Forty Years of the Charter: What We Still Don't Know

STEVE COUGHLAN

SCHULICH SCHOOL OF LAW

Introduction

- Section 8: Unreasonable Search and Seizure
  - Subjective expectation of privacy
  - Search incident to investigative detention
- Section 9: Arbitrary Detention
  - Psychological detention and acquiescence
  - The meaning of "reasonable grounds for arrest"
- Section 10: Right to Counsel
  - Citizen's arrest

Section 8: Subjective expectation of privacy

A police officer says to a suspect "I'm going to tap your phone." The suspect replies "there's no way that's legal, you don't have any basis to do it." The officer replies "you're right, but I do have a friend at TELUS who'll do it for me anyway."

The officer in fact does illegally listen to the accused's phone conversations. Should the accused have a section 8 claim?

Section 8: Subjective expectation of privacy

The *subjective* expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society...It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a *subjective* expectation of privacy and thereby forfeits the protection of s. 8.

R v Tessling, 2004 SCC 67 at para 42.

Section 8: Subjective expectation of privacy

1. What was the nature or subject matter of the evidence gathered by the police?

2. Did the appellant have a direct interest in the contents?

3. Did the appellant have a *subjective* expectation of privacy in the informational content of the garbage?

4. If so, was the expectation *objectively* reasonable?

R v Patrick, 2009 SCC 17 at para 27.

Section 8: Subjective expectation of privacy

"[a] subjective expectation of privacy need not be reasonable…However, it must exist."

R v Grunwald, 2010 BCCA 288 at para 50.

"If in fact there was no subjective expectation of privacy, either actual or presumed, then there is no need to examine whether the expectation of privacy was objectively reasonable."

R v Lecuyer, 2019 NLSC 69 at para 40.

Section 8: Subjective expectation of privacy

"Mr. Jones should have been permitted to rely on the Crown's theory that he authored the Text Messages for the purpose of establishing his subjective expectation of privacy in the subject matter of the search."

R v Jones, 2017 SCC 60 para 19

Section 8: Search incident to investigative detention

Police receive a report that a ring was shoplifted from a jewelry store a few minutes previously. The information given to them said that a tall woman with a black handbag left the store shortly before the ring was noticed to be missing. The clerk in the store had seen the woman's handbag open at an earlier point, and saw what might have been a knife, but he wasn't certain enough about it to take any action.

On their way to the store, the police pass a tall woman carrying a black handbag, and so they stop her for an investigative detention.

Can they search her handbag for safety purposes?

Section 8: Search incident to investigative detention

"Where an officer has *reasonable grounds to believe* that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual."

R v Mann, 2004 SCC 52 at para 43, emphasis added.

A safety search "will be authorized by law only if the police officer *believes on reasonable grounds* that his or her safety is at stake."

R v MacDonald, 2014 SCC 3 at para 41, emphasis added.

Section 8: Search incident to investigative detention

> [W]hile we agree with the majority on all three issues in this case…we part company with our colleagues on the proper interpretation of *Mann*. Our colleagues assert, relying on *Mann*, that officers are only empowered to conduct "safety searches" where they have reasonable grounds to *believe* an individual is armed and dangerous (paras. 39 and 44). With respect, we do not agree with that conclusion. In our view, *Mann* decided that officers may conduct safety searches when they have reasonable grounds to *suspect* an individual is armed and dangerous.
>
> *MacDonald* dissent at para 61.

Section 8: Search incident to investigative detention

"If a police officer possessed reasonable and probable grounds to believe a suspect was armed and dangerous, the suspect would invariably be arrested, not merely detained, and would be physically searched as incident to that arrest."

R v Le, 2014 ONSC 2033 at para 99.

Section 8: Search incident to investigative detention

"There is debate whether the Supreme Court of Canada's decision in *MacDonald* changed the legal threshold for lawful police safety searches from the 'reasonable suspicion' standard to a higher standard akin to the search warrant standard of 'reasonable grounds to believe'."

R v Webber, 2019 BCCA 208 at para 45

"In my opinion, the Supreme Court of Canada did not recalibrate the test for lawful police safety searches from the traditional 'reasonable suspicion' standard."

Webber at para 65

Section 8: Search incident to investigative detention

"When 'recalibrating' or revisiting legal standards, the Court generally says it is doing so expressly...If the majority in *MacDonald* intended to overturn *Mann*, it could have said so expressly. It did not."

Webber, paras 53, 54

"I agree with the minority in *MacDonald* that the whole context of the discussion in *Mann*, including the 'history from which *Mann* emerged', lead to the same unavoidable conclusion: '*Mann* recognized a protective search power predicated on reasonable suspicion'."

Webber at para 61

Section 9: Psychological detention and acquiescence

"a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply . . . and that they are not free to leave."

R v Lafrance, 2022 SCC 32 at para 21

"Detention may be effected without the application or threat of application of physical restraint if the person concerned *submits or acquiesces in the deprivation of liberty* and reasonably believes that the choice to do otherwise does not exist."

R v Therens, [1985] 1 SCR 613 at p 644, emphasis added

Section 9: Psychological detention and acquiescence

Terry, a black man, was walking out of an apartment building when he heard a police officer call out to him "stop right there". Turning to look, he saw two officers sitting in their vehicle. He recognized them as having stopped him before, and concluded (correctly, for purposes of thie hypothetical) that they were stopping him solely because of his race. He therefore kept walking to his car, got in, and began to drive away. The officers drove after him, turning on their lights and sirens, but nonetheless Terry did not stop. He drove through a light just as it turned yellow, and the officers decided to stop pursuing him at that point.

Can Terry bring a *Charter* complaint about racial profiling?

Section 9: Psychological detention and acquiescence

"… a reasonable person in Mr. Ratt's circumstances would have concluded that he or she had no choice but to comply with that command. What is missing, however, is the second component of the *Grant* test. Mr. Ratt did not submit or acquiesce – even briefly – to the peace officer's commands."

R v Ratt, 2020 SKCA 19 at para 37

Section 9: Psychological detention and acquiescence

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

(a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

Section 9: Psychological detention and acquiescence

"[I]n *Therens*, this Court held that a detention will arise when an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (p. 644) — a statement that may have suggested that the analysis focuses on the reasonableness of an individual's subjective perceptions. But in *Grant*, this Court clarified that the analysis is objective.

R v Le, 2019 SCC 34 at para 114.

Section 9: The meaning of "reasonable grounds for arrest"

A police officer has arrested an accused purporting to rely on the "reasonable grounds" standard in section 495(1)(a). In cross-examination, he is asked why he didn't simply carry out an investigative detention. The officer replies "I had better grounds than that." In response to the question "Did you think it was more likely than not?" the officer replied "No, but definitely more than just reasonable suspicion".

Was the arrest lawful?

Section 9: The meaning of "reasonable grounds for arrest"

"[t]he reasonable grounds standard does not require the establishment of a *prima facie* case or proof beyond reasonable doubt."

R v Canary, 2018 ONCA 304 at para 23

The reasonable grounds requirement "does not mean the Crown must make out a *prima facie* case, or prove beyond a reasonable doubt *or on a balance of probabilities* that the person arrested had committed or was about to commit an indictable offence".

R v Lichtenwald, 2020 SKCA 70 at para 34. emphasis added

Section 9: The meaning of "reasonable grounds for arrest"

"'*Reasonableness*' comprehends a requirement of probability."

Baron v Canada, [1993] 1 SCR 416 at para 55

"reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime."

R v Chehil, 2013 SCC 49 at para 27

"Slatter J.A. mistakenly held that the requirement of 'reasonable grounds' in s. 495(1)(*a*) is different from the requirement of 'reasonable and probable grounds'."

R v Loewen, 2011 SCC 21 at para 5, referring to *R v Loewen*, 2010 ABCA 255

Section 9: The meaning of "reasonable grounds for arrest"

And yet…

"It is also well-established that 'reasonable grounds' imports a test or standard that is *lower* than the standard of civil proof, or proof 'on the balance of probabilities'."

R v Glendinning, 2019 BCCA 365 at para 3

"The jurisprudence is consistent that 'probability', in this sense, does not mean 'balance of probabilities', or even 'more likely than not'."

R v Chapman, 2020 SKCA 11 at para 65.

Section 9: The meaning of "reasonable grounds for arrest"

And *even*…

"In *R.* v. *Loewen*, the Alberta Court of Appeal specified that a belief can be 'reasonable' even if the existence of the facts is not 'probable'."

R c Michael, 2019 QCCQ 5444 at 241

Section 9: The meaning of "reasonable grounds for arrest"

Section F(a) of Article 1 of the *United Nations Convention Relating to the Status of Refugees* and "reasonable grounds" when denying a person entry because of war crimes:

"the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens."

Sivakumar v Canada (Minister of Employment & Immigration), [1994] 1 FC 433 at para 18

Section 9: The meaning of "reasonable grounds for arrest"

Section 19(1)(f) of the *Immigration Act,* and "reasonable grounds" when denying entry because of a crime against humanity:

"The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445."

Mugesera v Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at para 114.

Section 9: The meaning of "reasonable grounds for arrest"

Section 19(1)(f) of the *Immigration Act,* and "reasonable grounds" when denying entry because of a crime against humanity:

"The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445."

Mugesera v Canada (Minister of Citizenship and Immigration), 2005 SCC 40 at para 114.

Section 9: The meaning of "reasonable grounds for arrest"

"Although the word "probable" or "probably" appears in some of the foregoing authorities, I do not read them as contravening the notion that the s. 495(1) standard is lower than the "balance of probabilities" standard in civil law…[O]ne often hears expressions such as 'There is a 30% probability of rain'."

R v Glendinning, 2019 BCCA 365 at para 7

Section 9: The meaning of "reasonable grounds for arrest"

Slatter J in the Alberta Court of Appeal in *Loewen*:

"Is there a difference between 'reasonable' grounds and 'probable' grounds? In other words, can grounds be reasonable if they are not also probable?"

The Supreme Court of Canada in *Loewen*:

"Slatter J.A. mistakenly held that the requirement of 'reasonable grounds' in s. 495(1)(*a*) is different from the requirement of 'reasonable and probable grounds'."

Section 10: Right to counsel on citizen's arrest

An off-duty police officer is working as security at the entry gate to a music festival. As he is checking bags, he finds a knife in a backpack, and arrests the person for carrying a concealed weapon while on the way to a public meeting. The officer asks the person several questions, in doing so confirming that the person was aware of the knife's presence in the backpack. At no point did the off-duty officer inform the person of the right to counsel.

Was there a violation of section 10(b)?

Section 10: Right to counsel on citizen's arrest

"A person who is 'detained' within the meaning of s. 10 of the *Charter* is in *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty."

R v Bartle, [1994] 3 SCR 173 at 191, emphasis in original.

Section 10: Right to counsel on citizen's arrest

"On the facts, we are not called on in this case to address the question whether a citizen's arrest could be construed as state action for purposes of the *Charter*."

R v Asante-Mensah, 2003 SCC 38 at para 77

Section 10: Right to counsel on citizen's arrest

"The power exercised by a citizen who arrests another is in direct descent over nearly a thousand years of the powers and duties of citizens in the age of Henry II in relation to the "King's Peace". Derived from the Sovereign it is the exercise of a state function…. [W]hen one citizen arrests another, the arrest is the exercise of a governmental function to which the *Canadian Charter of Rights and Freedoms* applies."

R v Lerke, 1986 ABCA 15 at paras 21 and 23.

Section 10: Right to counsel on citizen's arrest

"[T]he initial search of the appellant's locker by the security guards can only come under s. 8 scrutiny if the guards can be categorized either as "part of government" or as performing a specific government function…or if they can be considered state agents"

"It may be that if the state were to abandon in whole or in part an essential public function to the private sector, even without an express delegation, the private activity could be assimilated to that of a state actor for *Charter* purposes."

R v Buhay, 2003 SCC 30 at paras 25 and 31

Section 10: Right to counsel on citizen's arrest

"[W]e are satisfied on the authority of *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.), paragraphs 25-31 that the security guards could not be considered police agents or otherwise be subject to the limitation of the *Charter*."

R v NS, 2004 OJ No 290 (CA) at para 1

"*Buhay* involved a search and seizure, not a citizen's arrest, and *Lerke* was neither considered nor mentioned. There is but a passing reference to arrest in paragraph 31. The Supreme Court confirmed the existence of the government function exception in *Buhay*, noting that it may derive from an express delegation or an abandonment of state powers to a citizen."

R v Dell, 2005 ABCA 246 at para 17.

Forty Years of the *Charter*: What We Still Don't Know[1]

1) Introduction

On April 17 1982, the *Canadian Charter of Rights and Freedoms* came into force.[2] It is not possible to overstate its impact on the law, most particularly the criminal law. Because of the *Charter*, offences have ceased to exist or been rewritten, defences have been changed or added, police powers of search and detention have been radically restructured, rules of evidence or interrogation have been affected, it has become a matter of routine to consider whether evidence should be excluded, and so on. Because of that impact, there is of course a great deal that we *do* know about the criminal law in light of the *Charter*.

There is also, however, a surprising amount that we *don't* know about the impact of the *Charter*. Now, it would be naïve to expect that *all* our questions will ever be answered, or that we even know all the relevant questions yet, since unanticipated situations arise, and refinements to established rules are sometimes needed. Further, the "living tree" doctrine applies to the *Charter* as much as to any other area of constitutional law, so in some sense no answer is ever completely final.[3] In addition, there are matters where, even if the rules are known in the abstract, the application of those rules will be open to interpretation or reasonable disagreement. We should not expect to ever reach a point where there are *no* unanswered questions.

Even acknowledging that, however, there are questions about the impact of the *Charter* which do not have answers, and where that result is quite surprising. Sometimes this is because the issue has somehow never needed to be settled. Other times, it is because the Supreme Court has articulated the rules in somewhat different ways in different decisions, without acknowledging that difference. Sometimes, the unsettledness seems to arise from lower courts refusal to accept that the rules *should* be what the Supreme Court has said they are. In any case, as a result, there are questions which arise in criminal courts, sometimes on a daily basis, where remarkably, the correct answer is still unknown or is not universally agreed-upon.[4] In this paper, I will pursue some of those questions. Specifically, I will pursue unanswered questions relating to sections 8, 9 and 10 of the *Charter*, and their impact on individual rights.

2) Section 8 of the *Charter*: Unreasonable Search and Seizure

---

[1] Steve Coughlan, Schulich School of Law. I am indebted to Isis Hatte for her valuable research assistance.

[2] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982.

[3] See for example the reasons of Rowe J in *R v JJ*, 2022 SCC 28:

> 362…the interpretation of s. 7 and all *Charter* rights should preserve the opportunity for "growth, development and adjustment to changing societal needs" to ensure the *Charter* continues to be a "living tree" that is capable of responding to the needs of the moment.

[4] For many of these questions, it seems to me personally that the correct answer is clear: however, as an academic merely commenting on areas where judges are forced to make actual decisions, I acknowledge that there's a difference between "I think I know the right answer" and "this point is settled".

a) Introduction

The general structure of a section 8 analysis has been settled since the very early days of the *Charter*. *Hunter v Southam*,[5] in 1984, established that section 8 was meant to protect a reasonable expectation of privacy, and so the first question is always whether such an expectation exists on the particular facts: if so, there was a search. If such an expectation does exist, then *Collins* established in 1987 that to not be "unreasonable", the search must be authorized by law, the law itself must be reasonable, and the manner of search must be reasonable.[6] That underlying structure, which has been stable for thirty-five years now, eliminates most of the unanswered questions.

Some aspects of that test are inherently incapable of being settled. For example, since new common law police powers can be created, we don't know all the ways in which a search might be "authorized by law". That situation is arguably undesirable, but it's not the sort of issue I want to discuss here: it's not *surprising* that we don't know, now, all the police powers that will ever exist. There are, however, some surprising gaps in our knowledge about section 8, relating to both the first step and the second.

b) Is a Subjective Expectation of Privacy an Absolute Requirement?

Whether there is a reasonable expectation of privacy is, in one of its roles, a threshold question deciding whether there is a section 8 right or not: if there's no reasonable expectation, that's the end of the analysis. The test, which has been articulated in a number of ways by the Supreme Court over the decades, is consistently referred to as the "totality of the circumstances test". Given that it involves the weighing of many different factors, we cannot expect ever to have perfect uniformity in its application.

We *should* be able to expect, however, that we know what the test *is*: in one significant respect, that is not the case. I have in mind here the role that the existence – or non-existence – of a *subjective* expectation of privacy plays in the analysis. More specifically, is a subjective expectation of privacy an absolute requirement, a *sine qua non*, for satisfying the totality of the circumstances test? If a court decides that the accused did not *subjectively* expect privacy, does that conclusion alone determine the result? Surprisingly, that point is unsettled.

Now, in one sense this question ought not to be unsettled. The Supreme Court considered exactly this question with its 2004 decision in *Tessling*. There, in a unanimous nine-judge decision deciding that there was no reasonable expectation of privacy in the heat emanations from one's house, the Court specifically held that a subjective expectation was *not* a *sine qua non*:

> I should add a *caveat*. The *subjective* expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society. In an age of expanding means for snooping readily available on the retail market, ordinary people may come to fear (with or without

[5] *Hunter et al v Southam Inc*, [1984] 2 SCR 145.
[6] *R v Collins*, [1987] 1 SCR 265.

> justification) that their telephones are wiretapped or their private correspondence is being read. One recalls the evidence at the Watergate inquiry of conspirator Gordon Liddy who testified that he regularly cranked up the volume of his portable radio to mask (or drown out) private conversations because he feared being "bugged" by unknown forces. Whether or not he was justified in doing so, we should not wish on ourselves such an environment. Suggestions that a diminished *subjective* expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed. It is one thing to say that a person who puts out the garbage has no reasonable expectation of privacy in it. It is quite another to say that someone who fears their telephone is bugged no longer has a *subjective* expectation of privacy and thereby forfeits the protection of s. 8. Expectation of privacy is a normative rather than a descriptive standard.[7]

That is as clear a statement as one could want that a subjective expectation is *not* an absolute requirement.

That the point is unsettled, however, arises from the way in which the Court has consistently said, for nearly two decades now, that the totality of the circumstances test is to be structured.[8]

For example, in *Patrick*, drawing on *Tessling*, the Court said that the approach to determining reasonable expectation of privacy was to ask:

> 1. What was the nature or subject matter of the evidence gathered by the police?
>
> 2. Did the appellant have a direct interest in the contents?
>
> 3. Did the appellant have a *subjective* expectation of privacy in the informational content of the garbage?
>
> 4. <u>If so</u>, was the expectation *objectively* reasonable?[9]

I have added emphasis to the key words there: "if so". Similarly in *Spencer*, the Court articulated the last two considerations as "(3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether <u>this</u> subjective expectation of privacy was objectively reasonable, having

---

[7] *R v Tessling*, 2004 SCC 67 at para 42.

[8] As a side note, there is a further surprising unsettledness around this point. The Supreme Court has for quite some time consistently set out the test as being the four steps immediately below. A much earlier version of the test was found in *R v Edwards*, [1996] 1 SCR 128. For reasons which are unclear to me, some courts cling to that outdated formulation of the test: see for example *R v Greer*, 2020 ONCA 795 at para 79:

> Seven non-exclusive factors will typically inform such a decision, including: (i) presence at the time of the search; (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access, including the right to admit or exclude others from that place; (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.

[9] *R v Patrick*, 2009 SCC 17 at para 27.

regard to the totality of the circumstances" (emphasis added).[10] These formulations of the test describe it *as though* a subjective expectation of privacy *is* an essential condition, despite the statement to the contrary in *Tessling*. Other Supreme Court of Canada cases – which generally rely on the *Patrick* formulation of the test – talk about the issue as though the "if so" has significance. For example in *Marakah* the Court says "Only if the answer to the fourth question is "yes" — that is, if the claimant's subjective expectation of privacy was objectively reasonable — will the claimant have standing to assert his s. 8 right".[11]

Now, it is important to note that in post-*Tessling* decisions the Supreme Court has only spoken of the subjective expectation of privacy in this way in cases where they in fact found that a subjective expectation *did* exist. They were not, therefore, forced in the cases to actually wrestle with the question of how to proceed if there were no subjective expectation. And, indeed, they have repeated the caution about over-reliance on that factor. In *Jones*, the Court quoted *Tessling* and then held "a *Charter* claimant's subjective belief that Big Brother is watching should not, through the workings of s. 8, be permitted to become a self-fulfilling prophecy."[12]

On the one hand that could seem definitive that there is no absolute requirement for a subjective expectation of privacy. However, *Jones* is a little more ambiguous on the point than that. The decision does not say that a subjective expectation of privacy is not essential: it says that meeting the requirement "has never been 'a high hurdle'", that its importance is "attenuated", that the evidentiary foundation required is "modest" and that it "can be presumed or inferred in the circumstances".[13] All of these statements could easily be taken as saying that a subjective expectation *does* have to be proven, it is just not difficult to satisfy that requirement.

The Court has therefore, wavered somewhat in its treatment of whether a subjective expectation of privacy is a prerequisite: when they explicitly consider the issue, they say that it is not, but when that point is not "top of mind", they talk about it as though it is.

This inconsistency has not gone unnoticed. In *Chehil*, for example, at the Nova Scotia Court of Appeal level, the Crown argued that the accused's lack of a subjective expectation of privacy was automatically fatal to his section 8 claim. The Court of Appeal acknowledged that this was a real issue: "In *Patrick* and *Tessling* the existence of a subjective expectation of privacy appears to be a prerequisite to finding a s. 8 breach. However, in the earlier case of *R. v. Edwards*, [1996] 1 S.C.R. 128, the subjective expectation was just one of the contextual factors comprising the 'totality of circumstances'."[14] They concluded that "in view of the ambiguity in the case law"

---

[10] *R v Spencer*, 2014 SCC 43 at para 18.
[11] *R v Marakah*, 2017 SCC 59 at para 12.
[12] *R v Jones*, 2017 SCC 60 at para 21. Many lower courts have also adopted this same approach. See for example *R v Orlandis-Hasburgo*, 2017 ONCA 649 at para 44: "A subjective expectation of privacy cannot, however, be a prerequisite to a finding of a reasonable expectation of privacy. Otherwise, the protection afforded to personal privacy by s. 8 would shrink in direct correlation to the pervasiveness and notoriety of state intrusions upon personal privacy."
[13] *Jones*, *ibid* at paras 20 and 21.
[14] *R v Chehil*, 2009 NSCA 111 at para 39 (*Chehil* NSCA).

that they would not stop their analysis at the point of having found no subjective expectation of privacy.[15]

Other courts, however, both before and after *Jones*, have not seen the issue as ambiguous and have consciously adopted the view that the absence of a subjective expectation of privacy settles the issue. The British Columbia Court of Appeal has held, for example, that "[a] subjective expectation of privacy need not be reasonable: *Patrick* at para. 37. However, it must exist."[16] The Supreme Court of Newfoundland and Labrador has held that: "[i]f in fact there was no subjective expectation of privacy, either actual or presumed, then there is no need to examine whether the expectation of privacy was objectively reasonable."[17] Other courts have reached similar conclusions, for example:

> …without some evidence of a subjective expectation of privacy, the accused's s. 8 *Charter* rights have not been triggered, and I do not need to consider whether an expectation of privacy over an SDM and the information contained therein is objectively reasonable.[18]

or

> …whether the subjective expectation of the accused is objectively reasonable, need not be addressed until it has been determined that there is a subjective expectation of privacy.[19]

Other cases seem to adopt the same reasoning though less explicitly,[20] and in yet others the Crown has argued that this is the proper approach but it is not always clear whether judges have rejected the approach or simply the factual finding of no subjective expectation.[21]

The question therefore remains one which is capable of generating ambiguity and inconsistency.

Jones does add a further wrinkle to this issue, which limits how frequently the question of whether a subjective expectation is absolutely required will arise, and of course therefore reduces the likelihood of the Court being required to offer a definitive answer to that question. In *Jones*, the issue was access by the state to text messages which had been in the hands of a service provider. One issue was whether the accused had a reasonable expectation of privacy in those text messages. Normally that would not be a complicated question,[22] but the text messages in

---

[15] *Chehil* NSCA, *ibid* at para 40.
[16] *R v Grunwald*, 2010 BCCA 288 at para 50.
[17] *R v Lecuyer*, 2019 NLSC 69 at para 40.
[18] *R v Fedan*, 2014 BCSC 1716 at para 24. On appeal, in *R v Fedan*, 2016 BCCA 26, the Court of Appeal overturned the factual finding that there was no subjective expectation of privacy but did not comment on the correct approach.
[19] *R v Cox,* 2018 BCSC 877 ata para 24.
[20] See for example *R v Bartkowski*, 2004 BCSC 44, *R v Ho*, 2015 ONCJ 118, or *R v Kang* 2020 BCSC 1616.
[21] See for example *R v Desrochers*, 2020 BCPC 273 or *R v Carter*, 2011 ONSC 6752.
[22] See *Marakah*, note 11.

question had been sent from a phone which was not registered in the accused's name, and he was not willing to acknowledge that he was the author of them. The Crown argued that that was fatal to his claim, but the Court accepted the accused's argument: that he was "permitted to rely on the Crown allegation that he authored the Text Messages, and his subjective expectation of privacy in the subject matter of the search is accordingly established."[23]

What this means is that the answer to the question "did the accused have a subjective expectation of privacy" will far more frequently be answered "yes": as a result, the issue of what to do when the answer is "no" will arise even less often. Circumstances in which the Crown will *not* be asserting a connection between the accused and the object of the search will be rare: if there wasn't one, why would the police have sought that evidence out? Does *Jones* mean that the subjective expectation of privacy is always automatically established? If so, then for practical purposes it ceases to matter whether a subjective expectation of privacy is a *sine qua non*.

This issue has been pursued in recent case law. The result, it seems, it that the connection alleged by the Crown will not *always* amount to establishing the subjective expectation of privacy, but it often will.

In *R v Labelle*,[24] for example, police had obtained a warrant to search an apartment which they believed belonged to the accused, in order to search for items including a firearm. The accused, in challenging the warrant on the basis of insufficiency, led evidence showing that the apartment was rented by his girlfriend, who was licensed to possess a firearm. In response, the Crown argued that in that event, the situation was covered by *Edwards*,[25] and the accused could not claim to have a reasonable expectation of privacy in the apartment. The trial judge – in a pre-*Jones* decision – accepted that argument. On appeal, the Ontario Court of Appeal reversed the result, finding that the accused *did* have standing. A particular issue was the impact of *Jones*.

The Crown argued that *Jones* was distinguishable on two bases. First, in *Jones* the accused had simply led no evidence about his interest in the subject matter of the search, while here the accused was the one who had led the evidence showing that the apartment was in his girlfriend's name. Second, *Jones* had dealt with informational privacy, while it was territorial privacy in issue here. The Ontario Court of Appeal did not find either argument compelling.

Whether the accused had led evidence or not did not change the fundamental nature of the dilemma which *Jones* had concluded an accused ought not to face: "[t]he overriding point of *Jones* is that an accused should not be placed in the position of being forced to compromise his or her substantive defence to criminal charges in order assert standing to challenge the reasonableness of a search."[26] Further, they held, nothing in *Jones* suggested it was limited to informational privacy. This did not mean, the Court of Appeal held, that the Crown's assertion automatically established standing for the accused: it did, however, go to establishing the

---

[23] *Jones*, note 12 at para 9.
[24] *R v Labelle*, 2019 ONCA 557.
[25] *Edwards*, note 8.
[26] *Labelle*, note 24 at para 24.

subjective expectation of privacy aspect of that analysis.[27] Other cases have taken a similar approach.[28]

Not all trial courts have concluded that the Crown's position necessarily leads to a subjective expectation of privacy being satisfied, however. In *R v Abo Zead*, for example, the accused objected to the admission of two pieces of evidence that had been obtained without a warrant: CCTV footage from areas of an apartment building, and a statement from the property manager that the accused lived in a particular unit in that building not rented in his name. The trial judge noted that, because of *Jones*, the accused was entitled to rely on the Crown's position to infer a subjective expectation of privacy. However, the judge also held, "while inferences are permissible, there must still be a body of evidence from which that inference can be drawn."[29] The evidence in the case showed that the footage covered common areas of the building, and indeed showed the accused pointing out the camera to another suspect, evidence contrary to a subjective belief in privacy: the judge therefore found it "difficult to conclude in these circumstances that the accused could subjectively believe that he enjoyed any degree of privacy at that entry or exit way".[30] On the other hand, there were also no facts supporting the accused's subjective expectation of privacy in the fact that he lived in his mother's unit, but the Crown's theory of the case was there found to be sufficient on the subjective expectation.[31]

Similarly in *R v Chaudhry*, the trial judge found no reasonable expectation of privacy despite the Crown's theory. In that case, the evidence in issue was records of calls by the accused to a taxi company, which had been obtained without a warrant. The trial judge identified the subject matter of the search not simply as the records themselves, but as "information [which] shows something about his movements, phone number, conversations, and use of first names".[32] If the issue were whether it was the accused who had made the calls (parallel to the question in *Jones* of whether it was the accused who had sent the texts) then the Crown's theory might have been a sufficient basis. However, the trial judge held:

> In order to find that the accused had a subjective expectation of privacy in the subject matter of the search here… I must conclude that he would have expected his movements

---

[27] *Labelle*, note 24 at para 31.
[28] See for example *R v Hill*, 2021 BCSC 199, where the accused had, when arrested, denied possession of bags found in the vehicle but was held to be entitled to rely on the Crown's assertion that she did possess them in the standing analysis. Similarly see *R v Ellis*, 2019 ONSC 317, (upheld on appeal around other issues, 2022 ONCA 535), where the trial judge inferred the Crown's theory that the accused was the owner of a cell phone found in a vehicle, in order to rely on that theory and find a subjective expectation of privacy in the GPS data on that phone.
[29] *R v Abo Zead*, 2020 BCSC 2145 at para 34. See also *R v Ali, Boparai & Malonga-Massamba*, 2020 BCSC 1309, from which that proposition was taken.
[30] *Abo Zead*, *ibid* at para 101.
[31] *Abo Zead*, *ibid* at para 102.
[32] *R v Chaudhry*, 2021 ONSC 394 at para 51.

> to remain a private exchange of information with Beck Taxi. I cannot draw that inference from the Crown's theory.[33]

Ultimately, whether a subjective expectation of privacy is a *sine qua non* for a reasonable expectation of privacy remains unsettled. The *significance* of the question has certainly been reduced in practice. However, the question itself seems not to have been authoritatively resolved.

c) What is the Standard for Incident to Investigative Detention and Safety Searches?

I have to begin this portion with a disclaimer: I find what courts have done in this area so confusing that to think about it makes my head spin. The reasoning in the cases often straight out of Lewis Carroll: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less'."[34] Courts seems regularly to say things that *amount* to "I am bound by the decision of the majority, and therefore I adopt the reasoning of the dissent". I shall attempt to describe what has occurred and the current state of the law as logically as I can, but at times it does seem to defy logic.

The issue here concerns two search powers: search incident to investigative detention, and safety searches. Both are common law powers, the first created by the Court in *R v Mann*,[35] and the second created in *R v MacDonald*.[36] Fundamentally, they are effectively the same power – a power to search a person because of safety concerns – which differ only in whether an investigative detention was already occurring or not. The issue which is confusing is whether, in order to conduct such searches, the police are required to meet the higher "reasonable grounds" standard or only the lower "reasonable suspicion" standard.

There is good reason to suggest that neither question should be ambiguous, and that the Court was perfectly clear in each of those decisions that the higher standard applied. In *Mann*, for example, the Court said "where a police officer has *reasonable grounds to believe* that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual."[37] In *MacDonald* the majority said that a safety search "will be authorized by law only if the police officer *believes on reasonable grounds* that his or her safety is at stake."[38] It also seems very clear that the Court deliberately set the *same* standard for the two searches: that quote from *MacDonald* cites *Mann* as the authority for the standard, and the majority otherwise rests its decision on *Mann*.[39] The clearest indication that the majority in

---

[33] *Chaudhry*, *ibid.* at para 55.
[34] Lewis Carroll, *Through the Looking Glass*.
[35] *R v Mann*, 2004 SCC 52.
[36] *R v MacDonald*, 2014 SCC 3.
[37] *Mann*, note 35 at para 45, emphasis added. Almost identical language is found at paras 40 and 43.
[38] *MacDonald*, note 36 at para 41, emphasis added.
[39] See *MacDonald*, note 36 at para 31:

> In *Mann*, Iacobucci J. accepted the need for a general police power to conduct pat-down searches, but solely in appropriate circumstances. He was mindful of the risks of abuse of such a power, as he observed that "[s]uch a search power does not exist as a matter of

MacDonald is saying that the standard is reasonable grounds, not reasonable suspicion, and also saying that the standard for the two types of searches is the same, is that the minority decision in *MacDonald* exists *solely for the purpose of disagreeing with that*:

> In the instant case, while we agree with the majority on all three issues in this case, including Mr. MacDonald's claim under s. 8 of the *Canadian Charter of Rights and Freedoms*, we part company with our colleagues on the proper interpretation of *Mann*. Our colleagues assert, relying on *Mann*, that officers are only empowered to conduct "safety searches" where they have reasonable grounds to *believe* an individual is armed and dangerous (paras. 39 and 44). With respect, we do not agree with that conclusion. In our view, *Mann* decided that officers may conduct safety searches when they have reasonable grounds to *suspect* an individual is armed and dangerous.[40]

The reasonable grounds standard also makes sense at a policy level. A search of the person is a relatively intrusive search, typically requiring a stronger justification. The scope of a search incident to an investigative detention is, in its intrusion on the accused, likely to be essentially equivalent to a search incident to arrest: that latter *search power* does not require reasonable grounds, but it only arises after a lawful arrest, which does require that stronger justification.

Despite all of this, there is considerable resistance in lower courts to both claims: the majority opinion seems to be that search incident to investigative detention, at least, requires only reasonable suspicion, and that possibly safety searches only require that standard as well. In that respect, the correct answer has to be said to be unknown.

To be fair to the other side of the issue here, there is reason to question whether the reasonable grounds standard makes sense at a policy level. The facts of *R v McKenzie* are a simple illustration of the problem. The police saw a known member of a street gang running in a way that gave them reasonable suspicion he was carrying a weapon, and so they conducted an investigative detention.[41] Reasonable *suspicion* was, legally, a sufficient basis to detain him: if the search power to actually *check* for that weapon required reasonable *grounds*, one might reasonably wonder what the point of stopping him in the first place was. Alternatively, as pointed out by the trial judge in *R v Le*, "If a police officer possessed reasonable and probable grounds to believe a suspect was armed and dangerous, the suspect would invariably be arrested, not merely detained, and would be physically searched as incident to that arrest."[42]

There is also what could be taken as Supreme Court authority to the contrary. *R v Chehil*, a decision specifically about the use of sniffer dogs rather than other searches, says "the Court has

---

> course: the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk" (para. 40).

[40] *MacDonald*, note 36 at para 61.

[41] *R v McKenzie*, 2022 MBCA 3.

[42] *R v Le*, 2014 ONSC 2033 at para 99. The result in *Le* was reversed in the Supreme Court of Canada: *R v Le*, 2019 SCC 34. However, that result was based on finding the trial judge to have erred in concluding that the accused was not arbitrarily detained: the Court did not consider section 8, and so none of these issues were addressed.

found reasonable suspicion to be a sufficient threshold in certain investigative contexts" and in a footnote refers to search incident to investigative detention.[43] Of course that footnote also refers to *R v M (MR)* as creating a reasonable suspicion search standard, which is incorrect.[44] The reference seems as though it must be the result of a careless mistake, rather than an attempt to significantly reverse an important point of law inferentially and in a footnote. Nonetheless, as the minority in *MacDonald* and many lower courts have pointed out, the decision does *say* that.

Many lower courts almost immediately abandoned the "reasonable grounds" standard for search incident to investigative detention. Indeed, this was one of the arguments of the minority in *MacDonald*: lower courts had not read *Mann* as setting that standard.[45] The ambiguity that many lower courts saw coming out of *MacDonald* – and this is where my head starts to spin – was whether that later decision meant that the search incident to investigative detention created in *Mann* "now" required reasonable grounds: that is, did it now require what it was originally stated to require. As it was sometimes put, had "the traditional 'reasonable suspicion' standard" been raised to reasonable grounds?[46]

As a result, we are left with multi-level ambiguity over the standard for search incident to investigative detention. Some lower courts continue to ask whether the "reasonable grounds" standard is met: that is, they take *Mann* at face value as setting the higher standard.[47] Several courts, especially at the Court of Appeal level, have taken it as settled that search incident to investigative detention after *Mann* only requires reasonable suspicion, have noted the question of whether *MacDonald* raised that standard, but have concluded that on the facts before them they did not need to decide the issue: the grounds were either too weak to constitute even reasonable

---

[43] *R v Chehil*, 2013 SCC 49 at para 23.

[44] The search power created in *R v M (MR)*, [1998] 3 SCR 393 in fact is:

> 48 A search by school officials of a student under their authority may be undertaken if there are *reasonable grounds to believe* that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched. (emphasis added)

[45] See *MacDonald*, note 36 at para 78:

> Beyond our own cases, lower courts have relied on this Court's jurisprudence and have, unsurprisingly, concluded that *Mann* adopted a reasonable suspicion standard. For example, in *R. v. Crocker*, 2009 BCCA 388, 275 B.C.A.C. 190, leave to appeal refused, [2010] 1 S.C.R. viii, the court held that "[a] lawful protective safety search . . . need only meet the legal standard of *reasonable suspicions* . . . required by *Mann*" (para. 72 (emphasis added)). Just a few months ago, the same conclusion was reached in *R. v. Atkins*, 2013 ONCA 586, 310 O.A.C. 397: "The pat-down search that followed the detention was justified on officer safety grounds" because "[t]he officers *reasonably suspected* that the appellant was in possession of a weapon" (para. 15 (emphasis added)).

[46] *R v Webber*, 2019 BCCA 208 at para 65. See also *Le* (trial decision), note 41 at para 99:

> There is some question whether the decision in *R. v. MacDonald* changes the legal threshold for lawful police "safety searches" from the traditional "reasonable suspicion" standard to a higher standard akin to the search warrant requirement of "reasonable and probable grounds."

[47] See for example *R v Nunn*, 2018 ONSC 3929.

suspicion or were compelling enough to constitute reasonable grounds, and therefore the same result would flow whichever test was used.[48] Some decisions conclude that the standard *has* been raised.[49] And the British Columbia Court of Appeal in *Webber* has specifically concluded that, despite *MacDonald*, the standard for search incident to investigative detention "remains" one of reasonable suspicion:

> [61]…I agree with the minority in *MacDonald* that the whole context of the discussion in *Mann*, including the "history from which *Mann* emerged", lead to the same unavoidable conclusion: "*Mann* recognized a protective search power predicated on reasonable suspicion" (at para. 86).
>
> [65] In my opinion, the Supreme Court of Canada did not recalibrate the test for lawful police safety searches from the traditional "reasonable suspicion" standard.[50]

Webber is the decision which has gone furthest with this issue, having actually decided that search incident to investigative detention is authorized on a reasonable suspicion standard ("still" authorized on that standard, in their view). As just noted, there is considerable ambiguity in the case law over the proper standard for search incident to investigative detention. However, *Webber also* introduces ambiguity into the question of the standard for safety searches.

I observed above that the safety search power created in *MacDonald* is essentially the power of search incident to investigative detention, but without a prior investigative detention. Some cases do not really distinguish between the two powers, simply referring to a "safety search" even when dealing with a search incident to investigative detention.[51] That makes it quite anomalous if the two powers have different standards. *Webber* notes that that would be odd, and rejects the possibility:

> Mr. Webber says that it may be possible to reconcile the cases on the basis that the Court intended that there be two different tests for a safety search: i.e., one standard for a

---

[48] See for example *R v Ahmed-Kadir*, 2015 BCCA 346, *R v Peterkin*, 2015 ONCA 8, *R v Sheck,* 2015 BCCA 471, *R v Patrick*, 2017 BCCA 57, or *R v Del Corro*, 2019 ABCA 156.

[49] See *R v Van*, 2021 ONSC 4491:

> [52] The majority opinion [in *MacDonald*] however made clear that the power to do safety searches cannot be based on a nebulous concern about risk of danger. That type of search is permitted only in situations where there is objectively verifiable danger to the police or the public. This case departs from the earlier line of cases that held that *R. v. Mann* stands for the view that safety searches could be conducted on reasonable suspicion: [*R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at para. 40, (S.C.C.)].

See also *R v Thomas*, 2014 ABPC 172:

> [58] It is my view that the judgment of the court in *MacDonald* is not ambiguous or unclear. Its wording has been considered by three members of the Supreme Court and interpreted to mean what it clearly states. If that meaning works a profound change in the law, it is for trial courts to embrace and apply that change; not ignore it.

See also *R v Green*, 2014 ONSC 1470.

[50] *Webber*, note 46.

[51] See for example *R v Campbell*, 2019 ONSC 6183.

> stand-alone safety search and a second standard for a safety search incidental to investigative detention. This approach was rejected by Justice Fitch speaking for this Court in *R. v. Patrick*, 2017 BCCA 57 at para. 93, leave to appeal ref'd [2017] S.C.C.A. No. 108.
>
> In *Patrick*, while discussing the application of *MacDonald*, Fitch J.A. said "[i]t would be incongruous to bring a more restrictive interpretation to the scope of permissible searches in an investigative detention context – a context in which the police have already formed reasonable grounds to suspect that the detained individual is connected to a particular crime and that his or her detention is necessary – than in the safety search context" (at para. 93).[52]

But this leads, fairly obviously, to a further problem. If *MacDonald*, creating the freestanding safety search power, did not raise the standard for safety searches incident to investigative detention, and the standard for the latter is reasonable suspicion, and the standard for the former and the latter must be the same, then the former, the freestanding safety search power, must *also* be based on reasonable suspicion.

That seems to be an impossible conclusion. Recall that literally the *only* point of contention between the majority and minority in *MacDonald* was the dissent's view that the majority was *wrongly* setting a reasonable grounds standard:

> Our colleagues assert, relying on *Mann*, that officers are only empowered to conduct "safety searches" where they have reasonable grounds to *believe* an individual is armed and dangerous (paras. 39 and 44). With respect, we do not agree with that conclusion. In our view, *Mann* decided that officers may conduct safety searches when they have reasonable grounds to *suspect* an individual is armed and dangerous.[53]

Nonetheless, some courts seem to have concluded that the majority in *MacDonald* did not set the very standard that the minority objects to them setting.

The British Columbia Court of Appeal in *Webber*, for example, observes that "the Court does not ordinarily overrule existing authorities without being explicit in its reasons that it is doing so."[54] They note as well that "[t]hat did not occur in *MacDonald*."[55] They add "If the majority in *MacDonald* intended to overturn *Mann*, it could have said so expressly."[56] One might have concluded that the majority in *MacDonald* did not say they were overturning *Mann* precisely because they were not doing so: as the minority in *MacDonald* said, "The majority in this case purports to apply *Mann*."[57] However, that does not seem to be the conclusion that *Webber* draws,

---

[52] *Webber*, note 46 at paras 56, 57.
[53] *MacDonald*, note 36 at para 61.
[54] *Webber*, note 46 at para 53.
[55] *Webber*, note 46 at para 53
[56] *Webber*, note 46 at para 54.
[57] *MacDonald*, note 36 at para 65.

since they hold that "this Court is free to follow the reasonable suspicion standard".[58] I cannot see any way to read that other than "we are applying the majority decision, and therefore using the standard set out in the minority".

This oddity is even more explicit in *R v Kim*. The trial judge there concludes that "I am bound by the majority in *MacDonald*, not by the interpretation of the majority's decision by the dissent."[59] On that basis, the judge concludes that (despite what the minority thought) the majority in *MacDonald* had established the same standard as in *Mann*, and therefore had set a reasonable suspicion standard in that case as well.

It would be confusing enough if merely the standard for search incident to investigative detention were unsettled – or perhaps more accurately, settled in different ways by different courts. Once that ambiguity spreads to the standard for safety searches alone, the confusion and unsettledness is that much greater.

3) Section 9 of the *Charter*: Arbitrary Detention

a) Introduction

Section 9 of the *Charter* guarantees the right to be free from arbitrary detention. Although the test did not develop nearly as quickly in this context as in the section 8 context, the tests for the two sections are parallel. First it must be asked whether there was a detention at all. If there was, the question becomes whether that detention was arbitrary, which is assessed through three criterial "the detention must be authorized by law; the authorizing law itself must not be arbitrary; and, the manner in which the detention is carried out must be reasonable."[60] As with section 8, there are surprisingly unanswered questions relating both to whether a person is detained, and whether that detention was arbitrary.

b) Is Acquiescence Essential for a Psychological Detention?

The concept of "psychological detention" arose early very in *Charter* jurisprudence, though it took over twenty years before the concept was very fully fleshed-out. Whether particular facts do or do not amount to a psychological detention is often likely to be a challenging question about which reasonable people could disagree, but that sort of uncertainty is inherent in the nature of the test itself. The particular uncertainty I will pursue here is whether a person must, in fact, *submit* to the detention for the test to be satisfied. This issue arises because "psychological detention" is a concept that comes from the case law, and the case law has not been consistent in how it frames the test. The result is that different courts apply different tests, and for the most part it appears that this inconsistency has not even been recognised.

The contrasting approaches are easily illustrated by looking at the Court's *first* explanation of psychological detention, and at its most recent articulation.

---

[58] *Webber*, note 46 at para 61.
[59] *R v Kim*, 2016 ABPC 9 at para 52
[60] *R v Le*, 2019 SCC 34 at para 124.

"Psychological detention" was first acknowledged in *R v Therens* in 1985. The Court there explained the concept in this way:

> Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.[61]

The most recent articulation of the test is in *R v Lafrance* from 2022. There the Court held:

> a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply . . . and that they are not free to leave".[62]

The difference is straightforward: the later articulation of the test simply requires a reasonable belief one is obliged to comply, which the earlier articulation contained the requirement of *actual* compliance. Which is correct? Can a person be psychologically detained even if they do *not* submit or acquiesce?[63]

A number of courts have treated submission as an absolute requirement. In *Nesbeth*, for example, police saw an accused in an apartment complex and called to him to stop, but he instead ran away. He was eventually apprehended and arrested, and the Ontario Court of Appeal found that he was not detained until that point. Specifically there had been no psychological detention prior to the arrest because "while there was a demand: 'Stop, police', the element of compliance with the demand was missing."[64] Similarly in *R v Atkins*, where the accused fled, the Ontario Court of Appeal held that "if the appellant did not acquiesce or submit to any deprivation of liberty, there could be no detention".[65] Other courts have also held that submission is a requirement, though they have been willing to find that even a very brief submission will suffice to crystallize the detention.[66]

Nesbeth is an older case and predates the fuller articulation of the test for psychological detention in *R v Grant*,[67] but the same reasoning has been used much more recently, and held to be dictated by the test in *Grant*. For example, in *R v Ratt*, the police yelled at the accused that he was under arrest and to stop: instead he ran away and police pursued and caught him. Relying on *Nesbeth*

---

[61] *R v Therens*, [1985] 1 SCR 613 at p 644.
[62] *R v Lafrance*, 2022 SCC 32 at para 21, quoting *R v Le*, note 60 at para 26 (ellipses in *Lafrance*).
[63] I propose here only to illustrate that this point *is* uncertain, not to argue for one side or the other. I will briefly say that my view is that submission ought *not* to be required. If a person rightly perceives that police intend to improperly detain them without authority – for example because of racial profiling – and therefore declines to submit, it would be counter-productive to prevent that person from challenging the *arbitrariness* of the police action, on the basis that they do not get past the threshold step of there being a detention. That would create a no-win situation for those improperly detained – either put up with the detention or forfeit the right to object to it.
[64] *R v Nesbeth*, 2008 ONCA 579 at para 16.
[65] *R v Atkins*, 2013 ONCA 586 at para 10.
[66] See for example *R v Reddy*, 2010 BCCA 11 or *R v Dunkley*, 2016 ONCA 597.
[67] *R v Grant*, 2009 SCC 32.

and other cases, the Saskatchewan Court of Appeal concluded that there had been no detention prior to the capture:

> … a reasonable person in Mr. Ratt's circumstances would have concluded that he or she had no choice but to comply with that command. What is missing, however, is the second component of the *Grant* test. Mr. Ratt did not submit or acquiesce – even briefly – to the peace officer's commands.[68]

Also in *R v Julom*, the Alberta Court of Appeal refused to find that an accused who left and hid from police when they approached him had been detained, specifically on the grounds that "[t]he appellant's conduct in this case was the *opposite* of submission or compliance".[69] Similarly, though it did not dictate the result in that case, in *R v Saretzky* the Alberta Court of Appeal held that "[t]he emphasis is on acquiescing to a loss of liberty reasonably believing there is no choice to do otherwise".[70]

It is perfectly understandable that Courts of Appeal should take submission or acquiescence to be necessary: after all, the Supreme Court phrased the test for psychological detention in *Therens* to include that requirement. On the other hand, the accused there *had* complied, and so that particular aspect of the test was arguably *obiter*. What really complicates matters and makes the situation uncertain, though, is that although the Supreme Court has never *explicitly* repudiated the requirement for submission, it has stopped *mentioning* it, and implicitly has decided cases as though it is *not* a requirement.

Above I quoted *Therens* from 1985 and *Lafrance* from 2022: *Grant*, which is of course a watershed case on psychological detention, was decided in 2009 and is in something of a midpoint. *Grant* does frequently quote the test from *Therens*, including the acquiescence requirement.[71] However, it also defines psychological detention test independently of that, and when doing so omits any mention of acquiescence: for example

> This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand.[72]

Grant, of course, also famously articulates the test for assessing whether a person has been psychologically detained, by looking at "1) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual; 2) The nature of the police conduct; and

---

[68] *R v Ratt*, 2020 SKCA 19 at para 37.
[69] *R v Julom*, 2022 ABCA 198, at para 33, emphasis in the original.
[70] *R v Saretzky*, 2020 ABCA 421, at para 32.
[71] For example *Grant*, note 67 at para 28:

> The general principle that determines detention for *Charter* purposes was set out in *Therens*: a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (*per* Le Dain J., at p. 644).

[72] *Grant*, note 67 at para 31.

3) The particular characteristics or circumstances of the individual where relevant".[73] The most natural reading of that portion of the decision is that it *fully* articulates the test for psychological detention: that would lead to the conclusion that acquiescence is no longer a relevant consideration, since it is not mentioned. Indeed, in *Lafrance* the Court said that "*Grant* is comprehensive in scope", in the context of excluding reliance on a previously-articulated test for psychological detention.[74]

More recent cases Supreme Court cases have omitted any mention of a requirement for submission. In the 2019 decision in *R v Le*, for example, the test was articulated as

> Even, therefore, absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave.[75]

Le quotes the test from *Grant* several times, but always the version from *Grant* which leaves out any mention of acquiescence.[76] Similarly *Lafrance*, which describes itself as affirming and applying *Le*, only quotes versions of the test which omit reference to submission, such as

> Psychological detention exists where an individual is legally required to comply with a direction or demand by the police, or where "a reasonable person in [that individual's] position would feel so obligated" and would "conclude that he or she was not free to go" (*Grant*, at paras. 30-31; *Le*, at para. 25).[77]

Le discusses *Therens* in a way which *implies* that the accused's submission is not required, but does not quite say so. In the context of considering the significance of the detainee's *subjective* view – that is, in explaining that the detainee's subjective view is not the important issue – the Court says that *Therens* is misleading:

> Before this Court, the Crown has argued that claimants' subjective perceptions about whether or not they were detained are "highly relevant". We do not accept this argument. It remains, and should remain, that the detention analysis is principally objective in nature. Prior to *Grant*, the objective nature of the test may have been unclear. For example, in *Therens*, this Court held that a detention will arise when an individual "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (p. 644) — a statement that may have suggested

---

[73] *Grant*, note 67 at para 44.
[74] *Grant*, note 67 at para 28. The Court was precluding reliance on *R v Moran* (1987), 36 CCC (3d) 225 on the basis that "*Moran* encourages courts to consider the subjective perceptions and beliefs of the accused, thereby emphasizing considerations that play a limited (if any) role in an objective assessment" (para 27).
[75] *Le*, note 60 at para 26.
[76] See for example *Le* note 60 at paras 25 (majority) or 233 (dissent).
[77] *Lafrance*, note 62 at para 22.

> that the analysis focuses on the reasonableness of an individual's subjective perceptions. But in *Grant*, this Court clarified that the analysis is objective.[78]

This *suggests* that there is no acquiescence requirement, since it says that the accused's own state of mind is not the issue, but is not explicit on the point. Also strongly suggesting that the Court no longer sees any such requirement is the fact that, in *Le*, the accused *did not* comply, but rather fled: if that were fatal to his claim to be psychologically detained, it would surely have been mentioned, at least by the dissent!

Some other courts seem to take the test no longer to require submission. For example in *R v Thompson*, police pulled up directly behind the accused's parked vehicle, but he was not immediately aware of them. An issue was whether he was psychologically detained from the moment his vehicle was blocked, or not until later, when he knew of the police presence. The Ontario Court of Appeal held that the detention began at the earlier time. This implies that acquiescence was not an issue, because the accused *could not* be said to either acquiesce or not if he was unaware of the police. As the Ontario Court of Appeal noted,

> The correct question, however, was not whether the appellant intended to drive away, but whether objectively the police had taken away his choice to do so.[79]

There are many good reasons to think that the Supreme Court no longer regards acquiescence as essential for a psychological detention, if indeed it ever did. However, none of *Grant*, *Le* or *Lafrance* explicitly repudiate the acquiescence requirement which was articulated in the early cases, which leaves room for doubt, and for post-*Le* decisions such as *Ratt*, *Julom* or *Saretzky* which rely on it.

c) Are "Reasonable Grounds" Necessarily "Probable Grounds"?

Arrest powers are set out in the *Criminal Code*, primarily in sections 494 and 495.[80] Some of those powers require that the arresting person find the arrestee committing the offence, but in general the required standard for arrest is one of "reasonable grounds to believe". Whether a particular arrest was lawful will therefore depend on whether that standard was met on the facts of the case: that is a question which must come before courts across the country scores of times every day. It is therefore astounding – mind-boggling, even – that there is uncertainty over what standard must be met to satisfy "reasonable grounds".[81]

---

[78] *Le*, note 60 at para 114.
[79] *R v Thompson*, 2020 ONCA 264 at para 50. See also *R v Tessier*, 2020 ABCA 289, which relies only on the *Le* definition of psychological detention, with no mention of submission or acquiescence.
[80] The possibility of any non-statutory arrest powers seems to have been precluded in *Fleming v Ontario*, 2019 SCC 45.
[81] The "reasonable grounds" standard arises in many other contexts, for example in many search powers such as warrants, and in principle the issue discussed here applies to those contexts as well. As a matter of fact, however, it is in the context of arrests that the problem has generally arisen.

Specifically, the issue is whether, for the arrest to be lawful, the person arresting must believe it is *probable* that the arrestee has committed the offence, or whether something less than that standard is sufficient.

I say there is "uncertainty", but that is a system-wide description rather than referring to uncertainty in individual cases. That is, for the most part individual judges seem to be quite certain of the answer: the problem is that there is disagreement about what that answer *is*. And as with other issues, a large part of the uncertainty here arises not because the Supreme Court has not clearly stated an answer, but because many lower courts are, for whatever reason, unwilling to accept that answer.

The difference of opinion is easily illustrated. The Ontario Court of Appeal, holding to the higher standard, has said that "[t]he reasonable grounds standard does not require the establishment of a *prima facie* case or proof beyond reasonable doubt."[82] The Saskatchewan Court of Appeal, articulating a lower version of the standard, has said that meeting the reasonable grounds requirement "does not mean the Crown must make out a *prima facie* case, or prove beyond a reasonable doubt or on a balance of probabilities that the person arrested had committed or was about to commit an indictable offence" (emphasis added).[83] The highlighted words show the difference in approaches: the Ontario Court of Appeal decision requires the grounds to be more probable than not, but the Saskatchewan Court of Appeal decision does not.

Once again, this is a situation where there is good reason to argue that there *ought not* to be any unsettledness. The Supreme Court has frequently considered the question of whether the "reasonable grounds" standard automatically imports the requirement that the belief be "probable", and has uniformly said, in the criminal context, that it does. In *Baron v Canada*, for example, exactly the argument that "reasonable grounds" was something less than "reasonable and probable grounds" was put to the Court and rejected:

> To my mind, *Hunter, supra*, does not give rise to legitimate controversy on this point. That decision required reasonable "and probable" grounds and simultaneously established that the two words import the same standard. "Reasonableness" comprehends a requirement of probability.[84]

In *R v Chehil* the Court distinguished reasonable suspicion from reasonable grounds to believe, and reiterated that

> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime.[85]

---

[82] *R v Canary*, 2018 ONCA 304 at para 23.
[83] *R v Lichtenwald*, 2020 SKCA 70 at para 34.
[84] *Baron v Canada*, [1993] 1 SCR 416 at para 55.
[85] *Chehil*, note 43 at para 27.

The Court also routinely refers to the standard for arrest as "reasonable and probable grounds", even though the words "and probable" were removed from the *Code* decades ago.[86]

Most tellingly and unambiguously (or so one would have thought) the Supreme Court has considered a court of appeal decision which said that, in the context of an arrest, "reasonable" did *not* import "probable", and said the decision was mistaken about that specific point. In *R v Loewen*, the Court agreed that the officer in the case had reasonable grounds for arrest, but qualified their agreement by saying that:

> The correctness of this conclusion is not affected by the fact that Slatter J.A. mistakenly held that the requirement of "reasonable grounds" in s. 495(1)(*a*) is different from the requirement of "reasonable and probable grounds".[87]

The 2010 decision in *Loewen* was the first Court of Appeal case to suggest that the reasonable grounds standard set something lower than a requirement for probable grounds, and given the Supreme Court's explicit and prompt correction of it in 2011, it ought to have been the last. It was, however, not.

Instead, it is commonplace to see claims to the contrary, such as the British Columbia Court of Appeal saying

> it is also well-established that "reasonable grounds" imports a test or standard that is *lower* than the standard of civil proof, or proof "on the balance of probabilities",[88]

the claim from the Alberta Court of Appeal that Canadian case law

---

[86] See for example *R v Storrey*, [1990] 1 SCR 241which quoted the language of (at the time) section 450:

> (1) A peace officer may arrest without warrant
>
> *(a)* a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence…

By the time *Storrey* was decided, the language had already been changed to its current version:

> 495(1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence…

The Court continues to use the language of "reasonable and probable" when referring to the standard for an arrest: see for example *R v Saeed*, 2016 SCC 24, *R v Ali*, 2022 SCC 1, *R v Stairs*, 2022 SCC 11, *R v Tim*, 2022 SCC 12 or *R v Lafrance*, note 62.

[87] *R v Loewen*, 2011 SCC 21 at para 5, referring to *R v Loewen*, 2010 ABCA 255 (*Loewen* ABCA).

[88] *R v Glendinning*, 2019 BCCA 365 at para 3. See also *R v Spence*, 2011 BCCA 280 at para 33 or *R v Hanareh*, 2017 BCCA 7 at para 39, relied on in *R v Lotfy*, 2017 BCCA 418 at para 57 and in *R v Orr*, 2021 BCCA 42 at para 77.

> does not require evidence showing on a balance of probabilities that a criminal offence has occurred before there are reasonable grounds for an arrest,[89]

the Saskatchewan Court of Appeal's conclusion that

> [t]he jurisprudence is consistent that "probability", in this sense, does not mean "balance of probabilities", or even "more likely than not",[90]

the Manitoba Court of Appeal's view that

> the reasonable grounds standard is less than that of a *prima facie* case or proof on a balance of probabilities or proof beyond a reasonable doubt,[91]

or the Newfoundland and Labrador Court of Appeal's position that

> the jurisprudence does not require, nor suggest, that reasonable grounds must be proved on a balance of probabilities.[92]

Disturbingly, it is common to see lower courts suggesting that the reasonable grounds standard is lower than reasonable and probable grounds, pointing to the Alberta Court of Appeal judgment in *Loewen* as the authority for that claim![93]

It is tempting to suggest that this is less a matter of something being *unknown*, and more an example of various courts being *wrong*, given the clear direction from the Supreme Court in *Loewen*. However, there are two reasons to concede that the situation is not quite that straightforward.

One is that – as many courts have pointed out – the Supreme Court has also said:

---

[89] *R v Ha*, 2018 ABCA 233 at para 61. See also *R v Brayton* 2021 ABCA 316.
[90] *R v Chapman*, 2020 SKCA 11 at para 65. See also *R v Shinkewski*, 2012 SKCA 63 at para 13, *R v Todd*, 2019 SKCA 36 and *R v Santos* 2022 SKCA 50.
[91] *R v Jacob (JA)*, 2013 MBCA 29 at para 34. See also *R v Omeasoo et al*, 2019 MBCA 43 at para 31.
[92] *R v Kinsella*, 2022 NLCA 40 at para 23
[93] See for example *R c Michael*, 2019 QCCQ 5444 at 241:

> in *R.* v. *Loewen*, the Alberta Court of Appeal specified that a belief can be "reasonable" even if the existence of the facts is not "probable".

Equally relying on the Court of Appeal decision in *Loewen* for this point about which it was specifically overturned, see *R v St Clair*, 2018 ONSC 5173, *R v Cater*, 2019 NSSC 302, *R c Baptiste*, 2020 QCCQ 971, *R v Sekhon*, 2020 BCSC 2180, *R c McKenzie-Fletcher*, 2020 QCCQ 6227, *R v Coughlin*, 2012 ABPC 46, *R v Gross*, 2012 ABPC 286, *Allen v Alberta (Law Enforcement Review Board)*, 2013 ABCA 187, *R v Cook*, 2014 ABPC 70, or *R v Notay*, 2021 ABQB 706.

> the 'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.[94]

Many courts rely on that passage from *Mugesera v Canada (Minister of Citizenship and Immigration)* to support the "less than probable" claim.[95]

However, it is important to be aware of the entire context of that quote, since it shows that any such reliance is misplaced. More fully, what the Court said was:

> The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60.[96]

Two important things arise from that fuller context. First, the Court is *not* talking about the reasonable grounds standard in the context of arrest, or in a criminal context, or in general: it is discussing it in the very particular context of section 19(1)(f) of the *Immigration Act*. That is, the issue they are addressing is whether a person should be denied entry into Canada because they committed a war crime or a crime against humanity, *not* the standard a police officer should apply in deciding whether to arrest.

Second, it is not just that that different context *might* change things: *Mugesera* itself is clear that it *does* change things. The authority relied on in *Mugesera* is the Federal Court of Appeal decision in *Sivakumar*, also dealing with the *Immigration Act* and the issue of whether there were reasonable grounds to believe a person had committed crimes against humanity. Looking to international law for guidance on what that standard meant in that context, the Federal Court of Appeal had concluded that "the international community was willing to *lower the usual standard of proof* in order to ensure that war criminals were denied safe havens."[97]

Mugesera ought not, therefore, to be seen as useful authority for the meaning of "reasonable grounds" in the arrest context. Indeed, quite the opposite, it explicitly says that it is referring to a different context with a lower than usual standard of proof, which makes clear that the

---

[94] *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40.
[95] This passage was pointed to by the Alberta Court of Appeal in *Loewen*, and has been cited by many other cases, such as *Glendinning*, note 88, *Spence*, note 88, *Ha*, note 89, *Shinkewski*, note 90, *St Clair*, note 93, *Notay*, note 92 and others.
[96] *Mugesera*, note 94 at para 114.
[97] *Sivakumar v Canada (Minister of Employment & Immigration)*, [1994] 1 FC 433 at para 18, emphasis added.

"ordinary" standard *is* higher. Nonetheless *Mugesera* as an authority has taken on a life of its own, contributing to the uncertainty.

The second reason one cannot straightforwardly say that lower courts are just making a mistake is that some Court of Appeal decisions do acknowledge the Supreme Court decision in *Loewen*, but nonetheless argue that it does not stand for the proposition that reasonable grounds requires a balance of probability standard.

Some of these arguments are, frankly, difficult to follow. In *Glendinning*, for example, the British Columbia Court of Appeal argues

> in *Loewen*, the Supreme Court did *not* take issue with the Alberta Court of Appeal's suggestion that a judge before whom an arrest without warrant is being challenged "must find it was objectively reasonable to believe an offence was being committed, <u>not that it was probable or certain</u>." (C.A. at para. 32; emphasis added.)[98]

What the Supreme Court said was "Slatter J.A. mistakenly held that the requirement of 'reasonable grounds' in s. 495(1)(*a*) is different from the requirement of 'reasonable and probable grounds'.[99]" How that passage can *not* be read as taking issue with the claim that a reasonable belief does not have to be probable is mysterious to me.

The other arguments are terminological ones. For example, in *Ha*, the Alberta Court of Appeal suggests that the standard ought not to be phrased in terms of "probability" at all: the issue, they argue, is "likelihood":

> Semantically, the difference between "probability" and "likelihood" is subtle. In law, probability means "more likely than not", or when expressed mathematically, "at least 50% plus one". "Likely", or "not unlikely", do not have a technical meaning.[100]

On this basis, they argue that a reasonable *likelihood* of something occurring does not require that it be more probable than not, only that it be more probable than a mere suspicion. In support of that position, they suggest:

> The expression "the point where credibly based probability replaces suspicion" in particular is inherently counterintuitive, and not a helpful way to formulate the standard of proof; it could better be expressed as "the point where credibly based likelihood replaces suspicion".[101]

In the abstract it is possibly correct that there is the linguistic difference between "likely" and "probable" that the British Columbia Court of Appeal here claims. The argument, however, has something of a "cart before the horse" feel to it: it amounts to saying that because the standard is *not* "over 50%", and because using the word "probability" would imply that it *is* "over 50%",

---

[98] *Glendinning*, note 88 at para 3.
[99] *Loewen*, note 87 at para 5.
[100] *Ha* note 89 at para 64.
[101] *Ibid* at para 65. It is perhaps worth noting that the British Columbia Court of Appeal relies on the Alberta Court of Appeal decision in *Loewen* as the basis for this distinction.

therefore the phrase "credibly-based probability" is not the best way to describe the standard. However, the obvious problem with that argument is that the Supreme Court routinely *does* use the phrase "credibly-based probability" to define the standard.[102] The natural conclusion, one would think, should therefore be that the Court means to say that the standard is "over 50%", not that they have consistently expressed themselves badly.

The other linguistic argument which is made is not to claim that "probability" is the wrong word, but instead to claim that the word "probability" *itself* does not imply "more likely than not". In *Glendinning*, for example, it is argued that "one often hears expressions such as 'There is a 30% probability of rain'."[103] On this basis, the argument goes, statements such as that in *Chehil* – "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime"[104] – do not imply that reasonable grounds mean "more likely than not".

As a claim based on the meaning of the word "probability", again this argument could have some plausibility. "Probability" is a scale along which things are placed, and something which has only a 1% probability is certainly not "probable". The difficulty with the argument overall, however, is that most of the time the Supreme Court does not describe the reasonable grounds standard in terms of *probability*: it describes it in terms of whether the belief is *probable*.[105] Things with a low probability are not probable, but to ask whether something is "probable" *is* to ask whether it is more likely than not.

Indeed, to return to our starting point, this is *exactly* the point in the Supreme Court's decision in *Loewen*. In the Alberta Court of Appeal, Slatter J asked the question "Is there a difference between 'reasonable' grounds and 'probable' grounds? In other words, can grounds be reasonable if they are not also probable?"[106] The answer he gave was 'yes', and that is the thing – the *only* thing – about which the Supreme Court of Canada said he was mistaken: "Slatter J.A. mistakenly held that the requirement of 'reasonable grounds' in s. 495(1)(*a*) is different from the requirement of 'reasonable and probable grounds'."[107]

At a minimum, it has to be said that there remains confusion over whether the "reasonable grounds" standard in the context of arrests requires that a belief be "probable" or not. The Supreme Court of Canada has repeatedly said that it does. The Courts of Appeal in five provinces nonetheless claim that it does not, but not without some resistance from their own

---

[102] See for example *R v Fearon*, 2014 SCC 77, *R v Tse*, 2012 SCC 16, *Chehil*, note 43; *R v Morelli*, 2010 SCC 8, *R v Rodgers*, 2006 SCC 15, *R v M (MR)*, [1998] 3 SCR 393, *Baron*, note 83, *R v Wise*, [1992] 1 SCR 527, or *Hunter v Southam*, [1984] 2 SCR 145. Many of these cases refer to the standard for searches, which is also generally "reasonable grounds". It would be possible to suggest that the term has a different meaning in the arrest and search contexts, but I am not aware of that having been put forward in any case as an argument.
[103] *Glendinning*, note 88 at para 7. See also *R v Chapman*, 2020 SKCA 11 at para 65.
[104] *Chehil*, note 43 at para 27.
[105] See for example the cases listed above in footnote 86.
[106] *Loewen* ABCA, note 87 at para 14.
[107] *Ibid* at para 5.

lower courts.[108] The Ontario Court of Appeal has adopted the Supreme Court's approach, but not all lower courts in that province have taken the same view.[109] Realistically, counsel and accused in cases where the issue arises cannot be certain of what law will be applied, and so this remains an area of uncertainty.

4) Section 10: Right to Counsel

a) Is There a Right to Counsel during a Citizen's Arrest?

As it happens, I began law school in 1982, when the *Charter* was only a few months old. At an interview before I started, the Dean at the time, Bill Charles, asked me a question: does the newly-created right to counsel in the *Charter* apply to citizen's arrests? The same issue arose several times in other courses I took while in law school. It seemed obvious at the time that this was *the* burning issue around section 10! Somehow, forty years later, we still don't know the answer. As with the other issues I have pursued, my goal here is not to say what the answer should be, but simply to highlight the surprising fact that we still don't *know* the answer.[110]

In this case the uncertainty does not arise because of conflicting guidance from the Supreme Court, or even conflicting guidance from courts of appeal: it is simply that the question has not yet been authoritatively answered. The closest we have to direct guidance from the Supreme Court comes from *R v Asante-Mensah*, but all the Court said there was "we are not called on in this case to address the question whether a citizen's arrest could be construed as state action for purposes of the *Charter*": that is, a deliberate non-answer from two decades ago is the highest guidance we have.[111]

At a policy level, there are considerations which pull either way. For example, the right to counsel is extended to arrestees because

> a person who is "detained" within the meaning of s. 10 of the *Charter* is in *immediate* need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty.[112]

That rationale applies equally strongly no matter who it was that carried out the arrest.[113] Indeed, arguably it applies even *more* strongly in the context of a citizen's arrest, since the rules of

---

[108] See for example *R v Ahmed*, 2021 BCPC 203, arguing that the standard *does* require that the belief be more likely than not.
[109] See for example *R v Hayatibahar*, 2022 ONSC 1281.
[110] For an argument that the right to counsel *should* arise, see Steven Penney, "State Action in Action: The *Charter*'s Application in Criminal Investigations", to which I am indebted in the writing of this.
[111] *R v Asante-Mensah*, 2003 SCC 38 at para 77.
[112] *R v Bartle*, [1994] 3 SCR 173 at 191, emphasis in original.
[113] The right to counsel arises on either arrest or detention, and so the two need not be distinguished in this context or that of section 9. However, I shall speak here only of arrest, since that is realistically the context in which the question of *Charter*-invoking interferences with liberty by private citizens arises. Fortunately the concept of a "citizen's investigative detention"

evidence typically make it more difficult to admit statements when they have been made to officers of the state.

At a doctrinal level, the right to counsel arises only because of the *Charter*, and section 32 of the *Charter* limits its application to government action. On the one hand it is easy to argue that action by a private citizen – a "citizen's arrest" – is by definition *not* action by the government, and therefore no *Charter* rights can arise. On the other hand, one can argue that the power of citizen's arrest *is* an exercise of state action, but one undertaken by individual citizens.[114]

At a practical level, section 10 has been interpreted through a series of decisions to have a number of informational and implementational components, and it is unrealistic to think that all those rules *could* be complied with in the context of a citizen's arrest. Even presuming that only some simplified version of the right was held to apply,[115] it is easy to imagine the citizen saying "you have the right to counsel", the arrestee saying "ok, I want that", and things then coming to a standstill with no-one quite knowing what to do next.[116]

Whether one ultimately supports the right to counsel arising for citizen's arrests is likely to depend on whether one approaches the issue from the perspective of the arrestor or the perspective of the arrestee. It is not difficult to find cases where each of those approaches have been adopted, and so there is no sure guide to the likely answer there.

For example, we often see courts reasoning essentially on some basis like "if the officer has done all we could ask of them, then we should uphold their actions". In *R v Biron*, for example, this was the attitude of the majority, in finding that the officer properly arrested the accused on a "finds committing" basis, even though the arrestee was ultimately acquitted and therefore was not in fact "found committing" the offence. The majority took the view that if the arrestee's argument succeeded,

> no peace officer can ever decide, when making an arrest without a warrant, that the person arrested is "committing a criminal offence". In my opinion the wording used in para. (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence.[117]

---

had not gained currency, despite *R v Dell*, 2005 ABCA 246 implicitly approving of such a power.

[114] This is the approach in *R v Lerke*, 1986 ABCA 15, discussed below.

[115] See the discussion in Penney, note 110.

[116] A similar point was made in *R v AMJ*, 1999 BCCA 366**:**

> [37]…there is an air of unreality in requiring a person who apprehends a wrongdoer in one of the situations described in s. 494 to give the wrongdoer a *Charter* warning.

It should be said that the citizen's arrest power seems primarily, almost exclusively, to have been used by private security guards, so there is *some* basis there to think that at least a bit of training might be practical. Against that, however, it must be noted that conspiracy theorists now seem determined to make use of the power, which does make any orderly use of it seem likely.

[117] *The Queen v Biron*, [1976] 2 SCR 56 at p 75.

The majority approach the issue, therefore, by looking at the situation from the perspective of the arrestor. The dissent, in contrast, felt that matters had to be approached from the perspective of the arrestee:

> We cannot go on a guessing expedition out of regret for an innocent mistake or a wrong-headed assessment. Far more important, however, is the social and legal, and indeed political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise.[118]

More recently, we see the same kind of difference in perspective leading to a different result arising in *R v Tim*. In that case, the officer had arrested an accused, correctly thinking that the accused possessed gabapentin, but incorrectly thinking that it was unlawful to possess gabapentin. The Alberta Court of Appeal held to the view that this mistake of law did not mean the arresting officer did not act on reasonable grounds:

> The police officer's conduct was not perfect and it is not contested that he made a mistake. But, his actions should be assessed according to the test of the normally prudent, diligent and competent police officer in the same circumstances… on the issue of reasonableness, it would be imposing an impossible standard to expect a police officer to possess an encyclopedic knowledge of the contents of Schedules I to IV of the *CDSA*.[119]

The Supreme Court of Canada overturned this result, however, because for them the issue was not assessing the arresting officer's conduct, but assessing the arrestee's rights:

> Allowing the police to arrest someone based on what they believe the law is — rather than based on what the law actually is — would dramatically expand police powers at the expense of civil liberties. This would leave people at the mercy of what particular police officers happen to understand the law to be…Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce.[120]

Both perspectives – assessing whether the arresting person acted as appropriately as they could, or alternatively assessing the impact on the interests of the arresting person – can regularly be found in the case law, and so looking to that does not resolve the uncertainty.

Although the Supreme Court has left the question unanswered, other courts have been called upon to answer it, though surprisingly there is little case law at the court of appeal level. The leading case, one would have to say, is the decision in *R v Lerke*. In that early case, the Alberta Court of Appeal examined the power of citizen's arrest, noting that although it was now codified

---

[118] *Biron*, *ibid.* at p 64.
[119] *R v Tim*, 2020 ABCA 469 at para 39.
[120] *R v Tim*, 2022 SCC 12 at para 30.

it was of ancient lineage, and indeed that the broader powers of police officers to make arrests were statutory expansions of that original "citizens" authority. They concluded that

> [t]he power exercised by a citizen who arrests another is in direct descent over nearly a thousand years of the powers and duties of citizens in the age of Henry II in relation to the "King's Peace". Derived from the Sovereign it is the exercise of a state function.[121]

and therefore that

> when one citizen arrests another, the arrest is the exercise of a governmental function to which the *Canadian Charter of Rights and Freedoms* applies.[122]

That conclusion has never been affirmed by the Supreme Court of Canada, nor has it been explicitly repudiated. What primarily contributes to the sense of uncertainty over the issue is whether the Court *implicitly* repudiated *Lerke* with its decision in *R v Buhay*: a decision, it must be said at the start, which never mentions *Lerke* and is not about arrests, citizens or otherwise.

In *Buhay*, two security guards at a bus station detected the smell of marijuana from inside a locker, opened it, and found a duffel bag with marijuana. The guards put the bag back, locked the locker, called the police, then unlocked the locker again when the police arrived. There was no question that the actions of the police in relation to the locker and marijuana attracted *Charter* scrutiny under section 8: the issue was whether that was also true of the actions of the security guards. The Court concluded that section 8 *did not* apply.

The *Charter* could only apply to the security guards if they were performing a specific government function or if they could be considered state agents. The Court allowed for the possibility that private actors could be performing a public function if the state abandoned it,[123] but that was not the case here. Whether the guards were state agents would depend on the relationship between them and the police:

> the proper question is whether the security guards would have searched the contents of locker 135 but for the intervention of the police. On the facts here, it is clear that the security guards acted totally independently of the police in their initial search.[124]

This kind of "volunteer participation…will not usually be sufficient direction by the police to trigger the application of the *Charter*."[125] Whether someone, particularly a private security guard, had become a state agent on particular facts would require a case-by-case analysis.[126]

As noted, the central controversy (to the extent there really *is* a "controversy" in this under-discussed area) relates to whether *Buhay* implicitly overruled *Lerke*. It is important to note, therefore, that the reasoning in the two cases is fundamentally at cross-purposes to one another.

---

[121] *Lerke*, above note 114 at para 21.
[122] *Lerke*, above note 114 at para 23.
[123] *R v Buhay*, 2003 SCC 30 at para 31.
[124] *Buhay*, *ibid* at para 29.
[125] *Buhay*, *ibid* at para 30
[126] *Buhay*, *ibid* at para 31.

They address the same issue in quite different ways, and so using the reasoning from one case is simply to *ignore* the reasoning in the other.

For example, in *R v Skeir* the Nova Scotia Court of Appeal declined to follow *Lerke*. They held, based on *Buhay*, that "there has been neither an express delegation nor an abandonment in whole or part, of the police arrest power to private security officers", and therefore that no right to counsel arose.[127] See also *R v NS*, a very brief decision where the Ontario Court of Appeal held that:

> …we are satisfied on the authority of *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.), paragraphs 25-31 that the security guards could not be considered police agents or otherwise be subject to the limitation of the *Charter*.[128]

As an application of *Buhay*, these conclusions are perfectly reasonable. However, the reasoning ignores the rationale offered in *Lerke* for the *Charter* applying specifically to *citizen's arrests*: that that power *itself* is a state function. *Lerke* does not rest on the notion that private citizens are somehow filling in for police, or acting on their behalf, when they perform arrests. It says nothing about whether private security are *in general* acting as agents of the police, or are performing state functions when they do anything *other than* carry out arrests. The result in *Buhay* is simply beside the point to the rationale offered in that case.

That was the essence of the reasoning of the Alberta Court of Appeal, when they concluded in *R v Dell* that *Buhay* had not overturned *Lerke*. The decision looked at whether the right to counsel, given that it arose in the context of citizen's arrest, also arose in the context of "citizen's investigative detentions".[129] They concluded that it did not, but first confirmed that *Lerke* was still good law in Alberta:

> As I read *Buhay*, it does not determine that the *Charter* has no application to a citizen's arrest by a private person. *Buhay* involved a search and seizure, not a citizen's arrest, and *Lerke* was neither considered nor mentioned. There is but a passing reference to arrest in paragraph 31. The Supreme Court confirmed the existence of the government function exception in *Buhay*, noting that it may derive from an express delegation or an abandonment of state powers to a citizen. Moreover, the Supreme Court recently confirmed that the power of citizen's arrest, having its roots in a power derived from the sovereign or state, survives in s. 494 of the *Criminal Code: Asante-Mensah*, *supra*, at paras. 36-40. It follows that the power of citizen's arrest is a delegation by the sovereign or state to the ordinary citizen. The fact that the delegation is concurrent (to peace

---

[127] *R v Skeir*, 2005 NSCA 86.
[128] *R v NS,* 2004 OJ No 290 (CA) at para 1. See also *AMJ*, above note 116, which is unsympathetic to the notion of section 10 arising in a citizen's arrest, but is deciding a different issue.
[129] As a side note, I would argue that the proper conclusion ought to have been that there is no such thing as a "citizen's investigative detention". The power of investigative detention was created by means of the *Waterfield* test, which is specifically and exclusively a tool for creating *police* powers.

> officers as well as to private citizens) and direct (from the sovereign to the citizen rather than from the police to the citizen) does not necessarily defeat the essence of the delegation.[130]

Lerke, directly on the question of whether section 10 arises in a citizen's arrest, was decided in 1986. *Buhay*, which is inferentially relevant and possibly leads to the opposite result, dates back to 2003. *Asante-Mensah*, also in 2003, left the section 10 question open. In the intervening decades, nothing substantial has changed to make the answer any more certain.

Some lower courts continue to conclude that the reasoning in *Lerke* is correct, that *Buhay* does not affect it, and therefore that section 10 rights do arise in a citizen's arrest. Not surprisingly many of these cases are from Alberta,[131] but courts in other provinces continue to accept the reasoning in that case.[132] Courts in other provinces, particularly Ontario, have concluded that *Buhay* (or *Buhay* as applied in *NS*) settles that there is no right to counsel in a citizen's arrest.[133] Yet other lower courts take the view that the question remains an open one.[134] We are left, then, with two fundamentally different approaches to the issue, each defensible in their own right, but inconsistent with each other. Unless and until the matter reaches the Supreme Court, it appears that the uncertainty will remain.

5) Conclusion

Law is, in many ways, inherently unsettleable. It ought to develop to adapt to changed circumstances, and so no answer should ever be seen as certain. To a certain extent, this is not only unavoidable, but even desirable. As the Court has commented, if lower courts feel themselves too firmly bound by every potential dictate in higher court decisions,

> the effect would be to deprive the legal system of much creative thought on the part of counsel and judges in other courts in continuing to examine the operation of legal principles in different and perhaps novel contexts, and to inhibit or skew the growth of the common law.[135]

The uncertainty discussed above, however, cannot generally be thought of as falling within that desirable category. The lack of clarity around the need (or not) for a subjective expectation of privacy, and of the need for submission (or not) to an investigative detention, is a reflection of

---

[130] *Dell*, above note 113 at para 17.
[131] See for example *R v Parsons*, 2001 ABQB 42, *R v Castor*, 2006 ABPC 64, *R v McCowan*, 2011 ABPC 79, *R v MacKenzie*, 2014 ABPC 54, or *R v Whyte*, 2021 ABPC 326.
[132] See *Giguere c R*, 2017 QCCS 3959 or *R v Mehta*, 2018 QCCM 240.
[133] See for example *R v Giamou*, 2015 ONCJ 90:
> [6]…At least in Ontario, that issue was put to rest on appeal in *R v N.S.,* citing the reasoning in the Supreme Court of Canada decision, *R v Buhay*.

See also *R v Singh*, 2019 ONCJ 875 and *R v Williams*, 2019 ONSC 3414. See also *R v Webb*, 2017 SKPC 20, which concludes section 10 does not arise in a citizen's arrest, but without explanation.
[134] See *R v Asp*, 2008 BCSC 794 and *R v Tallman*, 2013 BCPC 306.
[135] *R v Henry*, 2005 SCC 76 at para 56.

ambiguous guidance from the Court. The disagreements over the standard for search incident to investigative detention or the meaning of “reasonable grounds” are related less to the absence of answers and more to unwillingness to accept the answer given. And the uncertainty over whether section 10 applies to citizen’s arrest arises from awareness by the Court that the question needs to be answered in the abstract, but has not yet needed to be answered in the concrete.

In that last case, the very fact that the question not reached the Supreme Court might suggest that the circumstances in which i arises are uncommon enough that the lack of a clear answer causes no real harm. Each of the other questions, though, relate to routine aspects of questions which come before the courts daily: was the accused searched, was that search unreasonable, was the accused detained, was that detention arbitrary? It is both surprising and unfortunate that these issues remain unsettled, and the system would be better off if those questions were answered, and those answers were accepted.