Arrest of Persons in Dwelling-House  
(Feeney Warrants- The First Three Years)

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I Introduction

On May 22, 1997, the Supreme Court of Canada in R v. Feeney,¹ signaled a change in law which would prevent execution of arrest warrants in a dwelling-house unless there was:

(a) judicial authorization in the form of a warrant issued on the basis of the existence of reasonable grounds to arrest the person and to believe the person is in the dwelling house in question (an arrest warrant alone is not sufficient); and

(b) proper announcement must be made before entering (i.e. knock on door or ringing of doorbell, followed by notice of authority by identification of themselves as law enforcement/police officers, followed by notice of purpose by stating a lawful reason for entry before entering or forcibly entering) the premises.

An exception to this requirement was recognized to exist in cases of hot pursuit. The majority of the Court did not deal with whether an exception would exist in the case of exigent circumstances, but indicated that the possibility of loss of evidence would not constitute an exigent circumstance since “ after any crime is committed, the possibility that evidence might be destroyed is inevitably present” (at p.169).

Bill C-16 was proclaimed on December 16, 1997 in an attempt to deal with the confusion created in Feeney. The Bill created two distinct procedures for effecting a warrant authorized arrest in a dwelling-house. This was by a “stand-alone” warrant procedure in section 529.1 (form 7.1) of the Criminal Code and, alternatively by a judicial authorization on a form 7 arrest warrant under section 529 of the Criminal Code.

II Arrest in Dwelling House - When do I Require a “Feeney” Warrant?

The short answer is that a warrant to arrest in a dwelling-house or an authorization to arrest in a dwelling house is required at common law and by statute whenever a recognized exception does not exist.

A dwelling-house is defined in section 2 of the Criminal Code to mean:

“the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes:

a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and

b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.”

The definition is very broad. The message to be taken is that it encompasses much more than a

¹(1997), 115 C.C.C. (3d)129 (S.C.C.)
**residence.** It would include a **motel unit**\(^2\) or trailer (even a **windowless trailer** as it did in *Feeney*\(^3\)), or a tent or lean-to or other shelter\(^4\). It also by definition **includes a structure** that is **kept as a dwelling-house** (apparently even if it is not currently used as such).\(^5\)

The annotation to section 2 of *Martin’s Annual Criminal Code 2000*\(^6\), provides further broad interpretation of the word “curtilage” which they describe as a word that “is not a term of normal usage in Canada, but has been extensively considered in the United States because of the Fourth Amendment protection against unreasonable search and seizure. In *United States v. Potts*, 297 F. 2d 69 (6th Cir. 1961), curtilage was defined to include all buildings in close proximity to a dwelling which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling and is habitually used for family purposes.”

The *Concise Oxford Dictionary of Current English*\(^7\) defines curtilage as “area attached to a dwelling house as part of its enclosure....”

These two definitions conflict somewhat over whether there must be a fenced in area or area attached by a passageway. In light of this interpretation **some outbuildings such as a garage could fall within the interpretation of curtilage.** There would be no doubt that an attached garage would do so under either interpretation\(^8\). Past cases under the former Narcotic Control Act sections 10 and 12 permitted searches without warrant into non dwelling-houses (dwelling-house was not defined) and restricted warranted searches to dwelling-houses which did not include detached garages.\(^9\)

It is likely with this definition, when **combined with evidence of usage,** that detached buildings such as a garage, storage area, playhouse **may in their individual circumstances,** also **fit this expanded definition of dwelling-house.** This would be the **safest interpretation** since police officers could hardly be faulted for seeking to execute a warrant of arrest after having defined the

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\(^3\) *supra,* footnote 1


\(^6\) Greenspan, Edward; and Rosenberg, Marc; (Aurora, Canada Law Book, 1999) at p. 12

\(^7\) (Oxford, Oxford University Press, 1987) at p. 234


\(^9\) see *R.v. LaPlante,* (1987) 40 C.C.C. (3d) 63 (Sask.C.A.) - detached garage; and *R. v. Nicholson,* (1990) 53 C.C.C. (3d) 403 (B.C.C.A.) - garage at rear of house with no indication that it was used for anything other than growing marijuana
usage associated to the outbuildings in proximity to the house. A warrant to search for a person is not permitted under section 487 of the Criminal Code, which, under subsection 487(1)(b) permits search for “anything [inanimate objects only] that there are reasonable grounds to believe... will reveal the whereabouts of a person who is believed to have committed a [federal] offence.”

III  Arrest in Dwelling-House  - When Do I Not Require a “Feeney” Warrant?

A) Hot Pursuit

In R. v. Feeney the Supreme Court of Canada held that in cases of hot pursuit, the police may enter a dwelling-house to make an arrest, without a warrant. Mr. Justice Sopinka states, “In cases of hot pursuit, society’s interest in effective law enforcement takes precedent over privacy interest, and the police may enter a dwelling house to make an arrest without a warrant.”

In R. v. Macooh, the accused was observed by police officers going through a stop sign in the early morning hours. The officer began to follow the accused with emergency signals on the cruiser activated. The accused accelerated and drove through two more stop signs. The accused was followed to an apartment parking lot, where he was observed exiting the car and running toward the apartment. One of the officers recognized the accused and told him to stop, but the accused entered the apartment. The police officers went to the apartment, identified themselves and called to the accused, but received no answer. The officers then proceeded into the apartment and into the bedroom where they found the accused. The accused was told that he was under arrest for failing to stop for a police officer. The accused refused to leave with the officers, and altercations ensued. The accused was eventually charged with impaired driving, failing to stop for a police officer, failing to submit to a breathalyser test and assaulting a police officer. The trial judge found that the officer had no right to enter the dwelling house to make an arrest for the provincial offence. As a result the trial judge found the accused’s right were infringed and refused to admit evidence obtained following the entry into the premises. The Supreme Court of Canada found that the accused, when he entered the apartment, knew he was being pursued by the peace officers for the specific purposes of escaping. He must reasonably have expected the officer to follow. The person who enters a house to get away from the police officers who are pursuing him in connection with an offence he has committed, and for which there is a power of arrest without a warrant, cannot expect his privacy to be protected in such circumstances so as to prevent the police from making an arrest. The Supreme Court pointed out that the entry of the police officer in this case took place in hot pursuit, which is an exception traditionally recognized by common law to the principle of the sanctity of the home. Chief Justice Lamer refers to the approach suggested by R. E. Salhany in Canadian Criminal Procedure Fifth Edition, 1989, p. 444:

“Generally the essence of fresh pursuit is that it must be continuous pursuit

10 see Nicholson, supra., footnote 9 at p. 408 where the court noted that the officer applied for a warrant out of an abundance of caution

11 Supra., footnote 1, at p. 156

12 (1993), 82 C.C.C. (3d) 481(S.C.C.)
conducted with reasonable diligence, so that pursuit and capture along with the commission of offence may be considered as forming part of the single transaction.”

This ruling has applicability for Provincial Statute Offences. In situations where a Statute based right of arrest exists, arrests in a dwelling-house in situations of hot pursuit are arguably extended to Provincial Statute offences.

In R. v. Anderson, the suspect ran away from police and sought refuge in a home of a third party. The police officers who were in uniform knocked on the door, identified themselves as police officers, stated they wanted “B” (who was wanted for robbery). The accused refused to let them in without a warrant. The police kicked in the door and located “B”. The accused, who was hysterical, attacked the police officers. The sole issue at trial was the lawfulness of the conduct of the police officers in entering the accused’s apartment. The Court found the police officers’ satisfied the necessary criteria for forceful entry onto a private property to effect lawful arrest. The accused’s conviction for assault of a peace officer and obstruction was upheld on appeal.

The following cases demonstrate the success of police officers on the road of hot pursuit “may find the strict requirements of the law to be “tough sledding.” In R. v. Noerenberg, the police had been informed that the accused was in an impaired driving condition in a bar and was about to leave in an automobile. The police followed the accused for a kilometre or two home (significantly failing to take steps to try and stop her), where she pulled into an attached garage which formed part of the accused’s home. The police pulled their cruiser into the driveway and entered the garage and confronted the accused. They subsequently arrested her after she questioned whether they were permitted to be in her garage. She subsequently failed the breathalyser test. The accused appealed on the ground that the police officer had no reasonable and probable grounds to demand a breathalyser test. She also alleged that the evidence obtained in her garage should have been excluded as it was obtained in a manner contrary to the Charter of Rights and Freedoms. The appeal was allowed and the accused was acquitted on the grounds that the police entered the garage, part of her home, without a warrant. The evidence obtained in the garage was pursuant to an unreasonable search and would not have been obtained but for the unreasonable search.

In R. v. Rowe, the police officer arrived at the house of the accused in response to a noise complaint. On arrival, they realized the noise was coming from the back yard. They approached the fence, knocked on the gate and identified themselves as police officers. The accused opened the gate and the officers informed him that there was a noise complaint and that he should be more quiet.

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13 at p. 491
16 (2000), Q.J. No. 1075 (February 1, 2000, Côté, J.)
At that time they noticed three other persons in the back yard. Two men next to pool were nude, and at the far end of the back yard a young woman in a t-shirt entered the house. As soon as the police left, they received a 911 call from the same address. At that time they were 100 metres from the residence. The police returned to the residence and they saw the complainant in the street. Her clothes were wet and she had her bra in her hand. She was accompanied by a young woman. The police officers engaged in conversation with the complainant who advised she had been sexually assaulted, and that the three accused were still in the house, indicating the accused’s residence. After a fifteen minute interview with the complainant, the police officers returned to the residence, knocked on the door, identified themselves, and the accused opened the door. They then entered the residence and arrested the accused. In this case, the Court asked the question, ‘Can it be said here that the police officers were in hot pursuit of the accused?’ The answer must be in the negative if we refer to the definition given by the Supreme Court of Canada in Macooh.17 Also, the Court found that there was no need to preserve the imminent loss or destruction of evidence. Further, exigent circumstances to preserve human life and safety did not apply since the complainant was already out of the house when the police arrived. The court in this case found that the search was unreasonable.

In R. v. Peters,18 the police responded to a break and enter complaint in the early morning hours. The site was a recreational vehicle sales establishment in Kamloops. Police noted that the chain link fence separating the sales yard and the shoreline had been cut. A distinctive footprint on the ground was located in the immediate area. The police went to a number of recreational vehicles and noticed a number of items missing, including bedding, furniture, microwave ovens, clocks, and lights. Identification units followed a trail along the river of a point of entry in the sales yard. At the bridge, (locally known as the red bridge) constables saw the familiar foot patterns and found a cushion which was identified as similar in colour and pattern to those of the recreational vehicles. Most cushions were found west of the red bridge behind some bushes. The police also found vehicle tire marks in the area, and signs that something heavy had been dragged through the dust toward the river. Further investigation led to the discovery of a new hide-a-bed, again matching furniture in the recreational vehicle. At this point, police were approached by the Director of the Kamloops Rowing Club, who also reported a break in at those nearby premises, and the theft of four canoes, two of which had since been recovered. After the identification unit arrived, the police the owner of the rowing club, showed police how the break and enter took place at the rowing club. The Director also related details of another break the previous year. The information was based on hearsay repeated to the owner. He told the officer that this earlier break, was thought to have been committed by aboriginal males from a nearby Kamloops Indian Band Reserve. Further, that on that occasion, these males were said to have run from a club to a home on the reserve, identified as Peter’s home, at 615 East Shuswap Road. The police officer testified he found footprints similar to those at the recreation yard near the club offices where he suspected the stolen canoes had been launched into the river. He went to the home on the Reserve and parked behind a recreational van. On leaving the police

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17 Supra., footnote 12 at p.491

vehicle, the police testified that his attention was immediately drawn to a tinted window at the rear of the van. In the window, he saw two cushions in the same pattern and colour scheme similar to the cushions and the furniture in the recreation vehicle at the compound. At this point the police spoke to one of the male occupants who left the house and subsequently arrested him. The police officer then testified that he believed that the break and enter suspects were in the home. He radioed for backup. When other police arrived, they entered the residence and arrested a number of individuals. The Court found that the entry of the residence was an unreasonable search and seizure, and that all arrests were unlawful.

**B) Exigent Circumstances s. 529.3 and 529.4 (3)**

Justice Sopinka writing for the Majority in *Feeney* indicated “I leave for another day the question of whether exigent circumstances other than hot pursuit may justify a warrantless entry in order to arrest. I do not agree with my colleague L’Heureux- Dubé J. that exigent circumstances generally necessarily justify a warrantless entry - in my view, it is an open question. ... I note that in reaching her conclusion she cites at p.p., 32-33 a dissenting opinion: *R.v. Silveira*, (1995) 97 C.C.C. (3d) 450 (S.C.C.) *per* L’Heureux- Dubé J.”

In *Silveira*, Cory, J. wrote the majority judgment, stating:

“This case comes down to a consideration of the balance that must be struck between the right to privacy within the home and the necessity of the police to act in exigent circumstances. On the one hand, the police, in direct contravention of s. 10 of the *Narcotic Control Act*, entered into a dwelling-house without a search warrant or authorization. The *Narcotic Control Act* itself recognizes the age-old principle of the inviolability of the dwelling-house. It must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized. This principle is fundamental to a democratic society as Canadians understand that term. Thus, it can be argued that the unauthorized entry into a dwelling-house is so grave a breach of a *Charter* right.

“Yet, on the other hand, the police were investigating a very serious crime, specifically the sale of a hard drug. It is a crime that has devastating individual and social consequences. It is, as well, often and tragically coupled with the use of firearms. This crime is a blight on society and every effort must be undertaken to eradicate it. It is so serious and the destruction or removal of evidence is so easy that it can be argued that the police, while awaiting a search warrant, should always have the right to enter a dwelling-house without authority to preserve the evidence. Perhaps the solution lies somewhere between these extreme positions. ...

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19 *Supra.*, footnote 1 at p. 156

20 (1995), 97 C.C.C. (3d) 450 (S.C.C.) at p. 496
“Yet, the question remains, how should the police act in a situation where they have a serious and valid concern pertaining to the preservation of evidence while awaiting a search warrant. **As a result of this case, police officers will be aware that to enter a dwelling-house without a warrant, even in exigent circumstances, constitutes such a serious breach of Charter rights that it will likely lead to a ruling that the evidence seized is inadmissible.**

“In the future, this problem may disappear as a result of legislation (Emphasis added)....

“Yet, that is not to say that the police forever should be prohibited from entering premises in order to secure and preserve the evidence. Situations may arise when it will be impossible for the police to proceed by means of a search warrant based on earlier observations. Undercover officers may have worked long and hard in situations of great personal danger to proceed with one very large purchase of drugs in circumstances where it is [page501] essential to preserve the evidence which the police believe on reasonable and probable grounds to be in a home. Yet, it will take time to obtain a search warrant. In those circumstances, courts will have to **determine on a case-by-case basis** whether or not there existed such a situation of emergency and importance that the evidence obtained may be admitted notwithstanding the warrantless search. However, I must emphasize again that after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of s. 10 of the Narcotic Control Act and s. 8 of the Charter. Otherwise, routinely permitting the evidence to be admitted under s. 24(2) of the Charter in cases where exigent circumstances exist would amount to a judicial amendment of s. 10 of the Narcotic Control Act. This was the position taken by counsel for the respondent [Crown]. In his submissions, he very carefully stated that he was not seeking carte blanche for the police to enter a dwelling-house to preserve evidence. Rather, he maintained, quite correctly I believe, that the issue should be considered on a case-by-case basis.”

In an attempt to get around the majority view on the common law, Parliament specifically codified an exception for exigent circumstances. Specifically, section 529.3 of the Criminal Code now reads:

“**529.3** (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) 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.**”

The **exigent circumstances** comprised in this definition are **open ended** but do provide some guidance in the form of two delineated categories which can be interpreted as exigent. This is unlike the completely undefined provision of warrant-like authority now found in section 487.11 or section 117.02 of the **Criminal Code** and under subsection 11(7) of the **Controlled Drugs and Substances Act.**

Given that this exception is into a dwelling-house we can expect that this **exception will be strictly construed.**

There is further, a different standard applied to the officer’s belief between both categories. The officer **need only reasonably suspect** in the case where the entry is **necessary to prevent imminent bodily harm or death.** Where it is necessary to prevent the **loss or destruction of evidence,** the officer **must have reasonable grounds to believe.** The reasonable belief standard is the same standard required in the case of most warrants. It strikes a proper balance between the interest of the state over the privacy of an individual. The lower standard of reasonable suspicion is viewed as necessary when the societal value of human life and limb is weighed against the privacy interest of sanctity of a dwelling house.

In **R. v. Godoy,** Chief Justice Lamer reconfirmed:

“[12] The accepted test for evaluating the common law powers and duties of the police was set out in Waterfield, supra (followed by this Court in **R. v. Stenning,** [1970] S.C.R. 631, [1970] 3 C.C.C. 145, 10 D.L.R. (3d) 224; **Knowlton v. The Queen,** [1974] S.C.R. 443, 10 C.C.C. (2d) 377, 33 D.L.R. (3d) 755; and **Dedman v. The Queen,** [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97, 20 D.L.R. (4th) 321). If police conduct constitutes a **prima facie** interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law? Second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty?  

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21 see **R. v. Grant** (1993), 84 C.C.C. (3d) 173 (S.C.C.) at p. 188-9


23 (1998), 131 C.C.C. (3d) 129 (S.C.C.) at p.135
“There is no doubt that the forcible entry by police into a private dwelling home constitutes a prima facie interference with a person's liberty and property...” (emphasis added).

i) To Prevent Imminent Bodily Harm or Death

Bodily harm is defined in section 2 of the Criminal Code to mean “any hurt or injury to a person that interferes with the health or comfort of the person and is more than merely transient or trifling in nature.”

In Godoy,24 the Supreme Court of Canada held that “at common law, police have a duty to act to protect life and safety” in circumstances of a 911 hangup call. The actions of a forced entry are justifiable and can be engaged whenever it can be inferred that the caller is or may be in some distress - even when the disconnection occurs before the nature of the emergency can be determined.25 This is now codified in section 529.3(2)(a) and further codified in provincial legislation. Chief Justice Lamër did note that if the 911 caller could be located without the need for a forced entry, then “obviously such a course of action is mandated. Each case will be determined in its own context...”26

In R. v. Golub27, the specific facts related to search incident to arrest were canvassed in circumstances that it was reasonably suspected that the accused may have an Uzi sub-machine gun. The accused exited his apartment in response to a request by a tactical response team but locked his door contrary to their instructions. He was arrested and asked if anyone else was in the apartment to which he ambiguously replied, “I don’t think so”. The tactical squad leader was very concerned that someone else might be in the apartment given the ambiguous answer and he believed a dangerous weapon was still in there. The tactical team was ordered within seconds of the arrest of the suspect to search the apartment for any persons who may be in the apartment (not evidence) because they “did not want to turn the scene over to investigators and risk a [later] confrontation with someone else wielding a gun in that apartment”28 The police had earlier investigated a complaint that the accused had made a threat against bar staff who had ejected him and in the course of speaking to a person had shown an 18 inch rifle that he had called an Uzi.

“Sergeant Curts acknowledged that while he suspected that someone else was in the apartment, he did not have reasonable grounds to believe that someone was

24 Supra., at p. 141
25 Supra., at p. 137
26 Supra., at p. 139
28 Supra., at p. 200
in the apartment. He went no further than to say there was a possibility that someone else was in the apartment. The trial judge appears to have held that a possibility was not enough to justify the entry and search. I disagree. The exercise of a police power ancillary to an arrest does not require independent grounds for its exercise: Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257, (S.C.C.) at p. 278. If the circumstances of an arrest give rise to a legitimate cause for concern with respect to the safety of those at the scene, reasonable steps to allay that concern may be taken. The nature of the apprehended risk, the potential consequences of not taking protective measures, the availability of alternative measures, and the likelihood of the contemplated danger actually existing, must all be considered. The officers making this assessment must, of course, do so on the spot with no time for careful reflection. In my opinion, a reasonable suspicion, based on the particular circumstances of the arrest, that someone is on the other side of a closed door with a loaded sub-machine gun, or that someone is lying injured on the other side of that door, creates a legitimate cause for concern justifying entry and search of the apartment for persons.

“Sergeant Curts did not order entry based on some pre-set protocol which directed entry in all "gun call" situations, and he was not acting on an unsubstantiated hunch. He considered all of the information available to him and on the basis of that information formed what, in my view, was a reasonable concern for the safety of those at [page212] the scene of the arrest. The information available included the respondent's behaviour that evening, his physical and mental condition, his delay in exiting the apartment, the location of his arrest, the respondent’s response to Sergeant Curts’ questions at the door, the respondent’s failure to leave the apartment door open when asked to do so, and the reasonable belief that there was a loaded, very dangerous weapon inside the apartment.

“Sergeant Curts' suspicion that someone else was in the apartment created a sufficient risk to the safety of the officers at the scene and anyone inside the apartment to justify reasonable steps to investigate those concerns. Sergeant Curts' legitimate concerns necessitated entry to, and search of, the apartment. The search was a thorough one, but did not exceed that which was reasonably necessary to secure the scene and preserve the safety of those at the scene. The officers looked where their experience indicated they might find someone.”

These extracts seem to authorize the use of a lower threshold of reasonable suspicion to authorize entry into a dwelling-house where it is reasonably suspected that someone is injured in a dwelling-house or in the situation which has subsequently been adopted in subsection 529.3(2)(a) of the Criminal Code that there is a risk of death or imminent bodily harm.

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29 Supra., at p.p., 211-212
ii) To Prevent Imminent Loss or Imminent Destruction of Evidence

Section 529.3(2)(b) is an attempt to have Parliament authorize a legislative exception to bypass the words of Justice Cory in *Silveira* by complying with his suggestion that legislative action may resolve the issue of whether the common law alone could justify search to prevent loss or destruction of evidence.

In *R. v. McCormack*, the British Columbia Court of Appeal approved an entry to ensure no-one else was present while the police obtained a warrant. The special circumstances of that case were that the police arrested the accused away from the scene, and were awaiting a warrant for his residence. The arrest was observed by a third party, the accused’s girlfriend, who made eye contact with the accused, causing the police to believe she might leave the scene of the arrest and destroy evidence. They knew she had previously looked after the apartment when the accused was away and was likely to have a key. The police entered, looked about to ensure no-one was present and retreated outside until the warrant arrived. In that case the entry was justified under section 11(7) of the *Controlled Drugs and Substances Act* and *Feeney* was distinguished as the police “had more than suspicion the appellant was involved in the activity for which he was arrested.”

Although this case is a situation where the arrest was made away from the dwelling, it may be useful in providing guidance as to the types of exigent circumstances in which the police may need to enter to arrest when occupants may receive a warning that may result in the imminent loss or imminent destruction of evidence.

Similarly, in *R. v. Damianakos*, the majority of the Manitoba Court of Appeal found the common law exigent circumstances warrantless arrest of an accused and freeze of his premises was unlawful and violated rights under section 8 of the *Charter*. The situation arose when the police arrested a person known to be a drug trafficker in a vehicle leaving the house. The police feared that this person may tip off the accused whom the police had decided to arrest and had already begun the process of obtaining a warrant to search his home. The police knocked and immediately entered saying police and arrested the accused for trafficking. They said something to the accused about a search warrant. They looked through the house making observations of some narcotics and firearms in “plain view”. Shortly thereafter explained they were obtaining a warrant. When it arrived, the seizures of the items in plain view were made along with other items found in the second search. The Court broke the searches into two parts. They found a breach of section 8 only with respect to the items in plain view in the first search. The court excluded the items found in the first search on plain view because the police failed to follow the announcement procedure in *Eccles v. Bourque*.

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30 Supra., footnote 20


32 Supra., at p. 270

33 (1997), 121 C.C.C. (3d) 293 (Man.C.A.)

34 (1974), 19 C.C.C. (2d) 129 (S.C.C.)
and misled the accused by stating “search warrant” at the time of entry. These amounted to a blatant disregard for the accused’s rights which were different than in Silveira\textsuperscript{35} where police had scrupulously waited for the warrant prior to searching. The court excluded the first items which had been seen and seized in “plain view” but admitted the second group of items which were found after execution of the warrant using a further distinction with Silveira that the police were already in the process of getting the warrant and did not begin the process until after the arrest as they had in Silveira.

In \textit{R. v. Dawson},\textsuperscript{36} the warrantless arrest of the accused Mrs. Dawson in her residence (in 1994), was at the time lawful (\textit{pre-Feeney}). Police exceeded the common-law right to enter and arrest in a dwelling that existed before \textit{Feeney} when they looked around the house to ensure no-one else was present prior to the arrival of the warrant when the in that case they did not have reasonable suspicion to believe they were in danger, or that someone might destroy the evidence. The violation of section 8 of the Charter was exacerbated by their staying in the premises for three hours (watching television and smoking on the balcony even though they did not search) until the warrant arrived. Evidence was excluded following a section 24(2) analysis that found further problems with the warrant.

\textbf{C) Consent, How and by Whom? Is it Worth the Risk?}

\textit{In Regina v. Wills},\textsuperscript{37} the accused was charged with impaired driving causing death. A malfunctioning ALERT\textsuperscript{TM} device erroneously registered a warning. Officers suggested that it might be helpful for the accused to take a breathalyzer test in the event of a civil lawsuit. Mr. Wills’ parents persuaded the accused to take the breathalyzer test. The readings were 120 mg per 100 ml blood. In this case Mr. Justice Doherty set out a six part test in order for a consent to be valid:

\begin{enumerate}
\item There was a consent, expressed or implied.
\item Giver of the consent had the authority to give the consent in question.
\item The consent was voluntary (not a product of police oppression, coercion, or other external conduct.)
\item Giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent.
\item The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested.
\item The giver of the consent was aware of the potential consequences of giving the consent.
\end{enumerate}

The court found that the last criteria was not met in that the accused was not aware that the police

\textsuperscript{35}Supra., footnote 20


\textsuperscript{37}(1992), 7 C.C.C. (3d) 529 (Ont. C.A.)
were still considering non-alcohol related charges. In dealing with the awareness of the consequences, Mr. Justice Doherty, stated:

“The awareness of the consequences requirement needs further elaboration. In Smith, supra, at page 322-323, McLachlin, J. considered the meaning of awareness of consequences requirement in the context of an alleged waiver of an accused 10(b) Rights. She held that the phrase required the accused have a general understanding of the jeopardy in which he found himself and an appreciation of the consequences of deciding for or against exercising his 10(b) Rights.

“A similar approach should be applied where section 8 rights are at stake. The person asked for his or her consent must appreciate in a general way what his or her position is via the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an innocent bystander whose help was requested by the police? If the person whose consent is requested is an accused, a suspect or a target, does that person understand the general way the nature of the charge or potential charge which he or she may face?”

Given the high threshold set out in R. v. Wills, why should the police ever consider using consent? In “Searches of Premises With Consent”, the author comments that consent searches are often relied upon to investigate suspected criminal activity when:

a) there are technicalities involved with obtaining a warrant;
b) there can be a wider scope if there are no limitations placed on the search;
c) it may give an ability to search where no probable cause exists.

In R. v. Wills, Justice Doherty stated:

“While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that a valid consent reinforces a principle of individual autonomy which underlies the rights set out in the Charter.”

Justice Doherty went on to say:

“it is probably more important to insist on a high waiver standard in the investigative

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38 Supra., at page 546
39 Barton P.G. “Searches of Premises With Consent” 35 C.L.Q. 376 at p. 377
40 Supra., footnote 37 at p. 541
stage where there is no neutral judicial arbiter or structured setting to control the process and sometimes no counsel to advise the individual of his or her rights.”

In *R. v. Stillman*, Justice Corey states:

“*R. v. Mellenthin* (1992), 3 S.C.R. 615... set out the requirements for a consent to be considered valid in the context of search and seizure. Specifically it is, ‘**incumbent upon the Crown to adduce evidence that the person detained had indeed made an informed consent to the search based upon an awareness of his rights to refuse to respond to the questions or to consent to the search**’.”

In *R. v. Edwards*, the Court made it very clear that you only get to the issue of consent if the person has a reasonable expectation of privacy. In this case as a result of police misrepresentation, the police obtained the girlfriend’s cooperation in locating drugs hidden in the apartment of his girlfriend by the accused. The accused was a frequent visitor at the apartment and had his own key. The accused’s girlfriend described the accused as a visitor without keeping personal belongings at the apartment. The accused did not contribute to rent or expenses. The accused also lacked the authority to regulate access to the premises, and, therefore, the accused was no more than a privileged guest, and had no reasonable expectation of privacy. Since no personal rights were affected by the police conduct the accused lacked standing to contest the admissibility of the evidence.

**Can a Spouse Consent?**

In *R. v. Van Wyk*, the police arrived at the Van Wyk residence to follow up an investigation in which the accused’s truck was identified as instrumental in causing a motor vehicle accident on the 401 Highway. A number of cruisers were parked in the driveway to approach the residence. Within 10-15 seconds, The Defendant’s wife responded to the police knocking at the front door of the home. Ms. Van Wyk pushed to screen door out toward the uniformed officers positioned immediately outside the door and they verbally identified themselves as police and produced their badges. The officers inquired whether Mr. Van Wyk was at home. Ms. Van Wyk was provided no further information as to the police objective in seeking to speak with her husband. Mr. and Ms. Van Wyk jointly owned their home. Mrs. Van Wyk then invited the police inside the house, which the accused acknowledged she had the authority to do. Constable Anders recalled Jean Van Wyk opening the door, and making a sweeping motion with her hand toward the interior of the residence as a signal to step inside. Mr. Van Wyk was awakened by his wife and subsequently answered questions

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41 Supra., footnote 37 at p. 542

42 (1997), 113 C.C.C. (3d) 321(SCC), at p. 347


44 (1999), O.J. No. 3515, (September 15, 1999, Hill J.)
acknowledging he was the driver. This led to his arrest. The Court in this case found that the search was unreasonable. Justice Hill provided this analysis:

“While there may have existed reasonable grounds respecting a search for, and seizure of, the truck and trailers registered to the accused, the police did not have reasonable and probable grounds for a Feeney warrant of arrest (ss. 529, 529.1 of the Code) for Henry Van Wyk.

“Undoubtedly, Mr. Van Wyk was a suspect but, in the absence of compelling evidence as to the identity of the driver at the time of the accident, there did not exist reasonable and probable grounds to arrest the registered owner of the vehicle as the person responsible: Regina v. Hicks (1988), 42 C.C.C. (3d) 394 (Ont. C.A.) At 407 per Lacourcière J.A. (affirmed (1990), 54 C.C.C. (3d) 575 (S.C.C.) at 575 per Lamer J. (as he then was)).

“A police investigator is at liberty, and indeed is obliged, in the execution of lawful duties, to ask questions to solve a crime. This entirely appropriate exercise by the police of their investigatory function, directed to any person whether suspected or not, includes inquiries directed to the identity of the party who may have committed an offence: Regina v. Hicks, supra, at 398; Regina v. Esposito, (1985) 24 C.C.C. (3d) 88 (Ont. C.A.) at per Martin J.A. (leave to appeal refused [1986] 1 S.C.R. viii); Regina v. Moran (1987) 36 C.C.C. (3d) 225 (Ont. C.A.) at 258 per Martin J.A. (leave to appeal refused [1988] 1 S.C.R. xi).

“In this case, the issue arises as to whether the authorities are entitled to pursue investigative questions, seeking further information, by warrantless attendance at a suspect’s residence. The accused asserts that the police intruded upon his reasonable expectation of privacy by coming onto his property to his home without notice or permission.

“The necessary starting point is a review of the principles in the judgement of Sopinka J. in Evans and Evans v. The Queen, (1996) 104 C.C.C. (3d) 23 (S.C.C.). In the absence of specific measures signalling the contrary (as existed in Regina v. Lauda, [1999] O.J. No. 2180 (C.A.)), any homeowner extends an “invitation to knock” to members of the public including the police. This implied licence to approach the door of a residence and knock is to permit communication with the occupant. Where the police act in accordance with this implied invitation, they cannot be said to engage in unconstitutional activity:

‘Where the police act in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant. The implied invitation, unless rebutted by a clear expression of intent, effectively waives the privacy interest that an individual might
otherwise have in the approach to the door of his or her dwelling.
(page 30)’

“The limited scope of such a waiver raises the need to determine the purpose of the
police in acting upon the implied invitation:

‘In my view, the implied invitation to knock extends no further than is required to permit
convenient communication with the occupant of the dwelling. The “waiver” of privacy
rights embodied in the implied invitation extends no further than is required to effect
this purpose. As a result, only those activities that are reasonably associated with the
purpose of communicating with the occupant are authorized by the “implied licence to
knock”. Where the conduct of the police (or any member of the public) goes beyond that
which is permitted by the implied licence to knock, the implied “conditions” of that licence
have effectively been breached, and the person carrying out the authorized activity
approaches the dwelling as an intruder. (page 31)’

“The accused places particular reliance upon Sopinka J.’s statements at pages 31 and
32:

‘As a result, the police approached the Evans’ home not merely out
of desire to communicate with the occupants, but also in hope of
securing evidence against them. Clearly, occupiers of a dwelling
cannot be presumed to invite the police (or anyone else) to
approach their home for the purpose of substantiating a criminal
charge against them. Any “waiver” of privacy rights that can be
implied through the “invitation to knock” simply fails to extend that
far. As a result, where the agents of the state approach a dwelling
with the intention of gathering evidence against the occupant, the
police have exceeded any authority that is implied by the invitation
to knock.

...’

‘Similarly, where the police, as here, purport to rely on the invitation
to knock and approach a dwelling for the purpose, inter alia, of
securing evidence against the occupant, they have exceeded the
bounds of any implied invitation and are engaging in a search of the
occupant’s home. Since the implied invitation is for a specific
purpose, the invitee’s purpose is all-important in determining
whether his or her activity is authorized by the invitation...

‘Mr. Van Wyk submitted that if the police intend to secure evidence through
speaking to the occupant such an objective constitutes an impermissible warrantless search. While a literal reading of the text of Sopinka J.’s statements might admit of such an interpretation, I am unable to accept that such an approach was intended.

“In the Evans case, the police sought to speak to the occupants and to sniff the air for marijuana once the door was opened. In Regina v. Campbell (1993), 36 B.C.A.C. 204 (C.A.), investigators sought to speak to the suspect in a stolen property case and to see if any stolen property was visible through the open door when the occupant answered the knock. In these instances, the police attempted to take advantage of the implied right to approach the residence door and knock through the hope that the occupant would respond to the knock, open the door, and reveal some part of the interior to the ears, eyes and olfactory facilities of the government agents. The act of opening the door, without more, permitted the search and seizure desired by the police. This is surely the limit of what Sopinka J. meant when he stated:

‘The police could enter a neighbourhood with a high incidence of crime and conduct surprise “spot checks” of the private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock.’

“I note that Major J., albeit in dissent, viewed the core issue in these terms:

‘Once lawfully at the door, however, the question remains as to whether sensory observations made from that position constitute searches within the meaning of s. 8 of the Charter. (emphasis added)’

“Where the sole purpose of the police officer is to ask questions of the homeowner, nothing can be gathered by the government, in the sense of unwitting disclosure by the occupant, until he or she chooses to speak. The police intent of facilitating communication, even investigative questioning, does not exceed the bounds of the implied right to approach and knock and is, accordingly, not trespassory or in breach of s. 8 of the Charter (emphasis added).

“I concur entirely with the observations of McEachern C.J.B.C. in Regina v. Vu (1999), 23 C.R. (5th) 302 (B.C.C.A.) at 311:

‘Further, if [Defence Counsel] is right, a police officer with information that an offender is at a certain residential address would not be entitled to knock on the door even for the purposes of ascertaining whether he would talk to the police. [Crown Counsel] suggested the following scenario: there is a hit and run accident but a vehicle license number is taken. It is given to the police who do a
computer check and find the name and address of the owner of the fleeing vehicle. Under the theory propounded, the police would not be able to knock on the door of this owner to ask him about the accident including permission to look at his vehicle if it was in a private garage.

‘In my judgement, principles extracted from authorities such as Hunter v. Southam and cases based upon it should not be extended so far ...’

“At page 30 of the Evans decision, Sopinka J. noted that the implied licence ends at the door of the dwelling. Two matters of significance flow from this observation which, in the circumstances of this case, after some initial comment, require further analysis. The implied licence to enter onto private property will generally import the requirement of a direct approach to the front door - not a trespassory detour elsewhere on the property to secure evidence. Secondly, the police have no jurisdiction to enter a dwelling-house unless admitted by an occupant with lawful authority to do so (emphasis added).

“On arrival at Mr. Van Wyk’s property, once the cruisers were parked in the driveway, the police could see a tractor and trailers backed in to the driveway to the side of the home. These observations in the dark, or as aided by the car headlights, exposed the vehicles in plain view. The vehicles had the general appearance of those described by witnesses to the accident. The record checks of the licence numbers provided by witnesses had already revealed the vehicles to be registered to Mr. Van Wyk at the Puslinch Township address.

“The principle investigators, however, elected to more closely examine the accused’s vehicle prior to attendance at the front door of the dwelling. To this end, officers did not approach the front of the home, but moved to the side of the residence, and walked around the tractor and trailer(s) to search for vehicle damage and to facilitate an attempted match of licence numbers. A flashlight was used to assist in the exercise.

“These actions of the police exceeded the scope of the implied licence to be on private property without a warrant. There was no consent or other lawful authority (as existed in Regina v. Joly, [1999] O.J. No. 1354 (C.A.) At para. 9-12). The investigators’ conduct was not incidental to an approach to the front door. The police trespassed to conduct a search and in so doing breached Mr. Van Wyk’s s. 8 Charter right to be secure against unreasonable search and seizure: Kokesch v. The Queen (1991), 61 C.C.C. (3d) 207 (S.C.C.) at 217-219 per Sopinka J. While the use of a flashlight directed toward private property to enhance human vision is permissible in limited circumstances as a reasonable aid to ensuring officer safety
In *R. v. Barrett*, Provincial Court Judge Lane found that consent of a common-law spouse was not sufficient in the circumstances and the evidence was excluded. In this case, when police knocked on the door and spoke to the accused’s common-law spouse, the accused was not at home. The accused’s wife consulted her in-laws, who were at home, and then allowed the police to enter. The police found a locked briefcase in the dresser drawer in the master bedroom in the accused’s house. The accused’s mother insisted that the briefcase be opened because she wanted to know if the accused had a gun. The police officer supplied the accused’s wife with a swiss army knife, and she then opened the briefcase. Inside was a semi-automatic pistol. In this case the Court found the officer’s did not have reasonable probable grounds to obtain a search warrant, there was no evidence of urgent compelling a warrant was searched nor was there any danger to public safety making it impractical for the police to conduct other investigations to collaborate the anonymous tip they had received. **Consent of a wife or mother, in this case, did not validate the search.** Even if the mother or wife had the authority in law to give consent, the consent could not have been considered informed consent.

In *R. v. Meyers*, in this case the accused was charged with nine counts of possession of stolen property. The police went to his residence at 11:45 p.m. and asked to speak to the accused after speaking to the accused’s wife. After speaking to the accused, the accused agreed to a search of the vehicles. That search had negative results. While the accused was cooperating in the search of the vehicles, another officer asked his wife whether they could also search the residence and she acquiesced but did assist by showing the officer certain areas of the house and made no objection. The accused later returned and also assisted and offered to help transport some goods to the police station. The police later returned at 3:00 a.m. with an administrator from the hospital the items were stolen from and the wife made no answer in answer to the suggestion that the police were there to search for other items. In this case the Court found that there was apparent consent from an occupant who had ostensible or apparent authority to consent. The consent was informed in that the occupant knew the purpose of the search. The occupant must have known she had a right to withhold consent since she was told if she withheld consent that a search warrant would be obtained. The consent had to be consciously, freely and voluntarily given. There was no suggestion of intimidation or threats were used to induce consent. Although the wife may have consented by acquiescence, it was not enough to satisfy the Judge that it was genuine consent. The Judge relied upon other evidence that was consistent with a valid consent. Specifically, she was mature, educated, able to communicate, and made no protest. Her conduct raised a strong inference that genuine consent existed.

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45 Supra., at p.p., 4-7


It should be noted that the Meyers case pre-dates the decision in Wills. While most of the required factors in the Wills case are considered, the last factor being awareness of the potential consequences does not seem to have been addressed. This was the deciding factor in the Wills decision. Arguably this case is fact specific, and may not today be decided in the same manner.

Can a Parent Consent?

In R. v. Langan, the police attended the accused’s residence and spoke to the accused’s parents. They then asked to speak to the accused, and waited while the parents went and got the accused. The Court in this case found that the search in this case was unreasonable. Gerein, J. stated:

“When I consider the circumstances of the accused in conjunction with the factors listed above, it cannot be said that the accused fits within many of them. In fact the only ones that he clearly meets are (i) presence at the time of the search; (ii) in possession of his room; and (iv) historical use of the property. However, I do not believe such a simplistic analysis is appropriate.

“Rather one must recognize that the presenting situation is that of a family and that this is so though, even though (sic) the accused was 22 years of age at the time and his sister even older. In such situations the parents inevitably own the property and retain the ultimate control. Unless expressly stated otherwise, those circumstances play no role in the relationships and do not impact on the question of who lives there, and whether it is his or her home. To view it otherwise would deprive the offspring of the right to privacy for so long as they resided with their parents. I do not accept this as being legitimate (emphasis added).”

In R. v. J.P.W., the Youth Court found that where parents gave permission to police to search the accused’s room, this was not a proper waiver of consent, and the evidence from the search was deemed inadmissible.

Can The Babysitter Consent?

In R. v. Taylor, police obtained the third party consent of a young teenage babysitter to enter the

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48 Supra., footnote 37
49 (2000), S.J. No. 103 (February 17, 2000, Gerein, J.)
50 Supra., at p.11
51 [1993] B.C.J. No. 2891 (September 27, 1993, B.C.Y. Ct., Howard, J.); (See also R. v. Barrett, supra., footnote 46)
residence at 2:30 a.m., and to wake up the accused, to obtain his cooperation and consent for a search. Lilles, Territorial Court Judge found:

“Although there are not a great number of Canadian cases dealing with third party consent, the article by P.G. Barton “Consent by Others to Search Your Place” (1993), 35 C.L.Q. 441, provides a helpful summary of the approaches by both American and Canadian courts. Professor Barton states, at p.449:

‘In a Canadian context the argument would be addressed at the stage of a search where consent apparently existed but where for one reason or another, it did not actually exist. The focus would then be on admissibility of the evidence and whether the police acted in good faith in the circumstances. An analogy to “apparent authority” would involve a look at whether it was reasonable for them to assume that the consenter had the power to do. They should be required to have made some inquiries into the power of the person consenting, rather than assuming it from appearances. I suggest, also, that apparent authority doctrines, drawn by analogy from agency doctrines might be useful in all third party consent cases. Not just those where mistakes were made. Instead of categorizing situations as property, contract, legislative or other authority cases, would it not be better to analyze the individual relationship closely to see there is any reason why the consenter should not have the power to consent?’” 53

In this case, the babysitter was unable to awake the intoxicated accused who was asleep in his bedroom. The accused had earlier returned and had vomited in the bathroom. A cousin of the accused, an off duty police officer who had attended the house to assist with cleaning up, had seen marijuana in the bathroom. The police asked the sitter if she wanted them to awaken the accused and she agreed. They entered to awaken the accused. They demanded he turn over the marijuana they knew from speaking to their colleague was there. He turned some over. The police insisted more was present and asked for him to fill out a written consent form. Taylor indicated he thought the police already had a warrant. The police told him he could consult a lawyer. The Court found the babysitter did not have the authority to consent in this case. The subsequent consent given by the intoxicated accused to uniformed and armed police officers in his bedroom was not informed consent. He did not know he could refuse. The Court further found that since he was detained, he had to have been given his rights to counsel and an opportunity to seek legal counsel.

Taylor’s statements and consent were conscriptive. Real evidence for which the police had grounds to seek a warrant was also excluded as it would bring the administration of justice into disrepute. The subsequent claim by his spouse, a co-accused who later became aware of the problem was also excluded as she was not informed of her rights and the admission was further tainted by the earlier

53 Supra., at p. 5
breaches. Although the accused was detained and not arrested, this case would in our opinion have had a similar result if an arrest had transpired.

**Can a third party consent?**

In *Regina v. Blinch*, the British Columbia Court of Appeal found that a neighbour could not waive the rights of the accused and could not consent to a warrantless search.

The Saskatchewan Provincial Court in *R. v. Trykalo* dismissed charges of obstruction after finding the police knocked on the door to investigate a loud party and entered without announcing by failing to identify themselves when an unknown female said ‘come in’. When the door opened, the female said, “Uh oh, it’s the cops”. The accused, after a conversation with the police, asked the police to leave. They did not leave. The court found the officers should have applied for a *Feeney* warrant and did not (even though they intended to issue a municipal ticket for which a *Feeney* warrant is not available).

In *Regina v. Mercer* and *Regina v. Kenney*, the Court held that a hotel manager could not consent to a warrantless search as there was a reasonable expectation of privacy on behalf of the occupants of a hotel room.

**D) When Lawfully in Dwelling House For Another Purpose**

i) to investigate when there are grounds to enter but no warrant

In *R. v. Godoy*, Chief Justice Lamer agreed with Finlayson, J.A.’s finding that police have a duty to enter a private dwelling where they reasonably believe the occupant is in distress and entry is necessary, not to arrest, but to protect life, prevent death, and prevent serious injury. Further, he clearly enunciated that police lawfully in a dwelling-house for another purpose (in that case a 911 hangup call) may formulate the grounds while they are investigating the other matter and arrest a person in that dwelling if the grounds exist to do so without leaving and obtaining a *Feeney* warrant.

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54(1993), 83 C.C.C. (3d) 158 (B.C.C.A.)


56(1992), 70 C.C.C. (3d) 180 (Ont.CA.), leave to appeal to SCC refused 74 CCC (3d) vi

57Supra., footnote 23 at p. 140

58Supra., footnote 23 at p.p., 140-1
The distinction that exists with the facts in R. v. Feeney\(^{59}\) and Godoy\(^{60}\) are that the police had grounds to be in the dwelling-house lawfully. Accordingly, the foundation of unlawful entry and an arrest without reasonable grounds and resulting tainted search incident to the arrest do not arise or trigger a Charter breach.

Care must, however, be taken not to subvert the intention of the ruling in Feeney by improperly extending a search into unlawful side searches. In R. v. Golub\(^{61}\) Doherty, J.A. stated “there was no suggestion that the arrest was in any way contrived to permit entry into and search of the residence.” Further, he also found:

“I would hold that where immediate action is required to secure the safety of those at the scene of an arrest, a search conducted in a manner which is consistent with the preservation of the safety of those at the scene is justified. If, in order to secure the safety of those at the scene, entry into and search of a residence is necessary, I would hold that the risk of physical harm to those at the scene of the arrest constitutes exceptional circumstances justifying the warrantless entry and search of the residence. The search must be conducted for the purpose of protecting those at the scene and must be conducted in a reasonable manner which is consistent with that purpose.”\(^{62}\)

In Cloutier v. Langlois\(^{63}\) the Supreme Court of Canada found:

“The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.”

Chief Justice Lamer further noted in Godoy\(^{64}\):

“Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's

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\(^{59}\)Supra., footnote 1

\(^{60}\)Supra., footnote 23

\(^{61}\)Supra., footnote 27, at p. 214

\(^{62}\)Supra., at p. 210

\(^{63}\) (1990), 53 C.C.C. (3d) 257 (S.C.C.) at p. 278

\(^{64}\)Supra., footnote 23 at p. 139
privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search the premises or otherwise intrude on a resident's privacy or property. In Dedman, supra, at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances. (I specifically refrain from pronouncing on whether an entry in response to a 911 call affects the applicability of the "plain view doctrine" as it is not at issue on the facts of the case at bar)” (emphasis added).

ii) execute another type of warrant

By extrapolation of the principles in Godoy, if police are executing a warrant to search and in the course of the search they gain sufficient grounds to arrest an offender, they may do so without leaving and obtaining a Feeney warrant.

iii) continue investigation by questioning when no grounds to obtain warrant

In R. Vu the Supreme Court of Canada affirmed without reasons the judgment of the British Columbia Court of Appeal which referred in obiter to a hypothetical situation:

“there is a hit and run accident and a vehicle licence number is taken. It is given to the police who do a computer check and find the name and address of the fleeing vehicle. Under the theory propounded [by the Defence] the police would not be able to knock on the door of this owner to ask him about the accident including permission to look at his vehicle if it were in a private garage....In my judgment, principles extracted from the authorities such as Hunter and Southam and cases based upon it should not be extended so far.”

The hypothetical motor vehicle accident situation approved of by Chief Justice MacEachern in Vu arose in R. v. Van Wyk [1999] O.J. No. 3515 (September 15, 1999, Hill, J.), at p.6. The court accepted this hypothetical situation as law but found that the actions of an officer looking at the truck with the aid of a flashlight exceeded the scope of the implied invitation and amounted to a trespass. Had he walked by the vehicle on the way to the door using the most direct route, without a walk

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65 Supra., at p.p. 140-1

around use of a flashlight, the observation that it was there would likely have been considered as acceptable as plain view or “incidental to the approach to the door”. The officer, instead, used the flashlight “exclusively in an evidence-gathering venture.” Justice Hill also noted “the right to use a flashlight to enhance officer vision is permissible in limited circumstances as a reasonable aid to ensuring officer safety Mellenthin v. The Queen, (1993) 76 C.C.C. (3d) 481 (S.C.C.) At 487 per Cory J.),...” Justice Hill declined, however, to afford a section 8 remedy. This situation did not result in a breach of the reasonable expectation of privacy, since

“there is a reduced expectation of privacy in a motor vehicle: Wise v. The Queen (1992), 70 C.C.C. (3d) 193 (S.C.C.) At 217-8 per Cory J. The officers walked a short distance only to the site of the commercial vehicles for external examination. The police secured no greater knowledge from the search of Mr. Van Wyk’s involvement in the occurrence than it possessed at the outset. \textbf{If damage to...vehicle(s) had been observed, supplying a circumstantial link to the accident, the situation might well be different} (emphasis added). The police observations, however, do not seem to have affected the reasonable grounds calculus. As well, I am not satisfied that any evidence subsequently discovered by the police was causally or temporarily [sic. temporally?] linked to the unreasonable search such that it could be said that the evidence was obtained in a manner that infringed the \textit{Charter: The Queen v. Goldhart} (1996), 107 C.C.C. (3d) 481 (S.C.C.) At 492-5 per Sopinka J.; \textit{Strachan v. The Queen} (1989), 46 C.C.C. (3d) 479 (S.C.C.) At 498-9 per Dickson C.J.C.”

These cases suggest that it is appropriate for police to attend at the door of a residence to make direct inquiries provided they make a direct approach and do not make other diversionary searches. This principle can and should be extended to allow police to attend at the door of a dwelling to make inquiry as to whether the accused is present. The results of this inquiry may confirm that an accused is present in a dwelling-house. That information can then be used to obtain a Feeney warrant or provide the information necessary to police that an accused for which an entry warrant exists is present.

IV \hspace{1em} \textbf{Statutory Procedure to Obtain a “Feeney” Warrant}

\textbf{A) Section 529 Authorization Entry of Dwelling-House on Arrest Warrant}

The statutory requirements of the authorization section are:

a) grounds exist for a federal warrant to arrest or apprehend;

b) the informant applies in person or by telewarrant procedure with a sworn, written information for an authorization to enter a dwelling-house;

c) satisfies the Judge or Justice that the informant has reasonable grounds to believe:
i) the person (must be identified);
ii) is or will be present;
iii) in the dwelling-house;
  d) immediately prior to entry the peace officer believes the person (must be identified) to be
  arrested or apprehended is present in the dwelling-house.

Section 529 of the **Criminal Code** allows an authorization to be added by a Judge or Justice (and
those who may issue a warrant to arrest under another federal Act - see section 34.1 of the
**Interpretation Act**) to a Form 7 warrant of arrest which would authorize the execution of the Form
7 warrant in a dwelling-house.

It is **unclear whether the authorization is designed to be heard only on the same occasion that the warrant is granted**. Arguably, the application should occur at the same time or right after the
warrant is issued. This is consistent with guidance sent from the Department of Justice just prior to
the implementation of Bill C-16. A similar view has been expressed by Renee Pomerance, and
by Andrew Locke and A. Larry Birnbaum. A **contrary view** is expressed by Watt and Fuerst who suggest that the authorization is an “add-on to an existing warrant of arrest or apprehension” in
Treemear’s **Criminal Code 2001**. Greenspan and Rosenberg do not address the issue in Martin’s
Annual Criminal Code.

The fact that only the grounds that a person is or will be in a dwelling-house section 529.1 needs to
be in writing to obtain this authorization may suggest to some that the application for an
authorization need not accompany the initial warrant application. This would accord with practice
that an arrest warrant is often issued without a written information (i.e., bench warrant for failure to
attend court). As well, grounds substantiating a dwelling-house entry may not be available at the time
a warrant is obtained (i.e., when a public interest warrant is issued or when a court issues a warrant
of committal for non-payment of a fine).

If, however, a separate application to authorize an arrest in a dwelling-house is subsequently made,
there will be a potential issue as to whether the original issuing Judge or Justice must make the
authorization. The form approved (although modifications to forms are permitted by virtue of
subsection 840(3) of the **Criminal Code**) is clearly in a format that is designed to be issued at the
same time as the form 7 warrant. If it is to be added later, amendments to traditional warrants must

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67 December 4, 1997 letter from Michael Zigayer with the Justice Department’s “Questions and Answers: Bill C-16”

(5th) 84, at p.89

69 “Warrant Authorizing Entry of Dwelling House For Purposes of Arrest”, August 1998

70 (Scarborough, Carswell, 2000) at p. 785

71 Supra., footnote 6
be made before the same judge before execution.⁷²

In these circumstances, **given the uncertainty that exists, the safest course of action would be to restrict the use of the authorization process to situations in which the grounds exist at the time of the original application.** If grounds for a dwelling-house or a further dwelling-house arise after a form 7 warrant is issued, it would be best to use the “’stand-alone’” warrant procedure in section 529.1 of the *Criminal Code* or to seek a whole new form 7 warrant of arrest and vacate and replace the original form 7 warrant at the same time.

The Judge or Justice must be satisfied by information on oath **in writing** that there are **reasonable grounds** to believe **the person is or will be present** in the dwelling house. The peace officer further may not execute the warrant in the dwelling unless immediately prior to entering the dwelling they have reasonable grounds to believe the person to be arrested or apprehended is present in the dwelling house.

**There are further potential drawbacks to the police choosing to follow the authorization method.** At present, form 7 arrest warrants which do not have an authorization to enter a dwelling do not become stale dated when they are not executed within a reasonable time. **It is unclear whether the addition of an authorization to arrest in a dwelling-house will create a situation where the endorsement is an unseverable clause of the arrest warrant.** If it is, this may cause the entire arrest warrant and endorsement to be treated in the same fashion as a search warrant. Normally search warrants lapse as stale dated if they are not executed within a reasonable time of issue. If the endorsement has the effect of creating an arrest warrant, the whole of which must be executed within a reasonable time (failing which the entire warrant and endorsement lapses as stale dated), this may require further application for form 7.1 “stand-alone” warrants when authorizations have expired given the uncertainty that exists as to whether successive applications for endorsements may be made.

Many jurisdictions in Canada now offer a telewarrant procedure. It is available under section 529.5 of the *Criminal Code* if the police officer believes it would be impractical in the circumstances to appear personally before a judge or justice. The section incorporates the provisions of section 487.1 which require, *inter alia*, the Chief Provincial Court Judge designate justices, and for the provision of a record either by way of recording or reproducing a writing. The existence of this process can be seen as a limit on police action as they must consider whether they could obtain such a warrant (if available in their jurisdiction) before executing a warrantless entry in exigent circumstances.

*Ex juris* execution of a form 7 warrant which has an authorization attached is permitted only when the warrant is endorsed by a justice in the jurisdiction of execution under section 528 of the *Criminal Code*.

The section does not restrict the number of dwelling-houses that can be authorized. Indeed, it is often

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the case that a person has more than one address (i.e., parent(s), girlfriend(s), or boyfriend(s), hotel, cottage).

Additionally, **if the warrant with an authorization is treated as an order with an unseverable authorization clause**, there could be situations where an attempt to execute the warrant at a dwelling-house results in the entire warrant being spent on execution (as would happen in the case of a search warrant which can only be executed once) which could preclude execution at other named dwelling-houses or at all. In such a situation, if by operation of law the entire document is spent when a person is not found in a dwelling, this could create a situation whereby technically the police may not be able to use the warrant of arrest until another warrant is obtained. There does not appear to be any case authority to illustrate this risk and although it is possible, it is the authors’ view that such an interpretation is unlikely.

If the courts interpret the endorsement as an unseverable clause, in both of the above scenarios, a difficult situation for both police and judiciary will result. This will require frequent re-application for warrants and endorsements or warrants of arrest and stand-alone entry warrants. This will lead to uncertainty over whether a warrant was still in force or not, and a consequent uncertainty with how to enter such matters on policing computer systems.

**Alternatively, the authorization may be viewed by the courts as one or more severable clauses** which could expire by operation of law as it becomes stale dated. This would effectively allow the form 7 warrant to continue in force despite the expiry of the endorsement.

A warrant which is executed becomes spent. It cannot be executed again. There is an issue as to whether in a section 529 authorization, the unsuccessful execution would result in the entire warrant becoming spent or just the authorization clause. Since it is possible to seek authorizations for more than one dwelling-house on the same document, the issue of what becomes spent when an unsuccessful execution is made at some but not all locations may arise. In an effort to address issues of uncertainty over whether each location authorized is spent, a clear expression that only the clause relating to an unsuccessful execution is spent. The entire warrant is obviously spent on successful execution so this does not need to be stipulated.

Until the law is clarified by the courts, the police would be well advised to use the “stand-alone” search warrant procedure in section 529.1 instead of the section 529 authorization procedure in order to avoid the risk of losing the underlying arrest warrant by either operation of time or attempted execution. “stand-alone” warrants are available for all circumstances that an authorization can be granted in. Furthermore, the scope of availability is more comprehensive.

At this time, the authorization is a valid procedure with some potential risks.

**B) Section 529.1 Stand-Alone Warrant to Enter Dwelling-House**

The statutory requirements of the “stand-alone” warrant section are that:
a) a federal warrant to arrest or apprehend exists and is in force in Canada, or
b) grounds exist to arrest without warrant under subsection 495(1)(a) or (b) or other federal legislation;
c) the informant applies in person or by telewarrant procedure with a sworn (not necessarily written) information for a warrant to enter a dwelling-house;
d) satisfies the Judge or Justice that the informant has reasonable grounds to believe:
   i) the person (identified or identifiable);
   ii) is or will be present;
   iii) in the dwelling-house;
e) immediately prior to entry the peace officer believes the person (identified or identifiable) to be arrested or apprehended is present in the dwelling-house;
f) a telewarrant may be applied for if the procedure is sanctioned by the Chief Judge of the Provincial Court in accordance with the procedure in sections 529.5 and 487.1 of the Criminal Code.

The “stand-alone” warrant procedure provides that a Judge or Justice (and those who may issue a warrant to arrest under another federal Act - see section 34.1 of the Interpretation Act) may issue a warrant in Form 7.1 authorizing a peace officer to enter a dwelling house described in the warrant for the purpose of arresting or apprehending a **person identified or identifiable** by the warrant. This is more comprehensive than the authorization procedure. The Judge or Justice must be satisfied by information on oath (which may or may not be in writing)\(^73\) that there are **reasonable grounds to believe** the **person is or will be present in the dwelling house** and that

\[
a) \quad \text{a warrant referred to in a Federal Act to apprehend the person is in force anywhere in Canada; or}

b) \quad \text{grounds exist to arrest the person without warrant under section 495(1)(a) or (b) (**but not** (c)) of the Criminal Code; or}

c) \quad \text{grounds exist to arrest or apprehend the person without warrant under an Act of Parliament other than the Criminal Code.}
\]

The elimination of subsection 495(1)(c) appears at first blush to be a restrictive distinction between “stand-alone” warrants and authorizations. However, it is submitted that the **“stand-alone” entry warrant is broadened in scope by removing this reference which has the effect of allowing peace officers to obtain such a warrant if a federal warrant is in force anywhere in Canada instead of restricting it to situations where the warrant is in force in the territorial jurisdiction in which the individual is found.**\(^74\)

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\(^73\) see *Re Sieger and Avery and the Queen*, (1982), 65 C.C.C. (2d) 449 (B.C.S.C.)

\(^74\) subsection 529.1(a) *Criminal Code*
This broader scope permits a form 7 arrest warrant issued in one province to form the basis for a “stand-alone” entry warrant issued in another province without the necessity of a form 28 endorsement (section 528 Criminal Code) so long as the stand alone warrant is issued in the same Province or Territory. Any time that the “stand-alone” warrant is issued in a different Province or Territory than the location of the dwelling-house, a form 28 endorsement is required to authorize the execution.

Many jurisdictions in Canada now offer a telewarrant procedure. It is available under section 529.5 of the Criminal Code if the police officer believes it would be impractical in the circumstances to appear personally before a judge or justice. The section incorporates the provisions of section 487.1 which require, inter alia, the Chief Provincial Court Judge to designate justices, and for the provision of a record either by way of recording or reproducing a writing. The existence of this process can be seen as a limit on police action as they must consider whether they could obtain such a warrant (if available in their jurisdiction) before seeking a warrantless entry.

Again, prior to entry the officer may not enter unless immediately before the entry the officer has reasonable grounds to believe the person is present in the dwelling house.

As with the authorization procedure, the “stand-alone” warrant may cover one or more dwelling-houses. Unlike the authorization procedure, separate warrants can be obtained for each dwelling-house. These other warrants have an advantage in that it is clear that they may be obtained at times other than when an arrest warrant is obtained.

This warrant, like other search warrants, may also expire if it is not executed within a reasonable time of issue. However, an underlying arrest warrant is not affected and will remain intact and unaffected by any execution of the “stand-alone” warrant. It can therefore be used to ground subsequent “stand-alone” warrants. It is recommended that an issuing judge or justice fix a reasonable time for execution of the “stand-alone” warrant pursuant to subsection 529.2 of the Criminal Code. Since a reasonable time for execution is fact specific, evidence to support a determination of this issue should be placed before the issuing judge or justice. This will assist in police determination of how long the warrant is in effect and when new applications must be made.

A warrant which is executed becomes spent. It cannot be executed again. The situation is not problematic when it arises in a section 529.1 “stand-alone” warrant which authorizes entry to only one dwelling-house. However, since it is possible to approve entry to more than one dwelling-house in the same warrant, the issue of what becomes spent when an unsuccessful execution is made at some but not all locations may arise. In an effort to address issues of uncertainty over whether each location authorized is spent, a clear expression that only the clause relating to an unsuccessful execution is spent. The entire warrant is obviously spent on successful execution so this does not need to be stipulated.

This warrant procedure avoids most of the uncertainty surrounding the authorization procedure. There is no issue as to whether the clause is severable from the arrest warrant and accordingly, an
underlying section 529 Criminal Code arrest warrant which does not have an authorization will clearly continue in effect even if the section 529.1 arrest in dwelling house warrant is spent by an unsuccessful execution or by operation of time. Further, the procedure is more expansive in scope by allowing warrants to be obtained for individuals who are “identifiable” and not just identified.

V Entry into Dwelling-House Using Either a “Feeney” Warrant or in Exigent Circumstances

A) The Requirement to Announce Subsection 529.4

Recognition of the need to permit force to be used upon announced entry into dwelling-houses has historical roots. In Eccles v. Bourque\textsuperscript{75} it is clear the historic authorization of use of force to enter and arrest when there are reasonable and probable grounds to exist that the person sought is within and after announcement, has been with us for centuries. The requirement to announce exists even when a forcible entry is not necessary.

B) Recognized Exceptions To The requirement to Announce

The common law has been codified in subsection 529.4 of the Criminal Code to permit exceptions to announcement in exigent circumstances. At common law, as outlined in Eccles v. Bourque\textsuperscript{76} “Except in exigent circumstances, the police officers must make an announcement prior to entry. There are compelling considerations for this. An unexpected intrusion of a man’s property can give rise to violent incidents. It is in the interests of personal safety of the householder and the police as well as respect for the privacy of the individual that the law requires, prior to entry for search or arrest, that a police officer identify himself and request admittance. No precise form of words is necessary. In Semayne’s Case [(1604), 5 Co. Rep.91a, 77 E.R. 194], it was said he should ‘signify the cause of his coming, and to make request to open the doors’. In Re Curtis (1756), Fost. 135, 168 E.R. 67, nine of the judges were of the opinion that it was sufficient that the householder have notice that the officer came not as a mere trespasser, but claiming to act under property authority, the other two judges being of the opinion that the officers ought to have declared in an explicit manner what sort of warrant they had. In Burdett v. Abbott (1811), 14 East. 1, 104 E.R. 591, Bayley, J., was content that the right to break the outer door should be preceded simply by a request for admission and a denial. The traditional demand was ‘Open in the name of the King’. In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers, and (iii) notice of purpose, by stating a lawful reason for entry. Minimally, they should request admission and have admission denied although it is recognized there will be

\textsuperscript{75} Supra., footnote 34 at p.p. 130-2

\textsuperscript{76} Supra., at p. 134
occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.”

i) If Ordered and Announcing Would Expose Peace Officer Or Other Person to Imminent Bodily Harm or Death - Section 529.4

Subsection 529.4(1)(a) entry provisions permit discretion on behalf of an issuing judge or justice to order that an announcement is not necessary when they are satisfied on information on oath that the peace officer has reasonable grounds to believe that a prior announcement of the entry would expose the officer or any other person to imminent bodily harm or death. As noted earlier, bodily harm is defined in subsection 2 of the Criminal Code.

Additionally, subsection 529.4(2) enacts a procedural safeguard that requires the officer executing the entry warrant to revisit the issue of announcement. The officer who has a warrant that does not require announcement must, nevertheless, still announce unless immediately before entering, reasonable grounds to suspect that prior announcement of entry would expose the peace officer or another person to imminent bodily harm or death.

The lower standard here with respect to bodily harm or death has been approved of in Cloutier v. Langlois which is referred to more recently by Justice Doherty in R. v. Golub.

ii) If Ordered and Announcing Would Result in the Imminent Loss or Imminent Destruction of Evidence Relating to the Commission of an Indictable Offence - Section 529.4

Subsection 529.4(1)(b) entry provisions permit discretion on behalf of an issuing judge or justice (and those who may issue a warrant to arrest under another federal Act - see section 34.1 of the Interpretation Act) to order that an announcement is not necessary when they are satisfied on information on oath that the peace officer has reasonable grounds to believe that a prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to an indictable offence.

Again, subsection 529.4(2) enacts a procedural safeguard that requires the officer executing the entry warrant to revisit the issue of announcement. The officer who has a warrant that does not require

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77 Supra., footnote 63 at p. 278
78 Supra., footnote 27 at p. 200
announcement must, nevertheless, still announce unless immediately before entering, the officer has reasonable grounds to believe that prior announcement of entry would result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence.

In this subsection the threshold is the normal higher standard of reasonable grounds. The circumstances are limited to indictable offences only which may be a restrictive effort to have an element of seriousness as a balance. It should be noted that indictable offences include “hybrid” offences by virtue of subsection 34 of the Interpretation Act. There are not many strict summary offences remaining in the Criminal Code. Care, should be taken to ensure that the type of authorization is not extended by some into any existing summary offence.

iii) When Warrantless Entry and Exigent Circumstances Subsection 529.4(3)

Many jurisdictions in Canada now offer a telewarrant procedure. It is available under section 529.5 of the Criminal Code if the police officer believes it would be impractical in the circumstances to appear personally before a judge or justice. The section incorporates the provisions of section 487.1 which require, inter alia, the Chief Provincial Court Judge to designate justices, and for the provision of a record either by way of recording or reproducing a writing. The existence of this process can be seen as a limit on police action as they must consider whether they could obtain such a warrant (if available in their jurisdiction) before seeking a warrantless entry.

If a warrantless entry is utilized, the same restrictions relating to warranted entries are imposed on the requirement to announce. Specifically, a peace officer may not enter without announcing unless the peace officer has immediately before entering the dwelling-house,

(a) reasonable grounds to suspect that prior announcement of the entry would expose the officer or any other person to imminent bodily harm or death; or
(b) reasonable grounds to believe that prior announcement of the entry would result in the imminent loss or imminent destruction of evidence relating to the commission of the indictable offence.

VI Reasonable terms and Conditions Section 529.2

Whichever route is chosen, authorization or “stand-alone” warrant, a Judge or Justice shall include in the warrant any terms and conditions they consider advisable to ensure that the entry into the dwelling house is reasonable in the circumstances (section 529.2).

i) Time Frame /Duration

A measure of certainty on the issue of when a warrant would lapse by operation of time can be addressed in this fashion. It may be useful to insert a clause into the section 529.1 warrant or section 529 endorsement indicating an expiry in a set number of days from issue if the warrant has not been executed. The number of days should be a reasonable number based upon the circumstances of the
case and supported in the information used to seek the endorsement. Specifically, the clause should state:

“this section 529.1 arrest warrant will expire if the warrant has not been executed by _______.”; or

“this section 529 authorization which permits execution of the arrest warrant in a dwelling house will expire if the warrant has not been executed by_______. The remaining clauses of the warrant will not expire on this date.”

ii) Time of Day

Although an entry warrant is not a warrant that must be executed by day, one can envisage circumstances in which the issuing judge or justice may seek to restrict or specify a time of execution. This could arise more frequently when the dwelling-house or area has school age children who will be absent at certain times and hence out of a potentially dangerous situation. Another example could arise in areas where the proximity and risk to third parties would be higher at certain times of the day.

These situations are unlikely to occur frequently as peace officers already have a significant restriction in executing the entry warrant when the have reasonable grounds to believe the target is in the dwelling-house.

iii) Execution of Warrant at Specified Location Extinguishes Only That Clause

A warrant which is executed becomes spent. It cannot be executed again. As previously noted, there is an issue as to whether in a section 529 authorization, the unsuccessful execution would result in the entire warrant becoming spent or just the authorization clause. The situation is not problematic when it arises in a section 529.1 “stand-alone” warrant which authorizes entry to only one dwelling-house. However, since it is possible to seek both forms for more than one dwelling-house at the same time, the issue of what becomes spent when an unsuccessful execution is made at some but not all locations may arise. In an effort to address issues of uncertainty over whether the whole warrant is spent when an unsuccessful attempt to execute is made, a clear expression that only the clause relating to an unsuccessful execution is spent. The entire warrant is obviously spent on successful execution so this does not need to be stipulated.

VII Pitfalls

i) Use of Force

It is clear by the provisions of Feeney Warrants that normally police officers must announce their entrance, that the police must be very cautious in the use of force. Ultimately, whenever a Charter analysis is applied to a forceful entry, the issue of excessive force can arise at two points. First, under
section 8 of the Charter, *R. v. Collins* holds that a search is reasonable and lawful if it is
i) authorized by law;
ii) the law is reasonable; and
iii) it is carried out reasonably.

This latter point permits the issue of excessive force to be considered in a section 8 analysis.

If the search is unreasonable and hence unlawful, the Court will then consider whether the admission of the evidence could bring the administration of justice into disrepute under section 24(2) of the Charter. In *Collins*, there are three considerations under this subsection. These are:

i) the effect on the fairness of the trial;
ii) the seriousness of the breach; and
iii) the effect on the trial of the exclusion of the evidence.

When considering the seriousness of the breach, the Court will often consider the issue of good faith of the officers involved in the search. The use of excessive force “can be legitimately be characterized as lacking in good faith (which, however, is not necessarily to be equated with the presence of bad faith)”.

A search must not be conducted in an abusive fashion.

In *R. v. Chandrasekaran*, the police received a Feeney warrant containing the clause: “whereas there are reasonable grounds to believe that the prior announcement of the entry would:

a) expose the police officer or any other person to imminent bodily harm or death”.

... 

“[A] team of six police officers from Toronto Central Field Command Drug Squad entered the residence in what was described by the police as a dynamic entry, which in ‘lay terms’ means a breaking open of the door. They did not make a prior announcement of their entry.”

The Court in this case found the case court form there was more than a technical breach of the Charter. The Court found:

“Here there was forceful invasion of the person’s home by a contingent of six police officers who were without conformity with the terms of the warrant issued and in

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79 (1987), 33 C.C.C. (3d) 1 (S.C.C.)

80 *Supra*.

81 *see* *R. v. Chandrasekaran*, [2000] O.J. No. 2230 (June 9, 2000, Low, J.)

82 *see* Cloutier v. Langlois , supra footnote 63 at p. 278

83 *supra*, footnote 81 at p.p. 2-3,
circumstances where the warrant was not validly issued. I am not able to say the breach is merely technical. In the continuum between a grave and flagrant breach and one that is merely technical, this breach was, in my view, a serious one. While I am not satisfied on the evidence that the police used the arrest warrant as a ruse to gain entry to do a drug raid, the Charter rights of [the Defendant] ...this conduct can be legitimately be characterized as lacking in good faith (which, however, is not necessarily to be equated with the presence of bad faith).”

In *R. v. Gilpin*, police received information from an apartment manager relating to a high amount of foot traffic to an apartment coupled with a frequent smell of marijuana. This was on November 5, 1997 (which was during the time that the Supreme Court of Canada had extended time for Parliament to deal with the *Feeney* decision), The manager suspected illegal activity. The police checked to see if there were any outstanding warrants for the suspect and found an endorsed warrant. An endorsed warrant (subsection 507(6) *Criminal Code*) in these circumstances is one in which the issuing judge or justice has seen fit to authorize the release of an accused by a peace officer or by the officer in charge pursuant to the procedure in section 499 of the *Criminal Code* instead of requiring the person be brought to Court. Accordingly, to be released, the individual did not even have to be taken from his home.

The officers attended at the apartment and listened at the door. They heard female voices and one male voice. They knocked and at the same time obscured the “peep hole” with a thumb. The accused came to the door and asked, “Who is it?” without opening the door. An officer responded, “Police.” At that point, the accused opened the door a crack and then quickly slammed it shut. The police tried to prevent it from slamming shut but could not. In executing the warrant, the four officers drew their guns, broke the door down, and ordered all inside to lie on the floor. The officers noticed some stolen stereos near the accused on the floor. They searched through the apartment to see if anyone else was hiding inside and found more stolen car stereos. They smelled burning marijuana. They checked serial numbers for the stereos and found some were stolen. A search warrant was then obtained and in the course of execution, illegal drugs were found.

Romilly J. noted that “exceptional [not exigent] circumstances do not refer to circumstances which rarely arise, but rather to circumstances where a state interest is so compelling that it must override a person’s right to privacy within the home.” He found further that “there was absolutely nothing to prevent the police from making a proper announcement and being denied admission before breaking down the door.” There were no such exceptional circumstances. The entry was unlawful. The Court found that the Charter breach was serious indeed (egregious) and the evidence was

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84 Supra., at p. 7
86 Supra., at p.6
87 Supra., at p.7
excluded citing *R. v. Burlingham* where Justice Iacobucci stated:

“Short cutting or short circuiting those rights affects not only the accused but the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques, are of fundamental importance.”

In *R. v. St. Denis*,\(^8^9\) the police responded to a complaint of an assault. They met the victim at a residence, and she and two others related that the assault had taken place in the front yard of the adjacent house. The witnesses had thought the parties responsible had left by driving away in a car. A police officer, nevertheless, attended at the home next door, and knocked. He identified himself and was refused entry. He made a warrantless forced entry with the stated intention of arresting those inside, determining who was responsible, and releasing those that were not involved. The **police entered the dwelling-house without a search warrant and without any reasonable grounds.** They arrested and handcuffed four males and invited the witnesses to attend a “lineup” which **resulted in two of the four being identified.** The officer **had only suspicion** that those responsible may be there. They did not have reasonable grounds on which to base the arrest, justifiable from an objective view. **An arrest cannot merely be made for investigatory purposes.** The arrest and lineup breached the paramount expectations of privacy of persons lawfully in this dwelling. **The evidence of the unfair identification was excluded as was the evidence relating to an assault of the officer.**

In *R. v. McAllister*,\(^9^0\) officers entered the residence without announcing, and arrested the accused at gunpoint, forcing him to the floor and handcuffing him. In this case the Court discussed the United States case law at page 11.:

“The United States case law also leans strongly against the adoption of specific no-knock warrants. The prevailing view is that a magistrate may not issue a no-knock search warrant in the absence of a statutory provision. Wayne R. LaFave, *Search and Seizure*. Sec. 4.8(g) (1987), State v. Bamber, supra at page 1051. Not all states have such provisions: State v. Bamber, supra. At the federal level no-knock warrants were enacted as part of the *Comprehensive Drug Abuse, Prevention and Control Act* of 1970. The legislation authorized federal no-knock warrants where the issuing magistrate found probable cause to believe that notice might allow suspects to destroy evidence. These were repealed four years later due to public outcry and widespread stories of terrified citizens thinking themselves the targets of burglaries and home invasions: Charles P. Garcia, “The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception” 93 Columbia. Law Review 685 (1993).

\(^8^8\) (1995), 97 C.C.C. 385 (S.C.C.) at p. 408


\(^9^0\) [2000] B.C.J. No. 963 (February 11, 2000, Wong, J.)
“Courts have also indicated that no-knock warrants cannot replace the particularity analysis. In *Washington v. Jeter*, supra, the Court rejected the validity of a no-knock search regardless of the fact of express no-knock authorization in the warrant. What would have been necessary was observation at the scene or specific prior knowledge.

At page 313 the footnote reads:

‘Like the trial court, we place no significance on the “no knock” authorization in the warrant. We think such a provision is superfluous and that justification of the unannounced entry must be based on the specific facts known to the police officers executing the warrant.’”

An example of poor judgment escalating a situation is found in *R. v. Sulyk*91. In that case, two experienced officers attended at a residence to arrest without warrant a lady alleged to have called two persons that she was prohibited by undertaking from contacting. The accused came to the door either in response to the door bell or her mother requesting her to come. The officers were in plain clothes but were well known to the defendant as police officers. They nevertheless identified themselves and reached out to arrest the accused for breach of undertaking stating she was under arrest and would have to accompany them. She was at this time inside the residence and the officers were on the doorstep. The officers were never invited inside. The screen door was open. The accused was emotionally upset and refused to come.

The officers then noticed what appeared to be pepper spray in the Defendant’s hand. They asked what it was and she informed them it was dog repellant and that it would only hurt for a few minutes. The officer then got out his own pepper spray and closed the screen door most of the way but left enough room for his cannister to intrude and he sprayed the accused. He indicated he feared for his safety. The accused was not affected by the spray and she retaliated causing the officers to retreat (one was sprayed in the eyes). The Defendant remained inside sitting at the top of a short flight of stairs near the door. One of the officers repeatedly tried to enter and each time, she pointed the cannister at him and he retreated, closed the door and stated he would not come in. The parties continued to talk and the mother tried to convince the accused to go with the officers but she declined.

The officers then called for gas masks to be brought to the scene which took 45 minutes. During the wait the accused said the officers would need to point his gun and she said something about 16 bullets. When they entered the dwelling, the accused started to walk away. The officer sprayed her again since he did not know what she would do. The spray was again ineffective as it hit the side of her head. The officers grabbed her and handcuffed her to complete the arrest.

Despite finding that the evidence of the accused and her mother was not credible. The Court noted that neither side had argued exigent circumstances and found further that none existed. There being

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no authority for the police to enter the dwelling, the accused was entitled to resist what was at law a forcible entry by the police under section 72 of the *Criminal Code*. There was no invitation or consent given to the officers and she was entitled to stand on her right at the door and require the police to leave and obtain a warrant. “She did not need to articulate this given the clear absence of authority for the officer’s actions.” The facts of this case amounted to a proper defence of dwelling under section 40 of the *Criminal Code*. “She was not required to measure her actions nicely” and her actions were not excessive.

**ii) Knock and Investigate / Question - How Far Can We Go After “Evans”?**

The dilemma involved in execution of a *Feeney* warrant is the procedural safeguard that requires the police to have reasonable grounds that a person is in the dwelling-house at the time of the execution of the warrant. This prevents the police from executing a *Feeney* warrant for a “look-see” which inevitably would result in the finding of evidence either incident to arrest, in “plain view” at common law, or in the course of their duties (section 489 *Criminal Code*).

It is a simple manner to have the police do a “knock-on” or “perimeter search” to see if the suspect is in. However, the Supreme Court of Canada has potentially limited the use of these techniques. The question arises: how can the police legitimately find out if the accused is in? Do they have to resort to the rumored trick telephone calls inviting the accused to leave quickly as the police are coming or other subtle tricks.

One option that always exists is the use of a general investigative warrant under section 487.01 of the *Criminal Code* if there are reasonable grounds to believe that information concerning the offence will be obtained. It can authorize various types of surveillance (video, infra red, telescopic - to name a few), or even covert entry which is provided for under section 487.01(5.1) of the *Criminal Code* (to install such devices or perhaps even to look around if the preconditions are met). The purpose in these cases must be to find information about an offence by “using any device or investigative technique or do anything which if not authorized be an unreasonable search and seizure.” The Part VI interception of communication provisions may also be authorized separately or in a layered approach with the general investigative warrant. Caution should be considered in the use of this procedure as case authority has not yet arisen to define limits. Further, anything (inanimate things - not the person) that there are reasonable grounds to believe will reveal the whereabouts of a person believed to have committed an offence must, however, be sought by a section 487 *Criminal Code* warrant under subsection 487(1)(b). The existence of this warrant subsection automatically disentitles a search for these animate things under the general investigative warrant.

In order to understand the limits on warrantless police behaviour, we need to understand the limitations imposed in the *Evans and Evans v. The Queen*. In this case, police received a crime stoppers tip that a narcotic was in a particular house which would have been insufficient to obtain

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92 (1996), 104 C.C.C. (3d) 23 (SCC)
a search warrant. The police officers, knowing that they had to substantiate the tip in order to ground a warrant, decided that they would go and knock on the door, conducting, in a sense, a perimeter search. When they knocked on the door they smelled marijuana and used that to go away and get their search warrant. The Supreme Court of Canada held despite an implied invitation to knock, “as a result, only those activities that are reasonably associated with communicating with the occupant are authorized by the implied invitation to knock.” Individuals in the position of the accused have a reasonable expectation of privacy in the approach to their home that is waived for the purposes of facilitating communication with the public. However, the police exceeded the terms of this waiver and approached the doors for an unauthorized purpose thereby exceeding the implied invitation by becoming intruders. In this case, they approached the residents for the purposes of securing evidence and were involved in a search of the occupants' home. The evidence was admitted by reason of good faith demonstrated by the officers, and the fact that the officers were unaware the 'olfactory perimeter search' was beyond their investigative powers and the subsequent search was in reliance on a warrant. To exclude the evidence would tarnish the image of the administration of justice.

The Supreme Court of Canada is slowly moving down the road of condemning in stronger and stronger terms, police practice of warrantless search and methods used to obtain search warrants. More and more frequently, courts are taking a closer look at police conduct and are closely scrutinizing the issue of good faith given past case law and are making findings that imply police authorities ought to have learned the lesson earlier. When they have not the court is emphasising that they will not in future accept an argument of good faith. They are using a “foot in the door technique “ to serve notice that in future the evidence obtained in a like manner will likely be excluded.” Police agencies must, therefore, learn to address deficiencies in practice by keeping up to date in developments in the law.

Obviously, then the implied invitation to knock continues to exist but is subject to a limit. In R. v. Vu\(^{93}\) the Supreme Court of Canada affirmed the British Columbia Court of Appeal’s determination that police have the right to approach a residence (in that case a motel unit) for the purpose of identifying a suspect. This was authorized as falling within the scope of the implied invitation to knock. The facts of that case are of interest since the police were conducting narcotic buys from suspected traffickers. After the buy, other police officers attended at the apartment to identify the suspect. They pretended to be investigating an assault. The officers had already received a description of the seller from the undercover operative which included the last name the person had provided during the buy. Chief Justice MacEachern acknowledged that the officers seeking to identify had crossed the door plane and entered into the hall of the premises. He found

\[\text{“that nothing turns on [that] fact...because they looked for no evidence there and the Crown placed no reliance upon any information they obtained inside the premises beyond looking at the accused before they stepped across the threshold. The question of Charter infringement must be decided on the basis of the officers walking to the door of the premises, knocking on the door, and looking at the accused when he} \]

\(^{93}\)Supra., footnote 66
opened the door.”

Further, he indicated,

“To obtain a warrant in these circumstances is futile because there was a risk the accused would not be on the premises after the warrant was obtained and the officer had no grounds for believing any drugs would be found in Unit 15. Moreover, as the drug sting was continuing for some considerable time, the police cover would be jeopardized by the use of a warrant.

“Further, if [the Defence] is right, a police officer with information that an offender is at a certain residential address would not be entitled to knock even for the purposes of ascertaining whether he would talk to the police. [The Crown] suggested the following scenario: there is a hit and run accident and a vehicle licence number is taken. It is given to the police who do a computer check and find the name and address of the fleeing vehicle. Under the theory propounded [by the Defence] the police would not be able to knock on the door of this owner to ask him about the accident including permission to look at his vehicle if it were in a private garage.

“In my judgment, principles extracted from the authorities such as Hunter and Southam and cases based upon it should not be extended so far.

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“...I would conclude that the actions of the officers was entirely reasonable. They believed on reasonable grounds that an offence had been committed and it was prudent to obtain some corroborating evidence (particularly as the sting was continuing and no arrest would be made at that time) and to ensure that the wrong person would not be arrested or charged. Walking to the door and knocking on it constituted a minimal interference with the privacy interest of the occupant who was not obliged to answer the knock. This is far different from the trespass relied on in Kokesch but similar in some respects to Evans.

“Looking at the person who answered the knock on the door, whom [the police operator] already knew was such a non-invasive technique that in my view it should not be characterized as conscriptive.”

The hypothetical motor vehicle accident situation approved of by Chief Justice MacEachern in Vu arose in R. v. Van Wyk. The court accepted this hypothetical situation as law but found that the actions of an officer looking at the truck with the aid of a flashlight was beyond the scope of the

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94 Supra., at p. 491
95 Supra., footnote 44 at p.6
implied invitation and amounted to a trespass. **Had he walked by it on the way to the door using the most direct route, without a walk around use of a flashlight, the observation that it was there would likely have been considered as acceptable as plain view or “incidental to the approach to the door”**. The officer, instead, used the flashlight “exclusively in an evidence-gathering venture.” Justice Hill also noted “the right to use a flashlight to enhance officer vision is permissible in limited circumstances as a reasonable aid to ensuring officer safety (**Mellenthin v. The Queen**, (1993) 76 C.C.C. (3d) 481 (S.C.C.) At 487 per Cory J.),...” Justice Hill declined, however, to afford a section 8 remedy. This situation did not result resulted in a breach of the reasonable expectation of privacy, since

“there is a reduced expectation of privacy in a motor vehicle: Wise v. The Queen (1992), 70 C.C.C. (3d) 193 (S.C.C.) At 217-8 per Cory J. The officers walked a short distance only to the site of the commercial vehicles for external examination. The police secured no greater knowledge from the search of Mr. Van Wyk’s involvement in the occurrence than it possessed at the outset. **If damage to...vehicle(s) had been observed, supplying a circumstantial link to the accident, the situation might well be different** (emphasis added). The police observations, however, do not seem to have affected the reasonable grounds calculus. As well, I am not satisfied that any evidence subsequently discovered by the police was causally or temporarily [*sic.* temporally?] linked to the unreasonable search such that it could be said that the evidence was obtained in a manner that infringed the **Charter: The Queen v. Goldhart** (1996), 107 C.C.C. (3d) 481 (S.C.C.) At 492-5 per Sopinka J.; **Strachan v. The Queen** (1989), 46 C.C.C. (3d) 479 (S.C.C.) At 498-9 per Dickson C.J.C.”

Kurisko, J. in **R. v. Boughner**, noted the implied invitation to knock to identify the occupant of a motel room and seek a consent search would probably have been upheld but for the plan to “freeze the premises” pending a warrant when consent was declined. In that case, the plan constituted an unlawful purpose which negated the implied licence to knock. The police had grounds to obtain an entry warrant to arrest for trafficking in cocaine although they honestly believed they did not which led to the unlawful plan to freeze the premises. In those circumstances, [absent the plan to freeze] “it is questionable whether [simply] recognizing the accused at the door justified entering... without a warrant.” The police initially employed a trick in their approach to the door, knocking and responding to a verbal inquiry that it was:

“Mike. The voice from inside asked, ‘Mike Halsted?’ [The officer] replied ‘Come on man, open the door’. Within a matter of seconds the door opened four or five inches .... [The officer] held his police badge up to the opening and said ‘Police’. The Defendant appeared shocked .... He slammed the door shut and the police said, ‘its Boughner’ and immediately kicked in the door.”

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67Supra., at p. 3
The facts of the situation “gave rise to critical new circumstances which, added to the ...grounds of belief, constituted objectively discernible grounds for...believing they had **reasonable grounds** by reason of **exigent circumstances to enter the room and arrest the Defendant** and prevent the destruction of evidence. In doing so they acted ... under the lawful authority conferred by section 529.3 (1) and (2) of the Criminal Code.”

Referring, at p. 9 to Justice Doherty’s decision in *R. v. Golub*, Justice Kurisko quoted, “The dynamics in an arrest situation are very different than those which operate on an application for a search warrant. Often the officer’s decision to arrest must be made quickly in volatile and rapidly changing situations....The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.”

The situation changed further when the Defendant said “Get the gun”, or “Give me the gun” which led to the officers exiting the room without either arrest or search. This provided further grounds to arrest for possession of a firearm. The arrest was subsequently and lawfully made in the hallway after a demand that he exit with hands up. It was appropriate to search the room incident to arrest for reasons of officer/public safety. Paraphernalia seen on the first search and cocaine residue around a flushing toilet were admissible as found “in plain view”. A second warrantless search which produced cash and cocaine was also upheld. It would be our submission that the failure to find a breach regarding the second search was in error since that search likely exceeded what was necessary to ensure officer/public safety. Perhaps the Judge also had concerns regarding this finding since he continued on to close the back door argument on appeal by finding he would, nevertheless have admitted the evidence under section 24(2) of the *Charter*.

**Police tricks**, (giving the false name”Mike”) it seems, **are alive and well** to some degree. Justice Kurisko found support for the proposition in the facts of *R. v. Edwards* in which the police tricked the accused’s girlfriend into permitting a search of her apartment (in which the accused had no reasonable expectation of privacy) for drugs. Citing McKinlay, J.A. from the majority decision of the Ontario Court of Appeal, that this “was well within the type of subterfuge which the courts have frequently stated must be resorted to by the police if they are to overcome the obvious disadvantage under which they labour in investigating suspected criminal activity.”

The investigatory “freeze” of premises pending a warrant will likely be tightly controlled by the

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98 *Supra.*, footnote 27 at p. 209

99 *Supra.*, footnote 96 at p. 9

100 *Supra.*, footnote 43
courts after *R. v. Silveira*\(^{101}\) despite the extension of statute based exigent circumstances.

### iii) Search Incident to Arrest - How far can We Go?

The present state of the law in relation to search incident to arrest is best summarized in *R. v. Golub*\(^{102}\):

“**Warrantless searches are presumptively unreasonable.** Searches properly conducted as an incident of a lawful arrest are an exception to that presumption.** The power to conduct a warrantless search as an incident of an arrest is well established as common law and has survived the advent of the *Chartier: R. v. Stillman*, (1997) 113 C.C.C. (3d) 321 (S.C.C.) (emphasis added).

“The scope of the power to conduct a warrantless search upon arrest has been considered in three decisions of the Supreme Court of Canada, two of which post-date this trial: Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257; *R. v. Stillman*, supra; *R. v. Feeney*, supra. In Cloutier, at pp. 274-76, it was recognized that the power to search upon arrest was a pragmatic recognition of legitimate state interests and the arrested person's reduced expectation of privacy. Those state interests include the need to secure the custody of the arrested person, protect those at the scene of the arrest and locate and secure evidence relevant to the arrested person's guilt or innocence. These state interests, while valid, do not, however, give the police a licence to conduct any and all searches which might advance those [page205] legitimate goals. L'Heureux-Dubé J., for the court, said, at p. 276:

‘However, while the common law gives the police the powers necessary for the effective and safe application of the law, it does not allow them to place themselves above the law and use their powers to intimidate citizens. This is where the protection of privacy and of individual freedoms becomes very important.’

“Justice L'Heureux-Dubé went on to explain that the legitimate and conflicting interests of the state and the arrested person have to be balanced in determining whether a particular search was a justified and reasonable exercise of the police power to search as an incident of a lawful arrest. Justice L'Heureux-Dubé set down three principles to guide that determination at p. 278:

‘1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police

\(^{101}\) *Supra.*, footnote 20

\(^{102}\) *Supra.*, footnote 27 at p.p., 204-206
may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.

2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.

3. The search must not be conducted in an abusive fashion and, in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.

“The balancing of state and individual interests referred to in Cloutier reflected the same approach taken by the Supreme Court of Canada in previous cases involving the scope of ancillary police powers, e.g., see R. v. Dedman (1985), 20 C.C.C. (3d) 97; R. v. Landry (1986), 25 C.C.C. (3d) 1; Eccles v. Bourque (1974), 19 C.C.C. (2d) 129 at 131. The individual interests identified in these cases, although firmly planted in the common law, now enjoy constitutional status.

“Before turning to the recent judgments of the Supreme Court of Canada in Stillman and Feeney, two additional principles which emerge from Cloutier should be mentioned. First, although Cloutier involved the search of an arrested person, the court recognized at p. 278, that the power to search upon arrest extended to the immediate surroundings at the place of arrest: see also R. v. Wong (1987), 34 C.C.C. (3d) 51 (Ont. C.A.) at 56; affirmed without reference to this point (1990), 60 C.C.C. (3d) 460 (S.C.C.). The court did not set any spatial limits on the search power but left those to be determined on a case-by-case basis through the application of the three principles set out above.

“Second, Cloutier, at p. 278, following a line of authority from this court, rejected the contention that the power to search was dependent upon the existence of reasonable grounds to believe that the search would produce the things sought by the police. A search upon arrest is incidental to that arrest and derives its authority from the lawful arrest and the circumstances of the arrest. No independent justification for the search is required either at common law or by the Charter: R. v. Morrison (1987), 35 C.C.C. (3d) 437 (Ont. C.A.) at 441-42; R. v. Lim (No. 2) (1990), 1 C.R.R. 136 (Ont. H.C.J.) at 143; affirmed (1993), 12 O.R. (3d) 538 (C.A.);

“In Stillman, the court was faced with a claim that the seizure of hair samples, teeth impressions and the taking of a buccal swab were justified as incident of a lawful arrest. I take these conclusions from the majority judgment of Cory J. at pp. 23-28:

‘the power to search as an incident of arrest is predicated on pragmatic and exigent circumstances inherent in the making of an arrest. Searches are permitted to allow the police to protect themselves and others, and to locate and preserve evidence located at the scene of the arrest;

‘the principles in Cloutier provide the analytical tools for the determination of whether a particular search is justified as an incident of arrest;

‘the nature of the search conducted and the place searched are relevant considerations in determining whether the search was a lawful incident of the arrest;

‘a search which intrudes upon the bodily integrity of the arrested person is so intrusive and constitutes such a significant invasion of the arrested person's privacy and security interests that [page207] it cannot be justified as an incident of an arrest absent statutory authority.’ ”

In Godoy, the Supreme Court of Canada refused to comment upon whether “an entry in response to a 911 call affects the applicability of the plain view doctrine as it is not an issue on the facts of the case at bar.” They did, however outline limits on the nature of the search, indicating:

“The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search the premises or otherwise intrude on a resident's privacy or property. In Dedman, [(1985), 20 C.C.C. (3d) 97] at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as

\footnote{Supra., footnote 23 at p. 139}
an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances.”

In Feeney, Sopinka, J.’s remarked that “in general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited”\(^{104}\). These remarks were distinguished by Justice Doherty on the facts of Golub\(^{105}\):

“In my opinion, searches of a home as an incident of an arrest, like entries of a home to effect an arrest, are now generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home. After Feeney, the general principles governing the scope of searches as an incident of arrest set down in Cloutier do not control where the place to be searched is a residence. Those principles are still helpful in that they identify relevant considerations. However, those considerations must be looked to, not to balance competing interests, but to determine whether the circumstances are sufficiently exceptional to justify overriding the general prohibition against warrantless searches of the home.

“What will amount to exceptional circumstances justifying a warrantless search of a residence as an incident of an arrest? I will not attempt an exhaustive answer. Exceptional circumstances do not, however, refer to circumstances which rarely arise, but rather to circumstances where a state interest is so compelling that it must override a person's right to privacy within the home.

“Broadly stated, the state interest upon arrest is the effective administration of justice. There are various components to that interest including the need to secure the arrested person, protect those at the scene of the arrest, and preserve evidence. In determining whether exceptional circumstances exist justifying a warrantless search, the nature of the state interest must be identified. The state interest in collecting evidence may not justify a warrantless search, but the interest in protecting the safety of those at the scene may justify that same search.

“In this case, I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the

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\(^{104}\) Supra., footnote 1 at p.154

\(^{105}\) Supra., footnote 27 at p.209
atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in ex-post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions.

“In my opinion, one cannot ask the police to place themselves in potentially dangerous situations in order to effect an arrest without, at the same time, acknowledging their authority to take reasonable steps to protect themselves from the dangers from which they are exposed to. If the police cannot act to protect themselves and others when making an arrest, they will not make arrests where any danger exists and law enforcement will be significantly compromised. The frustration of effective enforcement of criminal law is the hallmark of the exceptional circumstances identified in Feeney.

“I would hold that where immediate action is required to secure the safety of those at the scene of an arrest, a search conducted in a manner which is consistent with the preservation of the safety of those at the scene is justified. If, in order to secure the safety of those at the scene, entry into and search of a residence is necessary, I would hold that the risk of physical harm to those at the scene of the arrest constitutes exceptional circumstances justifying the warrantless entry and search of the residence. The search must be conducted for the purpose of protecting those at the scene and must be conducted in a reasonable manner which is consistent with that purpose.”

It is noteworthy, however that Justice Finlayson, in R. v. Bedard,\(^{106}\) indicated that the plain view doctrine would have authorized a seizure of marijuana and firearms when searching a dwelling-house incident to arrest. In that case, the fact that the police chose to leave the residence after arresting the accused and posted a guard while they obtained a further warrant. The court held that leaving and seeking a search warrant could not be grounds to criticize the police.\(^{107}\) Further, in the authors submission, even had the police found items that were not in plain view but items they uncovered in the course of a thorough search for the person, such items could be lawfully seized pursuant to subsection 489 (2) of the Criminal Code if the officer was lawfully present and the things found were evidence of a federal offence.

In R. v. Morrison,\(^{108}\) Dubin, J.A. recognized that the right of the police to search a person incident to arrest, for property which may be connected to the offence or a weapon (officer safety) is not dependant on the officer having a belief that the items will exist.

\(^{106}\)(1998), 125 C.C.C. (3d) 348 (Ont.C.A.)

\(^{107}\) Supra., at p.354

\(^{108}\)(1987), 35 C.C.C. (3d) 438 (Ont. C.A.) at p. 441
In conclusion, we are now receiving some much needed guidance on the interpretation of *Feeney* warrants. Perhaps the best that can be said is bad facts continue to make bad law. The cases in which evidence is excluded tend to be either egregious circumstances or circumstances where police are acting against the weight of prior judicial rulings. It is incumbent on all of us as officers of the Crown to ensure we deliver developments in case authority. By investing an interest in advance in the proper interpretation of developments in the area of search and seizure law, we can assist in the administration of justice and, promote our self interest in avoiding *Charter* Issues.