Analyzing the Law of Police Dynamic Entry in Canada

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Public police use of dynamic or "no-knock" entry is a little examined social and legal phenomenon. Conveying precedent to what was already happening in practice across Canada, R v Cornell *established that police "latitude" was reasonable when deciding whether police could use dynamic or no-knock entry. This paper examines the law of police use of dynamic entry in Canada. First, the authors assess relevant research on police tactics to provide background and context. Second, analyzing case law pre- and post-*Cornell*, the authors review cases demonstrative of how police latitude operates and assess what this means for expansion of police powers. Third, the authors examine cases that reveal what these dynamic entry practices mean for police use of special weapons, equipment, and tactics, focusing on* Charter *breaches. In the discussion, drawing from the overlooked* Cornell *dissent as it concerns checks on police powers, the authors offer legal and policy remedies. The authors conclude with comments on what their findings mean for the exercise of dynamic entry in Canada.*

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Introduction

On November 30, 2005, nine members of the Calgary Police Service Tactical Unit, wearing balaclavas, entered a private home in a residential area of Calgary.[1] The officers set upon Robert, a twenty-nine-year-old male with a mental disability who was home alone.[2] Robert was pushed to the ground before his hands were secured behind his back.[3] Exterior and interior doors of the home were destroyed, and locks were pried off a garage door.[4] Robert's mother came home to find her house in shambles.[5] After the Tactical Unit secured the house, a search team entered, uncovering 99.4 grams of cocaine.[6] Jason Cornell, Robert's brother, admitted to possessing the cocaine for purposes of trafficking.[7] Mr. Cornell attempted to have the evidence excluded pursuant to section 8 of the *Canadian Charter of Rights and Freedoms*, arguing that the search was conducted unreasonably.[8] The case reached the Supreme Court of Canada on appeal, dividing the court. A narrow majority of four justices

1. See *R v Cornell*, 2010 SCC 31 [*R v Cornell* SCC].
2. See *ibid* at para 10.
3. See *ibid*.
4. See *ibid* at para 46.
5. See *ibid* at para 11.
6. See *ibid* at para 12.
7. See *ibid* at para 1.
8. See *ibid*.

found no *Charter* violation and upheld Mr. Cornell's conviction, while three justices in dissent would have not only found a *Charter* violation but would have excluded the evidence and entered an acquittal due to the police use of a dynamic entry.[9]

In *R v Cornell*, the Supreme Court of Canada established that police are to be granted "latitude" by the courts when deciding whether to use dynamic or "no-knock" entry.[10] This is significant because while literature in the United States has examined increased use of dynamic entries, particularly by special weapons and tactics (SWAT) teams, and the implications therefore, little research has examined the same phenomenon with police practice across Canada. Dynamic entries, also known as no-knock or "hard entries", involve police utilizing force to gain rapid entry into a property. Police may employ specialized equipment, such as battering rams, flash bangs, or other distraction devices to quickly enter the premises and subdue occupants. Dynamic entry gives police the element of surprise, which may be important to avoid the destruction of evidence or prevent suspects from taking up arms, bolstering a defensive position, or taking and/or harming hostages. However, it is also a departure from the common law "knock and announce" principle, which grounds itself in the safety of occupants of a residence, the safety of police, and a respect for privacy.

Much Canadian scholarship to date has been devoted to examining the relationship between the *Charter* and police powers.[11] This work is necessary and important, but the focus has tended to be on defining what powers police have, and less on the manner in which they are exercised. To some extent this is unsurprising as outlining every way the exercise of a police power may be found unconstitutional will inherently be messier than simply defining what those powers are to begin with, though this should not deter such inquiries. Greater focus should be given to examining ground-level interpretations and effects of law and how these translate into police practice. Many police services have adopted forms of internal regulation of dynamic entry practices and equipment use, including specialized training, policies, and codes. Yet, there is little to no clear external regulation of police use of dynamic entry when executing a search warrant. For police this means limited guidance on what is expected of them by the courts, while for citizens it means greater risk that police will inadvertently go too far and violate their rights. As the use of dynamic entry increases, there is thus greater need to define its limits under the law. In this

9. See *R v Cornell* SCC, *supra* note 1.

10. *Ibid*.

11. See e.g. Don Stuart, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" (2008) 40:2 SCLR 3; Steve Coughlan, "Charter Protection Against Unlawful Police Action: Less Black and White Than It Seems" (2012) 57:9 SCLR 205; Richard Jochelson & Kirsten Kramer with Mark Doerksen, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Halifax & Winnipeg: Fernwood Publishing, 2014).

paper, we aim to remedy this shortcoming by examining both pre- and post-*Cornell* case law on dynamic entries in Canada and exploring the extent to which SWAT tactics and equipment use has been found to violate or abide by Canadian legal precedent and the *Charter*. From this case law review we offer guidance on the expectations of Canada's courts surrounding dynamic entries.

After a review of the literature on SWAT team use, we provide an overview of the law of dynamic entry by police in Canada. Then we provide our research findings. We conclude with a discussion on the limits of dynamic entry use and best practices which police should follow to ensure the power is exercised in a *Charter*-compliant manner. Additionally, we offer suggestions on the evidence which should be made available to assist the trial judge in their assessment of whether departing from knock and announce was justified in the circumstances of a case.

I. Context and Literature

Dynamic entry is a police tactic designed to gain rapid entry into a location, usually a private home. In recent years the practice has become strongly associated with SWAT teams, and sometimes controversially so.[12] In the US, no-knock warrants executed by dynamic entry have grown rapidly, numbering in the thousands each year.[13] Canadian police rely on dynamic entry as well, but thus far have avoided many of the controversies and criticisms occurring south of the border. It is important to recognize that the Canadian and US contexts are different as it regards SWAT teams and dynamic entry use, however. First, in the US, there are seemingly perpetual wars carried out domestically.[14] The so-called wars on crime, on drugs, and on terror really do create a militarized environment for policing. Stoughton refers to this as policing's "warrior" problem.[15] Second, US police have access to actual military vehicles and weapons through the Department of Defense 1033 Program. The

12. See Peter B Kraska, "Militarization and Policing—Its Relevance to 21st Century Police" (2007) 1:4 Policing 501; Kevin Sack, "Door-Busting Drug Raids Leave a Trail of Blood", *The New York Times* (18 March 2017), online: <www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?mtrref=www.google.com&assetType=REGIWALL> [perma.cc/MU5C-7XFE].

13. See Kraska, *supra* note 12 at 506–07.

14. See Christopher J Coyne & Abigail R Hall, "Perfecting Tyranny: Foreign Intervention as Experimentation in State Control" (2014) 19:2 Independent Rev 165; Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (New York: Public Affairs, 2013).

15. See Seth W Stoughton, "Principled Policing: Warrior Cops and Guardian Officers" (2016) 51:3 Wake Forest L Rev 611; Seth Stoughton, "Law Enforcement's 'Warrior' Problem" (2015) 128 Harvard L Rev Forum 225.

program transfers excess or decommissioned military equipment to police, of which SWAT teams and similar units are frequently the recipient. Salter argues police in general, but SWAT teams in particular, are now preoccupied with an armament culture and weapons fetish, meaning that police spend more and more on high-tech gear and weapons to use as part of their deployments.[16] Police are now also known by their paramilitary aesthetic, meaning their uniforms often more resemble military attire than the traditional blue police outfits. Relatedly, Rahall has written about the influence of private military contractors on public police in the US.[17] Third, SWAT teams are more likely to use dynamic entries or no-knock entries. Police enter premises using military entry tactics, and the results can be deadly. Persons inside buildings are treated as combatants.[18] Kraska and Kappeler track these changes and show the staggering rise of SWAT from its origins as small emergency response teams to major units in police forces across the US that strongly shape police culture and public culture.[19] These changes have become institutionalized in policing across the US.[20] The rise of SWAT has changed the institution of policing. Public policing today cannot be understood without examining the rise to prominence of SWAT teams.

It is important to examine the extension of SWAT because of the possibility of increased police violence and shootings as a result. For instance, Delehanty et al analyze receipts of equipment through the Department of Defense's 1033 program in the US as an indicator of militarization, and the influence of that militarization on levels of police violence.[21] They find that shootings of people and dogs are more likely when police are using equipment from the military. Police use of military equipment is a factor in increasing numbers of police killings. Lawson Jr likewise finds an association between police militarization

16. See Michael Salter, "Toys for the Boys? Drones, Pleasure and Popular Culture in the Militarisation of Policing" (2013) 22:2 Crit Criminol 163 at 168.

17. See Karena Rahall, "The Green to Blue Pipeline: Defense Contractors and the Police Industrial Complex" (2014) 36:5 Cardozo L Rev 1785.

18. See Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* (Washington DC: Cato Institute, 2006) at 17.

19. See Peter B Kraska & Victor E Kappeler, "Militarizing American Police: The Rise and Normalization of Paramilitary Units" (1997) 44:1 Soc Problems 1; Peter B Kraska, "Enjoying Militarism: Political/Personal Dilemmas in Studying U.S. Police Paramilitary Units" (1996) 13:3 Justice Q 405.

20. See Peter B Kraska & Louis J Cubellis, "Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing" (1997) 14:4 Justice Q 607 at 608.

21. See Casey Delehanty et al, "Militarization and Police Violence: The Case of the 1033 Program" (2017) 4:2 Research & Politics 1.

and police killings in the US.[22] Although Canadian police do not receive equipment through federal military departments, the rise of SWAT means the equipment and tactics of police are changing. These findings provide grounds to investigate the dynamics of SWAT equipment and tactics use in Canada and the possible effects.

In Canada, police militarization has not received the same attention. Roziere and Walby have examined SWAT team deployments, finding that SWAT team deployments are on the rise, especially in medium-sized Canadian cities, and that SWAT is being used for much more than emergency situations.[23] SWAT team members are deployed for community policing, traffic policing, domestic violence calls, and suicide and mental health calls. What has yet to be examined are the legal technicalities of SWAT team practices in Canada or the US, notably SWAT team entry practices.

Kappeler and Kraska argue there are a number of social and cultural mechanisms that normalize police militarization.[24] Because of the pervasiveness of these mechanisms, Kappeler and Kraska contend, we are collectively in denial about the extent to which police militarization has advanced.[25] Law is one of these mechanisms. It signals to citizens what the state treats as right and wrong. Law can also encourage or prohibit practices, including state and police practices. As with many police powers, the law of police entry is shaped by a combination of precedent from legal cases, police customs and culture, and mitigating factors such as the *Charter*. Section 8 of the *Charter* protects against unreasonable search and seizure. But, on the ground, public police may violate this *Charter* right as a matter of police custom. Our intent is to examine the law of police entry in Canada, specifically as it relates to dynamic entry use.

II. Methodology

Canadian legal cases involving dynamic entries were collected by searching the Lexis Advance Quicklaw database. Five search terms, variously used to refer to the practice, were used, resulting in the following return of cases: "dynamic

22. See Edward Lawson Jr, "Police Militarization and the Use of Lethal Force" (2019) 72:1 Political Research Q 177.

23. See Brendan Roziere & Kevin Walby, "Special Weapons and Tactics Teams in Canadian Policing: Legal Institutional, and Economic Dimensions" (2020) 30:6 Policing & Society 704 at 705, 709.

24. See Victor E Kappeler & Peter B Kraska, "Normalising Police Militarisation, Living in Denial" (2015) 25:3 Policing & Society 268.

25. See Stephen Hill & Randall Beger, "A Paramilitary Policing Juggernaut" (2009) 36:1 Soc Justice 25.

entry" (169), "hard entry" (92), "no-knock entry" (54), "quick entry" (25), and "dynamic search" (8). After removing duplicate hits and the *Cornell* decisions, there were a total of 269 cases. These cases were further sorted to separate and remove those that were not relevant to the question of public police use of dynamic or no-knock entry. A total of 155 cases were removed during this process. Sixty-seven of these cases involved the use of a dynamic entry but did not consider it as a legal issue. The other eighty-eight cases were determined to be false positive hits. Most involved cases where a dynamic entry was referred to in quoted jurisprudence but did not occur in the case itself. Other false positive hits included cases outside the scope of the research such as civil suits and tenancy termination applications. The remaining 114 cases, which considered the manner of entry as a legal issue, were then coded to reflect: whether a *Charter* breach was found, whether evidence was excluded (where a violation was found), and the result of any subsequent appeal. Additionally, we noted any pertinent discussion on the use of dynamic entry in the cases. This included discussion on the practice both as a legal issue and as it pertained to the specific facts of an individual case. From these passages we construct a picture of dynamic entry use in Canadian jurisprudence. Consistent with the Supreme Court of Canada's guidance in *Cornell*, police decision-making and trial judge findings of fact with respect to dynamic entry appear to now draw greater deference. At the same time, *Charter* violations stemming from the unreasonable use of dynamic entry continue to be viewed by the courts as serious and often warranting exclusion of evidence. We argue that what is revealed is a legal landscape post-*Cornell* which places heightened importance on how dynamic entries are characterized at the trial level.

III. The Law of Police Dynamic Entry in Canada

While the common law has long recognized the need to protect individual security and privacy within the home, it has also recognized that the public's interest in justice will at times outweigh this.[26] Police must be able to force entry into dwellings in certain situations, for instance, to collect evidence pursuant to a search warrant. It would be undesirable for the law to allow individuals to commit crimes and then obtain complete immunity from the state within their homes. Individuals might also engage in criminal activity completely from within the home, where most if not all evidence of the crime may be found, but remain out of reach of the law. Simultaneously, it would equally not be in the public's interest to allow police to enter dwellings with impunity. Thus,

26. See *Eccles v Bourque*, [1974] 2 SCR 739, 19 CCC (2d) 129; *Semayne's Case* (1604), 77 ER 194, 5 Co Rep 91a.

police are expected to comply with certain restrictions on the exercise of their power to search. In Canada, police are governed by the common law knock and announce rule, which the Supreme Court of Canada articulated in *Eccles v Bourque*.[27] As was stated then, before police may enter a dwelling by force in the typical case, they must first give the occupant "(i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry".[28] Departures from knock and announce are permitted, but only in exigent circumstances.[29] That is, where police have reasonable grounds in the circumstances "to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence".[30] This is where dynamic entries fall, as they are unannounced. Under Canada's current legal framework, the common law reigns in this area. While the law in many US states allows for police to seek prior judicial authorization to execute a search warrant unannounced,[31] Canada's does not.[32] In the past decade it has been argued before several Canadian courts that prior authorization should be found necessary to depart from knock and announce, though in all cases the courts have concluded that it is not.

27. See *Eccles v Bourque*, *supra* note 26.

28. *Ibid* at 747.

29. See *ibid* at 746; *R v Cornell* SCC, *supra* note 1 at para 18.

30. *R v Cornell* SCC, *supra* note 1 at para 20.

31. See Brian Dolan, "To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing" (2019) 93 St John's L Rev 201 at 205–06, 214; Kolby K Reddish, "A Clash of Doctrines: The Castle Doctrine and the Knock-and-Announce Rule" (2016) 25 Widener LJ 171 at 182–83.

32. See *Criminal Code*, RSC 1985, c C-46, ss 529–529.5. Sections 529–529.5 of the *Criminal Code* provide for prior authorization for warrants to enter a dwelling-house to carry out an arrest though. Under s 529.4(1), a judge or justice may grant prior authorization to the police to enter a dwelling unannounced "if the judge or justice is satisfied . . . that there are reasonable grounds to believe that prior announcement of the entry would (a) expose the peace officer or any other person to imminent bodily harm or death; or (b) result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence" (*ibid*, s 529.4(1)). As Michael Johnston explains however, this is largely a codification of the common law rule. See Michael Johnston, "Knockin' On Feeney's Door? A Case Comment on *R. v. Cornell*" (2012) 58:3 Crim LQ 379. The prior authorization does not allow police to execute the warrant unannounced if the circumstances described under 529.4(1) do not still exist "immediately before entering the dwelling-house". See *Criminal Code*, *supra* note 32, s 529.4(2). Additionally, the circumstances allowing unannounced entry for such purpose are higher than those required for search warrants.

One of the first to deal directly with this issue was the pre-*Cornell* case of *R v Perry*.[33] Rejecting a prior judicial authorization requirement, a three-justice panel of the Court of Appeal of New Brunswick noted that the issue had "been overtaken by developments in the law relating to the application of s. 8".[34] The panel concluded that since the reasonableness of a dynamic entry could be challenged at trial, prior authorization had become redundant.[35] The Court of Appeal of Newfoundland and Labrador adopted this reasoning in *R v Al-Amiri*,[36] commenting that police are not required to seek prior authorization for a forced entry "even though they have the intent to execute in this fashion before obtaining a general warrant".[37] Similar findings have been made at the superior court level in Manitoba[38] and Ontario.[39] Less explicit support can also be found from the Supreme Court of British Columbia[40] and the Nova Scotia Court of Appeal.[41] Nevertheless, a few cases have suggested that police are still well advised to disclose any intention to use a dynamic entry when applying for a search warrant.[42]

Thus, in Canada, judicial oversight of dynamic entry is left to occur at trial, where the onus lies on the Crown to justify why the departure from knock and announce was necessary and to provide evidence in support of the police's belief that there were exigent circumstances justifying it.[43] In doing so, the Crown is not permitted to use *ex post facto* justifications and the onus placed on them will be heavier the greater the police departure from knock and announce.[44] Departures must be justified on a case-by-case basis, meaning that blanket policies dictating that a dynamic entry be conducted in all instances of a particular offence do not comply with section 8.[45] Justice Mainella, then of the Court of Queen's Bench of Manitoba, commented on the issue of blanket

33. 2009 NBCA 12.

34. *Ibid* at para 20.

35. See *ibid*.

36. 2015 NLCA 37.

37. *Ibid* at para 54.

38. See *R v Pilkington*, 2013 MBQB 86 at para 69.

39. See *R v Thompson*, 2010 ONSC 2862 at para 59.

40. See *R v Sipes*, 2011 BCSC 1763 at para 242.

41. See *R v DeWolfe*, 2007 NSCA 79.

42. See *R v Thompson*, *supra* note 39 at para 59; *R v Campbell*, [2009] OJ No 4132 at paras 55–56, 70 CR (6th) 66; *R v McKay*, 2017 SKPC 53 at para 43.

43. See *R v Cornell* SCC, *supra* note 1 at para 20.

44. See *ibid*.

45. See *R v Pilkington*, *supra* note 38 at para 71–72; *R v Schedel*, 2003 BCCA 364; *R v Lau*, 2003 BCCA 337.

policies with respect to *Controlled Drugs and Substances Act* (*CDSA*) warrants in *R v Pilkington*.[46] He suggested that, for two reasons, blanket policies failed to meet the *CDSA*'s requirement that police exercise their powers with proportionality.[47] First, blanket policies lack "an accountable decision-maker exercising discretion",[48] meaning that they are unable to assess the unique circumstances of the specific situation facing police.[49] The Crown must be able to provide evidence in support of the police's decision-making process which led them to depart from knock and announce, but under a blanket policy this process will not have occurred.[50] Second, blanket policies are inconsistent with the need for police to re-evaluate their course of action should circumstances change.[51] If a knock and announce-compliant entry becomes possible, the police must be able to consider it.[52]

Evidence of the decision-making process is essential to satisfying the court that police did not follow a blanket policy, even an informal one, and that proper consideration is given to the circumstances facing the police at the time. Recent superior court decisions from across Canada demonstrate that while the evidentiary foundation required to support a dynamic entry is flexible, it must be clear that the decision to depart from knock and announce was not pre-determined. If there is some evidence of decision-making, the Courts will afford a degree of latitude to the decision to depart, but absent such evidence the departure will be found unreasonable. The case of *R v Flintroy* provides an example of the flexibility of this approach.[53] In *Flintroy*, the accused challenged the Surrey Royal Canadian Mounted Police's decision to use a dynamic entry primarily on the grounds that insufficient evidence had been presented to support it.[54] Several officers testified about the entry and information that had been known to them at the time, but the team leader who had actually made the decision to use a dynamic entry did not.[55] Without the decision-maker's testimony, the accused submitted that the Crown had failed to lay the necessary evidentiary foundation.[56] The trial judge rejected this argument, but agreed it

46. SC 1996, c 19; *R v Pilkington*, *supra* note 38 at paras 71–74.

47. See *R v Pilkington*, *supra* note 38 at paras 71–72.

48. *Ibid* at para 73.

49. See *ibid*.

50. See *ibid*.

51. See *ibid* at para 74.

52. See *ibid*.

53. 2019 BCSC 90.

54. See *ibid* at paras 4, 15.

55. See *ibid* at paras 15, 23, 26, 28.

56. See *ibid* at paras 15, 24.

would have been better to hear from the team leader.[57] While not having the team leader's testimony was a "deficienc[y] in the evidence [that would] necessarily undermine the reasonableness of the decision that was taken",[58] there was other evidence which revealed the decision-making process that took place.[59] The case serves as a warning to the Crown that failing to call the ultimate decision-maker may risk leaving insufficient evidence to discharge its evidentiary burden.

A more complete evidentiary foundation was offered in the Court of Queen's Bench of Alberta case of *R v Chang*.[60] In that case, the Calgary Police Service was investigating a drug trafficking operation and obtained search warrants for three houses and three vehicles.[61] Prior to entering the accused's house, the police had conducted surveillance on the suspects and their properties, completed a risk assessment, and held a pre-search briefing session.[62] The search warrants, risk assessment documents, and PowerPoint presentation from the briefing were all filed as exhibits.[63] Both the lead investigator who sought to conduct the dynamic entry, and the police sergeant who approved the request testified.[64] The sergeant had been provided with a copy of the risk assessment and questioned the lead investigator on the plan and possible alternative modes of entry before he approved it.[65] The trial judge found that the decision to depart from knock and announce was well supported by the evidence, and noted that the standard for the Crown to meet falls below that required to prove the accused's guilt.[66] The Court of Appeal of Alberta later upheld this decision.[67] Even if evidence is presented to support the existence of exigent circumstances, the Crown's burden is unlikely to be met if an actual decision-making process is not established.

57. See *ibid* at para 28.

58. *Ibid*.

59. See *ibid* at paras 26, 28. Though in Williams J's view the amount of evidence was not ideal: "To be clear, in this case, it would have been preferable to have more evidence and better evidence. Furthermore, on the evidence adduced, the basis for the use of the dynamic entry was not overwhelming. However, on balance, I am not prepared to find that it was unreasonable" (*ibid* at para 43).

60. 2017 ABQB 348 [*R v Chang* QB].

61. See *ibid* at paras 8, 36.

62. See *ibid* at paras 9–10, 13, 128.

63. See *ibid* at paras 8–11, 13, 128.

64. See *ibid* at paras 11–13.

65. See *ibid* at paras 11–12, 128.

66. See *ibid* at para 128.

67. See *R v Chang*, 2019 ABCA 315 at paras 1–2 [*R v Chang* CA].

In *R v Ruiz*, members of the Toronto Police Service decided to execute a warrant by dynamic entry as part of a drug search.[68] At trial, several officers were called on to testify about their decision to conduct the dynamic entry.[69] However, the officers were unable to explain how the decision was made or whether they had even considered following the knock and announce principle, though one suggested that dynamic entries were often used when investigating drug and firearm offences.[70] The trial judge found that the departure from knock and announce could not be justified as it appeared "the police officers simply showed up at the property, which was previously un-investigated, and employed a dynamic entry" despite ample time to further assess the situation.[71]

A similar finding was made in *R v Bahlawan*.[72] In that case, eight tactical unit officers of the Ottawa Police Service used a dynamic entry on a suspected stash house.[73] Five of the officers testified about decisions to depart from knock and announce, referring to the possibility of firearms being in the house and the need to ensure that evidence was not destroyed.[74] Some admitted that other means of entry were not considered, and even gave testimony suggesting that dynamic entries would almost always be conducted for drug, firearm, and child pornography searches.[75] Based on this evidence, the trial judge concluded that the unit's standard practice was to only follow the knock and announce principle in instances where "there was 'zero risk' to officer safety or the potential destruction of evidence," circumstances which "would be vanishingly rare".[76] Finding the departure unreasonable, the trial judge noted the importance of police giving consideration to knock and announce, stating, "I cannot uphold a decision-making process that simply did not occur."[77]

These cases illustrate how the evidentiary framework operates, though that is but one part of assessing *Charter* compliance. As stated in *Cornell*, the greater the entry departs from knock and announce, the heavier the onus placed on the Crown.[78] Not all dynamic entries are the same. Just as police must make a decision whether to employ dynamic entry, they must make decisions about the clothing, equipment, and conduct in doing so. By increasing the

68. 2018 ONSC 5452 at paras 3–4, 6.

69. See *ibid* at paras 4, 45–49.

70. See *ibid* at paras 47–49.

71. *Ibid* at para 51.

72. 2020 ONSC 952 at para 43.

73. See *ibid* at paras 1, 27.

74. See *ibid* at paras 35–38.

75. See *ibid* at paras 35–39.

76. *Ibid* at para 39.

77. *Ibid* at para 43.

78. See *R v Cornell* SCC, *supra* note 1 at para 20.

degree of departure from knock and announce, new questions arise about the appropriateness of those decisions. Although the court's assessment will depend on the circumstances of the individual case, general principles emerge by examining past cases, evidence, and decisions.

IV. Research Findings: Legal Parameters of Using Dynamic Entry

Next we present our analysis on factors affecting the manner of entry assessment. First, we examine what the courts have said on the use of several key pieces of police equipment during dynamic entry, as well as the expectations placed on police following an entry. Police uniform, equipment, and conduct during and immediately following dynamic entry all contribute to the courts' perception of whether it was reasonable, and therefore compliant with section 8. The guidance offered by the cases in our data set helps to illustrate the courts' views of best practices and principles, which police should strive to meet. Second, we review statistical data on section 8 violations and exclusion of evidence connected to dynamic entry. Our findings demonstrate the impact of *Cornell* on judicial decision-making within our data set, specifically with respect to affording deference to police, but also to the seriousness with which unreasonable dynamic entry will be viewed. We conclude with our suggestions for ensuring that dynamic entries meet the expectations of the courts both in practice and in evidence.

A. Clothing and/or Balaclavas

The use of balaclavas was not considered by the majority in *Cornell*, except to say that when assessing the reasonableness of a search, the details should not be "viewed in isolation".[79] For the dissenting justices however, this was a major issue. Referring to the Court of Appeal of Alberta's findings, they concluded that the Calgary Police Service's use of balaclavas in *Cornell* was part of a blanket policy of wearing balaclavas and was meant to intimidate the occupants of the home, rather than for officer safety reasons.[80]

Justice Ritter of the Court of Appeal of Alberta called the use of balaclavas an "extreme tactic" that "should be limited to extreme cases"[81] and commented that police may not freely use balaclavas, there must be a good reason to do

79. *Ibid* at para 31.

80. See *ibid* at para 115.

81. *R v Cornell*, 2009 ABCA 147 at para 50.

so, or their use will weigh in favour of finding a search unreasonable.[82] Speaking to the issue of police anonymity he further suggested that use of balaclavas "may backfire" because a suspect may mistake masked police officers conducting a search for invading gang members.[83] The dissenting Supreme Court of Canada justices similarly criticized the use of balaclavas as a "judicially condemned" practice,[84] with the potential to undermine the justice system by rendering anonymous police officers unaccountable for their actions during a search.[85]

Indeed this was the finding of Hamilton J of the Provincial Court of Alberta, a few years earlier in *R v Al-Fartossy*.[86] Finding that the use of balaclavas in that case constituted a breach of the defendant's section 8 *Charter* right, he criticized "the practice of masking police officers" as something that should "be discouraged, if not deplored".[87] Judge Hamilton's position was that while exigent circumstances may justify a dynamic entry, they do not necessarily justify the use of balaclavas.[88] The common law requirement for police to identify themselves was not satisfied, in his view, by "the mere yelling out of the word 'POLICE' by a member of a group of masked men not in readily identifiable police uniforms".[89] Furthermore, he found that use of balaclavas increases the risk to police that occupants "will react violently to defend [themselves]" and that their use in that case "add[ed] [an] unacceptable air of oppression to the scenario".[90]

Since *Cornell*, two primary considerations repeatedly arise in case law: officer safety and preventing police anonymity. Police are expected to wear clothing that identifies themselves to occupants, but deviations are largely accepted if there are officer safety concerns. In the absence of a valid safety concern, deviations become part of the assessment of the search's overall reasonableness. This is particularly true in cases involving the use of balaclavas.

B. Officer Safety

Officer safety is the primary justification offered for wearing masks or balaclavas during dynamic entry, as was the case in *R v McCann*, where Stratford

82. See *ibid* at paras 50, 53.

83. *Ibid* at para 51.

84. *R v Cornell* SCC, *supra* note 1 at para 117.

85. See *ibid* at para 118.

86. 2006 ABPC 203.

87. *Ibid* at para 33.

88. See *ibid* at paras 19, 33.

89. *Ibid* at para 19.

90. *Ibid* at para 20.

Emergency Response Unit (ERU) officers conducted a dynamic entry wearing balaclavas and tactical uniforms.[91] Justice Leach of the Ontario Superior Court of Justice found as fact that the balaclavas were meant to protect officers from "possible facial injuries" that might occur from using flashbangs or distraction devices, and to prevent officers involved in undercover operations from being recognized.[92] She rejected the defendant's argument that the balaclavas were "unnecessarily terrifying",[93] finding that the decision to wear them fell "within the permissible latitude of discretion given to police" to decide how to enter the residence.[94]

Similarly, in *R v Jordan*, after considering both the majority and dissenting opinions in *Cornell*, the use of balaclavas was found to be justified as a safety precaution against: debris from forcing open the door, police distraction devices, and chemicals that may be encountered when executing a drug warrant.[95] Twice at the appellate level, it has been suggested that once such a concern has been established the court should refrain from inquiring much further into the choice of equipment.

In *R v Sexton* the Court of Appeal of New Brunswick overturned the trial judge's finding that a search by the Fredericton Police Force was unreasonable due to the use of balaclavas.[96] The trial judge had rejected the argument that Emergency Response Team (ERT) members wore balaclavas as a safety precaution because they had already been wearing helmets and goggles. But, comparing the equipment used in this case to that used in *Cornell*, the Court of Appeal observed that it was "virtually the same",[97] going on to say that "the police force's choice of equipment" should not be micromanaged.[98] A new trial was then ordered.[99]

The significance of connecting balaclava use to officer safety is perhaps most notable in the Court of Appeal for Ontario's decision of *R v Burke*.[100] While the Court accepted that the appellant was "extremely frightened by the officers",[101] the fact that the police were masked and had their weapons out was insufficient

91. See *R v McCann*, 2017 ONSC 884.
92. *Ibid* at para 15.
93. *Ibid* at para 31.
94. *Ibid* at para 32.
95. 2011 ABQB 105 at paras 89–91.
96. 2011 NBCA 97 at para 39.
97. *Ibid* at para 29.
98. *Ibid* at para 30.
99. See *ibid* at para 39.
100. 2013 ONCA 424.
101. *Ibid* at para 55.

to make the search unreasonable.[102] For the majority, Weiler JA stated:

> In the absence of a concern for police safety, the element of intimidation accompanying the use of masks and drawn weapons may be unnecessary and is a cause for judicial concern. However, I am sensitive to Cromwell J.'s caution in *Cornell*, that, "[h]aving determined that a hard entry was justified, I do not think that the court should attempt to micromanage the police's choice of equipment."[103]

C. Police Anonymity

On the issue of police anonymity, case law largely focuses on the use of identifying markings or words (usually "POLICE") on police uniforms. If such markings are present it is usually accepted as sufficiently identifying, regardless of whether police choose to wear balaclavas or not. This position was articulated in *Sexton*. The Court of Appeal of New Brunswick rejected the trial judge's finding that the police had acted anonymously because they wore balaclavas, pointing to the fact that the ERT members had the word "POLICE" on the back and front of their vests, and because some of the officers removed their balaclavas after securing the apartment.[104]

Similarly, in *McCann*, the defendant's testimony that they were unaware that the masked individuals entering their apartment were police was found to be unreliable in part because the ERU tactical uniforms said "'POLICE' across the chest and back"[105] and on the shoulders.[106] These markings may even continue to be sufficient in cases where it is accepted that the defendant remained unaware of the identity of the police.

In *R v McKay*, members of the Prince Albert Police Service and the RCMP executed a *CDSA* search warrant using a dynamic entry. Two uniform officers were sent into the house first, as they were "more identifiable as police officers" than the rest, who were wearing dark clothing with the word "POLICE" upon it.[107] Despite this, the defendant testified they were not aware that the intruders were police officers until after the situation had settled down.[108] The

102. See *ibid*.

103. *Ibid* at para 58, citing *R v Cornell* SCC, *supra* note 1 at para 31.

104. See *R v Sexton*, *supra* note 96.

105. *R v McCann*, *supra* note 91 at para 15.

106. See *ibid* at paras 15, 18.

107. *R v McKay*, supra note 42 at para 18.

108. See *ibid* at para 22.

trial judge accepted this testimony, finding that: (1) the defendant had been unable to clearly hear what the police were shouting while they entered the home and (2) the poor lighting had prevented the defendant from seeing the badges or identifying markings on the police's uniforms.[109] Yet, no *Charter* violation was found to have resulted from this confusion.[110]

By contrast in *R v Robertson*, the first officer sent in during a search of a house "was wearing a t-shirt and baseball cap" and did not have a bulletproof vest or "police identification on his clothing," because the RCMP believed the house to be empty.[111] Justice Watchuk of the Supreme Court of British Columbia remarked that the officer "could easily have been mistaken for a civilian intruder".[112] Although the house was in fact empty when the RCMP entered, Watchuk J held that this "does not alter the duty of the police" with respect to the decision to conduct a dynamic entry and the procedures to follow when conducting a search generally.[113] In doing so, Watchuk J cited the British Columbia Court of Appeal's approval of *Glover v Magark* in *R v Schedel*, which found that police have a duty to identify themselves "particularly when they are not in traditional police uniform".[114]

D. Flash Bangs and Distraction Devices

Flash bangs or distraction devices are devices which explode similar to a grenade, emitting a loud noise and flash of light.[115] They are often used during dynamic entries when police are concerned about dogs or violence.[116] The police in *Cornell* did not use the devices, and few cases since have addressed the reasonableness of using them. Instead, the *Cornell* majority's caution to provide police with latitude has been followed as a guiding principle.

One of the first cases to consider the use of flash bangs was *R v Thompson*. The case was decided just prior to *Cornell*, but its decision is logically consistent with that of the *Cornell* majority. In *Thompson*, damage was caused to the accused's

109. See *ibid* at para 33.

110. However, it is unclear how seriously this was considered by the trial judge as they eventually excluded the collected evidence due to a series of *Charter* violations in the case, including that the police had unreasonably departed from the knock and announce principle. See *ibid* at paras 74–78.

111. 2016 BCSC 2474 at paras 36, 39.

112. *Ibid* at para 36.

113. *Ibid* at para 40.

114. *Ibid* at para 21, citing *Glover v Magark*, [1999] BCJ No 472 at para 28, 1999 CanLII 6636.

115. See *R v Thompson*, *supra* note 39 at para 7.

116. See *ibid* at paras 12–13; *R v Bahlawan*, *supra* note 72 at para 38.

property by a police flash bang.[117] Several officers testified that flash bangs may injure individuals who are near the device when it goes off and that the device may cause flammable materials to ignite.[118] Justice Code of the Ontario Superior Court of Justice commented that flash bangs are "an extraordinary new development" that "[appear] to have been adapted from warfare and counter-terrorism, and not from any traditional conception of policing".[119] Yet, he rejected the accused's position that police should be required to obtain a warrant to use them.[120] Instead, Code J concluded that flash bangs are just one of many possible departures from common law standards surrounding police searches.[121] As such, the police do not require prior permission to use flash bangs but should be aware that the greater their actions depart from common law standards, the heavier is the onus that will be placed on the Crown to show that the departure was justified.[122] Justice Code further noted that requiring police to obtain prior authorization would not afford police the proper level of "discretion and flexibility", as the circumstances of a search are "often fluid and dynamic".[123]

A few years after *Cornell*, flash bang use was considered once again in *R v Browne*, when the Toronto Police Service's Emergency Task Force used a flash bang grenade during a firearm search.[124] The accused argued that the use of the flash bang was unnecessary and violated his section 8 *Charter* right, while the Crown argued it was justified due to concerns about officer safety and loss of evidence.[125] Justice Hainey of the Ontario Superior Court of Justice accepted the Crown's position, noting the majority decision in *Cornell* and supporting testimony of the Emergency Task Force's supervisor.[126] Finding no *Charter* breach, Hainey J went on to conclude that even if a breach did occur, it was not serious and did not require any evidence to be excluded under section 24(2).[127]

Challenging the use of flash bangs from a different angle in *R v Al-Amiri*, the accused in that case alleged that his bodily integrity was interfered with in violation of section 487.01(2) of the *Criminal Code*, when police deployed a

117. See *R v Thompson*, *supra* note 39 at para 8.

118. See *ibid* at para 17.

119. *Ibid* at para 62.

120. See *ibid*.

121. See *ibid* at paras 63–64.

122. See *ibid* at para 63.

123. *Ibid* at para 65.

124. 2013 ONSC 5874 at paras 14, 17.

125. See *ibid* at paras 66–69.

126. See *ibid* at paras 69–71.

127. See *ibid* at paras 85, 94.

flash bang during a search of his home.[128] He did not submit any evidence in support of this position, but relied on police testimony about the effects of the device.[129] The trial judge accepted this argument, concluding that the tactics used by the police, including the deployment of the flash bang, were not permitted under section 487.01(2) and therefore constituted a breach of the accused's section 7 and 8 *Charter* rights. The Court of Appeal of Newfoundland and Labrador overturned this finding, concluding that even if it was accepted that the accused had been briefly disoriented by the flash bang, any interference with the accused's bodily integrity was minimal because the effects of the device are temporary.[130] Following *Cornell*, they noted the possibility that an otherwise authorized dynamic entry could be found to be unreasonable due to the manner in which it was carried out, but that this "will depend upon the facts of each case".[131]

E. Tear Gas

More recently, the use of tear gas during a dynamic entry received judicial attention in *R v Rutledge*.[132] At trial, the defence argued that tear gas should be prohibited "or at least emphatically discouraged"[133] during dynamic entries, suggesting that it was "qualitatively worse than 'flash bangs' or distraction devices".[134] Justice Wein of the Ontario Superior Court of Justice found that this argument was unsupported by the evidence, and that since police are authorized to use tear gas in other settings, prohibiting them from doing so here would "be to micromanage the police's choice of equipment" contrary to *Cornell*.[135] Since the search itself was conducted reasonably, the use of tear gas did not violate the accused's rights.[136] The Court of Appeal for Ontario later upheld this decision, reiterating that the court's role is to consider the reasonableness of the search overall.[137]

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128. See *R v Al-Amiri*, *supra* note 36 at para 51.
129. See *ibid*.
130. See *ibid* at paras 14–19.
131. *Ibid* at para 52.
132. 2015 ONSC 1675 [*R v Rutledge* SC].
133. *Ibid* at para 94.
134. *Ibid* at para 105.
135. *Ibid* at paras 105–106.
136. See *ibid* at para 109.
137. See *R v Rutledge*, 2017 ONCA 635 at paras 23–26 [*R v Rutledge* CA].

F. State of the Home Following Dynamic Entry

Even if the police are justified in conducting a dynamic entry and in their choice of equipment, they do not have a blank cheque to proceed with complete disregard for the rights of occupants. They must continue to exercise their powers reasonably throughout the search. This related issue arose in *Thompson* where the Court considered whether police are authorized to conduct searches in a manner which causes unnecessary damage to property.[138] The trial judge found that the police had exercised a "method of searching that essentially involve[d] dumping all of the household property on the floor and leaving it there"[139] and that other damage had been deliberately caused.[140] They were unconvinced that the search method was necessary, but concluded that even if police felt that it was, "there is no excuse for failing to put [an] item back where it was found".[141]

A similar finding was made in *Ruiz*. Following the dynamic entry in that case, police turned over furniture and emptied drawers throughout the house while searching for drugs.[142] The trial judge found that the officers had left "a large mess to clean up, and some furniture to repair or replace",[143] without any explanation as to why.[144] Although the accused could not necessarily expect their home to "be put back in its complete, pre-search state", the search had "caused unnecessary disorder and disarray and rendered the manner of the search unreasonable".[145]

Even if the damage caused by police is justifiable, their obligations do not necessarily end there. In *R v Boyd*, the door to the accused's home was "knocked off the hinges" as police forced entry.[146] The accused and his girlfriend were "taken into custody and brought back to the police station", leaving the property unoccupied except for the couple's dog.[147] Police later released the accused's girlfriend and informed her of the damage to the door, which they had propped up before leaving.[148] The trial judge found that the damage to the

138. See *R v Thompson*, *supra* note 39 at para 69.

139. *Ibid* at para 73.

140. See *ibid* at para 72.

141. *Ibid* at para 74.

142. See *R v Ruiz*, *supra* note 68 at paras 58–59.

143. *Ibid* at para 62.

144. See *ibid* at para 59.

145. *Ibid* at para 63.

146. *R v Boyd*, [2018] OJ No 7032 (QL) at para 49 (Ont Ct J).

147. *Ibid* at paras 50–51.

148. See *ibid* at paras 49–50.

door itself was not unreasonable, but that leaving the house unsecured with no other occupants and the accused's dog inside was.[149] The police's attempts to fix the door and to inform the occupants of the damage mitigated the breach, but officers were aware that the house and dog were unsecure and should not have left them in that state.[150]

V. *Charter* Compliance of Dynamic Entry by the Numbers

Table 1

Trial Decisions (92)	Dynamic Entry Breached Section 8		Breach (%)	Evidence Excluded (if entry breached)		Exclude (%)	Exclude (%) All Trial Decisions
	Yes	No		Yes	No		
Pre-*Cornell*	12	21	36.36	11	1	91.66	33.33
Pre After Appeals (3)	10 (-2)	21	32.35	9 (-2)	1	90.00	29.03
Post-*Cornell*	14	45	23.72	12	2	85.71	20.33
Post After Appeals (5)	13 (-1)	45	22.41	11 (-1)	2	84.61	18.96

Some caution is warranted with respect to our findings. Although our data set includes over one hundred legal cases involving dynamic entry, it relies only on those which were available through Lexis Advance QuickLaw. Legal databases include only a limited subset of the cases which are heard by the courts each year. Many decisions which are rendered are never reported, particularly those given orally.[151] Thus, it is possible that the decisions available for this research vary from those being made generally. However, as reported decisions are the most accessible to legal practitioners, they are also the most likely to be relied on in legal argument and referred to in court judgements. For this reason, our findings still have value in understanding the patterns in current case law.

149. See *ibid* at paras 53–55.

150. See *ibid* at para 59.

151. See e.g. "Writing Reasons for Judgment Simply is Not Easy" (9 June 2015), online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/enews/enews-09-06-2015> [perma.cc/PE8H-WNYC]; "Finding and Researching Cases" (last visited 20 September 2020),

A. Increased Latitude for Police and Deference for Trial Judges

Our findings suggest that the Supreme Court of Canada's guidance in *Cornell*—for trial judges to grant latitude to the police in deciding their manner of entry, and for appellate courts to give "substantial deference" to a trial judge's "assessment of the evidence and findings of fact"[152]—has been taken up by the courts. Although the use of dynamic entry was found to breach section 8 in two fewer pre- than post-*Cornell* trial decisions in our data set, the number of cases finding no breach was over double in the latter set. Pre-*Cornell*, approximately thirty-six per cent of cases examined found that the use of dynamic entry violated the accused's section 8 right. However, after factoring in appeals, the rate dropped slightly to around thirty-two per cent. Post-*Cornell*, dynamic entries were found to have violated section 8 in under twenty-four per cent of trial cases considered, and less than twenty-three per cent after considering the five appeals which were made. This is already a fairly noticeable change, though in actuality the change may be more considerable. As noted above, in collecting the cases for this analysis, 155 cases deemed false positive hits were removed. Sixty-seven of these cases indicated that a dynamic entry had been used but did not consider it as a legal issue. Presumably, in some of these cases the accused may have seen challenging the manner of entry as a losing argument given the enhanced degree of latitude afforded following *Cornell*. It is unfeasible to determine for certain why the dynamic entry was not challenged in those cases. It is arguably just as likely that the accused refrained from doing so due to overwhelming evidence that the dynamic entry was justified in the circumstances. As cases continue to be decided under the *Cornell* framework, it may be that the police have become increasingly aware of what is expected of them.

The number of appeals both pre- and post-*Cornell* is small, though they too suggest that increased deference is now being granted to trial judges. The appellate courts interfered in two of three trial decisions in our data set prior to *Cornell*, but only one of five afterwards. Moreover, while all appellate decisions before *Cornell* found no breach of section 8, those following it found mixed results. There were three pre-*Cornell* cases which appealed the reasonableness of the dynamic entry in our data set. In two of these, the courts of appeal ordered a new trial on the basis that the trial judge had incorrectly found a breach of section 8.[153] The third upheld a finding that no breach had

online: *Alberta Law Libraries* <lawlibrary.ab.ca/research-guides/finding-and-researching-cases/> [perma.cc/2KHN-J39C]; "Frequently Asked Questions (FAQ)" (last visited 20 September 2020) at no 2.3, online: *CanLII* <www.canlii.org/en/info/faq.html> [perma.cc/UE23-VVF5].

152. *R v Cornell* SCC, *supra* note 1 at para 25.

153. See *R v Al-Fartossy*, 2007 ABCA 427, rev'g 2006 ABPC 203; *R v DeWolfe*, *supra* note 41, rev'g 2006 NSPC 51.

occured.[154] Post-*Cornell*, four appellate decisions upheld the trial judge's findings, two of which found a breach of section 8,[155] while the two others found none.[156] A new trial was ordered in the fifth, after finding the manner of entry had been reasonable.[157] This is consistent with the appellate courts exercising greater restraint upon review, though some caution is warranted since so few of the trial decisions were appealed on the basis of the trial judge's findings on the use of dynamic entry.

B. Exclusion of Evidence

Our findings reveal little change to the rate of exclusion following *Cornell*.[158] When taking into account appeals, ninety per cent of cases in our data set involving an unreasonable dynamic entry led to exclusion prior to *Cornell*, while just under eighty-five per cent did after. Though even this result warrants caution. The number of available cases to draw upon is small, and often they involve multiple *Charter* violations, which may push a trial judge towards exclusion.[159] Most significantly, a year before *Cornell*, the Supreme Court of Canada released its seminal decision in *R v Grant*, establishing a new test for deciding evidence exclusion under section 24(2) of the *Charter*.[160] What can be

154. See *R v Lucas*, 2014 ONCA 561 at paras 257–60, 262–64, aff'g [2009] OJ No 5333, 2009 CanLII 69326.

155. *R v Fan*, 2017 BCCA 99, aff'g 2013 BCSC 1406 [*R v Fan* SC (TD)]; *R v Robertson*, 2018 BCCA 116 at para 62, aff'g 2016 BCSC 2474. Notably in *R v Fan*, the parties disagreed about whether the police had actually conducted a dynamic entry. See *R v Fan* SC (TD), *supra* note 155 at paras 45–46. The trial judge found that the police had knocked prior to entering the accused's residence, but that they had waited an insufficient amount of time for the accused to open the door. See *ibid* at para 51. Additionally, the police had not forced entry as the accused's door was unlocked. See *ibid* at para 63.

156. See *R v Chang* CA, *supra* note 67, aff'g *R v Chang* QB, *supra* note 60 at para 128; *R v Burke*, *supra* note 100, aff'g 2011 ONSC 7566.

157. See *R v Al-Amiri*, *supra* note 36, rev'g 2013 NLTD(G) 69.

158. *Cornell* did not call for police latitude to enter into the 24(2) analysis, though the majority's direction for judges to focus on "whether the search overall…was reasonable" and "not whether every detail of the search, viewed in isolation, was appropriate" would seem to allow for this possibility. See *R v Cornell* SCC, *supra* note 1 at para 31.

159. See e.g. *R v Calderon*, [2004] OJ No 3474, at paras 93–94, 188 CCC (3d) 481 (Ont CA); *R v Spence*, 2011 BCCA 280 at paras 50–52 (effect of multiple *Charter* breaches).

160. 2009 SCC 32. In *Grant*, the Supreme Court of Canada held that where an accused seeks to have evidence excluded under section 24(2) as a remedy for a *Charter* breach, the Court is to determine whether admission of the evidence would bring the administration of justice into disrepute after balancing three factors. Those factors are "(1) the seriousness of the

said is that the data suggests where a dynamic entry is found to have violated an accused's *Charter* rights, the likelihood that evidence will be excluded is high. In fact, the rate of exclusion we observe for unreasonable dynamic entries is higher than what previous studies have found of section 8 violations generally.[161]

This should be of little surprise. Not only do dynamic entries represent a departure from the long-established knock and announce rule, only to be allowed in exigent circumstances, they also inherently involve the state's intrusion into the home, where a person's expectation of privacy is at its highest.[162] The decisions in our data set largely support this. Although trial judges repeatedly stress the need to grant police latitude in deciding their use of equipment and manner of entry, unjustified dynamic entries are frequently viewed as serious breaches of section 8 which (usually) strongly favour exclusion of evidence.

For instance, in *R v McKay*, police executed a *CDSA* search warrant at the accused's home and obtained evidence of cocaine and fentanyl trafficking.[163] The decision to enter in that manner was made pursuant to a blanket policy and in the absence of exigent circumstances.[164] Judge Daunt found the conduct to be a serious violation as "the breach concerned a private home", an area afforded "the highest level of protection under the law".[165] In light of that, admitting the evidence "would send a message condoning the serious and routine departure from *Charter* norms".[166] The impact on the accused was similarly characterized as "substantial", particularly given that "the police actions [had]

Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits" (*ibid* at para 71). The *Grant* test replaced the previous one established in *R v Collins*, [1987] 1 SCR 265, [1987] SCJ No 15, which over time had drawn criticism for creating inconsistent results and unnecessary confusion. See *R v Grant*, *supra* note 160 at paras 60–66, 206–08.

161. See Ariane Asselin, *The Exclusionary Rule in Canada: Trends and Future Directions* (LLM Thesis, Queen's University, 2013) [unpublished] at 27. Asselin found that of a sample of eighty trial decisions with a section 8 violation, evidence was excluded in seventy-four per cent of cases (fifty-nine out of eighty). See *ibid*. See also Patrick McGuinty, "Section 24(2) of the *Charter*: Exploring the Role of Police Conduct in the *Grant* Analysis" (2019) 41:4 Man LJ 273 at 299–305. McGuinty collected a sample of 100 cases which included a 24(2) analysis. Of these, sixty found violations of section 8 and evidence was excluded in sixty-five per cent of cases (thirty-nine out of sixty). See *ibid* at 299–305.

162. See *R v Tessling*, 2004 SCC 67 at paras 22, 45.

163. See *R v McKay*, *supra* note 42 at paras 1–3, 5.

164. See *ibid* at paras 65, 72.

165. *Ibid* at para 72.

166. *Ibid* at para 74.

traumatized not only the accused, but her young family" and all those in the house had been arrested regardless of whether police had the necessary grounds to do so.[167] Despite the importance of the evidence, a balancing of the *Grant* factors favoured exclusion.[168]

A similar conclusion was reached in *R v Persad*, where police executed a search for drugs.[169] Believing a firearm may be present in the house, the entry was conducted without announcement.[170] Within seconds of entering, police encountered the accused.[171] The accused did not immediately comply with their instructions, though they were visibly unarmed and did not resist.[172] Yet, police proceeded to taser the accused four times "[w]ithin 15 to 20 seconds" of entering.[173] Justice Daley found that the police had executed the warrant unreasonably and that "the use of tasers was not warranted in the circumstances".[174] Their conduct "seriously infringed the accused's fundamental right of personal and territorial privacy [which] favour[ed] exclusion".[175] The resulting impact on the accused "amounted to most serious violations of human dignity, liberty and privacy",[176] also favouring exclusion.[177] Although the accused was facing several counts of drug and firearm related offences, balancing the *Grant* factors "admission of the evidence would have a serious negative effect on the repute of the administration of justice".[178]

A slightly different outcome occurred in *R v Robertson*.[179] Initially announcing their presence to execute a search warrant at the home of two co-accused, police proceeded to force entry less than thirty seconds later.[180] The entry was described as being between a dynamic entry and one which complied with knock and announce.[181] Once inside, police found a large stockpile of

167. *Ibid* at para 75.

168. See *ibid* at para 78.

169. 2012 ONSC 3390 at paras 38, 41.

170. See *ibid* at para 155.

171. See *ibid* at para 150.

172. See *ibid* at paras 146–147, 150–151.

173. *Ibid* at paras 148, 150.

174. *Ibid* at paras 191–192.

175. *Ibid* at para 193.

176. *Ibid* at para 200.

177. See *ibid* at para 201.

178. *Ibid* at para 215.

179. 2017 BCSC 965.

180. See *ibid* at para 52.

181. See *ibid*.

stolen firearms, drugs, and cash.[182] Justice Watchuk determined that the manner of entry was unreasonable and held a *voir dire*.[183] The Crown argued that the police had not acted in bad faith, they had simply become "overly eager in entering",[184] highlighting that police had not worn masks or used a distraction device.[185] Justice Watchuk rejected this argument, however, finding that the police entry had seriously violated the knock and announce rule, and further that it had undermined the goals of both knock and announce and dynamic entry.[186] However, the impact on the accused was said to be minimal since the police had a valid search warrant and could have obtained the evidence only a short time later had they fully complied.[187] Only one accused was in the home at the time of the search, and police had questioned them in violation of their right to counsel.[188] This breach tipped the balance, resulting in the evidence being excluded against only the accused present during the search.[189]

Our findings appear to show support for the *Cornell* majority's call for increased deference, both to police deciding when to use dynamic entry, and to trial judges assessing the reasonableness of their decision and its execution.[190] Yet, this does not appear to have lessened the degree of seriousness in which breaches will be viewed. Based on the cases in our data set, unjustified dynamic entry continues to be viewed as a serious violation of section 8, and in most cases has continued to result in evidence being excluded under section 24(2). Findings at trial now have enhanced importance following *Cornell*. Police decisions surrounding their manner of entry are less likely to be found unreasonable by the trial judge, but so too is the trial judge's assessment if challenged before the appellate courts. Where the trial judge is left unsatisfied about the necessity of the departure, the evidentiary framework presented before them, or the overall manner of the entry, they are likely to exclude the evidence obtained during the search and frequently this will bring an end to the case. Ensuring *Charter* compliance is therefore not only a matter of respecting individual rights, but in the interest of the public and the police to see that justice is done.

182. See *ibid* at para 11.

183. See *ibid* at paras 2–5.

184. *Ibid* at para 53.

185. See *ibid*.

186. See *ibid* at paras 52, 55–56.

187. See *ibid* at paras 77–78.

188. See *ibid* at para 81.

189. See *ibid* at paras 91–92.

190. However, the *Cornell* decision is not unique in this regard and fits well within the Supreme Court of Canada's post-*Charter* decision trajectory overall. See Jochelson & Kramer, *supra* note 11.

VI. Police Dynamic Entry in Canada: Recommendations

The split in *Cornell* was narrow (4–3) and demonstrates how different judges may come to opposite conclusions on the same evidence. The *Cornell* majority accepted that the police had valid concerns about officer safety due to the accused's association with a criminal gang as well as the destruction of evidence given the nature of the drug sought.[191] They stressed that latitude was owed to police and that the search was part of a complicated operation involving multiple days of surveillance.[192] The dissenting justices did not dispute the majority's approach, acknowledging that police "must be afforded considerable latitude" and that "[c]ourts [must] not lightly interfere in operational decisions."[193] What they contested was the majority's conclusion that the dynamic entry was justified by the facts and evidence in the instant case.[194] In their view, the dynamic entry was unnecessary and excessive, the evidentiary framework was lacking, and other factors, such as the use of balaclavas, added to the unreasonableness of the search.[195] Moreover, they found these deficiencies to be significant enough to demand exclusion of the obtained evidence.[196]

This split highlights the critical importance of police considering when and how far to depart from knock and announce, and the need for Crown attorneys to be sure that sufficient evidence is brought to avoid unnecessarily close calls at trial.[197] As our findings demonstrate, dynamic entries may violate section 8 even where police do not act in bad faith, and prosecutors may inadvertently generate too little evidence to meet their burden. Both would be well advised to take note of the following general recommendations.

Drawing on our findings, several general principles of best practice for *Charter*-compliant dynamic entry emerge.

First, while the cases we studied make clear that there is no minimum amount of surveillance which must be conducted prior to executing a search warrant, reasonable efforts should be made to understand the situation facing police.[198] Pre-search surveillance may support either escalating or de-escalating

191. See *R v Cornell* SCC, *supra* note 1 at paras 27–30.

192. See *ibid* at paras 9, 24, 34.

193. *Ibid* at para 48.

194. See *ibid* at paras 48–52.

195. See *ibid* at paras 101–102, 112–115, 125–129.

196. See *ibid* at para 152.

197. See e.g. *R v Bahlawan*, *supra* note 72.

198. See e.g. *R v Liu*, 2011 BCSC 1266 at para 105; *R v Ruiz*, *supra* note 68 at paras 50–51.

entry tactics and if challenged at trial, provides evidence of the decision-making process.[199] Rushing to conduct a search places police and occupants at unnecessary risk and is likely to be found unreasonable.[200] In tragic circumstances, rushing to conduct a search using a dynamic entry can lead to deaths.[201]

Second, police equipment selection should be tailored to the circumstances of the situation and not simply chosen out of routine. Distraction devices, breaching shotguns, battering rams, and other equipment require officers to undergo specialized training and are subject to internal policies or procedures in many police services.[202] This practice is certainly preferable to otherwise unregulated use, though police should be careful not to allow these practices or customs to develop into blanket policies such as those already found inappropriate for dynamic entries generally.

Third, all police officers involved in the execution of a dynamic entry should be clearly identifiable as police officers. At a minimum, officer uniforms should include the word "POLICE" on both the front and back in large print. Masks or balaclavas should be reserved for situations with specific officer safety concerns or otherwise where necessary "to protect the identity of officers still involved in an ongoing undercover investigation".[203] If masks are worn, they should be removed as soon as the purpose for their use is no longer pertinent.[204]

Fourth, the trial judge should be provided with all risk assessments, briefing documents, notes, emails, and other materials or information police considered as part of their decision-making process where a dynamic entry is challenged. Additionally, the final decision-maker, entry team leader, and other key participants should be called to testify about the decision to depart from knock and announce, the equipment used, and their overall conduct throughout the entry.[205]

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199. See *R v Liu*, *supra* note 198 at paras 103, 107; *R v Khan*, 2015 BCPC 443 at para 113.

200. See e.g. *R v Ruiz*, *supra* note 68 at para 51.

201. See Judy Trinh "Young Man Dies After Falling 12 Storeys During Ottawa Police Raid", *CBC News* (10 October 2020), online: <www.cbc.ca/news/canada/ottawa/ottawa-man-plunges-death-police-1.5757442> [perma.cc/LF3P-5TJY]; "Quebec Man Acquitted in Police Officer Slaying", *CBC News* (13 June 2008), online: <www.cbc.ca/news/canada/montreal/quebec-man-acquitted-in-police-officer-slaying-1.698274> [perma.cc/J97H-N6W8].

202. See e.g. *R v Pilkington*, *supra* note 38 at paras 9–10; *R v Robinson*, 2019 ONSC 4696 at paras 165–167, 178–183; *R v Rutledge* SC, *supra* note 132 at paras 105–106

203. *R v Cornell* SCC, *supra* note 1 at para 115.

204. See e.g. *R v Burke*, *supra* note 100 at para 58; *R v Sexton*, *supra* note 96 at para 31; *R v Jordan*, *supra* note 95 at paras 89–91.

205. See e.g. *R v Flintroy*, *supra* note 53 at para 28.

Finally, in lieu of decreased deployment of tactical teams for execution of warrants, police officers involved in dynamic entries could be equipped with body-worn cameras (BWC), as some police services already do.[206] This would supplement but not replace the evidence we recommend be provided above. BWC video would not capture all relevant information about police encounters during a dynamic entry, and BWC evidence would still be subject to interpretation as are other forms of evidence.[207] However, it would bear the potential to improve the Court's ability to assess an entry's reasonableness. Dynamic entries are by nature fast paced and tense for both police and occupants. How each perceives the situation may differ and result in opposing accounts. Some cases in our data set involved lengthy discussions about the credibility of witnesses with conflicting testimony on what transpired, even where none were being intentionally deceptive or misleading.[208] BWC footage in conjunction with witness testimony and other evidence would help trial judges to more accurately piece together what happened. In making this recommendation, we are sensitive to privacy concerns, which may be raised when BWCs are used, particularly within private homes.[209] BWCs should not be adopted by tactical teams without first ensuring that proper policies and procedures are in place to maximize individual privacy and meet the evidentiary requirements of the courts. Further, this is not an endorsement of BWCs for regular duty policing.[210]

Conclusion

In *R v Cornell*, the Supreme Court of Canada called for police to be granted latitude in deciding when to depart from the common law rule of knock

206. See "Body Worn Video Pilot Project" (last visited 11 May 2020), online: *Edmonton Police Service* <www.edmontonpolice.ca/News/BWV> [perma.cc/KVM8-R5ZX]; Heide Pearson, "Body-Worn Cameras to be Distributed to Calgary Police Officers by End of July", *Global News* (3 July 2018), online: <globalnews.ca/news/4309961/calgary-police-body-cameras-distribution/> [perma.cc/8BM2-BLPE].

207. See Ermus St Louis, Alana Saulnier & Kevin Walby, "Police Use of Body-Worn Cameras: Challenges of Visibility, Procedural Justice, and Legitimacy" (2019) 17:3/4 Surveillance & Society 305 at 312–13.

208. See e.g. *McKay*, *supra* note 42; *R v Boussoulas*, 2014 ONSC 5542 at paras 25, 28–35.

209. See e.g. Thomas K Bud, "The Rise and Risks of Police Body-Worn Cameras in Canada" (2016) 14:1 Surveillance & Society 117; Canada, Office of the Privacy Commissioner of Canada, *Guidance for the Use of Body-Worn Cameras by Law Enforcement Authorities* (Ottawa: OPC, 18 February 2015), online: <www.priv.gc.ca/en/privacy-topics/surveillance/police-and-public-safety/gd_bwc_201502/> [perma.cc/DBJ5-G77U] [Privacy Commissioner of Canada].

210. See Privacy Commissioner of Canada, *supra* note 208.

and announce, and for substantial deference to be accorded to trial judges in assessing whether that decision and its execution were reasonable. Our findings suggest that the courts have listened. Post-*Cornell*, trial judges in cases examined have been less likely to find dynamic entry use unreasonable, and appellate courts have been more hesitant to intervene. However, police and prosecutors cannot afford to become complacent. Under this framework, the findings at trial have enhanced importance. Moreover, the onus remains on the Crown to justify any departure from knock and announce, a task which becomes more difficult the greater the departure. Unreasonable dynamic entries are still very likely to result in evidence against an accused being excluded. Analyzing case law on dynamic entries from across Canada, we have identified general principles and practices which should be followed to ensure proper respect for the rights of occupants and avoid ill-fated prosecutions.