk is heightened where the vehicle is running. An impaired driver behind the wheel of a running truck in a private driveway could easily re-enter a public road, intentionally or accidentally, and pose a serious danger to the public and themselves. In addition, in this case, the impaired driving complaint came from someone who knew Mr. Singer personally in a small community.

[107] As a result, with respect, I cannot agree with the Court of Appeal’s assertion that there was “no evidence that the police were concerned with public safety” (para. 69). At the same time, I recognize that the trial judge made no specific finding as to whether there were grounds for a safety search because this point was not raised at trial.

[108] Whether a safety search is necessary must be assessed on the particular facts of each case. Because the findings of fact needed to justify a safety search were not made at trial, I would conclude, in the circumstances of this case, that the Crown did not discharge its persuasive burden of proving that the search was authorized. As a result, I conclude that the police breached s. 8 of the *Charter* by opening the truck door. I will therefore proceed to consider whether the evidence obtained should be excluded under s. 24(2) of the *Charter*.

C. *Should the Evidence Obtained Be Excluded Under Section 24(2)?*

[109] In my view, the evidence obtained should not be excluded under s. 24(2) of the *Charter*. I reach this conclusion by considering the impact of admitting this evidence on public confidence in the administration of justice over the long term, based on a balancing of the three lines of inquiry described by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on the merits (para. 71; see also *R. v. Fox*, 2026 SCC 4, at paras. 91, 94, 111 and 118; *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 74; *Beaver*, at para. 116; *McColman*, at para. 54).

[110] The first line of inquiry under s. 24(2) considers whether the *Charter*-infringing state conduct is so serious that the court needs to dissociate itself from it. This line of inquiry requires a court to situate the seriousness of the state's *Charter*-infringing conduct on a spectrum of culpability. At one end of the spectrum are

infringements that are technical, inadvertent, or otherwise minor, as well as those that reflect an understandable mistake. At the other end are infringements that constitute a wilful or reckless disregard for *Charter* rights, a major departure from *Charter* standards, or a systemic pattern of *Charter*-infringing state conduct (*Grant*, at para. 74; *Fox*, at para. 94; *Tim*, at para. 82; *Beaver*, at para. 120).

[111] In my view, the *Charter*-infringing conduct in this case is at the less serious end of the spectrum of culpability (*Grant*, at para. 72; *Tim*, at para. 82). The evidence shows that the police arguably had reasonable grounds to believe that it was necessary to open the door of Mr. Singer's running truck to prevent an imminent risk to his safety and the safety of others who may have been nearby:

1. A person who knew Mr. Singer personally in a small community had called 9-1-1 to report to the police her concern that Mr. Singer was driving a truck and speeding while impaired;
2. After investigating the complaint, at around midnight, the police saw a truck matching the 9-1-1 complaint in a residential driveway, parked but with its engine running and headlights on;
3. After entering the driveway, the police observed a man sleeping or passed out in the driver's seat of the running truck; and

4. The man did not respond when the police tried to wake him by knocking on the driver's side window for several minutes.

[112] Based on the evidence, the trial judge found as fact that the police acted “to protect the general public and their safety from potential impaired drivers” (A.R., vol. II, at p. 167). The police opened the truck door only to wake Mr. Singer. In doing so, they addressed objective and factually-grounded public safety concerns arising from their impaired driving investigation. The police conduct of opening the truck door was no more intrusive than necessary to address these concerns. It is difficult to conceive of what other options were available to the police in the circumstances. Although the trial judge did not make specific findings regarding a safety search because Mr. Singer limited his *Charter* argument to the entry onto the driveway, the record discloses extenuating circumstances requiring the police to open the truck door. This mitigates the seriousness of the police conduct (*Grant*, at para. 75, citing *R. v. Silveira*, [1995] 2 S.C.R. 297).

[113] The decision of the police to open the truck door, after having lawfully entered the driveway and knocked under the implied licence doctrine, at most reflects a reasonable misunderstanding about the law. This further attenuates the seriousness of the state misconduct (*McColman*, at paras. 61-62; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 86). Quite tellingly, at trial the parties did not argue that the opening of the truck door required a separate analysis from the entry onto the driveway. This distinction only crystallized in the Court of Appeal's decision. Nor, before this Court,

did the Crown attempt to justify the opening of the truck door under the ancillary police power to conduct a safety search.

[114] In my view, therefore, the first line of inquiry only weakly favours exclusion of the evidence.

[115] The second line of inquiry, the impact of the breach on the accused's *Charter*-protected interests, is driven by society's interest in protecting *Charter* rights. It requires determining the extent to which the breach "actually undermined the interests protected by the right infringed" (*Le*, at para. 151, quoting *Grant*, at para. 76; *Fox*, at para. 111; *Tim*, at para. 90; *Beaver*, at para. 123). As with the first line of inquiry, a court must situate the impact of the breach on a spectrum (*Fox*, at para. 111; *Tim*, at para. 90). In some cases, the impact may be merely fleeting, technical, transient, or trivial, while in others it may be profoundly intrusive or seriously compromise the interests underlying the infringed right (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 28; *Tim*, at para. 90). In these latter cases, there is a higher risk that admitting the evidence would signal to the public that *Charter* rights "are of little actual avail to the citizen", and would thus bring the administration of justice into disrepute (*Grant*, at para. 76; see also *Fox*, at para. 111; *Beaver*, at para. 123).

[116] In the present case, any impact of the s. 8 breach on Mr. Singer's *Charter*-protected interests was no more than moderate and does not strongly favour exclusion of the evidence (*Grant*, at para. 76; *Tim*, at para. 90). Although Mr. Singer may have had a reasonable expectation of privacy, that expectation was diminished. The Court of

Appeal emphasized that the breach occurred on his “residential property” (para. 92), but in my view, to assess the impact of the s. 8 breach on Mr. Singer’s territorial privacy interest, the place where the breach occurred must be characterized more specifically. Mr. Singer was in a private vehicle parked in the perimeter around his home, resulting in a diminished expectation of privacy compared to that in a dwelling house (*Wise*, at p. 533; *Mellenthin*; *Tessling*, at para. 22). As the trial judge found, “any interference with Mr. Singer’s property rights was fleeting at best” (A.R., vol. II, at p. 168). Although the trial judge made this finding in concluding that the implied licence authorized all of the officers’ conduct, it applies equally in describing the impact of any s. 8 breach in this case.

[117] It is also relevant to consider that the police may have detained Mr. Singer briefly in his truck. However, any impact of a potential breach of s. 9 of the *Charter* on Mr. Singer’s liberty interests cannot be described as being at the most serious end of the spectrum. This case is like *McColman*, where the Court held that the police had statutory authority to conduct sobriety checks on highways, but exceeded the scope of the authority by following Mr. McColman onto a private driveway to do so. Mr. McColman was arbitrarily detained, arrested, and then held at the police station for several hours. Describing the detention as “a marked, although not egregious, intrusion on [his] *Charter*-protected interests”, the Court ultimately held that the second line of inquiry “moderately favours exclusion of the evidence” (para. 68). Likewise, in the present case, the police’s initial entry and knock was lawful, but the Crown failed to establish that the subsequent opening of the truck door either fell within the scope of

the implied licence or was a reasonable safety search. In addition, the fact that Mr. McColman was plainly visible at the time of police entry onto the driveway does not distinguish that case from the present one: Mr. Singer was also visible to the police at the juncture of the *Charter* breach, when they opened the truck door.

[118] Considering the manner and place of the *Charter* breaches, I conclude that the impact of the police conduct on Mr. Singer's *Charter*-protected interests was not strong and only moderately favours the exclusion of the evidence.

[119] The third line of inquiry under the s. 24(2) analysis asks "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (*Grant*, at para. 79; *Fox*, at para. 118; *Tim*, at para. 96; *Beaver*, at para. 129). In conducting this inquiry, a court may consider the reliability of the evidence, the importance of the evidence to the prosecution's case, and the seriousness of the offence (*Grant*, at paras. 81-84; *Fox*, at para. 118; *Tim*, at paras. 96-97; *Beaver*, at para. 129).

[120] Here, society's interest in an adjudication on its merits is strong given the seriousness of the offence (*Grant*, at para. 84; *Beaver*, at para. 130). As this Court has noted, "impaired driving is a serious offence" and "society has a vital interest in combatting drinking and driving" (*McColman*, at para. 72). The evidence the police obtained regarding Mr. Singer's state of intoxication after opening the truck door — including their observations of him, his failed roadside breath test, and his eventual refusal to comply with a demand to provide a breath sample at the police station — was

reliable and essential to the Crown's case. In my view, the third line of inquiry points strongly in favour of admitting the evidence.

[121] The final step in the s. 24(2) analysis involves balancing the three lines of inquiry (*Grant*, at para. 85; *Fox*, at para. 125; *Tim*, at para. 98; *Beaver*, at para. 133). The cumulative weight of the first two lines of inquiry is balanced against the third, with a prospective and societal focus on the broad impact of admission or exclusion of the evidence on the reputation of the justice system over the long term (*Fox*, at para. 125; *Tim*, at para. 98; *Beaver*, at para. 134; *McColman*, at para. 74).

[122] In my view, like *McColman*, this is a case where the cumulative weight of the first two lines of inquiries is insufficient to overcome the strength of the third (para. 74; see also *Tim*, at para. 99; *Beaver*, at para. 134). The first line of inquiry weighs slightly or weakly in favour of exclusion, the second moderately so, but the first two lines of inquiry are outweighed by the compelling public interest in admitting the evidence. Considering all the relevant circumstances, I conclude that admission of the evidence would not bring the administration of justice into disrepute.

## VII. Disposition

[123] I would allow the appeal, set aside the judgment of the Court of Appeal, and remit the case to the Court of Appeal for determination of Mr. Singer's outstanding ground of appeal before that court.

The reasons of Karakatsanis, O'Bonsawin and Moreau JJ. were delivered by

O'BONSAWIN AND MOREAU JJ. —

I. Overview

[124] This appeal asks whether the police can enter a person's private property to obtain evidence against that person, without any prior judicial authorization, exigency, or reasonable grounds to suspect criminal activity. We hold that such conduct by the police constitutes a breach of s. 8 of the *Canadian Charter of Rights and Freedoms*.

[125] The police spotted a vehicle with its engine running, parked on a private residential driveway, that matched the description of a vehicle that a bare, uncorroborated tip alleged was operated by an intoxicated driver. Unable to see anyone inside the vehicle from the public roadway, the police entered the property, approached the vehicle, and peered inside. They observed the respondent, Wayne Singer, lying in the driver's seat asleep. The officers knocked on the windows and opened the doors to shake him awake. The respondent was subsequently charged with refusal to comply with a breathalyzer demand and impaired driving, contrary to ss. 320.15(1) and 320.14(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. At trial, the respondent challenged the admission of the evidence of his refusal and impairment on the basis

that the evidence was obtained through an unlawful search in violation of s. 8 of the *Charter*. The issue ultimately made its way to this Court.

[126] Relying on the common law doctrine of implied licence, the Crown argues that the entry of police onto the private residential property did not constitute a “search” within the meaning of s. 8 of the *Charter*. In the alternative, if the police exceeded the scope of the implied licence and intruded into the respondent’s reasonable expectation of privacy, the Crown asks this Court to recognize a new common law ancillary police power authorizing random sobriety checks on private property without reasonable suspicion of criminal activity.

[127] We conclude that the police exceeded the scope of the implied licence and conducted a search. Their conduct was unreasonable, as no statutory or common law police powers authorized this type of search. We further decline to recognize a new ancillary police power permitting this type of search, as it falls well below the minimum standards imposed by the *Charter*. In this regard, we agree with the comments of our colleague Martin J. in her dissenting reasons.

[128] Accordingly, the police’s entry onto the property violated s. 8 of the *Charter*. Given the serious nature of the violation and its impact on the respondent’s privacy interests, we would exclude all evidence flowing from the breach under s. 24(2) of the *Charter*.

[129] For the reasons that follow, we would dismiss the appeal.

## II. Facts

[130] The respondent is an Indigenous man who was raised in the Big Island Lake Cree Territory. At approximately 11:00 p.m. on the evening of March 20, 2019, Constables Sandra Lapointe and Morgan Fisher received a phone call stating that the respondent was driving while intoxicated in the Big Island Lake Cree Territory. The caller reported that the respondent was operating a white, single cab Ford truck at a high speed. This excessive speed formed the sole basis for the caller's claim that the respondent was intoxicated.

[131] Around midnight, over an hour after receiving the call, Cst. Lapointe, who was later joined by Cst. Fisher, came upon a vehicle matching the description provided by the caller parked on the gravel driveway of a residential property. The vehicle's engine was running and its headlights were on. Although the vehicle was visible from the public roadway, Cst. Lapointe and Cst. Fisher did not observe any occupant inside the vehicle from their vantage point. The officers did not know who owned the residential property.

[132] Cst. Lapointe testified that she entered onto the residential property with Cst. Fisher with the sole purpose of investigating a possible impaired driving offence. Cst. Lapointe acknowledged that there was no ongoing hot pursuit and testified that she never turned her mind to the possibility of obtaining a tele-warrant because she was "investigating an impaired driver" (A.R., vol. II, at p. 26).

[133] The two officers walked up the driveway, approached the vehicle, peered into the windows, and observed the respondent in the driver's seat. When Cst. Lapointe knocked on the driver's side window and received no response, she opened the door and detected a strong odour of alcohol inside the vehicle. Cst. Fisher, in turn, opened the passenger door and shook the respondent awake. He appeared sleepy, with bloodshot eyes, yet demonstrated no difficulty with his motor skills or walking.

[134] Cst. Lapointe administered an approved screening device demand, which the respondent understood and complied with. After failing the test, he was arrested and transported to the police detachment, where a formal demand for a breath sample was made. Following a consultation with legal aid counsel, the respondent declined to provide a breath sample. He was charged with refusal to comply with a breathalyzer demand and impaired driving contrary to ss. 320.15(1) and 320.14(1)(a) of the *Criminal Code*.

### III. Judicial History

#### A. *Saskatchewan Provincial Court (Segu J.)*

[135] The trial judge concluded that the police did not violate the respondent's s. 8 *Charter* rights. He held that the respondent had a reasonable expectation of privacy in the private residential property where the vehicle was located. However, he determined that the driveway was open to public view, the police had a report of a potential impaired driver in a matching vehicle, there were no barriers to entry on the

property, the police did not attempt to enter the residence, and at no point did anyone ask the officers to leave.

[136] The trial judge reasoned that the common law doctrine of implied licence permits police to enter private property on legitimate business, including when the police enter to fulfill their duty to protect the public from impaired drivers. The trial judge relied on *R. v. Kleven*, 2019 SKQB 238, 53 M.V.R. (7th) 183, to conclude that for there to be a “search” when the police enter private property, there must be something more done by the police than what occurred here, such as knocking on the door of the dwelling to observe an occupant’s state of inebriation.

[137] In the alternative, the trial judge would have admitted the evidence under s. 24(2) of the *Charter*. He consequently found the respondent guilty of failing to provide a breath sample. The impaired driving charge was stayed by the Crown.

B. *Court of Appeal of Saskatchewan, 2023 SKCA 123, 431 C.C.C. (3d) 364 (Schwann, Barrington-Foote and McCreary JJ.A.)*

[138] The Court of Appeal unanimously concluded that the police breached s. 8 of the *Charter* and that the evidence should be excluded pursuant to s. 24(2).

[139] First, the court held that the common law doctrine of implied licence did not apply. Relying on *R. v. Evans*, [1996] 1 S.C.R. 8, the Court affirmed that this licence does not permit the police to investigate or gather evidence against the occupant. Since

the police entered the respondent's driveway to investigate impaired driving, their conduct exceeded the scope of the implied licence.

[140] Next, the court found that the respondent had a reasonable expectation of privacy in his vehicle parked on private property, and concluded that the search was unreasonable because it was not authorized by law (para. 69). The court cited *R. v. McColman*, 2021 ONCA 382, 156 O.R. (3d) 253, which held that the common law does not permit random sobriety checks on private property.

[141] Finally, in applying the framework laid out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, the court excluded the evidence, quashed the conviction, and entered an acquittal.

#### IV. Issues

[142] This appeal raises the following issues:

1. Did the police exceed the scope of the implied licence, resulting in a “search” for the purposes of s. 8 of the *Charter*?
2. If so, did the police breach s. 8 of the *Charter* by conducting a search without legal authorization?

3. If so, should the evidence obtained from the breach be excluded pursuant to s. 24(2) of the *Charter*?

V. Analysis

A. *The Police Exceeded the Scope of the Implied Licence and Conducted a Search of the Respondent's Property*

[143] To establish a s. 8 violation, a claimant must first establish that a “search” took place. A “search” occurs whenever state agents such as the police intrude into a claimant’s reasonable expectation of privacy. In the context of residential property, this Court has consistently affirmed that individuals have a “strong” reasonable expectation of privacy “in the approaches to their homes” (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at para. 26; see also *Evans*, at para. 21).

[144] The doctrine of implied licence — which allows members of the public, including police, to enter private property without constituting a trespass — may attenuate an otherwise reasonable expectation of privacy, meaning that the police may approach a home without triggering a search for the purpose of s. 8. However, if police exceed the scope of an implied licence in approaching a residential dwelling, there can be no waiver of an occupier’s expectation of privacy, and police are engaged in a “search”. To determine whether this search complied with s. 8 of the *Charter*, the analysis must then shift to whether the search was reasonable. A reasonable search requires that (1) the search be authorized by law; (2) the law itself is reasonable; and

(3) the manner in which the search is carried out is reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278).

[145] The implied licence to knock, the licence at the heart of this appeal, allows members of the public to approach the door of a residence and knock. The first issue is whether the police exceeded the implied licence to knock, thereby triggering a search. We begin by outlining the legal principles that govern the implied licence to knock doctrine.

(1) Legal Framework on the Doctrine of Implied Licence to Knock

[146] The starting point for assessing the doctrine of implied licence to knock is understanding the legal meaning of the term “implied licence”, a well-defined concept in the common law of property which has been transposed into the criminal law context. Property owners have a common law right to exclude others — including police officers — from their property. Entering someone else’s property without consent or lawful justification is a trespass at common law (*Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807, cited in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 157). Within the context of private landownership, “a licence is a permission to do that which would otherwise constitute a trespass” (E. Kaplinsky, M. Lavoie and J. Thomson, *Ziff’s Principles of Property Law* (8th ed. 2023), at p. 367). A licence can be either express, as in a theatre ticket, or implied, such as the licence allowing strangers to approach a homeowners’ front door for a delivery or to ask about a ball that landed in the backyard. Implied licences play an important societal role, as these legal devices facilitate the

practical functioning of our communities (K. Gray and S. F. Gray, *Elements of Land Law* (5th ed. 2009), at p. 1288, citing *Edwards v. Attorney-General*, [1986] 2 N.Z.L.R. 232 (H.C.), at p. 237, per Eichelbaum J.).

[147] If a licensee oversteps the ambit of a licence's terms they will be on the land illegally and automatically become a trespasser. Trespass will be established if a person enters the perimeter of a dwelling, also referred to as the curtilage, with the purpose of engaging "in some activity to which it is known or understood that the occupier would not have given consent" (Gray and Gray, at p. 1289).

[148] In addition to the purpose for entry, the legal scope of an implied licence to approach a dwelling reflects social norms and customary practices. These norms manifest through both temporal and spatial limits. For example, in the context of property law, approaching a private dwelling and ringing the doorbell for a particular purpose is a privilege limited to daytime hours and, absent an emergency, no one has permission to ring a doorbell at 12:30 a.m. (see L. Katz, "Exclusion and exclusivity in property law" (2008), 58 *U.T.L.J.* 275, at p. 298). This temporal customary norm is reflected in our criminal law by s. 177 of the *Criminal Code*, which specifically prohibits trespassing at night, defined as loitering or prowling between the hours of 9:00 p.m. and 6:00 a.m. without lawful excuse "on the property of another person near a dwelling-house situated on that property". Moreover, there are well-recognized spatial limits when accessing private property on an implied licence, and it is customarily expected that visitors will use the main walkways and avoid "poking"

around backyards and open garages. In exceeding the temporal and spatial scope of an implied licence, an individual's "status becomes automatically that of a trespasser" (Gray and Gray, at p. 1289).

[149] In sum, the scope of an implied licence is circumscribed by three factors: the area accessed, the time of entry, and the specific purpose for that entry.

[150] In *Evans*, this Court imported the implied licence to knock doctrine into Canadian criminal law, yet that importation did not divorce the doctrine from its normative property law roots. Instead, *Evans* embraced property law principles in stating that "[s]ince the implied invitation is for a specific purpose, the invitee's purpose is all-important in determining whether his or her activity is authorized by the invitation" (para. 18). Should that purpose be counter to the property owner's declared or impliedly intended use of the land, there is no licence in law. Because there is a strong expectation of privacy in the approach to one's home, police conduct that is not authorized by an implied licence constitutes a "search" for the purposes of s. 8 of the *Charter* (para. 21; *MacDonald*, at para. 26).

[151] *Evans* remains the seminal decision on the application of the implied licence to knock within the criminal law context. In *Evans*, the police approached a house after receiving an anonymous and unsubstantiated tip regarding a marijuana grow-op. The police approached the dwelling with the intention to communicate with the occupants, but also to sniff the air in an attempt to smell marijuana. The police

relied on the doctrine of implied licence to gain lawful access to the front door of the dwelling.

[152] Justice Sopinka stated that “the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock” (*Evans*, at para. 13). He characterized the doctrine of implied licence as

a waiver of the occupier’s expectation of privacy in the approach to his or her home . . . . Clearly, under the “implied licence to knock”, the occupier of a home may be taken to authorize certain persons to approach his or her home for certain purposes. However, this does not imply that all persons are welcome to approach the home regardless of the purpose of their visit. [Emphasis in original; para. 14.]

[153] Justice Sopinka noted that the crucial factor in determining the scope of implied licence is the licensee’s *purpose* when approaching the private property. He held that the doctrine is limited to “permit convenient communication with the occupant of the dwelling” (*Evans*, at para. 15). Any action beyond this limited purpose is not authorized by the implied licence and the licensee approaches the dwelling as a trespasser.

[154] Applied to the facts in *Evans*, this Court held that the police approached the dwelling for two purposes: the first being to communicate with occupants, and the second being to attempt to gather evidence through sniffing the air for marijuana (para. 16).

[155] Despite their communicative purpose, in approaching the Evans' residence for the purpose of substantiating a criminal charge against the occupants, the police exceeded the bounds of the implied licence to knock. In coming to this conclusion, the Court noted that "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" (*Evans*, at para. 16).

[156] This Court has consistently applied *Evans* in its subsequent jurisprudence. In *MacDonald*, the Court affirmed that when a police officer approached a condominium dwelling simply for the purpose of communicating with the occupant about a noise complaint, the police conduct fell within the scope of the implied licence (para. 27). However, the licence was exceeded and a "search" occurred the moment the police officer saw a firearm and opened the door further to get a better view (*ibid.*). In *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, the police exceeded the scope of an implied licence the moment they stepped onto the property because "their purpose was to conduct a criminal investigation by speaking with an obvious suspect" in the hopes of gathering evidence against her (para. 52). And finally, in *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, the Court found the police to be trespassers when they entered the curtilage of a dwelling because their subsidiary purpose was to conduct a "speculative criminal investigation, or a 'fishing expedition'" (para. 127, citing *R. v. Le*, 2018 ONCA 56, 360 C.C.C. (3d) 324, at para. 107, per Lauwers J.A., dissenting). This Court cautioned that the "doctrine of implied licence was never intended to protect this sort of intrusive police conduct" (para. 127).

[157] The above case law confirms that police will exceed the bounds of an implied licence when their purpose for entering the property is to substantiate a criminal charge. Approaching a dwelling for the purpose of gathering evidence against the occupant falls squarely within the ambit of substantiating a charge.

[158] One mechanism by which police attempt to gather evidence during an investigation is through the use of their senses of smell, sight, and hearing. Coming onto property for the purpose of collecting information to incriminate the property owner through the use of these senses can only be understood as gathering evidence. Our colleague states that “[c]onvenient communication necessarily includes investigative questioning” (reasons of Jamal J., at para. 70). However, the notion of “convenient communication” cannot act as a guise for allowing the police to enter onto private property with the intention of collecting evidence absent lawful authority. Police entering private property for this purpose exceed the scope of an implied licence.

[159] As stated in *Evans*, no occupant would wish others to enter their property for the purpose of gathering evidence against them, as that purpose is indistinguishable from that of attempting to substantiate a criminal charge (para. 9). Therefore, police exceed the bounds of an implied licence when, prior to entering private property, the police crystallize an intention to gather evidence against the owner through their senses of smell, sight and hearing.

[160] To summarize, the doctrine of implied licence originates in property law, and its normative roots reflect the customary habits and usage of private land. The

doctrine applies to the public, including police. When a person approaches the dwelling or curtilage, they must respect the terms of the implied licence, which include restrictions on the area that can be accessed, the time of entry, and the specific purpose for that entry. When these terms are not respected, the implied licence is revoked and the licensee becomes a trespasser. Because individuals have a reasonable expectation of privacy in the approach to their home, police who fail to abide by the implied licence will conduct a “search” for the purposes of s. 8 of the *Charter*.

[161] The case law is clear that the doctrine of implied licence to knock cannot justify a police officer’s entry onto private property *for the purpose of* gathering evidence to substantiate a criminal charge against the property owner. This is based on the premise that no owner would permit access for such a purpose. When police enter property to gain evidence through their senses in relation to an offence, they have exceeded the scope of the implied licence and a “search” occurs. Consequently, another source of legal authority is required for such a search to comply with s. 8 of the *Charter*.

(2) Distinguishing Between the Doctrine of Implied Licence and Police Powers

(a) *The Implied License to Knock Is Not a Police Power*

[162] An implied licence is not a police power. The doctrine of implied licence functions as a permission granted *in rem* to access private property and, in turn, a waiver of the landowners’ privacy interest. In *Evans*, the doctrine of implied licence to

knock was not construed as a police power. Police powers are distinct state powers that authorize police to perform certain acts in furtherance of their duties that would otherwise be illegal (J. W. Burchill et al., *Ancillary Police Powers in Canada: A Critical Reassessment* (2024), at p. 24). For example, if not for the police power of investigative detention, the ability to physically detain a person would be tantamount to assault.

[163] Given that the implied licence doctrine is not a police power, it does not entitle the police to act in ways that materially differ from the general public. Under an implied licence, the police are entering the property as any other member of the public would. As a result, if the police enter private property under a grant of implied licence, the doctrine cannot be used to justify the exercise of police powers, such as conducting an arrest or a search. An implied licence may allow police to approach a dwelling, but a subsequent search or arrest requires independent authorization and will effectively extinguish the implied licence. This was illustrated in *MacDonald*, where the police were lawfully on the property under a grant of implied licence. However, because their purpose shifted to conducting a search, their presence on the property was no longer justified under the implied licence.

[164] In analyzing whether police have exceeded the bounds of the implied licence, it is essential to determine whether the purpose for police entering the property is to detain, search, or arrest as such purposes are contrary to the permission granted under the implied licence. In other words, entering private property under an implied

licence is discordant with entering private property to exert a police power. Lower courts have conflated the doctrine of implied licence with police powers by importing additional grounds, such as reasonable suspicion, in order to expand the scope of activity that the police may engage in while relying on the licence (see, e.g., *R. v. Lotozky* (2006), 81 O.R. (3d) 335 (C.A.)). The doctrine of implied licence must remain tethered to its property law origins and should not be reconfigured to authorize a new form of warrantless entry for police.

[165] Police who lawfully enter onto private property for the purpose of exerting search or detention powers are not gaining access to the property through implied licences; rather, they enter the property through another source of legal authorization. The law affords several mechanisms for police to enter private property in furtherance of these powers which we will next examine.

(b) *Sources of Authority for Police to Enter Private Property*

[166] Different sources of authority enable police to enter private property to execute a search, including prior judicial authorization and common law powers. These legal authorizations are not police powers *per se*. Rather, they allow police to enter premises *for the purpose* of executing police powers (S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶3.236).

[167] A warrant is presumptively required to enter a private dwelling and the surrounding curtilage to execute a search or arrest (*R. v. Kokesch*, [1990] 3 S.C.R. 3;

*R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13). To obtain a warrant, the minimum constitutional standard is “reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search” (*Hunter*, at p. 168). As emphasized in *Hunter*, it is not enough for police to have a “reasonable belief that evidence may be uncovered in the search” (p. 167 (emphasis in original)). Instead, they must demonstrate that the discovery of evidence is *likely* in order to obtain a search warrant (*ibid.*). After obtaining a search warrant, police have the lawful authority to enter the private property.

[168] Exceptional circumstances allow police to enter private property without prior judicial authorization. Depending on the nature of the crime at hand, the police may have statutory authorization under exigent circumstances, which allows them to enter a dwelling when the conditions for obtaining a warrant exist but it would be impractical in the circumstances to obtain a warrant (see *Criminal Code*, s. 529.3; *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 11(7)).

[169] Under the common law, police may be authorized to enter the boundaries of a dwelling under exigent circumstances (*R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at para. 32). For example, hot pursuit is a longstanding common law exception to the requirement of a warrant (*Feeney*, at paras. 47 and 51; *R. v. Maccooh*, [1993] 2 S.C.R. 802, at pp. 813-15). This Court defined hot pursuit as a “fresh” and “continuous pursuit conducted with reasonable diligence, so that pursuit and capture

along with the commission of the offence may be considered as forming part of a single transaction” (*Maccooh*, at p. 817, citing R. E. Salhany, *Canadian Criminal Procedure* (5th ed. 1989), at p. 44; see also *R. v. Hoffman*, 2025 SKCA 75, 4 C.R. (8th) 434, at para. 48). In other words, police may pursue a suspect into a dwelling if their pursuit forms part of a continuous transaction in attempting to lawfully arrest a suspect for an offence.

[170] Exigent circumstances also encompass circumstances where “immediate action is required for the safety of the police” or the public (*Feeney*, at para. 52). In *MacDonald*, the Court recognized a police power to conduct a safety search by pushing open the door of a dwelling in response to an imminent threat after police spotted a firearm behind Mr. MacDonald’s leg. However, Justice LeBel emphasized the narrow scope of this power:

... although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in *Mann* and reaffirmed in *Clayton* require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (*Mann*, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 33). As the Court stated in *Mann*, a search cannot be justified on the basis of a vague concern for safety. [Emphasis added; para. 41.]

[171] Additionally, there is a common law protective search power in response to 9-1-1 calls, which is distinct from the safety search power outlined in *MacDonald*. In *R. v. Godoy*, [1999] 1 S.C.R. 311, the police responded to a residence of a disconnected 9-1-1 call and, on arrival, the appellant answered the door but refused the police entry. The police forced their way inside and subsequently acquired the requisite grounds to arrest the appellant for assaulting his common law spouse. The Court created a new common law power for police to enter private property in order to “investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required” (para. 22).

[172] Significantly, the scope of the *Godoy* power has remained limited to locating and ensuring the safety of the 9-1-1 caller or a potential victim. To hold otherwise risks unreasonable intrusion into the residential sphere every time police are notified of suspected criminal activity. The 9-1-1 protective search is already exceptional in the domestic context and courts must be vigilant to “guard against ‘public safety’ being used as a pretext to circumvent well-established constitutional standards” (Penney, Rondinelli and Stribopoulos, at ¶3.415).

(c) *Conclusion*

[173] We have identified several avenues for police to lawfully enter private property. Prior judicial authorization through a warrant remains the presumptive requirement, but there are certain exceptional circumstances in which obtaining a warrant is not feasible. In such cases, the common law has equipped police with the

doctrine of hot pursuit or safety searches to lawfully enter property where police meet the requisite grounds.

[174] At this juncture it is important to repeat that police, like other members of the public, must have some lawful authority for entering private property and interfering with a reasonable expectation of privacy. As outlined in this section, police seeking to detain or search may have lawful authority through several distinct sources. Police entering property with a warrant or under the authority of a common law exception are not entering the property under an implied licence. Police may enter property lawfully through a grant of implied licence, but only if they are acting within its scope.

B. *Application: The Police Exceeded the Scope of Implied Licence and Triggered a Search*

[175] *Evans* clearly stands for the proposition that communicating with the intention of gathering evidence against an occupant falls outside the scope of the implied licence. Not every conversation with a police officer that comes out of an approach to a home will rise to the level of gathering evidence against the occupant, but there will certainly be occasions in which it is a secondary purpose.

[176] Cst. Lapointe testified that the only reason for entering the property was to investigate an impaired driving tip (A.R., vol. II, at pp. 21 and 29). The Crown argues that this stated purpose is consistent with the scope of the implied licence. We reject

this argument. The police did not obtain evidence as an unintentional by-product of their investigative inquiries. Like in *Evans*, by seeking to investigate for impaired driving, the police entered the property “not merely out of a desire to communicate with the occupan[t]” (para. 16), but also in the hopes of securing non-communicative evidence against the occupant through their senses of smell, sight, and hearing. This is further buttressed by the fact that the police could not see the respondent in his truck, so there was no evidence that they entered the driveway to conduct an investigation by communicating with the respondent (see C.A. reasons, at para. 63). Contrary to what our colleague suggests, the conduct of the police in this case extends well beyond the purpose of convenient communication with the respondent.

[177] In investigating an impaired driving offence, police must ascertain whether the driver’s ability to operate a motor vehicle is impaired. Police typically do so by administering an approved roadside screening test pursuant to s. 320.27(1) of the *Criminal Code*. Demanding a roadside screening requires the police to have formed reasonable grounds to suspect that the driver’s ability to operate a conveyance is impaired. Police rely on indicia of impairment as grounds for a roadside demand, such as olfactory (odour of alcohol), visual (bloodshot eyes and lack of motor skills), and auditory (slurred speech) observations (see, e.g., *R. v. Butchko*, 2004 SKCA 159, 192 C.C.C. (3d) 552; *R. v. McKenzie*, 2021 SKCA 150, 87 M.V.R. (7th) 21). Usually, as was the case here, a constellation of these indicia will form the grounds for a roadside demand.

[178] Cst. Lapointe testified that in opening the doors to the vehicle, without any prior communication, she and Cst. Fisher observed the respondent's red bloodshot eyes and smelled alcohol from his truck and breath (A.R., vol. II, at p. 14). These olfactory and visual clues, coupled with the tip from an hour earlier, grounded the suspicion necessary to demand a roadside screening.

[179] As mentioned above, the police's express purpose for entering the property was solely to conduct an impaired driving investigation. It is impossible to reconcile this purpose with *Evans*' interpretation of the doctrine of implied licence. In *Evans*, the police entered the property after receiving an unsubstantiated tip, in the hopes of gathering sensory non-communicative evidence by sniffing the air. Here, the police came to the respondent's home after receiving an unsubstantiated tip, in the hopes of gathering non-communicative indicia of impairment. The purpose of the police was squarely to gather evidence through non-communicative information and substantiate a criminal charge, therefore exceeding the scope of the implied licence.

[180] Furthermore, the police entered the property around midnight, proceeded directly to the parked vehicle, and peered into the windows hoping to find an occupant. There are no circumstances in which an implied licence would permit such conduct, it being neither temporally nor spatially aligned with an implied licence to knock. It is incorrect to suggest, as the Crown does, that Canadians impliedly invite police officers on to their private driveways at night to ask them if they have been committing a crime. Having no implied licence to enter the property for the purpose of furthering their

investigation, the police officers therefore became trespassers and conducted a search of the approach to the respondent's home.

[181] Since the respondent had a reasonable expectation of privacy within his car on his private driveway, and since the police had no implied licence to enter the driveway to gather evidence against him, the police's conduct constituted a search.

C. *The Search Was Unreasonable and Breached Section 8 of the Charter*

(1) The Search Was Not Authorized by Existing Legal Authorities

[182] As discussed, a search of a claimant's property or space that attracts a reasonable expectation of privacy will only be reasonable, and thus comply with s. 8 of the *Charter*, if it is authorized by law, the law is reasonable, and the search is carried out in a reasonable manner. The primary question here is whether the police's search of the approach to the respondent's home was authorized by law.

[183] No existing legal authority authorized the police to enter the respondent's property. Recall, the police only had the colour and the make of the vehicle from a call made an hour earlier. The call contained no grounds or evidence to substantiate its claim that the driver was intoxicated, referring only to the vehicle speeding. Cst. Lapointe testified that, prior to entering the private property, the officers did not know whether a person was inside the vehicle (A.R., vol. II, at p. 11). Nor did they see the respondent operate the vehicle at any point (p. 44). The only evidence suggesting that

the respondent was intoxicated while in the care and control of a vehicle only arose after the officers opened the doors of the vehicle and after they had conducted a search (p. 13). There were no reasonable grounds for a warrant, no reasonable suspicion of criminal activity, nor circumstances of exigency, and the police were not in hot pursuit.

[184] Nor did police have the grounds to trigger a safety search after seeing a vehicle parked on a driveway. Lawful authority for a safety search lies in the officer having reasonable grounds to believe that there was an imminent safety threat, and that such a search be objectively necessary in the circumstances (*MacDonald*, at para. 41). The sole purpose the police articulated for entering the property was to investigate a possible impaired driving offence. The police articulated no safety concerns for either themselves or anyone else when they stepped onto the property. Nor was it argued before this Court that a safety search authorized police to enter the property or open the doors of the vehicle.

[185] The burden of justifying this presumptively unreasonable warrantless search remains on the Crown. While there may be circumstances where police form reasonable safety concerns after seeing a vehicle parked on a driveway, no such concerns were disclosed in this case by the police. It is not this Court's role to fill in evidentiary gaps to assist in relieving the Crown of its persuasive burden. If this were the case, anytime an officer's testimony falls short of articulating reasonable suspicion or reasonable and probable grounds, courts could simply augment and "read in" a subjective belief based on *ex post facto* reasoning.

[186] Likewise, the protective search power from *Godoy* is inapplicable to these facts, as it remains confined to the limited scope of protecting potential victims and is not a *carte blanche* for police to avoid obtaining prior judicial authorization. If the *Godoy* protective power were to apply on these facts, where police had no victim and no reasonable suspicion on entering the property, it would undermine the privacy protections enshrined under s. 8 of the *Charter*.

[187] In sum, the police had no lawful authority for entering the property and searching the vehicle and the respondent for indicia of impairment. The facts here are not so dissimilar from those recently considered in *R. v. McColman*, 2023 SCC 8, [2023] 1 S.C.R. 309, where police entered a private driveway without legal authorization and questioned Mr. McColman about his drinking and driving, giving rise to an arbitrary detention contrary to s. 9 of the *Charter*. Though the present case was argued as a s. 8 *Charter* violation, the police conduct in surrounding a vehicle or suspects in a yard and questioning them will often raise s. 9 concerns as well (see, e.g., *Le*).

[188] As stated by Justice La Forest, concurring in *Evans*:

The sanctity of the home has constituted a bulwark against the intrusion of state agents for hundreds of years. . . . Our society simply cannot accept police wandering about or “sniffing” around our homes. As noted, the seemingly minor intrusion here would almost inevitably lead, and in fact did lead, to a more intrusive search. [para. 3]

[189] As in *McColman*, we recognize that the police face certain limitations in investigating impaired driving offences within the domestic sphere, but it is for legislatures — not the courts — to address these matters (para. 50). When it comes to dwellings and curtilage, a clear line must be drawn and “[t]his Court consistently has held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language” (*Kokesch*, at p. 17 (emphasis added)).

(2) The Search Was Not Authorized by a Novel Police Power to Conduct Sobriety Checks on Private Property

[190] In the alternative, the Crown asks this Court to recognize a novel police power to “enter private property with the intent to speak to the occupant and observe signs of impairment” (A.F., at para. 83).

[191] The respondent urges this Court to reject the proposed power because it lacks “parameters, guardrails or particular conditions for use” (R.F., at para. 76). The proposed power would allow police to enter private property to gather evidence based solely on an unsubstantiated report and without the police having formed reasonable grounds to suspect the impairment (para. 77).

[192] We agree with the respondent. The Crown’s proposed common law police power is best articulated as a power to conduct a sobriety check on private property, absent reasonable grounds to suspect that the search will reveal evidence of a criminal

offence. As we outline below, this power falls below the minimum standards imposed by the *Charter*. The recognition of such a police power must be firmly rejected.

(a) *The Ancillary Police Powers Doctrine and the Necessity of Judicial Caution*

[193] This Court recently reviewed the ancillary powers doctrine in *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519. The doctrine allows courts to recognize “carefully defined” common law police powers in circumstances where there is a legislative gap and the exercise of such powers is reasonably necessary (paras. 39 and 45).

[194] This Court has consistently emphasized the need for caution before recognizing new common law police powers. Yet, our jurisprudence has rarely articulated the rationale for such caution (*Fleming*, at para. 41; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 26). In our view, three concerns reflect the far-reaching constitutional and societal implications of judicially created police powers: (1) the separation of powers; (2) the minimum requirements of the *Charter*; and (3) the disproportionate impact of arbitrary police powers on marginalized communities.

[195] First, the doctrine of ancillary police powers is an example of a constitutional dialogue between the legislative and judicial branches that tests the limits of the judicial role, as the creation of new police powers falls “well within the authority of legislatures” (*Fleming*, at para. 41). Unlike a judicial proceeding, “the legislative

process encourages a wider range of inputs and a broad rigorous debate, involving multiple stakeholders, which creates a more thoughtful foundation for assessing the merits of new police powers” (I.F., Criminal Lawyers’ Association (Ontario), at para. 10). Legislators are also accountable through the democratic process in a way that judges are not. Accordingly, given that ancillary police powers emerge outside the ordinary democratic law-making process, courts should only assume a lawmaking function and recognize new police powers where a clear legislative gap exists, thereby preserving respect for the separation of powers (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 6 and 10; *Fleming*, at para. 41; T. Skolnik, “Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle” (2022), 67 *McGill L.J.* 259, at pp. 261 and 266). As this Court has affirmed, the judiciary “must tread softly where complex legal developments are best left to the experience and expertise of legislators” (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 17; see also *Fleming*, at para. 41).

[196] Second, recent jurisprudence from this Court has held that novel common law police powers recognized under the ancillary powers doctrine must respect the constitutional limits imposed by ss. 8 and 9 of the *Charter*. In other words, a novel common law search power must be reasonable and a novel common law power of detention or arrest must not be arbitrary (*Fleming*, at para. 111; *Clayton*, at para. 19). When assessing whether to recognize an ancillary police power, courts must always bear in mind that doing so expands the scope of lawful state intrusions into individuals’ constitutionally protected privacy and liberty interests.

[197] Finally, the necessity for judicial caution takes on heightened importance when considering the disproportionate impact of a proposed police power on marginalized communities. This is particularly so when the Crown proposes a novel police power that lacks any objective standard, or a standard below that of reasonable and probable grounds, as such a power risks infringing *Charter* rights (T. Skolnik, “Racial Profiling and the Perils of Ancillary Police Powers” (2021), 99 *Can. Bar Rev.* 429, at pp. 439-44; Burchill et al., at pp. 147-48).

[198] A large body of authoritative empirical research demonstrates that marginalized individuals are frequently subjected to arbitrary police interventions, often without reasonable grounds to suspect criminal activity. The harmful consequences of such unreasonable and arbitrary police powers have been well-documented. In *Le*, this Court recognized that the over-policing of racial minorities contributes to their social exclusion, erodes their trust in the fairness of the criminal justice system, and perpetuates criminalization (paras. 89-97, citing Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (2018), and M. H. Tulloch, *Report of the Independent Street Checks Review* (2018); see also *Grant*, at para. 154; *R. v. Wilson*, 2025 SCC 32, at para. 40). Qualitative research has also documented similar consequences. These include physical, psychological, professional, economic, identity-related, and democratic harms (Collectif de recherche sur les interceptions routières et le profilage racial, *Le profilage racial dans les interceptions routières au Québec* (2023), at pp. 68-76; S. Wortley and

A. Owusu-Bempah, *Appendix A: Street Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature*, March 27, 2019 (online), at p. 116). Such harms manifest in various ways: depression, anxiety, a pervasive fear for one's personal safety, prolonged absences from work, damage to professional reputation, and increased interactions with the justice system, among others. These experiences foster a profound sense of exclusion and alienation, as individuals come to feel that they are not fully recognized as equal members of society (*ibid.*).

[199] Given these well-documented harms, courts should exercise great caution in expanding common law police powers. Otherwise, “somewhat ironically, this erosion [of constitutional rights] would derive not from state action or from the laws of Parliament, but from decisions of the courts themselves” (*Kang-Brown*, at para. 10).

(b) *The Proposed Power Is Unconstitutional*

[200] The Crown's proposed police power would authorize sobriety checks on private property, absent reasonable grounds to suspect. This police power inevitably fails to respect the requirements of the *Charter*.

[201] This Court cannot recognize a search power that lacks safeguards to ensure compliance with constitutional standards. The proposed power arises within the residential sphere, where privacy expectations are at their highest. As this Court has repeatedly affirmed, individuals enjoy a “strong” expectation of privacy in the approach to their home (*MacDonald*, at para. 26; see also *Evans*, at para. 21; *R. v.*

*Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22). The presumptive standard for a lawful search of the dwelling and curtilage is reasonable and probable grounds to believe that a search will reveal evidence of an offence (*R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 20).

[202] The absence of justification for the proposed power is fortified by this Court's observations in *McColman* regarding the existing police powers to assess the sobriety of drivers on private property. In that case, this Court directly addressed the Crown's argument that failing to permit random sobriety checks on private property would create a "sanctuary problem" (para. 48). This Court characterized that concern as "overstated", emphasizing that "[v]arious factual scenarios" could arise that would allow the police to form reasonable and probable grounds entitling them to stop a driver on private property to check for sobriety (paras. 48-49). In drawing this conclusion, this Court noted that any expansion of police powers in such contexts should come from the legislature, not the judiciary (para. 50). This statement is equally applicable here.

[203] In conclusion, the Crown invites this Court to sanction a common law police power that would erode constitutional protections. We decline that invitation. The police conduct was unauthorized by law and therefore violated s. 8 of the *Charter*.

D. *The Evidence Should Be Excluded Under Section 24(2) of the Charter*

[204] Having found that the police engaged in an unreasonable search, we must now determine whether the evidence should be excluded under s. 24(2) of the *Charter*.

[205] Section 24(2) provides that evidence obtained in a manner that infringes or denies a *Charter* right or freedom *must* be excluded if, having regard to all the circumstances, its admission would bring the administration of justice into disrepute (*Le*, at para. 139, citing *Grant*, at paras. 68-70). The respondent seeks to exclude Cst. Lapointe's observations of him in the truck, the results of the roadside breath sample, the formal demand for a breath sample, and his refusal to comply with the demand (R.F., at para. 92).

[206] As the parties have acknowledged, the evidence was "obtained in a manner" that infringed the respondent's s. 8 *Charter* rights, thus triggering s. 24(2) (*R. v. Beaver*, 2022 SCC 54, [2022] 3 S.C.R. 718, at para. 94; see also *R. v. Tim*, 2022 SCC 12, [2022] 1 S.C.R. 234, at para. 78). Consequently, this Court must determine whether, having regard to all the circumstances, admitting the evidence would bring the administration of justice into disrepute (*Beaver*, at para. 94). This analysis examines the impact of admitting evidence on the long-term integrity of, and public confidence in, the justice system through three lines of inquiry: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interests in the adjudication of the case on its merits (*Grant*, at paras. 68 and 71). The conclusions on each of these lines of inquiry must then be weighed together to determine whether a reasonable person would conclude

that the admission of the evidence would bring the administration of justice into disrepute (*Grant*, at para. 127; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 36). This determination is not based on the “immediate reaction to the individual case”, but instead, on the broader interests of justice (*Grant*, at para. 68). The onus rests on the party seeking exclusion of the evidence (*Beaver*, at para. 117; *Tim*, at para. 75).

[207] Given our disagreement with the trial judge’s conclusion that the respondent’s s. 8 *Charter* rights were not breached, no deference is owed to his alternative analysis under s. 24(2). We must conduct the s. 24(2) analysis afresh, while respecting the trial judge’s findings of fact (*Grant*, at para. 129; *Beaver*, at para. 118).

(1) The Seriousness of the *Charter*-Infringing State Conduct

[208] The first line of inquiry considers the nature and gravity of the offending state conduct through a holistic analysis (*Grant*, at para. 73; *McColman*, at para. 58). The court must situate the police’s conduct on a “scale of culpability” that mirrors the impact on “the rule of law and, therefore, upon the reputation of the administration of justice” (*Le*, at para. 143, citing *Paterson*, at para. 43; see also *Grant*, at para. 74). Other considerations, such as “good faith” on the part of the police and extenuating circumstances, may inform the seriousness of the state conduct (*Grant*, at para. 75; *McColman*, at para. 58). By contrast, patterns of violations, wilful or flagrant disregard of *Charter* rights, or institutional and systemic misconduct will sit at the more serious end of the scale (*Grant*, at para. 74; *Feeney*, at para. 80). The key question is whether

the police's unlawful conduct is such that the court should dissociate itself from it (*Grant*, at para. 72).

[209] We are of the view that the police's conduct falls at the serious end of the scale of culpability. We arrive at this conclusion having regard to several considerations, including the police's conduct in the absence of: (1) any statutory or common law power; (2) uncertainty in the case law concerning the scope of the implied licence as it applies to impaired driving offences; (3) reasonable grounds to believe that there was a public safety threat at the time the police crossed the threshold of the respondent's property without valid legal authority; and (4) extenuating circumstances.

[210] To recall, for the reasons outlined above, the police acted without statutory or common law power in effecting the search. Their conduct exceeded the scope of the implied licence doctrine and was not authorized under a statutory provision, such as exigent circumstances, nor a common law power, such as hot pursuit or a safety search.

[211] At the time of the violation, the case law in Saskatchewan was unambiguous and there was no legal uncertainty that might otherwise mitigate the seriousness of the police conduct. The trial judge referred to "competing authorities" from the Court of Queen's Bench of Saskatchewan on the scope of the implied licence where police officers on "legitimate business" enter private property (A.R., vol. II, at pp. 166-67, citing *Kleven*, and *R. v. Peequaquat*, 2020 SKQB 2, 55 M.V.R. (7th) 21). The trial judge relied on *Kleven*, wherein Chicoine J. held that "merely walking on to

a driveway, even with [the] intent to conduct an investigation involving the owner, does not constitute a sufficient intrusion to be considered a search” (*Kleven*, at para. 91).

[212] However, *Kleven* had not yet been decided as of the respondent’s arrest on March 21, 2019. Instead, the state of the law at the relevant time was set out in *R. v. Rogers*, 2016 SKCA 105, 341 C.C.C. (3d) 502, as well as the lower court decisions in *R. v. Klevin*, 2017 SKPC 4, 375 C.R.R. (2d) 1, and *R. v. Peequaquat*, 2018 SKPC 16, 26 M.V.R. (7th) 151. This line of authority stood for the principle that the police exceed the bounds of an implied licence where they enter private property for the purpose of uncovering information about an impaired driving offence, as “observing the person opening the door will give visual, auditory and olfactory clues about the person’s participation in the crime under investigation” (*Rogers*, at para. 29). In such circumstances where established decisions from courts with jurisdiction in a given province or territory settle a legal issue, as with *Rogers*, *Klevin*, and *Peequaquat*, it will be “manifestly unreasonable for the police to remain ignorant of the law” (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 492). In *Grant*, this Court expressly noted that “[w]hile police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is” (para. 133). Indeed, the police should have been aware of the need for a search warrant or some legal authority for entering the respondent’s property.

[213] Even if there had been legal uncertainty, which we do not accept to be the case, the police “ha[s] a duty to act cautiously and to question the limits of their

authority” (*McColman*, at para. 63; see also *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 10). Yet, despite this duty, the conduct of the police reflected a careless disregard for the limits of their lawful authority. At no point did they turn their minds to the limits of their power while investigating an unsubstantiated tip. Although Cst. Lapointe clearly recognized that the vehicle was on private property, she did not consider what, if any, authority she had to enter onto the property, including whether she should obtain a tele-warrant (A.R., vol. II, at pp. 26 and 126). Rather, the police were operating under the erroneous assumption that they *had* legal authority to enter the property and conduct a search, simply because they were “investigating an impaired driver” (p. 26). In our view, this assumption cannot be reduced to a mere “misunderstanding about the law”, as our colleague suggests (reasons of Jamal J., at para. 113). The “(in)capacity of police to enter a private residence without prior judicial authorization or some exigent circumstance” is a well-established principle of this Court (*Le*, at para. 149). While the violations may not have been deliberate, the officers’ conduct showed a careless disregard for *Charter* rights. This places the police conduct at the serious end of the spectrum (*Grant*, at para. 74; *Harrison*, at paras. 23-24).

[214] Our colleague points to evidence which purportedly demonstrates that the police had reasonable grounds to believe that public safety concerns made it necessary to open the door of the respondent’s truck thereby attenuating the seriousness of the state misconduct (reasons of Jamal J., at paras. 111-12). This evidence includes that the police officers saw a truck matching the 9-1-1 call running in a residential driveway; that the police found a man sleeping in the driver’s seat of the vehicle; and that the man

did not respond after the police knocked on the driver's side window. Respectfully, we disagree that the seriousness of the police misconduct is significantly attenuated by such factors.

[215] Although the respondent's vehicle was visible from the public roadway, Cst. Fisher and Cst. Lapointe did not observe any occupant inside the vehicle from their vantage point (C.A. reasons, at para. 6). At this point, prior to conducting the unauthorized search of the respondent's property in the absence of any implied licence, the police could only observe a driverless vehicle idling in a residential parking spot. This is compounded by the fact that there was no direct evidence as to whether the police officers were subjectively motivated by a concern for public safety when they saw the respondent asleep in the truck because this issue was not raised at trial. It is only after the s. 8 breach crystallized that the police were able to make the observations relied upon by our colleague. This is the kind of *Charter*-infringing conduct that the Court must disassociate itself from (*Grant*, at para. 72). It would be inappropriate to rely on the fruits of the *Charter*-infringing conduct to justify the police's infringing conduct in the first place. Absent reasonable grounds to believe the idling truck was a threat to public safety, the police conduct in this case remains on the serious end of the spectrum.

[216] Further, the contention that the police conduct in opening the truck door was no more intrusive than necessary (see reasons of Jamal J., at para. 112) does not necessarily attenuate the seriousness of the *Charter*-infringing conduct. When

analyzing the seriousness of the *Charter*-infringing conduct, the focus of the analysis is on the gravity of the state misconduct. Acting in a manner that is the least intrusive option of all *Charter*-infringing conduct does not necessarily mean that the seriousness of the *Charter*-infringing conduct was minor. This is because the least-intrusive option may still be highly serious and blameworthy conduct that the Court must disassociate itself from. The police had other options at their disposal to deal with the situation at hand. An option that is always available is applying for a warrant. As mentioned above, Cst. Lapointe did not consider what authority she had to enter onto the property (A.R., vol. II, at pp. 26 and 126). A police officer's negligence or ignorance as to the scope of their authority or of *Charter* standards cannot be used to attenuate the seriousness of the *Charter* breach (see *Tim*, at para. 85; *Grant*, at para. 75; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59; *Le*, at para. 147; *Paterson*, at para. 44).

[217] In summary, the first line strongly favours exclusion. The police's careless disregard for the respondent's *Charter* rights, combined with the absence of emergent circumstances, cumulatively militate against the admission of the evidence.

## (2) The Impact of the Breach on the Accused's *Charter*-Protected Interests

[218] The second line of inquiry considers the interests engaged by the infringed right and the extent to which the *Charter* breach actually undermined those interests (*Grant*, at paras. 76-77). This inquiry is approached from the perspective of "society's interest in respect for *Charter* rights" and requires consideration of the totality of the

circumstances (*Le*, at para. 151). As with the first line of inquiry, the court must place the impact of the *Charter* breach on a scale of seriousness (*Grant*, at paras. 76-77).

[219] We find that the second line of inquiry also weighs strongly in favour of exclusion (*Grant*, at para. 109).

[220] To reiterate the sequence of events, the police came on to the respondent's property around midnight, opened the doors to his vehicle, shook him awake, and surrounded both the driver and passenger doors while questioning him and observing for indicia of impairment. We note, tangentially, that although the respondent's territorial privacy interest is at the centre of this case, his personal privacy interests are also engaged by virtue of the officers' search for indicia of impairment (*Tessling*, at para. 21).

[221] While the length of the search was brief, its intrusiveness was amplified by the lack of any reasonable suspicion leading to these events (*Le*, at para. 155, citing *Mann*, at para. 56). Cst. Lapointe conceded that she only formed a reasonable suspicion for the approved screening device demand in part through olfactory clues, specifically her "smelling a strong liquor of alcohol" (A.R., vol. II, at pp. 14-15). The respondent's failed breath test, provided after being escorted off his property and into the police vehicle where he waited for 50 minutes before departing for the RCMP detachment, formed the basis for his arrest and Cst. Lapointe's reasonable grounds to make a formal breath demand (pp. 33-34). Following his refusal to provide a breath sample at the police station, the respondent was placed in a cell and released later the next morning.

Both the degree of intrusion and the length of the detention were neither fleeting nor trivial.

[222] The degree of the intrusion is compounded further by the fact that the breach occurred on the respondent's private property, thus engaging a territorial privacy interest. It was within this private sphere where the respondent's vehicle, from which he was not visible, was parked. The perimeter around the home attracts a heightened expectation of privacy, albeit less than inside a dwelling, and individuals ought to be able to exercise their right to be left alone in this private space (see *Tessling*, at para. 22; *McColman*). Moreover, the respondent has a reasonable expectation of privacy in his car separate from the expectation of privacy that arises by virtue of being on the driveway of a private dwelling (*R. v. Wise*, [1992] 1 S.C.R. 527).

[223] We pause here to note that in addition to violating the respondent's s. 8 rights, we recognize, as did the court below, a potential s. 9 breach. As outlined in *Le* and *McColman*, an arbitrary detention occurring on private property is relevant because retreat to a private property "will sometimes be the only practical way for individuals to exercise their right to be left alone" (*Le*, at para. 155; see also *McColman*, at para. 68).

[224] Our colleague relies on this Court's decision in *McColman* to buttress his conclusion that the second prong of the *Grant* test "moderately favours exclusion of the evidence" (*McColman*, at para. 68). He analogizes the cases by stating that in *McColman*, the police exceeded the scope of their authority by following Mr.

McColman onto a private driveway to conduct a sobriety check (reasons of Jamal J., at para. 117). We take issue with this analogy. As noted by the Court of Appeal, the facts of this case are fundamentally different than those in *McColman*. Mr. McColman was observed riding in an all-terrain vehicle and parking in his parents' driveway. He was plainly visible to police and could readily be spoken to. By contrast, the respondent was not visible to the police from the road, he was asleep and not in a position to communicate with the police, and the police only entered his driveway to investigate an unsubstantiated report of impaired driving. Further, an integral element of the analysis in *McColman* involved ambiguity in the law, which did not exist in this case. These are significant differences.

[225] Finally, to properly give effect to the totality of the circumstances, we must situate the impact of the breach of the respondent's *Charter*-protected interests in their larger social context. This necessitates consideration of the over-policing of Indigenous peoples and communities, a practice deeply rooted in the policy of assimilation against Indigenous peoples that continues to this day (*Le*, at paras. 82-97 and 155; *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, at paras. 22-24; Public Inquiry Commission on relations between Indigenous Peoples and certain public services, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress — Final report* (2019); Ipperwash Inquiry, *Report of the Ipperwash Inquiry* (2007); National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered*

*Indigenous Women and Girls* (2019); Royal Commission of Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996); Ontario Human Rights Commission, *Paying the Price: The Human Cost Of Racial Profiling* (2003)).

[226] Undoubtedly, over-policing profoundly impacts Indigenous peoples and communities. On an individual level, this harm extends to sentiments of mistrust towards police officers and the criminal justice system, changes in behaviour to prevent recurring or negative attention, and the loss of dignity or self-esteem (Public Inquiry Commission, at p. 295; *Paying the Price: The Human Cost of Racial Profiling*, at pp. 60-64). More broadly, over-policing perpetuates systemic discrimination and over-representation (Royal Commission of Aboriginal Peoples, at pp. 33-36). With this context in mind, we conclude that the police officers' conduct in entering a private driveway situated on a First Nation reserve without authority, late at night, surrounding and opening the truck doors to question the occupant, would have had a severe impact on the respondent as an Indigenous person.

[227] In summary, the second line of inquiry strongly favours exclusion of the evidence.

(3) Society's Interest in the Adjudication of the Case on its Merits

[228] The third line of inquiry asks “whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (*Grant*, at para. 79).

[229] Both parties acknowledge that this line of inquiry favours the admission of the evidence (A.F., at paras. 105-6; R.F., at para. 114). The impugned evidence is reliable and crucial to the Crown’s case. However, as this Court instructed in *Buhay*, the fact that evidence is “essential to the Crown’s case” should not automatically require that the evidence be included (para. 71).

[230] We agree with our colleague that impaired driving is a serious offence that society has a vital interest in fighting. We also note, however, that the seriousness of the offence should not take on disproportionate significance or detract the Court’s focus from requiring that the state actors comply with their duties under the *Charter* (*Harrison*, at para. 34; *Silveira*, at para. 91). As explained by Doherty J.A. in *R. v. McGuffie*, 2016 ONCA 365, 131 O.R. (3d) 643, the seriousness of the offence can cut both ways (para. 73, citing *Grant*, at para. 84). Indeed, where the consequences of the breach are significant, as is the case here, the seriousness of the offence may weigh in favour of exclusion given the societal interest in preventing the justice system from condoning the *Charter*-infringing conduct. It is critical that the third *Grant* factor, society’s interest in the adjudication of the case, not trump all other considerations (*Paterson*, at para. 56).

#### (4) Final Balancing

[231] The final step involves balancing “the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute” (*Grant*, at para. 71). Where the cumulative weight of the first two lines of inquiry favour exclusion, the third line of inquiry “will seldom tip the scale in favour of admissibility” (*R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 90; see also *Le*, at para. 142).

[232] In this case, both the first and second lines of inquiry strongly favour exclusion of the evidence. The *Charter*-infringing conduct was on the more serious end of the spectrum: the police showed a careless disregard for the respondent’s *Charter* rights and there were no extenuating circumstances to attenuate the seriousness of the breach. Further, the impact of the *Charter* breach on the respondent was significant, given it occurred on his private property, there was a lack of reasonable suspicion leading to the events, and he was subsequently detained. On balance, we are of the view that the admission of the evidence would bring the administration of justice into disrepute. Requiring the police to respect the *Charter* rights of *all* individuals in *all* neighbourhoods reinforces the rule of law, fosters public confidence and contributes to safer communities (*Le*, at para. 165).

[233] We would therefore exclude the evidence.

## VI. Disposition

[234] For the foregoing reasons, we would dismiss the appeal.

The following are the reasons delivered by

MARTIN J. —

I. Introduction

[235] In this case, the Crown asks this Court to recognize a novel police power to “enter private property with the intent to speak to the occupant and observe signs of impairment . . . where they have reasonable grounds to suspect that individual is connected to a recent or ongoing criminal offence” (A.F., at paras. 83 and 86). The Crown argues that, given the serious risks posed by impaired driving, this power should be judicially recognized under the ancillary powers doctrine. It contends that the power is reasonably necessary for police to fulfill their duty “to protect life and safety and to prevent crime” (para. 83).

[236] The ancillary powers doctrine sets the standard for what must be proven before a new police power is recognized at common law. It employs a two-part test from the decision of the English Court of Criminal Appeal in *R. v. Waterfield*, [1963] 3 All E.R. 659. The first stage of the test asks whether the police action at issue falls within the scope of a statutory or common law police duty. If it does, the court moves to the second stage, which asks whether the police action is reasonably necessary to

fulfill that duty (*Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519, at paras. 46-47; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 35-36).

[237] As Binnie J. observed in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at para. 75, “*Waterfield* is an odd godfather for common law police powers”. *Waterfield* was a case about whether a police constable was acting in the execution of his duties when he was assaulted by the accused (*Fleming*, at para. 43). It did not consider the creation of a novel police power at common law. It also emanates from a country in which courts not only have the authority to create common law crimes, but where state action is not constitutionally constrained by a written bill of rights like the *Canadian Charter of Rights and Freedoms*. These important distinctions raise questions about how *Waterfield* should be applied in Canada.

[238] In Canada, federal and provincial legislation empowers police to detain, arrest, search, and seize. When the Crown invokes the ancillary powers doctrine, it is asking courts to grant powers to the police that the legislature has not conferred upon them. Such powers operate in tension with the *Charter* rights of those against whom they are exercised. That courts — the traditional guardians of the Constitution — are asked to recognize these powers creates jurisprudential tensions which continue to plague this area of the law. Any request to expand police authority through judge-made law merits caution because it engages fundamental concerns about the rule of law, the proper role of courts, and the need to safeguard constitutionally entrenched rights.

[239] In their reasons, both Jamal J. and O'Bonsawin and Moreau JJ. reject the Crown's request to recognize a new police power and affirm that courts should tread lightly when asked to invoke the ancillary powers doctrine. I write in support of that conclusion and to further explain why judicial restraint is warranted in this context. I begin by setting out the history of the ancillary powers doctrine, examining some of the critiques it has attracted, and exploring the role of *Charter* standards in the *Waterfield* framework. I then outline some principles that should guide courts when considering whether to recognize a novel police power at common law.

## II. History of the Ancillary Powers Doctrine

### A. *Origins*

[240] As a corollary of the rule of law, police officers are only entitled to interfere with individual liberties to the extent authorized by law (*R. v. McColman*, 2023 SCC 8, [2023] 1 S.C.R. 309, at para. 63, citing *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 10). In Canada, Parliament is the pre-eminent law-making body in matters of criminal law, and it exercised its authority by enacting the *Criminal Code* in 1892 (*The Criminal Code, 1892*, S.C. 1892, c. 29), with further consolidations in 1906, 1927, and 1955. The 1955 consolidation abolished all common law offences (except contempt of court) while retaining common law defences, justifications, and excuses (*Criminal Code*, S.C. 1953-54, c. 51, s. 8). Therefore, virtually all offences in Canada are now expressly defined by statute (see, generally, A. W. Mewett, "The Canadian Criminal

Code, 1892-1992” (1993), 72 *Can. Bar Rev.* 1; D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (1989)).

[241] In the pre-*Charter* era, the *Criminal Code* also expressly conferred important powers on the police, such as the authority to conduct searches with a warrant and to arrest individuals without a warrant (see, e.g., *Criminal Code*, R.S.C. 1970, c. C-34, ss. 443 and 449). In addition to the existing statutory powers, courts sometimes filled perceived gaps with common law powers to allow police to fulfill their duties, like the power to search a lawfully arrested person incident to arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 175-81; B. P. Archibald, “The Law of Arrest”, in V. M. Del Buono, ed., *Criminal Procedure in Canada* (1982), 125, at pp. 157-58). However, judicial consideration of this power was infrequent, leaving its contours uncertain (*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 67; S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶1.218).

[242] The enactment of the *Charter* changed the legal landscape in Canada by introducing new minimum constitutional requirements for the investigative phase of the criminal process, and coupling them with express remedial provisions. Section 24(2), in particular, empowered courts to exclude improperly obtained evidence where its admission would bring the administration of justice into disrepute. Accordingly, an accused person could seek to exclude evidence obtained through police action that was not authorized by law (see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *R. v. Grant*,

2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54; S. Coughlan, “Charter Protection against Unlawful Police Action: Less Black and White Than It Seems” (2012), 57 S.C.L.R. (2d) 205, at p. 207). The exclusionary remedy brought perceived gaps in police powers to the foreground.

[243] In *Dedman*, this Court was asked to assess the legality of random sobriety check stops of motorists by police when there was no statutory authority for them. The Court split 4-3. Writing for the majority, Le Dain J. affirmed that the authority for these stops existed at common law. In doing so, he seized on the two-part test from *Waterfield*. As stated, *Waterfield* was an appeal of a conviction for assaulting a police constable in the execution of his duty. In that case, the court held at p. 661 that, in assessing whether a police officer is acting in the execution of their duty, courts should

consider what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person’s liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

Although *Waterfield* did not involve the judicial creation of new police powers, Le Dain J. held that it “laid down the test for the existence of police powers at common law” (*Dedman*, at p. 33). With this, he transformed a test for establishing the *actus reus* of a criminal offence into a tool for creating new police powers.

[244] At the first stage of the *Waterfield* test, Le Dain J. held that random sobriety check stops of motorists by police fell within the general scope of police duties “to prevent crime and to protect life and property” (*Dedman*, at p. 35). At the second stage, Le Dain J. said that an interference with individual liberty is only justifiable if it is “reasonably necessary” to fulfill the police duty in question (at p. 35):

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

Applying this test, Le Dain J. concluded that random sobriety check stops were reasonably necessary to fulfill a police duty (pp. 35-36).

[245] Writing for the dissent, Dickson C.J. concluded that random sobriety check stops were unlawful (*Dedman*, at p. 19). He noted that, short of arrest, police had never had the authority at common law to detain anyone merely for investigatory purposes (*ibid.*). He rejected the idea that the *Waterfield* test could be used to sanction unlawful police conduct, holding that “[i]t is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful” (p. 15).

## B. *Mixed Signals*

[246] In the years following *Dedman*, it appeared that Dickson C.J.’s dissenting views shaped this Court’s jurisprudence. This Court sent strong signals that it would

not employ the ancillary powers framework from *Waterfield* to recognize new police powers in the future. For example, in *R. v. Wong*, [1990] 3 S.C.R. 36, at p. 57, La Forest J. held that it was the role of Parliament, not the courts, to expand the scope of police authority:

. . . it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.

See also *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, at para. 18; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93, per McLachlin J., dissenting in part, but not on this point; *R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 43, per McLachlin J.

[247] This Court also held that several police powers were not authorized at common law without even referencing the ancillary powers doctrine. This included warrantless perimeter searches without reasonable and probable grounds (*R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 17-18 and 26), seizures of hair, buccal swabs, and dental impressions without consent (*R. v. Stillman*, [1997] 1 S.C.R. 607, at paras. 25-27 and 33-43), and warrantless entry into a dwelling house to effect an arrest absent hot pursuit (*R. v. Feeney*, [1997] 2 S.C.R. 13, at paras. 23-37 and 51).

### C. *Recognition*

[248] However, in *R. v. Godoy*, [1999] 1 S.C.R. 311, a unanimous Court employed the ancillary powers framework from *Dedman* to recognize a novel police power to enter a dwelling without a warrant to ascertain the health and safety of a 9-1-1 caller. In so doing, Lamer C.J. explained some of the factors that are relevant to determining whether police conduct is “justifiable” at the second stage of the *Waterfield* test:

... the justifiability of an officer’s conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

(para. 18, citing *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.), at pp. 199-200.)

[249] Following *Godoy*, this Court used the ancillary powers doctrine to recognize several other common law powers that are now used regularly in modern policing. These include the power to detain an individual for investigative purposes and perform a protective pat-down search (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59); to conduct criminal investigative roadblock stops (*Clayton*); to use drug-sniffing dogs to sniff an individual and their belongings (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569); and to conduct a protective safety search outside the context of an investigative detention (*MacDonald*). Given their nature, number, centrality, and frequent use, some argue that these judicially

created police powers have become much more than “ancillary” (T. Skolnik and V. MacDonnell, “Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine” (2021), 100 S.C.L.R. (2d) 187, at p. 192).

[250] In *Kang-Brown*, at para. 22, Binnie J., citing the need for jurisprudential certainty, signalled a general acceptance of the ancillary powers doctrine:

In fairness to litigants, the Court ought not, in my respectful view, to waver unpredictably between the willingness of the Court to explore adjustments in the common law of detention or search and seizure based on reasonable suspicion, as in the recent cases of *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 (investigative detention), and *R. v. Clayton*, [2007] 2 S.C.R. 725, 2007 SCC 32 (detention, search and seizure), and the “hands off” or “leave it to Parliament” attitude my colleague advocates in this case. How are litigants to anticipate whether they will find the Court in a “can do” mode or a “leave it to Parliament” mode? In my view, *Mann* and *Clayton* resolved the Court’s attitude to this particular area of common law police powers in favour of the former. We have crossed the Rubicon. [Emphasis added.]

(See also para. 51; *Fleming*, at para. 42; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 77, per Moldaver J.)

As a consequence, through a careful application of the ancillary powers framework, courts are seen as having the authority to expand the limits of police authority to condone conduct that would have otherwise been unlawful.

[251] This Court last addressed the ancillary powers doctrine in *Fleming*, where it unanimously refused to create a new common law power allowing police to arrest someone acting lawfully in order to prevent an apprehended breach of the peace by others. While noting that “the courts cannot abdicate their role of incrementally

adapting common law rules where legislative gaps exist”, Côté J. warned that courts “should tread lightly when considering proposed common law police powers” (paras. 41-42). Applying *Waterfield*, Côté J. found that although the proposed power fell within the general scope of police duties to preserve peace, prevent crime, and protect life and property, it was not reasonably necessary to fulfill those duties. The proposed power would have represented a severe intrusion on the liberty of someone who was not suspected of any criminal wrongdoing, and would largely escape judicial oversight. Police officers already had less intrusive measures and statutory arrest powers available to them to manage dangerous situations and prevent violence, making a new common law power unnecessary. *Fleming* marked a break from the prior jurisprudence in which this Court had repeatedly expanded the scope of police powers at common law (Skolnik and MacDonnell, at pp. 187 and 197).

### III. Critiques of the Ancillary Powers Doctrine

[252] While the ancillary powers doctrine may have “crossed the Rubicon” into acceptability, concerns about its rationale, scope, and application appear to have also made the journey with it. The ancillary powers doctrine, and the common law police powers it has brought about, have provoked forceful and sustained criticism (see, e.g., D. Stuart, “The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain” (1999), 25 *Queen’s L.J.* 65, at pp. 84-87; G. Luther, “Police Power and *The Charter of Rights and Freedoms*: Creation or Control?” (1986), 51 *Sask. L. Rev.* 217; R. J. Delisle, “Judicial Creation of Police Powers” (1993), 20 *C.R.* (4th) 29; L. A. McCoy, “Liberty’s

Last Stand? Tracing the Limits of Investigative Detention” (2002), 46 *Crim. L.Q.* 319; T. Quigley, “*Mann*, It’s a Disappointing Decision” (2004), 21 C.R. (6th) 41; S. Coughlan, “Common Law Police Powers and the Rule of Law” (2007), 47 C.R. (6th) 266; R. Jochelson et al., “Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter” (2020), 28 *Crit. Criminol.* 107).

[253] Critiques of the ancillary powers doctrine generally fall into one of the following categories: (1) rule of law concerns; (2) the traditional role of courts as guardians of constitutional rights; (3) the limits of judicial law-making; and (4) disproportionate impacts on racialized groups and marginalized populations. These concerns underscore why caution and restraint are warranted when courts are asked to recognize new common law police powers.

#### A. *Rule of Law Concerns*

[254] The rule of law is “a fundamental postulate of our constitutional structure” (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). It aims to provide a “stable, predictable and ordered society” in which citizens can conduct their affairs with confidence (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 70). This requires a system of laws that are prospective, open, clear, and therefore capable of guiding the behaviour of their subjects (J. Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed. 2009), at p. 214; see also L. L. Fuller, *The Morality of Law* (rev. ed. 1969), at pp. 39-40).

[255] A crucial aspect of the rule of law is the notion that individuals must be able to anticipate the legal consequences of their actions, and that the powers of public officials must be defined and knowable in advance (J. Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005), 31 *Queen’s L.J.* 1, at p. 54; Skolnik and MacDonnell, at p. 203). This concept of fair notice is especially important in criminal law, which remains “the most dramatic and important incursion that the state makes into individual liberty” (*R. v. Paré*, [1987] 2 S.C.R. 618, at p. 630). The need for fair notice in criminal law is a major reason why Parliament has codified the criminal law and abolished all common law offences, other than contempt of court (*Criminal Code*, R.S.C. 1985, c. C-46, s. 9).

[256] The ancillary powers doctrine impairs the ability of citizens to know the limits of police authority. It enables courts to confirm the existence of a police power *after* it has been exercised, in situations where an accused may have reasonably believed no such power existed (Coughlan (2007)). This approach “leaves even the most informed citizen unaware of the blunt limits of police powers” any time they encounter law enforcement (R. Jochelson, “Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference” (2008), 13 *Rev. Const. Stud.* 209, at p. 238). Likewise, by enabling courts to condone otherwise unlawful conduct after the fact, the ancillary powers doctrine limits police officers’ ability to understand the true limits of their authority when interacting with citizens (Skolnik and MacDonnell, at p. 203).

[257] Of course, the rule of law is just one of the virtues our law should possess and must “be balanced against competing claims of other values” (Raz, at p. 228). One such value is the ability of courts to “make incremental changes to the common law to bring legal rules into step with a changing society” (*Salituro*, at p. 666; see also *Bow Valley Husky*, at para. 93, per McLachlin J.; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 40).

[258] However, some argue that the judicial creation of police powers in Canada has not been incremental. As Penney, Rondinelli and Stribopoulos observe, “our courts have used the doctrine to create police powers out of whole cloth”, with few links to earlier judgments (¶1.228). In some cases, courts have recognized new police powers that implicitly contradict prior rulings denying the existence of such powers (*ibid.*). For example, before 1993, there was a broad consensus that police lacked the authority to detain individuals for investigative purposes short of arrest (see, e.g., *R. v. Esposito* (1985), 53 O.R. (2d) 356 (C.A.), at p. 362; *Dedman*, at p. 13, per Dickson C.J.; P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), at p. 1072; A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991), 29 *Osgoode Hall L.J.* 329, at p. 330; J. Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003), 41 *Alta. L. Rev.* 335, at pp. 338-39). However, in *Simpson*, the Ontario Court of Appeal employed the ancillary powers doctrine to affirm the existence of a novel investigative detention power at common law.

#### B. *Role of Courts as Guardians of Constitutional Rights*

[259] The ancillary powers doctrine “blurs the role of the judiciary as a guardian of constitutional rights” (T. Quigley, “Brief Investigatory Detentions: A Critique of *R. v. Simpson*” (2004), 41 *Alta. L. Rev.* 935, at p. 950; see also *Kang-Brown*, at para. 12, per LeBel J.). Under s. 24 of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, courts have the authority to review state action for *Charter* compliance and grant effective remedies to those whose rights have been infringed. This positions courts as the “guardians of the Constitution”, tasked with safeguarding individual rights from unwarranted expansions of state power (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169).

[260] By contrast, when the judiciary recognizes a new ancillary police power, the common law ceases to be a shield for individual rights and becomes a tool for actively restricting them (*R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at paras. 192-93, per LeBel and Fish JJ., dissenting; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 70, per LeBel J., dissenting; *R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1, at para. 147, per Jackson J.A.; R. Jochelson, “Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory” (2013), 43 *Ottawa L. Rev.* 355, at p. 372). When it seeks recognition of a new police power, the Crown asks the court not merely to interpret or apply existing law, but to extend the common law to authorize state conduct that intrudes on *Charter* rights. This task is markedly different from the courts’ traditional role of reviewing state action for constitutional compliance. It places the judiciary in the uneasy position of both conferring authority on police and scrutinizing its use.

[261] The practice of recognizing new common law police powers is also fundamentally different from the way the common law evolves in areas such as tort law or contract law. In those domains, incremental development typically serves to extend protection to individual legal rights that are insufficiently protected and to adapt existing rules to meet the changing needs of society. By contrast, creating new police powers does not enlarge individual rights; it authorizes state action that restricts them. This distinction is amplified by the fact that, in criminal law, Parliament is the pre-eminent law-making body. Unlike tort or contract law, where legislatures have not assumed primary responsibility for defining rights and obligations, criminal law has been largely codified. Against this backdrop, judicial innovation in the realm of police powers risks eroding democratic accountability in a way that is not present when courts refine private law rules.

### C. *Limits of Judicial Law-Making*

[262] Many argue that legislatures are much better suited than judges to create new police powers. Commentators have identified four main limitations that underscore the judiciary's comparative disadvantage in this domain.

[263] First, unlike legislatures, courts cannot address the full scope of police investigative practices in a comprehensive and prospective way. Their role is confined to resolving the specific legal issues raised by the parties before them (Stribopoulos, "In Search of Dialogue", at p. 56). As Professor Young notes, the matters brought before the court "are restricted by the fortuities of litigation", and "may be distorted by

the motives and resources of the litigants” (“Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches” (2002), 16 *S.C.L.R.* (2d) 121, at p. 125). The practice of recognizing and refining common law police powers over time, on a case-by-case basis, is unable to provide the sort of clarity and predictability that a comprehensive statutory scheme could provide.

[264] Second, particularly in the area of police powers, lawmakers are generally in a better position than judges to ascertain the sort of social facts that are required for sound policy development and to balance them against the complex array of interests at play (Stribopoulos, “In *Search* of Dialogue”, at pp. 56-57; see also *Watkins*, at p. 760). While courts benefit from skilled counsel, interveners, and internal research support, the executive and legislative branches of government have greater capacity to assess the social impacts of novel police powers. They can consult a wider range of stakeholders, engage directly with affected communities, refine proposals in committees, draw on the expertise of public servants and policy specialists, and commission their own empirical studies (T. Skolnik, “Racial Profiling and the Perils of Ancillary Police Powers” (2021), 99 *Can. Bar Rev.* 429, at p. 461; J. W. Burchill et al., *Ancillary Police Powers in Canada: A Critical Reassessment* (2024), at pp. 148-49; M. Cappelletti, “The Law-Making Power of the Judge and its Limits: A Comparative Analysis” (1981), 8 *Monash U.L. Rev.* 15, at pp. 48-49). As a result, lawmakers are generally better positioned to evaluate the benefits of a proposed police power and weigh them against any broader systemic harms.

[265] Third, courts generally lack the ability to monitor the effects of their judgments and to modify the rules they create in a timely way (Stribopoulos, “In Search of Dialogue”, at p. 57). With limited exceptions, lower courts are bound to apply the decisions of higher courts (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 26; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44). Although this Court may depart from its own precedents, compelling reasons are required to do so (*Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 25; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44). In contrast, statutory police powers are easier to revise or repeal if they have unintended consequences (M. L. Friedland, “Reforming Police Powers: Who’s in Charge?”, in R. C. Macleod and D. Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (1994), 100, at p. 103).

[266] Fourth, courts cannot design and implement administrative procedures to meaningfully check police conduct (*Watkins*, at p. 760; R. A. Harmon, “The Problem of Policing” (2012), 110 *Mich. L. Rev.* 761, at pp. 763-64). For example, Stribopoulos explains that a statutory investigative detention power could include safeguards like a requirement for approval by a senior officer to extend a detention beyond a set time (“A Failed Experiment”, at p. 381). It could also include reporting requirements to reduce the risk of abuse (*ibid.*). In criminal law matters, courts are limited in their ability to impose or monitor these sorts of administrative safeguards.

[267] In sum, legislatures have the primary responsibility for law-making in the area of criminal law and police powers. While the quality of statutory rules may vary, legislatures are better equipped than courts to craft police powers that are comprehensive, informed, monitored, and supported by administrative safeguards to prevent abuse. Judicial law-making has inherent limitations that make it less suitable for creating new police powers, especially given the complex and far-reaching consequences such powers can entail.

[268] These concerns about judicial law-making would be less significant if legislatures consistently responded to common law police powers by enacting comprehensive statutory replacements. However, as Penney, Rondinelli and Stribopoulos observe, the systemic effect of the ancillary powers doctrine has been “to absolve Parliament of its responsibility to define and regulate new police powers” (¶1.231). When courts fill legislative gaps, there is little incentive for lawmakers to engage in the difficult work of crafting comprehensive statutory frameworks. Over time, this dynamic erodes democratic oversight of policing and leaves fundamental questions about state authority to be resolved in a piecemeal fashion through judicial decisions.

#### D. *Impacts on Marginalized Populations*

[269] Finally, there are concerns about the impact of expanding common law police powers on racialized groups and marginalized populations. This Court has acknowledged that members of racialized groups experience disproportionately high

levels of contact with police and are especially vulnerable to unjustified police interventions (*R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 90; *Grant*, at para. 154). It has also recognized that over-policing “contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization” (*Le*, at para. 95, citing N. Nichols, “The Social Organization of Access to Justice for Youth in ‘Unsafe’ Urban Neighbourhoods” (2018), 27 *Soc. & Legal Stud.* 79, at p. 86; and Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (2017), at pp. 31-40). Therefore, several authors claim that expanding the list of common law police powers risks intensifying the over-policing of marginalized communities and further entrenching systemic inequalities (Skolnik and MacDonnell, at pp. 196-97; see also Skolnik, at pp. 436 et seq.; Stribopoulos, “A Failed Experiment”, at pp. 340-44; Quigley, “Brief Investigatory Detentions”, at pp. 946-47; J. R. Marin, “*R. v. Mann*: Further Down the Slippery Slope” (2005), 42 *Alta. L. Rev.* 1123, at pp. 1129-31; C. Skibinsky, “Regulating *Mann* in Canada” (2006), 69 *Sask. L. Rev.* 197, at pp. 213-15; B. L. Berger, “Race and Erasure in *R. v. Mann*” (2004), 21 *C.R.* (6th) 58).

#### IV. The Role of Charter Standards

[270] The minimum standards set by the *Charter* apply to all police powers, whether their origin is a statute or the ancillary powers doctrine. While the *Charter* does not apply to the common law in a purely private dispute (*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 597; *B.C.G.E.U. v. British Columbia (Attorney*

*General*), [1988] 2 S.C.R. 214, at p. 243), the police are government actors under s. 32(1) of the *Charter*. Thus, where the common law forms the basis of police action that infringes a guaranteed right or freedom, the *Charter* will apply (*Dolphin Delivery*, at p. 599; see also *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 968). Writing on *Dolphin Delivery*, Professor Hogg has queried whether it is even helpful to describe the *Charter* as applicable to the common law in these situations, because it is the presence of the governmental actor, not the source of the actor's power, that makes the *Charter* applicable ("The *Dolphin Delivery Case*: The Application of the *Charter* to Private Action" (1986-87), 51 *Sask. L. Rev.* 273, at p. 278; see also P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 37:12).

[271] Where the *Charter* applies, there is a well-established methodology for assessing whether a law complies with it. The court first considers whether the law breaches a *Charter* right, as informed by a purposive interpretation of the provision at issue and the Constitution as a whole (*Taylor v. Newfoundland and Labrador*, 2026 SCC 5, at paras. 70-85). If a breach is established, the court considers whether the law is a reasonable limit that can be demonstrably justified in a free and democratic society under s. 1. This requires proof that the law serves a pressing and substantial objective and satisfies all parts of the proportionality analysis: rational connection, minimal impairment, and salutary effects which outweigh its deleterious effects (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39).

[272] The standard methodology is applied regularly in cases involving *Charter* challenges to legislative enactments, including statutory police powers (see, e.g., *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 35-55; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at paras. 36-61; *R. v. Hufsky*, [1988] 1 S.C.R. 621, at pp. 633-37). However, this Court has also applied it to assess whether judge-made rules comply with the *Charter*. In *Swain*, for example, Lamer C.J. held that the common law rule permitting the Crown to adduce evidence of insanity over and above the accused's wishes violated s. 7 of the *Charter* and was not saved by s. 1 (pp. 968-77 and 980-88).

[273] The methodology for ensuring that judicially created police powers comply with the *Charter* is not as clear. The *Waterfield* test does not expressly require courts to consider whether a common law police power infringes the *Charter* and, if so, whether that infringement can be justified under s. 1. In addition, this Court's case law does not fully explain the proper methodology for ensuring that common law police powers comply with the *Charter*.

[274] Discussion of *Charter* standards was essentially absent from this Court's early ancillary powers jurisprudence. Perhaps that can be explained by the fact that *Waterfield* was the chosen framework. That case was decided in England around 20 years before the *Charter* came into force and it did not involve the creation of police powers that intrude on individual rights. Accordingly, *Dedman* did not discuss how the new test for recognizing common law police powers was to operate in our constitutional framework. Although *Godoy* referred to the *Charter*, it was only to highlight the

importance of the privacy interest residents have within the sanctity of their home (para. 19).

[275] In later cases, this Court recognized that common law police powers and their exercise should satisfy the minimum requirements of the *Charter*. In *Mann* and *Clayton*, the Court spoke mostly in general terms, noting that common law search and detention powers are subject to “*Charter* scrutiny”, and must align with “*Charter* values” (*Mann*, at para. 20; *Clayton*, at para. 21). Subsequent cases made this obligation more concrete. In *Kang-Brown*, this Court, in multiple sets of reasons, suggested that the scope of police authority to conduct warrantless sniffer-dog searches must be defined in a manner consistent with the *Charter* (paras. 23, 54, 146, 148 and 214). Likewise, in *MacDonald*, the Court confirmed that the contours of the common law safety search power would need to be “reasonable” under s. 8 of the *Charter* (paras. 29 and 43-45). In *Fleming*, the Court noted that while determining whether a common law power exists does not itself require the court to apply s. 1 of the *Charter*, “the two frameworks are not completely unrelated” (para. 53).

[276] Some have argued that the ancillary powers framework has shown some clear parallels to the *Oakes* test (Jochelson, “Ancillary Issues with *Oakes*”, at pp. 365-67). The first stage of the *Waterfield* test — requiring that the proposed police power be connected to police duties like preserving the peace and preventing crime — echoes the requirement in *Oakes* that a law must be rationally connected to a pressing and substantial objective. The second stage of the test from *Waterfield* — requiring that the

police power be reasonably necessary for the fulfilment of a police duty — echoes the concept of minimal impairment by also requiring “that other, less intrusive measures not be valid options in the circumstances” (*Fleming*, at para. 54). Moreover, the second stage of the *Waterfield* test weighs “the importance of the performance of the duty to the public good” against “the extent of the interference with individual liberty” (*MacDonald*, at para. 37; *Fleming*, at para. 47). This analysis arguably involves the court in a proportionality assessment that mimics the final step of the *Oakes* test.

[277] But even if courts are building some of the same *Charter* inquiries about breach and justification into the *Waterfield* test, questions remain about how the *Charter* ought to apply to common law police powers. When judges are asked to create new police powers, is something lost by seeing the rights and justifications at play through the lens of *Waterfield* rather than focusing more directly on what the *Charter* requires? What are the consequences of saying that state action derived from a common law police power need only comport with *Charter* “values” rather than comply with *Charter* rights? Why would there be a lesser standard or a different methodology for police powers rooted in the common law, compared to those based in statute? Our constitutional democracy calls for a careful examination of whether the nature and rigour of *Charter* scrutiny of police powers should vary depending on their source.

[278] Because the *Charter* is part of the supreme law of Canada, its requirements must remain central when courts consider creating new police powers. A direct engagement with the *Charter* best respects its status and ensures fuller protection of its

guarantees. Feathering *Charter* considerations into the *Waterfield* test may operate to diminish their centrality and/or content when common law police powers can have similar effects on individual rights as statutory police powers. A sound theoretical basis would be needed to justify *Charter* scrutiny that is not only categorically different, but markedly diminished, based on how the police power was brought into existence.

[279] Some members of this Court have expressed discomfort with using the *Waterfield* test as a tool for justifying new police powers. In *Clayton*, at para. 58, Binnie J. argued that “the ‘reasonably necessary’ test is not a *Charter* test, and is not an adequate substitute for proper *Charter* scrutiny”. He said at para. 59 that

[a]n asserted common law police power that is challenged on *Charter* grounds should be subjected to the usual *Charter* analysis that requires the Court to articulate the individual’s asserted *Charter* right (here ss. 8 and 9) and measure it against the countervailing societal interests (s. 1) in an open and candid manner. The growing elasticity of the concept of common law police powers must, I think, be subjected to explicit *Charter* analysis. Accordingly, I propose to proceed as follows: firstly, does the alleged police power exist at common law; secondly, if so, does the claimed police power authorize interference with *Charter* rights including an individual’s reasonable expectation of privacy (s. 8) or result in arbitrary detention (s. 9); and, thirdly, if so, is the law authorizing the infringement (in this case a common law) justified as a reasonable limit under s. 1 of the *Charter*?

In Binnie J.’s view, there was no principled reason “for creating a different scheme of *Charter* scrutiny for common law police powers from that which the courts have developed for statute law” (*Clayton*, at para. 61; see also *Sinclair*, at para. 194, per LeBel and Fish JJ., dissenting). While the majority in *Clayton* did not adopt his

approach, Binnie J. asks a pertinent question: Why are common law police powers not subjected to *Charter* analysis in the same manner as statutory limits on *Charter* rights?

[280] Clearly, to recognize a new common law police power, more is required from the Crown than a statement that the requested power represents an incremental development in the common law which comports with *Charter* values. In my view, reconciling the *Waterfield* test with the *Charter* requires courts to expressly treat constitutional limits as a substantive constraint on the creation of new police powers. When courts apply the *Waterfield* test, they must do so with the understanding that a common law police power cannot be justified if, under the usual approach to *Charter* scrutiny, an equivalent statutory power would not pass constitutional muster. This approach ensures that the ancillary powers framework does not become a back door for authorizing state action that would otherwise be unconstitutional.

## V. Principles for Recognizing New Police Powers

[281] As my colleagues Jamal J. and O'Bonsawin and Moreau JJ. recognize, creating new police powers at common law reshapes the boundaries of state authority and must be approached with the utmost care and caution. The ancillary powers doctrine is not a licence to expand police authority whenever it is expedient (see *Fleming*, at para. 98). Its use must be grounded in *Charter* standards and guided by a clear understanding of the limits of judicial law-making. When courts are overly permissive in recognizing new police powers, they risk undermining the rule of law,

eroding democratic accountability, and creating powers that are vague or ill-defined. They also distort the judiciary's traditional role as a guardian of individual rights.

[282] The following principles are suggested to help ensure that any invocation of the ancillary powers doctrine does not stray beyond its proper limits.

[283] First, the Crown must clearly define the scope of any power it seeks to have recognized at common law. As this Court highlighted in *Fleming*, at para. 48, “the onus is always on the state to justify the existence of common law police powers that involve interference with liberty”. As a corollary of its onus, the Crown must articulate with precision the power it is requesting. Without clearly defining the proposed power, courts cannot meaningfully assess the power's compatibility with *Charter* standards or apply the *Waterfield* test.

[284] Second, courts should avoid recognizing new common law police powers in domains already governed by statute. According to Professor Sullivan, courts generally have no jurisdiction to cure perceived gaps in a legislative scheme (*The Construction of Statutes* (7th ed. 2022), at § 12.02[1] and [3], citing *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 25-26). Where Parliament has enacted a detailed legislative framework, supplementing that framework with judge-made rules risks frustrating the legislature's intent and usurping its role. What some might see as a “gap” to be filled is often simply a reflection of Parliament's intent to impose limits on when the power in question can be exercised.

[285] For example, the *Criminal Code* sets out comprehensive rules governing the collection of bodily substances for forensic DNA analysis (ss. 487.04 to 487.092), the interception of private communications (ss. 183 to 196.1), and the use of tracking devices and transmission data recorders (ss. 492.1 and 492.2), among other things. If police conduct one of these searches without meeting the statutory criteria, relying on the ancillary powers framework to condone that search would undermine the statutory scheme and bypass the safeguards Parliament has put in place.

[286] Likewise, in *Fleming*, this Court rejected the proposed preventive arrest power as unnecessary, in part because the police had other options available to them to prevent a breach of the peace by others. However, the proposed power to arrest someone who was not even suspected of criminal activity also fell outside of, and well below, the statutory standard Parliament prescribed for a warrantless arrest, being reasonable and probable grounds to believe a crime has been committed (*Criminal Code*, s. 495(1)). The words chosen to describe the arrest power in s. 495 were the product of considered debate, careful calibration, and constitutional contemplations. Parliament can be assumed to have intended that the legal test for a police power as constitutionally charged as arrest would be the very one it enacted. It was drawing a line, not creating a gap, and absent a true gap, the judicial creation of a new police power risked weakening the safeguards built into the existing warrantless arrest power.

[287] Third, courts should resist invitations to create new common law police powers simply because the Crown cannot satisfy the conditions of an existing one. This

Court has already recognized an array of police powers to aid criminal investigations and protect public and officer safety. When asked to recognize a new police power, courts should assess whether the police conduct in question is authorized under an existing common law power (*Clayton*, at para. 80, per Binnie J.). Where a recognized common law power *could* apply to the conduct at issue, but the facts of the case do not satisfy the conditions for its lawful exercise, courts should be especially hesitant to condone that conduct by invoking the ancillary powers doctrine. The ancillary powers doctrine is not a mechanism for sidestepping established legal standards.

[288] Fourth, courts should refrain from recognizing new common law police powers where the potential ramifications are uncertain or far-reaching. This Court has consistently held that courts should only change common law rules if they are capable of assessing the consequences (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842, at para. 42; *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 20; see also *Salituro*, at p. 670; *Bow Valley Husky*, at para. 93, per McLachlin J.). Where the recognition of a new police power could produce complex or unpredictable effects — such as diffuse harms to communities, increased risk of discriminatory enforcement, or erosion of public trust in law enforcement — courts should defer to Parliament and the provincial legislatures. Legislatures are institutionally well-placed to weigh competing policy considerations, consult affected communities, and design appropriate accountability mechanisms. In such contexts, judicial innovation may lead to unintended consequences, some of which may undermine the reputation of the criminal justice system.

[289] Fifth, the second stage of the ancillary powers framework demands more than a finding that the proposed police power would be useful or expedient. Courts must ask whether the proposed police power is *reasonably necessary* to fulfill a police duty, which includes assessing whether less intrusive alternatives are available. In *Fleming*, at para. 98, Côté J. emphasized that effectiveness alone cannot justify creating a new police power:

Secondly, the mere fact that a police action was effective cannot be relied upon to justify its being taken if it interfered with an individual's liberty. For an intrusion on liberty to be justified, the common law rule is that it must be "reasonably necessary". If the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort, not a first option. To conclude otherwise would be generally to sanction actions that infringe the freedom of individuals significantly as long as they are effective. That is a recipe for a police state, not a free and democratic society. [Emphasis added.]

Therefore, courts should not recognize new police powers merely because they offer a more convenient means of achieving a law enforcement objective than could otherwise be achieved through existing statutory or common law powers. The availability of reasonable, less intrusive alternatives undermines any claim of reasonable necessity and forecloses the expansion of police authority under the ancillary powers doctrine (*Clayton*, at para. 21).

[290] Finally, and crucially, any proposed common law police power must satisfy the requirements of the *Charter*. Although this Court's ancillary powers jurisprudence does not replicate the usual methodology for assessing whether a

legislative enactment complies with the *Charter*, it must be that a proposed common law police power must fail the *Waterfield* test if an equivalent statutory power would not pass constitutional muster under the standard *Charter* analysis. Courts should be deliberate in assessing whether the proposed power would infringe a protected right, and if so, whether that infringement can be justified in a free and democratic society. Requesting the creation of police powers by judicial pronouncement cannot become a way for the state to limit its obligations under the *Charter*. In practice, this means that the ancillary powers analysis must be consciously informed by concepts like pressing and substantial objective, rational connection, minimal impairment, and proportionality. For example, if a proposed police power breaches the *Charter* in a manner that is not logically connected to the objective it seeks to advance or is not proportionate in its overall effects, “reasonable necessity” will not be established. Moreover, in cases involving novel search powers, courts should not lose sight of the fact that the “default” minimum requirements for the reasonableness of a search under s. 8 of the *Charter* are prior authorization (i.e., a warrant issued by an impartial arbiter) supported by reasonable and probable grounds (*Hunter*, at pp. 160-62 and 167-68; *Penney, Rondinelli and Stribopoulos*, at ¶¶3.136-3.137).

[291] Considering these principles, I agree with Jamal J. and O’Bonsawin and Moreau JJ. that this is not a proper case to recognize a new common law police power. For one, I question whether the Crown has defined the police power it is requesting with sufficient precision. In its factum, the Crown variously describes the power as extending to “stepping on a driveway”, “entering private property”, and “step[ping] on

a driveway or walk[ing] to the door of a residence” (paras. 3, 65 and 83). However, given the conduct of police in this case, the proposed power would seemingly also include entry into enclosed spaces, such as the interior of a vehicle. This lack of clarity makes it difficult to determine the extent to which the proposed power intrudes on individual liberty and, in turn, whether it is *Charter* compliant and “reasonably necessary” to fulfill a police duty.

[292] Assuming the proposed power was limited to authorizing the specific police conduct at issue in this case, I am not satisfied that it would be “reasonably necessary” to fulfill a statutory or common law police duty. While the proposed power might offer a more convenient way for police to protect the public against impaired driving, a less intrusive alternative was available: waiting to see if the vehicle would re-enter a public roadway. Even if this alternative was not reasonable, Jamal J. highlights that this Court has already recognized a power to conduct a safety search where a search is “reasonably necessary to eliminate an imminent threat to the safety of the public or the police” (para. 100, citing *MacDonald*, at para. 40). This is a broad power allowing police to respond to public safety threats where an officer believes on reasonable grounds that public or officer safety is at risk and that, as a result, it necessary to conduct a search (*MacDonald*, at para. 41). However, as Jamal J. highlights, the trial judge in this case made no finding as to whether the police were subjectively motivated by a concern for public safety in opening the respondent’s truck door. In light of this, it would be inappropriate to allow the Crown to sidestep the

minimum requirements of the safety search power by creating a new common law police power with lower standards.

[293] Finally, I am not satisfied that the proposed power complies with *Charter* standards. As O'Bonsawin and Moreau JJ. highlight, at para. 201, individuals enjoy a strong expectation of privacy in the approach to their home (citing *MacDonald*, at para. 26; *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 21; and *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 22), and the presumptive standard for a lawful search of a dwelling and curtilage is reasonable and probable grounds to believe the search will reveal evidence of an offence (citing *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 20). Although a standard of reasonable suspicion may be justified where a person has a lowered expectation of privacy, the circumstances in which the respondent found himself at the time of the impugned search (i.e., inside his vehicle with the door closed on a private driveway) did not attract a diminished expectation of privacy.

## VI. Disposition

[294] I agree with O'Bonsawin and Moreau JJ. that the police exceeded the scope of the implied licence in this case, that the search was unreasonable and therefore infringed s. 8 of the *Charter*, and that the resulting evidence should be excluded under s. 24(2) of the *Charter*. I would therefore dismiss the appeal for the same reasons as O'Bonsawin and Moreau JJ.

*Appeal allowed, KARAKATSANIS, MARTIN, O'BONSAWIN and MOREAU JJ.  
dissenting.*

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