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Commissioned Paper:

The Reasonable Grounds to Believe Standard in Canadian Criminal Law

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The Reasonable Grounds to Believe Standard in Canadian Criminal Law

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Section 17 of the *Emergencies Act* provides that the Governor in Council may declare a state of emergency if the Governor in Council "believes, on reasonable grounds" that a state of emergency exists that necessitates the taking of special temporary measures.[1]

The power to declare a state of emergency justifying extraordinary measures is therefore subject to the standard of "reasonable grounds to believe" that such a situation exists. The *reasonable grounds to believe* standard is central to the exercise of several powers in criminal matters, including the powers of justices of the peace to issue judicial authorizations, such as a search warrant[2] or general warrant.[3] This standard also pertains to certain police powers, especially the power to make a warrantless arrest.[4] This expression ("to believe on reasonable grounds") is also used in substantive law, for example as a requirement for certain defences, especially self-defence ("to believe on reasonable grounds" that one is being assaulted)[5] or the defence of necessity ("to believe on reasonable grounds" that there is an imminent danger).[6] This text aims to present and explain the standard of reasonable grounds to believe in the context of criminal law, to distinguish it from similar but separate standards (particularly the standard of "reasonable grounds to suspect" or "reasonable suspicions") and to highlight the factors used to assess it. We will see that the reasonable grounds to believe standard, as interpreted in criminal law, also serves as a guideline for the exercise of certain powers in areas other than criminal law, especially immigration, and that it is interpreted in the same way as in criminal law in these other contexts.

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[1] *Emergencies Act*, RSC (1985), ch. 22 (4nd Supp.). Para. 17 (1) provides that "When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare."
[2] Sec. 487 *Cr.C.*
[3] Sec. 477.01 *Cr.C.*
[4] Sec. 495 *Cr.C.*
[5] Sec. 34 *Cr.C.*
[6] *R. v. Latimer*, 2001 SCC 1, (2001) 1 RCS. 3 (the defence of necessity is a common law defence that is not codified).

Introduction. "Reasonable grounds to believe" and "probable grounds to believe": two ways of expressing one and the same standard

In criminal matters, there are laws subjecting the exercise of power to the existence of reasonable grounds to believe. Such is the case, for example, with regard to the powers of peace officers to make a warrantless arrest, as provided for in Section 495 of the *Criminal Code*, which uses the same formula as Section 17 of the *Emergencies Act*:

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

Another example is a search warrant issued by a justice of the peace. Section 487 of the *Criminal Code*, provides:

> **487** (1) A justice who is satisfied by information on oath in Form 1 that *there are reasonable grounds to believe* that there is in a building, receptacle, or place: (…)
>
> may at any time issue a warrant authorizing a peace officer (…) [emphasis added]

To obtain a search warrant, the police officer must demonstrate to the justice of the peace that there are reasonable grounds to believe that there is evidence in a given place.

However, sometimes laws—as in the case with the former Section 450 of the Criminal Code, which preceded the current Section 495 of the Criminal Code[7]—or case law, use the expression "reasonable and probable grounds to believe." This is the case in the *Hunter v. Southam* decision, where the Supreme Court of Canada explained that the validity of a search under Section 8 of the *Canadian Charter of Rights and Freedoms* was subject to the reasonable and probable grounds to believe standard:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the *Charter,* for authorizing search and seizure.[8]

[7] Section 450 of the Criminal Code, RSC 1970, ch. C-34 provided: "A peace officer may arrest without a warrant a) a person who has committed an indictable offence or who, *on reasonable grounds,* he believes has committed or is about to commit an indictable offence…"

[8] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 168.

Naturally, this raised the question of whether the reasonable and probable grounds standard was different, and more stringent, than the reasonable grounds to believe standard. In the *Baron* v. *Canada* case, the Supreme Court of Canada found that these two expressions refer to one and the same standard:

> To my mind, *Hunter, supra,* does not give rise to legitimate controversy on this point. That decision required reasonable "and probable" grounds and simultaneously established that the two words import the same standard. "Reasonableness" comprehends a requirement of probability. As Wilson J. said in *R. v. Debot*, (…) the standard to be met in order to establish reasonable grounds for a search is "reasonable probability." It appears that the normal statutory phrase in Canada is "reasonable grounds," and that some of the remaining exceptions requiring "reasonable and probable grounds" may have been amended in recent years, one imagines for the sake of uniformity, by deleting the words "and probable": (…).[9]

Therefore, the expressions "reasonable grounds to believe" and "reasonable and probable grounds to believe" both refer to same standard, with reasonableness encompassing the criterion of probability.

1. Assessment of the reasonable grounds to believe standard

- The reasonable grounds to believe standard includes a standard of probability (belief in a *possibility* is insufficient)

A person who exercises a power based on reasonable grounds to believe must therefore believe in the *probability* that certain facts or a certain situation exists.

Belief in the mere *possibility* of their existence is therefore insufficient. The belief in a possibility refers to the *reasonable grounds to suspect* standard applicable to certain powers (i.e., the power of police officers to detain someone for investigative purposes[10] or even to engage in some forms of investigation, such as "entrapment,"[11] etc.), which is a less stringent standard than the reasonable grounds to believe standard.

> Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility,

[9] *Baron v. Canada*, 1993 CanLII 154 (SCC), [1993] 1 RCS 416, p. 447 (the notes have been omitted).
[10] *R. v. Mann*, [2004] 3 RCS. 59, 2004 SCC 52, par. 27.
[11] *R. v. Ahmad*, 2020 SCC 11 (CanLII), par. 24 et seq.

> 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.[12]

Based on this principle, Judges Moldaver and Wagner in *R. v. MacDonald* concluded that,

> In this case, however, Sgt. Boyd's testimony of his "concern" that Mr. MacDonald "might" have a weapon does not fit with the majority's conclusion that Sgt. Boyd himself believed he had reasonable and probable grounds. Sgt. Boyd believed in a possibility, not a probability. In other words, he subjectively *suspected* that Mr. MacDonald had a weapon, and this suspicion was objectively reasonable.[13]

- The reasonable grounds to believe standard includes a standard of probability: the belief may be erroneous

The concept of reasonable grounds to believe does not require that the apprehended fact be proved or established, and it can be argued that the decision-maker has made a reasonable error regarding the actual existence of a fact or in their apprehension of the situation. What matters is that the person had, at the time of the action, reasonable grounds to believe that the situation existed.

Regarding arrests, reasonable grounds to believe that an offence has been committed obviously don't require the offence to have actually been committed, much less the commission of the offence to have been proved beyond a reasonable doubt.

> The police are not required to have a *prima facie* case for conviction before making an arrest[14]

In other words, to meet the standard of reasonable grounds to believe that a situation or fact exists, it is not necessary to establish (whether beyond a reasonable doubt or by a preponderance of evidence) that the situation or fact exists. It is the reasonable grounds to believe, at the time the decision was made, that must be established.

Already, in 1975 in the *Jolly* decision, the Federal Court of Appeal explained:

> Section 5 (l) does not prescribe a standard of proof but a test to be applied for determining admissibility of an alien to Canada, and the question to be decided was whether there were reasonable grounds for believing, etc., and not the fact

[12] *R. v. Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 27 and 28.
[13] *R. v. MacDonald*, 2014 SCC 3 (CanLII), [2014] 1 RCS 37, par. 85 (the references have been omitted, emphasis in original).
[14] *R. v. Tim*, 2022 SCC 12, par. 24.

> itself of advocating subversion by force, etc. No doubt one way of showing that there are no reasonable grounds for believing a fact is to show that the fact itself does not exist. But even when *prima facie* evidence negativing the fact itself had been given by the respondent there did not arise an onus on the Minister to do more than show that there were reasonable grounds for believing in the existence of the fact. In short, as applied to this case it seems to me that even after *prima facie* evidence negativing the fact had been given it was only necessary for the Minister to lead evidence to show the existence of reasonable grounds for believing the fact and it was not necessary for him to go further and establish the fact itself of the subversive character of the organization.[15]

As the Supreme Court explained in *Mugesera*:

> The first issue raised by s. 19(1)*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minster of Employment and Immigration)*, 1993 CanLII 3012 (FCA), [1994] 1 F.C. 433 (C.A.), p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 C.F. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16300 (FC), [2000] A.C.F. no. 1615 (1st inst.).[16]

This means that it is possible for the decision-maker to be mistaken about the existence of a fact or situation. However, this error must be reasonable. For example, a police officer's arrest without a warrant will be valid if the officer has reasonable grounds to believe that an individual has committed an offence, even if the individual hasn't actually committed an offence. The police officer will have acted based on reasonable grounds to believe insofar as the error is reasonable. An error is reasonable if a reasonable police officer placed in the same situation, observing the same facts, would have committed the same error.

The possibility of invoking a reasonable error in assessing the circumstances is also discussed in the context of defences whose requirements refer to reasonable grounds to believe. In the context of self-defence, the Supreme Court explained:

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[15] *Attorney General of Canada* v. *Jolly*, 1975 CanLII 1058 (FCA), [1975] FC 216 (FCA), par. 18.

[16] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 RCS 100, 2005 SCC 40, par. 114.

> Pursuant to s. 34(2) of the *Criminal Code*, there are three constituent elements of self-defence where the victim has died: 1) the existence of an unlawful assault; 2) a reasonable apprehension of a risk of death or grievous bodily harm; and 3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary: see *R. v. Pétel*, 1994 CanLII 133 (SCC), [1994] 1 R.C.S. 3. On the first element, a majority of this Court held in *Pétel* that an honest but reasonable mistake as to the existence of an assault is permitted where an accused relies upon self-defence. Accordingly, the jury must be told that the question is not "was the accused unlawfully assaulted?" but rather "did the accused reasonably believe, in the circumstances, that she was being unlawfully assaulted?"[17]

Therefore, someone may be found to have acted in self-defence even if they were not actually assaulted. It is the existence of a reasonable belief at the moment the actions were taken that is evaluated, not whether this belief was correct.

- The reasonable grounds to believe standard is both subjective and objective

The person who exercises a power (such as the power to make an arrest) based on reasonable grounds to believe must subjectively believe that reasonable grounds for their decision exist, and that subjective belief must be reasonable. In the *Storrey* decision, concerning the power to make an arrest, the Supreme Court of Canada explains this clearly:

> It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. (…)
>
> In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probably grounds for the arrest.[18]

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[17] *R. v. Malott*, [1998] 1 RCS. 123, p. 132.
[18] *R.* v. *Storrey*, 1990 CanLII 125 (SCC), [1990] 1 RCS 241, pp. 250-251 (the references have been omitted). See also *R. v. Tim*, 2022 SCC 12, par. 24.

The following excerpt from *Rhyason* may also be cited here:

> As explained by this Court in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 RCS. 254, the test for reasonable and probable grounds consists of both a subjective and an objective component:
>
> > [Section] 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief . . . [para. 48]
> >
> > . . .
> >
> > The decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed and, therefore, that a demand is authorized under s. 254(3) of the *Criminal Code*, R.C.S. (1985), Ch. C-46 must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law. [para. 46][19]

A purely subjective belief that there are grounds to make an arrest is therefore not sufficient. The belief must be based on verifiable reasonable grounds, which makes the standard more stringent.[20]

Nonetheless, reasonable grounds for arrest are not sufficient if the officer did not personally believe that these reasonable grounds existed. As Judges Moldaver and Wagner explain in *R. v. MacDonald*,

> The law is clear that an officer must *subjectively* believe he has reasonable and probable grounds; it is not enough that he objectively did. [21]

- Assessing the reasonableness of the grounds to believe

[19] *R.* v. *Rhyason*, 2007 SCC 39 (CanLII), [2007] 3 RCS 108, par. 12

[20] Also see *R.* v. *Ryan*, 2013 SCC 3, [2013] 1 RCS 14, par. 50: On its face, therefore, the section requires a purely subjective belief, a lower standard that made sense when the threat was clearly immediate and the threatener physically present on the scene. Once the immediacy and presence requirements are removed, however, measuring the accused's belief that the threat will be carried out necessarily demands a higher standard of evaluation. In other words, the accused's actual belief must also be reasonable.

[21] *R.* v. *MacDonald*, 2014 SCC 3 (CanLII), [2014] 1 RCS 37, par. 85.

- The reasonableness of the grounds to believe in making a warrantless arrest is evaluated based on objectively verifiable circumstances known to the officer at the time, taking the officer's experience into account

The officer who makes a warrantless arrest must have reasonable grounds to believe that the person has committed an indictable offence. To put the following excerpts from court decisions into context, note that the validity of the arrest determines the validity of the subsequent detention and the validity of the search incidental to the arrest and, therefore, the admissibility of the evidence gathered during the incidental search. It is therefore through a *voir dire* during the trial that the validity of the arrest and subsequent actions are contested, and the reasonableness of the officer's belief will be at the core of the matter.

> A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. *The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience [to] the arresting officer.* The police are not required to have a *prima facie* case for conviction before making the arrest.[22]

In the *Clayton* decision concerning police officers' power of detention, the Court explains that:

> Justification for a police officer's decision to detain, as developed in *Dedman* and most recently interpreted in *Mann*, will depend on the "totality of the circumstances" underlying the officer's suspicion that the detention of a particular individual is "reasonably necessary." If, for example, the police have particulars about the individuals said to be endangering the public, their right to further detain will flow accordingly. As explained in *Mann*, searches will be permitted only where the officer believes on reasonable grounds that his or her safety, or that of others, is at risk.
>
> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine

[22] *R*. v. *Tim*, 2022 SCC 12, par. 24 (italics added).

> whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.
>
> In my view, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.[23]

- Note that all the circumstances known to the police officer *at the time* of the decision to arrest or detain an individual are taken into account, and not what is known after. The reasonableness is prospective, not retrospective.

- When evaluating the reasonableness of the police officer's belief, the reasonable person is attributed knowledge, training, and experience comparable to the police officer's.

- The reasonableness of the grounds to suspect (a related standard based on possibility and not probability) is assessed in the same way:

> Reasonable suspicion must be assessed against the totality of circumstances. The inquiry must consider the constellation of objectively discernible facts that are said to give the investigating officer reasonable cause to suspect that an individual is involved in the type of criminal activity under investigation. This inquiry must be fact-based, flexible, and grounded in common sense and practical, everyday experience.[24]

- The reasonableness of the grounds to believe in the context of the requirements for arguments of defence: taking into account the circumstances as well as the experience and personal characteristics of the accused

The grounds for several defences require the accused to reasonably believe that a fact or situation exists. For example, for a defence of necessity, the accused must have believed on reasonable grounds that they were facing an imminent danger. The question of whether the accused had a reasonable belief in a given situation arises when the judge in a trial asks whether the requirements for the argument of the defence have been met. As in analyzing the reasonableness of the belief of a police officer who has made a warrantless arrest, the question is whether the accused subjectively held a belief in the existence of a situation (in the case of necessity, the existence of an imminent danger) and whether this belief was reasonable under the circumstances. Reasonableness is evaluated in consideration of the facts known to the accused, their experience, and their personal characteristics that influenced their assessment of the situation. In other words,

[23] *R.* v. *Clayton*, [2007] 2 RSC 725, 2007 SCC 32, par. 30 to 32.
[24] *R.* c. *Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 29 (the references have been omitted).

the experiences and personal characteristics of the accused are attributed to the hypothetic reasonable person who serves as a point of reference. To describe the situation, the Court uses the expression "modified objective criterion." In the *Latimer* decision, which concerns the defense of necessity, the Supreme Court explains:

> The first and second requirements—imminent peril and no reasonable legal alternative—must be evaluated on the modified objective standard described above. As expressed in *Perka*, necessity is rooted in an objective standard: "involuntariness is measured on the basis of society's expectations of appropriate and normal resistance to pressure" (p. 259). We would add that it is appropriate, in evaluating the accused's conduct, to take into account personal characteristics that legitimately affect what may be expected of that person. The approach taken in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 R.C.S. 973, is instructive. Speaking for the Court, C.J. Lamer held, at para. 59, that
>
> > . . . it is appropriate to employ an objective standard that takes into account the particular circumstances of the accused, including his or her ability to perceive the existence of alternative courses of action.
>
> While an accused's perceptions of the surrounding facts may be highly relevant in determining whether his conduct should be excused, those perceptions remain relevant only so long as they are reasonable. *The accused person must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open. There must be a reasonable basis for the accused's beliefs and actions, but it would be proper to take into account circumstances that legitimately affect the accused person's ability to evaluate his situation. The test cannot be a subjective one, and the accused who argues that he perceived imminent peril without an alternative would only succeed with the defence of necessity if his belief was reasonable given his circumstances and attributes.*[25]

The same applies when an accused invokes self-defence. An accused who invokes self-defence must have believed, on reasonable grounds, that he or she was being assaulted and that it was necessary to resort to deadly force. Here, too, an objective criterion is applied that takes into account the characteristics and experience of the accused. In the context of self-defence, case law is especially behind the times with regard to gender and the violence experienced by an accused who has killed a violent spouse.

As the Pétel decision explains,

[25] *R.* v. *Latimer*, 2001 SCC 1, (2001) 1 R.C.S. 3, par. 33. Also see *R.* v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14.

> The importance of failing to relate the earlier threats to the elements of self-defence cannot be underestimated. The threats made by Edsell throughout his cohabitation with the respondent are very relevant in determining whether the respondent had a reasonable apprehension of danger and a reasonable belief in the need to kill Edsell and Raymond. The threats prior to July 21 form an integral part of the circumstances on which the perception of the accused might have been based. The judge's answer to this question might thus have led the jury to disregard the entire atmosphere of terror which the respondent said pervaded her house. It is clear that the way in which a reasonable person would have acted cannot be assessed without taking into account these crucial circumstances. (…)
>
> By unduly limiting the relevance of previous threats, the judge, in a sense, invited the jury to determine what an outsider would have done in the same situation as the respondent.[26]

In the *Lavallee*[27] decision, the reasonableness of the accused's perception was assessed taking into account both her gender and her experience of her spouse's violence. This is summarized in the *Malott* decision:

> Section 34(2)(*a*) provides that an accused who intentionally causes death or grievous bodily harm in repelling an assault is justified if he or she does so "under reasonable apprehension of death or grievous bodily harm." In addressing this issue, Wilson J., who expressed the majority opinion in the *Lavallee* decision, rejected the requirement that the accused apprehend imminent danger. She also stated at pp. 882–883:
>
> > Where evidence exists that an accused is in a battering relationship, expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death when she acted by explaining the heightened sensitivity of a battered woman to her partner's acts. Without such testimony I am skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship. After all, the hypothetical "reasonable man" observing only the final incident may have been unlikely to recognize the batterer's threat as potentially lethal. . .

[26] *R. v. Pétel*, [1994] 1 R.C.S. 3, pp. 16-17.
[27] *R.* v. *Lavallee*, [1990] 1 R.C.S. 852.

> The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.[28]

Still in *Malott*, Judge L'Heureux-Dubé explains:

> Second, the majority of the Court in *Lavallee* also implicitly accepted women's experiences and perspectives may be different from the experiences and perspectives of men. It accepted that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and that both are relevant to the legal inquiry. This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of particular events. But it is wrong to think of this development of the law as merely an example where an objective test -- the requirement that an accused claiming self-defence must reasonably apprehend death or grievous bodily harm – has been modified to admit evidence of the subjective perceptions of a battered woman. More important, a majority of the Court accepted that the perspectives of women, which have historically been ignored, must now equally inform the "objective" standard of the reasonable person in relation to in self-defence.[29]

Echoing this case law to a certain extent, the new paragraphs (1) and (2) of Section 34 of the *Criminal Code* read as below. The legislature has drawn up a non-exhaustive list of factors to consider in determining whether the accused has acted reasonably in the circumstances:

> **34** (1) A person is not guilty of an offence if:
>
> a) they believe on reasonable ground that force is being used against them or another person or that a threat of force being made against them or another person;
>
> b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> c) the act is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties, and the act, including, but not limited to, the following factors:

[28] *R.* v. *Malott*, 1998 CanLII 845 (SCC), [1998] 1 RCS 123, par. 20.
[29] *R.* v. *Malott*, 1998 CanLII 845 (SCC), [1998] 1 RCS 123, par. 38.

a) the nature of the force or threat;

b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

c) the person's role in the incident;

d) whether any party to the incident used or threatened to use a weapon;

e) the size, age, gender, and physical capabilities of the parties to the incident;

f) the nature, duration, and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

f.1) the history of interactions or communications between the parties to the incident;

g) the nature and proportionality of the person's reaction to the use or threat of force; and

h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

These factors are relevant for assessing the actions of the accused. They are also relevant, and, by implication, necessary, for assessing a person's belief on reasonable grounds that they were facing a danger.

Even considering the accused's experience and personal characteristics, the criterion of reasonable grounds to believe remains an objective criterion. As explained in the *Ryan* decision, which concerns the defence of moral duress:

> Considering that society's opinion of the accused's actions is an important aspect of the principle, it would be contrary to the very idea of moral involuntariness to simply accept the accused's subjective belief without requiring that certain external factors be present. Citing *R. v. Howe*, [1987] A.C. 417 (H.L.), p. 426, Baker agrees that "[t]he threat must involve such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist" (pars. 25-015). He specifically mentions that there must have reasonable grounds for the accused's belief that the threat would be carried out (paras. 25-015 and 25-016).[30]

The next excerpt shows that the necessity that the accused's belief be reasonable conveys the existence of social expectations in terms of behaviour.

[30] *R.* v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14, par. 52.

> The accused must meet society's standard for the reasonable person similarly situated, which includes a capacity to resist the threat to some degree.[31]

- The reasonableness of the grounds to believe in the context of the issuance of a search warrant and subsequent judicial review: the reasonable belief founded on reliable grounds and the role of the reviewing judge

A justice of the peace may issue a search warrant when they are convinced there are reasonable grounds to believe that evidence will be found. In this case, the justice of the peace acts on faith in the information submitted by the police in an affidavit. Search warrants are usually reviewed during a trial, where the accused seeks, in the *voir dire*, to have evidence thrown out on the grounds that the search was illegal. In this context, it is the credibility and reliability of the information provided to the justice of the peace who issued the warrant that is most often discussed.

The authorizing justice of the peace must seek to confirm the existence of reasonable grounds to believe that a situation exists:

> But the authorizing judge must look with attention at the affidavit material, with an awareness that constitutional rights are at stake and carefully consider whether the police have met the standard. All this must be performed within a procedural framework where certain actions are authorized on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the documents submitted by the applicant. He or she should not be reluctant to ask questions of the applicant, to discuss or to require more information, or to narrow down the authorization requested if it seems too wide or too vague.[32]

The person who draws up an affidavit is required to make a full and honest statement of the facts considered so that the authorizing judge may determine whether it meets the applicable legal criterion, in this case, reasonable grounds to believe, and justify the authorization.[33] Although it is not a legal obligation, it is advisable that the persons with the most direct knowledge of the facts of the case, for example, the police officers who conducted the criminal investigation or who are responsible for the informants, draw up the affidavit. This gives more weight to the documents; the affidavit is deemed more

[31] *R.* v. *Ryan*, 2013 SCC 3 (CanLII), [2013] 1 RCS 14, para. 60.
[32] *R.* v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 29. This excerpt concerns the issuance of a wiretapping warrant, but the actions expected of a judge who issues a search warrant is the same.
[33] *R.* v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 46.

reliable since the person who drafted it is answerable for the truth of the facts claimed in it.[34]

A review determines whether the facts set forth in the affidavit were sufficient for the justice of the peace to issue the authorization. As explained in the *Morelli* decision,

> In reviewing the sufficiency of a warrant request, however, "the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have [been] issued" (*R. v. Araujo*, 2000 SCC 65, [2000] 2 R.C.S. 992, at para. 54 (emphasis in original)). The question is not whether the reviewing court would itself have issued the warrant, but whether there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place.[35]

As the Supreme Court explains in the *Araujo* decision, the review process is not a proceeding where the reviewing judge substitutes their own judgment for the judgment of the authorizing judge.

> The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli*, *supra*, at p. 1452:
>
> > The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [Emphasis added]
>
> As I noted as a judge of the Quebec Court of Appeal in *Hiscock, supra*, at p. 366 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, 1994 CanLII 46 (SCC), [1994] 3 R.C.S. 1097, at p. 1098, the requirement was described as "sufficient reliable information to support an authorization" (emphasis added). The Court concluded that this requirement had still been met

[34] *R.* v. *Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 48, 49.
[35] R. v. Morelli, par. 40

> despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.[36]

Although the reviewing judge cannot substitute his or her decision for that of the issuing judge, the reviewing judge will review whether the authorizing judge's decision to issue the warrant was based on reliable evidence. As shown in the above excerpt, exaggerations, lies, and failure to declare information known when the affidavit was drafted will affect the credibility of the information provided to the justice of the peace and, consequently, the validity of the search warrant. One could also say that the information supplied by persons unable to verify the truth of that information is not reliable information.

Judicial review of the justice of the peace's original decision is conducted based on the facts known at the time the warrant was issued and not on the basis of new facts. As already stated, it is a matter of whether the decision to issue the search warrant was based on reliable evidence at the time of its issuance. That being said, the reviewing court may, in exceptional cases, proceed to "amplify" the evidence, that is, to use new information to correct a technical error contained in the affidavit. However, it is not a matter of evaluating the merits of the issuing judge's decision in the light of new facts. Rather, it is a matter of seeing whether the new facts allow minor errors in the affidavit to be corrected to uphold the validity of the search warrant issued. As the Supreme Court explains in the *Morelli* decision (note that the court sometimes speaks of an ITO [information to obtain] rather than of an affidavit):

> The reviewing court does not undertake its review solely on the basis of the ITO as it was presented to the justice of the peace. Rather, "the reviewing court must exclude erroneous information" included in the original ITO (*Araujo*, at para. 58). Furthermore, the review in court may have reference to "amplification" evidence—that is, additional evidence presented at the *voir dire* to correct minor errors in the ITO—so long as this additional evidence corrects good faith errors of the police in preparing the ITO, rather than deliberate attempts to mislead the authorizing justice.
>
> It is important to reiterate the limited scope of amplification evidence, a point well articulated by Judge LeBel in *Araujo*. *Amplification evidence is not a means for the police to adduce additional information so as to retroactively authorize a search that was not initially supported by reasonable and probable grounds.* The use of

[36] *R. v. Araujo*, 2000 SCC 65 (CanLII), [2000] 2 RCS 992, par. 51 (emphasis in the original).

amplification evidence cannot in this way be used as "a means of circumventing a prior authorization requirement" (*Araujo*, at para. 59).

Rather, reviewing courts should resort to amplification evidence of the record before the issuing justice only to correct "some minor, technical error in the drafting of their affidavit material" so as not to "put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity, but had, in good faith, made" such errors (para. 59). *In all cases, the focus is on the "information available to the police at the time of the application" rather than the information that the police acquired after the original application was made* (para. 59).[37]

In brief, the reasonable grounds to believe standard:
- is objective and based on probability
- allows for reasonable error
- relies on objectively verifiable (and reliable) facts
- is assessed in light of the facts and circumstances known at the time the verified decision was made
- is assessed in light of the activity in question and the experience and characteristics of the person who made the decision that may have influenced his or her perception of the situation
- allows an independent judicial review of its implementation.

2. The basis of the reasonable grounds to believe standard and the interests it is meant to protect

- Establishing a balance between the rights of citizens and the interests of the state

Case law consistently shows that the reasonable grounds to believe standard is a condition for the exercise of certain state powers aimed at establishing a balance between, on the one hand, the rights of citizens—including liberty (in the case of powers

[37] *R. v. Morelli*, 2010 SCC 8 (CanLII), [2010] 1 RCS 253, para. 41 to 43 (my italics).

of arrest)[38] and the reasonable expectation of privacy (in the case of searches)[39] — and, on the other hand, the protection of society from crime and therefore, the state's right to investigate crime. This balance must be established based on objective grounds that can be evaluated by an independent observer who may find that the state's interests prevail.[40]

In terms of privacy protections, when it comes to determining the degree of justification necessary for the state to infringe on this right, both the impact on the right to privacy and the importance of the law enforcement objective come into play. In the *Hunter* decision, the Court recognizes that this exercise in weighing the interests at stake may justify a search under a less stringent standard than that of reasonable grounds to believe when the right to privacy is reduced or when the public order objectives of the state prevail.[41] This explains that reasonable suspicions are a sufficient threshold in some investigative contexts, and that the legislature has made the authorization of some searches subject to this less stringent standard.

In the case of the *Emergencies Act*, however, the legislature has provided the standard, or threshold, of reasonable grounds to believe to establish the balance between citizens' rights, notably to liberty and privacy, and the state's right to take exceptional measures to deal with emergencies.

- The reasonable grounds standard (and the standard of reasonable suspicion) allows an independent judicial examination and protects against arbitrary action by the state

In criminal law, judicial authorization prior to the exercise of certain investigative powers based on reasonable grounds to believe allows for prior examination by an independent

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[38] *R.* v. *Storrey*, 1990 CanLII 125 (SCC), [1990] 1 RCS 241, p.249: "Section 450(1) makes it clear that the police were required to have reasonable and probable grounds [to believe] that the appellant had committed the serious offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest. The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus, the police need not establish more than reasonable and probable grounds for an arrest. "

[39] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, pp. 159-160.

[40] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, pp. 167-168.

[41] *Hunter et al.* v. *Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 168.

evaluator and provides the opportunity to ensure in advance that the criterion of reasonable grounds has been met.[42]

Nonetheless, it is possible, in some cases, for officers of the state to act without prior judicial authorization, and the standard of reasonable grounds (to believe or suspect) guarantees the possibility of an independent review (generally by the trial judge) after the fact. In all cases, the standard of reasonable grounds to act must be such as to allow an independent review of the decision to exercise a power.

The examination by an independent evaluator is both a characteristic and a function of the reasonable ground standard, though has mostly been discussed in the case of reasonable grounds to suspect, as the reasonable grounds to suspect standard has a lower criterion and is more recent than the reasonable grounds to believe standard.

In the case of a warrantless search using sniffer dogs, for example, the Court explained:

> The requirement for objective and ascertainable facts as the basis for reasonable suspicion permits an independent after-the-fact review by the court and protects against arbitrary state action. Under the *Collins* framework, the onus is on the Crown to show that the objective facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have held a reasonable suspicion of criminal activity.[43]

With regard to the existence of reasonable grounds to suspect in the context of police entrapment, the Supreme Court explains:

> In every context, the reasonable suspicion standard ensures courts can conduct *meaningful* judicial review of what the police knew at the time the opportunity was provided (…). This standard requires the police to disclose the basis for their belief and to show that they had legitimate reasons related to criminality for targeting an individual or the people associated with a location (…). An objective standard like reasonable suspicion allows for exacting curial scrutiny of police conduct for conformance to the *Canadian Charter of Rights and Freedoms* and society's sense of decency, justice, and fair play because it requires objectively discernible facts. As is the case with warrantless searches, "the trial judge [must be] [. . .] in a position to ascertain [these objective facts], and not bound by the personal conclusions of the officer who conducted the [investigation]" (…). This is essential to upholding the primacy of law and preventing the state from arbitrarily infringing individuals' privacy interests and personal freedoms. (…).[44]

[42] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 161-162.
[43] *R.* v. *Chehil*, 2013 SCC 49 (CanLII), [2013] 3 RCS 220, par. 45.
[44] R. v. Ahmad, 2020 SCC 11 (CanLII), par. 24 (the references have been omitted).

The Court adds:

> A standard of "bad faith" police conduct in this branch of the entrapment doctrine is no substitute for the objective standard of reasonable suspicion, which is reviewable by an independent assessor. A test of "bad faith" cedes primacy to the police's own assertions. Reasonable suspicion insists on an objective assessment of the information the police actually had. Reasonable suspicion thus shifts the protection of the public against unreasonable intrusions from the shadows of police discretion to the light of curial scrutiny.[45]

If the reasonable grounds to suspect standard allows subsequent examination by an independent evaluator in order to avoid arbitrariness and ensure legal status, the reasonable grounds to believe standard, which is more stringent, pursues the same goals.

The *Emergencies Act* does not provide for an independent judicial examination but provides for a mechanism of examination by an independent evaluator who must assess whether the Governor in Council has acted on the bases of reasonable grounds to believe that there is an emergency situation, which amounts to the same thing, in my opinion.[46] In *Hunter* v. *Southam*, the Supreme Court of Canada further recognizes that it is not necessary for the person exercising the function of independent evaluator to be a judge.[47] In the present case, the independent examination is conducted by the Commission mentioned in Section 63 of the *Emergencies Act* and created by decree C.P. 2022-0392.

3. The reasonable grounds to believe standard in areas other than criminal law

The reasonable grounds to believe standard is used in areas other than criminal law. For example, Section 37(1)a) of the Immigration and Refugee Protection Act[48] provides that a person is inadmissible on grounds of organized criminality for:

> being a member of an organization *that is believed on reasonable grounds* to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada

[45] *R.* v. *Ahmad*, 2020 SCC 11 (CanLII), par. 29.
[46] Sec. 63 of the *Emergencies Act*, RSC (1985), ch. 22 (4nd supp.).
[47] *Hunter et al. v. Southam* Inc., 1984 CanLII 33 (SCC), [1984] 2 RCS 145, p. 162
[48] *Immigration and Refugee Protection Act*, L.C. 2001, ch. 27. (emphasis added)

> that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern.

Moreover, Section 33 of the law provides that "he facts that constitute inadmissibility under Sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring, or may occur."

In the *Sittampalam* v. *Canada*[49] decision, the Federal Court of Appeal explains the reasonable grounds to believe standard by referring to criminal case law:

> The standard that the minister must apply when assessing the facts is that of "reasonable grounds." The Federal Court of Appeal explained this criterion in the *Charkaoui* decision (…). Judge Décary and Judge Létourneau, with the support of Chief Justice Richard, state in paragraphs 102 to 105:
>
> > 102 The "reasonable grounds" criterion is generally the standard used to file proceedings for wrongdoing, as well as to exercise preventive or investigative powers. By way of example, therefore, a police officer's power to arrest an individual, obtain a search warrant, and issuance of the warrant by the justice of the peace are based on reasonable grounds (…). With regard to prevention, the police officer must have reasonable grounds to believe that a person is about to commit an indictable offence or to violate his or her promise to appear so that it is in the public interest to arrest him or her. The same goes for a report accusing an individual of committing a criminal act or offence (…).
> >
> > 103 The "reasonable grounds" standard requires more than suspicions. It also requires more than a mere subjective belief on the part of the person relying on them. The existence of reasonable grounds must be established objectively, that is, that a reasonable person in placed in the same circumstances would have believed that reasonable grounds existed, in the case of an arrest, to make the arrest: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 R.C.S. 241, at page 250.
> >
> > (…).[50]

[49] *Sittampalam* v. *Canada (Citizenship and Immigration)*, 2005 CF 121

[50] *Sittampalam* v. *Canada (Citizenship and Immigration)*, 2005 CF 121, par. 11 (the references have been omitted).

In this text, I have already cited the decision of the Federal Court of Appeal in the *Jolly*[51] case and that of the Supreme Court of Canada in the *Mugesera*[52] case, two immigration decisions.

As another example, Section 33 of the Public Servants Disclosure Protection Act provides that the Commissioner who has grounds to believe that wrongdoing has been committed and reasonable grounds to believe that the public interest demands it, may investigate wrongdoing.[53] In the *Gordillo* decision, the Federal Court of Appeal explains:

> The "reason to believe" standard the provision sets out is similar to the standard found in other statutes. For example, as the Federal Court observed in *Agnaou v. Canada (Attorney General)*, 2017 FC 338 at para. 8, it is similar to the "reasonable grounds to believe" standard found in paragraph 19(1)(j) of the former *Immigration Act*, RSC 1985, c I2. The Supreme Court held in *Mugesera v. Canada (Minister of Citizenship and Immigration*), 2005 SCC 40 at para. 114, that that standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" and that "[i]n essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (internal citations omitted). [54]

The courts do not distinguish between the use of the reasonable grounds to believe standard in criminal matters and its use in other areas.

[51] *Attorney General of Canada* v. *Jolly*, 1975 CanLII 1058 (FCA), [1975] F.C. 216 (F.C.A.).
[52] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 R.C.S. 100, 2005 SCC 40
[53] *Public Servants Disclosure Protection Act*, LC 2005, c 46, par. 33 (1): « If, … as a result of any information provided to the Commission by a person who is not a public servant, the Commissioner has reason to believe that a wrongdoing … had been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section."
[54] *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 (CanLII), para. 112