SOWING THE SEEDS OF TRAGEDY

Loud Parties, Mischief and Warrantless Entries for Breach of the Peace

JOHN BURCHILL

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J O H N B U R C H I L L [*]

> March 16, 2001 should have been a good day for Fraser Pogue. All of the necessary preconditions for an excellent party were present. First, he had an occasion to celebrate - it was his birthday; second, his friends were available and enthusiastic; and third, most crucially, his parents were away for the weekend. Accordingly, he notified his 15 to 20 friends that March 16 was the date and 3310 Jackson Court was the place for celebration and fellowship. Unfortunately, as commonly occurs, word of the party spread like a grass fire [and] by 10:30-11:00 p.m., approximately 100 young people had gathered in the house … *the seeds were sown which ultimately led to tragedy* …
>
> *Justice Klinger, R. v. J.B.D., 2002 BCPC 136*

I. INTRODUCTION

The police across Canada and the United States respond to thousands of noise complaints every year. In 2020 the Winnipeg Police received 2,595 noise complaints and another 11,799 disturbance calls. Due to the pandemic, the number of noise calls was slightly lower than in previous years. However, collectively these two types of calls are the second most prevalent call types received by the Winnipeg Police. Most uniform officers will respond to one or two of these calls every shift.

While most are very minor in nature, some can become unpredictable and quickly escalate out of control. In the case of J.B.D. above, a fight broke out at the party between the

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hosts' friends and a group of uninvited youths. During the fight one of the uninvited "guests" pulled out a handgun and shot the victim in the face. The police had responded to complaints about the party twice before the shooting occurred.

Because of this unpredictability there can be a lot of dynamics that are involved when responding to a noise complaint involving an out-of-control party. Often a request to turn down the noise or disperse the party will suffice and there will be no further problems. However, there may be instances where the host cannot be found or the host and/or his guests do not appreciate the police presence and refuse to assist in abating the noise or dispersing the party. In these cases these police have a number of options and how they deal with them may result in prosecutions by Manitoba Justice.

While a formal caution, followed by an Offence Notice for a breach of the *Neighbourhood Liveability By-law* for creating a noise nuisance may suffice in most cases, [1] officers may also have the power to arrest anyone for committing a public nuisance or criminal Mischief who, by their words or actions, shows an utter lack of concern for the convenience and welfare of their neighbours by creating excessive noise. However to support a criminal conviction the accused must wilfully or recklessly continue, assist or persist in causing the noise even after being requested to stop.

Furthermore, the case law would also seem to indicate that where an accused refuses to comply with the noise by-law and further refuses to allow the police to enter and abate the nuisance, that a warrant may be required to affect the suspect's arrest and seize the offending noisemaker (but only if the accused were charged criminally). However, if the owner cannot be located or identified, it may be in the public's interest to enter the premise to stop the noise and possibly ensure the owner's safety and safeguard his/her property if there is a justifiable (articulable) need to do so.

However, where the owner refuses to stop the noise and denies the police entry to abate it, and a warrant might otherwise he required, if the officer reasonably believes any continuation of the noise would incite others to violence or destroy property, then he may be

[1] Depending on the time of day, zoning laws and the type of sound, specific types of noises may be authorized under municipal laws. For example the sound from a parade or marching band, children on a school playground, religious services, singing carols at Christmas, or from the building, construction, repair or operation of tools, equipment or vehicles related thereto between 7:00 a.m. and 9:00 p.m. on weekdays or 9:00 a.m. to 9:00 p.m. on Saturdays, Sundays and statutory holidays, are not generally prohibited. See Winnipeg's *Neighbourhood Liveability By-law* #1/2008, sections 65-71.

justified at common law to enter without warrant and arrest the owner to prevent a breach of the peace.

In this article I hope to use the response to serious or on-going noise complaints as a vehicle for a number of issues that the police may have to deal with regarding warrantless police powers and the result of such actions from the admissibility of seized evidence to charges of assault peace officer.

II. CAUSE DISTURBANCE

R. v. Kukemueller, 2014 CarswellOnt 4915, 2014 ONCA 295, 119 O.R. (3d) 741

The charges in this case arose from an incident that took place at a property in rural Ontario. The local fire department were called to deal with a car fire where young people were gathered at night for a party. The car belonged to the accused's girlfriend. It had crashed into a tree on the accused's property during a game of "demolition derby". The fire department requested police assistance.

The young people appeared to have been drinking. The firefighters extinguished the fire. On learning of the demotion derby the police officer arrested the girlfriend for dangerous driving following which a struggle ensued between the police officer and the girlfriend. The accused and some of his friends became upset, yelling and swearing at the police. About 22 people, including family members, friends, firefighters and police officers, were present. The accused was arrested and charged with causing a disturbance.

The trial judge found that the accused's "behaviour had an effect on the other family and friends who were present and contributed to raising the tension at the scene amongst those people as well as the police". The accused's behaviour, she found, "made things worse". The summary conviction appeal judge affirmed the conviction.

However, on further appeal, a unanimous Ontario Court of Appeal set aside the conviction and entered an acquittal. While the conduct of the accused was obnoxious and deplorable, it was not criminal. While the accused was clearly screaming, shouting, swearing and using insulting or obscene language, it did not cause a disturbance in or near a public place.

The Court of Appeal applied the Supreme Court's ruling in *R. v. Lohnes*, [1992] 1 S.C.R. 167, holding that a mere disturbance of the peace or tranquility was insufficient and that

"the enumerated conduct must cause an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question". As noted by Justice McLachlin (as she then was), a disturbance in this context "involves more than mere mental or emotional annoyance or disruption". The aim of the offence is "not the protection of individuals from emotional upset, but the protection of the public from disorder calculated to interfere with the public's normal activities" and interference "with the ordinary use of a place" (pp. 178-9).

In *Lohnes,* the accused had shouted obscenities at his neighbour from his own veranda. The Supreme Court held that even if this caused emotional disturbance or annoyance to the neighbour, it did not constitute a "disturbance in or near a public place" because upset does not amount to interference with the ordinary and customary use of the premises by the public.

Lohnes was applied by the Court of Appeal in *R. v. Swinkels*, 2010 ONCA 742, 103 O.R. (3d) 736 (Ont. C.A.), where the accused was part of a group yelling obscenities outside a bar at closing time. The police heard the yelling, proceeded to investigate and the accused came towards them yelling further obscenities and holding out his arms with his middle fingers up. The police charged the accused with causing a disturbance and he was convicted. While there was "evidence that the appellant's conduct fired up the crowd", the majority (LaForme J.A., Feldman J.A. concurring) allowed an appeal from conviction, holding that even where the shouting is done and a crowd gathers, the Crown must still prove more to establish the second element of the offence, namely, that the conduct caused an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public.

> Generally speaking ... shouting obscenities at police officers is not a disturbance in and of itself … a 'public disturbance' requires more than a crowd observing – or even shouting anti-police sentiments at – police officers in the course of arrest.

Where, however, a large party causes an externally manifested disturbance or where the accused wilfully continues to cause a disturbance even after being requested to stop such that neighbours and area residents are calling the police, mischief may be a reasonable alternative. [2]

[2] Also see Breach of the Peace later in this article, and consider the words of Lord Abinger in *Cohen v. Huskisson* (1837) 150 Eng. R. 845 at 847 where he states:

Mischief is defined in Section 430(1)(d) of the Criminal Code as meaning the wilful obstruction, interruption or interference with the lawful use, enjoyment or operation of property. Generally we think of this section as being synonymous with vandalism or the wilful destruction or damaging of property. However it may also be used, in some instances, in solving on-going loud party complaints and other excessive noise issues.

Generally the police use a municipal by-law or ordinance to control and regulate excessive sounds that may be prejudicial to the health, welfare, safety or quality of life of the citizens of their community. In fact, the police have the authority to summons any person who creates a "noise nuisance", which is defined as any loud, unnecessary or unusual sound or any sound whatsoever which either annoys, disturbs, injures, endangers or distracts from the comfort, repose, health, peace or safety of any person.

Causing a disturbance, however, is a summary conviction offence. The officer must find committing. What if it is no longer occurring but the officer reasonably apprehends the disturbance will manifest itself again (or prevent it in the first place)? What happens if the noise is coming from inside a dwelling and the person continues to create disturbance, even after repeatedly being warned by the police or requested repeatedly by a citizen to keep quite or reduce the noise level because they cannot eat, think, work or sleep? Can the officer enter, arrest and shut the noise down? In these cases a breach of the peace or a criminal charge of Mischief could be considered as an alternative.

III. MISCHIEF

***R. v. Lundin*,** per Judge Minuk, Man. Prov. Crt, (Feb 25, 1987)

In *R. v. Lundin* the Winnipeg Police were confronted with just this situation when they were called several weekends in a row for noisy parties at the accused's house. In the first

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> The uttering of the abusive words imputed to the plaintiff, abstractedly speaking, undoubtedly <u>would not</u> [be a breach of the peace]; but if they are so uttered, and in such a place, as to attract a crowd of a hundred persons, and when that crowd is collected the party continues to use the same abusive language, nobody can tell whether the passions of the crowd may not be thereby inflamed, and whether they may not proceed to execute the vengeance which the party himself invokes and threatens. It is necessary to prevent in the first instance the mischief that may ensue under such circumstances: and I am of opinion that such acts, under such circumstances, do amount to a breach of the peace; and that the policemen were justified, of their own authority, in taking these parties into custody.

Cohen v. Huskisson was later cited in *R. v. Howell* (1981), 73 Cr. App. R 31 (C.A.) without reference to this paragraph.

three instances the accused was issued with an offence notice under the Noise Control By-law (as it then was). When the police responded to neighbour complaints at 2:40am in the morning on the final weekend, they could hear the accused's stereo playing from a block away. In addition, cars were racing up and down the street and partygoers were drinking and talking loudly in the front yard of the owner's home. As the previous warnings and complaints from the neighbours seemed to have no effect, the accused was arrested and charged with Mischief for interfering with his neighbour's lawful enjoyment of their property.

Initially the Crown was sceptical about the charge, feeling that it was a prima facie case at best, however at trial the entire neighbourhood showed up to testify against the accused and the Crown proceeded with the case. The male was subsequently found guilty in Provincial Court, fined $300.00 and received a criminal record for his partying ways.

R. v. W.(T.), [1993] B.C.J. No. 2031, 21 W.C.B. (2d) 194, 1993 CanLII 973 (BC SC)

In 1993 the B.C. Supreme Court also visited the issue sitting as an appeal court in *R. v. W.(T.)*. In that case the police charged a young offender after a neighbour complained that he had been prevented from sleeping for two days because of excessive noise coming from the accused's home, which included a live band. The young offender was charged with Mischief, however he was acquitted at trial based on the provincial courts belief that "enjoyment" of property meant "quite enjoyment", or possession. Since there was no interference with the victim's possession of her property, the accused was acquitted. The Crown appealed and the Court held that "enjoyment" meant either "use or pleasure" and was not confined to mere possession.

> In my view it can be said that by using the term enjoyment in the section Parliament intended to make it an offence to wilfully disturb a person's pleasurable enjoyment of property, such as, in this case, by noise sufficiently excessive so as to prevent the enjoyment of sleep. The loss of sleep is not a trivial matter as was found by Greene M.R. in the case of *Andreae v. Selfridge & Co. Ltd.* (1937), 3 A.E.R. 255where he stated:
>
> > To say that the loss of one or two nights rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception ...

R. v. Drapeau (1995), 96 C.C.C. (3d) 554, (Que C.A.)

In *R. v. Drapeau* the Quebec Court of Appeal also considered a charge of Mischief under

the Criminal Code regarding a noise complaint; however the Court was split as to the meaning "enjoyment". Justice Fish (as he then was) took the position that enjoyment meant possession while Justice Chamberland clearly agreed with the position in *W.(T)* that enjoyment meant use or pleasure, stating:

> If Parliament had intended that the word "enjoyment" mean "possession", it would have used the word possession. Section 430(1)(d) is drafted in such a way as to cover property in its dynamic aspect (employment, enjoyment or exploitation of property), rather than its static aspect (ownership, rental or possession). The use of the word "enjoyment" comes completely within this logic.
>
> In my view, the word "enjoyment" here has a much more inclusive meaning than just the fact of being the holder of a right to possess the property; it includes the action of obtaining the property, which a person lawfully holds, the satisfaction that this property can provide to that person.

R. v. Maddeaux (1997), 33 OR (3d) 378; 115 CCC (3d) 122, leave to appeal to S.C.C. dismissed Nov. 6, 1997.

However, the definition of "enjoyment" was clarified a few years later when the Ontario Court of Appeal considered the issue again in *R. v. Maddeaux*. In this case it was alleged that the accused had made loud noises in his apartment that interfered with his neighbours' lawful use of her property and her right to enjoy it peacefully. The accused was originally acquitted at trial in Provincial Court and while the Judge ruled that the charge had been made out, the meaning to be assigned to "enjoyment" was possession. The Crown subsequently appealed the decision to the Ontario Superior Court. After reviewing the case Justice McLeod overturned the acquittal, entered a conviction and sent the matter back to the Provincial Court for sentencing. The accused was subsequently sentenced to 18-months Probation and a $500.00 fine; however he appealed both the conviction and the sentence to the Ontario Court of Appeal.

The Court of Appeal unanimously upheld the conviction and stated that the meaning of "enjoyment", as used in section 430(1)(c) of the Criminal Code, was to be given its plain and ordinary meaning. The Court held that there was no doubt as to the meaning of the word and that by resorting to the strict construction rule, as was done by the trial judge, was unnecessary and inappropriate. The Court held that:

> The words 'use, enjoyment or operation' in Section 430(1)(c) are to be read *ejusdem generis*. 'Enjoyment' might include any or all of such uses as cooking, eating, cleaning, resting, sleeping, watching television, or listen-

> ing to a radio. The accused had clearly interfered with the tenant's enjoyment in that sense, and the wilfulness of the noise could clearly be inferred from the conduct and language of the accused.

The accused subsequently sought leave to appeal to the Supreme Court of Canada on the sole issue of whether the term "enjoyment" was correctly interpreted by the Court of Appeal as meaning the normal everyday use of property. The Supreme Court dismissed the application to appeal without comment on November 6, 1997.

R. v. Nicol (2003), 170 CCC (3d) 59; 8 CR (6th) 151; 170 Man R (2d) 127 (C.A.)

In *Nicol* the Manitoba Court of Appeal also concluded that the meaning of "enjoyment", as used in Section 430(1)(d) of the Criminal Code, was to be given its plain and ordinary meaning. As a result the court upheld the conviction of a Brandon woman on a charge of mischief that she did unlawfully obstruct, interrupt or interfere with her neighbours lawful use, enjoyment or operation of property.

The trial judge found Nicol to be a noisy and verbally abusive neighbour who disturbed the peace in her neighbourhood and that there were so many incidents that the neighbours could not peacefully enjoy the use of their property. Her conduct constituted a disturbance. It was more than mere emotional upset or annoyance. It caused an externally manifested disturbance of the public peace.

Leave to appeal a conviction for causing a disturbance was rejected in Justice Twaddle in *R. v. Nicol*, [2002] M.J. No. 33; however he allowed leave to appeal regarding the mischief charge and the meaning of enjoyment. The Court of Appeal unanimously agreed with the ruling in *R. v. Maddeaux* on the meaning of enjoyment, and upheld the 3-year suspended sentence with supervised probation handed down by the trial judge.

Besides *Maddeaux* the Court of Appeal also considered *R. v. Hnatiuk*, [2000] A.J. No. 545, 2000 ABQB 314 (Alta. Q.B.), in which there was a long and acrimonious relationship between the accused and her neighbours who had a fire pit in their backyard (which was allowed by municipal ordinance).

To show her displeasure the accused used foul language and threats, complained to the police and fire department, sprayed a garden hose over fence, left a lawn mower running, bounced basketballs against the fence, and displayed a large sign with insulting words. She was ultimately convicted of mischief.

While the neighbours fire pit interfered with the accused's enjoyment of her backyard, the Court found that no criminal offence had been committed. Veit J. held that:

> [...] doing of something which is not illegal is not transformed into a crime by the fact that it annoys a neighbour. However, the doing of something which is wrongful - for example causing a loud disturbance in the middle of the night which contravenes a municipal by-law may also constitute a crime if it disturbs, or interferes with, a neighbour's sleep. A purposive interpretation of the words of s. 430 leads us to the conclusion that, although the words themselves are broad, they mean that a person who engages in wrongful behaviour which interferes with the lawful enjoyment of property is guilty of a crime.[14]

The term "wrongful behaviour" finds its definition in the effect that it has on someone else. It is therefore contextual. Consider the fire pit example used by Justice Viet. Her view was that since the fire pit was legal, its use even though it annoyed Hnatiuk (the accused), was a legal act and could not be characterized as a crime.

However, if the evidence had shown otherwise, that the only times the fires were lit:

(1) was when the wind was blowing in the direction of the neighbour's house;

(2) the neighbours were in the back yard alone, or with guests;

(3) the material being burned produced a black noxious smoke;

the act in that case may be "wrongful", as the obvious reason would be to interfere with the "enjoyment" of the property. Where the noise making is an isolated incident, and there is neither a pattern of warnings being given to cease and desist, or a pattern of continuous noise making, such isolated incidents while possibly annoying would not be illegal. [3]

R. v. Zargar, 2014 CarswellOnt 2718, 2014 ONSC 1415 (Ont. S.C.J.) [4]

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[3] See *R. v. Anderson***,** 2009 ABPC 249, leave to appeal refused 2010 CarswellAlta 1162, 2010 ABCA 209, 30 Alta. L.R. (5th) 73 (Alta. C.A. Jun 29, 2010). Also see *R. v. Tesar* [2010] S.J. No. 741 (QB), aff'ing [2009] S.J. No. 423 (P.C.); and *R. v. Bird*, 2003 SKPC 16.

[4] Also see *R. v. Wilhelm*, 2014 ONSC 1637 (S.C.J.), for a similar case where Justice Hill set aside a conviction for assault peace officer and entered an acquittal where the officer had pushed open the accused's door against the wishes of the home owner and an altercation ensued as the accused tried to eject the officer from entering. Notwithstanding a 911 call from a neighbour, there was no evidentiary support to transform the officer's speculative concerns to an objective basis for the entry. Nor was there anything to provide an

Zargar was charged in a two count Information with assault police "in the execution of his duty" and with mischief by "playing loud music" which wilfully interrupted the lawful enjoyment of property at his condominium building. This latter offence, contrary to s. 430(1)(c) of the *Criminal Code*, was the underlying substantive criminal conduct that the police were investigating at the time of the alleged assault.

The police responded to a noise complaint at a condominium. Upon arrival, they learned that the security had attempted to get the condominium owner to turn the music down. It was 4:00 a.m. They knocked at the door from where the sound of music was coming from. When it was opened, the officers stepped inside. The occupant was not pleased with the police presence and told the two officers to leave. They did not and, without the consent of the owner, stepped further inside stating they were not going to leave until they had completed their investigation. He accused turned and lightly shoved the officer.

Zargar was charged with mischief pursuant to s. 430(1)(c) of the *Criminal Code* and assault police pursuant to s. 270(1)(a). The trial Crown chose not to proceed on the mischief and, instead, proceeded only on the assault police charge. Subsumed in the s. 270(1)(a) offence is that an officer must be engaged in the "execution of his duty". The trial judge determined that the assaulted officer was so engaged and convicted the accused. Brown J. imposed a suspended sentence and twelve months' probation. The accused appealed.

Justice Code determined that the officer was not engaged in the execution of his duty as he was trespassing at the time the assault occurred. As assault police offence (s. 270(1)(a)) requires that the police be engaged in the "execution of [their] duty" as an element of the offence, Justice Code found they were not in the execution of their duty as the police are not permitted to enter a dwelling place unless they fall within an exception to the general rule that no one can enter another's home without permission.

Justice Code reviewed the exceptions to the general rule that man's home is his castle: (1) where the police are engaged in hot pursuit; (2) where they have reasonable grounds to believe it is necessary to enter to prevent an offence that could result in serious injury to life or safety; (3) where they are attempting to arrest with a warrant; (4) where there exist "exigent circumstances"; and (5) where there exists prior judicial authorization to enter.

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objective basis for believing there was an emergent hazard in the house. Also see *R. v. Custer* (1984), 1984 CanLII 2586 (SK CA), 12 C.C.C. (3d) 372 (Sask. C.A.).

The answer to this question turns on the longstanding common law precept concerning the 'sanctity of the home'. Although this principle dates back to seventeenth century English common law, it has repeatedly been applied in a strong line of modern Canadian authority. For example, *R. v. Colet* (1981), 57 C.C.C. (2d) 105 (S.C.C.), at 110 -113 was a case where the police had a warrant to 'seize' Colet's firearms. However, the warrant did not expressly authorize entry onto his premises in order to effect that seizure. Ritchie J. gave the unanimous judgment of the Court and stated:

> It is true that the appellant's place of residence was nothing more than a shack or shelter which no doubt was considered inappropriate by the City of Prince Rupert, but what is involved here is the longstanding right of a citizen of this country to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it. The common law principle has been firmly engrafted in our law since *Semayne's Case* (1604), 77 E.R. 194, where it was said: "That the house of every one is to him as his (a) castle and fortress, as well as his defence against injury and violence, as for his repose ...". This famous dictum was cited by my brother Dickson in the case of *Eccles v. Bourque et al* (1974), 19 C.C.C. (2d) 129 (S.C.C.), in which he made an extensive review of many of the relevant authorities.
>
> ... it would in my view be dangerous indeed to hold that the private rights of the individual to the exclusive enjoyment of his own property are to be subject to invasion by police officers whenever they can be said to be acting in the furtherance of the enforcement of any section of the *Criminal Code* although they are not armed with express authority to justify their action.
> …
> As I have indicated, I am of opinion that any statutory provision authorizing police officers to invade the property of others without invitation or permission would be an encroachment on the common law rights of the property owner and in case of any ambiguity would be subject to a strict construction in favour of the common law rights of the owner.
> …
> In the result, I am of opinion that the police officers were acting without authority in attempting to enter and search the appellant's property and they were therefore trespassers.

Interestingly, what Justice Code chose to omit in his editing is the following sentence by Justice Ritchie immediately after he outlines Justice Dickson's "extensive review of

many of the relevant authorities" at p. 131 (C.C.C.) …

> But there are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from *arrest* in his own home nor in the home of one of his friends. [5]

As Justice Binnie noted in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 (S.C.C.), at one end of the spectrum is the nightmare image of the late night knock on the door in a police state, at the other is the community's countervailing need for protection, safety, security and the suppression of crime. "Thus s. 8 of the *Charter* accepts the validity of *reasonable* searches and seizures. A balance must be struck ..." (paras. 14 and 17).

R. v. MacDonald, 2014 SCC 3, [2014] 1 S.C.R. 37

While it is true to the police have no power to enter a dwelling simply for purposes of furthering an investigation against the householder's will, there may be instances where the police are not pursuing an investigation or public safety interests are involved. Every case will turn on its facts.

For example, in *R. v. MacDonald*, in a case not unlike *R. v. Zargar*, the police responded to a noise complaint at the accused's condominium unit late in the evening. The concierge had previously received a noise complaint and asked MacDonald to "please turn the music down". MacDonald told the concierge to "fuck off" and slammed the door in his face. Further attempts were made to reason with MacDonald without success, so the police were called. However they too were told to "Go fuck yourself".

Another officer arrived and, after banging and kicking on the door, MacDonald finally opened it. When he opened the door an officer noticed he had something "black and shiny" concealed in his right hand behind his leg. When asked what it was MacDonald did not respond, just stared at him with "this crazy look on his face". Based on the officer's experience he believed it might be a weapon. As a result the officer pushed the door open further and observed MacDonald holding a loaded 9 mm semi-automatic Beretta handgun. After a brief struggle he was arrested and convicted of a number of fire-

[5] Justice Dickson, for a unanimous court, also cites this same passage in *R. v. Landry*, [1986] 1 S.C.R. 145, at para. 14. While Justice Dickson qualified these comments in the *Wiretap Reference*, [1984] 2 S.C.R. 697, stating they "do not create a general right of entry", his comments were in dissent and related to the installation of a Wiretap listening device and not for emergency purposes. The majority found the entry to install the device was implied in the Authorization and there was no need to consider common law police powers.

arms offences.

At trial and on appeal the accused had alleged the police had conducted a warrantless search by pushing the door open. However the trial judge and MacDonald C.J.N.S. (Saunders J.A. concurring) found that no *Charter* violation had occurred. While noting that a warrantless entry into a home is *prima facie* illegal, it only shifts the onus to the Crown to justify the entry. Relying on the Supreme Court's decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (S.C.C.), the majority concluded that there is a common law police power to search without a warrant where the safety of the public or the police is at stake. It was acknowledged, however, that this power is limited to situations where, "in addition to acting within the general scope of their authority, [the police] have no other feasible less intrusive alternative", adding that "the manner of carrying out the impugned activity must also be reasonable" (para. 31).

Beveridge J.A., in dissent, held that the officer had infringed MacDonald's right under s. 8 of the *Charter* by pushing the door to the door open. In Beveridge view, the authority of the police to enter an individual's home for the purpose of ensuring officer safety did not apply in the circumstances of this case.

While the Supreme Court found the police action constituted a search of MacDonald's home, it was not unreasonable. Rather it was reasonably necessary to eliminate threats to the safety of the public and/or the police. Such "safety searches" will generally be conducted by the police as a reactionary measure, carried out in response to dangerous situations created by individuals, to which the police must react "on the sudden".

The Court relied on the test from *R. v. Waterfield*, [1963] 3 All E.R. 659 (Eng. C.A.), as applied and expanded by the Supreme Court on numerous occasions from 1970 through until today.[6]

At the first stage of the *Waterfield* test, the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized at common law. At the second stage, if the answer at the first is affirmative, the police action must be *reasonably necessary* for the carrying out of the particular duty in light of all the circumstances. To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liber-

[6] Prior to *MacDonald*, *Waterfield* had been cited by the Supreme Court in 14 different judgements from *R. v. Stenning* [1970] S.C.R. 631 to *R. v. Aucion* [2012] 3 S.C.R. 408.

ty interest in question. These factors include:

> 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.

If these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the action will not constitute an "unjustifiable use of ... police power[s]". If the requirements of both stages of the *Waterfield* test are satisfied, the court will then be able to conclude that the search in question was authorized by law.

The Court concluded that "on balancing these factors, I am convinced that the duty of police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search" (para. 40).

Although not a factor in any of the court's rulings, on December 16, 2005, a police officer was shot through the door and killed by a high powered firearm while responding to a noise complaint at an apartment in Laval, Quebec. The accused, Francois Pepin, pled guilty to second-degree murder on May 7, 2008.

As such, while routine in many instances, responding to noise complaints can be dangerous and perhaps this is what the Halifax officer had in mind, from his training and experience, when he saw the "black and shiny" object in the hand of a man with a "crazy look on his face" who told them to "fuck off" after a reasonable request was made of him. More will be discussed about an officer's training and experience in a later section.

IV. RIGHT TO ENTER

Another issue that sometimes arises in noise complaints (or any by-law offence for that matter) is the right of the police to enter the premise to abate (stop) the nuisance. Most provincial statutes or municipal acts which regulate cities and towns provide that local authorities or police officers may, at all reasonable times, and with the consent of the owner or occupier, enter and inspect any premise in which he has reason to believe a by-law of the city or town is or has been violated. Should the owner refuse; these Acts usual-

ly have a clause authorizing the police or designated authority to obtain a warrant to exercise their right of entry. [7]

However, as this right of entry only allows the police or other lawful authority (ie: building, health and license inspectors, etc) to enter and inspect, it would appear that there is no additional authority to seize evidence of the offence or to make an arrest. The right of entry would be confined to merely stopping the noise nuisance. However, as the police would be lawfully in the home, evidence of other crimes in plain view (ie: firearms, marijuana grow, etc) may be admissible and assault or obstruction charges could be laid against anyone who interferes with an officer who is in the lawful execution of his duties.

However, depending on the seriousness of the offence, officers may forgo by-law enforcement and obtain a search warrant pursuant to 487 of the *Criminal Code* to seize the offending noisemaker (ie: stereo, musical equipment, ect) and/or a "Feeney" warrant to enter the home and arrest the offender. However, since "Feeney" warrants are only available for offences under an Act of Parliament (s. 529/529.1 of the *Criminal Code*) and were never adopted under the old *Summary Convictions Act* of Manitoba, it was not available for provincial or by-law offences.

While officers would have had to proceed by way of a criminal mischief charge prior to if they planned on obtaining a Feeney warrant to arrest the accused prior to 2014, under the *Provincial Offences Act and Municipal By-law Enforcement Act*, there is now a complete scheme for search warrants and inspections for all provincial and municipal offences. [8] While section 47(3) of the Act is clear that no person may be arrested without a warrant in respect of a municipal offence, there is no similar provision to s. 529 of the Criminal Code contemplated (warrant for entry to arrest).

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[7] See s. 67(1) of the *City of Winnipeg Neighbourhood Liveability By-law* No. 1/2008 regarding the prohibition of unreasonably loud, unnecessary or excessive noises the disturb, injure or endanger the comfort, repose, health, peace or safety of a reasonable individual of ordinary sensitivity. Section 180(1) of the *City of Winnipeg Charter*, S.M. 2002, c. 39, further empowers an enforcement officer to enter any land or building at any reasonable time, and carry out enforcement or action authorized or required by a by-law. Where the owner or occupier refuses to allow entry, enforcement or action referred to in section 180, a justice may issue a warrant pursuant to s. 183. However, pursuant to s. 181 in an emergency, or in extraordinary circumstances, a designated employee need not give reasonable or any notice to enter land or a building and may do any of the things referred to in subsection 180(1) without the consent of the owner or occupier of the land or building and without a warrant.

[8] *Provincial Offences Act and Municipal By-law Enforcement Act*, S.M. 2013, c. 47. See sections 32-46

Alternately entry maybe effected with the consent of the owner; as part of a community caretaking function (police common law powers to preserve the peace); or under exigent circumstances as outlined below.

(a) Consent

The occupier of a dwelling gives implied licence (consent) to any member of the public, including police officers, who are on legitimate business, to come onto the property and attend at the door. This implied licence applies to anyone who has a lawful reason to speak to the occupier of the dwelling. This implied licence ends, however, at the door to the dwelling. The purpose of this implied licence is to facilitate convenient communication between members of the public and the occupier of the dwelling. This implied licence may be rebutted by some express notice on the property itself, or revoked explicitly by the occupier of the dwelling. Once revoked by the occupier, the person who entered upon the property pursuant to this implied licence is obliged to leave with reasonable dispatch. Anyone who does not so leave becomes a trespasser. If a police officer enters property pursuant to this implied licence and, before the licence is withdrawn, develops the necessary grounds to detain or arrest a suspect, the police remain entitled to detain or arrest that person and use proportional and reasonable force to do so.

Jones and Jones* v. *Lloyd, [1981] Crim. L.R. 340 (Q.B.D.) [9]

In *Jones and Jones* v. *Lloyd* the police surprised a quest leaving a house party of trying to break into a car. The guest invited them back to his host's house to display the car keys. The police were told to leave by another guest and were subsequently assaulted. The court held that the first guest would be presumed to have authority to invite the police in to demonstrate his innocence. A commentary by D.J. Birch follows the report of that case:

> Two points of interest arise from this case. The first is whether the officers were trespassers, because as a general rule a constable who is a trespasser is no longer acting in the execution of his duty. *(Davies* v. *Lisle* [1936] 2 K.B. 434: *Robson* v. *Hallett* [1967] 2 Q.B. 939.) The status of the officers depends on the question whether there exists an implied licence, as the court finds there does, given by the ordinary host to his guests to re-enter the party

[9] *Jones and Jones* v. *Lloyd* is cited in *R. v. Thomas* (1991), 91 Nfld. & P.E.I.R. 341 (C.A.), aff'd 1993] 1 S.C.R. 835). *R. v. Thomas* (C.A.) is cited in *R. v. Grotheim*, 2001 SKCA 116; *R. v. Zargar*, 2014 ONSC 1415 and *R. v. Wilhelm*, 2014 ONSC 1637, all cases that follow.

> bringing a policeman with him in order to clear the guest from suspicion. This may perhaps be doubted. Normally it is assumed that a caller has the tacit permission of the householder to knock on the door of his house in order to communicate with him. If a caller arrives during a party, it might fairly be said that if a guest answers the door and says that the host is in another room, the guest would have the householder's implied permission to send the caller in search of him, or to bid the caller wait indoors while he was summoned. Similarly, perhaps, if the caller comes not to speak to the host, but to another guest, for example to ask him to move his car. But the position of the policeman is arguably different. In *Brunner* v. *Williams* [1975] Crim. L.R. 250 the Divisional Court employed the implied licence doctrine to permit the entry onto premises of a Weights and Measures Inspector whose purpose was to check up on a tradesman delivering coke to the owner. In the commentary the point is made that the ordinary householder might well take exception to such an entry. The same could be said of the ordinary host's reaction to the appearance of a policeman in his house, checking up on the guests.
>
> This does not necessarily conclude the matter, however, because even if the officers were trespassing against the host, should this necessarily take them outside the execution of their duty *vis-à-vis* other guests? In *Morris* v. *Beardmore*, [1980] 2 All E.R. 753 the House of Lords, in holding that a policeman who went outside the execution of his duty by trespassing on D's property could not validly require a specimen of breath from D, were careful to point out that the rule did not necessarily apply where D was also a trespasser on the property of a third party. In this situation, referred to by Lord Diplock as “hedgehopping”, it seems to be tacitly accepted by their Lordships that the officer; though a trespasser, is still in the execution of his duty *vis-à-vis* D, and this, it is submitted, is correct. In this case, unless the guests were in some way acting on behalf of the host to remove trespassers, it is submitted that there is no reason to give them the benefit of the officers’ possible trespass against the host.

In *R. v. Grotheim*, 2001 CarswellSask 735, 2001 SKCA 116 (Sask. C.A.); leave to appeal refused (2002), 163 C.C.C. (3d) vi (S.C.C.), an officer investigating an accident knocked on the door of a house, and heard a voice say “come in”. After a few questions and observations in the residence, he arrested the defendant. In finding this entry and arrest lawful,

the court observed that the officer did not enter for the purpose of arresting, but with permission of an occupant, for the purposes of inquiring about a motor vehicle accident.

(b) Implied Consent (Protection of Property)

R. v. Martin, [1996] 1 SCR 463, aff'ing (1995), 97 C.C.C. (3d) 241, 1995 CanLII 1003 (B.C.C.A.)

In *R. v. Martin* the Supreme Court of Canada upheld a decision of the B.C. Court of Appeal under s. 24(2) of the Charter to admit evidence seized in plain view when the police attended a loud noise complaint. In that case, the police could not find the owner and entered the house to shut off the offending stereo.

On the evening in question, police arrived at the accused's residence to investigate a complaint of a loud stereo. They knocked loudly on the front door but there was no answer. They went to the back door and saw that a sliding patio door was open. They saw speakers in the kitchen. After calling several times for someone to come to the door, they entered the house and turned off the stereo. The officers then walked through the house looking for the owner. Their intention was not to search the house for evidence, but to see if the homeowner was sick or otherwise physically unable to answer their calls. If they found no one, their intention was to secure the house and leave.

However, while the police were looking for the occupant, they discovered a marijuana grow operation. At the same time, the accused returned to the house and was arrested and charged with cultivating marijuana. The police subsequently obtained a search warrant for the house based on their observations.

At trial, the accused stated that the police had committed a trespass by entering his house without warrant and that the evidence should be excluded. The trial judge found that the police had been "acting within their powers" when they entered the house, but may have committed a technical trespass when they walked through the house after abating the noise nuisance. Nevertheless the trial judge concluded that the evidence should be admitted.

The Court of Appeal found that while the noise may have been a breach of the Coquitlam Noise By-law, it could not be relied upon by the officers to justify the subsequent walk through of a silent house as there was no basis for the police concerns that someone needed help. Nevertheless, Justice Gibbs upheld the trial judges ruling and admitted the evi-

dence, but lamented that it was unfortunate the law considered police officers to be trespassers "while engaging in the performance of what might be called 'good Samaritan' functions". Gibbs further stated that (para 16, CanLII):

> There can be little doubt that in proceeding as they did *[the police] were engaged in a function expected of them by the community at large*, an expectation based in part upon the historic role of police officers in the settlement and development of Western Canada. Police officers were, and are, expected to perform aid and succour functions above and beyond the duties specified in the [police regulations]. [10]

Gibbs felt that exigent circumstances may have been able to justify the officer's search of the house (to ensure the owner's well being), however he felt that such an exception did not exist in Canada and that it was not open to the Court to create one. Nevertheless he felt that the breach (trespass) was of such a non-serious technical nature that he admitted the evidence, as it was not likely to bring the administration of justice into disrepute.

In a concurring opinion, Chief Justice McEachern also admitted the evidence and while he assumed, without deciding, that there had been a Charter breach, he found that the police did not attend the residence with any pre-determined investigative intention related to the offence in question and had merely entered the house for the purpose of turning off a noisy stereo. As with Justice Gibbs, McEachern found that the police had been performing their common law duty to preserve the peace and had not been conducting a search when they entered. In addition, McEachern stated that:

> On balance, it seems to me that it may be arguable that the police had general common law authority to enter the premises to shut off the noisy stereo as they would if a water tap was overflowing or a small fire needed dousing. I have no doubt that the police have no common law right to enter a premise merely because a door may be open. At the very least something further will always be required.
>
> [As for the search], a further consideration that arises is whether a purposive interpretation would make the conduct in question unlawful when their purpose may have been merely to determine whether there was anyone or anything in the premise needing their assistance. It is not necessary to con-

[10] For example, prior to Confederation, the Laws of Assiniboia, passed by the Governor and Council of Assiniboia, specifically the Red River Settlement (later Winnipeg), called for the appointment of 12 constables for a three year term, requiring an oath to do the following … "be ready at all hazards to serve and execute all legal writs and to maintain public peace and security. Articles 32-34, *Laws of Assiniboia*, Governor and Council of the Settlement, 1862.

> struct scenarios, but an unattended child or an elderly person in distress might have welcomed their assistance.

In his dissenting opinion, Justice Wood would have excluded evidence. However, he made a distinction between the nature of a trespass committed by the police to turn off a noisy stereo and that committed by police who searched a house as a result of a noisy stereo:

> The police had no lawful authority to enter Martin's premises to turn off the noisy stereo. However, had they done that and nothing more, the resulting breach of his s. 8 Charter rights right may well have been regarded as technical and insignificant. In those circumstances, a good faith argument based on their belief that the loud stereo constituted a 'mischief', which gave them the authority to at least investigate, might well support the conclusion that the administration of justice would not be brought into disrepute.

On appeal, the Supreme Court agreed with the majority of the Court of Appeal and admitted the evidence as it would not bring the administration of justice into disrepute, but assumed, without deciding, that there had been a breach of the Charter. The Court did not rule on the availability of a community caretaking function for police.

In this case, it is important to note that the police could not initially locate the owner and justified their search of the house to ensure the safety and well being of the owner. However, in future cases, it is doubtful that the courts would allow a warrantless search of a house unless there were reasonable grounds to believe the occupant was actually in need of help, or his property needed to be protected. This fact was probably best articulated by Lord Atkin in the English case of *Great Central Railway Company v. Bates*, [1921] 3 K.B. 578, in which he stated:

> [I]t appears to me to be quite impossible to suggest, merely because a constable may suspect there is something wrong, that he has the right to enter a dwelling-house either by opening the door or by entering an open door or an open window and go into the house. It is true that a reasonable householder would not as a rule object if the matter was done bona fide and no nuisance was caused. But the question is whether the constable has the right to enter … it appears to be very important that it should be established that no body has a right to enter premises except strictly in accordance with authority.

The *Great Central Railway* case was a civil suit brought against the company by a con-

stable who, seeing the door of a warehouse open after dark, entered it to see that everything was all right. Once inside the warehouse the constable fell and was injured. He subsequently sued the company; however the court held that the constable had been a trespasser when he entered the premise without a reasonable belief that his help was required. As previously noted by Chief Justice McEachern in *R. v. Martin*, there is "no doubt that the police have no common law right to enter a premise merely because a door may be open. At the very least something further will always be required." However, in this case, the failure of the owner to answer his door indicated that something might be wrong and the police entered.

R. v. Hern, (1994) 149 A.R. 75 (C.A.), 1994 ABCA 65

Another example where the police justified their entry into a house because something might be wrong was in *R. v. Hern*. In that case the Alberta Court of Appeal ruled that police officers responding to a break and enter were justified in entering the unoccupied home of Mr. Hern, which appeared to have been forcibly entered. Once inside the officers found marijuana grow operation valued at $497,280. Although Mr. Hern complained that the police had no grounds to enter his home, his conviction was upheld by the Court of Appeal who stated that "an inference can be drawn that the owner would welcome police to stop a break-in and protect the residents … it is only good sense that the investigation will not be clearly over if there are reasonable grounds to believe that ... there is any risk of continuing property damage by vandalism, fire, water or power, or that there may be evidence inside the dwelling that could deteriorate while the absent homeowner's permission to continue or a warrant to search is obtained".

The Alberta Court of Appeal had made a similar ruling in *R. v. Dreysko*, (1990) 110 A.R. 317 (C.A.), when they held that "… it was obvious to them that the home had been broken into. The officers therefore faced the risks of further damage from earlier vandalism like fire, the risk of injured victims being in the house, and the risk that criminals might yet be in the house. It was therefore not only the right but the duty of the officers to enter to preserve the property and the public peace".

In *R. v. Mulligan* (2000), 142 CCC (3d) 14; [2000] OJ No 59 (QL), the Ontario Court of Appeal came to a similar conclusion that the police may enter onto private property where there is a bona fide purpose to protect, rather than investigate, the owner/occupant. In Mulligan, the police officer suspected that someone might be attempting to break into the accused's property. When he drove further into the rural area, he unexpectedly found the accused behind the wheel of his truck in an intoxicated condition. Sharpe J.A. found

that the officer's initial purpose was to investigate suspected criminal activity directed against the owner or occupant of the property. There was articulable cause for the officer's suspicion, based on objectively discernable facts. In these circumstances, Justice Sharpe found that:

> It is plainly in the interests of a property owner or occupant that police investigate suspected crimes being committed against the owner or occupant upon the property. For that reason, absent notice to the contrary, a police officer may assume that entry for that purpose is by the implied invitation of the owner, particularly where entry is limited to areas of the property to which the owner has extended a general invitation to all members of the public. [11]

(c) Withdrawal of Consent

R. v. Thomas, [1993] 1 SCR 835, aff'ing (1991), 91 Nfld.& P.E.I.R. 341 (C.A.), dismissing the Crown's appeal from a judgment of Riche J. (1989), 73 Nfld. & P.E.I.R. 132.

In *R. v. Martin* the situation was unique in that the homeowner was not present when the police attended. As such the police felt they had a right, if not a duty, to enter the house to abate the noise and ensure the well being of the occupant. However, in *R. v. Thomas* the Supreme Court upheld the acquittal of an accused who had been charged with assaulting the police when they entered and remained in her home without permission after responding to a noise complaint.

In this case, members of the Royal Newfoundland Police attended to a noisy party complaint at the accused's house. Loudspeakers had been affixed to the outside of the house and music that was being played in the house was broadcast outside the house into the neighbourhood. The police visited the home on one occasion and were subsequently called back later in the night when the complaints continued.

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[11] Also see *R.* v. *Nguyen*, [2000] B.C.J. No. 2728 (S.C.) where police responded to a 911 call from a neighbour that intruders were in the house next door and the homeowners were away. Upon arrival, the police saw a man at the window but the man would not open the front door. After repeated attempts to have the person open the door, the police forced their way into the house. They found the accused in a bedroom and a marijuana grow operation in the basement. In response to an alleged breach of section 8 of the Charter, the court held that the police had a duty to investigate, especially because the intruder would not come to the door or otherwise respond to the police. The intruder's actions were suspicious and confirmed a break and enter may be in progress. Emergent circumstances justified the forced entry. The search was reasonable and therefore, did not amount to a breach of s. 8 of the Charter. See also *R. v. Jamieson*, 2002 BCCA 411, where the police entered a home suspected of having a Meth Lab after finding a man suffering from acid burns outside the house and their concern for public safety.

On the second visit the police requested to see the homeowner (Mrs. Thomas) and were invited into the house by two guests who directed them to the accused's bedroom. The officers met with the accused who summarily ordered them out of her house. The officer's attempted to explain that she was going to be charged with breaching the City's Noise by-law, however she and her friend ordered them out of the house. The police told the friend that if he continued to interfere he would be arrested for obstructing a police officer in the execution of his duties. The friend then placed his hand on the Constable's chest and pushed him. The officer subsequently arrested the friend and during the process was assaulted by the accused who was later arrested as well.

The charges against the accused were dismissed by the trial judge who found that even if the officers had been lawfully in the house with the consent of a guest, they became trespassers when they were ordered to leave by the owner. The dismissal was upheld by the Newfoundland Supreme Court and by the Court of Appeal who agreed with the trial judge that the police had become trespassers when they did not leave at the request of the owner and who were therefore not in the execution of their duties.

While the Court determined that the police obviously had a duty to do something about the noisy party and no doubt had a duty to act in respect of a breach of the law, their right to remain in the house could not be supported by the officer's common law duty to preserve the peace, prevent crime and apprehend offenders. Speaking for the Court, Chief Justice Goodridge stated that:

> The general tenor of the law is that the private interest must yield to the public interest when the circumstances so require. This would happen when the police seek to exercise a duty to arrest or to protect persons or property, to prevent the destruction of evidence or when in hot pursuit. The *Eccles* rule applies although there may be occasions when the urgency of the situation precludes prior announcement. There may be other common law exceptions to the no trespassing rule. Whatever the exceptions may be, it has not been shown that the circumstances of this case fit into any of them.

The case was subsequently appealed to the Supreme Court of Canada, which in a short decision penned by Chief Justice Lamer, upheld the acquittal stating that: "even if the police were authorized to go into the respondent's house, that authorization was revoked by the respondent, thereby making the subsequent arrest unlawful".

However, where the identity of the property owner is in question, the police may remain on the premise to conclude their investigation, even when their license to remain has been revoked. In the English case of *Kay v. Hibbert* [1977] Crim. L.R. 226 (C.A.), the Court of Appeal ruled that an officer responding to a burglary alarm "had an implied authority [given by the business owner] to enter the premise to investigate the matter, and there having thus entered as licensees, a reasonable time must be allowed to them to investigate before the license [is] revoked".

In that case, the owner attended to the premise and ordered the police to leave. When the police asked him to identify himself and did not immediately leave the premise, a scuffle ensued and the owner was charged and convicted of assault. The owner appealed on the sole ground that once he told the officer's to leave, they were trespassers. The appellate court disagreed and found that the license could not be revoked until the officer's had completed their investigation, satisfying themselves as to the owner identity (being that they had the owner's implied consent to be there, it could not be revoked until they satisfied themselves that he was truly the owner).

R. v. Felger, 2014 CarswellBC 187, 2014 BCCA 34. Leave to appeal Supreme Court refused, October 17, 2014. Docket No. 35795.

With regards to the implied license to approach or enter a premise, on October 17, 2014 the Supreme Court refused leave to appeal the decision in *R. v. Felger*. At trial the accused were acquitted on joint charges of three counts of trafficking marihuana. The accused had posted a sign in window indicating police officers were not allowed entry unless they had warrant. However undercover police officers visited the store on five separate occasions and purchased marihuana. Following a *vire dire*, the trial judge refused to admit the evidence on the basis that it was obtained in breach of accused's rights under s. 8 of the Charter.

Citing Justice Dickson and the "famous dictum" in *Eccles v. Bourque* (supra) that "there are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed", a unanimous Court of Appeal found that the accused did not have a reasonable expectation of privacy and ordered a new trial. The community's insistence on protection, safety, security and the suppression of crime outweighed the privacy demands of the accused (citing Binnie, J. in *R. v. Tessling*).

At the conclusion of their re-trial on September 18, 2015, the accused were found guilty as charged. *R. v. Felger*, 2015 BCSC 2234.

(d) Seizure Without Warrant

R. v. Travers, [2001] N.S.J. No.154 (C.A.), 2001 NSCA 71 (Cromwell JA, as he then was, formed part of the unanimous court)

While the Court in *R. v. Martin* was concerned about the walkabout performed by the police after they had abated the noise nuisance and shut off the offending stereo, in *R. v. Travers* the Nova Scotia Court of Appeal was concerned about the actual seizure of the stereo as well as the right of the police to enter a residence to abate a noise nuisance.

In this case the accused was charged with Mischief after several complaints were made to the police about the loud music coming from the neighbour's half of the duplex. In response to the complaints the police attended on many occasions. Occasionally it was quite when they arrived, but on other occasions they heard loud music, but no one answered the door when they knocked. The complaints continued and eventually the accused was arrested and charged with Mischief for interfering with his neighbour's lawful use and enjoyment of their property.

Two days after his arrest the police were again called to the neighbour's residence regarding the loud music emanating from the accused's home. The police shouted and knocked on the front and back doors and on the windows. There was no response so the police forced open the back door and entered. A confrontation subsequently ensued during which the accused was pepper sprayed and arrested. The police then searched the dwelling without warrant and seized the offending stereo.

At trial the officer was questioned why he entered the home without a warrant, to which he replied that he had done so to stop the noise and to prevent a continuation of the offence. Furthermore, the officer stated that entry had been made to check on the well being of the occupant as he had not answered the door and they were concerned for his welfare.

The stereo, which had been unplugged and seized by the police while playing at full volume, was played in open court as evidence of the noise it had created. The Court accepted the evidence of the police as to how loud the stereo was, and also accepted the evidence of the neighbours that the level of noise was intolerable and that the accused, by his continued actions, wilfully obstructed or interfered with their lawful enjoyment of property.

The accused received a suspended sentence of 18 months and was ordered not to go near his neighbour's residence.

The conviction was upheld by the Nova Scotia Supreme Court, however on appeal to the Court of Appeal, the conviction was overturned and a new trial ordered. While the Court of Appeal concluded that the summary conviction appeal judge "did not err by concluding the verdict was reasonable", they concluded that the judged erred in law in upholding the conviction when the stereo that had been entered into evidence was seized without warrant:

> The evidence before the trial judge indicated that the appellant's neighbours had had to endure a barrage of noise for a long time. But before this Court, the Crown did not ague that the police could not have applied for and obtained a warrant. It did not argue that the police were responding to an emergency, or that there was an urgent need to preserve evidence, or that somehow this time, it was necessary to take such immediate and direct action to deal with the playing of loud music. The Crown did suggest that, had the trial judge raised the issue of the legality of the entry, search and seizure, it may have argued exigent circumstances under s. 529.3 of the Code.
> …
> In my view, the evidence at trial was more than sufficient to alert the trial judge that he should raise the question of the admissibility of evidence in light of possible Charter infringement … he could have considered any argument by the Crown based on exigent circumstances. If he found any infringement of rights, he should have then determined whether the evidence obtained pursuant to it, namely the radio, should be excluded under s. 24(20 of the Charter.
> …
> [T]he police may have deliberately disregarded the appellant's rights under s. 8 of the Charter in entering and searching his dwelling and in seizing the radio which was entered into evidence at trial. The trial judge erred in law when he proceeded without entering into an inquiry as to the possibility of a breach of constitutional rights.

While the Court of Appeal concluded that "there is no reasonable possibility that the verdict would have been any different if the error of law had not occurred … the playing of the radio in court clearly had an impact but its extent cannot be assessed from the record before us". As such they ordered a new trial at which time the Crown could either argue that a warrantless entry to abate a noise nuisance could constitute exigent circumstances, or proceed without the stereo and simply rely on the evidence of the neighbours.

On the retrial in Provincial Court before Curran, P.C.J., (as he then was) now Chief Judge, Mr. Travers was again convicted of mischief. Justice Robert Wright of the Supreme Court dismissed his summary conviction appeal, which was affirmed on further appeal. At the re-trial Judge Curran found that the entry could not be supported by exigent circumstances, but little turned on it as the Crown did not offer into evidence the offending stereo and the lawfulness of that search was, therefore, not an issue in Provincial Court. In any event the Court of Appeal was not persuaded that there was a violation of any of Mr. Travers' *other* Charter rights (see *R. v. Travers*, 2003 NSCA 56 affirming 2002 CarswellNS 617 (N.S. S.C.); affirming 2002 CarswellNS 616 (N.S. Prov. Ct.)).

(e) Exigent Circumstances

As we have already discussed, warrantless entries are presumptively illegal as a trespass against the property owner. However the Criminal Code does afford a peace officer the power to enter and search or arrest in exigent circumstances:

> 487.11 WHERE WARRANT NOT NECESSARY — A peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) or 492.1(1) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
>
> 529.3 AUTHORITY TO ENTER DWELLING WITHOUT WARRANT
> (1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
>
> (2) EXIGENT CIRCUMSTANCES — 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.

As causing a disturbance under s. 175(1) of the *Criminal Code* is not an indictable offence, entry to arrest to prevent the loss or destruction of evidence would not be authorized. Entrance for mischief would be. However, without a warrant to search and/or arrest, could a noisy party in and of itself ever justify a warrantless entry in exigent circumstances?

City of Fargo v. Lee (et al) 580 N.W.2d 580 (1998), 1998 N.D. 126 (Supt Ct N.D.)

As to whether or not a simple noise complaint could constitute exigent circumstances was considered by the North Dakota Supreme Court in *City of Fargo v. Lee*.

In this case the police responded to a noise complaint at the Alpha Tau Omega (ATO) fraternity house in Fargo. Police could hear the loud music from approximately one-half block away. As officers approached the ATO house, beer bottles could be seen thrown from the window. When the officers shined their flashlights at the third floor window from which the loud music was emanating, the music was turned off and no more beer bottles were thrown.

Officers went to the front door and observed what they thought were intoxicated minors inside. The officers subsequently instructed the individuals to get either a resident or a fraternity officer of the house to attend. The vice-president of the house attended and accompanied officers around the house, providing keys for locked rooms when necessary, in an effort to disperse those people who did not live there. The vice-president indicated that he felt he had no choice but to show the officers around the house.

As a result of the search the Fargo police charged several minors with possession or consumption of alcohol and loud party violations. At trial the defendants were successful in suppressing all evidence obtained after the officers entered the fraternity hose, as the search was made without a search warrant. The City of Fargo subsequently appealed to the state's Supreme Court claiming that crimes being committed or attempted in the police officers' presence created exigent circumstances justifying a warrantless entry into the ATO fraternity house.

In finding that the police had conducted a warrantless search, the state Supreme Court excluded the evidence, holding that:

> Exigent circumstances are the only other exception [besides consent] to the warrant requirement raised below. Exigent circumstances has been defined as an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. The government has the burden to demonstrate exigent circumstances existed in order to overcome the presumption a warrantless is unreasonable.
> …
> The only crimes being committed in the officer's presence were class B misdemeanours, relatively minor infractions. The United States Supreme Court stated in Welsh v. Wisconsin [that the] "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned where there is probable cause to believe only a minor offence has been committed". We do not believe the crimes allegedly being committed here created exigent circumstances justifying entering the ATO house to search for evidence.

Commonwealth v. Kiser, 48 Mass.App.Ct.647, 651, 724 N.E.2d 348, 352 (2000)

The Massachusetts Court of Appeal reached a similar conclusion in *Commonwealth v. Derrick C. Kiser*. In this case four Worcester police officers attended to the accused's suite after a citizen complained of loud music coming from his third floor apartment at 3:00 a.m. As the officers approached the building, they could hear loud music coming from the top floor and observed several people inside having a party. The officers climbed the stairs and knocked on the door. After several hard knocks, the accused answered the door. At that time, the officers recognized him as a member of a local street gang known for narcotics and weapons offenses.

One officer told the defendant to turn down the music and the defendant responded "Yeah, okay". At that time, an unidentified male ran from the one side of the front room to the other, out of the officer's sight. The officer leaned forward from his position to get a better look into the room due to this action of the other male. Just then, the accused pushed the officer back from the door and then attempted to close the door but the officers forcibly pushed their way into the apartment.

The unidentified male returned to the main room and all occupants were ordered by the police to put their hands on a nearby pool table. All occupants who did not live there were then told to leave and the occupants who did live there were told to get some identification. At first the accused refused to get his ID, but then stated it was in another room. He went to retrieve it and tried to close the door, but two police officers, out of concern for

their safety, followed him into the room. In plain view, on top of a speaker, was an open box containing cocaine, marijuana and other drug paraphernalia. The accused was then arrested for possession of drugs and assaulting a police officer.

At trial the accused sought to suppress the evidence based on an unlawful entry and an improper arrest. The State argued that the entry into the apartment was lawful as the officers were in the process of quelling a disturbance and, once the defendant pushed the officer, they had every right to arrest him.

The Court looked at two separate issues in deciding this case – the officers' authority to enter to suppress the noise; and the officers' authority to enter to make an arrest without a warrant.

In determining the officer's authority to suppress the noise, the Court stated that, in this instance:

> The loud music did not amount to a breach of the peace ... [and] if a statutory, warrantless arrest for murder requires exigent circumstances to be constitutional, surely a statutory, warrantless entry to suppress loud music requires the same ... As the Supreme Court put it, 'it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offence is extremely minor'. Playing music - even so loudly that is disturbs the neighbours - is an extremely minor offense.

With respect to the assault as justification for entry, the court concluded that it may well have been justified as a form of hot pursuit as the offence and the arrest could have formed part of a single transaction. However, to make such an arrest legal, it should have been made at the time of the assault, not subsequent to the officer's entry and search of the apartment. As noted by the Court, "They did not arrest him at that point, but instead dispersed the party ... when all the guests left, they still did not arrest him, but instead asked him for identification. They followed him into another room while he got it. There they saw contraband, and only then did they arrest him. The assault was completed long before the arrest took place, and it is clear the two events did not form part of one transaction".

V. COMMUNITY CARETAKING FUNCTION

Cady v. Dombrowski (1973), 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706

In *Cady v. Dombrowski* the United Supreme Court established a new exception to the warrant requirement, sometimes called the "community caretaking function" that is analogous to the *Waterfield* test. In Cady, police officers of a small town in Wisconsin searched Dombrowski's car for a handgun. At the time of the search, Dombrowski was in a coma in a local hospital as the result of an automobile accident. The police knew that he was a Chicago police officer, that Chicago police officers were required to carry their service revolvers with them at all times, and that Dombrowski's service revolver had not been found in a cursory search of the rental car he was driving at the time of the accident. The police returned to the rental car to look more thoroughly for the service revolver, presumably so it would not fall into the wrong hands.

As a result of this search the police discovered the body of a murder victim, discovered evidence linking Dombrowski with the killing, and charged him with murder. The Supreme Court permitted this warrantless search, conducted without any reason to think the police would find evidence of a crime. In doing so, the Court created what is sometimes called the community caretaking exception to the warrant requirement. The Court recognized that local law enforcement officers often engage in activities that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

The most influential standard for evaluating community caretaking arose in *People v. Mitchell* (1976), 39 N.Y.2d 173 (C.A.) where the police searched hotel rooms without warrant for a missing chambermaid who was ultimately found murdered. The court established a three-part test for assessing the reasonableness of such "emergency" entries at p. 177-78:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
> (2) The search must <u>not be</u> primarily motivated by intent to arrest and seize evidence.
> (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

In performing this community caretaking function, officers are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." *United States v. Smith*, 522 F.3d 305 (3d Cir.2008) quoting *United States v. Rodriguez-Morales*, 929 F.2d

780 (1st Cir.1991). The exception applies where: 1) an officer's initial contact or investigation is reasonable, 2) the intrusion is limited, and 3) the officer is not investigating criminal contact under the pretext of exercising his community caretaking function. (The court refers to this as an objective reasonableness test, although the third factor would seem to be subjective in nature because it appears to call for a conclusion about the intentions of the officer in the case at hand). *Commonwealth v. Waters*, 456 S.E.2d 527 (Va.Ct.App. 1995).

This "community caretaking" function also applied where firefighters responded to an apartment water leak call, the water coming through the ceiling from an apartment above, in which two dogs were barking. The animal control officer was called, who, in turn, called for police backup before making entry into the upstairs apartment (which was a standard procedure). When all these municipal employees climbed a fire escape to the upstairs apartment, a bong was spotted, through a window, inside one of its rooms. The police officer present then called for a detective and superior officer.

As a result the police personnel entered, searched a closet, and found marijuana plants growing in an aquarium therein. That apartment's occupant was out at work. The court found that there were no exigent circumstances and that the police should have posted guard and obtained a search warrant before searching the apartment for evidence. All seized evidence was suppressed. The court reasoned that while

> The police activity at the very beginning of the episode may as well be viewed as community caretaking. When, however, Officer Therrien sighted the bong, he regarded himself immediately as involved in "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" (to return to the passage from Cady), whence followed the call answered by Sergeant Case and so on to a warrantless search that disclosed the drug. Here the police erred. Finding the dogs and the source of the ceiling leak and curing it could be left to the animal control officer and the firefighters; to validate the search for the drugs, the police must apply for and secure a search warrant. To revert again to the Cady text, here the community caretaking, such as it was, was surely not "totally divorced from the detection," etc., and thus any privilege inherent in the mere caretaking was later lost. [12]

United States v. Rohrig, 98 F.3d 1506 (1996) 6th Cir CA

[12] *Commonwealth* v. *Sondrini*, 48 Mass. App. Ct. 704, 724 N.E. 2d 748 (2000) at p. 707 (Mass.App.Ct).

In *United States v. Rohrig* the 6th Circuit Court of Appeals for the United States considered an identical situation to that encountered in *R. v. Martin*. In this case the Canton, Ohio, police attended to the accused's residence at 1:30 a.m. in response to a loud stereo complaint. The officers, in an effort to abate the nuisance, began knocking on the front door. The officers did not receive a response, so they began to shout into the house in order to gain the attention of the occupant. No one ever came to the door, so the officers opened the unlocked door and entered the home to search for the source of the nuisance. While looking through the house one of the officers discovered a 'wall-to-wall' marijuana grow operation. The accused was also located lying on the floor of his bedroom.

The police seized approximately 150 marijuana plants; however they did not arrest the accused that night. Rather, he was issued with an offence notice for violating the Canton, Ohio, noise by-law. Nevertheless the accused was later charged with possession of marijuana with intent to distribute.

At trial the accused successfully argued that the evidence should be suppressed as the police could not lawfully enter his home in order to turn down the loud music without first securing a warrant. The ruling was appealed on the grounds that the entry into the home was not "unreasonable" under the circumstances and that the court must also consider the needs of the community and society's expectation of the legitimate role of the police in abating an on-going and highly intrusive breach of the neighbourhood's peace in the middle of the night.

In reversing the trial judge's decision, the Court of Appeal held that a warrantless entry by the police was justified in the circumstances and that further they were entitled to seize any evidence they found in plain view. The court observed that:

> Upon their arrival at the scene, [the police] were confronted by an irate group of pyjama-clad neighbours. Had the officers attempted to secure a warrant, it is clear that the aural assault emanating from Defendant's home would have continued unabated for a significant period of time. Thus, if we insist on holding to the warrant requirement under these circumstances, we in effect tell Defendant's neighbours that "mere" loud and disruptive noise in the middle of the night does not pose "enough" of an emergency to warrant an immediate response, perhaps because such a situation "only" threatens the neighbours' tranquillity rather than their lives or property. We doubt that this result would comport with the neighbours' understanding of "reasonableness". Further, because nothing in the Fourth Amendment requires us to set aside our common sense, we decline to read that Amendment's

> "reasonableness" and warrant requirements as authorizing timely governmental responses only in cases involving life-threatening danger.
> …
> By entering the Defendant's residence for the limited purpose of locating and abating a nuisance, the officers sought to restore the neighbours' peaceful enjoyment of their homes and neighbourhood. In view of the importance of preserving our communities, we do not think that this interest is so insignificant that it can never serve as justification for a warrantless entry into a home … clearly, nothing in the Fourth Amendment requires the police (and the neighbours) to idly observe and tolerate a late-night, on-going nuisance to the community while a warrant is sought and obtained … we conclude therefore, that the governmental interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighbourhood is sufficiently compelling to justify warrantless intrusions under some circumstances.

Although *R. v. Martin* and *United States v. Rohrig* appear to be near identical cases, one main difference between the two cases is that the noise in Martin occurred at 6:00pm in the evening, while the noise in *Rohrig* occurred at 1:30am in the morning where the police were confronted by an irate group of pyjama-clad neighbours. As such there was more of an urgency to enter and abate the noise during the early morning hours when neighbours are sleeping than in the evening when they are awake and going about their normal activities.

Nevertheless, in *R. v. Martin*, Justice Gibbs and McEachern considered that the police "*were engaged in a function expected of them by the community*" and queried if they had a "general common law authority to enter the premises to shut off the noisy stereo as they would if a water tap was overflowing or a small fire needed dousing"? Similarly the Court in *Rohrig* relied on the United States Supreme Court decision in *Cady v. Dombrowski* (1973), 413 U.S. 433, that the officer's "*community caretaking function*" was also engaged thus permitting a warrantless entry of a home in order to abate a nuisance. The Court explained that the officers' warrantless entry did not violate the Fourth Amendment because "a compelling governmental interest supports warrantless entries where, as here, strict adherence to the warrant requirement would subject the community to a continuing and noxious disturbance for an extended period of time without serving any apparent purpose." [13]

[13] However see *Ray v. Township of Warren* (2010), #09-4353, 2010 U.S. App. Lexis 24043 (3rd Cir.), where the Court rejected the community caretaking approach in *Rohrig*, reasoning that cases taking this approach "do not simply rely on the community caretaking doctrine established in *Cady*. They instead apply what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role."

***Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006)**

While not referring to an officer's community caretaking function, but to the "emergency aid" doctrine in *People v. Mitchell*, the United States Supreme Court in *Brigham City v. Stuart* applied a similar reasonableness test in concluding that a police officer's entry into a home was justified by the need to prevent violence and restore order.

Responding to a loud party call, officers hear loud noises from inside the house. Going around to the back, they see juveniles drinking alcohol in the back yard. Entering the yard, they see a fight ongoing in the kitchen, where a group of adults are attempting to control a teenager. The youth breaks free and hits one of the adults in the mouth, causing his mouth to bleed. At this point, officers announce themselves and, getting no response, enter the kitchen and stop the fight.

They arrested several of the party goers for contributing to the delinquency of a minor, disorderly conduct and other related offenses. The Court held that the officers had an objectively reasonable basis for believing both that the injured adult in the kitchen may need help and that the violence in the kitchen was just beginning. As the court notes, "*the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided*".

In the *Commonwealth of Massachusetts v. Kiser* and *Fargo v. Lee*, the prosecution tried to justify the entry by police as exigent circumstances. While a noise complaint by itself could not justify exigent circumstances, the trial Judge in *Kiser* did note: "Had the defendant not answered the officer's knock and had the loud music continued unabated, or had the defendant refused to turn down the music ... then entry [to quell the disturbance] might well have been justified".

As noted earlier a similar line of reasoning was held by Justice Gibbs and McEachern in *R. v. Martin* when they considered if the police "*were engaged in a function expected of them by the community*" to shut off a noisy stereo. Furthermore, this reasoning may only be an extension of the Alberta Court of Appeal's decision in *R. v. Dreysko* (supra) that it is "not only the right but the duty of the officers to enter to preserve the property and the public peace". However, as noted in *Great Central Railway Company v. Bates* (supra), a constable would need to have more than mere suspicion that the homeowner or his prop-

erty were in need of aid or protection before he entered. Nevertheless this could be supported by the fact the occupant did not open the door.

***Caniglia v. Strom*, No. 19-1764 (1st Cir. 2020), appeal to the United States Supreme Court granted, No. 20-157. Arguments heard March 24, 2021.**

The issue to be decided is if the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home. The federal district court found that community caretaking "services could be required not only in vehicles [as in Cady v. Dombrowski], but also in homes." The U.S. Court of Appeals for the First Circuit agreed.

Edward Caniglia had a disagreement with his wife of 22 years. He grabbed an unloaded gun and placed it on the table where they were sitting in their Rhode Island home and said "Why don't you just shoot me and get me out of my misery." His wife left the house. Ultimately she called the police for a "wellness check." The police interviewed Caniglia, who had no criminal record, nor any history of violence, and took him to a local hospital for evaluation.

After he left, the police went into his house without a warrant and took his guns. The officers asserted the "community caretaking" exception to enter his home without a search warrant, believing they were "reasonable to do so based on Caniglia's state of mind." They feared that he could be a danger if guns remained in the home.

Caniglia was release later the same day. He sought the return of his guns and was denied. He filed a civil rights claim, alleging the police had violated his rights. The federal district court relying on Cady v. Dombrowski found that community caretaking "services could be required not only in vehicles, but also in homes." Unlike *Brigham City v. Stuart* (which did not rely on Cady v. Dombrowski), there was no urgency to the entry.

As there is a split among the federal courts of appeal on whether the community caretaking exception extends to homes, the United States Supreme Court agreed to hear the appeal.

VI. BREACH OF THE PEACE

Nicholson v. Avon, [1991] 1 VR 212, leave to appeal High Court denied.[14]

In *Nicholson v. Avon* the Victoria (Australia) Supreme Court came to a similar conclusion, holding that the police have a common law duty to enter an accused's residence to prevent a breach of the peace with respect to a noisy party. In this case the Crown did not rely on exigent circumstances to justify the entry, but rather on the common law duty of the police to prevent a breach of the peace. [15]

In this case the police were called to a noisy party in an apartment complex shortly after 5:00 a.m. The complainant, who lived below the accused, called the noise "horrific". When the police arrived they could hear loud voices and music from the street and when they knocked on the door they were told to "fuck off". The door was eventually opened and the police were further insulted, told to "fuck off" and leave. The officer refused to leave and advised the accused that she was going to be cited with unreasonable noise and needed her name. The accused refused and another male stated: "This is a Mexican standoff. We're not telling you anything so you might as well fuck off now". The accused was subsequently arrested and charged with several violations under the Environment Protection Act for excessive noise.

The accused was convicted at trial of the noise violation, but appealed to the Victoria Supreme Court on the grounds that the police had not been entitled to remain on the premise and affect her arrest after being told to leave. The Crown countered that the police were not trespassers, but had been in her suite pursuant to their common law duty to prevent a breach of the peace.

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[14] Also see *Panos v Haynes (*1987) 44 SASR 148 and *Cintana v Burgoyne* [2003] NTSC 106 for appellate court authority from other Australian jurisdictions that police do have power to enter premises to prevent a breach of the peace.

[15] Like the United Kingdom's *PACE Act*, most Australian States have also codified their police powers. However the power to enter a premise at common law to prevent a breach of the peace remains. For example see ss. 4 and 9 of New South Wales *Law Enforcement (Powers and Responsibility) Act 2002* (LEPRA):

> **4 Relationship to common law and other matters**
> …
> (2) Without limiting subsection (1) and subject to section 9, nothing in this Act affects the powers conferred by the common law on police officers to deal with breaches of the peace.
>
> **9 Power to enter in emergencies**
> (1) A police officer may enter premises if the police officer believes on reasonable grounds that:
> (a) a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of peace, or
> …
> (2) A police officer who enters premises under this section is to remain on the premises only as long as is reasonably necessary in the circumstances.

At common-law, the Court found that "there is much authority to the effect that a police officer has a duty to prevent a breach of the peace or threatened breach of the peace" and referred to Halsbury's Laws of England, which states that:

> The first duty of a constable is always to prevent the commission of a crime. If a constable reasonably apprehends that the action of any person may result in a breach of the peace it is his duty to prevent that action. It is his general duty to protect life and property.

While it is true that a constable has no general right of entry into private property to seize evidence, question suspects or effect an arrest, Halsbury's Laws of England further states that, at common-law, a constable "may, however, enter premises to prevent a breach of the peace, and probably to prevent the commission of any offence which he believes to be imminent or likely to be committed". In addition, the Court found support for their position in a long line of English cases that suggest that the police have a duty to prevent breaches of the peace:

> In *R. v. Waterfield*, [1963] 3 All E.R. 659, the Court of Criminal Appeal unreservedly recognized common law duties of police including the duty to take all steps appearing necessary to keep the peace. In *Rice v. Connolly* (1966) Lord Parker said: 'It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace'. This passage was quote with approval by Lord Donaldson in *Coffin v. Smith* (1980), where he added 'in a word a police officer's duty is to be a keeper of the peace and to take all necessary steps with that in view'.

In *Albert v. Lavin* [1981] 3 All ER 878, [1982] AC 546, the House of Lords also assumed that a police officer has a common law duty to prevent a breach of the peace. At p. 880 [All ER], Lord Diplock said 'every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against him will. At common law this is not only the right of every citizen, it is also his duty, although, except in the cases of a citizen who is a constable, it is a duty of imperfect obligation'.

The Court then went on to hold that police officers may enter upon private premises in

the performance of their duty to prevent a breach of the peace and quoted the English Court of Appeal in *Thomas v. Sawkins*, [1935] 2 K.B. 249, which held that:

> I think that there is quite sufficient ground for the proposition that it is part of the preventative power, and therefore, part of the preventative duty, of the police, in cases where there are such reasonable grounds of apprehension as the justices found here, to enter and remain on private premises ... In my opinion, no express authority [to enter private premises] is necessary where the police have reasonable grounds to apprehend a breach of the peace ... If a constable in the execution of his duty to preserve the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass.

Ultimately, the question to be decided by the Victoria Supreme Court was whether or not a noisy party at 5:00 a.m. could constitute a breach of the peace and if so, if the police were duty bound to take all steps reasonably necessary to abate the noise and keep the peace (including a warrantless entry). The Court concluded that they did, stating:

> In my opinion there is no conduct more likely to promote violence than prolonged disturbance of the sleep of neighbours by noise and behaviour of the kind disclosed by the uncontradicted facts. It is within my own judicial experience to have presided over a trial, which led to a conviction for murder arising out of an analogous incident. Other conduct of similar kind is commonly the background of violence leading to cases before the courts. There was evidence before the magistrate that the police believed that there was a threat of breach of the peace. I think that the only conclusion is that there was.
> ...
> I cannot think that the circumstances were otherwise. The plaintiff and her companions so expressed themselves as to leave little doubt that they would make as much noise as they liked. Their utter lack of concern for the convenience and welfare of neighbours could not have been more clearly demonstrated. It is difficult to imagine circumstances more productive of anger, so often the forerunner of violence, than the behaviour of the plaintiff and her companions.
> ...
> In the result it cannot be concluded that the defendant and other police acted other than in performance of their common law duty to prevent a breach of the peace when they remained on the premise. If they were not unlawfully on the premises they were entitled to make the arrest they did pursuant to s. 458 having regarding to the offences under the EPA having been committed on and arising out of the use of those premises. There was therefore no unlawful arrest.

Special leave to appeal to the High Court was refused. However, the Supreme Court of Victoria also ruled, in *Edwards v. Raabe*, [2000] VSC 471, that the breach of peace must be extreme and that the defendant's conduct, if persisted in, would have as its natural consequence the provoking of the neighbours to violence. Thus, the noise cannot be merely annoying, but would, if not stopped immediately, result in the neighbours taking matters into their own hands similar to the Court of Appeal's concern in *United States v. Rohrig*.

Based on the reasoning in *Nicholson v. Avon* and the *Waterfield* analysis employed by the Court, would the situation have been different in *R. v. Zargar* or even *R. v. MacDonald* if the police had justified their entry to prevent a breach of the peace?

McLeod v. Commissioner of Police of the Metropolis, [1994] 4 All ER 553 (C.A.). Leave to appeal House of Lords refused May 18, 1994. Rev'd *McLeod v. United Kingdom* (1999) 27 EHRR 493

Although the decision in *Sawkins v. Thomas*, cited by the Australian court as justification for the police to enter a private premise to prevent a breach of the peace, was decided almost 80 years ago and did not deal with the right of the police to enter a private premise that was a dwelling house, in *McLeod v. Commissioner of Police of the Metropolis* (1994), the English Court of Appeal further held that the police have the power to enter any private premise (including a dwelling house) against the wishes of the owner where they have a genuine belief that there is a real and imminent risk of a breach of the peace occurring. Speaking for a unanimous court, Lord Neill stated:

> Having had the benefit of argument, I am satisfied that Parliament in s. 17(6) has now recognized that there is a power to enter premises to prevent a breach of the peace as a form of preventive justice. I can see no satisfactory basis for restricting that power to particular classes of premises such as those where public meetings are held. If the police reasonably believe that a breach of the peace is likely to take place on private premises, they have power to enter those premises to prevent it. The apprehension must, of course, be genuine and it must relate to the near future.
> ...
> It seems to me it is important that when exercising his power to prevent a breach of the peace a police officer should act with great care and discretion; this will be particularly important where the exercise of his power involves entering on private premises contrary to the wishes of the owners or occupiers. The officer must satisfy himself that there is a real and imminent risk of a breach of the peace, because, if the matter has to be tested in

> court thereafter there may be scrutiny not only of his belief at the time but also of the grounds for his belief.

Although the case of *McLeod v. Commissioner of Police of the Metropolis* did not deal with entry to prevent a breach of the peace with respect to a noise complaint as in *Nicholson v. Avon*, it does confirm that at common-law the police do have the power to enter a dwelling house to prevent a breach of the peace where there is a real and imminent risk of harm (also see s. 17(6) of the *PACE Act* below).

Leave to appeal to the House of Lords was refused, however Mrs McLeod took her case to European Court of Human Rights (ECHR) in Strasbourg, alleging a breach of her right to respect for her private life and home contrary to Article 8 of the European Convention on Human Rights.

There was no dispute that the police entry into Mrs McLeod's home amounted to interference with her right to respect for her private life and home, so that Article 8 was engaged. The question was whether such interference was justifiable on the basis of paragraph 2 of the Article, which states:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first issue was whether the power to enter in relation to breaches of the peace was "in accordance with law". As we have already seen, the Court felt that the concept of "breach of the peace" was sufficiently recognised and defined by English law to meet this criterion. As to the power to enter premises to deal with an actual or apprehended breach of the peace the Court took note of *Thomas* v. *Sawkins* as well as section 17(6) of *Police and Criminal Evidence Act* (PACE) 1984. [16] It also noted that the interpretation of domestic law was primarily for the national authorities, and that in this case the issues had been carefully considered by the Court of Appeal. In the light of all this, it held that the power of entry was sufficiently defined and predictable to meet the standard of being "in accordance with the law".

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[16] *The Police and Criminal Evidence Act (PACE) 1984*, c. 60 codified police powers in the United Kingdom and abolished all the rules of common law under which a constable had power to enter premises without a warrant. However s. 17(6) specifically retained a constable's power of entry to deal with or prevent a breach of the peace.

Laporte v. Chief Constable of Gloucestershire, [2007] 2 AC 105, [2007] 2 All ER 529 (H.L.)

In *Laporte v. Chief Constable of Gloucestershire* the House of Lords examined the history and jurisprudence of police powers to prevent a breach of the peace at great length. While each member of the house recited a similar list of cases, at para. 62 Lord Earlsferry gave a concise example of the kinds of expression which judges have used to describe the stage at which the power and duty to intervene arise or prevent a breach of the peace arise:

> For the most part, the common law is concerned to punish those who have committed an offence and to deter them and others from doing so in the future. It does not step in beforehand to prevent people from committing offences. The duty to prevent a breach of the peace is therefore exceptional. And, if not kept within proper bounds, it could be a recipe for officious and unjustified intervention in other people's affairs. The common law guards against this danger by insisting that the duty arises only when the police officer apprehends that a breach of the peace is "imminent" (*O'Kelly v. Harvey* (1883) 14 LR Ir 105, 109; *Foulkes v. Chief Constable of the Merseyside Police* [1998] 3 All ER 705, 711b-c) or is "about to take place" or is "about to be committed" (*Albert v. Lavin* [1982] AC 546, 565) or will take place "in the immediate future" (*R. v. Howell* [1982] QB 416, 426). His apprehension "must relate to the near future" (*McLeod v. Commissioner of Police of the Metropolis* [1994] 4 All ER 553, 560F). If he reasonably apprehends that a breach of the peace is likely to occur in the near future, the officer's duty is to take reasonable steps to prevent it.

To that list Lord Earlsferry also added *Piddington v. Bates* [1961] 1 WLR 162 where Lord Parker CJ at p. 170 referred to "a real danger" and "a real possibility" of a breach of the peace occurring. [17] However an assessment of what a police officer believes is about to happen will depend on his assessment of the information that is available to him. Besides what he sees in front of him, the officer may add to that any additional information or specialized knowledge at his disposal (at para. 67):

> In former times, when a police officer patrolled the streets without any of the modern means of communication, he would often have no more information than any ordinary citizen walking beside him. So, for the most part, he would only apprehend the occurrence of breaches of the peace which were brewing and about to

[17] *Piddington v. Bates* was also adopted by Hodgson J in *Albert v. Lavin* (at p. 553). *Albert v. Lavin* was in turn applied by the Victoria Supreme Court in *Nicholson v. Avon* (supra). *Piddington v. Bates* also remains good law under the LEPRA in New South Wales today.

> break out in his presence. These would be the ones which he would regard as imminent. But, today, officers on the ground can be supplied by radio with information about what lies round the corner or what people are doing a few miles down the road. Armed with such information, they may have good reason to anticipate that people in front of them are intending to take part in a breach of the peace, or are likely to become involved in one, a short time later or a short car ride away. Intervention to prevent that breach of the peace may therefore be justified. A fortiori, a senior officer at the centre of a police operation, receiving reports from his officers on the ground, plus intelligence and advice on how to interpret the data, may have good reason to appreciate that a breach of the peace is "imminent" or "about to happen", even though that would not be apparent to officers lacking these advantages. The precondition for intervention remains the same but the test has to be applied in the conditions of today.

R. v. Godoy, [1999] 1 S.C.R. 311, aff'ing (1997), 33 O.R. (3d) 445, 100 O.A.C. 104

While *Nicholson v. Avon* was an Australian decision, they also drew on *R. v. Waterfield* to justify the powers of the police at common-law. *Waterfield* was also cited by the Courts of Appeal in both *R. v. Martin* and *R. v. Thomas*, but did not rely on it when justifying (or not) the officer's right to enter the accused's homes. However, the Supreme Court of Canada has consistently upheld the duties and powers of the police at common law to preserve the peace, and has cited *R. v. Waterfield* in fifteen judgements since 1970.

As was the case in *Nicholson v. Avon* (supra), the Supreme Court of Canada has employed what has become known as the "Waterfield" test when considering the authority of a constable to act within the scope of this common law duties. As most recently expressed by the Supreme Court in *R. v. Godoy*, the "justifiable" use of police power depends on a number of factors, including:

1. The duty being performed;
2. The extent to which some interference with individual liberty is necessitated in order to perform that duty;
3. The importance of the performance of that duty to the public good;
4. The liberty interfered with; and
5. The nature and extent of the interference.

In *Godoy*, the police responded to a 911 hang-up call and forced entry into the accused's apartment to ensure the safety and well being of the person who made the call. In upholding the officer's right to enter the home, the Court unanimously stated that:

> In the case at bar, the forced entry into the appellant's home was justifiable

> considering the totality of the circumstances. The police were responding to an unknown trouble call. They had no indication as to the nature of the 911 distress. They did not know whether the call was in response to a criminal action or not. They had the common law duty (statutorily codified in s. 42(3) of the Police Services Act) to act to protect life and safety. […] The police had the power, derived as a matter of common law from this duty, to enter the apartment to verify that there was in fact no emergency.

The Court distinguished *Godoy* from its earlier ruling in *R. v. Feeney*, [1997] 2 S.C.R. 13, by emphasizing that "Feeney was concerned solely with when the police can enter a dwelling without warrant to make an arrest. Thus, in my view, the reasoning in *Feeney* does not apply to the case at bar, which is unconcerned with powers of arrest". The reasoning is similar to the United States cases mentioned earlier where entry is not motivated by intent to arrest and seize evidence, but to provide emergency aid, assistance or to restore order.

The common law duties of a police officer, as set out in Halsbury's Laws of England (and quoted with approval by the Australian Court in *Nicholson v. Avon*), were adopted by the Supreme Court of Canada in *R. v. Dedman*, [1985] 2 S.C.R. 2, which was in turn cited with approval by the Court in *Godoy*. As set out in *Dedman*, "he primary function of the constable remains as in the seventeenth century, the preservation of the Queen's peace. From this general function stem a number of particular duties additional to those conferred by statute and including those mentioned hereafter".

The first duty of a constable is always to prevent the commission of a crime. If a constable reasonably apprehends that the action of any person may result in a breach of the peace it is his duty to prevent that action. It is his general duty to protect life and property.

Blanchard v. Galbraith (1966), 10 Crim. L.Q. 122 (Man QB)

In *Blanchard v. Galbraith*, Justice Hall (as he then was), dismissed a law suit against three police officers for false arrest and imprisonment as a result of a charge for obstructing a police officer in the execution of his duty outside a bar at 4:30 am in the morning. [18]

[18] The English Court of Appeal decision in *R. v. Howell* (1981), 73 Cr. App. R 31 (C.A.), decided 15 years after *Blanchard*, also involved an apparently noisy participant in a street party which had continued into the early hours of the morning. There were complaints by neighbours and the police arrived. Howell and others were told to leave or they would be arrested for breach of the peace. While moving off slowly Howell stopped to swear at one of the police officers. He was told that if he continued to swear he would be arrested. Howell continued to swear, whereupon the police officer attempted to arrest him. Howell struck the

Notwithstanding the accused's ultimate acquittal on the criminal charges for procedural issues (see *R. v. Blanchard* (1965) 47 C.R. 342), Justice Hall found that the police had been justified in arresting the plaintiff and lodging him in jail to prevent a real or possible breach of the peace. As found by Justice Hall,

> Here was a trouble spot which, to the knowledge and experience of [police officers], had been the source of much trouble associated in no small measure with the use of liquor. The time was about 4:30 a.m.; the restaurant was closed and chairs were on the tables; the lights at the front were out. Plaintiff and his companion, including four or five other people, were standing outside the restaurant for what appeared to be no particular purpose. They were all in various degrees of intoxication and talking loudly. One of the group was arrested for being obviously drunk on the street. [The police officer] thought it desirable that the remainder of the group should be dispersed to prevent trouble which, under the circumstances and in the light of his previous experience, told him would probably occur. He ascertained that plaintiff and his companion were from out-of-town but were staying at a hotel a short distance away. He tried to persuade plaintiff and his companion to return to their rooms, but plaintiff, entertaining the belief that he had a superior right to remain on the street, stubbornly, and in a belligerent and defiant manner, refused to comply. He was asked several times to move away and, finally, [the officer] offered plaintiff the choice of returning to his hotel room or going to jail. Plaintiff invited arrest and it was accepted.
>
> It is the plain duty of peace officers to act in anticipation and to thereby prevent breaches of the peace. In the case of *Piddington v. Bates,* [1960] 3 All E.R. 660 (Q.B.), Lord Parker, C.J., at p. 663, succinctly put the duty this way:
>
> > It seems to me that the law is reasonably plain. First, the mere statement by a constable that he did anticipate that there might be a breach of the peace is clearly not enough. There must exist proved facts from which a constable could reason· ably have anticipated such a breach. Secondly, it is not enough that his contemplation is that there is a remote possibility but there must be a real possibility of a breach of the peace. Accordingly, in every case it becomes a question whether, on the particular facts, there

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police officer in the face. He was subsequently convicted of and the Court of Appeal rejected his claim that the initial attempt to arrest had been unlawful. It was legitimate as an arrest to prevent a breach of the peace.

> were reasonable grounds on which a constable charged with this duty anticipated that a breach of the peace might occur.
>
> In the present case there existed reasonable and probable grounds for believing that a breach of the peace would probably occur, and defendant White was acting within the course of his duty in asking the group to disperse. Plaintiff 's refusal by inviting arrest amounted to obstruction in the discharge of defendant's duty, and, in my opinion, was complete justification for the arrest and detention.

Irving v. Clemens, 2000 CarswellBC 482, 2000 BCSC 291

In *Irving v. Clemens* Justice Singh applied *Blanchard v. Galbraith* to a late night drinking party involving three friends at their house in an upscale neighbourhood in Coquitlam. They were playing their music loud and the police were called. The police told them to turn the music done. One of the residents did, however the other two confronted the officer outside. The officer told them to go back into house, but they continued yelling and screaming at him. They were subsequently arrested for being drunk in public place and a causing disturbance. All three subsequently brought an action for damages against the police for false arrest and false imprisonment, alleging lack of reasonable and probable grounds. However the Court found the arrest was lawful not only for causing a disturbance but that their conduct also fell within the ambit of causing a breach of the peace as encompassed in s. 31(1) of the Criminal Code (para. 39).

In addition he found the use of force applied by the police in affecting their arrest was justified citing Stevenson J. in *Breen v. Saunders* (1986), 39 C.C.L.T. 237 (N.B. Q.B.), at page 277:

> That force was used is not disputed. Was it more force than was necessary? A policeman's job is not an easy one. However, it is his lot to have to deal with persons who, fortified by drink, obstruct and provoke them while they are carrying out their duties. Mr. Justice Dickson, in *Foster v. Pawsey* (1980), 28 N.B.R. (2d) 334, 63 A.P.R. 334 (N.B.Q.B.), at 346 said "Some allowance must be made for an officer in the exigencies of the moment misjudging the degree of force necessary to restrain a prisoner". The same applies to the use of force in making an arrest or preventing an escape. Like the driver of a vehicle facing a sudden emergency, the policeman "cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course". See *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654 at 665.

Irving v. Clemens was recently followed by Justice Verhoeven in *Ludlow v. Victoria* (City), 2014 CarswellBC 454, 2014 BCSC 295.

As noted by the Supreme Court in *Godoy*, these common law duties have been incorporated into various police acts in Canada, including s. 24 and 25 the *Police Services Act* of Manitoba. [19] These duties were previously included in s. 454(a) of the former *City of Winnipeg Act*, S.M. 1989-90, c. 10, which stated that "members of the police department are charged with the duty of preserving the peace, the prevention of crimes and offences, apprehending offenders and generally with the performance of all duties that by law devolve upon peace officers". [20]

Therefore, in addition to preventing statutory crimes and offences and apprehending offenders for breaches of those statutory crimes and offences, police officers also have the responsibility for preserving the peace and maintaining order. Preserving the peace and maintaining order implies that, at common law, the police have a preventative role in safeguarding the peace, not just a reactive role to be exercised only when they find someone committing, or who they believe is about to join in or renew in a breach of the peace.

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[19] *The Police Services Act*, C.C.S.M. c. P94.5 proclaimed in force on June 1, 2012. Section 24 and 25 read as follows:

> **Status of police officers**
> 24(1) A police officer has all the powers, duties, privileges and protections of a peace officer and constable at common law or under any enactment.
>
> **Duties of police officers**
> 25 The duties of a police officer include
> (a) preserving the public peace;
> (b) preventing crime and offences against the laws in force in the municipality;
> (c) assisting victims of crime;
> (d) apprehending criminals and others who may lawfully be taken into custody;
> (e) executing warrants that are to be executed by peace officers, and performing related duties;
> …

[20] The *City of Winnipeg Police Service By-law* 783/74 still reads as follows:

> **5. The members of the Police Service shall**
> (a) perform all duties assigned to the officer in relation to the preservation of peace, the prevention of crime and offences against laws in force in Manitoba and the apprehension of criminals and offenders and others who may lawfully be taken into custody;
> (b) execute all warrants and perform all duties that under the laws in force in Manitoba may lawfully be executed or performed by peace officers; and
> (c) perform such other duties and functions as may from time to time be assigned to them by the Chief of Police;

As such, in a serious case, where there is no time to obtain a warrant, the police may be able to enter a premise to prevent a breach of the peace to safeguard life and property as in *Nicholson v. Avon*. While there is no offence at law in Canada for breaching the peace, police may arrest a person as a preventative measure to stop or abate any actions that may give rise to acts of violence. However, as noted in *R. v. Khatchadorian* (1998), 127 C.C.C. (3d) 565 (B.C.C.A.), "a police officer cannot in effect create a breach of the peace and then claim to have a proper basis for arrest".

Brown v. Durham Regional Police (1999), 106 C.C.C. (3d) 302 (Ont C.A.), leave to appeal allowed (1999) 140 C.C.C. (3d) vi (S.C.C.), discontinuance filed October 4, 2000.

In 1998 the Ontario Court of Appeal released probably one of the most thorough and comprehensive analyses of the law to date regarding the right of the police to detain persons for breaches, or apprehended breaches of the peace.

Writing for the court Justice Doherty held that, "it is well established that in acting in furtherance of their duties, the police need not point to express statutory authority for every action they take which imposes some limitation on individual liberties. In *Dedman* [the Supreme Court] wrote, at p. 32 'it has been held that at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property'". Later on, Justice Doherty wrote that:

> The infinite variety of situations in which the police and individuals interact and the need to carefully balance important in each of those situations make it difficult, if not impossible to provide pre-formulated bright-line rules which appropriately maintain the balance between police powers and individual liberties.
> …
> The police duty to prevent crime and maintain the public peace commands proactive measures on their part. Often those measures do not conflict with any individual rights and no not raise constitutional issues. Many facets of community based policing involve proactive measures taken with the full support and cooperation of those affected by the measures. [...] Proactive policing is in many ways more efficient and effective than reactive policing. Where proactive steps do not collide with individual rights, that increased efficiency and effectiveness comes at no constitutional cost. Even where there is interference with individual rights, the societal gains are sometimes worth the interference.
> …
> Preventative policing which limits an individual's liberty is not, however, limited to the regulatory sphere. There are at least four powers available to the police which authorize restrictions on individual liberty in the name of

crime prevention. [... These powers include the right] to arrest or detain a person who is about to commit a breach of the peace. That power deserves more detailed consideration in this case because, like the police power the respondent contends the police acted under here, the power to arrest for an apprehended breach of the public peace is a manifestation of the common law ancillary power doctrine: *Hayes v. Thompson* (1985), 18 C.C.C. (3d) 254 (B.C.C.A.) at 258-62.

In *R. v. Howell* (1981), 73 Cr. App. R 31 (C.A.) Watkins L.J. justified the police power to arrest for an apprehended breach of the public peace in these terms:

> The public expects a policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace, in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a person's liberty, provides the police with this power in the public interest.

The House of Lords arrived at the same conclusion in *Albert v. Lavin*, [1982] A.C. 546 (H.L.) at 565, where Lord Diplock said:

> ... Every citizen in whose presence a breach of the peace is being or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.

A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. A breach of the peace contemplates an Act or actions, which result in actual or threatened harm to someone [or their property]. Actions which amount to a breach of the peace may or may not be unlawful standing alone. Thus, in *Percy v. D.P.P.* (1994), [1995] 3 All ER 124 (Q.B.) Collins J. observed:

> The conduct in question does not itself have to be disorderly or a breach of the criminal law. It is sufficient if its natural conse-

> quence would, if persisted in, be to provoke others to violence, and so some actual danger to the peace is established.
>
> Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. These features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence.
>
> That is not to say that the two powers are coextensive. Many indictable offences do not involve a breach of the peace and, as indicated above, conduct resulting in an apprehended breach of the peace need not involve the commission of any offence. Both powers are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.
>
> In deciding whether the ancillary power doctrine justifies these detentions, I adhere to the fact-specific inquiry required by that doctrine. The police purpose behind the detentions, the nature of the liberty interfered with, the extent of the interference, and the need to employ the impugned means to effectively perform a duty placed upon the police must all be taken into account.
>
> …
>
> When taking proactive measures to maintain the public peace, the requisite necessity arises only where there is a real risk of imminent harm. Before that point is reached, proactive policing must be limited to steps which do not interfere with individual freedoms. [...] In some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime. The efficacy of laws controlling the relationship between the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

In summary, the duties of a constable are not just confined to the statute books, but they also draw on the extensive common law powers that have been invested in constables for hundreds of years to preserve the peace, prevent offences and protect life and property.

R. v. MacInnis, 2014 CarswellNS 527, 2014 NSSC 262

In *R. v. MacInnis* the accused was drinking at the home of a friend. She became intoxicated, emotional and upset. Her friend wanted her to leave and called 911. The police attended and found Ms. MacInnis extremely intoxicated. Ms. MacInnis was arrested and taken to the police station. Her behaviour deteriorated and she spit at the officers. She was subsequently charged with assaulting the officers.

At trial the accused was found guilty of assaulting the police officers. She appealed her convictions stating that her arrest was unlawful and that she used reasonable force in resisting the unlawful arrest. The appeal dismissed. The trial judge did not err in finding that common law power existed to arrest the accused for an apprehended breach of peace. The responding officers had known the accused to have mental health issues, and their past experience was that accused was volatile and capable of criminal behaviour when intoxicated. The evidence supported that there was a risk to the public, a risk of criminal behaviour, and a risk to accused's personal safety if she was not detained.

The accused was arrested for an apprehended breach of the peace is found in Section 31(1) of the *Criminal Code*. The accused argued that section 31(1) does not contemplate arrest for an anticipated breach of the peace. However the trial judge, quoting extensively from *Brown v. Durham Regional Police Force*, found support for her conclusion that the police did have a common law power of arrest for an apprehended breach of the peace. In addition support was found in the Court's own jurisprudence in *R. v. E.(C.)*, 2009 NSCA 79 (N.S.C.A.), at para. 37, that an arrest may be justified to avert an anticipated breach of the peace. The real issue was if the trial judge properly applied the law to the circumstances. The summary conviction appeal judge found that she did.

However the most controversial issue on this appeal was the officers' subjective beliefs as to the imminent and substantial risk posed by the accused herself. They had known her to have mental health issues. Their past experience was that when intoxicated, she was volatile and capable of general criminal behaviour. Her criminal behavior included past assaults on police. At para. 54 the Court stated:

> The distinguishing feature of this case was the extensive knowledge and experience that the officers had with respect to Ms. MacInnis. This gave them a basis to predict her behavior and her reaction to the circumstances. The police should be permitted to rely on their knowledge and experience if it is a reasonable approach in the circumstances. It would be impractical and artificial in my view to ask police to put aside such knowledge and experience

> in the types of assessments they required to make. It will always be the function of the trial judge to determine whether such knowledge and experience discharge the requisite legal standard.

As noted by Watkins L.J. in *R. v. Howell* (1981), 73 Cr. App. R 31 (C.A.), *the public expects a policeman … to prevent the commission of crime, to keep the peace in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property".*

VII. TRAINING AND EXPERIENCE

Explicit in the decisions of *Blanchard v. Galbraith* and *R. v. MacInnis* are that an officers training and experience can provide reasonable grounds to believe a breach of the peace is imminent. In *Blanchard* it was the officer's knowledge of the place, while in *MacInnis* it was the officer's knowledge of the person. Implicit in the Court's decision in *R. v. MacDonald* was that an officer's training and experience interpreting facial expressions, body movements and lack of verbal response to his questions, could provide reasonable grounds to believe the accused held a weapon in his hand. So to can police intelligence and information systems provide good reason to appreciate that a breach of the peace is "imminent" or "about to happen" (*Laporte v. Chief Constable of Gloucestershire*).

R. v. Chehil, 2013 SCC 49 (S.C.C.) and ***R. v. MacKenzie***, 2013 SCC 50 (S.C.C.)

Indeed, with the recent rulings in *R. v. Chehil*, 2013 SCC 49 (S.C.C.) and *R. v. MacKenzie*, 2013 SCC 50 (S.C.C.) the Supreme Court has confirmed that in some circumstances an officers training and experience is relevant and probative to the officer's subjective belief but also to the objective reasonableness of that belief. However the Court also indicated that claims of training and experience should be subject to scrutiny as they are not *always* probative. For example the Court stated in *Chehil* and emphasized again by the majority in *MacKenzie*:

> An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion. However, this is not to say that hunches or intuition grounded in an officer's experience will suffice, or that deference is owed to a police officer's view of the circumstances based on her training or experience in the field: see *Payette*, [2010 BCCA 392, 291 B.C.A.C. 289] at para. 25. A police officer's educated guess must not supplant the rigorous and independent scrutiny demanded by the reasonable suspicion standard. [para. 47 *Chehil*].

> [However] Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, "*a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police*" (*Yeh* [2009 SKCA 112], at para. 53). Sights, sounds, movement, body language, patterns of behaviour, and the like are part of an officer's stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold. [para. 62 *MacKenzie*].

Although the Manitoba Court of Appeal stated in *R. v. Nelson* (1987), 45 Man. R. (2d) 68 (C.A.) that a detention may be justified if the officer "intuitively senses that his intervention may be required in the public interest", in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), Justice Doherty found that articulable cause could not be based entirely on an officer's intuition, no matter how accurate that intuition might later prove to be. As he pointed out:

> […] such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria, detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a hunch … in order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that, at a minimum, bears some relationship to a reasonable suspicion of crime.

Furthermore, in *R. v. Cox* (1999), 132 C.C.C. (3d) 256 (N.B.C.A.) and *Brown v. Durham Regional Police*, the New Brunswick and Ontario Court of Appeals have held that "profiling" (ie: of smugglers, outlaw motorcycle gangs or racial groups) cannot, by themselves, support articulable cause. As noted by the Court in *Cox*:

> The elements of the smuggler's profile here are no more than hunches, speculation and guesses that do not qualify as "objectively discernible facts" As such, they do not support a reasonable belief that Mr. Cox was implicated in unlawful activity that justified stopping his motor vehicle.

Nevertheless, intuition or profiling, may be two of the many objectively discernible facts which when combined with other facts give the officer reasonable cause to believe that the accused is criminally implicated in the activity under investigation. However this does not mean that the instinctive knowledge of police officers is to be ignored. Rather as the Alberta Court of Appeal said in *R. v. Rajaratnam*, 2006 ABCA 333:

> […] a judge is entitled to consider a police officer's training and experience in determining objective reasonableness. See *R. v. Smith*, 1998 ABCA 418, 219 A.R. 109 at para. 30; *R. v. Sinclair*, 2005 MBCA 41, 192 Man. R. (2d) 283 at para. 14. *What may appear to be innocent objects to the general public may have a very different meaning to an officer experienced in drug operations: R. v. Kluczny*, 2005 ABQB 350, 385 A.R. 182at para. 51. [21]

Depending on the situation and the training and experience of the others involved, one officer's articulable cause for detention may be another's reasonable grounds for arrest. There is definitely a grey area between the two but, as eloquently stated by Justice Rehnquist for the United States Supreme Court in *Adams v. Williams* (1972), 407 U.S. 143, an officer who lacks the precise level of information necessary for arrest should not simply shrug his shoulders and allow a crime to occur or a criminal escape (at p. 145-6).

R. v. Messina, 2013 CarswellBC 3543, 2013 BCCA 499

In *R. v. Messina* the B.C. Court of Appeal thoroughly canvassed the law surrounding an officer's subjective beliefs and the objective justification for the officer's subjective belief. In assessing objective justification, the consideration is whether a reasonable person, "standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest".

Citing Madame Justice MacKenzie in *R. v. Wilson*, 2012 BCCA 517 (B.C. C.A.), leave to appeal ref'd [2013] S.C.C.A. No. 71 (S.C.C.), the Court reviewed a number of appellate cases that have held an arresting officer's personal experience is relevant to whether the officer's subjective belief is objectively justified:

> [22] For example, in *R. v. To* (1998), 109 B.C.A.C. 242, Madam Justice Ryan, for the Court, said:
>
> > [11] As for the objective test I am satisfied that there is ample evidence to establish reasonable and probable grounds. The red Talon was engaged in activity which would baffle a layman. What was the vehicle doing in these brief, obviously prearranged street encounters? The police officers testified that they are aware, through experience, of a custom which has arisen in the drug trade which they describe as "dial-a-doper". The activity of Mr. To fit

[21] This phrase from *R. v. Kluczny* has been quoted in at least 14 reported decisions, including two from Manitoba (*R. v. Oswald*, 2013 CanLII 12415 (MB QB) and *R. v. Grammatikos*, 2012 MBQB 73 (CanLII). Also see *R. v. Mouland*, 2007 SKCA 105 and *R. v. Lawes*, 2007 ONCA 10 where the court held that an officer's training was relevant factor to consider.

> that profile. As Professor LaFave has described it – "Objective grounds must be measured from the standpoint of the officer with his skills and knowledge rather from the standpoint of the average citizen."

[24] After [canvassing a number of] cases from other jurisdictions, Mr. Justice Thackray said in [*R. v. Juan*, 2007 BCCA 351]:

> [27] The test set forth is to establish that "a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest." This does not mean that the beliefs of police officers are not necessarily objective. However, in that their conclusions might be perceived to have a bias or prejudice they must be subjected to a test of whether a reasonable person standing in the officers' shoes would have come to the same conclusion. In applying the *Storrey* test the knowledge of the police officers is not to be ignored. As said in *R. v. Rajaratnam,* 2006 ABCA 333:
>
> > [25] ... a judge is entitled to consider a police officer's training and experience in determining objective reasonableness. See *R. v. Smith*, 1998 ABCA 418, at para. 30; *R. v. Sinclair*, 2005 MBCA 41, at para. 14. What may appear to be innocent objects to the general public may have a very different meaning to an officer experienced in drug operations: *R. v. Kluczny*, 2005 ABQB 350, 385 A.R. 182 at para. 51.

[25] In *Luong*, 2010 BCCA 158, 286 B.C.A.C. 53, Madam Justice Bennett, for the Court, was clear:

> [19] Being "placed in the position of the officer" does not just mean making the same observations as the officer, as to many lay people such observations would be meaningless. Included in the assessment of whether the grounds for arrest are reasonable is the officer's experience, training and knowledge: *R. v. Juan*, 2007 BCCA 351at para. 27, *R. v. To* (1998), 109 B.C.A.C. 242 at para. 11, and *R. v. Tran*, *supra.*
> …
> [24] The assessment of whether objective grounds exist undertaken by a trial judge is conducted by first looking at the observations of the officer (which the trial judge has found as facts) through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations, and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer. This, in my view, is what the Court was referring to in [*R. v. Kang-Brown*, [2008] 1 S.C.R. 456]. There is no need to call an independent expert to testify. Such evidence would not be admissible as it is irrelevant. It is the arresting officer's lens which is key to the assessment of reasonable grounds.

> [37] Most recently, the Court in *R. v. Whyte*, [2011] 3 S.C.R. 364, endorsed the decision in *R v. Whyte*, 2011 ONCA 24, where the sole question was whether the police had objectively reasonable grounds to arrest. Mr. Justice Rosenberg for the Court found the arresting officers' experience and knowledge were relevant in evaluating the objective grounds to arrest.

However, while the police are "entitled to draw reasonable inferences" from facts (*R. v. Cornell*, [2010] 2 S.C.R. 142, at para. 35), to rely on investigative training and experience (*MacKenzie*, at paras. 15-6, 62-4), with some contextual latitude for police discretion and judgment in difficult and fluid circumstances (*Cornell*, at para. 24; *Jones*, 2013 BCCA 345, at para. 42; *R. v. Kelsy*, 2011 ONCA 605, at paras. 56-7; and R. v. *Kephart*, 1988 ABCA 325, at para. 10), the exercise of police discretion in entering an occupied dwelling without warrant or consent is not unlimited as observed by McFarlane J.A. in *R. v. Tunbridge* (1971), 3 C.C.C. (2d) 303 (B.C.C.A.), a domestic violence case, at para. 8:

> I recognize that police officers who are called to deal with domestic quarrels are faced frequently with difficult decisions as to the extent to which their duty requires them to intervene. Actions prompted by feelings of humanity and goodwill may easily and understandably extend into an area outside the bounds of legal duty. This is what I think occurred in this case.

While the majority are cases involving drug trafficking, the issues are no different for other types of cases. Considering the police respond to more than 11,500 noise and disturbance calls every year (and more than 14,500 domestic disturbance calls), their assessment of the risks and dangers posed by these calls based on their training and experience may still be highly relevant within the context of a specific fact situation and should not be overlooked.

***R. v. Le*, 2019 SCC 34**

Where, however, the police are clearly trespassers with no objective justification to believe there are reasonable grounds for their presence or continued presence, they will not be found to be in the execution of their duties. As trespassers any evidence they find may be excluded or worse. [22]

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[22] *Cf R. v. Zargar* and *R. v. Wilhelm*, *supra* note 4, where the Court held that a homeowner has the right to use reasonable physical force for the purposes of protecting their property. This includes the right to prevent a person from entering or to remove that person from the property. This includes entry by a police officer. Reasonable force is a key component. The act committed must be reasonable in the circumstances.

In Le, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. The young men did not appear to be doing anything wrong but were just talking. The backyard was small and was enclosed by a waist-high fence. Without a warrant, or consent, or any warning to the young men, two officers entered the backyard and immediately questioned them about what they were doing. One officer questioned Le, and asked him what was in the satchel he was carrying. At that point, Le fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash.

At trial, Le sought the exclusion of this evidence under s. 24(2) of the Charter. In convicting Le, the trial judge held that he lacked standing to advance his claims, there being no objective reasonableness to any subjective expectation of privacy that he might harbour as "a mere transient guest" in the backyard. A majority of the Supreme Court disagreed.

The police entered the property as trespassers. No statute authorized these police officers to detain anyone in the backyard. Similarly, the common law power to detain for investigative purposes could not be invoked. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. This was serious police misconduct. There simply were no grounds, let alone reasonable grounds, to suspect any criminal wrongdoing was committed or being committed by the young men in the backyard. The discovery of the evidence was only possible because of the Charter breach in this case. The admission of this evidence, in the circumstances of this police conduct, would bring the administration of justice into disrepute. The convictions were set aside and acquittals entered.

VIII. CONCLUSION

Police forces exist in municipal, provincial, and federal jurisdictions to exercise powers designed to promote the order, safety, health, morals, and general welfare of society. Their duties are by no means exhaustive and it would be impossible to describe their duties in detail. As noted by the Supreme Court in *O'Rourke v. Schacht*, [1976] 1 S.C.R. 53, "it is infinitely better that the courts should decide as each case arises whether, having regard to the necessities of the case and the safeguards required in the public interest, [if] the police are under a legal duty in the particular circumstances".

The intent of this paper was not what to do with a noise complaint and any charges that may arise from it. Rather it was to look broadly at a variety of issues from the perspective

of a rather routine, common occurrence faced by police officers every day. How might it be applied to other cases or circumstances?