**Regina v. Golub**
**[Indexed as: R. v. Golub]**

**34 O.R. (3d) 743**
**[1997] O.J. No. 3097**
**Docket No. C22618**

**Court of Appeal for Ontario,**
**Houlden, Osborne and Doherty JJ.A.**
**July 24, 1997**

***Notice of discontinuance of appeal to the Supreme Court of Canada filed August 14, 1998. S.C.C. File No. 26298. S.C.C. Bulletin, 1998, p. 1271.**

*Charter of Rights and Freedoms* -- Search and seizure -- Search without warrant -- Search of home as incident of arrest prohibited except in exceptional circumstances where law enforcement interest is so compelling that it overrides individual's right to privacy within home -- Exceptional circumstances existing where accused arrested outside his apartment and police believed there was possibility that another person armed with dangerous weapon was in apartment -- Search not exceeding what was necessary to secure scene and preserve safety of those at scene -- Search not violating s. 8 of *Charter* -- *Canadian Charter of Rights and Freedoms*, s. 8.

H, an acquaintance of the accused, told police that the accused had become involved in a disturbance in a bar, had hit him, and had threatened to "get even" with staff at a bar which had refused to serve the accused more alcohol. H also told police that the accused was very upset and agitated as his wife had left him the night before and that the accused had shown H a loaded sub-machine gun during the evening. H also told police that the accused had been using cocaine. The police traced the accused to his home and, based on concerns that the accused was armed and agitated, the emergency task force ("ETF") was called to the scene. The accused complied with an order to leave his house but, contrary to specific instructions from the police that he leave the door to the residence open, he closed and locked it. When asked if anyone else was inside the residence, the accused did not respond initially and then said, "I don't think so." The officer in charge of the scene was concerned that there was a possibility that someone else was in the residence in which there was a very dangerous, possibly loaded, firearm, and that perhaps there was an injured person in the residence. He ordered the ETF to enter and search the residence to ensure that no one else was present. The police officers testified that they had previously discovered people hiding in what seemed to be very unlikely places, such as under a pile of clothes or between mattresses on a bed so they conducted a very thorough search. The officers discovered a loaded .22 calibre sawed-off semi-automatic rifle under a mattress. The accused was charged with several offences, all but one of which required that the Crown prove that he was in possession of the rifle. The trial judge ruled that the arrest of the accused was lawful but concluded that the entry into the residence was not justified. As a result, the trial judge found that the rifle was seized in violation of the accused's s. 8 rights and he ordered it excluded pursuant to s. 24(2) of the *Canadian Charter of Rights*

*and Freedoms*. The accused was acquitted on the charges involving possession of the rifle. The Crown appealed.

Held, the appeal should be allowed.

The arrest of the accused was lawful. The fact that the arrest was based on information provided by H, a source unknown to the police, did not mean that the police did not have reasonable and probable grounds to arrest the accused. The situation was not analogous to search warrant cases holding that a search warrant could not be issued on the unconfirmed information of an untested informant. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant. In deciding whether reasonable grounds for an arrest exist, the officer must conduct the inquiry which the circumstances reasonably permit. He must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable. In this case, the police had a specific and detailed complaint from a witness who identified himself and who made no claim to anonymity. They had a firsthand opportunity to assess H's credibility. They had no reason to discount his information. They had reasonable and probable grounds to arrest the accused.

Searches of a home as an incident of arrest, like entries into a home to effect an arrest, are generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home. In determining whether exceptional circumstances exist justifying a warrantless search, the nature of the state interest must be identified. The state interest in collecting evidence may not justify a warrantless search, but the interest in protecting the safety of those at the scene, including the safety of police officers, may justify the same search. If, in order to secure the safety of those at the scene, entry into and search of a residence is necessary, the risk of physical harm to those at the scene of the arrest constitutes exceptional circumstances justifying the warrantless entry and search of a residence. The search must be conducted for the purpose of protecting those at the scene and must be conducted in a reasonable manner which is consistent with that purpose.

In this case, the police had good reason to believe that a loaded sub-machine gun was still in the apartment. They thought that there was a possibility that another person was in the apartment, either armed with the gun or injured by the accused. They were not required to have reasonable grounds to believe that someone else was in the apartment; the exercise of a police power ancillary to an arrest does not require independent grounds for its exercise. Their legitimate concerns necessitated entry to, and search of, the apartment. The search did not exceed that which was reasonably necessary to secure the scene and preserve the safety of those at the scene. The search was a lawful incident of the arrest of the accused and was reasonable. It did not violate s. 8 of the *Charter*.

APPEAL by the Crown from an acquittal.

*R. v. Feeney* (1997), 1997 CanLII 342 (SCC), 44 C.R.R. (2d) 1, 115 C.C.C. (3d) 129, 146 D.L.R. (4th) 609, 212 N.R. 83 (S.C.C.), apld

*Cloutier v. Langlois*, 1990 CanLII 122 (SCC), [1990] 1 S.C.R. 158, 46 C.R.R. 37, 53 C.C.C. (3d) 257, 74 C.R. (3d) 316, 105 N.R. 241, 30 Q.A.C. 241; *R. v. Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206, 28 C.R.R. (2d) 244, 97 C.C.C. (3d) 385, 38 C.R. (4th) 265, 124 D.L.R. (4th) 7, 181 N.R. 1; *R. v. Landry*, 1986

CanLII 48 (SCC), [1986] 1 S.C.R. 145, 25 C.C.C. (3d) 1, 50 C.R. (3d) 55, 26 D.L.R. (4th) 368, 65 N.R. 161, 14 O.A.C. 241, 54 O.R. (2d) 512n; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, 42 C.R.R. (2d) 189, 113 C.C.C. (3d) 321, 5 C.R. (5th) 1, 144 D.L.R. (4th) 193, 185 N.B.R. (2d) 1, 472 A.P.R. 1, 209 N.R. 81, consd

Other cases referred to *Chartier v. Quebec (Attorney General)*, 1979 CanLII 17 (SCC), [1979] 2 S.C.R. 474, 48 C.C.C. (2d) 34, 9 C.R. (3d) 97, 104 D.L.R. (3d) 321, 27 N.R. 1; *Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129, 27 C.R.N.S. 325, 50 D.L.R. (3d) 753, 3 N.R. 259, [1975] 1 W.W.R. 609; *Maryland v. Buie*, 494 U.S. 325 (1990); *R. v. Debot*, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140, 45 C.R.R. 49, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129, 102 N.R. 161, 37 O.A.C. 1; *R. v. Dedman*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, 51 O.R. (2d) 703, 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 20 D.L.R. (4th) 321, 34 M.V.R. 1, 60 N.R. 34, 11 O.A.C. 241; *R. v. Hall* (1995), 1995 CanLII 647 (ON CA), 22 O.R. (3d) 289, 39 C.R. (4th) 66 (C.A.); *R. v. Lim (No. 2)* (1990), 1 C.R.R. (2d) 136 (Ont. H.C.J.), affd (1993), 1993 CanLII 8558 (ON CA), 12 O.R. (3d) 538 (C.A.); *R. v. Miller* (1987), 1987 CanLII 4416 (ON CA), 62 O.R. (2d) 97, 38 C.C.C. (3d) 252, 23 O.A.C. 32 (C.A.); *R. v. Morrison* (1987), 1987 CanLII 182 (ON CA), 44 C.R.R. 181, 20 O.A.C. 230, 35 C.C.C. (3d) 437, 58 C.R. (3d) 63 (C.A.); *R. v. Proulx* (1993), 1993 CanLII 3677 (QC CA), 81 C.C.C. (3d) 48 (Que. C.A.); *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, 47 C.R.R. 210, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 105 N.R. 81, 37 O.A.C. 161; *R. v. Wong* (1987), 1987 CanLII 6858 (ON CA), 19 O.A.C. 365, 34 C.C.C. (3d) 51, 56 C.R. (3d) 352 (C.A.), affd 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36, 2 C.R.R. (2d) 277, 60 C.C.C. (3d) 460, 1 C.R. (4th) 1, 120 N.R. 34, 45 O.A.C. 250

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 8, 24(2), *Criminal Code*, R.S.C. 1985, c. C-46, ss. 103(2), 494(1)(a), 495(1), (2)

Scott C. Hutchison and Alexander Alvaro, for the Crown, appellant.

David E. Harris, for respondent.

The judgment of the court was delivered by

DOHERTY J.A.:--

**I**

The respondent was charged with several offences. All but one required that the Crown prove that the respondent was in possession of a sawed-off .22 calibre semi-automatic rifle (the rifle). The police seized the rifle from the respondent's home in the course of a warrantless search conducted immediately after his arrest just outside of his home. At trial, the respondent successfully moved to exclude the rifle from evidence arguing that it was seized in violation of his s. 8 rights and that s. 24(2) of the *Canadian Charter of Rights and Freedoms* mandated its exclusion. The respondent was acquitted on the charges involving possession of that rifle. He then pleaded guilty to the remaining charge (threatening to cause death or bodily harm). The Crown appeals from the acquittals and raises two questions of law:

> -- Did the search of the respondent's home and the seizure of the rifle violate s. 8 of the *Charter*?

-- If s. 8 was violated, should the rifle have been excluded from evidence pursuant to s. 24(2) of the *Charter*?

**II**

The trial judge was alerted at the outset of the trial that counsel would challenge the constitutionality of the search and the admissibility of the rifle. There was, however, no separate inquiry into those issues. Instead, evidence relevant to the charges and to the constitutionality of the search was led as part of the Crown's case, and the trial judge ruled on the constitutionality of the search and the admissibility of the rifle at the end of the Crown's case. On this appeal, I need only address the evidence which is germane to the admissibility of the rifle. The Crown does not suggest that the acquittals can be challenged if the rifle was properly excluded from evidence.

**III**

Philip Hepworth saw the respondent in a bar called Rhinos at about 10:30 p.m. on January 27, 1995. The manager of the bar refused to serve the respondent any more drinks and he and Hepworth left. They visited various bars. The respondent was drinking and appeared very upset and angry. He told Hepworth that he was having trouble with his ex-wife. At one point, the respondent struck Hepworth. On at least two occasions, the respondent said he would "get even" with the staff at Rhinos. Just before leaving one of the bars, the respondent showed Hepworth a rifle which was about 18 inches in length. The respondent had the rifle underneath his jacket. Hepworth took the respondent's threats seriously and reported them to Matthew Brooks, the manager of Rhinos at about 12:15 a.m. Brooks called the police. Two officers attended at Rhinos. They spoke to Hepworth who told them that the respondent had been causing a disturbance at Rhinos and had been ejected. Hepworth said that he and the respondent went to another bar across the street where the respondent showed him the gun. Hepworth described the gun as "an uzi sub-machine gun" loaded with five clips. Hepworth also said that the respondent was very upset and agitated. Hepworth seemed very "shooken up" and the officers took his information seriously. They decided that it was necessary to locate the respondent and treated the complaint as a "gun call" requiring immediate attention.

Attempts to locate the respondent eventually led the police to 67 Boustead Avenue where the basement apartment was rented to one Zvonko Golub. Initial attempts by the police to gain entry to the building were unsuccessful. Eventually, Detective Simone arrived at the residence at about 6 a.m. He learned, apparently from Hepworth, that the respondent was extremely distraught and that his wife had left him the day before. He was told that the respondent had been drinking and may have been using cocaine. The landlord confirmed that the respondent lived in the basement apartment. Detective Simone contacted the Emergency Task Force ("E.T.F.") and was told to evacuate the other tenants from the building. At about 7 a.m., a team from the E.T.F. took up positions around the then evacuated house. Sergeant Curts was in charge of the E.T.F. team and he took over command at the scene.

Sergeant Curts phoned the respondent at 7:25 a.m. but received no answer. He made a second call at 7:28 a.m. and spoke with the respondent. The respondent initially identified himself as "John" but then said his name was "David". Sergeant Curts identified himself and "explained the situation". [See Note 1

at end of document.] He asked the respondent to come to the door of his unit with nothing in his hands and to do as he was told by the officers at the door. Nothing happened for the next five minutes so Sergeant Curts made another call. The respondent said he understood Sergeant Curts' orders and he would leave the apartment after he got dressed. At 7:35 a.m. the respondent opened the door and backed out of his unit. He had nothing in his hands. As he came out of the door, the respondent was told to leave it open, but he closed and locked it. The respondent was taken into custody, led up a short flight of stairs leading from his apartment to the main floor, arrested and handcuffed. He was about 15 feet from the door of his apartment when he was formally arrested.

Sergeant Curts spoke to the respondent at the top of the stairs. He asked him if anyone else was in the apartment. The respondent did not reply at first and then shrugged and said, "I don't think so." Sergeant Curts became concerned that "another suspect" or "other occupants" might be in the apartment. He treated this concern "very seriously" because he believed that a dangerous weapon was still in the apartment. Sergeant Curts testified that because he suspected that another person or persons might be in the apartment, he decided to order the E.T.F. to immediately enter the apartment, search it, and secure it. His instructions were conveyed to the E.T.F. officers waiting in the hallway outside of the respondent's apartment. A key to the apartment was obtained and four E.T.F. officers led by Constable Drago entered the apartment. They were to search for any persons who might be in the apartment. The officers were instructed to enter the apartment within seconds of the respondent's arrest.

Sergeant Curts explained that his officers were trained to conduct a thorough search to determine whether there was anyone else in the apartment. They were looking for persons, not evidence. Sergeant Curts did not want to turn the scene over to the investigators and risk a confrontation with someone else wielding a weapon in the apartment. Public safety was "definitely" a concern. Sergeant Curts also testified that in his lengthy experience it was not uncommon to find people hiding in strange places such as under piles of clothing or between mattresses. Sergeant Curts indicated that the E.T.F. team was not looking for a gun when they entered the apartment, but if they found it, they were to secure it, finish searching the premises for other occupants, and then turn the scene and the weapon over to the investigating officers. Sergeant Curts never thought about obtaining a search warrant.

Constable Drago, who led the team on the search, said that the team was to ensure that there were no other persons in the room with weapons. They were to look methodically in "every room, every crevice" where a person might hide. Like Sergeant Curts, Constable Drago had in the past found persons hiding in very unusual places.

The team entered the unit, searched the closets, living room, kitchen, bedroom and bathroom. They checked in every conceivable place where someone might be hiding. In the bedroom, Constable Drago searched between the mattresses which he described as "not an unusual place for someone to be hiding". Constable Drago found the rifle, a .22 calibre sawed- off semi-automatic rifle under the mattress. The 15-round magazine clip was fully loaded. Beside the gun he found two clear plastic boxes each containing 100 rounds of .22 hollow point ammunition. One box was missing 15 rounds. The gun was emptied and the E.T.F. team continued its search. They did not find an uzi sub-machine gun or any other persons in the unit. The search took about 15 minutes.

After the Emergency Task Force team had completed its search, the investigating officers entered the apartment. They took custody of the weapon and ammunition and also searched the apartment for other weapons and ammunition. Detective Simone, who was in charge of this group of officers, testified

that he was satisfied that s. 103(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, authorized the search which he ordered at this point. In his view, the totality of the circumstances were such as to make it impracticable to obtain a search warrant.

The evidence reveals two separate searches. For the purposes of the respondent's s. 8 claim, however, I am concerned only with the search which led to the discovery and seizure of the rifle. That search was conducted by the E.T.F. under the direction of Sergeant Curts.

**IV**

The Crown contends that the search of the respondent's dwelling was constitutionally justified on any of three grounds:

> -- it was a reasonable search incident to a lawful arrest;
>
> -- it was statutorily authorized under s. 103(2) of the *Criminal Code*;
>
> -- the rifle was found and seized in the course of a proper exercise of the police common law power referred to in American jurisprudence as a "protective sweep".

Was the search an incident to a lawful arrest?

*(a) Was the arrest lawful?*

Before a search can be held to be incidental to an arrest, the lawfulness of the arrest must be established. In asserting the lawfulness of the arrest, the Crown relies on s. 495(1) of the Criminal Code which provides in part:

> 495(1) A peace officer may arrest without warrant
>
> > (a) a person . . . who, on reasonable grounds, he believes has had committed . . . an indictable offence. [See Note 2 at end of document.]

The reasonable grounds relied on by the police came essentially from the information provided to them by Mr. Hepworth.

The lawfulness of the respondent's arrest was not contested at trial and the trial judge expressly found that the police had reasonable and probable grounds to arrest the respondent. On appeal, Mr. Harris, for the respondent, submits that as the arrest was based on information provided by Mr. Hepworth, a source outside of and unknown to the police, the officers could not, absent some confirmation of Hepworth's information, have reasonable and probable grounds to arrest the respondent. Mr. Harris looks to the search warrant cases dealing with information provided to a justice of the peace through the affiant from a police informant. He contends that just as a search warrant could not be issued on the unconfirmed information of an untested informant, an arrest could not be made on that same basis.

Mr. Harris' proposition is a novel one. If correct, it would greatly restrict the police power of arrest. It would preclude the police from arresting a suspect based on information received from a witness to the

crime even where the witness could have arrested the suspect pursuant to s. 494(1)(a). In addition, as pointed out by Mr. Hutchison for the Crown, in the course of oral argument, Mr. Harris' position would set the test for reasonable grounds for arrest higher than the eventual standard for conviction since the respondent could be convicted based on the evidence of Hepworth absent any confirmation of his version of events.

Mr. Harris' reliance on the search warrant cases is misplaced. Both a justice and a arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

The justice asked to issue a search warrant based on information provided by a police source is in a very different position than the police officer who is face to face with the complainant. The justice asked to issue a search warrant based on information provided by a police source cannot assess the reliability of that secondhand information without additional information from the officer pertaining to the reliability of the officer's source. The police officer faced with a complaint from a witness to events has information from a firsthand source and can question that source, if necessary. To the extent that the position of the justice and the arresting officer can be compared at all, the officer acting on a complaint from a witness to the relevant events is in a similar situation to a justice who acts on firsthand information provided by the police officer.

The police power to arrest under s. 495 of *the Criminal Code* was considered in *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, 47 C.R.R. 210, 53 C.C.C. (3d) 316. Cory J., for the court, said at p. 251 S.C.R., p. 218 C.R.R., p. 324 C.C.C.:

> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a prima facie case for conviction before making the arrest.

In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable: *R. v. Storrey*, supra, at pp. 250-51 S.C.R., p. 218 C.R.R., pp. 323-24 C.C.C.; *Chartier v. Quebec (Attorney General)*, 1979 CanLII 17 (SCC), [1979] 2 S.C.R. 474, 48 C.C.C. (2d) 34 at p. 56; *R. v. Hall* (1995), 1995 CanLII 647 (ON CA), 22 O.R. (3d) 289 at pp. 296-98, 39 C.R. (4th) 66 at pp. 73-75 (C.A.); *R. v. Proulx* (1993), 1993 CanLII 3677 (QC CA), 81 C.C.C. (3d) 48 at p. 51 (Que. C.A.).

In this case, the police had a specific and detailed complaint from a witness to the events. Mr. Hepworth contacted the police, identified himself, and made no claim to anonymity. The officers had a firsthand opportunity to assess Mr. Hepworth's reliability. They had no reason to discount his information. Certainly, counsel for the respondent at trial did not suggest that the officers should have disregarded Mr. Hepworth's information.

Based on the information provided by Mr. Hepworth, the police had every reason to believe that the respondent had committed more than one indictable offence, and was in possession of an unlawful weapon when he was located at his home. The police also had strong reason to believe that the respondent was distraught and intoxicated. Clearly, the respondent presented an immediate danger to himself and others. The police were not only justified in acting on Mr. Hepworth's information, they would have been derelict in their duty had they not acted on it.

Mr. Hepworth's evidence at trial that he was so drunk he could not recall the events of that evening is not relevant to the existence of reasonable and probable grounds for an arrest. There is no evidence that Mr. Hepworth's condition at the time he spoke to the police was such that his information should have been discredited. A failed memory several months after the events, even if legitimate, does not imply that information provided at the relevant time was unreliable.

The police had reasonable and probable grounds to arrest the respondent. As the arrest occurred outside of the respondent's home, I need not consider the effect of the recent judgment of the Supreme Court of Canada in *R. v. Feeney*, released May 22, 1997 [reported 1997 CanLII 342 (SCC), 44 C.R.R. (2d) 1, 115 C.C.C. (3d) 129]. [See Note 3 at end of document.] The arrest was lawful.

*(b) Was the search a lawful incident of the arrest?*

Warrantless searches are presumptively unreasonable. Searches properly conducted as an incident of a lawful arrest are an exception to that presumption. The power to conduct a warrantless search as an incident of an arrest is well established as common law and has survived the advent of the *Charter*: *R. v. Stillman* 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, 42 C.R.R. (2d) 189 at p. 207, 5 C.R. (5th) 1 at p. 23.

The scope of the power to conduct a warrantless search upon arrest has been considered in three decisions of the Supreme Court of Canada, two of which post-date this trial: *Cloutier v. Langlois* (1990), 1990 CanLII 122 (SCC), 46 C.R.R. 37, 53 C.C.C. (3d) 257; *R. v. Stillman*, *supra*; *R. v. Feeney*, *supra*. In *Cloutier*, at pp. 181-83 S.C.R., pp. 56-58 C.R.R., pp. 274-76 C.C.C., it was recognized that the power to search upon arrest was a pragmatic recognition of legitimate state interests and the arrested person's reduced expectation of privacy. Those state interests include the need to secure the custody of the arrested person, protect those at the scene of the arrest and locate and secure evidence relevant to the arrested person's guilt or innocence. These state interests, while valid, do not, however, give the police a licence to conduct any and all searches which might advance those legitimate goals. L'Heureux-Dubé J., for the court, said, at p. 183 S.C.R., p. 58 C.R.R., p. 276 C.C.C.:

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

Madam Justice L'Heureux-Dubé went on to explain that the legitimate and conflicting interests of the state and the arrested person have to be balanced in determining whether a particular search was a justified and reasonable exercise of the police power to search as an incident of a lawful arrest. Madam Justice L'Heureux-Dubé set down three principles to guide that determination at p. 186 S.C.R., pp. 60-61 C.R.R., p. 278 C.C.C.:

> 1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.
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> 2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case for example if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.
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> 3. The search must not be conducted in an abusive fashion and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.

The balancing of state and individual interests referred to in *Cloutier* reflected the same approach taken by the Supreme Court of Canada in previous cases involving the scope of ancillary police powers, e.g., see *R. v. Dedman*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97; *R. v. Landry*, 1986 CanLII 48 (SCC), [1986] 1 S.C.R. 145, 25 C.C.C. (3d) 1; *Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739 at p. 743, 19 C.C.C. (2d) 129 at p. 131. The individual interests identified in these cases, although firmly planted in the common law, now enjoy constitutional status.

Before turning to the recent judgments of the Supreme Court of Canada in *Stillman* and *Feeney*, two additional principles which emerge from *Cloutier* should be mentioned. First, although *Cloutier* involved the search of an arrested person, the court recognized at p. 186 S.C.R., p. 60 C.R.R., p. 278 C.C.C., that the power to search upon arrest extended to the immediate surroundings at the place of arrest: see also *R. v. Wong* (1987), 34 C.C.C. (3d) 51 at p. 56, 19 O.A.C. 365 (C.A.), affirmed without reference to this point 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36, 2 C.R.R. (2d) 277, 60 C.C.C. (3d) 460. The court did not set any spatial limits on the search power but left those to be determined on a case-by-case basis through the application of the three principles set out above.

Second, *Cloutier*, at p. 186 S.C.R., p. 60 C.R.R., p. 278 C.C.C., following a line of authority from this court, rejected the contention that the power to search was dependent upon the existence of reasonable grounds to believe that the search would produce the things sought by the police. A search upon arrest is incidental to that arrest and derives its authority from the lawful arrest and the circumstances of the arrest. No independent justification for the search is required either at common law or by the *Charter*: *R. v. Morrison* (1987), 1987 CanLII 182 (ON CA), 44 C.R.R. 181 at pp. 185-86, 35 C.C.C. (3d) 437 at pp. 441-42 (Ont. C.A.); *R. v. Lim (No. 2)* (1990), 1 C.R.R. (2d) 136 at p. 143 (Ont. H.C.J.), affirmed (1993), 1993 CanLII 8558 (ON CA), 12 O.R. (3d) 538 (C.A.); *R. v. Miller* (1987), 1987 CanLII 4416 (ON CA), 62 O.R. (2d)

97 at pp. 101-06, 38 C.C.C. (3d) 252 at pp. 257-62 (C.A.); see also *R. v. Debot*, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140 at p. 1146, 45 C.R.R. 49 at p. 54, 52 C.C.C. (3d) 193 at p. 198, per Lamer J.

In *Stillman*, *supra*, the court was faced with a claim that the seizure of hair samples, teeth impressions and the taking of a buccal swab were justified as incident of a lawful arrest. I take these conclusions from the majority judgment of Cory J. at pp. 207-12 C.R.R., pp. 23-28 C.R.:

> -- the power to search as an incident of arrest is predicated on pragmatic and exigent circumstances inherent in the making of an arrest. Searches are permitted to allow the police to protect themselves and others, and to locate and preserve evidence located at the scene of the arrest;
>
> -- the principles in Cloutier provide the analytical tools for the determination of whether a particular search is justified as an incident of arrest;
>
> -- the nature of the search conducted and the place searched are relevant considerations in determining whether the search was a lawful incident of the arrest;
>
> -- a search which intrudes upon the bodily integrity of the arrested person is so intrusive and constitutes such a significant invasion of the arrested person's privacy and security interests that it cannot be justified as an incident of an arrest absent statutory authority.

After *Stillman*, the general approach to searches made as an incident of an arrest set out in *Cloutier v. Langlois* remained intact. However, the majority in *Stillman* declared that certain searches could never be justified under the principles set down in *Cloutier* because of their highly intrusive nature. Cory J. also sounded a general caution against an overly aggressive resort to the power to search as an incident of arrest. He said at p. 211 C.R.R., p. 27 C.R.:

> No matter what may be the pressing temptations to obtain evidence from a person the police believe to be guilty of a terrible crime, and no matter what the past frustrations to their investigations, the police authority to search as an incident to arrest should not be exceeded. Any other conclusion could all too easily lead to police abuses in the name of the good of society as perceived by the officers. When they are carrying out their duties as highly respected and admired agents of the state they must respect the dignity and bodily integrity of all who are arrested. The treatment meted out by agents of the state to even the least deserving individual will often indicate the treatment that all citizens of the state may ultimately expect. Appropriate limits to the powers to search incidental to arrest must be accepted and respected.

*Feeney*, *supra*, also deals with the scope of police powers exercised in aid of, or as an incident of, the exercise of the arrest power. In *Feeney*, the police entered the suspect's residence, arrested him, and conducted a brief search of the residence. The police had no prior judicial authorization for the entry, arrest, or search. The accused argued that his right under s. 8 of the *Charter* had been violated by the entry and search. The Crown countered that, as the arrest was lawful, the prior entry to effect the arrest and the subsequent search were both justified as incidents of the lawful exercise of the arrest power. The majority found that the arrest was not lawful as the police had neither the requisite belief nor adequate grounds to make an arrest prior to entering the residence (paras. 138-52 [pp. 13-21 C.R.R.]).

Sopinka J., for the majority, went on to hold that even if the police had reasonable grounds to arrest before entering the residence, they could not enter the residence to make the arrest absent prior judicial authorization. In so holding, he expressly overruled *R. v. Landry*, *supra*, observing at para. 159 [p. 24 C.R.R.]:

> The analysis in *Landry* was based on a balance between the individual's privacy interest in the dwelling house and society's interest in effective police protection. This court held that the latter interest prevailed and warrantless arrests in the dwelling house were permissible in certain circumstances. While such a conclusion was debatable at the time, in my view, the increased protection of the privacy of the home in the era of the *Charter* changes the analysis in favour of the former interest: in general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited.

(Emphasis added)

Where the state invades the privacy of the home to make an arrest, *Feeney* rejects the balancing process set down in *Landry* in favour of an approach which gives paramountcy to the privacy interest. The same balancing process found in *Landry* appears in *Cloutier v. Langlois*. The impact of *Feeney* on *Cloutier* is apparent in the following passage at para. 160 [p. 24 C.R.R.]:

> If *Landry* were to be adopted in the post-*Charter* era, there would be the anomalous result that prior judicial authorization is required to intrude on an individual's privacy with respect to a search for things, but no authorization is required prior to an intrusion to make an arrest. The result becomes more anomalous when *Cloutier v. Langlois*, *supra*, is considered. *Cloutier* held that a search incidental to a lawful arrest does not violate s. 8. Putting this proposition together with the proposition that a warrantless arrest in a dwelling house is legal may lead to the conclusion that a warrantless search of a dwelling house is legal so long as it is accompanied by a lawful arrest. Such a conclusion is clearly at odds with *Hunter* [*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145] which held that warrantless searches are *prima facie* unreasonable.

Even though the warrant requirement created in *Feeney* has been suspended for six months (see *supra*, note 3), the implications of the judgment on the scope of incidental police powers cannot be ignored. As in *Stillman*, the court in *Feeney* has carved out a privacy zone within which the balancing of state and individual interests performed in cases like *Landry* and *Cloutier* has been found insufficiently sensitive to the constitutional imperatives of privacy and personal security.

Intrusions into the physical being of an arrested person, like those which occurred in *Stillman*, compromised the most basic aspects of personal privacy and security and were consequently held to be unconstitutional absent prior statutory authorization. *Feeney* was concerned with state intrusion into the home. That intrusion, while less invasive than those contemplated in *Stillman*, struck at an aspect of personal privacy which has always held a special place in the law. The heightened privacy interest infringed by state entry into a home justified a general prohibition against warrantless entries as an incident to an otherwise lawful arrest.

Unlike *Stillman*, however, *Feeney* did not prohibit all warrantless intrusions. Sopinka J. recognized that in exceptional circumstances, society's interests in effective law enforcement would take precedence over

privacy interests so as to permit a warrantless entry into a home to make an arrest. Sopinka J. placed cases of "hot pursuit" within that exception and left for future development the full reach of the exceptional circumstances exception to the warrant requirement (paras. 161-166 [pp. 24-27 C.R.R.]).

The approach taken in Feeney must be applied to this case. Feeney fixed the constitutional limit of the exercise of a police power to enter a home as an incident of an arrest. This case also involves the exercise of an ancillary police power involving an intrusion into the home. Where a search of a home is said to be an incident of an arrest, the same privacy interest is engaged as when the police enter a home to make an arrest. Furthermore, that interest comes in conflict with the same law enforcement interests.

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

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

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

In this case, I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in ex post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions.

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

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

Here, the police were faced with a potentially dangerous situation. When the respondent left his residence, he was immediately taken into custody. The police had good reason to believe that a loaded sub-machine gun was still in the apartment. The respondent's answers to Sergeant Curts' questions left him uncertain whether there was another person inside the apartment. Sergeant Curts believed that there might be another person on the other side of the closed door armed with a potentially lethal weapon. There was also the possibility that someone who had been hurt by the respondent was inside the apartment. Sergeant Curts had but a few seconds to make a decision. He made it and ordered the E.T.F. team into the apartment with orders to determine whether there was anyone else in the apartment. Four members of the E.T.F. entered the apartment and conducted a search for that purpose.

Sergeant Curts acknowledged that while he suspected that someone else was in the apartment, he did not have reasonable grounds to believe that someone was in the apartment. He went no further than to say there was a possibility that someone else was in the apartment. The trial judge appears to have held that a possibility was not enough to justify the entry and search. I disagree. The exercise of a police power ancillary to an arrest does not require independent grounds for its exercise: *Cloutier v. Langlois*, supra, at p. 186 S.C.R., p. 60 C.R.R., p. 278 C.C.C. If the circumstances of an arrest give rise to a legitimate cause for concern with respect to the safety of those at the scene, reasonable steps to allay that concern may be taken. The nature of the apprehended risk, the potential consequences of not taking protective measures, the availability of alternative measures, and the likelihood of the contemplated danger actually existing, must all be considered. The officers making this assessment must, of course, do so on the spot with no time for careful reflection. In my opinion, a reasonable suspicion, based on the particular circumstances of the arrest, that someone is on the other side of a closed door with a loaded sub-machine gun, or that someone is lying injured on the other side of that door, creates a legitimate cause for concern justifying entry and search of the apartment for persons.

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

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

scene and preserve the safety of those at the scene. The officers looked where their experience indicated they might find someone.

The American jurisprudence fortifies my view that reasonable grounds to believe someone else was in the apartment were not necessary to justify the protective measures taken by Sergeant Curts. The American cases recognize that, when making an arrest, the police may conduct a "protective sweep" of the place where the arrest occurs even if it is a dwelling house. That sweep must be based on a reasonable belief of the presence of person or persons who would pose a demonstrable danger to the arresting officers. That belief must be based on specific and articulable facts, but need not amount to probable cause: *Maryland v. Buie*, 494 U.S. 325 (1990). [See Note 4 at end of document.] That standard was met here.

I do not think that it is an answer to say that the police could have withdrawn from the scene of the arrest and maintained their guard around the building until a warrant was obtained. That option was open to the police, but was not without its own risks. The officers in the hallway would have been at risk during the withdrawal. Withdrawal at the time of arrest may have created a "stand-off" if someone else was armed with a machine gun in the apartment. That "stand-off" could have posed a greater risk to those at the scene than would the immediate and quick entry into the apartment by a select group of specially trained officers. It must be remembered that the police had every reason to believe that there was a loaded machine gun in that apartment. Withdrawal from the scene would certainly have increased the danger to someone in the apartment if that person had been injured by the respondent.

Although a relatively minor point, I also do not think the privacy interest of the other persons who lived in the building can be completely ignored. They were forced from their homes so that the area could be secured and the respondent disarmed and taken into custody without injury to anyone. Withdrawal from the scene immediately after the arrest could have significantly prolonged the siege and caused further intrusion into the privacy of those persons who had been forced to leave their homes. Surely, the respondent's privacy interest in his home was not the only privacy interest to be considered in these circumstances. The privacy interests of his innocent neighbours deserved some consideration.

I conclude that the police had legitimate concerns about their safety and the safety of others when they arrested the respondent right outside the door to his apartment. The police were entitled to take reasonable steps to ensure their safety and the safety of others. In these circumstances, those steps included entry into the residence and a search of the residence for other persons. The search by members of the E.T.F. was conducted for that purpose and in a reasonable manner which was consistent with that purpose. The search was a lawful incident of the arrest of the respondent and a reasonable search. There was no violation of s. 8 of the *Charter*.

**V**

I need not address the other arguments advanced by the Crown in support of the constitutionality of the search. I will, however, consider s. 24(2) of the *Charter* in the event that I am wrong in holding there was no violation of s. 8.

The rifle was non-conscriptive evidence and its admissibility would not affect the fairness of the trial. The admissibility of the rifle turns on the consideration of the seriousness of the s. 8 breach and the effect of exclusion on the repute of the administration of justice.

If there was a violation of s. 8, it cannot be dismissed as inconsequential. The place searched was a residence and the police could have obtained a warrant to conduct the search. These two factors tend to make the breach more serious: *R. v. Feeney*, *supra*, at paras. 191-92 [pp. 36-37 C.R.R.].

I agree, however, with the trial judge who expressly held that the police acted in "good faith". Unlike *Feeney*, the police here had reasonable and probable grounds to arrest the respondent and reasonable and probable grounds to search his apartment. There is no suggestion that the arrest was in any way contrived to permit entry into and search of the residence. The police did not disregard any statutory or judicial rule which they should have known about in making their search. To the contrary, the combined effect of *Landry* and *Cloutier*, as well as cases from this court (e.g., *R. v. Wong*, *supra*), gave strong credence to the police contention that they were entitled to search the residence as an incident of the arrest.

Even in the light of the higher standard set down in *Feeney*, the police conduct does not suggest a disregard for the privacy interests of the respondent. The police searched the residence because they perceived a threat to their safety and the safety of others. If the search is said to be unconstitutional, it must be because that perception was unwarranted, not because that perception was not in fact held by the police. If there was a violation of s. 8, it flowed from an honestly held mistaken belief by the police that the danger inherent in the circumstances justified the entry into and the search of the home. That assessment had to be quickly made as events were unfolding. In my view, the police conduct, at worst, reveals an error in judgment and in no way indicates any disrespect for the appellant's constitutional rights.

In addressing the effect of the exclusion of the evidence on the repute of the administration of justice, I bear in mind the comments of Iacobucci J. in R*. v. Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206 at p. 242, 28 C.R.R. (2d) 244 at pp. 268-69, 97 C.C.C. (3d) 385 at p. 408:

> . . . we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques, are of fundamental importance in applying s. 24(2).

Iacobucci J. reveals the heart of the third part of the s. 24(2) inquiry in this passage. The moral authority to apprehend and punish those who commit crimes rests on the community's commitment to the rule of law. Convictions procured by state violations of our most fundamental law lack that moral authority. Respect for the rule of law and the long-term viability of the justice system suffers where the police engage in "short cuts" or fail to respect the constitutional rights of those they encounter in the course of the exercise of their duties. The long-term harm to the justice system is not worth the short-term gain made by the admission of evidence which was obtained in a manner that ignores the rule of law.

The police conduct here was not heavy-handed and did not smack of a "short-cut". The police faced a situation which did not permit a delicate and reflective assessment of competing interests. Even if the police judgment was constitutionally flawed, it was honestly made and was entirely understandable in the circumstances. I think the repute of the administration of justice would suffer significant harm if important evidence was excluded because of the police error in judgment.

The trial judge appears to have excluded the rifle from evidence principally because the police could have obtained a search warrant. She also referred to the direct causal link between the breach and the discovery of the weapon. The trial judge failed to give consideration to the various factors I have set out above and did not give sufficient weight to her finding that the police acted in good faith. Assuming the police violated the respondent's s. 8 rights when they entered and searched his apartment, the rifle should not have been excluded from evidence under s. 24(2) of the *Charter*.

**VI**

I would allow the appeal, set aside the acquittals, and direct a new trial.

Appeal allowed.

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Notes

Note 1: The record does not reveal exactly what Sergeant Curts said to the respondent, although in cross-examination Sergeant Curts agreed that he would have told the respondent that the apartment was surrounded and there was no point in trying to escape.

Note 2: Section 495(2) places important limitations on the arrest power but they are not germaine here.

Note 3: On June 27, 1997, the Supreme Court issued an order staying the warrant requirement created in *Feeney* for a period of six months from the date of the release of the judgment in Feeney.

Note 4: In looking to the American cases to support my rejection of the probable cause standard, I do not intend any comment on the applicability of other aspects of the "protective sweep" doctrine.