CITATION:	*O'Neill v Roy* [2019] NTSC 23
PARTIES:	O'NEILL, Julie
	v
	ROY, Aileen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 70 of 2018 (21815687)
DELIVERED:	12 April 2019
HEARING DATE:	29 March 2019
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

APPEAL – LOCAL COURT APPEAL

Whether police have the power under the *Police Administration Act* (NT) and the *Domestic Violence Act* (NT) to enter private property to ensure compliance with Domestic Violence Orders - existence of implied licence - legitimate purpose of implied licence - whether entry onto private property merely to investigate whether an offence has been committed falls within legitimate purpose of implied entry - held absent a clear and express statutory power to do so there is no authority to enter private property of the occupier merely for investigating if a breach has occurred by the occupier or for gathering evidence of criminal activity by the occupier, in circumstances where the police have no reasonable belief that an offence is occurring or may be occurring, without an express invitation by the occupier.

Admissibility of evidence -whether police had any basis to request to submit to a breath test while trespassers at a private property - held evidence unlawfully obtained - appeal dismissed.

Evans and Evans v The Queen (1996) 104 CCC (3rd) 23; *Harvey v Bofilios* [2017] NTSC 68; *Howden v Ministry of Transport* [1987]2 NZLR 747; *Kuru v New South Wales* [2008] HCA 26, applied

Barker v The Queen [1983] HCA 18; 153 CLR 338; *Fisher v Ellerton* [2001] WASCA 315; *Halliday v Nevill* [1984] HCA 80; 155 CLR 1; 246 ALR 260; *Morris v Beardmore* [1981] AC 446*; Munnings v Barrett* [1987] Tas R 80; 5 MVR 403; *Plenty v Dillon and Others* [1991] HCA 5; 171 CLR 635; *Semayne's Case* (1604) 77 ER 194; *Tasmania v Crane* [2004] TASSC 80; 148 A Crim R 346; *Thomas v Sawkins* [1935] 2 KB 249; *Transport Ministry v Payne* [1977] 2 NZLR 50, referred to

O'Connor v Police [2010] NZAR 50; *Police v McDonald* [2010] NZAR 59, distinguished

Domestic and Family Violence Act (NT) s5(e), s8, s21, s21(1A), s22(1), s22(2), s22(3),s120(1)
Domestic and Family Violence Regulations (NT) s6, 7(3)
Evidence (National Uniform Legislation) Act s138
Police Administration Act (NT) s126(2A), s116

REPRESENTATION:

Counsel:

Appellant:	D Dalrymple
Respondent:	J Murphy & R McCarthy

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	A
Judgment ID Number:	Mil19552
Number of pages:	31

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

O'Neill v Roy [2019] NTSC 23
LCA 70 of 2018 (21815687)

BETWEEN:

JULIE O'NEILL
Appellant

AND:

AILEEN ROY
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 12 April 2019)

[1] This appeal from the Local Court raises important questions about the admissibility of evidence relating to an alleged breach of a domestic violence order.

The Facts

[2] The respondent, Ms Roy, was charged with a breach of s 120(1) of the *Domestic and Family Violence Act.* The complaint does not particularise which condition of the Domestic Violence Order it is alleged that she is said to have breached. The allegation appears to be that Ms Roy remained where Mr Johnson, the protected person, was living whilst she was intoxicated contrary to condition 2 of the Domestic Violence Order (DVO). The DVO, which came into force on 1 June 2017 and was confirmed for a period of 12 months, contained the following conditions:

> The defendant Aileen Roy is now restrained from directly or indirectly:

1. Approaching, contacting or remaining in the company of the Protected Person/s (sic) when consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance.
2. Approaching, entering or remaining at any place where the Protected Person/s (sic) is living, working, staying, visiting or located if consuming alcohol or another intoxicating drug or substance or when under the influence of alcohol or another intoxicating drug or substance.
3. And must submit to a breath test and/or breath analysis when requested by police in relation to this order.
4. Causing harm or attempting or threatening to cause harm to the Protected Person/s (sic).
5. Intimidating or harassing or verbally abusing the Protected Person/s (sic).

[3] Ms Roy lived with her partner Mr Johnson in a unit (the premises) within a duplex building situated within a public housing compound. There was a perimeter fence around the whole compound. The fence did not have a locked gate. There was no curtilage-defining fence around the premises nor around the duplex building. Access to the front door of the premises was by a concrete path which led to an alcove within which was the front door.

[4] On 6 April 2018 the police were carrying out Operation Haven, described as conducting pro-active DVO compliance checks, by going to a person's home to see if he or she was complying with their order. At about 1:22pm, three police officers arrived at the premises. One of them, Constable Elliott, knocked on the fly-screen door. He could see Mr Johnson sitting on a couch and Ms Roy lying on the floor. He called upon Ms Roy to come to the door. It is not clear exactly what words he used. His evidence was that "I called upon her to come to the door, for the purposes of a domestic violence order check." Ms Roy came to the door and opened it. Constable Elliott told her that he would like to conduct a domestic violence check and asked her to submit to a breath test. He said that he noticed that when she got up from the floor, she was very lethargic, and when she approached him, he could smell a very strong odour of liquor on her breath, her eyes were bloodshot and she was slurring her speech a lot more than usual from when he had had past dealings with her. The machine he used, called a

Draeger, gave a positive reading for alcohol. It is not clear on the evidence where exactly the Draeger test was administered, but there is no evidence that any of the police officers entered the unit through the door. I think that the inference is that it took place either on the doorstep or in the alcove. It is not disputed that the alcove was part of the premises occupied by Ms Roy and her partner. Ms Roy was then taken to the watch-house where she was requested to submit to breath analysis on five occasions but she did not give a sufficient sample, possibly he thought, because of her state of intoxication. Presumably she was technically under arrest after failing the Draeger test. The power to arrest her and take her to the police station for this purpose is said to be contained in regulation 7(3) of the *Domestic and Family Violence Regulations.*

[5] Constable Elliott knew Ms Roy. He had seen her two weeks previously engaging in what he called social order offences and warned her for possible breaches of her DVO. In fact she was taken to a sobering up shelter, but whether she was charged or not with any offences is not clear. He also said that he had seen Ms Roy with Mr Johnson at a bottle shop on a previous occasion when Mr Johnson did not have his basic card or any money. Constable Elliott said that Ms Roy was in control of that at the time, and that Mr Johnson asked for a bottle of water. He became suspicious that there was quite a bit of manipulation going on and as a result he made further enquiries and found out that there were eight other "incidents" before that day, although what they were was not explained. Constable Elliott also found out that on a previous occasion Ms Roy had stabbed Mr Johnson. When this occurred, and whether this was before or after the DVO was made, and in what circumstances, is not explained. Constable Elliott also gave evidence that he understood from speaking with Ms Roy on a previous occasion that she was Mr Johnson's carer, and that Mr Johnson suffers from seizures. Constable Elliott said that he felt that if Ms Roy was intoxicated, Mr Johnson's welfare would be compromised and that he might not be able to speak up for himself. He believed at the time that Mr Johnson may be the victim of "economic domestic violence". I assume by this that Constable Elliott was referring to economic abuse: see the *Domestic and Family Violence Act* s 5(e)

and s8. He said that he was exercising his power to require Ms Roy to submit to the Draeger test *vide* regulation 6 of the regulations.

[6] When the matter came before the learned Local Court Judge, his Honour was informed that there was a challenge to the admissibility of the evidence relating to the alleged breach. His Honour conducted a voir dire hearing at which Constable Elliott and Constable Dowie gave evidence.

[7] Constable Dowie said that his duties that day were to take part in Operation Haven which was a targeted domestic violence operation. He said: "We were conducting domestic violence compliance checks on people in the Katherine area who had domestic violence orders". He was asked what power the police were exercising to go to Ms Roy's home that day. He said: "We weren't exercising any power to attend that specific address. We were just using tacit consent to enter the complex and approach the front door". In cross-examination he agreed that the police had received no complaint of a potential breach of the order at the time they approached the residence that day.

The submissions before the learned Judge

[8] Counsel for the prosecution argued that the police were entitled to enter the block of units, walk along the path to the alcove, enter the alcove and knock on the front door. To the extent that they needed permission of the occupiers, they had an implied licence to do so. Although it seems to have been conceded that the police could not have forced Ms Roy to come to the door, once she answered the door, and the police smelt alcohol on her breath, it was argued that they had the power under the DVO to require her to submit to the Draeger test. The DVO, which was in evidence, provided by condition 3, that she "must submit to a breath test and/or breath analysis when requested by police in relation to this order". Alternatively, it may be that the prosecutor relied on s126 (2A) of the *Police Administration Act* which provides:

> A member of the Police Force may, by reasonable force if necessary, enter a place he believes, on reasonable grounds, that:

(a) [not relevant]; or

(b) a contravention of an order under the *Domestic and Family Violence Act* has occurred, is occurring or is about to occur at the place, and remain at the place for such period, and take such reasonable actions, as the member considers necessary;

(c) to verify the grounds of the member's belief.

[9] Written submissions were prepared by counsel for the defendant. Counsel also spoke to them briefly. In short, the defendant's case was that the police had no legal authority to go to Ms Roy's door and submit her to a breath test. It was put that the *Domestic and Family Violence Act* contained no such power, and the powers under the *Police Administration Act* arose only if the Police had reasonable grounds to believe that there was a contravention of the order. As to the latter, this did not authorise them to knock on the defendant's door because up until then, they had no such reasonable belief. As to the possibility of an implied licence, it was put that where the legislature had carefully defined the rights of the police to enter private property, it was not for the courts to alter the balance between individual privacy and the power of public officials, citing Brennan J in *Halliday v Nevill.*[1] The written submissions then addressed the reasons why the Court should exclude the evidence under s138 of the *Evidence (National Uniform Legislation) Act.* It is not necessary to refer to them in detail, save to say that a strong argument was put for excluding the evidence.

[10] At the end of the defendant's counsel's submissions, counsel for the complainant said that he wished he had had more than an hour and 15 minutes to prepare this matter. The learned judge offered the opportunity for him to put in written submissions by the next Thursday, but this was declined by the prosecutor because he had seven hearings the next day in Mataranka. No request was made for more time than "next Thursday". The prosecutor then made oral submissions in reply. He did not address the issues raised by s138 of the *Evidence (National Uniform Legislation) Act* at all.

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1 [1984] HCA 80; 57 ALR 331 at 343.

The learned judge's decision

[11] The learned Judge provided brief oral reasons for his decision three days later. After reciting the facts, His Honour held that the police had no power either under the *Police Administration Act* or the *Domestic and Family Violence Act* to attend at the private residence to check on persons of interest to ensure that they are complying with a domestic violence order. He further held that there was no basis for a request for the breath test as the police had exceeded their powers on the day in question. His Honour did not specifically deal with the argument that the police had no implied licence to knock on the door of Ms Roy and request her to come to the door. His Honour said that he excluded the evidence but gave no reasons for doing so. It was common ground at the time of the hearing of the voir dire that if the evidence were excluded that was the end of the case; similarly, if the evidence was admitted, the defendant would be pleading guilty. His Honour, no doubt with that in mind, found the defendant not guilty.

The grounds of appeal

[12] The appellant's grounds of appeal are as follows:

(1) The learned Local Court Judge erred in determining the lawfulness of the attendance of police at Unit 6 of 41 Victoria Highway, Katherine by reference to whether they had a specific statutory power to attend at a private residence for a domestic violence-related purpose, rather than by reference to whether they had an implied licence to attend for the purpose of lawful communication with any person there.

(2) The learned Local Court Judge erred in finding that the police did not have the power under the *Domestic Violence Act* to attend at a private residence to check compliance with the conditions of a Domestic Violence Order.

(3) The learned Local Court Judge erred in finding that the police had no basis to request the respondent to submit to a breath test.

Grounds 2 and 3

[13] It is convenient to deal with these grounds first. The appellant contended that the powers available to the police under s126 (2) (a) (sic) of the *Police Administration Act* (PAA) were not relevant because:

- the police did not purport to rely on these powers at the time;
- as the Police did not enter the private residence there was no need to consider whether the Police officer had a reasonable belief as to an offence or harm being caused.

[14] s126 (2A) of the PAA provides:

> A member of the Police Force may, by reasonable force if necessary, enter a place if he believes, on reasonable grounds, that:
>
> (a) a person at the place has suffered, is suffering or is in imminent danger of suffering personal injury at the hands of another person; or
>
> (b) a contravention of an order under the *Domestic and Family Violence Act* has occurred, is occurring or is about to occur at the place
>
> and remain at the place for such period, and take such reasonable actions, as the member considers necessary:
>
> (c) to verify the grounds of the members belief;
>
> (d) to ensure that, in the member's opinion, the danger no longer exists;
>
> (e) to prevent a breach of the peace or a contravention of the order; or
>
> (f) where a person at the place has suffered personal injury, to give or arrange such assistance to that person as is reasonable in the circumstances.

[15] The definition of "place" in s116 includes "premises" which is also defined to include "a building or structure", a "part of a building or structure" and "land on which a building or structure is situated". I will leave to one side whether the definition of "premises" is sufficiently wide so as to include a person's home, given the discussion in the cases to which I will refer later, for there to be clear

language to authorize an intrusion into the privacy of one's home, and assume for the purposes of the present argument that "place" does include a private residence, as well as any part of the property which is occupied by the person concerned. The evidence fell short of proving that the police had reasonable ground for believing that a breach of the DVO was occurring etc. in terms of subparagraph (b) when they entered the premises and knocked on Ms Roy's door. This was properly conceded by counsel for the appellant. However, the argument that was developed was that the police had an implied licence to enter the premises and knock on the door and that once it became apparent that Ms Roy was intoxicated when she came to the door, the police could have exercised their powers under s126 (2A) even though they did not purport to do so. This depends on whether the implied licence existed, and, if so, on the lawfulness of the police in (a) requiring Ms Roy to come to the door in order to conduct a breath test and (b) whether there was power to conduct a breath test in the circumstances. I will deal with these considerations under the remaining grounds of appeal.

[16] Counsel for the appellant's submission is that the power to enter the premises and knock on the door and request the individual to participate in a breath test is to be found in s21 of the DVA. There is no such power to be found in the express terms of the section. What s21 does is empower a court to make an order "imposing the restraints on the defendant stated in the DVO as the issuing authority considers are necessary or desirable to prevent the commission of domestic violence against the protected person". S21 (1A) empowers a court to impose an "ancillary order" which "may require the defendant to take specified action". The example given in the legislation is that a court could make "an order to the defendant to submit to testing to ensure compliance with an order prohibiting consumption of alcohol or certain drugs". So far as is relevant to this case, s22 (1) empowers a court to include a "premises access order" restraining the defendant from entering premises where the defendant and the protected person live together, except on stated conditions. S22 (3) makes it clear that

such an order can be made regardless of whether or not the defendant has a legal or equitable interest in the property. No doubt one of those stated conditions would include a condition such as is contained in condition 2 of the order in this case. S22 (2) goes on to provide that "before making a premises access order, the issuing authority must consider the effect of making the order on the accommodation of the persons affected by it".

[17] In the present case, there is an "ancillary order" requiring Ms Roy to submit to a breath test when requested by police: see condition 3. However, the power to require an individual to submit to a breath test is governed by regulation 6 of the *Domestic and Family Violence Regulations.* Regulation 6 is in Division 2 of Part 3 of the Regulations. Reg. 4, which is in Division 1 of part 3 provides that:

> This Part applies in relation to a defendant if a DVO applying to the defendant:
>
> (a) prohibits the defendant from consuming alcohol or using a drug (other than a drug as prescribed by a health practitioner); and
> (b) includes an ancillary order requiring that the defendant submit to testing by an authorised person to monitor compliance with the prohibition.

[18] An "authorised person" is defined by regulation 6 to mean, inter alia, a police officer.

[19] Regulation 6, which is in Division 2 of part 3 of the Regulations and therefore relates only to "ancillary orders", provides:

> (1) A defendant must comply with:
>
> (a) a reasonable direction by an authorised person to submit to a breath test to assess whether the defendant may have alcohol in his or her breath; and
>
> (b) the directions given by the authorised person about submitting to the breath test.

(2) For a direction mentioned in sub-regulation (1)(a) to be reasonable, it is not necessary that the authorised person suspects that the defendant has consumed liquor.

[20] Regulation 6 does not by its terms empower a police officer to enter a defendant's private property or home for the purpose of administering a breath test. Regulation 4 relates only to a condition prohibiting consuming alcohol; it has nothing to say about a condition prohibiting being in the company of the protected person when intoxicated. However that may be, the requirement to comply with a direction arises only if the direction is reasonable. It was submitted by the appellant that lack of "reasonableness" in this context may relate to excessively invasive and frequent requests, or requests that a defendant cannot reasonably comply with. That may well be so but I see nothing reasonable about knocking on the door of a person's home and directing a person to come to the door in order to conduct a breath test, particularly if the circumstances are such that s126 (2A) of the PAA do not apply and the police officer is a trespasser. To recognize that such a direction is reasonable would be to in effect enlarge the statutory powers given to police officers by s126 (2A). It was not contended that the police had a power to request a breath test because of condition 3 of the DVO. That condition must be understood in the light of regulation 6. It could not have been intended to empower a police officer to demand a breath sample in circumstances where regulation 6 did not apply. To hold otherwise would mean that a court could override the protection given, limited though it is, by PAA or by the DVO regulations.

Ground 1

[21] The appellant's argument starts with the proposition that police are not prevented from doing their work as police officers if all they are doing is exercising the same rights and opportunities which are available to citizens generally. So much may be conceded. I do not doubt, for example, that a police officer who is making enquiries from neighbours who may be potential witnesses to an offence, can enter private land and knock on doors and ask questions. It was submitted

that police required no licence, express or implied, from the occupiers of any unit at 61 Victoria Highway to approach the front door. The argument was premised upon the fact that the land leading up to the front door was common property. However, this overlooks the evidence that the entrance to the front door was within an alcove which one steps into to approach the front door. Strictly speaking, the word "alcove" is a recess in a room or a garden, although I see no reason why it could not be used to describe a recess between the walls of the building to approach the front door. It is not clear whether it had a covered roof; if so, it would be more accurately described as a porch. During argument, counsel for the appellant was content to accept that the alcove was part of the tenancy occupied by Ms Roy and Mr Johnson. It was put that even if this were so, the police had an implied licence to enter the alcove to knock on the door.

[22] There was no evidence as to who held the tenancy; it may have been Ms Roy or Mr Johnson, or both of them. However, the facts were that they both lived there. It was their home. They were living together in a domestic relationship. I do not think it matters who held the tenancy. Both were in lawful occupancy of the tenement.

[23] I was referred to a number of authorities which dealt with the circumstances under which police have an implied licence to enter private property, particularly in the context of exercising powers to investigate offences. The argument of Mr Murphy for the respondent was that there is no implied licence from an occupier of premises to enter any part of the private premises for the purpose of finding out if the occupier is breaking the law. It was put that the power of police to enter such premises is carefully guarded by statute, and in the absence of an express statutory power, there can be no implied licence. I was referred to a number of authorities from Australia, New Zealand and Canada.

[24] Dealing first with the Australian authorities, the first in time is *Barker v The Queen*[2]. Before leaving on a holiday, Mr Curl asked his neighbour, Mr Barker, to look after his house whilst he was away and told him where to find the key if he

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2 [1983] HCA 18; 153 CLR 338.

needed to enter. Whilst Curl was away, Barker and another man entered the house and removed certain items. Barker was convicted of burglary. The question was whether Barker, who had limited authority to enter the premises but entered the premises with an intent to steal, was a trespasser. After reviewing the cases, Mason J. said that the common law principle is "that a person who enters premises for a purpose alien to the terms of a licence given to him to enter the premises enters as a trespasser… If a person enters for a purpose outside the scope of the authority then he stands in no better position than a person who enters with no authority at all".[3] Counsel for the appellant submitted that in circumstances where the purposes of the alleged trespasser is twofold, and one of those purposes is within the scope of an implied licence, the licence is not abrogated by reason of an ancillary unlawful purpose, referring to a passage in the judgment of Mason J. where his Honour said that 'if a person enters premises for a purpose which is within the scope of his authority, his entry is authorized; it is not made unlawful because he enters with another and alien purpose in mind".[4] Brennan and Deane JJ observed similarly that "unless the consent to enter is limited by reference to purpose, an entry which is otherwise lawful does not become trespassory because it is effected for a purpose of which the person giving the consent is ignorant and of which he would not have approved".[5] On the other hand, if the entry is limited by a particular exclusive purpose, an entry for the particular purpose as well as some other illegitimate purpose will result in a trespass.[6] I understand that one reason for referring to this case is to show that the purpose of the entry and the extent of the licence to enter is relevant to whether the entry is an unlawful trespass, which is a question of fact. The majority of the court held that the trial judge was correct when he instructed the jury that if they found that Barker's authority was only to guard, and not to steal, they should convict.

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3 *Barker v The Queen* [1983] HCA 18; 153 CLR 338 at 346.

4 *Barker v The Queen* [1983] HCA 18; 153 CLR 338 at 347.

5 *Barker v The Queen* [1983] HCA 18; 153 CLR 338 at 359. *See also* pp 361-362.

6 *Barker v The Queen* [1983] HCA 18; 153 CLR 338 at 365.

[25] Both parties referred me also to *Halliday v Nevill*[7]. In that case police officers saw a person they knew to be a disqualified driver reverse out of premises at 375 Liberty Parade, West Heidelberg and onto the street. The appellant saw the police car approaching and immediately drove back into the driveway from where he had come. The police parked in front of the driveway and entered the driveway of the premises and spoke to the appellant. He was then arrested for driving whilst disqualified. Whilst walking with one of the police back towards the police car, the appellant suddenly broke away and ran across the street to his own home at number 370. The police then pursued him into the house where a scuffle took place before he was overcome. He was then charged with resisting arrest and assaulting police. At first instance the magistrate found that the arrest of the appellant in the driveway of 375 Liberty Parade was unlawful because the arresting officer was a trespasser and dismissed the charges. As to the question of whether the officer was a trespasser the majority of the High Court found that the police officer had an implied licence from the occupier of the premises to be on the driveway, there being nothing in the facts to suggest that the occupier of 375 Liberty Parade did anything to negate or rescind any implied licence. However, as counsel for the respondent correctly points out, in that case the occupier of the premises was not the defendant, but in effect the defendant's neighbour.

[26] Brennan J dissented. In a passage later referred to with approval by the High Court[8], he said:

> There is, of course, a tension between the common law privileges that secure the privacy of individuals in their own homes, gardens and yards and the efficient exercise of statutory powers in aid of law enforcement. The contest is not to be resolved by too ready an implication of a licence in police officers to enter on private property. The legislature has carefully defined the rights of the police to enter; it is not for the courts to alter the balance between individual privacy and the power of public officials. It is not incumbent on a person in possession to protect his privacy by a notice of revocation of a licence that he has not given; it is for those who infringe

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7 [1984] HCA 80; 155 CLR 1; 57 ALR 331.

8 *Kuru v New South Wales* [2008] HCA 26; 246 ALR 260 at [45].

> his privacy to justify their presence on his property. There may well be a case for enlarging police powers of entry and search, but that is a matter for the legislature.

[27] In *Munnings v Barrett*[9] the driver of a van had pulled into his daughter's driveway. A police vehicle which was following him stopped in front of the driveway. There had been no chase and the police had not done anything to stop the driver whilst it was on the road. One of the officers required the appellant to submit to a breath test. The officer had no reason to suspect that the driver was intoxicated. Under the provisions of s7A of the *Road Safety (Alcohol and Drugs) Act 1979* (Tas) police had a power to require any person who was driving a motor vehicle on a public road to stop and submit to a breath test, irrespective of whether or not the police had reason to suspect that the driver had been drinking. Cosgrove J. held that in the circumstances, the police officer had no authority to require the appellant to submit to the test, as the request was made on private land and therefore did not come within the provisions of the Act. An attempt was made to justify the police officer's request based on an implied licence to be on the appellant's daughter's driveway, referring to *Halliday v Nevill.* Cosgrove J said:[10]

> In determining whether the licence ought to be implied in all the circumstances, including the nature of the driveway, the relationship between the citizens concerned and the property, and/or its owner, the time of day, the purpose for which a licence is sought to be implied, the nature of the power sought to be exercised (see Brennan J at 2 MVR at 172) and so on have to be considered. The saga of *DPP v Smith* (1961) AC 290 still stands as a caution against irrebuttable presumptions of fact. There is no presumption of an implied licence. Where it is found to exist, it must have a basis in the evidence, or at least in the common behaviour of citizens of our community. The learned magistrate seems to have imputed consent to the owner as a matter of law, requiring no evidentiary basis, but the licence is implied, not imputed. An imputation of a licence is a universal derogation from the property rights of the owner. Only Parliament can do that. I would not myself be prepared to infer that the defendant's daughter, in these circumstances, must be taken to have consented to police entry on

9 [1987] Tas R 80; (1987) 5 MVR 403.

10 *Munnings v Barrett* [1987] Tas R 80 at 87; 5 MVR 403 at 409.

the property shown in D2. Of course, if there was no consent, express or implied, the police officers were trespassers and had no powers.

[28] In *Fisher v Ellerton*[11] some dogs belonging to the appellant had menaced a lady whilst walking past the appellant's premises. One of the dogs bit the lady on the leg. A complaint having been made to a ranger, the ranger sought and obtained a warrant to seize the dogs. The warrant was of doubtful validity. The ranger, accompanied by police, went to the premises of a Mr Gray. He parked in the driveway behind a vehicle which contained the dogs. Mr Gray was present, as was the appellant's wife. The ranger told her that he wanted to seize the dogs and that he had a warrant. With the assistance of Mr Gray, three of the dogs were removed from the vehicle and placed in the ranger's vehicle. In the meantime, the appellant arrived at the scene and he refused to allow the ranger to take the fourth dog. He attempted to prevent the ranger from taking the dog and assaulted the ranger. He was charged with impeding and with assault, and convicted in the Court of Petty Sessions at Karratha. On appeal to the Court of Appeal, the court held that the ranger had no statutory power to enter upon the land of Mr Gray to seize the dogs, but that he was entitled to enter the premises for the purpose of seizing the dogs pursuant to an implied licence from Mr Gray, following what fell from the majority in *Halliday v Nevill* taking into account the cautionary note sounded by Cosgrove J. in *Munnings v Barrett.* The reasoning of the Court did not depend on the fact that Mr Gray assisted the ranger to place the dogs into the ranger's vehicle, because he knew that the ranger had a warrant. The Court concluded, after considering the legislation and the second reading speech of the Minister, that the intention of the legislature was to place the ranger on the same footing as if he were a police officer making an arrest, and in the absence of any evidence that Mr Gray would have terminated the licence if he had thought that the warrant was of questionable validity, the licence should be implied. It was noted that as the appellant was not the occupier, he had no authority to terminate the licence. However, there are obvious distinctions between this case and the present one in that the case

11 [2001] WASCA 315.

involved the same powers of entry as police have to execute a power of arrest at common law, to be inferred from the legislative scheme in place, and it occurred not on the defendant's land, but on the land of someone else.

[29] In *Tasmania v Crane*[12] police received a complaint from the owners of land that someone was growing a poppy crop on their land without their authority. Upon attending the property, police saw a residence near one end of the poppy crop on land not belonging to the complainants. Although there were no vehicles there and no sign of life, the police entered the property to see if there was anybody present who could provide them with information as to who had been growing the poppies. Blow J. (as he then was) held that the police had an implied licence to enter the property for that purpose. When they arrived, the police noticed some cannabis in a 44 gallon drum outside the building, walked around it and peered inside. They entered the building through a window and found cannabis being grown inside hydroponically, left the building and then sought a search warrant. Subsequently, the police went to the accused's home. On arrival police noticed what appeared to be light from another hydroponic system that was visible through a crack under a door. As a result, police sought a second warrant to search those premises as well. For technical reasons which are not relevant to this appeal, neither warrant was valid and the question was whether the evidence should be excluded. Blow J. found that the police, when they started to walk around the first building, were trespassers, and that they were trespassers when they entered it. As to the accused's home, police had an implied licence to go to the door of the premises, but became trespassers by moving around outside the building looking for what they could see. This case is of little assistance in the circumstances of the present case, although it does demonstrate that police will generally have an implied licence to enter property which is not enclosed or prohibited from entry in some way and knock on the door to make enquiries from the occupier in relation to some matter which the police are investigating whether the occupier is a suspect or not.

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12 [2004] TASSC 80; (2004) 148 A Crim R 346.

[30] In *Plenty v Dillon and Others*[13] Mr and Mrs Plenty were the occupiers of a farm. A complaint had been laid against their 14 year old daughter. A summons was issued to the child to appear. Non-personal service of the summons was effected by leaving it with her father. The child failed to appear and a fresh summons was issued. In addition, summonses were issued against the child's parents. The girl's father had made it clear by correspondence that if a summons was to be served, it had to be served by post. Nevertheless, police attended at the farm in an attempt to effect service. The appellant and his wife refused to accept the summonses. Police left them on the car seat in which the appellant was sitting. The car was within an open garage some distance from the dwelling. As the police were leaving the farm, Mr Plenty attempted to strike one of the police officer's with a piece of wood. After a struggle, he was arrested and subsequently convicted of assaulting the police officer in the execution of his duty. As a result, Mr Plenty sued the police officers for damages for assault and trespass. The trial judge entered judgment for the defendants. That judgment was upheld on appeal. On further appeal to the High Court, the only question was whether the police were liable for trespass to Mr Plenty's land. Mason CJ, Brennan and Toohey JJ held that at common law, the third rule in *Semayne's Case*[14] authorises the sheriff or his officer, where the process is at the suit of the King, in cases of great necessity or where the safety of the King and commonwealth are concerned, after request to have the door opened, and refusal, to break and enter the house and to do execution on his goods or take his body as the case may be. However, the rule applies only when the person making the entry is either to arrest or to do some other execution of the King's process. Their Honours held that this did not apply to a summons to appear in a court. The Supreme Court had held that the statutory power to serve a summons carried with it the right to make such entry onto land as was necessary to effect service. In response to this argument, their Honours said:

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13 [1991] HCA 5; 171 CLR 635.

14 (1604) 77 ER 194 at 195.

> But a statute which confers a power to arrest is of a different order from a statute which prescribes the manner of service of a summons and which confers no power on a person to do a thing that that person is not free to do at common law.

[31] Gaudron and McHugh JJ considered the circumstances under which the common law recognised an implied right to enter premises in some detail. It is not necessary to repeat all of what their honours said, but their honours made it clear that "no public official, police constable or citizen has any right at common law to enter a dwelling-house merely because he or she suspects that something is wrong".[15] Of course, we are not here concerned with the question of police entering Ms Roy's unit but it is indicative of what the answer might be if the question was: could they enter a person's property and knock on the door in the same circumstances? Their Honours went on to remark[16]:

> A number of statutes also confer power to enter land or premises without the consent of the owner. But the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise be tortious conduct.

[32] Their Honours then considered and rejected a submission that the entry fell within the third exception to *Semayne's Case*. Their Honours then said[17]:

> At this late stage in the development of the common law, it seems impossible to declare that for the purpose of serving a summons, a constable has a common law right of entry upon private property without the consent of the occupier. The general policy of the law is against government officials having rights of entry on private property without the permission of the occupier, and nothing concerned with the service of a summons gives any ground for creating a new exception to the general rule that entry on property without the express or implied consent of the occupier is a trespass.

This provides support for the proposition put by the respondents that even if the police had an implied licence to knock on Ms Roy's door, they had no authority as part of that licence to ask her to come to the door to submit to a breath test.

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15 *Plenty v Dillon and Others* [1991] HCA 5; 171 CLR 635 at 648.

16 *Plenty v Dillon and Others* [1991] HCA 5; 171 CLR 635 at 648-649.

17 *Plenty v Dillon and Others* [1991] HCA 5; 171 CLR 635 at 653.

[33] As to whether there was a licence to be implied by the statute authorising the issue and service of the summons, their Honours said:

> In terms, S 27 has nothing to say about the right to enter property. In *Morris v Beardmore* [18] Lord Diplock said that the presumption is "that in the absence of express provision to the contrary Parliament did not intend to authorize tortious conduct". If service of a summons could only be effected by entry on premises without the permission of the occupier, it would follow by necessary implication that Parliament intended to authorize what would otherwise be a trespass to property. But a summons can be served on a person without entering the property where he or she happens to be at the time of process service. Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. But inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law principles.

[34] Counsel for the appellant submitted that if the police did not have the power to demand at any time that a person against whom a premises access order was made, must come to the door for the purpose of submitting to a breath test, the purposes of the order, which was made to protect Mr Johnson, would be incapable of being enforced. As was put by Mr. Dalrymple, these offences often occur behind closed doors. But I think that Mr Dalrymple has over-stated the position. Assuming that they had a right to enter the alcove and knock on the door, it does not follow that the police were unable to enforce the order. They might have asked for permission to enter the premises. If that had been refused, or if Ms Roy had told the police to go away, Mr Dalrymple conceded that the police could do no more and would have had to leave. If, when they knocked on the door, they were able to see through the door that Ms Roy was intoxicated, they might have been able to exercise their powers under s126 (2A) of the PAA. They might have used their powers under that section if Mr Johnson, or some other person, had contacted them and complained. As Woodhouse J. said in

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18 [1981] AC 446 at 455.

Transport Ministry v Payne[19] in a passage cited with approval by Gaudron and McHugh JJ in *Plenty v Dillon*[20]:

> I am unable to accept the view that it is open to the courts to remedy a 'flaw in the working of the Act' by adding to or supplementing the provisions….Nor am I able to think that in a matter of this importance Parliament can have taken it for granted that basic rights of citizens were inferentially being overridden.

[35] In a case somewhat closer to home, the High Court considered an appeal from the Court of Appeal of New South Wales in a domestic violence matter in *Kuru v New South Wales.*[21] In that case the *Crimes Act 1900* (NSW) made provision for entry in cases of domestic violence. The police received a report of a male and female fighting in a flat. Six police officers went to the flat. The appellant and his then fiancé who lived there had had a noisy argument. By the time the police arrived, the fiancé had left the flat with the appellant's sister. When police arrived, the front door of the flat was open. Two friends of the appellant, who did not live there, were in the living room and the appellant was taking a shower in the flat's bathroom. When the appellant came out of the shower, the police asked him if they could "look around" and he agreed. After looking into the bedrooms, the police asked to see "the female that was here". The appellant told the police that she had left and provided them with a telephone number. He then asked them to leave, but the police did not do so. The appellant then jumped onto the kitchen bench. After he got down he moved towards one of the police with whom he made contact. A violent struggle ensued following which he was arrested. He later brought proceedings against the police for damages for trespass to land, trespass to the person and false imprisonment. To some extent the case turned on the statutory powers contained in the *Crimes Act* which the High Court (Heydon J. dissenting) found did not authorise the police to remain in the premises once the appellant had told them to leave. The majority of the

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19 [1977] 2 NZLR 50 at 64.

20 *Plenty v Dillon and Others* [1991] HCA 5; 171 CLR 635 at 654

21 [2008] HCA 26; 246 ALR 260.

Court then considered whether there was any common law justification. Gleeson CJ, Gummow, Kirby and Hayne JJ said:[22]

> As was pointed out in this court's decision in *Plenty v Dillon*, it is necessary to approach questions of the kind now under consideration by recognising the importance of two related questions. First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.

[36] The argument for the respondent in that case was that where the police apprehend on reasonable grounds that a breach of the peace has occurred and unless they involve themselves may reoccur, or alternatively that a breach of the peace is imminent, they may enter private dwelling premises for preventative and investigative purposes, acting only in a manner consistent with those purposes only for so long as is necessary for those purposes. After referring to *Halliday* and noting that the implied licence is only for any *legitimate* purpose[23] and to *Thomas v Sawkins*[24] their Honours observed[25]:

> It is to be noted that neither of these statements countenances an entry or remaining on premises for *investigating* whether a breach of the peace has occurred or determining whether one is threatened or imminent. Nothing else that was said in *Thomas* would support such a power and no reference was made to any decision that would cast the power so widely.

[37] After considering other English authorities, their Honour concluded[26]:

> Further, the state's submission that police may enter for preventative *and* investigative purposes would, by reference to its "investigative purposes", extend the power much further than the common law power given in the English cases. There is no basis for making that extension. Whatever may

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22 *Kuru v New South Wales* [2008] HCA 26; 246 ALR 260 at 270 [43].

23 *Kuru v New South Wales* [2008] HCA 26; 246 ALR 260 at 271 [45].

24 [1935] 2 KB 249.

25 *Kuru v New South Wales* [2008] HCA 26; 246 ALR 260 at 272 [47].

26 *Kuru v New South Wales* [2008] HCA 26; 246 ALR 260 at 273 [51].

> be the ambit of the power of police (or a member of the public) to enter premises to *prevent* a breach of the peace, the power of entry does not extend to entry for the purposes of investigating whether there has been a breach of the peace or determining whether one is threatened.

[38] By analogy with the reasoning in *Kuru v New South Wales* in the passages above cited, going to Ms Roy's door for the purpose of *investigating* whether or not she was complying with the DVO was outside of the l*egitimate* purposes of implied entry to the defendant's premises or any part thereof, including the front door.

[39] In *Howden v Ministry of Transport*[27] the question was whether a police officer could conduct a random breath test of a driver in circumstances where the driver had driven home and parked in his driveway when police stopped and asked him for a sample of his breath. The relevant statutory provisions gave the police no authority to enter the driver's premises in those circumstances. The question was whether the police officer had express or implied permission to enter on the driver's land. Cooke P said:[28]

> Random stopping on the road, with a view to breath testing if a good cause for suspicion arises, is not a subject raised by the facts of this case. Entering private property for random checking of a driver whose driving or other prior behaviour has given no cause for suspicion is quite a different thing. It is a very considerable intrusion into privacy. In my opinion it would not be reasonable to hold that an occupier gives any implied licence to police or traffic officers to enter for those purposes. Most New Zealand householders, I suspect, if confronted with that question would answer No. Whether or not that suspicion is correct, it certainly could not be maintained that the answer Yes is required so clearly as to justify the Courts in asserting that such an implied licence exists.

Somers J agreed with Cooke P. Bisson J agreed with the result, but His Honour held that the implied licence may only be exercised at a time of the day when it was reasonable to the lawful business to be conducted, and as this occurred at 1:30am it was not a reasonable hour to knock on the door for a lawful purpose and that therefore there was no occasion for the officer to enter under an implied permission

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27 [1987] 2 NZLR 747.

28 *Howden v Ministry of Transport* [1987] 2 NZLR 747 at 751.

The decision of the majority seems to be similar to the conclusion in *Kuru's* case, in that it denied the implied right of entry onto private property merely to investigate whether an offence had been committed in circumstances where there was nothing suspicious about the defendant's behaviour such as to connect him to a possible offence.

[40] I was referred to two subsequent decisions of single judges of the High Court of New Zealand which appear to contradict each other. The first is *O'Connor v Police*[29] which concerned slightly different circumstances from those in *Howden.* In *O'Connor*, a bystander had seen the appellant in a very intoxicated state at 6am attempting to fill up his car from an unattended service station. The bystander rang the police who asked him to follow the driver of the car, which the bystander did. The driver, the appellant, drove home, parked in his property and went inside. Acting on the bystander's information, the police attended at the appellant's home shortly afterwards and knocked on his door. The constable asked the appellant if he had recently returned home. He said he had. She noticed a strong smell of liquor on his breath and that he was unsteady on his feet. She then required him to undergo a breath test which he failed. He was then taken to a police station to be breathalysed. A blood test was taken. Following completion of this he was asked if he had been driving and he agreed that he had. Fogarty J. considered *Howden* as well as a number of subsequent judgments of single High Court judges, noting that in some cases the view has been taken that if the police officer had lawful grounds for entering the property, such as a reasonable suspicion that the occupier or someone else on the property had committed an offence, there was an implied licence to enter the property. His Honour concluded that although the constable's entry onto the appellant's land was based on a reasonable belief that there was a person there who had been driving whilst intoxicated in breach of the law, she nevertheless had no implied licence to enter private land to check on whether the occupants or their guests had been driving whilst intoxicated. The reasoning depended on the question of

29 [2010] NZAR 50.

the existence of the implied licence being looked at from the perspective of the occupier. This case goes further than is necessary to decide the issues in this case, as the evidence in this case is that the police had no such reasonable suspicion so far as Ms Roy was concerned.

[41] The second case is *Police v McDonald* [30] which is reported immediately following *O'Connor v Police* in the same volume of the law reports. The facts were similar. The driver of a vehicle had pulled into a drive-through window of a service station and paid for goods. The staff member noticed that the driver's faculties seemed impaired and there was a strong smell of alcohol on her breath. He called the police as she drove away, providing a description of her and the registration number of her vehicle. Shortly thereafter, police attended at the driver's residence and knocked on the door. He then spoke to the respondent who, after initially making denials, admitted that she had recently driven the car which was parked in the driveway. He administered a breath test on the doorstep which she failed, and then she agreed to accompany him to a police station where she was administered, and failed, a breath test. She was then charged. The judge at the District Court followed *O'Connor v Police* and dismissed the charge. The appeal was by way of a case stated which challenged the correctness of *O'Connor's* case. The appeal was heard by Dobson J. who held that *O'Connor's* case was wrongly decided.[31] It was argued that the implied licence should be looked at from the perspective of the public interest rather than from the perspective of either the officer or the occupier. Dobson J. distinguished *Howden's* case on the basis that the reasoning in that case should be confined to the context of random questioning without any grounds to suspect that the occupier may have committed an offence, "in an era wherein a reasonable ground for such suspicion was a necessary precondition to requiring anyone to submit to a breath test".[32] Dobson J. said that it was inappropriate to test the scope of the implied licence by reference to standards notionally

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30 [2010] NZAR 59.

31 It is not clear how a single judge of the High Court can over-rule the judgment of another single Judge of the High Court.

32 *Police v McDonald* [2010] NZAR 59 at 67 [34].

attributed to occupiers of residential premises (notwithstanding that this seemed to be the approach in *Howden's* case) but his Honour went on to say, in a passage relied heavily upon by Mr Dalrymple:[33]

> The notion of an implied licence is an invention of the common law to deflect the balance between respect for an individual's right to privacy, and the public interest in enforcement of the criminal law. While the objective reconstruction of the expectations of the reasonable, objective participants in the position of both the occupier and the officer may be a useful tool in testing the boundaries of the licence when it is to be imputed in any particular situation, neither perspective necessarily dictates the outcome in any case.
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> The existence of the implied licence is not contentious. It permits a police officer to enter private property so far as is necessary to engage an occupier, in the course of any lawful enquiry. Generally, that would involve going to the threshold of the premises on the property. Going further, typically into the premises, depends upon either consent being given by the occupier to the officer to do so, or the dialogue from the threshold reaching the point where the officer can justify exercising coercive powers. Realistically, consent is often treated as having been granted impliedly.

[42] There is considerable force in Mr Dalrymple's submission bearing in mind that in order for police to demand a sample of breath from a person who is the subject of a DVO, that person may be required to submit a sample even if the police do not have any grounds to suspect that he or she has ingested alcohol: see reg. 6 of the DVO regulations. The other point to be made is that in *McDonald*, the licence was extended to going to the threshold of the premises, whereas in *Howden* the Court of Appeal found that there was no licence even to enter the driveway. However, the case is not authority for the proposition that police can enter a person's premises, or knock on their door, to find out if the occupier has or is committing an offence, when there is no reason for believing or suspecting that the occupier has committed any offence.

[43] The implied licence to enter private property was considered by the Supreme Court of Canada in *Evans and Evans v The Queen.*[34] In that case, the accused

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33 *Police v McDonald* [2010] NZAR 59 at 67 [35] - [36].

34 (1996) 104 CCC (3rd) 23.

were charged with possession of marijuana for the purpose of trafficking. The police received an anonymous tip that the accused had marijuana growing in their home. Checks of criminal records, electricity consumption and by means of a visible perimeter search of the dwelling-house from public property disclosed nothing. The police then approached the door to the accused's home and knocked, with the intent of sniffing for marijuana when the occupants opened the door. The police smelled marijuana and arrested the accused immediately. After securing the premises, the police obtained a search warrant based in part on smelling the marijuana when they went to the door. Upon searching the premises, marijuana plants and other drug-related paraphernalia were seized. The appellants were convicted and their appeal to the British Columbia Court of Appeal was dismissed. The Supreme Court of Canada also dismissed the appeal on the basis that although the search was unlawful, the evidence was properly admitted. In the course of their reasons, the majority Sopinka, J, (Cory and Iacobucci JJ concurring) considered the implied licence to enter the accused's private property. His Honour said that the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock.[35] His Honour said:[36]

> Clearly, under the "implied licence to knock", the occupier of a home may be taken to authorize certain persons to approach his or her home for certain purposes. However, this does not imply that all persons are welcome to approach the home regardless of the purpose of their visit. For example, it would be ludicrous to argue that the invitation to knock invites a burglar to approach the door in order to "case" the home. The waiver of privacy interest that is entailed by the invitation to knock cannot be taken that far.
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> … In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The "waiver" of privacy rights embodied in the implied invitation goes no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorised by the "implied invitation to knock". Where the conduct of the police (or any member of the public)

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35 *Evans and Evans v The Queen* (1996) 104 CCC (3rd) 23 at 30 [13].

36 *Evans and Evans v The Queen* (1996) 104 CCC (3rd) 23 at 30-33 [14]- [16] and [20].

> goes beyond that which is permitted by the implied invitation to knock, the implied "conditions" of that licence have effectively been breached and the person carrying out the unauthorized activity approaches the dwelling as an intruder.
>
> … Although I accept that one objective of the police in approaching the Evans' door was to communicate with the occupants of the dwelling in accordance with the implied invitation to knock, the evidence makes it clear that a subsidiary purpose of approaching the Evans' door was to attempt to "get a whif [sic] or a smell" of marijuana. As a result, the police approached the Evans' home not merely out of a desire to communicate with the occupants, but also in the hope of securing evidence against them. Clearly, occupants of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock.
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> ... In my view there are sound policy reasons for holding that the intention of the police in approaching an individual's dwelling is relevant in determining whether or not the activity in question is a "search" within the meaning of s8 [of the *Canadian Charter of Rights and Freedoms*]. If the position of my colleague is accepted and the intention is *not* a relevant factor, the police would be then be authorized to rely on the "implied licence to knock" for the purpose of randomly checking private homes for evidence of criminal activity. The police could enter a neighbourhood with a high incidence of crime and conduct "surprise checks" of the private homes of unsuspecting citizens, surreptitiously relying on the implied licence to approach the door and knock. Clearly, this Orwellian vision of police authority is beyond the pale of any "implied invitation".

[44] The conclusion that I have reached is that, consistently with the decisions of the High Court of Australia, the Court of Appeal of New Zealand and the Supreme Court of Canada, absent a clear and express statutory power to do so, neither the police nor anyone else has an implied invitation to enter private property, or the threshold of a person's home, for the mere purpose of investigating whether a breach of the law has occurred or for the purpose of gathering evidence of criminal activity by the occupier, in circumstances where there is no basis for

believing or even suspecting[37] that an offence has been or is in the process of being committed, absent an express invitation by the occupier to do so. To hold otherwise would be an Orwellian intrusion into the fundamental rights of privacy that the common law has been at great pains to protect and would amount to a new exception to the common law. It is not for judges to create such an exception. That is the province of the elected legislators who are responsible to the people for their decisions. I therefore find that the police had no power to go to Ms Roy's home and take a sniff of her breath and then require Ms Roy to provide a sample of her breath, that they were trespassers when they entered her alcove and knocked on the door. Consequently the evidence was unlawfully obtained.

Other matters

[45] Counsel for the appellant sought to persuade me that the police had another lawful purpose for knocking on the respondent's door, namely to check up on the welfare of Mr Johnson. It was put that in circumstances where the purpose of an alleged trespasser is twofold and one of those purposes is within the scope of an implied licence, the licence is not abrogated by reason of an ancillary unlawful purpose. In the course of argument it was submitted by the respondent that the only purpose of knocking on the door was to submit Ms Roy to a breath test. The learned Judge in the Court below in his brief reasons made no finding of fact that a reason for knocking on Ms Roy's door was to check on Mr Johnson. His Honour observed that, so far as Constable Elliott was concerned, Ms Roy was a person of interest but that he did not endeavour to "conflate - sorry to confect (sic) the state of mind that he had into something more. She was merely a person of interest to him". It is difficult to see on what basis such a finding as is suggested by the appellant would have been open. The evidence was that the police were conducting random proactive DVO checks to see if the various "defendants" the subject of DVOs were complying with their orders. It

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37 I am not implying by this that a mere suspicion would be enough. In the present case, the police did not suspect, reasonably or otherwise, that the accused had been drinking at the time they went to the door. This only arose after Ms. Roy went to and opened the door.

may be that the result of their efforts to enforce the orders were of benefit to the protected persons, but that is another matter. It was put that the learned Judge accepted that this was an ancillary purpose of Constable Elliott. During argument the learned Judge commented: "It's more in the nature of a welfare check on this man, well intentioned".[38] Subsequently His Honour said: "I'll take a good look at it. But, it seems to me this is all under the auspices of proactive policing".[39] There was no submission that Constable Elliott was conducting a welfare check on Mr Johnson and his Honour did not deal with it. There was no evidence that when the police knocked on Ms Roy's door that they even spoke to Mr Johnson, even though they could see him sitting in a lounge chair inside the unit. Nor is there any evidence that he did speak to him or try to speak to him at any other time that day. If Constable Elliott had the subsidiary purpose of checking on Mr Johnson's welfare, one would have expected that at the very least, he might have enquired about his welfare.

[46] In any event, I do not consider that such a subsidiary purpose, even if it had existed, would have altered the status of the police. Reliance was placed on what fell from Mason J in *Barker v The Queen*[40] where His Honour said (in the context of the words "enters any building as a trespasser" in s. 76 of the *Crimes Act* 1958 (Vic)):

> "If a person enters premises for a purpose which is within the scope of his authority his entry is authorized; it is not made unlawful because he enters with another alien purpose in mind. The performance of acts with a view to the attainment of that alien purpose does not relate back to his entry so as to endow it with a trespassory character. It is hardly to the point to say that the licensor would not have given that licence, had he known the alien intention of the licensee. It is the effect of the licence actually given that is decisive.

[47] The licence being considered in that case was an express licence, rather than one implied at common law, in circumstances where the character of the provision was one which created a serious criminal offence and where the entry had to be

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38 Transcript of proceedings in Local Court in Police v Aileen Roy 13 November 2018 p 25.

39 Transcript of proceedings in Local Court in Police v Aileen Roy 13 November 2018 p 26.

40 [1983] HCA 18; 153 CLR 338 at 347.

accompanied by an intent to steal. Nevertheless his Honour did discuss the position of an implied licensee, where a shoplifter enters premises with an intent to steal. His Honour concluded that the invitation in such a case is a wide one; it is not limited to doing business or with a view to doing business, although it would certainly not include an intent to steal. His Honour went on to observe that it would always be necessary to make a close analysis of the implied invitation held out by the shopkeeper and of the belief of the offender as to his right to enter the premises.[41] However, that is a different factual scenario from this.

[48] None of the other more recent authorities which discuss implied licenses suggest that where there are two purposes, one of which is proper and the other improper, necessarily saves the intruder from being a trespasser. I have already referred to what fell from Sopinka J. in the Supreme Court of Canada in *Evans*' case[42], where his Honour said that he accepted that one objective of the police in approaching the Evans' door was to communicate with the occupants of the dwelling in accordance with the implied licence, but the fact that there was a subsidiary purpose in getting a "whiff" of "smell" of the marijuana did not alter the fact that the police had exceed the authority given to them by the implied licence. This seems to me to more accord with the purposes of the common law of implied licences in the circumstances of this case.

[49] The learned Judge in his reasons did not appear to consider the question of the admissibility of the evidence in accordance with s138 of the *Evidence (National Uniform Legislation) Act*. His Honour merely dismissed the complaint. There is no complaint raised about this in the notice of appeal. In any event, no submission was made to his Honour by the prosecutor at the time although counsel for the accused dealt with the matter thoroughly in his written submissions. If that matter remained a live issue, the prosecutor did not indicate that to the learned Judge. He was given the opportunity to make written

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41 *Barker v The Queen* [1983] HCA 18; 153 CLR 338 at 348.

42 (1996) 104 CCC (3rd) at [16].

submissions if he needed time to do so. He rejected that invitation, as I have noted previously. He did not ask for more time. In those circumstances I do not think that I can allow the appeal on this basis.

[50] Finally, I should add that even if I had found that any of the grounds of appeal had been made out I would not have ordered that the matter be remitted to the Local Court for further hearing. This is an appeal by the prosecution and the court has a discretion whether or not to remit: see *Harvey v Bofilios*[43]. In this case, the question raised by the appeal was no doubt of considerable importance. But the alleged offending is of a relatively minor nature, it is now over a year ago since the alleged offending occurred, the domestic violence order has now expired and there is no suggestion that the respondent has committed any further offences in the meantime.

Orders

[51] Accordingly, for the reasons given the appeal must be dismissed.

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43 [2017] NTSC 68 per Grant CJ