Most Negative Treatment: Check subsequent history and related treatments.

2014 ABCA 322
Alberta Court of Appeal

Can v. Calgary Police Service

2014 CarswellAlta 1836, 2014 ABCA 322, [2014] A.W.L.D. 4540, [2014] A.W.L.D. 4566, [2014] A.W.L.D. 4604, [2014] A.W.L.D. 4635, [2014] A.J. No. 1112, [2015] 2 W.W.R. 695, 116 W.C.B. (2d) 578, 246 A.C.W.S. (3d) 98, 315 C.C.C. (3d) 337, 3 Alta. L.R. (6th) 49, 584 A.R. 147, 623 W.A.C. 147

Jim Can, Appellant (Plaintiff) and Jack Beaton acting as the Chief of Police for the Calgary Police Service, Douglas Andrus, John Manahan, John Brydges and John Miller, Respondents (Defendants) and Attorney General of Alberta, Her Majesty the Queen in Right of Alberta, Alberta Minister of Justice, John Doe, Jim Doe, and Emmanuel (Mac) Vomberg, Not parties to the Appeal (Defendants)

Carole Conrad, Clifton O'Brien, Thomas W. Wakeling JJ.A.

Heard: May 6, 2014
Judgment: October 10, 2014
Docket: Calgary Appeal 1301-0154-AC

Proceedings: affirming *Can v. Calgary Police Service* (2013), *(*sub nom. *Can v. Calgary Chief of Police)* 560 A.R. 202, 85 Alta. L.R. (5th) 91, 2013 CarswellAlta 508, 2013 ABQB 226, [2013] A.J. No. 404, S.M. Bensler J. (Alta. Q.B.)

Counsel: N.D. Anderson, C.K. Jones for Appellant/Plaintiff
S.H.D. Bower for Respondents/Defendants

Subject: Civil Practice and Procedure; Constitutional; Criminal; Public; Torts

Related Abridgment Classifications

Civil practice and procedure
XVIII Summary judgment
XVIII.3 Availability of summary judgment
XVIII.3.b Miscellaneous
Criminal law
XXIV Investigation and arrest
XXIV.4 Arrest
XXIV.4.c Arrest without warrant
XXIV.4.c.ii When power may be exercised
XXIV.4.c.ii.C Reasonable grounds for belief that accused committed indictable offence
Law enforcement agencies
I Police
I.2 Duties, rights and liabilities of officers
I.2.c Conduct of officers
I.2.c.vii Negligence
Torts
XIV Malicious prosecution and false imprisonment
XIV.2 Establishing elements
XIV.2.c Want of reasonable and probable cause
XIV.2.c.iii Proof

2014 ABCA 322, 2014 CarswellAlta 1836, [2014] A.W.L.D. 4540, [2014] A.W.L.D. 4566...

XIV.2.c.iii.E Miscellaneous

Headnote

Criminal law --- Pre-trial procedure — Arrest — Arrest without warrant — When power may be exercised — Reasonable grounds for belief that accused committed indictable offence

Plaintiff C was charged with forcible confinement and extortion — Charges were stayed. due to information that complainant was convicted perjurer — C brought action against defendant police service for wrongful arrest, false imprisonment, and related torts — C also claimed breach of Charter of Rights and Freedoms rights — Police service applied for summary dismissal, which was granted — C appealed summary dismissal, but was unsuccessful — C appealed from this judgment — Appeal dismissed — Although accused was arrested without warrant, this did not make arrest illegal — Police had to have reasonable degree of certainty that accused should be arrested, based on facts available to them at time — Exact standard had not been determined, but it was moderate to high degree of certainty — Based on evidence, police could be highly certain that accused had committed crimes at time of arrest — Exculpatory evidence was only available after arrest — Police were not obligated to receive accused's side of story — Arrest was not unlawful.

Law enforcement agencies --- Police — Duties, rights and liabilities of officers — Conduct of officers — Negligence

Plaintiff C was charged with forcible confinement and extortion — Charges were stayed. due to information that complainant was convicted perjurer — C brought action against defendant police service for wrongful arrest, false imprisonment, and related torts — C also claimed breach of Charter of Rights and Freedoms rights — Police service applied for summary dismissal, which was granted — C appealed summary dismissal, but was unsuccessful — C appealed from this judgment — Appeal dismissed — Although accused was arrested without warrant, this did not make arrest illegal — Police had to have reasonable degree of certainty that accused should be arrested, based on facts available to them at time — Exact standard had not been determined, but it was moderate to high degree of certainty — Based on evidence, police could be highly certain that accused had committed crimes at time of arrest — Exculpatory evidence was only available after arrest — Police were not obligated to receive accused's side of story — Arrest was not unlawful.

Torts --- Malicious prosecution and false imprisonment — Establishing elements — Want of reasonable and probable cause — Proof — Miscellaneous

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Civil practice and procedure --- Summary judgment — Availability of summary judgment — Miscellaneous

Plaintiff C was charged with forcible confinement and extortion — Charges were stayed. due to information that complainant was convicted perjurer — C brought action against defendant police service for wrongful arrest, false imprisonment, and related torts — C also claimed breach of Charter of Rights and Freedoms rights — Police service applied for summary dismissal, which was granted — C appealed summary dismissal, but was unsuccessful — C appealed from this judgment — Appeal dismissed — Summary judgment was appropriate remedy in matter where action had no reasonable chance of success — Oral evidence was not to be part of summary judgment application in Alberta, as this was reserved for summary trial.

The plaintiff was originally charged by the defendant police service, on charges of forcible confinement and extortion. The charges were dropped when information was received that the complainant was a convicted perjurer. The plaintiff then brought an action against the police service for torts including wrongful arrest and false imprisonment. The police service moved before a Master for summary dismissal of the plaintiff's action, and was successful. The plaintiff appealed this judgment to the Court of Queen's Bench, but was unsuccessful. The plaintiff appealed from the Queen's Bench judgment.

Held: The appeal was dismissed.

Per Conrad and O'Brien JJ.A: The only issue on the appeal was whether there was a genuine issue requiring trial, regarding whether the police services and its officer had reasonable grounds to arrest the plaintiff. These grounds were present at the time of the arrest, based on the information available to the police. The proper test for summary judgment was used, in that the case did not have to be "without merit" to be dismissed but rather that no genuine issue for trial existed. Any error made by the trial judge regarding evidence would not have affected the outcome. Summary judgment was appropriate.

Per Wakeling J.A. (concurring in the result) Although summary judgment was appropriate, there was more analysis needed to reach this conclusion. On the facts of this case, the plaintiff's claim was actually without merit and the higher standard for summary judgment was met. There was objective evidence that the detective could rely upon to make an arrest without warrant of the plaintiff, and the procedure of the arrest met all necessary standards under provincial law and the Criminal Code. The standard for summary judgment was different in Alberta from the standard set out in Ontario, due largely to the presence of summary trial in Alberta. It would have been in question whether summary judgment was appropriate if there had been more merit to the plaintiff's case.

Table of Authorities

Cases considered by *Carole Conrad, Clifton O'Brien JJ.A.*:

R. v. Storrey (1990), 1990 CarswellOnt 78, 1990 CarswellOnt 989, 105 N.R. 81, [1990] 1 S.C.R. 241, 37 O.A.C. 161, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 47 C.R.R. 210 (S.C.C.) — followed

Cases considered by *Thomas W. Wakeling J.A.*:

Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc. (2014), 2014 ABCA 280, 2014 CarswellAlta 1662 (Alta. C.A.) — referred to

Adams v. Norcen Energy Resources Ltd. (1999), 72 Alta. L.R. (3d) 234, 1999 CarswellAlta 670, 35 C.P.C. (4th) 294, 248 A.R. 120 (Alta. Q.B.) — referred to

Alabama v. White (1990), 110 S.Ct. 2412, 496 U.S. 325, 110 L.Ed.2d 301, 58 U.S.L.W. 4747 (U.S. Ala. S.C.) — considered

Alberta (Minister of Justice) v. Cardinal (2013), 2013 CarswellAlta 1245, 2013 ABQB 407, 565 A.R. 271 (Alta. Q.B.) — considered

Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242 (U.S. Sup. Ct.) — considered

AT Films Inc. v. AT Plastics Inc. (2014), 2014 ABQB 422, 2014 CarswellAlta 1151 (Alta. Q.B.) — followed

Bahcheli v. Yorkton Securities Inc. (2012), 21 C.P.C. (7th) 371, 2012 ABCA 166, 2012 CarswellAlta 940, 65 Alta. L.R. (5th) 127, 524 A.R. 382, 545 W.A.C. 382, 43 Admin. L.R. (5th) 74 (Alta. C.A.) — referred to

Baron v. R. (1993), (sub nom. *Baron v. Canada*) [1993] 1 C.T.C. 111, 1993 CarswellNat 845, 1993 CarswellNat 1375, (sub nom. *Baron v. Canada*) 78 C.C.C. (3d) 510, (sub nom. *Baron v. Canada*) 13 C.R.R. (2d) 65, 93 D.T.C. 5018, (sub nom. *Baron v. Minister of National Revenue*) 146 N.R. 270, 18 C.R. (4th) 374, (sub nom. *Baron v. Canada*) 99 D.L.R. (4th) 350, (sub nom. *Baron v. Canada*) [1993] 1 S.C.R. 416 (S.C.C.) — considered

Beckwith v. Philby (1827), 108 E.R. 585, 6 B. & C. 635 (Eng. K.B.) — considered

Beier v. Proper Cat Construction Ltd. (2013), 35 R.P.R. (5th) 105, 564 A.R. 357, 2013 ABQB 351, 2013 CarswellAlta 1141 (Alta. Q.B.) — referred to

Bonsma v. Tesco Corp. (2011), 2011 ABQB 620, 2011 CarswellAlta 1765 (Alta. Q.B.) — referred to

Briginshaw v. Briginshaw (1938), 60 C.L.R. 336, [1938] A.L.R. 334 (Australia H.C.) — considered

Brinegar v. United States (1949), 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (U.S. Sup. Ct.) — considered

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall*) 380 N.R. 82, (sub nom. *F.H. v. McDougall*) 439 W.A.C. 74, (sub nom. *F.H. v. McDougall*) 260 B.C.A.C. 74 (S.C.C.) — considered

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc. (1984), (sub nom. *Hunter v. Southam Inc.*) 11 D.L.R. (4th) 641, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.*) 55 A.R. 291, 27 B.L.R. 297, 41 C.R. (3d) 97, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577,

1984 CarswellAlta 121, 1984 CarswellAlta 415, (sub nom. *Hunter v. Southam Inc.*) [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.*) 55 N.R. 241, (sub nom. *Hunter v. Southam Inc.*) 2 C.P.R. (3d) 1, (sub nom. *Hunter v. Southam Inc.*) 9 C.R.R. 355, 48 N.R. 320 (S.C.C.) — considered

Celotex Corp. v. Catrett (1986), 477 U.S. 317 (U.S. Sup. Ct.) — considered

Christie v. Leachinsky (1947), [1947] A.C. 573, [1947] 1 All E.R. 567 (U.K. H.L.) — considered

Chu v. Chen (2002), 2002 BCSC 906, 2002 CarswellBC 1469, 22 C.P.C. (5th) 73 (B.C. S.C.) — referred to

Cloutier c. Langlois (1990), 53 C.C.C. (3d) 257, [1990] 1 S.C.R. 158, 105 N.R. 241, 74 C.R. (3d) 316, 46 C.R.R. 37, 30 Q.A.C. 241, 1990 CarswellQue 8, 1990 CarswellQue 110 (S.C.C.) — considered

Collis v. Toronto Police Services Board (2007), 228 O.A.C. 333, 2007 CarswellOnt 5519 (Ont. Div. Ct.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin*) [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin*) 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin*) 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed

Commonwealth v. Koczwara (1959), 155 A.2d 825, 397 Pa. 575, 1959 Pa. 493 (U.S. Pa. S.C.) — considered

Compton Petroleum Corp. v. Alberta Power Ltd. (1999), 242 A.R. 3, 1999 ABQB 42, 1999 CarswellAlta 31 (Alta. Q.B.) — referred to

Continental Insurance Co. v. Dalton Cartage Co. (1982), 25 C.P.C. 72, [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559, (sub nom. *Dalton Cartage Ltd. v. Continental Insurance Co.*) 40 N.R. 135, [1982] I.L.R. 1-1487, 1982 CarswellOnt 372, 1982 CarswellOnt 719 (S.C.C.) — considered

Davis v. United States (1895), 160 U.S. 469 (U.S. Ark. S.C.) — referred to

Deguire v. Burnett (2013), 2013 ABQB 488, 2013 CarswellAlta 1601, 36 R.P.R. (5th) 60, 568 A.R. 341 (Alta. Q.B.) — considered

Desoto Resources Ltd. v. EnCana Corp. (2011), 2011 ABCA 100, 2011 CarswellAlta 502, 44 Alta. L.R. (5th) 253, 79 C.B.R. (5th) 202, 513 A.R. 72, 530 W.A.C. 72 (Alta. C.A.) — referred to

Devenpeck v. Alford (2004), 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537 (U.S. Sup. Ct.) — considered

Diegel v. Diegel (2008), 2008 ABCA 389, 2008 CarswellAlta 1763, 100 Alta. L.R. (4th) 1, 60 R.F.L. (6th) 18, 303 D.L.R. (4th) 704 (Alta. C.A.) — referred to

Dingwall v. Foster (2014), 93 Alta. L.R. (5th) 80, 10 C.B.R. (6th) 103, 2014 ABCA 89, 2014 CarswellAlta 327, 50 C.P.C. (7th) 219 (Alta. C.A.) — referred to

Dr. Therese Thomas Dentistry Professional Corp. v. Bank of Nova Scotia (2010), 95 C.P.C. (6th) 96, 2010 ONSC 1227, 2010 CarswellOnt 1123 (Ont. S.C.J.) — considered

Draper v. United States (1959), 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (U.S. Ill. S.C.) — considered

Dumbell v. Roberts (1944), [1944] 1 All E.R. 326, 60 T.L.R. 231 (Eng. C.A.) — considered

Elliott v. Amante (2001), 2001 ABQB 1080, 99 Alta. L.R. (3d) 246, 306 A.R. 82, 2001 CarswellAlta 1660, 20 M.V.R. (4th) 262, [2002] 3 W.W.R. 735, 15 C.P.C. (5th) 280 (Alta. Q.B.) — referred to

Emond v. Ottawa-Carleton Regional Police Service (2003), 2003 CarswellOnt 3402, [2003] O.T.C. 811 (Ont. S.C.J.) — considered

Encana Corp. v. ARC Resources Ltd. (2011), 2011 ABQB 431, 2011 CarswellAlta 1340, 523 A.R. 108 (Alta. Q.B.) — considered

Entick v. Carrington (1765), 19 State Tr. 1029, 95 E.R. 807, 2 Wils. K.B. 275, [1558-1774] All E.R. Rep. 41 (Eng. K.B.) — considered

Florida v. Harris (2013), 133 S.Ct. 1050 (U.S. Sup. Ct.) — followed

Gayton v. Lacasse (2010), 490 W.A.C. 179, 482 A.R. 179, 2010 CarswellAlta 655, 2010 ABCA 123, 26 Alta. L.R. (5th) 182 (Alta. C.A.) — referred to

Gerstein v. Pugh (1975), 420 U.S. 103 (U.S. Sup. Ct.) — considered

Hajjar v. Repetowski (2001), [2001] 8 W.W.R. 539, 91 Alta. L.R. (3d) 358, 7 C.P.C. (5th) 375, 319 A.R. 251, 2001 CarswellAlta 675, 2001 ABQB 432 (Alta. Q.B.) — considered

Henry v. US (1959), 361 U.S. 98 (U.S. C.A. 7th Cir.) — considered

Hicks v. Faulkner (1878), 8 Q.B.D. 167, 51 L.J.Q.B. 268 (Eng. Q.B.) — considered

Hill v. California (State) (1971), 28 L.Ed.2d 484, 91 S.Ct. 1106, 401 U.S. 797 (U.S. Sup. Ct.) — considered
Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 64 Admin. L.R. (4th) 163, 50 C.C.L.T. (3d) 1, 368 N.R. 1, 285 D.L.R. (4th) 620, [2007] 3 S.C.R. 129, [2007] R.R.A. 817, 50 C.R. (6th) 279, 230 O.A.C. 253 (S.C.C.) — considered
Holgate-Mohammed v. Duke (1984), [1984] 1 All E.R. 1054, [1984] A.C. 437 (U.K. H.L.) — considered
Horton v. California (1990), 496 U.S. 128, 110 L.Ed.2d 112, 110 S.Ct. 2301 (U.S. Cal. Sup. Ct.) — considered
Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to
Hussien v. Kam (1969), [1969] 3 All E.R. 1626, [1970] A.C. 942 (Malaysia P.C.) — considered
Hyder v. Commonwealth of Australia (2012), [2012] NSWCA 336 (New South Wales C.A.) — considered
Illinois v. Gates (1983), 103 S.Ct. 436, 76 L.Ed.2d 527, 462 U.S. 213 (U.S. Ill. S.C.) — followed
Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199, 1989 CarswellBC 69 (B.C. C.A.) — considered
Jackamarra v. Krakouer (1998), 195 C.L.R. 516, [1998] H.C.A. 27 (Australia H.C.) — referred to
Jama v. Immigration and Customs Enforcement (2005), 160 L.Ed.2d 708, 125 S.Ct. 694, 543 U.S. 335 (U.S. Sup. Ct.) — considered
Kellman v. Iverson (2012), 2012 ONSC 3244, 2012 CarswellOnt 7016 (Ont. S.C.J.) — considered
Koechlin v. Waugh (1957), 1957 CarswellOnt 142, [1957] O.W.N. 245, 118 C.C.C. 24, 11 D.L.R. (2d) 447 (Ont. C.A.) — considered
Kulaga v. First National Financial GP Corp. (2014), 2014 CarswellAlta 1086, 2014 ABQB 400 (Alta. Q.B.) — considered
Kvello v. Miazga (2009), 69 C.C.L.T. 1, [2010] 1 W.W.R. 45, 69 C.C.L.T. (3d) 1, 464 W.A.C. 260, 337 Sask. R. 260, 395 N.R. 115, (sub nom. *Kvello Estate v. Miazga*) 313 D.L.R. (4th) 330, (sub nom. *Miazga v. Kvello Estate*) [2009] 3 S.C.R. 339, 2009 SCC 51, 2009 CarswellSask 717, 2009 CarswellSask 718 (S.C.C.) — referred to
Kwan v. Superfly Inc. (2011), 2011 CarswellAlta 863, 2011 ABQB 343, 54 Alta. L.R. (5th) 161, 520 A.R. 234 (Alta. Q.B.) — considered
Lawrence v. Peel Regional Police Force (2009), 2009 CarswellOnt 2161 (Ont. S.C.J.) — considered
Leigh v. Cole (1853), 6 Cox C.C. 329, 21 L.T.O.S. 144 (Eng. C.A.) — considered
Lister v. Perryman (1870), L.R. 4 H.L. 521, 19 W.R. 9 (U.K. H.L.) — considered
Mackey v. Montrym (1979), 61 L.Ed.2d 321, 99 S.Ct. 2612, 443 U.S. 1 (U.S. Sup. Ct.) — considered
Magellan Morada Investment Ltd. Partnership v. Miller (2009), 2009 CarswellAlta 456, 2009 ABCA 124, (sub nom. *Miller v. Magellan Morada Investment Ltd. Partnership*) 447 W.A.C. 331, (sub nom. *Miller v. Magellan Morada Investment Ltd. Partnership*) 448 A.R. 331, [2009] 8 W.W.R. 506, 7 Alta. L.R. (5th) 95 (Alta. C.A.) — referred to
Mallory v. US (1957), 354 U.S. 449 (U.S. Sup. Ct.) — considered
Manson Insulation Products Ltd. v. Crossroads C & I Distributors (2011), 2011 ABQB 51, 2011 CarswellAlta 108 (Alta. Q.B.) — followed
Manufacturers Life Insurance Co. v. Executive Centre at Manulife Place Inc. (2011), 2011 CarswellAlta 479, 48 Alta. L.R. (5th) 178, [2011] 11 W.W.R. 833, 2011 ABQB 189 (Alta. Q.B.) — considered
Maryland v. Pringle (2003), 124 S.Ct. 795, 540 U.S. 366 (U.S. Sup. Ct.) — considered
Maxwell v. Wal-Mart Canada Corp. (2013), 2013 ABQB 625, 2013 CarswellAlta 1989 (Alta. Q.B.) — considered
McArdle v. Egan (1933), [1933] All E.R. Rep. 611, 150 L.T.R. 412 (Eng. C.A.) — considered
Moak v. Haggerty (2008), 2008 CarswellOnt 7 (Ont. S.C.J.) — considered
Mraiche Investment Corp. v. Paul (2011), 511 A.R. 268, 2011 ABQB 164, 2011 CarswellAlta 434 (Alta. Q.B.) — considered
Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2005), (sub nom. *Mugesera v. Canada (Minister of Citizenship & Immigration)*) 197 C.C.C. (3d) 225, 15 C.P.C. (6th) 51, 2005 CSC 39, 2005 SCC 39, 2005 CarswellNat 1738, 2005 CarswellNat 1739, 254 D.L.R. (4th) 193, 30 C.R. (6th) 107, (sub nom. *Mugesera v. Canada*

(Ministre de la Citoyenneté & de l'Immigration)) 335 N.R. 220, 47 Imm. L.R. (3d) 1, [2005] 2 S.C.R. 91 (S.C.C.) — considered

Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2005), *(sub nom. Mugesera v. Canada (Minister of Citizenship & Immigration))* 197 C.C.C. (3d) 233, 2005 CSC 40, 2005 SCC 40, 2005 CarswellNat 1740, 2005 CarswellNat 1741, 254 D.L.R. (4th) 200, 28 Admin. L.R. (4th) 161, 30 C.R. (6th) 39, *(sub nom. Mugesera v. Canada (Minister of Citizenship & Immigration))* 335 N.R. 229, 47 Imm. L.R. (3d) 16, [2005] 2 S.C.R. 100 (S.C.C.) — considered

Murphy Oil Co. v. Predator Corp. (2006), [2006] 5 W.W.R. 385, 384 A.R. 251, 367 W.A.C. 251, 2006 ABCA 69, 2006 CarswellAlta 233, 55 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to

N. (J.) v. Kozens (2004), 30 C.C.L.T. (3d) 1, 2004 ABCA 394, 2004 CarswellAlta 1675, *(sub nom. J.N. v. G.J.K.)* 361 A.R. 177, 339 W.A.C. 177, [2005] 7 W.W.R. 631, 248 D.L.R. (4th) 245, 40 Alta. L.R. (4th) 42 (Alta. C.A.) — considered

Nelles v. Ontario (1989), 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 69 O.R. (2d) 448, 1989 CarswellOnt 963, 1989 CarswellOnt 415 (S.C.C.) — referred to

O'Hanlon Paving Ltd. v. Serengetti Developments Ltd. (2013), 567 A.R. 140, 2013 ABQB 428, 18 B.L.R. (5th) 73, 91 Alta. L.R. (5th) 1, 2013 CarswellAlta 1426 (Alta. Q.B.) — considered

O'Hara v. Chief Constable of the Royal Ulster Constabulary (1996), [1997] A.C. 286, [1997] 1 All E.R. 129, [1997] 1 Cr. App. R. 447, [1997] Crim. L.R. 432, [1997] 2 W.L.R. 1, [1996] N.I. 8, [1996] UKHL 6 (U.K. H.L.) — considered

Ornelas v. US (1996), 517 U.S. 690 (U.S. Sup. Ct.) — considered

Orr v. Fort McKay First Nation (2014), 2014 ABQB 111, 2014 CarswellAlta 312 (Alta. Q.B.) — followed

P. Burns Resources Ltd. v. Locke, Stock & Barrel Co. (2014), 2014 ABCA 40, 2014 CarswellAlta 137 (Alta. C.A.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), *(sub nom. Lameman v. Canada (Attorney General))* 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, *(sub nom. Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, *(sub nom. Lameman v. Canada (Attorney General))* 429 A.R. 26, *(sub nom. Lameman v. Canada (Attorney General))* 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — followed

Porochnavy v. Scheie (2014), 2014 ABQB 316, 2014 CarswellAlta 930 (Alta. Q.B.) — considered

Prunkl v. Tammy Jean's Diner Ltd. (2014), 2014 CarswellAlta 909, 2014 ABQB 338 (Alta. Q.B.) — referred to

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — considered

R. v. Biron (1975), [1976] 2 S.C.R. 56, 4 N.R. 45, 23 C.C.C. (2d) 513, 30 C.R.N.S. 109, 59 D.L.R. (3d) 409, 1975 CarswellQue 34F, 1975 CarswellQue 2 (S.C.C.) — considered

R. v. Briggs (2001), 2001 CarswellOnt 2911, 149 O.A.C. 244, 55 O.R. (3d) 417, 157 C.C.C. (3d) 38, 45 C.R. (5th) 99, 86 C.R.R. (2d) 196 (Ont. C.A.) — considered

R. v. Brown (2008), [2008] 6 W.W.R. 17, 55 C.R. (6th) 240, 87 Alta. L.R. (4th) 1, *(sub nom. R. v. Kang-Brown)* 293 D.L.R. (4th) 99, 2008 CarswellAlta 523, 2008 CarswellAlta 524, 2008 SCC 18, *(sub nom. R. v. Kang-Brown)* 230 C.C.C. (3d) 289, *(sub nom. R. v. Kang-Brown)* [2008] 1 S.C.R. 456, *(sub nom. R. v. Kang-Brown (G.))* 373 N.R. 67, *(sub nom. R. v. Kang-Brown)* 432 A.R. 1, *(sub nom. R. v. Kang-Brown)* 424 W.A.C. 1 (S.C.C.) — considered

R. v. Chehil (2013), 301 C.C.C. (3d) 157, 4 C.R. (7th) 219, 364 D.L.R. (4th) 1, 1060 A.P.R. 1, 335 N.S.R. (2d) 1, 290 C.R.R. (2d) 77, [2013] 3 S.C.R. 220, 2013 CarswellNS 693, 2013 CarswellNS 694, 2013 SCC 49, 448 N.R. 370 (S.C.C.) — considered

R. v. Clayton (2005), 2005 CarswellOnt 1061, 27 C.R. (6th) 197, 194 C.C.C. (3d) 289, 196 O.A.C. 16, 129 C.R.R. (2d) 82 (Ont. C.A.) — considered

R. v. Clayton (2007), 2007 CarswellOnt 4268, 2007 CarswellOnt 4269, 2007 SCC 32, 364 N.R. 199, 281 D.L.R. (4th) 1, 47 C.R. (6th) 219, 158 C.R.R. (2d) 81, 227 O.A.C. 314, [2007] 2 S.C.R. 725, 220 C.C.C. (3d) 449 (S.C.C.) — considered

R. v. Crowther (2013), 2013 CarswellBC 2417, 2013 BCCA 364, 301 C.C.C. (3d) 29, 343 B.C.A.C. 127, 586 W.A.C. 127, 292 C.R.R. (2d) 85 (B.C. C.A.) — considered

R. v. Flight (2014), 2014 CarswellAlta 850, 2014 ABCA 185 (Alta. C.A.) — considered

R. v. Golub (1997), 34 O.R. (3d) 743, 9 C.R. (5th) 98, 102 O.A.C. 176, 45 C.R.R. (2d) 254, 117 C.C.C. (3d) 193, 1997 CarswellOnt 2448 (Ont. C.A.) — considered

R. v. Grotheim (2001), 2001 SKCA 116, 2001 CarswellSask 735, 161 C.C.C. (3d) 49, 17 M.V.R. (4th) 176, 213 Sask. R. 141, 260 W.A.C. 141, [2002] 2 W.W.R. 49 (Sask. C.A.) — considered

R. v. Hall (1995), 22 O.R. (3d) 289, 79 O.A.C. 24, 39 C.R. (4th) 66, 1995 CarswellOnt 107 (Ont. C.A.) — considered

R. v. Jacques (1996), 202 N.R. 49, 110 C.C.C. (3d) 1, [1996] 3 S.C.R. 312, 139 D.L.R. (4th) 223, 38 C.R.R. (2d) 189, 1 C.R. (5th) 229, 180 N.B.R. (2d) 161, 458 A.P.R. 161, 24 M.V.R. (3d) 1, 1996 CarswellNB 469, 1996 CarswellNB 470 (S.C.C.) — considered

R. v. Loewen (2008), 461 A.R. 193, 2008 CarswellAlta 1637, 2008 ABQB 660 (Alta. Q.B.) — considered

R. v. Loewen (2010), 2010 ABCA 255, 2010 CarswellAlta 1721, 260 C.C.C. (3d) 296, [2011] 2 W.W.R. 15, 32 Alta. L.R. (5th) 203, 219 C.R.R. (2d) 296, 490 A.R. 72, 497 W.A.C. 72 (Alta. C.A.) — considered

R. v. Loewen (2011), 415 N.R. 397, [2011] 9 W.W.R. 429, 84 C.R. (6th) 215, 44 Alta. L.R. (5th) 57, 502 A.R. 3, 517 W.A.C. 3, [2011] 2 S.C.R. 167, 273 C.C.C. (3d) 1, 338 D.L.R. (4th) 1, 2011 SCC 21, 2011 CarswellAlta 695, 2011 CarswellAlta 696 (S.C.C.) — referred to

R. v. MacDonald (2014), 2014 SCC 3, 2014 CarswellNS 16, 2014 CarswellNS 17, [2014] 1 S.C.R. 37, 303 C.C.C. (3d) 113, 366 D.L.R. (4th) 381, 7 C.R. (7th) 229, 2014 CSC 3, 453 N.R. 1, 1081 A.P.R. 353, 341 N.S.R. (2d) 353, 298 C.R.R. (2d) 190 (S.C.C.) — considered

R. v. MacKenzie (2013), 2013 SCC 50, [2013] 12 W.W.R. 209, 4 C.R. (7th) 260, 303 C.C.C. (3d) 281, 290 C.R.R. (2d) 99, [2013] 3 S.C.R. 250, 2013 CarswellSask 655, 2013 CarswellSask 656, 363 D.L.R. (4th) 381, 448 N.R. 246, 423 Sask. R. 185, 588 W.A.C. 185 (S.C.C.) — followed

R. v. Mann (2004), 21 C.R. (6th) 1, 241 D.L.R. (4th) 214, 185 C.C.C. (3d) 308, 122 C.R.R. (2d) 189, 324 N.R. 215, [2004] 3 S.C.R. 59, 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, 187 Man. R. (2d) 1, 330 W.A.C. 1 (S.C.C.) — considered

R. v. Mayor (2013), 2013 CarswellAlta 1995, 2013 ABQB 598, 295 C.R.R. (2d) 59 (Alta. Q.B.) — considered

R. v. Monney (1999), 1999 CarswellOnt 935, 1999 CarswellOnt 936, 237 N.R. 157, 133 C.C.C. (3d) 129, 171 D.L.R. (4th) 1, 61 C.R.R. (2d) 244, 24 C.R. (5th) 97, 119 O.A.C. 272, [1999] 1 S.C.R. 652, 6 B.H.R.C. 336 (S.C.C.) — considered

R. v. Navales (2014), 2014 ABCA 70, 2014 CarswellAlta 242, 307 C.C.C. (3d) 219, 94 Alta. L.R. (5th) 52, 569 A.R. 203, [2014] 5 W.W.R. 345 (Alta. C.A.) — considered

R. v. Nolet (2010), 256 C.C.C. (3d) 1, 320 D.L.R. (4th) 1, 213 C.R.R. (2d) 52, [2010] 1 S.C.R. 851, 403 N.R. 1, 76 C.R. (6th) 1, 350 Sask. R. 51, 487 W.A.C. 51, 2010 CarswellSask 368, 2010 CarswellSask 369, 2010 SCC 24, [2010] 8 W.W.R. 1, 95 M.V.R. (5th) 1 (S.C.C.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 1986 CarswellOnt 95, 1986 CarswellOnt 1001, 53 O.R. (2d) 719 (note) (S.C.C.) — considered

R. v. Roks (2011), 2011 CarswellOnt 6853, 87 C.R. (6th) 144, 2011 ONCA 526, 281 O.A.C. 235, 274 C.C.C. (3d) 1 (Ont. C.A.) — considered

R. v. Shepherd (2009), 194 C.R.R. (2d) 86, 2009 SCC 35, 2009 CarswellSask 430, 2009 CarswellSask 431, 81 M.V.R. (5th) 111, [2009] 8 W.W.R. 193, 66 C.R. (6th) 149, 245 C.C.C. (3d) 137, 460 W.A.C. 306, 331 Sask. R. 306, [2009] 2 S.C.R. 527, 309 D.L.R. (4th) 139, 391 N.R. 132 (S.C.C.) — referred to

R. v. Simmons (1988), 67 O.R. (2d) 63, *(sub nom. Simmons v. R.)* 18 C.E.R. 227, 1988 CarswellOnt 91, 1988 CarswellOnt 968, 66 C.R. (3d) 297, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673, 89 N.R. 1, 30 O.A.C. 241, 45 C.C.C. (3d) 296, 38 C.R.R. 252, *(sub nom. Simmons v. R.)* 2 T.C.T. 4102 (S.C.C.) — considered

R. v. Smellie (1994), 25 C.R.R. (2d) 244, 53 B.C.A.C. 202, 87 W.A.C. 202, 1994 CarswellBC 2597, 95 C.C.C. (3d) 9 (B.C. C.A.) — considered

R. v. Storrey (1990), 1990 CarswellOnt 78, 1990 CarswellOnt 989, 105 N.R. 81, [1990] 1 S.C.R. 241, 37 O.A.C. 161, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 47 C.R.R. 210 (S.C.C.) — considered

Richter v. Chemerinski (2010), 2010 CarswellAlta 896, 2010 ABQB 302 (Alta. Q.B.) — referred to
RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — considered
Schaffer v. Lalonde (2014), 2014 ABQB 222, 2014 CarswellAlta 589 (Alta. Q.B.) — considered
Scott v. Cresswell (1975), 56 D.L.R. (3d) 268, 1975 CarswellAlta 15, [1975] 3 W.W.R. 193 (Alta. C.A.) — considered
SHN Grundstuecksverwaltungsgesellschaft MBH & Co. Seniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne (2012), 72 Alta. L.R. (5th) 276, 2012 ABQB 624, 2012 CarswellAlta 1767, 550 A.R. 129 (Alta. Q.B.) — referred to
Smith, Hogg & Co. v. Black Sea & Baltic General Insurance Co. (1940), [1940] 3 All E.R. 405, [1940] A.C. 997 (U.K. H.L.) — considered
Soni v. Malik (1985), 1985 CarswellBC 53, 1 C.P.C. (2d) 53, 61 B.C.L.R. 36 (B.C. S.C.) — considered
Speiser v. Randall (1958), 357 U.S. 513 (U.S. Sup. Ct.) — considered
Steadman v. Steadman (1974), [1976] A.C. 536, 29 P. & C.R. 46, [1974] 3 W.L.R. 56, [1974] 2 All E.R. 977 (U.K. H.L.) — considered
Stobbe v. Paramount Investments Inc. (2013), 2013 ABCA 384, 2013 CarswellAlta 2483, 566 A.R. 155, 597 W.A.C. 155 (Alta. C.A.) — referred to
Terry v. Ohio (1968), 88 S.Ct. 1868, 20 L.Ed.2d 899, 392 U.S. 1 (U.S. Ohio S.C.) — followed
Texas v. Brown (1983), 460 U.S. 730, 75 L.Ed.2d 502, 103 S.Ct. 1535 (U.S. Tex. S.C.) — considered
Thompson v. Cardel Homes Limited Partnership (2014), 2014 ABCA 242, 2014 CarswellAlta 1240 (Alta. C.A.) — considered
Toribio v. Spece (February 21, 2014), Doc. 13-3029 (U.S. C.A. 3rd Cir.) — considered
Trudgian v. Bosche (2003), 2003 SKQB 168, 2003 CarswellSask 324, [2004] 1 W.W.R. 324, 235 Sask. R. 16 (Sask. Q.B.) — considered
U.B.'s Autobody Ltd. v. Reid's Welding (1981) Inc. (1999), 1999 CarswellAlta 1176, 258 A.R. 325, 1999 ABQB 956 (Alta. Q.B.) — considered
Union Pacific Railway v. Botsford (1891), 141 U.S. 250 (U.S. Sup. Ct.) — considered
United States v. Cortez (1981), 449 U.S. 411, 101 S.Ct. 690 (U.S. Ariz. S.C.) — followed
US v. Garcia (1999), 179 F.3d 265 (U.S. C.A. 5th Cir.) — considered
US v. Humphries (2004), 372 F.3d 653 (U.S. C.A. 4th Cir.) — considered
US v. Lopez (1971), 328 F. Supp. 1077 (U.S. Dist. Ct. E.D. N.Y.) — considered
US v. Ortiz (2012), 669 F.3d 439 (U.S. C.A. 4th Cir.) — considered
US v. Schipani (1968), 289 F. Supp. 43 (U.S. Dist. Ct. E.D. N.Y.) — considered
US v. Valencia-Amezcua (2002), 278 F.3d 901 (U.S. C.A. 9th Cir.) — considered
Walters v. W.H. Smith & Son Ltd. (1914), [1914] 1 K.B. 595, 110 L.T. 345 (Eng. K.B.) — considered
Welch v. Bancarz (2008), 2008 CarswellAlta 92, 2008 ABQB 60 (Alta. Q.B.) — referred to
Wiles v. Ontario (Police Complaints Commissioner) (1997), 1997 CarswellOnt 6039 (Ont. Div. Ct.) — considered
Wilson v. Russo (2000), 212 F.3d 781 (U.S. C.A. 3rd Cir.) — considered
Wiltshire v. Barrett (1965), [1966] 1 Q.B. 312, [1965] 2 All E.R. 271 (Eng. C.A.) — considered
Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107 (Alta. C.A.) — considered
Wong v. Toronto Police Services Board (2009), 2009 CarswellOnt 7412 (Ont. S.C.J.) — considered
Woolmington v. Director of Public Prosecutions (1935), [1935] A.C. 462, 25 Cr. App. R. 72, [1935] All E.R. Rep. 1, [1935] UKHL 1 (U.K. H.L.) — considered
1214777 Alberta Ltd. v. 480955 Alberta Ltd. (2014), 2014 CarswellAlta 821, 2014 ABQB 301 (Alta. Q.B.) — considered
1214934 Alberta Ltd. v. Clean Cut Ltd. (2014), 2014 ABQB 330, 2014 CarswellAlta 887 (Alta. Q.B.) — considered

Statutes considered by *Thomas W. Wakeling J.A.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 6(2)(a) — considered

s. 7 — considered

s. 8 — considered

s. 9 — considered
Crimes Act 1914, No. 12, 1914
s. 3W(1)(a) — considered
Crimes Act, 1961, No. 43
s. 315(2)(b) — considered
Criminal Code, 1892, S.C. 1892, c. 29
s. 28 — considered
Criminal Code, R.S.C. 1906, c. 146
s. 652 — considered
Criminal Code, R.S.C. 1927, c. 36
s. 647(b) — considered
Criminal Code, S.C. 1953-54, c. 51
Generally — referred to
Criminal Code, R.S.C. 1970, c. C-34
Generally — referred to

s. 450 — considered

s. 450(1)(a) — considered
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 254(2) — considered

s. 279(2) — considered

s. 346(1) — considered

s. 495(1) — considered

s. 495(1)(a) — considered

s. 495(1)(b) — considered

s. 495(2)(a) — considered

s. 495(2)(b) — considered

s. 495(2)(d)(i) — considered

s. 495(2)(e) — considered

s. 553 — considered
Criminal Code Amendment Act, 1913, S.C. 1913, c. 13

Generally — referred to
Criminal Law Act, 1967, c. 58
s. 2(3) — considered
Customs Act, R.S.C. 1970, c. C-40
s. 143 — referred to
Customs Act, R.S.C. 1985, c. 1 (2nd Supp.)
s. 98(1) — considered
Police and Criminal Evidence Act, 1984, c. 60
s. 24(4) — considered
Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4
s. 12(1)(b) — considered
United States Constitution, Fourth Amendment
Generally — referred to
Rules considered by *Carole Conrad, Clifton O'Brien JJ.A.*:
Alberta Rules of Court, Alta. Reg. 390/68
R. 159(3) — considered
Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.3(1)(b) — considered
Rules considered by *Thomas W. Wakeling J.A.*:
Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 158.1-158.7 [en. Alta. Reg. 152/98] — referred to

R. 159 — considered

R. 162 — considered
Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. 7 — referred to

Pt. 7, Div. 2 — referred to

R. 1.2(1) — considered

R. 1.2(2)(a) — considered

R. 1.2(2)(b) — considered

R. 1.2(3)(a) — considered

R. 1.2(3)(b) — considered

R. 1.2(3)(d) — considered

R. 1.4(1) — considered

R. 1.4(2)(g) — considered

R. 6.11(1)(g) — considered

R. 7.1(1) — considered

R. 7.2(a) — considered

R. 7.3 — considered

R. 7.3(1) — considered

R. 7.3(1)(b) — considered

R. 7.3(2) — considered

R. 7.3(3)(a) — considered

R. 7.5 — considered

R. 7.5(1) — considered

R. 7.7(2) — considered

Federal Courts Rules, SOR/98-106

R. 216 — referred to

Queen's Bench Rules, Man. Reg. 553/88

R. 20.03(4) — referred to

Queen's Bench Rules, Sask. Q.B. Rules

Pt. 40 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 20 — referred to

R. 20.04 — considered

R. 20.04(2) — referred to

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

Rules of Civil Procedure, P.E.I. Rules

R. 75.1 — referred to

Rules of Court, 1976, B.C. Reg. 310/76

R. 18A [en. B.C. Reg. 178/83] — considered

R. 18A(5) [en. B.C. Reg. 178/83] — considered

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 9-7 — considered

Regulations considered by *Thomas W. Wakeling J.A.*:

Court of Queen's Bench Act, R.S.A. 2000, c. C-31

Alberta Rules of Court Amendment Regulation, Alta. Reg. 152/98

Generally — referred to

Provincial Court Act, R.S.A. 2000, c. P-31

Provincial Court Civil Division Regulation, Alta. Reg. 329/89

s. 1.1 [am. Alta. Reg. 139.2014] — referred to

Revised Statutes of Canada, 1985 Act, R.S.C. 1985, c. 40 (3rd Supp.)

Order Fixing December 12, 1988 as the Day on which the Revised Statutes of Canada, 1985 Come into Force, SI/88-227

Generally — referred to

APPEAL by plaintiff who was formerly accused of crimes from judgment reported at,*Can v. Calgary Police Service (2013), 2013 ABQB 226, 2013 CarswellAlta 508, [2013] A.J. No. 404, 85 Alta. L.R. (5th) 91, 560 A.R. 202* (Alta. Q.B.) dismissing appeal from summary judgment in favour of defendant police service.

***Carole Conrad, Clifton O'Brien JJ.A.*:**

1 We agree with our colleague Wakeling J.A. that this appeal must be dismissed. However, our reasons for dismissal are much narrower than his.

2 Before us, the parties agreed "that if there is no genuine issue requiring a trial regarding whether Det. Andrus had objectively reasonable and probable grounds for ordering the arrest of Mr. Can, then all of Mr. Can's causes of action fail". In our view, counsel correctly identified and formulated the single issue presented by this appeal. It is therefore unnecessary, and in our view undesirable in the circumstances of this appeal, to deal with other issues beyond those addressed by counsel in their submissions.

3 Did the appellate judge err in finding Det. Andrus had reasonable and probable grounds for ordering the arrest of Mr. Can? The Supreme Court of Canada set out the governing test in *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), at p. 250-1:

> 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 probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

4 The facts relating to Mr. Can's arrest are set out in the written reasons of the courts below: the Master at 2012 ABQB 340 (Alta. Master) and the Queen's Bench Judge who heard the appeal from the Master, at 2013 ABQB 226 (Alta. Q.B.). It was conceded that Det. Andrus subjectively believed that the appellant participated in criminal activities for which he was arrested. The only question remaining was whether the objective standard had been met.

5 The appellant submits that the police did not have reliable and credible information at the time of his arrest that showed Mr. Can had participated in the alleged illegal activity. We note, however, that in his affidavit filed in support of the application for summary judgment, Det. Andrus deposed that the complainant, Mr. Sarvucci, had told him that he had seen Mr. Can at the warehouse, that Mr. Can had assisted the interrogators by providing information, regularly, about such things as Mr. Sarvucci's wife's and children's names (¶ 7 (u)), and further that Sarvucci had "identified Mr. Can as one of the individuals who held him hostage and as an active participant in the extortion" (¶ 39).

6 It appears that this information concerning Mr. Can's alleged involvement in criminal activities was provided by Mr. Sarvucci when he was interviewed by Detectives Andrus and Brydges for more than an hour in length commencing late on the day of the complaint (March 10, 2003) and completed in the early hours of the following day before Mr. Can's arrest. This interview was audio and videotaped. Mr. Sarvucci subsequently provided a written statement, which appears to repeat and perhaps enlarge upon what he had told the police in his oral interview. The mere fact that Detective Andrus did not yet have the formal written statement at the time of the arrest does not mean that he could not rely on the information gleaned from Mr. Sarvucci through the earlier interview.

7 Furthermore, interviews conducted before the arrest with each of Mr. Sarvucci's wife and with Mary Anne Fornalik, the office assistant at the warehouse, tended to corroborate Sarvucci's complaint in certain material aspects and to demonstrate the consistency of his allegations.

8 We also note that the appellant did not swear an affidavit, or otherwise adduce evidence, contradictory or challenging the facts set out by Det. Andrus in his affidavit. As observed by the Queen's Bench judge, "the responding party must put his best foot forward to show a real issue for trial in order to resist the motion for summary judgment", (¶ 31).

9 While the evidence at the time of Mr. Can's arrest concerning his involvement in the alleged criminal activities was not overwhelming, in the sense of establishing a *prima facie* case for conviction, and additional investigation was ongoing and necessary, such evidence as there was at the time provided the necessary objective justification to support Det. Andrus's subjective view that Mr. Can was a participant in the alleged extortion scheme. Whatever the precise measurement of the degree of certainty required for a warrantless arrest, here the information disclosed to Det. Andrus prior to the time of arrest was sufficient to allow a reasonable person in his position to conclude that there were reasonable and probable grounds to arrest Mr. Can. It follows that there is no genuine issue for trial.

10 In our view the analyses undertaken by both the Master and the Queen's Bench judge was correct. Their judgments reflect an appreciation both of the relevant facts and applicable law. They concluded that there were no genuine issues for trial. While current Rule 7.3 (1)(b) is framed in terms of a claim being "without merit", such a finding flows when a claimant has not established any genuine issue for trial. In other words, the new Rule has not substantively changed the test for summary judgment from that under former Rule 159 (3) which spoke in terms of "no genuine issue for trial".

11 We have not overlooked the appellant's argument that both the Master and the judge erred in stating that Det. Andrus had the evidence of Ms. Godfrey when he made the decision to arrest Mr. Can. There was some evidence before them to make such a finding. In any event, even if either of them erred in this regard the error was harmless as the remaining evidence supported the finding that there were reasonable and probable grounds to arrest Mr. Can.

12 In summary, the appellant has not persuaded us that either the Master or the appellate judge erred in law or failed to appreciate the evidence. Summary judgment was therefore warranted and the appeal is dismissed.

***Thomas W. Wakeling J.A.*:**

I. Introduction

13 This is an appeal from a Queen's Bench order dismissing summarily Jim Can's actions against the respondents, members of the Calgary Police Service.

14 After the Crown prosecutor stayed extortion [1] and forcible confinement [2] charges against Mr. Can, he commenced a civil action against members of the Calgary Police Service for wrongful arrest, false imprisonment and negligent investigation and against the Crown prosecutor for malicious prosecution.

II. Questions Presented

15 What is the standard of review in an appeal against a summary judgment order made under r. 7.3 of the *Alberta Rules of Court*, Alta. Reg. 124/2010?

16 What are the statutory criteria for a lawful arrest under s. 495(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46? Were those criteria met in this case? Was the warrantless arrest of Mr. Can lawful?

17 Taking into account *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), a judgment discussing Ontario's hybrid summary judgment and trial rule, [3] which is fundamentally different than Alberta's summary judgment rule, what principles govern the application of Alberta's summary judgment protocol?

18 Is Justice Bensler's judgment dismissing summarily the appellant's actions against the respondents consistent with the principles governing summary judgment in Alberta?

III. Brief Answers

19 A summary judgment disposition may be set aside if the only difference between the parties relates to the result of the application of the standard for summary judgment to agreed-upon facts and the result is unreasonable. Such a decision will not survive judicial review.

20 Summary judgment is appropriate if the nonmoving party's position is without merit. *Alberta Rules of Court*, r. 7.3. "A party's position is without merit if the facts and law make the moving party's position unassailable .... A party's position is unassailable if it is so compelling that the likelihood of success is very high". *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374. Mr. Can's claims are without merit. Justice Bensler's decision was correct and hence, reasonable.

21 The circumstances under which members of the Calgary Police Service arrested Mr. Can contained facts which clearly meet the measure of lawfulness for warrantless arrests under s. 495(1)(a) of the *Criminal Code.* Detective Andrus, the officer who ordered the arrest of Mr. Can, believed that Mr. Can had committed indictable offences. As well, there were objectively verifiable facts that would have caused a reasonable person with the training and experience of Detective Andrus and who was aware of the information which caused the officer to order Mr. Can's arrest to easily conclude with a high degree of certainty — that it was more likely than not — that Mr. Can had committed the indictable offences of extortion and unlawful confinement. This degree of certainty meets the standard s. 495(1)(a) adopts.

22 This determination inevitably leads to the conclusion that the moving party's position is unassailable. The likelihood the respondents will be able to successfully defend the appellant's claims is very high.

IV. Applicable Alberta Rules of Court and Criminal Code Provisions

23 Rule 7.3 of the *Alberta Rules of Court* is set out below:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> . . . . .
>
> (b) there is no merit to a claim or part of it ....
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:
>
> (a) dismiss one or more claims in the action ....

24 Section 495 of the *Criminal Code* reads, in part, as follows:

> 495(1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> . . . . .
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553, [4]

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction

. . . . .

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

V. Statement of Facts

A. Mr. Sarvuccci and His Wife Provided the Calgary Police Service with a Substantial Amount of Information About the March 10, 2003 Incident

25 For approximately fifty minutes before midnight on March 10, 2003 and roughly twenty-six minutes after midnight [5] Douglas Andrus and John Brydges, then senior [6] detectives with the Calgary Police Service, met with Anthony Richard Sarvucci. He told them that Jim Can, the plaintiff, and others, on March 10, 2003 held him against his will and threatened to kill him and his family members if he did not give them $1 million.

26 This distressing event was part of a bigger story which Mr. Sarvucci related to Detectives Andrus and Brydges at this midnight interview. [7]

27 Sometime in 2002 Ernst Heistand, a Vancouver entrepreneur, asked Mr. Sarvucci, a Calgarian, and Steve Apolant, a New Yorker, to promote the sale of Arabel Records stock. As compensation Mr. Heistand promised to transfer to each of them 100,000 shares of Arabel Records, worth $72,000 at the time. They could sell their shares whenever they wished. Messrs. Sarvucci and Apolant accepted these offers.

28 Fiaz Khan, a partner in Arabel Records, was unhappy with Arabel Records' stock price. It was going down. Mr. Khan wanted more trading. It would appear that Mr. Khan directed Mr. Heistand to remedy this. In response, Mr. Heistand contacted Mr. Sarvucci and suggested that he ask Mr. Can to help. Mr. Sarvucci met with Mr. Can. The former agreed to transfer to the latter 25,000 of his 100,000 shares in Arabel Records to reward him for his services.

29 Having Mr. Can on the team did not help the project. The stock price dropped to $0.25.

30 Once again, Mr. Heistand contacted Mr. Sarvucci to discuss the problems associated with the falling stock price. Mr. Heistand claimed that the Triads and the Hell's Angels [8] were pressuring him to do something.

31 Mr. Sarvucci did two things. He suggested to Mr. Heistand that he contact the police. He also sold the rest of his shares — the record does not indicate what he held — for $2,700.

32 Subsequently the share price dropped even more.

33 On March 10, 2003 Steve Fassman, an acquaintance of Mr. Sarvucci, told Mr. Sarvucci that he needed to meet with the Habib brothers on an important matter. Minutes later, a person Mr. Sarvucci knew as Phil O, phoned him and asked him to come to a parking lot behind a nearby strip club.

34 As requested, Mr. Sarvucci met Phil O in the designated parking lot. The two entered a nearby warehouse through a back door. Mr. Sarvucci's version of what transpired inside the warehouse is recorded in Detective Andrus' September 22, 2011 affidavit, parts of which are set out below:

> 6 ... Once at the warehouse, Mr. Sarvucci saw several men that he knew, including Mr. Can. He told me that he had been physically assaulted and that his life and the life [sic] of his family were threatened.
>
> 7 . . .
>
> (i) Mr. Sarvucci went into the back door of the warehouse and was shoved inside. Ms. Sarvucci saw Mr. Can walk by and saw a Hell's Angel member was standing inside. He was told to come to the back, where he noted five Pakistani or Middle Eastern males standing off to one side. Also present were Mike and Sam Habib (the Habib brothers), Phil O and an associate of Phil O.
>
> (j) One of the men told Mr. Sarvucci that he owed them money. ... [O]ne ... said that Mr. Sarvucci had sunk his company. Mr. Sarvucci eventually realized it was the Arabel deal they were referring to. The Hell's Angels male said that Mr. Sarvucci owed Mr. Khan money and because Mr. Khan owed the Hell's Angels money, the debt is now theirs and Mr. Sarvucci owed them money. They told him he wasn't leaving until they got their money.
>
> (k) Ms. Sarvucci was told that he owed over $1,000,000. When Mr. Sarvucci tried to explain that he did not owe the money, Sam Habib came over, told him to "shut the fuck up and show him respect". He then pulled out a gun and said that he was just going to shoot him now because they weren't getting anywhere with him. He cocked the gun, put it to his head and said, "give the word, I'll do it". Then Sam Habib hit him on the side of the face.
>
> (l) Mr. Sarvucci was asked about his ... assets. ... He was again told that he was not leaving that day. Mr. Sarvucci called Mr. Apolant in New York and told him that he was in trouble with the Arabel deal, and that he was being accused of owing $1,000,000. Mr. Sarvucci asked if Mr. Apolant could help. Mr. Apolant ... [said] that it was too late to help him until the following morning. Sam Habib grabbed the phone and told Mr. Apolant that it was "too late" and hung up the phone. Mr. Sarvucci sat down at a table and Mr. Khan went over to him and hit him. They continued to tell Mr. Sarvucci that he owed the money and that he was not leaving that day.
>
> (m) The Hell's Angel member told Mr. Sarvucci ... that if he ... [went to] the cops ... his whole family would be dead. He proceeded to list off all the names of his family members.
>
> . . . . .
>
> (o) This went on from 2:30 p.m. to almost 5:00 p.m.
>
> (p) ... They told Mr. Sarvucci that they had people at his house, and could "pop" his wife and kids.
>
> . . . . .
>
> (u) Mr. Sarvucci was confident that Mr. Can was present at the warehouse "the whole time" telling them information. Mr. Sarvucci said that Mr. Can assisted the interrogators by providing information regularly, such as information about Mr. Sarvucci's kids' names and his wife's name.

35 This group of men arranged to have Mr. Sarvucci's driver's licence copied.

36 Later in the afternoon Mr. Sarvucci left the warehouse in the company of a male who had been in the warehouse while he was there. They drove in Mr. Sarvucci's vehicle, followed by two other persons who had been in the warehouse. While on his way home, with the permission of his unwelcome passenger, Mr. Sarvucci spoke with his wife on his cell phone.

37 Detective Andrus' affidavit states that he and Detective Brydges met with Mr. Sarvucci's wife as soon as they concluded their meeting with Mr. Sarvucci. It records what she told them about this cell phone conversation and other cell phone conversations she had which occurred in the same time frame:

> 9. ... During that interview [Paula Pearce, Mr. Sarvucci's wife] ... seemed upset and told us that she had received a phone call from Steve Apolant (on March 10, 2003) telling her that something was wrong and that it sounded like Mr. Sarvucci was in trouble. Mr. Apolant told her that it was in regards to a stock deal Mr. Sarvucci had been involved in, and that he thought there were guys trying to "collect". ... She told us that she was very upset, and that one of Mr. Sarvucci's friends, Steve Fassman, was trying to help her over the phone. ... After speaking with Mr. Fassman, Mr. Apolant called her again, and then Mr. Heistand called her. Mr. Heistand told her that he had a disturbing telephone call from Mr. Apolant and that she should call the police. Mr. Heistand told her that he would also call a constable in British Columbia that knew him.
>
> 10. Ms. Pearce also told us that Mr. Sarvucci called her at some point and that he sounded "not right". She told us that he was saying things that did not make sense to her. Ms. Pearce told us that she eventually asked Mr. Sarvucci if he needed her to call the police and he said yes. She asked him if there was someone else in the truck and he said yes. She asked him if he was okay and he said no. When she hung up, Ms. Pearce called the police. After she hung up, Mr. Sarvucci called Ms. Pearce again. Ms. Pearce told us that she asked Mr. Sarvucci if the people he was with had guns and he said yes. She asked him if there was more than one person and he said yes. She asked him if there were people following him and he said yes. Ms. Pearce ... then went to the Esso station, where she met the police officers.

38 Mr. Sarvucci managed to escape when the man who accompanied him in his vehicle to his home used the washroom.

B. The Calgary Police Service Responded to the Information Mr. Sarvucci Provided to Detective Andrus

39 Detectives Andrus and Brydges reacted immediately to the information provided by Mr. Sarvucci and Ms. Pearce.

40 They asked Mr. Sarvucci to take them to the crime scene as he described it. He did.

41 The Calgary Police Service arrested the Habib brothers on March 11, 2003 — Mike at 8:29 a.m. and Sam at 2:07 p.m. — and interviewed them.

42 After meeting with Mr. Sarvucci and Ms. Pearce, Detective Andrus, the primary investigator, directed other members of the Calgary Police Service to interview the people Mr. Sarvucci and Ms. Pearce identified in their startling stories. The information these interviews produced and which were known to Detective Andrus by the time he ordered Mr. Can's arrest was consistent with the accounts given by Mr. Sarvucci and his wife. For example, a neighbour stated that Mr. Sarvucci came to her home on March 10, 2003 and spoke to the police on his cell phone. In addition, a woman who worked at the warehouse where Mr. Sarvucci said he had been held acknowledged that several of the persons Mr. Sarvucci claimed were present on March 10, 2003 while he was detained, including a person Detective Andrus concluded was Mr. Can, were indeed at the warehouse on March 10, 2003. In addition, the Habib brothers admitted that they were present at the warehouse on March 10. Sam Habib said that he had hit Mr. Sarvucci in the mouth with his fist.

C. Detective Andrus Decided To Order the Arrest of Mr. Can

43 Several members of the Calgary Police Service arrested Mr. Can on the afternoon of March 11, 2003. Detective Andrus made the decision to order Mr. Can's arrest earlier in the afternoon. His September 22, 2011 affidavit explains why:

> 17. ... I believed that Mr. Sarvucci had been held hostage and was the victim of violent extortion. I believed that he and his family were in danger and that I had reasonable grounds to make arrests in the case. I decided that Mr. Can should be arrested, which he was on March 11, 2013.
>
> . . .
>
> 39. It was my decision to order the arrest of Mr. Can, and I do believe that I had reasonable grounds ... upon which to base his arrest. Those grounds included the following:

> (a) My interview with Mr. Sarvucci, where he identified Mr. Can as one of the individuals who held him hostage and as an active participant in the extortion;
>
> (b) My interview with Ms. Pearce, who corroborated Mr. Sarvucci's statement;
>
> (c) The interview with Ms. Fornalik, who confirmed that Mr. Can had been at the warehouse in question on the day in question; and
>
> (d) The interviews with the Habibs, which generally corroborated that Mr. Sarvucci was held against his will at the warehouse and that violence was involved.

44 This passage from Detective Andrus' affidavit makes no mention of a statement given by Ms. Godfrey, the neighbour who allowed him to stay in her home after he eluded his captor.

45 The following part of his September 22, 2011 affidavit describes the gist of the neighbour's statement:

> 13. A statement was taken from Deborah Anne Godfrey, a neighbour of Mr. Sarvucci's on March 10, 2003. I reviewed that statement shortly after it was taken. Ms. Godfrey stated at approximately 6:20 p.m. on March 10, 2003, she saw a man come up her front steps and pause at the front door. The gentlemen knocked on the door, but didn't wait for her to answer. He opened the door and came inside. He was talking on his cell phone at the time. She told him to get out, but he said people were after him and trying to extort money out of him. He handed Ms. Godfrey his cell phone and told her that he was talking to the police. Ms. Godfrey said she took the phone, said hello, and handed it back. Mr. Godfrey said that the man stood at her front door or her front mat until she offered him a chair in the living room. She said he locked the front door and was looking out the small window at the top of the front door. He told Ms. Godfrey that he was her neighbour, and that his name was Anthony. He told Ms. Godfrey that he had been held at gunpoint at a warehouse for a couple of hours that afternoon. He said that he managed to call his wife and alert her that he was in trouble and to get out of the house with the kids and phone the police. Ms. Godfrey said that the man stayed on his cell phone with the 911 operator the entire duration if his stay in her house.

46 No member of the Calgary Police Service, before Mr. Can's arrest, asked him to submit to questioning about Mr. Sarvucci's allegation that Mr. Can played a role in the March 10, 2003 events.

47 Mr. Can's counsel questioned Detective Andrus on this point:

> Q Now, was there a timing issue here that meant it important for Can to be immediately arrested versus waiting for a period of time, while other inquiries were made?
>
> A There was no timing issue. ... We did have a concern for Mr. Sarvucci and his family's well-being. [9]
>
> Q Right, because there was a suggestion of gang activity.

48 Master Mason concluded that Detective Andrus reviewed Ms. Godfrey's statement before Mr. Can's arrest. 2012 ABQB 340 (Alta. Master), ¶27. Justice Bensler and Master Mason worked from the same fact pattern. 2013 ABQB 226 (Alta. Q.B.), ¶3.

49 Subsequent events did not cause Detective Andrus to retreat from the conclusion reached before the arrest of Mr. Can that the arrestee committed the crimes Mr. Sarvucci attributed to him. First, Mr. Can initially denied being at the warehouse on March 10, 2013 when Mr. Sarvucci was present. Second, search warrants executed late in the afternoon on March 11, 2003 at the warehouse produced a copy of Mr. Sarvucci's driver's licence, a rifle, pistol, shotgun, ammunition and a revolver speed loader. Third, another neighbour reported that late in the afternoon Ms. Pearce and two of her children showed up at her front door asking for help. Fourth, the person Mr. Sarvucci said he spoke to in New York

confirmed the version of events Mr. Sarvucci gave to the Calgary Police Service. Fifth, another Calgarian claimed that Mr. Can had threatened him with a firearm to extort money.

D. The Crown Prosecutor Stayed the Charges Against Mr. Can

50 On March 21, 2003 Assistant Chief Judge Stevenson of The Provincial Court of Alberta granted Mr. Can bail.

51 On October 29 and November 3, 2003 the Crown prosecutor stayed the charges against Mr. Can. It would appear that he did so because Mr. Sarvucci had a criminal record in the United States for perjury.

E. Mr. Can Commenced an Action Against Members of the Calgary Police Service and Others

52 On October 22, 2004 Mr. Can filed a statement of claim against several members of the Calgary Police Service, the City of Calgary, the Attorney General of Alberta, Her Majesty the Queen in right of Alberta and others. He amended it on January 14, 2005. On January 15, 2005 he discontinued his action against the City of Calgary.

53 Mr. Can alleges that the defendants who are or were members of the Calgary Police Service acted unlawfully when they arrested and interrogated him. His complaint against the Attorney General of Alberta and the Crown prosecutor is based on the latter's opposition to the plaintiff's release on bail on March 21, 2003. Assistant Chief Judge Stevenson granted the plaintiff bail. Mr. Can asserts that the Crown prosecutor's position is "tantamount to malicious prosecution". He sues for gross negligence, intentional infliction of mental distress and breach of *Charter* rights.

F. The Remaining Defendants Successfully Moved for Summary Judgment

54 On October 4, 2011 Jack Beaton, Douglas Andrus, John Manahan, John Brydges, John Miller and any "Doe" defendant who is a member of the Calgary Police Service applied for summary judgment.

55 The summary judgment applicants filed Detective Andrus' September 22, 2011 affidavit. Mr. Can did not file an affidavit.

56 Plaintiff's counsel informed Master Mason that he would not be proceeding with his malicious prosecution claim against the Attorney General of Alberta and the Crown prosecutor and the assault and battery action against the Calgary Police Service. 2012 ABQB 340 (Alta. Master), ¶3.

57 Master Mason gave summary judgment against Mr. Can. 2012 ABQB 340 (Alta. Master).

58 Her memorandum of decision was thorough and fully explained her conclusion that the Calgary Police Service lawfully arrested Mr. Can. 2012 ABQB 340 (Alta. Master), ¶62. Both the plaintiff and the defendant agreed that if the master held Mr. Can's arrest to be lawful, there was no basis for his claims. 2012 ABQB 340 (Alta. Master), ¶13.

59 Master Mason carefully recorded Mr. Can's factual and legal arguments before rejecting them. Parts of her opinion which demonstrate this most clearly are set out below:

> [37] While Mr. Can submits that there are facts in dispute that need resolution by trial in order to determine the objective existence of reasonable and probable grounds, he did not identify such facts.
>
> [38] ... Mr. Can does not in fact dispute any of the evidence relied on by the defendants, but merely takes issue with the significance and implications of the evidence, and makes incorrect references to the evidence....
>
> . . . . .
>
> [46] ... Mr. Can did not submit any evidence ... in response to this application.
>
> [47] Mr. Can ... emphasizes that before the charges were laid, the Detectives were aware that Mr. Sarvucci was or had been under investigation for fraud, yet none of the defendants checked Sarvucci's criminal record prior to the

> arrest. It was later learned that in fact, Mr. Sarvucci had been convicted of perjury in the United States, which ultimately led to the Crown staying the prosecution.
>
> [48] ... [T]he police need not exhaust their investigation prior to arrest. Det. Andrus stated that although looking into a victim's criminal record is sometimes done, it is not always done before an arrest is made, and simply depends on the circumstances.
>
> [49] ... [E]ven known liars can be victims of crime in need of police protection, and it is unusual for the victim in an extortion case to have clean hands. The Detectives were aware of Mr. Sarvucci's involvement in a past or current fraud matter and were alive to the importance of Mr. Sarvucci's credibility. The investigation ... extended to other sources which confirmed the particulars of his account of the incident. As to the particular involvement of Mr. Can, a warehouse employee placed Mr. Can at the warehouse that day, as did the Habibs. Counsel for Mr. Can asserts that the confirmatory evidence must implicate Mr. Can. That is not correct.

2012 ABQB 340 (Alta. Master).

60 Mr. Can appealed to the Court of Queen's Bench.

61 Justice Bensler dismissed the appeal. 2013 ABQB 226 (Alta. Q.B.). She did so for the reasons adopted by Master Mason, as well as others fully explained in her own judgment. 2013 ABQB 226 (Alta. Q.B.), ¶50.

62 She understood that the applicable standard of review [10] allowed her to make her own assessment and substitute her opinion for that of Master Mason.

63 The appeal judge noted that the summary judgment applicants relied on r. 7.3(1)(b) of the *Alberta Rules of Court* [11] and opined that "[s]ummary judgment will only be granted where there is no genuine issue for trial". 2013 ABQB 226 (Alta. Q.B.), ¶29, relying on 2006 [12] and 2010 [13] decisions of this Court.

64 As they did before the master, the parties informed Justice Bensler that they agreed that if she concluded that Detective Andrus had reasonable and probable grounds for ordering the arrest of Mr. Can then all of the plaintiff's remaining causes of action failed.

65 Both parties accepted that a peace officer may arrest [14] a person without warrant if the peace officer believes that the arrestee has committed an indictable offence and that the peace officer had reasonable grounds to so believe. 2013 ABQB 226 (Alta. Q.B.), ¶33.

66 Justice Bensler understood that Mr. Can did not challenge Detective Andrus' assertion that when he ordered the plaintiff's arrest, he believed that Mr. Can had committed indictable offences. The evidence clearly indicated that he held this belief. 2013 ABQB 226 (Alta. Q.B.), ¶43. As a result, in her mind, "the only question with regard to reasonable and probable grounds in this case is whether Detective Andrus' subjective belief that he had grounds to arrest Mr. Can was objectively reasonable in light of the facts known to him before the arrest". 2013 ABQB 226 (Alta. Q.B.), ¶43.

67 The Queen's Bench appeal judge concluded that the factual record justified the legal determination that the detective's belief that Mr. Can had committed indictable offences was reasonable:

> Detective Andrus had evidence before him that corroborated Mr. Sarvucci's statement. In particular, Mr. Sarvucci's version of events was corroborated at various points by Ms. Pearce through the recounting of the phone calls from Mr. Apolant and Mr. Can, by Ms. Godfrey's explanation of Mr. Sarvucci's entrance into her home, by Ms. Fornalik's confirmation that Jim, Sam and Mike were present at the warehouse during the relevant hours and that she was asked to photocopy a licence. In addition, the Habib brothers confirmed that they had been at the warehouse with Mr. Sarvucci, and that Sam Habib had hit Mr. Sarvucci in the face.

2013 ABQB 226 (Alta. Q.B.), ¶46.

68 Justice Bensler dealt with the fact that the Habib brothers had suggested that Mr. Sarvucci was attempting to extort Mr. Can this way:

> Though the Habib brothers gave a different version of events than Mr. Sarvucci, the bulk of the evidence before Detective Andrus at the relevant time supported Mr. Sarvucci's version of events. ... Mr. Can does not point to any evidence that corroborates the Habibs' allegation. There is no evidence ... that Mr. Can came forward to the police to report an extortion attempt by Mr. Sarvucci and there is nothing to suggest that the Habibs' version of the story is inherently more reliable than Mr. Sarvucci's, in particular since it is not surprising that an individual implicated in the alleged crimes under investigation might provide a contradictory and exculpatory explanation of events.

2013 ABQB 226 (Alta. Q.B.), ¶47.

VI. Analysis

A. Standard of Review

69 Mr. Can challenges Justice Bensler's determination that his claims present no genuine issues for trial. The appeal judge's conclusion is a function of three distinct inquiries. First, she had to identify the test for summary judgment and a lawful warrantless arrest. Second, she had to ascertain the facts to which the summary judgment test would be applied. Third, she had to apply the summary judgment test to the fact pattern and come to a conclusion.

70 Both sides agree that the Queen's Bench judge correctly selected the legal test for summary judgment and a lawful warrantless arrest.

71 But there is a contest with regard to one finding — that Detective Andrus received Ms. Godfrey's statement before he ordered Mr. Can's arrest. To succeed on the fact-finding point, the appellant must demonstrate that the contested fact finding represents palpable and overriding error. *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), ¶116; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), 262 & *Desoto Resources Ltd. v. EnCana Corp.* (2011), 513 A.R. 72 (Alta. C.A.), 76. To succeed on the challenge to the application of the summary judgment standard to the facts, the appellant must convince the Court that the motions judge's decision was unreasonable. *Dingwall v. Foster*, 2014 ABCA 89 (Alta. C.A.), ¶19; *P. Burns Resources Ltd. v. Locke, Stock & Barrel Co.*, 2014 ABCA 40 (Alta. C.A.), ¶11; *Desoto Resources Ltd. v. EnCana Corp.* (2011), 513 A.R. 72 (Alta. C.A.), 76 & *Magellan Morada Investment Ltd. Partnership v. Miller*, 2009 ABCA 124 (Alta. C.A.), ¶12. Contra *Stobbe v. Paramount Investments Inc.*, 2013 ABCA 384 (Alta. C.A.), ¶10 ("Decisions about summary dismissal are reviewed by this Court on the basis of ... palpable and overriding error for questions of ... mixed fact and law").

72 To succeed on his assertion that his arrest was unlawful, Mr. Can must convince the Court that the motions court's conclusion on this question of law is incorrect. *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 275; *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 244 & *R. v. Shepherd*, [2009] 2 S.C.R. 527 (S.C.C.), 537.

B. An Alberta Court May Grant Summary Judgment to a Defendant if the Plaintiff's Claim Is Without Merit

73 The high costs [15] and extensive delays associated with civil trials and the barriers to justice these represent to ordinary Canadians caused the Supreme Court of Canada, in *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), 93, to declare that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims".

74 This conclusion followed these introductory passages:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. The shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. ...
>
> [3] Summary judgment motions provide one such opportunity.

[2014] 1 S.C.R. 87 (S.C.C.), 92-93.

75 This strong endorsement of the merits of summary judgment, one type of expedited dispute resolution procedure, postdates the unequivocal hortatorical message [16] delivered by Alberta courts: "[S]ummary judgment is an important procedure which could be invoked more often than it is. Its proper use expedites litigation, reduces costs for the litigants, frees up scarce judicial resources [17] and ameliorates access to justice issues" (*Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 378) and "Legislators in the United Kingdom, Canada and the United States have introduced summary judgment into their litigation model to ensure that dispute resolution takes place at the earliest point in the litigation continuum where it is just to do so" (*O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶34). [18] In a judgment issued after the release of *Combined Air Mechanical Services Inc. v. Flesch*, this Court confirmed that the "principles stated in ... *Combined Air Mechanical Services Inc. v. Flesch* [regarding Ontario's r. 20] are consistent with modern Alberta summary judgment practice as set out [in r. 7.3 of the *Alberta Rules of Court*]". *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶14. Justice Brown, in *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶29, asserted that Alberta's summary judgment protocol was based on the same principles which the Supreme Court approved in *Combined Air Mechanical Services Inc. v. Flesch*.

76 Alberta courts are dedicated to resolving disputes in the least amount of time practicable and at the lowest possible cost. [19] Summary judgment is just one of the available protocols. Other mechanisms are featured in Part 7 of the *Alberta Rules of Court*, including trials of specific issues [20] and summary trials. [21]

77 It can, without exaggeration, be asserted that the Supreme Court of Canada is preaching to the converted, if part of its target audience includes Alberta's superior courts. [22]

78 Alberta's summary judgment protocol and the other procedures in the Part 7 suite of expedited procedures are built on a foundation that assumes the features a dispute displays may determine the parts of the litigation spectrum which must be accessed to resolve it. [23] Part 1 of the *Alberta Rules of Court* records the foundational rules:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> . . . . .
>
> (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

> (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
>
> (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
>
> . . . . .
>
> (d) when using publicly funded Court resources, use them effectively.
>
> . . . . .
>
> 1.4(1) To implement and advance the purpose and intention of these rules ... the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.
>
> (2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:
>
> . . . . .
>
> (g) give advice, including making proposals, providing guidance, making suggestions and making recommendations ....

79 Rule 7.3(1)(b) of the *Alberta Rules of Court* allows a court to dismiss a claim summarily if it has no merit.

80 I adopt as the correct statement of principles governing the application of r. 7.3 of the *Alberta Rules of Court* those formulated in *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374-78:

> [61] Rule 7.3 of the new *Alberta Rules of Court* allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.
>
> [62] This may exist in a number of scenarios.
>
> [63] First, the moving party is entitled to summary judgment if, as a plaintiff, it presents uncontroverted facts and law which entitle it to judgment against the nonmoving party. [24] The court must be satisfied that the plaintiff has presented uncontested facts which establish all the essential elements of the action. ...
>
> [64] Second, the moving party is entitled to summary judgment if, as a defendant, it presents uncontroverted facts and law, which makes it highly unlikely the plaintiff will succeed. Again, the court must conclude that the uncontested facts before it do not establish an essential element of the plaintiff's action or do establish all the essential elements of a defence. ...
>
> [65] There are a number of relevant principles which underly the fundamental norm that claims or defences that are so compelling the likelihood they will succeed is very high should be dealt with summarily.
>
> [66] First, the legal or persuasive burden rests on the moving party. ... The moving party must present the facts which, in combination with the applicable law, make its position unassailable if the nonmoving party does not contest the facts and the law. ...
>
> [67] Second, the nonmoving party has no legal or persuasive burden to discharge. ... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party. ... The nonmoving party cannot rely solely on its

> pleadings [25] or as the United States Supreme Court opined in *Matsushita Electric Industrial v. Zenith Radio Corp*. ... that "there is some metaphysical doubt as to the material facts". ...
>
> [68] Third, the motions court may not make findings of credibility and resolve contested fact issues. [26] ... If a fact on which the moving party relies to support summary judgment is the subject of a credibility contest, the motion court must dismiss the summary judgment application. [27] ... That a controversy over nonmaterial facts exists is irrelevant.
>
> [69] Fourth, if the law is unclear, [28] either because the moving party is seeking to extend the scope of a well established proposition or to make new law, a chambers judge may decline to resolve the dispute. [29] ... The chambers judge may legitimately conclude that her proper role is to identify unassailable positions, which assumes the law on the issue is settled, not develop the law in the course of a summary judgment chambers application. ... But the chambers judge is entitled to decide the novel legal issue if she wishes to do so. A willingness to decide such a legal issue would be consistent with the goal of expedited justice. ...
>
> [70] Fifth, a nonmoving party's argument that questioning or trial may produce evidence which assists the nonmoving party is without merit. [30] *Canada v. Lameman*, [2008] 1 S.C.R. 372, 382 ("A summary judgment motion cannot be defeated by vague references to what may be adduced in the future if the matter is allowed to proceed") ... & *Apsley v. Boeing Co.*, 722 F. Supp. 2d 1218, 1231 (D. Kan. 2010) ("a party must do more than simply claim that discovery is incomplete").

81 I also agree with the cautionary observation expressed in *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Alta. Q.B.), 19-20 that summary judgment is not appropriate unless the court is satisfied that the "determination of the dispute without making available to a party all stages of the litigation spectrum is just". This is the message *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶15 delivered in this sentence: "Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication".

82 Justice Brown's opinion in *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶29 also merits approbation, because it records the uniform nature of the basic norms recently adopted by Alberta courts and the Supreme Court of Canada:

> [The principles formulated in *Beier v. Proper Cat Construction* and *O'Hanlon Paving Ltd. v. Serengetti Development Ltd.* state] the high threshold which an applicant must meet for obtaining summary judgment, but also contains within it the rationale for granting summary judgment and depriving the respondent of full access to all litigation tools. It is also consistent with those aspects of the Supreme Court's statements in *Canada v Lameman* and *Hryniak v Mauldin* which I have identified as generally applicable to summary judgment applications brought beyond Ontario's borders. Just as it serves neither litigants nor the administration of justice to have claims or defences which are highly likely to succeed thwarted or delayed by forcing litigants to undertake the expense and delay of a full trial, neither are they served when summary judgment is used to prematurely extinguish a potentially meritorious claim or defence for the sake of economy. By its terms, the formulation of the test for summary judgment in *Bei[e]r v Proper Cat Construction* keeps the ... judge's attention focussed upon resolving litigation in a timely and cost-effective manner by imposing a proportionate remedy where it can be said that a claim or defence ought to succeed or fail without further process. In doing so, it promotes robust application of Alberta's summary judgment rule despite its preclusion of factual determinations.

83 There is one additional point.

84 Rule 6.11(1)(g) of the *Alberta Rules of Court* allows a motions court to hear "oral evidence ... given in the same manner as a trial". While there is no provision in the *Alberta Rules of Court* which expressly precludes a motions court hearing a summary judgment application from invoking r. 6.11(1)(g), [31] there are sound reasons to conclude that the

Alberta Rules of Court do so by implication. And even if I am incorrect on this point, I believe that it would be imprudent to admit oral evidence in a summary judgment application.

85 Four reasons explain my opposition to the use of oral evidence in a summary judgment application.

86 First, summary judgment serves a completely different purpose than summary trial. [32]

87 This is not surprising. Summary judgment disposes of a suit before trial [33] and summary trial after trial. [34]

88 Summary judgment removes from the litigation stream those disputes in which the nonmoving's party position is without merit. [35] If the moving party's position is unassailable, it makes sense to allocate as few public and private resources as possible to resolve a dispute the outcome of which is obvious. [36] As stated in *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 378, the summary judgment protocol, when used properly, "expedites litigation, frees up scarce judicial resources and ameliorates access to justice issues". The summary trial mechanism [37] is designed to resolve disputes which display features amenable to just resolution without accessing all aspects of the trial protocol. [38] Proceedings which do not involve contested facts or complicated legal issues are well suited for summary trial. *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 81; Welsh, "Judging the Summary Trial Rule", 44 The Advocate 173, 179 (1986) & Canadian Bar Association, Report of the Task Force on Systems of Civil Justice 41 (1996). But it is still a trial. *U.B.'s Autobody Ltd. v. Reid's Welding (1981) Inc.* (1999), 258 A.R. 325 (Alta. Q.B.), 327 & Welsh, "Judging the Summary Trial Rule", 44 The Advocate 173, 176 (1986) ("an 18A application is in the nature of a trial"). Generally, trials are the best method for determining contested facts. *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶16 ("Trials are for determining facts").

89 Second, the internal structure of r. 7.3 contemplates that a summary judgment application will be resolved by reference to the pleadings and affidavits. Rule 7.3(2) states that an application for summary judgment "must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met". It is a unique protocol intended to be implemented as a stand-alone methodology.

90 This rule makes no reference to oral evidence. This is not an oversight. It would have been incorporated into the summary judgment rule had it been thought desirable to do so. Its omission is an unequivocal statement that oral evidence is not part of the summary judgment protocol. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (U.S. Sup. Ct. 2005), 344 ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our relucatance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

91 Oral evidence can play a useful role in summary trials. The *Alberta Rules of Court* allow a summary trial judge to hear oral evidence if it is appropriate. [39] *SHN Grundstuecksverwaltungsgesellschaft MBH & Co. Seniorenresidenz Hoppegarten-Neuenhagen KG v. Hanne* (2012), 72 Alta. L.R. (5th) 276 (Alta. Q.B.), 285. So did the old rules in force before November 1, 2010. *Alberta Rules of Court*, Alta. Reg. 390/68 as am. Alta. Reg. 152/98, s. 6 (in force September 1, 1998). See *Welch v. Bancarz*, 2008 ABQB 60 (Alta. Q.B.), ¶13; *Compton Petroleum Corp. v. Alberta Power Ltd.* (1999), 242 A.R. 3 (Alta. Q.B.), 15 & *Adams v. Norcen Energy Resources Ltd.* (1999), 72 Alta. L.R. (3d) 234 (Alta. Q.B.), 245.

92 This lacuna makes the structure of Alberta's summary judgment protocol dramatically different from Ontario's counterpart, [40] r. 20.04 of the *Rules of Civil Procedure.* Part of r. 20.04(2.1) reads as follows:

> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. [41]

93 Presumably Ontario welded these additional fact-finding features onto its summary judgment model because summary trial [42] is not part of Ontario's expedited dispute resolution procedures. *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), 103 (Ontario rejected the Civil Justice Reform Project report's recommendation to adopt a summary trial procedure and "the legislature made the choice to maintain summary judgment as the accessible procedure"). The conditions which prompted Ontario to marry two distinct concepts do not exist in Alberta. *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶19 ("Ontario's Rule 20.04(2.1) provides for a process that is broadly comparable to an application under Alberta's civil procedure ... for judgment by way of summary *trial* under Rule 7.5") (emphasis in original).

94 Third, the motions court may have to invest a significant amount of time to hear oral evidence. This may sacrifice the expeditious elements built into the streamlined summary judgment procedure. One can envisage fact patterns where the resolution of a fact-in-dispute may necessitate hearing from several witnesses and trigger other evidentiary controversies that would not otherwise arise. See *N. (J.) v. Kozens* (2004), 361 A.R. 177 (Alta. C.A.), 189 (extensive cross-examination of several witnesses defeats the purpose of an expedited procedure) & *Adams v. Norcen Energy Resources Ltd.* (1999), 72 Alta. L.R. (3d) 234 (Alta. Q.B.), 245 ("It is unlikely that these conflicts may be resolved by having viva voce testimony from one or two witnesses; rather it is likely that many witnesses will have to be called to enable the summary trial judge to make the necessary finding of facts").

95 Fourth, a r. 7.3 summary judgment application is not an expedited dispute resolution protocol that has to be distorted to resolve disputes in less time and cost than a trial would necessitate. Part 7 of the *Alberta Rules of Court* introduces two other discrete models — trial of an issue and summary trial — that were created for that purpose. The trial of an issue and summary trial options may be more suitable than summary judgment in some fact patterns. But the point is this: their existence eliminates the need to convert Alberta's summary judgment vehicle into the hybrid model Ontario's rule makers built.

96 The wisdom of converting a protocol designed to remove disputes from the active file list because the nonmoving party's position is without merit into one which resolves legitimate issues — both the moving and nonmoving parties' positions have merit — is not clear. Other components of the Part 7 suite of expedited dispute resolution tools are available to resolve disputes the outcomes of which are not obvious.

97 The fact that the Supreme Court declared in *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), 101-02 that its positive evaluation of expedited dispute resolution mechanisms is of "general application" does not mean that Alberta's robust Part 7 suite of "rocket docket" [43] provisions is in any respect deficient. Alberta has the sole constitutional jurisdiction to fashion its own civil procedure rules and need not follow the Ontario model. *Combined Air Mechanical Services Inc. v. Flesch* does not, in any way, support the notion that the existing principles which govern Alberta's summary judgment rule need to be revised. [44]

98 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶16 does not stand for the proposition that *Combined Air Mechanical Services Inc. v. Flesch* jettisoned a made-in-Alberta summary judgment rule that was straightforward, simple and easy to apply and the progeny of the Supreme Court of Canada's judgment in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372 (S.C.C.) [hereinafter Lameman], 378. Rule 7.3 of

the *Alberta Rules of Court* came into effect on November 1, 2010, literally on the heels of the Supreme Court of Canada's opinion in *Lameman*, interpreting the predecessor of r. 7.3. The following passage clearly shows the congruence between the Supreme Court's opinion in *Lameman* and r. 7.3.:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying *unmeritorious* claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. (emphasis added)

[2008] 1 S.C.R. 372 (S.C.C.), 378.

99 The best reading of *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) is that r. 7.3 of the *Alberta Rules of Court* "allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit", the position set out in *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374. Is this not the clear meaning of the passages from *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶¶16 & 21:

> [16] ... On appeal it is appropriate to examine the summary dismissal application to see whether there is in fact any issue of 'merit' that genuinely requires a trial. When the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate .... Trials are for determining facts ....
>
> . . . . .
>
> [21] The appellant's evidence that it was not foreseeable that the migration of TCE would cause harm to neighboring lands is uncontradicted on this record. A party faced with an application for summary judgment must put its best foot forward, and present evidence to show sufficient 'merit' to establish a genuine issue requiring a trial with respect to the outstanding issues: *Lameman* at para. 19. Speculating that evidence might be available at a trial is not sufficient to create a genuine issue requiring a trial. [45]

100 Nothing in *Windsor v. Canadian Pacific Railway* is inconsistent with the theme of this part of the judgment — Part 7 of the *Alberta Rules of Court* contains several protocols that each have their own distinct features and utility in aligning disputes with the protocol best suited to the earliest and least expensive dispute resolution.

101 There is no need to revisit either the purpose or the principles used to implement the summary judgment rule. Rule 7.3 and its predecessors have been in place since 1914. There is a settled understanding of the rule's purpose and principles. [46] And these are entirely in accord with the values endorsed by *Combined Air Mechanical Services Inc. v. Flesch*.

102 The Supreme Court's *Combined Air Mechanical Services Inc. v. Flesch* judgment does not support the conclusion that any reassessment of the purpose or principles of summary judgment under Part 7 of the *Alberta Rules of Court* is either desirable or necessary.

103 While *Combined Air Mechanical Services Inc. v. Flesch* does recognize that the current litigation system is stressed by the demands made by litigants and must adjust to meet these societal needs, it is primarily the role of legislators to make major changes to the litigation process. Alberta's legislators have responded. Summary trial was added to the litigation repertoire in 1998. And summary judgment has been available for a very long time. More changes are on the way. [47]

104 To summarize, in Alberta summary judgment is appropriate if the moving party's position is so compelling that the likelihood of success is very high. *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374.

105 Both parties agree that if this Court concludes that Detective Andrus' decision to order the arrest of Mr. Can meets the standard for a warrantless arrest embedded in s. 495(1)(a) of the *Criminal Code*, that this Court must dismiss this appeal.

106 The Court will now consider whether Mr. Can's warrantless arrest was lawful.

C. A Peace Officer May Arrest a Person Without a Warrant if the Conditions Under S. 495(1)(a) of the Criminal Code Are Present

1. Liberty and Law Enforcement Values Shape Arrest Powers

107 Section 495(1)[48] of the *Criminal Code* stipulates that a peace officer may effect a warrantless arrest under a number of scenarios. One, set out in s. 495(1)(a), is that a "peace officer may arrest without warrant ... a person who ... on reasonable grounds ... he believes[49] has committed ... an indictable offence".[50]

108 What does s. 495(1)(a) mean?[51]

109 Does it sanction these two basic inquires? First, did the arrestor believe that the arrestee had committed an indictable office? This is a subjective inquiry. Second, did the arrestor have reasonable grounds for his or her belief? This is an objective undertaking.[52] I think so.

110 But what degree of certainty is required before peace officer X can be held to believe that A has committed an indictable offence?

111 Can it be said that X does not believe A has committed an indictable offence unless X is 100 percent certain that A has committed an indictable offence?[53] A police officer will seldom have this level of conviction given the manner in which information is collected and the limited ability to verify it. This cannot be the law.

112 If 100 percent certainty is not necessary, what lesser degree of certainty is required before one can conclude that X believes A has committed an indictable offence?[54] Is it enough if X believes that it is more likely than not — fifty-one percent degree of certainty — that A has committed an offence?[55] Is it enough if X is moderately certain — a degree of certainty approaching fifty percent — that A has committed an indictable offence?[56] Is it enough if X suspects that A has committed an indictable offence?[57]

113 I will revisit this issue after considering the context in which this topic arises.

114 This statutory provision synthesizes two distinct values.[58]

115 One celebrates the autonomy of the individual — free will.[59] It champions a person's freedom to go where she pleases when she pleases and determine what use anyone makes of her property.[60] This is the liberty value. We cherish it. Lord Simonds, in *Christie v. Leachinsky*, [1947] A.C. 573 (U.K. H.L.), 591, examined the fundamental nature of liberty from the perspective of the limitation: "every citizen ... [has the right] to be free from arrest unless there is in some other citizens, whether a constable or not, the right to arrest him".

116 This value accounts, in part, for many provisions in the *Canadian Charter of Rights and Freedoms*[61], including mobility rights,[62] liberty rights[63] and the right to be secure against unreasonable search and seizure[64] and not to be arbitrarily detained or imprisoned.[65]

117 The second value arises from the first. It affirms the community's interest in providing an environment in which the first value may be safely exercised. "The people of this country have a right to go about their daily lives without fear of harm to their person". *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), 48. See *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 249 ("society ... needs protection from crime"). The proponents of the second value maintain that liberty is less valuable if private and public places are not safe [66] when others choose to exercise their liberty by engaging in unlawful acts. [67] The law must be enforced to protect important community interests. [68]

118 Unlawful acts may diminish the benefits freedom represents to the community. As a result, the state must identify criminals and take the steps needed to limit criminals' ability to diminish the benefits the first value represents for law-abiding persons. One of the means a state may employ in its pursuit of its legitimate goal of identifying and punishing criminal actors is bestowing power on persons to forcibly restrain persons who may have committed crimes before the ultimate determination of criminal conduct has been made. [69] Granting persons in the community the authority to limit temporarily, without express judicial authorization, freedom of movement of persons displaying the markers of criminality results in the abridgment of the freedom for these members of the community. [70] This is the law enforcement value. [71]

119 Justice Dickson, as he then was, in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 167-68, described the norm legislators created to define the conditions under which the state may legitimately advance the second value at the expense of the liberty value of some of its members: "The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion". [72] Did the justice mean that whatever point on the scale of degree of certainty was selected the decision maker must be able to provide reasons for his or her belief that this degree of certainty exists? Determining the location of this important point on the scale measuring degree of certainty is the product of a sensitive evaluation of the merits of the two competing values and must be a reasonable assessment. [73]

2. Different Degrees of Certainty Are Available To Define a Lawful Warrantless Arrest

120 Anglo-Canadian-American criminal law has recognized for some time that the prosecution must prove the essential elements of the crime charged beyond a reasonable doubt [74] before a criminal sanction may be imposed. This reflects the magnitude of the adverse consequences attendant upon a criminal conviction — potential loss of liberty, reputational damage and future economic loss. *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), 119 ("An individual charged with a criminal offence faces grave social and personal consequences") & *Commonwealth v. Koczwara*, 155 A.2d 825 (U.S. Pa. S.C. 1959), 835 ("The laceration of a man's reputation, the blemishing of his good name, the wrecking of his prestige by a criminal court conviction may blast a person's chance for honorable success in life to such an extent that a jail sentence can hardly add much to the ruin already wrought upon him by the conviction alone").

121 There is a correlation between the nature of the consequences of a decision and the degree of risk tolerance we have for incorrect determinations. As the detriment for a person adversely affected by a decision increases, the community's tolerance of risk for an incorrect decision diminishes. To reduce the risk that a person will suffer adverse consequences unjustly the degree of certainty which must be attained escalates in unison with the elevation of the severity of the adverse consequences. This explains why the criminal standard of persuasion — proof beyond a reasonable doubt — is so high. [75]

122 The state must have a test that a peace officer must meet before he or she may lawfully arrest another without prior judicial authorization — a warrantless arrest — on account of suspected criminal conduct. When does the degree of certainty or likelihood [76] a person has committed a criminal act become high enough to conclude that the law enforcement value is sufficiently important to justify the abridgment of the liberty value? [77] This is a "delicate balanc[ing]" exercise. *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 64-65.

a. The Standard for a Warrantless Arrest Must Be Capable of Use Under Exigent Circumstances in the Field

123 A court must remember that the principles it crafts for the regulation of warrantless arrests made by front-line police officers must be capable of application under adverse conditions in the field. [78] An officer may have to make a decision when the situation demands a prompt determination [79] and other equally important issues press for consideration — such as the safety of persons in the vicinity of the confrontation, including the potential arrestee and members of the public and the police service. [80] Benchmarks of validity must be as simple as possible and easy to understand. Rules which are unnecessarily complicated compromise the police role. It makes no sense to deliver to a peace officer an arrest power that effectively handcuffs the officer because it is too complex or otherwise unintelligible.

124 But it must not be forgotten that the test which delineates the lawfulness of a warrantless arrest determines whether one person may lawfully limit the freedom of movement of another in our community. The test must be sufficiently clear so that both the arrestor, the arrestee and a court can understand the elements of the test. There is no reason why the legal standard for a warrantless arrest should not be clear. [81]

125 Surprisingly, the top courts in Canada [82] and the United States have declined to define precisely the elements of a lawful warrantless arrest. The United States Supreme Court has expressly favored a vague standard to measure the lawfulness of a warrantless arrest. In *Maryland v. Pringle*, 540 U.S. 366 (U.S. Sup. Ct. 2003), 371 Chief Justice Rehnquist, for the Court, opined that the "probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances". A recent opinion confirms that this view still prevails. Justice Kagan, in *Florida v. Harris*, 133 S.Ct. 1050 (U.S. Sup. Ct. 2013), 1055, pronounced that "we have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach". See also *Ornelas v. US*, 517 U.S. 690 (U.S. Sup. Ct. 1996), 695 ("Articulating precisely what 'reasonable suspicion' and 'probable cause' means is not possible. They are commonsense, nontechnical conceptions that deal with 'the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians act'").

126 The United States Supreme Court, in *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175, held that "probable cause" in the Fourth Amendment "mean[s] more than bare suspicion". But how much more? It is also declared, in the same case, that it means less than proof beyond a reasonable doubt. 338 U.S. 160 (U.S. Sup. Ct. 1949), 175. But how much less? Why the commitment to vagueness? Professor LaFave, in his classic work, 2 Search and Seizure: A Treatise on the Fourth Amendment (5th ed. 2012) 84 posed the question this way:

> But what degree of probability? Specifically, is it necessary that the particular matter under consideration (i.e. that a crime has been committed, that a particular person has committed it, that evidence of crime is to be found in a particular place or that a particular object is evidence of crime) be more probable than not, or will something short of this suffice?

127 While precision in the test is desirable and attainable, the circumstances to which it must be applied vary so greatly that reasonable persons may be expected to hold different opinions as to whether an arrest is lawful or not. It follows that a court discharging its important function as the adjudicator of the lawfulness of police field decisions must not apply the governing principles as if they were constructed for application in a legal laboratory. They must receive a context-sensitive assessment. [83] This is the message I extract from Justice Moldaver's important observation in *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 281: "Assessing whether a particular constellation of facts ... [authorizes challenged police conduct] ... must not ... devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of the reasonable person armed with the knowledge, training and experience of the investigating officer." [84] Chief Justice Burger made the same point more than thirty years ago in *United States v. Cortez*, 449 U.S. 411 (U.S. Ariz. S.C. 1981), 418: "[T]he evidence ...

collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement".

b. The Standard for a Lawful Warrantless Arrest Must Be Precise and Incorporate a Measure Based on a Specific Degree of Certainty that the Arrestee Has Committed an Arrestable Offence

128 To repeat, the test itself must be precise. [85] But what degree of certainty should it adopt? [86]

129 I will now tackle this thorny problem.

130 Should the community restrict the power of arrest to those circumstances in which an objective observer may conclude that the arrestor had a very high degree of certainty that the arrestee committed an indictable offence? This may equate, in mathematical terms, to at least an eighty percent degree of certainty. [87] In other words, the arrestor must conclude that it is at least four times as likely that the arrestee committed an indictable offence as not. [88]

131 Is the insistence on a very high degree of certainty too demanding a mark? Is this range an invitation to lawlessness? Would a less stringent standard be appropriate? Should the power of arrest be available if the facts known to the arrestor, objectively assessed, support the conclusion to a high degree of certainty that the arrestee has committed an indictable offence? In mathematical terms, this may be a range starting at fifty-one percent [89] and ending at seventy-nine percent. If peace officer X concludes that Y is at least more likely than not to exist X has a high degree of certainty that Y exists. Many judges and commentators may hold the opinion that this standard sets the bar too high. These two options cover the top half of the certainty scale.

132 The bottom half of the certainty scale consists of three components. One sector identifies an extremely low degree of certainty. In this category X believes that Y is a remote possibility. X knows that almost anything is possible. In mathematical terms this may represent a range of certainty from .0001 to ten percent. [90] The second sector represents a low degree of certainty. It covers a range from eleven to thirty-five percent. To my way of thinking, reasonable suspicion falls here. [91] The third category of the bottom half of the scale of certainty may be referred to as a moderate degree of certainty. It covers the degrees of certainty from thirty-six to fifty percent. [92]

133 Would any state which understands the fundamental importance of the rule of law and recognizes the merit of the liberty value make lawful an arrest made by a police officer who believes to an extremely low degree of certainty that the arrestee committed an arrestable offence? No. This would sanction arrests based on hunches. [93] This measure would give unjustifiable priority to the law-enforcement value and force too many persons who are innocent of any crime to endure arrest. Colb, "Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms", 73 Law and Contemp. Prob. 69-73 (Summer 2010). See also *R. v. Navales*, 2014 ABCA 70 (Alta. C.A.), ¶37 (Berger J.A. spoke against a standard sanctioning detention on the "mere 'possibility' of criminality").

134 This is so regardless of the skill level of the police force. Can it be assumed that if a police force consists of trained professionals, [94] that its members will make arrests only in appropriate circumstances? No. Such a law would undermine the principle that freedom is a virtue and erode the state's commitment to the rule of law. A community whose members may be arrested on the unaccountable exercise of a power of arrest [95] would be living in a police state — not a free state.

135 Here is a hypothetical which confirms why legal decisions which affect the liberty of a person should not be based on an extremely low-degree-of-certainty determination.

136 Suppose that X, a Canadian police officer, works a densely populated urban beat and that he received notice at 6:00 p.m. that a homeowner just reported that his house had just been broken into. The homeowner did not see the burglar. He could not provide any information about the intruder. Could X, when ten blocks away from the location

of the break-in, arrest A, [96] the first male he came across wearing running shoes, because in the past X had caught Z, a male, breaking into a house and Z wore running shoes? [97] Objectively evaluated, the likelihood A is the burglar is close to zero. Given the complete absence of any information about the intruder, the target could be anyone within a large radius of the break-in. There could be tens of thousands of persons in the set of potential burglars.

137 Suppose that D, a person in the vicinity of the home broken into, called police to report that he saw a young male with white running shoes run by him carrying something. This information is relayed to X. Now six blocks from the break-in, X spots A, a young male wearing white running shoes and a number nine Nashville Predator jersey running towards him carrying a Gold's gym bag. Can X lawfully arrest A? Because a large number of young males wear white running shoes and are on the streets in the evening, objectively assessed, one may conclude there is a low degree of certainty that A is the burglar. A is a member of a very large group of persons who may have committed this crime — a young male in the vicinity of the break-in who was carrying something. But A may be a member of a group populated by those who were in the vicinity of the break-in shortly after it occurred and who had nothing to do with the break-in. The links between A and the break-in are tenuous. A may not be the person the witness saw. Even if A is the person the witness spotted, A may have just happened to be in the neighborhood playing basketball with a friend and decided to run home.

138 X may now have enough information to trigger the low-degree-of-certainty standard — eleven to thirty-five percent. Is the low degree of certainty standard unacceptable to justify an arrest because it shows insufficient regard for the liberty value? Most legally-trained persons would probably think so. [98]

139 Would it be appropriate to sanction a warrantless arrest if the degree of certainty was less than but close to the more-likely-than-not point on the scale of certainty? This is the moderate degree of certainty. In mathematical terms, the range may be between thirty-six and fifty percent. [99] This appears to be the standard which governs warrantless arrests in United Kingdom, [100] New Zealand [101] and the United States. [102] It may also be the law in Canada. [103]

140 Selecting this moderate degree of certainty gives a police officer considerable latitude, [104] as the following example shows. Suppose that police officer X receives more information before he encounters A. X learns that the homeowner's neighbor had called the local police station and related that he saw a young white male wearing white running shoes and a hockey jersey jump out of his neighbor's side window carrying something. X now has reason to believe that the burglar is a young white male wearing white running shoes and a hockey jersey and carrying something. This is a significant enhancement to the knowledge X had in the previous hypothetical. If the information the police officer has, objectively evaluated, need not meet the more-likely-than-not degree of certainty but support a finding of a moderate degree of certainty — the Americans sometimes call it a fair probability and the English refer to it as reasonable suspicion — X could lawfully arrest A. There is an objective basis to believe that a young white male wearing white running shoes and a hockey jersey and carrying something is the culprit. A displays those features. [105] While it is far from a certainty that A is the burglar, objectively measured, the degree of certainty is somewhere in the thirty-six to fifty percent range.

141 Will the state allow a peace officer to arrest a person only if a fact pattern exists which allows a reasonable person to conclude that it is at least more likely than not [106] that the person has committed a criminal offence? [107] Professors Coughlan and Luther, in Detention and Arrest 76-78 (2010) are satisfied [108] that this is the standard for a lawful warrantless arrest in Canada:

> In the arrest context, the standard does not require so high a standard as *prima facie* case. However, it does require that the thing believed *be more likely than not, that it be probable*. ... Many courts, the Supreme Court among them, have continued to use the phrase "reasonable and probable" when speaking of the required grounds for arrest. ... It has occasionally been suggested that "reasonable grounds" in the arrest context can be satisfied by something less than probability, but this interpretation arises from failure to pay attention to context. The source of the confusion is a statement by the Supreme Court in *Mugesera v. Canada* ... in which the Court said that reasonable grounds to believe required less than the civil standard of proof on the balance of probabilities. To apply this in the arrest

> context is to ignore that it is a statement about the standard in the *Immigration Act* for refusing entry to suspected war criminals, not a standard in the *Criminal Code* ... There is no basis for thinking that it overrides [the Supreme Court's] statements in *Storrey, Debot, Barren v. Canada*, or other cases which maintain the probability requirement (emphasis added).

142 A fifty-one percent degree of certainty is the starting point of the high degree of certainty sector of the spectrum. Suppose that the neighbor reported to the police that he had seen a young white male wearing white running shoes and a number nine Nashville Predators' jersey carrying a Gold's gym bag leave his neighbor's house. The degree of certainty, objectively assessed, that A is the burglar now meets the more-likely-than-not standard. The fact that A is a young white male wearing white running shoes and a number nine Nashville Predators' jersey and carrying a Gold's gym bag considerably increases the likelihood that A is the housebreaker. X knows that not many people in this urban area are fans of the Nashville Predators' and wear the Predators' jersey. This dramatically reduces the size of the group to which A belongs. The fact that A is wearing a specific jersey number and carrying a Gold's gym bag markedly increases the degree of certainty A is the burglar. See *R. v. Crowther*, 2013 BCCA 364 (B.C. C.A.), ¶¶34 & 35 (arrestees wore wet and muddy clothes when they were lawfully arrested inside a house very close to the scene of a very recent brutal beating that was administered in a wet and muddy area); *R. v. Grotheim* (2001), [2002] 2 W.W.R. 49 (Sask. C.A.), 60 ("the arrestor acted reasonably in concluding that an injured man in the company of the arrestee, shortly after a motor vehicle accident, suffered his injuries as a result of the arrestee, while impaired, driving his truck into a tree) & *Draper v. United States*, 358 U.S. 307 (U.S. Ill. S.C. 1959), 333 (the fact that the arrestee displayed the same physical attributes, wore the clothes and walked in the same manner the informer described gave the arrestor probable cause). In this fact pattern, it is safe to conclude that if A displayed these features, X could lawfully arrest him.

143 This point on the scale measuring likelihood of criminality — a high degree of certainty — would accord considerable weight to the liberty value. At the same time, settling on this measure as opposed to a less onerous standard, impairs to some extent the community's ability to vigorously pursue law enforcement objectives. Most jurists would be reluctant to adopt such a demanding standard for a lawful warrantless arrest.

144 If the law enforcement value is not given sufficient weight in the more-likely-than-not model, it goes without saying there would be no support for a more demanding standard — a very high degree of certainty. Police officers would be unable to do the job society has assigned to them if they labored under such onerous standards. The community would pay a severe price to accord this much weight to individual liberty. [109]

3. The Supreme Court of Canada Has Not Unequivocally Stated the Degree of Certainty Which Defines a Lawful Warrantless Arrest

145 The Supreme Court of Canada has never stated with precision the degree of certainty that justifies an arrest under s. 450(1)(a) of the *Criminal Code*. Generally, speaking, it has been content to tell us what it is not.

146 Stating what a concept is by declaring what it is not is usually of limited value. Suppose that a symphony announces that its next concert will feature a composer who was born after Ludwig van Beethoven died — 1827 — and before John Adams, the American minimalist composer was born — 1947. This information provides boundaries and effectively tells patrons that Johan Sebastian Bach (born 1685), Joseph Haydn (born 1732) and Thomas Adès (born 1971) will not be played — but is that enough information for a patron who has to decide whether she will attend the orchestra's next performance?

147 In *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 270, 282& 284, Justice Moldaver, for the majority, explained that reasonable grounds to believe is a more demanding concept than reasonable grounds to suspect concept. He opined that the latter "is a matter of probabilities" and the former is a matter "possibilities"? Almost anything is possible. Justice Moldaver said that it means police officer X believes that A "might" have committed an indictable offence. [2013] 3 S.C.R. 250 (S.C.C.), 282. But what degree of certainty does this entail?

148 And what does "probabilities" mean? It means "reasonable and probable grounds". [2013] 3 S.C.R. 250 (S.C.C.), 282. Reasonable and probable grounds to believe what? To believe that the arrestee has committed a criminal offence? No. Because the case law makes it clear than arrestor can lawfully arrest without evidence which would justify a conviction.

149 Justice Cory in *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 250-51, was content to say this:

> In summary ... the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base an 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 probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. *Specifically, they are not required to establish a prima facie case for conviction before making the arrest* (emphasis added).

150 With respect, this passage says nothing about the degree of certainty this measure contemplates. And stating that the police officer need not have acquired information which establishes a prima facie case appears to be a determination that the very high standard of proof — proof beyond a reasonable doubt — is not applicable. [110]

151 A review of the Supreme Court of Canada's opinions on warrantless arrest demonstrates that there are only two possible answers to how certain must the arrestor and the objective evaluator be before an arrest under s. 495(1)(a) of the *Criminal Code* is lawful. It is either a moderate or a high degree of certainty. There is no reason to argue that the extremely low, low or very high degrees of certainty have any judicial support.

152 If I am correct, two separate but related conditions must co-exist. Each condition is drafted to reflect the uncertainty in the law.

153 First, the arrestor must believe, [111] at the time the arrest was made, [112] that there is (a) a moderate degree of certainty or (b) a high degree of certainty [113] that the arrestee has committed an indictable offence. This is a subjective assessment and a question of fact. *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 251 & *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 298.

154 The second condition exists if a reasonable person, with the arrestor's training and experience and aware of the facts known to the arrestor, [114] would conclude that (a) there is a moderate degree of certainty or (b) a high degree of certainty that the arrestee has committed an indictable offence. [115]

155 This assessment must be based on all information known to the arrestor at the time the arrest is effected — "the totality of the circumstances". *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 233 ("Reasonable suspicion must be assessed against the totality of the circumstances"); *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 281 ("Reasonable suspicion must be assessed against the totality of circumstances"); *Florida v. Harris*, 133 S.Ct. 1050 (U.S. Sup. Ct. 2013), 1055 (the Court again endorsed "a more flexible, all-things-considered approach") & *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 230-31 ("The totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip").

156 The existence of the second condition is a question of law and an objective evaluation. *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 251; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), 193 & *Henry v. US*, 361 U.S. 98 (U.S. C.A. 7th Cir. 1959), 102. See S. Penney, V. Rondinelli & J. Stribopoulos, Criminal Procedure in Canada 127-28 (2011).

157 But I am troubled by the fact that the Supreme Court of Canada has not clearly articulated the standard it favors for a warrantless arrest. [116] For this reason, and my conclusion in the next part, that Detective Andrus' decision to make a warrantless arrest is objectively justified on the high degree of certainty standard — more-likely-than-not, I do not

have to decide what degree of certainty is required for a lawful warrantless arrest. There will be another occasion to resolve this issue when the arrestor, objectively assessed, cannot be adjudged to have had reason to believe that it is more likely than not that the arrestee had committed a crime. In such a case, Canadian jurists will have to determine with precision what the degree of certainty must be. How much certainty is required in a society which cherishes individual freedom and personal autonomy?

4. A Police Officer May Rely on Information Not Admissible in a Criminal Trial

158 Having discussed the legal standard by which the lawfulness of a warrantless arrest is measured, some consideration must be given to the data on which a police officer may justifiably rely when determining whether the fact pattern known to the officer justifies a warrantless arrest. Professors Coughlan and Luther provide a very helpful discussion in their book Detention and Arrest 78-80 (2010):

> The information that can enter into forming a basis for reasonable and probable grounds [for a warrantless arrest] need not be evidence that would be admissible in court as proof that the accused was guilty. Hearsay evidence can be used as a basis for forming reasonable grounds, for example. Similarly, accused's past history of involvement in violent crimes can help inform a peace officer's reasonable belief that the accused has committed an offence, though for the trier of fact to rely on the same information to make the same inference at trial would be [improper] propensity reasoning .... An accused's reputation can also contribute to forming reasonable grounds, though it would not alone be enough to create them. Similarly, police are entitled to rely on eyewitness identification without cautioning them against the frailty of such evidence in the way that a jury would be instructed.
>
> . . . . .
>
> ... [A] peace officer must take into account all the information available to her, and is entitled to disregard only that which there is good reason to believe is not reliable. More specifically, police are not entitled to rely on the incriminating evidence they discover and to ignore the exculpatory evidence.

See also *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 172-73.

159 My review of the caselaw [117] leads me to conclude that Professors Coughlan and Luther have accurately analyzed the law.

D. Mr. Can's Warrantless Arrest Was Lawful Under S. 495(1)(a) of the Criminal Code

160 Detective Andrus ordered the warrantless arrest of Mr. Can in the afternoon on March 11, 2003. This means that the Court must focus on the information which he processed before deciding to issue the arrest order, his state of mind at that moment. What degree of certainty characterized his belief that Mr. Can had committed the indictable offences of extortion and false imprisonment? The Court must also ask whether a reasonable observer with the attributes of Detective Andrus — his experience and training — and access to the same data as the arrestor took into account, would have concluded that there was a high degree or a moderate degree of certainty that Mr. Can committed the offence of extortion and forcible confinement.

161 There is no dispute about the arrestor's state of mind. He believed that Mr. Can had committed the indictable offences of extortion and forcible confinement. This meets the very high degree of certainty test. The subjective component would have been met if the arrestor had claimed a lesser degree of certainty. The dispositive dispute centers on the Court's assessment of the second part of the test — the objective measure.

162 A reasonable person with Detective Andrus' experience and training and given the data on which the arrestor relied would have easily concluded with a high degree of certainty that Mr. Can had committed the indictable offences of extortion and forcible confinement.

163 After Detective Andrus completed his interview of Ms. Pearce, the complainant's wife, he had collected enough information to justify Mr. Can's arrest under s. 495(1)(a) of the *Criminal Code*. The information he had in his possession

would justify an objective observer concluding with a high degree of certainty — that it was more likely than not — that Mr. Can had committed indictable offences. Obviously, if the objective standard is only a moderate degree of certainty, a reasonable observer would have also concluded using this lesser standard that Detective Andrus was entitled to arrest Mr. Can.

164 The arrestor had interviewed Mr. Sarvucci, the alleged victim, for seventy-six minutes and had a detailed account of a complicated fact pattern that occurred earlier in the day and revealed serious criminal activity on the part of Mr. Can. [118] Detective Andrus' affidavit stated that "Mr. Sarvucci was confident that Mr. Can was present at the warehouse 'the whole time' ... providing [the interrogators] information regularly, such as information about Mr. Sarvucci's kids' names and his wife's name. [119] Detective Andrus was a very experienced police officer who must have developed the interview skills needed to detect falsehood and exaggeration. [120] A police officer's experience must be given considerable credit when he or she attributes a determination to experience. [121] In addition, his version of the facts involved others who could be asked to verify his version. His wife, Ms. Pearce, was one of them. Ms. Pearce provided Detective Andrus with information that was entirely consistent with the account Mr. Sarvucci had just given him. And like Mr. Sarvucci, her account included identifiable third parties. For example, Ms. Pearce claimed that when she left her house on the afternoon of March 10, 2003, after her husband asked her to do so, she met with members of the Calgary Police Service. There persons were readily available and could be asked for their recollection of their part in this episode. The fact that she did not mention Mr. Can's name is not significant. She did not provide the detectives with the names of any of the persons Mr. Sarvucci said were at the warehouse. Her account confirms Mr. Sarvucci's claim that he was held against his will. This is the nature of the contribution her interview provided in assessing the legal effect of the information on which Detective Andrus acted. [122]

165 But Detective Andrus did not order the arrest of Mr. Can until the afternoon of March 11. And with the passage of time the arrestor acquired more information which increased significantly the degree of certainty that the account related by Mr. Sarvucci of the key events of March 10, 2003 was reliable. The information supplied by the Habib brothers confirmed that Mr. Sarvucci had been held against his will at the warehouse and been the victim of an assault. In addition, a person who worked at the warehouse Mr. Sarvucci identified as the crime scene, provided information that reasonably allowed Detective Andrus to conclude that it was more likely than not that Mr. Can had been at the crime scene. [123]

166 By the time Detective Andrus issued the arrest order, he had accumulated more than enough information to satisfy even the most cautious reasonable person that there was a high degree of certainty that Mr. Can had committed two indictable offences — extortion and forcible confinement. [124]

167 Neither the arrestor nor a court tasked with the obligation to objectively analyze the arrestor's decision may disregard exculpatory data. [125]

168 There are two paragraphs in Detective Andrus' affidavits which merit review:

> 43. At the time of his arrest, I knew that Mr. Sarvucci had previously been suspected of being involved in some other criminal investigations, however, I did not know that Mr. Sarvucci had a criminal record for perjury in the United States, and I had not yet done a search into Mr. Sarvucci's criminal past. Although looking into a victim's criminal record is sometimes done, it is not always done before an arrest is made, and simply depends on the circumstances. Further, regardless of his criminal past, I believe that Mr. Sarvucci was a victim in this case ....
>
> 44. Even if I had known the details of Mr. Sarvucci's criminal record, including his U.S. perjury conviction, I still would have believed him and ordered that Mr. Can be arrested.

169 The fact that Detective Andrus knew that Mr. Sarvucci might have been involved in some way with a previous criminal investigation is not telling in this fact pattern. [126] There was compelling evidence provided by persons other

than Mr. Sarvucci that supported the conclusion that on March 10, 2003 Mr. Can and others confined Mr. Sarvucci against his will, threatened his life and the lives of his wife and children.

170 I also reject Mr. Can's argument that his arrest was premature because there was no urgent need which justified it. [127] This argument overlooks the fundamental principle by which the lawfulness of an arrest is measured. Did the arrestor have sufficient information to meet the test for a warrantless arrest? The preceding parts of this opinion explain why the arrest was lawful. It matters not whether additional inquiries would have produced a greater degree of certainty. [128]

171 In any event, Detective Andrus, when questioned on his affidavit, [129] stated that the Calgary Police Service did have "concerns for [the safety of] Mr. Sarvucci and his ... [family]". This no doubt explained, in part, why the Calgary Police Service arrested the Habibs and Mr. Can on March 11, 2003 and not at a later time. This is a legitimate interest the protection of which justifies police intervention. [130]

172 I am also satisfied that under the circumstances Detective Andrus was not obliged to conduct a criminal background check on the complainant. Third-party verification was sufficient to warrant an arrest regardless of the results of such a query. A reasonable observer would have concluded that Detective Andrus' decision to arrest Mr. Can would have been lawful even if he had known that the complainant was a convicted perjurer. Convicted perjurers are not immune from being victimized by other criminals.

173 Nor is there any merit in Mr. Can's argument that the Calgary Police Service should not have arrested him without hearing from him. In most cases, certainly this one, the arrestor is under no obligation to interview the arrestee. [131] What is important is whether the information on which the arrestor acted justified a warrantless arrest. [132] The conclusion that the objective component of the warrantless arrest test had been satisfied without taking into consideration Ms. Godfrey's March 10, 2003 statement to the Calgary Police Service relieves me of the need to resolve the challenge to the factual determination made by Justice Bensler. [133]

VII. Conclusion

174 This appeal is dismissed. [134]

175 I acknowledge the able assistance of counsel.

Appeal dismissed.

Footnotes

1 Extortion is an indictable offence. A person who is convicted of extortion may be sentenced to imprisonment for life. *Criminal Code*, R.S.C. 1985, c. C-46, s. 346(1).

2 Forcible confinement may be prosecuted by indictment or summary procedures. *Criminal Code*, s. 279(2).

3 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.04(2).

4 Extortion and forcible confinement are not offences listed in s. 553 of the *Criminal Code*.

5 The Calgary Police Service created an audio and video record of this seventy-six minute meeting.

6 Mr. Andrus joined the Calgary Police Service in 1980. As of March 10, 2003 he had roughly twenty-three years service. In 2009 the Calgary Police Service promoted Mr. Andrus to the position of staff sergeant. I will refer to Mr. Andrus as "Detective Andrus".

7 The information set out in ¶¶15 to 27 of this judgment was known to Detective Andrus in the early hours of March 11, 2003.

8 The Triads are "an Asian criminal organization"; the Hell's Angels are an "outlaw motorcycle gang". Affidavit of Douglas Andrus sworn September 22, 2011, ¶7(e).

9 Detective Andrus swore in paragraph 17 of his September 22, 2011 affidavit that he "believed that [Mr. Sarvucci] and his family were in danger". Within hours of interviewing Mr. Sarvucci and Ms. Pearce, Detective Andrus arranged to have Mr. Sarvucci's family live outside Calgary. The Sarvucci family did not return to their home until March 25.

10 *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 (Alta. C.A.), ¶3.

11 Rule 7.3(1)(b) came into effect on November 1, 2010.

12 *Gayton v. Lacasse* (2010), 482 A.R. 179 (Alta. C.A.).

13 *Murphy Oil Co. v. Predator Corp.* (2006), 384 A.R. 251 (Alta. C.A.)

14 The appeal judge referred to the *Criminal Code*, R.S.C. 1985, c. C-46, s. 495; *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), ¶12; *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), 755; *Kvello v. Miazga*, [2009] 3 S.C.R. 339 (S.C.C.), 375-76 & *R. v. Shepherd*, [2009] 2 S.C.R. 527 (S.C.C.), 537.

15 The high costs of litigation may be directly attributable to the increased level of complexity of actions. There is a direct correlation between the complexity of an action and its costs. The more complex a matter is the more time lawyers must devote to identify the issues and develop the best arguments to resolve these issues in the client's favor. Complex matters frequently require the retention of experts. In addition, complex actions make increased demands on a client's time. Clients must spend more time in discoveries and in the affidavit-drafting process. All of these factors have a cumulative impact on the time frame an action is a live file. See generally, Report of the Canadian Bar Association Task Force on Civil Justice 15-16 (1996). These factors no doubt contribute to the declining percentage that conventional trials represent as the ultimate method by which disputes are resolved. Professor Galanter reports that the "portion of [American] federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s. ... The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. ... Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy". "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 459-60 (2004). See also Twohig, Baar, Myers & Predko, "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973-1994" in 1 Ontario Law Reform Commission, Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127 (1996) (trials declined both in absolute and percentage terms as the method of resolution from 1973 to 1994). Justice Bouck provides some insights into why in British Columbia delay is a problem. *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.).

16 Some have argued that the summary judgment device has directly contributed to the declining rate at which trial dispositions resolve disputes in American federal courts. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", 1 J. Empirical Legal Stud. 459, 483 (2004) & Simmons, Jacobs, O'Malley & Tami, "The *Celotex* Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial", 1 Fla. A & M.U.L. Rev. 1, 3 (2006).

17 *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 80 (trial delays are associated with the severe shortage of superior court justices).

18 See also 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2010, at p. 7-11 ("This Rule is one of the most important, and most heavily relied upon, in chambers. ... Summary judgment is important, and cases with no chance of success should be weeded out early") & Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix", 57 Stan. L. Rev. 1329, 1339 (2005) ("Both the litigants in the individual case and the judicial system as a whole suffer potentially significant burdens and expenditures that, by hypothesis, need not and should not have been made").

19 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶15 ("Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication"); *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374 ("Any protocol which reduces the cost of litigation increases the likelihood more members of the community can afford to retain lawyers"); *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Alta. Q.B.), 16 ("A litigant whose claim or defence is so weak that its chances of succeeding is very low, cannot reasonably expect the state to make available all parts of a publicly funded judicial process"); *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶27 ("the purpose of the *Rules of Court* is to provide a means by which claims can be fairly and justly resolved ... by a court process in a timely and cost effective manner") & *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.), ¶¶20-21 (adopted the values stated in *Beier v. Proper Cat Construction Ltd.* and *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*).

20 *Alberta Rules of Court*, r. 7.1(1): "On application, the Court may ... order ... an issue to be ... tried before ... a trial for the purpose of ... substantially shortening a trial, or ... saving expense".

21 *Alberta Rules of Court*, r. 7.5(1): "A party may apply to a judge for judgment by way of a summary trial on an issue, a question or generally". See *Hajjar v. Repetowski*, [2001] 8 W.W.R. 539 (Alta. Q.B.), 546 ("The Summary Trial Rules ... were carefully designed and adopted in Alberta in service of the objective of improving access to expeditious justice as part of a multi-option civil justice system") & *Thompson v. Cardel Homes Limited Partnership*, 2014 ABCA 242 (Alta. C.A.) (the parties selected summary trial as the process best suited to resolve a contract dispute).

22 *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), ¶46; *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶15; *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶24; *Deguire v. Burnett*, 2013 ABQB 488 (Alta. Q.B.); *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 373; *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Alta. Q.B.), 16; *Bonsma v. Tesco Corp.*, 2011 ABQB 620 (Alta. Q.B.), ¶27; *Richter v. Chemerinski*, 2010 ABQB 302 (Alta. Q.B.), ¶16; *Elliott v. Amante*, 2001 ABQB 1080 (Alta. Q.B.), ¶43; *Hajjar v. Repetowski*, [2001] 8 W.W.R. 539 (Alta. Q.B.), 546; *U.B.'s Autobody Ltd. v. Reid's Welding (1981) Inc.* (1999), 258 A.R. 325 (Alta. Q.B.), 327 & *Compton Petroleum Corp. v. Alberta Power Ltd.* (1999), 242 A.R. 3 (Alta. Q.B.), 6.

23 *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 378; *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.* (2013), 91 Alta. L.R. (5th) 1 (Alta. Q.B.), 16 & *Orr v. Fort McKay First Nation*, 2014 ABQB 111 (Alta. Q.B.), ¶24.

24 This is the American position. *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 323 (the moving party "always bears the initial responsibility ... of identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ...' which it believes demonstrates the absence of a genuine issue of material fact").

25 This is the American position. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 256 ("a [nonmoving] party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts, showing that there is a genuine issue for trial").

26 This is the American position. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are not ... [judicial] functions") & *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 327 ("Rule 56 [of the Federal Rules of Civil Procedure] must be construed with due regard ... for the rights of persons opposing such claims and defenses to demonstrate ... that the claims and defenses have no factual basis). But "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 248.

27 *Kulaga v. First National Financial GP Corp.*, 2014 ABQB 400 (Alta. Q.B.), ¶33 (the motions judge held that summary judgment was an inappropriate remedy because the allegations of fraud could only be resolved by a full trial).

28 *Prunkl v. Tammy Jean's Diner Ltd.*, 2014 ABQB 338 (Alta. Q.B.), ¶42 ("the Court needs to hear and weigh *viva voce* evidence in order to define or delineate the exact legal nature of the working or business relationship between the Applicants [for summary

judgment] and the Plaintiff as it pertains to the operation of the Devon Hotel on the Premises and the restaurant services being carried on in the Demised Premises").

29 See *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶16 ("When the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate").

30 There may be some exceptional cases where it is appropriate to adjourn a summary judgment application to allow for questioning.

31 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶14 ("As in Ontario, *viva voce* evidence may exceptionally be allowed in chambers applications").

32 The unique role summary judgment played caused the Alberta Law Reform Institute in its Consultation Memorandum No. 12.12 (August 2004) entitled Summary Disposition of Actions at p. xv to oppose combining summary judgment with any other expedited dispute resolution device: "[W]hile there are some reasons why it might make sense to combine Rule 159 [summary judgment] with the summary trial procedures under Rules 158.1-158.7, the Committee decided that the functions of the two rules are too different to amalgamate them".

33 *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.), ¶14 (r. 7.3 of the *Alberta Rules of Court* is a procedure "for resolving disputes without a trial (as compared with Alberta's summary trial procedure which is a form of trial)" (emphasis in original)); *Diegel v. Diegel*, 2008 ABCA 389 (Alta. C.A.), ¶2 ("A decision on summary judgment is not the same thing as a judgment on a summary trial, which may achieve fact findings from which an appeal of the typical sort might lie"); *Celotex Corp. v. Catrett*, 477 U.S. 317 (U.S. Sup. Ct. 1986), 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defences"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (U.S. Sup. Ct. 1986), 250 ("The [summary judgment] inquiry ... [determines] whether ... there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party") & *Jackamarra v. Krakouer* (1998), 195 C.L.R. 516 (Australia H.C.), 528 (summary judgment allows for the "summary determination of a proceeding without trial"; other cost and time-saving devices are useful in "different contexts").

34 Queen's Bench of Alberta Civil Practice Note No. 8, at 2 (effective September 1, 2000) ("There is a very clear distinction between an application for summary judgment ... and a summary trial, which is like any other 'conventional' trial, except the procedures are simplified"); *Soni v. Malik* (1985), 61 B.C.L.R. 36 (B.C. S.C.), 40 ("There are substantial differences between [summary judgment and summary trial] ... [T]he raising of a triable issue ... will not defeat an application under rule 18A [the summary trial rule]"); *Compton Petroleum Corp. v. Alberta Power Ltd.* (1999), 242 A.R. 3 (Alta. Q.B.), 7 ("in a summary trial, the court actually tries the issues raised by the pleadings and weighs the evidence"); *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 79 ("Under Rule 18A ... the hearing judge may enter judgment ... even though some of the facts may be disputed and the law may be in conflict"); *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.), 211 ("R. 18A was added to the Rules of Court in 1983 ... to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by way of the other proceedings authorized by R. 18A(5)" & Welsh, "Judging the Summary Trial Rule", 44 The Advocate 173, 174 (1986) ("Rule 18A is referred to as a summary *trial* rule rather than a ... summary judgment rule").

35 *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 374.

36 Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix", 57 Stan. L. Rev. 1329, 1335 (2005) ("the very purpose of summary judgment is to avoid unnecessary trials"); Issacharoff & Lowenstein, "Second Thoughts About Summary Judgment", 100 Yale L.J. 73, 74 (1990) ("The summary judgment trilogy [of 1986] seems consistent with the spirit of the 1983 revisions to the Federal Rules in encouraging the judiciary to screen as well as to adjudicate cases") & Louis, "Federal Summary Judgment Doctrine: A Critical Analysis", 83 Yale L.J. 745, 769 (1974) ("The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial").

37 Summary trials were introduced into British Columbia effective September 1, 1983. B.C. Reg. 178/83, s. 3. The applicable provision is now rule 9-7. *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Alberta adopted a summary trial methodology effective September 1, 1998. *Alberta Rules of Court Amendment Regulation*, Alta. Reg. 152/98. Summary trials are also available to litigants in the superior courts of Saskatchewan (*The Queen's Bench Rules*, Part 40), Manitoba (*Court of Queen's*

Bench Rules, Man. Reg. 553/88, r. 20.03(4)) and Prince Edward Island (*Rules of Civil Procedure*, r. 75.1) and the Federal Court (*Federal Court Rules*, SOR/98-106, r. 216). This protocol is particularly useful if the dispute features no differences on the key facts and the outcome depends on the application of the common law, equity or a statute to the agreed facts. Summary trial procedures were utilized in Roman law, continental law and early Anglo-American chancery and admiralty procedures. South Carolina adopted a summary process in 1769 when it was a province. Millar, "Three American Ventures in Summary Civil Procedure", 38 Yale L.J. 193 (1928).

38 Yungwirth, "Summary Trials in Family Law: A Reasonable Alternative" 17 (March 2012) (presented at a Legal Education Society of Alberta conference on Issues in Matrimonial Law) ("Parties are sometimes prepared to sacrifice 'perfect justice' in order to achieve a final result, especially given the effect on families of the litigation process").

39 Rule 7.7(2) of the *Alberta Rules of Court* states that "Part 6 ... applies to an application under this Division [summary trials] except to the extent that it is modified by this Division". Rule 6.11(1)(g) provides that "with the Court's permission, oral evidence, which, if permitted, must be given in the same manner at trial." There is no counterpart to r. 7.7(2) for the Division 2 Summary Judgment.

40 Justice Burrows, in *AT Films Inc. v. AT Plastics Inc.*, 2014 ABQB 422 (Alta. Q.B.), ¶19, correctly observed that "[t]here is no equivalent of Ontario sub rule 2.1 in the Alberta Rules". Master Schlosser, in *Schaffer v. Lalonde*, 2014 ABQB 222 (Alta. Q.B.), ¶26 and *1214777 Alberta Ltd. v. 480955 Alberta Ltd.*, 2014 ABQB 301 (Alta. Q.B.) ¶15, suggests that the *Alberta Rules of Court* be amended so that its summary judgment rule resembles the new r. 20.04 in the Ontario *Rules of Civil Procedure.* Others will have to consider the merit of this proposal. In doing so, they will take into account the fact that Part 7 of the *Alberta Rules of Court*, in its current form, gives a motions court the jurisdiction to hear oral evidence as part of a summary trial or a trial of an issue.

41 *Dr. Therese Thomas Dentistry Professional Corp. v. Bank of Nova Scotia* (2010), 95 C.P.C. (6th) 96 (Ont. S.C.J.) (the court concluded that it could not resolve a fact-in-issue on the basis of conflicting affidavits and ordered a mini-trial to determine the fact-in-issue).

42 Summary trial is a process which has its detractors. *Chu v. Chen* (2002), 22 C.P.C. (5th) 73 (B.C. S.C.), 83-85 (affidavits introduce inadmissible material; disputes which cannot be resolved by summary trial waste the time of lawyers and judges involved in the application; and its misuse promotes delay).

43 Some American courts, including the United States District Court for the Eastern District of Texas, the United States District Court for the Northern District of California and the United States District Court for the Southern District of California, expedite litigation through a variety of measures that are called "rocket dockets".

44 Writing extra-judicially and referring to *Combined Air Mechanical Services Inc. v. Flesch*, [2014] 1 S.C.R. 87 (S.C.C.), Chief Justice Wittman opined that it dealt "with an amended rule in the Ontario Rules of Civil Procedure which I perceive to be equivalent to our summary *trial* rule" (emphasis added). Contra *1214934 Alberta Ltd. v. Clean Cut Ltd.*, 2014 ABQB 330 (Alta. Q.B.), ¶4 ("The contemporary test for granting summary judgment is: can the court make a disposition that is fair and just to both parties on the existing record.")

45 One will note the symmetry between the key features of the preceding passage and the parts of *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 376-77 reproduced above.

46 *Beier v. Proper Cat Construction Ltd.* (2013), 564 A.R. 357 (Alta. Q.B.), 388 n. 2 ("The test for summary judgment is the same under the new and old rules"); *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51 (Alta. Q.B.), ¶31 ("There is no material difference between new rule 7.2(a) and former rule 162"); *Manufacturers Life Insurance Co. v. Executive Centre at Manulife Place Inc.*, [2011] 11 W.W.R. 833 (Alta. Q.B.), 838 ("The parties agree that new Rule 7.3 has not amended the test developed in Alberta jurisprudence for summary judgment under old rule 159"); *Mraiche Investment Corp. v. Paul*, 2011 ABQB 164 (Alta. Q.B.), ¶11 ("It is common ground between the parties that although this rule is worded slightly differently than the previous existing ...summary judgment [rule], previous authorities on the subject are still applicable"); *Kwan v. Superfly Inc.*, 2011 ABQB 343 (Alta. Q.B.), ¶20 ("Rule 7.3 operates in the same manner and follows the same principles

as its precursor") & *Encana Corp. v. ARC Resources Ltd.*, 2011 ABQB 431 (Alta. Q.B.), ¶7 ("[t]he test for summary judgment under new rule 7.3 is the same as under the old rules"). The old rules were in force after January 1, 1969. Alta. Reg. 390/68.

47 Effective August 1, 2014, The Provincial Court of Alberta has jurisdiction to hear civil claims of up to $50,000. *Provincial Court Civil Division Amendment Regulation*, Alta. Reg. 271/2014. Alberta's Minister of Justice announced on July 21, 2014 that pilot projects in Calgary and Edmonton would give Provincial Court litigants the opportunity to access a summary trial process. Each side would be allowed fifteen minutes to present its case.

48 Prior to December 12, 1988 (SI/88-227), the corresponding *Criminal Code*, R.S.C. 1970, c. C-34 provision, s. 450, provided that "[a] peace officer may arrest without warrant ... a person ... who, on reasonable *and probable* grounds, he believes has committed ... an indictable offence" (emphasis added). This is a confusing formulation. Does it mean that an arrestor must have reasonable grounds to believe that it is probable the arrestee committed an arrestable offence? This is a different measure than the one incorporated in this proposition: the arrestor must have reasonable grounds to believe that the arrestee committed an arrestable offence. Commenting on this revision to the *Criminal Code*, the British Columbia Court of Appeal, in *R. v. Smellie* (1994), 95 C.C.C. (3d) 9 (B.C. C.A.), 17, observed that "[i]t is common ground that reasonableness comprehends a requirement of probability. The meaning of the section has not changed with the amendment". What does probability mean? Is it a reference to a specific degree of certainty — it is more likely than not that X exists — or a general obligation to take into account degrees of certainty? The common law authorizes a constable to arrest a person without warrant for suspicion of a felony if he has reasonable grounds for the suspicion. *Christie v. Leachinsky*, [1947] A.C. 573 (U.K. H.L.), 587 (the House of Lords approved the proposition that a policeman may arrest without warrant "upon reasonable suspicion of felony"); *Beckwith v. Philby* (1827), 108 E.R. 585 (Eng. K.B.), 586 ("a constable having reasonable grounds to suspect that a felony has been committed is authorized to detain the party suspected"); *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 ("The power possessed by constables [at common law] to arrest without warrant ... for suspicion of felony ... provided always they have reasonable grounds for their suspicion, is a valuable protection to the community") & *Walters v. W.H. Smith & Son Ltd.*, [1914] 1 K.B. 595 (Eng. K.B.), 602 ("At common law a police constable may arrest a person if he has reasonable cause to suspect that a felony has been committed though it afterwards appears that no felony has been committed"). Under American federal law an officer may make warrantless felony arrests if the felony is committed in his presence or the officer has "reasonable grounds to believe that the person to be arrested has committed or is committing such felony". 18 U.S.C. §3052.

49 Webster's Third New International Dictionary (1971) defines "believe" this way: "1a: to take (a statement or a person making a statement) as true, valid or honest: give credence to <~ the reports> ... 3: to be of the opinion: suppose, suspect <~ it will rain> <the die is believed to be a complex acid>".

50 The Australian standard for a warrantless arrest by a constable is comparable. *Crimes Act 1914*, No. 12, s. 3W(1)(a) ("A constable may, without a warrant, arrest a person for an offence if the constable believes on reasonable grounds that ... the person has committed ... the offence ....")

51 See *Alberta (Minister of Justice) v. Cardinal* (2013), 565 A.R. 271 (Alta. Q.B.), 286 (a court cannot interpret legislation and apply it to the facts before it "without an understanding of the underlying purpose of the enactment") & *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), 331 ("All legislation is animated by an object the legislature intends to achieve").

52 *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 298 ("In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed").

53 Justice Slatter, in *R. v. Loewen* (2010), 260 C.C.C. (3d) 296 (Alta. C.A.), 314, opined that s. 495(1)(a) does not require the arrestor to believe "to a virtual certainty" that the arrestee had committed an arrestable offence. This must be correct. Any other interpretation would be absurd. So why does the statute insist that the arrestor must *believe* that the arrestee committed an indictable offence? Why does the statute not set out the appropriate degree of certainty for a propostion for which the arrestor must have reasonable grounds? It could say, as it used to, that the arrestor must have reasonable grounds to suspect that the arrestee has committed an arrestable offence or it could state that the arrestor must have reasonable grounds to believe with a moderate degree of certainty that the arrestee has committed an arrestable offence. Or it could say that the arrestor must have reasonable grounds to believe that it is more likely than not that the arrestee has committed an arrestable offence. Justice Slatter made it clear that the requisite degree of certainty was less than a balance of probabilitites. (2010), 260 C.C.C.

(3d) 296 (Alta. C.A.). Nothing the Supreme Court of Canada said in its *Loewen* opinion or any other judgment suggests that this aspect of Justice Slatter's analysis was incorrect. [2011] 2 S.C.R. 167 (S.C.C.), 169-70.

54 See *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, s. 98(1) ("An officer may search (a) any person who has arrived in Canada ... if the officer *suspects* on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or *might* be contravened"). An earlier version (*Customs Act*, R.S.C. 1970, c. C-40, s. 143) authorized a search "if the officer ... has reasonable grounds to suppose that the person searched has goods ... secreted about his person").

55 See Black's Law Dictionary 1321 (9th ed. 2009 B. Garner ed.) ("probable consequence" means "[a]n effect or result that is more likely than not to follow its supposed cause").

56 *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [2005] 2 S.C.R. 91 (S.C.C.), 145 ("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").

57 *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 167 ("[Possibility] is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions") & *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175 ("[probable cause in the Fourth Amendment] has come to mean more than bare suspicion").

58 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 231 ("Both the impact on privacy interests and the importance of the law enforcement objective play a role in determining the level of justification required for the state to intrude upon the privacy interest in question"); *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 268 (the lawfulness of a police detention is the proper balance of the detainee's "privacy interest and the state's countervailing interest in law enforcement"); *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.), 473 ("The needs of law enforcement have to be taken into consideration and to be balanced with reasonable expectations of privacy"); *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 64-65 ("this case offers another opportunity to consider the delicate balance that must be struck in adequately protecting individual liberties and properly recognizing legitimate police functions"); *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 249-50 ("there [must] be a reasonable balance ... between the individual's right to liberty and the need for society to be protected from crime"); *R. v. Grotheim* (2001), [2002] 2 W.W.R. 49 (Sask. C.A.) ("The general purpose of [s. 495(1)(a)] ... [lies] in a balanced safeguard of the interests of the citizenry, one that protects citizens against crime ... and [one that] preserves their liberty"); *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 ("The British principle of personal freedom [is adversely affected when a person is arrested]"); *Holgate-Mohammed v. Duke*, [1984] A.C. 437 (U.K. H.L.), 445 ("there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it"); *Walters v. W.H. Smith & Son Ltd.*, [1914] 1 K.B. 595 (Eng. K.B.), 602 ("Interference with the liberty of the subject ... has ever been most jealously guarded by the common law of the land"); *Hyder v. Commonwealth of Australia*, [2012] NSWCA 336 (New South Wales C.A.), ¶13 ("Because the law places a high value on personal liberty, a statute which authorizes the detention of a person must be strictly construed"); *Gerstein v. Pugh*, 420 U.S. 103 (U.S. Sup. Ct. 1975), 112 (the Fourth Amendment probable cause provision "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime"); *Terry v. Ohio*, 392 U.S. 1 (U.S. Ohio S.C. 1968), 10-11 (the relative importance of the two values shaped the American "stop and frisk" jurisprudence) & Colb, "Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms", 73 Law and Contemp. Prob. 69, 73 (Summer 2010) ("the Fourth Amendment, in setting out 'probable cause', as a limiting principle for searches and seizures balances the privacy and liberty of innocent people against the also-significant goal of protection of the public from criminal predation").

59 *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.), 471 ("personal privacy and autonomy" are "fundamental" interests); *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 60 ("Absent a law to the contrary, individuals are free to do as they please"); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), 336 ("Freedom can primarily be characterized by the absence of coercion or constraint"); *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), 60 ("Human dignity is closely aligned with an individual's freedom of choice"); *Cloutier c. Langlois*, [1990] 1 S.C.R. 158 (S.C.C.), 187 ("For centuries the common law has spearheaded the protection of individual freedoms"); *Christie v. Leachinsky*, [1947] A.C. 573 (U.K. H.L.), 588 (the House of Lords approved the observation that "[t]he liberty of a man is a thing specially favoured by the common law"); & *Union Pacific Railway v. Botsford*, 141 U.S. 250 (U.S. Sup. Ct. 1891), 251 ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by

clear and unquestionable authority of law"). This liberty value has ancient roots in England. Hall, "Legal and Social Aspects of Arrest Without a Warrant", 49 Harv. L. Rev. 566, 588 (1936).

60 *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 158 (section 8 of the *Charter* champions privacy interests) & *Entick v. Carrington* (1765), 95 E.R. 807 (Eng. K.B.), 817 ("our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave").

61 *Canada Act 1982*, c. 11 (U.K.)

62 Section 6(2)(a) provides that a Canadian citizen and a permanent resident "has the right ... to move to and take up residence in any province ...."

63 Section 7 declares that "[e]veryone has the right to ... liberty ... and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

64 Section 8 records that "[e]veryone has the right to be secure against unreasonable search or seizure".

65 Section 9 states that "[e]veryone has the right not to be arbitrarily detained or imprisoned". See *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 160 (the *Charter* prefers "where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference").

66 Participants in the Gordon Riots — June 2 to 7, 1780 — threatened the executive, the legislators and the judiciary and ordinary citizens. A mob burned Lord Mansfield's home to the ground. Hall, "Legal and Social Aspects of Arrest", 49 Har. L. Rev. 566, 586 (1936). See *R. v. Clayton* (2005), 194 C.C.C. (3d) 289 (Ont. C.A.), 304 ("Criminal conduct involving the use of firearms ... is a serious and growing societal danger. The law abiding segment of the community expects the police to react swiftly and decisively to seize illegal firearms and arrest those in possession of them".)

67 *Cloutier c. Langlois*, [1990] 1 S.C.R. 158 (S.C.C.), 185 ("the common law gave the police only such powers as were consistent with the protection of individual rights").

68 *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 176 (the Fourth Amendment — protected the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" — gives "fair leeway for enforcing the law in the community's protection").

69 *Holgate-Mohammed v. Duke*, [1984] A.C. 437 (U.K. H.L.), 445 ("there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and bringing to justice of those who commit it").

70 This consequence accounted in part for the opposition by some in England to the introduction of a professional police force. Hall, "Legal and Social Aspects of Arrest Without a Warrant", 49 Harv. L. Rev. 566, 589 (1936).

71 Justice Dickson, as he then was, acknowledged in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 159 that a person's liberty interest "must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement". See also *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), 48 ("it is in the interests of everyone that serious crime be effectively investigated and prosecuted").

72 In coming to this conclusion, Justice Dickson rejected as inadequate a measurement adopting possibility as a degree of likelihood a described conclusion is justifiable: "This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions". [1984] 2 S.C.R. 145 (S.C.C.), 167. The United States Supreme Court, in *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175, occupied the same ground: "Since [Chief Justice] Marshall's time ... [probable cause] has come to mean more than bare suspicion".

73 Barrett, "Police Practices and the Law — From Arrest to Release or Charge", 50 Calif. L. Rev. 11, 14 (1962).

74 *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), 119 ("the presumption of innocence ... ensures that until the state proves an accused's guilt beyond a reasonable doubt, he or she is innocent"); *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 (U.K. H.L.), 481 ("Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecutor to prove the prisoner's guilt ... [beyond] a reasonable doubt"); *Entick v. Carrington* (1765), 95 E.R. 807 (Eng. K.B.), 816 ("Our law ... supposes every man accused to be innocent before he is tried by his peers"); *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (Australia H.C.), 360 ("in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution") & *Davis v. United States*, 160 U.S. 469 (U.S. Ark. S.C. 1895), 485-86 ("Upon [the plea of not guilty] ... the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved if the jury entertain a reasonable doubt").

75 *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 284 ("The reasonable and probable grounds standard is a more demanding standard than the reasonable suspicion standard. It follows ... that more innocent persons will be caught under a reasonable suspicion standard than under a reasonable and probable grounds standard") & *Speiser v. Randall*, 357 U.S. 513 (U.S. Sup. Ct. 1958), 525-26 ("There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account").

76 *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (Australia H.C.), 361 ("No doubt an opinion that a state of fact exists may be held according to indefinite gradations of certainty"); *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175 ("In dealing with probable cause, ... we deal with probabilities"); McCauliff, "Burdens of Proof: Degree of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293, 1304 (1982) ("'probable cause' is a guideline denoting when the decision maker ... has reached the required certainty for the type of decision at hand"); T. Starkie, Practical Treatise of the Law of Evidence 724 (8th American ed. 1860) ("From the highest degree [of probability] it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of the particular fact") & Sankoff & Perrault, "Suspicious Searches: What's So Reasonable About Them", 24 C.R. 5th 123, 126 (1999) (the various objective measures used in criminal law are distinguished by the "degree of probability demonstrating that a person is involved in criminal activity").

77 S. Coughlan & G. Luther, Detention and Arrest 1 (2010) ("The central goal of a proper criminal justice system must be to maintain a balance between the individual interest of private citizens to carry on their lives free from state interference, and the communal interest in maintaining a safe society") & W. LaFave, Arrest: The Decision to Take a Suspect into Custody 249 (1965) ("The requirement of 'reasonable cause' has often been characterized by the courts as a balance between the needs of effective law enforcement and the interest of individual freedom").

78 See *R. v. Flight*, 2014 ABCA 185 (Alta. C.A.), ¶53 ("in section 254 ... Parliament created a framework for ready-use in the field. Turning it into a standard difficult to apply would thwart Parliament's will") & *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 69 ("police officers must be empowered to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing").

79 *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), 202 ("Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations"); *Wiltshire v. Barrett*, [1965] 2 All E.R. 271 (Eng. C.A.), 273 ("The police have to act at once, on the facts as they appear on the spot; and they should be justified by the facts as they appear to them at the time and not in any ex post facto analysis of the situation"); *Terry v. Ohio*, 392 U.S. 1 (U.S. Ohio S.C. 1968), 10 ("police have to confront rapidly unfolding and often dangerous situations on city streets") & *US v. Valencia-Amezcua*, 278 F.3d 901 (U.S. C.A. 9th Cir. 2002), 906 ("judgments made by law enforcement officers in the heat of their battle against crime need not be assessed in the abstract").

80 *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 80 ("Police officers face any number of risks everyday ... and are entitled to go about their work secure in the knowledge that risks are minimized to the greatest extent possible"); *R. v. Loewen* (2008), 461 A.R. 193 (Alta. Q.B.), 200 ("reactions to arrest can endanger officer safety") & *Terry v. Ohio*, 392 U.S. 1 (U.S. Ohio S.C. 1968), 26 ("We are now concerned with more than the governmental interest in protecting crime; in addition, there is the more immediate

interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him").

81 McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293, 1302 (1982) ("defining burdens of proof in terms of probability theory and degrees of belief suggests that percentage definitions should attach to each burden and that the burdens lie along a continuum") & Williams, "The Mathematics of Proof-1", [1979] Crim. L. Rev. 297, 340 & 353. Contra Kerr, "Why Courts Should not Quantify Probable Cause", George Washington University Public Law and Legal Theory Paper #543 (March 27, 2011 draft). See generally Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix", 57 Stan. L. Rev. 1329, 1356 (2005) ("Although it would be unrealistic to expect the text of a generally framed rule to resolve all conceivable issues of specific application, I nevertheless reject all of these rationales for leaving the [test] ... so woefully devoid of meaningful guidance"). Generally speaking, legal standards should be clearly stated in plain English. *Smith, Hogg & Co. v. Black Sea & Baltic General Insurance Co.*, [1940] A.C. 997 (U.K. H.L.), 1003 ("English law can furnish in its own language expressions which will more fitly [than latin phrases] state the problem in any case").

82 The reluctance of the Supreme Court of Canada to adopt a precise standard is discussed in footnote 103 and paragraphs 133 to 138.

83 Judges recognize and apply this principle to their own work. A court asked to adjudicate the wisdom of granting or declining to grant an interim or interlocutory injunction is routinely denied the luxury of time to consider the issues and access to a record developed by a more extensive use of the litigation spectrum. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), 348 the Supreme Court of Canada directed a motions court to decide the first part of the tripartite test "on the basis of common sense and an extremely limited review of the case on the merits". See *Porochnavy v. Scheie*, 2014 ABQB 316 (Alta. Q.B.), n. 14 ("Family chambers is a frenetic environment not conducive to the resolution of problems with complicated fact patterns").

84 This is not an admonition to work with a vague standard. Rather, it directs courts to apply the norm with "common sense, flexibility and practical everyday experience".

85 McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293, 1335 (1982) ("decisionmakers must have a clearly prescribed level of certainty") & (1938), 60 C.L.R. 336 (Australia H.C.), 343 ("there are differences in degree of certainty, which ... can be intelligently stated"). Contra *Florida v. Harris*, 133 S.Ct. 1050 (U.S. Sup. Ct. 2013), 1055 ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach") & *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 232 ("probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contests — not readily, or even usefully, reduced to a neat set of legal rules").

86 Parliament may wish to consider whether s. 495(1)(a) could be improved by incorporating a degree of certainty component. Bacigal, "Making the Right Gamble: The Odds on Probable Cause", 74 Miss. L.J. 279, 282-83 (2004) ("Specifying a standard of certainty for probable cause necessarily entails drawing a dividing line on the spectrum of uncertainty"). See also *R. v. Biron* (1975), [1976] 2 S.C.R. 56 (S.C.C.), 75 (the majority criticized the construction of the predecessor of s. 495(1)(b) and concluded the "wording used in para. (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is *apparently* committing an offence") (emphasis added).

87 A hypothetical may help understand this assertion. X, a competitive golfer, believes, with a very high degree of certainty, that the golf ball imprinted with the "Titleist" brand name and the number "5" he found in the rough on the first hole is the one he just hit. He has four reasons for this belief. First, X always plays Titleist 5 golf balls. Second, the ball found has a green shamrock mark on it just like the mark he placed on it with a green sharpie at the start of his round. Third, X found the ball within the area he expected to find it. Fourth, neither X nor his playing companions found any other golf balls in the vicinity of this golf ball. A referee, assessing the information objectively, would agree that X was justified in believing, with a very high degree of certainty, that the Titleist 5 with the green shamrock ink mark was his.

88 Thinking of degrees of certainty along a spectrum is a useful way to identify when different law enforcement decisions, such as arrest, detention and search, may be lawfully made. *US v. Lopez*, 328 F. Supp. 1077 (U.S. Dist. Ct. E.D. N.Y. 1971), 1094

("The relative positions and levels of probability required have not been and, as a practical matter, cannot be precisely fixed; the most we can hope to accomplish at this juncture is to indicate that some relatively gross differentiations exist between the various levels").

89 This is the standard of persuasion used to resolve civil disputes. *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41 (S.C.C.), 61 ("In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred"); *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 (S.C.C.), 169-70 ("in civil litigation, the ... burden of proof ... [is] proof on a balance of probabilities"); *Scott v. Cresswell* (1975), 56 D.L.R. (3d) 268 (Alta. C.A.), 271 ("in civil cases ... the fact must be proved by a balance of probabilities"); *Steadman v. Steadman*, [1974] 2 All E.R. 977 (U.K. H.L.), 981 ("A thing is proved in civil litigation by showing that it is more probably true than not"); *US v. Schipani*, 289 F. Supp. 43 (U.S. Dist. Ct. E.D. N.Y. 1968), 55-56 ("[In] an ordinary civil case ... the trier of fact must be convinced ... that the proposition is more probably true than false (50+% probable for purposes of this analysis"); A. Bryant, S. Lederman & M. Fuerst, The Law of Evidence in Canada 204 (3d ed. 2009) ("the trier of fact must find that the existence of the contested fact is more probable than its nonexistence") & Rothstein, Centa & Adams, "Balancing Probabilities: The Overlooked Complexity of the Standard of Proof" in The Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence 459 (2004) ("Proof on a balance of probabilities is more often understood as requiring the adjudicator to determine that it is more likely than not that a disputed fact exists or occurred"). It is recognized that the power to arrest standard and the civil litigation standard play completely different roles. But this does not deprive the more-likely-than-not standard of utility in either of these spheres. Here is a hypothetical illustrating this concept. X hits his white Taylormade 5 golf ball into the deep rough on the right side of the first fairway just short of a single pine tree. X failed to put his usual green shamrock mark on the ball because he showed up late for his start time. His playing companions found another golf ball in the expected landing area. It was also a Taylormade 5. But it did not have the same gloss as X's ball. X's ball was brand new. Even though the golfers found two Taylormade 5 golf balls in close proximity to each other, it is more likely than not that the found golf ball is the one X just struck. If the high degree of certainty is the governing standard, X can play the ball he claims he hit from the first tee. If the test is a very high degree of certainty, the referee may rule that there is insufficient certainty to declare that either of the balls is the one X played. If such a ruling is made, X lost his ball and must return to the first tee and put another ball in play.

90 X and his playing companions believe that there is an extremely low degree of certainty that the golf ball X just hit into the dense woods far to the right of the green on the par three hold ended up in the water bordering the green. The ball entered the woods at least fifty yards from the water. While it is true that the ball most likely hit a couple of trees because of the loud sounds which came from the woods when the ball entered the woods on the fly, and it is possible that a couple of fortuitous caroms could have sent the ball to the water, the likelihood that the ball is lost in the water instead of the woods is close to zero. As a result, X must play the ball as if it was lost in the woods and hit another ball from the tee. Had X hit the ball into the water, he could have played his next shot from a drop area beside the green. This would have been to A's advantage.

91 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 232 ("a reasonable suspicion is a lower standard [than reasonable and probable grounds to believe], as it engages the reasonable possibility, rather than probability of crime"); *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.), 501 ("A 'reasonable' suspicion means something more than a mere suspicion and something less than belief based upon reasonable and probable grounds"); *R. v. Clayton*, [2007] 2 S.C.R. 725 (S.C.C.), 748 ("Taken together, these facts, objectively, give rise to the reasonable suspicion that the occupants of the Jaguar could be in possession of the handguns reported in the 911 call"); *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 81 ("police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary") & McCauliff, "Burdens of Proof: Degrees of Belief Quanta of Evidence, or Constitutional Guarantees?", 35 Vand. L. Rev. 1293, 1309 (1982) ("'Reasonable suspicion' applies to less intrusive searches and seizures, such as stop-and-frisk searches. A showing of 'reasonable suspicion' traditionally has required less certainty than 'probable cause'").

92 Suppose that X hits his brand new white Callaway 5 golf ball into the rough approximately 250 yards down the left hand side of the first fairway. Unlike his playing companions, X failed to place a unique identification mark on his golf ball with a sharpie. To X's dismay, his playing companions find two white like-new Calaway 5 golf balls within four square yards of the spot where everyone agreed X's ball would most likely be found. X could not argue that the degree of certainty either of the two Calaway 5 golf balls was the one he just struck exceeded fifty percent. The Rules of Golf utilize a higher degree of certainty when ascertaining the identity of a ball in play and preclude X from playing either of the two balls. X has lost his golf ball.

93 *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [2005] 2 S.C.R. 100 (S.C.C.), 144-45 (reasonable grounds to believe that a person has committed a crime against humanity "requires something more than mere suspicion, but less than the standard applicable in civil matters or proof on the balance of probabilities"); *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 167 ("[Possibility] is a very low standard which would validate intrusion on the basis of suspicion"); *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336 (Australia H.C.), 343 ("No court should act upon mere suspicion, surmise or guesswork"); *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175 ("[probable cause in the Fourth Amendment] has come to mean more than bare suspicion"); *Mallory v. US*, 354 U.S. 449 (U.S. Sup. Ct. 1957), 454 ("The police may not arrest upon mere suspicion but only probable cause") & *Henry v. US*, 361 U.S. 98 (U.S. C.A. 7th Cir. 1959), 104 ("Under our system suspicion is not enough for an officer to lay hands on a citizen").

94 *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129 (S.C.C.), 158 ("Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work").

95 *R. v. MacKenzie*, 2013 SCC 50 (S.C.C.), ¶44 ("random traffic stops to check for drugs ... would ... amount to a serious abuse of the powers society has entrusted [to the police]"); *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 77 ("any intrusion upon [individual liberty interests] ... must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain"); *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 249 ("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"); *Koechlin v. Waugh* (1957), 11 D.L.R. (2d) 447 (Ont. C.A.), 449 ("the rights and freedoms under law from unlawful arrest and imprisonment of an innocent citizen must be fully guarded by the courts"); *Leigh v. Cole* (1853), 6 Cox C.C. 329 (Eng. C.A.), 330-31 ("It is equally incumbent on everyone engaged in the administration of justice, to take care that the powers necessarily entrusted to the police are not made an instrument of oppression or of tyranny") & *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 176 ("To allow less [than probable cause] would be to leave law-abiding citizens at the mercy of the officer's whim or caprice"). See also *Entick v. Carrington* (1765), 95 E.R. 807 (Eng. K.B.), 817 ("The defendants [messengers in ordinary to the King] have no right to avail themselves of the usage of these [general] warrants [made by a Lord of the Privy Council] since the Revolution ... [and if the opposite was the case] it would destroy all the comforts of society") & J. Hall, "Legal and Social Aspects of Arrest Without a Warrant", 49 Harv. L. Rev. 566, 566 (1936) ("a warrantless arrest requires the maximum exercise of discretion and hence grants the maximum grant of right").

96 In this hypothetical and those that follow, no consideration is given as to whether police officer X may detain A for investigative purposes. *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 81 ("police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary"). On the degree of certainty scale, this is the low-degree-of-certainty range.

97 *See Koechlin v. Waugh* (1957), 118 C.C.C. 24 (Ont. C.A.), 25-26 (police could not lawfully arrest a person who was out late at night just because his friend was wearing rubber-soled shoes and recent neighborhood break-ins had been committed by a person wearing rubber-soled shoes") & *Henry v. US*, 361 U.S. 98 (U.S. C.A. 7th Cir. 1959) (the FBI did not have probable cause to arrest the petitioner just because the FBI were investigating his friend, who was in the petitioner's car when he was arrested, for a criminal offence).

98 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 231 (reasonable suspicion is a less demanding standard than the arrest standard).

99 A survey of 166 United States federal judges revealed that, on average, they equated probable cause with roughly forty-five percent certainty. McCauliff, "Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293, 1332 (1982). During oral argument of *Maryland v. Pringle*, 540 U.S. 366 (U.S. Sup. Ct. 2003) one of the justices suggested to counsel that probable cause under the Fourth Amendment was less than fifty percent certainty. Transcript of oral argument, p. 14 ll. 12-13 (November 3, 2003).

100 *Police and Criminal Evidence Act 1984*, c. 60, s. 24(4) ("Any person may arrest without a warrant ... anyone whom he has reasonable grounds for suspecting to be guilty of the [arrestable offence]"; *Criminal Law Act 1976*, c. 58, s. 2(3) ("where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be, guilty of the offence"); *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 (the common law authorizes a constable to arrest without warrant if he had reasonable grounds to support his

suspicion that the person to be arrested had committed a felony) & *Beckwith v. Philby* (1827), 108 E.R. 585 (Eng. K.B.), 586 ("a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities"). See also *Prevention of Terrorism (Temporary Provisions) Act 1984*, s. 12(1)(b) ("a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be ... a person who is or has been concerned in ... acts of terrorism to which this Part of this Act applies") & *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 293 ("In order to have reasonable suspicion the constable need not have evidence amounting to a prima facie case").

101 *Crimes Act 1961*, Public Act No. 43, s. 315(2)(b) ("Any constable ... may arrest and take into custody without a warrant ... any person whom he or she has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment") & *Caie v. Attorney General of New Zealand*, [2001] NZHC 259, ¶85 ("It is sufficient if there is good cause to 'suspect'. There need not be good cause to commit for trial, leave to a jury, or convict, nor need there be a prima facie case").

102 The study of American law is usually rewarding. As Chief Justice Dickson declared in *R. v. Simmons*, [1988] 2 S.C.R. 495 (S.C.C.), 516, "American courts have the benefit of two hundred years of experience in constitutional interpretation. This wealth of experience may offer guidance to the judiciary in this country". Good ideas are a function of their soundness and rational roots; not where they originated. The jurisprudence of non-Canadian courts routinely merits review. The Fourth Amendment of the Constitution for the United States provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause ...." See *Alabama v. White*, 496 U.S. 325 (U.S. Ala. S.C. 1990), 330 ("Reasonable suspicion is a less demanding standard than probable cause"); *Texas v. Brown*, 460 U.S. 730 (U.S. Tex. S.C. 1983), 742 ("probable cause ... does not demand any showing that such a belief be correct or more likely true than false"); *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 235 ("standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place ... [in a probable cause] decision"); *Florida v. Harris*, 133 S.Ct. 1050 (U.S. Sup. Ct. 2013), 1055 ("All we have required is the kind of 'fair probability' on which 'reasonable and prudent [people] not legal technicians act'"); *Hill v. California (State)*, 401 U.S. 797 (U.S. Sup. Ct. 1971), 804 ("sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment"); *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 238 (probable cause requires a "fair probability that contraband ... will be found in a particular place"); *US v. Garcia*, 179 F.3d 265 (U.S. C.A. 5th Cir. 1999), 269 ("the requisite 'fair probability' is something more than a bare suspicion but need not reach the fifty percent mark"); *US v. Ortiz*, 669 F.3d 439 (U.S. C.A. 4th Cir. 2012), 446 ("This [Fourth Amendment probable cause] standard is not particularly demanding, and the evidence need not provide the officers with an air-tight case, nor even a case satisfying the preponderance standard") & *Wilson v. Russo*, 212 F.3d 781 (U.S. C.A. 3rd Cir. 2000), 789 ("Probable cause exists if there is a 'fair probability' that the person committed the crime at issue").

103 *R. v. MacDonald*, [2014] 1 S.C.R. 37 (S.C.C.), 70 (declared that the Fourth Amendment probable cause standard and the Canadian standard for arrest were the same); *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), 167 (the Court declared that the probable cause standard in the Fourth Amendment is "identical" to the "reasonable grounds to believe" standard); *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, [2005] 2 S.C.R. 91 (S.C.C.), 145 ("'reasonable grounds to believe' standard requires something more than mere suspicion, but less than the standard applicable in civil matters"); *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 250-51 (Justice Cory referred to the English case, *Dumbell v. Roberts*, with approval); *R. v. Loewen* (2010), 260 C.C.C. (3d) 296 (Alta. C.A.), 309 ("'reasonable' [in s. 495(1)(a) of the *Criminal Code*] relates to legitimate expectations that a fact exists, without being able to say that it is 'more likely than not'") & *R. v. Hall* (1995), 22 O.R. (3d) 289 (Ont. C.A.) (the court upheld as lawful an arrest under circumstances where the grounds of arrest, objectively assessed, amounted to a moderate degree of certainty). It was clearly the law in Canada before April 1, 1955, the date the *Criminal Code*, S.C. 1953-54, c. 51 came into force. *The Criminal Code, 1892*, S.C. 1892, c.29, s. 28 ("Every police office is justified in arresting without warrant any person whom he finds ... loitering by night and whom he has good cause to suspect of having committed any [arrestable] offence"; *Criminal Code*, R.S.C. 1906, c. 146, s. 652 ("Any peace officer may, without a warrant, take into custody any person whom he finds ... loitering ... during the night, and whom he has good cause to suspect of having committed an indictable offence"); *An Act to amend the Criminal Code*, S.C. 1913, c. 13, s. 23 ("Any police officer may arrest without warrant any person whom he has good cause to suspect of having committed ... any of the [arrestable offences]"); *Criminal Code*, R.S.C. 1927, c. 36, s. 647(b) ("A peace officer may arrest, without warrant ... any person whom he has good cause to suspect of having committed ... any [arrestable] ... offence"). See also *Criminal Code*, R.S.C. 1985, c. C-46, s. 254(2) ("If a peace officer has reasonable grounds to suspect that a person has alcohol or drugs in their body and that the person has, within the preceding three hours, operated a

motor vehicle ..., the peace officer may, by demand made as soon as practicable, require the person ... to provide ... samples of breath"). Justice Binnie, in *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.), 501, developed the concept of reasonable suspicion: "'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". Justice Deschamps, also in *R. v. Brown*, [2008] 1 S.C.R. 456 (S.C.C.), 545, spoke against incorporating into the reasonable suspicion standard the elements of the more-demanding "reasonable grounds to believe standard". The Supreme Court, in *R. v. Monney*, [1999] 1 S.C.R. 652 (S.C.C.), 682, expressly recognized that the reasonable grounds to suspect standard was less demanding than the reasonable grounds to believe standard.

104 *R. v. Mann*, [2004] 3 S.C.R. 59 (S.C.C.), 69 (the police have a "mandate to investigate crime and keep the peace") & *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129 (S.C.C.), 139 ("The police must investigate crime").

105 See *R. v. Hall* (1995), 22 O.R. (3d) 289 (Ont. C.A.) (the arrest of a person who resembled someone spotted in the general vicinity of a rural break-in shortly after it occurred was upheld as lawful).

106 This means that a reasonable person would assess the degree of certainty that a person has committed a crime at not less than fifty-one percent. *R. v. Mayor*, 2013 ABQB 598 (Alta. Q.B.), ¶47 ("The Appellant involved himself in a series of actions that ... would lead to a reasonable person to conclude that the Appellant ... [was] probably involved in a drug transaction"). This is most likely not the law in the United States. *Texas v. Brown*, 460 U.S. 730 (U.S. Tex. S.C. 1983), 742 (the Fourth Amendment does not require the arrestor to have an objectively verifiable belief that the arrestee more likely than not committed an arrestable offence) & *US v. Humphries*, 372 F.3d 653 (U.S. C.A. 4th Cir. 2004), 660 ("the probable-cause standard does not require that the officer's belief be more likely true than false"). See generally McCauliff, "Burdens of Proof: Degree of Belief, Quanta of Evidence, or Constitutional Guarantees?" 35 Vand. L. Rev. 1293, 1302 n.45 (1982) & Williams, "The Mathematics of Proof -1" [1979] Crim. L.R. 297.

107 H. Packer, "Two Models of Criminal Process", 113 U. Pa. L. Rev. 1, 26 (1964) (the due process model postulates that a police officer may make a warrantless arrest if "acting upon probative data subject to subsequent judicial scrutiny ... [the police officer concludes] that a crime has probably been committed, and that ... [the arrestee] is the person who probably committed it").

108 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 232 & 284 ("reasonable and probable grounds to believe ... engages the ... probability ... of crime" and the "reasonable suspicion standard addresses the *possibility* of uncovering criminality and not a *probability* of doing so"); *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 270 ("'reasonable grounds' [to arrest] means reasonable grounds to believe that an individual is or has been involved in a particular offence ... [T]he ... concept ... is one of probabilities"); *Baron v. R.*, [1993] 1 S.C.R. 416 (S.C.C.), 447 ("'Reasonableness' comprehends a requirement of probability"); *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 250-51 ("a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest"); *R. v. Smellie* (1994), 95 C.C.C. (3d) 9 (B.C. C.A.), 17 ("It is common ground that reasonableness comprehends a requirement of probability") & *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 (Eng. Q.B.) (in the context of a malicious prosecution action the court held that one of the elements of the action was an absence of reasonableness and probable cause: facts would not "lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that a person charged was probably guilty of the crime imputed").

109 Bacigal, "Making the Right Gamble: The Odds on Probable Cause", 74 Miss. L.J. 279, 334 (2004) ("Whether this level is equated with beyond a reasonable doubt or some even higher standard, it really has no place at the preliminary inquiry stage").

110 See *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 293 ("In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case").

111 One can construct plausible hypotheticals in which an arrestor may not believe with a moderate or high degree of certainty that the arrestee has probably committed an indictable offence but that a reasonable person would. Suppose that the arrestor is a personal friend or family member of the arrestee. This subjective element is not the primary protector of the liberty interest. Indeed, the liberty interest would not be diminished if this condition was eliminated. The Supreme Court of Canada has concluded that s. 495(1)(a) of the *Criminal Code* makes the belief of the arrestor one of the indicia of a lawful arrest. Some argue that the insistence on a subjective component protects the liberty value. S. Coughlan & G. Luther, Detention and Arrest

80 (2010) ("The subjective standard is important"). The second condition, which introduces an objective test, is designed to introduce objective and rational judicial oversight. It is this element of the test which protects the liberty value. See *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 302 ("It is [the] ... objective test [in s. 12(1)(b) of the *Prevention of Terrorism (Temporary Provisions) Act 1984*] ... which provides the safeguard against arbitrary arrest and dentention").

112 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 234-35 ("the court will assess the circumstances the police were aware of at the time of the execution of the search"); *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129 (S.C.C.), 167 ("It is accepted that the investigation, as it stood at the time the arrest was made, disclosed reasonable and probable grounds"); *R. v. Biron* (1975), [1976] 2 S.C.R. 56 (S.C.C.), 72 ("the validity of an arrest under ... [the predecessor of s. 495(1)(b)] must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made"); *Wong v. Toronto Police Services Board*, 2009 CarswellOnt 7412 (Ont. S.C.J.), ¶61 ("The determination as to whether reasonable grounds exists is based upon the analysis of the circumstances apparent to the officer at the time of the arrest and not based upon what the officer or anyone else learned later"); *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 293 ("The information which causes the constable to be suspicious ... must be in existence to the knowledge of the police officer at the time he makes the arrest"); *McArdle v. Egan*, [1933] All E.R. Rep. 611 (Eng. C.A.), 613 ("The inquiry is as to the state of mind of the chief constable at the time when he ordered the arrest"); *Devenpeck v. Alford*, 543 U.S. 146 (U.S. Sup. Ct. 2004), 153 ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest"); *Terry v. Ohio*, 392 U.S. 1 (U.S. Ohio S.C. 1968), 22 ("would the facts available to the officer at the moment of the seizure 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"); *Henry v. US*, 361 U.S. 98 (U.S. C.A. 7th Cir. 1959), 103 ("It is ... necessary to determine whether at or before ... [the time of arrest] they had reasonable cause to believe that a crime had been committed") & L. Leigh, Police Powers in England and Wales 62 (1975) ("The validity of arrest is to be judged according to whether the conditions required for arrest were known to the arrestor at the time or were reasonably supposed by him to exist"). This timeline means that a future determination of the guilt or innocence of the arrestee "does not decide the legality of the arrest". W. LaFave, Arrest: The Decision to Take a Suspect into Custody 250 (1965).

113 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 232; *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 270; *Baron v. R.*, [1993] 1 S.C.R. 416 (S.C.C.), 447; *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.), 250-51; *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 235; *United States v. Cortez*, 449 U.S. 411 (U.S. Ariz. S.C. 1981), 418 & *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175.

114 *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 281 ("Common sense, flexibility, and practical everyday experience are the keywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer") & *United States v. Cortez*, 449 U.S. 411 (U.S. Ariz. S.C. 1981), 418 ("a trained officer draws inferences and makes deductions — inferences and deductions that might well elude an untrained person").

115 This objective condition is essential to the protection of the liberty value. Its existence reduces the likelihood that a person may be deprived of freedom of movement under a fact pattern which does not disclose sufficient markers of likely criminal conduct. The battle takes place within the framework of this test. *Horton v. California*, 496 U.S. 128 (U.S. Cal. Sup. Ct. 1990), 138 ("evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); *Illinois v. Gates*, 462 U.S. 213 (U.S. Ill. S.C. 1983), 235 ("While an effort to fix some general numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that only the probability ... of criminal activity is the standard of probable cause"); *United States v. Cortez*, 449 U.S. 411 (U.S. Ariz. S.C. 1981), 418 ("The process does not deal with hard certainties, but with probabilities") & *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 175 ("In dealing with probable cause, however, as the very name implies, we deal with probabilities").

116 As noted above, neither has the United States Supreme Court. 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (5th ed. 2012) 84 & Colb, "Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms", 73 Law and Contemp. Prob. 69, 71-72 (Summer 2010).

117 *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 276-77 & 278-79 ("Police officers need not be trained pharmacologists or toxicologists or medical doctors before they can give evidence on the factors that their training and experience has taught

them provide reasonable grounds to suspect that someone is engaged in the use of drugs" and "Sights, sounds, movement, body language, patterns of behaviour, and the like are part of an officer's stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold"); *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 234, 238 & 246 ("the exercise of *Charter* rights to remain silent or to walk away from questioning made outside the context of detention [should not] provide grounds for reasonable suspicion"; "An officer's training and experience may provide an objective experiential, as opposed to empirical, basis for grounding reasonable suspicion"; and "the police are not under a duty to investigate alternative explanations"); *R. v. Nolet*, [2010] 1 S.C.R. 851 (S.C.C.), 879 ("While the Crown did not attempt to qualify the officer as an expert on drug monies, the officer's experience and training supported the probative value of his evidence on this point"); *Hussien v. Kam* (1969), [1970] A.C. 942 (Malaysia P.C.), 949 ("Suspicion can take into account matters that could not be put in evidence at all"); *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 293 ("Hearsay information ... may afford a constable reasonable grounds to arrest"); *McArdle v. Egan* (1933), 150 L.T.R. 412 (Eng. C.A.) (the arrestor may rely on hearsay); *Draper v. United States*, 358 U.S. 307 (U.S. Ill. S.C. 1959), 332 (a police officer may rely on hearsay when deciding whether to arrest a person); *Brinegar v. United States*, 338 U.S. 160 (U.S. Sup. Ct. 1949), 177 (a police officer may take into account a person's prior record when deciding whether to arrest a person) & W. LaFave, Arrest: The Decision to Take a Suspect into Custody 251 (1965) ("the officer may consider ... the character of the suspect, his past record and hearsay concerning the commission of the offence").

118 *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), 751 (the police "would have been derelict in their duty" if they did not arrest the accused based on "a specific and detailed complaint from a witness to the events [whose reliability] ... [t]he officers had a firsthand opportunity to assess").

119 ¶7(u).

120 See *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 278-79 ("Sights, sounds, body language, patterns of behaviour, and the like are part of an officer's stock in trade and courts should consider this when assessing whether their evidence, in any given case, passes the reasonable suspicion threshold"); *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), 751 ("The officers had a firsthand opportunity to assess Mr. Hepworth's reliability. They had no reason to discount his information") & *Mackey v. Montrym*, 443 U.S. 1 (U.S. Sup. Ct. 1979), 14 ("The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process"). If an upstanding citizen had provided the same information to Detective Andrus, the detective most certainly would have been in a position to lawfully arrest the alleged perpetrators as soon as the interview was concluded.

121 *R. v. MacKenzie*, [2013] 3 S.C.R. 250 (S.C.C.), 278-79 ("Police officers are trained to detect criminal activity. That is their job. They do it every day. ... [C]ourts should consider this when assessing their evidence") & *R. v. Nolet*, [2010] 1 S.C.R. 851 (S.C.C.), 879 ("While the Crown did not attempt to qualify the officer as an expert on drug monies, the officer's experience and training supported the probative value of his evidence on this point").

122 See generally *R. v. Roks*, 2011 ONCA 526 (Ont. C.A.), ¶65 ("To satisfy the materiality requirement [on a *R. v. Vetrovec* [1982 CarswellBC 663 (S.C.C.)] caution], confirmatory evidence need not implicate the accused").

123 While Ms. Fornalik's statement did not name Jim Can as one of those present on March 10, 2003, she did assert that "Jim (Hummer owner) was there". Detective Andrus was justified in concluding that it was more likely than not that Jim, the Hummer owner, and Jim Can were one and the same. See *O'Hara v. Chief Constable of the Royal Ulster Constabulary* (1996), [1997] A.C. 286 (U.K. H.L.), 203 (would a reasonable observer in the circumstances of the arrestor have come to the conclusion the arresting officer did).

124 See *R. v. Monney*, [1999] 1 S.C.R. 652 (S.C.C.), 682-84 (the Court concluded that the "*cumulative* effect of several factors" on which the officer relied justified a determination that there were reasonable grounds for the officer's suspicion (emphasis added)); *R. v. Jacques*, [1996] 3 S.C.R. 312 (S.C.C.), 326 ("Viewing the facts and circumstances as a whole, rather than isolating each in turn, is an approach which commends itself") & *R. v. Loewen* (2008), 461 A.R. 193 (Alta. Q.B.), 1999 (Justice Ross relied on a number of factors — smell of burnt marijuana in the car, only the accused was in the car and a large sum of money in small bills found on the accused — to conclude that reasonable grounds validated the police officer's subjective belief that the accused possessed a large amount of marijuana) aff'd (2010), 260 C.C.C. (3d) 296 (Alta. C.A.) aff'd [2011] 2 S.C.R. 167 (S.C.C.).

125 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 226 ("The reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed"); *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), 751 ("The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable") & *Wilson v. Russo*, 212 F.3d 781 (U.S. C.A. 3rd Cir. 2000), 790 ("An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists").

126 *R. v. Chehil*, [2013] 3 S.C.R. 220 (S.C.C.), 234 & 246 ("the obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations" and "the police are under no duty to investigate alternative explanations").

127 There is no basis to characterize the investigation conducted by the Calgary Police Service as "hasty". Its members responded promptly to a threat to Mr. Sarvucci and his family. Before the arrest of Mr. Can, the Calgary Police Service interviewed Mr. Sarvucci and his wife, the Habibs and Ms. Fornalik. See *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 ("where there is no danger of a person who has *ex hypothesis* aroused their suspicion, that he probably is an 'offender' attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their inquiries forthwith" per Scott, L.J.).

128 *Lister v. Perryman* (1870), L.R. 4 H.L. 521 (U.K. H.L.), 536 ("The question was not whether the Defendant might have obtained more satisfactory and surer grounds of belief by applying to Robinson for direct information, but whether the facts brought to his knowledge furnished reasonable and probable cause for his believing that the Plaintiff had dishonestly possessed himself of his rifle, and justified him in acting on that belief without further inquiry").

129 Detective Andrus swore in paragraph 17 of his September 22, 2011 affidavit that "I believed ... Mr. Sarvucci had been held hostage and was the victim of a violent extortion. I believed that he and his family were in danger ...."

130 There are other legitimate interests which may justify an arrestor to move expeditiously. *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 (the police may "have to act on the spur of the moment ... and be bound ... to arrest to prevent escape"). See W. LaFave, Arrest: The Decision to Take a Suspect into Custody 248 (1965) (the police may arrest if they suspect that the arrestee may leave the jurisdiction or "is carrying vital evidence").

131 *Maxwell v. Wal-Mart Canada Corp.*, 2013 ABQB 625 (Alta. Q.B.), ¶69 ("an officer is not required to obtain a version of events from the person to be charged"); *Kellman v. Iverson*, 2012 ONSC 3244 (Ont. S.C.J.), ¶27 ("there was nothing improper or unfair in the police not asking ... [the plaintiff] for his version of events"); *Wong v. Toronto Police Services Board*, 2009 CarswellOnt 7412 (Ont. S.C.J.), ¶59 ("a police officer is [not] required to obtain the accused's version of events"); *Lawrence v. Peel Regional Police Force*, [2009] O.J. No. 1684 (Ont. S.C.J.), ¶49 ("Based on all of the above, I do not find that the police breached the standard of care owed to Mr. Laurence when they did not take a statement from Mr. Laurence in advance of laying criminal charges on May 15, 2001") & *Wiles v. Ontario (Police Complaints Commissioner)*, [1997] O.J. No. 6274 (Ont. Div. Ct.), ¶50) ("Detective Wiles was not required to obtain the position of a potential accused ... before he can form reasonable grounds to arrest for an indictable offence. There is no obligation upon a police officer to weigh and determine the validity of various versions of events and render judgment before effecting an arrest"). See also *Trudgian v. Bosche* (2003), [2004] 1 W.W.R. 324 (Sask. Q.B.), 356 (under the circumstances the arrestor should have interviewed witnesses who attended a broom ball game involving RCMP cadets before arresting a cadet for an alleged sexual assault committed during the game) & *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (Eng. C.A.), 329 (the defendant constable should have asked the person the plaintiff claimed supplied him with the rationed goods the constable alleged was unlawfully in his possession).

132 *Wiles v. Ontario (Police Complaints Commissioner)*, [1997] O.J. No. 6274 (Ont. Div. Ct.), ¶47) ("Detective Wiles was not required ... to establish that the accused has no valid defence to the charge"); *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), 751 ("In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonable permit") & *McArdle v. Egan* (1933), 150 L.T.R. 412 (Eng. C.A.), 413 & 414 ("but once there is what appears to be a reasonable suspicion against a particular individual, the police officer is not bound ... to hold his hand in order to make further inquiries if all that is involved is to make assurance doubly sure" per Lord Wright and "if ... that evidence which is contained substantially in reasons 1 to 8 stated in the evidence of the chief constable, in itself of necessity gives a reasonable and probable cause for

suspicion, I do not see the relevance of considering whether he may or may not have corroborated that suspicion by further inquiries" per Slesser, L.J.).

133 My review of the evidence discloses that there are four aspects which support the finding made. First, there is no dispute about the time Ms. Godfrey completed the statement. She prepared it on March 10, 2003. As it was in existence before Detective Andrus ordered Mr. Can's arrest, it was certainly available for review by Detective Andrus. Second, Detective Andrus swore in paragraph 13 of his affidavit that he "reviewed ... [her] statement shortly after it was taken". Had he reviewed her statement before he made the arrest order this would have occurred "shortly after it was taken". Third, Detective Andrus stated in paragraph 17 of his affidavit that he took into account the information contained in paragraph 13 of his affidavit before reaching the conclusion that "Mr. Sarvucci had been held hostage and was the victim of a violent extortion". Fourth, Detective Andrus did not state in his affidavit or during questioning on his affidavit (the transcript the Court reviewed does not indicate that counsel explored this issue with the detective) that his review of Ms. Godfrey's March 10, 2003 statement postdated his decision to order Mr. Can's arrest. On the other hand, there are aspects of Detective Andrus' affidavit which warranted the challenge Mr. Can presented. First, Detective Andrus did not refer to Ms. Godfrey's March 10, 2003 statement when he catalogued in paragraph 39 of his affidavit the grounds which justified his belief that he "had reasonable grounds ... upon which to base his arrest". But to be fair, the Court notes that he introduced the grounds with the statement that "[t]hose grounds included the following". The word "include" means that there may be other grounds besides those listed. M. Asprey, Plain Language for Lawyers 140 (4th ed. 2010) ("Using the word 'includes' in your definition leaves your definition open-ended. You have not closed off your definition. The defined word means what you've described, *and* anything else that the defined word would normally mean".) Second, and this is his best argument, Detective Andrus, in paragraph 40(a) of his affidavit, writes that "[s]ubsequent to the arrest of Mr. Can, our investigation progressed and continued to provide information corroborating Mr. Sarvucci's version of the events". One of the items he listed as corroborating information was Ms. Godfrey's March 10, 2003 statement. Both Master Mason and Justice Bensler must have concluded, given the other parts of his affidavit, that this entry was an oversight on Detective Andrus' part. They concluded that "[p]rior to Mr. Can's arrest Detective Andrus reviewed [Ms. Godfrey's] ... statement". 2012 ABQB 340 (Alta. Master), ¶27 & 2013 ABQB 226 (Alta. Q.B.), ¶50. They did not explain the basis for this conclusion. Their factual determination is not the product of palpable and overriding error.

134 There have been a number of successful applications for summary judgment by police officers in Canada and the United States who have been sued for false arrest. E.g. *Maxwell v. Wal-Mart Canada Corp.*, 2013 ABQB 625 (Alta. Q.B.); *Moak v. Haggerty*, 2008 CarswellOnt 7 (Ont. S.C.J.); *Wong v. Toronto Police Services Board*, 2009 CarswellOnt 7412 (Ont. S.C.J.); *Lawrence v. Peel Regional Police Force*, [2009] O.J. No. 1684 (Ont. S.C.J.); *Collis v. Toronto Police Services Board*, [2007] O.J. No. 3301 (Ont. Div. Ct.); *Emond v. Ottawa-Carleton Regional Police Service*, 2003 CarswellOnt 3402 (Ont. S.C.J.); *Toribio v. Spece*, Doc. 13-3029 (U.S. C.A. 3rd Cir. February 21, 2014) (dismissal of an appeal against an order granting the defendant summary judgment in an action for false arrest, false imprisonment and malicious prosecution) & *Wilson v. Russo*, 212 F.3d 781 (U.S. C.A. 3rd Cir. 2000) (dismissal of an appeal against an order granting the police officer defendant summary judgment in an action alleging an unconstitutional arrest).

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