

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* MacDonald,2014 SCC 3, [2014] 1 S.C.R. 37 | **Date:** 20140117  **Docket:** 34914 |

**Between:**

**Erin Lee MacDonald**

Appellant

and

**Her Majesty The Queen**

Respondent

**And Between:**

**Her Majesty The Queen**

Appellant

and

**Erin Lee MacDonald**

Respondent

- and -

**Director of Public Prosecutions and Attorney General of Ontario**

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 63)  **Concurring Reasons:**  (paras. 64 to 92) | LeBel J. (McLachlin C.J. and Fish and Abella JJ. concurring)  Moldaver and Wagner JJ. (Rothstein J. concurring) |

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

Erin Lee MacDonald Appellant

v.

Her Majesty The Queen Respondent

‑ and ‑

Her Majesty The Queen Appellant

v.

Erin Lee MacDonald Respondent

and

Director of Public Prosecutions and

Attorney General of Ontario Interveners

**Indexed as: R. *v.*** MacDonald

2014 SCC 3

File No.: 34914.

2013:  May 23; 2014:  January 17.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ.

on appeal from the court of appeal for nova scotia

*Constitutional law — Charter of Rights — Search and seizure — Police responding to noise complaint at accused’s residence — Accused answering door while concealing loaded restricted firearm — Police pushing door open further to ascertain concealment — Whether officer’s conduct constituted search and if so, whether search reasonable — Canadian Charter of Rights and Freedoms, s. 8.*

*Criminal law — Offences — Elements of offence — Mens rea — Possession of loaded restricted firearm — Police responding to noise complaint at accused’s residence — Accused answering door while concealing loaded restricted firearm — Accused’s licence to possess firearm in Alberta not extending to Nova Scotia, but accused believing it did — Whether Crown required to prove accused knew or was wilfully blind to fact that possession of firearm was unauthorized — Criminal Code, R.S.C. 1985, c. C‑46, s. 95.*

Police responded to a noise complaint at M’s home in Halifax. When M opened the door, an officer observed that M had an object in his hand, hidden behind his leg. The officer twice asked M what was in his hand. Because M did not answer, the officer pushed the door open a few inches further to see. A struggle ensued and M was disarmed of a loaded handgun. M was licensed to possess and transport the handgun in Alberta, but not in Nova Scotia as he believed he was. At trial, the judge concluded that M’s possession of the gun was unauthorized. He also concluded that the officer’s pushing the door open further did not breach M’s s. 8 *Charter* right to be free from unreasonable search. The trial judge convicted M of careless handling of a firearm (under s. 86 of the *Criminal Code*), possessing a weapon for a dangerous purpose (s. 88), and possessing a loaded restricted firearm (s. 95). The trial judge sentenced M to a three‑year imprisonment and a ten‑year weapons prohibition. A majority of the Court of Appeal upheld the trial judge’s decision that the officer did not breach M’s s. 8 *Charter* right. It upheld M’s ss. 86 and 88 *Criminal Code* convictions, but significantly reduced the sentences. However, the Court of Appeal allowed M’s appeal of his s. 95 conviction and substituted an acquittal.

Held: The appeal of the s. 8 *Charter* issue should be dismissed and the Crown’s appeal of the s. 95 *Criminal Code* acquittal should be allowed. The matter is remitted to the Court of Appeal for sentencing.

*Per* McLachlin C.J. and LeBel, Fish and Abella JJ.: The officer’s action of pushing the door open further constituted a “search” for purposes of s. 8 of the *Charter*. The action went beyond the implied licence to knock on the door and constituted an invasion of M’s reasonable expectation of privacy in his home. Although the officer’s action constituted a search for s. 8 purposes, that search was reasonable because both stages of the *Waterfield* test were satisfied. The first stage was satisfied because the warrantless search falls within the scope of the common law police duty to protect life and safety and the second, because the search constitutes a justifiable exercise of powers associated with the duty.

To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question. These factors include: the importance of the duty to the public good; the necessity of the infringement for the performance of the duty; and the extent of the infringement. The duty to protect life and safety is of the utmost importance to the public good, but an infringement on individual liberty may be necessary when, for example, the officer has reasonable grounds to believe that the individual is armed and dangerous. That infringement will be justified only to the extent that it is necessary for the officer to search for weapons. In other words, and as this Court recognized in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, the powers of the police are limited. Courts must consider not only the extent of the infringement, but how it was carried out. Restraints on safety searches are particularly important in homes, where such searches can often give the police access to a considerable amount of very sensitive personal information.

In this case, the officer had reasonable grounds to believe that there was an imminent threat to public and police safety and that the search was necessary to eliminate that threat. The manner in which he carried out the search was also reasonable. The trial judge found that the officer pushed the door open no more than was necessary to find out what M had behind his leg. The officer twice asked M what he had in his hand but received no answer. In these circumstances, it is hard to imagine a less invasive way of determining whether M was concealing a weapon and thereby eliminating any threat. It follows that M’s rights under s. 8 of the *Charter* were not violated.

As for a s. 95 *Criminal Code* conviction, the Court of Appeal erred in requiring the Crown to prove that M knew that his possession and acquisition licence and authorization to transport the firearm did not extend to his Halifax home. That requirement is inconsistent with the rule, codified in s. 19 of the *Code*, that ignorance of the law is no excuse. Section 95 is a *mens rea* offence, but does not include knowledge of *unauthorized* possession. Rather, knowledge of possession, together with intention to possess in a particular place, is enough.

In this case, M’s subjective belief that he could possess the firearm in his Halifax home is a mistake of law and that mistake is no defence. Therefore, M’s s. 95 conviction must be restored and the matter remitted to the Court of Appeal both for sentencing and for assessing the constitutional validity of the mandatory minimum sentence under s. 95.

*Per* Rothstein, Moldaver and Wagner JJ.: The majority concludes that the officer’s conduct in this case was only justified because he had reasonable grounds to believe that M was armed and dangerous. In doing so, they effectively overturn the “safety search” power recognized in *Mann* and a decade of subsequent jurisprudence.

This Court decided in *Mann* that officers may conduct protective searches when they have reasonable grounds to *suspect* that an individual is armed and dangerous. And that is why the search was justified in this case. Five reasons support this conclusion.

First, the language of *Mann* makes clear that it recognized a protective search power predicated on reasonable suspicion. Second, *Mann* relies on the U.S. Supreme Court’s seminal decision in *Terry v. Ohio*, 392 U.S. 1 (1968), a decision which recognized a directly analogous protective search power on a reasonable suspicion standard. Third, subsequent judgments from this Court and courts of appeal have affirmed that *Mann* employed the reasonable suspicion standard. Fourth, the logical consequences of a reasonable grounds to believe standard make little sense in this context; if *Mann* required reasonable grounds to believe for a pat‑down search, it would seem that all that *Mann* achieves is a power to *search* when there are already grounds to *arrest*. Fifth, the facts of this case do not support a finding that the officer had reasonable grounds to believe that M was armed and dangerous.

These five reasons — the language of *Mann*, the history from which *Mann* emerged, the consequences of interpreting *Mann* as requiring reasonable grounds to believe, the jurisprudence that has interpreted *Mann*, and the facts of this case — all lead to the same unavoidable conclusion: *Mann* recognized a protective search power predicated on reasonable suspicion.

This case ought to have been resolved by extending the logic of *Mann*. First, the officer, while lawfully engaged in his duties, had a reasonable suspicion that M was armed and dangerous. Second, in response to that reasonable suspicion, the officer’s conduct — pushing M’s door open a few more inches — was no more intrusive of M’s privacy interests than was reasonably necessary to address the threat. Accordingly, the search was reasonable for s. 8 purposes.

The consequence of the majority’s decision is to deprive officers of the ability to conduct protective searches except in circumstances where they already have grounds to arrest. As of today, officers are empowered to detain individuals they *suspect* are armed and dangerous for investigatory purposes, but they have no power to conduct pat‑down searches to ensure their safety or the safety of the public as they conduct these investigations. However, a police officer in the field, faced with a realistic risk of imminent harm, should be able to act immediately and take reasonable steps, in the form of a minimally intrusive safety search, to alleviate the risk.

**Cases Cited**

By LeBel J.

**Applied:** *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Evans*, [1996] 1 S.C.R. 8; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Waterfield*, [1963] 3 All E.R. 659; *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v. Forster*, [1992] 1 S.C.R. 339; **referred to:** *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Stenning*, [1970] S.C.R. 631; *Knowlton v. The Queen*, [1974] S.C.R. 443; *Wiretap Reference*, [1984] 2 S.C.R. 697; *R. v. Tse*,2012 SCC 16,[2012] 1 S.C.R. 531; *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420; *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Beaver v. The Queen*, [1957] S.C.R. 531.

By Moldaver and Wagner JJ.

**Applied:** *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; **referred to:** *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Kang‑Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Terry v. Ohio*, 392 U.S. 1 (1968); *Arizona v. Johnson*, 129 S. Ct. 781 (2009); *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *R. v.* *Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408; *R. v. Crocker*, 2009 BCCA 388, 275 B.C.A.C. 190, leave to appeal refused, [2010] 1 S.C.R. viii; *R. v. Atkins*, 2013 ONCA 586, 310 O.A.C. 397; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Golub* (1997), 34 O.R. (3d) 743, leave to appeal refused, [1998] 1 S.C.R. ix.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 12, 24(2).

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 19, 86, 88, 95, 487.11, 529.3(2).

*Firearms Act*, S.C. 1995, c. 39, s. 17.

**Authors Cited**

Healy, Patrick. “Investigative Detention in Canada”, [2005] *Crim. L.R.* 98.

LaFave, Wayne R. *Search and Seizure: A Treatise on the Fourth Amendment*, 5th ed., vol. 4. St. Paul, Minn.: West, 2012.

*Oxford English Dictionary* (online: www.oed.com), “risk”.

Ruby, Clayton C., Gerald J. Chan and Nader R. Hasan. *Sentencing*, 8th ed. Markham, Ont.: LexisNexis, 2012.

Stribopoulos, James. “The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*” (2007), 52 *Crim. L.Q.* 299.

APPEALS from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Saunders and Beveridge JJ.A.), 2012 NSCA 50, 317 N.S.R. (2d) 90, 1003 A.P.R. 90, 283 C.C.C. (3d) 308, 261 C.R.R. (2d) 303, [2012] N.S.J. No. 252 (QL), 2012 CarswellNS 328, setting aside the accused’s conviction for possession of a loaded restricted firearm. Appeal of Erin Lee MacDonald dismissed and appeal of Her Majesty The Queen allowed.

Hersh Wolch, Q.C., and Janna Watts, for the appellant/respondent.

William D. Delaney, Q.C., and Timothy S. O’Leary, for the respondent/appellant.

James C. Martin and Ann Marie Simmons, for the intervener the Director of Public Prosecutions.

John C. Pearson and Michelle Campbell, for the intervener the Attorney General of Ontario.

The judgment of McLachlin C.J. and LeBel, Fish and Abella JJ. was delivered by

LeBel J. —

I. Introduction

1. This case requires us to consider the scope of police search powers in the context of everyday interactions with private citizens at the doorsteps of their homes. The police in this case responded to a noise complaint and, without warning, became engaged in a dangerous situation that, in their opinion, put their safety, and the safety of others, in jeopardy. The charges laid as a result of this incident afford us an opportunity to consider the operation of s. 8 of the *Canadian Charter of Rights and Freedoms* in this context, the *mens rea* required for conviction under s. 95(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and some corollary issues related to sentencing.

II. Background Facts

1. In 2009, Mr. MacDonald was employed in the oil and gas industry. His employment required him to spend time in both Calgary and Halifax. On the evening of December 28, 2009, Mr. MacDonald entertained a co-worker and his co-worker’s friend at his Halifax condominium (the “unit”). Some alcohol was consumed during the evening as Mr. MacDonald and his colleague — who was about to replace him in Halifax — discussed work.
2. Later in the evening, the concierge of Mr. MacDonald’s building, Mr. Sears, received a noise complaint regarding loud music reverberating from the unit. Mr. Sears went to the unit, heard the loud music and knocked on the door. He received no response. Just as he was about to leave, he saw Mr. MacDonald’s guests leaving the unit and saying good night. At this point, Mr. Sears asked Mr. MacDonald to turn down his music. Mr. MacDonald, swearing at him, refused to do so.
3. Mr. Sears contacted the Halifax Regional Police and asked them to deal with the complaint about the noise issue. Cst. Pierce went to the building and, together with Mr. Sears, approached Mr. MacDonald’s unit. Cst. Pierce knocked on his door and asked him to turn his music down or off. Mr. MacDonald swore at her and slammed the door shut.
4. Cst. Pierce contacted her supervisor, Sgt. Boyd, who arrived at the building approximately a half hour later. Sgt. Boyd, Cst. Pierce and Mr. Sears went to the unit. Sgt. Boyd tried to get Mr. MacDonald to answer the door by knocking on it and kicking it, and also shouted that he was from the Halifax Regional Police.
5. About five minutes later, Mr. MacDonald opened the door, but only about 16 inches — enough for the officers to see the right side of his body and face. Sgt. Boyd noticed something “black and shiny” in Mr. MacDonald’s right hand that was in a shadow and was partially hidden by his right leg (A.R., at p. 167). He believed it might be a knife. He twice asked Mr. MacDonald what was behind his leg, gesturing toward his right hand. Mr. MacDonald did not respond.
6. Wanting to get a better look at what Mr. MacDonald had in his hand, Sgt. Boyd pushed the door open a few inches further. The resulting light enabled him to identify it as a handgun. He yelled “gun!” and quickly forced his way into the unit. After a brief struggle, he was able to disarm Mr. MacDonald.
7. The gun that Mr. MacDonald was holding when he opened the door was found to be a 9-mm Beretta — a restricted firearm. It was registered to him. The gun was loaded.
8. Mr. MacDonald was charged with numerous offences, three of which are relevant here: handling a firearm in a careless manner or without reasonable precautions for the safety of other persons, contrary to s. 86(1) of the *Code*; unlawfully having in his possession a weapon for a purpose dangerous to the public peace, contrary to s. 88(1); and possessing, in a place, a loaded restricted firearm without being the holder of an authorization or a licence under which he may possess the said firearm in that place, contrary to s. 95(1).

III. Judicial History

1. *Nova Scotia Provincial Court*
2. At trial, a *voir dire* was held to determine whether Mr. MacDonald’s right to be secure against an unreasonable search guaranteed by s. 8 of the *Charter* had been violated when Sgt. Boyd pushed the door to the unit open a few inches further to ascertain what he was holding. Judge Digby found that there is an exception that permits an officer to enter a home to ensure his or her safety, particularly where, as here, the intrusion is minor. He concluded that “there is no *Charter* breach and the burden is on the accused to prove on a balance of probabilities that there is a *Charter* breach” (A.R., at p. 250).
3. After weighing all the circumstances, Judge Digby found Mr. MacDonald guilty of the charges under ss. 86(1) and 88(1). Others could have been injured as a result of his conduct, which was out of proportion to any threat, actual or reasonably perceived. Before opening the door, Mr. MacDonald knew the people there were police officers or people claiming to be police officers. He also knew that if they were in fact police officers, they would react to his holding a handgun, and this would put his own safety at risk as well as that of the officers themselves and of the public.
4. Judge Digby also found Mr. MacDonald guilty of the charge under s. 95(1). In so finding, he noted that Mr. MacDonald and the Crown agreed on the following facts:

. . . it is common ground that Mr. MacDonald had a possession and acquisition license, that the Beretta firearm was properly registered in Mr. MacDonald’s name and that he had a right to possess it in his dwelling. It was registered with the Canadian Firearms Centre or another place approved for storage by the chief firearms officer.

. . .

It is common ground that [Mr. MacDonald] had a loaded, restricted firearm in his residence at Bishop’s Landing. . . . He had documentation which he submitted in evidence from the Nova Scotia Rifle Association indicating that he was a member and invited to use their facility. I take it it is common ground, and certainly the case has proceeded on the basis of common ground, that Nova Scotia Rifle Association is an organization which falls under section 19(1)(*a*) of the *Firearms Act*. [A.R., at pp. 19 and 21]

1. Mr. MacDonald had an authorization to transport the firearm, but, the learned trial judge held, it entitled him to transport the firearm only between his residence in Calgary and shooting ranges and border crossings in Alberta. He therefore had no right to take it to Halifax. Mr. MacDonald was guilty under s. 95(1) because he had the firearm in the unit without holding a licence which permitted him to possess it in that place.
2. Judge Digby sentenced Mr. MacDonald to three years’ imprisonment. He found that two years in a federal penitentiary was an appropriate sentence for the offence under s. 86(1). For the offence under s. 88(1), the proper sentence was three years in a federal penitentiary concurrent with the first sentence. As for the s. 95(1) offence, he found that the minimum sentence of three years in a federal penitentiary was appropriate and ordered that it be served concurrently with the other two sentences. Judge Digby rejected Mr. MacDonald’s contention that the minimum three-year sentence violated the right not to be subjected to cruel and unusual punishment guaranteed by s. 12 of the *Charter*, finding, despite the consequences for him and despite certain hypothetical scenarios, that it was not grossly disproportionate. He ordered that the firearm be forfeited and prohibited Mr. MacDonald from possessing any weapons for 10 years and any restricted weapons for life.
3. *Nova Scotia Court of Appeal, 2012 NSCA 50, 317 N.S.R. (2d) 90*
4. MacDonald C.J.N.S. (Saunders J.A. concurring) found that no *Charter* violation had occurred on the evening in question. He noted that warrantless entry into a home is *prima facie* illegal and that the onus was therefore on the Crown to justify the entry. Relying on this Court’s decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, he concluded that there is a common law police power to search without a warrant where the safety of the public or the police is at stake. He acknowledged, however, that this power is limited to situations in which, “in addition to acting within the general scope of their authority, [the police] have no other feasible less intrusive alternative”, and he added that “the manner of carrying out the impugned activity must also be reasonable” (para. 31). He found that Sgt. Boyd had exercised the power validly in the case at bar. The police were acting within the general scope of their authority by going to Mr. MacDonald’s place of residence to deal with a noise complaint. Sgt. Boyd acted reasonably in the circumstances in pushing the door open further to see what he was hiding. Furthermore, no other action would have been appropriate, as it was too late to simply retreat or issue a noise violation ticket.
5. MacDonald C.J.N.S. upheld the convictions under ss. 86 and 88, but overturned the one under s. 95. On the latter conviction, he acknowledged that pursuant to s. 17 of the *Firearms Act*, S.C. 1995, c. 39, Mr. MacDonald’s licence did not extend to his Halifax residence. However, he found that Mr. MacDonald should be acquitted on the basis of an honest but mistaken belief that it did extend to the unit. For the majority, this belief was a mistake of *fact* which negated the *mens rea* of the s. 95 offence. The Crown had to prove that Mr. MacDonald knew or was wilfully blind to the fact that his possession was unauthorized. It had failed to do so, as Mr. MacDonald genuinely believed that he was authorized to possess the firearm in the unit. MacDonald C.J.N.S. accordingly set aside the verdict and substituted an acquittal on the s. 95 charge.
6. Finally, the majority reassessed the fitness of Mr. MacDonald’s sentences for the convictions under ss. 86 and 88. The majority found that a review of these sentences was warranted because, rather than conducting an independent analysis for each offence, the trial judge had considered the incident globally. Because they had set aside the conviction under s. 95, they found it necessary to scrutinize the dispositions for the other convictions.
7. MacDonald C.J.N.S. found the three-year sentence for the conviction under s. 88 to be too harsh, since Mr. MacDonald’s actions “did not involve the more typical scenario such as a highly volatile public confrontation or a dangerous domestic dispute” and since “the gun was neither fired, nor . . . intentionally pointed” (para. 117). He reviewed a number of cases which suggested that three years was outside the sentencing range for this offence. He found the sentence to be demonstrably unfit and concluded:

Considering the principles of sentencing, the circumstances of this offence and Mr. MacDonald’s individual circumstances, particularly his positive pre-sentence report and his previous unblemished record, in my view a sentence of time served would be appropriate. This would represent 18 days in custody (considering the 2 days following his arrest, his release on his own recognizance and then the 16 days between his sentencing and his release on bail pending appeal). [para. 123]

1. As for the sentence for the conviction under s. 86, the majority found the imposition of the maximum two-year sentence to be unduly harsh in comparison with other cases. They held this sentence to be demonstrably unfit and imposed a sentence of 14 days concurrent with the sentence imposed for the s. 88 offence.
2. Finally, MacDonald C.J.N.S. ordered a two-year term of probation, a prohibition on possession of weapons for five years, and forfeiture of the firearm.
3. Beveridge J.A., in dissent, held that Sgt. Boyd had infringed Mr. MacDonald’s right under s. 8 of the *Charter* by pushing the door to the unit open further and extending his hand into Mr. MacDonald’s home. In Beveridge J.A.’s view, the authority of the police to enter an individual’s home for the purpose of ensuring officer safety did not apply in the circumstances of this case:

While I have no difficulty with the premise that the officers were lawfully present and carrying out their duties, they did not acquire any power to intrude into [Mr. MacDonald’s] home as a result of Sgt. Boyd’s concern that [he] was concealing something. Sergeant Boyd never suggested that he suspected, let alone had reasonable grounds to believe, that it was a firearm. He said it was something black and shiny. At best he said he “thought he might have a weapon in his hand”. In my view, this is more akin to hunch or suspicion than reasonable grounds to believe. In fact, the trial judge made no finding that reasonable grounds existed. Despite ample opportunity to give evidence that he did, Sgt. Boyd said no such thing.

. . .

The issue is not whether Sgt. Boyd acted reasonably in pushing open the door. The issue is did he have lawful authority to do so. That would only materialize if he had reasonable grounds to believe that his safety, or the safety of others, was at risk and his search in pushing open the door was reasonably necessary in the circumstances.

Absent a new-found power to enter a private dwelling based on a suspicion that officer safety concerns are triggered, the conclusion is inescapable that [Mr. MacDonald’s] reasonable expectation of privacy protected by s. 8 of the *Charter* was infringed or denied. [paras. 156 and 173-74]

1. In light of all the circumstances, Beveridge J.A. would have excluded the firearm as evidence at trial, because its admission would bring the administration of justice into disrepute. He would accordingly have set aside the convictions and directed acquittals on all three of the charges.

IV. Analysis

A. *Issues*

1. This case raises three issues, which I will discuss in turn:

1. Was Mr. MacDonald’s right under s. 8 of the *Charter* to be free from unreasonable search and seizure violated and, if so, what is the appropriate remedy?

2. Does the *mens rea* of the offence provided for in s. 95(1) of the *Code* include knowledge that one’s licence does not extend to the place where the firearm is possessed?

3. Should the sentences imposed by the Court of Appeal for the convictions under ss. 86(1) and 88(1) be varied?

B. *Mr. MacDonald’s Charter Challenge*

1. Mr. MacDonald’s central argument is that Sgt. Boyd’s action of pushing the door open further constituted an unreasonable search, contrary to s. 8 of the *Charter*. He submits that the evidence obtained by the police as a result of the search — namely the firearm — ought to be excluded under s. 24(2) of the *Charter*, as its admission would bring the administration of justice into disrepute. I cannot accept this argument. As I will explain, although Sgt. Boyd’s action constituted a “search” for the purposes of s. 8 of the *Charter*, that search was not unreasonable.

(1) Did Sgt. Boyd’s Action Constitute a Search?

1. *R. v. Evans*, [1996] 1 S.C.R. 8, is a leading case on what constitutes a “search” for the purposes of s. 8. The facts of that case were not dissimilar to those of the instant case in that the search was carried out by police at the doorstep of the accused person’s home. Sopinka J. laid down the following test for determining whether a police action constitutes a “search”:

. . . it is only where a person’s reasonable expectations of privacy are somehow diminished by an investigatory technique that s. 8 of the *Charter* comes into play. As a result, not every form of examination conducted by the government will constitute a “search” for constitutional purposes. On the contrary, only where those state examinations constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a “search” within the meaning of s. 8. [Emphasis added; para. 11.]

In other words, a s. 8 search “may be defined as the state invasion of a reasonable expectation of privacy” (*R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569, at para. 8).

1. There is no question that individuals have a reasonable, indeed a strong, expectation of privacy in their homes (*R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 19; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Silveira*, [1995] 2 S.C.R. 297), as well as in the approaches to their homes (*Evans*, at para. 21). However, *Evans* also established that the police have an implied licence to approach the door of a residence and knock. Doing so will not be considered an invasion of privacy constituting a search if the purpose of the police is to communicate with the occupant. But “[w]here the conduct of the police . . . goes beyond that which is permitted by the implied licence to knock, the implied ‘conditions’ of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder” (*Evans*, at para. 15). In such circumstances, the police action constitutes a “search”.
2. Initially, Sgt. Boyd’s actions were compatible with the implied licence to knock. He approached Mr. MacDonald’s door, knocked on it and kicked it for the purpose of communicating to the occupant that he needed to turn his music down. After Mr. MacDonald had opened the door, however, Sgt. Boyd’s purpose in pushing it open further was to get a better view of what was in his hand (A.R., at pp. 168-69). Simply put, Mr. MacDonald’s implied waiver of his privacy rights did not extend that far. Speaking or shouting through the door or knocking on it falls within the waiver; pushing it open further does not. Sgt. Boyd’s action of pushing the door open further constituted an intrusion upon Mr. MacDonald’s reasonable privacy interest in his dwelling.
3. Having found that the police action constituted a search of Mr. MacDonald’s home, I must now consider whether that search was unreasonable, and therefore in violation of s. 8 of the *Charter*. At this stage, because the search was warrantless, the Crown has the burden of showing that it was reasonable (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278).

(2) Was the Search Unreasonable?

1. The framework for scrutinizing warrantless searches for *Charter* compliance was summarized by this Court in *Mann*:

[Warrantless] searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in *R. v. Collins*, [1987] 1 S.C.R. 265. Under *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable (p. 278). The Crown bears the burden of demonstrating, on the balance of probabilities, that the warrantless search was authorized by a reasonable law and carried out in a reasonable manner: *R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 32. [para. 36]

1. Applying the *Collins* test to the facts of the instant case, I find that the search carried out by Sgt. Boyd was reasonable.
   * + - 1. *The Search Was Authorized by Law and the Law Itself Is Reasonable*
2. Where the first prong of the *Collins* test is concerned, a search will be authorized by law if it is authorized by a valid police power. In *Godoy*, Lamer C.J. affirmed that the police have a common law duty to protect life and safety. Nevertheless, “[p]olice powers and police duties are not necessarily correlative” (*Mann*, at para. 35). Indeed, the police power to search is not unlimited. This power is constrained by a requirement of objectively verifiable necessity (para. 26). In *Mann*, Iacobucci J. accepted the need for a general police power to conduct pat-down searches, but solely in appropriate circumstances. He was mindful of the risks of abuse of such a power, as he observed that “[s]uch a search power does not exist as a matter of course: the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk” (para. 40).
3. A search that is reasonably necessary to eliminate threats to the safety of the public or the police — which I will term a “safety search” — will generally be conducted by the police as a reactionary measure. In other words, although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react “on the sudden”. Binnie J.’s observation in *A.M.* in relation to sniffer-dog searches that “the police are generally required to take quick action guided by on-the-spot observations” (at para. 90) is equally applicable to safety searches. Thus, safety searches will typically be warrantless, as the police will generally not have sufficient time to obtain prior judicial authorization for them. In a sense, such searches are driven by exigent circumstances. Even if exigent circumstances exist, however, “safety searches” must be authorized by law.
4. In arguing that Sgt. Boyd’s search was authorized by law, the Crown relies on the test from *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.), as set out by this Court in *Dedman v. The Queen*, [1985] 2 S.C.R. 2. It will be recalled that in *Waterfield*, two police officers had attempted to detain *personal property* (a car) belonging to the accused. The court set down a two-part test to determine whether the officers were *acting in the execution of their duties* when they sought to stop the accused from removing his property. As Professor P. Healy notes, the *Waterfield* test served in *Dedman*, as in earlier Canadian cases in which it had been applied (*R. v. Stenning*,[1970] S.C.R. 631, and *Knowlton v. The Queen*, [1974] S.C.R. 443), to mark “the limits of liability when there [was] some question whether a police officer [had] acted in the execution of his or her duty”: “Investigative Detention in Canada”, [2005] *Crim. L.R.* 98, at p. 102. It was of assistance in the determination of whether a police officer who had been assaulted was acting as an officer at the time of the assault, in which case the accused would be guilty of assaulting a police officer and not a regular citizen. *Waterfield* is therefore an imperfect authority on the question whether police have a *common law power* to search an *individual* in a safety search.
5. Instead, we must consider this Court’s jurisprudence. This Court has elaborated on and applied the two-step *Waterfield* test in a variety of contexts comparable to safety searches in assessing whether an action constituting *prima facie* infringement of an individual’s liberty falls within an officer’s power (*Dedman* and *Mann*)*.*
6. At the first stage of the *Waterfield* test, the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized at common law. For safety searches, the requirement at this first stage of the analysis is easily satisfied. In the case at bar, the police action falls within the general scope of the common law police duty to protect life and safety that I mentioned above. This duty is well established (*Mann*, at para. 38; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at paras. 20-21; *Dedman*).
7. At the second stage, if the answer at the first is affirmative, as it is in this case, the court must inquire into whether the action constitutes a justifiable exercise of powers associated with the duty. As this Court held in *Dedman*,

[t]he interference with liberty must be necessaryfor the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [Emphasis added; p. 35.]

Thus, for the infringement to be justified, the police action must be *reasonably necessary* for the carrying out of the particular duty in light of all the circumstances (*Mann*, at para. 39; *Clayton*, at paras. 21 and 29).

1. To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question.These factors include:

1. the importance of the performance of the duty to the public good (*Mann*, at para. 39);

2. the necessity of the interference with individual liberty for the performance of the duty (*Dedman*, at p. 35; *Clayton*, at paras. 21, 26 and 31); and

3. the extent of the interference with individual liberty (*Dedman*, at p. 35).

If these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the action in question will not constitute an “unjustifiable use” of police powers (*Dedman*,at p. 36). If the requirements of both stages of the *Waterfield* test are satisfied, the court will then be able to conclude that the search in question was authorized by law.

1. As can be seen, the *Dedman-Mann* line of cases does not stand for the proposition that all acts related to an officer’s duties are authorized by law. Quite the opposite, only such acts as are reasonably necessary for the performance of an officer’s duties can be considered, in the appropriate circumstances, to be so authorized. The English Court of Appeal was clear on this point in *Waterfield*,in a passage quoted by this Court in *Dedman*:

Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. [Emphasis added; p. 33.]

Likewise, Dickson J., in a powerful dissent in the *Wiretap Reference*, [1984] 2 S.C.R. 697, stressed the critical importance of a narrow reading of the *Waterfield* test:

The fact that police officers could be described as acting within the general scope of their duties to investigate crime cannot empower them to violate the law whenever such conduct could be justified by the public interest in law enforcement. Any such principle would be nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual’s rights. [pp. 718-19]

Such restraints on safety searches are particularly important in the context of a search in a private home, as in the case at bar, which concerns a serious invasion of Mr. MacDonald’s privacy in his home. Moreover, safety searches can often give the police access to a considerable amount of very sensitive personal information.

1. With this clarification in mind, we must sensitively weigh the factors of the second stage of the *Dedman-Mann* test. The factors assist both in determining whether a police power exists and in defining the limits of that power:

1. Importance of the duty: No one can reasonably dispute that the duty to protect life and safety is of the utmost importance to the public good and that, in some circumstances, some interference with individual liberty is necessary to carry out that duty.

2. Necessity of the infringement for the performance of the duty: When the performance of a police duty requires an officer to interact with an individual who they have reasonable grounds to believe is armed and dangerous, an infringement on individual liberty may be necessary.

3. Extent of the infringement: The infringement on individual liberty will be justified only to the extent that it is necessary to search for weapons. Although the specific manner (be it a pat-down, the shining of a flashlight or, as in this case, the further opening of a door) in which a safety search is conducted will vary from case to case, such a search will be lawful only if all aspects of the search serve a protective function. In other words, the authority for the search runs out at the point at which the search for weapons is finished. The premise of the *Collins* test — a warrantless search is presumed to be unreasonable unless it can be justified — must be borne in mind in determining whether the interference with individual liberty involved in a safety search is reasonable.

1. On balancing these factors, I am convinced that the duty of police officers to protect life and safety may justify the power to conduct a safety search in certain circumstances. At the very least, where a search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, the police should have the power to conduct the search.
2. But although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in *Mann* and reaffirmed in *Clayton* require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (*Mann*,at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see *R. v. Tse*,2012 SCC 16,[2012] 1 S.C.R. 531, at para. 33). As the Court stated in *Mann*, a search cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on “reasonable and specific inferences drawn from the known facts of the situation” (*Mann*, at para. 41).
3. A safety search is a physical search that could uncover a broad array of information about an individual. In the instant case, even though all Sgt. Boyd did was push the door open slightly further, this had the potential to reveal to the officers any number of things about Mr. MacDonald, as they could now see more of the interior of the unit. However, because Sgt. Boyd had reasonable grounds to believe that Mr. MacDonald was armed and dangerous, the further opening of the door was authorized by law.
4. As for the second prong of the *Collins* test, it cannot be disputed that the lawful authority underlying safety searches outlined above is reasonable. Indeed, the execution of the police duty to protect life and safety lies at the very core of the existence of the police as a social entity. Further, the law will justify the exercise of this police power only if exercising it is *reasonably necessary* in order for the police to conduct the safety search in question (*Clayton*, at paras. 21, 26 and 31). As I explained above, it is only when police officers have reasonable grounds to believe that there is an imminent threat to their safety that it will be reasonably necessary to conduct such a search. This limit guarantees that the lawful police power is not excessively broad. In so doing, it ensures that the law itself is reasonable and can be reasonably delineated.
5. This common law power to conduct searches for safety purposes is the reasonable lawful authority for the search carried out by Sgt. Boyd. The power was engaged because Sgt. Boyd had reasonable grounds to believe that there was an imminent threat to the safety of the public or the police and that the search was necessary in order to eliminate that threat. More specifically, the trial judge found that Sgt. Boyd had observed the following when Mr. MacDonald answered the door:

1. Mr. MacDonald had his hand behind his leg and was clearly holding an object;

2. what he was holding was “black and shiny” and therefore could have been a weapon; and

3. when twice asked what he had behind his back, he refused to answer or to provide any explanation.

1. In my opinion, the search conducted by Sgt. Boyd was authorized by law and the law itself, in the form of a well-established common law principle, is reasonable. As I will explain below, the manner in which he carried out the search was also reasonable.

(b) *The Manner in Which the Search Was Carried Out Was Reasonable*

1. Two aspects of this prong of the *Collins* test must be addressed. First, as we have seen, an officer must have reasonable grounds to believe that there is an imminent threat to the safety of the public or the police before a safety search will be deemed reasonable. I agree that Sgt. Boyd had such grounds in the circumstances of this case.
2. Second, the actions of the police in conducting the search must be scrutinized to determine whether the search was carried out reasonably. To a certain extent, this analysis relates to the second stage of the *Waterfield* test. If the extent of the infringement is greater than what is required to search for weapons, the search will not be authorized by law. At this point, however, the overall reasonableness of the search must be assessed in light of the totality of the circumstances (*Mann*, at para. 44). It is necessary to consider not only the *extent* of the interference, but *how* it was carried out. This inquiry turns on whether the search was minimally intrusive on the privacy interest at stake. In other words, the manner in which the search was carried out must have been reasonably *necessary* to eliminate any threat.
3. In the instant case, the trial judge found that Sgt. Boyd had, in pushing the door open further, done no more than was necessary to find out what Mr. MacDonald had behind his leg. His action was therefore reasonablynecessary in order to determine what was behind Mr. MacDonald’s leg and in so doing eliminate any threat to the safety of the public or the police. In fact, one could go further and state that there was no less intrusive way to do so. Sgt. Boyd twice asked Mr. MacDonald what he had in his hand but received no answer. In these circumstances, it is hard to imagine a less invasive way of determining whether Mr. MacDonald was concealing a weapon (and thereby eliminating any threat in that regard).
4. Indeed, when the officer’s evidence is read as a whole, it appears that he had reasonable grounds to believe that Mr. MacDonald had a weapon in his hands. He simply was not sure what kind of weapon it was (see, for example, A.R., at p. 180).
5. On this basis, Sgt. Boyd’s pushing the door to the unit open further constituted a reasonable search. It was authorized by a reasonable law and was carried out in a reasonable manner. It follows that Mr. MacDonald’s rights under s. 8 of the *Charter* were not violated. As a result, I need not consider the issue of a remedy under s. 24(2) of the *Charter*.

C. *Appeal of the Acquittal on the Charge Under Section 95 of the Code*

1. The Crown is appealing Mr. MacDonald’s acquittal on the charge under s. 95 of the *Code*. It submits that the Court of Appeal erred in interpreting the *mens rea* requirement of the offence of possession of a loaded restricted firearm provided for in s. 95 and imposed a nearly insurmountable burden on the Crown which is inconsistent with the principle that ignorance of the law is no excuse. Mr. MacDonald takes the position that the Court of Appeal correctly interpreted the *mens rea* requirement of that offence and correctly held that the *mens rea* had not been made out. I agree with the Crown that the Court of Appeal made an error in requiring the Crown to prove, in order to secure a conviction under s. 95, that the accused knew his possession and acquisition licence and authorization to transport the firearm did not extend to the place where he unlawfully had it in his possession. As I will explain, such a requirement is inconsistent with the rule, codified in s. 19 of the *Code*, that ignorance of the law is no excuse.
2. Section 95(1) of the *Code* reads as follows:

**95.** (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of

(*a*) an authorization or a licence under which the person may possess the firearm in that place; and

(*b*) the registration certificate for the firearm.

1. In this Court, Mr. MacDonald’s argument on his conviction under s. 95 relates to the *mens rea* of the offence. He does not dispute that he possessed a loaded restricted firearm in the unit. Nor does Mr. MacDonald deny that he possessed the firearm there without being the holder of an authorization or a licence that entitled him to possess it in that place. Rather, he argues that s. 95 is a *mens rea* offence and that, to secure a conviction, the Crown must show that he knew his possession of the firearm in the unit was unauthorized. This, Mr. MacDonald says, the Crown failed to do, whereas he testified at trial that he had a subjective belief that the authorization he had obtained in Alberta extended to his condominium in Halifax.
2. In my view, the offence provided for in s. 95 is a *mens rea* offence. As this Court recognized in *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 16, classifying an offence as either a *mens rea* offence, a strict liability offence or an absolute liability offence is a question of statutory interpretation. The Crown agreed at the hearing of this case that the offence at issue is a *mens rea* offence, and in any event, we may validly rely on the presumption that an offence should be classified as a *mens rea* offence where, as here, nothing in the statute indicates a contrary intention (*The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1309-10; *Beaver v. The Queen*, [1957] S.C.R. 531).
3. The *mens rea* the Crown is required to prove under s. 95(1) does not, however, include knowledge that possession in the place in question is *unauthorized*. Rather, knowledge that one possesses a loaded restricted firearm, together with an intention to possess the loaded firearm in that place, is enough. An individual who knowingly possesses a loaded restricted firearm in a particular place with an intention to do so will be liable to punishment for the offence provided for in s. 95(1) unless he or she holds an authorization or a licence under which the firearm may be possessed in that place. Thus, a proper authorization or licence serves to negate the *actus reus* of the offence, thereby allowing someone who legitimately possesses a restricted firearm in a given place to avoid liability.
4. With respect, the Court of Appeal erred in law by improperly reading a defence of ignorance of the law into s. 95(1). In the majority’s view, the Crown had to prove that Mr. MacDonald knew or was wilfully blind to the fact that his possession was unauthorized. Such a burden would compel the Crown to prove that an accused knew the conditions of his or her authorization or licence. This amounts to requiring the Crown to prove that the accused knew the law.
5. The following example illustrates the point that an error made by an accused in interpreting his or her authorization or licence is a mistake of law and not one of fact. Suppose the *Code* provided that restricted firearms could be possessed only in the province of Alberta, and nowhere else in Canada. Surely, if that were the case, there could be no dispute that Mr. MacDonald’s possession of such a firearm in Halifax contravened this rule, and any suggestion that he thought he could lawfully possess it there would have to be considered a mistake of law and would therefore afford no defence to a charge of unlawful possession. For my part, I find no distinction when such a rule is expanded to an individual’s authorization and the applicable section of the *Code* merely refers to such a document. Mr. MacDonald’s subjective belief that he could possess the firearm in Halifax is therefore nothing other than a mistake of law.
6. I therefore find that a requirement that an accused knew or was wilfully blind to the fact that his possession was unauthorized would be grounded on the acceptance of mistake of law as a defence to a charge under s. 95(1). It is trite law that, except in the case of an officially induced error, a mistake of law is no defence in our criminal justice system. Section 19 of the *Code* states:

**19.** Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

1. In *R. v. Forster*, [1992] 1 S.C.R. 339, Lamer C.J. accurately and succinctly explained this as follows:

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one’s deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen*, [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one’s actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence. [p. 346]

1. In sum, the Court of Appeal erred by treating Mr. MacDonald’s mistake of law as a mistake of fact which exonerated him of the charge resulting from his actions. I would allow the Crown’s appeal on this issue and restore the conviction under s. 95(1).
2. Although I am of the view that the conviction must be restored, I nevertheless appreciate the Court of Appeal’s concern that Mr. MacDonald may as a result of this conviction be sentenced to a mandatory three-year term of imprisonment despite the fact that, in ordinary circumstances, his mistake of law would be a mitigating factor to be considered in fashioning a sentence that is proportionate to his crime (C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at pp. 319-21). Whether the mandatory minimum three-year term of imprisonment provided for in s. 95(2)(*a*)(i) is constitutional will now be a matter for the Court of Appeal to decide.

D. *Appeal Against the Sentence Imposed by the Court of Appeal*

1. Having restored Mr. MacDonald’s conviction under s. 95(1), this Court is not in a position to consider the Crown’s appeal against the sentences imposed by the Court of Appeal on the charges under ss. 86(1) and 88(1). Because the Court of Appeal acquitted Mr. MacDonald on the charge under s. 95(1), it did not consider his argument that the mandatory minimum three-year sentence provided for in s. 95(2)(*a*)(i) is unconstitutional. Given the decision to restore Mr. MacDonald’s conviction on this count, the matter should be remitted to the Court of Appeal for consideration of this argument. Because of the close factual tie between the sentences imposed for the convictions under ss. 86 and 88 and the one imposed for the conviction under s. 95, the Court of Appeal should reconsider all the sentences together after deciding whether s. 95(2)(*a*)(i) is constitutionally valid.

V. Disposition

1. For the reasons set out above, I would dismiss Mr. MacDonald’s appeal on the s. 8 issue and allow the Crown’s appeal on the charge under s. 95(1). Mr. MacDonald’s acquittal on that charge is set aside, and his conviction is restored. This matter will be remitted to the Court of Appeal for sentencing, and it will be necessary for that court to determine whether the mandatory minimum sentence applicable under s. 95(2)(*a*)(i) of the *Code* is constitutionally valid.

The reasons of Rothstein, Moldaver and Wagner JJ. were delivered by

1. Moldaver and Wagner JJ. — Every day, throughout this country, police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others. In return, they are entitled to know that when potentially dangerous situations arise, the law permits them to conduct minimally intrusive safety searches to alleviate the risks they face. That is the fundamental bargain we, as a society, have struck with the police — and it is a fundamental commitment upon which the police are entitled to rely.
2. The commitment of which we speak was acknowledged by this Court in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. *Mann* recognized a limited police power to search without a warrant solely for protective purposes where a police officer has reasonable grounds to suspect a threat to his or her safety or the safety of others. The majority in this case purports to apply *Mann*. Respectfully, however, it does not. Instead, it renders *Mann* redundant, depriving police officers of the limited search powers they need to protect themselves and the public in fluid and often unpredictable situations of potential danger.
3. In the instant case, while we agree with the majority on all three issues in this case, including Mr. MacDonald’s claim under s. 8 of the *Canadian Charter of Rights and Freedoms*, we part company with our colleagues on the proper interpretation of *Mann*. Our colleagues assert, relying on *Mann*, that officers are only empowered to conduct “safety searches” where they have reasonable grounds to *believe* an individual is armed and dangerous (paras. 39 and 44). With respect, we do not agree with that conclusion. In our view, *Mann* decided that officers may conduct safety searches when they have reasonable grounds to *suspect* an individual is armed and dangerous. The balance of these reasons will focus on explaining why.
4. The case law reveals that the *rationale* justifying the police power to perform protective searches is the protection of public or officer safety. It seems to us that such a power is a necessary corollary of the duties imposed on the police, two of which include the duty to preserve the peace and to protect life and property. Police officers cannot be asked to intervene in dangerous or fluid situations and, at the same time, be denied the authority to take protective measures when they reasonably suspect their own safety is at risk, especially when there is a suspicion weapons are present.
5. *Mann* affirmed as much. Our starting point then is the language of the caseitself:

. . . where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. [Emphasis added; para. 45.]

1. Read in isolation, the “reasonable grounds to believe” language connotes the “reasonable and probable grounds” standard. See *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 447. But one cannot stop reading there, because the concept of being “at risk” inherently builds in the concept of possibility. See, e.g., the *Oxford English Dictionary* (online), *sub verbo* “risk” (“the possibility of loss, injury, or other adverse or unwelcome circumstance; a chance or situation involving such a possibility” (emphasis added)).
2. The language of *Mann* thus appears to stack a *probability* on top of a *possibility* — a chance upon a chance. In other words, *Mann* says a safety search is justified if it is *probable* that something *might* happen, not that it is *probable* that something *will* happen. As this Court only recently explained, the formeris the language of “reasonable suspicion” (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 74). The latter is the language of “reasonable and probable grounds”.
3. Admittedly, the language of *Mann* could have been clearer. Indeed, the ambiguity in the key paragraph of *Mann* has led at least one authority in this field to suggest that the Court simply “misspoke”: J. Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*” (2007), 52 *Crim. L.Q.* 299, at p. 311. While it would have been helpful if the Court in *Mann* had simply said either “reasonable grounds *to* *believe* an individual is armed and dangerous” or “reasonable grounds *to* *suspect* an individual is armed and dangerous”, the fact is that it did not. Fortunately, however, we are able to resolve any lingering doubt about the meaning of *Mann* with the tools available to us. As we will explain, each of these tools points away from the majority’s interpretation.
4. Since legal terms of art are not always self-defining, we begin with how the *Mann* Court actually described the standard it was adopting. A close reading leaves no doubt it was describing reasonable suspicion. For example, *Mann* held that “[t]he search must be grounded in objectively discernible facts to prevent ‘fishing expeditions’ on the basis of irrelevant or discriminatory factors” (para. 43 (emphasis added)). As we recently held in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, reasonable suspicion must be grounded in “objectively discernible facts, and . . . prevents the indiscriminate and discriminatory exercise of police power” (para. 3 (emphasis added)). Similarly, *Mann* spoke of a “logical possibility that the [suspect] . . . was in possession of break-and-enter tools, which could be used as weapons” (para. 48 (emphasis added)). Again, *Chehil* makes clear that “reasonable suspicion . . . engages [a] reasonable possibility, rather than probability” (para. 27 (emphasis added)). Finally, *Mann* required that an officer “not be acting solely on a hunch” (para. 41 (emphasis added)). And again, *Chehil* cautioned “hunches . . . will [not] suffice” (para. 47 (emphasis added)). We know of no case that has described the reasonable and probable grounds standard using this language.
5. To look at the matter another way, had *Mann* intended to adopt a reasonable and probable grounds standard, these detailed elaborations would have been unnecessary since reasonable and probable grounds was at the time a well-known standard. Indeed, it was and remains the *presumptive* standard under the *Charter* (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145). In contrast, *Mann* represented one of the first attempts by this Court to define the standard of reasonable suspicion (see also *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569; *Chehil*; *MacKenzie*).
6. Second, we look at the history from which *Mann* emerged. In recognizing a power of investigative detention and a related power to search for protective purposes incidental to that detention, *Mann* explicitly relied on the U.S. Supreme Court’s seminal decision in *Terry v. Ohio*, 392 U.S. 1 (1968). Significant for present purposes, *Mann* quoted the following passage from *Terry* (at p. 27)when articulating the standard upon which an officer safety search must be measured:

. . . there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. [Emphasis added; para. 41.]

1. As the excerpt makes clear, Chief Justice Warren clearly distinguished the *Terry* standard from the “probable cause” standard — the equivalent of our reasonable and probable grounds — traditionally used for arrests. And though there has never been any serious debate about what *Terry* meant, in speaking of a “reason to believe”, the language of *Terry* risked being “confusing and contradictory” because “it is precisely the language the [U.S. Supreme] Court has used time and again to define the probable cause requisite for arrest” (W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (5th ed. 2012), vol. 4, at §9.6(a)). As our American colleagues only recently affirmed, however, under *Terry*, “the police must harbor reasonable suspicion that the person . . . is armed and dangerous” (*Arizona v. Johnson*, 129 S. Ct. 781 (2009), at p. 784 (emphasis added)). It is surely ironic, then, that in borrowing from *Terry*’s diction, *Mann* inadvertently imported the same confusion and contradiction into Canada.
2. That brings us to our third point. Until today, it was thought that the subsequent interpretation and application of *Mann* by this Court and others had put that confusion to rest. Most significantly, in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, as Abella J. explained, the two accused were detained because the police had a “reasonable suspicion” they were in possession of firearms and “as a result, the lives of the police officers and of the public were at risk” (para. 46). Those very safety concerns — without more — justified searches of the accused incidental to their detention (para. 48). In other words, the officers were entitled to conduct a minimally intrusive search for safety purposes because they had reason to suspect that the accused were armed and dangerous.
3. Beyond *Clayton*, this Court has on at least three distinct occasions expressed, albeit in *obiter*, that *Mann* authorized a protective search incidental to investigative detention on the basis of reasonable suspicion. First, Binnie J., writing for himself and the Chief Justice in *Kang-Brown*, referred to “the Court’s decision in *Mann* to lower the bar from reasonable and probable cause to reasonable suspicion in the context of a warrantless search” (para. 62 (emphasis added)). In *R. v.* *Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408, at para. 44, n. 3, the majority expressly declined to endorse the minority’s assertion that *Mann* required a reasonable and probable grounds standard for pat-down searches. And, lastly, only a few months ago — in an opinion joined by every member of today’s majority — we noted that *Mann* authorized “limited searches accompanying investigative detentions” on the basis of “reasonable suspicion” (*Chehil*, at para. 22, n. 1). With respect, the majority does not explain why these comments were mistaken.
4. Beyond our own cases, lower courts have relied on this Court’s jurisprudence and have, unsurprisingly, concluded that *Mann* adopted a reasonable suspicion standard. For example, in *R. v. Crocker*, 2009 BCCA 388, 275 B.C.A.C. 190, leave to appeal refused, [2010] 1 S.C.R. viii, the court held that “[a] lawful protective safety search . . . need only meet the legal standard of reasonable suspicions . . . required by *Mann*” (para. 72 (emphasis added)). Just a few months ago, the same conclusion was reached in *R. v. Atkins*, 2013 ONCA 586, 310 O.A.C. 397: “The pat-down search that followed the detention was justified on officer safety grounds” because “[t]he officers reasonably suspected that the appellant was in possession of a weapon” (para. 15 (emphasis added)).
5. Fourth, the logical consequences of a reasonable and probable grounds standard in the context of *Mann* make little sense. Had the officer possessed reasonable grounds to believe that the accused in *Mann* was armed and dangerous, he could have arrested him. See, e.g., *Criminal Code*, R.S.C. 1985, c. C-46, s. 88 (possession of a weapon for a purpose dangerous to the public peace). In other words, if *Mann* required reasonable and probable grounds for a pat-down search, it would seem all that *Mann* achieves is a power to *search* when there are already grounds to *arrest*. See also Stribopoulos, at p. 311. Manifestly, this is an anomalous result.
6. An officer who has reasonable grounds to believe an individual is armed and dangerous will always have an immediate need to assert control over that person. That need will inevitably entail *arresting* the individual, and, as soon as it is safe to do so, subjecting that person to a search incident to arrest, predicated on a lower standard (see *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 25). Indeed, it defies common sense to suggest that an officer confronted with an individual who is reasonably believed to be armed and dangerous would forgo the lawful option of arresting the individual in favour of a mere pat-down search. Notably, a search incident to arrest is far more intrusive than the minimally intrusive search recognized under *Mann*. A search incident to arrest would include a search of the person, but could also include a search of his or her belongings or automobile (see *Caslake*, at para. 15).
7. Against that background, it is worth recalling that each time this Court has asked itself whether it should recognize a new common law police power, it has been “because of perceived gaps in the law” (*Kang-Brown*, at para. 6, *per* LeBel J.(emphasis added)). The identification of such gaps has quite rightly been a prerequisite to doing so given this Court’s reluctance to take upon itself the task of creating new police powers under the common law. We fail to understand then why the Court in *Mann* would recognize a protective search power on a standard that renders the power unnecessary. Put simply, on the majority’s interpretation, *Mann* fills no gap.With respect, that result cannot be what *Mann* intended.
8. Fifth, and turning to the facts of this case, the majority’s conclusion that Sgt. Boyd had reasonable and probable grounds to believe that Mr. MacDonald was armed and dangerous does not conform with the evidence. Of greater concern, the majority’s approach appears to appreciably lower the standard for what constitutes reasonable and probable grounds.
9. To be sure, on the facts as found by the trial judge, Sgt. Boyd’s *suspicion* that Mr. MacDonald was armed and dangerous was reasonable. The context of the encounter with him indicates a degree of hostility toward the building staff and police. To begin, Mr. MacDonald dismissed the building concierge’s attempts to turn down the music in what the trial judge diplomatically characterized as an “undiplomatic manner” (trial reasons, MacDonald’s A.R., at p. 5). He showed “some evidence of intoxication” (*ibid.*). When Cst. Pierce attended on the scene, Mr. MacDonald “proceeded to shut the door requiring the constable to remove her foot from the threshold, telling the constable to fuck off or words to that effect” (p. 6). The trial judge accepted that Sgt. Boyd saw a “black and shiny” object in Mr. MacDonald’s hand (*voir dire* reasons, MacDonald’s A.R., at p. 248). Significantly, “[i]t was concealed behind [his] right leg” (*ibid.*). Moreover, Sgt. Boyd thought “it might be a knife” (p. 249). In these circumstances, Sgt. Boyd had reason to suspect that Mr. MacDonald, who had been acting in a hostile and aggressive fashion, was armed and dangerous — but he surely did not have reasonable grounds to believe that he wasarmed and dangerous.
10. Our colleagues do not give effect to the officer’s clear evidence and find instead that Sgt. Boyd had reasonable grounds to believe that Mr. MacDonald wasarmed and dangerous. With respect, we cannot accept this conclusion. This is the first time such a finding has been made. The trial judge made no such finding, nor did any justice of the Court of Appeal reach this conclusion. Second, no party before this Court advances such a claim. Indeed, the Crown submits that a reasonable and probable grounds standard is “completely unrealistic” in this context (R.F., at para. 46).
11. Overstating Sgt. Boyd’s evidence is not just inconsistent with the evidence in this case; it also significantly lowers the reasonable grounds to believe threshold by eliminating the subjective requirement that the standard demands (*R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51). The law is clear that an officer must *subjectively* believe he has reasonable and probable grounds; it is not enough that he objectively did. In this case, however, Sgt. Boyd’s testimony of his “concern” that Mr. MacDonald “might” have had a weapon does not fit with the majority’s conclusion that Sgt. Boyd himself believed he had reasonable and probable grounds. Sgt. Boyd believed in a possibility, not a probability.[[1]](#footnote-1) In other words, he subjectively *suspected* that Mr. MacDonald had a weapon, and this suspicion was objectively reasonable.
12. These five reasons — the language of *Mann*, the history from which *Mann* emerged, the logical consequences of interpreting *Mann* as requiring reasonable grounds to believe, the jurisprudence that has interpreted *Mann*, and the facts of this case — all lead to the same unavoidable conclusion: *Mann* recognized a protective search power predicated on reasonable suspicion.
13. This case could have been — and ought to have been — resolved by extending the logic of *Mann*. First, Sgt. Boyd, while lawfully engaged in his duties, had a reasonable suspicion that Mr. MacDonald was armed and dangerous. Second, in response to that reasonable suspicion, Sgt. Boyd’s conduct — pushing Mr. MacDonald’s door open a few more inches — was “no more intrusive of liberty interests than [was] reasonably necessary to address the risk” (*Aucoin*, at para. 36, quoting *Clayton*, at para. 31). Accordingly, the search was reasonable for purposes of s. 8.
14. It must be stressed that in cases such as the one at hand, the “*Mann* standard” for protective searches, as properly understood, does not empower an officer to engage in random searches based on a whim or a hunch. Rather, the officer’s suspicion that the individual is armed and dangerous must be reasonable having regard to the totality of the circumstances. As this Court said recently in *Chehil*, the belief must be derived from “objectively discernible facts, which can then be subjected to independent judicial scrutiny” (para. 26).
15. Nor is the proposition of a reasonable suspicion standard — even where it authorizes entry into a home — unfaithful to the *Charter*. Though *Hunter* established a presumption of reasonable and probable grounds, Dickson J. (as he then was) was careful to observe that in some circumstances “the relevant standard might well be a different one” (p. 168). That is to say, the purpose of a search matters. While the general rule is that a warrant secured on reasonable and probable grounds is required for entry into a home to effect an arrest (*R. v. Feeney*, [1997] 2 S.C.R. 13), the *Criminal Code* provides for warrantless entry in “exigent circumstances” where there are “reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person” (see, e.g., ss. 487.11 and 529.3(2)). Moreover, this Court has recognized that warrantless entry into a home is authorized by a 911 distress call, as it reveals a potential threat to life (see *R. v. Godoy*, [1999] 1 S.C.R. 311). Similarly, in *R. v. Golub* (1997), 34 O.R. (3d) 743, leave to appeal refused, [1998] 1 S.C.R. ix, the Ontario Court of Appeal recognized a power to search a home without a warrant incidental to arrest on the basis of “a reasonable suspicion” that a threat to safety existed (pp. 758-59).
16. In the end, this case illustrates the danger of leaving police powers to be developed in a piecemeal fashion by the courts. Today, our colleagues impose a standard requiring that an officer have reasonable grounds to believe an individual is armed and dangerous before a “safety search” is authorized, effectively overturning the search power recognized in *Mann* and a decade of subsequent jurisprudence in the process.
17. We should be clear about the consequences of the majority’s decision: officers are deprived of the ability to conduct protective searches except in circumstances where they already have grounds to arrest. As of today, officers are empowered to detain individuals they *suspect* are armed and dangerous for investigatory purposes, but they have no power to conduct pat-down searches to ensure their safety or the safety of the public as they conduct these investigations. In our view, a police officer in the field, faced with a realistic risk of imminent harm, should be able to act immediately and take reasonable steps, in the form of a minimally intrusive safety search, to alleviate the risk.
18. Subject to this disagreement with the majority, we join the balance of Justice LeBel’s reasons and would dispose of the case as he proposes.

*Appeal of Erin Lee MacDonald dismissed and appeal of Her Majesty The Queen allowed.*

Solicitors for the appellant/respondent:  Wolch, Hursh, deWit, Silverberg & Watts, Calgary.

Solicitor for the respondent/appellant:  Public Prosecution Service of Nova Scotia, Halifax.

Solicitor for the intervener the Director of Public Prosecutions:  Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

1. In *Hunter*, this Court held that *probabilities* and not *possibilities* satisfy the reasonable grounds to believe standard (p. 167). [↑](#footnote-ref-1)