The Suspicious Distinction between Reasonable Suspicion and Reasonable Grounds to Believe

Terry Skolnik

CANADIAN CRIMINAL LAW DISTINGUISHES between the thresholds of "reasonable suspicion" and "reasonable grounds to believe" required in order for police officers to lawfully arrest persons, conduct certain forms of searches, and to obtain warrants. Officers wishing to lawfully exercise these powers must satisfy the requisite legal standard, or risk violating individuals' constitutional rights with the ensuing possibility of exclusion of evidence. Unfortunately, recent attempts to clarify differences between the two thresholds is complex to articulate, confusing, and impracticable.

This article examines the fundamental difficulties related to the current theoretical and practical distinctions between both standards. These issues are important for legal practitioners and judges interpreting whether the standards have been reached and whether constitutional rights have been violated, and, as a theoretical and pragmatic basis upon which to interpret the scope of new police powers.

It is argued that the current confusion between both standards arises from the faulty usage of notions of "possibility" and "probability." Furthermore, in identifying new police powers, courts have sometimes imposed legal standards which cannot safely or reasonably be met. Ultimately, I will attempt to provide a more coherent theoretical basis for distinguishing between both standards based on comprehensible pragmatic considerations. As a result, I hope to not only articulate a more simple and

LE DROIT CRIMINEL CANADIEN établit la distinction entre les critères que sont les «soupçons raisonnables» et les «motifs raisonnables de croire» afin que les agents de police puissent légitimement exercer leurs pouvoirs de procéder à des perquisitions et des arrestations ou d'obtenir des mandats. Les agents désireux d'exercer ces pouvoirs en toute légalité doivent satisfaire à la norme légale exigée, sans quoi ils risquent de porter atteinte aux droits constitutionnels des personnes concernées et risquent par la même occasion de voir rejeter les éléments qu'ils comptaient présenter en preuve. Hélas, les récentes tentatives visant à clarifier les différences entre ces deux critères sont difficiles à formuler, elles portent à confusion et sont à peu près irréalisables.

Dans cet article, l'auteur examine les difficultés fondamentales inhérentes aux distinctions actuelles théoriques et pratiques entre les deux normes. Ces questions sont importantes tant pour les avocats de la pratique que pour les juges chargés d'interpréter dans quelle mesure ces critères ont été respectés et si des droits constitutionnels ont été violés, et enfin sur quelles assises théoriques et pragmatiques il faut interpréter la portée des nouveaux pouvoirs conférés aux policiers.

Je soutiens que la confusion qui entoure les deux normes découlerait de l'emploi erroné des notions de «possibilité» et de «probabilité». Qui plus est, en identifiant les nouveaux pouvoirs policiers, les tribunaux ont imposé, à quelques reprises, des normes juridiques

meaningful distinction between both standards based on certain overarching considerations, but which will also assist in identifying which standard ought to apply in identifying new police powers.

qui ne pourraient être respectées de manière raisonnable ou sécuritaire. En dernier lieu, je tenterais de présenter un fondement théorique plus cohérent afin de distinguer entre les deux normes à partir de considérations pragmatiques compréhensibles. Par conséquent, j'espère formuler une distinction non seulement plus simple et plus significative entre les deux critères fondés sur certaines considérations prépondérantes, mais une distinction qui permet en outre d'identifier la norme applicable lorsqu'il s'agit de déterminer les nouveaux pouvoirs conférés aux policiers.

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I. INTRODUCTION

If there is one legal distinction which is wrought with confusion and difficult to articulate, it is the distinction between the "reasonable suspicion" and "reasonable grounds to believe" standards in Canadian criminal law. In a series of recent decisions, the Supreme Court of Canada (SCC) has made a welcome attempt to clarify the differences between the two thresholds, which must be distinguished for several crucial reasons.

Firstly, criminal law legislation and common law police powers both distinguish between reasonable suspicion and reasonable grounds to believe as the legal thresholds required to lawfully undertake certain actions that would normally infringe on individuals' constitutional rights, such as detaining,[1] arresting,[2]

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1 See *R v Dedman*, [1985] 2 SCR 2, 20 DLR (4th) 321 [*Dedman* cited to SCR]; *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 [*Mann*]; *R v Clayton*, 2007 SCC 32, [2007] 2 SCR 725 [*Clayton*]; *R v Suberu*, 2009 SCC 33, [2009] 2 SCR 460 [*Suberu*]. See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 9 [*Canadian Charter*].

2 See *R v Storrey*, [1990] 1 SCR 241, 53 CCC (3d) 316 [*Storrey* cited to SCR]; *R v Latimer*, [1997] 1 SCR 217 at para 26, 142 DLR (4th) 577. See also *Criminal Code*, RSC 1985, c C-46, s 495 [*Criminal Code*] (the police power to arrest persons without warrant) and *Canadian Charter*, *supra* note 1, s 9 (the constitutional right to be protected against arbitrary detention and imprisonment).

or searching individuals[3] or places.[4] The two standards are also used as the requisite thresholds to obtain warrants.[5] As a result, failing to meet the required threshold can render a search abusive,[6] an arrest unlawful and arbitrary,[7] and warrantless entry into a dwelling house illegal.[8] Furthermore, it can lead to the exclusion of incriminating evidence with ensuing acquittals,[9] in addition to justifying the merit of civil actions brought against police officers for constitutional rights violations.[10]

Secondly, in cases where the SCC recognizes the existence of a common law police power, it must also determine which legal threshold should apply accordingly.[11] Because the Court has confirmed the existence of a number

3 See *Cloutier v Langlois*, [1990] 1 SCR 158, 53 CCC (3d) 257 [*Cloutier* cited to SCR] (warrantless searches of persons incidental to arrest); *Mann*, *supra* note 1 (warrantless searches of persons incidental to investigative detention); *R v Golden*, 2001 SCC 83, [2001] 3 SCR 679 [*Golden*] (warrantless strip-searches of persons); *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37 [*MacDonald*] (warrantless safety searches of persons who are not detained); *R v Fearon*, 2014 SCC 77, [2014] 3 SCR 621 [*Fearon*] (warrantless searches of cellphones incidental to arrest). See also *Canadian Charter*, *supra* note 1, s 8.

4 See *Hunter v Southam Inc*, [1984] 2 SCR 145, 55 AR 291; *Criminal Code*, *supra* note 2, s 487(1).

5 *Ibid*, s 487(1). The obtention of a search warrant pursuant to Form 1 of the *Criminal Code* requires the threshold of reasonable grounds to believe and prior judicial authorization.

6 See e.g. *R v Collins*, [1987] 1 SCR 265, 13 BCLR (2d) 1; *R v Stillman*, [1997] 1 SCR 607, 185 NBR (2d) 1.

7 See *R v Duguay* (1985), 50 OR (2d) 375, 18 DLR (4th) 32 (CA), aff'd on other grounds (1989), [1989] 1 SCR 93, 56 DLR (4th) 46 [*Dugay* cited to SCR]. See also *R v Monney* (1997), 153 DLR (4th) 617 at para 90, 120 CCC (3d) 97 (Ont CA).

8 See *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609.

9 See *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

10 See e.g. *Vancouver (City of) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 (with respect to the possibility of bringing tort actions against police officers who breach the constitutionally protected rights of complainants).

11 With respect to the judicial recognition of certain common law police powers, see e.g. *Dedman*, *supra* note 1 (the common law police power to randomly stop individuals to verify their sobriety); *R v Godoy*, [1999] 1 SCR 311, 168 DLR (4th) 257 (the common law police power to enter into a dwelling house without warrant following a 911 call, in order to investigate the reasons for the call, locate the caller, and provide assistance if needed); *Mann*, *supra* note 1 (the common law police power to detain individuals without warrant for investigative purposes, and to conduct safety searches incidental to investigative detention without warrant); *R v Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456 [*Kang-Brown*] (the common law police power to use drug sniffer dogs without warrant). Many of these are referred to in Michael Plaxton, "Police Powers After Dicey" (2012) 38:1 Queen's LJ 99 at 100. See also *Cloutier*, *supra* note 3 (the common law police power to search an individual incidental to a lawful arrest without warrant); *Clayton*, *supra* note 1, Binnie, Lebel, and Fish JJ (the concurring judges' recognition of the common law police power of detention by vehicular blockade); *Fearon*, *supra* note 3 (the common law police power to search a cell phone incidental to arrest without warrant); *MacDonald*, *supra* note 3 (the common law police power to conduct safety searches of persons prior to lawful arrest or detention without warrant).

of common law police powers over the past 20 years,[12] adequately distinguishing between the standards will become increasingly important.[13] In an era rife with new challenges that both governments and law enforcement agencies are facing, the judiciary will likely continue having to do this.[14]

Unfortunately, it remains difficult to distinguish between the standards adequately and articulate their differences meaningfully. The current distinctions are theoretically and practically confusing, and furthermore, are likely difficult to understand for those applying them on a regular basis. In this article, it will be argued that the current distinction between reasonable suspicion and reasonable grounds to believe is in need of crucial revision for three important reasons.

Firstly, the current framework, which serves to distinguish between the two standards, relies on a false dichotomy between possibility and probability, and tends to treat each concept as if they were mutually exclusive. Notably, it has been explained that the *possibility* that a state of affairs *might* occur characterizes the legal threshold of reasonable suspicion, whereas the *probability* that a state of affairs *will* occur characterizes the standard of reasonable grounds to believe.[15] Yet, it will be demonstrated that these distinctions between "possibility" and "probability" are largely futile, notably because any *ex post facto* judicial assessment of whether or not the requisite standard was met would focus principally on the issue of probability given the extent of information available to officers in the circumstances.[16] As a result, the notion of possibility is inevitably collapsed into that of probability, rendering considerations of whether it was possible that something might occur a generally fruitless inquiry.

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12 *Ibid*.

13 See Steve Coughlan, "Charter Protection Against Unlawful Police Action: Less Black and White Than It Seems" (2012) 57 SCLR (2d) 205 at 215–16; Matthew Johnson, "Privacy in the Balance—Novel Search Technologies, Reasonable Expectations, and Recalibrating Section 8" (2011–2012) 58 Crim LQ 442.

14 *Ibid*.

15 *R v Chehil*, 2013 SCC 49 at paras 27, 32, [2013] 3 SCR 220 [*Chehil*] ("[t]hus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime" at para 27). See also *R v MacKenzie*, 2013 SCC 50, [2013] 3 SCR 250 [*MacKenzie*] ("[t]hat, however, does not amount to a material evidentiary distinction between these two cases. As *Chehil* makes clear, the police need not have evidence indicative of a reasonable *probability* of finding drugs under a reasonable suspicion standard" at para 88).

16 See Terry Skolnik, "*R. v. MacDonald* and the Illogicality of the Reasonable Belief Requirement for Safety Searches" (2015) 65:1&2 Crim LQ 43.

Secondly, certain overarching considerations that not only meaningfully distinguish between the two standards, but also assist in determining which standard should apply to an emerging police power, have, in some respects, been ignored or obscured. As a result, courts have concluded that certain common law police powers exist, but require a standard that ignores these considerations and cannot reasonably be met in the circumstances.

Lastly, although the SCC has noted that the standards of reasonable suspicion and reasonable grounds to believe are supposed to be rooted in common sense, they may nonetheless be difficult to apply for police officers, lawyers, and judges. As a result, clarification that seeks to simplify matters should be welcome.[17]

The structure of this article is as follows. In the first part, the historical development of the thresholds of reasonable suspicion and reasonable grounds to believe in the United Kingdom and Canada are discussed, in order to demonstrate why it is increasingly important to distinguish between the standards adequately. In the second part, the ways in which courts have interpreted both standards, in addition to the recent developments in Canadian case law, are canvassed. Third, I explain the current problems with the distinctions between reasonable suspicion and reasonable grounds to believe. To conclude, I present a simpler and more meaningful approach to distinguishing between the standards of reasonable suspicion and reasonable grounds to believe. Furthermore, I provide certain overarching considerations that guide the respective standards, and may also prove helpful for determining which standard ought to be used for emerging police powers. As will be seen, these overarching considerations adequately draw a simple line between the two standards, are not complicated to articulate, and can easily be applied by police officers and interpreted by lawyers and judges.

17 On the notion of common sense guiding the application of both standards, see e.g. *MacKenzie*, *supra* note 15 at para 73; *Chehil*, *supra* note 15 at para 29; *R v Bramley*, 2009 SKCA 49 at para 60, 324 Sask R 286 [*Bramley*].

II. DEVELOPMENT OF THE STANDARDS OF REASONABLE SUSPICION AND REASONABLE GROUNDS TO BELIEVE

A. Initial Development of Reasonable Suspicion and Reasonable Grounds to Believe in England and Canada

Although the terms "reasonable grounds to believe" and "reasonable suspicion" have been used in Canadian law for many years,[18] the two standards initially developed separately with little discussion or analysis of their relationship or differences. Because legislation offered no definition of the standards, their respective developments are principally attributable to judicial interpretation.[19]

The standard of reasonable suspicion originates from English law, and was required in order to lawfully arrest persons without warrant for having committed a felony:

> A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another.[20]

18 See e.g. *Liquor Licence Act*, RSO 1960, c 218, s. 53(6) ("[a]ny person holding a licence under this Act who has reasonable grounds to suspect from the conduct of any person who has come upon the premises in respect of which such licence is issued that such person although not of notoriously bad character, is present for some improper purpose or is committing an offence against this Act or the regulations, may request such person to leave the licensed premises immediately and, unless the request is forthwith complied with, such person may be forcibly removed"), cited in *Jordan House Ltd v Menow*, [1974] SCR 239 at 245, 38 DLR (3d) 195; *MacDonald v R*, [1947] SCR 90, [1947] 2 DLR 625 [cited to SCR] ("[t]his other evidence may of course be direct or circumstantial, oral or by writing or otherwise, as long as it leads to the reasonable belief that the statement of the accomplice is true, and does not let it stand alone" at 94).

19 Leonard Herschel Leigh, *Police Powers in England and Wales*, 2nd ed (London, UK: Butterworths, 1985) at 80. See *Hussien* v *Kam*, [1969] 3 ALL ER 1626 (PC) [*Hussien*].

20 See Edward Bullen & Stephen Martin Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law: With Notes, and an Appendix of Recent Statutes and General Rules Relating to Pleading*, 3rd ed (London, UK: Stevens and Sons, 1868) at 795, cited in *Duguay*, *supra* note 7. See also *Beckwith v Philby* (1827), 108 ER 585 (KBD); *Hobbs v Branscomb* (1813), 170 ER 1431 (HC); *Davis v Russell* (1829), 130 ER 1098 (CP); *Hogg v Ward* (1858), 157 ER 533 (Ex). For later cases, see e.g. *Dumbell v Roberts*, [1944] 1 All ER 326 (CA) ("[t]he power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion" at 329), cited in *Storrey*, *supra* note 2.

Later, in the Privy Council decision *Shaaban Bin Hussien v Chong Fook Kam*,[21] the Council elaborated what constituted "reasonable suspicion" and the evidence that could be used to substantiate it.[22] The case considered the legal merit of a civil action brought against two Malaysian constables (one of whom was Bin Hussien) for having falsely imprisoned the plaintiffs for reckless or dangerous driving causing death. At issue was whether the constables had met the requisite threshold of legal suspicion required in Malaysian law to lawfully arrest the plaintiffs, resulting in their contested overnight detention. In considering the degree of required proof, the Privy Council explained:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting-point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage.[23]

Building on this interpretation, courts later held that the standard of reasonable suspicion could be met even when based on inadmissible evidence, such as hearsay evidence;[24] a position which was later accepted into Canadian law.[25] Both historically and contemporarily, English law required the lesser standard of reasonable suspicion in order to lawfully arrest individuals without warrant, and in order to undertake certain preventative searches without warrant.[26]

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21 *Hussien*, *supra* note 19.

22 Leigh, *supra* note 14 at 80.

23 *Hussien*, *supra* note 19 at 1630.

24 *O'Hara v Chief Constable of the Royal Ulster Constabulary* (1996), [1997] 1 All ER 129 (HL). See also *Hussien*, *supra* note 19 at 1631 (reasonable suspicion could be based upon information stemming from an informant, or hearsay information stemming from other officers).

25 For instance, this was later accepted with respect to the application of the standard of reasonable grounds to believe in Canadian criminal law. See *Eccles v Bourque*, [1975] 2 SCR 739 at 745, 50 DLR (3d) 753. See also Justice Heureux-Dubé's dissenting opinion in *Duguay*, *supra* note 7 at para 49, and most clearly in *R v Garofoli*, [1990] 2 SCR 1421 at 1456–57, 60 CCC (3d) 161.

26 Today, the same standard is required to undertake lawful warrantless searches of persons who have not yet been arrested (referred to as a "stop and search"). See *Police and Criminal Evidence Act 1984* (UK), c 60, s 1 [*PACE*]. However, though constables can undertake lawful, warrantless arrests where reasonable suspicion related to the commission of the offence exists, officers must also have reasonable grounds to *believe* that the arrest is necessary (although there are so many reasons contained in subsection 24(5) of the Act, rendering nearly every arrest "necessary"). See *PACE*, s 24(1)–(5). For legislation empowering police officers to undertake warrantless searches of persons on the basis of reasonable suspicion prior to

B. The Importance of Distinguishing between Reasonable Suspicion and Reasonable Grounds to Believe in Canadian Law

In Canadian law, attempts to articulate what constituted the respective standards of reasonable suspicion and reasonable grounds to believe only occurred in the early 1990s.[27] In *R v Storrey*,[28] the issue was whether police officers had met the requisite reasonable grounds to believe standard in order for their arrest to have been lawful in conformity with the *Criminal Code* provision governing arrest.[29] In discussing the applicable standard of reasonable grounds to believe, the SCC explained that the standard had both an objective and subjective facet.[30] Not only must the arresting officer subjectively believe that the standard has been met, but also the grounds must be objectively justifiable in the sense that an ordinary person in the officer's place would conclude that there were indeed reasonable grounds.[31]

The pressing need to mark an adequate distinction between the two standards was recognized in a time when common police powers were being increasingly developed by the judiciary.[32] A contrast between the two standards occurred in the influential decision on investigative detention and preventative searches: *R v Mann*.[33] In that case, police investigating a recent break-and-enter detained the accused because he matched the physical description of the suspect that had been given by police dispatchers.[34] While being detained, the accused complied with a pat down search for concealed

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the enactment of *PACE*, see *British Transport Commission Act, 1949* (UK), 12 & 13 Geo 6, c 29, s 54; *Vagrancy Act, 1824* (UK), 5 Geo 4, c 83, s 4; *Firearms Act 1968* (UK), c 27, s 47.

27 Certain Canadian cases analyzed whether or not the threshold of reasonable suspicion was met without elaborating further on the standard's characteristics. For example, certain SCC decisions involving driving while impaired offences, and whether the threshold was met in order to permit officers to demand a breath sample from a roadside alcohol screening device. See *Dedman*, *supra* note 1; *R v Hufsky*, [1988] 1 SCR 621, 40 CCC (3d) 398; see the current provision in the *Criminal Code*, *supra* note 2, s 254(2). The standard was also analyzed in cases involving the defence of entrapment. See *R v Mack*, [1988] 2 SCR 903, 44 CCC (3d) 513.

28 *Storrey*, *supra* note 2.

29 Formerly *Criminal Code*, section 450, which was modified to section 495 prior to the SCC's judgment being rendered, and remains section 495 today.

30 *Storrey*, *supra* note 2 at 250–51.

31 *Ibid*.

32 For a discussion on the increasing judicial recognition of police powers, see James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1. See also Plaxton, *supra* note 11.

33 *Mann*, *supra* note 1.

34 *Ibid* at paras 4–5.

weapons.[35] One of the officers, feeling a soft object in the accused's pocket, put his hand in the pocket, seizing a small quantity of marijuana in the possession of the accused, for which the accused was arrested and charged.[36] At issue was whether or not a common law power to detain individuals for investigative purposes and preventatively search them existed.

The reason why it became so important to differentiate between the standards can be explained as follows. The Court held that reasonable suspicion that the accused had been involved in recent criminal activity was required in order for police officers to undertake investigative detentions,[37] whereas reasonable grounds to believe that the officer or another person's safety was at risk was required to conduct a preventative pat down search of the accused.[38]

Thus, distinguishing between the two standards became paramount. Officers who met the lesser standard of reasonable suspicion required to lawfully detain individuals would be conducting illegal searches where they merely held a reasonable suspicion that the accused presented a danger to their safety or the safety of the public.[39] Although a line between reasonable suspicion and belief had been drawn following the Court's decision in *Mann,* it remained unclear what the distinctions between the two standards were. In the next section, the defining characteristics of the two standards are discussed, in order to later underpin arguments related to the need to revisit their respective defining characteristics.

III. THE DEFINING CHARACTERISTICS OF BOTH STANDARDS

A. *R v Kang-Brown*

Only recently, with a series of decisions related to police dog sniffer searches, has there been a substantial attempt to elaborate the differences between the standards of reasonable suspicion and reasonable grounds to believe. Firstly, in *R v Kang Brown*,[40] the SCC was called on to determine whether a common law power enabling police to lawfully conduct sniffer dog searches of baggage at a bus station existed, and if so, whether the

35 *Ibid* at para 5.

36 *Ibid*.

37 *Ibid* at para 45. See also *Grant*, *supra* note 9 at para 55.

38 *Mann*, *supra* note 1 at para 40. This was recently affirmed by the majority of the SCC in *MacDonald*, *supra* note 3.

39 *Mann*, *supra* note 1 at paras 40, 45.

40 *Kang-Brown*, *supra* note 11.

requisite standard was reasonable suspicion or reasonable grounds to believe. Despite the important disagreement between many of the Court's judges regarding different points, the majority of them agreed that such a power existed, based upon the standard of reasonable suspicion.[41] The different judges also took the opportunity to express what they considered to be the defining characteristics that distinguished reasonable suspicion from reasonable grounds to believe.

Chief Justice McLachlin and Justice Binnie approved the usage of the standard of reasonable suspicion as the constitutionally sound threshold based, notably, on the "minimal intrusiveness, narrowly targeted objective and high accuracy of [the search]."[42] As with reasonable grounds to believe, they stated that reasonable suspicion must be objectively justifiable,[43] so that the judiciary can independently scrutinize whether the standard had been met at trial,[44] especially because no prior judicial authorization was initially given to permit the search.[45] Furthermore, they stated that, "'Suspicion' is an expectation that the targeted individual is possibly engaged in some criminal activity. A 'reasonable' suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds."[46] Citing Professor Sankoff, Justice Binnie agreed with the following proposition:

> What distinguishes "reasonable suspicion" from the higher standard of "reasonable and probable grounds" is merely the degree of probability demonstrating that a person is involved in criminal activity, not the existence of objectively ascertainable facts which, in both cases, must exist to support the search.[47]

Furthermore, quoting American case law, Justice Binnie noted that less reliable information could justify reasonable suspicion, though not reasonable grounds to believe.[48]

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41 *Ibid* at paras 60, 107.

42 *Ibid* at paras 24–25.

43 *Ibid* at para 76, citing *R v Simpson* (1993), 12 OR (3d) 182 at 202. See also *R v AM*, 2008 SCC 19 at para 80, [2008] 1 SCR 569 [*AM*].

44 *Ibid* at para 77, citing *R v Lal* (1998), 113 BCAC 47 at para 23.

45 *Ibid* at para 78.

46 *Ibid* at para 75.

47 *Ibid* at para 75, citing Peter Sankoff and Stéphane Perrault, "Suspicious Searches: What's So Reasonable About Them?" (1999) 24 CR (5th) 123 at 125–26. As will be seen, this concept was later changed in *Chehil*, *supra* note 15.

48 *Kang-Brown*, *supra* note 11 at para 75, citing *Alabama v White*, 496 US 325 at 330 (1990).

Justices Deschamps and Rothstein also discussed the appropriate standard applicable to canine olfactory searches. Firstly, they situated reasonable suspicion as the median between requiring no standard whatsoever in order to undertake the search, and requiring the most stringent standard of reasonable grounds to believe absent exigent circumstances.[49] In their view, reasonable suspicion is "based on a constellation of objectively discernible facts" and the totality of the circumstances, rather than one single factor[50] or a "hunch based on instuitional experience."[51]

Secondly, similar to Justice Binnie, they agreed that reasonable suspicion is suited for situations where the reasonable expectation of privacy is relatively low and the investigative technique is relatively non-intrusive.[52] However, a word of caution was also voiced with respect to Justice Binnie's interpretation that reasonable suspicion was not met in the case at hand. They explained that if the standard of reasonable suspicion is interpreted too harshly, it will inevitably collapse into the standard of reasonable grounds to believe, rendering the former concept vacuous and redundant.[53]

B. *R v Chehil*

The most substantial attempt to demarcate reasonable suspicion from reasonable grounds to believe occurred recently in the SCC case *R v Chehil*.[54] In that case, the issue before the SCC was whether police officers had the requisite reasonable suspicion required to deploy a canine trained in sniffing narcotics in conformity with the standard established in *R v Kang-Brown*.

Justice Karakatsanis, writing on behalf of a unanimous court, expounded upon the principles governing reasonable suspicion and what differentiates it from the standard of reasonable grounds to believe. Building upon the prior definitional elements elaborated in *Kang-Brown,* the Court held that it had long been recognized that reasonable suspicion was appropriate in certain investigational contexts and had been required by Parliament in order to authorize certain searches.[55] The inquiry of whether or not rea-

49 *Kang-Brown*, *supra* note 11 at para 160.

50 *Ibid* at para 165.

51 See *Mann*, *supra* note 1 at para 30. It should be noted that reasonable suspicion can be based upon an officer's training and experience. See *Chehil*, *supra* note 15 at para 47.

52 *Kang-Brown*, *supra* note 11 at para 168.

53 *Ibid* at para 205.

54 *Chehil*, *supra* note 15.

55 *Ibid* at para 23.

sonable suspicion had been met was "fact-based, flexible, and grounded in common sense and practical, everyday experience."[56] Furthermore, an individual's choice to exercise his or her *Charter* rights, such as the right to silence or to request to contact legal counsel, could not be used to justify that a particular standard had been met.[57] The onus rested on the Crown to demonstrate that the standard had been reached.[58] Most importantly, the Court accepted the following distinction on which the differences between the two standards were hinged:

> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.[59]

C. *R v MacDonald*

Finally, the SCC once again took the opportunity to distinguish between reasonable suspicion and belief in the very recent case of *R v MacDonald*.[60] In that case, officers received a noise complaint about a belligerent resident of a condominium complex who refused to turn down the volume of his music.[61] After knocking on the accused's condo door and having it slammed in her face by the accused, Constable Pierce of the Halifax Regional Police contacted her supervisor (Sgt. Boyd) who arrived on the scene shortly after and banged on the accused's door.[62] Several minutes later, MacDonald finally opened the door a very minimal width. Sgt. Boyd, seeing the accused concealing some type of shiny black object behind his leg—which he believed to be a knife—ordered the accused to show his hands to the officers, to which he did not respond.[63] Consequently, the officers pushed

56 *Ibid* at para 29. See also *Bramley*, *supra* note 17 at para 60.
57 *Chehil*, *supra* note 15 at para 44.
58 *Ibid* at para 45.
59 *Ibid* at para 27.
60 *MacDonald*, *supra* note 3.
61 *Ibid* at para 3.
62 *Ibid* at paras 4–5.
63 *Ibid* at para 6.

open the accused's condo door.[64] The light from the hallway revealed that the accused was holding a gun.[65] The officers had a brief struggle with the accused and disarmed him of the loaded handgun he was carrying.[66] At issue was whether opening the accused's condo door constituted a search, and if so, whether the search was constitutional.

Although both the majority and the concurring opinions came to the same disposition that the search was legal and thus, restored the accused's conviction, they disagreed as to the appropriate threshold required in order to lawfully undertake "safety searches."[67] The majority concluded that reasonable grounds to believe that the suspect was armed and dangerous was required to conduct safety searches,[68] whereas the concurring opinion considered reasonable suspicion to be an onerous enough standard.[69]

The majority's opinion was based principally on concerns of privacy; notably that such searches could reveal an important degree of personal information, entailing that the reasonable necessity of the search could only be established if there was reasonable grounds to believe that the officer's safety was in danger.[70] In their view, three facts justified the assertion that the officers "reasonably believed" their safety to be in danger:

1. Mr. MacDonald had his hand behind his leg and was clearly holding an object;
2. What he was holding was "black and shiny" and therefore could have been a weapon; and
3. When twice asked what he had behind his back, he refused to answer or to provide any explanation.[71]

In the concurring judges' opinion, reasonable suspicion was the more appropriate standard required to lawfully undertake "safety searches."[72] Another argument put forth by the concurring opinion was the futility of requiring the standard of reasonable grounds to believe, where that standard was required to lawfully arrest suspects and perform more intrusive

64 *Ibid* at para 7.
65 *Ibid*.
66 *Ibid*.
67 Safety searches are searches conducted by officers on individuals who are not detained or arrested and are undertaken in order to ensure officer safety.
68 *MacDonald*, *supra* note 3 at para 41.
69 *Ibid* at para 91.
70 *Ibid* at paras 41–42.
71 *Ibid* at para 44.
72 *Ibid* at para 91.

searches, rendering the standard redundant.[73] The rest of the concurring judges' reasoning involved a comparison with American case law and the SCC's acceptance of the reasonable suspicion standard in *obiter dictum* of prior decisions.[74] Finally, in their view, the facts that the majority opinion considered to be indicative of reasonable grounds to believe, either fell short of that standard but satisfied the standard of reasonable suspicion, or alternatively, loosened the requirement of reasonable grounds to believe, essentially rendering the concept vacuous.[75]

IV. CURRENT PROBLEMS WITH THE STANDARDS OF REASONABLE SUSPICION AND REASONABLE GROUNDS TO BELIEVE

Thus far, it has been demonstrated that there is an important need to distinguish between the thresholds of reasonable suspicion and reasonable grounds to believe in conducting *ex post facto* judicial assessments of whether a legal threshold was met in a particular case, in addition to the ongoing interpretation of emerging police powers. In this section, several important deficiencies related to the current distinction between both thresholds will be discussed. Notably, the increasingly recognized distinction between *possibility* and *probability* as the basis for reasonable suspicion, rather than belief, will be challenged. It will be argued that such a distinction is largely futile, and inevitably collapses into an inquiry concerning the issue of probability. Secondly, the illogicality of requiring reasonable grounds to believe when the standard cannot possibly be met will be discussed, as illustrated by the current requirement of reasonable suspicion in order to lawfully undertake safety searches. It will be argued that the current conceptual distinction is overly complicated and that attempts to simplify it have failed. I will use these conclusions to underpin later arguments on how to adequately distinguish between both standards based on different overarching considerations.

73 *Ibid* at para 71. See also James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 Crim LQ 299 at 311.

74 *MacDonald*, *supra* note 3 at paras 74–75.

75 *Ibid* at para 82.

A. The Distinction between Possibility and Probability May not Be Useful

My first concern relating to the distinction between reasonable suspicion and reasonable grounds to believe relates to how the distinction between the standards has been articulated. One of the principal distinctions that the SCC has used in order to distinguish between reasonable suspicion and reasonable grounds to believe has chiefly been based upon notions of possibility and probability. In the Court's view, "while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime."[76] Furthermore, "the reasonable suspicion standard addresses the *possibility* of uncovering criminality, and not a *probability* of doing so."[77] Canadian courts have increasingly relied on this as a justified distinction between the two standards.[78]

As I will explain next, one problem with this approach is that it suggests the concepts of possibility and probability are mutually exclusive, whereas they are necessarily contingent upon one another. Consider first the most obvious proposition that establishes the starting point of the relationship between possibility and probability. If a state of affairs is impossible, there is no probability of it being obtained. Something that cannot possibly occur will certainly not occur. It is impossible for an individual to swim across the Atlantic Ocean at its widest point, and accordingly, there is no probability that an individual will succeed in such an undertaking. When something is impossible, it is clearly futile to examine the probability of its occurrence. Because it is useless to examine the probability of an impossible state of affairs, an examination of probability will therefore only be relevant where a state of affairs is possible.[79] Evidently, if

76 *Chehil*, *supra* note 15 at para 27. See also the dissenting opinions of Wagner and Moldaver JJ in *MacDonald*, *supra* note 3 at para 70; the majority opinion in *MacKenzie*, *supra* note 15 at para 74.

77 *Chehil*, *supra* note 15 at para 32.

78 See e.g. *MacKenzie*, *supra* note 15 at para 74; *R v Sword*, 2015 SKQB 9 (CanLII) at para 17; *R v Synkiw*, 2014 SKQB 362 (CanLII) at para 11; *R v Vuth*, 2014 ABPC 263 (CanLII) at para 31; *R v Heise*, 2015 SKQB 270 (CanLII) at para 18; *R v Yates*, 2014 SKCA 52 at para 29, 311 CCC (3d) 437 [*Yates*]; *R v Flight*, 2014 ABCA 185 at para 36, 313 CCC (3d) 442.

79 See e.g. David Stirzaker, *Probability and Random Variables: A Beginner's Guide* (Cambridge: Cambridge University Press, 1999) at 2; John M Vickers, *Belief and Probability* (Boston: D Reidel, 1976) at 3; Michael Woolfson, *Everyday Probability and Statistics: Health, Elections, Gambling and War* (London: Imperial College Press, 2012) at 9–10. Notably, as the authors

something is possible, there is necessarily *some* degree of probability that it will occur. Therefore, reasonable suspicion must obligatorily address both the possibility of a state of affairs in addition to the probability of its occurrence.

Aside from these theoretical issues involving the distinction, there are some practical problems which are also related to their application. Why should the reasonable *possibility* that a state of affairs *might* occur concern reasonable suspicion, whereas the reasonable *probability* that a state of affairs *will* occur concerns reasonable grounds to believe? As it has been argued elsewhere, *R v MacDonald* is a compelling illustration that such reasoning is not necessarily logical.[80] In *R v MacDonald,* the majority and concurring opinions were at odds about whether the standard of reasonable grounds to believe that there was a danger to the officers was met. Justices Wagner and Moldaver, writing on behalf of the concurring justices, explained:

> *Mann* says a safety search is justified if it is *probable* that something *might* happen, not that it is *probable* that something *will* happen. As this Court only recently explained, the former is the language of "reasonable suspicion" (*R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, at para. 74). The latter is the language of "reasonable and probable grounds".[81]

In *MacDonald,* this would translate to reasonable suspicion being met if it is *possible* that the suspect *might* be armed, rather than if it is *probable* that the suspect *was* armed. Evidently, the inquiry examines the time frame prior to the undertaking of the search. But prior to the search being undertaken by officers, there are only two possibilities: that the suspect is armed, or that the suspect is not armed. Because both scenarios are entirely possible, it does not appear to be particularly helpful to inquire as to how possible each scenario is. They both are possible. The analysis seems to be as helpful as inquiring as to how possible it is that a coin will land on heads or tails prior to it being flipped.[82]

The only time that the degree of possibility will change for one of the scenarios will be once the accused has been searched by police officers. When officers thoroughly search the accused and a weapon is found, it is

point out, where the possibility of a state of affairs occurring is zero, the probability that it will occur cannot exceed zero.

80 Skolnik, *supra* note 16.

81 *MacDonald*, *supra* note 16 at para 70.

82 See generally Stirzaker, *supra* note 79 at 3.

impossible at that point that the suspect was not armed. Conversely, when officers search the accused and no weapon is found, it is impossible that at that point, the suspect is armed. Thus, inquiring as to the possibility of a state of affairs is generally of little value, except as a basis to identify blatant constitutional rights violations where officers undertake actions on the basis of seemingly impossible states of affairs, or where their conclusions are in no way objectively supported by facts which can be subject to after-the-fact judicial scrutiny.[83]

Another major concern relates to the more concrete implications of allowing notions of possibility and probability to be the driving force behind distinguishing between reasonable suspicion and belief. Notably, in *R v MacDonald,* the different judges of the SCC disagreed on whether the standard of reasonable grounds to believe was met by the officers who searched the accused. They disagreed on whether or not the officers had reasonable grounds to believe that the accused was armed and dangerous, even though he was hiding an object behind his leg and would not show his hands.[84] Though the standards of reasonable grounds to believe and reasonable suspicion are rooted in common sense, there was still disagreement on whether or not it was probable that the accused was armed and dangerous.[85] If some of the most brilliant legal minds in the country cannot agree on whether a standard that is supposed to be rooted in common sense was met in a particular case, it would seem that the concept is complicated, hard to articulate, and likely difficult to apply for officers, who evidently have a lesser understanding of the intricacies of each standard, and the subtleties of their differences.

B. It is Futile to Require a Standard that cannot be Reasonably Met without Unreasonable Consequences

My second concern regarding the distinction between reasonable suspicion and reasonable grounds to believe relates to the choice of standard

83 See e.g. *R v Shepherd*, 2009 SCC 35 at para 23, [2009] 2 SCR 527; *Chehil*, *supra* note 15 at para 26; *Mackenzie*, *supra* note 15 at para 41; *R v Chipman*, 2015 QCCM 45 (CanLII).

84 *MacDonald*, *supra* note 15 (the majority concluding that the officer had the required reasonable grounds to believe that the suspect was armed and dangerous, and therefore, that the standard was met; the concurring opinion concluding that the standard of reasonable grounds to believe was not met at paras 49, 82–85).

85 On the notion of how common sense and flexibility ought to guide the assessment of whether the particular legal standard was met, see MacKenzie, *supra* note 15 at para 73; *Chehil*, *supra* note 15 at para 29; *Bramley*, *supra* note 17 at para 60.

that courts adopt in recognizing emerging police powers. Notably, although courts must be careful to ensure that the rights of citizens are balanced with effective law enforcement, courts should not require police officers to meet a standard that cannot be met without unreasonable consequences and risks.[86]

I will begin with the premise that the formation of reasonable suspicion or belief is contingent upon the existence of certain information and knowledge that, oftentimes, is limited. *MacDonald* provides a compelling illustration of this idea. The door was only opened a sufficient width to reveal a shiny black object, which the officer thought was a weapon (possibly a knife). There was no way to obtain further information to substantiate the grounds necessary to undertake the search.[87] The probable outcome that the object that the accused was holding was, in fact, a gun, demonstrated the dangerousness of the situation and risk to the officers' lives. One minor (and very plausible) variation of this scenario, which has been argued elsewhere, serves to demonstrate how officers cannot obtain the reasonable grounds to believe needed to lawfully effectuate a safety search, despite the existence of grave danger, without violating a person's constitutional rights.[88]

Suppose that the accused had completely hidden the weapon either behind his leg or in his coat pocket so that the gun's characteristics were completely concealed. The officer had already asked the accused to show his hands and divulge what he was hiding, but to no avail. Officers saw no shiny object that could be a weapon. Suffice it to say that, at this point, the threshold of reasonable grounds to believe has not been met. The problem with this example is that even if officers want to form the required reasonable grounds to believe that the suspect is armed, several factors can render it impossible.

Firstly, the accused is under no obligation to tell police that he or she is armed, effectively rendering further demands by police futile.[89] Secondly,

86 With respect to balancing the rights of citizens with effective law enforcement, see *Fearon*, *supra* note 3 at para 3; *Golden*, *supra* note 3 at para 26.

87 *MacDonald*, *supra* note 3 at para 6.

88 Skolnik, *supra* note 16. A similar analogy is also made in Steven Penney & James Stribopoulos, "Detention under the Charter after *R. v. Grant* and *R. v. Suberu*" (2010) 51 SCLR (2d) 439 at 470.

89 See e.g. *R v Turcotte*, 2005 SCC 50 at para 55, [2005] 2 SCR 519. It was noted that "[t]he law imposes no duty to speak to or cooperate with the police." Moreover, individuals who are searched by police officers during safety searches are not detained. Thus, traditional issues relating to investigative detention and whether the accused believed that they did or did

because the accused is under no such obligation, non-compliance cannot contribute to the formation of an officer's reasonable suspicion that the person is armed and dangerous.[90] Thirdly, due to the inherent danger of the context, attempts to obtain further information increase danger to officers and the accused, especially because the latter has the distinct tactical advantage of knowing whether or not he is actually armed.[91] At this point, the only option that officers have is to search the accused forcefully in a non-intrusive manner, in the interest of self-preservation. This would violate the constitutional rights of the accused because the requisite standard to conduct a lawful search was not met and could not be met. Thus, the right to silence, the possibility to exercise that right through non-compliance, and urgency, effectively place police officers in an untenable position where they are effectively blocked from forming the requisite reasonable grounds to believe.

This example is also crucial because it highlights another shortfall of the current conception of reasonable suspicion. Professor Sankoff has argued that the degree of probability of a state of affairs, rather than the availability of objectively discernible facts, is what distinguishes reasonable suspicion from reasonable grounds to believe.[92] However, I disagree with the latter part of his proposition and believe it to be illogical. Although the existence of objectively discernible facts is indeed necessary for both reasonable suspicion and reasonable grounds to believe, an increase in information, which tends to confirm the likely existence of a probable state of affairs, grounds the likelihood of its occurrence. In other words, the more objectively discernible information that exists to confirm the likely existence of X, the more epistemically probable it is that X falls within a range of probable outcomes, or, is the correct conclusion in the circumstances.

Therefore, it seems illogical to require the standard of reasonable grounds to believe where there are factors such as non-compliance by the accused, impossibility of forming the requisite reasonable grounds to believe without violating the accused's constitutional rights, or danger to officers as a result of continuing to attempt to form reasonable grounds to believe. To be clear, I am not arguing that police powers ought to trump

not have a choice but to cooperate with the orders of a police officer are evident. See *Suberu*, *supra* note 1 at para 26.

90 *Chehil*, *supra* note 15 at para 44.

91 Penney & Stribopoulos, *supra* note 88 at 469–70.

92 Sankoff & Perrault, *supra* note 48.

the constitutional rights of persons who may not even be detained. On the contrary, provided that the power to conduct certain searches is minimally intrusive,[93] briefly executed,[94] temporally close to the behaviour justifying the exercise of the power,[95] narrowly targeted,[96] and exercised for sufficiently important concerns, the lower and more attainable standard of reasonable suspicion ought to apply, in light of the aforementioned concerns.

V. PROPOSAL FOR REFORMING WHAT DISTINGUISHES REASONABLE SUSPICION FROM REASONABLE GROUNDS TO BELIEVE

What may in fact be a more useful distinction between reasonable suspicion and reasonable grounds to believe has been discussed by Canadian courts in a series of recent decisions. Some courts have suggested that what may more properly characterize the reasonable suspicion standard is whether the conclusion reached by the officers fell within the range of reasonable conclusions which could have been reached, because objectively discernible facts suggest that the accused is not innocent in the circumstances.[97] Taking this approach, which considers the presence of inculpatory objectively discernible information, will not reduce the standard of reasonable suspicion to generalized suspicion or hunches.[98]

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93 See *Mann*, *supra* note 1 at para 34; *Cloutier*, *supra* note 3 at 185.

94 *AM*, *supra* note 43 at para 152.

95 *Clayton*, *supra* note 1 at para 41.

96 *Chehil*, *supra* note 15 at para 28.

97 *Yates*, *supra* note 79 at para 28; *R v Chipchar*, 2009 ABQB 562 (CanLII); *R v Mitchell*, 2013 MBCA 44, 298 CCC (3d) 525; *R v Plantje*, 2014 SKQB 265 (CanLII); *R v Turnbull*, 2014 NSPC 70 (CanLII). It should be noted that the term that the courts use is the number of "possible conclusions;" however, given the aforementioned discussion, I believe the term "probable conclusions" would perhaps be more appropriate. See Kevin Cyr, "The Police Officer's Plight: The Intersection of Policing and the Law" (2015) 52 Alta L Rev 889 at 912. See also David Dalrymple, "Reasonable Suspicion: Two Competing Approaches" (2011) 84 CR (6th) at 94. Notably, as Dalrymple argues, some courts have articulated the reasonable suspicion standard as requiring that the accused is obviously not innocent in light of the objectively discernible information available to them. See e.g., as cited by the author, *R v Mai*, 2010 BCPC 159 (CanLII), where certain evidence found during a safety search was excluded on grounds that the threshold of reasonable suspicion was not met in the circumstances.

98 See Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 98; Jared Biden, "A 'Whiff' of Criminality: Reasonable Suspicion in the Context of Dog-Sniff Searches" (2012) 75 Sask L Rev 189.

In some senses, parallels can be drawn between the standard of reasonable suspicion and the reasonableness standard of review in administrative law. In *Dunsmuir v New Brunswick*,[99] Justice Lebel explained the underlying principles of the reasonableness standard of review, noting:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one, specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process.[100]

When the reasonable suspicion standard applies, provided that the conclusions of the police officers are motivated by objectively discernible facts demonstrating that the person is not innocent in the circumstances, and the conclusions fall within the range of reasonable outcomes, deference is granted even when their conclusions are wrong.[101] Deference is granted for two reasons. On the one hand, deference is granted because the objectively discernible facts demonstrate that the person is not innocent in the circumstances.[102] On the other hand, deference is granted because important law enforcement objectives justify the exercise of a police power, in a brief and minimally intrusive manner, where the necessary grounds for arrest may be lacking even though objectively inculpatory facts demonstrate the accused is not innocent.[103] As Professor Sankoff has explained with reference to this point, "The reasonable suspicion standard was designed to make it easier—in appropriate situations—for officials to search where it is simply not possible to obtain reasonable and probable grounds."[104]

The standard of reasonable grounds to believe, on the other hand, requires the presence of objectively discernible facts which suggest something more than the accused's lack of innocence in the circumstances.[105]

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99 *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

100 *Ibid* at para 47.

101 *Yates*, *supra* note 79 at para 28; Dalrymple, *supra* note 97.

102 *Ibid*.

103 *Chehil*, *supra* note 15 at para 28. See also *Grant*, *supra* note 9; Dalrymple, *supra* note 97.

104 Sankoff & Perrault, *supra* note 48 at 130.

105 *Yates*, *supra* note 79 at para 28.

Rather, they demand that a higher threshold is met for several reasons. First, most police powers requiring the threshold of reasonable grounds to believe will result in what would otherwise be unlawful actions that are highly invasive of privacy, restrictive of freedom, or impact human dignity.[106] Consider, for example, the restriction of freedom or privacy inherent to arrests[107] or invasive search and seizures.[108] Merely concluding that a person is objectively not innocent does not justify the significant intrusions on liberty, dignity, and freedom inherent in searches and arrests. Rather, the officer must meet a far higher standard in light of these overarching considerations.

Second, when the standard of reasonable grounds to believe is met, more objectively discernible facts are generally available to police officers, compared with cases where the mere threshold of reasonable suspicion is met. If the threshold of reasonable suspicion exists to allow officers to acquire the requisite reasonable grounds to believe, it follows that the use of powers based on reasonable suspicion exists to assist in acquiring more objectively discernible facts on which to ground their beliefs as well.[109]

Powers requiring that the standard of reasonable grounds to believe be met are generally exercised because the objectively discernible facts available at the time suggest not only that there is a "probability of crime,"[110] but rather, that the accused is probably guilty of the crime in question.[111]

106 See e.g. *Cloutier*, *supra* note 3 at 185; *R v Monney*, [1999] 1 SCR 652 at para 44, 171 DLR (4th) 1 [*Monney*]; *R v Greffe*, [1990] 1 SCR 755, 55 CCC (3d) 161 [*Greffe*]. See also Steven Penney, "Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach" (2007) 97 J Crim L & Criminology 477 at 478–79; Jane Bailey, "Framed by Section 8: Constitutional Protection of Privacy in Canada" (2008) 50:3 Can J Corr 279 at 281ff.

107 *Code*, *supra* note 1, s 495; *Storrey*, *supra* note 2.

108 *Golden*, *supra* note 3 at para 99.

109 On the notion that police powers requiring reasonable suspicion exist in the eventual formation of reasonable grounds to believe, see Sankoff & Perrault, *supra* note 48 at 126.

110 See *Chehil*, *supra* note 15 at para 27.

111 See *Hicks v Faulkner* (1878), 8 QBD 167 at 171; *Wiltshire v Barrett* (1965), [1966] 1 QB 312 (CA) at 321–22, Lord Denning. The latter case is cited in *R v Minoza*, 2007 NWTTC 1 at paras 28–29 (CanLII) [*Minoza*]. See also *PACE*, *supra* note 26, s 24(5), which states that a police officer may arrest a person who is guilty for committing an offence. See also Horace L Wilgus, "Arrest Without a Warrant" (1923–1924) 22 Mich L Rev 673 at 673, citing *Halsbury's Laws of England*, 1923 Supplement at para 1553 (notably, "if no felony has been committed by anyone, but D is suspected of having committed one, [a police officer] may arrest him on reasonable ground to believe him guilty; but [a private citizen] may not.") Certain Canadian cases have adopted such language in assessing whether the standard of reasonable grounds to believe has been met. See e.g. *R v Saleh*, 2013 SKQB 374 at para 31 (CanLII); *R v Harvey*, 2009 CanLII 66609 at para 3 (Ont Sup Ct); *R v Dickinson*, 2005 BCPC 41 at para 8 (CanLII); *Minoza*, *supra* note 111; *R v Mohammed*, 2015 ONSC 905 at para 36 (CanLII).

When police officers arrest a person they find committing criminal offences,[112] or where objectively discernible facts demonstrate that a person probably committed an offence,[113] the arrests are justified because the facts in question are sufficiently inculpatory to demonstrate that the accused is probably guilty.[114] Furthermore, such a standard recognizes that officers must often make decisions in "volatile and rapidly changing" situations, when objectively inculpatory information is usually limited.[115] The objectively discernible facts and subjective conclusions of the officer need not meet the standard required to establish a *prima facie* case against the accused,[116] nor demonstrate the accused's guilt beyond a reasonable doubt.[117] Requiring such a standard not only ensures that police officers do not arrest people or conduct invasive searches, with all of the ensuing consequences, unless a high standard is met, but also recognizes the existence of objectively discernible inculpatory facts suggesting the guilt of the accused rather than his or her mere involvement in crime.[118]

VI. CONCLUSION

I have argued that the current distinction between reasonable suspicion and reasonable grounds to believe is in need of revision. I have suggested that it is worth reconsidering what distinguishes the two legal thresholds from one another by placing less emphasis on the notion of possibility. Rather, in cases of reasonable suspicion, the conclusion that the accused is not innocent ought to fall within the range of acceptable or reasonable

112 *Code*, *supra* note 2, s 495(1)(b).

113 *Ibid*, s 495(1)(a).

114 Wilgus, *supra* note 111 at 673.

115 *R v Golub* (1997), 34 OR (3d) 743 at 750, 117 CCC (3d) 193 (CA), cited in *R v Sanghera*, 2015 BCCA 316 at para 45 (CanLII).

116 *Shepherd*, *supra* note 83 at para 23; *R v Gunn*, 2012 SKCA 80 at para 22, 291 CCC (3d) 265; *R v Usher*, 2011 BCCA 271 at para 31 (CanLII); *Dumbell v Roberts*, [1944] 1 All ER 326 (CA) at 329. The latter case cited in *Storrey*, *supra* note 2 at 249–50.

117 See especially *R v Debot*, [1989] 2 SCR 1140 at 1166, 52 CCC (3d) 193. As Justice Wilson noted in discussing the standard of reasonable grounds to believe, "[t]he question as to what standard of proof must be met in order to establish the reasonable grounds for a search may be disposed of quickly. I agree with Martin J.A. that the appropriate standard is one of 'reasonable probability' rather than 'proof beyond a reasonable doubt' or a '*prima facie* case.' The phrase 'reasonable belief' also approximates this standard." See also *R v Debot* (1986), 30 CCC (3d) 207, 17 OAC 141 (Ont CA); *R v Liu*, 2014 BCCA 166 at para 39 (CanLII). See, with respect to the issue of proof beyond a reasonable doubt, *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733.

118 *Kang-Brown*, *supra* note 11 at para 75.

outcomes because it is supported by objectively discernible facts.[119] Where these criteria are fulfilled, and because of the limited intrusions on interests of privacy, dignity, and freedom inherent to police powers requiring the mere standard of reasonable suspicion, courts generally grant deference to the conclusions of the officers, even if they were not in fact correct.[120]

Moreover, in identifying new police powers, courts should avoid imposing the standard of reasonable grounds to believe where the police power is minimally intrusive, briefly executed, highly accurate, and undertaken for sufficiently important law enforcement objectives.[121] Furthermore, in such cases, it is generally unreasonable, impossible, or dangerous for officers to attempt to gain access to more objectively discernible facts needed to form the requisite reasonable grounds to believe.[122] In such cases, the impact on dignity, privacy, and liberty interests of the accused is minimal,[123] and there are sufficiently important law enforcement concerns to justify the existence of the police power.[124]

Lastly, in cases where the threshold of reasonable grounds to believe is imposed for the execution of a police power, there is substantially more intrusion on the aforementioned interests of the accused.[125] Such powers are generally exercised when the objectively discernible facts do not merely demonstrate that the accused is not innocent, but rather, that the accused is probably guilty in light of objectively discernible inculpatory facts.[126]

Despite the current complicated conceptual and practically difficult-to-apply distinction between reasonable suspicion and belief, the aforementioned general principles ought to provide helpful and simple guidance in distinguishing between the standards. With their implementation, improvements to the current state of the law and its clarity are entirely possible and hopefully welcomed by police officers, lawyers, and judges alike. The probability of their implementation, though, is another story altogether, however reasonable their proposal.

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119 *Ibid*; Dalrymple, *supra* note 97.

120 See the above analogy to the reasonableness standard in administrative law, stemming from *Dunsmuir*, *supra* note 99.

121 *Chehil*, *supra* note 15 at para 28.

122 See generally Skolnik, *supra* note 16.

123 *Cloutier*, *supra* note 3 at 185; *Monney*, *supra* note 106 at para 44; *Greffe*, *supra* note 106.

124 *Fearon*, *supra* note 3 at para 3; *Golden*, *supra* note 3 at para 26.

125 *Ibjd*.

126 Minoza, *supra* note 111.