JOHNSON *V.* THE QUEEN: *THE SUPREME COURT OPENS THE DOOR*

STEPHEN KLOEPFER*

Seldom does an appeal arising from a charge of simple break, enter, and theft reach the Supreme Court of Canada,[1] and it is more unusual still for such to attract the deliberation of the full Court.[2] The case of *Johnson* v. *The Queen*[3] provides a noteworthy exception to this tendency, and from this decision emerge important questions regarding the proper scope of statutory interpretation and the rule of law generally, questions which, it is submitted, were unsatisfactorily addressed by the Supreme Court. That the judgment of the Court has legal implications extending beyond the limited branch of criminal law with which the trial originally was concerned renders appropriate a close examination of its content.

In *Johnson,* the accused entered a partly-constructed, unoccupied house through an open doorway leading into the house from a carport. The door had not yet been installed, and, evidently, a sheet of plywood which had been nailed over the opening had been removed *prior to* the approach and entry by the accused and a companion. It was undisputed that Johnson had had no lawful justification or excuse for entering the building, and that he had committed theft subsequent to his entry. The substantial ground of appeal advanced after his trial and conviction on a charge under Section 306(1) (b) of the *Criminal Code*[4] was that there was no "breaking" of the premises, and therefore that a conviction for theft only should be substituted.

The Court of Appeal Decision

In the British Columbia Court of Appeal, McFarlane, J.A., after noting that the accused's entry was made without any actual breaking or any further opening of a partly-opened door or other covering,[5] set out the relevant provisions of the *Code* with respect to an offence of breaking and entering a place other than a dwelling-house:

> 282. In this Part 'break' means
>
> (a) to break any part, internal or external, or
>
> (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening. . . .
>
> 306. (1) Every one who. . . .
>
> (b) breaks and enters a place and commits an indictable offence therein. . . .
>
> is guilty of an indictable offence and is liable
>
> (d) to imprisonment for *life,* if the offence is committed in relation to a *dwelling-house,* or
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> (e) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling-house. . . .

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* Student, Faculty of Law, University of Ottawa.

1. In the past 15 years, only 3 other appeals bearing directly upon the interpretation of "break and enter" provisions in the *Criminal Code,* R.S.C. 1970, c. C-34, as am., have reached the Supreme Court of Canada: *Lemieux* v. *The Queen,* [1967] S.C.R. 492, [1968] 1 C.C.C. 187; *Austin* v. *The Queen,* [1968] S.C.R. 891, [1969] 1 C.C.C. 97; *R.* v. *Proudlock,* [1979] 1 S.C.R. 525, (1978), 43 C.C.C. (2d) 321.

2. Of the above 3 cases, neither *Lemieux* (5:0) nor Austin (3:2) was argued before the full Court.

3. [1977] 2 S.C.R. 646; 34 C.C.C. (2d) 12; 37 C.R.N.S. 370 (9:0).

4. R.S.C. 1970, c. C-34, s. 306, as am. by S.C. 1972, c. 13, s. 24.

5. *Johnson* v. *The Queen* (1977), 37 C.R.N.S. 370, at 372.

(4) For the purposes of this section, 'place' means

(a) a dwelling-house;

(b) a building or structure or any part thereof, other than a dwelling-house. . . .

308. For the purposes of sections 306 and 307. . . .

(b) a person shall be deemed to have broken and entered if

(i) he obtained entrance by a threat or artifice or by collusion with a person within, or

(ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a *permanent or temporary opening.*[6]

The appellant's submission that the word "deemed" as used in Section 308(b) should be interpreted as meaning "deemed *prima facie*" or "deemed until the contrary is proved" was peremptorily dismissed by the Court,[7] and it was held that the word "deemed" in this context was intended to mean "deemed conclusively."

Of more substance was the principal ground of appeal, founded upon a proposed restrictive interpretation of the phrase "permanent or temporary opening" in Section 308(b) (ii). The strength of this ground lay in the fact that, notwithstanding the apparent conclusiveness of the Section 308(b) deeming provision, Section 308(b) (ii) could have no application to an entry through a totally open doorway if such an aperture did not qualify as a "permanent or temporary opening." Here again, however, the Court's rejection of this view was attended by no clear exposition of legal principles.[8] Mr. Justice McFarlane succinctly expressed his disagreement with the Ontario Court of Appeal decision in *R.* v. *Jewell*[9] and adopted the reasoning followed in *R.* v. *Sutherland,*[10] concluding that "the language adopted by Parliament in s. 308(b) (ii) is clear and unambiguous."[11] Implicit in the Court's judgment was that a totally open doorway is subsumed by Section 308(b) (ii) and, accordingly, the accused's appeal against conviction was dismissed.

The Supreme Court Opinion

The accused was granted leave to appeal to the Supreme Court of Canada, where his appeal from the judgment of the British Columbia Court of Appeal was dismissed.[12] Mr. Justice Dickson, for the full Court,[13] outlined first the position at Common Law with respect to the distinction between actual and constructive breaking, and then provided a short treatment of the legislative history of the present Section 308.[14] The Court acknowledged

6. Emphasis added.
7. *Supra* n. 5, at 373.
8. *Id.*, at 373-74.
9. (1974), 22 C.C.C. (2d) 252; 28 C.R.N.S. 331 (Ont. C.A.).
10. (1966), 58 W.W.R. 441; [1967] 2 C.C.C. 84; 50 C.R. 197 (B.C.C.A.).
11. *Supra* n. 5, at 374.
12. *Supra* n. 3.
13. *Compare Supra* n. 2.
14. *Supra* n. 3, at 647-48; 34 C.C.C. (2d), at 13-14; 37 C.R.N.S., at 374-75.

that the scope to be given Section 308(b) (ii) was central to the appeal. After summarizing the facts which gave rise to Johnson's arrest and conviction, Mr. Justice Dickson dealt summarily with the three Canadian decisions bearing most directly on the question of the latitude to be given the phrase "permanent or temporary opening" in Section 308(b) (ii). These decisions[15] are important in their own right and will be canvassed in more detail later in this comment, but it will suffice here to consider the legal principles which Mr. Justice Dickson purported to extract from them.

Early in his reasons, Mr. Justice Dickson asserted that the question before the Court in the *Johnson* appeal was "whether an intruder can be convicted of breaking and entering premises without actual breaking."[16] Citing *R.* v. *Sutherland,*[17] where the accused's appeal against conviction on a charge under what is now Section 306(1) (b) was allowed by the British Columbia Court of Appeal because his entrance into an open-ended garage (in order to steal gasoline) was held to lie outside the application of Section 308(b) (ii), Mr. Justice Dickson proceeded to quote a passage from *Johnson* in the British Columbia Court of Appeal to the effect that, had the garage entrance in *Sutherland* been a "permanent or temporary opening," Section 308(b) (ii) would have applied notwithstanding the absence there of an *actual* break within the meaning of Section 282. The principal issue in *Johnson,* however, was not whether a constructive (*i.e.,* non-actual) breaking is *possible* under Section 308(b) (ii), but rather, whether this legislative fiction should be confined within reasonable limits. The limits placed upon it are dictated essentially by the kinds of "openings" that Section 308(b) (ii) is held to embrace and, ironically, the Supreme Court in *Johnson* appeared first to question the viability of constructive breaking by way of Section 308(b) (ii), only later to interpret this Section so as vastly to widen its operation and, hence, the operation of the constructive breaking doctrine.[18]

After his comments about *Sutherland,* Mr. Justice Dickson cited *R.* v. *Bargiamis,*[19] and extracted from that case the principle that *doorways* constitute *openings* within the meaning of Section 308(b) (ii). In *Bargiamis,* the accused induced the assistant night manager to leave unlocked the doors of a restaurant, on the understanding, or so the accused thought, that he would be enabled to enter the restaurant and, through it, reach an adjacent drugstore for the purpose of stealing a safe therein. The police were notified, and the accused was arrested before he entered the drugstore, but *after* he had opened and passed through two doors in order to get inside the restaurant. Chief Justice Gale for the Ontario Court of Appeal upheld the conviction on the basis that the accused contravened what is now Section 306(1) (a) of the *Code,* to which, *inter alia,* the present Section 308(b) (ii) is

15. *R.* v. *Sutherland, Supra* n. 10; *R.* v. *Bargiamis,* [1970] 3 O.R. 90, [1970] 4 C.C.C. 358, 10 C.R.N.S. 129 (Ont. C.A.); *R.* v. *Jewell, Supra* n. 9.

16. *Supra* n. 3, at 647; 34 C.C.C. (2d), at 13; 37 C.R.N.S., at 374.

17. *Id.,* at 649; 34 C.C.C. (2d), at 15; 37 C.R.N.S., at 376.

18. *Id.,* at 652; 34 C.C.C. (2d), at 17; 37 C.R.N.S., at 378-79.

19. *Supra* n. 15.

20. *Id.,* at 93; [1970] 4 C.C.C., at 361; 10 C.R.N.S., at 132.

made applicable, and stated: "Here, of course, both doorways constitute openings, the one at the lane in the outside wall of the building and the one into Zumburger's basement in an inside wall of the building. Accordingly, the provisions of para. (b) (ii) [of the current s. 308] cover the situation precisely."[20]

Just as the dismissal of Johnson's appeal by the Supreme Court of Canada involved an invocation of principles extracted from *Sutherland* and *Bargiamis,* so did it necessitate a repudiation of the judgment of the Ontario Court of Appeal in *R.* v. *Jewell.*[21] In *Jewell,* the Court, speaking through Martin, J.A., held that an entry by a person through an already-open door, without any further displacement of the door, did *not* constitute a breaking of the premises. Clearly implicit in *Jewell* is that a door open wide enough to permit entry without any further displacement of the door is not a "permanent or temporary opening" within the meaning of Section 308(b) (ii). The Court founded its decision principally on a perceived lack of clarity of Parliamentary intent to dispense entirely with the element of "breaking" in the offence of "breaking and entering," and on the obliteration of the distinction between Sections 306 and 307, with respect to dwelling-houses, should the alternate construction prevail.[22]

In his treatment of *R.* v. *Jewell* in the *Johnson* appeal, Mr. Justice Dickson dealt initially with the legislative history of Section 308 of the present *Code,* and then with what the Court perceived[23] to be the implications of *Jewell* should it be approved, namely, that it would have the effect of limiting Section 308(b) (ii) to those situations in which a would-be intruder found a door or window partly ajar and opened it further in order to gain entry, and that such an interpretation of Section 308(b) (ii) would do away with constructive entry through chimneys, "conceptually inbedded in common law and statute for centuries."[24] Mr. Justice Dickson then stated that, by enacting Section 308 of the present *Code,* Parliament had extended the limits of constructive breaking. With respect to the assertion that to subsume an open doorway under Section 308(b) (ii) would effectively obliterate, with respect to dwelling-houses, the legal distinction between Sections 306 and 307 in the face of gravely different maximum sentences available under these two Sections, Mr. Justice Dickson conceded that, although the *Johnson* interpretation would "narrow the gap between the two sections," differences remain and, to the extent that there was overlap,

21. *Supra* n. 9.

22. *Id.,* at 255-56; 28 C.R.N.S., at 335-36.

23. Rather dubiously, it is submitted. *See* text, n.

24. *Supra* n. 38, at 652; 34 C.C.C. (2d), at 17; 37 C.R.N.S., at 379.

prosecutorial discretion would prevail.[25] The Court stated that such a contingency was not uncommon, and likened this newly-conferred discretion to that exercised by a prosecutor with respect to a stabbing,which "may give rise to a nice question of whether to charge attempted murder, or causing bodily harm with intent to maim, or some lesser charge. It remains for the prosecutor in the circumstances of the particular case to decide which charge is appropriate."[26] Accordingly, the accused's appeal against conviction was, again, dismissed. And so, from our highest Court it has now been decreed that it is possible to break and enter a place by walking through a totally-open doorway.

Commentary

The soundness of the *Johnson* decision may, it is respectfully submitted, properly be challenged on two bases: (1) that the Court's treatment of the cases upon which it purported to rely in support of its judgment, especially *Sutherland* and *Bargiamis,* was superficial in the extreme, and (2) that the Court's interpretation of Section 308(b) (ii) of the *Criminal Code* effectively neutralizes the legal distinction between the offence of "breaking and entering" a dwelling-house (s. 306) and the offence of "entering" a dwelling-house without lawful excuse (s. 307) in the face of widely disparate maximum sentences available under these two sections — *life* imprisonment under Section 306 as contrasted with *ten years'* imprisonment under Section 307.[27] With respect to both of these submissions, it is instructive to contrast the *rationes decidendi* of *Sutherland, Bargiamis,* and *Jewell* with the somewhat different legal principles ascribed to these decisions by the Supreme Court in *Johnson.*

R. v. *Sutherland*

In *Johnson,* Mr. Justice Dickson referred to the comments by McFarlane, J.A., when the appeal was before the British Columbia Court of Appeal, that the language of Section 308(b) (ii) is clear and unambiguous and that the *Sutherland* approach was to be preferred over that taken in *Jewell.*[28] It is appropriate, in light of this reference, to review the *Sutherland* decision, especially since it was McFarlane, J.A., who delivered the judgment of the British Columbia Court of Appeal in that case as well.

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25. *Id.*, at 653; 34 C.C.C. (2d), at 17-18; 37 C.R.N.S., at 379-80. Section 306(1) provides that:

    Every one who

    (a) *breaks and enters* a place with intent to commit an indictable offence therein. . . .is guilty of an indictable offence and is liable

    (d) to imprisonment for *life,* if the offence is committed in relation to a dwelling-house. . . .

    Section 307 reads:

    (1) Every one who without lawful excuse, the proof of which lies upon him, *enters* or *is in* a *dwelling-house* with intent to commit an indictable offence and is liable to imprisonment for *ten years.*

    (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, *entered* or *was in* a *dwelling-house* is, in the absence of any evidence to the contrary, proof that he *entered* or *was in* the dwelling-house with intent to commit an indictable offence therein. (Emphasis added.)

26. *Ibid.;* 34 C.C.C. (2d), at 18; 37 C.R.N.S., at 380.

27. *Supra* n. 25.

28. *Supra* n. 3, at 649, 34 C.C.C. (2d), at 14; 37 C.R.N.S., at 376.

In *Sutherland,* McFarlane, J.A., stated: "While the language of s. 294(b) (ii) [now s. 308(b) (ii)] *appears* clear and unambiguous I think some assistance in ascertaining the intention of Parliament expressed in the words 'permanent or temporary opening' may be derived from an examination of the legislative history of the enactment."[29] Later, in considering whether the open side of a garage should be construed as a "permanent or temporary opening" within the meaning of the now Section 308(b) (ii), he concluded that "[i]n ordinary parlance the open end of a three-sided garage would not be described as an opening. It is naturally referred to as an entrance."[30] If the open end of a garage is not an opening, but rather an entrance, then it is contended that, *a fortiori,* an open doorway is not an opening, but an entrance. Indeed, the sole purpose of a doorway is to allow persons to *enter* and exit. Such cannot be said about windows, chimneys, skylights, air-vents, and so forth, and it is submitted that the phrase "permanent or temporary opening" in Section 308(b) (ii) was intended to comprise any *opening* which could not properly be described as an *entrance,* namely, openings of the above sort. In the writer's view, the dismissal of Johnson's appeal against conviction by the British Columbia Court of Appeal resulted largely from the failure of the Court to carry the *Sutherland* analysis to its logical conclusion, so as to place an open doorway outside the ambit of Section 308(b) (ii), just as a garage entrance was so placed in *Sutherland.*

In one particularly revealing passage, McFarlane, J.A., continued:

> It is important also to remember that the concept of breaking as an ingredient of the offence is retained in s. 292(1) [now s. 306(1)] which is the substantive provision and that the definition of 'break' is retained (s. 268(a)) [now s. 282]. Further, it is not without significance that reference to breaking is omitted from s. 293 [now s. 307] under which breaking is not an element in the offence of entering or being in a dwelling-house with intent to commit an indictable offence.
>
> For these reasons I am unable to conclude that, for purposes of constructive breaking and entering, Parliament intended to include within the provisions of s. 292(b) (ii) [now s. 308(b) (ii)] the entrance to a garage, being an open end of a building enclosed on two sides and the other end.[31]

These observations are strongly reminiscent of those made by Martin, J.A., in *Jewell,* a decision which McFarlane, J.A., affected to derogate from in the *Johnson* appeal. Consequently, although McFarlane, J.A., in *Johnson* asserted that the language adopted by Parliament in Section 308(b) (ii) is clear and unambiguous and that the reasons in *Sutherland* should apply, presumably Mr. Justice McFarlane's confidence in the Section's clarity and unambiguity was subject to the same strong qualifications which he himself expressed in the *Sutherland* case.

29. *Supra* n. 10, at 442; [1967] 2 C.C.C., at 86; 50 C.R., at 198. (Emphasis added).

30. *Id.,* at 443; [1967] 2 C.C.C., at 87; 50 C.R., at 199.

31. *Id.,* at 443-44; [1967] 2 C.C.C., at 87; 50 C.R., at 199.

R. v. *Bargiamis*

Later in his reasons, Mr. Justice Dickson stated that "[i]n *R.* v. *Bargiamis*. . . .doorways were held to constitute openings."[32] Although Gale, C.J.O., did state that the two doorways there in question constituted openings[33] within the meaning of Section 308(b) (ii), it is submitted that this statement was an *obiter dictum*. Moreover, the legal analysis in *Bargiamis* is, it is respectfully contended, itself open to serious question. It was apparent from the evidence that the accused opened one door and pushed another door that was already ajar[34] in order to gain entry to the restaurant. By so doing, the accused fell within the definition of *actual* breaking in Section 282, "to open any thing that is used . . . to close or to cover an internal or external opening," and thus there should have been no question of *constructive* breaking at all. Although the Section 308(b) (ii) fiction serves a necessary purpose in the criminal law, it should not be invoked too hastily, but only where a culpable entry has occurred in the *absence* of an actual (*i.e.*, s. 282) breaking, for example, where a person enters a place through an open window, without further displacing the window. It is submitted that the Court's unnecessary reliance in *Bargiamis* upon the Section 308(b) (ii) deeming provision seriously weakens its validity and that, in any event, *Bargiamis* should not have been construed by the Supreme Court as constituting a precedent for the proposition that doorways constitute "openings" within the meaning of Section 308(b) (ii). That this is so becomes more evident when one considers that in *Jewell,* an appeal on which Gale, C.J.O.[35] sat and from which he delivered no dissent, Martin, J.A., for the Court[36] made no reference[37] to Chief Justice Gale's statement in *Bargiamis* that doorways constitute openings, and proceeded unmistakeably to imply that open doorways do *not* constitute openings within the meaning of Section 308(b) (ii).

32. *Supra* n. 3, at 651; 34 C.C.C. (2d), at 16; 37 C.R.N.S., at 377.

33. *Supra* n. 15, at 93; [1970] 4 C.C.C., at 361; 10 C.R.N.S., at 132.

34. *Id.*, at 91-92; [1970] 4 C.C.C., at 359; 10 C.R.N.S., at 130. Gale, C.J.O., seems to interpret the phrase "permanent or temporary opening" in s. 308(b) (ii) as relating to an *action* of the person entering, rather than as an *aperture* of some sort:

> As the subparagraph qualifies the term "opening" by using both "permanent" and "temporary", it matters not, as it seems to us, whether one considers the opening of the door that was ajar in the laneway or the opening of the door into Zumburger's as the opening through which the accused entered without lawful justification or excuse. *Id.*, at 93; [1970] 4 C.C.C., at 361; 10 C.R.N.S. 132.

This interpretation of s. 308(b) (ii) is, it is respectfully submitted, incorrect. The legislative history of the present s. 308 makes it clear that this section was included to cover illegal entrances where *no actual* breaking takes place. If s. 308(b) (ii) were given the above construction, it would simply be an example of *actual* breaking, which is covered by s. 282, and constructive breaking (which requires no *actual* break) would effectively be done away with.

35. It should be noted that Gale, C.J.O., delivered the judgment in *Bargiamis*, the quorum comprising Gale, C.J.O., Evans and Jessup, J.J.A.

36. The quorum in *Jewell* comprised Gale, C.J.O., Brooke and Martin, JJ.A.

37. Martin, J.A., devoted one short paragraph to *Bargiamis:* "In *R.* v. *Bargiamis*. . .this Court held that further opening a door that was ajar constituted a breaking. An examination of the record in that case discloses that the door in question was open about one-half inch." *Supra* n. 9, at 254-55; 28 C.R.N.S., at 333-34. Curiously, the statement summarizes what *should have been* the basis of the accused's conviction in *Bargiamis*. A reading of *Bargiamis* discloses clearly, however, that, in spite of the accused's *actual* break (by opening the two doors), Gale, C.J.O., relied on s. 308(b) (ii), which typically is considered to apply only to *constructive breakings*.

R. v. *Jewell*

In the *Johnson* appeal, Mr. Justice Dickson's treatment of *Jewell* consisted partly in an examination of the implications which he perceived would follow from such an interpretation of Section 308(b) (ii). The *Jewell* decision, it is respectfully submitted, does not imply what the Court stated it to imply, and this submission compels a consideration of the facts and *ratio* of *Jewell,* after which its implications may more effectively be debated.

In *Jewell,* the accused was charged under Section 306(1) (a) of the *Criminal Code* for entering an unoccupied house through a screen door and an inner door, both of which were open wide enough to permit the accused to enter without further displacing the doors. Martin, J.A., considered the legislative history of the current Section 308 of the *Code,*[38] and adopted the analysis of the author of *Martin's Criminal Code*[39] with respect to the effect of the Section's last amendment, namely, that with such amendment the raising of a window that was already partly open would now constitute a breaking, whereas it would not have been so considered either at Common Law or under the former Section.[40] After "distinguishing" *Bargiamis,*[41] he stated his reasons for holding that the accused's entry through the open doors ought not to be considered a breaking of the premises. Mr. Justice Martin proposed first that the legislative intention as expressed in Sections 282 and 308 was not sufficiently clear to cause the Court to conclude that Parliament had dispensed entirely with the element of breaking in the offence of breaking and entering, and that the retention of the definition of actual breaking in Section 282 and constructive breaking in Section 308 was inconsistent with such a legislative purpose. The Court's second ground is amply demonstrated by the following passage from Mr. Justice Martin's reasons:

> The offence of breaking and entering a dwelling-house with intent to commit an indictable offence therein is punishable by life imprisonment under s. 306 [am. 1972, c. 13, s. 24] of the *Code.* Section 307 provides that everyone who without lawful excuse, the proof of which lies upon him, unlawfully enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for 10 years. The distinction between breaking and entering a dwelling-house and the offence of entering a dwelling-house without lawful excuse would seem to be obliterated if entry through an open door also constituted breaking. 'Breaking' has the same meaning in relation to a dwelling-house as it has in relation to a place other than a dwelling-house. I conclude that entry through a door which is open sufficiently wide to permit the accused to enter the building without further displacement of the door does not constitute a breaking.[42]

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38. *Supra* n. 9, at 254-55, 28 C.R.N.S., at 333-34.

39. (1st ed. 1955) 517.

40. S. 308 was preceded by s. 340 in the former *Code* (R.S.C. 1927, c. 36) which was in effect until April 1, 1955, and s. 294 (now s. 308) which came into effect on April 1, 1955. S. 340 provided:
340. An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building.

(2) Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building.

41. *Supra* n. 37.

42. *Supra* n. 9, at 255-56; 28 C.R.N.S., at 335.

jectionable interpretations: (1) that of *Jewell* which appears to fly in the face of the plain words[47] of Section 308(b) (ii) or (2) that of *Johnson,* which virtually obliterates a former distinction between two other Sections of the *Code,* Sections 306 and 307, the latter of which being irrelevant to the appeal and therefore not formally before the Court.[48]

Nor, it is respectfully submitted, is there anything in *Jewell* which implies that such an interpretation of Section 308(b) (ii) would do away with constructive breaking by way of a chimney. A chimney would properly be subsumed by the phrase "permanent or temporary opening," as would a hole in a wall or roof, a window, skylight, air-vent, and so on, and thus a person who gains entrance through such an aperture would be deemed to have broken and entered even though he did not *actually* break within the meaning of Section 282. It is precisely these kinds of "openings" which Section 308(b) (ii) was intended to comprise and, further, no violence is done either to Section 306 or to Section 307 thereby.

Section 306 (1) refers to "every one who *breaks and enters* a place" (which, by Section 306(4) (a), includes a dwelling-house), while Section 307(1) refers to "every one who . . . *enters* or *is in* a dwelling-house." Presumably, the more severe maximum sentence available when a person "breaks and enters" a dwelling-house as opposed to when a person "enters" or "is in" a dwelling-house is referable to the "break and enter," either actual or constructive, in the former as contrasted with the use of an *entrance,* and with no actual or constructive break, in the latter. The *Jewell* construction of Section 308(b) (ii) retains this distinction; the *Johnson* interpretation effectively abolishes it, since a person who walks through (*i.e.,* enters) an open doorway of a "place" (which includes a dwelling-house) with the requisite culpable intent is now deemed, by Section 308(b) (ii), to have broken and entered that place. Consequently, a culpable *entry* is also a culpable *break and entry* in virtually all cases,[49] and the distinction between the offence of *breaking and entering* a dwelling-house in Section 306 and the offence of *entering* a dwelling-house without lawful excuse in Section 307 reduces to nothing.

Further, Mr. Justice Dickson's relegation of the operation of this anomaly to prosecutorial discretion[50] is, it is respectfully submitted, highly unsatisfactory. To take his example, although the physical act of stabbing may be undisputed, the prosecutor typically will charge according to his appreciation of the degree of the accused's *mens rea* at the time of the offence. The circumstances may disclose that the accused's act was likely to have been motivated by a premeditated murderous intent, or by a desire to prevent the other from repeating an earlier grievous attack, or by some other mental state, and the prosecutor will, accordingly, proceed with the greater

47. Although, in the writer's view, an open doorway would more properly be classified (as was the open end of a garage in *Sutherland*) as an *entrance* rather than as a "permanent or temporary opening."

48. *Supra* n. 25.

49. *Supra* n. 9, at 255-56; 28 C.R.N.S., at 335.

50. *Supra* n. 3, at 653; 34 C.C.C. (2d), at 18; 37 C.R.N.S., at 380.

As there was no question of an *actual* breaking in *Jewell,* and as Section 308(b) (i) was plainly inapplicable, the clear implication of Mr. Justice Martin's analysis is that the accused's entry did not constitute a breaking because the open doorway through which the accused gained entrance was not a "permanent or temporary opening" within the meaning of Section 308(b) (ii).[43]

In support of his rejection of the interpretation placed upon Section 308(b) (ii) by the Ontario Court of Appeal in *Jewell,* Mr. Justice Dickson outlined the undesirable implications which he perceived would follow from that decision:

> If I understand the judgment in *R.* v. *Jewell* correctly, it would have the effect of limiting s. 308(b) (ii) to those situations in which a would-be intruder found a door or window partly ajar and opened it further in order to gain entry. A partly opened door would be an opening but a fully open door would not be so regarded. There is nothing in the *language* of the section to connote such a result.[44]

Later in his reasons, Mr. Justice Dickson stated: "Such an interpretation of the section would also do away with constructive entry through chimneys, perhaps not a daily occurrence but conceptually inbedded in common law and statute for centuries."[45]

With respect, it is submitted that Mr. Justice Dickson misinterpreted the Ontario Court of Appeal judgment in *Jewell.* It is *not* that a partly opened door is an *opening* within Section 308(b) (ii), but rather that, where a person is confronted with only a partly opened door, he must *necessarily* break within the definition of Section 282. Once that person *actually* breaks within the meaning of Section 282, any consideration of constructive breaking becomes superfluous.

A *fully* open door (or one open wide enough to permit entry without a further displacement of the door) was, in *Jewell,* clearly placed outside the meaning of the phrase "permanent or temporary opening." Such construction derived, not from the *language* of Section 308(b) (ii), but from the potential impact which the alternative interpretation would have on the distinction between Section 306 and Section 307 offences in cases of dwelling-house entry. Mr. Justice Dickson was quite correct, it is respectfully submitted, when he stated that "[t]here is nothing in the language of the section [s. 308(b) (ii)] to connote such a result [that open doorways should fall outside the application of s. 308(b) (ii)]."[46] Apart from any consideration of Sections 306 and 307, the phrase "permanent or temporary opening" could quite defensibly be held to subsume an open doorway. However, when one considers, as did Martin, J.A., in *Jewell* and McFarlane, J.A., in *Sutherland,* the manner in which such a construction impacts upon Sections 306 and 307 with respect to dwelling-house entry, the problem resolves itself into a 'Hobson's choice' between two seemingly ob-

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43. An application for leave to appeal to the Supreme Court of Canada (Laskin, C.J.C., Judson and Spence, JJ.) was dismissed on December 2, 1974.

44. *Supra* n. 3, at 652; 34 C.C.C. (2d), at 16; 37 C.R.N.S., at 378. (Emphasis added).

45. *Ibid.;* 34 C.C.C. (2d), at 17; 37 C.R.N.S., at 378-79.

46. *Id.,* at 652; 34 C.C.C. (2d) at 16; 37 C.R.N.S., at 378.

or lesser charge.[51] With the construction placed upon Section 308(b) (ii) by the Supreme Court in *Johnson,* however, both the physical act required and the requisite criminal intent would be *identical* under both Sections 306 and 307, except that greatly different sentences could be applied depending upon which Section the prosecutor chose to invoke. Although the discretion vested in Canadian Crown prosecutors to determine what, if any, charge should be laid is largely unfettered,[52] it is submitted that the *judicial interpretation* of a criminal enactment so as to confer upon a Crown prosecutor a discretion where none existed before skates dangerously close to that nebulous area where "[l]egitimate interpretation passes by imperceptible shades into so-called illegitimate extension [of the criminal law]."[53] In the writer's opinion, the *Johnson* interpretation of Section 308(b) (ii) is an obtrusive example of the "analogical extension" of the criminal law by the judiciary and is consequently "offensive to the principle of legality,"[54] a principle perhaps more universally admired than consistently adhered to.[55]

51. *See generally,* W.B. Common, Q.C., "The Crown Prosecutor — Key Man in Law Enforcement" (1966), 14 Chitty's L.J. 12 and B. Grosman, "The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice" (1968), 11 Can. Bar J. 580.

52. *See R.* v. *Verlaan* (1972), 6 C.C.C. (2d) 160 (B.C.C.A.), and with respect to prosecutorial discretion where the offence is "hybrid," *R.* v. *Smythe,* [1971] S.C.R. 680; aff'g. 3 C.C.C. (2d) 122 (Ont. C.A.); aff'g. 3 C.C.C. (2d) 97 Ont. H.C.).

53. G. Williams, *Criminal Law: The General Part* (2nd ed. 1961) 604.

54. *Id.,* at 605.

55. The principle of the 'rule of law' has, in the writer's view, suffered yet another indignity at the hands of the Supreme Court of Canada in the recent decision of *Moore* v. *The Queen,* [1979] 1 S.C.R. 195. The accused, Moore, went through an intersection against a red light while riding a bicycle in the City of Victoria. A peace officer, who was on duty at the time and who observed the infraction, stopped the accused and asked him for identification, for the purposes of issuing a traffic ticket. Moore, after repeated requests for identification from the officer, refused to divulge his name and address, whereupon, after a small scuffle, he was handcuffed and taken to the police station. The accused was charged, under s. 118 of the *Criminal Code,* with wilfully obstructing a peace officer in the execution of his duty. At trial, the Judge directed the jury to acquit, on the basis that there was no evidence of obstruction of the police officer. On appeal by the Crown, the British Columbia Court of Appeal reversed this verdict and directed a new trial, from which decision the accused appealed to the Supreme Court of Canada.

The Supreme Court dismissed the accused's appeal. Spence, J. for the majority (Martland, Ritchie, Pigeon and Beetz, JJ., concurring) stated that, although the accused was not in breach of either s. 58 or s. 63 of the *Motor-vehicle Act,* R.S.B.C. 1960, c. 253, as am. S.B.C. 1975, c. 46, the provisions of s. 450(2) of the *Criminal Code* were made applicable to this traffic violation by virtue of s. 101 of the *Summary Convictions Act,* R.S.B.C. 1960, c. 373, and that, as it was necessary to establish the accused's identity in order to issue the traffic ticket, the accused's identity in order to issue the traffic ticket, the accused's refusal to identify himself constituted an obstruction of the police officer in the performance of his duty, thereby providing grounds for the s. 118 charge.

Dickson, J. (Estey, J., concurring, dissenting) argued forcibly that omission to act in a particular way should only give rise to criminal liability where a duty to act arises at Common Law or is imposed by statute. It was agreed that the accused was under no statutory duty to identify himself under the *Motor-vehicle Act,* nor did such duty arise (and this the Crown conceded) at Common Law. With respect to the Crown's contention that because there exists a legal duty upon peace officers to make inquiries in order to uphold the law, an implied 'reciprocal' duty to 'co-operate' arises in persons to whom such inquiries are made, Dickson, J. stated at "The criminal law is no place within which to introduce implied duties, unknown to statute and common law, breach of which subjects a person to arrest and imprisonment." *Id.,* at 213. Although the accused could have been arrested under s. 450(2) of the *Code* in order to establish his identity for the purposes of proceedings relating to the *original, summary conviction offence,* the Supreme Court's sanctioning of the laying against the accused of the much more serious charge under s. 118 of the *Criminal Code,* in the absence of any statutory or Common Law duty on the accused to disclose his name and address in these circumstances, amounts, it is contended, to the judicial creation of a new criminal offence. Mr. Justice Dickson's strong libertarian dissent in *Moore* is noteworthy in that it appears to be incongruous, in spirit at least, with his reasons in the *Johnson* appeal. For a valuable commentary on the *Moore* decision in the context of the judicial expansion of police powers generally, *See* E. Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979) 147-50.

Conclusions

The English Common Law of break and enter has enjoyed a long and often fascinating history,[56] and both in England and in Canada have its principles been encoded and modified by legislation. In England, the element of breaking in the offence of breaking and entering with intent (there known as burglary) has been replaced by a trespassory entry,[57] and nowhere in this clearly-worded enactment does the phrase "break and enter" or "shall be deemed to have broken and entered" rear its ungainly head.[58] One would have thought that, in Canada, the desirability of dispensing with the element of breaking in the offence of breaking and entering would properly be a question of policy for Parliament to consider and to act upon through a similarly clear-worded section in the *Criminal Code.* It is evident, however, that the interpretation placed upon Section 308(b) (ii) by the Supreme Court of Canada in *Johnson* dispenses, *de facto,* with the element of breaking in the offence of breaking and entering, Parliament's arguable forbearance from legislating such a result not withstanding.[59] The *Johnson* decision has, it is respectfully contended, other dubious implications, namely, it renders Section 308(b) (i) largely redundant, and it clouds what was formerly a clear distinction between a *thief* and a *burglar.* For example, should a shoplifter within a "place" be charged under Section 306(1) (a) or 306(1) (b), a conviction could be entered if such person failed to discharge the onus placed upon him by Section 308(b) (ii), even though he entered in the same manner as other shoppers, say, through an electric self-opening door. Here again, the distinction between thievery and burglary is not solely one of criminal theory, but is, on the contrary, very real when one compares the different

56. *See* 2 *Russell on Crime* (12th ed. J.W.C. Turner 1964) 813-42.

57. *Theft Act 1968,* 1968, c. 60, s. 9 (U.K.).

58. Section 9 of the English *Theft Act 1968* reads:

> (1) A person is guilty of burglary if —
> (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mention in subs
> (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.
> (2) The offences referred to in subsection (1) (a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any woman therein, and of doing unlawful damage to the building or anything therein.
> (3) References in subsections (1) and (2) above to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.
> (4) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding fourteen years.

59. In *Jewell,* Martin J. stated:

> It would require a much clearer expression of the legislative intention, however, to cause me to conclude that Parliament, has entirely dispensed with the element of 'breaking' in the offence of 'breaking and entering'. The retention of the definition of 'actual' breaking in s. 282 and 'constructive' breaking in s. 308 is inconsistent with such a legislative purpose. *Supra* n. 9, at 255; 28 C.R.N.S., at 335.

sentences available depending on the classification of the offence.[60] That the *penal* distinction between two offences remains intact regardless of the judicial erosion of the *legal* distinctions between them should, it is submitted, exhort the judiciary to construe the pertinent sections of the *Criminal Code* and other criminal and quasi-criminal statutes with deliberation and care, and to ensure that the constituent elements of distinct offences do not become unnecessarily blurred.

Perhaps the most compelling criticism that can be directed against the judgment of the Supreme Court in *Johnson* is that the many problems to which such an interpretation of Section 308(b) (ii) gives rise could have been avoided by the application of certain recognized principles of statutory interpretation. As submitted earlier, the essential problem presented by the *Johnson* appeal was the necessary and, admittedly, difficult choice between two possible interpretations of Section 308(b) (ii), one which would exclude a person's entrance through an open doorway from the operation of the Section, the other which would include it, with both constructions capable of being accommodated by the language of the Section, taken by itself. The *language* of the Section is, however, only one of the factors[61] to be considered in resolving a legislative ambiguity, and this should especially be so when the provisions of the enactment are highly interdependent and concern the criminal law.[62] In the writer's view, the strength of the *Jewell* decision lies in Mr. Justice Martin's attempt to ascertain parliamentary intent by reaching beyond the language of Section 308(b) (ii), and by advancing an interpretation based not merely on what was *semantically defensible* but, more importantly, on what was *legally acceptable* in light of this Section's place in a scheme of interrelated break and enter provisions comprised by Sections 282, 306, 307, and 308.

Although he did not cite specifically any of the guidelines of statutory interpretation that may have motivated his conclusions, Mr. Justice Martin's approach, it is respectfully contended, is embodied by the following general principles, principles which the Supreme Court perhaps would have done well to have borne in mind in the *Johnson* appeal:

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60. Section 294 of the *Criminal Code* reads:

> Except where otherwise provided by law, every one who commits *theft*
>
> (a) is guilty of an indictable offence and is liable to imprisonment for *ten years*, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds two hundred dollars; or
>
> (b) is guilty
>
> (i) of an indictable offence and is liable to imprisonment for *two years*, or
>
> (ii) of an offence punishable on *summary conviction*,
>
> where the value of what is stolen does not exceed two hundred dollars. (Emphasis added.)

As has been noted, the maximum sentence for break, enter and theft is *14 years* or *life imprisonment* where the "place" is a dwelling-house.

61. *See* E. Driedger, *The Construction of Statutes* (1974) 14 *et. seq.*

62. Professor Driedger cites, *inter alia*, the following *dictum* in support of his assertion "that penal statutes are to be construed 'strictly'. . . .is clear from the decisions:

> 'We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.' *Tuck and Sons* v. *Priester* (1887), 19 Q.B.D. 629, at 638 *per* Lord Esther." *Id.*, at 153.

(1) If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice. The question then seems to me to be reduced to this, Does the reading of this section in its ordinary sense as applied to the subject-matter produce any absurd inconvenience or any palpable injustice?[63]

(2) Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter.[64]

(3) A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations.

Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words.[65]

The following passage, taken from another, very different, context, serves dually as a fitting close to this comment: "We often discover what *will* do, by finding out what will *not* do; and probably he who never made a mistake never made a discovery."[66]

63. *R.* v. *Overseers of Tonbridge* (1884), 13 Q. B.D. 339, at 342 (C.A.) (per Brett, M.R.).

64. *Canada Sugar Refining Co.* v. *The Queen*, [1898] A.C. 735, at 741 (P.C.) (per Lord Davey).

65. *Maxwell on the Interpretation of Statutes* (11th ed. R. Wilson and B. Galpin 1962) 193; judicially noted in *Marsellus* v. *Marsellus* (1970), 13 D.L.R. (3d), at 387 (B.C.S.C.) and *MacPherson* v. *MacPherson* (1976), 13 O.R. (2d) 233, at 246 (Ont. C.A.).

66. S. Smiles, *Self-Help; with illustrations of Character, Conduct, and Perserverence* (1874) 371.