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Investigative Detention: A Search/ Seizure by Any Other Name?

Hon. Justice Casey Hill*

I. INTRODUCTION

The common law interpretation of a constable's duties and powers, resulting in a non-legislative ancillary powers doctrine, has more or less been broadly criticized, especially insofar as the recognition of an authority to investigatively detain a person.¹ The judicial importation of the *Waterfield*² analysis as the foundation for investigative detention sees the courts as both the creator of the detention power and definer of its contours within the *Canadian Charter of Rights and Freedoms*³ context of arbitrary detention prohibited by section 9 of the Charter.

While undoubtedly enhancing section 9 Charter standards by interpreting the prohibition against arbitrary detention in accordance with equality principles animating section 15(1) of the Charter would serve to counter both abusive and over-inclusive exercises of investigative

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¹ J. Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 Crim. L.Q. 299; D.M. Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905; A. Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329; S. Coughlan, "Search Based on Articulate Cause: Proceed With Caution or Full Stop?" (2002) 2 C.R. (6th) 49; T. Quigley, "Brief Investigative Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L. Rev. 935.

² *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164, at 166 (C.A.) requiring the Court to consider whether the constable's conduct was *prima facie* an unlawful interference with the individual's liberty or property and, if so, whether such conduct falls within the general scope of any duty imposed by statute or recognized at common law and whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of police powers associated with the duty. The *Waterfield* approach, accepted in *R. v. Dedman*, [1985] S.C.J. No. 45, 20 C.C.C. (3d) 97, at 115-16 (S.C.C.), was applied by Doherty J.A. in *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.) to define a police officer's power to investigatively detain a suspect. Prior to the decision in *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.) recognizing such a common law authority, the *Simpson* case had been adopted in every province: see M. Fairburn, "*Mann* Oh Man — We've Only Just Begun" (2005) 17 N.J.C.L. 171, at 172-73.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11 [hereinafter "the Charter"].

detention,⁴ the choice to settle investigative detention into a section 9 analysis alone, and not a section 8 search/seizure analysis may, at some point, require rethinking.

In the seminal case of *Hunter v. Southam*,⁵ Dickson J. (as he then was) observed that the section 8 Charter right textually carrying an unreasonableness standard otherwise had no historical, political or philosophical context providing any obvious gloss on the guarantee, unlike the U.S. Fourth Amendment with its “advantage” of a number of articulated prerequisites.⁶ Interpretation of the U.S. Constitution with a guarantee that everyone has a right “to be secure in their persons”,⁷ and no arbitrary detention equivalent, has led to the American courts dealing with investigative detention as a search and seizure issue.⁸

Early on in our Charter experience, random vehicle stop jurisprudence, arbitrary detention scenarios justified by section 1 Charter analysis, and therefore not true investigative detention situations based on reasonable grounds to suspect, rejected search and seizure scrutiny in favour of section 9 Charter analysis.⁹

⁴ D.M. Tanovich, “Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall L.J. 145.

⁵ *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.) [hereinafter “*Hunter v. Southam*”].

⁶ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 at 105 (S.C.C.). In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, 54 C.C.C. (3d) 417, at 449 (S.C.C.), Wilson J. (dissenting in the result) described s. 8 of the Charter as “totally lacking in specificity”. Justice La Forest, in *R. v. Edwards*, [1996] S.C.J. No. 11, 104 C.C.C. (3d) 136, at 153 (S.C.C.), stated that s. 8 “unlike many of the other Charter provisions is not qualified by express circumstances, such as, for example, s. 9 which protects everyone arbitrarily detained or imprisoned”. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁷ U.S. Const., amend. IV.

⁸ *Brendlin v. California*, 127 S. Ct. 2400, at 2403, 2405, 2407 (2007) (“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment”: p. 2403). “[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person”: *Terry v. Ohio*, 392 U.S. 1, at 16 (1968); C. Slobogin, “Let’s Not Bury *Terry*: A Call for Rejuvenation of the Proportionality Principle” (1998) 72 St. John’s L. Rev. 1053, at 1068 (“holding that a stop is not a ‘seizure’ clearly does violence to the normal meaning of the word”).

⁹ In *R. v. Hufsky*, [1988] S.C.J. No. 30, 40 C.C.C. (3d) 398 (S.C.C.), the Court answered the following stated constitutional question “No”: “whether the spot check procedure, whereby the police officer required the surrender for inspection of the driver’s licence and insurance card, infringed the right to be secure against unreasonable search guaranteed by s. 8 of the *Charter*” (at 401 C.C.C.). The Court held, at 410 C.C.C.:

With the common law recognition, many would say development, of investigative detention, the courts continued to distance the constitutional analysis from section 8, staying with the trend established in random/arbitrary detention cases. The vehicle/driver stop jurisprudence relating to arbitrariness concerned itself with unfettered discretion, randomness and action other than in accord with fixed standards. This is quite different than police conduct measured against the standard of targeted necessity of “reasonable grounds to suspect” integral to investigative detention.¹⁰ Accordingly, it is not readily apparent why section 9 has occupied the entire constitutional field in assessing the investigative detention topic.

It is evident that the exclusive section 9 approach to detention tends to fall down when one considers the situation where, in the decision to detain, however defined, the probable cause standard is not met only at

In my opinion, the demand by the police officer, pursuant to the above legislative provisions, that the appellant surrender his driver’s licence and insurance card for inspection did not constitute a search within the meaning of s. 8 because it did not constitute an intrusion on a reasonable expectation of privacy: cf. *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145. There is no such intrusion where a person is required to produce a licence or permit or other documentary evidence of a status or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege.

Similarly, in *R. v. Ladouceur*, [1990] S.C.J. No. 53, 56 C.C.C. (3d) 22 (S.C.C.), the Court rejected (at 45 C.C.C.) a s. 8 Charter application in light of the narrow question before the court:

Is section 189a(1) of the *Highway Traffic Act*, R.S.O. 1980, c. 198, as amended by s. 2 of the *Highway Traffic Amendment Act, 1981 (No. 3)*, S.O. 1981, c. 72, inconsistent with ss. 7, 8 and 9 of the *Canadian Charter of Rights and Freedoms* to the extent that it authorizes the random stop of a motor vehicle and its driver by a police officer acting without any reasonable grounds or other articulable cause to believe that an offence has been committed, when such stop is not part of an organized procedure such as the R.I.D.E. program?

At p. 30 C.C.C., the court concluded that the case was “governed by the decision in *Hufsky*”, adding: Section 8 might be brought into play in circumstances where the police, in the process of a random stop, found in the car marijuana or an item of stolen property. But the police in this case did no more than request the appellant’s licence and insurance papers. The appellant quickly admitted that his licence was under suspension and as a result he was unable to produce these documents. It follows that it cannot be argued that a “seizure” within the meaning of s. 8 occurred. The action of the police in this case cannot be regarded as a violation of s. 8 of the *Charter*.

¹⁰ Here, the distinction is drawn between arbitrary in the sense of “random”, “no criteria for selection”, with “absolute discretion” without “criteria, express or implied, which govern its exercise” (*R. v. Hufsky*, [1988] S.C.J. No. 30, 40 C.C.C. (3d) 398, at 407 (S.C.C.)) or indiscriminate, capricious, abusive and indiscriminate (*R. v. Cayer*, [1988] O.J. No. 1120, 66 C.R. (3d) 30, at 43 (Ont. C.A.) (leave to appeal refused [1989] 1 S.C.R. vii (S.C.C.))) on the one hand, and, on the other, an officer’s mistaken application of a reasonable grounds or reasonable suspicion standard within the context of a specific fact situation. It was observed in *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 22 (Ont. C.A.) (notice of discontinuance filed after leave to appeal granted [1999] S.C.C.A. No. 87 (S.C.C.)) that “articulable cause is used only to distinguish between those lawful stops which are random and, therefore, arbitrary and those lawful stops which are selective and not arbitrary”. On this view, the selectivity criterion, in effect the absence of randomness, distinguishes arbitrary from non-arbitrary.

the level of unlawful police conduct, as opposed to the imposition of arbitrary detention breaching section 9.¹¹ While a finding of unlawful detention is not dispositive of the section 9 Charter issue, such a finding nevertheless “will play a central role in determining whether the detention is also arbitrary”.¹²

Section 8 of the Charter “guarantees a broad and general right to be secure from unreasonable search and seizure”.¹³ While *Hunter v. Southam*¹⁴ introduced a constitutional framework for section 8 analysis extending

¹¹ Turning again to the subject raised in footnote 10, the appropriate characterization of imperfect application of a selective standard of belief to particular facts, in *R. v. Duguay*, [1989] S.C.J. No. 4, 46 C.C.C. (3d) 1, at 5 (S.C.C.), in stating that: “The majority in the Court of Appeal for Ontario did not enunciate any principle or rule of law with which we disagree”, the Court implicitly approved the *dicta* of MacKinnon A.C.J.O. ([1995] O.J. No. 2492, 18 C.C.C. (3d) 289, at 296 (Ont. C.A.)):

It cannot be that every unlawful arrest necessarily falls within the words “arbitrarily detained”. The grounds upon which an arrest was made may fall “just short” of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.

Subsequently, the question as to whether “[u]nlawful arrests may be inherently arbitrary” was left as an open question in *R. v. Latimer*, [1997] S.C.J. No. 11, 112 C.C.C. (3d) 193, at 204 (S.C.C.). In *R. v. Clayton*, [2007] S.C.J. No. 32, at paras. 20-21, 220 C.C.C. (3d) 449 (S.C.C.), the court observed that a lawful search cannot be arbitrary without committing itself to saying every unlawful search is arbitrary. That said, the distinction between unlawful detention/arrest and that which is properly characterized as arbitrary has been otherwise solidly grounded jurisprudentially: *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 504 (Ont. C.A.); (“it may be that a detention although unlawful would not be arbitrary if the officer erroneously believed on reasonable grounds that he had an articulable cause. I need not decide whether such a belief could avoid an infringement of s. 9 of the *Charter*”); *R. v. Ladouceur*, [1987] O.J. No. 333, 35 C.C.C. (3d), 240, at 252 (Ont. C.A.) (revd on a different basis [1990] S.C.J. No. 53, 56 C.C.C. (3d) 22 (S.C.C.)); *R. v. Cayer*, [1988] O.J. No. 1120, 66 C.R. (3d) 30, at 43 (Ont. C.A.) (leave to appeal refused [1989] 1 S.C.R. vii); *R. v. Monney*, [1997] O.J. No. 4806, 120 C.C.C. (3d) 97, at paras. 88-90 (Ont. C.A.) (revd on a different basis [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129 (S.C.C.)); *R. v. Willis*, [2003] M.J. No. 117, 174 C.C.C. (3d) 406, at para. 18 (Man. C.A.); *R. v. Tam*, [1995] B.C.J. No. 1428, 100 C.C.C. (3d) 196, at 210 (B.C.C.A.); *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at paras. 12, 20-21 (Ont. C.A.) (notice of discontinuance filed after leave to appeal granted [1999] S.C.C.A. No. 87 (S.C.C.)).

¹² *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 488 (Ont. C.A.).

¹³ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 107 (S.C.C.).

¹⁴ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

beyond narrow common law notions of trespass to include reasonable expectation of privacy, the Court did not limit section 8 protection to reasonable expectation of privacy alone.¹⁵ Five years later, the Court specifically noted that *Hunter*'s construct for section 8 "underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual".¹⁶ Again, two decades later, with the Supreme Court of Canada observing that in the purposive approach to section 8 of the Charter, a guarantee to protect "people, not places", "privacy became the dominant organizing principle",¹⁷ it is evident that it is not the exclusive principle.

Not unlike the reasonableness element of section 8 of the Charter, the concept of investigative detention rooted in the *Waterfield*¹⁸ analysis requires that the detention be a justifiable use of police power associated with an identified police duty. There must be "reasonable necessity or justification".¹⁹ Reasonable grounds to suspect the individual's involvement in recent or ongoing criminal activity and that detention is reasonably necessary to confirm or dispel that suspicion is the minimum threshold for interference with a person's liberty or freedom of movement.²⁰ A detainee may be searched, on reasonable grounds, for a weapon to protect

¹⁵ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 108-109 (S.C.C.). At 108, the Court linked the s. 8 Charter right to "the public's interest in being left alone". This includes freedom of movement as "[a]bsent a law to the contrary, individuals are free to do as they please": *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 15 (S.C.C.).

¹⁶ *R. v. Dymont*, [1989] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 253 (S.C.C.).

¹⁷ *R. v. Tessling*, [2004] S.C.J. No. 63, 189 C.C.C. (3d) 129, at 138-39 (S.C.C.). Section 8 is also "equally intended to protect people not things": *R. v. Dymont*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 259 (S.C.C.).

¹⁸ *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.).

¹⁹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 320-21, 324 (S.C.C.) ("The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.") As well, the importance of the duty discharged by the officer to the public good must be considered: *R. v. Dedman*, [1985] S.C.J. No. 45, 20 C.C.C. (3d) 97, at 121-22 (S.C.C.). Using search and seizure as the conceptual framework for an investigative stop or detention recognizing that *reasonableness* in its common sense and constitutional dimensions "is a spacious concept" (A.R. Amar, "Terry and the Future: Terry and Fourth Amendment First Principles" (1998) 72 St. John's L. Rev. 1097, at 1118), it allows for invocation of this proportionality principle as noted by C. Slobogin, "Let's Not Bury Terry: A Call For Rejuvenation of the Proportionality Principle" (1998) 72 St. John's L. Rev. 1053, at 1053, "a search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action."

²⁰ Discussed *infra* at pp. 151-62.

the detaining police officer.²¹ Questions during the detention may, depending on the circumstances, amount to a search for and seizure of information.²²

The result is pieces of search and seizure analysis grafted onto an exclusive section 9 Charter analysis relating to the detention itself — a stop and restraint of the person subjected to investigative detention whether by physical or psychological compulsion to surrender liberty and freedom of movement.

We have experience with the seizure of persons by warrants of arrest, *Feeney*²³ warrants, or section 487.01(1) *Criminal Code*²⁴ general warrants. Such measures involve governmental interference with physical and personal autonomy. Charter rights are to be interpreted generously, not in a narrow or legalistic fashion.²⁵ If questioning can constitute a search, and observations by the police a seizure, then it is no stretch to consider the stop and restraint of movement of an individual as a warrantless seizure. Although, as said, reasonable expectation of privacy is not a *sine qua non* for section 8 Charter protection, the circumstances of an investigative detention may implicate intrusion upon a reasonable expectation of privacy as the police are able to take advantage of the opportunity to undertake precise scrutiny of a pedestrian's person, clothes and carried possessions, or the interior of a stopped vehicle, or to question a detainee who, often perceiving compulsion to respond, answers questions in a context which would not meet the section 8 criteria for a valid and informed consent search.

Before rushing to subsume unlawful detention (*i.e.*, subjectively and in good faith, an officer believes she has reasonable suspicion to detain but is mistaken, falling just short on the objective aspect of the test) into section 9 arbitrariness, a standard of constitutional departure including elevated police misconduct such as randomness, capriciousness, improper purpose, and the like, we should pause and take a last opportunity, assuming it still exists, to assess the issue in section 8 Charter terms. The decision to opt for a paradigm focusing on the arbitrariness of the stop and restraint, as opposed to the reasonableness of the seizure of the individual, holds significant implications, not the least of which is

²¹ Discussed *infra* at pp. 163-68.

²² Discussed *infra* at pp. 168-75.

²³ *R. v. Feeney*, [1997] S.C.J. No. 49, 115 C.C.C. (3d) 129 (S.C.C.).

²⁴ R.S.C. 1985, c. C-46.

²⁵ *R. v. Dymnt*, [1988] S.C.J. No. 82, 45 C.C.C. (3d) 244, at 253 (S.C.C.).

that the onus resides with the accused to demonstrate in the section 9 context that she or he was arbitrarily detained, whereas consideration of investigative detention as a warrantless seizure/search would flip the burden to the Crown to establish compliance with section 8 Charter principles.²⁶

In any event, whether or not described as pure section 8 Charter issues, a number of search/seizure-like issues arising in investigative detention cases warrant further discussion.

II. REASONABLE GROUNDS TO SUSPECT...

Given that the exercise of police powers in furtherance of public safety is not unrestrained in the sense of being entirely at the whim of state agents regardless of the circumstances, government interference with an individual's liberty must be premised on a standard of belief. A standard is effectively a judicially established cost/benefit policy governing the generic factual scenario, including consideration of the nature and degree of interference with civil rights and the public interest objective of the restraint.

Standards of belief — requisite degrees of probability — have generally been accepted by the courts as incapable of precise definition and more often than not are described in terms of what they are not.

Justice La Forest observed as to reasonable and probable grounds:

Let me first say something about the vagueness of the proposed test of "reasonable and probable cause" and the consequential danger of giving the police power to enter into a private dwelling on that basis. The expression, no doubt, comprises something more than mere surmise, but determining with any useful measure of precision what it means beyond that poses rather intractable problems both for the police and the courts. . . . I have found nothing in the cases or in learned commentaries that gives much assistance in giving more precision to the concept, the situations being so various. Because of the vagueness of the discretion it gives a police officer, that discretion is virtually uncontrollable.²⁷

²⁶ Such a s. 8 Charter approach would likely impact on racial profiling litigation as, in the s. 9 context, "[p]lacing an onus on the accused to prove the unstated subjective motivations of a police officer explains why few, if any, racial profiling cases have been challenged and exposed in court": D.M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2004) 40 Osgoode Hall L.J. 145, at para. 75.

²⁷ *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 25-26 (S.C.C.) (dissenting in the result).

On the other hand, L'Heureux-Dubé J. viewed the standard as a practical, non-technical threshold which, "at its core . . . is a 'common sense' concept".²⁸

"Reasonableness" comprehends a requirement of probability.²⁹ Reasonable grounds to believe have been equated to the American Fourth Amendment standard of "probable cause".³⁰ The standard "to be met in order to establish reasonable grounds for a search is 'reasonable probability'".³¹ Put somewhat differently, reasonable grounds to believe, the point where the state's interest in detecting crime begins to prevail over the individual's interest in being left alone, is "where credibly-based probability replaces suspicion".³² The standard of reasonable grounds to believe "is not to be equated with proof beyond a reasonable doubt or a *prima facie* case. . . . The standard to be met is one of reasonable probability".³³

The *Hunter v. Southam*³⁴ standard of reasonable grounds is accepted as "the minimum standard" for constitutional compliance where the state's interest is "law enforcement".³⁵ As such, belief that evidence *may* be uncovered in a search, as a general rule, impermissibly dilutes that standard to the mere "possibility of finding evidence".³⁶

Consensus exists that conjecture or a hunch cannot generally support the legitimate exercise of a police power interfering with individual liberty.

²⁸ *R. v. Feeney*, [1997] S.C.J. No. 49, 115 C.C.C. (3d) 129, at para. 124 (S.C.C.) (dissenting in the result) ("There are no absolute magic words necessary to define when this standard has been reached").

²⁹ *Baron v. Canada*, [1993] S.C.J. No. 6, 78 C.C.C. (3d) 510, at 532 (S.C.C.).

³⁰ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 114 (S.C.C.).

³¹ *Baron v. Canada*, [1993] S.C.J. No. 6, 78 C.C.C. (3d) 510, at 532 (S.C.C.). This is not a standard of "certainty": *R. v. Mouland*, [2007] S.J. No. 532, 2007 SKCA 105, at para. 22 (Sask. C.A.).

³² *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 114-15 (S.C.C.).

³³ *R. v. Debot*, [1986] O.J. No. 994, 30 C.C.C. (3d) 207, at 219 (Ont. C.A.) (aff'd [1989] S.C.J. No. 118, 52 C.C.C. (3d) 193, at 198, 213 (S.C.C.)). C. Slobogin, "Let's Not Bury *Terry*: A Call For Rejuvenation of the Proportionality Principle" (1998) 72 St. John's L. Rev. 1053, at 1082, assuming the probable cause standard equates to a minimum "more likely than not" threshold, states: "But can we be serious about that definition? Are we really willing to allow police to arrest someone when there is a 50% chance they have the wrong person?"

³⁴ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

³⁵ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 115 (S.C.C.).

³⁶ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97, at 114 (S.C.C.). *Baron v. Canada*, [1993] S.C.J. No. 6, 78 C.C.C. (3d) 510, at 532-33 (S.C.C.): "This court established in *Hunter* that a standard of credibly based probability rather than mere suspicion should be applied in determining when an individual's interest in privacy is subordinate to the needs of law enforcement . . . the controlling standard is credibly-based probability, not mere possibility."

“A ‘hunch’ based entirely on intuition gained by experience cannot suffice, no matter how accurate that ‘hunch’ might prove to be.”³⁷

The relevant factual baseline for an investigative detention is that available at the time of detention, a “front-end” determination and not “[l]ater acquired information”.³⁸

The defined standard for a police officer to effect an investigative detention is “reasonable grounds to suspect” that in all the circumstances a person “is connected to a particular crime and that such a detention is necessary”.³⁹ This equates to the “articulable cause” standard of American search and seizure jurisprudence.⁴⁰ The accepted standard then is “reasonable suspicion” — a state of belief grounded in objectively discernible facts⁴¹ and “clearly a threshold somewhat lower than the reasonable and probable grounds required for lawful arrest”,⁴² a less demanding standard, though more than “unparticularized suspicion or ‘hunch’”.⁴³ The precise contours of the standard, imported from the U.S.

³⁷ *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 501 (Ont. C.A.); *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 30 (S.C.C.).

³⁸ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 34 (S.C.C.); *R. v. Cooper*, [2005] N.S.J. No. 102, 195 C.C.C. (3d) 162, at paras. 29, 42 (N.S.C.A.); *Florida v. J.L.*, 529 U.S. 266, at 271 (2000); A.S. Patel, “Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police Judgment” (2001) 45 *Crim. L.Q.* 198, at 202 (danger in some cases of “police shap[ing] their testimony after an *ex post facto* consideration of the incident”).

³⁹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 45 (S.C.C.).

⁴⁰ *R. v. Jacques*, [1996] S.C.J. No. 88, 110 C.C.C. (3d) 1, at para. 24 (S.C.C.) *per* Major J. in dissent on a different point; *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 503 (Ont. C.A.).

⁴¹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 324-25 (S.C.C.).

⁴² *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 322 (S.C.C.); *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.), at 501 (“particularized suspicion”), 502 (“reasonable suspicion of crime”); a standard lower than the standard set by s. 495(1) of the Code for an arrest: *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 27, 45 (S.C.C.); *R. v. Cooper*, [2005] N.S.J. No. 102, 195 C.C.C. (3d) 162, at 172 (N.S.C.A.); *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305, at para. 41 (B.C.C.A.) (leave to appeal refused [2004] S.C.C.A. No. 522 (S.C.C.)); C. Slobogin, “Let’s Not Bury *Terry*: A Call For Rejuvenation of the Proportionality Principle” (1998) 72 *St. John’s L. Rev.* 1053, at 1082, citing C.M.A. McCauliff, “Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?” (1982), 35 *Vand. L. Rev.* 1293, at 1327-28 that a surveyed group of American federal judges considered the “reasonable suspicion” standard to carry about a 30 per cent level of certainty, questions whether we should be “willing to subject two innocent people” to restraint of liberty “to nab one bad actor”.

⁴³ *U.S. v. Sokolow*, 490 U.S. 1, at 7 (1989); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at 491 (Ont. C.A.), *per* Weiler J.A. otherwise in dissent; *R. v. Byfield*, [2005] O.J. No. 228, 193 C.C.C. (3d) 139, at 147 (Ont. C.A.) (not “hunches, speculation and guesses”). See also *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 501 (Ont. C.A.): “Terms like ‘articulable reasons’ and ‘founded suspicion’ are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise.”

*Terry*⁴⁴ stop and frisk experience, is not made clearer by resort to the American cases.⁴⁵

What is apparent is that the standard of reasonable grounds to suspect is the “possibility” threshold subjected to criticism in *Hunter v. Southam*⁴⁶ and *Baron v. Canada*⁴⁷ during the establishment of the reasonable and probable grounds standard as the minimum constitutional standard for search and seizure in furtherance of law enforcement interests. The reasonable grounds to suspect standard is a minimal level of belief which does not rule out “the possibility of innocent conduct”⁴⁸ or “other reasonable possibilities”.⁴⁹ Indeed, it has been observed “that a reasonable suspicion will much more frequently be wrong than will reasonable and probable grounds”.⁵⁰

Critics of investigative detention imposed on a reasonable suspicion threshold argue that such a malleable and ambiguous standard is a prescription for pretextual stops in high crime areas, detention based on lack of cooperation, or stops employing race and stereotyping as proxies for criminality. The risks to liberty of adoption of a significantly depressed standard of belief are not necessarily offset by the judicial interpretive toolkit accompanying the “reasonable grounds to suspect” threshold, which kit includes the following:

- (1) The totality of the circumstances, the content and reliability of the information acquired by the officer, must be assessed in determining

⁴⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴⁵ *U.S. v. Cortez*, 449 U.S. 411, at 417 (1981) (reasonable suspicion is not a “finely-tuned standard”); *U.S. v. Arvizu*, 534 U.S. 266, at 274 (2002) (“concept of reasonable suspicion is somewhat abstract”; “we have deliberately avoided reducing it to ‘a neat set of legal rules’”); *U.S. v. Sokolow*, 490 U.S. 1, at 7 (1989) (articulable cause amounts to a level of suspicion “fall[ing] considerably short of satisfying a preponderance of evidence standard”).

⁴⁶ *Hunter v. Southam*, [1984] S.C.J. No. 36, 14 C.C.C. (3d) 97 (S.C.C.).

⁴⁷ [1993] S.C.J. No. 6, 78 C.C.C. (3d) 510 (S.C.C.).

⁴⁸ *U.S. v. Arvizu*, 534 U.S. 266, at 277 (2002).

⁴⁹ *U.S. v. Gould*, 364 F.3d 578, at 593 (5th Cir. 2004).

⁵⁰ T. Quigley, “Brief Investigative Detentions: A Critique of *R. v. Simpson*” (2004) 41 Alta. L. Rev. 935, at para. 20. In *R. v. Lal*, [1998] B.C.J. No. 2446, 130 C.C.C. (3d) 413, at 423 (B.C.C.A.) (leave to appeal refused [1999] S.C.C.A. No. 28 (S.C.C.)), the Court observed that, “Since the standard for reasonable suspicion is less demanding than that for reasonable belief it can arise from information that is less reliable than that required to show reasonable belief.” Similarly, in *Alabama v. White*, 496 U.S. 325, at 330 (1990), the Court observed that

[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

whether reasonable suspicion exists — a constellation of objectively discernible facts together with rational inferences from those facts — with a preference for scrutiny of the whole picture; each fact or indicator ought not to be separated out for isolated assessment where the police are involved in fluid and fast-paced law enforcement, making quick decisions on limited information.⁵¹

- (2) Avoidance of second-guessing the police and the perspective of hindsight contribute to immunizing the exercise of discretion from critical review.⁵²

⁵¹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 34, 45 (S.C.C.) (“the totality of the circumstances. . . informing the officer’s suspicion”; “in all the circumstances”); *R. v. Simpson*, [1993] O.J. No. 308; 79 C.C.C. (3d) 482, at 501 (S.C.C.) (assessment based “upon all of the circumstances”); *R. v. Lal*, [1998] B.C.J. No. 2446, 130 C.C.C. (3d) 413, at 423 (B.C.C.A.) (leave to appeal refused [1999] S.C.C.A. No. 28 (S.C.C.)) (“Reasonable suspicion like reasonable belief is dependent on both the content of the information provided to the police and its degree of reliability”); *U.S. v. Arvizu*, 534 U.S. 266, at 273-74, 277 (2002) (reasonable suspicion determination to be made on “totality of the circumstances” approach; “divide-and-conquer analysis” of separating out individual factors inappropriate even though “each of these factors alone is susceptible to innocent explanation . . .”); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at paras. 15, 18 (Ont. C.A.) *per* Weiler J.A. (in dissent in the result) (potentially “neutral indicators”, though each “susceptible of innocent explanation”, the “totality of circumstances” may “be suspicious”); *R. v. Tran*, [2007] B.C.J. No. 2341, 2007 BCCA 491, at paras. 15, 17 (B.C.C.A.) (factors to be considered “cumulatively” not looking at each item of evidence viewed “separately”); *R. v. Schrenk*, [2007] M.J. No. 154, 2007 MBQB 93, at para. 51 (Man. Q.B.) (“sometimes facts which on their own have little or no significance, when combined with other events or facts, create a situation from which reasonable inferences may be drawn. It is equally so, however, that ‘zero plus zero equals zero’, so a long list of only potentially suspicious facts does not create reasonable grounds to suspect an individual was connected to a crime”); *R. v. Gurr*, [2007] B.C.J. No. 1480, 2007 BCSC 979, at para. 23 (B.C.S.C.) (accused argued “there could have been an innocent explanation for all of these things”; held: “That . . . is not the test”); *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at para. 53 (S.C.C.) *per* Abella J. (“responding to legitimate safety concerns in a ‘fast-paced’ situation”) and at paras. 97, 99, 122 *per* Binnie J. (“The law requires individual police officers to make difficult decisions under fast-moving conditions”; “The tip was hot. Quick police action promised success”; “The police do not always have the advantage of the full story from a 911 caller”); *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 318 (S.C.C.) (“[P]olice officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters daily on the front lines of policing”).

⁵² *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 26-27 (S.C.C.), *per* La Forest J. in dissent in the result (“The police’s job of maintaining the peace and enforcing the criminal law is difficult enough without fearing being regularly ‘second-guessed’ about every mistake of judgment in such circumstances”); *Crompton v. Walton*, [2005] A.J. No. 178, 194 C.C.C. (3d) 207, at 221 (Alta. C.A.) (immediate decision of a police officer made in the course of duty not generally assessed through “the lens of hindsight”); *R. v. White*, [2007] O.J. No. 1605, 2007 ONCA 318, at para. 54 (Ont. C.A.) (“. . . he found himself in a dangerous and potentially volatile situation. In the circumstances, he had little time to reflect. He had to make a split second decision; a moment’s hesitation could have put his life and that of his partner in peril. Courts should keep this in mind when assessing the conduct of officers in the field. When it comes to officer safety and preserving the integrity of their investigation, police officers should be given a good deal of leeway and second

- (3) Although the standard has both the subjective suspicion of the police officer and, as a control or check, an objective component of reasonable suspicion of one placed in the circumstances of the officer,⁵³ the subjective and objective aspects of the threshold belief include consideration of the training and experience of the detaining officer.⁵⁴

guessing should be avoided”); *Webster v. Edmonton (City) Police Service*, [2007] A.J. No. 71, 2007 ABCA 23, at paras. 28-29 (Alta. C.A.) (court’s “inappropriate use of hindsight”); *R. v. Aguirre*, [2006] O.J. No. 5071, at para. 259 (Ont. S.C.J.) (“Although the police ‘usually act deliberately and not accidentally’ (*R. v. Brown*, at para. 63), ‘[a] certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances’: *R. v. Asante-Mensah* (Ont. C.A.) [[2001] O.J. No. 3819, 157 C.C.C. (3d) 481 (Ont. C.A.)], at p. 510 [affd [2003] S.C.J. No. 38, 174 C.C.C. (3d) 481 (S.C.C.)]. Unlike search warrant applications, in an arrest situation, ‘the dynamics at play . . . are very different’ as the police must make an arrest decision ‘based on available information which is often less than exact or complete’: *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.) at pp. 197-8. In street policing, police officers do not have the ‘luxury of waiting and synthesizing all information available to them’ (*R. v. Mollazadeh*, [[2006] B.C.J. No. 181, 2006 BCCA 35 (B.C.C.A.)] at paras. 9-10) as ‘on the spot’ decisions are made without ‘time for careful reflection’: *R. v. Golub* [[1997] O.J. No. 3097, 117 C.C.C. (3d) 193 (Ont. C.A.)], at p. 211 [leave to appeal refused, [1997] S.C.C.A. No. 571, [1998] 1 S.C.R. ix (S.C.C.)]”); *U.S. v. Winston*, 444 F.3d 115, at 119-21 (1st Cir. 2006) (“ . . . the experienced perceptions of law enforcement agents deserve deference and constitute a factor in our reasonable suspicion analysis”; “. . . we are not here to second guess the agents . . .”).

⁵³ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 27, 34 (S.C.C.); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at 504 (Ont. C.A.) (“The objectivity of the assessment is critical”).

⁵⁴ *R. v. Feeney*, [1997] S.C.J. No. 49, 115 C.C.C. (3d) 129, at 149 (S.C.C.) *per* Sopinka J. (“The objective test . . . is whether a reasonable person, standing in the shoes of the officer, would have believed . . .”) and *per* L’Heureux-Dubé J. dissenting in the result at 183 (“should incorporate the experience of the officer”); *U.S. v. Cortez*, 449 U.S. 411, at 418 (1981) (“the evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement”); *U.S. v. Arvizu*, 534 U.S. 266, at 273-74, 277 (2002) (allows officers to draw on their own experience and training to make inferences from and deductions about the cumulative information available to them that “might well elude an untrained person”; due weight to be given to factual inferences drawn by local law enforcement officers); *Minnesota v. Dickerson*, 508 U.S. 366, at 372 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, at 30 (1968), “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. . . .”); *R. v. Juan*, [2007] B.C.J. No. 1402, 222 C.C.C. (3d) 289, at para. 19 (B.C.C.A.) (“the ‘reasonable person’ is presumed to have the knowledge and experience . . . of a knowledgeable and experienced police officer”); *R. v. Tran*, [2007] B.C.J. No. 2341, 2007 BCCA 491, at para. 12 (B.C.C.A.) (experience of police officers relevant and relates to existence of objective grounds); *R. v. Moulard*, [2007] S.J. No. 532, at paras. 26-27 (Sask. C.A.) (officers entitled to act on their “training and experience”); *R. v. Ingle*, [2007] B.C.J. No. 2024, 2007 BCCA 445, at para. 53 (B.C.C.A.) (“based on his extensive experience in investigating marijuana cases”); *R. v. Iraheta*, [2007] O.J. No. 2205, at paras. 16, 23 (Ont. S.C.J.) (officer relying on past “experience, knowledge and training”); *R. v. Quillian*, [1991] A.J. No. 1211, 122 A.R. 131, at para. 56 (Alta. Q.B.) (“I am of the opinion that the reasonable person must be deemed to have the same level of experience as the police officer whose actions are being scrutinized. If this were not so, then the reasonable man would have no standard or guideline against which to measure the reasonableness of the officer’s belief.”); *R. v. Grotheim*, [2001] S.J. No. 694, 2001 SKCA 116,

- (4) There is no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded by that stop to further some other legitimate interest.⁵⁵

These interpretive guidelines do not relieve the court of its obligation to ascertain whether, objectively viewed, there existed articulable and logically probative factors meeting the requisite standard of belief. Deference to law enforcement has its boundaries.⁵⁶ An officer's experience and assessment of an ongoing situation "must not become a substitute for a court's independent evaluation of the reasonableness of the officer's decision and should not serve as a basis for rubber stamping the officer's conclusion".⁵⁷

Many have voiced concern that despite the existence of an objective component,⁵⁸ the judicial creation of a police power to detain for investigative purposes on a low-level standard of belief holds implications for racial profiling or at least a disproportionate impact on visible minorities.⁵⁹ On occasion, the issue of race is inextricably bound up in a

at para. 30 (Sask. C.A.) ("Whether such grounds in fact exist depends upon whether a reasonable person, standing in the shoes of the police officer, would have believed that there were reasonable and probable grounds for making an arrest"); *R. v. Rajaratnam*, [2006] A.J. No. 1373, 214 C.C.C. (3d) 547, at 559 (Alta. C.A.) ("a judge is entitled to consider a police officer's training and experience in determining objective reasonableness . . . What may appear to be innocent objects to the general public may have a very different meaning to an officer experienced in drug operations"); *R. v. Lawes*, [2007] O.J. No. 50, 2007 ONCA 10, at para. 4 (Ont. C.A.) ("An objective assessment will include the dynamics within which the police officer acted, and his or her experience"); *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 501 (Ont. C.A.); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at para. 19 (Ont. C.A.) (dissent) (constable could take into account training received on drug interdiction courses).

⁵⁵ *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 17 (Ont. C.A.) (notice of discontinuance filed after leave to appeal granted [1999] S.C.C.A. No. 87 (S.C.C.)).

⁵⁶ A.S. Patel, "Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2001) 45 *Crim. L.Q.* 198, at 202; T. Maclin, "Terry and Race: *Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion" (1998) 72 *St. John's L. Rev.* 1271, at 1309 ("When a police suspicion test is substituted for the probable cause standard, the judicial tendency to defer to police intuition and experience is exacerbated").

⁵⁷ L.R. Katz, "*Terry v. Ohio* at Thirty-Five: A Revisionist View" (2004) 74 *Miss. L.J.* 423, at 491.

⁵⁸ *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 501-502 (Ont. C.A.) (objective standard "serves to avoid indiscriminate and discriminatory exercises of the police power" or a purely subjective assessment that "can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's . . . colour . . . ethnic origin").

⁵⁹ J. Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 *Crim. L.Q.* 299, at 304 ("the reality that abuses of this new power will have a disproportionate impact on visible minorities went unmentioned" in *Mann* in its approval of investigative detentions which are "low-visibility encounters") and 313-14 (footnotes omitted) (" . . . a mounting body of empirical evidence would now seem to suggest, when these powers are

abused, the effect is felt disproportionately by visible minorities, in particular African and Aboriginal Canadians”); *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 30 (S.C.C.) *per* La Forest J. dissenting (grant of a vague discretion to police most likely to be used “against the disadvantaged” including “on the poor and on marginal, minority groups”); A. Fiszauf, “Articulating Cause — Investigative Detention and Its Implications” (2007) 52 *Crim. L.Q.* 327, at 335 (“In recent years, the police practice of profiling has become increasingly prevalent and linked to investigative detentions”); D. Tanovich, “E-Racing Racial Profiling” (2004) 41 *Alta. L. Rev.* 905; B.L. Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 *C.R. (6th)* 58; D.M. Tanovich, “The Colourless World of *Mann*” (2004) 21 *C.R. (6th)* 47; D.A. Harris, “*Terry* and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under *Terry v. Ohio*” (1998) 72 *St. John’s L. Rev.* 975; F.R. Cooper, “Cultural Context Matters: *Terry*’s ‘Seasaw Effect’” (2003) 56 *Okla. L. Rev.* 833; T.R. Calderon, “Race-Based Policing from *Terry* to *Wardlow*: Steps Down the Totalitarian Path” (2000) 44 *How. L.J.* 73; M. Carpinello, “Striking A Sincere Balance: A Reasonable Black Person Standard For ‘Location Plus Evasion’ *Terry* Stops” (2001) 6 *Mich. J. Race & L.* 355; *R. v. Young*, [2007] O.J. No. 102, 84 O.R. (3d) 437 (Ont. C.J.) (in context of investigation detention analysis, the Court noting at 441, “the seemingly endless confrontations between police officers and (usually) poor young males in this city [Toronto] . . .” (further footnoting that the defendant was an Afro-Canadian). In dissent in *Illinois v. Wardlow*, 528 U.S. 119 (2000), a stop and frisk case, Stevens J., writing for himself and three others, stated at 129, 132-33:

In short, there are unquestionably circumstances in which a person’s flight is suspicious, and undeniably instances in which a person runs for entirely innocent reasons.³

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³ Compare, e.g. *Proverbs* 28:1 (“The wicked flee when no man pursueth: but the righteous are as bold as a lion” with *Proverbs* 22:3 (“A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty”).

I have rejected reliance on the former proverb in the past, because its “ivory towered analysis of the real world” fails to account for the experiences of many citizens of this country, particularly those who are minorities. See *California v. Hodari D.*, 499 U.S. 621, 630, n. 4, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991) Stevens J., dissenting). That this pithy expression fails to capture the total reality of our world, however, does not mean it is inaccurate in all instances.

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Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer’s sudden presence. For such a person, unprovoked flight is neither “aberrant” nor “abnormal.”⁸ Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient. [footnotes omitted except footnote 8]

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⁸ Many stops never lead to an arrest, which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas. See Goldberg, *The Color of Suspicion*, *N.Y. Times Magazine*, June 20, 1999, p. 85 (reporting that in 2-year period, New York City Police Department Street Crimes Unit made 45,000 stops, only 9,500, or 20%, of which resulted in arrest); *Casimir, supra*, n. 7 (reporting that in 1997, New York City’s Street Crimes Unit conducted 27,061 stop-and-frisks, only 4,647 of which, 17%, resulted in arrest). Even if these data were race neutral, they would still indicate that society as a whole is paying a significant cost in infringement on liberty by these virtually random stops.

report to the police of criminal conduct and as such forms a necessarily integral feature of identifying the person alleged to have been involved, or to be involved, in criminal activity.⁶⁰ On other occasions, the role of race in effecting an investigative detention is more questionable.⁶¹

Where the authorities receive a report of sufficient reliability⁶²

⁶⁰ *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at paras. 44, 46, 47 (S.C.C.) *per* Abella J. (police told suspects were black males and occupants of stopped vehicle “matched the race of the suspects mentioned in the 911 call”; they “matched the general description they had”; “the police would not have had reasonable grounds for the continued detention of non-white occupants”) and at paras. 81, 122, 124 *per* Binnie J. (after the stop of the vehicle, “the only relevant description of the individuals from the 911 call was that they were all black”; “the 911 caller must be presumed to be less error prone in dealing with a person’s appearance” than in dealing with vehicle recognition; “if the occupants of the stopped car had been female and Asiatic” then a tailored roadblock would let them pass; “Farmer, being black, fit the general description given by the 911 caller”); *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 315 (S.C.C.) (police looking for a suspect whose description included that he was an Aboriginal Canadian); *R. v. Aguirre*, [2006] O.J. No. 5071, at paras. 60, 180 (Ont. S.C.J.) (police seeking suspect whose description included that he was of olive complexion and Spanish appearance).

⁶¹ *R. v. Aslam*, [2006] B.C.J. No. 3152, 2006 BCCA 551, at para. 2 (B.C.C.A.) (in routine licence plate check, officers determined vehicle “registered to a person with an Asian name” and, because the driver “appeared to be East Indian”, the police stopped the van to see if it was stolen).

⁶² *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at para. 34 (S.C.C.) (police “should be entitled to rely” on information from a 911 call); and para. 122 (police do not always have “the full story from a 911 caller”); *R. v. Plummer*, [2007] O.J. No. 2818, at paras. 43-48, 55-56, 148-52 (Ont. S.C.J.) (“Officer Safety Alert” used by officer as part of grounds to detain re weapon investigation though unaware of reliability of information behind Alert); *R. v. Lewis*, [1998] O.J. No. 376, 122 C.C.C. (3d) 481, at 489, 493 (Ont. C.A.) (re anonymous tipster’s information, the “totality of the circumstances” must be considered — “The totality of circumstances encompasses factors which are relevant either to the accuracy of the specific information supplied by the tipster or the reliability of the tipster as a source of information for the police”; here, although Lewis was scheduled to fly to Edmonton on a Canada 3000 flight at the time indicated and he matched the description given by the caller (“a clean shaven, heavy-set black man named Keith Lewis” [at 485]) and was travelling with a young child as reported, the absence of confirmation of details other than which describe innocent and commonplace conduct held to be insufficient to constitute reasonable grounds for an arrest or search but amounting to “articulable cause to briefly detain [Lewis] to investigate the allegations made by the tipster” [at 493]); but see *Florida v. J.L.*, 529 U.S. 266, at 272-73 (anonymous tip to police that young black male at a particular bus stop wearing a plaid shirt was carrying a gun; on arrival at the bus stop, three black males observed with one wearing a plaid shirt; frisk of suspect revealed gun in his pocket; held: no reasonable suspicion to justify stop and frisk; held [at 271-73]):

The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct . . .

.....

Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, *Search and Seizure* § 9.4(h), p. 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

describing a person who is, or has recently been, involved in criminal activity, the police search for someone resembling the broadcast description. The case law, consistent with the minimal degree of probability for investigative detention, as currently contoured, does not require extensive details⁶³ or an identical match⁶⁴ before lawful detention can be effected. Where the police do not operate from a reported description but happen upon an individual they suspect of involvement in criminality, the indicators or circumstantial factors subjectively employed to support that

A second major argument advanced by Florida and the United States as *amicus* is, in essence, that the standard *Terry* analysis should be modified to license a “firearm exception.” Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*’s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. See 392 U.S. at 30. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target’s unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. Several Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. See, e.g., *United States v. Sakyi*, 160 F. ed 164, 169 (CA4 1998); *United States v. Dean*, 59 F.3d 1479, 1490, n. 20 (CA5 1995); *United States v. Odom*, 13 F.3d 949, 959 (CA6 1994); *United States v. Martinez*, 958 F.2d 217, 219 (CA8 1992). If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White*, the Fourth Amendment is not so easily satisfied.

⁶³ *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.) (black males); *R. v. Batzer*, [2005] O.J. No. 3929, 200 C.C.C. (3d) 330 (Ont. C.A.) at paras. 18, 19 (suspects “answered the very general description given by the caller”).

⁶⁴ *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at para. 37 (S.C.C.) (persons detained need not match “exactly” the information provided); *R. v. Aguirre*, [2006] O.J. No. 5071, at para. 174 (Ont. S.C.J.) (“A suspect’s appearance need not, of course, be a perfect match before the police act: *R. v. Mollazadeh*, [2006] B.C.J. No. 181 (C.A.) at paras. 9-10; *R. v. Greaves* (2004), 189 C.C.C. (3d) 365 (B.C.C.A.) at pp. 323-4 (leave to appeal refused [2004] S.C.C.A. No. 522); *R. v. Hall* [[1995] O.J. No. 544, 22 O.R. (3d) 289 (C.A.)] at para. 39; *R. v. Singh* (1983), 8 C.C.C. (3d) 38 (Ont. C.A.) at p. 43”); *R. v. Gurr*, [2007] B.C.J. No. 1480, 2007 BCSC 979, at para. 22 (B.C.S.C.) (person “closely resembling” the accused). This is, in part, a reflection of a reality that “reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause”: *Alabama v. White*, 496 U.S. 325, at 330 (1990).

belief are not always cogently and objectively probative⁶⁵ except in combination with other known facts.

The broad authority of peace officers to randomly stop vehicles on roadways to determine driver and vehicle compliance with relevant regulatory requirements⁶⁶ cannot be used as a pretext to stop vehicles and their occupants to further an ongoing criminal investigation through questioning of an occupant or observations of the vehicle interior.⁶⁷ The stop must be a legitimate highway traffic legislation stop or, at the outset, meet the criteria set for a *Mann*⁶⁸ investigative detention.

Everyone in a motor vehicle is not by virtue of occupancy in personal, joint or constructive possession⁶⁹ of the auto or its contents. Much the same may be said about two or more pedestrians walking together in terms of an item, a knapsack or something in one person's hand or pocket. The enforcement approach frequently tends toward detention of the collective as the police seek identification from everyone in their effort to sort out who might be involved in illegal activity. The circumstances may reasonably warrant such suspicion and detention,⁷⁰ but the justification is

⁶⁵ *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.) (Clayton stared straight ahead, made no eye contact, looked nervous and swayed from side to side); *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (suspect made eye contact, abruptly halted, and walked in opposite direction); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at paras. 72, 74 (Ont. C.A.) (fast food, duffel bags, roadmap, cell phones, pagers in car not amounting to reliable indicators identifying a drug courier profile: "Given the neutrality and apparent unreliability of these indicators" they could not amount to reasonable grounds for detention); *R. v. Moulard*, [2007] S.J. No. 532, at paras. 25, 27 (Sask. C.A.) (officer may consider that vehicle originated out-of-province and "unusual circumstance" that driver not the registered owner); *R. v. Cox*, [1999], 132 C.C.C. (3d) 256, at para. 12 (N.B.C.A.) ("The elements of the smuggler's profile here are no more than hunches, speculation and guesses that do not qualify as 'objectively discernible facts'"); *U.S. v. Arvizu*, 534 U.S. 266 (2002) (driver's posture was stiff and rigid and he did not look at the cruiser as he drove by or offer a "friendly wave" and, as the officer followed the vehicle, the three children in the back waved in an abnormal pattern as though instructed to do so); *R. v. Rajaratnam*, [2006] A.J. No. 1373, 214 C.C.C. (3d) 547 (Alta. C.A.) (suspect biting his lip, bus ticket purchased at the last minute with cash, visibly trembling and stammering speech).

⁶⁶ *R. v. Ladouceur*, [1990] S.C.J. No. 53, 56 C.C.C. (3d) 22, at 37-45 (S.C.C.).

⁶⁷ *R. v. Doell*, [2007] S.J. No. 264, 221 C.C.C. (3d) 336, at paras. 20-25, 28 (Sask. C.A.); *R. v. Houben*, [2006] S.J. No. 715, 214 C.C.C. (3d) 519, at 541 (Sask. C.A.).

⁶⁸ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.).

⁶⁹ *R. v. Terrence*, [1983] S.C.J. No. 28, 4 C.C.C. (3d) 193, at 198 (S.C.C.) (not merely knowledge of the unlawful character of an object but some measure of control necessary on the part of a passenger to establish constructive possession as defined in s. 3(b) of the Code).

⁷⁰ *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.) (passenger met general description of suspects); *R. v. Juan*, [2007] B.C.J. No. 1402, 222 C.C.C. (3d) 289, at paras. 22-28 (B.C.C.A.) (passengers detained following police take-down of a significant cocaine transaction; police evidence accepted that ordinarily in high-level commercial drug transactions, principals do not take "innocents" along but rather persons as holders, protection and lookouts who are therefore *prima facie* complicit in the criminality).

not always comfortably apparent when objectively viewed.⁷¹ On occasion, the question of the constitutionality of a passenger's detention engages discussion of a security detention incidental to a stop and detention of the driver and vehicle.⁷²

III. INCIDENTAL AUTHORITY TO SEARCH DETAINEE

Warrantless searches are presumptively unreasonable.⁷³ On the occasion of an investigative detention, a police officer may execute a limited search of the detainee. This may be essential for police safety in a close encounter with an individual suspected of involvement in crime.⁷⁴ The

⁷¹ A. Fiszauf, "Articulating Cause – Investigative Detention and Its Implications" (2007) 52 Crim. L.Q. 327, at 341 ("Routinely officers demand identification from passengers . . . without cause"); *R. v. Chaisson*, [2006] S.C.J. No. 11, 206 C.C.C. (3d) 1 (S.C.C.) (revg [2005] N.J. No. 277, 200 C.C.C. (3d) 494 (N.L.C.A.)) (passenger ordered out of vehicle after driver apparently stuffing something under vehicle seat); *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481 (Ont. C.A.) (passenger detained on speculation that vehicle was an illicit drug conveyance); *R. v. Cooper*, [2005] N.S.J. No. 102, 195 C.C.C. (3d) 162, at paras. 34-46 (N.S.C.A.) (officer's habit was to stop vehicle, "check parties" by taking names and "check[ing] them for warrants and CPIC. . . Just a general compliance"; passenger found to be lawfully detained after he fled from a traffic stop as under provincial highway legislation police are entitled to question front seat passengers with "a newly licenced driver" and therefore action of passenger consisting of act of obstruction).

⁷² *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220 (Ont. C.A.) (traffic stop for failure to signal left turn, officer asked for identification from all occupants of vehicle including H. on officer's evidence as "just a . . . routine investigation" to see "[i]f there is anything pertinent or anything important that these three parties will have on them or this vehicle that could involve . . . anything from probations to recognizance, whether the vehicle was stolen or not, to numerous types of other information, it allows us to act as police officers and enforce the laws" [at para. 8]; CPIC check revealed H. on bail with curfew condition of which he was in breach; H. arrested for bail breach and cocaine discovered on his person; in circumstances, H. detained in vehicle once told to keep hands in open view; here officer took "reasonable steps . . . to assume control of the occupants of the vehicle" [at para. 27], H.'s detention not arbitrary including after he was asked for his identification, a request which "did not prolong or alter the nature" [at para. 26] of H.'s detention; request for H.'s identification, though, amounting to unreasonable search breaching s. 8 of Charter).

⁷³ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 324 (S.C.C.); *R. v. Buhay*, [2003] S.C.J. No. 30, 174 C.C.C. (3d) 97, at 112 (S.C.C.); *R. v. Evans*, [1996] S.C.J. No. 1, 104 C.C.C. (3d) 23, at 34 (S.C.C.).

⁷⁴ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 41 (S.C.C.), the Court specifically notes the "stop and frisk" *Terry* origin of investigative detention and the authority for an incidental search where officer believes he or she is dealing with "an armed *and* dangerous individual" (emphasis added). The U.S. courts have maintained adherence to the "armed and dangerous" criteria: D.A. Harris, "*Terry* and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under *Terry v. Ohio*" (1998) 72 St. John's L. Rev. 975; *Ybarra v. Illinois*, 444 U.S. 85, at 92-93 (1979) ("initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons"). Frequently, an officer must make "a quick decision as to how to protect himself . . . from possible danger": *R. v. Ferris*, [1998] B.C.J. No. 1415, 126 C.C.C. (3d) 298, at 316

search power does not exist as a matter of course.⁷⁵ The warrantless search is not strictly incidental to an investigative detention but will be authorized at common law if its purpose relates to officer safety, not discovery or preservation of evidence,⁷⁶ and it is carried out in a reasonable manner. Such a protective search, limited to a pat-down or frisk search of the person,⁷⁷ will be justified in the sense of reasonably necessary if, in the totality of the circumstances, the detaining officer “has reasonable grounds to believe” that his or her safety is at risk,⁷⁸ or the safety of another party is at risk.⁷⁹ The search must “be grounded in objectively discernible facts to prevent ‘fishing expeditions’ on the basis of irrelevant or discriminatory factors”.⁸⁰

In theory, a detained suspect can consent to an extended search for items other than weaponry where the criteria for a valid and informed consent exist.

(B.C.C.A.) (leave to appeal refused [1998] S.C.C.A. No. 424 (S.C.C.)). “[I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties”: *Terry v. Ohio*, 392 U.S. 1, at 23.

⁷⁵ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 40 (S.C.C.).

⁷⁶ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 37, 41 (S.C.C.) (search incidental to lawful investigative detention not equivalent to broader scope of search incident to arrest; the authorized intrusion is “designed to locate weapons” (not evidence); *R. c. Bitzanis*, [2007] J.Q. no 12628, at paras. 5-6 (Que. C.A.)). On occasion, as in *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.), in the context of detention relating to possession of a weapon, the protective search may also result in discovery of evidence relating to the initial complaint or reason for detention. But there is no “unrestricted power to search incidental to . . . discovering evidence of a crime”: *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at paras. 78-79 (Ont. C.A.).

⁷⁷ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 43, 45 (S.C.C.) (pat-down or “frisk search” the duration of which is “only a few seconds” considered relatively non-intrusive; pat-down search to be conducted reasonably).

⁷⁸ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at paras. 43, 45 (S.C.C.) (“[R]easonable grounds to believe”, stated in two separate paragraphs, is most comfortably equated to the reasonable grounds/reasonable and probable grounds standard. Pegged at this level, the threshold to conduct a protective search would be more onerous than the standard to invoke the investigative detention itself. A Crown application for a rehearing in *Mann* limited to clarification of the standard of belief relating to a search incidental to an investigative detention was dismissed by a panel of six judges without reasons (see note at [2002] S.C.C.A. No. 484 (S.C.C.)).

⁷⁹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.) finds the protective search not only on police protection (“the interests of police officer safety” (at para. 37); police officer’s “own safety” (at paras. 40, 43, 45); “importance of ensuring officer safety” (at para. 43)) but also, without illustration or elaboration, the protection of others (“or the safety of others . . . is at risk” (at paras. 40, 45)). In *Minnesota v. Dickerson*, 508 U.S. 366, at 373-74 (1993), the Court described the objective of a valid protective search extending to “bystanders”.

⁸⁰ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 43 (S.C.C.) (decision to search “cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition” (at para. 40); need for “reasonable and specific inferences drawn from the known facts of the situation” (at para. 41)).

Prior to instituting an investigative detention, the police do not always possess information concerning the prospect of the detainee being armed.⁸¹ In practice, it may be that the “reasonable grounds to believe” threshold for a search incidental to detention is a more strenuous standard in name than in application.⁸²

It is accepted that the rationale of a protective search is to search for a weapon *or* something that might be used as a weapon. While the first category, including guns and knives, is easy enough to understand, the “adaptable as a weapon” category affords considerable subjective interpretation to street officers. Does this latter category include such mundane items as keys? In such an instance, would an officer require reasonable belief (1) that the item is adaptable as a weapon and (2) that the detainee may utilize the item in that manner?

The discretion to undertake a protective search of the person of the detainee has been extended by the courts to receptacles⁸³ and vehicles.⁸⁴

⁸¹ In addressing the lower American standard of reasonable suspicion applicable to frisk searches (*Ybarra v. Illinois*, 444 U.S. 85, at 93 (1979)), S.A. Saltzburg, “*Terry* and the Fourth Amendment: Marvel or Mischief? *Terry v. Ohio*: A Practically Perfect Doctrine” (1998) 72 St. John’s L. Rev. 911, at 966, notes that, “One problem with reasonable suspicion as applied to frisks is that it assumes the police have the same ability to gather information relating to a frisk as to a stop and this assumption almost surely is false.”

⁸² A tension exists between a perception of objectively existing articulable facts referable to the particular detainee as opposed to categorical assessment or application of a presumption of armed dangerousness. In *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.), he was reasonably suspected of involvement in a recent break and enter. The court sanctioned the existence of reasonable grounds to believe the suspect ought to be the subject of a protective search on the basis of a “logical possibility” (at para. 48) that he could be “in possession of break-and-enter tools, which could be used as weapons”. This conclusion apparently assumes that unlawful entry was not secured by manually forcing an opening, the use of a rock at the scene or the kicking of a door, and that any entry device had not already been abandoned or dispossessed. Without explanation as to the nature of their contribution to reasonable grounds to believe Mann was armed, the Court added in terms of reasonable grounds for the search that the search by the two officers occurred after midnight at a time when no one else was in the area. D.A. Harris, “*Terry* and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under *Terry v. Ohio*” (1998) 72 St. John’s L. Rev. 975, at 1006 and footnotes 120-21, notes that in the United States, “[e]ven though burglars need not carry weapons to ply their trade, a number of courts have created an automatic frisk rule for all burglary cases on the rationale that burglars often carry screwdrivers and other tools that they could use as weapons.” In *R. v. Aguirre*, [2006] O.J. No. 5071, at para. 185 (Ont. S.C.J.), the Court held the search of the detainee justified in part on the officer’s decision to move the detainee in a police cruiser without a protective screen between the seats. An observation of considerable ambiguity, a bulge or bulkiness associated with a person’s appearance, has supported a search for a weapon incidental to investigative detention: *R. v. Waniandy*, [1995] A.J. No. 131, 162 A.R. 293, at para. 4 (Alta. C.A.); *Pennsylvania v. Mimms*, 434 U.S. 106, at 111-12 (1977).

⁸³ In *R. v. Peters*, [2007] A.J. No. 560, 2007 ABCA 181, at paras. 7-13 (Alta. C.A.), in the course of an investigative detention relating to suspected possession of a firearm, the police justifiably searched the detainee’s large knapsack twice for a firearm posing a threat, discovering drugs and related

As expected, a protective search of more than one person at the scene raises its own problems.⁸⁵

During a lawful search of a detainee, weapons unlawfully possessed are properly seized, as are any other items, whether evidence or those unlawfully possessed, discovered in the course of such a search. In other words, seizures are constitutionally acceptable not only where the search is reasonably necessary as a protective search based upon reasonable grounds but also where the search is reasonably conducted.⁸⁶

Since weapons or potential armaments are not generally openly worn or carried, the manner by which such items, or any derivatively discovered item of contraband or evidence, are lawfully seized by the authorities becomes important. A pat-down search is a tactile search as the searching officer explores the person of the detainee by touch. Until reasonable grounds exist to believe that an item, concealed on the detainee in the sense of not visible to the naked eye, may be a weapon, the officer is not

paraphernalia in the process. Where a detainee separates himself from his knapsack, disclaiming any privacy interest in the receptacle, the knapsack is effectively abandoned precluding a s. 8 challenge: *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596, at paras. 70-71 (Ont. C.A.); *R. v. Plummer*, [2007] O.J. No. 2818, at para. 158 (Ont. S.C.J.) (search of bag); *R. v. Tran*, [2007] B.C.J. No. 2341, 2007 BCCA 491, at paras. 5, 9 (B.C.C.A.) (search of fanny pack for weapons).

⁸⁴ In *R. v. Batzer*, [2005] O.J. No. 3929, 200 C.C.C. (3d) 330 (Ont. C.A.), the officers decided to search a vehicle following a pat-down search of the occupants looking for a gun. In a second search of the vehicle, the police discovered cocaine and ecstasy in a zippered case in the glove compartment. At 336-37, on the particular facts of the case, the Court agreed that “the extended search” was unsupported by reasonable grounds. In *Minnesota v. Dickerson*, 508 U.S. 366, at 374 (1993), the Court confirmed that “in the context of a roadside encounter, where police have reasonable suspicion based on specific and articulable facts to believe that a driver may be armed and dangerous, they may conduct a protective search for weapons not only of the driver’s person but also of the passenger compartment of the vehicle.” But see *R. v. Johnson*, [2007] O.J. No. 5099, at paras. 29-30 (Ont. S.C.J.) (where driver handcuffed, search of vehicle incidental to detention unreasonable).

⁸⁵ *R. v. Parchment*, [2007] B.C.J. No. 1281, 2007 BCCA 326, at paras. 4-11 (B.C.C.A.) (report of P. “and a blond” dealing drugs out of a white van; police surveillance observed apparent drug transaction conducted from white van by P., passenger “searched for weapons” and released); *Florida v. J.L.*, 529 U.S. 266, at 218 (2000) (the second officer frisked the other two individuals at the bus stop in company of the suspect said to have a gun — persons “against whom no allegations had been made, and found nothing”); *R. v. Peters*, [2007] A.J. No. 560, 2007 ABCA 181, at para. 8 (Alta. C.A.) (P. closely fit description of a man in hotel reported to have a gun; “The police officers were also searching another man who had been with the accused”); *Ybarra v. Illinois*, 444 U.S. 85, at 91 (1979) (“a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person”).

⁸⁶ *R. v. Mam*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 45 (S.C.C.). Also, in *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at para. 104 (S.C.C.), Binnie J. observed that “[i]f evidence of the crime emerges in the course of a valid pat-down search incidental to the detention for the purpose of police safety, the evidence will be admissible” [emphasis omitted]. Similarly, in *Minnesota v. Dickerson*, 508 U.S. 366, at 373 (1993), the Court held that non-threatening contraband or evidence could be validly seized during a lawful protective search.

entitled to enter a suspect's pocket.⁸⁷ Intrusion beyond touch engages the plain-feel principle, a cousin and variation of the plain-view doctrine,⁸⁸ and has its own limitations.⁸⁹

⁸⁷ A pat-down search does not itself permit an officer searching in the detainee's pockets from the inside. Where, however, the feel of the outline or contours of a concealed object by its shape, mass and hardness makes it immediately apparent that it is a weapon in the experience of the searcher, the officer may take steps to retrieve the item from its location for visual verification and seizure if necessary. In *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 49 (S.C.C.), the Court noted that the officer's decision to enter Mann's pocket, after feeling a soft object in the pat-down search, as "more intrusive" and "an unreasonable violation of the appellant's reasonable expectation of privacy in the contents of his pockets". In *R. v. Calder*, [2006] A.J. No. 1303, 213 C.C.C. (3d) 342, at 344, 346 (Alta. C.A.), the Court agreed that the officer's search of the detainee's pocket, undertaken on the stated belief the bulge might be a weapon, was unreasonable having regard to the size of the two cocaine spitballs discovered in the pocket.

⁸⁸ A person has no reasonable expectation of privacy in things exposed to plain view: *R. v. Boersma*, [1994] S.C.J. No. 63, 31 C.R. (4th) 386, at 387 (S.C.C.). A "central" feature of the plain view doctrine is "a prior justification for the intrusion into the place" where the plain view occurred: *R. v. Buhay*, [2003] S.C.J. No. 30, 174 C.C.C. (3d) 97, at 114 (S.C.C.); *R. v. Longtin*, [1983] O.J. No. 3011, 5 C.C.C. (3d) 12, at 16 (Ont. C.A.). As a general rule, a legitimate plain view seizure does not permit "an exploratory search to find other evidence": *R. v. Fawthrop*, [2002] O.J. No. 2604, 166 C.C.C. (3d) 97, at 115 (Ont. C.A.) (approving *R. v. Spindloe*, [2001] S.J. No. 266, 154 C.C.C. (3d) 8, at 37 (Sask. C.A.)). According to *Minnesota v. Dickerson*, 508 U.S. 366, at 374, 376 (1993) while recognizing "the sense of touch is generally less reliable than the sense of sight", "the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure". However, as noted at 378, where the officer squeezed, slid and otherwise manipulated the contents of the suspect's pocket, he overstepped the bounds of a protective search leading to a general or evidentiary search.

⁸⁹ J.A. Cecere, "Searches Woven From *Terry* Cloth: How The Plain Feel Doctrine Plus *Terry* Equals Pretextual Search" (1994), 36 B.C.L. Rev. 125 underlines the concern at 150, 152:

The risk is great that the plain feel doctrine will lead to far more intrusive, if not pretextual, searches.

.....

This fundamental premise fails for most items of contraband. The varying physical characteristics of contraband make it virtually impossible for an officer to immediately ascertain the criminal nature of the substance, given the more cursory treatment of a patdown search. Thus, in theory, *Dickerson* protects the individual because the Court requires an officer to have probable cause before seizing an object or conducting a more extensive search. In practice, however, an officer could not possibly gain probable cause from the mere touching of an object through clothing. Indeed, the *viewing* of an object of contraband will very often be insufficient to give rise to probable cause, because the illegal nature of the object may not be immediately apparent. Touching in the context of a protective search is inherently less reliable than viewing. While a law enforcement officer normally would view the contraband itself, he or she could only touch it through clothing. In addition, the identification of an object detected through the sense of touch is open to a wider range of interpretation than if detected through the sense of sight. Thus, ...the plain feel doctrine in the context of a cursory patdown search has great potential for error.

This potential for misinterpretation, along with a zealous police officer's desire to establish probable cause to justify a seizure, will inevitably lead to more intrusive searches than permitted by *Terry*. Moreover, to approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapon searches as a pretext for unwarranted searches,

A search incidental to a lawful arrest may, in some circumstances, precede the arrest itself.⁹⁰ The danger exists of an officer cascading through a groundless investigative detention to an arrest supported only by information arising from the detention until after the arrest itself. Grounds for arrest arising from an unconstitutional investigative detention or from an unreasonable search incident to a lawful investigative detention cannot afford valid grounds for arrest.⁹¹

IV. EXERCISE OF ADDITIONAL POWERS

The exercise of investigatory duties by the police does not translate to a police officer's powers being "unlimited".⁹² The detaining officer seeks to quickly confirm or dispel her or his suspicions during a brief investigative detention. The primary investigative technique is questioning the detainee.⁹³

An officer's questions to an individual investigatively detained may themselves amount to a warrantless search within a section 8 Charter context.⁹⁴

and thus to severely erode the protection of the Fourth Amendment. (footnotes omitted) (emphasis of original)

⁹⁰ *R. v. Debot*, [1989] S.C.J. No. 118, 52 C.C.C. (3d) 193, at 207 (S.C.C.); *R. v. Dubois*, [2004] B.C.J. No. 2426, 205 B.C.A.C. 156, at para. 10 (B.C.C.A.).

⁹¹ On occasion, an accused will argue that the police employed the "pretense of an investigative detention to search him for evidence to justify an arrest": see, for example, *R. v. Parchment*, [2007] B.C.J. No. 1281, 2007 BCCA 326, at para. 36 (B.C.C.A.).

⁹² *R. v. Dedman*, [1985] S.C.J. No. 45, 20 C.C.C. (3d) 97, at 120 (S.C.C.); *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at 324 (S.C.C.) ("Police powers and police duties are not necessarily correlative"; police are "not empowered to undertake any and all action in the exercise of that duty"); *U.S. v. Place*, 462 U.S. 696, at 714 (1983) (*Terry* stops "do not provide the police with a commission to employ whatever investigative techniques they deem appropriate"); *Florida v. Royer*, 460 U.S. 491, at 499 (1985) ("Nor may the police seek to verify their suspicions by means that approach the conditions of arrest").

⁹³ As noted in *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at 40 (Ont. C.A.) (leave to appeal granted [2007] S.C.C.A. No. 150 (S.C.C.)), "Persons who are detained for investigative purposes are usually questioned"; "Asking questions is an essential part of police investigations": *Hübel v. Sixth Judicial District Court*, 542 U.S. 177, at 185 (2004).

⁹⁴ In *R. v. Mellenthin*, [1992] S.C.J. No. 100, 76 C.C.C. (3d) 481, at 487-88, 490 (S.C.C.), the officer's questions were "elements of a search" as they fell outside the scope of the lawful reason for the detention and were not based on reasonable and probable grounds leading to "compelled testimony" contravening s. 8. In *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 506 (Ont. C.A.), the Court concluded that a search of the vehicle driver commenced "when the appellant was initially questioned by the police officer" in the absence of articulable cause for the detention. Similarly, in *R. v. Young*, [1997] O.J. No. 2431, 116 C.C.C. (3d) 350, at 358 (Ont. C.A.), the court held that the police questions of a detained suspect constituted an unreasonable search because the officer acted on a hunch or mere suspicion of the suspect's involvement in a break and enter. In *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250, at 264-65 (Ont. C.A.) (leave to

appeal allowed [2007] S.C.C.A. No. 99 (S.C.C.), after noting that “[t]he divide between questions that begin a search and questions that do not is sometimes not easy to draw”, the Court observed that in *R. v. Young*, *R. v. Mellenthin*, [1992] S.C.J. No. 100, 76 C.C.C. (3d) 481 (S.C.C.) and *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.) “when the police asked the crucial questions, they had already formed the intention to conduct a search, as evidenced by the specificity of the questions they asked”. The Court in *Grant* considered, in that case, that “the nature of the police’s question [“if he had anything he shouldn’t”] did not go that far and . . . was asked in quite a different context”. In *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at 556-57 (Alta. C.A.), the accused’s argument that police questioning constituted a search stumbled on the facts as R. was told he was free to go at any time. In *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220 (Ont. C.A.), a majority of the Court found H. was subjected to a search within the scope of s. 8 when, as a passenger in a vehicle stopped by the police, not suspected of any wrongdoing, he was questioned. At paras. 34, 38-44, the Court stated:

Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person.

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 . . . [I]n the present case, Harris was under police detention. Lipkus was not asking Harris to identify himself out of some sense of curiosity or so he could greet Harris by name should they meet again. Lipkus had a very specific purpose in mind when he asked for identification. He intended to use that identification to access a wealth of personal information about Harris before allowing Harris to proceed on his way. That information included whether Harris had a criminal record, was subject to any outstanding court orders and, if so, the terms of those orders. Although Crown counsel submits that the officer’s request for identification was “not directed at obtaining incriminating information in relation to unrelated criminal conduct”, I think that was precisely one of the reasons Lipkus asked Harris for identification. Why else would Lipkus use the identification to determine whether Harris was in breach of any outstanding court orders?

Given the information readily available to Lipkus through CPIC, I see no functional difference between Lipkus asking Harris to identify himself and then checking that identification through CPIC, and Lipkus asking Harris a series of questions about his criminal past, his bail status, and the terms of any bail that Harris might be under. Lipkus’s immediate access to information available on CPIC made Lipkus’s request for identification the equivalent of Lipkus asking Harris whether he was breaching any court orders at that moment.

A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police: *R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.). In the circumstances, Harris’s identification in response to the officer’s question constitutes a seizure and attracts s. 8 protection.²

²Section 7 of the *Charter* was not argued. It may be that on these facts the appellant’s claim could be more easily assessed as a self-incrimination claim under s. 7. Whether the claim is made under s. 7, the broad description of an individual’s legal rights, or s. 8, one of the specific examples of those rights, the essentials are the same. Individuals are entitled to be left alone by the state absent justification for state interference. Could the state justify compelling Harris to provide information to an agent of the state to be used by that agent to investigate Harris?

The seizure was unreasonable. As in *Mellenthin*, Lipkus had no reason to suspect Harris of anything when he questioned him and requested his identification. The purpose for the stop and the consequential detention of Harris and the other occupants of the vehicle had

A detained suspect is not obliged to respond to questioning.⁹⁵ As a matter of common sense, a detained suspect is more likely than an undetained person to believe she or he is compelled to respond to police questioning. While the police are under no obligation to inform the detainee of his or her right to remain silent, there must be compliance with the section 10(a)⁹⁶ and section 10(b)⁹⁷ Charter rights.

nothing to do with the request for Harris's identification. The purpose of the stop did not justify an at large inquiry into Harris's background or his status in the criminal justice system. That was the effect of the request for identification. Just as in *Mellenthin*, Lipkus expanded a *Highway Traffic Act* stop into a broader and unrelated inquiry. Harris's identification of himself provided the entrée into that broader and unrelated inquiry.

.....

Grafe and the other cases, however, turn largely on the finding that the person who was asked for identification was not under police detention or any other form of compulsion to answer the request for identification. If, as in this case, a request for identification is made in circumstances of detention in which the detained individual reasonably feels compelled to answer the request for identification, then the question assumes a coercive quality in the nature of a demand, which suggests a state seizure of the response: see *Mellenthin, supra*; *R. v. Young* (1997), 116 C.C.C. (3d) 350 (Ont. C.A.).

The Crown also relies on *R. v. Grant* (2006), 209 C.C.C. (3d) 250 at 264-65 (Ont. C.A.). *Grant* recognized that some questioning will constitute a search for the purposes of s. 8 and other questioning will not. Laskin J.A. pointed out that the nature of the questions and the context in which those questions were asked are important considerations in determining whether the questions constituted a search. On his analysis, it was important to consider whether the question was, in the minds of the police, preliminary to a more detailed search. In the present case, when Lipkus asked for identification, he intended to use that identification to conduct a CPIC search, one of the purposes of which was to determine whether the appellant was under any court orders and in breach of any court orders. I think the officer's intention to use Harris's identification to make the various inquiries available through CPIC is akin to an intention to conduct a further more intrusive search after receiving the answer to the request for identification. *Grant* offers support for my conclusion that the request for identification in the circumstances of this case amounted to a search or seizure for the purposes of s. 8.

I conclude that Harris was subject to a seizure when he gave Lipkus his identification. The seizure was warrantless and without reasonable cause.

⁹⁵ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 45 (S.C.C.); *Hübel v. Sixth Judicial District Court*, 542 U.S. 177, at 192-93 (2004) *per* Stevens J. (dissenting in the result) ("It is a 'settled principle' that 'the police have the right to request citizens to answer voluntarily questions concerned unsolved crimes' but 'they have not right to compel them to answer'"). However, the driver of a vehicle is generally required to identify himself or herself by regulatory legislation: *R. v. Moore*, [1978] S.C.J. No. 82, 43 C.C.C. (2d) 83, at 86 (S.C.C.).

⁹⁶ In *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 21 (S.C.C.), the Court stated that, "At a minimum, individuals who are detained for investigative purposes must therefore be advised, in clear and simple language, of the reasons for the detention"; *R. v. Nguyen*, [2008] O.J. No. 219, 2008 ONCA 49, at paras. 11-22 (Ont. C.A.) (here obligation of police to comply with s. 10(a) "easy to fill" — the officer could easily have said, "Police, stop, we're investigating a marijuana grow op in this house" to driver of vehicle turning into driveway at time of execution of search warrant). In *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.), the detainee was told there had been a gun complaint. In *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481 (Ont. C.A.), the suspect was informed that he was under investigative detention for trafficking. In *R. v. Aguirre*, [2006] O.J. No. 5071, at para. 182 (Ont. S.C.J.), the Court observed: "J.A. Nicol,

In an investigative detention, the police officer is generally in an adversarial position *vis-à-vis* the detainee as the officer seeks confirmation that the suspect is the person involved in the subject criminality — in effect, making an effort to top up reasonable suspicion to reasonable grounds to make an arrest. There is, therefore, a situational incentive for the police to provide the suspect less, rather than more, information about the transaction under investigation as the investigator’s questions attempt to draw out information about the suspect’s recent whereabouts, association with others, route, *etc.*, committing the detainee to an account for evaluation against the officer’s possessed and incoming information.

A suspect who is detained within the meaning of section 10(b) must be given the right to counsel upon detention.⁹⁸ Compliance with section 10(b) “cannot be transformed into an excuse for prolonging, unduly and artificially, a detention that . . . must be of brief duration”.⁹⁹ In some instances, the police may communicate the section 10(b) rights to a detained suspect at the outset of investigative detention with failure to

“‘Stop in the Name of the Law’: Investigative Detention” (2002), 7 Can. Crim. L. Rev. 223 at p. 244, in my view correctly observes that ‘in rapidly developing situations on the street, it would be unreasonable to expect police [to] provide the suspect with precise and comprehensive details as to why they are being detained’ . . . the primary benefit of the s. 10(a) communication [is] to permit an informed decision as to whether to exercise the s. 10(b) Charter right to counsel (*R. v. Latimer*, (1997), 112 C.C.C. (3d) 193 (S.C.C.), at 205; *R. v. Schmautz* [[1990] S.C.J. No. 21, 53 C.C.C. (3d) 556 (S.C.C.)] at p. 560 . . .’). Quite apart from providing appreciation of his or her jeopardy, in the words used to communicate the s. 10(a) right, it should be made clear that the officer is not simply chatting with the suspect but that he is detained and not free to leave until released: see A. Fiszauf, “Articulating Cause – Investigative Detention and Its Implications” (2007) 52 Crim. L.Q. 327, at 336-37. Ambiguity in this regard will fail to alert the detainee to his or her predicament respecting escape, resistance, obstruction or assault and may well defeat prosecution.

⁹⁷ In *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 22 (S.C.C.), a case where there was no communication of the s. 10(b) right, after noting that s. 10(b) must be purposively interpreted, the Court left to another day the question of the need for compliance with s. 10(b) during a brief investigative detention. In *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at 42 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)), the Court held that a detainee is to be afforded his or her s. 10(b) Charter right after a “brief interlude” has passed since the invocation of investigative detention. In the United States, with *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] rights vesting on custodial detention, the counsel issue does not arise in the context of a stop and frisk. In *R. v. Suberu*, at 45, without deciding the issue, the Court raised the prospect of self-incriminatory statements of a detainee given prior to communication of the s. 10(b) Charter right being excluded, other than to explain subsequent police conduct, to prevent unfairness (“The force of that argument would depend on the entirety of the circumstances surrounding the detention and taking of the statements. Factors such as the nature of the detention, the kinds of questions asked, and the age of the detained person would be among the relevant considerations.” [at para. 61]).

⁹⁸ *R. v. Debot*, [1989] S.C.J. No. 118, 52 C.C.C. (3d) 193, at 211-12 (S.C.C.); *R. v. MacEachern*, [2007] N.S.J. No. 245, 221 C.C.C. (3d) 321, at para. 19 (N.S.C.A.).

⁹⁹ *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308, at para. 22 (S.C.C.).

do so breaching the detainee's right to counsel.¹⁰⁰ Other authority has decided that a contextual and purposive application of section 10(b), and specifically the words of the text of the constitutional right, "without delay", does not require a detaining officer to immediately communicate the right to counsel during the "brief interlude between the commencement of an investigative detention" and the cessation of the "brief"¹⁰¹ detention permitted in a *Mann*¹⁰² investigative detention.¹⁰³ This approach, either through the interpretation of the "without delay" mandate of section 10(b), or perhaps at some point through a section 1 Charter justification, defers the section 10(b) right. Although the Court in *Suberu*¹⁰⁴ recognized that

¹⁰⁰ *R. v. Lewis*, [1998] O.J. No. 376, 122 C.C.C. (3d) 481, at para. 28 (Ont. C.A.); *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305, at paras. 82-85 (B.C.C.A.) (leave to appeal refused [2004] S.C.C.A. No. 522 (S.C.C.)); *R. v. Campbell*, [2003] M.J. No. 207, 175 C.C.C. (3d) 452, at paras. 44-52 (Man. C.A.).

¹⁰¹ *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)) (delay of one-half hour "is beyond the limits of the 'without delay' requirement" [at para. 54]); *R. v. Gurung*, [2007] O.J. No. 4231, at paras. 25-29 (Ont. S.C.J.) (55-minute roadside detention breaching s. 9 Charter right); *R. v. Schrenk*, [2007] M.J. No. 154, 2007 MBQB 93, at para. 27 (Man. Q.B.) (an eight-minute detention was "brief"). In *R. v. Aguirre*, [2006] O.J. No. 5071 (Ont. S.C.J.), on the issue of "brief" detention, the court stated at paras. 189-91:

Beyond the admonition that an investigative detention must be "brief" to retain its constitutional status, the courts have declined bright line temporal rules: *U.S. v. Place*, at p. 709 ("we question the wisdom of a rigid time limitation"; "we decline to adopt any outside time limitation for a permissible *Terry* stop"); *U.S. v. Sharpe*, at p. 685 (*per* Burger C.J., "... our cases impose no rigid time limitation on *Terry* stops"; no outside limit of 20 min.; and at p. 697 *per* Marshall J., "... *Terry*'s brevity requirement is not judged by a stopwatch but rather by the facts of particular stops").

I agree with the observations of J.A. Nicol, "'Stop in the Name of the Law': Investigative Detention", at p. 232 that "the facts will play a pivotal role in determining the flexibility of any temporal restrictions" including the seriousness and complexity of the crime(s) being investigated. Resort to caselaw examples is at best rough guidance as to the constitutionally tolerable duration of the temporary restraint of an investigative detention: *R. v. Greaves*, at pp. 324-7 (40-min. detention not violating s. 9 of the *Charter*); *R. v. Willis*, at para. 31 (questioning for a few minutes was justifiable"); *R. v. Scott* (2005), 191 C.C.C. (3d) 183 (N.S.C.A.) at paras. 6, 35 (leave to appeal refused [2005] S.C.C.A. No. 24) (approximate 30-min. investigative detention not unreasonable); *R. v. Dupuis*, [1994] A.J. No. 1011 (C.A.) at paras. 9-10 (1-hr. detention upheld; police may detain "for a reasonable duration of time"); *U.S. Tavolacci*, at p. 1427 (10-to-15 min. delay for canine to arrive not unreasonable).

In assessing the permissible length of the detention, the court may "take into account whether the police diligently pursue[d] their investigation": *U.S. v. Place*, at p. 709; *U.S. v. Sharpe*, at p. 687 (*per* Burger C.J., no "delay unnecessary to the legitimate investigation" by the police).

¹⁰² *R. v. Mann*, [2004] S.C.J. No. 49, 185 C.C.C. (3d) 308 (S.C.C.).

¹⁰³ *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at paras. 41-42, 50-51 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)); *R. v. Peters*, [2007] A.J. No. 560, 2007 ABCA 181, at para. 15 (Alta. C.A.).

¹⁰⁴ *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)).

at the conclusion of a “brief detention” “the officer will either have to release the individual or, if reasonable and probable grounds exist, arrest the individual”, as investigative detention “is not an arrest and cannot be treated as a *de facto* arrest by the police or by the courts”,¹⁰⁵ the Court twice speaks of an officer not being obliged to communicate the section 10(b) right while he or she makes up his or her mind whether “the detained person will be detained for something more than a brief interval.”¹⁰⁶ It is unclear whether this latter language envisions a brief interval within a brief detention.

Beyond the protective search of a detainee and the investigative technique of exploratory or accusatory questioning, police officers effecting investigative detention at times exercise other powers, some protective in nature,¹⁰⁷ others investigatory.¹⁰⁸ These powers ought not to be as

¹⁰⁵ *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 40 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)).

¹⁰⁶ *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at paras. 50, 54 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 150 (S.C.C.)).

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- (1) *illumination of vehicle interior* — In *R. v. Mellenthin*, [1992] S.C.J. No. 100, 76 C.C.C. (3d) 481, at 487 (S.C.C.), in the context of a check-stop program at night, the Court considered that an officer’s use of a flashlight was “necessarily incidental” to the lawful vehicle stop and occupants’ detention as “essential for the protection of those on duty”.
- (2) *opening vehicle door* — Vehicle stopped for speeding; driver unable to produce licence, insurance and vehicle registration when asked; driver claimed vehicle belonged to a friend; officer suspected vehicle might be stolen so ran computer check of plates; officer unsuccessfully searched glove compartment for ownership or registration; officer opened back door of stopped car to ask passenger to identify herself; held: the officer “had the right to open the back door and look into the rear of the vehicle for safety reasons and to speak with the passenger in the back seat” (*R. v. Belnavis*, [1997] S.C.J. No. 81, 118 C.C.C. (3d) 405, at 421 (S.C.C.)).
- (3) *direction to driver to exit vehicle* — Vehicle stopped on account of expired licence plate; police intention to issue traffic summons; driver asked to step out of vehicle and produce owner’s card and operator’s licence; only when driver out and standing did officer have reason to suspect detainee armed; .38-calibre handgun seized in ensuing search; held: police direction to exit vehicle an “incremental intrusion” of a “*de minimis*” nature necessary out of “legitimate concerns for the officer’s safety” (*Pennsylvania v. Mimms*, 434 U.S. 106, at 109-11 (1977)). See also *R. v. Lal*, [1998] B.C.J. No. 2446, 130 C.C.C. (3d) 413, at 418 (B.C.C.A.) (leave to appeal refused [1999] S.C.C.A. No. 28 (S.C.C.)); *R. v. Johnson*, [2007] O.J. No. 5099, at para. 3 (Ont. S.C.J.); *R. v. Plummer*, [2007] O.J. No. 2818, at para. 49 (Ont. S.C.J.).
- (4) *direction regarding detainee’s hands* — Commonly, the police direct a detainee to keep his or her hands clearly exposed during the investigative encounter (*R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at paras. 7, 10 (S.C.C.) — detainee instructed to turn around and place hands on top of car; *R. v. Harris*, [2007] O.J. No. 3185, 49 C.R. (6th) 220, at paras. 20, 27 (Ont. C.A.) — occupants of stopped vehicle directed

- to keep hands where officer could see them; *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250, at 254, 261-62 (Ont. C.A.) (leave to appeal allowed [2007] S.C.C.A. No. 99 (S.C.C.)) — detainee pedestrian told to keep his hands in front of him); *R. v. Tran*, [2007] B.C.J. No. 2341, 2007 BCCA 491, at paras. 2, 9 (B.C.C.A.); *R. v. Iraheta*, [2007] O.J. No. 2205, at paras. 30, 32 (Ont. S.C.J.) (show hands, direction to take hands out of pockets); *R. v. Ismail*, [2007] O.J. No. 3851, at paras. 6, 12 (Ont. S.C.J.) (order to remove hands from pockets); *R. v. Williams*, [2007] O.J. No. 4305, at paras. 9-10 (Ont. S.C.J.) (detainee advised to keep hands out of pockets)).
- (5) *physical restraint* — Handcuffing of detainee (*R. v. Parchment*, [2007] B.C.J. No. 1281, 2007 BCCA 326, at para. 10 (B.C.C.A.); *R. v. Batzer*, [2005] O.J. No. 3929, 200 C.C.C. (3d) 330, at 336 (Ont. C.A.); *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305, at 316, 327-28 (B.C.C.A.) (leave to appeal refused [2004] S.C.C.A. No. 522 (S.C.C.)); J.A. Nicol, “‘Stop in the Name of the Law’: Investigative Detention” (2002) 7 Can. Crim. L. Rev. 233 (having recognized authority to investigatively detain, it would be “unreasonable if police were not able to physically restrain a suspect if necessary”); *R. v. Gurr*, [2007] B.C.J. No. 1480, 2007 BCSC 979, at para. 28 (B.C.S.C.) (even if detainee handcuffed, pat-down search may not be inappropriate); *R. v. Johnson*, [2007] O.J. No. 5099, at paras. 20, 28 (Ont. S.C.J.) (perhaps handcuffs necessary)).
- (6) *seizure of cell phone* — During investigative detention detainee speaking on his cell phone saying to unknown third party that the police were present; officer seized cell phone; seizure justified to prevent detainee summoning “back-up forces”; police “were entitled to take preventative measures” (*R. v. White*, [2007] O.J. No. 1605, 2007 ONCA 318, at paras. 39, 45, 47-49, 53 (Ont. C.A.)).
- (7) *movement of detainee* — Can police require detainee to sit in cruiser? (J. Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*” (2007) 52 Crim. L.Q. 299, at 309).
- (8) *pursuit to detain* — Where reasonable grounds to detain and suspect flees, police “had the right to pursue him” (*R. v. Wainwright*, [1999] O.J. No. 3539, at para. 1 (Ont. C.A.)).
- (9) *use of force* — During an on-foot pursuit, the suspect attempted to conceal himself beneath a parked car; the officer was concerned that the suspect was armed and the officer was therefore disinclined to climb under the car; the officer elected to kick the prone suspect in the chest to gain control of the suspect; held: “application of situational force designed to dissolve a potential risk” to officer safety (*R. v. Yum*, [2001] A.J. No. 365, at paras. 4, 6-8 (Alta. C.A.)).
- (10) *asking if weapon(s) present* — Where police saw a knife, lawfully possessed and visible in the front seat of the vehicle, police asked a passenger whether there were other weapons in vehicle (*R. v. Gurung*, [2007] O.J. No. 4231, at para. 8 (Ont. S.C.J.)).
- (11) *movement of clothing* — In circumstances, detainee told to lift front of hoodie to expose waistband as weapons often concealed there (*R. v. Williams*, [2007] O.J. No. 4305 at para. 10 (Ont. S.C.J.)).
- ¹⁰⁸ Measures apparently incidental to investigative questioning include:
- (1) *request for detainee’s identification* — As noted at footnote 94, a detained suspect, other than a vehicle driver, cannot be compelled to identify himself or herself. It may be that a “stop and identify” legislative initiative as an adjunct to investigative detention would pass constitutional scrutiny (*Hübel v. Sixth Judicial District Court*, 542 U.S. 177, at 182-89 (2004)). See also *R. v. Ismail*, [2007] O.J. No. 3851, at paras. 23-28, 42-43 (Ont. S.C.J.) (where discrepancy between driver’s identification and police information as to registered owner, reasonable to ask driver for passenger’s name).

invasive as the circumstances of an arrest. Often the case law reporting the exercise of these ancillary powers is simply as part of the context or narrative of the facts, without any consideration of the appropriateness of their application or whether, beyond reasonableness, some threshold of belief must first exist before implementation of the particular measure.

V. CONCLUSION

Experts will undoubtedly continue to debate whether the courts ought to have left the subject of investigative detention to Parliament. But whether or not the judiciary should have exercised common law authority

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- (2) *moving the detainee* — suspect touched on elbow and directed to side of train station (*R. v. MacEachern*, [2007] N.S.J. No. 245, 221 C.C.C. (3d) 321, at para. 8 (N.S.C.A.)). In *R. v. Aguirre*, [2006] O.J. No. 5071, at paras. 187-88 (Ont. S.C.J.), the Court upheld a 45-second cruiser ride back to the crime scene as tolerably incidental to an investigative detention:

This minimal movement of the detainee is qualitatively different than transport to a police facility — conduct converting an investigative detention to unconstitutional detention: *Florida v. Hayes* [460 U.S. 491 (1985)], at p. 815. There is no *per se* prohibition of movement of a detainee provided it is necessary in the sense of rationally in furtherance of the objective of the detention itself: *R. v. Lewis*, (1998), 122 C.C.C. (3d) 481 (Ont. C.A.), at p. 190 (decision to move detainee from airport concourse to nearby private room “appropriate”); *R. v. Elshaw* (1989), 70 C.R. (3d) 197 (B.C.C.A) at pp. 203-4 (reasonable to move detainee from park to rear of patrol wagon (rev’d on right to counsel issue (1991), 67 C.C.C. (3d) 97 (S.C.C.) with court stating at p. 126, “It may have been reasonable and necessary to place the accused in the patrol wagon”)); L.A. McCoy, “Some Answers from the Supreme Court on Investigative Detention . . . and Some More Questions” (2004), 49 C.L.Q. 268 at p. 276 (“ . . . all but the most minimal transfers would defeat the goal of investigative detentions being brief and non-intrusive”); *U.S. v. Place* [462 U.S. 696 (1983)], at 715 (during the course of stop, “the suspect must not be moved or asked to move more than a short distance”); *Florida v. Royer*, 460 U.S. 491, 504 (1983) (*per* White J., safety and security concerns may justify “moving a suspect from one location to another during an investigative detention”); *U.S. v. Sharpe* [470 U.S. 675 (1985)], at p. 692 (*per* Marshall J., “A stop can be unduly intrusive if the individual is moved . . . more than a short distance”); *U.S. v. Tavolacci* [895 F.2d 1423 (2nd Cir. 1990)], (movement of detainee not unreasonable — “Nor does the change of location from the train to the platform entail a full-fledged arrest”).

- (3) *subjecting detainee to identification procedure* — Subjecting detained suspect to identification by eyewitnesses upheld in *R. v. Aguirre*, [2006] O.J. No. 5071, at para. 187 (Ont. S.C.J.) (“The identification procedure was essential to determining whether Mr. Aguirre was the intruder or whether the perimeter of police officers should remain active. Elimination of a detainee is an important aspect of a brief investigative detention: *U.S. v. Place*, [462 U.S. 696 (1983)], at 702 (action ‘that would quickly confirm or dispel the authorities’ suspicion’); *U.S. v. Sharpe* [470 U.S. 675 (1985)], at p. 686 *per* Burger C.J. (whether officer chose ‘a means of investigation that was likely to confirm or dispel . . . suspicions quickly’”).

to fashion such a power for the police, and despite the cogent arguments for and against the existence of such a power, investigative detention as a police power has survived transplantation from the United States.

The courts have an established penchant for eschewing “bright-line” rules in favour of broad discretion applied contextually on a case-by-case basis and according to general guiding principles including the overarching requirements of Charter compliance.¹⁰⁹ An advantage is that no case suffers an apparent arbitrary fate in the application of a one-size-fits-all rule which adequately covers the majority of situations faced by the police, but not all.

However, pride in avoidance of bright-line rules is surely warranted only where the courts provide, as a surrogate, tolerable clarity and certainty in the law.¹¹⁰ Establishment of police powers which are uncertain or ambiguous risks greater injustice than implementation of a bright-line rule.¹¹¹

In street policing, officers need to make quick decisions and to remain responsive to changing information. In such a dynamic and fluid environment, a police officer needs to know and be able to apply clear

¹⁰⁹ *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at para. 62 (Ont. C.A.) (notice of discontinuance filed after leave to appeal granted [1999] S.C.C.A. No. 87 (S.C.C.)) (where competing interests in each situation, it is “difficult, if not impossible, to provide preformulated bright-line rules which appropriately maintain the balance between police powers and individual liberties”); *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250, at 257 (Ont. C.A.), leave to appeal allowed [2007] S.C.C.A. No. 99 (S.C.C.) (although “[b]right-line rules . . . have the advantage of certainty”, bright-line rules “ill-suited” to addressing the myriad of circumstances in police/citizen encounters).

¹¹⁰ *R. v. Belnavis*, [1997] S.C.J. No. 81, 118 C.C.C. (3d) 405, at 433 (S.C.C.) (La Forest J. dissenting in the result) (“The police are entitled to as clear a standard as possible so as to guide them in the performance of their . . . work”); *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 30 (S.C.C.) (La Forest J. dissenting in the result) (police “need the clearest possible rules” in enforcement endeavours); J. Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*” (2007) 52 *Crim. L.Q.* 299, at 314 (on the subject of investigative detention and the public, the police, lawyers and judges, “All four constituencies desire clarity, albeit for different reasons”); *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at para. 62 (Ont. C.A.) (notice of discontinuance filed after leave to appeal granted [1999] S.C.C.A. No. 87 (S.C.C.)) (“clear and readily discernible rules governing the extent to which the police can interfere with individual liberties are most desirable”).

¹¹¹ *R. v. Belnavis*, [1997] S.C.J. No. 81, 118 C.C.C. (3d) 405, at 433 (S.C.C.) (“a vague standard . . . offers almost no protection to the citizen from interference by the police”); *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 30 (S.C.C.) (problematic to provide the police “a very vague rule for action”); J. Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*” (2007) 52 *Crim. L.Q.* 299, at 304 (uncertainty is incompatible with the stated goal of regulating investigative detention as a low-visibility encounter); A. Fiszauf, “Articulating Cause – Investigative Detention and Its Implications” (2007) 52 *Crim. L.Q.* 327, at 336 (vague criteria for detention is troublesome for police acting in good faith in performance of their duties and vagueness inadvertently legitimizes many detentions as a practical matter).

rules almost automatically. There is no time to “grapple . . . with complexities”¹¹² in the law. Unfortunately, many of the limits relating to investigative detentions and related searches and field interrogations remain entirely uncertain. Granted, the characterization of detainees as warrantlessly seized may not achieve significantly enhanced clarity and fairness. But the approach should not be rejected out of hand. Indeed, if the courts do not soon achieve greater certainty respecting investigative detention, then the words of La Forest J. may, at some point, become a reality: “It would be an ironic reversal of roles if Parliament was required to act to protect . . . from possible excesses flowing from the application of a judicially created rule.”¹¹³

¹¹² J. Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*” (2007) 52 *Crim. L.Q.* 299, at 314.

¹¹³ *R. v. Landry*, [1986] S.C.J. No. 10, 25 C.C.C. (3d) 1, at 31 (S.C.C.).