Safety searches on the frontier: ten years since *Mann*

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Almost ten years ago, in *R v Mann*,[2] the Supreme Court of Canada created a new common-law warrantless search power: the power to conduct a pat-down search for weapons incident to an investigative detention. This power met an undeniable need but also created difficulties which, I argue, courts are still trying to address.

The *Mann* search power evolved because courts recognize that police sometimes put themselves at risk when they detain people. Sanctioning a new search power was necessary to ensure that, when that new power is properly exercised, police can protect themselves. At the same time, the court wanted to confine the purpose of the search for *protection*, so that the search incident to investigative detention did not undermine the standard of reasonable grounds to believe for searches for evidence:

> In the context of an arrest, this Court has held that, in the absence of a warrant, police officers are empowered to search for weapons or to preserve evidence: *R. v. Golden* [citation omitted]. … I note at the outset the importance of maintaining a distinction between search incidental to arrest and search incidental to an investigative detention. The latter does not give license to officers to reap the seeds of a warrantless search without the need to effect a lawful arrest based on reasonable and probable grounds, nor does it erode the obligation to obtain search warrants where possible.[3]

It is not easy to maintain the distinction between safety searches and searches for evidence because a safety search is by definition a search for weapons, and weapons are themselves almost inevitably evidence of a weapon-possession offence. The danger is that some police officers may unconsciously exaggerate safety concerns to lay the groundwork for a search that is ostensibly safety-motivated but which is really driven by the desire to find evidence.

The second problem is a lack of judicial oversight. Investigative detentions are warrantless searches which, by definition, are subject to less judicial oversight than warrant-based searches. At the same time, warrantless searches occur many times more frequently than warrant-based searches. Within the category of warrantless searches itself, searches incident to

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[2] *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59.
[3] *Mann*, *supra* at para 37 (emphasis added).

arrest occasion more oversight than searches incident to investigative detention. On the whole, arrests generate more police paperwork, and are more likely to lead to a criminal proceeding, which provide, respectively, the raw material, and the occasion, for judicial scrutiny. The bulk of investigative detentions are, to an even greater degree, under the judicial radar.

Perhaps as a result of these trade-offs occurring in the definition of the power itself, there are definite signs of a stricter approach being taken under s. 24(2) in the context of searches incident to investigative detention. This tendency is visible in *Mann* itself, where the marijuana was excluded because the officer reached into a pocket after feeling a "soft lump", and *R v Byfield*,[4] where cocaine was excluded because the officer touched the detainee's crotch area without any specific safety concerns. *Byfield* suggests, but does not expressly propound, a stricter s. 24(2) approach for these searches:

> I would also make this observation. In *R. v. Mann* at para. 18, Iacobucci J. considered the justification for undertaking modification of the common law to permit the police to conduct investigative detentions short of arrest. He noted that the "unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role". In this case, I have not found it necessary to deal with the appellant's submissions that the initial stop was motivated by racial profiling. These kinds of investigative stops, however, are the very types of police conduct that lend themselves to allegations of racial profiling. An important lesson from *R. v. Mann* is that the courts must take seriously the violation of a suspect's rights in the course of an investigative stop.[5]

Lest anyone think that the stricter approach is limited to cases where drugs, and not weapons, were located, in *R v Dhillon*,[6] the British Columbia Court of Appeal excluded an AK-47-type assault rifle: police responded to a fight complaint, encountered seven to nine men, saw rolling papers and a pair of scissors inside a car, and received (ultimately invalid) consent to look in the trunk, where they found the rifle. Also possibly demonstrating this trend is *R v Reddy*, from the British Columbia Court of Appeal, where Frankel JA wrote for the majority, excluding two loaded handguns.[7]

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[4] *R v Byfield*, (2005), 74 OR (3d) 206 (CA).
[5] *Byfield*, *supra* at para 26 per Rosenberg JA (emphasis added).
[6] *R v Dhillon*, 2012 BCCA 254.
[7] *R v Reddy*, 2010 BCCA 11, 251 CCC (3d) 151.

A stricter approach under s. 24(2) could be an important counter-weight to the difficulties with searches incident to investigative detention, outlined above. It may be especially valuable in light of the incremental application of the safety search concept to new situations, to which I now turn.

The expanding frontier, and an unheeded warning

Mann itself involved a classic investigative detention situation. The police stopped a person who fit the description of a burglar. They had reasonable grounds to suspect that he was involved in an ongoing or recent crime. The crime in question might involve the carrying of break-in tools, which could be used as weapons. On this basis, a pat-down search was justified.

In the years since *Mann*, this power has been expanded in various ways and considered in different circumstances:

- **Initial detention not based on individualized suspicion**. *R v Clayton*: pat-down search of suspects in the context not of an individualized detention but of a road-block stop of all vehicles leaving a parking lot.[8]
- **Detention not investigative in nature**. *R v Aucoin*: pat-down search in the context of a non-investigative detention.[9]
- **Vehicle search**. *R v Plummer*: search of a vehicle, rather than a person, pursuant to an investigative detention, where the person was out of the vehicle.[10]
- **Seizure of a cell phone**. *R v White*: cell phone being used by a detainee to inform someone that the police were there; seizure justified to protect officer safety and also, more unusually, to guard against the possible loss of evidence.[11]
- **Non-pat-down search, without any detention**: *R v MacDonald*: power to open wider the door of a home to see what a person was carrying.[12]

Mann is replete with a sense of judicial modesty and caution. In particular, this is driven by the court's consciousness of the disadvantages of judicial law-making in the area of police

[8] 2007 SCC 32, [2007] 2 SCR 725.
[9] 2012 SCC 66, [2012] 3 SCR 408.
[10] 2011 ONCA 350.
[11] 2007 ONCA 318, 47 CR (6th) 271.
[12] *R v MacDonald*, 2014 SCC 3.

powers. Ultimately, the Court decided that it was precisely *because* the police encounters in question were "under the radar" that it had to intervene. In *Mann*, Iacobucci J wrote:

> [T]his Court must tread softly where complex legal developments are best left to the experience and expertise of legislators. … [M]ajor changes … are better accomplished through legislative deliberation than by judicial decree. … The Court cannot, however, shy away from the task where common law rules are required to be incrementally adapted to reflect societal change. Courts, as its custodians, share responsibility for ensuring that the common law reflects current and emerging societal needs and values …. Here, our duty is to lay down the common law governing police powers of investigative detention in the particular context of this case.
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> … Over time, the common law has moved cautiously to carve out a limited sphere for state intrusions on individual liberties in the context of policing. The recognition of a limited police power of investigative detention marks another step in that measured development. It is, of course, open to Parliament to enact legislation in line with what it deems the best approach to the matter, subject to overarching requirements of constitutional compliance. … In the meantime, however, the unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role.[13]

The "meantime" to which Iacobucci J refers stretches at least ten years back to *Mann*, and probably twenty-one years back to *R v Simpson*, the pre-*Mann* leading case on investigative detention.[14] In the "meantime", the Supreme Court of Canada has definitively rejected the contrary view, expressed in the dissent of and the decision of LeBel J in *R v Kang-Brown*,[15] that expanding police powers should be left to Parliament. This debate ended when the Court, in *R v Chehil*,[16] unanimously approved the more expansionist philosophy that Binnie J espoused in *R v Kang-Brown*. And, in the "meantime", Parliament has remained steadfastly silent on the issue of detentions and safety searches.

The particular difficulty with judges developing the law of police powers is that the issues arise only retroactively, in criminal prosecutions where, usually, some evidence of a crime was found as a result of the exercise of the power. The question of whether the power *exists* arises only after it has been *exercised* – and exercised fruitfully. Now, the principle of legality

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[13] *Mann*, *supra* at paras 17-18.
[14] (1993), 12 OR (3d) 182 (Ont CA).
[15] *R v Kang-Brown*, [2008] 1 SCR 456, 2008 SCC 18.
[16] *R v Chehil*, 2013 SCC 49.

would be best served if the scope of police powers was apparent in advance in a way that was publicly available both to police and to the public. Under the retroactive model, however, where the search results in a gun or a large quantity of drugs being discovered, there will be an unconscious temptation to validate the search and the power that sponsored it.

In *Plummer*, Sharpe JA gave eloquent voice to this concern. While signing on to the majority's expansion of the *Mann* power to vehicle searches, he sounded a note of caution:

> [75] The cautionary note sounded in *Mann* is rooted in the historic role of the courts, standing between the individual and the state, and reluctant to grant or recognize new police powers that encroach on individual liberty … . In my view, we should follow *Mann*'s caution in a case like the present, when we are asked to expand the scope of a search incidental to an investigative detention.
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> [76] A search incidental to an investigative detention is defined and limited by the immediate concerns of officer safety. This reflects an important difference between the narrowly focussed and strictly limited protective search that may accompany an investigative detention, and the broader power to search consequent to a lawful arrest. It is necessary to maintain that distinction and to confine the scope of a search incidental to an investigative detention within strict limits. … As the appellant points out, there is an understandable tendency to expand a narrow rule to endorse the police conduct being challenged, since the case before the court will always be one where the search actually yielded a weapon or some other valuable evidence. This is a tendency that the courts should resist.[17]

Unfortunately, if two post-*Plummer* decisions of the Ontario Superior Court of Justice are any indication, Sharpe JA's warning may be going unheeded.

The first case is *R v Faucher*.[18] There, two police officers stopped a car because it had a damaged tail light. On approaching the vehicle, the officers saw a unsheathed hunting knife in the side pocket of the passenger door. The driver explained that he carried the knife for personal protection. One officer arrested the driver, but the second officer didn't notice, and started looking in the car for identification documents and for weapons.

The trial judge noted and quoted "the cautionary comments of R. J. Sharpe JA in *Plummer*", but, without a great deal of analysis, he held that the police officer "was entitled to

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[17] *Plummer*, *supra* at paras 75-76.
[18] 2013 ONSC 5492.

conduct a safety-focused superficial search of the vehicle after discovering the knife."[19] One's immediate instinct is that this result is probably correct, but perhaps that is precisely tendency against which *Mann* warns, which should spur us to think further.

In the second case, *R v Carelse-Brown*, a recent decision of the Ontario Superior Court of Justice, it was held that a search incident to investigative detention could include a search of the detainee's pockets for *soft* objects such as a bag of marijuana:

> It is clear on MacPherson J.A.'s interpretation of *Mann* that pocket searches are not simply banned. It depends on the context. Like the situation in *Plummer*, it is hard to see how the police could have simply searched the occupants and then let them go without searching the silver Dodge. It would have been negligent beyond all reason for the police to have done that, even if they were only conducting an investigative detention of the Mr. Carelse-Brown and the driver. It is difficult to see how the police would be justified in conducting a search of the silver Dodge but not in looking in the pockets of the occupants. Constable Verdoold testified that the safety concerns were not fully mitigated simply because the occupants of the silver Dodge were in custody. I agree that the concerns were somewhat mitigated, but I accept Constable Verdoold's evidence that there were still remaining issues. A slightly more intrusive search under the circumstances was not a violation of s. 8 of the *Charter*.[20]

One might argue that the "understandable tendency" that Sharpe JA identified in *Plummer* now threatens to overwhelm the specific holding in *Mann* itself. Especially in cases involving the discovery of a firearm, the cautious incrementalism of *Mann* warrants re-examination.

One related issue is what the police need to conduct a safety search during a detention or other encounter – reasonable grounds to believe, or merely to suspect, that the person is armed.

The standard for a safety search – belief or suspicion?

Those who read *Mann* carefully may have noticed that it defined the standard for a safety search somewhat curiously, speaking in terms of "reasonable grounds to believe" that there is a "risk" to safety, whereas the standard for the underlying detention is "reasonable grounds to suspect":

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[19] *Ibid* at para 21.
[20] *R v Carelse-Brown*, 2013 ONSC 4287 at para 44.

> The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. (at para 40)
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> Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. (at para 43)
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> To summarize, as discussed above, 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. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. (at para 45)

These passages led some to ask, after *Mann*, if the standard for a safety search is "reasonable grounds to believe", in the sense of the standard for obtaining a search warrant or effecting a warrantless arrest. That would create an obvious incongruity: the police can *detain* a person for investigation if they *suspect* on reasonable grounds that he is carrying a dangerous weapon, but cannot *search* him for the weapon unless they have reasonable grounds to *believe*. Surely if the law allows (and, indeed, expects) police officers to detain people for possession of firearms – on a "suspects" standard – they should also be allowed to perform protective pat-down searches for the same reason and on the same standard.

Courts of appeal have tended either to quote *Mann* and not address the ambiguity, or to hold that the standard is suspicion, not belief. For instance, in *R v Atkins*, the Ontario Court of Appeal wrote: "The pat-down search that followed the detention was justified on officer safety grounds. The officers reasonably suspected that the appellant was in possession of a weapon."[21] In *Dhillon*, *supra*, the British Columbia Court of Appeal wrote:

> [T]he Supreme Court has now recognized two situations in which that objective basis may be on a lower standard of "reasonable suspicion". The first permits a limited safety search in the context of an investigative detention.[22]

In *R v MacDonald*, a minority of the Supreme Court has addressed this very point. The majority upheld, and did not explicate, the Mann "reasonable grounds to believe … risk"

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[21] *R v Atkins*, 2013 ONCA 586 at para 15, emphasis added.
[22] *Dhillon*, *supra* at para 65.

language, while even seeming to upgrade it to reasonable grounds to believe" that the person "is armed and dangerous" or that there is an "imminent threat" to safety:

> When the performance of a police duty requires an officer to interact with an individual who they have reasonable grounds to believe is armed and dangerous, an infringement on individual liberty may be necessary. (at para 39)
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> [B]ecause Sgt. Boyd had reasonable grounds to believe that Mr. MacDonald was armed and dangerous, the further opening of the door was authorized by law. (at para 42)
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> The power was engaged because Sgt. Boyd had reasonable grounds to believe that there was an imminent threat to the safety of the public or the police and that the search was necessary in order to eliminate that threat. (at para 44)

Moldaver and Wagner JJ, writing for themselves and Rothstein J, concurred in the result. They expounded several reasons why the standard should be "reasonable grounds to *suspect* an individual is armed and dangerous":

1. *Mann* spoke not of reasonable grounds to believe that there was a *risk* to safety, and the concept of a risk connotes a degree of uncertainty which, when combined with "reasonable grounds to believe" may amount to "reasonable grounds to suspect" that a weapon is *actually* present. Further, *Mann* articulated the threshold for a pat-down search in terms of a "possibility" and compared it to a "hunch" or "discrimination", suggesting that the threshold is lower than the well-known standard of "reasonable grounds to believe".

2. *Mann* relied on the American case-law flowing from *Terry v Ohio,* which places the standard for a search lower than "probable cause" necessary for an arrest.

3. The *Mann* search standard has subsequently been interpreted and applied as equivalent to "reasonable grounds to suspect" rather than "reasonable grounds to believe".

4. It would be unworkable to have a "reasonable grounds to believe" standard to search in a detention that is driven by "reasonable grounds to suspect", especially where the offence suspected consists of, or implies, the possession of weapons. Where an officer has "reasonable grounds to believe" that a detainee is armed and dangerous, there is little

need for a pat-down search incident to an investigative detention, since the person can be immediately arrested for a weapon-possession offence.

5. Along similar lines, requiring "reasonable grounds to believe" for a protective search incident to an investigative detention risks watering down the same standard when applied to arrests. The minority argued that in the instant case it was questionable whether such grounds were actually present.

The majority did not address the minority's point directly; it maintained the "reasonable grounds to believe" language from *Mann*. It is possible that the majority was simply reluctant to interfere with the the *Mann* standard, especially in a case that did not turn on the issue (both sides found that the search was justified under their respective standards). However, the majority may have actually *raised* that standard by eliminating the "risk" element and by maintaining "reasonable grounds to believe" in the face of the minority's reasons.

It is possible that this issue will arise again at the Supreme Court. First, note that the *MacDonald* court consisted of a panel of only seven judges, with a majority of only four. Second, the case did not turn on the definition of the *Mann* search standard, so the majority's position could be circumvented as *obiter* in a future appeal. Finally, the majority does not attempt to reply to the arguments of the minority; the debate is not even joined, let alone resolved. In the meantime, criminal lawyers and trial judges will have to attempt to apply the "reasonable grounds to believe" standard that the *MacDonald* majority implicitly sanctioned when they confront the perennially difficult issue of searches incident to investigative detention.

Conclusion

The proper scope and application of search incident to investigative detention, and safety searches more generally, has developed a great deal since *Mann* cautiously laid the groundwork almost ten years ago. The various dimensions of the search power have expanded: we have moved from patting down clothing to pushing open doors, looking in vehicles, and confiscating cell phones; we have moved from searching purely for protection to searching also to preserve (although not locate) evidence; and we have moved from searching in classic investigative detentions to searching in situations not involving investigation and, sometimes, not involving any detention at all. While the concept of the safety search has undoubtedly matured and been

consolidated, there is still a great deal of work to be done, especially in the areas of how vigorously the borders of the power should be enforced under s. 24(2), and the required "reasonable grounds" for conducting the search in the first place. The Supreme Court's decision in *MacDonald* continues, rather than resolves, these important discussions.