

# **A Practical Guide to the Suspension of s. 10 of the Charter during the Search Warrant Process**

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## A PRACTICAL GUIDE TO THE SUSPENSION OF S. 10 OF THE CHARTER DURING THE SEARCH WARRANT PROCESS

### A. INTRODUCTION

Little can assuage the naked vulnerability of being handcuffed by the police. The *Charter*, of course, assures timely contact with a lawyer in response to a person's sudden loss of liberty as a constitutional lever to restore a measure of balance in an otherwise lopsided moment between the individual and the state. Nevertheless, courts have accepted delays in facilitating access to counsel in "exceptional circumstances," which can sometimes leave an accused in an icy vacuum for long hours without legal guidance.

In the context of search warrants, courts have permitted the police to delay access to counsel if there are *identifiable reasons* to believe that (1) the safety of officers or others are at risk, (2) evidence will disappear or be destroyed, or (3) an ongoing investigation will be jeopardized. Whether these recognized exceptions also apply to delays in the police discharging their informational duties under s. 10(a) and (b) is still open to debate.

These circumstances, however, must remain exceptional and should not routinely be justified by generalized police concerns, or worse, a policy of indifference. A standard practice or habit of delaying access to counsel while police officers execute search warrants will aggravate the seriousness of *Charter*-infringing conduct in the *Grant* analysis and increase the likelihood that evidence will be excluded under s. 24(2).

### B. THE BOUNDARIES OF "EXCEPTIONAL CIRCUMSTANCES"

Summary:

1. "Exceptional circumstances" signify emergency or peril (*Archambault*);
2. The dangerous or urgent situation must be imminent or immediate (*Manninen, Feeney, Criminal Code* s. 529.3);
3. The justification for suspending the right to counsel must be "identifiable" (*Patterson*);
4. Three types of circumstances have been justified as exceptional for the purposes of delaying access to counsel:
  - (a) a potentially volatile situation that creates a risk of imminent harm to the police or public (*Strachan, Archambault*);

- (b) the risk of imminent loss or destruction of evidence (**Archambault**, *Criminal Code* s. 529.3); and,
- (c) a real and present danger that a police operation in progress will be compromised or frustrated (**Archambault**).

The Alberta Court of Appeal has acknowledged that exceptional circumstances must exist to justify the denial of an accused's right to access counsel without delay.<sup>1</sup> What are "exceptional" or "special" circumstances that can justify delaying a reasonable opportunity to contact counsel?

The Supreme Court of Canada has used varying terms to describe circumstances that may fairly be accepted as exceptional. For example, in **R. v. Manninen**,<sup>2</sup> Lamer J. (as he then was) referred to an "urgency" that requires the police to continue their investigation before it is possible to facilitate access to counsel. In **R. v. Strachan**,<sup>3</sup> Dickson C.J. commented in *obiter* that the right to counsel may be delayed until a "potentially volatile situation" is under police control. And in **R. v. Feeney**,<sup>4</sup> Sopinka J. described circumstances as exigent where "immediate action is required" for police safety or the preservation of evidence.

For further guidance, some courts have also relied on statutory descriptions of "exigent circumstances" in the context of executing arrests or conducting searches without a warrant. Under s. 529.3(1) of the *Criminal Code*, the police can enter a dwelling-house without a warrant to arrest and apprehend a person where the grounds to obtain an arrest warrant under s. 529.1 exist, but by reason of "exigent circumstances" it would be impractical to obtain one. Subsection (2) defines exigent circumstances as the following:

- (2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer
  - (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
  - (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

(emphasis added)

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<sup>1</sup> **R. v. Heng**, 2014 ABCA 325.

<sup>2</sup> **R. v. Manninen**, [1987] 1 S.C.R. 1233 at para. 22.

<sup>3</sup> **R. v. Strachan**, [1988] 2 S.C.R. 980 at para. 34.

<sup>4</sup> **R. v. Feeney**, [1997] 2 S.C.R. 13 at para. 52.