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REASONABLE GROUNDS: THROUGH YOUR EYES

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There is no statutory definition for the term "reasonable grounds to believe". Synonymously, reasonable grounds has been referred to as strong reason to believe[1], credibly based probability[2], reasonable probability[3], reasonable belief[4], reasonable and probable cause to believe[5], and the American equivalent of probable cause[6].

The Legal Standard

Reasonable grounds involves a two-limb test[7]. Firstly the officer must subjectively and genuinely believe they have reasonable grounds[8]. The subjective belief relates entirely to the "state of mind" of the police officer when a power (search, arrest, force) is exercised[9]. Although it would be a best practice for police to state they subjectively had reasonable grounds when testifying in court, they need not "resort to particular words to satisfy the subjective component"[10]. In the absence of a police officer expressly stating their belief, the court may conclude there was a subjective belief on a fair reading of the evidence, including circumstantial evidence[11], and if a "police officer is to give an honest answer as to [their] belief, [the court cannot], as a matter of law, ... tell the officer that the answer is wrong[12]".

Secondly, reasonable grounds must be objectively based. The objective test "is whether a reasonable person, standing in the shoes of the officer, would have believed that [reasonable grounds] existed[13]". The grounds that form the basis for the officer's subjective belief "must be justifiable from an objective point of view"[14]. The objective standard recognizes that police conduct may be warranted only when such conduct can be subject to detached, independent, and neutral scrutiny of a court that must evaluate the reasonableness of the police action in light of the particular circumstances that were apparent to the officer. This serves to avoid and provide a safeguard against arbitrary and indiscriminate police action and to prevent officers from being the ultimate judges of their own decisions[15]. The objective component imposes a responsibility on the police to act with restraint and after careful assessment[16]. Intuition, for example, cannot be equated with reasonable grounds since there is no objective, or factual basis, upon which a court can assess the intuition[17]. Any reasonable person in possession of the same information of the officer must be able to conclude that reasonable grounds exist[18].

In applying the objective test to the reasonableness of the officer's subjective belief, the court is not required to look beyond what was in the mind of the officer at the time of action[19]. However, the lack of a subjective

IN THIS ISSUE

[1] Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (S.C.C.) at p.114.
[2] Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (S.C.C.) at p.115.
[3] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Wilson at p.1166.
[4] R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Wilson at p.1166.
[5] R. v. Proulx (1992) 76 C.C.C. (3d) 316 (Que.C.A.)
[6] Hunter v. Southam (1984) 14 C.C.C. (3d) 254 (S.C.C.) at p.114.
[7] See (context of a search) R. v. Belnavis [1997] 3 S.C.R. 341(S.C.C.) per Cory J. at para. 27, (context of a breath demand) R. v. Bernshaw [1995] 1 S.C.R. 254 (S.C.C.) per Sopinka at para. XLVIII, (context of an arrest) R. v. Storrey [1990] 1 S.C.R. 241 (S.C.C.) per Cory J. at p. 324, R. v. Feeney [1997] 2 S.C.R. 13 (S.C.C.) per Sopinka J. at para. 29, per L'Heureux-Dube at para. 113. R. v. Latimer [1997] 1 S.C.R. 217 (S.C.C.) at para 226.R. v. Klimchuk (1991) 67 C.C.C. (3d) 385 (B.C.C.A.) per Wood at p.406, R. v. Hall (1995) 22 O.R. (3d) 289 (Ont.C.A.), R. v. Lewis (1998) 122 C.C.C. (3d) 481 (Ont.C.A.) per Doherty J.A. at p. 493, (context of exigent circumstances) R. v. McCormack 2000 BCCA 57 at para. 25.
[8] R. v. T.A.C. [1994] B.C.J. No.1692 (B.C.C.A.) at para.19.
[9] O'hara v. Chief Constable of the R.U.C. [1996] H.L.J. No. 41 (House of Lords) per Lord Craighead.
[10] See R. v. Hall (1995) 22 O.R. (3d) 289 (Ont.C.A.).
[11] R. v. J.R. [2000] O.J. No. 930 (Ont.Crt.J.) at para. 22.
[12] R. v. Bernshaw [1995] 1 S.C.R. 254 (S.C.C.) per Sopinka J. at para. LIX.
[13] See R v. Storrey [1990] 1 S.C.R. 241(S.C.C.) at p.324, R. v. G.M.R. [1994] N.S.J. No. 566 (N.S.C.A.) at para. 39, R. v. Brown (1987) 33 C.C.C. (3d) 54 (N.S.C.A.) at pp.65-66..
[14] R. v. Latimer [1997] 1 S.C.R. 217 (S.C.C.) at para 226., see also R. v. Crossman [1991] B.C.J. No. 729 (B.C.C.A.)
[15] R. v. Perrault [1992] R.J.Q. 1848 (Que.C.A.)
[16] R. v. Sundquist (2000) 145 C.C.C. (3d) 145 (Sask.C.A.) at p.158.
[17] R. v. Guse (1983) 37 C.R. (3d) 339 (Ont.Co.Ct.) at p.344.
[18] R. v. Proulx (1993) 81 C.C.C. (3d) 48 (Que.C.A.) at p.51.
[19] O'hara v. Chief Constable of the R.U.C. [1996] H.L.J. No. 41 (House of Lords) per Lord Craighead.

belief on the part of the officer will generally suggest the objective test has not been met "unless the officer is to be considered to have an unreasonably high standard[20]".

How Much is Enough?

The police need not demonstrate that they possessed anything more than reasonable grounds. It is not necessary to establish that the officer had proof beyond a reasonable doubt or even that there was a prima facie case for conviction[21]. The threshold for reasonable grounds is significantly lower[22]. However, the degree of likelihood must transcend a reasonable suspicion. The line between reasonable suspicion and reasonable grounds is often a fine, grey one[23].

Piecing Together the Puzzle

The "circumstances have to be considered as a whole and not in isolation[24]" nor separately or out of context[25]. The "totality of the circumstances test[26]" must be applied. As stated by Belzil J.A. in *R. v. Huddle* (1987) 21 M.V.R. (2d) 150 (Alta.C.A.):

> [I]t is an error in law to test individual pieces of evidence which are offered to establish the existence of [reasonable] grounds...[T]he question is whether the total of the evidence provided [reasonable grounds], on an objective standard.

The foundation for establishing reasonable grounds can be reduced to three fundamental categories; **personal observations**[27], **information**, and the officer's **experience**.

Personal observations are the externally manifested stimuli that the officer considers when reaching a subjective conclusion. These personal observations are not restricted to visual perception but include auditory, tactile, taste, and olfactory senses.

Information would include personal observations relayed by other persons including colleagues[28], information provided by an informant[29], CPIC[30] queries, information bulletins, or other sources of reliable second hand information coming to the attention of the officer. The law is clear that reasonable grounds may be based on information that is hearsay[31].

Experience is not to be discounted in the formulation of reasonable grounds for belief[32]. The general category of experience may incorporate personal experience[33], corporate experience[34] of the agency or profession, and training[35].

As well, "an arresting officer is permitted to draw inferences[36]" or reasonable assumptions[37]. The officer also need not have personal knowledge of every element of an offence[38]. Perhaps Cumming J. in *R. v. Charlton* (1992) 15 B.C.A.C. 272 (B.C.C.A.) described it best when he stated **the police "are entitled to 'put two and two together'[39]"**.

The Doppelganger[40] Test

The combination of personal observations, information, and experience must be examined by the reasonable person standing in the "shoes of the officer" viewing the circumstances through the eyes of the officer knowing what the officer knew and taking into account

[20] See R. v. Feeney [1997] 2 S.C.R. 13 (S.C.C.) per Sopinka at para. 34.
[21] See R. v. Storrey (1990) 53 C.C.C. (3d) 316 (S.C.C.) per Cory J. for the court at p.324, R. v. Charlton (1992) 15 B.C.A.C. 272 (B.C.C.A.) per Cumming J., R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) per Lamer J., R. v. Debot (1986) 30 C.C.C. (3d) 207 (Ont. C.A.) per Martin J.A., R. v. Feeney [1997] 2 S.C.R. 13 (S.C.C.) per L'Heuereux-Dube J. at para.113, R. v. Cook [1990] B.C.J. No.37 (QL) (B.C.C.A.)., R. v. Duguay [1989] 1 S.C.R. 93 (S.C.C.) per L'Heureux-Dube J., R. v. Lam 2000 BCCA 545 at para.46, R. v. Tunney [1990] B.C.J. No.1871 (B.C.S.C.).
[22] R. v. Duguay [1989] 1 S.C.R. 93 (S.C.C.) per L'Heureux-Dube J.
[23] R. v. Sundquist (2000) 145 C.C.C. (3d) 145 (Sask.C.A.) at p. 158 & p.161.
[24] R. v. Johnson 1999 BCCA 622 at para. 24.
[25] R. v. Ranneris [1994] B.C.J. No. 3077 (B.C.S.C.) at para 42.
[26] See R. v. Cook [1990] B.C.J. No.37 (QL) (B.C.C.A.).
[27] R. v. Tanguay and Rozon [2001] Docket:C35418 (Ont.C.A.)
[28] See R. v. Fielding (1967) 3 C.C.C. 258 (B.C.C.A), R. v. Haglof 2000 BCCA 604 at para.33..
[29] R. v. Charlton (1992) 15 B.C.A.C. 272 (B.C.C.A.).
[30] CPIC is an acronym for Canadian Police Information System. See for example R. v. Vu 2000 BCCA 51 at para 15.
[31] R. v. Brown (1987) 33 C.C.C. (3d) 54 (N.S.C.A.) at p.66., R. v. Feeney 2001 BCCA 113 at para.30.
[32] See R. v. Feeney [1997] 2 S.C.R. 13 per L'Heureux-Dube at para. 124, R. v. Jacques [1996] 3 S.C.R. 312 (S.C.C.) per Major J. at para.66, R. v. Ranneris [1994] B.C.J. No. 3077 (B.C.S.C.) per Owen-Flood J. at para. 13, Berntt v. City of Vancouver et al. (1999) 135 C.C.C. (3d) 353 (B.C.C.A.) per Southin J.A. at p. 361, per McEachern C.J.B.C. at p.366, R. v. Smith (1998) 126 C.C.C. (3d) 62 (Alta.C.A.) at p.66 and p.77.
[33] R. v. C.M.G. [1996] M.J. No. 428 (Man.C.A.),
[34] R v. McIntosh (1984) 29 M.V.R. 50 (B.C.C.A.)
[35] R. v. Jones [1992] B.C.J. No. 231 (B.C.S.C.) per Drost J.
[36] R. v. Vance (1979) 48 C.C.C. (2d) 507 (B.C.C.A.) at p.515.
[37] R. v. Batty [1997] B.C.J. No. 3062 (B.C.P.C.)
[38] See R. v. Vance (1979) 48 C.C.C. (2d) 507 (B.C.C.A.) at p.515.
[39] See also R. v. Arason & Derosier (1992) 78 C.C.C. (3d) 1 (B.C.C.A.) per Cumming J. at p.33.
[40] doppelganger (dop·pel·gäng·er) means a stand in, clone, or a ghostly counterpart of a living person.

the officers experience, training and understanding at the time[41]. It is the police officer's own account of the information which the officer had at the time which is material, not what is known or observed by someone else[42]. In the case of an arrest, Ryan J. in *R. v. Daggit* [1991] B.C.J. No. 3210 (B.C.S.C.) described the test as "whether the circumstances that the peace officer believes to be true are such that would give rise in the mind of a reasonable person in the likelihood that the accused has committed the offence[43]".

Reasonable grounds "does not require that the grounds be made up of evidence that can later be adduced in a court room[44]". Evidence that may otherwise be inadmissible at a trial for various reasons, may be used by the officer in forming reasonable grounds[45]. For example, evidence of prior criminal misconduct is generally excluded at trial on policy grounds (the prejudicial effect outweighs its probative value). However, this policy has no application to the analysis of whether or not reasonable grounds existed for an arrest or a search[46].

In assessing the reasonableness of police conduct, the test is not, if at the end of the day the officer turns out to be "wrong" as to their belief, but whether the officer lacked reason for their belief. It is the facts, known to the officer who exercised the power, to which the mind of the independent observer must be applied. The question therefore posed by a judge may be either[47]:

- Would I, being in the police officers position, having the police officers training, experience, and responsibility, think: **Was the police officers action wrong, unnecessary, and lacking in reason?** (an affirmative response suggests reasonable grounds for belief do not exist) or

- Would I, being in the police officers position, having the police officers training, experience, and responsibility, think: **I would do it too or I wouldn't do it, but the officer's doing is not lacking in reason?** (an affirmative response suggests reasonable grounds for belief do exist).

Applying the Standard

It has been recognized that police officers have a very heavy responsibility under the law and "may have to decide in a moments notice points that have engaged the attention of our Courts on many occasions and have caused great perplexity even to learned judges sitting in Appellate Tribunals[48]". Precisely when reasonable grounds "is reached is open to some debate" however, a "police officer seeking to apply [the reasonable grounds] standard should not be held to the strict exactitude of a lawyer, or justice swearing out a warrant"[49]. Although the law does not expect the same enquiry of a police officer that it demands of a justice, "the law does require some meaningful inquiry by the police"[50].

Accuracy v. Reasonableness: Hindsight is 20/20

An assessment of police conduct is based on the reasonableness of what occurred up and until the point of the core transaction (ie. the moment of search, arrest, force)[51]. A fact that "arose or came to light subsequent to the formation of the belief is not relevant in determining whether the police officer had [reasonable grounds] for [their] belief at the time" the belief was formed[52]. An *ex post facto* (after the fact) analysis, or "doctrine of relation back[53]", is not the appropriate approach in determining whether a police action was lawful. The proper analysis governing the conduct of police officers must focus at the starting point, the point of inception, not at the end result and reason backwards. As stated by McClung J.A. in *R. v. Musurichan* (1990) 56 C.C.C. (3d) 570 (Alta.C.A.)[54]:

[41] For example see R. v. Kissen [1978] A.J. No. 266 (Alta.Dist.Crt.)
[42] O'hara v. Chief Constable of the R.U.C. [1996] H.L.J. No. 41 (House of Lords) per Lord Craighead.
[43] The court was tasked with finding whether reasonable grounds existed for a breath demand.
[44] See R. v Duguay, Murphy, and Sevigny (1985) 18 C.C.C. (3d) 289 (Ont.C.A.) affirmed[1989] 1 S.C.R. 93 (S.C.C.) per Zuber J.A. in dissent at p.302, R. v. C.M.G. [1996] M.J. No. 428 (Man.C.A.) at para. 39.
[45] See for example R. v. Vu 2000 BCCA 51 at para 15, R. v. Kissen [1978] A.J. No. 266 (Alta.Dist.Crt.)
[46] R. v. Debot (1986) 30 C.C.C. (3d) 207 (Ont. C.A.) affirmed R. v. Debot [1989] 2 S.C.R. 1140 (S.C.C.) at p.220-221.
[47] See comments of Southin J.A. at p.363, and McEachern C.J.B.C. at p.366.
[48] Kennedy v. Tomlinson et al. (1959) 126 C.C.C. 75 (Ont.C.A.)[48] leave to appeal to S.C.C. refused 20 D.L.R. (2d) 273 (S.C.C.) per Schroeder J.A. for the Court at p.211.
[49] R. v. Feeney [1997] 2 S.C.R. 13 per L'Heureux-Dube at para. 122, see also *R. v. Golub* (1997) 117 CCC (3d) 193 (Ont.C.A.) appeal to Supreme Court of Canada discontinued [1997] S.C.C.A. No. 1571.
[50] R. v. Peters [1998] B.C.J. No.156 (B.C.S.C.)
[51] Provided an officer does not exceed the intensity or scope of the interaction authorized by law.
[52] See for example R. v. McClelland (1995) 98 C.C.C. (3d) 509 (Alta.C.A.), R. v. Vivian 2000 ABPC 137 at para. 22, R. v. Lulu [1991] B.C.J. No.2491 (B.C.S.C.).
[53] See R. v. Vance (1979) 48 C.C.C. (2d) 507 (B.C.C.A.) at p.514.
[54] The issue in this case was whether the officer had the requisite reasonable grounds to demand a breath sample.

> The important fact is not whether the peace officer's belief…was accurate or not, it is whether it was reasonable. That it was drawn from hearsay, incomplete sources, or that it contains assumptions, will not result in its legal rejection by resort to facts which emerged later. What must be measured are the facts as understood by the peace officer when the belief was formed.

An unexpected result does not solely defeat the legality of police conduct[55]. In law, it is not the accuracy of the belief or whether the belief was "right", a term erroneously used to mean reasonable[56], but the reasonableness of the belief itself[57]. Society does not, and cannot while at the same time recognizing reality, demand perfection. The analysis will end with the state/citizen encounter, not with its results, and begin with a "whole picture" analysis. An inaccurate result will not retroactively render a reasonable search at inception unreasonable.

Portability: Relying on the Grounds of Another Officer

It is not uncommon in police work for a police officer to rely on the information, request, or direction of another police officer. A police officer who takes action is entitled to rely on the belief of another police officer provided the other officer's belief met the requirements of reasonable grounds (subjective/ objective analysis)[58]. For example, it is not necessary that the police officer, effecting the arrest or undertaking a search, to "obtain from [the other officer] sufficient information about the underlying facts to enable…an independent judgement that there are reasonable grounds upon which to arrest or search the suspect[59]". The officer who conducted the police action "is entitled to assume the officer who ordered [it] had reasonable grounds for doing so[60]". However, relying on this assumption does not prove reasonable grounds in fact existed. It will be the other officer who requested or ordered the action to justify the requisite grounds for their belief.

[55] R. v. Mulligan [2000] O.J. No. 59 (Ont. C.A.)
[56] See Berntt v. City of Vancouver et al. (1999) 135 C.C.C. (3d) 353 (B.C.C.A.) per Southin J.A. at p. 362.
[57] See R. v. Musurichan (1990) 56 C.C.C. (3d) 570 (Alta.C.A.)
[58] R. v. Venzi [1997] B.C.J. No. 3019 (QL) (B.C.S.C.), R. v. Laurier [1997] B.C.J. No.276 (B.C.C.A.), R. v. Lam 2000 BCCA 545 at para.46.
[59] R. v. Debot (1986) 30 C.C.C. (3d) 207 (Ont.C.A.) affirmed (1989) 52 C.C.C. (3d) 193 (S.C.C.) per Martin J.A.
[60] R. v. Debot [1989] 2 S.C.R. 1140 per Lamer J.

Summary

The actions of police officers are often made at a moment's notice. Officers are required in many cases to receive, process, and react to sensory observations and information in an instant with no second opinion, no appellant process, and no judicial review. Undoubtedly the action chosen by officers will be subject to critique. This review may be made by a supervisor, a court, a board of enquiry, the media, the general public, or the officers themselves who, in hindsight, may be critical of their actions.

However, it is important to recognize that the foundation on which the officer acts, their reasonable grounds, is not to be assessed by the accuracy or outcome of the belief, but the reasonableness of the belief itself from the point of inception. Facts that arise after the requisite grounds have been met do not invalidate the initial grounds nor render the action by the police unlawful. The grounds upon which the officer acted are not to be examined in a "vacuum", although there may be attempts by review authorities to "arm chair quarterback" the officer's conduct in the comfort of a controlled environment and with an inordinate amount of time at their disposal. In fact, they may reserve judgement for a later day, a luxury the officer cannot afford. The proper test is "**through the officer's eyes**" based on the **totality of the circumstances**. The officer's perception of the stimuli presented and their understanding and apprehension of the unfolding events, through their experience and training, is critical to the analysis. It is of utmost importance the officer understand the concept of reasonable grounds, their authorities in law, and their corresponding responsibilities. In detailing the proper foundation for their belief, the officer must convincingly "paint a picture" for the critic who, at the end of the day, will intuitively state to themselves: I would have done the same thing if I was in that officer's shoes.

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