IN THE SUPREME COURT OF NEW ZEALAND SC 40/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **ALISTAIR PATRICK BROOKER**

Appellant

AND **THE QUEEN**

Respondent

Hearing 7 December 2005

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Thomas J

Counsel A P Brooker in person
T Arnold QC for the Crown
A J F Wilding as Amicus Curiae

CRIMINAL APPEAL

10.02 am

All stand for their Honours the Queen's Judges.

Elias CJ Thank you. Is Mr Brooker here? Oh I'm sorry, I overlooked you, thank you.

Arnold I appear with Miss Davison for the Respondent Your Honour.

Elias CJ Yes thank you Mr Arnold.

Wilding If it please the Court, Wilding, I appear as Amicus.

Elias CJ Yes thank you. Now Mr Brooker do you want to expand at all on the material you put before the Court?

Mr Brooker Yes Your Honour.

Elias CJ Alright, then I invite you to start. Do you want to stand up at the lectern, it's easier?

Mr Brooker As my submission to the Court reads, the argument by the Crown is flawed in some respects which has led to a miscarriage of justice. The arguments that the previous courts have based their decisions on have been incorrect.

Elias CJ Sorry if you could just pause a moment, will you – are you reading from the material.

Mr Brooker No Your Honour

Elias CJ No this is something that we don't have?

Mr Brooker yes

Elias CJ That's alright.

Mr Brooker I will relate it to the material I presented earlier.

Elias CJ Yes, yes that's fine.

Mr Brooker Though the main point, one of the main points is that the previous Court seemed to find it inexplicable that I was protesting outside a private residence of an individual and to a large extent the District and High Court and Appeal Court judgments seem to condemn this behaviour as being outside the bounds of recognised protest action. Events have occurred recently which have meant that there should be a revision of this consideration of what is acceptable. The events to which I am referring to are protests which occurred at Blackball, which is very near to where to live and approximately 20 kilometres from where my protest action took place.

Elias CJ This is not protests involving you?

Mr Brooker No

Elias CJ This is something that you say indicates what, that the law is being applied unevenly?

Mr Brooker The main consideration with the Blackball protest is the immunity acceptance of protest action outside private residences which is the main, one of the main factors in the Court condemning my action. They found it unacceptable but, obviously the community on the West Coast finds it perfectly acceptable behaviour. Because no one complained it was a community, community action involving some twenty-odd people I believe in the community and I have there the newspaper clippings which refer to that protest, which I would like to have entered as evidence.

Elias CJ I'm not sure what we can take from them Mr Brooker because we don't really have any evidence in front of us as to what was entailed in that protest and how it was perceived that's just a newspaper report, is it?

Mr Brooker Yes it is a newspaper report.

Elias CJ Yes

Mr Brooker And it does detail the fact that no arrests were made.

Elias CJ Yes

Mr Brooker And the number of people involved and their actions which I submit is relevant to my case.

Elias CJ And it was outside a private home?

Mr Brooker Yes Your Honour it's detailed in the clippings.

Elias CJ Yes. Do you want to receive this material?

Blanchard J Might as well.

Elias CJ Yes we will take that material in thank you.

Mr Brooker There are a number of clippings. One also relates to an Australian protest would you like that one as well?

Elias CJ Well we are applying the law in New Zealand, how much further afield do you want us to go?

Mr Brooker No fine, that's fine.

Elias CJ Is it, is it, is it helpful – oh this is

Mr Brooker They all concern

Elias CJ Are the same one?

Mr Brooker Yes they all concern the Blackball process.

Elias CJ Oh I see, so I'll pass it round.

Mr Brooker Two different, two different newspapers.

Elias CJ And what does the Australian protest involve?

Mr Brooker Well it's also involving a protest outside a private residence by a number of people, chanting, waving placards, exactly the same – well almost exactly the same as what I was doing. I wasn't chanting, I was singing and playing the guitar.

Elias CJ Yes, yes.

Mr Brooker But the circumstances

Tipping J I think we will think of geographical boundaries.

Elias CJ Yes, yes I think we will take the New Zealand material, thank you. Oh yes, yes. We've all read about this one.

Mr Brooker Would you like some time

Elias CJ No, no that's fine. You carry on.

Mr Brooker So the point being that, that it is on the West Coast anyway, I'm not saying about the rest of New Zealand but I can speak for the Coast because I have lived there twelve years and that is acceptable in the community.

Elias CJ I don't think we want to be drawn on whether the conduct in this, these clippings is acceptable in the community but you are asking us simply to draw on this to indicate that in other cases where there have been protests, protests outside private dwelling houses there haven't been arrests?

Mr Brooker Yes, yes

Tipping J And I think you are suggesting the fact that it's on the West Coast is part of the time, place and circumstance?

Mr Brooker Yes I am unsure whether it would relate to other places in New Zealand, possibly social attitudes might be different but I, I couldn't speak for

Tipping J Well there's a real difficulty there because we don't have any proper evidence about that and I would think it very difficult to start making different tests for different parts of the country.

Mr Brooker Yes I agree, yes.

Tipping J You agree that's a bit

Mr Brooker Yes

Tipping J Dodgy

Mr Brooker Yes I, I just wasn't trying to extrapolate too much for the rest of the country, yes. So once the, once the, the court's criticism of my actions as being outside the bounds of acceptable behaviour are negated by the obvious lawful acceptance of the, the obvious acceptance of the community of this type of behaviour once, once the court's arguments, criticisms have been negated it can be seen that in that case I was not, I was not there to harass and annoy her as a personal vendetta as has been said at various levels of the court. I believe at the District Court level it was first mentioned and that was a justification for denying my action as a legitimate protest. Rather, the court found that it was outside then norms of legitimate protest. Thus the previous courts sought to distance my action from the sections of the, of the Bill of Rights which protect the right of protest and freedom of expression and I reject that concept. I have been a protester for many years, my parents brought me up to believe in the right of protest. I was at Bastion Point when I was approximately ten years old. I have been on many anti nuclear protests in Auckland and protesting is a, oh it's a belief that I hold strongly and have done for many years.

Elias CJ Would you go so far as to say that protesters can never be guilty of disorderly behaviour?

Mr Brooker That would of course depend on the actions of the protester. I would say if you class throwing eggs or bags of twigs as protest then no I believe that that could be construed as disorderly in some circumstances.

Elias CJ So it depends on the circumstances?

Mr Brooker It depends on the action of the protester. Obviously if a protester was going to say McDonald's and say breaking a window because they

disapproved of McDonald's well that's obviously going too far. But I, I wouldn't like to attempt to set a limit like that. I believe that's the place for the court to set that, those limits. And to a certain extent they would depend on the setting, possibly the country involved would have different social moral and judicial, well yeah moral standards which would then affect the concepts of disorderly behaviour. I mean in many countries in the world protest action is simply almost forbidden, take Singapore you know can't just have a street march in Singapore to the best of my knowledge.

Tipping J Do you accept that there's got to be some balancing of your rights to protest against the rights of other citizens in the particular circumstances?

Mr Brooker Yes I do, but at the same time I fail to see how I have majority infringed upon the rights of Miss Croft. The submissions from the Crown talk of her right to privacy which seems to be a major plank of their case. In what respect have I infringed upon her privacy? I was noise, noise would be one possible option but I submit that the way to deal with that, with that complain would be through noise control and indeed I did expect or I, I wouldn't have been surprised if that had been an option that the police had employed would have been to call noise control.

Blanchard J How loudly were you singing?

Mr Brooker A normal singing voice Your Honour.

Elias CJ Well that's confirmed too isn't it by the Constable who was first on the scene.

Mr Brooker Yes it is.

Elias CJ Not shouting he said.

Mr Brooker Yes. Yes and my guitar was not amplified in any way it was just acoustic.

Blanchard J Be a shame if noise control was called in every time somebody decided to play a guitar and sing in the street.

Mr Brooker Well that is a possibility I believe. I believe there some people that would object to that. And, and their only option would be to call noise control.

Tipping J I take it this was not a lullaby you were singing?

Mr Brooker No, no Your Honour. No. No, no it was a protest song.

Tipping J But did it not have some features that focused on the attributes or lack of them as you saw of the Constable?

Mr Brooker I to the best of my memory refrained from any personal attack on the Constable. The comments I made concerned her performance as a police officer and the general performance of police officers that I have had troubles with in Greymouth. I don't recall that I'm, would have got personal with her.

Tipping J No, no.

Mr Brooker I would have

Tipping J But the whole point was directed in part of her? It was a protest against her

Mr Brooker Yes

Tipping J conduct

Mr Brooker correct yes

Tipping J And that may be fine. I mean that is a factor in the case isn't it. You were directing your protest in part against her and in part against the police generally?

Mr Brooker Yes, yes that would be correct, yes. Yes.

McGrath J You say you were singing in a normal voice, and of course it was during daylight hours in the morning but isn't it relevant that we have findings that at the time the police constable was endeavouring to sleep and that you knew that and it appears that your singing while at a normal voice was engaged in with a view to interrupting the sleep?

Mr Brooker No the, the fact that she was sleeping was purely coincidental because to go into the circumstances I had spent considerable time and effort tracking down her address and then I found out that she was moving the next day so it left me no alternative but to, well possibly I would have had to have abandoned the whole protest because I might not have ever been able to find where she was living when she moved/

Elias CJ I thought the evidence was that you first went to the police station but she wasn't there, have I got that wrong?

Mr Brooker Yes. No that is correct the day before I went to the Police Station, yes.

Elias CJ And she wasn't there?

Mr Brooker Yes.

Thomas J Would you have considered that it would have been a valid protest to, protest with a placard no sound element at all?

Mr Brooker That, that would have been another option had noise control been called I would have continued my protest in that manner or, or reduced the volume of the playing until it was acceptable to noise control, yes.

Elias CJ Fair enough.

Mr Brooker So the location of the protest was a determining factor in, in the previous guilty verdicts because I've already said the location now, bearing in mind the, the evidence, the clippings that I presented, the location should not be seen as a major factor in determining the, the, the, whether it's disorderly or not.

Elias CJ Well that's a submission you can make to us. That, the fact that this was outside a house in a residential area shouldn't have been a factor but I don't think we can draw from, we're not precluded by what might have happened in another protest from determining that protesting in the manner you did outside a house in a residential street was disorderly behaviour. So you can make the submission, but you shouldn't feel that the material you've given us prevents us looking critically at that question.

Mr Brooker Yes I should also add that I did conduct a protest outside the police station later as in the evidence. In this also I would like to say shows that, that the whole concept behind my protesting outside Miss Croft's house was connected with the police in general and their actions that I see as being unlawful. So there is a connection there. But looking it, at the Crown case would, would seem to consist of a number of points. Number one that my protest was not a legitimate protest and therefore I did not have the protection of the Bill of Rights and the other protest ah the other point is that privacy, the right to privacy of Miss Croft, which I have dealt with in the way of the noise issue being my, would be the one thing that I would, could think of that I might, that it could be said would have infringed on her privacy. The visual aspect of my protest I can't see how that infringed on her privacy at all because although I did have a sign that sign was facing away from her house so she was at no point able to read it. The sign was directed out into the street so that passers-by could read it and those passers-by could read it and then have an idea of what the protest was about.

Blanchard J Was she named on the sign?

Mr Brooker No she was not, no.

Tipping J That sign simply said stop the bogus warrants is that correct?

Mr Brooker Correct.

Tipping J Mm.

Mr Brooker Yes. And I used the same sign outside the Greymouth police station. I, I, I didn't yes. But to get to the, to the actual actions of the protest and, and the public viewing of those actions. The Appeal Court says that it is the natural tendency of that conduct that is important and I believe that the tendency of my conduct was such that it was not disorderly and that the public would have viewed it in that manner. I agree with the, with the Court of Appeal in that respect but in the way that they interpreted my conduct was the, the error that was made. The Crown has submitted a, a number of authorities or cases from overseas which they say have a bearing on, on the events on the determination of disorderly. I do not obviously pretend to be a, have a vast knowledge of international law or what is a, or what's acceptable overseas but it seems to me that and, and we've already touched upon this point with regards to the Australian protest being relevant, it seems to me that, that there will be different standards for different countries based upon the fact that well the countries which the Crown mentions are – some of them being European Union countries – have a completely different judicial history to New Zealand and the other countries which are Canada and the United States and Australia have, have of course got divergent histories due to the last 150 years of development in New Zealand. I, I would believe that Australia has a similar standard certainly as, as concerns the, the protest which I refer to, which I attempted to have admitted would lead me to believe that Australia does have similar standards to ourselves and but it might be a similar case in Australia in that previous court decisions regarding disorderly might now be looked at in a new light once the, the public attitude in Australia is, is brought into play. Because a similar process would seem to have taken place in New Zealand in that the public attitude has changed over the years. We are, obviously have to look back to the cases you know *Melser* and *Kinney* to determine that some of the actions which people considered disorderly even as little as thirty years ago would in no way now be considered disorderly. If those cases were brought to Court now I submit that they would, that not guilty verdicts would be entered, certainly for *Melser* in the light of the decision in the *Bradford* case regarding the right to protest and the, the grounds of annoyance no longer being grounds for, grounds for a guilty verdict, grounds for disorderly. I submit that the public attitude in New Zealand has changed and that, that people don't regard my actions as disorderly, no one else complained about them. People drove past, I

don't believe anyone walked past but people definitely drove past. There were neighbours who were aware of my action, that's in the evidence that the neighbours were aware of my actions at the time. They did not complain, it was only the one person who was offended and possibly she didn't like, well I would say probably she did not like it being pointed out to the community that she had performed actions which I believe were unlawful and vindictive in nature. As such she does not even represent the average person. The average or reasonable person. And she has the particular characteristics which make her unrepresentative of the public. Will I get a chance to

Elias CJ Yes you can respond to anything

Mr Brooker To respond to the crown

Elias CJ that is raised

Mr Brooker yes okay, thank you.

Elias CJ Thank you Mr Brooker. Now would it be convenient to, to hear first from the Amicus, Mr Arnold is that the order that you'd propose?

Arnold I'm very comfortable with whatever the Court would find most helpful. That makes good sense.

Elias CJ Yes I think that it would be useful to hear first from Mr Wilding if that's alright.

Wilding May it please the Court if I could just explain that given that Mr Brooker didn't have counsel I saw my role as most usefully being to present submissions in his favour. And the issue in this case is whether the criminalisation of Mr Brooker's conduct in a public place assessed objectively and as a matter of time, place and circumstance is a reasonable limit prescribed by law pursuant to s 4(1) of the Summary Offences Act. So the issue is not whether prescribing such conduct might in the abstract be a reasonable limit. If I could just raise some preliminary matters, in my submissions I have used the phrase "peaceful focus residential protest". Obviously that's just a nametag. I am not endeavouring to identify a category of protected conduct, clearly a balance of rights and interests is necessary. In the example given by my learned friend in para 6 of his submissions would almost certainly not be lawful and that's first because peaceful. And he refers to an example of Mr Brooker playing the guitar and playing at 1am in the morning. The first, peaceful, which is a concept which mirrors that in s 16 Bill of Rights must be context dependent. A peaceful protest in a library might be quite different from a peaceful protest in a city area and second, because for that to be lawful would be placing undue weight on expression and too little on the interests of residential

tranquillity. In the interests of residential tranquillity must require a lower degree of noise at night time than during the day. Instead my submissions are directed towards the proposition that the fact that a protest occurs in a residential area takes place in front of the particular residence and is directed at the occupant of that residence or the organisation with which he or she is affiliated does not of itself mean that the protest is not peaceful nor that it is disorderly. It could become so but not of itself. And nor should it be used to support allegations of harassment in the context of a disorderly behaviour offence which focuses objectively on the conduct occurring in public. I have tentatively made submissions later in my written submissions towards the test and I am happy to address that subsequently if the court wishes me to do so. My learned friend has queried whether I'm submitting that a breach of the peace requirement should be read into the test. I am not making that submission. The test as developed appears to involve consideration of whether or not there's an interference with the rights of others given that the purpose of the legislation appears to be to protect or maintain public order. The interference ought in my submission to be only with those rights and interests protected by public order. And it may be that that's a preferable formulation to that which I have made in my written submissions. If I could just turn to s 5 of my submissions which is p4 onwards, and in particular 5.4, the heading to sections 3 to 8 of which s 4 forms a part, offences against public order, and the fact that it is concerned with the regulation of conduct in or within view of public places suggests that its concern is public rather than private purposes. And the maintenance of public order. It does not expressly prescribe peaceful protests and the intention not to prescribe those is reflected in the New Zealand Parliamentary Debates and I have set out the relevant portion at para 5.10 of my submissions on p7. The Honourable J K McLay referred to the right to engage in peaceful, orderly and lawful protest when it does not interfere with the rights of others or freedoms of others and when it does not result in violence or has the potential for violence. And that concept that peaceful protest is permissible unless it interferes with the rights or freedoms of others sits nicely with the requirement of interference with the rights of others which has been developed in case law subsequent to *Melser v Police*. On a plain reading, s 4(1) also does not appear to be directed towards regulating protest to within a range of accepted or recognised protest actions to use the phrase used by the Court of Appeal. Nor to ensure that they do not occur when someone is off duty.

Tipping J Mr Wilding could you just help me on one point. I think I am inclined to agree that at that very high level of generality what we are talking about here is the right to protest if you like, speaking very loosely, as against the rights of others to enjoy them. The, the idea of dis, disorderly I must say carries to my mind more than just the abstract interference with rights as a sort of headline test but also some idea of, of disturbing others in the sense that the, you would have thought that you could perhaps bring the balance of rights concept to, together with

the idea of disturbance in the sense that the conduct in question disturbs others to a greater extent than they should be expected to tolerate or some, something along those lines. Do, do you have anything that you could usefully say about that?

Wilding Well I, I agree, I agree with that, Sir. I certainly don't think that any interference with rights would be sufficient and hence the suggestion that the interference with the rights ought to be the interference with the rights which are protect in the interests of public order. And public order of course won't protect any interference with rights involves consideration not only of the right which it might protect, but also the degree to which it might protect. So for example the Court of Appeal I think spoke of an interference with the right to feel secure in one's home. Public order wouldn't protect the right to feel secure in one's home. It might protect the right to be secure in one's home against physical intrusion or intrusion into residential peace and tranquillity.

Tipping J But would, would you be, would it be consistent with your submission to weave somewhere into the test the idea of disturbing others if you like. There's the idea of interfering with others rights at a high level but on the ground to speak at least provisionally it seems to me that some member, somebody in society has to be disturbed or some of the cases talk about annoyance.

Wilding Sir, I think it is certainly consistent with my submissions, that can impart be either inherent in the step (c) in the proposed test to which I have referred or alternatively in the caution which is step (d) this is p29 of my submissions. But the s ought not to be used to scoop up all sorts of minor troubles and that could have appended to it the concept that it also ought not to be used to scoop up minor interferences with rights because if we accept that minor troubles are permissible in society we also accept that minor interference or trivial interferences with rights ought not to be criminalised.

Elias CJ Is your submission that the concept of disturbance has to be grounded in rights to public order so that it's disturbing others in their enjoyment of rights in public order or something of that sort?

Wilding Yes it is Ma'am although I don't go so far as to say that it should be confined solely to the rights of those who are using a public place.

Elias CJ No, no I understand that.

Wilding And I just note that because in *Queen v Rowe* the Court of Appeal I think referred to the formulation of Justice McKewen in *Coleman v Power* which spoke on the interference of the rights to use a public place.

Tipping J But say this man had been using amplified music and it was blasting at the most fearful level of noise, that wouldn't be, at least directly, concerned with public order but it would I would have thought have been disorderly conduct?

Wilding I think that might be two things, Sir. First it would be a serious contravention of the standards of public order and secondly it would be an interference with an interest which is protected by public order which is the interest in residential privacy and that was

Tipping J Oh well if you accept that that's protected by public order then I think my, my point subsides.

Wilding Well I certainly do, Sir, and that's identified in *Queen v Lohnes* which is the Canadian case in which Justice McLachlin identified that there is such a right but such a right doesn't imply complete tranquillity and I have referred to that at p8.2 of my submissions. I think the citation is Vol 3 p99.

Thomas J Where are you, I'm sorry?

Wilding para 8.2 p15 of my submissions, Sir.

Elias CJ So this is the *Lohnes* case you are referring to?

Wilding The *Lohnes* case Your Honour. Perhaps if I can take you to vol 3, p99. And it's the bottom of p128 of the case para 9.

Tipping J You are going a wee bit fast.

Wilding Sorry, Sir.

Tipping J Volume 3?

Wilding Volume 3 p99, Sir. para 9 the bottom of p128 of the decision.

Thomas J So it is always a question of where to draw the line?

Wilding Yes it is, Sir.

Thomas J In the, both the select committee report and then parliament through the Minister's comments it seems that the word that is being focused on is "annoyance" conduct may be disorderly if it's sufficiently annoying to someone to warrant prosecution. How, how do you work public order into that. If one was to say this s is now all about

preventing undue annoyance how do you work the, your concept of public order into that?

Wilding The concept of public order involves consideration of what rights might be protected and it maybe that there is a right to be protected from undue annoyance but firstly that annoyance ought to be annoyance assessed objectively in, that objective assessment is a matter which also is commented in *Queen v Lohnes* from p102 of the case, para 27 onwards.

Thomas J One?

Wilding Page 102 para 27 onwards where the comment is made that there oughtn't to be a duty

Elias CJ Sorry what, I've lost the place.

Wilding Page 102 Ma'am

Elias CJ 102

McGrath J Of the casebook. Yes.

Elias CJ Oh I'm sorry. Yes thank you.

Wilding And para 27 focusing on the principle of legality notes that the focus oughtn't be on upset in the mind of another person.

Thomas J Well this para affirming the entitlement of every person to know in advance whether their conduct is illegal, that's what you're drawing our attention to?

Wilding Yes Sir commencing that paragraph.

Thomas J How can that be when it's a question of always drawing the line?

Wilding Well I don't think it can be with absolute certainty sir and that's perhaps one of the difficulties with broadly worded offences such as disorderly behaviour its accepted that they have to be broadly worded but the point is one's criminality ought not to depend on whether someone is annoyed but rather whether there has been annoyance but even in assessing that there has to be a degree of tolerance. At para 29 of the decision Her Honour said "but it is far from self evident that the goal of peace and order in our public places requires the criminal law to step in at the stage foreseeability of mental annoyance. Indeed our society has traditionally tolerated a great deal of activity in our streets

and byways which can and does disturb and annoy others sharing a public space".

Tipping J Isn't a more helpful concept the degree which people ought reasonably be expected to tolerate rather than some subjective, I mean we can't make it subjective it's got to be some external standard if you like and the idea of what people should be expected to tolerate in a, what's the word, democratic society.

Blanchard J Well that's the point that Justice McLachlin then immediately moves onto when you pick up the quotation at the point at which Mr Wilding left off.

Tipping J I had it somewhere in my mind it must have been lurking there.

Elias CJ The annoyance, the annoyance has to be a public annoyance, a disturbance of public order values not simply an annoyance of an individual person unless it is taken to the extent that it is likely to disturb public order.

Wilding Certainly the test ought to include a requirement that there be a disturbance or

Elias CJ Yes

Wilding Or serious contravention of the standards of public order.

Elias CJ yes

Tipping J But I can be directed at one person rather than a group can it not?

Wilding Well it could be the, certainly could be an interference with one person but it ought to be

Tipping J That's fairly well established in the cases isn't it that you helpfully cited to us?

Wilding Certainly, Sir, but it ought to be at a level which is recognised in the interests of public order.

Elias CJ Mm

Tipping J Yes

Wilding That's identified to a certain extent in the Canadian case also of *R.W.D.S.U. v Pepsi-Cola* which talks about not protection of innocent

parties from harm but from undue harm and thus recognises that there is some intrusion or harm which is inherent in the rights important in a free and democratic society.

Elias CJ Which case uses that? This is another one?

Blanchard J *Pepsi-Cola.*

Elias CJ Oh *Pepsi-Cola.*

Tipping J The next one.

Elias CJ Yes, yes thank you.

Tipping J Is there any particular passage in *Pepsi-Cola* that you consider to be helpful Mr Wilding?

Wilding Yes if I can just turn to it, Sir. In terms of undue harm perhaps if I can turn Your Honours also to volume 3 page

McGrath J Next case, next case book

Wilding 114 and in para 44 and it's on p177 of the case, the para starting "secondly although McIntyre J's comments" about half way through, Sir.

Thomas J Of course the use of all these words like "undue" are just an effort aren't they to indicate that there is a balancing exercise required, the line will have to be drawn don't draw it too far one way or the other so as to destroy one right or impair one right as against the other?

Wilding Yes Sir, I certainly accept that. Although my suggestion is that the balance exercise has to have regard to the objective of the legislation, being the preservation of public order.

Thomas J Well I'm just a little uneasy about that because having read the Select Committee's report and what was said in parliament it doesn't seem as though the focus was on public order so much as the fact that when the offence was downgraded from being an offence that carried imprisonment to only a fine it was intended to catch those, that offending which would be an annoyance and they went no further than that. That's the word that was used both by the Select Committee and by the Minister.

Wilding I certainly accept that, Sir although the scheme of the legislation does talk about public order it does concern itself with offences committed

in or within view of the public and in some ways it's very similar to that in *Coleman v Power*. And since then of course has been the Bill of Rights which not only affirms expression but it also on the test in *Moonan* introduces the idea of proportionality with reference to the objective of the legislation. So it may well be that Parliament intended something else or something broader.

Elias CJ There's been a supervening in intention

Wilding Even if it did, well certainly there has been a supervening

Elias CJ mm

Wilding of intention because the intention is not only that under this Act but also under the Bill of Rights.

Elias CJ Yes, yes. And indeed they don't even refer do they to the – it was '62 wasn't it I can't remember when – we didn't ratify of course until the 1970s I think the *International Covenant on Civil and Political Rights* but it, but it was around but the Select Committee makes no reference to that at all.

Wilding No it doesn't Your Honour and of course our ratification wasn't incorporated fully in the Bill of Rights which didn't include the right to privacy. Not that I'm suggesting that privacy is not an important value in New Zealand but its expression and which with s 6 of the Bill of Rights requires that this legislation be interpreted consistently with if possible.

McGrath J If you are about to move onto something else I'd just like to be sure that all you wanted us to look at in the *Pepsi-Cola* case was para 44 on p177 of the Report, the notion of shielding from undue harm is that the only point you want to take?

Wilding Well no there are some other aspects of that case of relevance thank you, Sir. Perhaps the first is that the idea of protest being able to be regulated to an accepted or recognised action is quite inconsistent with the nature of protest and that's recognised by Justice Dixon, and this is p111 of the casebook. p170 of the case para 26 who makes the comment picketing attaches to a wide range of diverse activities and objectives and then goes on to give examples of those. And interestingly in that case the court at para 27 acknowledged that the purpose of labour picketing were both to put social and economic pressure on the employer and often by extension on the suppliers and clients as well as to provide information about a dispute. So there seems to be an acceptance that putting social pressure maybe a legitimate purpose. And the conclusion in that case is set out on p119 of the casebook which is p186 at para 66 which is that secondary

picketing which includes picketing at people's residences is not unlawful unless it constitutes a crime or a tort which it is not of itself

Tipping J I wonder if there's quite a helpful passage in para 67 the left column of 186, where the judges say common law influence by the charter must start with the proposition that free expression is protected unless it's curtailment is justified. It's the same idea of course is that limited, but you might be able to say that the benefit of any doubt must go to freedom of expression. In other words you've got to be satisfied beyond reasonable doubt that this curtailment is justified.

Wilding I'm not sure that I'd go as high as beyond reasonable doubt but I certainly accept that the case must be persuasively proven Sir

Tipping J but it must be beyond reasonable doubt disorderly conduct.

Wilding Yes it must, Sir,

Tipping J That's what I'm trying to say here.

Wilding Accepted, Sir. And it can be seen that that same para says the preferred methodology is to begin with the proposition that secondary picketing is prima facie lawful. And then impose such limitations on word use there are justified in protecting third parties.

Tipping J Well the methodology in *Hosking v Runting* in the privacy in the civil arena was at least in some of the judgments similar to what is set out here. So that might assist you.

Wilding Yes sir in that, and that cases are relevant to the extent that there's an issue about whether or not there's a privacy interest, being a privacy interest of Constable Croft's aside from residential privacy affected because of course there will be no privacy interest of hers in the content of the communication by Mr Brooker which would rise to the level which would have been recognised by *Hosking v Runting.*

Tipping J Well Mr Brooker seemed to me to make himself quite a, quite an interesting point where he, he contend that really the only privacy interest here was the noise.

Wilding Yes

Tipping J Would you agree with that from

Wilding I do agree with that. In terms of the test for disorderly behaviour I accept that if this was an application under for example the Harassment

Act 1997 there could be other considerations. But in this case it is the disturbance with residential tranquillity with which we are concerned.

Thomas J Or possibly an inability to move freely from and to one's property?

Wilding Yes I, I understand that my learned friend's submission have raised the issue of freedom of movement but I don't understand that there was sufficient evidence in the transcript to show that there was interference with that freedom.

Tipping J She did say, she did say that she felt inhibited in, in leaving the property while he was there and now how much weight one puts on that her subjective feeling of anxiety if you like. She said she, she didn't feel safe in leaving the property because of what he might do to it and also she felt he was sort of, didn't want to pass by him.

Blanchard J I take all that with a grain of salt since she had no intention it would appear of leaving the property during the short time in question.

Wilding I accept that Sir but if that was accepted that would be an interference with freedom of movement then that might cause difficulty in the criminal context or any other context where people may feel slightly inhibited, for example when they are being questioned.

Tipping J Well I'm not necessarily disagreeing with what my brother has said, but there was some evident, it's what you make of it is another matter.

Wilding My point is that in my submission it's not sufficient to arise to the level of being an interference with that freedom.

Tipping J There was nothing objectively occurring that suggested that he, he would or he was signalling that he would interfere with her freedom of movement as I can read it?

Wilding No there wasn't, Sir.

Elias CJ And indeed if there was he'd have been charged with threatening behaviour or something of that sort.

Wilding Certainly there would have been other charges which were available, Ma'am.

Elias CJ While you are interrupted and there was reference to the Harassment Act I have wondered whether discerning public standards which is one of the tasks of course cast upon the Court with this sort of offence is assisted by looking at comparable statutes. Now of course harassment

under that Act isn't an issue here because apart from anything else there isn't the persistence and the repetition that's required but it may be a pointer to the sort of conduct that parliament thinks is conduct that the community doesn't have to accept. I don't know whether there are other statutes which similarly give some steer so that it's not just cast upon the courts to work out what public standards require.

Wilding I do support that proposition Ma'am and in this case the threshold for intimidation under s 21(d) of the Act was not reached.

Elias CJ Yes

Wilding The threshold for the Harassment Act both the civil and the criminal aspects of it weren't reached. It's likely that the threshold for an application for a bond to keep the peace hasn't been reached. Most of the legislation appears to focus on some fear to safety. Some aspects such as that and it would in my submission be surprising if disorderly behaviour in the interests of public order did recognise a level of harassment, lower or significantly lower than that recognised by the legislation. It would turn disorderly behaviour into a fallback or washup statute.

McGrath J This line of argument the court's been discussing with you in the last two or three minutes really goes to a central point of the Court of Appeal decision does it because the Court of Appeal seems to have focused on the proposition that targeting a person at her home is outside accepted or recognised legitimate process and it's indicative in itself of harassment or threatening behaviour. I'm just really wondering how, how you take on that conclusion given that you're adhering to Mr Brooker's proposition that the only intrusive element of this process could have been noise?

Wilding I think there are two cases which might help you, Sir. First is the *R.W.D.S.U. v Pepsi-Cola* case

McGrath J Yes

Wilding Which is course recognised that secondary picketing was permissible so if we say that secondary picketing is in itself harassment we are having a different standard from Canada. Now it may well be that we do have a different standard that involves a value judgment but New Zealand does value openness and accountability, that's of course recognised for example in the approach taken in name suppression by the courts to publicity, the Official Information Act which includes I think in s 4(1)(a) as a purpose freedom of information for the promotion of accountability of state officers.

Thomas J Finished that point?

Wilding Yes, Sir.

Thomas J The picketing cases seem to me to oppose the difficulty of trying to import into the exercise some sort of classification when it's all a question of fact and degree. I mean one can envisage a primary picketing, that is outside the factory which because of it's nature might be considered disorderly on the same basis there might be a secondary picketing so unobnoxious as to be acceptable. Now I don't know that it's been contended that all protest in a residential area is automatically banned or disorderly. And one can imagine situations such as protesters moving down the road to protest outside some proposed development in a residential street. That is unlikely to be considered disorderly conduct but its still in a residential area. So what, what can you put your finger on that would assist the court to know where the draw the line in respect of protesting in a residential area?

Wilding Sir if I can just deal with the first issue. On my reading of the case is they do place significant weight on the fact that this was in a residential area and focused as supporting harassment. And I think that the High Court decision went even further than that and just stated the broad proposition that – and if I can turn to p50 of the case on appeal – that busking and most of the other protests referred to by the appellant did not take place in a residential neighbourhood and in such a setting right thinking members of the public would be seriously offended by the appellant's behaviour.

Thomas J But that introduces his behaviour and the extent of it doesn't it at once, it's just not talking about it being a residential neighbourhood?

Wilding Well he does, the learned Judge does then go on to say that in that area it was taking the right to protest too far. That's not, I certainly accept Sir that whether or not something as disorderly is all a matter of fact and degree and involves a balancing exercise and perhaps this case involves quite a fine balancing exercise. But in terms

Tipping J Can I just say

Elias CJ Well it's the

Tipping J sorry

Elias CJ sorry I was just drawing attention to what the Judge says in the para before this behaviour would hardly have raised an eyebrow outside the Greymouth police station. In a residential neighbour it meets the requisite test and wants the interference of the criminal law. So that puts it very starkly.

Tipping J Can I just say, sorry you wanted to reply to Chief Justice?

Wilding I was just going to come back to a point but certainly Sir.

Tipping J It seems to me that relying on the High Court judgment it's a little, I find it a little difficult to see any analysis of why it's in breach other than the fact that it's a protest in a residential zone. And the problem with that is it's, it's also a protest in a public street.

Wilding yes it is. That, that comes to another issue which was raised in the *Pepsi-Cola* case. At p120 of the third volume, p189 of the case at para 75. And Your Honours will see that the court is quite critical of reliance or overly reliance on

Tipping J 120 of the casebook

Wilding page 189 of the case and it's at para 75 under the heading of Rationality. And the courts are quite critical of reliance on location as a marker.

Thomas J But it's it inevitable that in trying to decide where to draw the line the court must necessarily list those factors which lead it to the conclusion the line is to be drawn where it has chosen to draw it and one of the factors in a case like this that it's a residential neighbourhood rather than a urban neighbourhood?

Wilding Certainly, Sir. My point was that that seems to have been the primary or the sole marker certainly in the High Court decision and also it seems in some of the other two decisions and that is to place too much weight on that one factor.

Elias CJ Well it wouldn't even raise an eyebrow one setting it's hard to see that it isn't entirely done on the, on the setting context.

Tipping J The passage you've just referred in *Pepsi-Cola* contains within it the focus shouldn't be on location. I think they mean their location per sé because they go on but it's character and impact, now the impact may vary enormously with the location. With great respect I think that passage is a little formalistic, it's a warn off that just, you just don't focus on location per sé but I mean it, it's naïve isn't it to suggest that location is entirely relevant.

Wilding Well I'm certainly not suggesting that, Sir.

Tipping J I know you're not but I'm just criticising a sense and in a mild way the starkness if you like of what they're saying there which I think is a little blunt.

Wilding I accept that, Sir and of course it's location which triggers in this case the issue of the interference with residential tranquillity for example.

Tipping J Quite.

Wilding It, it is certainly a significant factor. That case also addresses a couple of other issues and one of those is the comment on the Court of Appeal that this could to an extent be seen as involving freedom of expression. p112 of that volume, p172 of the case at para 32 the point is made that picketing always involves expression of action even when associated with tortious acts.

Thomas J Well one could say the same of protesting which picketing is a form of.

Wilding Yes.

Thomas J Always involves expressive action. Where does that take us.

Wilding Well it is just an answer to a comment on the Court of Appeal which said that this could to an extent be seen as an exercise of expression.

Tipping J I find para 2 on 9 of the Court of Appeal's judgment quite tricky Mr Wilding and as you've just referred to it I think it might be a good moment just to invite some attention to it. I think one of the most difficult features in this area and in the way the Court of Appeal went about it and you've hinted at this, is the weight they gave to Mr Brooker's purposes. Now this may be right it may not be but the judgment seemed to me to turn on the fact that they took the view that he wasn't really expressing genuine freedom of speech if you like. He was really having a go at the policeman putting it very colloquially. Not I'm not sure about all that and I'd very much benefit from any assistance you can give us in that area because the question of one's motive if you like or one's purpose and its relationship with whether one is behaving in a disorderly manner strikes me as being not easy.

McGrath J What para of the judgment.

Tipping J Page 29 of volume, of the case on appeal volume, paragraph, it's para 31 of the judgment itself but sub para 2.

McGrath J Thank you.

Tipping J Because this seems to be that the fulcrum if you like on which the whole judgment turns.

Wilding Yes Your Honour they are doing two things. The first is that they are implicitly limiting freedom of expression only to expression which doesn't serve some purpose such as harassment and that cannot be correct and secondly they are taking the fact that the protest was focused on residential to support harassment. Those two paragraphs are somewhat inconsistent with the decision in *Queen v Rowe* which is volume 1 p169 of the casebook.

Elias CJ The Court of Appeal is really referring though to the invocation of s 14 rights rather than commenting on the ingredients of disorderly behaviour there.

Wilding Yes it is Your Honour.

Elias CJ And that's why they say it wasn't freedom of expression that was being exercised here.

Wilding Yes Your Honour although in doing so they failed to recognise that freedom of expression ought to be the starting point if this decision is to be consistent with the *Pepsi-Cola* case.

McGrath J It may be that what they're saying is that the manner of expression is not, not protected in this particular case. Now it's generally accepted of course that violence in expressing your opinion is not acceptable, it's not protected and may be that they're saying that these purposes of annoyance and harassment took the case out of one that was protected by s 14.

Wilding I'm not sure, Sir, because the first para on that page says that the actions in targeting a single individual at their home were outside the range and that can be seen as a line of a different course. So it seems to me it was that fact which tipped the balance in this case. Could I just perhaps return to a point His Honour Justice Tipping which was that of purpose or motive and *Queen v R* does address that issue on page, volume 1 Your Honour p169. In this case it was subsequent to Mr Brooker's but at paragraph

Tipping J Oh this was the man who was photographing the girls in the caravan.

Wilding yes it was, Sir.

Tipping J Yes, yes. I'm just trying to get the facts, yes from the caravan rather not in the caravan.

Wilding from the caravan with the curtains pulled I think Sir.

Tipping J Yes

Wilding And at para 32 it says that evidence of purpose is not irrelevant. And it says that where there's a discernible purpose to the conduct. And then in para 33 it refers to an obvious purpose. And then in para 46 the conclusion, it talks about one circumstance in that particular case being a manifest absence of legitimate purpose. And in part that is the point, that in assessing disorderly behaviour one needs to look at the behaviour in public assessed as a matter of time place and circumstance. And what is the obvious conduct, obvious purpose of the that. In this case it was to protest. That view is strengthened

Tipping J You mean this is the purpose that any bystander would naturally infer from, from the objective action?

Wilding From the objective actions in public, Sir

Tipping J Yes, yes.

Wilding And that view is strengthened by the court's dicta at para 30 of the decision, so p168 of the casebook.

Elias CJ What page is it on?

Wilding Page 617 of the decision, Ma'am and its para 30 where the Court considered that

Elias CJ Yes

Wilding Where the Court said that they did not think that in evaluating whether the conduct was offensive the Judge was entitled to have regard to the circumstance that it was an instance comprising part of a pattern of conduct and one of the difficulties in this case is that the Crown in its submissions appears to place some weight on the fact that some effort was taken to track down the address and those sorts of matters. But that's really to introduce a pattern of conduct or course of conduct evidence.

Tipping J See they use here the expressions "serious disturbance" to the use and enjoyment by others at the particular time.

Wilding Yes they did, Sir.

Tipping J It doesn't make any difference I suppose in the present context of purpose that this was offensive when we're dealing with disorderly.

Wilding And just while I'm addressing that issue the Northern Territory Court of Appeal in *Watson & Trenerry* – perhaps I can turn Your Honours to

volume 2 p221 of that volume and this involved flag burning in the course of a political protest and Justice Angel at page

Tipping J A bit like *Derbyshire v Police* was it Mr Wilding.

Wilding The times were against you, Sir. Less so in the case of *Hopkinson v Police*. Justice Angel at p6 lines 9 view that the manifest motive of the appellants in doing what they did was a relevant circumstance. He also said he expressed no opinion on whether uncommunicated motive was relevant. And Mildren at, Justice Mildren at p14 of the decision lines 26 also expressed the view that

Thomas J What page again?

Wilding Page 14 of the decision, p225 of the casebook, Sir. Also expressed the view that motives as manifested to others were relevant.

McGrath J So what line was that?

Wilding Page 14 of the decision lines 26 and

McGrath J Thank you.

Thomas J It may be difficult to draw a distinction but and this maybe an area where the courts would not want to tread but there can be no abstract right of protest, protest will relate to any number of matters and one can imagine that the court could well conclude that conduct was disorderly if it were pursuant to employees picketing and not disorderly because of that right to protest that the employee has but the same conduct by an individual about a personal grievance might be considered disorderly. Now that's to allow the nature of the protest to enter into the circumstances, what would you say to that?

Wilding Sir I wonder if that takes us back to the *Pepsi-Cola* case. At p121 of the third volume which is p191 of the case at para 81 where the court says we can find no persuasive reasons to deprive union members of an expressive right of common law that is available to all members of the public. So it appears to take the view that there shouldn't be a difference between those purposes.

Elias CJ Well it would be a slippery slope wouldn't it if the court were to have to rule on the type of protest, whether the type of protest justified more latitude?

Wilding It certainly would be a slippery slope Ma'am and that's a point which is reinforced by the American decision of *Carey v Brown.* Perhaps if I could take Your Honours to p150 of the same

Tipping J but that's the same

Thomas J If I could just interrupt on that *Pepsi-Cola* case also says somewhere or other that what we would all agree is true, freedom of expression is not absolute. That's at para 36.

Wilding Oh certainly, Sir.

Thomas J Well can you tell me how you avoid being influenced by the nature of the protest in assessing whether or not the right to freedom of expression is being curtailed or not?

Wilding I think when we talk about nature we can certainly have regard to the fact that it's a protest.

Thomas J Yes

Wilding and the manner in which the protest is being conduct but I think there's difficulty if we start considering the viewpoint of the protest.

Elias CJ Mm

Thomas J Well that's the delicate area.

Tipping J Well you can't say this is disorderly because I don't like this protest.

Elias CJ Yes

Tipping J But it would be perfectly orderly if liked it.

Wilding That's correct, Sir.

Thomas J I was suggesting a viewpoint, one gets the feeling that the picketing cases have been very, very understanding of the expression, freedom of expression, in those cases. They are perceived as a right. Now there's the same right decreed to an individual expressing a personal grievance. It has nothing to do with viewpoint.

Wilding Well Sir they all focus on exercise of the freedom of expression because of the fact that there's an assembly doesn't confer a greater right than the individual right and I think that point is perhaps addressed by *Carey v Brown*, Sir, p150 of the casebook, para 7, where the court was considering a provision which did discriminate between labour picketing. And it said the central difficulty with this argument is that forthrightly presupposes that labour picketing is more deserving of first amendment protection than are public protests over other issues,

particularly the important economic, social and political subjects which these appellants wish to demonstrate. We reject that proposition and it goes on to say that public issue picketing is an exercise of basic constitutional rights in the most pristine and class form and reliance on *Edwards v South Carolina*.

Thomas J That's the sort of gist of what I'm just trying to get at. There is a weighting that seems to come in there and I'm not certain that it's appropriate.

Wilding Well, Sir, I understand that *Carey v Brown* to say that there isn't a weighting.

Thomas J There isn't a weighting. Would you apply that same direction to an individual protesting about a personal grievance?

Wilding Certainly I don't think that whether conduct is disorderly ought to depend on content or viewpoint, certainly that can be consideration of the fact of the protest. It may be that if the content is highly abusive then some of the provisions preventing offensive or abusive language should be taken into account. I know my learned friend I think has filed or may refer to a case of *Hill v Colorado*

Tipping J Let's say someone was, oh sorry, was protesting in favour of the death penalty for example or against it for that matter there might be very strongly held views on both sides but I, unless it goes beyond in its manner if you like of protest or some incident of the protest I would have the greatest difficulty seeing how it could matter which side of that debate you are on as to whether or not it was orderly or disorderly.

Wilding I agree, Sir.

Thomas J Who is saying anything to the opposite of that then.

Tipping J Well I thought that, that the previous debate might have been tending in that direction if it wasn't I am much relieved.

Wilding Certainly it is not my intention, Sir.

Tipping J No

Wilding I think there should be a quality of all types and point if I could take Your Honours to p9 of the decision just handed out. This was quite close to the line because the provision prevented certain types of behaviour, etc in an area health facility. The last para did place some importance on the fact that it did not prohibit either a particular viewpoint or any subject matter that may be discussed by a speaker. It

simply imposed a, in that case they said minor place restriction. And over the top of the next page, para notes that it applies equally to used car salesmen, animal rights activists, fundraisers, etc.

McGrath J Is the contrast with the breadth of the ordinance in *Carey* which I think covered quite an area in restriction of

Wilding Yes this was certainly more narrowly tailored, Sir and that seems to be a key focus of the American decisions and it is perhaps of some relevance to this provision at p10 of that decision, sorry p13 of that decision

Elias CJ What is Justice Skilyer's happy speech?

Wilding Is talking about people being able to express happiness.

Elias CJ I see.

Wilding Whether there was a distinction Ma'am.

Elias CJ There'd be in an annoying way presumably.

Wilding Or an annoying way.

Tipping J But all these cases are about logistics or manner aren't they?

Wilding That's right Sir there is no focus on the actual viewpoint expressed and certainly I submit

Tipping J It's legitimate if you like to say you can say it but don't closer than eight feet.

Wilding yes sir and that's recognised in the injunction decisions against abortion protests in both Canada *Dillman* is the case to which I have referred in my written submission and *Madson.* And I anticipate that the courts in New Zealand might consider granting an injunction in certain circumstances and the ability to prevent certain behaviours recognised by the Harassment Act. That case at p13 of course touches on the vagueness concept in America and it's the first para on the righthand side of p13. It talks about a statute being permissibly vague for either of two independent reasons. First it fails to provide people of ordinary intelligent or reasonable opportunity to understand what the conduct that prohibits. And that concept if applied here would cause some difficulty with the idea that disorderly behaviour prescribes peaceful focus residential protest because there is nothing on its face which suggests that it would appear to do so.

Elias CJ Is that a convenient time to take the morning adjournment.

Wilding Certainly Ma'am.

MORNING ADJOURNMENT 11.31.31

RECOMENCE 11.53

Wilding I had just raised the issue of vagueness in the American context. And the desirability of vagueness was recognised in the New Zealand context in the commentary in the White Paper.

Elias CJ Do you mean the Select Committee report do you?

Wilding No this is the White Paper of the Bill of Rights, Ma'am.

Elias CJ Oh right, yes.

Wilding Volume 1 pages 2 and 3

Thomas J page again?

Wilding Pages 2 and 3 of volume 1, Sir. And at para 10.58 in particular. And a comment is made from the last six or so lines that the courts will be concerned to weigh to way the degree and type of intrusion, the precision of the restraint, the vaguer the direction, the more chilling and suspect it is. And *Lange v Atkinson* in the defamation context recognised the potential for the chilling effect and the undesirability of that and the same in my submission could be said for s 4(1) it would be a broad and uncertain device to control peaceful protest on the grounds that they are focused and occur in a residential neighbourhood and would in my submission carry with it some potential for chilling effect particularly when consideration is given to the mixed landscape in New Zealand, particularly for example those who live in apartments or in city zones or mixed zones. Your Honours I just want to turn briefly to the importance of freedom of protest. That seems to be accepted as an important matter in the cases including from *Police v Melser* onwards. It's emphasised in the Select Committee report into the visit of the President of China to New Zealand which is in volume one of the submissions. And it can be seen at p234 of volume one. This was in reliance on the advice of the Ministry of Justice, amongst others, under the heading police actions were not justified limitations.

Tipping J Sorry what is this document, Mr Wilding?

Wilding This is the report of the Select Committee's inquiry into the visit of the President of China in 1999, Sir.

Tipping J Oh right, thank you.

Wilding And the Select Committee made the comment that under New Zealand domestic law protesters are entitled to protest provided that they do not create a breach of the peace and that their assembly does not become unlawful and disorderly and that they do not obstruct a public way. And the Select Committee considered the police guidelines for regulating protests and that consideration starts at p239 of that volume. Down the very bottom "Police policy on demonstrations" with the heading "D 031, Basic Principles". At the top of p240 you can see that the guidelines commence "every endeavour must be made to provide a reasonable balance between the individual's right to" and then they've got this freedom of expression and it includes of course freedom from intimidation and interference. But the Committee on that same page under the heading "Need For Revision of Guidelines" make the comments that the Guidelines should be stated in clear language and well publicised so that the public and police could have a clear understanding where their rights and responsibilities lay. And in the second paragraph, that the guidelines should emphasise that the freedom for lawful protest is the starting point for the police in making operational decisions.

Elias CJ What are you inviting us to take from this?

Wilding I'm simply, Your Honour, outlining that certainly the Select Committee placed significant importance on the freedom of protest in New Zealand. It is a matter of some value in New Zealand and certainly in its view it stated that the starting point should be freedom of expression. So I am suggesting that in the balancing exercise the starting point should be to place weight on freedom of expression. And that's what was suggested in the suggested amendment to the Police General Instructions on p251 of that volume.

Elias CJ Are you putting this forward in terms of the test to be applied by the law or the application?

Wilding In terms of the balancing exercise.

Elias CJ Yes

Wilding I am suggesting that New Zealand values protest and expression and that this is evidence of that.

Elias CJ I see.

Wilding And that fact has to be given weight and is a factor which didn't

Tipping J This is

Wilding sorry Sir

Tipping J This is really in aid of our understanding or sort of societal values and expectations?

Wilding Certainly, Sir. That's the sole purpose.

Tipping J Yes.

Wilding And it gives an insight in the weight to be placed, in Court of Appeal decision weight wasn't placed on that value.

Elias CJ It's not directed at the same point but, which is why I asked about the test, but I am just reminded by this that the Select Committee which considered the amendments to the old s 3(d) didn't think it appropriate that reliance be placed on the police guidelines but the law should be more certain than that, but that isn't the point which you are making here.

Wilding No it's not my point at all Your Honour. It's just the weighting.

Elias CJ Yes

Wilding Which ought to be placed. Perhaps relevant to that weighting in the particular circumstances of this case, this protest was certainly by the standards in *Coleman v Power* a political protest of one of our governmental matters. Perhaps while looking at that decisions in those, in that case the word was, or the phrase was, that this is Constable Brendan Parr a corrupt police officer. So it identified him, it was focused on him and was directed at him. And those matters didn't mean that

Elias CJ It was in the Mall though wasn't it, in the shopping mall wasn't it or something.

Wilding Yes it was Your Honour.

Elias CJ It was in Brisbane wasn't it that case.

Wilding I can't recall Ma'am but it was certainly in a shopping mall. But the point was the fact that it identified, focused and was directed at him didn't take it out of the category of a political comment, just ass if it's

considered that Mr Brooker's comment were directed the individual police officer that does not prevent it being a comment about the police.

Thomas J Well I, I took it to be both. It was directed at the constable, but it was also directed to the wider question of improper search warrants being issued.

Wilding Yes, Sir. Of course in Mr Coleman's case that it was a political comment was the, the fact that notwithstanding that the magistrate and it's p191 of the case at para 28 described Mr Coleman engaging in a personal campaign against some individual police officers. Volume 2, p174, it's just a brief comment.

Thomas J Well a protest may inevitably get personal in the protest against almost anything gets personal. A protest against the Iraq war got personal if you were President W Bush, George W Bush, you would have thought of it as very personal if you read the placards. What's the point that's, are you just saying well that doesn't stop it being political?

Wilding Well the point that it was focused on the constable doesn't mean that it was political nor does it mean that it's an improper protest by way of harassment. It's a legitimate method of protest. And perhaps expanding on that in my submission so was protesting outside a residence because there is no protest orthodoxy which requires that protest be taken to the head or indeed any office of the organisation at which the protest is directed. In reaching that conclusion that the content in *Coleman v Power* was political certainly Justice Kirby placed some weight on concern about police corruption and governmental responses to that. p198 of the casebook which is p239 of the case at para 229. And those concerns are also present in New Zealand, a matter which may go to the value of this feature if the court wishes to weigh that. And that's shown by the inquiry of Sir David Tompkins in Counties Manukau Police District and I have included the executive summary in the volume 1 at p271, and also apparent from comments of the Select Committee in its inquiry to the visit of the President of China which at p30 of its report which is volume 1 p231 they expressed concern about police integrity. Your Honours in s 7 of my submissions I have reviewed some of the cases on disorderly behaviour. I don't intend to go through those in detail unless the court wishes save to say that the subsequent, the cases subsequent to *Melser v Police* appear to have recognised two parts to the test. The first that the behaviour must be disorderly and second that there must be an interference with the rights of others. I've also included in volume 1 at pages 274 and 276 an extract from Black's Law Dictionary with the reference to disorderly behaviour and the model Penal Code and also at p276 disorderly as defined within the new Shorter Oxford English Dictionary. And I don't advocate for a pure dictionary definition but that hasn't been adopted in subsequent cases because of course there's

the second limb of interference with the rights of others but the new Shorter English Oxford Dictionary does refer to disorderly as being amongst other things opposed to or violating public order. So that

Tipping J It incorporates the word public does it?

Wilding It does, Sir. p276 of the first volume and it's the first definition of disorderly referred to, meaning (1). Opposed to or violating public order or morality or constitutional authority especially unruly turbulent riotous.

Tipping J See that's interesting because I just wondered this under a heading in the Act isn't it, Offences Against Public Order.

Wilding Yes it is, Sir.

Tipping J So there's obviously a public connotation. The only public element here seems to me to be the fact that it was being done on a public street. Now if one were to take the view that it was done just inside, rather than just outside the fence, I know there would be other issues involved if that were so, but from the point of view of whether it was disorderly, leave outside the fact that it has to be in a public place

Elias CJ Or within view of

Blanchard J In view of

Tipping J Or within the view of a public place, view that's an interesting that, that might give a clue too. In view of. Sorry I'm just thinking aloud Mr Wilding.

Wilding Well I think, Sir, view implies that the focus has to be on the conduct as observable and that I think is the underlying rationale that a course of conduct type evidence isn't relevant.

Tipping J Might it be helpful to say what threat was there to public order in this conduct.

Wilding Well yes it might and I think at para 12.2 of my submissions I have said that there was none, Sir. It was a gentleman who was playing a guitar and singing for 15 minutes in a residential area outside someone's address.

Tipping J Because this is really a major part of your theme isn't it that the order that we are talking about here is public order, the word order in disorderly. Public order in the heading, dictionary everything has a

sort of public connotation and what here was the threat if you like or the harm or the damage to public order.

Wilding That's correct, Sir.

Tipping J Is a very significant part of your argument.

Wilding Well in essence it is the argument, Sir. And thus based on my submissions given that the manifest purpose was a protest and that can't be said to threaten public order, that it was for a legitimate purpose, protesting about policeman's conduct and that if it was disorderly it must be disorderly because of the manner of the protest, there must be something about the volume of the playing of the guitar which unreasonably interfered with the residential interest in peace and tranquillity. But that has to be assessed according to the standards in *Queen v Lohnes* the Canadian case where Justice McLachlin identified that it's not an absolute right.

Tipping J And if it's targeted out at an individual as the Court of Appeal was minded to emphasise your argument I suppose is that that per sé is not a threat to public order unless it is of such a kind or such an extent as is likely to create public disorder. Would that be the way you might be inclined to look at that dimension?

Wilding That's correct, Sir. While that's not to go so far as to say that public order can't protect harassment.

Tipping J I'm not saying it can't be disorderly ever if it is targeted at an individual but it's got to be of such a kind, such a degree whatever that, that reasonably might be thought to trench on public order.

Wilding Yes, Sir. And that is in part the crux of the decision in *Coleman v Power* and just in terms of the effect of the individual in *Coleman v Power* Justice McHugh noted in this, volume 2 para 81 p181 of the casebook.

Blanchard J Sorry page number please?

Wilding Sorry Sir p181 of volume 2. And it's para 81 and Justice McHugh noted that the fact that the words were insulting to Constable Power was beside the point. And although my learned friend's submissions talk about the effect of the Constable in this case I also submit that that's beside the point because it doesn't help us with whether there has been an interference with public order. Now in saying that I think Your Honour Justice Blanchard in *O'Brien v Police* which I think is p120 of volume 1 note that the action might be relevant in one way, that's the last full para on p120 of the casebook, the presence of

absence of a genuine and not exaggerated reaction by a person within a range of the defendant's conduct may be a good practical test of defensiveness and it maybe in this type of offence public reaction is a guide as to whether or not behaviour is disorderly.

Blanchard J That's a bit difficult to apply though when it's a targeted protest and there's only really one person receiving it.

Wilding Although members of the public or others could certainly have complained about the interference with residential tranquillity in this case sir and did not do so and interestingly Constable Croft's complaint was not made initially in relation to the protest. If I could take you to the case on appeal, p86, halfway down that page she's asked at what point did you, at what point did you contact the police. ANSWER: I contacted the police as soon as he knocked on my door.

Tipping J When she's referring to the conduct there in the next question and answer presumably it was the conduct, oh not necessarily I was wondering whether that was confined to the knocking on the door, but it can't have been can it? Not that her opinion makes the slightest difference but I was just trying to get the context.

Wilding Well she complained at the knocking on the door.

Tipping J Yes

Wilding It was at that stage, Sir.

Tipping J Yes

Wilding It wasn't a, a complaint after having observed the protest.

Tipping J Right.

Wilding So there is no person who contacted the police and complained about the protest despite it seems the evidence that it was seen and heard by others.

Blanchard J Did Constable Little say what he thought was going on when he left the police station to go to Constable Croft's address?

Elias CJ Well how could he give evidence of that?

Blanchard J What he thought was going on, his understanding. It's a question of fact what was in his mind.

Wilding No he, he didn't although my learned friend does refer in his submissions to the warning and I'm not submitting that the fact the police warning veers on whether there was disorderly conduct but just to address that point. I am not sure if Your Honours have the joint memorandum of counsel dated 8 November 2005 which attaches briefs of evidence which were read at the first instance here but not included on the case on appeal.

Elias CJ The additional briefs.

Wilding Yes

Tipping J Can't find it in mine.

Elias CJ I've got a copy. Here.

Tipping J I'm sure I've got it because I've read it, here we are.

Wilding If I could turn to the brief of Constable Vernon Noel Morris and towards the lower half of the page, "it can be said that the warning is stark". He entered the address, he spoke to Constable Croft, he came out he told him to leave or he would be arrested without having ascertained so it seems Mr Brooker's view. And that point is made even more starkly in relation to Constable Little at p75 of the case on appeal towards the middle of the page under the heading Evidence in Chief Continues, is a question I did not explain to you the reasons for my actions, ANSWER: Like I previously said you did make me aware of why you were there however you didn't explain fully why you were doing what you were doing. I believe I may have asked you at one stage, I wasn't interested. I wanted to speak to the complainant first. Now I'm not submitting that that's relevant to disorderly but just answering the point in relation to the warning, it is a stark choice without reference to Mr Brooker's concerns. I have set out in s 8 pages 14 and 15 of my submission the objective of the legislation. I don't intend to go through that. Plainly public order is important. The key point is that the conception of public order protected in New Zealand must value robust expression and also peaceful conduct, peaceful protest and that also involves acceptance of the insult and embarrassment and harm or intrusion into others which may result, it is undue harm or intrusion from which there ought to be protection and that's the phrase which is referred to in the *Pepsi-Cola* case. And second it must accept, as of course was accepted on *Coleman and Power*, the purpose of such has drawn community attention to alleged misconduct of others serve longer term goals. And Sir Kenneth Keith observed in his article *The Right to Protest* that those faced with political protest would often be annoyed and he questioned how views could be changed except by the process of challenge, irritation and annoyance. I could turn to the overseas jurisprudence.

Elias CJ Am I right in thinking that the, sorry just thinking again about the material and the evidence you referred us to, am I right in thinking that the police officers who attended the scene don't ever, don't give evidence of their observation of anything. That they characterised as disorderly?

Wilding No they don't Sir

Elias CJ No

Wilding No they don't, Ma'am at least. The closest we get is the cross-examination of Constable Little case on appeal p79.

Elias CJ And two officers went into the house and one was outside observing him.

Wilding Yes Ma'am.

Elias CJ Yes, so 79 is that what you took us to?

Wilding Yes and that simply is where he, he was asked about the volume of the

Elias CJ Yes, yes. I recall that.

Wilding louder than talking although quieter than shouting.

Elias CJ And at 92 there's the exchange about whether, whether the observed conduct warranted an arrest for disorderly behaviour.

Wilding And the reply is that the officer hadn't made up his mind.

Elias CJ Yes

Wilding At that stage.

Tipping J Because the arrest was for intimidation.

Elias CJ Yes

Wilding It was, Sir. And that in a way is the elephant in the room in this case. The arrest was for intimidation, the evidence introduced was introduced on the basis of intimidation is now being relied upon to sustain a charge based on behaviour in view of a public place.

Elias CJ That's why the other evidence was called wasn't it, that's why there was the adjournment and the additional evidence was called.

Wilding Yes it was Ma'am and in the District Court the learned Judge at p39 of the case on appeal with reference to the charge of intimidation in para 17 of the decision said that there wasn't evidence demonstrating intention to intimidate but the most that could be said was that he wanted to annoy her. And one of the difficulties in this case is that the most that can be said is that he

Elias CJ That he may have just wanted to

Wilding has now become a principal purpose of harassment sufficient to roust the right to protest.

Tipping J And it's not easy to reconcile that fairly lukewarm finding with the view the Court of Appeal expressed.

Wilding No it's not, Sir. And so perhaps a minor point that on p43 of the case on appeal under para 32 the last three lines can be seen that for the District Court Judge the concern was the fact that others within reasonable proximity could hear and observe his actions. One might one what type of protest you can have if others can't see and observe it. That was an issue which was raised in the Select Committee inquiry into the President of China's visit which was critical, police action was taken to block protests.

Tipping J Was that, was that an inference or was there direct evidence that or was that a reference to the other police officers?

Wilding Constable Croft as I understand it gave evidence that other could, in the neighbourhood, could see or observe.

Tipping J Could not

Wilding Could and I think she may have gone so far as to say that they did, Sir.

Tipping J Right. But there's no suggestion that it went beyond just being able to see it and hear it?

Wilding No, not at all, Sir. In fact p85 of the case on appeal and this is just over half way down the page Constable Croft is asked "Did any person to your knowledge such as a neighbour or the school enter a complaint with the police regarding my behaviour?" ANSWER: "Not that I'm aware that they entered a complaint, they were certainly aware of your presence." So on the evidence others were aware and didn't complain.

Blanchard J Mr Wilding, just while we're look at all this, the question I'm about to ask really goes beyond your brief but the procedure here was pretty irregular wasn't it? The, my understanding and correct me if I'm wrong, is that the charge got changed from harassment to disorderly conduct after effectively there'd been a trial.

Wilding Certainly after there had been much of the evidence put in Sir.

Blanchard J Well the defence, the Crown closed its case, I assume no amendment at that stage, then the defence gave evidence and then the charge gets changed and they have to have another hearing.

Wilding Yes, Sir. It changed from

Blanchard J I don't pretend to be expert in these matters but I can't recall ever seeing a similar situation.

Tipping J There's a case called *The Queen v Jones* which I sat on in the Court of Appeal where something I think even more extreme happened than that, that provided the statutory requirements are observed, that is to say the ability to have witnesses recalled if you want and so on I think it is in order.

Elias CJ Yes there's a provision in the Crimes Act but that wouldn't apply here either.

Tipping J Oh there's also one in the Summary Proceedings Act, yes s 40 something.

Elias CJ Is there, yes. Because you can amend even after verdict can't you.

Tipping J You can amend on appeal after verdict but you can amend a trial I think up to the time when the judgement is delivered.

Blanchard J But in this case the Crown was able to call further evidence.

Tipping J That is the corollary I think of if the accused wants further evidence to be called I think it works both ways. If the accused had simply said right I'll accept the substitution and no I don't want any more evidence called then he might have actually been in a better situation. But I don't think this is an impediment technically.

Wilding I can't answer that Sir.

Tipping J No. Well I can't be definite either.

Wilding Because I didn't look at it within the ground of appeal.

Tipping J But it's not, it's not before us.

Blanchard J Well I just had the natural curiosity about it.

Tipping J It's unusual to say the least.

Elias CJ Mm

Wilding I think I was just turning to the international jurisprudence and I don't intend to go through that in detail but *Percy v DPP*

Elias CJ Which volume are you in?

Wilding This is volume two p76 this was a protest against an American airbase. I think it was an application for a review but at para 32 on p76 Mrs Justice Heller(?) gives a list of the factors which could have been taken into account and it can be seen that they are quite broad, and likewise in New Zealand there are likely a range of factors which can be taken into account in the balancing exercise required. And the problem in that case identified in para 33 was that the learned Judge placed sole or too much reliance on just one factor. The same in my submission could be said in this case.

Tipping J Of course in England they're quite fond now aren't they of this concept of disproportionality, that influenced by the European jurisprudence. Was this a disproportionate reaction to malice if you like of the occasion. It's open to the view that it was disproportionate.

Wilding Yes. Of course proportionality as used in the European context has the advantage of tying in the objective of the legislation, Sir.

Tipping J Quite.

Wilding And I think the same in the jurisprudence under the International Covenant, perhaps I could refer you to my learned friend's bundle of authorities, tab 6. This is *Faurisson v France* the holocaust denial case.

Blanchard J Sorry where are we now?

Wilding Tab 6 of the Respondent's bundle of documents, Sir. p565 under para 8 about half way through that para is the similar concept. "The restriction must be necessary to protect the value given, this requirement of necessity implies an element of proportionality. The

scope of the restriction imposed upon freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value."

Tipping J Must not put the very right itself in jeopardy.

Wilding Yes. So in both the European, the international covenant and also the American jurisprudence there's a very strong theme of connecting the provision to the objective or value which it serves to protect. Turning briefly to the Australian cases, I have already referred to *Coleman v Power* and anticipate that Your Honours will be familiar with that case. At p197of vol 2 at para 225 there a list of the international principles of construction to which His Honour Justice Kirby referred in supporting restrictive interpretation, being principles which prefer compatibility with the constitution and avoid diminishing fundamental rights if possible. We don't have to rely on those because of the mandatory interpretation direction within s6 Bill of Rights but those principles are equally applicable and they do serve to both affirm and support a rights based construction of s4. If I could just turn to p21 of my submissions in the top para I refer to case of *Stoke, Graham v Queen* which was a case which involved the reading down of a provision which prescribed anything but disturbs the order of serenity of religious meeting. I perhaps refer to that because it includes the concept of a disturbance. And at vol 3 p185, sorry vol 3 p135. Justice Dixon delivering the majority reasons at p118 so the left pin the first paragraph, notes that it is not sufficient that an accused conduct produce annoyance, anxiety or emotional upset in the members of the assemblage. And he goes on to say there must be some activity in the nature of a disorder which occurs.

Tipping J You don't actually have to wait under our law do you until disorder has actually occurred. You can intervene if there is a serious threat of disorder. It's not disorderly just only when disorder results.

Wilding Oh certainly, Sir.

Tipping J Yes.

Wilding Yes disorderly is a broader concept than simply disorder.

Tipping J Yes.

Wilding I accept that, Sir. I don't need to go through *Committee for the Commonwealth of Canada v Canada* in detail because it's been superseded in large part by *City of Montreal v Quebec* which Professor Rishworth drew to my attention and was filed under cover of memorandum on 30 November. However for present purposes one of

the purposes of the *Committee for the Commonwealth of Canada* is the acceptance by the Judges, Chief Justice Lamer and

Elias CJ Oh sorry you are sticking with the, you're not referring us to the *Montreal* case?

Wilding No I'm not Your Honour although I imagine the citation is sufficiently well known, it was the acceptance of the proposition in the American case of *Hayden Committee for Industrial Organisation* that wherever the title of streets and parks may rest they have immemorial been held in trust for the use of the public and time out mind have been used for the purpose of assembly, communicating thoughts between citizens and discussing public questions and the references are for Justice McLauchlin at p230, para 8 to the decision for Chief Justice Lamer at p154 para (I) of the decision. Perhaps if I could turn just very briefly to one part of that decision which is p20 of vol 3. And at p174 Justice Lahore d'Bay(?) at para (g) cites the American case of *West Virginia State Board of Education v Barnett.* If there is any fixed star in our constitutional constellation it is that no official high or petty can prescribe what should be orthodox in politics, nationalism, etc. And that's not directly on the point of protest but the same could be said that it's not for the court in my submission to prescribe what's orthodox in terms of protest and then limit protests to that under s4(1). If I could turn now to *City of Montreal v Quebec* at para 74 of that decision which is p20 it clarified the somewhat difficult series of tests from *Committee for Canada* case.

Tipping J Paragraph?

Wilding para 74.

Tipping J Thank you

Wilding Page 20. The basic question with respect to expression on government owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s2(b) is intended to served.

Elias CJ What are you taking us to this for?

Wilding Well first just to clarify that my submission in that regard is no longer current because it has been superseded.

Elias CJ I see, yes.

Wilding And second no longer conflict in my submission that protests in residential areas wouldn't conflict with the values on that test Your Honour.

Tipping J One thing I found particularly interesting in this case Mr Wilding was on p36 I'm taking this out of context but I do think it could have some bearing where Their Honours cite the Civil Code of Quebec, p36 of the *Montreal* judgment.

Blanchard J This is the dissenting judgment is it.

Tipping J Yes but I'm not citing it I'm only citing it for a reference to the Civil Code of Quebec.

Wilding This is the nuisance being a serious

Tipping J Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other and so on. That I must say attracted my thought as to you know the need for tolerance of the rights of others, again comes back to the question has the line been crossed.

Wilding Yes, Sir. And if the line has been crossed by Mr Brooker's conduct then the line's going to be crossed by anyone playing a guitar and singing at a normal volume for 15 minutes.

Tipping J Well its crossed only according to the Court of Appeal because of his animus

Wilding Yes

Tipping J And that I think is the, one of the really important points of principle in this case, whether that makes all the difference.

Wilding And in my submission it doesn't because it ought not to be given regard in the context of an offence based on behaviour in view.

McGrath J Mr Wilding one thing about this case that in reading it as I understand it there's one judgment from Chief Justice McLauchlin and Justice Dishon(?) one from Justice Binney in dissent. Now I missed and it may be there somewhere, wherever the other judges come in.

Wilding Oh the majority judges draw in with Justice McLauchlin as I understand it too.

McGrath J All of them joined with that judgment.

Wilding There was only the one dissent and the

McGrath J So it's the judgment really of the minority except for Justice Binney?

Wilding Yes. And the difficulty in terms of the dissent is that the dissenter opposed the reading in of an element that the lawyers produced by sound equipment must interfere with the peaceful use and enjoyment of the urban environment and it's telling the majority that it's necessary to read that in and I that's referred to para 99 of the decision on p24.

McGrath J The other part of the judgment that interested me is p18 in the majority judgment because it indicate that the court considered whether the expressive activity was unprotected and that was an extremely narrow circumstances.

Wilding Yes

McGrath J And it's such, I think I raised this with you this morning such as where the expression was through violent conduct but that seems to be the only question that the court would ask itself in relation if you like to the quality of the manner in which the opinion was expressed. And if it wasn't of a, basically a publicly harmful kind such a violent conduct then it was protected and the court moved on.

Wilding Yes, Sir and that's consistent with the American cases to which I have referred to at para 9.20 of my submissions. Of course in America there's not the balancing in the constitution so it's addressed as a matter of classification in Trapinksy(?) in New Hampshire prescribed or held outside the protecting fighting the words but that's been circumscribed in *Brandenberg v Ohio* referred to the statement the state cannot be prescribe advocacy of the use of force or of law violation except where it is directed to inciting or producing lawless action and is likely to incite or produce such action. Perhaps if I can continue on the American.

Elias CJ Yes Mr Wilding I wonder, I'm just looking at the time and wondering how much longer you expect to be?

Wilding I suspect probably about twenty minutes Ma'am.

Elias CJ Yes I think we'd, yes what I'm being reminded is that it may not be necessary to traverse all these cases if they're sufficiently indicated in your submissions. It's really, it would perhaps be more helpful if there's anything that you particularly want to draw our attention to for you to concentrate on those.

Wilding That may limit me to about five more minutes, so certainly. Just turning briefly to *Frisby v Schultz* then and that was the American case in which a restriction was upheld and that involved an ordinance which prescribed focused peaceful residential protesting. And the background to that was that there was repeated picketing outside an abortion doctor's residence I think on six occasions involving groups between 11 and 14 for periods from one to one and a half hours. The key difference between the ordinance in that case and this is that the ordinance was narrowly tailored, so expressed precluded picketing. The court read it down so as to only prescribe focused picketing solely outside someone's address and the purpose of the legislation which was set out in it was to prohibit picketing which caused emotional disturbance and distress and had as its objective the harassing of occupants. So that's quiet a different emphasis when you've got a broader emphasis from the public order emphasis and the broad wording in this case. The two international cases to which I've referred

McGrath J Are you going to leave *Frisby* now?

Wilding Yes I am. I just

McGrath J I know that you're short of time but I did want to put one question to you on it at p167 of the casebook in Justice Brennan's dissenting judgment on the righthand column just starting about five lines from the top, I just ask you for your comment on that. This is Justice Brennan dissenting speaking for himself and Justice Marshall but acknowledging some element of restriction on freedom of speech although he doesn't like the majority decision obviously. The government may prohibit unduly coercive conduct around the home even though it involves expressive elements and then a crowd of protesters need not be permitted virtually to imprison a person merely because they showed slogans or signs but as long as the speech remains outside of the home and does not unduly coerce the occupant it goes on the government's heightened interest is not implicated. Now would you accept that as a fair statement of where disorderly behaviour might kick in, in a residential protest case?

Wilding Well I do accept that with one reservation, Sir. I certainly accept the unduly coerce the occupant I am slightly troubled by "so long as the speech remains outside the home" because in fact there is a lot of noise and speech from the public which can be heard inside someone's property or home. And I think in assessing whether the speech has gone inside the home there has to be regard to the concept of peace and tranquillity referred by Her Honour Justice McLauchlin in *Queen v Lohnes*. So the mere fact that you may be able to hear speech inside the home doesn't mean that it's disorderly.

McGrath J Thank you.

Wilding I have referred to international cases included in the casebook both the decisions of the Commissioner and the court. And perhaps if I take Your Honours just to one *Hashman and Harrup* which is vol 3. Probably more relevant would be the *Commissioner and Steel v United Kingdom* which is vol 3 p254 at para 145. Referring to the expression prescribed by law and requiring first that the law be equably accessible to citizens and secondly formulated with sufficient precision to enable the citizens to regulate this conduct and foresee with reasonable certitude the consequences which together the action may entail.

Thomas J Well we're back to where we started. It's a splendid sentiment but when it comes a question of drawing the line it's going to be very difficult to give effect to that sentence.

Wilding Yes I accept there's always uncertainty in public order offences because they have to be broadly worded, Sir. Although in this case the uncertainties are first heightened by the test of Justice Turnbull in *Melser* which refers to annoyance of others and is really quite subjective in some of the elements that I submit needs to be addressed, and second it's difficult on a reading of s418 to see that it would prescribe focused residential peaceful protesting, there could be specific legislation which makes that quite clear. Your Honours the remainder of my submissions really are devoted to the facts and I think they are probably been traversed in sufficient detail unless Your Honours wish to refer me on those or in relation to any other matter.

Elias CJ No thank you very much Mr Wilding.

Wilding Thank you Your Honour.

Elias CJ We will take the adjournment now. I have a commitment entered into before this case was set down which may make me a little late perhaps if we could resume at 2.30 if that's convenient. Thank you.

ALL STAND – COURT IS ADJOURNED

12.57pm

2.31pm

ALL STAND– COURT RESUMES

Elias CJ Thank you, yes Mr Solicitor.

Arnold Your Honours, the Crown accepts of course that freedom of speech is an important right, it has been highlighted on many occasions by courts and human rights bodies, critical in a functioning democracy for a range of reasons. But courts and human rights bodies have also accepted that freedom of speech is not an absolute right but maybe subject to limitation and it's the extent of those limitations or the identification of the boundary between the legitimate and illegitimate exercise of the right that causes the most difficulty in practice. And it's in that borderland that most of the cases sit. Now in my submission there's not difficulty in this case however. The appellant, Mr Brooker, believed that he was being harassed by the Greymouth police and that they were corrupt. He wanted to say so publicly. Nobody sought to prevent him from doing that. As the evidence shows he protested outside the Greymouth police station by holding up his sign alleging improperly obtained warrants by singing, chanting, all of that without any hindrance. What gave rise to the conviction and charge in this case was not the content of his speech but rather the elements of his conduct which disturbed the peace and quiet of the neighbourhood and intruded excessively on the constable's rights. That is her right to be left alone and her right to enjoy the peace and tranquillity of her house. Now Her Honour the Chief Justice talked about the amount of, or raised the question about the amount of noise. Could I just refer Your Honours to the Judge's finding on that which is at para 11 of the judgment, the District Court judgment at p37 of the case on appeal at para 11. He began – about two-thirds of the way down – he began playing his guitar and singing in a relatively loud voice chants of protests including no more bogus warrants being issued as I've mentioned earlier, you do not know when to quit. He was singing in a reasonably loud voice that I find any neighbours who would have heard and anybody in the immediate vicinity including people across the road in the primary school grounds if they had been there would also have heard.

Elias CJ What evidence was there of that though? I can't remember anyone saying anything which make an evidential foundation for that. And it may be that I just missed it going through.

Arnold When – well I'll turn up the references – there were several sequences in the evidence. First Your Honour the Chief Justice asked about whether there was any evidence going to the nature of the behaviour on, as I understood it of anyone, other than the constable involved. If one looks at p91 you will see there that there is a cross-examination of one of the other Constables who came to the scene and he was describing what occurred because the appellant had asked him have I, am I disorderly yet and at this point the witness refers to his notebook and there describes what he took down. And you will see there, I made notes that his vehicle registration was parked on the grass, partially on the footpath, sign up against the fence read "Stop the bogus warrants".

Mr Brooker yelled out at the address "you shouldn't have signed the warrant Fiona" and he began singing the song. He began singing the song "you just don't know when to quit no more 3am visits Fiona" he said to me taking all this down as he was playing his guitar and yelling "too many bogus warrants, no malicious prosecutions" he continued playing the guitar and at that point he said to me "is it disorderly yet". So there's the note of what the officer took down describing the conduct as yelling.

Elias CJ Which officer was that?

Arnold That was Constable Paxton, p88 the cross-examination starts

Elias CJ Yes actually I note that in fact the finding that you referred to does follow the evidence of the complainant at p60 of the case, it seems to have been taken from that because it's in exactly the same terms.

Tipping J The terminology suggests that was no one actually there but if they had been there they would have been impacted?

Arnold Yes that's, that's certainly the way the District Court Judge describes the situation as.

Elias CJ Well one of the constables though and this was the thing that is sticking in my mind said that it wasn't shouting, it was normal singing. Louder than speaking but I think it was the constable who was outside, oh I think it's at p79.

Arnold That's right.

Elias CJ Louder than talking though quieter than shouting possibly.

Arnold Yes.

Elias CJ And that's her, which one's that? That's

Arnold Sergeant Eden.

Elias CJ Yes.

Arnold The other point to be noted

Elias CJ Who was the one outside with her when the other two went inside and who was there before the other two arrived.

Arnold Yes. But the other point to note in this

Elias CJ yes

Arnold context was that the constable said she could hear the noise from all parts of her house.

Elias CJ Oh yes, yes.

Arnold So it had to be pretty vigorous singing for that to be so.

Tipping J Can we really go behind the Judge's descriptions, relatively loud voice he says and then two lines down "reasonably loud voice". There's no finding of yelling.

Arnold I would hope that one doesn't go behind that and one doesn't need.

Tipping J No.

Arnold Well the point for drawing attention

Elias CJ And I raise the challenge as to what the underlying evidence was and I am satisfied there was evidence that he used yes.

Arnold But the point I wanted to make is simply this that it was sufficiently loud in the view of the District Court Judge to be heard by others in the vicinity including people across the road in the school. Now the Bill of Rights doesn't contain, as Your Honours well know, a right to privacy although the ICCPR does and so does the European Convention on Human Rights, but despite that the common law has a long tradition of recognising some privacy interests and in particular the special status of residences and Your Honours will all remember what we all learnt at Law School, and Englishman's home is his castle and that reflects the notion. It is a pretty powerful notion in the common law reflected in a variety of ways through the law in relation to nuisance and so on. Now in other jurisdictions, comparable jurisdictions whose Bill of Rights like New Zealand's do not contain a right to privacy. The interest of people in being left alone and their interest in preserving the sanctity of the home is recognised in law, not only generally but specifically in the context of freedom speech issues. And I don't want to take Your Honours to a lot of cases but there are several that I will take you to. But in one case the Supreme Court put it this way. The unwilling listener's interest in avoiding unwanted communications has been repeatedly identified in our cases. It is an aspect that the broader right to be left alone, that one of our wisest Justices characterise as and this is quote "the most comprehensive or rights and the right most valued by civilised men."

Blanchard J Is that *Frisby*?

Arnold Justice Brandeis(?) said that in a much earlier case

Blanchard J Yes

Arnold which is referred to in *Hill* I don't think it's referred to in *Frisby*.

Blanchard J No.

Arnold And then in *Frisby*

Tipping J What were you citing from on this unwillingness?

Arnold I'll take you to the precise thing I'm just

Tipping J Oh right

Arnold I'm just making the general point at the moment. But there is ;then, what I am trying to do is to identify two interests particularly that persons in the position of the constable. That is the right to be left alone and not to be if you like forced to listen to unwelcome speech. And secondly the interest in the wellbeing the tranquillity, the privacy of the home which is articulated in

Thomas J Well it cuts all ways doesn't it but it's not absolute. Much of the purpose of protest is to make people listen to what they don't want to hear.

Arnold Except that as the Supreme Court points out in these cases in the great majority of protest situations you can remove yourself from the source of the protest. You have that option. The point about a home is that you're trapped there, it's your home, it's your space. Somebody is coming to protest at it. You home no option if you cannot leave but to listen and that distinguish this type of situation from most other protest situations where people are free to go.

Blanchard J I suppose you could put that the other way. You shouldn't be forced out of your home

Wilding Yes

Elias CJ Sorry, what's this.

by something occurring outside it.

Arnold That's another way of putting it. Precisely Your Honour.

Elias CJ It's interesting however and I accept that we can't go behind the findings of fact if there's some evidential basis for it but there is no indication from the officers in the house of what all this sounded like.

Arnold No but let's not focus simply on the noise Your Honour.

Elias CJ I thought that was really what you were focusing on.

Arnold Well yes that's fair but there's a broader dimension to it that I do want to address really arising out of Your Honour Justice Blanchard's observation that you took with a grain of salt the constable's observation that she didn't feel able to leave and you made the point that well she no intention of leaving and the timeframe was very short. But with respect when, when one looks at her evidence you have to put yourself in her situation and as she says in her evidence, she's asleep. She's woken up by a loud thumping on the door, there's a person there with whom she's had dealings in the past, carrying a placard and turning up at her door.

Blanchard J That's not what, that's not what she's, what he's convicted on.

Arnold No, no. But I am just trying to explain

Blanchard J Yes

Arnold context in which she made the observation that she didn't feel able to go outside. She woke up to find that and was concerned about her own safety. She didn't know what was going to happen. Her concern may have turned out to be unfounded but the point is one can hardly be critical of her for feeling that she wasn't able to go outside because she didn't know what was going to happen.

Blanchard J But what is said to be disorderly here is what he did on the street after that.

Arnold That's so Your Honour. I accept that but I would certainly argue that one has to look at the course of conduct that has occurred as indeed the District Court Judge did.

Thomas J You haven't quite answered Justice Blanchard's point. His point is that she had no intention of leaving the house so what relevance is it that she might have been fearful of leaving the house?

Arnold She had to decide what do I do and I am simply basing myself on the evidence that she gave. She had to decide what do I do. And she thought well I feel uncomfortable staying here with this going on. I

don't feel I am able to go outside because I don't know what's going to happen therefore I am going to call the police and that's what she did.

Tipping J Did she say that she was trying to get back to sleep while he was serenading her?

Arnold No. She had been woken up and I think

Tipping J There was no question of him as it were stopping her from going back to sleep from her point of view?

Arnold Well I'm not sure that that's fair either because as I said she does give evidence that she could hear the noise throughout the house when he knocked on the door and she ultimately came he made some comment like you don't like being woken up do you. So he knew she was asleep, he knew he had woken her up.

Tipping J Yes but what I was interested in was whether there was any evidence. It certainly doesn't seem to appear in the trial Judge's discussion that he was stopping her from – as a matter of fact not intention, stopping her from going back to sleep.

Arnold I don't recall any evidence where she says I tried to go back to bed.

Tipping J No.

Arnold Now this sort of targeted protest action has been held to fall outside the proper boundary of legitimate free speech in both the United States and Canada. Both of those courts as well as the House of Lords have recognised that there's a balancing process to be undertaken in these situations and I think Your Honours accept this. On the one hand there is the rights of those who are asserting the free speech rights or the assembly rights, on the other hand the rights of those affected by the protest, they may be strangers and passersby whose rights of passage and so on maybe interfered with or they may be the objects of the protest action and other rights of theirs may be affected. Now I wonder if I could start before turning to some of the authorities, by just reminding Your Honours of the provisions themselves because as Your Honours saw from the report of the Select Committee, when the Select Committee considered s3(d) it analysed as one of the reasons for the dissatisfaction for that provision that it in a sense it tried to do too much. It captured too much. And so one of the solutions that the committee hit upon which was ultimately taken up in the legislation was to try and divide out different types of behaviour. And the provisions are set out at p60 of volume one of my learned friend's casebook. You see there on the lefthand column the basic disorderly behaviour offence which is now amended. The amended version is on the righthand column. Every person is liable to imprisonment for a

term not exceeding three months or a fine not exceeding $2,000 who in or within view of any public place behaves or incites or encourages any person to behave in a riotous offensive threatening insulting or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or to continue. Now the point about that is that last element that is likely in the circumstances to cause violence against persons or property to start or to continue. That's the additional element that justified the greater seriousness of that offence as reflected in the possibility of a penalty of imprisonment. Now when one then turns to s4(a), (b), (c) one sees various different classes of conduct but it's quite clear from the Select Committee's report at that least from its perspective the purpose of s4(1)(a) the provision that we are concerned with was that it was to be an offence at the bottom of the hierarchy. In a sense a catchall which was attempting to deal with behaviour that was disruptive before it grew into anything else. That, that's the way the scheme works and in my submission that's the way Your Honours need to look at it.

Elias CJ You said behaviour which is disruptive. Is that the approach you take?

Arnold Well one of the difficulties that the House of Lords pointed out in *Cousin v Brutus* that Your Honours may remember where at issue was the term "insulting behaviour" and the divisional court there had attempted to come up with a range of different descriptions and the House of Lords said look this is not a sensible exercise to get involved in. The word "insulting" or the word I would say "disorderly" is, is a word in common usage. It has a meaning. And really it's very difficult to try and come up with a lot of alternative descriptions of, of what it means. And I don't want to be unhelpful in responding but there is with respect a lot of truth in that, that it becomes very difficult to try and to come up with another set of words for describing the notion of disorderly which is really, so I use the term disruptive. It shows the danger Your Honour is saying to me well is that what it means.

Elias CJ Well because disruptive

Arnold I would say disorderly means disorderly.

Elias CJ Yes but, but the evidence is whether it's put in; a context of public order and disruptive does suggest something, something similar. Perhaps not.

Arnold It depends, well again Your Honour says put it in the context of public order. As I understood my learned friend here accepted the notion that the if you like the tranquillity of a residence

Elias CJ Yes

Arnold was a concept within public order

Elias CJ Yes

Arnold If that is accepted and Your Honours find it helpful to use the language of public order then I have no problem with it but if public order is trying to introduce some other notion as in other contexts that it may have then my submission would be that it is a dangerous thing to do.

Elias CJ What's the role of private sensitivity?

Arnold Well the private sensitivity I mean that's really what the Supreme Court was addressing in the Canadian case to which Your Honours were earlier taken.

Elias CJ Mm

Arnold And with respect the principle that articulated there is really very similar in my submission to what the New Zealand courts are doing when they say even going right back to *Melser* the behaviour must cause annoyance but it's not everything that is annoying that falls within the scope of the law. It's got to be such as to justify the intervention of the criminal law or in *R v R* that Your Honours looked at a little earlier the notion of objectivity was introduced and that's with respect the way to do it but one is not saying that because I as an individual am annoyed therefore that's the answer there's disorderly behaviour it must be such that applying some sort of community standard and that is what the court, the Judge in the individual case, will be trying to do, applying the community standard it's thought that this is, or it's considered that this is behaviour which one should not be expected to tolerate. So I would say it's an objective standard maybe informed by the circumstances of the particular individual but just because a particular individual finds it annoying doesn't necessarily mean that there is disorderly behaviour.

Elias CJ Well the problem with it and I won't interrupt you any more, the problem is that that comes very close to saying that disorderly behaviour is what strikes a Judge in a particular case as being disorderly.

Arnold Another way I could put that to Your Honour is that it's a matter of fact, circumstance and degree. You're absolutely right, that is exactly what the cases say and when one looks at the Canadian decision that we looked at earlier, we will have a quick look at it again when one looks at it, the English decisions you find precisely that point made but nobody says it's therefore inappropriate. All it is, is a recognition that at this end of the spectrum and we are dealing with the very most minor forms of behaviour you know when one's doing a hierarchy of

criminal behaviour, that a concept of this sort is necessarily going to require a balancing of interests in the circumstances of the particular case and it will be the Judge who does that.

Thomas J Well it can't be otherwise can it. Even if you adopt the "objective" test of say what the reasonable person would consider it's still the Judge's view of what the reasonable person would consider disorderly. It's in the nature of the system.

Arnold That's right and it's not a, it's not a – it's an issue that arises for Judges all the time that, that

Elias CJ And juries.

Arnold And juries yes. That there are just some concepts where at the end of the day, well take obscenity we've got in the materials the Supreme Court of Canada a decision on obscenity. What is it, the notion is community standards. And you know again that's a decision that the finder of fact whoever is dealing with it will have to make in the individual case. So I accept Your Honour that that's a characteristic but with respect would not accept that it's a criticism or defect, it's just inherent in the nature of it.

Tipping Although this is as you rightly put out Mr Arnold very low level stuff in a sense you can actually be arrested without warrant can't you for disorderly behaviour?

Arnold Yes you can. I mean the original suggestion was that you wouldn't be but

Tipping J Yes but they didn't change that.

Arnold No because in many of these situations you do need in fact to intervene to

Tipping J well quite

Arnold stop what is occurring if there aren't obvious alternatives. Now I mean I don't, I don't want diminish the significance of the invocation of the criminal process but I certainly do want to make the submission that when one looks at the hierarchy of these offences this really is at the very bottom, it does not have a term of imprisonment for the very reason that parliament understood the issues that Your Honours are grappling with. Understood it was difficult and understood that judges were going to have to do these things on a case by case basis.

Elias CJ I wonder though it is reviewing it in terms the conviction and the offence but the reality is as was recognised I think partly by the Select Committee is that this is a s which gives the police powers of control and I wonder whether that affects how it's to be interpreted and applied because the law is generally fairly concerned about choking off expressions, inhibiting publication, that sort of thing and I wonder whether that's something that also has to be considered. I mean that its not enough simply to say that the consequence, the ultimate consequences are pretty minimal. It is a, it is mechanism for stopping activity.

Arnold Because of the power of arrest.

Elias CJ Yes. The Policeman's friend notion.

Arnold Yes, yes. Well 3(d) was described as

Elias CJ Yes

Arnold that it's true and that's one of the reasons that you know led to this revised structure. But part of the answer to that must be surely that you know when we look at other jurisdictions like ours they all have this type of provision and it clearly does serve a purpose. It is clearly

Elias CJ Oh yes I don't think that that's a, I mean I don't think that's an issue. I think that you can accept that there is a place for a provision but what does it mean if it's going to be, if it's not going to be destructive of values that we recognise in our legal system and I'm not sure that the total answer is to say that the penalty is light.

Arnold Well I agree with that entirely but, but Your Honour the, the protection likes in the court. The court must consider in each individual case what are the range of rights at issue here and what is the appropriate balance. That's what the District Court Judge did in this case because as you recall he said look if you had acted in the way that you did in front of the police station there wouldn't have been a problem. But what makes it a problem is where you did it the way you did it and the way you targeted it. Now that's, so what the Judge has done is sit down effectively work through and achieve the balance if the Police had behaved inappropriately in his view then that would have emerged. That is the protection. That's what parliament saw it as being.

Tipping J But if we are to do it on substantially a case by case basis and I understand the force of that argument what sort of guidance can one give to police officers in the field that's going to help them to strike the right balance and not get over zealous or unduly wimpish? I mean it's a very pragmatic thing in the ;end as to whether you whip someone into

the cooler for the night or whether you just shrug your shoulders and say well this doesn't quite make it.

Arnold It is, it is a judgment that has to be exercised in the circumstances and in this case we, we have two examples of the way in which it was exercised. The police obviously were aware of what Mr Brooker was doing outside the police station, nobody interfered with him.

Tipping J But they thought it was intimidation. It's just a happy accident that it's also disorderly conduct case.

Arnold No, no what was going on outside the police station, the police did not intervene in that and that continued. In other words the police had made a decision that they weren't going to intervene there and that went ahead. They did intervene in the residential situation. So Your Honour is putting to me but, but how can the police make this work. All I am saying is that in this case which they have by making a decision that they're not going to do anything about it in the one context but they will in the other. And as Your Honours know the police guidelines on these sorts of things do attempt to develop that kind of principle and that will be drawn from I assume a whole body of individual instances developed over time.

Tipping J I was quite interested you invoke the notion of conduct which society as opposed to the individual shouldn't be expected to tolerate. I think I noted that point not expected to tolerate, now that actually I think is quite helpful. Does that come from any authority or is that just, and I am not depreciating it if it simply comes from you Mr Arnold, please don't think that for a moment.

Elias CJ I recorded it as this is behaviour which one should be expected to tolerate and I wasn't sure whether it was a reference to

Tipping J Oh I interpreted it as, because it

Arnold society yes

Tipping J it was linked, it was linked with community

Elias CJ society yes

Arnold yes

Tipping J the community standards.

Arnold Absolutely Your Honour.

Tipping J Yes. There's a link I don't think there's any doubt about it. Well certainly we couldn't make it subjective. But does that have a pedigree is that a submission that you're making.

Arnold Well it doesn't have a pedigree in quite that language of expecting to tolerate but it certainly does have a pedigree in my submission going right back to *Melser* because when you look, when one looks at *Melser,* that is really what is being said. That there's

Tipping J I like it much more than right thinking people and all that stuff.

Arnold Yes, yes

Tipping J It's a, it brings in societal values and makes the point that there has to be a degree of interference, annoyance or whatever it might be before you get to the idea that society just wont tolerate this.

Elias CJ But surely it begs the question. Because the question is why, you have to articulate a reason why this is not acceptable and that's the area that we are in, and that establishes the limits to the, to the offence if it isn't directed at the mischief that this provision is designed to achieve.

Arnold I'm just trying to understand. The language of tolerance was an attempt to develop if you like a general proposition. How it works in a particular case is I think what Your Honour is asking what is it about a particular case that makes one, makes the court say well this falls within in you know what you would expect people to tolerate and this goes outside it.

Elias CJ But surely you have to have some conception of why people shouldn't be expected to tolerate it. Is it because it has a public order dimension, is it because it's going to disrupt public order or is it because this is too much as I think one of the cases said. Well I think in this case they say.

Arnold Yes. But that gets back to looking at the particular rights engaged in the particular case and making an assessment about how those are impacted. So to take this case and one of the valuable things that in my submission one can draw from the US cases is that they do put the value of peace in the home in a particular context and talk about the, in the particular context that they're dealing with, the extent to which the law should recognise that. Now in this case that then would be one of the relevant interests. The other relevant interest I would argue is the right to be free of unwanted speech, the limit on the ability to remove yourself when you are in your home which most people will have when they are facing ordinary protesters. They can simply go away. Now those have to be weighed up against the other rights which have been

identified. The right to free speech and right to assembly to the extent that that's relevant.

Tipping J Sorry, is there one very simple way of putting it in the sense is that freedom of expression is matched by freedom from expression?

Arnold Well in some cases.

Tipping J I know it sounds little cute but in a sense that's what you are saying isn't it. You have a right to be free of this sort of expression?

Arnold Again there is a real danger with trying to lay down hard and fast rules in this sort of situation. Let me give you another example. Take the *Pepsi Cola* case, the picketing that occurred round the building may I suppose have been disruptive, disrupted for some of the executives working the building and they may have preferred to not hear all the carry on outside but it may well be that the right to picket outside the office of the employer is regard and to speak in that context is regarded as more significant that the right of the executives inside to be free of unwanted speech. All I'm saying is that it is which is why I took exception to my understanding of my learned friend's point that there was this protected class of protest that in any given set of circumstances the weight one might give to the interests will vary. So you can't say well there is an absolute right to be free of unwanted communications. There clearly isn't. We're all bombarded with unwanted communications. Again it's just where the, where the boundary is in the particular case. Your Honours I'd like if I may to quickly take you to some cases I don't want to dwell on them a great deal but I do want to draw from them if I may some principles. I can deal quickly with two Canadian cases. The first is here in bundle three. First in relation to the *Pepsi Cola* case could I just correct an impression that Your Honours may have gained from what my learned friend said. My learned friend said that the case stands for proposition as I understood it that secondary picketing is lawful and that is true providing it doesn't involve tortious or criminal conduct. But the point I wanted to make was that the injunction which is set out at volume 3 p107 of the volume the injunction in that case restrained the picketers from picketing, watching or besetting and so on the residences of the plaintiff's employees and that's at (iv) of that injunction. And although there's much discussion throughout the case about secondary picketing and the principles to be applied when it came to the question of picketing at the homes of the management and other employees the court dealt with that quite quickly and that's at p127 of the volume of 203 of the case, bottom righthand column. With regard to the demonstration outside the homes of *Pepsi Cola's* management or personnel we agreed with the Court of Appeal that the injunction was well founded since the conduct was tortious. And ;then it is simply, the court simply adopts what was said in the Appeal Court by Justice Cameron. I just wanted to draw attention to that, that although

secondary picketing was permitted that it was accepted that a home is in a sense slightly different. The second case if I could just take Your Honours back to is the *Lohnes* case which is a little earlier in that volume at p97 commences – now I just wanted to draw attention here Your Honours to the factual context because this is conduct which occurred between homeowners who were neighbours across a street and one of them, the defendant, got irritated with his neighbour's habit of collecting various bits of equipment that made an awful lot of noise and went out and shouted abuse at his neighbour.

Blanchard J Sounds like Bert Munro.

Arnold So that's the context in which this discussion is taking place. It is activity occurring from one residential property affecting somebody in another residential property across the road. There's no suggestion that, that this case is not the proper subject of this type of statutory provision causing a disturbance by using insulting or obscene language. Now the provision is set out at para 5 at p98. Everyone who not being in a dwellinghouse causes a disturbance in or near a public place by fighting, screaming, shouting, swearing, singing or using insulting or obscene language. And what happened in this case as you can see is that the defendant went onto his veranda and shouted obscenities and Justice McLachlin describes him as revealing and impressive command of the obscene vernacular. Now the issue before the court or one of them was really the question that Your Honour the Chief Justice raised, the question of sensitivity. In other words do you look at this from the perspective simply of seeing whether a particular individual has been insulted or is there something broader, I'm sorry something further that you have to find described as an external manifestation of disturbance and the Justice McLachlin in para 11 and following goes through the various cases and comes to the passage that my learned friend referred to you at p100, McGechan, Chief Justice of Nova Scotia, his reasoning in *Swimmena(?)* where he makes two important observations, Justice McLachlin says, firstly disturbance is an objective term relating to noise and confusion created by the specified means, but second is the assertion that whether a disturbance has occurred it is a question of fact the depends on the degree and the intensity of the activity complained of and on the degree and nature of the peace which should be expected to prevail in the particular public place at the particular time and that picks up some language which you will see earlier up the page from that extract from the decision of Justice McGechan and I think you referred to that earlier and then the reference to the unlawful jangling of the street musician at an urban intersection at noon becoming criminal if it is three in the morning. And then Justice McLachlin goes on at para 17 to say well however it is that the Canadian courts have dealt with this as a matter of theory when one turns and looks at the way in which the law is being applied, it's generally being applied in a situation where there has been an overt manifest disturbance that has affected people's conduct. And Her

Honour gives the example from *Swimmenma* the accused fighting and shouting in obscene language in front of his residence interfered with the usual activities of a neighbour as well as her children the Judge from her testimony that she had to return to the bedroom from an episode to calm the children down. So again it's time impact in the private residential setting but within the broad concept of public order described as involving residential tranquillity. And then the Supreme Court in the ensuing pages goes through the policy considerations and again notes the underlying policy which supports the approach which focuses on the manifestation rather than simply on the individual reaction and you will see that discussion at p102 on the righthand column of 135. The narrower public disturbance test permits a more sensitive balancing between the countervailing interests at stake. Tests for disturbance in or near a public place under s 175(1)(a) should permit the court to weigh the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time. Now with respect Your Honour there Justice McLachlin is going right to the heart of what I was talking about earlier. That it does an involve an assessment in the individual case taking regard of the competing interests.

Thomas J Can you just pinpoint that reference again?

Arnold That's I'm sorry Your Honour it's at p102 of the volume and it's at p135 of the actual case at the top of the righthand column there. There's a general heading policy on the lefthand side and then Her Honour goes through some policy considerations and it's the top half of the righthand column.

Elias CJ I'm just wondering how, what we are to take of this given the fact that the offence is one of causing a disturbance in or near a public place. Whereas ours focuses on the conduct, on one view divorced from its effect, that's not the case in the Canadian legislation.

Arnold That's true but

Elias CJ Unless you accept that it does have to create a disturbance in a public place.

Arnold It has to be disorderly Your Honour.

Elias CJ Yes

Arnold And really I'm going to resist trying to come up with some other formulation of it because you just begin to tie yourself in a knot with respect. The reason I'm referring to this is that it requires a process which is precisely what the New Zealand courts have said is required in the disorderly conduct arena. That is involves an assessment in the

facts of the case in the light of the interests at stake. Now this is different language but precisely the same approach must be applied and it's really, I am attempting to meet Your Honour's earlier point that isn't this in a sense unsatisfactory. No with respect it isn't. It's what, I'll take you precisely

Elias CJ I don't find the Canadian, I don't find the Canadian position as it's laying here unsatisfactory.

Arnold I thought Your Honour put to me the, the proposition that disorderly behaviour is a control mechanism, it isn't unsatisfactory.

Elias CJ Oh no I was raising that in connection with your argument that disorderly behaviour is at the bottom of ;the criminal peak.

Arnold Yes

Elias CJ And I was pointing out that it actually has, that the sentence that can be imposed is not the, is not a sufficient consideration.

Arnold I'm sorry I thought Your Honour had some concern about if you like the open-ended nature and the fact that the court

Elias CJ Oh well I do, yes, yes I do.

Arnold But all I'm saying is that that's those same characteristics of open ended

Elias CJ Yes, yes.

Arnold nature that are present here.

Elias CJ Except that what the court is looking at here is the objectively assessed fact of whether this has caused a disturbance because that's what their statute requires whereas ours could be quite, unless you read into it, the public order limitation which arguably is there in *Lohnes* judgment in particular and *Melser* you're pretty adrift from objective elements.

Arnold Well the objective element though is the

Elias CJ Bad behaviour by right thinking in the mind of

Arnold Well you may be sceptical of the language of right thinking people and a trip down memory lane for me reading all these cases because I thought it was outrageous that that language was used. But that was an immature reaction Your Honour from a young academic because

Elias CJ I thought you might have been quoting a paper of mine when you said that trip down memory lane, I have been known to mention mothballs.

Arnold But the point that I was I going to make is that right thinking man or woman or person is simply a technique for describing the

Elias CJ Yes

Arnold that you're trying to capture something beyond the individual sensitivity of the person. You're grasping for a sense of a community standard, a community norm, a level of tolerance or whatever it is. But it's something out there and although ultimately the Judge has to reach that decision I mean it is a rational process and there is a discipline in that to think, to try and think and about well where do I think the level of tolerance should be pitched in this particular case and that's really all the District Court Judge was doing. Anyway and then the court goes on here to talk about the context and to say that you know in one situation something may be objectionable and in another it may not it depends on context. But the important point is that it certainly seems to be accepted that the conduct here which was aimed at a neighbour and affected the neighbour in his house would nevertheless have met the test everything else being equal, it didn't because of the additional element the court required. On the same theme could I quickly take Your Honours to two English cases one of which you have had a brief look at but I do want to refer to here in volume 2 of the bundle, prepared by my learned friend. And the first case is we quickly looked at, that's at p72 of the volume. This was a case which arose out of a protest at a RAF base in England it was a campaign directed at the American military and American policy. It involved protesting and defacing the American flag and stamping on it in front of a vehicle which was carrying American service personnel. And the case raised issues of free speech. They are set out at p73 of the volume at para 7 you will see the issues described there and you will see the s that was at issue in the case on the righthand column on p73 at the top of para 9. s 51 of the Public Order Act, a person is guilty of an offence if he uses threatening, abusive or insulting words or behaviour or disorderly behaviour. So that's the basic offence. And then there's a defence. That he had no reason to believe there was any person within hearing or sight who was likely to be caused harassment, alarm or distress or see that his conduct was reasonable. Now the reason for referring to this of course is that here the definition of the offence builds in explicitly the concept of what is reasonable in the circumstances. So the statutory definition envisages the very process that the New Zealand cases envisage and that is envisaged in the Canadian case that I've just taken Your Honours to. Now in dealing with this I don't want to spend a lot of time on it but if I could just quickly ask Your Honours to turn to 75 of the casebook para 25. So there the Lord Justice, sorry it's Mrs Justice Hallet, says that she agrees with Mr Heath who was arguing the matter for the Director of Public Prosecutions that ss5 and

6 of the Public Order Act contain the necessary balance between the right of freedom of expression and the right of others not to be insulted or distressed. And Her Honour then goes through that, refers to *Brutus v Cousins*. Makes the point at the end of para 26 that the question of reasonableness must be a question of fact before the Tribunal concerned taking into account all the circumstances. And then Mrs Justice Hallet goes through the facts at para 28 and following and concludes at the end that the conviction couldn't be upheld because the trial court hadn't addressed all the relevant factors. But it's accepted that in a civilised society there must be a balance between competing rights of those who may be consulted by a particular course of conduct and those who wish to register their protest on an important matter of public interest. The problem comes in striking that balance between due ?? and the presumption in the accused's favour of the right to freedom of expression. So again just to make the point that the balancing process as contemplated by that provision in individual cases and carried out of course by the English Courts. And then in *Jones* I can be very quick with that at p23 of the casebook. This is a judgment of the House of Lords and this is the *Stone Henge* case and this involved a group of persons who gathered to protest at Stone Henge on the grass verge by the main road up there and the question that arose was, concerned their right to do that. There were two dissentients three in the majority and the majority found that there was a right to assemble and exercise right of free speech on a public highway providing that that was done reasonably, consistently with the right of others to use the highway. The argument had been made that highways are there simply for passage and therefore this type of activity could be prohibited. The majority said no, highways have a broader dimension to them and the mediating concept was the notion of a reasonable use in the circumstances. Now there are a number of lengthy judgments I don't want to go through them all but Your Honours will find that sort of point made by Lord Irvine at p27 of the volume 264 of the report of (b) where His Lordship is talking about the test which he favours and he makes the point that it would not permit unreasonable use of a highway nor use which was obstructive. It would not therefore afford carte blanche to squatters and other uninvited visitors and then over the p265 just below (c) I conclude therefore the law to be that a public highways is a public place which the public may enjoy for any reasonable purpose provided the activity in question does not amount to a public or private nuisance, does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass within these qualifications is a public right of peaceful assembly on the highway.

Blanchard J What's the relevance of this?

Arnold Again it's just to make the point at again at para (e) in every case it is for the magistrates to decide whether the use of the highway under consideration is reasonable and not inconsistent with the primary right.

Now all I'm trying to do is to emphasise Your Honours that that fundamental approach which is what the New Zealand courts said should be taken to disorderly behaviour is precisely the type of approach that the English and Canadian courts have adopted in comparable contexts. Now I can be very brief now in the reference to the final two cases that I wish to mention Your Honours and they are *Frisby* and *Hill* the decisions of the US Supreme Court. If I could ask Your Honours to take out volume 3 of the appellant's, sorry my learned friend's casebook. And Your Honours will be familiar with the case that involves picketing on a public street outside the home of a doctor who performed abortions. And what was at issue was at issue was an ordinance which sought to make unlawful any person engaged in picketing about the residence or dwelling of an individual in a particular township. Now the point of referring to this is simply again to make the point that the Supreme Court looks at the issues in terms of identifying the interests at stake in attempting to achieve a balance between them. So that when one looks at p163 at para 3 under the heading II the court makes the point that the ordinance operates at the core of the First Amendment by prohibiting people from engaging and picketing on an issue of public concern. So right in free speech territory but then the court goes on to say that there are limits on free speech. It looks at the question of place and says of course streets are a traditional public forum.

Thomas J You're at what page, I'm sorry I've lost it.

Arnold Sorry I'm sort of – I don't want to read it all out but I'm skimming it. It's 163 and I'm at p428 of the volume.

Thomas J Thank you.

Arnold And that's in the righthand column talking about limits on free speech and then focusing on place. And then you will see over at the righthand column at 429 about a quarter of the way down, the conclusion is that the streets of Brookfield are traditional public fora. Now then turning over the page to 164 of the volume

Thomas J I see though at p163 that it is said that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighbourhood.

Arnold No that's, that's so and

Tipping J And then a very important I would have thought observation that the location doesn't alter the test but it may alter the application of the test.

Arnold That point we will come back to in the analysis which follows because the court at 164 notes and this is at the lefthand column on p430 that

the ordinance is content neutral, my learned friend talked about that earlier. And then at 431 just above 1(d) it talks about the nature of the ban which the court interprets as providing, limiting only focused picketing taking place solely in front of a particular residence. That's the nature of the ban as the majority interpreted it.

Thomas J Really in a way it's the judiciary telling the legislature that there are no absolutes and if you enact an absolute that is you can't picket in a residential area we will read it down so that it's no longer absolute. That's what in effect has happened here.

Arnold Yes by, by putting in the qualification that the attention

Thomas J Must be to a single dwelling

Arnold to the focused picketing taking place solely in front of a particular residence, yes there is a reading down of it. The point I wanted to really draw out of it is the point that then the majority develop it 164 the righthand column in 431, we readily agree that the ordinance preserves ample alternative channels of communication must move onto inquire as to whether ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself, the protection of residential privacy. And then the court goes on. The state's interest in protecting the wellbeing, tranquillity and privacy of the home is certainly of the highest order in a free and civilised society. And then at the bottom of the page at para 10 one important aspect of residential privacy is the protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech they do not want to hear, the home is different. And then the court goes on to talk about the special benefit the privacy also does enjoy within their own walls that the state may legislate to protect. And then the court goes on to develop that analysis in the context of the interpretation of the ordinance that was applied. And the very narrowly directing picketing at issue in this case fell within the prohibition and the court said it was an appropriate prohibition. And if I could take Your Honours to a passage at p433 in the lefthand column. Here in contrast the picketing is narrowly directed at the household not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public but to intrude upon the targeted resident and to do so in an especially offensive way. Moreover even if some such picketers have a broader communicative purpose their activity nonetheless inherently and offensively intrudes on residential privacy the devastating effect of target picketing on the quiet enjoyment of the home is beyond doubt and then again at para 12 the court returns to the captive audience sort of analysis and says that again those who are, it describes as trapped in their homes can be protected from this sort of intrusion. Now the point of referring Your Honours to that material is simply to show that there is a legitimate interest in residential privacy that can properly be

described as an element of public order which I think my learned friend accepts, but it is an interest which is one which the state may legitimately protect. So that when one comes to do the weighing or undertake the weighing in a case like this it is an interest which can be identified as it was by the courts below.

Tipping J Mr Solicitor can I ask, you focused of course on the majority judgments can I ask you your view of what is said at p437 of the report by Justice Brennan who acknowledges the interest you've just been referring to but says in the middle of the lefthand column that it's critical to specify the precise scope of this interest and goes on to indicate that for him, for the interest to be breached there has to be an unduly coercive intrusion. I suppose that given we are looking at judgments that are only of persuasive effect and we have to distinguished judges on either side in this particular case I would be interested in your observation on what Justice Brennan is saying there at 437? Sorry have you got the passage?

Arnold Yes I'm just, yes I've marked the passage.

Tipping J Suggesting a slightly higher standard.

Arnold Well I must say Your Honour I was just reflecting on it because I must confess I perhaps misread it or misunderstood it, but doesn't it go to this point that it's very difficult to say and I'm not trying to submit in the context of this case that all protest occurring in a residential area is going to be disorderly. That there may well be protests occurring in a residential area that will not be, fall within the description disorderly conduct. So for example if Mr Brooker had erected his sign on his car and or just walked down the neighbourhood carrying the sign and so just walked past the house and kept on going perhaps there would be no issue. I am certainly not trying to argue that every type of what you might call residential protest would necessarily be disorderly and perhaps that's really what the point that's being made here.

McGrath J Do I take it from that you're not concerned with the fact that neighbours find out that Mr Brooker considers that the constable was in breach of the requirements of the law in relation to search warrants? It's really the noise that's the fact that you're putting emphasis on?

Arnold Well it's not simply the noise. In some situations the mere fact that people park themselves at your gate – let me give you a different fact situation whether this casts further light I'm not sure but say a group of five or six men who support the fathers have rights movement go to a residential property where there is a woman who has obtained custody of her children and stand silently outside holding up placards and things of that sort. That maybe a situation where one would say there was disorderly behaviour because of the nature or the implicit – it's

getting dangerous because I am trying to find another form of words to describe it. But the particular circumstances can certainly be seen as pretty threatening and upsetting for the occupant of the house.

McGrath J Yes

Arnold So all I'm trying to say is that I'm very reluctant with respect to come up to accept a blanket proposition that in all situations this or that will be the position because with respect I don't think one can do that. There are any number of factual situations and different elements will weigh in different ways in different situations.

McGrath J Is it fair to say that the elements that are at the more serious end of the scale are more likely to be categorised as disorderly conduct will probably have a coercive element to them, coercive being Justice Brennan's word including the case that I though you were mentioning where a litigant was being picketed.

Arnold Yes ah is that, well by coercive does Your Honour mean intrusive one of the points made by Justice Hardie Boys in *Meseder* was that there had to be this unwanted intrusion on the rights of others if that's what's meant by coercive

McGrath J A serious intrusion

Arnold Yes

McGrath J if I can come back to the language of *Melser*

Arnold Yes

McGrath J the extremes that *Melser* was suggesting

Arnold Yes

McGrath J Putting it at one end of the scale.

Arnold. Yes. Yes, yes well that yes I would accept that. I'm sorry Your Honour I'm not trying to be unhelpful but it just in an area in my submission where it is very difficult to, to be absolute because the variety of situations are, are so wide.

Tipping J Are you in effect arguing, Mr Solicitor, that we should not endeavour to produce an all embracing test that is other than the statutory word?

Arnold Well Your Honours as we have seen it really is extraordinarily difficult. What, what occurred in Australia as I read *Coleman v Power* is that a notion was introduced of the behaviour having the capacity to create a breach of the peace, something of that sort, but one can't do that in the, in my submission in the New Zealand context given the careful gradation between s 3 and s 41(a). So once you accept that one then has to think well what, what description could one give. Now the Court of Appeal has attempted in the case of *Queen v R* to state some general principles and in some ways they're helpful because they talk about objectivity and make those sorts of points but even there when one comes to analyse what the court says one can think of situations that wouldn't necessarily within it within the description and yet would properly be as characterised as disorderly conduct. So yes sir I do submit that it is extremely difficult to come up with something that's going to be

Tipping J Well it maybe difficult

Arnold helpful and comprehensive.

Tipping J It may be difficult but are you inviting us not to try? Because this seems to me to be quite significant because if we don't try we just simply say disorderly means disorderly, it will be one of the shortest judgments on record.

Arnold I, I think one

Blanchard J Justice Turner did say that

Tipping J He did say that but then he went on to elaborate.

Arnold Yes

Elias CJ Sorry, what was this.

Tipping J Exactly. Justice Turner in *Melser* was it.

Arnold Yes, said disorderly means disorderly.

Tipping J Said disorderly means disorderly.

Blanchard J No well he actually said disorderly conduct is conduct that is disorderly.

Arnold Yes

Tipping J Yes

Blanchard J But then

Tipping J he went on to elaborate

Blanchard J he went on to elaborate

Arnold it's in effect that the House of Lords said in *Brutus* precisely that. But with respect one can go further. One can say you know for the guidance of courts below disorderly conduct charges are going to arise in a range of situations which will engage a range of rights. They will often engage for example free speech rights and things like this. Here's the process which could be followed in dealing with those. You should identify the rights and attempt to balance them and so on. So one can usefully describe if you like the analytical process by which the court is to approach the problem. But if what Your Honours are putting to me is that you should try and come up with some other form of words that tries to capture what is at the heart of disorderly conduct then with respect I think that's very difficult

Tipping J I understand. Thank you.

Arnold and something that in other situations the court's been unwilling to do. Statutory language is there, it speaks.

Thomas J But you can add semblance of objective test by saying that it's not what the judge's predilection might be or the individual who's been annoyed might be but rather the reasonable person.

Arnold Absolutely Your Honour. That we're, but again in my submission that would go to approach.

Elias CJ But what is to be disordered?

Arnold Sorry?

Elias CJ But what, I accept one shouldn't try and find synonyms for a language like this but it still leaves the question what order are we talking about? Is it the composure of an individual or is it the, is the public peace. Is it public order?

Arnold It's public order

Elias CJ yes

Arnold if one defines it in that broad notion

Elias CJ Yes

Arnold Using the idea that there is a level of disorder that people should not be required to tolerate. That's the underlying concept.

Elias CJ Yes. And

Arnold I did want to refer just

Elias CJ Before you do, sorry just because you've been interrupted, it occurs to me is it any part of, of your argument that the person being addressed by this form of speech is a relevant consideration? A vulnerable person?

Arnold The courts have certainly treated it as relevant yes. The fact that it was a police officer in *Coleman v Power* was seen to be relevant by the court and a number of the judges talked about that.

Elias CJ I thought in *Coleman v Power* it was relevant because it was a public official and therefore it was political.

Arnold No relevant also, a number of the judges make the point that one would, because remember the notion was introduced of causing a breach of the peace and the point was made that because it was a police officer one would expect him to exercise self control and he would not be provoked by that sort of conduct.

Elias CJ Oh I see, yes.

Arnold To react in that way.

Elias CJ But it's not part of your argument that police officers are, are vulnerable so that the confrontation in a private residence of a police officer is particularly disorderly?

Arnold No what I'm saying about police officers and any other public official is that they are entitled to the same rights as any other citizen when it comes to the private home.

Elias CJ Yes. Yes thank you.

Arnold Even though and in fact a case, the decision of Justice Blanchard's that was mentioned earlier, the point was made that the particular activity that occurred there to a policeman because the person was a policeman

would not really have caused insult, it was in a sense part of the daily activity of policeman to put up with that sort of stuff on duty.

Blanchard J It's really very difficult to avoid factoring in the person to whom offensive behaviour is directed. As I think I've said in that case, what might be – I didn't use the word – but tolerable between two youthful individuals might not be tolerable from a youthful individual to an elderly person, particularly an elderly woman.

Arnold Yes

Blanchard J So I still I think would be of the view that with offensive behaviour you have to factor that in. I'm not quite so sure the extent to which one if at all factors it in for disorderly behaviour. Whether that's a much more objective thing.

Arnold It may be that the, the answer is to say that to avoid the, the problem that Your Honour the Chief Justice has raised about the sensitivity of the individual simply to say that looking at it from a community standard perspective or looking at it from the perspective of what society might expect different groups to tolerate that the expectation of tolerance may be greater for some occupational groups than for others although in order words we may, we may build greater protections around the elderly than we do around the young. I mean there is room in that notion of community standard to reflect different levels of tolerance depending on different situations without saying we are simply giving effect to the sensitivities of this particular victim.

Elias CJ I wasn't really talking about sensitivities I was talking about the vulnerabilities and whether but, but I think you've sufficiently answered that.

Blanchard J The other side of the coin.

Elias CJ It is the other side of the coin. Yes.

Arnold Just on the question of public order Your Honour could I mention that in the respondent's bundle of authorities under tab 6 there is the commentary on the ICCPR that my learned friend took you to but I simply wanted to make the point that article 19 which protects freedom of expression has these exceptions and one can see them under tab 6 at p525 of the extract at the top of the page, article 19(3) permits freedom of expression to be limited by measures provided by law and proportionately designed to protect various things including public order. Now the volume then goes on to talk about public order and it has a very brief definition at page 530 at paragraph 18.29. Public order may be defined as the sum of rules which ensure the peaceful and effective functioning of society. And I mean in a sense in the Supreme

Court decisions *Frisby v Hill* it's that kind of notion that's talked about when the court talks about the tranquillity of the home and the right to be free of unwanted communication. It's that sort of sense.

Tipping J Do you accept, Mr Solicitor, that it's a valid approach without prejudice as to how one actually works it in to be influenced by the fact that this offence falls within a list of offences that are introduced by that heading, offences against public order?

Arnold It's a little difficult to know how much one can draw from that. I mean it obviously I accept Your Honour that in terms of the Interpretation Act one can draw whatever one can from that, but when one looks at the offences which follow and it attempts then to articulate or relate back to that heading, it's not easy.

Tipping J Well in some instances it's not easy but when the very word which captures the offence "disorderly" contains the concept or order. I would have thought that what one can reasonably say that what we're talking about here is that it's disorderly in a sense of disrupting or interfering with public order. I just feel that that's

Arnold yes

Tipping J essentially what it must be driving at. Not sort of, it's not there to regulate private, private dealings so much as it's threatening the orderly wellbeing of society if you like.

Arnold As long as one interprets that to in a way that my learned friend seemed to agree was appropriate, namely that like the tranquillity of the home, fell within the concept.

Tipping J I know he did tend to accept that but I'm not entirely convinced at the moment, that's why I'm putting it to you.

Arnold Well but then if one then has to think about the logic of that position in my submission it doesn't actually make any difference in this case anyway given the findings that I took Your Honour to initially that the singing was sufficiently loud to impact on others beside the constable, that is the neighbours and the people across the road in the school. So there is there a disturbance of public order in that broader sense. But let's remove that possibility and, and really assume we have this sort of case that Justice McLachlin dealt with, with one person standing at his front gate hurling abuse at the neighbour who was at the gate over the road there. Now with respect it's going to be an odd outcome if that does not constitute disorderly behaviour but if the victim of all this abuse steps outside the boundary of his house onto the footpath it does constitute disorderly behaviour. If you look at it in terms of the, of the social values that you're trying to protect they're the same and that is

that there simply is a, a way of behaving that is regarded as appropriate with all due levels of tolerance within our society and that, that the notion of public order I would submit can be affected and can be disturbed and disrupted by conduct that occurs simply between one residence and another. In fact the way the law is drafted does reflect that.

Elias CJ But the Canadian example is a case of what in *Coleman v Power* I think a couple of the judges referred to fighting talk. I mean it was almost the paradigm of what is disorderly behaviour and has always been understood to be disorderly behaviour if within view or hearing or whatever of a public place. The example you just gave about noise being heard, I mean you can't take that too far because if it doesn't have the element and some of the cases talk about provocation, if it doesn't have that element then my neighbour who turns up his stereo set is behaving in a disorderly way if he can be heard on the street and they can. So there's got to be something more than that. Not just an audio thing.

Arnold Well as I have said I've submitted that in this case there is more. I mean your neighbour's not in a public place of course.

Elias CJ No but I was saying if it went out onto the street.

Arnold Mm

Tipping J If they're yelling at each other across the front fence if you like and it's within view of a public place I've always understood perhaps this is instinctive more than, that the essence of it was that it was likely to provoke if you like a general public reaction. Not just one on one fiendish rows.

Arnold Well if that's test that one wants to apply I mean again one has to ask what, in what way could the subject of this sort of targeted behaviour react. What can they do? What is our expectation of them, and was the proper course for the constable to really remain in her house for such time as this activity continued until Mr Brooker decided that he'd had enough. Are we really saying that we accept that people in the constable's position, we expect them to tolerate this type of conduct because that's in effect what Your Honour is putting to me.

Tipping J Well that's another way of expressing it and you've used that concept yourself which is I think the ultimate question is. But it's this public dimension. Is it so threatening to public order if I suppose if two people have a row across the front fence that's not really our case, your real point is that the effect on this woman, constable, should not be expected to be tolerated. Society would not or should expect her to live with this.

Arnold That's so but it has a broader dimension and I just wanted to remind Your Honours again because of the, of the finding that I think I drew attention to at the outset at paragraph 31 of the District Court Judge's findings. His protest included making sure that the constable was there. It was intentionally designed to annoy or harass her. He wanted to shame her in front of her neighbours and he intended not only would she be affected but neighbours if they had been there. That was and that is based on the evidence that Mr Brooker gave. That he wanted to shame her in front of her neighbours. So it had a public dimension. That's what he was trying to do. With respect it is quite artificial to say because she happened to be in her home therefore it loses its public dimension or it's public order dimension.

Blanchard J Did it become disorderly the moment he put down the sign and started singing?

Arnold Your Honour one of the American cases makes the, the court makes the observation that you know it's very difficult to answer all of the hypotheticals that, that one might raise and I mean I don't, I don't know what I would answer to that. That what the court is dealing with is pretty clear evidence about what happened on a particular occasions. The assessment that could be made is in my submission whether the District Court Judge has gone about dealing with that in the right. Has the District Court Judge recognised that involves identification of a range of interests and balancing of those interests. If the District Court Judge has adopted that fundamentally correct approach the question is that given the evidence was this a decision that was capable of being reached. The Court of Appeal said it was and in my submission that is right. Now what the outcome might have been if one had varied one or other of elements of the facts is difficult to say.

Tipping J Mr Solicitor

Arnold They may have made a difference.

Tipping J This business about the District Court Judge correctly directing himself, if we're going to get down that road I think there would be a number of matters that would need to be taken into account and within the very paragraph to which you've just drawn our attention the opening words are "what is orderly and reasonable conduct will depend upon the circumstances". So he's really brought in at least collaterally a test of unreasonable conduct. It was unreasonable of him to, I mean and frankly that's not all of it.

Arnold Ah well with respect if one is talking about the right thinking person, what is one talking about other than a standard of what is reasonable or tolerable within a particular, at a particular time in a particular context?

Tipping J Well

Arnold With respect his, the District Court Judge has gone right to the point.

Tipping J Well I'm not sure that he has by linking the concept of orderliness with reasonableness.

Arnold Well I can only repeat, I don't understand that really there is any difference. The Court of Appeal in *R* talked about an objective approach to this and there may be a variety of different words that one could use, but when with respect one analyses what the District Court Judge has done he does recognise that there are legitimate interests of free speech here. He recognises that Mr Brooker went off and exercised them in another location and there was no particular problem. What he has clearly done has weighed up the right to be left alone and the right to have a peaceful occupation of the residence and he has decided that in this set of circumstances those rights prevail. With respect that is a decision which is capable of being reached.

Tipping J Yes well at paragraph 5 on p35 also strikes me as being at least debatable. Behaving in a disorderly manner is behaving in a way that right thinking members of the public would consider inappropriately annoying to members of the public. But I don't know that

Elias CJ Is that a test that you, I was going to ask you whether that's a test that you accept?

Arnold Well the right thinking members of the public is the language of *Melser*, it also talks about annoying but

Elias CJ Yes but there's more than annoying in *Melser* isn't it. In fact that was an additional requirement that Sir Alfred North imposed. First there had to be serious disorder.

Arnold There's the notion that it merits the intervention of the criminal law and I have assumed that the word "inappropriately" was, he's not saying it simply because it's annoying. He's using the term "inappropriately" and maybe it's too compressed, but he's trying to capture the other flavour. But remember Your Honours that this

Elias CJ Sorry but on that test you think that test is adequate do you?

Arnold Well it's not the way I would have stated it, no.

Elias CJ You see that's the way he's approached it. He says that's the test.

Arnold Well with respect the learned District Court Judge does come back to the whole question of the approach. At paragraph 22 he takes the summary from *Wainwright*, *O'Brien v Police*, he talks about at para 25 and then takes the lengthy statement of Justice Henry from the *Police v Christie* which was largely approved in *Melser*.

Tipping J Well the problem is that he maybe quite close to the mark in places but in other places he may be thought yet somewhat further away from the mark. So I was only as it were induced to make this, to enter into this as you have appropriately said well as long as he directed himself properly it was within his, you know it was within the sphere of a properly exercised judgment. But I'm not entirely convinced that he did direct himself properly. He certainly didn't direct himself consistently. And this is, I know it was an oral judgment and I recognise all of that but I'm not sure. We have to set this, we have to set the precedent don't we.

Arnold Oh yes, yes. I

Tipping J Unfortunately I am not, I am not entirely comfortable with some stuff in here as setting the precedent putting it quite bluntly.

Arnold Well certainly the Judge deals with it at more or less length in different places but taking the judgment as a whole certainly in my submission that it's quite clear that His Honour did understand the correct principles and has applied them although I accept at once he hasn't sort of set out – here are the interests on one side, here are the others, how do I do the weighing. He hasn't set out in that explicit way but it's implicit in there that

Tipping J yes I don't think that's the problem. It's not presentational it's substantive if it's anything.

Elias CJ So on this para 5 you don't accept that that's, you don't suggest that that is an adequate test itself?

Arnold I think if it had been me I would have wanted to spelled out what I meant by inappropriately.

Elias CJ Mm

Arnold I just, it's not clear precisely what that is trying to capture. It maybe fine if it has a particular content, if it doesn't it may be problematic. So I guess the answer is in order to avoid any misunderstanding I would have expressed it differently but I don't necessarily, so I think it's an unhelpful summary. I don't know if it's a wrong summary is what I'm trying to say. Because I just don't know what, what the word

"inappropriately" is intended, not meaning it's intended to bear here. I'm conscious of time Your Honours and I can pretty quickly draw to a conclusion. We did hand up the case of *Hill* given time I won't go into that in detail.

Elias CJ Sorry which case? *Hill*?

Arnold That was the case of *Hill* which was handed up, the other Supreme Court case.

Elias CJ Oh yes. Yes.

Arnold And my learned friend took you to it. All I want to say about it is this was a case where there was a ordinance which set some boundaries outside a medical facility within which people who were protesting in the vicinity of the facility were not allowed to go and they had to keep eight feet away from people who were going into the facility to have medical treatment. And the reason that the case is referred to Your Honours is that it is very much recognising this right to avoid unwanted communications. So it accepts the right to protest but says that people can't force you, can't force on you communications. Now this of course was in a public place and people going to a particular facility to use the services there and their rights were protected by this no go zone created around them. And of course that interest is even stronger when you're talking about a residence, that right to be let alone. Now the only other observation that I'd make about the case is simply to say that in the case of *R* which you recall was the case disorderly behaviour case where the defendant was in the caravan photographing the schoolgirls, there was no disturbance there of course. He was hidden away and the young women involved were not aware of his presence. But it was

Tipping J Was his conduct found to be disorderly or was it offensive?

Arnold Offensive.

Tipping J Offensive. It was offensive.

Arnold Offensive yes it was. I think it was.

Tipping J Yes because he applied for leave to appeal to this Court.

Arnold That's right and he was turned down, yes.

Tipping J He was turned down but I think if it had found to be disorderly conduct we might well have

Arnold You might have, yes. There's just one point that my learned junior raises. Justice Blanchard made the point that the offence doesn't relate to Mr Brooker knocking on the door and waking up the constable, the point is simply that the District Court Judge makes some point of saying that the knocking on the door and so on was occurring within view of a public place. So I presume he regarded that as part of the course of conduct within the definition. So just to summarise Your Honours, in my submission

Elias CJ If he'd knocked on the door and said I think you behaved badly over the matter of the warrant and then left is that, would that be disorderly behaviour?

Arnold Well if he did it at three in the morning. I mean this is the point Your Honour you, it's very difficult to take these things out of context and say but what about this and what about that. As the Supreme Court of Canada says, somebody playing some music on a corner at daytime and somebody doing it at three in the morning are two different situations. Now what is relevant here is that Mr Brooker knew that this person had just come off nightshift and was asleep and that is revealed by the remark he made when she came to the door. You don't like being woken up do you. And in my submission that does have to be taken in as part of the course of conduct at issue here. We wouldn't be arguing about this, if this had happened at one in the morning. But so far as this particular person was, it was effectively one in the morning. She had just come back from work and gone to sleep. So the approach which the New Zealand courts have adopted and which the Court of Appeal summarises in *R* and which was applied in *Brooker* is one which requires the identification of the interests and the particular circumstances of the case and for the court then to make a decision about whether the boundary has been crossed. That's what the court did here. In my submission it was an appropriate boundary. It simply would not be reasonable or appropriate to expect public officials or other similar groups to put up with behaviour of this sort. And the disorderly conduct offence in my submission is appropriate because there is a public order dimension here reflected in the various interests that I've talked about as the submissions have developed and reflected also in the findings made by the District Court Judge of the impact of the behaviour. And by impact I mean impact on others besides the constable. Now unless Your Honours have further questions that's all I have, the only submissions I wish to make.

Elias CJ Just pause just a moment. Thank you Mr Solicitor. Mr Brooker do you want to be heard in reply?

Brooker Yes please. I'll be quick but there is just a few points that I'd like to make. Annoyance as a grounds for conviction appears to have been removed if one looks at para 28 of the Court of Appeal judgment. While I disagree with the way in which the judgment was, with the

interpretation of the Court I believe that some of the general statements contained in their decision can be applied. Annoyance generated by such protest does not in itself warrant the application of the criminal law. Protest action is often likely to cause annoyance and perhaps serious annoyance to some and perhaps many in the community. That annoyance maybe a function of the underlying research for the method by which in the circumstances in which that message is conveyed. And to further look at the High Court – one of the findings of the High Court – para 24, it says that the with reference to the line for disorderly behaviour being drawn by the community. With regard to busking and most other protests referred to by the appellant did not take place in a residential neighbourhood. In such a setting right thinking members of the public would be seriously offended by the appellant's behaviour. In that area it was taken a right to protest too have. Well I don't agree with the last conclusion but the method which, with the High Court reached that decision was, well we go back to the right thinking members of the public again. And as such as I've already submitted there is no, no evidence to prove, the Crown has not submitted any evidence to prove that the public was in any way offended by my behaviour. And with regard to my actions being a genuine protest. Para 31 subs (2) of the Court of Appeal "we accept that the appellant was to some extent expressing opinions about the policewoman's prior conduct and in this sense his actions could be seen to involve the exercise of his rights under s 14 New Zealand Bill of Rights Act 1990". So even at that, the Court of Appeal was accepting that to some extent, which I do not completely agree with because, not to a full extent I was protesting and but even, even that when they say to some extent does tend to override the District Court findings that I was just there to annoy and harass and – I was, yes we can refer to the, we were talking about disseminating of the protest messages to the public. Well obviously I was doing that because I had the sign facing the road and at times I wasn't even facing Fiona Croft's house when I was singing and playing the guitar. I was facing in all directions. And any intrusion which I did cause to Miss Croft was of a minor nature. Restricted to noise and the forum for dealing with that is noise control. Not, not trying to prosecute people for disorderly behaviour well for intimidation as it turned out. Toleration. We talked about toleration. Well the Crown did. Was Fiona Croft expected to tolerate my behaviour. Well she did have options that she didn't have to sit in her house, she didn't have to called the police, she could have called noise control but she didn't. She didn't use that option. I don't know why not. I can't guess. Similarly the Crown talked about me wanting to shame Fiona Croft and saying that was down in evidence. Well that was a conclusion I believe that was drawn by the District Court Judge. It was that I was there to shame her. Well I completely, that's just not right. All I was doing was drawing the community's attention to illegal behaviour by, by people that should be trusted but the situation in Greymouth is such that the police have lost the trust of the public. It's just an unfortunate situation that's developed in that part of the world. And similarly the Crown has just mentioned the impact of my

behaviour on others. Well I again I fail to see any impact that my behaviour had on other people. We've already established that the neighbours coupled and did in fact hear what I was doing and for all I know they could have seen but they definitely heard because that's been brought up in evidence yet there were no complaints. UI fail to see the impact. If they hadn't have liked what I was doing they quite probably would have called noise control I imagine if they thought I was too loud. The fact is Fiona Croft was in a very small dwelling, so I'm not surprised in some ways that it would have penetrated the house being only a matter of five or six metres from the road I believe was the figure, although the figure of three metres was bandied about but that's not correct, it was further than that. The Crown similarly brought up the issue that I deliberately went there knowing she was asleep. Well that's not true. I knew that she was on night duty and I knew that her night shift had finished because I'd asked the, at the police station to ascertain that. But it had only finished very recently and I don't know about you but when I finish work I don't go straight to bed.

Elias CJ We can't really take this from you I'm afraid, Mr Brooker.

Brooker Okay. Well

Elias CJ it is however clear from the evidence I think that the, the suggestion that you knew that she was asleep and that you said she didn't like to be woken up was a comment made after she'd asked you to leave, that's her evidence on that.

Brooker Can I say something about that.

Elias CJ No perhaps actually I shouldn't have opened it. We're all bound by the findings that have been made in the lower courts.

Brooker So I can't say anything about that?

Elias CJ No

Brooker Okay. Well in that case I will just finish with the proposition which is at the end of the day the, what is reasonable is up to the Judge to decide and, and my proposition is that the Judge must decide that based on the public perceptions of what is reasonable and the public perception all the evidence points to the fact that the public didn't find it unreasonable.

Elias CJ Thank you. I hadn't thought to, were you trying to attract my attention Mr Wilding? I hadn't thought to call on you. Was there a matter you wished to raise?

Wilding I wonder if I could just raise a couple of matters Your Honour but I won't if the court defer otherwise.

Elias CJ If you're short.

Wilding And if I perhaps give the reference so there's no need to take Your Honours to the volumes. First I submit that undue weight ought not to be placed on the fact that penalty for this is low. That points is powerfully by Justice Hardie Boys in his opening passage in *Meseder* when he talks about this being an important constitutional boundary.

Tipping J The blood of martyrs passage?

Wilding Yes that's correct, Sir. Secondly I also submit that undue weight ought not to be placed upon the legislative history nor the discussions in parliament nor even the select committee report preceding the legislation because this has to be interpreted consistently with the Bill of Rights and one of the difficulties with relying on the word "disorderly" as judges or police other may well conceive it, is that their definition may not accord with the structures and values and interpretation direction within the Bill of Rights. Thirdly, the *RWD* issue *Pepsi-Cola* case notes at p113 that the issue of public order was raised and of course that wasn't a trump in that case. Finally, in terms of the phrase right thinking members of the public *Queen v Butler* vol 3 p71 refers to the community standards test. Well that's in a slightly different context but does note that it does have to be a national standard.

Thomas J A what standard, sorry?

Wilding A national standard, Sir.

Elias CJ Not a West Coast standard?

Wilding That's correct Your Honour.

Tipping J A bit like self defence.

Wilding Yes, Sir., Unless there are other matters?

Elias CJ No. Thank you. Well thank you very much counsel and Mr Brooker for your submissions we will take time to consider our decision.

ALL STAND

Court finished 4.39.03pm