A Horse Gallops Down a Street ... Policing and the Resilience of the Common Law

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> It is not only impossible but inadvisable to attempt to frame a definition which will set definite limits to the powers and duties of police officers appointed to carry out the powers of the state ... [A Constable's duties] stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject.
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> *O'Rourke v Schacht*, [1976] 1 SCR 53, citing Schroeder JA, [1973] 1 OR 221 (CA), with approval at 65-66.

I. INTRODUCTION

Notwithstanding the enactment of the *Charter of Rights and Freedoms*[1] in 1982, the common law has remained rather resilient as it applies to modern police powers.[2] In fact, some suggest it has

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 The foundation of the common law has commonly been traced to the reign of Henry II (1154-89). As early as 1200 a practice had begun of appointing a number of knights to "keep the peace" and to relieve the load on justices of assize between circuits. Constables were appointed at the local level to preserve order with varying degrees of effectiveness until the nineteenth century when professional police forces were established. J H Baker, *An Introduction to English Legal History*, 4th ed (Markham, ON: Butterworths LexisNexis, 2002), at 13 & 24.

flourished under the *Charter* and that this flourishment should be tempered by statute. However, considering police duties are wide and varied and not easily compiled into an exhaustive list, the flexibility of the common law tempered by the reasonableness and fairness criteria of the *Charter* may be more appropriate in times of accelerating change currently facing our society.

As noted by Ray Kurzweil "technological change is exponential [...] we won't experience 100 years of progress in the 21st century – it will be more like 20,000 years of progress (at today's rate) [...] Technological change [is] so rapid and profound it represents a rupture in the fabric of human history."[3]

Consider a team of horses that breaks free from its hitching post and gallops erratically down a street. It is late afternoon and throngs of children will be getting out of school. At the end of the street there is a police station where there is a constable on duty. He hears a disturbance and sees the pair of horses coming down the road towards him. He instantly runs out across the street, pushes a woman out of the way and seizes the reins of the off-side horse, bringing it to the ground.

There was no apparent crime or offence being committed. Yet the constable apprehended a risk of harm if he did not intervene. The off-side horse fell on the officer as he brought it down, causing him substantial injuries in doing so. Who was liable for the constable's injuries? Did the officer assume the risk of injury – *volenti non fit injuria* – or was he in the execution of his duty?

Many of the cases where the phrase "execution of duty" has been interpreted are in relation to offences of assaulting a police officer, resisting arrest or obstructing an officer in the performance of his duties. However a police officer's duties are many and varied. As Justice Ashworth pointed out in *R. v. Waterfield*,[4] it is difficult to reduce within specific limits the general terms of a police officer's duties. This problem was further highlighted by Justice Cosgrove in *Innes v. Weate*:

> There are two difficulties in this concept of duty. One is that it cannot be stated in other than general terms – the range of circumstances in which the duty to act may

[3] Ray Kurzweil, "The Law of Accelerating Returns" (7 March 2001), *Ray Kurzweil* (Essay), online: <http://www.kurzweilai.net/the-law-of-accelerating-returns>.

[4] [1964] 1 QB 164 at 170, [1963] 3 All ER 659 [*Waterfield*].

> arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty often depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong. These difficulties cannot be overcome. It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens [...].[5]

In the case of the galloping horses the issue was whether the officer was entitled to coverage for his injuries. The Court of Appeal found that he was:

> It is true that the primary duty of the police is the prevention of crime and the arrest of criminals; but that is only a part of the duties of the police [...] There is a general duty to protect the life and property of the inhabitants; there is a discretionary duty to direct the traffic, to help blind and infirm people to cross the road, and to direct people who have lost their way. [...] In my opinion they are not mere lookers-on when an accident takes place, or seems likely to take place; they have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so [...] [H]e is not to be deprived of a remedy [...][6]

Yesterday it was wrestling a galloping horse to the ground. Today it may be entering a house because of concerns of domestic violence and the need to check on the wellbeing of the occupant(s). In either case the officer may be harmed – one from a frightened horse, the other from an angry spouse. Should the law treat the officer's swift and decisive decision to intervene differently? Should the remedy – to find the officer in the execution of his duty – be any different?

While prior legislative authority may provide some democratic legitimacy and better legal certainty, the codification of police powers in a time of rapid and profound change would inevitably be so broadly expressed as to make the advantages illusory.

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5 *Innes v Weate* (1984) 12 A Crim R 45 at 51, [1984] ASRp 3 (SC) [*Innes*] [emphasis added]. Also see *Panos v Hayes* (1987) 44 SASR 148 (SC) [*Panos*].

6 *Haynes v Harwood*, [1935] 1 KB 146 (CA) per Maugham, LJ at 162, aff'ing [1934] 2 KB 240 [*Haynes*] [emphasis added].

II. POLICE IN SOCIETY

Total freedom is anarchy, while total order is tyranny.[7] It is the police, representing the interests of the community that hold these elements in balance.[8] As members of society our rights are somewhat fluid and subject to interpretation as we try and balance our rights with our obligations as members of society. As noted by Professor Peter Hogg:

> When we speak of the protection of civil liberties in a society, we are really speaking about the nature of the compromises which society has made between civil libertarian values and the competing values recognized by social and economic regulation, which limit individual freedom in pursuit of collective goals.[9]

Professor Stribopoulos, now Judge of the Ontario Court of Justice, previously argued that police powers in Canada should be developed through legislation.[10] However, since the passage of the *Charter*, they have been crafted more often than not, he argues, by the Supreme Court using a number of law-making devices. Rather than regulating police authority the Court has legitimized it, making up for the lack in formal or codified police powers through such mechanisms as:

- Concoction (creating new powers)
- Insertion (filling gaps in statutory powers)
- Contraction (reading in powers).[11]

Other commentators have also argued that the role of the Court, indeed the Constitution, is to protect individual liberty by insisting that any interference with an individual's freedom of movement be premised on express legal authority. According to Stribopoulos, this "principle of

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7 Bruce L Berg, *Policing in Modern Society* (Woburn, MA: Butterworth-Heinemann, 1999) at 5.

8 *Ibid.*

9 Peter Hogg, *Constitutional Law of Canada*, Student ed (Toronto: Thompson Canada Ltd, 2007) at 678.

10 James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005), 31 Queen's LJ 1 at 17.

11 *Ibid* at 17.

legality", is founded on the common law tradition that Parliament speaks clearly when licensing an invasion of individual liberties.[12]

The *Charter*, Stribopoulos continued, should not be used to authorize government action, but rather to constrain it. As noted by Lord Keith in the House of Lords decision of *Morris v. Beardmore*, "it is not the task of judges, exercising their ingenuity in the field of implication, to go further in the invasion of fundamental private rights and liberties than Parliament has expressly authorized".[13] Instead of insisting on the principle of legality and refusing to make up for the shortcomings in police powers, the courts have become de facto law makers.

Stribopoulos stated that the Court has slipped away from its historic role of standing between the individual and the State and become too activist. In his view, it has, and should embrace a cooperative dynamic or "reciprocal institutional review" concerning police powers.[14] This is because it creates a constitutional dialogue that exposes the deficiencies in the law that the competent legislative body will want to correct. The majority of the Supreme Court has suggested:

> [I]t does not sit well for the courts, as protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.[15]

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12 *Ibid* at 11. Also see Richard Jochelson, "Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory", (2012) 43:3 Ottawa LR 355; Steve Coughlan, "Common Law Police Powers and the Rule of Law", (2007) 47 CR (6th) 266; Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012), 57 SCLR (2d) 225; Don Stuart, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" (2008), 40 SCLR (2d) 3; Tim Quigley, "The Impact of the Charter on the Law of Search and Seizure" (2008), 40 SCLR (2d) 117; and to a lesser extent Hon Justice Casey Hill, "Investigative Detention: A Search/Seizure by Any Other Name?" (2008), 40 SCLR (2d) 179.

13 Stribopoulos, *supra* note 10 at 19, citing *Morris v Beardmore*, [1981] AC 446 at 463 (HL) [*Beardmore*].

14 *Ibid* at 63.

15 *Ibid* at 65, citing *R v Wong*, [1990] 3 SCR 36 at p 57, [1990] SCJ No 118 per Dickson C.J. and La Forest, L'Heureux-Dubé and Sopinka JJ [emphasis added].

However, this dialogue regarding search powers, which may have existed during the *Charter*'s early years, was mainly under Chief Justice Dickson who retired in 1990. It has changed under Chief Justice McLachlin.[16] I would argue that while the dialogue under Justice McLachlin may not be the same as it was under Justice Dickson, but that it is still occurring today with a different lens, considering the profound social changes that have occurred over the past generation.[17]

Indeed, any support found in the decision of the House of Lords in *Beardmore* may be misplaced as it has never been cited with approval by a majority of the Supreme Court of Canada. Even in *R. v. Landry*[18] Justice Dickson stated that where Parliament has remained silent, the issue must be interpreted "with regard to the principles of the common law"; accordingly *Morris v. Beardmore* "[does] not [...] provide support for the position [that police cannot make an arrest on private property]."[19]

Further, *Beardmore* has never been cited by the McLachlin court, which generally took the position espoused in *R. v. Mann*[20] that where Parliament is silent the Court cannot "shy away" from adapting the common law to reflect societal change.[21] Where the common law has evolved gradually through jurisprudential treatment, "the judiciary is the

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16 Brian Dickson was appointed to the Supreme Court in March 1973 and became its Chief Justice on April 18, 1984. He retired on June 30, 1990. Beverley McLachlin was sworn in as a Justice of the Supreme Court of Canada in April 1989. On January 7, 2000 she was appointed Chief Justice of Canada. See Supreme Court of Canada, *Current and Former Chief Justices*, online: <https://www.scc-csc.ca/judges-juges/cfcju-jucp-eng.aspx>.

17 See e.g., *Bedford v Canada (Attorney General)*, 2013 SCC 72, [2013] 3 SCR 1101, reconsidering the *Prostitution Reference*, [1990] 1 SCR 1123; *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*], reconsidering *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

18 [1986] 1 SCR 145, 26 DLR (4th) [*Landry*].

19 *Ibid* at paras 28 & 32 [emphasis added]. *Morris v Beardmore* has been cited three other times by the Supreme Court in *Lyons v The Queen*, [1984] 2 SCR 633, 14 DLR (4th) 482 [*Lyons*]; *Wiretap Reference*, [1984] 2 SCR 697, 14 DLR (4th) [*Wiretap Reference*]; and *R v Dedman*, [1985] 2 SCR 2, 51 OR (2d) 703 [*Dedman*].

20 2004 SCC 52, [2004] 3 SCR 59, rev'ing 2002 MBCA 12 [*Mann*]. A search of WestlawNext database on July 29, 2017 shows *Mann* has been cited in 1573 cases and 148 secondary sources. Sixteen of those decisions are by the Supreme Court itself.

21 *Ibid* at para 17, citing *R v Salituro*, [1991] 3 SCR 654 at 670, 68 CCC (3d) 289.

proper forum for the recognition and ordering of further legal developments, absent legislative intervention."[22]

Even those who quote Justice McLachlin in *Watkins v. Olafson*[23] that "major revisions of the law are best left to the legislature", often omit the fact that she never said the Court could not make major revisions to the law. In fact, she suggested they could, but where they do "the courts must proceed with great caution".[24] Indeed, as Justice McLachlin notes in her extra-judicial writings, the courts have not hesitated to make major revisions to the law where the legislators have not:

> The indisputable fact is that Judges have been making the law – important law – for a very long time ... The Judges of the Kings Bench made law 400 years ago when the decided in *Shelley's Case* that certain words used in the conveyance of land were to be taken as words of limitation and not purchase ... Lord Mansfield made law over 200 years ago when in *Sommersett's Case* he said, "Let the Negro go free". And Lord Atkin made law in 1932 when he introduced the modern law of negligence ...[25]

As society evolves, so must the common law[26] and, where the legislators have failed to act, the courts must. Justice Hall indicated as much for the Court in *Ares v. Venner*[27] when making a major revision to the law on hearsay. The Court, he suggested, need not leave it for "Parliament and the ten legislatures to do the job".[28] He followed the

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22 *Ibid* at para 18 per Iacobucci J (Major, Binnie, LeBel, and Fish JJ concurring); Deschamps J and Bastarache JJ dissenting but concurring in principle with the analysis on the issue of the existence of a power to detain at common law (para 62).

23 [1989] 2 SCR 750 at p 761, 61 DLR (4th) 577.

24 *Ibid* [emphasis added].

25 Beverley McLachlin "Judicial Power and Democracy" (2000) 12 Sing Ac LJ 311, at 317-319. Also see Beverley McLachlin "The Role of the Court in the Post-Charter Era: Policy Maker or Adjudicator?" (1990) 39 UNB LJ 43.

26 Reference Re Judicature Act, 1983 ABCA 332 at para 85, 5 DLR (4th) 601 per Harradence JA (dissenting), aff'd *Wiretap Reference*, *supra* note 19.

27 [1970] SCR 608, 14 DLR (3d) 4 [*Ares*].

28 *Ibid* at p 626, applying the minority views of Lord Pearce and Lord Donovan in *Myers v DPP*, [1964] 2 All ER 881, [1964] 3 WLR 145 (CA) [*Myers*]. Indeed the Court has refined the common law hearsay rules many times over the past 40 years from *R v Khan*, [1990] 2 SCR 531, 59 CCC (3d) 92, through to *R v Starr*, 2000 SCC 40, and *R v Khelawon*, 2006 SCC 57, to *R v Bradshaw*, 2017 SCC 35, without legislative intervention.

dissenting views of Lord Pearce and Lord Donovan in *Myers v. D.P.P.* In this case, Lord Pearce could not accept that an evolution in the common law was not possible:

> Life has greatly changed in various respects ... mass production and modem business [...] have created machines and records whose complexity, efficiency, and accuracy are beyond anything [previously] imaginable [...] [T]he way in which those principles are applied must change if the principles are to be honoured and observed.[29]

Nevertheless I would argue that the legislatures have not remained silent and, at the very least, have given their tacit approval for the common law rules to be developed by the courts by leaving them unaltered. As noted by Professor Mark Carter:

> [I]f our elected representatives are satisfied with certain common law rules, then there is no reason for them to enshrine or alter them in statute. If there is any currency left in Edward Coke's view that the common law represents 'that which hath been refined and perfected by all the wisest men in former succession of ages,' legislators may be acting prudently by leaving it as unaltered as possible.[30]

Support for this proposition can be found in the enactment or re-enactment of several policing statutes after the proclamation of the *Charter* that now include or maintain all the powers and duties of a Constable "at common law".[31] For example, *The Police Services Act* of Manitoba (enacted in 2009 but not in force until June 1, 2012) states:

> **Status of police officers**
> 24(1) A police officer has all the powers, duties, privileges and protections of a peace officer and constable at common law or under any enactment.[32]

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29 Paraphrasing Lord Pearce in *Myers v DPP, ibid*, as quoted by Justice Hall in *Ares*, *supra* note 27 at p 625.

30 Mark Carter, "Non-Statutory Criminal Law and the Charter: The Application of the Swain Approach in R v Daviault" (1995) 59:2 Sask LR 241 at 242.

31 See *The Police Services Act*, CCSM c P94.5, s 24(1) for municipal officers and 18(2) for RCMP officers; *Police Act,* SNS 2004, c 31, s 42(1)(a); *Police Act,* RSBC 1996, c 367, s 38(1)(a) for municipal officers and 10(1) for RCMP officers; *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17, s 8(3); *Police Services Act,* RSO. 1990, c P.15, s 42(3); and *Police Act*, RSPEI 1988, c P-11.1, s 15(2).

32 *Ibid,* enacted SM 2009, c 32, in force on 1 Jun 2012 (Man Gaz: 2 Jun 2012), s 24(1) [emphasis added]. Repealing *The Provincial Police Act*, CCSM c P-150, s 5, *The City of Winnipeg Charter Act*, SM 2002, c 39, s 166, and *The Municipal Act*, CCSM c M-225, s 272 dealing with municipal policing.

None of the former acts (*The Provincial Police Act*, *The City of Winnipeg Charter*, or *The Municipal Act*) which were repealed in part and replaced by *The Police Services Act* made any reference to the powers and duties of a constable at common law.[33] It is clear that the provincial legislature made a conscious and deliberate decision to include the words in the new legislation.

Additionally, the duties assigned to the police in all provinces and territories include the duty to "preserve the peace". This is to be distinguished from the duty to prevent crimes and offences, apprehend offenders, maintain law and order, execute warrants, or to assist victims, which are all separately enumerated.[34] In fact, many police duties are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[35]

For example, in 2016, the Winnipeg Police responded to 205,641 calls for service. However only 51,808, or 25 percent, of those calls involved criminal offences.[36] While the most common call for service was for "domestic disturbances", less than 13% resulted in criminal charges. The second most common call for service was to "check the wellbeing" of someone.[37] This is representative of most police departments[38] where many of the activities performed by the police are related to social

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33 *Ibid.*

34 See *The Police Services Act*, CCSM c P94.5, s 25; *Police Act*, SNS 2004, c 31, s 42(2); *Police Act*, RSA 2000, c P-17, s 38(1); *Police Act*, CQLR 2000, c P-13.1, s 48; *Police Act*, RSBC 1996, c 367, ss 34(2), 7(2); *Royal Newfoundland Constabulary Act*, 1992, SNL 1992, c R-17, s 8(1); *Police Services Act*, RSO 1990, c P 15, s 42(1); *Police Act, 1990*, SS c P-15.01, s 36(2); *Police Act*, RSPEI 1988, c P-11.1, s 13; *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 18; *Police Act*, SNB 1977, c P-9.2, s 12(1); and *Police Act Quebec*, c P-13.1, ss 48 (generally) and 93 (native policing).

35 *Cady v Dombrowski*, 413 US 433 (1973) at 441, 93 S Ct 2523.

36 Winnipeg Police, "2016 Annual Statistical Report" at 18 and 5 respectively, online: <http://www.winnipeg.ca/police/AnnualReports/2016/2016_wps_annual_report_english.pdf >.

37 *Ibid* at 21.

38 See Dr Lee P Brown, *Policing in the 21st Century* (Bloomington, IN: AuthorHouse, 2012) at 137 where he states that 80 percent of the calls responded to by the police involved non-criminal incidents.

behaviour issues not directly connected to crime including mental illness, public drunkenness, and community disorder.[39]

As such, the interpretation and application of the law involving police powers should not go "to absurd lengths and hamper normal police investigation to an extent that would seriously jeopardize the public interest".[40] Indeed, the *Charter* does not require otherwise. Unnecessarily and unduly hampering police duties indirectly infringes the very rights that the *Charter* was enacted to protect.[41] Justice Cockburn spoke to the value of the common law more than 150 years ago. He said:

> [I]t has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which a rise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied.[42]

Considering the dramatic changes that have occurred in the past 150 years in transportation, telecommunications, medicine, designer drugs, genetics, weaponry, and electronics, the strain on individuals, the environment and entire societies is also increasing. The concept of life, death, and marriage have all radically changed and the human population has grown from 1.2 billion to over 7 billion people during that time, most

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39 Livio Di Matteo, *Police and Crime Rates in Canada* (Vancouver, BC: Fraser Institute, 2014) at 6.

40 *Lyons v The Queen*, *supra* note 19 at p 691 citing *R v McQueen* (1975), [1975] 6 WWR 604, 25 CCC 262 (BCCA).

41 *R v Power*, 2003 SKQB 334 at para 70, 236 Sask R 40. Also see *R v Carter* (1983), 39 OR (2d) 439, 144 DLR (3d) 301 (Ont CA) per Brooke, Martin, Zumber, Blair and Robins, JJ A quoting *R v Altseimer* (1982), 29 CR (3d) 276 at 282, 38 OR (2d) 783 (Ont CA) that "the *Charter* does not intend … *the paralysis of law enforcement.* Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the supreme law of this country" [emphasis added].

42 *Wason v Walter* [1865] 4 LR QB 73 at 93. See also *Eccles v Bourque*, [1975] 2 SCR 739 at 743, 50 DLR (3d) 753 where Dickson J stated … "there are occasions when the interest of a private individual in the security of his house *must yield to the public interest*, when the public at large has an interest in the process to be executed" [emphasis added]. Also see *R v Alexson,* 2015 MBCA 5, at para 2, 315 Man R (2d) 70 [*Alexson*] where Chartier CJ said "[there needs be a] proper balance between an individual's right to live free from state interference within the sanctity of one's home and society's interest to live in a safe community".

of it clustered in major cities. While creating opportunities, urbanization has also increased human congestion, housing costs, inequality, and pollution. "Slow" incremental change is now measured in years, not generations. Flexibility is more important now than it was in the past. As noted by Ray Kurzweil, we will experience 20,000 years of progress in the next 100 years.[43]

Professor Don Stuart has also suggested that *Beardmore* is persuasive,[44] finding additional support in Justice LeBel's "strong and compelling dissent"[45] in *R. v. Orbanski; R. v. Elias*.[46] Justice LeBel noted that it is "not appropriate [for the courts] to adopt a strained legal interpretation to sidestep inconvenient *Charter* rights for the greater good."[47] However, Stuart also fails to note that *Beardmore* had never been cited in a Supreme Court decision in the previous 22 years, and never in a majority decision. Furthermore, no matter how 'strong and compelling' he believed Justice LeBel's dissent to be at the time, it has *never* been cited in *any* court decision since.[48] Respectfully, the Court's decision in *Ares v. Venner* may be more persuasive.

As such, the question should not be why Parliament or the legislatures have not curbed the courts on developing the powers and duties of the police at common law (as it appears the legislatures have already given their approval). Rather, one should ask what the powers and duties of a Constable are at common law as developed by the 'interests and varying conditions of each generation', including what it means to preserve the peace and how those duties and powers work within the rubric of the *Charter* in our rapidly changing world.

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43 Kurzweil, *supra* note 3.

44 Don Stuart, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" (2008), 40 SCLR (2d) 3 at 9 & 19.

45 *Ibid* at 20.

46 2005 SCC 37, [2005] 2 SCR 3.

47 *Ibid* at para 70.

48 Search done on WestlawNext database July 29, 2017.

III. POLICE POWERS

To understand police authority it is necessary to make a distinction between duty and power. According to Black's Law Dictionary, "duty" is defined as a legal obligation or responsibility that is owed to another.[49] This legal duty can exist if the Court says there is one – "it is only a word" developed and guided by "history, our ideas of morals and justice, and the convenience of administration of the rule."[50] Black's continues:

> A classic English definition [of duty] from the late nineteenth century holds that, when circumstances place one individual in such a position with regard to another that thinking persons of ordinary sense would recognize the danger of injury to the other if ordinary skill and care were not used, a duty arises to use ordinary skill and care to avoid [or prevent] the injury.[51]

On the other hand "power" is defined as the legal right or authority to act or not act, and the "ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another."[52] This authority may be derived from statutory law or as a matter of common law that recognizes the existence of broad conventional or customary duties.[53]

A. Not Mere On-Lookers

The police are not merely volunteers or on-lookers bound only by social obligations to protect the life, limb and property of the public; they also have legal obligations "subject to all the duties and responsibilities belonging to constables".[54] In *O'Rourke v. Schacht*, this included a positive

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49 *Black's Law Dictionary*, 9th ed, *sub verbo* "duty" [Black's].

50 *Ibid*, citing William L Prosser, "Palsgraf Revisited" (1953) 52:1 Mich L Rev 1 at 15.

51 *Ibid*, citing Marshall S Shapo, *The Duty to Act: Tort Law, Power, and Public Policy* (Austin, TX: University of Texas Press, 1977) at xi-xii.

52 Blacks's, *ibid*, sub *verbo* "power".

53 *O'Rourke v Schacht*, [1976] 1 SCR 53 at pp 65-66, 55 DLR (3d) 96, citing Schroeder JA [1973] 1 OR 221 (CA) that a Constable's duties "stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject" [*O'Rourke*]. Also see *Dedman*, *supra* note 19.

54 *O'Rourke*, *ibid* at p 66.

duty to notify road users of dangers arising from an earlier accident that created a potential risk of harm on a highway:

> [Police] are not mere lookers-on when an accident takes place, or seems likely to take place; they have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so.[55]

Similarly, in *Poupart v. Lafortune*[56] the Supreme Court held that a police officer confronted by an armed suspect at the scene of a robbery, who is engaged by the suspect in gunfire while attempting to escape, has a duty to act and is not liable for accidentally shooting an innocent by-stander pursuant to section 25(1) of the *Criminal Code*.[57]

While a police officer is not relieved of his duty to take reasonable care, the Court held that when assessing liability, the officer's actions must be determined in relation to the particular circumstances of the case and what the officer was actually doing. He is not "merely engaged in performing an act permitted by law [like the driver of an automobile]"; he is "engaged in the hazardous performance of a grave duty imposed on him by law".[58] The Court noted this principle was previously recognized in *R. v. Waterfield* and applied in *R. v. Knowlton.*[59]

Poupart was analogous to the Court's earlier decision in *Priestman v. Colangelo, Shynall and Smythson*[60] where no liability attached to an officer who shot a fleeing suspect whose vehicle subsequently crashed into, and killed, two innocent by-standers. There, the Court also looked at what the

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55 *Ibid*, citing Maugham LJ in *Haynes*, *supra* note 6.

56 [1974] SCR 175, 41 DLR (3d) 720 [*Poupart*].

57 *Criminal Code*, RSC 1985, c C-46, s 25(1) currently states:

> **Protection of Persons Administering and Enforcing the Law**
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> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law ... (b) as a peace officer ... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

58 *Poupart*, *supra* note 56 at 183 [emphasis added].

59 *Ibid* citing *Waterfield*, *supra* note 4 and *R v Knowlton*, [1974] SCR 443, 33 DLR (3d) 755 [*Knowlton*].

60 [1959] SCR 615, 19 DLR (2d) 1 per Locke and Taschereau JJ, and Fauteux J concurring in the disposition (Cartwright and Martland JJ dissenting) [*Priestman*].

officer was doing and the nature of the interference with individual rights. Justice Locke, for the majority, stated that section 25 of the *Criminal Code* and the duty imposed on the officer by section 45 of *The Police Act*[61] to preserve the peace, prevent crimes and offences and apprehend offenders, provided a complete defence.[62]

Nevertheless, Justice Locke went on to say that duty and risk had to be balanced against the nature of the offence being investigated. A police officer would never be justified in firing at an escaping suspect, obscured from his view by a crowd of people, in the hopes of stopping him. However an officer's duty may, at times and of necessity, involve injury to other people and property.[63] Such risk, in the absence of a negligent or unreasonable exercise of such duty, may be justified *salus populi suprema est lex*. As noted by Justice Locke:

> [t]his phrase is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.[64]

B. A Balancing Test

The considerations applied by Justice Locke in *Priestman*, which were in turn applied by the majority of the Supreme Court in *O'Rourke*,[65] are consistent with the reasoning of Justice Ashworth in *Waterfield*. That is, when justifying any interference with a person's liberty interests a police officer's actions must be assessed in light of a number of factors, including:

1. The duty being performed;

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61 *The Police Act*, RSO 1950, c 279, s 45.

62 *Priestman*, *supra* note 60 at pp 618-624.

63 *Ibid* at p 623.

64 *Ibid* citing Broom's Legal Maxims. Also see *R v Pavletich* (1932), 58 CCC 285, 1932 CarswellQue 317 (Que RC) [*Pavletich*], and *British Cast Plate v Meredith* (1792), 100 ER 1306, (1792) 4 Term Reports 794, referenced at p 618 for an early application of this maxim.

65 *O'Rourke*, *supra* note 53 at 66-67.

2. The extent to which some interference with individual liberty is necessitated in order to perform that duty;
3. The importance of the performance of that duty to the public good;
4. The liberty interfered with; and
5. The nature and extent of the interference.[66]

The framework is very similar to the test formulated by Justice Dickson in *R. v. Oakes* to determine if a law or activity, while violating the *Charter*, can still be demonstrably justified in a free and democratic society under section 1.[67]

The analytical framework in *Priestman* and *O'Rourke* is also similar to that reached by the New Zealand Supreme Court in *Police v. Amos*.[68] Justice Speight stated that policemen have a common law duty to take steps which would otherwise be unlawful to prevent unlawful conduct (actual or apprehended) by another, "but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended."[69]

Haynes was applied in *O'Rourke*, both at the Ontario Court of Appeal and the Supreme Court. Meanwhile, *O'Rourke* was applied in *Jane Doe v.*

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66 *Waterfield*, *supra* note 4 at 170.

67 *R v Oakes* [1986] 1 SCR 103, 53 OR (2d) 719. The test to be applied is as follows:

1. What is the purpose or objective
2. Is the objective pressing and substantial
3. Are the means rationally connected to the objective
4. Is there a minimal impairment of rights, and
5. Is there proportionality between the infringement and objective

See note 74 for text of section 1 of the *Charter*. Also see *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508 for the reasonableness test under section 8 [*Collins*].

68 *Police v Amos Police v Taylor,* [1977] NZHC 8, [1977] 2 NZLR 564. *Police v Amos* was subsequently applied by the Supreme Court in *Ngan*, *infra* note 109, holding that the New Zealand *Bill of Rights* was consistent with the common law rules in *Waterfield*. The main difference noted by Tipping J in his concurring opinion was that the police had to act "lawfully" under *Waterfield* and "reasonably" under the *Bill of Rights*.

69 *Ibid* at p 569. Speight applied both *Haynes*, *supra* note 6 and *Waterfield*, *supra* note 4.

Board of Commissioners of Police for the Municipality of Metropolitan Toronto.[70] In that case, the Ontario Supreme Court refused to strike a claim against the Toronto Police for failure to warn potential victims of an active rapist in a particular area of Toronto. The Court found that the police had a duty at common law to preserve the peace and prevent crimes and offences, and by statute and the *Charter* to accord all such potential victims, of whom Jane Doe was one, equal protection of that law.[71]

From the preceding it is clear that police conduct that interferes with an individual's liberty or freedom is authorized by the common law if the police are acting in the course of their duty and their conduct does not involve an unjustifiable use of powers in the circumstances.[72] In the case of *Jane Doe* the police interfered with her liberty interests by failing to notify her of an active rapist in her area. Essentially using her and other similarly situated women as bait, the police conduct involved an unjustifiable use (or misuse) of powers. The Court upheld a cause of action for negligence and a violation of her rights under sections 7 and 15 of the *Charter*.[73]

As the police conduct could not be justified by any legislative enactment or common law rule, section 1 of the *Charter* had no application because the conduct of police was not "prescribed by law".[74] As

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70 [1998] OJ No 2681, 39 OR (3d) 487 (Ont SC) [*Jane Doe*].

71 *Ibid.*

72 See *R v Godoy*, [1997] OJ No 1408 (CA), 33 OR (3d) 445, aff'd [1998] 1 SCR 311; and *Mann*, *supra* note 20, where the Supreme Court modified the *Waterfield* test to emphasize the importance of *Charter*-protected rights.

73 *Jane Doe*, *supra* note 70; *Charter, supra* note 1. Sections 7 and 15 of the *Charter* read as follows:

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

74 *Jane Doe*, *supra* note 70. Section 1 of the *Charter* reads as follows:

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set

such, the *Waterfield* analysis was not employed. However, where the principles of fundamental justice are at play, competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under section 1 of the *Charter*.[75] As the Court stated in *R. v. Swain*:

> It is not appropriate for the State to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit the accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*[.][76]

C. Interplay With Charter

Interplay between the *Charter* and the common law keeps the police in balance by ensuring an officer's actions are not unreasonable, unfair, or arbitrary when balanced against the expectations and legitimate societal concerns for safety, protection and law enforcement.[77] However this should not be surprising. As noted by Justice Lewis in *R. v. Gallant*,[78] section 7 of the *Charter* has been a root principle of our common law for decades, and in particular has a counterpart in the *Canadian Bill of Rights*.[79]

Although some commentators would prefer police powers to be legislated, and while precision may be desirable, the circumstances to which it must be applied vary so greatly that it may be too difficult to

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out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

75 *Carter*, *supra* note 17 at para 79.

76 *Ibid* at para 80, citing *R v Swain* [1991] 1 SCR 933 at 977, 3 CRR (2d) 1.

77 *Charter*, *supra* note 1. Section 8 of the *Charter* states everyone has the right to be secure against unreasonable search or seizure; and section 9 states everyone has the right not to be arbitrarily detained or imprisoned. Even section 7's requirement of "fundamental justice" implies no more than fairness in the application of the law. While it will vary in accordance with context, fairness also considers reasonableness and arbitrariness.

78 (1982) 70 CCC (2d) 213, 1982 CanLII 1826 (ON SC).

79 *Ibid*. Section 1(a) of the *Canadian Bill of Rights*, SC 1960, c 44, states that "It is hereby recognized and declared that in Canada there have existed and shall continue to exist ... the following fundamental freedoms (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law" [emphasis added].

compile an exhaustive list of an officer's duties.[80] Reasonable persons may be expected to hold different opinions, but principles constructed in a legal laboratory or library analysis will not work in rapidly unfolding real world encounters.[81] An officer's action will often depend on a reasonable assessment at the time of a given situation, and it is important that they should have a wide discretion to act swiftly and decisively. As noted by the U.S. Supreme Court in *Graham v. Connor*:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. Moreover, the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving....thus we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.[82]

The day-to-day operation of law enforcement depends upon the exercise of discretion[83] and the assessment of an officer's conduct should not devolve into a scientific or metaphysical exercise.[84] Common sense, flexibility, and practical everyday experience are to be applied through the eyes of the reasonable person armed with the knowledge, training and experience of the officer.[85] Furthermore, as noted by Professor David

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80 *Innes*, *supra* note 5.

81 See *United States v Cortez*, 449 US 411 (1981) at 418, 101 S Ct 690 where Chief Justice Berger stated "[T]he evidence ... collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement". This phrase has been quotes by several appellate courts in Canada, most notably *R c Bilodeau* (2004), 192 CCC (3d) 110, 2004 CarswellQue 5562 (QC CA); *Can v Calgary Police Service* 2014 ABCA 322 per Wakeling JJA concurring; *Brown v Durham Regional Police* (1996),134 DLR (4th) 177, 106 CCC (3d) 302 (ONCJ); *R v Simpson* (1993), 79 CCC (3d) 482, 20 CR (4th) 1 (Ont CA); and Madame Justice L'Heureux-Dubé for herself Gonthier and McLachlin JJ in *R v Feeney*, [1997] 2 SCR 13, 1997 CarswellBC 3179.

82 *Graham v Connor* (1989), 490 US 386 at 388, 109 S Ct 1865.

83 *R v Beare* (1988), [1988] 2 SCR 387, 45 CCC (3d).

84 *R v Yates*, 2014 SKCA 52 at para 77, 311 CCC (3d) 437, citing *R v MacKenzie*, 2013 SCC 50 at para 73, [2013] 3 SCR 250, per Moldaver [*MacKenzie*].

85 *MacKenzie*, *ibid*.

Paciocco (now a Judge of the Ontario Court of Justice), fairness includes the views of the community – not just the accused. He noted the following:

> [T]he *Charter* has not given criminal procedure a monochromatic focus that reflects only shades of liberty [...] [P]rinciples of fundamental justice "embrace interests and perspectives beyond those of the accused" [and] "the fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused"[...] [F]undamental justice and section 11(d) entitle the accused to a "fair hearing" and not to "the most favourable procedures that could possibly be imagined".[86]

As previously noted by Professor Peter Hogg, when we speak of the protection of civil liberties in a society, we are really speaking about the nature of the compromises which society has made between civil libertarian values and the competing values recognized by social and economic regulation, which limit individual freedom in pursuit of collective goals.[87]

IV. POLICE DUTIES

As noted by Stribopoulos and others, in the era of the *Charter*, the Supreme Court has routinely employed a variety of techniques to fill the gaps in police powers using a number of devices such as concoction, insertion and contraction, based on the English decision in *Waterfield*. While these authors would prefer the approach to police powers to be curbed and clearly circumscribed by legislation and not left to the courts to invent,[88] the reality is that this 'unprecedented approach to the creation of novel police powers' did not start with *Waterfield*. Rather, the decision

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[86] David Paciocco, "Charter Tracks: Twenty-Five Years of Constitutional Influence on the Criminal Trial Process and Rules of Evidence" (2008) 40 SCLR (2d) 309 at 312, citing *R v Mills*, [1999] 3 SCR 668 at paras 72-73, 180 DLR (4th) 1; *Cunningham v Canada*, [1993] 2 SCR 143 at para 17, 80 CCC (3d) 492; *R v E (AW)*, [1993] 3 SCR 155 at 198, 83 CCC (3d) 462; *R v Lyons*, [1987] 2 SCR 309 at para 88, 44 DLR (4th) 193; and *R v Darrach*, [2000] 2 SCR 443 at para 24, 191 DLR (4th) 539 [emphasis added].

[87] Hogg, *supra* note 9.

[88] Stribopoulos, *supra* note 10.

in *Waterfield* can itself be seen as the midway point in the judiciary's dialogue on police duties and responsibilities, founded as it was on cases and principles dating back more than 150 years.

Indeed, the courts have shown a clear appreciation for the nature of a policeman's lot – his duty to protect the life and property; to preserve the peace; and to apprehend offenders all in the face of uncontrolled forces. Prior to the *Charter* the courts had already been examining what an officer was doing on a case by case basis as it was otherwise 'too difficult to compile an exhaustive list' of an officer's duties.

As previously mentioned, considering the dramatic changes that have occurred in the past 150 years, the question should not be why Parliament has not restrained the courts on developing the powers and duties of the police at common law, but rather what these powers consist of in our evolving society.

A. Police Codes

Almost all Commonwealth countries have a Charter of Rights enshrined in their Constitution.[89] Canada is not unique in this regard. However, the ones that do not, the United Kingdom and Australia, have the most comprehensive codes outlining the duties and responsibilities of the police.

For example, the *Police and Criminal Evidence Act*[90] codified police powers in the United Kingdom and abolished all the rules of common law under which a constable had the power to enter premises without a warrant except for a constable's power of entry to prevent a breach of the peace.[91] The PACE was passed shortly after the 1985 Brixton Riots and the report of Lord Scarman regarding the manner in which the police carried out their duties.[92]

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89 Parliament of Canada, *Charters of Rights in Commonwealth Countries*, online: <https://web.archive.org/web/20151125173105/http://www.parl.gc.ca/parlinfo/compilations/constitution/CharterOfRights.aspx>.

90 *The Police and Criminal Evidence Act 1984* (UK), c 60 [PACE].

91 *Ibid*, ss 17(5) & (6).

92 BBC News, "Q&A: The Scarman Report", *BBC News* (27 April 2004), online: <http://news.bbc.co.uk/1/hi/programmes/bbc_parliament/3631579.stm>.

Nevertheless, the United Kingdom did not have an entrenched Bill of Rights. In fact, while the United Kingdom is a party to the *European Convention on Human Rights*,[93] no actual legislation was introduced to give effect to the Convention's rights until the passing of the *Human Rights Act 1998*.[94] The Act subsequently came into force in October 2000. Still, the Act is not entrenched. It is not given any special status and, like any Act of Parliament it can be repealed by a simple majority of the House of Commons.

In *McLeod v. Commissioner of Police of the Metropolis*[95] the Court of Appeal looked at the common law right of a constable to enter a dwelling to prevent a breach of the peace surrounding the separation of assets in a matrimonial matter. The first issue was whether the power to enter to prevent a breach of the peace was in accordance with the common law. The Court felt that the concept of "breach of the peace" and the right to enter was sufficiently recognised and defined by English law to meet this criterion in the circumstances of the case, taking note of the half-century old decision in *Thomas v. Sawkins*,[96] as well as section 17(6) of PACE.[97]

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93 EC, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, (France: EC 1950), online: <http://www.refworld.org/docid/3ae6b3b04.html> [ECHR].

94 *The Human Rights Act 1998* (UK), c 42. Received Royal Assent on November 9, 1998, and came into force on October 2, 2000.

95 [1994] 4 All ER 553 (CA), [1994] EWCA Civ 2. Leave to appeal House of Lords refused May 18, 1994. Rev'd *McLeod v United Kingdom* (1999) 27 EHRR 493 [*McLeod*].

96 *Ibid* at 560. The Court has recognized there is "a power to enter premises to prevent a breach of the peace *as a form of preventative justice*". Applying *Thomas v Sawkins*, [1935] 2 KB 249, [1995] All ER Rep 1935 (DC) [*Sawkins*]. *McLeod* was subsequently applied in *Addison v Chief Constable of the West Midlands Police*, [2004] 1 WLR 29 (CA) [*Addison*], upholding police actions in detaining Mr. Addison to prevent a neighbour dispute over a fence from escalating. Also see *Williamson v Chief Constable of the West Midlands Police*, [2004] 1 WLR 14, [2003] EWCA Civ 337 (CA) [*Williamson*]. Detention was also upheld, but the court said Mr. Williamson should have been released once the passions had cooled and the threat of a further breach had passed.

97 PACE, *supra* note 90. Section 17(6) specifically retained a constable's power of entry to deal with or prevent a breach of the peace. Similar provisions exist in the *Law Enforcement (Powers and Responsibilities) Act 2002 No 103* (NSW), s 9 [LEPARA]; *Police Administration Act* (NT), s 126; *Police Powers and Responsibilities Act 2000* (Qld), ss 9, 50 [PPRA]; and *Police Powers and Procedures Act* 1998 (Isle of Man), s 20, to name a few.

In *Laporte v. Chief Constable of Gloucestershire*[98] the House of Lords further examined the history and jurisprudence of police powers to prevent a breach of the peace at great length. Each member of the House recited a number of cases. Notably, four of the five separate judgements cited the 19th century decision of *O'Kelly v. Harvey*.[99] Lord Earlsferry emphasized that the duty to intervene arises when breaches of the peace are "imminent" or will take place "in the immediate future".[100]

Another case cited in the decision was *Piddington v. Bates*.[101] In *Piddington*, the accused was arrested for wanting to join a picket line. A police officer, deciding that there should be no more than two pickets at each location, would not allow him to join since he believed that a breach of the peace was a real possibility if he did. The defendant pushed past him, and the officer arrested him for obstructing a constable in the execution of his duty. There was no disorder, and no violence ensued. However, the conviction was upheld as the officer anticipated that without his taking preventative action, "a real danger" and "a real possibility" of a breach of the peace would occur.[102]

The assessment of what a police officer believes is about to happen will depend on the information that he has available to him. That is, was it reasonable? Besides what he sees in front of him, the officer may add any additional information or specialized knowledge at his disposal to provide reasonable grounds, including radio transmissions, reports from other

98 [2007] 2 AC 105, [2007] 2 All ER 529 (HL) [*Laporte*].

99 (1882) 14 LR IR 14, aff'd (1883) 15 Cox CC 435 (CA) [*O'Kelly*].

100 *Laporte, supra* note 98 at para 62.

101 [1961] 1 WLR 162, [1960] 3 All ER 660 (CA), [*Piddington*]. One of the other cases referred to in argument was *Humphries*, *infra* note 104, which held, at common law, that a police officer may interfere in some limited way with an innocent person for the preservation of order. In this case taking a party emblem (orange lily) away from a protestor that was likely incite others.

102 *Ibid* at 170. *Piddington* was also adopted by Hodgson J in *Albert v Lavin* [1981] 2 WLR 1070, [1982] AC 546 (CA), aff'd [1982] AC 546 (HL) at 553. *Albert v Lavin* was in turn applied by the Victoria Supreme Court in *Nicholson*, *infra* note 112. *Piddington* also remains good law under the Law Enforcement Powers Act (LEPRA) in New South Wales today. However see *Kuru v State of New South Wales*, [2008] HCA 26, 236 CLR 1 rev'ing [2007] NSWCA 141 [*Kuru*].

officers, intelligence information and advice on how to interpret the data.[103]

The 1864 appeal decision in *Humphries v. Connor*,[104] where an accused's arrest for wearing an orange lily (an action "calculated and tending to provoke animosity between different classes of Her Majesty's subjects") was upheld, was also considered by the Court of Appeal in *Waterfield*.

Police codes also exist in some Australian jurisdictions.[105] However, like the United Kingdom, Australia does not have an entrenched Bill of Rights in its Constitution. While two Australian States have a Bill of Rights,[106] only the State of Victoria has a Charter similar to Canada's. Nevertheless the policing statutes in these States maintain the rights and duties of a constable at common law,[107] including the rights and powers conferred by the common law on police officers to deal with breaches of the peace.

Suffice to say, the *Charter* adds another layer of checks and balances to other formal processes already in place in Canada, but which are absent in other jurisdictions. Even where there are police codes and statutory Bills of Rights (or Charters), other jurisdictions still maintain police powers at common law to deal with unknown, unanticipated and uncontrolled forces.

For example, in New Zealand, where *Waterfield* has also been applied with some regularity, the Supreme Court recently found that while police actions must be tested against the requirements of the *Bill of Rights Act*,[108] the requirements of the common law as stated in *Waterfield* are consistent

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103 *Laporte, supra* note 98 at para 67.

104 (1864) 17 ICLR 1 (CA) [*Humphries*]. Also see *Fleming v Ontario*, 2018 ONCA 160 for a recent example where carrying a flag towards a protest was seen as likely to provoke others to violence based on the police knowledge of historical frictions in the Caledonia area (per Nordheimer and Cronk concurring, Huscroft dissenting).

105 PPRA, *supra* note 97; LEPARA, *supra* note 97.

106 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

107 *Police Act 2013* (Vic), s 51; PPRA, *supra* note 97, s 9; *Police Act 1990 No 47* (NSW), s 14; LEPARA, *supra* note 97, s 4; and the *Australian Federal Police Act 1979* (Cth), s 9.

108 *New Zealand Bill of Rights Act 1990* (NZ), 1990/109 [*Bill of Rights*]. The Act is very similar to the *Charter*, online: <http://www.legislation.govt.nz/act/public/1990/0109/latest/whole.html>.

with the *Act* (specifically, that both the common law and the *Bill of Rights Act* require that police officers act reasonably).[109]

As such, it is likely that even if a police code were enacted in Canada, it would contain a clause stating that the powers and duties of a constable at common law still applied. Furthermore, those powers and duties as viewed using the *Waterfield* analysis would be upheld as reasonable within the framework of the *Charter*, similar to the New Zealand *Bill of Rights Act*. Therefore, looking at what the common law already provides is important, keeping in mind that the common law is not static, but "a growing organism which continually adapts itself to meet the changing needs of time."[110]

Moreover, when considering if prior legislative authority would generally provide some democratic legitimacy and better legal certainty to the multitude of unwritten government powers in New Zealand, Justice McGrath suggested that they would "inevitably be so broadly expressed as to make [any] advantages illusory."[111]

B. Execution of Duties

As already noted, police officers have statutory duties which include those of a constable at common law. Those duties are wide and varied and not easily compiled into an exhaustive list. Oftentimes those duties are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

These duties may include entering a house to abate a noise nuisance,[112] stopping a water tap that is overflowing,[113] dousing a fire or

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109 *Ngan v The Queen*, [2007] NZSC 105 at para 22, [2008] 2 NZLR 48 per Blanchard for a majority of the Court, concurring opinions by Tipping and McGrath, JJ. The difference, according to Tipping is that under *Waterfield* the police had to act "lawfully", whereas under the *Bill of Rights* they had to act "reasonably" [*Ngan*]. Also see *Tuato v R*, [2011] NZCA 278 at paras 14-17

110 *Chic Fashions (West Wales) Ltd v Jones* [1968] 1 All ER 229, [1968] 2 WLR 201 (CA), per Lord Salmon at 240. Also see notes 23-29 and associated text regarding the continued evolution of the common law.

111 *Ngan, supra* note 109 at para 96. McGrath was also talking about the existence of residual freedom, or "third source of authority" for government action that is distinct from statutory and common law powers that cover the thousands of administrative government actions that occur every day.

112 *Nicholson v Avon*, [1991] 1 VR 212, [1991] VicRp 15, leave to appeal High Court denied (AustLII) [*Nicholson*]; *United States v Rohrig*, 98 F 3d 1506, 65 USLW 2325 (6th

checking for explosive chemicals.[114] It may include checking on property that has been vandalized,[115] to help the blind and infirm, to direct people who have lost their way, or to pull down a galloping horse to prevent an accident from occurring.[116] The police are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety".[117] They are also expected to intervene when a person suffering from a mental disorder is likely to cause harm,[118] to stop fights and to prevent the commission of crime,[119] and to keep the peace and prevent that which might cause serious injury to someone, or even to many people or to property.[120]

The public expects the police to make inquiries when suspicious events happens, and "[t]he *Charter* is not a barrier to those inquiries."[121] In fact, when there is reason to believe that someone's health or safety may be

Cir 1996). Also see *City of Fargo v Lee (et al)* 580 NW 2d 580, 1998 ND 126 (Supt Ct ND 1998); and *Commonwealth v Kiser*, 724 NE 2d 348, 48 Mass App Ct 648 (Mass CA 2000).

113 *R v Martin*, 1995 CanLII 1003 (BCCA) at para 38, (1995), 97 CCC (3d) 241, aff'd *R v Martin*, [1996] 1 SCR 463, 1996 CanLII 223 [*Martin*].

114 *United States v Lancellotti*, 145 F 3d 1342 (9th Cir 1998). Also see *R v Jamieson*, 2002 BCCA 411, 166 CCC (3d) 501, where entry may be necessary to contain the risk of property damage to *vandalism, fire, water or powe*r.

115 *R v Hern*, 1994 ABCA 65, (1994) 149 AR 75 (CA). Also see *R v Dreysko*, 1990 ABCA 309, (1990) 110 AR 317 (CA); and R v *Nguyen*, 2000 BCSC 1547, [2000] BCJ No 2728 (SC).

116 *Haynes, supra* note 6 at 161.

117 *United States v Smith*, 522 F 3d 305 (3rd Cir 2008), citing *United States v Rodriguez-Morales* 929 F 2d 780 (1st Cir 1991) at 784-5, cert denied 112 S Ct 868 (1992).

118 *R v Tereck (RS)*, 2008 MBCA 90, 228 Man R (2d) 260 (CA).

119 *Brigham City v Stuart*, 547 US 398 (2006) at 406 where the Court stated "the role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided".

120 *R v Howell* (1981), 73 CR App R 31, [1981] 3 AII ER 383 [*Howell*].

121 *R v Orellana*, [1999] OJ No 5746 (OCJ) at para 32, as cited by Deschamps J in her concurring opinion in *R v Grant*, 2009 SCC 32 at para 187, [2009] 2 SCR 353.

endangered, an officer could be considered derelict by not acting promptly to ascertain if someone needed help.[122]

Where a police officer acts on reasonable grounds, he is justified in doing what he is required to do and in using as much force as is necessary for that purpose.[123] In addition, section 27 of the *Criminal Code* provides that everyone is justified in using as much force as is reasonably necessary to prevent anything from being done that would likely cause immediate and serious injury to the person or property of anyone.[124] Section 31(2) of the *Interpretation Act* further empowers an officer with all such ancillary powers deemed necessary to enable the officer to do what he is lawfully required to do.[125]

While it is true, as Stribopoulos notes, that there are no longer any common law offences in Canada,[126] this does not equate with the abolition of all common law powers or justifications. For example, in *R. v. Jobidon*[127] the Supreme Court held that section 8(3) of the *Criminal Code* authorizes the courts to look to pre-existing common law rules and principles to give meaning to, and explain the outlines and boundaries of an existing defence or justification. This provision "expressly indicates that the common law rules and principles continue to apply, but only to the extent that they are not inconsistent with the *Code* or other Act of Parliament and have not been altered by them."[128]

Indeed, no Act of Parliament or the Legislature of a Province has sought fit to abolish or limit a police officer's powers or duties at common law, although in some provinces the authority is silent.[129] Even then, the

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122 *State v Gocken*, 857 P 2d 1074 at 276, 71 Wn App 267 (Wash CA 1993) [*Gocken*]. Also see *O'Rourke, supra* note 53.

123 *Criminal Code, supra* note 57, s 25(1).

124 *Ibid*, s 27.

125 *Interpretation Act*, RSC, 1985, c I-21, s 31(2). Also see *Lyons*, *supra* note 19 at 692, where a majority of the Supreme Court found s 26(2) of the *Interpretation Act* (as it then read), authorized the surreptitious entry into a dwelling house to install a listening device as ancillary to a Wiretap authorization.

126 James Stribopoulos, "Unchecked Powers: The Constitutional Regulation of Arrest Reconsidered", (2003) 48 McGill LJ 225 at 236.

127 [1991] 2 SCR 714, 128 NR 321.

128 *Ibid* at para 49 citing *Criminal Code, supra* note 57, s 8(3).

129 *Supra* note 34. In *Quebec Police Act*, chapter P-13.1, there is no reference to the

use of force to carry out a duty to prevent a reasonably apprehended breach of the peace that may give rise to violence could fall under section 8 of the *Criminal Code* as a "justification" under the common law.[130] As noted by Justice Hayes more than 150 years ago in *Humphries*, "it would seem absurd to hold that a constable may arrest a person whom he finds committing a breach of the peace, but that he must not interfere with the individual who has wantonly provoked him to do so."[131]

Although section 31 of the *Criminal Code* is confined to breaches of the peace that have actually taken place,[132] there is a common law power for a police officer to detain without warrant where he reasonably apprehends a breach of the peace may occur, as a preventative measure to stop or abate any actions that may give rise to acts of violence.[133] "It would be a strange thing if the constable, reasonably believing that [someone could be harmed] should be compelled to remain outside or set off for a justice of the peace in order to obtain a warrant".[134]

Although Stribopoulos indicates the Court has taken an unprecedented approach to the creation of novel police powers, the reality is that some courts had already stated that an individual's welfare may yield to that of the community for the public good. For example, in

common law and all duties and powers of municipal police officers are to be proscribed by municipal by-law (s 86(2)).

130 Any defence or justification raised under s 8(3) can and has been used to develop entirely new defences under the common law such as battered women's syndrome in *R v Lavallee*, [1990] 1 SCR 852, 55 CCC (3d) 97; sleepwalking in *R v Parks*, [1992] 2 SCR 871, 75 CCC (3d) 287; automatism based upon voluntary intoxication in *R v Daviault* [1994] 3 SCR 63, 118 DLR (4th) 469; hypoglycemia, hypnotism in *R v Rabey*, [1980] 2 SCR 513, 114 DLR (3d) 193; and abuse of process. If such defences can be used to acquit murders, this section should be equally used to justify the use of force at common law.

131 *Humphries*, *supra* note 104.

132 *Criminal Code*, *supra* note 57, s 31.

133 *Hayes v Thompson* (1985), 18 CCC (3d) 254, 17 DLR (4th) 751 (BCCA) [*Hayes*]; *R v Khatchadorian*, 127 CCC (3d) 565, [1998] BCJ No 1867 (CA); *Alexson supra* note 42 at para 29; *Howell*, *supra* note 120; and *Blanchard v Galbraith* (1966), 10 Crim LQ 122 (Man QB).

134 *Dowling v Higgins*, (1944) Tas SR 32 [*Dowling*]. Also see *Gocken*, *supra* note 122 and *Humphries*, *supra* note 104.

Brinegar v. United States,[135] twenty years before *Waterfield*, the United States Supreme Court also held that officers must be given fair leeway in enforcing the law for the community's protection since many situations which confront them in the course of executing their duties are more or less ambiguous. Room for mistakes must be allowed based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[136]

Recently, in *R. v. MacKenzie*,[137] the Supreme Court applied a "reasonable person" test in assessing whether a police officer had reasonable suspicion in detaining a motorist believed to be involved in a drug-related offence and conducting a dog-sniff search of his vehicle. Although not highlighted by the Court, the reasonable person test has been a part of the legal landscape for well over 150 years in assessing liability or responsibility for one's conduct. First appearing in the English case of *Vaughan v. Menlove*[138] in 1837 and upheld 20 years later in *Blyth v. Birmingham Waterworks*,[139] it has been applied many times since in Canada.[140]

On top of the hundreds of inquests and commissions of inquiry,[141] there have been thousands of tort actions against the police for trespass,

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135 (1949), 338 US 160 at 175, 69 S Ct 1302 [*Brinegar*]. Also see *Priestman*, *supra* note 60.

136 *Brinegar*, *ibid* at 175. Also see *R v Musurichan*, 1990 ABCA 170, at para 10, 107 AR 102 where the Court stated:

> The important fact is not whether the peace officer's belief ... was accurate or not, it is whether it was reasonable. That it was drawn from hearsay, incomplete sources, or that it contains assumptions will not result in its legal rejection by resort to facts which emerged later. What must be measured are the facts as understood by the peace officer when the belief was formed.

137 *MacKenzie*, *supra* note 85.

138 (1837) 3 Bing NC 467, 132 ER 490.

139 (1856) 11 Ex Ch 781, 156 ER 1047.

140 *Arland v Taylor* [1955] OR 131, [1955] 3 DLR 358 (CA). Also see *R v Strachan*, [1986] BCJ No 55 at para 89, 25 DLR (4th) 567 (CA), aff'd [1988] 2 SCR 980, where Esson JA stated at para 88 that the ideal way of reflecting community values was through such legendary devices as "the reasonable man".

141 There is a mandatory inquest into every time a person dies in the custody of a peace officer. See for example the *Fatality Inquiries Act*, CCSM c F52, ss 7(5) and 7(9)(ix). All inquiries since 2002 are publicly available online at: <http://www.manitobacourts.mb.ca/provincial-court/inquests/inquest-reports/>. In

assault, battery, negligence, false imprisonment and malicious prosecution.[142] These have all been an important method of supervising police actions in the past where the criminal law and exclusionary rules have not.[143] Many of these cases took into account the reasonableness of what an officer was actually doing when assessing whether liability should attach to their actions or not.

This was the point made by Justice O'Brien in *Humphries*[144] over 150 years ago when he said the law would not protect a constable who exercised his powers unnecessarily, excessively, or improperly. In fact, the police have been sued for breaching civil rights when interfering with lawful religious practices;[145] failing in their duty to warn, to prevent accidents and preserve safety;[146] failure to take reasonable care and protection of those taken into custody;[147] negligent use of force in attempt to stop or arrest a suspect;[148] false imprisonment without reasonable

addition there have been hundreds of other types of commissions or Royal Commissions of Inquiry into police activities across the country. Federally a searchable list of all commissions of inquiry can be found online at <www.bac-lac.gc.ca/eng/discover/royal-commissions-index/Pages/index-federal-royal-commissions.aspx>

142 See notes 145-153 for examples.

143 See A M Linden, *Canadian Tort Law* (6th ed, 1997) at 93 where he states tort actions against the police are an important method of supervising police actions as the criminal law and exclusionary rules furnish insufficient protection to the public. Even unsuccessful claims still require from them to account for their actions at the behest of the aggrieved citizen. "This cannot help up to render the police more sensitive to the individual rights of those they must deal with in their work".

144 *Humphries, supra* note 104.

145 *Chaput v Romain*, [1955] 1 DLR (2d) 241, 114 CCC 170 (SCC); *Lamb v Benoit et al*, [1959] SCR 321, 17 DLR (2d) 369 (SCC).

146 *O'Rourke*, *supra* note 53.

147 *Fortey (Guardian ad Litem) v Canada (Attorney General),* 1999 BCCA 314, 125 BCAC 29; *Funk v Clapp* (1986) 68 DLR (4th) 229, 35 BCLR (2d) 222 (BCCA); *Lipcsei v Central Saanich (District of),* 1994 CanLII 368 (BCSC); *Dubé v Montreal (City)*, (1912) 7 DLR 87, 42 Que SC 533 (Que CA); *Indiana v Gobin*, 94 F 48 (USCC 1899).

148 *Cretzu v Lines*, [1941] 2 DLR 413, [1941] 1 WWR 396 (BCSC); *Vignitch v Bond* (1928), 50 CCC 273, 37 Man R 17 (Man KB); *Gelfand v CPR,* [1925] 2 WWR 765, 44 CCC 325 (Man KB); *AG Canada v Sandford*, [1957] 11 DLR (2d) 115, 118 CCC 93 (Ex Crt); *Beim v Goyer*, [1965] SCR 638, 57 DLR (2d) 253; *Priestman v Colangelo* [1959] SCR 615, 19 DLR (2d) 1; *Green v Lawrence*, [1998] MJ No 335, 163 DLR (4th) 115 (CA).

grounds;[149] illegal entry, execution of search warrant and negligence in performing duty as guardians of the public peace;[150] negligent operation of a police vehicle;[151] malicious arrest or prosecution;[152] conducting a negligent investigation;[153] and obstruction for inappropriate use of discretion,[154] to name a few.

Nevertheless the starting point for the courts' "concoction" of police powers was not the decision in *Waterfield*. This is evident from the decision in *Waterfield* itself, which cites several older authorities supporting the proposition that the police already had some powers and duties at common law to preserve the peace and maintain law and order – specifically *Glasbrook Brothers Ltd. v. Glamorgan County Council*;[155] *Sawkins*;[156] and *Humphries*.[157]

In *Glasbrook Brothers* the issue before the court was the use of police discretion in the protection of striking miners and the mine property itself. While the police had a duty – indeed "an absolute and

149 *Johnson v Moore* (1911), 1 WWR 308, 1911 CarswellBC 97 (BCSC) aff'd (1911), 1 WWR 1102 (BCCA); *Koechlin v Waugh* (1957), 11 DLR (2d) 447, 118 CCC 24 (Ont CA); *Kozak v Beatty*, [1958] SCR 177, 13 DLR (2d) 1.

150 *McCleave v City of Moncton* (1902), 32 SCR 106, 6 CCC 219.

151 *Vallery v Po* (1971), 23 DLR (3d) 92, 1971 CanLII 1039 (BCSC); *Winterbottom v London (City) Commissioners of Police* (1901), 1 OLR 549, [1923] 3 DLR 869 (Ont HC), aff'd (1901), 2 OLR 105 (Ont CA); *Bowles v Winnipeg (City)* (1919), 29 Man R 480, 45 DLR 94 (KB); *Aikens v City of Kingston and Police Com'rs of Kingston*, [1923] 3 DLR 869, 1922 CanLII 540 (Ont SC); *Crew Estate v Nicholson* (1987), 1 MVR (2d) 284, 68 OR (2d) 232, aff'd (1989) 58 DLR (4th) 111 (Ont CA); *Doern v Phillips Estate* [1997] BCJ No 2625, 2 DLR (4th) 108 (CA), aff'ing [1994] BCJ No 2840 (SC).

152 *Lang v Burch* (1982), 18 Sask R 99, 140 DLR (3d) 325 (CA), aff'ing (1981), 8 Sask R 96 (QB); *Wishart v The City of Brandon* (1887), 4 Man R 453 (CA); *McSorley v Saint John (City)* (1882), 6 SCR 531, 1882 CanLII 31.

153 *Beckstead v Ottawa Police,* (1995) 37 OR (3d) 64, 37 OR (3d) 64 (Gen Div); aff d [1997] OJ No 5169 (CA); *Oniel v Toronto (Metropolitan) Police Force*, [2001] OJ No 90, 195 DLR (4th) 59 (CA); and *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 [*Hill*].

154 *R v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190 aff'ing 2005 QCCA 996. Also see *R v Liebrecht*, 2005 SKCA 6, 257 Sask R 75.

155 [1925] AC 270 (HL), aff'ing [1924] 1 KB 879 (CA) [*Glasbrook Brothers*].

156 *Sawkins, supra* note 96.

157 *Humphries, supra* note 104. Also see *O'Kelly, supra* note 99.

unconditional obligation [...] to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property"[158], the manner in which that duty was carried out was owed deference by the courts to the experience and view of the police for the preservation of peace and order.

C. Preservation of the Peace

One of the legislated duties of the police is to preserve the peace,[159] which may also involve a wide and varied list of uncontrolled forces faced by the police. One of the earlier decisions to canvass the issue was *Thomas v. Sawkins*, involving a private prosecution against Sawkins (a police constable) for assaulting Thomas, who was attempting to have the police removed from a public meeting on private property. The police had attended to the meeting and refused to leave for fear that a breach of the peace was likely to occur based on their experience and knowledge of similar previous meetings. The case against Sawkins was dismissed at trial and a further appeal to the Divisional Court was dismissed:

> I think that there is quite sufficient ground for the proposition that it is part of the preventative power, and therefore, part of the preventative duty, of the police, in cases where there are such reasonable grounds of apprehension as the justices found here, to enter and remain on private premises [...] In my opinion, no express statutory authority [to enter private premises] is necessary where the police have reasonable grounds to apprehend a breach of the peace [...] If a constable in the execution of his duty to preserve the peace is entitled to commit an assault, it appears to me that he is equally entitled to commit a trespass.[160]

While Oxford Professor Arthur Goodhart also claimed that *Sawkins* was a constitutional concoction,[161] it too was founded on earlier jurisprudence such as *R. v. Queen's County Justices*,[162] *Lansbury v. Riley*[163] and

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158 *Waterfield*, *supra* note 4 at 170, citing Viscount Cave LC in *Glasbrook Brothers*, *supra* note 155 at 277 [emphasis added].

159 *Supra* note 34.

160 *Sawkins*, *supra* note 96 at 254-257, per Hewart, CJ, Avory J and Lawrence J. Also see *McLeod*, *Addison* and *Williamson*, *supra* notes 95 and 96.

161 A J Goodhart, "Thomas v Sawkins: A Constitutional Innovation" (1936) 6:1 Cam L J 22.

162 (1882), 10 LR IR 294 at 301, sub nom *R v Justices of Cork*, (1882) 15 Cox CC 149 at

Wise v. Dunning.[164] The Court analogized the duty of a police constable to prevent a breach of the peace with the power of a police magistrate to bind persons over to be of good behaviour to prevent a breach of the peace. The decision was an evolution of the common-law, not a concoction. Indeed, the English Court of Appeal would have found support for their decision in the earlier Canadian appellate decisions of *Patterson* and *Pavletich* had they looked.[165]

Within six months of the decision in *Sawkins*, Chief Justice Hewart and a differently constituted panel of the Divisional Court released its decision in *Duncan v. Jones*.[166] Not unlike *Sawkins*, but without reference to that decision, the police were deemed to be in the execution of their duty when they prevented Ms. Duncan from holding a public meeting due to concerns her speech would create a breach of the peace. When she refused to move some 175 yards further down the road she was arrested when she attempted to address those present.

Chief Justice Hewart, in affirming the decision of the trial judge, cited a case that had been decided 75 years earlier (in 1862)[167] for the proposition that the police have a duty to prevent a breach of the peace. Justice Humphreys, while agreeing with the disposition, stated that no authority is required to show that it is the duty of a police officer to prevent apprehended breaches of the peace.[168]

In *Humphries*, a police inspector was charged with assault for stopping and removing a party emblem (an orange lily) from a protestor that was likely to incite others. The charge was dismissed at trial and affirmed by the Court of Appeal. Justice O'Brien held that it is a constable's duty to

155 [*Queen's County Justices*].

163 [1914] 3 KB 229 (DC), at 236 [*Lansbury*]. Also see *MacKenzie v Martin*, [1954] SCR 361, [1954] 3 DLR 417, where the Supreme Court per Kerwin J applied and approved *Lansbury v Riley* and the power of a justice to bind over to keep the peace at common law.

164 [1902] 1 KB 167 (DC) at 175 [*Wise*].

165 *R v Patterson* (1930), 55 CCC 218 (Ont CA) [*Patterson*]; *Pavletich, supra* note 64.

166 [1936] 1 KB 218 (DC) [*Duncan*]. Also see *Burton v Power* [1940] NZLR 305 (SC) for a similar Commonwealth decision.

167 *Duncan*, *ibid* at 223, citing *R v Preeble* (1862), 1 F&F 325, 175 ER 748.

168 *Ibid* at 223.

prevent offences from occurring when it appears to him that the circumstances justify it. When considering if some direction should be given to the police in how they should exercise their discretion in the future, Justice O'Brien stated that the law would "not protect a constable from any unnecessary, excessive, or improper exercise of such power in other cases."[169]

In support of this conclusion Justice O'Brien considered a number of cases including *Cooke v. Nethercote*,[170] *R. v. Browne*,[171] *Ingle v. Bell*[172] and *R. v. Hogan*,[173] which showed the duties police officers have been given in order to keep the peace, even where the activity might be lawful. Justice Hayes, while concurring with Justice O'Brien, added that a constable by his very appointment is charged with the solemn duty of seeing that the peace is preserved.[174] He continued that while the law had not ventured to lay down with precise measures all the facts which call for a constable's interference, "he is not only at liberty, but is bound, to see that the peace be preserved, and that he is to do everything that is necessary for that purpose".[175]

Furthermore, in *R. v. Vincent*, it was held that where there is a reasonable belief that a meeting is "likely to produce danger to the tranquillity and peace of the neighbourhood",[176] an officer is bound to disperse it, and not wait until an actual offence occurs. Considerations in assessing the reasonableness of such belief included the time, place, and language used by both the speaker and those in attendance.

The proposition that a perfectly lawful gathering could lead a police officer to apprehend a breach of the peace was decided by the Ontario

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169 *Humphries*, *supra* note 104 at 6. Also see *Minto v McKay* [1987] NZCA 19, [1987] 1 NZLR 374, where this passage was cited by Bisson J with approval.

170 (1835), 6 C&P 744, sub nom *Cook v Nethercote*, 172 ER 1443 [*Cooke*].

171 (1841), 1 C&M 314, sub nom *R v Brown*, 174 ER 522.

172 *Kyle v Bell* (1836), 1 M&W 519, sub nom *Ingle v Bell*, 150 ER 539 [*Ingle*]. Also see *Cohen v Huskisson* (1837), 2 M&W 477, 150 ER 845 (Court of Exch.) at 847 [*Cohen*].

173 (1837), 8 C&P 171, sub nom *R v Hagan*, 173 ER 445 [*Hogan*].

174 *Humphries, supra* note 104 at 7 (ER).

175 *Ibid* [emphasis added].

176 *R v Vincent* (1839), 9 CaR& P 91, 173 ER 754 [*Vincent*]. Also see *O'Kelly*, *supra* note 99.

Court of Appeal in *R. v. Patterson*[177] – four years before *Sawkins* – yet all the same cases were applied (*Queen's County Justices*, *Lansbury, Wise*, *O'Kelly* and *Vincent*).[178]

While the police in *Patterson* had no intentions of arresting the leaders and merely requested they remain outside a designated area, fearing the public peace would otherwise be disturbed, the leaders were arrested when they ignored the request and continued their parade. While no physical violence resulted, the leaders were subsequently charged. The concern was not whether any violence ensued, but whether the direction of the police – who reasonably believed a breach of the peace was likely – was a lawful one.[179]

Justice Couture subsequently cited these same cases 18-months later in *R. v. Pavletich*.[180] In this case, it was held that if a person who addresses meetings in public places, although not directly inciting anyone, uses language the natural consequences of which are that a breach of the peace will be committed by others, he or she may be bound over to be of good behavior. '*Salus populi est suprema lex*'.[181]

Although the charges laid against *Patterson* were for unlawful assembly, his actions were no different than those of E.J. Knowlton who ignored a police barricade near the front of a hotel where Soviet Premier Kosygin was to make a short stop in Edmonton. Fearing a recurrence of an earlier incident in Ottawa, the Edmonton police created a security zone around the hotel and only those individuals authorized by police were allowed to enter. Mr. Knowlton, refusing to take heed of the police warnings, pushed his way between two constables and was arrested for obstruction.[182]

As the police were not enforcing any law at the time, Mr. Knowlton argued he could not be guilty of obstructing them in their duties. The Supreme Court disagreed. While accepting that the police had interfered with the liberty of the appellant, including his undoubted legal right to

177 *Patterson*, *supra* note 165.

178 *Ibid.*

179 *Ibid.*

180 *Pavletich*, *supra* note 64.

181 *Ibid* at para 13 (CarswellQue), citing *Wise*, *supra* note 164. Also see *supra* note 64 for the meaning of this phrase.

182 *Knowlton*, *supra* note 59, headnote.

circulate freely on a public street, the Court upheld the police action pursuant to a constable's common law duty to preserve the peace and prevent crime.

In light of the earlier assault on the Soviet Premier, the Court thought it reasonable for the police to seek to guard against any further disturbance. As Chief Justice Fauteux explained for a unanimous Court, the conduct of the police clearly fell within the general scope of the duties imposed upon them.[183]

The only case cited by Chief Justice Fauteux was *Waterfield*. However he could have easily applied *Glasbrook Brothers*, *Sawkins*, and *Humphries* (all cases considered or referred to in *Waterfield*). He could have also applied *Queen's County Justices*, *Lansbury*, *Wise*, *O'Kelly*, and *Vincent* (all cases cited in *R. v. Patterson*). These cases all support the proposition that the police have a duty to interfere with a person's liberty where they reasonably apprehend an offence will occur. While *Waterfield* was sufficient, it was far from the only authority for the proposition.

D. Conservators of the Peace

Historically, another term used for police *qua* peace officer, was "conservator of the peace". While the term is not in use today, it does provide some historical foundation supporting the use of police powers at common law to prevent the commission of offences that existed long before *Waterfield*.

When acting as a conservator of the peace, or exercising his own original and inherent functions, a constable could act without a warrant, and as such a conservator he had very great and extensive powers.[184]

Indeed, in *The Canadian Constable's Assistant*,[185] published in 1852, the Honourable James Gowan outlined the authority of a constable as being

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183 *Ibid* at 447-48.

184 Adam Wilson, QC *The Constable's Guide: A Sketch of the Office of Constable* (Toronto: Maclear & Co, 1859) at 19. Also see Joseph Ritson, Esq *The Office of Constable* (London: Whieldon & Butterworth, 1791) at 2-3. Also see *Re In trespass of assault, battery and imprisonment* (1593), 79 ER 1135 (KB) in which Chief Justice Popham stated that "a Constable was one of the most ancient offices in the realm for conservation of the peace, and by his office he is a conservator of the peace".

185 Hon James R Gowan (with notes and additions by James Patton, Esq) *The Canadian Constables' Assistant: Being the Substance of a Charge of the Grand Jury of the County of*

both general and specific. The specific was delegated to him by statute or by a Justice of the Peace. The general authority however accrued by virtue of his right as the holder of a public office (and all constables were conservators of the peace by right of their office).[186] A conservator had inherent powers to act without warrant in the prevention of crime. While Gowan recognized that it is always safer for a constable to act under the warrant of a Justice of the Peace, he noted the following:

> In the prevention of crime[,] [a] constable, not only may, but *must* interfere, to prevent a breach of the peace, or any felonious offence which he sees about to take place: or when such is expected, on receiving proper information thereof, he should attend to deter the evil disposed, and prevent the perpetration of crime. Laws for prevention, are ever preferable, to laws for the punishment of offence – and in the proper exercise of his authority in this particular, the constable may, in his station, materially assist in preserving the peace of the Country, and in preventing violation of the law.[187]

Judge Gowan is clear that the police had a duty at common law to prevent a breach the peace, short of arrest, by laying hands and restraining the offending parties until their heat and passions subsided.[188]

At common-law, the courts have found that there is much authority to the effect that a police officer has a duty to prevent a threatened breach of the peace. While it is true that a constable has no general right of entry into private property to seize evidence, question suspects or effect an arrest, Halsbury's Laws of England provided that, at common-law, a constable "may, however, enter premises to prevent a breach of the peace, and probably to prevent the commission of any offence which he believes to be imminent or likely to be committed".[189]

As Lord Justice Watkins later pointed in *R. v. Howell*:

Simcoe (Barrie: JW Young, 1852).

186 *Ibid* at 15.

187 *Ibid* at 16 [internal quotation marks omitted].

188 *Ibid.* 'Laying hands' was also a term used in *Hogan*, *supra* note 173 and is not inconsistent with terminology in *Humphries*, *supra* note 104 that stopping a demonstrator to remove a party emblem that might incite others was appropriate. Also see *Addison* and *Williamson, supra* note 96, where the detentions were upheld but stated, in the case of MR Williamson, he should have been released "once the passions had cooled" and the threat of a further breach had passed.

189 H*alsbury's Laws of England*, 4th ed, vol 11 at para 122.

> The public expects a policeman [...] to prevent the commission of crime, to keep the peace in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property.[190]

Although the decision in *Howell* was decided after *Waterfield*, the English Court of Appeal canvassed a number of historical cases that supported the proposition that a police officer has a common law duty to arrest or detain individuals where violence is reasonably apprehended.[191]

In upholding the power of a police officer to arrest for an apprehended breach of the peace, the Court held that since the law recognises a power of arrest for the threatened renewal of a breach of the peace, it should not be surprising that a correlative power exists to arrest when an offence is apprehended. The Court cited both *Ingle*[192] and *Cohen*,[193] as well as *R. v. Light*,[194] *Timothy v. Simpson*,[195] and *Hardie v. Murphy*[196] as authorities.

Historically, subject to certain exceptions, there was no statutory authority allowing police to detain suspects. However in *R. v. Dedman*[197] the Supreme Court held that, at common law, the police can interfere with an individual's liberty if they are acting in the course of their duty (i.e. for the preservation of the peace, the prevention of crime, and the protection of life and property) when they effected that interference.[198]

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190 *Howell*, *supra* note 120.

191 Also consider *R v Kennedy* (1973), 11 CCC (2d) 263, 21 CRNS 251 (Ont CA) and *R v Richards* (1974), [1975] 20 CCC (2d) 568, 1974 CarswellOnt 1069 (Ont CC) where a conviction for attempted cause disturbance was substituted for one of causing a disturbance where the accused's actions in making a verbal attack on the police officer who had stopped him for a traffic offence and in exhorting bystanders in such a manner that they might come to his aid or might lead to some embarrassment of the police.

192 *Ingle*, *supra* note 172.

193 *Cohen*, *supra* note 172.

194 (1857), 169 ER 1029, Dears & B 33 [*Light*].

195 (1834) 172 ER 1337 aff'd (1835)149 ER 1285, 1 CM & R 757 at 762 [*Timothy*].

196 (1795), 1 Esp 294, sub nom *Hardy v Murphy & Wedge* (1795), 170 ER 362 [*Hardie*].

197 *Dedman*, *supra* note 19.

198 *Ibid.* See also Casey Hill, "Investigative Detention: A Search/Seizure by Any Other Name?" (2008), 40 SCLR (2d) 179; Steven Penney & James Stribopoulos, "Detention under the Charter after R v Grant and R v Suberu" (2010), 51 SCLR (2d) 439.

Justice LeDain, for the majority of the Supreme Court, applied the reasoning of Justice Ashworth in *Waterfield* to conclude that police powers to detain exist at common law. Without listing all common law police powers, Justice LeDain stated it was more convenient to just consider what the police are actually doing and in particular, whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, the Court should consider whether such conduct (a) fell "within the general scope of any duty" recognized at common law and (b) "whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty."[199]

Similar to the decision in *Knowlton*, Justice LeDain did not cite any other cases outside of *Waterfield*. However, it is clear from reading *Waterfield* that there were cases to support the existence of common law police powers to detain. Nevertheless, as the detention that underlays the decision in *Dedman* pre-dated the enactment of the *Charter,* the question to be asked was how these common-law duties were to be balanced against section 9 of the *Charter*, which prohibits arbitrary detentions.

The Supreme Court considered this question in *R. v. Mann*,[200] a ruling that has had a significant impact on police officers' conduct, investigations, detentions, and searches since it was decided over a decade ago. This aspect of the test requires a consideration of whether an invasion of individual rights is necessary in order for a peace officer to perform his duty, and whether such invasion is reasonable in light of the public purposes being served.[201]

In assessing what is reasonable and necessary, and still relying on the analytical framework espoused by Justice Ashworth in *Waterfield*, the Court in *Mann* held that the detaining officer must have some "articulable cause" for the detention.[202]

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199 *Dedman*, *ibid* at p 33, citing *Waterfield*, *supra* note 4 at 661-62.

200 *Mann*, *supra* note 20. Motion for rehearing by SCC dismissed, October 28, 2004, per Iacobucci. Justices Bastarache and Deschamps, dissenting in disposition only, agreed there is a power to detain at common law.

201 *Ibid* at para 26.

202 *Ibid* at para 27 citing *R v Simpson* (1993), 12 OR (3d) 182 at 202, 79 CCC (3d) 482 (CA).

While some academic commentators[203] believe that investigative detentions are nothing more than the judicial creation of police powers, according to Lorne Stern, investigative detentions as a legitimate police power have existed for centuries (dating back to 1839, when the English Parliament extended the common law power to detain by authorizing police to search any vessel, carriage, and persons who could be reasonably suspected of possessing stolen goods). [204]

Indeed, similar to Canadian jurisprudence, the Victoria Supreme Court in *Nicholson v. Avon*[205] found support for the proposition that the police in Australia have a duty to prevent breaches of the peace based on English cases, including *Waterfield*, *Rice v. Connolly*,[206] *Coffin v. Smith*,[207] and *Albert v. Lavin*.[208] The Court then went on to hold that police officers may enter upon private premises in the performance of their duty to prevent a breach of the peace and quoted from the English Court of Appeal in *Thomas v. Sawkins*. [209]

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203 See, e.g., Stribopoulos, *supra* note 10. See also DJ Delisle, "Judicial Creation of Police Powers" (1993), 20 CR (4th) 29; AS Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2001), 45 CLQ 198; Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012), 57 SCLR (2d) 225; James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill LJ 225.

204 Lorne G Stern, "Stop and Frisk: An Historical Answer to a Modern Problem" (1967), 58:4 J Crim LC & PS Science 552. Also see Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991), 29:2 Osgoode Hall LJ 329.

205 *Nicholson*, *supra* note 112 at 10 (AustLII), citing Halsbury's Laws of England, vol 36, 4th ed, para 320.

206 [1966] 2 QB 414, [1966] 2 All ER 649 (CA), per Lord Parker.

207 (1980), 71 CRAppR 221 (CA) at 227, per Lord Donaldson.

208 [1982] AC 546 (HL) aff'ing [1981] 3 All ER 878 (CA) at 880, per Lord Diplock.

209 *Sawkins*, *supra* note 96 at 254-257. Similar Australian decisions upholding entry onto private property were also cited: *Dowling*, *supra* note 134 at 34 per Morris CJ; *Todd v O'Sullivan* (1985) 122 LSJS 403 at 409 per Legoe J [*Todd*]; and *Panos*, *supra* note 5 at 154-155 per Legoe J. Also see *Allen v Police*, [1961] NZLR 732, regarding reasonable grounds for suspecting that a breach of peace will occur if police do not evict a trespasser.

E. Apprehended Breach of the Peace

Although the decision in *Thomas v. Sawkins* did not deal with the right of the police to enter a dwelling-house – just a private meeting place –[210] the decision in *Dowling v. Higgins* did a few years later.[211] Fifty years later the English Court of Appeal also held that the police have the power to enter any private premise (including a dwelling house) against the wishes of the owner where they have a genuine belief that there is a real and imminent risk of a breach of the peace occurring.[212]

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

> In the case at bar, the forced entry into the appellant's home was justifiable considering the totality of the circumstances. The police were responding to an unknown trouble call. They had no indication as to the nature of the 911 distress. They did not know whether the call was in response to a criminal action or not. They had the common law duty (statutorily codified in s. 42(3) of the [Police Services] Act) to act to protect life and safety. [...] The police had the power, derived as a matter of common law from this duty, to enter the apartment to verify that there was in fact no emergency.[213]

The Court distinguished *Godoy* from its earlier ruling in *R. v. Feeney*[214] by emphasizing that *Feeney* was concerned solely with when the police can enter a dwelling without warrant to make an arrest. As such, *Feeney* did not apply, as the officers in *Godoy* were unconcerned with powers of arrest. The reasoning is similar to the United States cases mentioned earlier where entry is not motivated by intent to arrest and seize evidence, but to

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210 The location in *Sawkins* was a Hall that had been rented out for a private meeting. However see *Panos supra* note 5, for entry to a private yard and *Dowling, supra* note 134 for entry to a private dwelling. Hewart, CJ also relied on the decision of *Humphries, supra* note 104, in which the Court found that a police officer may interfere in some limited way with an innocent person for the preservation of order.

211 *Dowling, supra* note 134. Entry was in response to a domestic incident to check on the wellbeing of the couple's children.

212 *McLeod, supra* note 95.

213 *R v Godoy,* [1999] 1 SCR 311 at para 23, 168 DLR (4th) 257, aff'ing (1997), 33 OR (3d) 445 (CA) [*Godoy*].

214 [1997] 2 SCR 13, 146 DLR (4th) 609 [*Feeney*].

provide emergency aid, assistance or to restore order – "to perform aid and succour functions".[215]

While the Court applied *Waterfield* and its own decisions in *Dedman* and *Knowlton*, it could also have applied earlier decisions, such as *Dowling* and *Sawkins* to reach the same conclusion. However, in the interests of brevity, simply citing *Waterfield* was sufficient.

In another case, *Blanchard v. Galbraith*, a lawsuit was dismissed against a peace officer for false imprisonment as a result of a charge for obstructing a peace officer in the execution of his duty.[216] The accused was ultimately acquitted on the criminal charges due to procedural issues,[217] and so the onus was on the peace officer to prove justification. Justice Hall (as he then was) found that the police had been justified in arresting the plaintiff and lodging him in jail to prevent a real or possible breach of the peace. Justice Hall concluded that the bar was a trouble spot which, to the knowledge and experience of police officers, had been the source of much trouble associated with the consumption of liquor. The police thought the accused should leave to prevent trouble which, under the circumstances was likely to occur. However, the plaintiff belligerently and defiantly refused to comply and was subsequently arrested. Relying on *Piddington*,[218] the lawsuit was dismissed as there existed reasonable grounds for believing that a breach of the peace would occur, and the officer was acting within the course of his duty in asking the group to disperse. The plaintiff's refusal invited arrest and amounted to obstruction in the discharge that duty.[219]

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215 *Martin*, *supra* note 113 at para 17, "There can be little doubt that in proceedings as they did [the police] were engaged in a function expected of them by the community at large, an expectation based in part upon the historic role of police officers in the settlement and development of Western Canada. Police officers were and are expected to perform aid and succour functions above and beyond the duties specified in the [...] Act" [emphasis added].

216 1966 WL81111, 10 Crim LQ 122 (Man QB). The decision in *Howell*, *supra* note 120, was decided 15 years after *Blanchard*. That decision also involved an apparently noisy participant in a street party which had continued into the early hours of the morning [*Blanchard*].

217 See *R v Blanchard* (1965) 47 CR 342, 53 WWR 687.

218 *Piddington*, *supra* note 101.

219 *Blanchard*, *supra* note 216. Also see *Irving v Clemens*, 2000 BCSC 291, citing *Breen v Saunders* (1986), 39 CCLT 237 (NBQB), at 277. Also see *Ludlow v Victoria* (City), 2014 BCSC 295; *R v MacInnis*, 2014 NSSC 262 [*MacInnis*], and *R v C(E)*, 2009 NSCA 79,

In 1998 the Ontario Court of Appeal released a thorough and comprehensive analysis of the law to date concerning the right of the police to detain persons for an apprehended breach of the peace at common law in *Brown v. Durham Regional Police*.[220] This case involved the repeated roadside checks (detentions) of members of the Paradise Riders Motorcycle Club by the Durham Regional Police Service. Members of the Motorcycle Club sought an injunction and declaration that the police conduct was unlawful. The stops were upheld pursuant to the *Highway Traffic Act*,[221] but the Court rejected the police submissions that they could also be supported by the common law. Justice Doherty was not satisfied that the detentions were a justifiable intrusion on members' rights and, consequently, they were not a proper exercise of their ancillary powers to prevent a breach of the peace.[222]

Nevertheless, Justice Doherty thoroughly canvassed the law in reaching his decision, and concluded that it is "well established that in acting in furtherance of their duties, the police need not point to express statutory authority for every action they take which imposes some limitation on individual liberties."[223] Cases cited by Justice Doherty included *Dedman*, *Waterfield, Knowlton, Howell* and *Hayes v. Thompson*[224] among others.

Justice Doherty did not consider the *Humphries* decision, which may have been useful in the context of this case. As previously mentioned, it was held in *Humphries* that a police officer may interfere at common law in some limited way with an innocent person for the preservation of order. *Humphries* involved taking a party emblem away from a protestor that was likely to incite others. Arguably the "party emblem" of the Paradise Riders Motorcycle Club identifying themselves as an "outlaw" motorcycle gang may have caused such a concern for a breach of the peace.[225]

279 NSR (2d) 391 [*C(E)*], aff'ing 2009 NSSC 6.

220 (1998), 131 CCC (3d) 1, 1998 CanLII 7198 (ONCA), leave to appeal allowed (1999) 140 CCC (3d) vi (SCC), discontinuance filed October 4, 2000, at 35 (CanLII) [*Brown*].

221 RSO 1990, C H 8.

222 *Brown*, *supra* note 220.

223 *Ibid*.

224 *Hayes*, *supra* note 133.

225 This is precisely why several liquor licensing acts, including section 32 of the *Manitoba Liquor Liquor and Gaming Control Act*, CCSM c L153, allowing police officers to

The Ontario Court of Appeal recently considered many of these same issues in *Figueiras v. Toronto Police*,[226] where the Court issued a declaration that the Toronto police violated Mr. Figueiras's *Charter* and common law rights, and further committed the tort of battery[227] when they did not let him proceed down a street until they had searched his knapsack. The incident happened the day after extreme looting, violence and vandalism had occurred in downtown Toronto in relation to the G20 international heads of government summit. Figueiras was there to protest animal rights, but not the G20. He had a bag and the phone number of his lawyer was stenciled on his arm (which the officer took to indicate a sign of trouble).[228]

Considering the events of the day before, the location, and what he was wearing, the police decided to stop Figueiras. One of the officers told him, "There's no civil rights here in this area"; he was also told "This ain't Canada right now."[229] Such comments are not indicative of good faith or reasonableness. However, if a perimeter or roadblock had been established, such as in *Knowlton* or *Patterson*, and no one was allowed to pass, this likely would have been a non-issue as Mr. Figueiras's actions would otherwise have indicated to a reasonable person that he was likely to produce the very "danger to the tranquility and peace of the neighbourhood" that concerned the Court in *Vincent* almost 200 years ago.[230]

In fact, a better understanding of the common-law by the Toronto Police may have been beneficial in securing the G20 event. That being said, a related police discipline hearing against Superintendent Mark Fenton for "kettling" suspected protesters was found to fall within the common law duty to prevent an apprehended breach of the peace.

remove any person from a licenced premise who, by their known character or appearance creates a risk of violence. This includes a gang member or gang associate, or any person wearing clothing, headgear or any other item that displays a sign, symbol, logo or other representation that identifies that person as a member or associate of a gang. Also see section 69.1 of the *Alberta Gaming and Liquor Act*, RSA 2000, c G-1.

226 2015 ONCA 208, 383 DLR (4th) 512.

227 *Ibid* at para 153.

228 *Ibid* at para 19.

229 *Ibid* at para 2.

230 *Vincent*, *supra* note 176. Also see *Patterson*, *supra* note 177 and *Knowlton*, *supra* note 59.

However, it was found that the means used were not always rationally connected to the performance of that duty – leaving those detained to stand in the heavy rain and wait to be processed was found to be inappropriate.[231] The hearing officer found that "having made the order, being aware of the conditions at the intersection, Fenton was obliged to both the arrestees and the police officers at the intersection to make immediate efforts to alleviate the risks to their health and safety caused by the weather conditions".[232]

Still, when it came to the containment of protestors at three locations (Novotel and Queen and Spadina), it was found that there was no clear and convincing evidence that it was an unnecessary or unlawful exercise of authority. As a result, Fenton was found not guilty of misconduct by kettling, as alleged in the particulars of charge; nor did he commit discreditable conduct as it pertained to the kettling of the crowds. The hearing officer noted the following at paras 437-38 of the decision:

> The boxing in or containing a crowd by police has been described as "kettling". This is not a case about the practice of kettling. It is not illegal. Kettling is not prohibited in TPS policy and procedure. It is well-established that police containment of a crowd of protestors, with an egress route, is legal in countries such as the United Kingdom, *Austin et al. v. Commissioner of Police of the Metropolis*, [2009] UKHL 5 at para. 34; *Mengesha v. Commissioner of Police of the Metropolis*, [2013] EWHC 1695 (Admin) at para. 2. In the U.K. cases, the tactic was used where a justifiable expectation of violence and disorder existed or a breach of the peace was occurring and a funnel or egress is made available.
>
> I find Fenton did not commit misconduct by kettling, as alleged in the particulars of charge 1, and 2 and 5 related to kettling of the arrestees at the Novotel or Queen and Spadina. Nor did he commit discreditable conduct particularized in charge 3 or 4 as they pertain to the kettling of the crowds. At the time that Fenton ordered the containment and boxing of the protestors at the Novotel and Queen and Spadina, there is not clear and convincing evidence kettling was an unnecessary or unlawful exercise of authority.[233]

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231 *Office of the Independent Police Review Director v D Mark Fenton,* Superintendent, Toronto Police Service (25 August 2015) Disciplinary Decision, at para 434, OIRPD online: <http://www.oiprd.on.ca/EN/PDFs/Fenton,D.Mark,DisciplinaryHearingDecision-25.08.15.pdf>. Conviction appeals dismissed, penalty varied by Ontario Civilian Police Commission, 2017 ONCPC 15 (CanLII).

232 *Ibid* at para 434.

233 *Ibid* at paras 437-438 [emphasis added].

Interestingly, outside of the references to *Mengesha v. Commissioner of Police of the Metropolis*, *Austin v. Commissioner of Police of the Metropolis* and *Brown v. Durham Regional Police*, there is no other jurisprudence discussed surrounding detentions for apprehended breaches of the peace at common law. Nevertheless, the decision in *Austin* itself was based, in part, on the earlier decision of *O'Kelly,* handed down more than 120 years earlier.[234]

F. Training and Experience

The case of *R. v. MacInnis*[235] involved an accused drinking at the home of a friend. She became intoxicated, emotional and upset. Her friend wanted her to leave and called 911. The police attended and found Ms. MacInnis extremely intoxicated. Ms. MacInnis was arrested and taken to the police station. Her behaviour deteriorated and she spit at the officers. She was subsequently charged with assaulting the officers.

At trial the accused was found guilty of assaulting the police officers. She appealed her convictions stating that her arrest was unlawful and that she used reasonable force in resisting the unlawful arrest. The appeal was dismissed. The trial judge had not erred in finding that common law power existed to arrest the accused for an apprehended breach of peace.[236] The responding officers had known the accused to have mental health issues, and their past experience was that the accused was volatile and capable of criminal behaviour when intoxicated.[237] The evidence supported that there was a risk to the public, a risk of criminal behaviour, and a risk to the accused's personal safety if she was not detained.

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234 The Court of Appeal decision in *Austin v Commissioner of Police*, [2007] EWCA Civ 989, [2008] 1 All ER 564, as affirmed by the House of Lords [2009] UKHL 5, [2009] 3 All ER 455, relied in part on *O'Kelly*, *supra* note 99. A further appeal to the European Court of Human Rights was dismissed on March 15, 2012, as not being an arbitrary detention (*Austin v UK* 39692/09 [2012] ECHR 459, [2012] MHLO 22). Also see *Moos and McClure v Commissioner of Police* [2012] All ER (D) 83 (Jan), [2012] EWCA Civ 12.

235 *MacInnis*, *supra* note 219.

236 *Ibid* at para 44.

237 *Ibid* at para 49.

The accused was arrested for an apprehended breach of the peace as found in section 31(1) of the *Criminal Code*. The accused argued that section 31(1) does not contemplate arrest for an anticipated breach of the peace.[238] However the trial judge, quoting extensively from *Brown*, found support for her conclusion that the police did have a common law power of arrest for an apprehended breach of the peace. In addition, support was found in the Court's own jurisprudence[239] that an arrest may be justified to avert an anticipated breach of the peace. The real issue was if the trial judge properly applied the law to the circumstances. The summary conviction appeal judge found that she did.

The most controversial question on this appeal was the officers' subjective beliefs as to the imminent and substantial risk posed by the accused herself. Her criminal behavior included past assaults on police. Justice Gogan noted:

> The distinguishing feature of this case was the extensive knowledge and experience that the officers had with respect to Ms. MacInnis. This gave them a basis to predict her behavior and her reaction to the circumstances. The police should be permitted to rely on their knowledge and experience if it is a reasonable approach in the circumstances. It would be impractical and artificial in my view to ask police to put aside such knowledge and experience in the types of assessments they required to make. It will always be the function of the trial judge to determine whether such knowledge and experience discharge the requisite legal standard.[240]

As stated by Lord Justice Watkins in *R. v. Howell*, the public expects a policeman to prevent the commission of crime. In other words, police are expected to keep the peace. To deny him the right to arrest a person who he reasonably believes is about to breach the peace would therefore be to disable him from preventing that which might cause serious injury to someone or even to many people or to property.[241]

As noted by the Honourable James Gowan more than 160 years ago, a constable could be justified in arresting a party by "joining together

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238 *Ibid* at para 38.

239 *C(E)*, *supra* note 219, aff'ing 2009 NSSC 6 at para 37. In addition to *Brown v Durham Regional Police* the Court also cited *Hayes*, *supra* note 133.

240 *MacInnis, supra* note 235 at para 54 [emphasis added].

241 *R v Howell, supra* note 120. Also see *Ingle, Cohen*, *Cooke, Timothy*, and *Hardie* which were all before the Court of Appeal in argument, *supra* notes 170, 172, 195 and 196.

various items of information received" with "circumstances which the constable is acquainted with that are sufficient to raise a strong presumption."[242]

Explicit in this statement is that personal knowledge and experience (if not training) can be important factors in forming reasonable suspicion. This is even more explicit in the decisions of *Humphries, Sawkins, Duncan, Blanchard* and *MacInnis*. In *Humphries*, it was the officer's knowledge of a party symbol; in *Sawkins* and *Duncan* it was the officer's knowledge of what had happened at prior meetings; in *Blanchard* it was the officer's knowledge of the place; meanwhile, in *MacInnis*, it was the officer's knowledge of the person.

A similar implication can be read into the recent Supreme Court decision in *R. v. MacDonald.*[243] There, an officer's training and experience (interpreting facial expressions, body movements and lack of verbal response to his questions) could provide reasonable grounds to believe the accused was a danger to the officer. Similarly, police intelligence and information systems can provide good reason to appreciate that a breach of the peace is "imminent" or "about to happen" as in *Laporte*.[244]

While it is true to the police have no power to enter a dwelling simply for purposes of furthering an investigation against the householder's will, there may be instances where the police are not pursuing an investigation or public safety interests are involved. Every case will turn on its facts.[245]

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242 *Supra* note 185 at 19.

243 2014 SCC 3, [2014] 1 SCR 37 rev'ing in part *R v MacDonald*, 2012 NSCA 50 [*MacDonald*].

244 *Laporte, supra* note 98 at para 67.

245 *Kuru, supra* note 103, rev'ing [2007] NSWCA 141, where the High Court held that while police may enter a dwelling without warrant to prevent a breach of the peace at common law (domestic situation), they could not remain to investigate. The powers were preventative, not investigative. The officers could remain on the premises only as long as is reasonably necessary in the circumstances. Once they had checked the house and were told to leave, they had to leave. A subsequent scuffle with the owner resulted in $418,265 being awarded against the police for unlawful trespass and false imprisonment. Aggravating to the police suggestion that they had needed to check one more room after being asked to leave was the fact that of the six officers who were at the scene – none of them thought it necessary or desirable to look in the room after the scuffle. This suggested strongly that such a search formed no part of the police undertaking (para 23).

The Court in *MacDonald* again relied on the test from *Waterfield*, applied within the framework of the *Collins* test,[246] to determine if the safety search was reasonably necessary, and therefore justifiable in the circumstances. In upholding that it was, the Court looked at whether the search was (a) authorized by law, (b) if the law was reasonable, and (c) if the manner in which it was carried out was reasonable.[247] To determine if it was reasonable the Court further looked at (1) the importance of the duty being performed to the public good; (2) the necessity of the interference with individual liberty in the performance of that duty, and (3) the extent of the interference with individual liberty.[248] These tests are inextricably linked.[249]

While the majority also cited *Knowlton*, I would opine that the same outcome would have been reached if the Court had applied *Glasbrook Brothers*, *Sawkins*, and *Humphries* (all cases cited in *Waterfield*). *Piddington*, *Dowling* or even *Priestman* could have also applied. Sometimes an individual's welfare may yield to that of the community or even be sacrificed for the public good. While *Waterfield* was sufficient, it was far from the only authority for the same proposition. Indeed, where the legislature has specifically held that the common-law powers and duties of a constable at common law apply, the law goes back more than a century.

IV. CONCLUSION

The thread running through this paper is that the police have statutory duties, which include those of a constable at common law. Those duties are wide and varied and not easily complied into an exhaustive list. Often those duties are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. They may include attending to noisy parties, dousing a fire or stopping a water tap that is overflowing. It may be to check on property that has been vandalized, on the wellbeing of an elderly resident who is reported

246 *MacDonald*, *supra* note 243 at paras 30-50, citing *R v Collins*, *supra* note 67.

247 *Ibid* at para 29.

248 *Ibid* at para 37.

249 Also see notes 66 and 67 and related text for the similarity to the *Oakes* test under s 1 of the *Charter*.

missing, or to pull down a galloping horse to prevent an accident from occurring.

The public expects a policeman to render first aid, combat actual hazards and prevent potential hazards from occurring, but also to stop fights and to prevent the commission of crime – to keep the peace and prevent that which might cause serious injury to someone or even to many people or to property.

We live in a society where some of our individual welfare must, in cases of necessity, yield to that of the community. We do not expect police officers to sit in the station waiting for those who commit offences to walk in and confess. We expect them to be out in the community and, when suspicious events occur, to make inquiries. The *Charter* is not a barrier to those inquiries.

If anything the *Charter* has shed a light on police duties and created another layer of accountability where tort actions, the criminal law and exclusionary rules may not furnish sufficient protections. In fact it has created more and different types of accountability mechanisms, such as a new "Charter tort" in *Vancouver (City) v. Ward*,[250] and expanded heads of liability in *Jane Doe*[251] and *Hill v. Hamilton-Wentworth Regional Police Services Board*.[252]

While I would argue that many legislators have explicitly adopted the general powers and duties of a constable at common law, even in those countries where they have more narrowly codified such powers, room has been left for the police to deal with unknown, unanticipated and uncontrolled forces by maintaining some of the undefined rights and duties of a constable at common law. While more detailed legislative authority may generally provide some democratic legitimacy and better legal certainty, even 'strict' codification of police powers would inevitably be so broadly expressed as to make the advantages illusory – especially in such rapidly changing times.

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250 [2010] 2 SCR 28, 2010 SCC 27.

251 *Jane Doe*, *supra* note 70.

252 *Hill*, *supra* note 153.