Reasonable Apprehension Under Mental Health Law

Robert Diab and Jolene Sanderson*

Provincial mental health acts in Canada codify police powers to apprehend or take a person to a health facility involuntarily. The acts provide limited guidance on the scope of these powers and how police should carry out apprehensions. Courts address these powers in a body of cases dealing with obstruction or possession offences but focus primarily on the issue of the authority to apprehend. The Supreme Court of Canada's decision in R v Le *(2019) alters the landscape for involuntary apprehension in Canada by importing from jurisprudence on search and seizure a requirement that a detention not only be authorized by a reasonable law but also that it be carried out in a reasonable manner. We contend that, in addition to being authorized to apprehend, police must carry out a reasonable apprehension. Drawing on case law on reasonably conducted searches, we set out conditions of a reasonable apprehension and anticipate a jurisprudence that may bring police conduct in closer conformity with the rule of law.*

* Robert Diab is a professor in the Faculty of Law, Thompson Rivers University, and Jolene Sanderson is a 2022 graduate of the JD program in the Faculty of Law at TRU. The authors thank Professors Ruby Dhand and Robin Whitehead for their comments, the anonymous reviewers, and the editors of the Queen's Law Journal. We are also deeply indebted to Sonja Luck for sharing a case with us that first drew our interest in the subject of reasonable apprehension.

Introduction

The police power to apprehend a person and take them to the hospital has long been a problem in mental health law. Provincial mental health acts in Canada codify police powers not to arrest but to apprehend or take a person to a health facility where, in general terms, the person appears to suffer from a mental disorder and poses a danger to themselves or others.[1] The acts provide limited guidance on the scope of these powers, giving rise to questions about the use of force or restraint, privacy, and the right to counsel, among others. More broadly, legislation is silent on how police should carry out what might be called a "reasonable apprehension"—how to exercise the power in a minimally invasive way, where the latter (and other forms of relief) are not readily available.

1. Powers under provincial legislation to take a person to hospital or apprehend for this purpose are canvassed in more detail below. See e.g. *Mental Health Act*, RSO 1990, c M 7, ss 16–17 [ON *Mental Health Act*]; *Mental Health Act*, RSBC 1996, c 288, s 28 [BC *Mental Health Act*]. Some provincial acts use the word "apprehend" (British Columbia, Alberta, Saskatchewan, and Newfoundland and Labrador), and some use the phrase "take a person into custody" (Manitoba,

Police not only lack guidance in the law, they lack oversight in practice. Police conduct on apprehensions is seldom subject to review in a court of law. Once at the hospital, a provincial review board decides whether to *keep* a person in custody.[2] Yet countless apprehensions take place with no review of how police carried them out. More often than not, there is no forum for asking: did police have grounds to apprehend? Did they use excessive force? Did they violate rights to privacy by entering a home or residence unlawfully? Did male officers unnecessarily outnumber and intimidate a female or person of colour or stage the apprehension—even if inadvertently—in ways that unnecessarily embarrassed or humiliated the individual?

The rare cases where apprehensions do come to court tend to involve criminal charges arising from a detainee's resistance or the discovery of an illicit substance.[3] In most cases, the court's analysis of the legality of the apprehension is binary in nature: police were either authorized to apprehend under provincial mental health provisions or not. Police conduct in the course of carrying out an apprehension and the scope of their powers receive less attention, mirroring the gap in legislation.

Involuntary detention in Canadian mental health law has been explored in earlier scholarship, though the primary focus has been on the apparatus around involuntary committal and treatment,[4] along with the discriminatory use of the criminal law power against persons suffering from a mental disorder.[5] We seek to shift the focus in this paper to the under-explored issue of police conduct in carrying out apprehensions.[6] We argue that the Supreme Court of

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Ontario, Nova Scotia, Prince Edward Island, and New Brunswick) or "take a person against his will" (Quebec). We refer in this paper to all such powers as forms of "apprehension" or "apprehension powers".

2. See e.g. ON *Mental Health Act*, supra note 1, ss 20(1.1), 20(5).

3. We explore the cases in more detail below.

4. See Ruby Dhand & Kerri Joffe, "Involuntary Detention and Involuntary Treatment Through the Lens of Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*" (2020) 43:3 Man LJ 207; Ruby Dhand & Laverne Jacobs, "Women and Girls with Disabilities: Gendered Disability Discrimination" in Laverne Jacobs et al, eds, *Law and Disability in Canada: Cases and Materials* (Toronto: LexisNexis, 2021) at 125.

5. See David Ireland, Richard Jochelson & Brayden McDonald, "Arrest, Detention and Disability in Canada" in Laverne Jacobs, ed, *Law and Disability in Canada: Cases and Materials* (Toronto: LexisNexis, 2021) at 145.

6. We are indebted to Robin Whitehead's "Policing Mental Health Disabilities" in Jennifer A Chandler & Colleen M Flood, eds, *Law and Mind: Mental Health Law and Policy in Canada*

Canada's decision in *R v Le* (*Le*) significantly alters the landscape for mental health apprehensions.[7] The Court in Le adopted a test for what constitutes an arbitrary detention under section 9 of the *Canadian Charter of Rights and Freedoms* (*Charter*) that parallels the test for a reasonable search under section 8 jurisprudence.[8] A detention is arbitrary if it fails to satisfy any of three conditions: it must be "authorized by law; the authorizing law itself must not be arbitrary; and, the manner in which the detention is carried out must be reasonable".[9] We contend this applies directly to mental health apprehensions. In addition to needing authority to apprehend, police must carry out a 'reasonable apprehension' in an analogous way to which strip searches or forced entry searches must be authorized by law, but also carried out reasonably.[10]

We explore the implications of *Le* in mental health law by proceeding in three parts. In part I, we provide a brief overview of powers to apprehend under provincial law and conditions in which police carry out apprehensions in Canada at present. In part II, we survey criminal cases in which apprehensions have been challenged under section 9 to demonstrate the magnitude of apprehension powers, how easily they can be misused, and how courts tend to approach them in narrow terms. In part III, turning to *Le* and section 8 jurisprudence, we argue for the minimal content of a reasonable apprehension. In doing so, we anticipate a jurisprudence on reasonable apprehensions that may eventually inform police practices and bring them into closer conformity with the rule of law.

I. Apprehension Legislation and Context

We begin this part with an overview of apprehension powers in provincial legislation, related powers, and remedies for their misuse. We then provide context into the practice of apprehensions across Canada.

(Toronto: LexisNexis, 2016) at 325, an important earlier contribution in this area, considering a range of constitutional rights on apprehension.

7. 2019 SCC 34 [*Le*].

8. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]; *Le*, *supra* note 7; *R v Collins*, [1987] 1 SCR 265, 38 DLR (4th) 508 [*Collins*]. Both *Le* and *Collins* are discussed in more detail below.

9. *Le*, *supra* note 7 at para 124.

10. See *R v Golden*, 2001 SCC 83 [*Golden*]; *R v Cornell*, 2010 SCC 31.

A. Authority to Apprehend

The police power to apprehend a person without a warrant and take them to a hospital or facility is an emergency power. It seeks to balance a right to individual liberty with a collective interest in preserving health and wellbeing. In theory, police need a power to act quickly to prevent a suicide or violence to others. In practice, the scope of police discretion varies among provinces, and many questions remain about the scope of the power itself.

In general terms, provincial mental health acts authorize police to apprehend a person without a warrant or judicial authorization[11] and take them to a facility for examination by a doctor, where an officer has reasonable grounds to believe that (a) a person is apparently suffering from a mental disorder;[12] (b) a person is threatening to harm themselves or another person; and (c) it would be "dangerous" to wait to obtain a warrant.[13] British Columbia and Quebec allow for apprehensions on less onerous grounds. An officer in British Columbia need not consider the possibility of obtaining a warrant if she is "satisfied" that a

11. Some of the acts specifically authorize only a "police officer" to carry out a warrantless apprehension, while others use the more expansive phrase "peace officer" (which, in some cases, is not defined in the act, such as the Alberta's *Mental Health Act*, RSA 2000, c M-13 [AB *Mental Health Act*]). Acts specifying that only a police officer can apprehend without a warrant include Ontario's and British Columbia's acts.

12. "Mental disorder" is a defined term in most provincial acts in Canada. See e.g. BC *Mental Health Act*, *supra* note 1, s 1. Section 1 defines it as "a disorder of the mind that requires treatment and seriously impairs the person's ability (a) to react appropriately to the person's environment, or (b) to associate with others" (*ibid*). See also ON *Mental Health Act*, supra note 1, s 1(1), where the definition is simpler: "means any disease or disability of the mind" (*ibid*); Quebec's *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, SQ 1997, c 75, art 8 [QC *Act*] (which refers to the "mental state of the person present[ing] a grave and immediate danger to himself or to others"—but does not define this state). See also New Brunswick's *Mental Health Act*, RSNB 1973, c M-10, s 1(1) [NB *Mental Health Act*] (which uses the term "serious mental illness" and provides a definition similar to that of "mental disorder" in British Columbia's Act).

13. AB *Mental Health Act*, *supra* note 11, s 12(1); *Mental Health Services Act*, SS 1984–86, c M-13.1, s 20(1) [SK *Mental Health Services Act*]; *Mental Health Act*, CCSM c M110, s 12(1) [MB *Mental Health Act*]; ON *Mental Health Act*, *supra* note 1, s 17; New Brunswick *Mental Health Act*, supra note 12, s 10; *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42, s 14 [NS *Act*]; *Mental Health Act*, RSPEI 1988, c M-6.1, s 8(1) as repealed by *Estates of Incompetent Persons Act*, RSPEI 1988, c E-10.1 [PEI *Mental Health Act*]; *Mental Health Care and Treatment Act*, SNL 2006, c M-9.1, s 20 [NFL Act]; *Mental Health Act*, RSY 2002, c 150, s 8(1); *Mental Health Act*, RSNWT 1988, c M-10, s 11(1).

person "is acting in a manner likely to endanger that person's own safety or the safety of others," and they are "apparently a person with a mental disorder".[14] An officer in Quebec may apprehend without a warrant where no member of a "crisis intervention unit" is present and the officer has "good reason to believe that the mental state of the person concerned presents a grave and immediate danger to himself or to others".[15]

Courts have suggested that being "satisfied" or having "good reason to believe" conditions for apprehension are present is an equivalent test to the "reasonable grounds to believe" standard used in other provincial legislation.[16] In *R v Debot* (*Debot*), Wilson J held the "reasonable belief " standard to be synonymous with "reasonable and probable grounds",[17] and in *R v Storrey* (*Storrey*), the Court defined "reasonable and probable grounds" in the context of arrest to comprise both a subjective and objective component.[18] The arresting officer must hold the requisite belief herself, and the belief "must [. . .] be justifiable from an objective point of view", which means "a reasonable person placed in the position of the officer must be able conclude that there were indeed reasonable and probable grounds for the arrest".[19] Courts have applied the reasoning in *Storrey*—its requirement for subjectively held and objectively reasonable belief—to apprehension powers under mental health acts.[20]

Police are also authorized to carry out warrantless apprehensions in the mental health context in other instances. They may do so when a person subject to committal leaves a facility without being released,[21] and where a patient violates a community treatment order.[22] Analogous but distinct powers are found in other legislation. British Columbia's *Adult Guardianship Act* provides

14. BC *Mental Health Act*, *supra* note 1, s 28.

15. QC *Act*, *supra* note 12, art 8(2).

16. See e.g. *R v Milino*, 2009 BCSC 1802 at paras 37–42 [*Milino* BCSC]; *DS c Christopolos*, 2010 QCCQ 2907 at paras 82–86 (applying the "good reason to believe" standard in a manner tantamount to probable grounds).

17. [1989] 2 SCR 1140 at 1166, 102 NR 161 [*Debot*].

18. [1990] 1 SCR 241 at 250–251, 105 NR 81 [*Storrey*].

19. *Ibid* at 251.

20. See e.g. *R v Wang*, 2011 ONCJ 766 at para 71 [*Wang*]; *R v Jones*, 2013 BCCA 345 at paras 27–29.

21. See e.g. BC *Mental Health Ac*t, supra note 1, s 41(1) (on permitting apprehension with a warrant issued by director); ON *Mental Health Act*, *supra* note 1, s 28(1) (on allowing for apprehension without a warrant "within one month after the absence becomes known to the officer in charge").

22. See e.g. AB *Mental Health Ac*t, supra note 11, s 12(1)(b).

that, where an adult is "apparently incapable of giving or refusing consent" and in a situation of imminent harm, a "person from a designated agency" may enter a residence without a warrant, "remove the adult from the premises and convey him or her to a safe place", and "take any other emergency measure that is necessary to protect the adult from harm".[23] Under the *Criminal Code*, an officer may arrest a person violating a Review Board disposition, or an order made pursuant to a finding of being unfit to stand trial or not criminally responsible due to mental disorder.[24]

Turning back to apprehension powers, an important feature of the legislation on point is that it offers limited guidance on how police should conduct an apprehension. And the guidance is inconsistent. Alberta and Newfoundland and Labrador's acts require a peace officer to make note of the grounds on which they formed their belief in the need to apprehend.[25] New Brunswick and Prince Edward Island's acts require police to advise a detainee of the reason for the detention, where the detainee will be taken, and the right to "retain and instruct counsel without delay".[26] Newfoundland and Labrador's act directs that police take a detainee to a faculty for assessment "as soon as practicable and by the least intrusive means possible without compromising the safety of that person or the public".[27] Saskatchewan, Manitoba, and Nova Scotia set a twenty-four hour limit on the duration of an apprehension.[28] Nova Scotia directs police to avoid taking a person to a jail while waiting for an assessment.[29] Three provinces explicitly allow for warrantless entry of a residence to apprehend.[30] Three Atlantic provinces direct that if a person is not detained after assessment,

23. See *Adult Guardianship Act*, RSBC 1996, c 6, s 59. See also Ontario's *Substitute Decisions Act*, 1992, SO 1992, c 30, ss 27, 62, 82(1)–(2), 82(7)–(8) (which authorizes police to assist the Public Guardian and Trustee to enter a residence without a warrant and apprehend a person where a person is believed to be incapable, at risk of serious self-harm or damage to property).

24. See *Criminal Code*, RSC 1985, c C-46, s 672.54.

25. See AB *Mental Health Act*, *supra* note 11, s 12(3); NFL *Act*, *supra* note 13, s 21(2)(c).

26. NB *Mental Health Act*, *supra* note 12, s 10.1; PEI *Mental Health Act*, *supra* note 13, s 10(c).

27. NFL *Act*, *supra* note 13, s 21(1)(b).

28. See SK *Mental Health Services Act*, *supra* note 13, s 20(2); MB *Mental Health Act*, *supra* note 13, s 13(1); NS *Act*, *supra* note 13, s 15(1).

29. See NS *Act*, *supra* note 13, s 15(2). "[A]n appropriate place where a person may be detained means a hospital, the office of a physician or another suitable place for a medical examination, but does not include a jail or lock-up unless no other suitable place is available" (*ibid*, s 15(2)).

30. See MB *Mental Health Act*, *supra* note 13, s 12(2); NFL *Act*, *supra* note 13, s 21(1)(a); PEI *Mental Health Act*, *supra* note 13, s 8(2).

police must return them or arrange for their return to a requested location.[31] Some of the acts authorize the use of force,[32] though this is redundant given that section 25(1) of the *Criminal Code* authorizes police to use reasonable force to carry out lawful duties, which would apply in this context.[33]

Courts have assumed, without need for analysis, that an apprehension under provincial mental health law constitutes a detention under section 9 of the *Charter* (a point we explore further in part III).[34] Some courts have also assumed that an apprehension triggers a right under section 10(a) of the *Charter* to be advised of the reason for the detention.[35] The Supreme Court of Canada in *R v Grant* (*Grant*) and *R v Suberu* have held that an investigative detention engages the right to counsel under section 10(b) of the *Charter*.[36] But mental health apprehensions are not investigations. Persons apprehended in the mental health context have rights to counsel once detained in a facility, but courts have tended not to recognize a section 10(b) right on apprehension.[37]

Robin Whitehead has noted that mental health acts in Canada do not contain a distinct offence for resisting an apprehension.[38] At least one court

31. See NB *Mental Health Act*, *supra* note 12, s 10.2; NS *Act*, *supra* note 13, s 16(3); PEI *Mental Health Act*, *supra* note 13, s 12(2).

32. See e.g. AB *Mental Health Act*, *supra* note 11, s 30; NFL *Act*, *supra* note 13, s 21(1)(a); PEI *Mental Health Act*, *supra* note 13, s 8(2).

33. See *Criminal Code*, *supra* note 24, s 25(1). Section 25(1) states that an officer "who is required or authorized by law to do anything in the administration or enforcement of the law . . . is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose" (*ibid*).

34. See e.g. *R v Crane*, [2005] AJ No 292, 129 CRR (2d) 225 [*Crane*]; *R v Hickey*, 2013 BCPC 328 [Hickey].

35. See e.g. *Crane*, *supra* note 34. See also *R v Holdsworth*, 2019 ABQB 856 [*Holdsworth*]. Both are discussed in more detail below in Part II.

36. *R v Grant*, 2009 SCC 32 [*Grant*]; *R v Suberu*, 2009 SCC 33.

37. There are only two exceptions to this among the cases we survey in Part 2 below. See e.g. *R v Cunha*, 2014 BCPC 236 (in which the Court held, at paras 14–19, that 10(b) is required after an apprehension but officers in this case were permitted a delay to confirm identity); *Holdsworth*, *supra* note 35 at para 96 (where the Court held that if 10(b) is engaged on an apprehension it was reasonable in that case for police to prioritize bringing a detainee to a hospital).

38. See Whitehead, *supra* note 6 at 332.

has held that a person resisting an apprehension does not commit the *Criminal Code* offence of resisting arrest.[39] But they can commit the *Criminal Code* offence of obstructing an officer in the execution of her duty.[40]

B. Remedies for Unlawful Apprehension

Police must take a person they apprehend to a doctor for examination. The doctor must decide whether the person should be detained in a hospital or facility for treatment. The test is generally whether a person is suffering from a mental disorder which, if not treated, would lead to imminent harm of self or others, or "substantial mental or physical deterioration".[41] If the doctor decides the test is not met, the person must be released. This does not mean the officer's initial apprehension was unlawful, though it may have been. The apprehension may not have been authorized by law (the officer may not have had grounds to apprehend) or it may have been unlawful on some other basis, in ways explored further below.

The larger point to highlight here is that, at each stage of mental health detention, the focus for decision makers is prospective. The receiving doctor, or a second doctor certifying the first doctor's decision—or the Mental Health Review Board or even a court upon review—are all deciding only whether the detention should continue. There is no routine mechanism that forms a part of the process of apprehension where an independent party reviews the officer's initial decision to detain and her conduct in the course of the apprehension. Avenues for holding police accountable for the conduct of an apprehension are peripheral to the process and seldom pursued.

A survey of cases dealing with apprehensions in the next section will illustrate forms of abuse that do arise in the course of apprehensions. Suffice it to note here that avenues to hold officers accountable are limited.

For serious police misconduct, a person could complain to a provincial police regulator such as British Columbia's Office of the Police Complaint Commissioner,[42] or in the case of the RCMP, the Civilian Review and Complaints Commission[43]—though none of these avenues would directly

39. See *ibid*, citing *Wang*, *supra* note 20 at paras 74–75.

40. See *Criminal Code*, *supra* note 24, s 129(a).

41. ON *Mental Health Act*, *supra* note 1, s 20(1.1). See also BC *Mental Health Act*, *supra* note 1, s 22(3); AB *Mental Health Act*, *supra* note 11, s 2; QC *Act*, *supra* note 12, art 7.

42. See *Police Act*, RSBC 1996, c 367, s 78.

43. See *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, Part VII.

compensate the person apprehended. They might sue in personal injury or seek a remedy under section 24(1) of the *Charter*, including damages,[44] though this too remains unlikely in most cases given the cost, complexity, and time involved.[45] Conduct involving unlawful force might form the basis of a criminal charge against an officer, if the Crown chooses to pursue it. Once again, without a more direct means of accountability, police conduct in apprehensions is, in practical terms, an exercise of a significant and invasive power not subject to law.

C. Context in Which Apprehensions Occur

A detailed overview of the practice of apprehensions in Canada is beyond the scope of this paper. We seek to note only the general context in which they occur.

It is unclear how many emergency apprehensions take place as a proportion of involuntary admissions, and how many of these involve police.[46] A report published in 2019 by British Columbia's Ombudsperson noted that roughly 15,000 people were involuntarily detained in the province's facilities in 2016–17, and that this number has "grown by approximately 70 percent in the last decade".[47] A report published in 2014 on Toronto Police encounters with people in crisis found that "more than 1 in every 50 calls for which an officer was dispatched involved a person in crisis, while approximately 1 in every 100

44. For an example of a failed attempt to sue for damages flowing from the use of force in an apprehension, see *DS c Christopoulos*, *supra* note 16. The test for granting a monetary remedy for a *Charter* breach can be found in *Vancouver (City) v Ward*, 2010 SCC 27—a test that would likely be onerous to meet in this context if officers were acting in good faith in response to a distress call.

45. See BC Ombudsperson, *Committed to Change: Understanding the Rights of Involuntary Patients under the Mental Health Act* (2019) at 24 [BC Ombudsperson Report] (which makes a similar observation about the rarity of *habeas* applications or discharge orders under section 33 of the BC *Mental Health Act*, *supra* note 1—avenues for review of the decision to continue detaining a person in a facility).

46. See British Columbia, Ministry of Health & Ministry of Public Safety and Solicitor General, *Interfaces Between Mental Health and Substance Use Services and Police* (2018) at 26 [BC Ministry of Health] (noting "literature on absenteeism shows that police are involved in returning between 13% and 33% of individuals who go missing from a hospital").

47. BC Ombudsperson Report, *supra* note 45 at 1.

calls resulted in an apprehension under the Mental Act".[48] A study in 2018 found that nearly three-quarters of all psychiatric hospital admissions in Ontario are involuntary.[49] Whatever the percentage of involuntary detentions in Canada in which police are involved, the overall number of detentions in British Columbia and Ontario suggests that police involvement is significant.

In some of Canada's larger cities, police seek to respond more effectively to mental health emergencies by patrolling in vehicles with a nurse trained in mental health. The Vancouver Police Department has had a dedicated vehicle for this purpose since 1978, pairing a nurse with an officer in plain clothes.[50] Since the late 1980s, other cities in British Columbia, including Surrey, Kamloops, and Prince George have adopted a similar practice.[51] The Toronto Police Service has deployed "Mobile Crisis Intervention Teams" that pair officers and nurses to "provide a second response to people in crisis after the first responding officers have ensured that the incident is safe enough to involve a civilian nurse".[52] Such initiatives have been effective in drawing on community resources and diverting people from the criminal justice system.[53]

Yet, more often than not, police are acting on their own.[54] Persons apprehended by the police spend significant time in custody in a distressed state. A police report on apprehensions in British Columbia notes that emergency departments often give mental health cases "a low triage priority, unless a life threatening physical issue is also present".[55] This can result in "extended wait times for the individual and police that consume a significant amount of police

48. Statistics Canada, "Mental Health and Contact with Police in Canada, 2012", by Jillian Boyce, Cristine Rotenberg & Maisie Karam, in *Juristat* Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 14 citing Frank Iacobucci, *Police Encounters with People in Crisis* (Toronto: Toronto Police Service, 2014) at 72 [Iacobcci, *Police Encounters*].

49. See Michael Lebenbaum et al, "Prevalence and predictors of involuntary psychiatric hospital admissions in Ontario, Canada: a population-based linked administrative database study" (2018) 4:2 BJPsych Open 31 at 33.

50. See BC Ministry of Health, *supra* note 46 at 9.

51. See *ibid*.

52. Iacobcci, *Police Encounters*, *supra* note 48 at 99.

53. See BC Ministry of Health, *supra* note 46 at 9.

54. See Iacobcci, *Police Encounters*, *supra* note 48 at 99 (which notes that "in recent years," the Toronto Police Force's Mobile Crisis Intervention Teams had "handled roughly 11 percent of calls coded by the TPS as involving an 'emotionally disturbed person'").

55. BC Ministry of Health, *supra* note 46 at 21.

resources and cause undue stress and strain on the individual".[56] Justice Iacobucci, writing about the issue in Ontario, noted that "[i]n addition to wasting scarce police resources, these extended delays aggravate the stigma associated with mental health issues by forcing individuals to wait under police supervision, often in handcuffs."[57] In some parts of Toronto, "the average emergency department wait time is in excess of two hours. The [Toronto Police Service] Review was told that wait times can stretch up to eight hours."[58]

For a more vivid picture of what can happen between police and the people they apprehend, we turn in the next part of the paper to case law dealing with apprehensions.

II. Case Law on Apprehension

The case law scrutinizing police conduct in mental health apprehensions provides only a glimpse of the practice of apprehensions. The decisions we canvass here represent not simply the subset of cases where individuals resisted or were found in possession of illegal substances, nor even the subset of those cases the Crown chose to prosecute. They represent the even smaller subset of cases that resulted in reported decisions. We can draw no inferences from them about more general trends in police conduct. We survey a *selection* of these cases briefly here for three purposes. The cases we have chosen to foreground show, in specific ways, how police carrying out apprehensions can be intimidating, humiliating, or intrusive—whether or not they were authorized to apprehend. The cases show where courts have drawn limits around police apprehension powers. They also highlight a tendency on the part of judges to assess the legality of police conduct by focusing on the question of authority to apprehend or to search rather than also considering the reasonableness of police conduct—a point we explore further in part III. The cases involve complex dynamics, engaging several core rights: liberty, privacy, and dignity. We approach them under two broad headings—use of force and privacy—noting the possible inclusion of cases in either category.

A. Cases Involving Intimidation, Humiliation, or Excessive Force

In *R v Milino*, two uniformed male officers in Prince George, British Columbia received a dispatch at 10:20 p.m., indicating the accused was

56. *Ibid*.

57. Iacobcci, *Police Encounters*, *supra* note 48 at 101.

58. *Ibid*.

intoxicated and potentially suicidal. Police were aware of a prior suicide attempt.[59] After knocking, officers entered the residence from an unlocked patio door, searched the ground floor, then found the accused in a bedroom upstairs, naked and asleep. Once woken, she had to ask the officers to "turn away" while she dressed.[60] Lead officer Kay thought the accused seemed "somewhat confused"[61] but she said she "didn't believe herself to be suicidal at that point".[62] Still believing she was at risk, Constable Kay asked the accused to go to the hospital and she initially agreed before asking to call her sister. Her sister encouraged police to take the accused to the hospital, but the accused then became uncooperative, not wanting to go.[63] Police handcuffed her and took her to the hospital while she resisted. At the hospital, when police removed the cuffs, the accused attempted to flee before being caught and "thrown to the floor"; soon after, she kicked Constable Kay in the groin or inner thigh.[64] A doctor briefly examined the accused, found that she was not an immediate threat to herself, and released her. Constable Kay arrested the accused for escaping lawful custody and assaulting a peace officer acting in the course of his duties.

The trial court held the apprehension was not authorized because police lacked grounds to infer that the accused was "apparently a person with a mental disorder" as required under section 28(1) of the *Mental Health Act*.[65] Section 1 of the Act defines a person with a mental disorder to be someone with "a disorder of the mind that requires treatment and seriously impairs the person's ability to react appropriately to the person's environment or to associate with others".[66] The accused was lucid, oriented in time and place, and not seriously impaired in her social functioning. She was thus unlawfully detained, justified in her actions, and acquitted. On a Crown appeal of the matter to the Supreme Court of British Columbia, Chamberlist J affirmed the trial court's analysis. The accused's rational responses to police questioning as she lay in bed demonstrated an ability to "react appropriately" and, at that point, police lacked any authority to apprehend.[67]

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59. See *Milino* BCSC, *supra* note 16 at paras 2–15, upholding *R v Milino*, 2008 BCPC 355 [*Milino* BCPC].

60. *Milino* BCPC, *supra* note 59 at para 10.

61. *Milino* BCSC, *supra* note 16 at para 12.

62. *Ibid* at paras 13, 15.

63. See *ibid* at paras 17, 19.

64. *Ibid* at para 22.

65. BC *Mental Health Act*, *supra* note 1, s 28(1).

66. *Ibid*.

67. *Milino* BCSC, *supra* note 16 at para 49.

Both decisions in *Milino* BCSC and *Milino* BCPC are silent on the power and gender dynamics inherent in a situation where two male officers in uniform enter a home at night, without a warrant, and find a woman alone and naked in her bed. Police may have been acting on what amounted to reasonable grounds to believe the accused was in imminent danger, and may have had authority to enter her home pursuant to the "safety search" power the Supreme Court of Canada would later recognize in *R v MacDonald*.[68] Yet both the trial and appeal decisions focused narrowly on whether police had authority to apprehend when confronting the accused in her bedroom—neglecting altogether to address the conduct of police upon entry or the force used in bringing her to a doctor. Had the police had grounds to apprehend in this case, the fact that two male officers accosted a naked woman in her bedroom in the middle of the night, used handcuffs, and later, at hospital, threw her to the floor, may all have seemed irrelevant to the legality of the apprehension.

Crane may be an outlier in terms of police conduct, but it illustrates how the power to apprehend can be grossly misused.[69] Police received a dispatch at close to 8 p.m. indicating that an intoxicated female caller intended to kill herself, but without providing a location. Fifty minutes later, police received a second dispatch locating the source and indicating that the woman's son was also intoxicated and suicidal.[70] Four officers entered the home (it is not clear who admitted them) and found the accused's mother (the caller) sitting on a couch, apparently intoxicated, attempting to make a phone call.[71] Without questioning her about the nature of her suicide call, two police restrained her, took away the phone, and took her outside to a patrol car.[72] She was wearing only a nightgown and slippers and it was cold outside.[73] She resisted vigorously, holding onto the door and porch railing on the way out.[74] While she was being forcibly removed, two other officers located the accused sitting on his bed conversing with another person.[75] The accused appeared to police to be intoxicated, "but not so drunk as to not understand what was going on".[76]

68. 2014 SCC 3.

69. See *Crane*, *supra* note 34; *Criminal Code*, *supra* note 24, s 270(1)(a) (assaulting a peace officer).

70. See *Crane*, *supra* note 34 at paras 10–11.

71. See *ibid* at para 17.

72. See *ibid* at para 18.

73. See *ibid*.

74. See *ibid*.

75. See *ibid* at para 20.

76. *Ibid*.

Without inquiring into his mental state, police directed the accused out of the bedroom.[77] The accused testified to being told that he was placed under arrest for causing a disturbance; the officer said the reason given was an "arrest" under the *Mental Health Act*, but the trial judge was not satisfied this had occurred.[78] The accused did not resist being placed in handcuffs.[79] Brought to the front room where he saw his mother being forcibly removed, the accused pulled away from the officer leading him, spit in his face, and approached the officer dragging his mother away.[80] That officer struck the accused at least twice in the face, causing "a considerable quantity of blood [to be] shed".[81] Police "forcibly placed" the accused in a patrol car, took him to the detachment, placed a "spit mask" on him when removing him; then, "several POs" were involved in placing him in cells "more roughly than necessary", leaving him "on the floor of the cell, covered in blood" until the next morning.[82]

Addressing whether police were authorized to apprehend the accused and his mother, Gaede J noted the requirement in section 10 of Alberta's *Mental Health Act* that a person be "suffering from a mental disorder" and "in a condition presenting or likely to present a danger to the person".[83] Aside from the "sketchy report" over the dispatch, there was no further evidence of danger. The officers ought to have made inquiries before detaining.[84] And even if officers had had authority to detain, they failed to take the accused directly to a facility, as required under the Act.[85] Striking the accused when he was handcuffed with hands behind his back was unnecessary and unlawful.[86] Without authority to detain, police violated the accused's rights under section 9 of the *Charter*, along

77. See *ibid* at para 21.

78. *Ibid*.

79. See *ibid*.

80. See *ibid* at para 23.

81. *Ibid*.

82. *Ibid* at para 24.

83. AB *Mental Health Act*, *supra* note 11, s 10. As the Court notes here, section 10 permits a warrant to be issued for apprehension, but section 12 allowed for a warrantless apprehension where "circumstances are such that to proceed under s. 10 would be dangerous." The Act has been amended to require reasonable grounds to believe conditions in sections 10 and 12 have been met. The danger condition in section 10 now requires a reasonable belief that a person "within a reasonable time, [is] likely to cause harm to others or to suffer negative effects, including substantial mental or physical deterioration or serious physical impairment, as a result of or related to the mental disorder" (*ibid*, s 10)

84. See *Crane*, *supra* note 34 at para 17.

85. See *ibid* at para 34.

86. See *ibid* at para 36.

with section 10(a) for failing to provide the reason for detention.[87] This, together with the use of excessive force, entitled the accused, under section 24(1) of the *Charter*, to the extraordinary remedy of a judicial stay of proceedings.[88]

The Court's analysis in *Crane* focused on whether police were authorized to detain. Judge Gaede plausibly framed the use of excessive force here as a factor that made the violation of section 9 more egregious. But notably, Gaede J did not identify the use of force as a separate basis on which section 9 was violated. Lost in the analysis is the suggestion that had the facts been otherwise, had police the authority to detain, excessive force on its own might have rendered the apprehension arbitrary and unlawful.

Holdsworth[89] is a good example of this—an authorized apprehension involving considerable force the court fails to address. Early in the evening, in response to a 911 call from the accused's father, two police officers attended the accused's property in separate vehicles. The 911 call described the accused as "alone in the house, with a loaded weapon" and noted he had been drinking and was "very upset and angry".[90] Police made several attempts to reach the accused by phone to no avail.[91] Six more officers arrived on the property over an hour later, blocking access to the yard and setting up a perimeter.[92] Close to midnight, police were joined by an Emergency Response Team that included "snipers, assault personnel, and a tactical armoured vehicle with a loud hailer system" along with "a helicopter and numerous [additional] police officers".[93] Around 1 a.m., the accused came out of the house, was apprehended under the Alberta *Mental Health Act*,[94] and was taken to hospital.[95] Police obtained a search warrant before entering the house, finding evidence of numerous firearm offences.[96] Both trial and appeal courts held the apprehension to be lawful, focusing once again on the question of authorization. What police gleaned from the accused's father and a further witness amounted to a reasonable belief

87. See *ibid* at para 52.

88. See *ibid* at para 54.

89. See *supra* note 35.

90. *Ibid* at para 11.

91. See *ibid* at para 12.

92. See *ibid* at para 13.

93. *Ibid* at para 14.

94. See *supra* note 11.

95. See *Holdsworth*, *supra* note 35 at paras 15–17.

96. See *ibid* at paras 16–21.

the apprehension was necessary.[97] On appeal, Mandziuk JA found the circumstances to be "exceptional" and police justified in delaying the right to counsel until the accused was discharged from the hospital and taken to the police detachment.[98] Justice Mandziuk affirmed that detainees in mental health are "particularly vulnerable" and "strongly entitled to have their *Charter* rights respected," and that "the conduct of the police should be more closely scrutinized than otherwise".[99] Yet the manner of the apprehension here—the number of police involved and tactics used—received only passing consideration. Police response was "heavy" but "justified" in light of the "police duty to protect the public as well as to protect life".[100] More reductively: "[t]he actual interference with the Appellant's liberty would have been the same even if only one car with one officer had shown up."[101]

Wang[102] offers a partial exception to the pattern above by expanding the focus of the analysis to include conduct—though without explicitly framing it as a basis to assess the legality of the apprehension. The accused was required to improve ventilation around his furnace to continue his gas service. After repeated warnings, an Enbridge employee came to his house to turn off the gas.[103] Dressed in his pyjamas and slippers, the accused accosted the worker in front of his house and implored him not to leave without turning the gas back on.[104] The worker called 911 to report that the accused was "repeatedly following, pushing, grabbing and blocking him".[105] When police arrived, the accused threatened he would "go on the street and kill himself" and walked towards a busy thoroughfare.[106] Deciding it would be safer to try to apprehend the accused in his backyard, police persuaded him to follow them there by telling him, untruthfully, they intended to turn the gas back on.[107] In the backyard, officers apprehended the accused under Ontario's *Mental Health Act* and informed him of this. He began "yelling and screaming incoherently" and

97. See *ibid* at para 91.
98. *Ibid* at paras 94–96.
99. *Ibid* at para 82.
100. *Ibid* para 62.
101. *Ibid* para 63.
102. See *Wang*, *supra* note 20.
103. See *ibid* at paras 6–7.
104. See *ibid* at para 9.
105. *Ibid* at para 10.
106. *Ibid* at paras 12–13.
107. See *ibid* at paras 13–16.

"bolted" towards the door of the house attempting to get inside.[108] Police grabbed him, a scuffle ensued involving the accused's wife, and two officers were injured—resulting in charges of assaulting a peace officer and resisting arrest.[109]

At trial, the accused challenged the validity of the detention under section 9 of the Charter. The court found the apprehension lawful under section 17 of the Ontario *Mental Health Act*, on the basis that the accused was clearly at risk of self-harm by running toward traffic, and threatening to kill himself.[110] Justice Wong held that police were justified in their opinion that the accused was suffering from a mental disorder—but he did not consider what constitutes a mental disorder under the Act and whether police had evidence to meet this test.[111] Yet Wong J did address the officers' use of force and their decision to attempt to apprehend the accused in his backyard rather than the street out front, finding them both reasonable in the circumstances.[112] In doing so, the decision implies that the legality of the apprehension turned in part on the question of reasonable conduct.

B. Cases Involving Violations of Privacy

Hickey[113] is one of a series of cases that raise important questions about the scope of search powers in a mental health apprehension. Early on the day in question, police received a report that the accused, parked at a weigh scale, had, without provocation, backed up his vehicle and said "[f]uck you anyways" to a transport safety inspector.[114] In the afternoon, the accused's mental health nurse and girlfriend told police that the accused had been "experiencing mental health problems[,] was not coping well", and had "suicidal ideations".[115] Police were also told the accused may be a danger to himself and others, had been a patient in a mental health hospital, and was apprehended a week earlier.[116] Police located the accused in his vehicle soon after.[117] Despite finding him

108. *Ibid* at para 16.

109. See *ibid* at paras 16–19.

110. See *ibid* at para 70.

111. See *ibid*.

112. See *ibid* at paras 76–79.

113. *Hickey*, *supra* note 34.

114. *Ibid* at para 5.

115. *Ibid* at para 7.

116. See *ibid* at para 7.

117. See *ibid* at paras 8–9.

coherent and cooperative, one officer had concerns on the basis that the accused was "overly quiet given the circumstances" and had "growth on his face, looked 'rough', and appeared sweaty".[118] The officer apprehended the accused under the British Columbia *Mental Health Act*, placing him in handcuffs before putting him in a police vehicle.[119] When asked if he "needed anything from his vehicle", the accused said no.[120] Despite this, the officer collected a wallet, cellphone, and jacket that he could see in plain view, and placed them in a backpack that the officer saw in the backseat.[121] The officer "had a quick look inside the backpack to ensure there were no items that could be used as a weapon".[122] In the backpack, he saw a "shiny small container labeled 'wax'".[123] Suspecting it may contain an illicit substance, he opened the container and found crack cocaine.[124] The accused was arrested under the *Controlled Drugs and Substances Act*[125] but was taken first to a mental health facility.[126] Officers then searched the accused's vehicle, without a warrant, finding more cocaine in a console.[127]

The court found the apprehension under section 28 of British Columbia's *Mental Health Act* lawful based on the officer's personal observations and "recent compelling reliable and credible information from numerous sources, including medical professionals".[128] However, police had no authority to search the backpack or console of the vehicle, thereby violating the accused's rights under section 8 of the *Charter* and resulting in the exclusion of evidence under section 24(2).[129] On section 8, Cutler J held that police may have a power at common law to conduct a search incident to apprehension.[130] Given the longer time a person may be in police custody on an apprehension, the power to search

118. *Ibid* at paras 9–10.
119. See *ibid* at para 11.
120. *Ibid* at para 13.
121. See *ibid* at para 14.
122. *Ibid* at para 15.
123. *Ibid*.
124. See *ibid* at para 15.
125. SC 1996, c 19.
126. See *R v Hickey*, *supra* note 34.
127. See *ibid* at para 17.
128. *Ibid* at paras 25, 33.
129. See *ibid* at para 45.
130. See *ibid* at para 54.

should be more expansive than the power to search incident to investigative detention (which allows for only a brief pat down).[131] Closer in nature to search incident to arrest, police on apprehension have at least the power to search a person and "any items in his immediate possession which he may have access to during the period of the apprehension".[132] The power should not extend to a search of "the immediate vicinity" or items such as a backpack that police would remove.[133] The purpose of the power is to facilitate safe conduct to a doctor, not to "engage in investigative activities".[134] As a challenge to a search in a criminal case, the analysis here was properly framed as a section 8 violation. We return in part 3, below, to the question of whether a privacy violation in the course of an apprehension can render it a violation of section 9 on the basis that the detention was not reasonably conducted.

The search in *R v Pilon*[135] was more invasive. Two officers attended the accused's residence in response to a complaint that he had written an email to a bank threatening to "rob the bank, harm employees and kill himself ".[136] Upon arrival, the accused refused the officer's entry but spoke to them outside.[137] Dismissing the email as "an empty threat", he explained that he had lost his job, was on pain medication, and was under financial stress.[138] He also denied being suicidal.[139] Despite finding the accused "lucid", officers detained him under Ontario's *Mental Health Act* and informed him of this.[140] They searched the accused, found keys to his apartment, and handcuffed him before placing him in a cruiser.[141] One officer searched his apartment for weapons he might have used to carry out the threat made in the email, while the other officer stayed with the accused in the vehicle.[142] While in the apartment, police found marijuana plants in a cupboard.[143] Police then took the accused to the hospital

131. See *ibid* at para 51, citing *R v Mann*, 2004 SCC 52 [*Mann*].

132. *Ibid* at para 54.

133. *Ibid* at para 55.

134. *Ibid* at para 56.

135. 2012 ONSC 1094 [*Pilon*].

136. *Ibid* at para 2.

137. See *ibid*.

138. See *ibid*.

139. See *ibid*.

140. *Ibid* at para 3.

141. See *ibid*.

142. See *ibid* at para 5.

143. See *ibid*.

where he was assessed and discharged.[144] Based on observations from the search, police obtained a warrant for a further search and discovered more plants and equipment.[145]

Justice Hennessy found the emergency apprehension lawful under section 17 of Ontario's *Mental Health Act*, though the analysis was exceedingly brief.[146] It involved no consideration of whether officers had reason to believe the accused was suffering from a mental disorder as defined under the Act. It also gave no consideration to whether officers could first have obtained a warrant for the apprehension, as required under section 17 of the Act. The warrantless search of the apartment, however, was unlawful. An apprehension does not give rise to a power to carry out a warrantless search of a residence, absent "concerns of a threat to life or personal safety".[147] With the accused safe in police custody, there were no such concerns;[148] the searches violated section 8 and the evidence was excluded under section 24(2).[149]

R v Larson[150] offers a further example of an invasive search in the context of an apprehension, this time triggered in part by the detainee's concerns. On the morning in question, the accused, known to police, was suffering from an episode of paranoid delusions that caused him to discharge pepper spray at a group of strangers in a vehicle. Police found him moments later in a lake, in a "rocky area not suited for swimming", agitated, claiming that people were shooting at him.[151] He was apprehended under section 28 of British Columbia's *Mental Health Act*, and on the drive to the hospital, he told officers he had been the victim of a home invasion.[152] Police suspected him of operating a marijuana grow operation in his home.[153] Despite knowing the accused was suffering delusions, they dispatched another officer to the home—testifying at trial that their sole purpose was to investigate the report of a home invasion.[154] Two officers attended the accused's home, found no signs of forced entry, and spoke to a neighbour who said he was not aware of an incident.[155] Police entered the

144. See *ibid*.

145. See *ibid*.

146. See *ibid* at paras 7–8.

147. *Ibid* at para 11.

148. See *ibid* at para 12.

149. See *ibid* at para 17.

150. 2011 BCCA 454 [*Larson*].

151. *Ibid* at para 3.

152. See *ibid* at para 6.

153. See *ibid* at para 8.

154. See *ibid*.

155. See *ibid* at para 10.

home through an unlocked side door, searched all three floors, found no blood stains or anything disturbed, but discovered what appeared to be a grow operation in the basement.[156] After obtaining a warrant, police conducted a second search.

The trial judge found the searches lawful and convicted the accused of production. Despite his delusional state, the allegations of a home invasion could have been true, giving police reasonable grounds to believe safety was at risk.[157] On appeal, the court gave no consideration to the validity of the apprehension. But it found the searches unlawful, excluded the evidence, and acquitted. Police acted reasonably in deciding to investigate a possible home invasion; but once at the accused's home, finding no signs of forced entry or other evidence of danger within, they lacked an objective basis for believing safety was at issue.[158]

Finally, *R v Tereck (RS)*[159] illustrates how an invasive search on an apprehension can be reasonable in the circumstances. At 11 p.m., a mental health worker informed police that the accused had written a letter to his psychiatrist threatening to "kill himself with a gun".[160] Police spoke with the accused's father who described his son as "agitated" when he spoke with him at 6 p.m.[161] Shortly after midnight, a team of five police officers attended the accused's home to apprehend him under the Manitoba *Mental Health Act*.[162] Police had to force open the door, but found the accused cooperative and placed him in a cruiser. Officers then carried out a "sweep search" of his residence for weapons, discovering a marijuana grow operation.[163] Defence conceded that police had grounds to apprehend.[164] The courts at trial and on appeal found the search reasonable given the risk of leaving a "loaded firearm in unsecured premises".[165] Not performing the sweep search would have been "a dereliction of their duty or plain negligence".[166]

156. See *ibid* at paras 11–12.

157. See *ibid* at para 13.

158. See *ibid* at paras 39–45.

159. 2008 MBCA 90.

160. *Ibid* at para 2; *R v RST*, 2007 MBQB 166 at para 3 [*RST*].

161. *R v Tereck (RS)*, 2008 MBCA 90 at para 2 [*Tereck*].

162. See *ibid*; RST, *supra* note 160 at para 4; MB *Mental Health Act*, *supra* note 13.

163. Tereck, *supra* note 161 at para 3.

164. See *ibid* at para 9.

165. *Ibid* at para 7.

166. *Ibid* at para 12.

C. Broader Inferences to Draw from the Cases

Once again, the cases provide only a glimpse into the practice of apprehensions, but they show that police wield a power here that can be easily and seriously abused. However, in all but the most extreme cases, it may be difficult to assess whether police conduct was reasonable or necessary in the circumstances. Our aim here was to shed light on the degree to which the question of what constituted reasonable conduct on the part of police is overlooked in the case law in favour of a focus on whether the initial apprehension was authorized. When reasonableness of conduct was considered, it tended to be an afterthought—addressed only once the court had decided whether an apprehension or search was authorized. We turn in the next part to how the jurisprudence might evolve to make police conduct more central when assessing the legality of apprehensions.

III. Parameters of a Reasonable Apprehension

It should be clear by this point that both legislation and case law tend to frame the legality of apprehensions in binary terms. Police are either authorized in law to apprehend a person or not. In 2019, the Supreme Court of Canada in *Le* recognized a further distinct basis on which a detention by state agents can be arbitrary under section 9 of the *Charter* by holding that a detention must be authorized by law but also carried out in a reasonable manner.[167] In this part, we explore what the Supreme Court of Canada's reframing of section 9 in *Le* might mean in the context of mental health apprehensions. We suggest that, at the least, it compels police and other stakeholders to reconsider current practices and assumptions about the scope of apprehension powers. We begin by providing context into section 9 and the new requirement in *Le*, and then argue for the minimum content of a reasonable apprehension.

A. Apprehensions and Section 9

Section 9 of the *Charter* guarantees that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[168] A preliminary issue is whether an apprehension under mental health legislation constitutes a detention for the

167. See *Le*, *supra* note 7.

168. *Charter*, *supra* note 8.

purposes of section 9. The Supreme Court of Canada set out a test for what constitutes a detention under section 9 in *R v Grant*,[169] and it would clearly capture a mental health apprehension.

Briefly, *Grant* dealt with an investigative detention, seeking to determine if there had been a detention in that case and, if so, when it had crystallized. The Court's test is broadly formulated: "Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint."[170] In the latter case, a person is detained "either where the individual has a legal obligation to comply with [a] restrictive [police] request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply".[171] Factors to consider include the circumstances giving rise to the encounter; the nature of the police conduct (language, duration, place, physical contact, presence of others); and the particular characteristics or circumstances of the individual (age, physical stature, minority status, level of sophistication).[172] Courts prior to *Grant* have assumed that an apprehension engages section 9 without need for analysis,[173] but the test is relevant in cases where conduct of police or other state agents may give rise to ambiguity.

In *Le*,[174] the Supreme Court of Canada affirmed the *Grant* test for detention but also broadened the test for what constitutes an arbitrary detention under section 9. It did so by drawing on *Collins*,[175] a leading decision on section 8. To understand the significance of the Court's holding in *Le*, it may help to briefly address *Collins*.

Section 8 guarantees "[e]veryone the right be secure against unreasonable search and seizure."[176] In *Hunter v Southam*,[177] the Court defined a reasonable search to be one held pursuant to a warrant issued independently on probable grounds—but the Court also held that a warrantless search was only prima facie unreasonable.[178] A search could still be reasonable if the Crown could establish,

169. See Grant, *supra* note 36.

170. *Ibid* at para 44.

171. *Ibid*.

172. See *ibid*.

173. See e.g. *Crane*, *supra* note 34 at para 35; *R v French*, 2018 BCSC 825 at paras 164–167.

174. See *Le*, *supra* note 7.

175. *Collins*, *supra* note 8.

176. *Charter*, *supra* note 8, s 8.

177. [1984] 2 SCR 145, 11 DLR (4th) 641.

178. See *ibid* at para 161.

on a balance of probabilities, that it was authorized by law. Three years later, in *Collins*,[179] the Court confronted a case in which police may have had authority to carry out a search but used excessive force. Justice Lamer, writing for the majority, provided a broader test for what constitutes an unreasonable search: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."[180]

In the two decades following *Collins*, the Court embraced Lamer J's three-part test for section 8 as a core framework but resisted adopting an equivalent test for section 9.[181] In 2009, the Court in *Grant* (discussed above) cited *Collins*, suggesting that arbitrary detention in section 9 should be understood in similar terms as reasonable search in section 8, but did not endorse a full equivalent of Lamer J's three-part test.[182] The Court would finally do so in *Le*.

Le concerned an encounter between "five young racialized men" and three police officers in the backyard of a townhouse in a Toronto housing co-operative.[183] The majority opinion, authored by Brown and Martin JJ (and joined by Karakatsanis J), held that a detention had occurred and was arbitrary for not being authorized by law. Significant for our purposes was the majority's definition of what would constitute an arbitrary detention, worth citing in full:

> Where a detention is established, a court must consider whether the detention is arbitrary. This Court's decision in

179. *Collins*, supra note 8.

180. *Ibid* at 278.

181. On the Court's evolving approach to what constitutes an arbitrary detention, see Coughlan and Luther, *Detention and Arrest*, 2nd ed (Toronto: Irwin Law, 2017) at 295–305.

182. The passage appears in *Grant*, *supra* note 36 at para 56, falling short of a complete adoption of the three-prong test: ". . . Under *Collins*, *supra* note 8, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary." Coughlan and Luther, *supra* note 181 at 297, suggest that by adopting an equivalent to the first 2 prongs of *Collins* in the context of s 9, the Court settled a disparity in the case law as to whether a non-authorized detention was necessarily arbitrary. See *R v Duguay* (1985) 50 OR (2d) 375; 1985 CarswellOnt (the Ontario Court of Appeal holding that it may not be arbitrary). The Court in *Grant*, *supra* note 36 at para 54, held to the contrary that "a detention not authorized by law is arbitrary and violates s. 9." Coughlan and Luther, *supra* note 181 at 296, contend that "the failure to have established this point earlier means that much of the section 9 caselaw prior to 2009 is not entirely reliable."

183. *Le*, *supra* note 7 at headnote.

> Grant provides guidance (at paras. 54-56), drawing from the three-part test stated in *R. v. Collins*, [1987] 1 S.C.R. 265, for assessing unreasonable searches and seizures under s. 8. Specifically, the detention must be authorized by law; the authorizing law itself must not be arbitrary; and, the manner in which the detention is carried out must be reasonable.[184]

One might argue this part of *Le* is *obiter*, not forming a necessary part of the judgment. We concede this possibility, but suggest the Court's embrace of *Collins* here—explicitly endorsing all three parts—was inevitable. What may only be *obiter* here is likely to soon form the basis of a holding on point. Writing in 2017, Coughlan and Luther noted that lower courts have relied on the manner of police conduct as a basis for finding an accused that has been arbitrarily detained.[185] More to the point, given the weight of jurisprudence on the third ground in *Collins* (discussed below), we suggest it is unlikely the Court would resile from its endorsement of a three-part test for section 9 in *Le*. There is no *principled* basis on which to do so.[186]

Before turning to what might constitute a detention carried out unreasonably, we look first at three decisions on unreasonable conduct in the context of section 8. Our purpose here is twofold: to demonstrate the broad scope of factors to consider in assessing reasonable conduct, and to illustrate a larger point the Court makes about the third prong of *Collins* in *R v Vu (Vu)*.[187] The Court in that case held that the reason a search "must be conducted in a reasonable manner" is to "ensur[e] that the search is no more intrusive than is

184. *Ibid* at para 124.

185. See Coughlan and Luther, supra note 181, at 303–04, citing *Brown v Durham (Regional Municipality) Police Force* (1998), 131 CCC (3d) 1, 167 DLR (4th) 672 at para 34 (ONCA) (held that an authorized highway stop carried out for an improper purpose, such as racial profiling, would render it arbitrary; they note this reasoning was applied to find an arbitrary detention on racial grounds in *R v Khan* (2004), 189 CCC (3d) 49, 244 DLR (4th) 443 (ONSC)).

186. We set aside in this paper the question of what constitutes a non-arbitrary law under s 9 – the second part of the *Collins* / *Le* test – and when a law authorizing a warrantless apprehension under provincial mental health legislation might be arbitrary under s 9. Briefly, the Supreme Court of Canada's approach to deciding whether a detention law is arbitrary has, since *R v Hufsky*, [1988] 1 SCR 621, [1998] SCJ No 30 (QL), turned on the question of whether it provides criteria for the exercise of the discretion to detain (*ibid* at 633). On whether there might be other ways in which a detention law might be arbitrary, see the discussion in Coughlan and Luther, *supra* note 181, at 298–303.

187. 2013 SCC 60 [*Vu*].

reasonably necessary to achieve its objectives."[188] This principle tacitly shapes the analysis in the following cases and should apply to the assessment of apprehensions under section 9.

B. Searches Carried Out in an Unreasonable Manner

The first example is from *Collins*, cited above.[189] An officer, acting on a belief that the accused was a heroin dealer, approached her in a bar and tackled her to the ground, using a chokehold to her throat to prevent her from swallowing potential evidence. The officer conceded the force he used was "considerable".[190] At issue for the Court was whether the search was authorized by law—whether the officer had grounds to believe he would find narcotics on the accused—and if so, whether he "carried out the search in a manner that made the search unreasonable".[191] Notably, Lamer J held that the two issues were closely connected: "The nature of the belief [the officer held about whether she had drugs] will also determine whether the manner in which the search carried out was reasonable."[192] If the officer had specific information about her being a "drug handler", "then the 'throat hold' would not be unreasonable".[193] In this case, since such information was lacking, the search was "unreasonable because unlawful [unauthorized] and carried out with unnecessary violence".[194] However, in his discussion of whether the evidence ought to have been excluded under section 24(2) of the *Charter*, Lamer J suggested that had the officer had more certainty that Collins was a "handler of drugs", "taking a flying tackle" at her may not have been unreasonable.[195] We query whether a court today would take the same view. We read *Collins* as authority for the proposition that where a search is authorized by law, the use of excessive force to effect it is the most obvious way in which the search can be carried out unreasonably.

188. *Ibid* at para 22.

189. See *Collins*, *supra* note 8.

190. *Ibid* at 271.

191. *Ibid* at 278.

192. *Ibid*.

193. *Ibid*.

194. *Ibid* at 279.

195. See *ibid* at 288 ("[i]ndeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs").

In *Golden*, the Court addressed the question of when police are authorized to carry out a strip search incident to arrest and what constitutes a strip search carried out in a reasonable manner.[196] Toronto police entered a Subway restaurant after observing Golden, a black male, and others apparently engaging in drug dealing. Officers patted Golden down without finding any drugs or weapons and then took him to a stairwell at the back of the restaurant where they conducted "a visual inspection of [his] underwear and buttocks".[197] Officers saw a "plastic wrap" in Golden's buttocks, and Golden shoved the officer, who then pushed him "into the stairwell, face-first".[198] Officers then brought Golden to a seating booth at the back of the restaurant, removing remaining patrons. With five officers, two suspects, and the employee still present, police forced Golden to bend over a table, lowering his pants and underwear. Trying to remove the package, Golden "accidentally defecated" without dislodging the package.[199] Police used a pair of rubber gloves the employee provided to remove the package—gloves that were used for cleaning the washrooms.[200] The package contained a substantial amount of crack cocaine. Trial and appellate Courts found the search reasonable under section 8.

A narrow majority of the Supreme Court of Canada held the search to violate section 8 on the basis that it was both not authorized by law and not carried out in a reasonable manner. Police do not have authority to conduct a strip search without grounds additional to those for the arrest; they must have reason to believe a strip search would yield evidence of an offence or weapons.[201] They also need exigent circumstances to carry out a strip search in the field.[202] In this case, while there were grounds to strip search Golden, there were no grounds to do so at the Subway shop rather than at a police station some two minutes away.[203] The searches at the restaurant—taking them together as a single event—were conducted in an unreasonable manner.[204] To establish this, the majority set out criteria for a strip search carried out in a reasonable manner.[205]

196. See *Golden*, *supra* note 10.

197. *Ibid* at para 30.

198. *Ibid*.

199. *Ibid* at para 33.

200. See *ibid*.

201. See *ibid* at para 99.

202. See *ibid* at para 102.

203. See *ibid* at paras 107–112.

204. See *ibid* at para 113.

205. See *ibid* at para 101.

The criteria are unique to the context of strip searches, but relevant here, once again, is the Court's expansive view of what might make the exercise of invasive power unreasonable under the third prong of *Collins* and *Le*—but also its sensitivity to dignity, privacy, and autonomy. Among the many concerns the Court enumerates, we highlight a few: whether the strip search will be "conducted in a manner that ensures the health and safety of all involved"; whether it will be "authorized by a police officer acting in a supervisory capacity"; whether it "[h]as it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched"; whether "the number of police officers involved in the search be no more than is reasonably necessary in the circumstances"; whether police used "the minimum of force necessary"; whether the search is "carried out in a private area such that no one other than the individuals engaged in the search can observe the search"; whether it is "conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time"; and whether the detainee was given a chance to remove any object found or have it removed "by a trained medical professional".[206] The majority also suggested that "a proper record be kept of the reasons for and the manner in which the strip search was conducted".[207] Where the reasonableness of a search is challenged, "*the Crown* bears the onus of proving its legality."[208]

The searches at the restaurant in *Golden* were carried out unreasonably because police violated a number of the criteria. Officers acted without consulting a supervisor. Golden was not given a chance to remove his clothing, "a measure that might have reduced the sense of panic he clearly experienced".[209] The search was carried out in a way that may have "jeopardized [his] health and safety"; he should have had a chance to remove the item police sought or a medical professional should have been involved.[210] *Golden* ends with an important caution about resistance to police use of force:

> We particularly disagree with the suggestion that an arrested person's non-cooperation and resistance necessarily entitles police to engage in behaviour that disregards or compromises his or her physical and psychological integrity and safety. If the general approach articulated in this case is not followed, such that the search is unreasonable, there is no requirement that

206. *Ibid.*

207. *Ibid.*

208. *Ibid* at para 105 [emphasis in original].

209. *Ibid* at para 113.

210. *Ibid.*

> anyone cooperate with the violation of his or her *Charter* rights. Any application of force or violence must be both necessary and proportional in the specific circumstances.[211]

This reasoning would apply directly to mental health apprehensions: i.e., a situation in which officers are authorized to apprehend but carry out an unreasonable apprehension could give rise to lawful resistance. Put another way, contrary to the cases surveyed in part II above, the questions of whether police were authorized to apprehend and used reasonable force do not exhaust the analysis of whether a person's resistance—including force used against police—was lawful.

A final case is *R v Cornell (Cornell)*,[212] which, on its facts, may seem too tangential to be relevant to mental health apprehensions. We cite it briefly to illustrate two points. In distinction to *Collins* and *Golden*, police were authorized to carry out the search at issue, but the Court entertained the possibility that it violated section 8 strictly on the basis that it was carried out unreasonably—with the bench divided on this point. The search at issue concerned an entry into a residence without warning by nine officers wearing balaclavas and body armour with their weapons drawn. They were executing a warrant against an associate running what was believed to be a stash house for two other accused known to be involved in a drug gang and to have histories of violence. For the dissenting justices, the lack of individualized concerns about violence in relation to the accused rendered the scale of force here unreasonable. The majority held that "the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises"[213] and that "the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be".[214] Courts should recognize that "after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances".[215] Reviewing courts looking at how a search was conducted should "balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback".[216] Assessments of force used in mental health apprehensions, or other intimidating or invasive police conduct under the third prong of *R v Le*, might be assessed in a similar light. Police need to be granted

211. *Ibid* at para 116.

212. See *Cornell*, *supra* note 10.

213. *Ibid* at para 24.

214. *Ibid* at para 23.

215. *Ibid* at para 24.

216. *Ibid*.

leeway to recognize the limits of their knowledge and their efforts to act prudently in circumstances of uncertainty.

C. Apprehensions Carried Out in an Unreasonable Manner

The case law on the third part of the *Collins* test under section 8 establishes that courts take into account a range of factors in assessing whether police acted in a reasonable manner. The broader concern is to ensure that a search is "no more intrusive than is reasonably necessary to achieve its objectives".[217] Turning to apprehensions, we apply these considerations to what might be conceived as a set of minimal concerns that courts should address when applying the third prong in *Le*. We caution that not every concern about police conduct we canvass here would, on its own, constitute a violation of section 9 or warrant a remedy under section 24 of the *Charter*. We return to the question of how to make a determination about police conduct under the third part of *Le* at the conclusion of the discussion.

(i) Force

Police will often have to use force to effect a lawful apprehension. The question is when this becomes excessive. *Crane* points to one obvious instance: when a person who is restrained resists or strikes at an officer and the officer strikes back in anger.[218] Force can also be excessive in more subtle ways. If police lack evidence to believe a person may do something to harm themselves or others in police custody, handcuffs should not be used. Routine use of them in mental health apprehensions is unreasonable.

Force can also be used excessively by outnumbering a detainee in the course of an apprehension unnecessarily. When entering a home in response to a mental health distress call, police should consider whether more than one officer needs to be involved and why. As was the case in *Golden*, the presence of more than one or two officers can be needlessly intimidating or turn the event into a spectacle.[219]

Race dynamics may give rise to discrete concerns in an apprehension. The majority in *Le* recognized that a person's minority status may affect whether they more readily—and reasonably—perceive themselves to be subject to police compulsion or demand.[220] However, by acknowledging the "disproportionate

217. *Vu*, *supra* note 187, at para 22.

218. See *Crane*, *supra* note 34 at para 23.

219. See *Golden*, *supra* note 10 at para 101.

220. See *Le*, *supra* note 7 at para 97.

policing of racialized and low-income communities" in Canada, the majority in *Le* also suggests that race plays a role beyond perceptions about whether a person is detained.[221] A person of colour might reasonably perceive a confrontation with police in the course of an apprehension as more intimidating or coercive than a person of a different race may. Apprehensions involving race dynamics should be assessed in the wider social context of historically fraught relations between police and racialized communities recognized in *Le*.[222] What may seem reasonable—non-intimidating or coercive conduct by police—may appear unreasonable from this perspective.

(ii) Dignity

The Court in *Golden* suggests that police should be sensitive to gender when a search violates bodily or sexual integrity.[223] Apprehensions will often be urgent, as was apparently the case in *Milino* BCSC.[224] But where possible, police should at least consider involving officers of the same gender in invasive or intrusive searches or confrontations in homes, bedrooms, and other intimate settings.

Police should heed the direction in *Golden* to provide detainees with a chance to comply voluntarily to police direction. The Court in *Golden* mandates that police allow detainees a chance to remove items secreted on their person before attempting to do so themselves. Analogously, before using any physical force, police should provide a clear opportunity for a person to comply voluntarily with the demand to accompany them to a facility—contrary to what occurred in *Crane*, where police began to force the accused's mother to leave before waiting for her to get off the phone.[225]

If police do need to use force to detain, they should do so as discreetly as possible. Officers in *Wang* provide a good example in leading the accused to his backyard before attempting to detain him.[226] Police should be mindful of avoiding an unnecessary spectacle in removing a person from a private setting such as a home or a business—by giving thought to route, manner, and timing.

221. *Ibid*.

222. See *ibid* at paras 82–88.

223. See *Golden*, *supra* note 10 at paras 11, 101.

224. See *Milino* BCSC, *supra* note 16.

225. See *Crane*, *supra* note 34 at para 18.

226. See *Wang*, *supra* note 20 at paras 78–79.

(iii) Notice

Rights under sections 10(a) and 10(b) of the *Charter* present separate and discrete issues from the manner in which police carry out an apprehension. As noted earlier, some provinces and some courts assume that police have a duty to provide either or both sections 10(a) and 10(b) on an apprehension—i.e., the reason for detention and a right to instruct counsel without delay. But courts and legislatures are far from a consensus on these points. Apart from these rights, however, some measure of communication with a detainee is necessary to render an apprehension reasonable.

Police should advise a person they apprehend where they are being taken, what will happen, and how long it might take. Provisions in New Brunswick's and Prince Edward Island's acts that require persons to be told where police will be taking them and for what purpose gesture at this as a requirement of a reasonable apprehension.[227] A detainee should also be free to contact other people while waiting to be seen by a doctor. They should also be apprised of relevant new information about the status of their detention as it arises (e.g., changes in destination or estimated wait time). Police likely take these measures in many if not most cases, but failing to do so could render the experience more confusing and distressing than it needs to be.

(iv) Privacy

Courts have suggested that, in a mental health apprehension, police are permitted to search a person and their immediate surroundings for a potential weapon, if there are grounds to believe safety is an issue. Any search beyond this should require a warrant, and any breach would violate section 8 of the *Charter*.[228] However, police could violate a person's privacy in the course of an apprehension in a way that does not amount to a section 8 breach—i.e., that does not involve a search—but would constitute an unreasonable apprehension.

Police might do this by carrying out an apprehension in a manner that divulges or reveals more about a person's health or situation than is necessary. They might do so by apprehending a person at work without regard to the presence of co-workers, by not being discrete in communicating the reasons for

227. See NB *Mental Health Act*, *supra* note 12, s 10.1; PEI *Mental Health Act*, *supra* note 13, s 10(c). Analogous provisions can be found in the *Criminal Code*'s warrant provisions for obtaining a DNA sample, which require a person to be told the nature, purpose, and authority for taking the sample, and in the case of a young person, rights to having counsel and a parent present. See e.g. *Criminal Code*, *supra* note 24 s 487.07(1).

228. See *Hickey*, *supra* note 34; *Pilon*, *supra* note 135; *Larson*, *supra* note 150.

the apprehension, or by staging the apprehension in an unnecessarily public or compromising fashion.

(v) Length

As noted in part I, some provinces codify a limit on how long an apprehension may last—suggesting that length is an important consideration in a reasonably conducted apprehension. Where the provincial acts are silent on this point, they do still contemplate bringing a person to a doctor for assessment immediately or without delay. We noted evidence that, in Ontario, it could take up to eight hours to be seen by a doctor.[229] An arrest or detention can become arbitrary under section 9 if a person is held for too long.[230] The question arises here as to whether, at some point, the power to apprehend a person lapses.

If the power does lapse, an apprehension that goes on for too long would appear to be an issue of authorization rather than manner of conduct. Yet a lengthy apprehension might, in some cases, also be construed as a matter of conduct. For example, an apprehension would be carried out unreasonably if police were the cause of a delay in getting a person to a doctor that they could not explain or was clearly unnecessary.[231] In other cases, the failure of officers to consider whether a detention should continue could render it an apprehension carried out unreasonably. Consider a person who police apprehend due to concerns about suicide. If the suicidal intentions were due in part to a failure to take medication and the person is given their medication while waiting to be seen and stabilizes, it may become unreasonable to continue to keep them in

229. See Iacobucci, *Police Encounters*, *supra* note 48 at 225.

230. See *Mann*, *supra* note 131, at para 45. Justice Iacobucci, for the majority, held that an investigative detention "should be brief in duration" (*ibid*). Length would be considered when assessing the "overall reasonableness of the decision to detain," which would factor "all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference" (*ibid*, para 34). A body of case law holds that long detentions following arrest were not authorized under section 498(1) and (2) of the *Criminal Code*, resulting in violations of section 9. See e.g. *R v Iseler*, 2004 CanLII 34583 (ONCA) at para 1, 190 CCC (3d) 11 (in which the accused was held in police cells for eleven hours with "no contact (except for a few seconds) with any police officer"). See also *R v Poletz*, 2009 SKPC 121; *R v James*, 2011 NBPC 1 (holding that detentions of close to twelve hours in former case and 8.5 hours in the latter violated section 9).

231. One province codifies this expectation. See NFL *Act*, *supra* note 13, s 21(1)(b) (mandates that police take a detainee to a faculty for assessment "as soon as practicable and by the least intrusive means possible without compromising the safety of that person or the public").

custody if they no longer present as an imminent risk of harm. We concede this raises difficult questions that officers may not be in a position to address. Police are not mental health experts, and as the Court in *Holdsworth* noted, typically, "individuals who find the police on their doorstop deny having any problems and claim that the statements which led to the visit were not serious".[232] Yet, on the other hand, emergency powers are extraordinary but limited. In *R v Godoy*, the Supreme Court of Canada recognized a police power to enter a residence without a warrant to protect a person's life and safety.[233] But the authority to enter a residence ends as soon as officers have ascertained the person's health and safety—they have no permission to be there after that.[234] A similar logic should apply here. A vague concern for a person is one thing; an emergency is another. Where lengthy apprehensions occur, police and courts should be attentive to reasons why and should assess them as a matter of reasonable conduct, if not authority.

(vi) Notetaking

The Supreme Court of Canada in *R v Tse* held that in cases where a warrant is "not essential to a reasonable search, additional safeguards may be necessary, in order to help ensure that the extraordinary power is not being abused".[235] One such mechanism is the requirement in *Golden* that police keep "a proper record . . . of the reasons for and the manner in which the strip search was conducted".[236] Similarly, in *R v Fearon* (*Fearon*), where police search a phone incident to arrest, they must take "detailed notes" of what they examined.[237] As noted earlier, Alberta along with Newfoundland and Labrador require a peace officer to make note of the grounds on which they formed their belief in the need to carry out a warrantless apprehension under mental health law.[238] Requiring police to take contemporaneous notes lends a measure of transparency to their

232. Holdsworth, *supra* note 35 at para 90.

233. [1999] 1 SCR 311, [1998] SCJ No 85 (QL).

234. See *ibid* at para 22, Lamer CJ. "I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there."

235. *R v Tse*, 2012 SCC 16 at para 84.

236. *Golden*, *supra* note 10 at para 101.

237. *R v Fearon*, 2014 SCC 77 at para 82 [*Fearon*].

238. AB *Mental Health Act*, *supra* note 11, s 12(3); NFL *Act*, *supra* note 13, s 21(2)(c).

conduct, but it may have further salutary benefits. As Cromwell J wrote for the majority in *Fearon*: "[T]he record keeping requirement is likely to have the incidental effect of helping police officers focus on the question of whether their conduct in relation to the phone falls squarely within the parameters of a lawful search incident to arrest."[239] Similar logic applies here.

(vii) Responsibility to Return

In many cases, police have authority to apprehend, but a doctor decides to release. Three provinces direct that upon release, police must return a detainee or arrange for their return to a requested location.[240] We do not suggest that a failure to return would render an apprehension unreasonable on its own, but police conduct at this stage is a factor in assessing the reasonableness of their conduct as a whole. In choosing to codify this duty, provinces are expressing an important assumption not about authority to detain but about reasonable conduct in the course of it.

D. Global Assessments of Reasonably Conducted Apprehensions

There are many things police might do in the course of an apprehension—humiliate, embarrass, fail to communicate adequately, delay unreasonably—that might be excusable in the circumstances. At all times, apprehensions need to be seen in the larger context of police attempting to prevent harm and save lives. As courts have held in other contexts, decisions police make in urgent situations, with limited knowledge, should not be second guessed too readily.[241] Yet, police conduct does remain subject to the rule of law. Once a person is safely in police custody, the urgency, in most cases, has passed. Police decisions about the manner and conduct of an apprehension should be assessed in the totality of the circumstances, taking into account the nature of the emergency, necessary force, gender dynamics, concerns about privacy arising from the

239. *Fearon*, *supra* note 235 at para 82.

240. NB *Mental Health Act*, *supra* note 12, s 10.2(b) ("[R]eturn the person to the person's residence or, if that is not practicable, to the place where the person was taken into custody"); NS *Act*, *supra* note 13, s 16(3) ("[T]he peace officer or other authorized individual shall arrange and pay for the return of the person to the place where the person was taken into custody"); PEI *Mental Health Act*, *supra* note 13, s 12(2) ("[T]he person who brought the person to the facility or such other person who has assumed custody shall, unless the detained person otherwise requests, arrange for the return of the person to the place where the person was when taken into custody or to another appropriate place").

241. See *Cornell*, *supra* note 210 at para 23.

setting of the apprehension, communication, and duration. In the clearest of cases—involving excessive force, gross violations of dignity or privacy—a section 9 violation on the third prong of *R v Le* would be made out. Short of this, an apprehension might be carried out unreasonably by police neglect of a constellation of concerns we have outlined above, but they would need to be significant in their totality to render the apprehension arbitrary and unlawful on this basis alone.

The reasonableness of police conduct in carrying out apprehensions will be an issue most often in criminal cases to which apprehensions have given rise—most typically, assault or possession charges. In this context, courts would assess the third prong of the *Le* test when deciding whether police violated section 9 rights in the course of the apprehension and might also consider the lack of reasonable conduct when assessing police actions under section 24(1) or (2) on applications to exclude evidence or grant a civil remedy.[242] Less often, the reasonableness of police conduct will be assessed in the course of a police disciplinary hearing, a civil action, or an inquiry. With the passage of time, as jurisprudence on point develops, police and other stakeholders in mental health apprehensions may become better informed about this aspect of the law, which in turn may help foster more consistency in carrying out reasonable apprehensions.

Conclusion

Provincial Mental Health Acts across Canada authorize police to carry out warrantless apprehensions of persons in urgent circumstances. The powers are limited but significant. Both the legislation and case law focus primarily on whether and when police are authorized to apprehend, providing limited and inconsistent guidance on how to conduct them. Apprehensions engage section 9 of the *Charter* and can be challenged as unlawful, often resulting in acquittals in criminal cases arising from apprehensions. The Supreme Court of Canada's decision in *R v Le* provides a further basis on which to assess the legality of apprehensions under section 9: whether they were conducted in a reasonable manner. We have argued for a minimal set of considerations that should guide police and courts in conducting apprehensions and assessing their reasonableness after the fact. We anticipate that as jurisprudence applying *R v Le* to apprehensions develops, police and other stakeholders will draw on the concept of a reasonable apprehension as a catalyst for thinking about how they can be carried out more humanely and in closer conformity with the rule of law.

242. See *R v Grant*, *supra* note 36; *Vancouver (City) v Ward*, *supra* note 44.