SHOPKEEPER'S PRIVILEGE: COMING TO A STORE NEAR YOU?

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When it comes to suspected shoplifting, Canadian merchants and their agents (collectively, "shopkeepers") have traditionally faced a dilemma. Many Canadian courts have held that having reasonable grounds to believe an offence has been committed is insufficient to perform a lawful citizen's arrest; rather, an offence must have actually been committed. As a result, shopkeepers who detain customers reasonably believed to have committed theft risk civil liability for false imprisonment if their belief turns out to have been mistaken. Yet, at the same time, shopkeepers have a legitimate interest in responding to suspected theft so as to protect their property and their livelihood. In view of this dilemma, the Ontario Superior Court in Mann v Canadian Tire Corporation Limited recognized, for the first time in Canada, a "shopkeeper's privilege" permitting shopkeepers to perform brief investigative detentions based on a reasonable belief that theft has occurred. This article examines this development and argues that while there is space in Canada for shopkeeper's privilege, it must be carefully circumscribed.

Les marchands canadiens et leurs agents (collectivement, les « commerçants ») qui soupçonnent qu'un vol à l'étalage a été commis ont, au fil des ans, été confrontés à un dilemme. De nombreux tribunaux canadiens ont conclu que pour qu'un citoyen procède à une arrestation légale il n'est pas suffisant qu'il ait eu des motifs raisonnables de croire qu'une infraction a été commise; il faut plutôt que l'infraction ait bel et bien été commise. En conséquence, les commerçants qui retiennent des clients lorsqu'ils ont des motifs raisonnables de croire que ceux-ci ont commis un vol risquent d'engager leur responsabilité civile pour emprisonnement illégal si leurs croyances se sont avérées erronées. Mais en même temps, les commerçants ont un intérêt légitime à réagir face à un soupçon de vol afin de protéger leurs biens et leur gagne-pain. Compte tenu de ce dilemme, la Cour supérieure de l'Ontario dans l'affaire Mann v. Canadian Tire Company Limited, 2016 ONSC 4926 a reconnu, pour la première fois au Canada, un « privilège du commerçant » permettant aux commerçants d'effectuer de brèves détentions aux fins d'enquête s'ils ont des motifs raisonnables de croire qu'un vol s'est

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produit. Cet article examine cette évolution du droit et soutient que même si le privilège du commerçant a sa place au Canada, il doit être soigneusement circonscrit.

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Introduction

When it comes to suspected shoplifting, Canadian merchants and their agents (collectively, "shopkeepers") have traditionally faced a dilemma. Many Canadian courts have held that having reasonable grounds to believe that an offence (such as theft) has been committed is insufficient to perform a lawful citizen's arrest. Rather, an offence must have *actually* been committed. Moreover, Canadian courts have traditionally resisted attempts by shopkeepers to establish a special privilege permitting them to perform a brief investigatory detention where they have reasonable grounds to believe that an offence has occurred. As a result, shopkeepers who detain customers reasonably believed to have committed theft risk civil liability for false imprisonment if their belief turns out to have been mistaken.

But the Ontario Superior Court's 2016 decision in *Mann v Canadian Tire Corporation Limited*[1] changes the legal landscape. For the first time in Canada, the court in *Mann v Canadian Tire* recognized a "shopkeeper's privilege" permitting shopkeepers to perform brief investigative detentions based on a reasonable belief that theft has occurred. This development signals a readjustment of the balance struck between property rights and individual liberty. But does this readjustment move the law in the right direction?

This article argues that while there is space in Canadian law for shopkeeper's privilege, it must be carefully circumscribed. This can be achieved by adopting strict requirements, broadly consistent with those set out in *Mann v Canadian Tire*, that limit the scope of the privilege in a way that protects individual liberty while giving due weight to the property rights of shopkeepers and the broader societal interest in responding to suspected crime where there is a reasonable basis for doing so.

This article proceeds in five parts. Part 1 briefly describes the tort of false imprisonment, which provides the context in which arguments around shopkeeper's privilege are most likely to arise. Part 2 discusses the law of citizen's arrest. Part 3 explores the evolution of shopkeeper's privilege in the United States (where the doctrine originated) and in Canada. Part 4 sets out a measured approach to shopkeeper's privilege. Finally, Part 5 provides a brief conclusion.

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[1] *Mann v Canadian Tire Corporation Limited*, 2016 ONSC 4926, 2016 CarswellOnt 12549 (WL Can) [*Mann v Canadian Tire*]. For a recent discussion of this case and shopkeeper's privilege more generally, see Mitchell McInnis & Adam Simpson, "The Shopkeeper's Privilege and Canadian Tort Law" (2018) 56:1 Alta L Rev 29.

1. The Tort of False Imprisonment

Arguments around shopkeeper's privilege are most likely to arise in the context of false imprisonment suits. Fundamentally, the tort of false imprisonment consists of an unlawful deprivation of liberty. To make out a *prima facie* case, the plaintiff must establish three elements on a balance of probabilities: (1) the plaintiff was totally deprived of his or her liberty; (2) the deprivation took place against the plaintiff's will; and (3) the deprivation was caused by the defendant.[2] The tort is actionable *per se*, meaning the plaintiff need not show damage.[3] Nor is the plaintiff required to show that actual physical force was used; the plaintiff can instead attempt to show that he or she had a reasonable belief that an attempt to leave would have been met with force, or that he or she could not leave due to moral pressure.[4] Once the plaintiff has established the three elements of a *prima facie* claim, the onus shifts to the defendant to justify the deprivation of liberty, thereby negating the "false" element of the imprisonment, based on legal authority under common law or statute.[5]

One potential source of justification is the common law and statutory principles governing citizen's arrest—i.e. the authority of one private citizen to arrest another. When considering the scope of this authority, it should be borne in mind that private security officers, loss prevention personnel, and other private parties who perform similar functions have no higher rights of arrest than other private citizens, as they do not qualify as peace officers,[6] who enjoy special arrest powers.[7]

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2 See *Kovacs v Ontario Jockey Club* (1995), 126 DLR (4th) 576, [1995] OJ No 2181 (Gen Div) (QL) at para 45 [*Kovacs*]; *Nichols v Wal-Mart Canada Corp*, 2003 CarswellOnt 256 (WL Can) at para 10, [2003] OJ No 282 (Ont Sup Ct).

3 See *Chopra v T Eaton Co.*, 1999 ABQB 201 at para 90, 240 AR 201 [*Chopra*].

4 *Kovacs*, *supra* note 2 at para 47, citing *Lebrun v HighLow Foods Ltd* (1968), 69 DLR (2d) 433, 1968 CarswellBC 312 (WL Can) (BC Sup Ct) at 437 and *Campbell v SS Kresge Co* (1976), 74 DLR (3d) 717 (NS SC (TD)) at 719.

5 See *Kovacs*, *supra* note 2 at para 46, citing *Kendall v Gambles Canada Ltd* (1981), 11 Sask R 361, 1981 CarswellSask 139 (WL Can) at para 37 (Sask QB) [*Kendall*].

6 See *Banyasz v K-Mart Canada Ltd* (1986), 57 OR (2d) 445, 1986 CarswellOnt 773 (WL Can) (Div Ct) [*Banyasz* cited to WL Can]; *Dendekker v FW Woolworth Co*, [1975] 3 WWR 429, 1975 CarswellAlta 17 (WL Can) (Alta QB) [*Dendekker* cited to WL Can]; *Chopra*, *supra* note 3 at para 108, citing *Kendall*, *supra* note 5.

7 See *Criminal Code*, RSC 1985, c C-46, s 495 [*Criminal Code*].

2. Citizen's Arrest

A) Common Law

While courts regularly refer to certain *Criminal Code* provisions (discussed in Part 2(B)) when describing a private citizen's authority to arrest another citizen, that authority originated (and persists) under common law.[8] The roots of this authority run deep: they stretch back as far as the time of Henry II, nearly a thousand years ago,[9] making citizen's arrest "as old as the common law", predating the rise of the modern police force.[10] Its origins were traced by the Supreme Court in *R v Asante-Mensah*,[11] where Justice Binnie explained that citizen's arrest was developed in relation to the 'King's Peace', a concept introduced by the Norman Kings that "required the inhabitants of each community to apprehend all felons, and held them collectively responsible for failing to do so."[12] At common law, Justice Binnie noted, "a private citizen had both a right and a positive obligation to perform an arrest when a felony was being committed or had 'in fact' been committed."[13] This right[14] and duty—which, over time, would become purely a privilege[15]—was seen as a means of maintaining a safe, peaceful society.

But the common law "yielded to the private citizen only carefully circumscribed powers of arrest and grounds of justification".[16] In particular, the common law afforded private citizens no authority to arrest a person for a misdemeanour where there was no breach of the peace and no risk of renewal of the act.[17] Consequently, as a general rule, relatively

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8 See *Chopra*, *supra* note 3 at para 109; *Kovacs*, *supra* note 2 at para 78, citing *Hayward v FW Woolworth Co Ltd* (1980), 23 Nfld & PEIR 17, 98 DLR (3d) 345 (Nfld SC (TD)) [*Hayward*]; *Briggs v Laviolette*, 1994 CarswellBC 1116 at para 12, 21 CCLT (2d) 105 (SC) [*Briggs*].

9 See *R v Lerke*, 1986 ABCA 15 at para 21, 25 DLR (4th) 403.

10 *R v Asante-Mensah*, 2003 SCC 38 at para 36, [2003] 2 SCR 3 [*Asante-Mensah*].

11 *Ibid*.

12 *Ibid* at para 37.

13 *Ibid*.

14 Some legal scholars have suggested that citizen's arrest is better understood as a "privilege" than as a "right". See Ira P Robbins, "Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest" (2016) 25:3 Cornell JL and Pub Pol'y 557 at 562, n 26, citing M Cherif Bassiouni, *Citizen's Arrest: The Law of Arrest, Search, and Seizure for Private Citizens and Private Police* (Springfield, IL: Charles C Thomas, 1977) at 8.

15 See Robbins, *supra* note 14 at 564.

16 *Kendall*, *supra* note 5 at para 69. See also *R v Boyd*, 2013 BCCA 19 at para 21, 2013 CarswellBC 48 (WL Can) [*Boyd*] (observing that "[t]he law has always sought to circumscribe within very narrow limits the powers of a citizen to effect an arrest").

17 See *Asante-Mensah*, *supra* note 10 at para 38.

minor offences such as simple trespass[18] or shoplifting[19] could not form the basis for a citizen's arrest.

Two seminal Canadian authorities—*McKenzie v Gibson*[20] and *Williams v Laing*[21]—affirmed the limited scope of citizen's arrest at common law. In *McKenzie*, a 1852 decision, the Upper Canada Court of Queen's Bench held that in order to lawfully effect a citizen's arrest, the arrestor must show that a felony was being or had been committed, though the arrestor need only have reasonable grounds to believe it was the arrestee who was the perpetrator.[22] In *Williams*, a 1923 decision, the Ontario Court of Appeal reaffirmed this principle: "The law is quite clear that in order to succeed in establishing this defence the appellants must prove first that the crime they suspected had actually been committed, not necessarily by the person detained, but by some one, and that they had reasonable ground for suspecting the person detained."[23] In short, under *McKenzie* and *Williams*, nothing less than a showing, on a balance of probabilities,[24] that a felony was being or had been committed, plus reasonable grounds to believe the arrestee was the perpetrator, would suffice to perform a lawful citizen's arrest.

Common law citizen's arrest does not extend to temporary detentions for investigatory purposes.[25] This restriction flows from the fact that, as already explained, common law citizen's arrest was lawful only where a felony was being or had been committed; it was not engaged upon mere suspicion.[26] Further, while the Supreme Court in *R v Mann*[27] recognized a

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18 See *Ibid*.

19 See "The Law of Citizen's Arrest" (1965) 65:3 Colum L Rev 502 at 503.

20 *McKenzie v Gibson* (1852), 8 UCR 100, 1850 CarswellOnt 335 (WL Can) (QB) [*McKenzie* cited to UCR].

21 *Williams v Laing* (1923), 55 OLR 26, 1923WL19971 (WL Can) (CA) [*Williams* cited to OLR].

22 *McKenzie*, *supra* note 20 at 101–02.

23 *Williams*, *supra* note 21 at 28. See also *Walters v Smith and Son*, [1914] 1 KB 595 at 602–03, [1913] 12 WLUK 11, Isaacs CJ [*Walters*]: "[s]uspicion only without a felony committed, is no cause to arrest another".

24 See *Kovacs*, *supra* note 2 at para 72, citing *Hayward*, *supra* note 8 at 355 and *Frey v Fedoruk*, [1950] SCR 517, [1950] 3 DLR 513; *Mann v Canadian Tire*, *supra* note 1 at para 33; *Newhook v K-Mart Canada Ltd* (1991), 116 Nfld & PEIR 102, 1993 CarswellNfld 51 (WL Can) at paras 100–01 (SC TD)) [*Newhook*].

25 See *R v Dell*, 2005 ABCA 246 at para 32, 367 AR 279, Côté JA [*Dell*], citing *Walters*, *supra* note 23.

26 See *Dell*, *supra* note 25 at para 32, Côté JA.

27 *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 [*R v Mann*].

common law power to perform brief investigatory detentions, this power can be invoked only by "officers".[28]

B) Statute

Citizen's arrest is not confined to the common law; it also finds expression in statute. Prior to 1955, the existing common law principles governing citizen's arrest in Canada were codified in the *Criminal Code*.[29] After that, however, the *Criminal Code* adopted a new regime,[30] though at least one Canadian court has suggested that the "fundamental nature" of citizen's arrest remains the same.[31] Today, sections 494(1)–(2) provide as follows:

> **Arrest without warrant by any person**
>
> 494 (1) Any one may arrest without warrant
>
> a) a person whom he finds committing an indictable offence; or
>
> b) a person who, on reasonable grounds, he believes
>
> 1) has committed a criminal offence, and
>
> 2) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
>
> **Arrest by owner, etc., of property**
>
> (2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and
>
> a) they make the arrest at that time; or
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> b) they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

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28 *Ibid* at para 23. For a helpful discussion of *R v Mann*, see Steve Coughlan & Glen Luther, *Arrest and Detention*, 2nd ed (Toronto: Irwin Law, 2017) at 142–55.

29 See Allen Linden, *Canadian Tort Law*, 5th ed (Toronto: Butterworths, 1993) at 82, cited in *Briggs*, *supra* note 8 at para 11.

30 *Ibid*. See also discussion in *Kendall*, *supra* note 5 at paras 45–65.

31 See *R v Lerke*, 1986 ABCA 15 at para 21, 67 AR 390.

The proper interpretation of the words "finds committing" in section 494(1)(a), which also appear in section 494(2), is the subject of debate. It is well established that, at a minimum, this language imports a personal observation requirement: the arrestor must witness the event.[32] Beyond this, however, things get a bit murky. According to one line of civil jurisprudence, the phrase "finds committing" applies only where an offence was being or had been committed *in fact*, meaning there can be no lawful citizen's arrest under the relevant provisions without an actual offence.[33] However, an alternative line of civil jurisprudence holds that the phrase "finds committing", when read together with section 25(1) of the *Criminal Code*,[34] requires only that there be reasonable grounds to believe that an offence was *apparently* being committed.[35] This latter interpretation aligns with how the words "finds committing" have been interpreted in certain criminal cases.[36] For example, in *R v Abel*,[37] the British Columbia Court of Appeal stated that "[i]n the context of a citizen's arrest under s. 494(1)(a) of the *Code* … before a citizen can effect an arrest, he or she must have reasonable grounds to believe that the person to be arrested is *apparently* in the process of committing an indictable offence in his or her presence".[38]

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[32] See *R v Biron*, [1976] 2 SCR 56 at 72, 59 DLR (3d) 409 [*Biron*]; *R v Abel*, 2008 BCCA 54 at paras 31, 45–47, 50–51 [*Abel*]; Coughlan & Luther, *supra* note 28 at 254.

[33] See *R v Asante-Mensah*, 1996 CarswellOnt 1851 (WL Can) at para 168, [1996] OJ No 1821 (QL) (Ct J (Gen Div)), rev'd 2001, 204 DLR (4th) 51, 2001 CarswellOnt 3369 (WL Can) (CA), aff'd 2003 SCC 38, citing: *Kendall*, *supra* note 5; *Cronk v RW Woolworth Co (Woolco Dept Stores)* (1986), 44 Sask R 81, 1986 CarswellSask 193 (WL Can) (QB); *Hayward*, *supra* note 8; *Banyasz*, *supra* note 6; *Kovacs*, *supra* note 2; *Briggs*, *supra* note 8; *Smart v Sears Canada Inc* (1986), 64 Nfld & PEIR 187, 36 DLR (4th) 756 (CA) [*Smart*]. See also *Chopra*, *supra* note 3 at paras 126, 128–31; *Allen v C Head Ltd*, 1985 CarswellNfld 115 at paras 47–54, 160 APR 108 (SC (TD)).

[34] *Criminal Code*, *supra* note 7, s 25(1) provides:

> Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
>
> (b) as a peace officer or public officer,
>
> (c) in aid of a peace officer or public officer, or
>
> (d) by virtue of his office,
>
> 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.

[35] See *Karogiannis v Poulus* (1976), 72 DLR (3d) 253, 1976 CarswellBC 248 (BC SC); *Banerjee v K-Mart Canada Ltd* (1983), 43 Nfld & PEIR 252, 127 APR 252 (Dist Ct); *Dendekker*, *supra* note 6.

[36] See *Biron*, *supra* note 32 at 75; *R v Roberge*, [1983] 1 SCR 312 at 324, 147 DLR (3d) 493 [*Roberge*]; *Abel*, *supra* note 32 at para 52.

[37] *Abel*, *supra* note 32.

[38] *Ibid* at para 52 [emphasis added].

The latter interpretation is difficult to square with the traditional common law position on citizen's arrest and with the text of the *Criminal Code*. At common law, while peace officers could lawfully arrest a person based on a reasonable belief that a felony had been committed, private citizens could do so only where, among other things, a felony had *actually* been committed.[39] Many courts have concluded that this distinction survives in the *Criminal Code*,[40] and this is likely the better view. This conclusion is reinforced by the fact that section 494(1)(a)'s neighbouring provision, section 494(1)(b), expressly refers to a "belie[f]" based on "reasonable grounds", in contradistinction to the act of finding someone committing an offence. Moreover, section 25(1) of the *Criminal Code*, which some courts have relied on when interpreting section 494(1)(a), comes into play only *after* it has been determined that a person "is required or authorized by law to do anything in the administration or enforcement of the law"; it does not provide any initial legal authorization to do anything.[41] Therefore, it seems unlikely that it could modify the preconditions to a lawful citizen's arrest. Finally, a number of the criminal cases interpreting the phrase "finds committing" did so in the context of *Criminal Code* provisions authorizing arrest by peace officers, not private citizens.[42] It has been suggested that the term "finds committing" does not necessarily share the same meaning in these two different contexts, as a private citizen's authority to perform an arrest is narrower than that of a peace officer.[43] For these reasons, the better view is that the words "finds committing" in section 494(1)(a) and section 494(2) apply only where an offence was being or had been committed *in fact*.

The absence of any leniency for reasonable mistakes in the *Criminal Code*'s citizen's arrests has attracted proposals for reform. In its July 1986 *Report on Arrest*,[44] the Law Reform Commission of Canada recommended that the citizen's arrest provisions be expanded to permit a person to "arrest without warrant a person who the arrester has reasonable grounds to believe is committing or has just committed a criminal offence".[45] This would give effect to the more forgiving interpretation of the words "finds committing" outlined above. However, to date, this recommendation has not been taken up by Parliament.

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39 See *Kovacs*, *supra* note 2 at 56, citing *Walters*, *supra* note 23 at 602; Coughlan & Luther, *supra* note 28 at 255–56.

40 See Coughlan & Luther, *supra* note 28 at 256.

41 *Ibid*.

42 See e.g. *Biron*, *supra* note 32; *Roberge*, *supra* note 36.

43 See Coughlan & Luther, *supra* note 28 at 257; *Boyd*, *supra* note 16 at para 21.

44 Law Reform Commission of Canada, *Report on Arrest* (Ottawa: The Commission, July 1986).

45 *Ibid* at 88. See the discussion in *Briggs v Laviolette*, 1994 CarswellBC 1116 (WL Can) at para 17, 21 CCLT (2d) 105 (SC).

A further debate relates to whether the citizen's arrest provisions in the *Criminal Code* permit reasonable mistakes about the identity of the offender, so long as *someone* committed an offence. In *Hayward v F.W. Woolworth Co Ltd*,[46] the Newfoundland Supreme Court concluded that while the *Criminal Code* and the common law both require an arrestor to show that an indictable offence was being or had been committed, under the *Criminal Code* the arrestor must also show that it was in fact the arrestee who was the perpetrator, whereas the common law permitted reasonable mistakes about identity.[47] The Ontario Supreme Court (General Division) in *Kovacs v Ontario Jockey Club*[48] reached the same conclusion.[49] This interpretation also finds support in the academic literature. As Professor John Irvine writes: "In either case [common law or statute] it would appear incumbent upon the defendant to establish that a crime was being committed. Under the *Criminal Code* it would be necessary, for justification, to show that the plaintiff committed it. Under the common law it would be sufficient to show that the defendant had reasonable grounds for believing that the plaintiff committed it."[50] Thus, the general consensus among Canadian courts and academic commentators is that section 494(1)(a) is less forgiving than its common law counterpart when it comes to reasonable mistakes about identity. On the other hand, some Canadian courts have considered the common law on citizen's arrest and section 494(1), when taken together with section 25(1), to be functionally equivalent, meaning that either formulation would be satisfied where the defendant can prove that he or she had reasonable grounds to believe the plaintiff committed the offence, provided *someone* did.[51] That said, these decisions are comparatively few.

Thankfully, however, on some issues there is clarity. It is clear, for example, that for section 494(1)(a) to apply, the offence must be indictable. This requirement is akin to the historical common law requirement that the crime be a felony offence, a concept which does not exist under the modern *Criminal Code*. Notably, under section 34(1)(a) of the federal *Interpretation Act*,[52] indictable offences include hybrid offences.[53] This means that only purely summary conviction offences fall outside the scope of section 494(1)(a).[54] The *Criminal Code* offence corresponding

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46 *Hayward*, *supra* note 8.

47 *Ibid* at para 68.

48 *Kovacs*, *supra* note 2.

49 See *Ibid* at para 74. See also *Chopra*, *supra* note 3 at para 121.

50 See annotation to *Banyasz*, *supra* note 6 (available on WL Can).

51 See *Briggs*, *supra* note 8 at para 18; *Smart*, *supra* note 33.

52 *Interpretation Act*, RSC 1985, c I-21.

53 See *R v Dudley*, 2009 SCC 58 at para 18, [2009] 3 SCR 570.

54 See *R v Huff* (1979), 17 AR 499, 50 CCC (2d) 324 (CA) at 328; Coughlan & Luther, *supra* note 28 at 249.

to run-of-the-mill shoplifting is theft under $5,000—which, according to sections 322(1) and 334(b), is a hybrid offence. Accordingly, it is deemed to be an indictable offence and thus potentially the basis for a citizen's arrest under section 494(1)(a).

Unlike section 494(1)(a), section 494(2) is not restricted to indictable offences; it applies more broadly to any "criminal offence" that is committed on or in relation to property owned or lawfully possessed by the arrestor (the arrestor may also be a person authorized by the owner or lawful possessor of the property). A security guard or other store employee would typically fall within the scope of this provision.[55] Therefore, it naturally lends itself to use in the shoplifting context.[56]

By contrast, section 494(1)(b), the "fresh pursuit" power, is less likely to be invoked in the shoplifting context. While this provision is broader than sections 494(1)(a) and 494(2) in the sense that it contemplates a citizen's arrest where someone has a mere *belief* (based on reasonable grounds) that another person has committed a criminal offence, it can be invoked only where the latter person is already being pursued by third parties who have lawful authority to make an arrest.

The *Criminal Code* provisions on citizen's arrest do not authorize private citizens to perform mere investigative detentions, nor do any another other pieces of Canadian legislation appear to do so.[57] Fundamentally, citizen's arrest is a tool used to apprehend someone who is committing or has committed a crime, not to *investigate* potential criminal misconduct.

The citizen's arrest provisions in the *Criminal Code* have consistently been applied as a guide in determining whether a lawful citizen's arrest took place in the tort context.[58] The late Professor Allen Linden suggested that this cross-pollination may be constitutionally suspect:

> The effect of [the post-1955] criminal provisions on tort liability remains shrouded in mist to this day, but most judges seem to be incorporating them into tort law, despite the real uncertainty about whether the Parliament of Canada has

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55 See *R v Dean*, [1966] 1 OR 592, 47 CR 311 (CA), cited in Coughlan & Luther, *supra* note 28 at 263; Coughlan & Luther, *supra* note 28 at 250 (noting that the arrest power under s 494(2) "is most frequently used by private security guards, bouncers, and so on").

56 See Coughlan & Luther, *supra* note 28 at 263.

57 See *Dell*, *supra* note 25 at para 33, Côté JA (concurring).

58 See *Chopra*, *supra* note 3 at para 117.

> the constitutional power to interfere with private tort rights, which are generally thought to be within the jurisdiction of the provinces.[59]

On the other hand, it may be theorized that the citizen's arrest provisions in the *Criminal Code* have only an incidental effect on tort rights and obligations. These provisions authorize private citizens to perform an arrest in respect of criminal misconduct, but this authorization can also incidentally justify what would otherwise constitute false imprisonment in the civil context. Put differently, by authorizing an arrest in the criminal context, the citizen's arrest provisions in the *Criminal Code* may incidentally justify a deprivation of liberty in the civil context.

In sum, Canadian courts have tended to adopt the view that in order to perform a lawful citizen's arrest under section 494(1)(a) or section 494(2) of the *Criminal Code*, an offence must have been committed. In this way, the law of citizen's arrest endorses a form of absolute liability for mistake.[60] As a result, in the retail setting, even if an arrestor honestly and reasonably believed that someone was committing or had committed theft, the law of citizen's arrest will not protect the arrestor (or his or her employer) from civil liability for false imprisonment if an arrest is carried out and the arrestor's belief turns out to have been mistaken.

Beyond citizen's arrest, another potential—though not yet widely accepted—means of justifying a deprivation of liberty in response to a false imprisonment claim is shopkeeper's privilege, the development and evolution of which is explored below.

3. Shopkeeper's Privilege

A) Shopkeeper's Privilege in the United States

Historically, at common law, shopkeepers in the US could lawfully detain a customer suspected of theft only if a theft had in fact occurred. Consequently, they faced a dilemma: either detain the customer and risk liability for false imprisonment if the crime could not be proven, or take no immediate action and absorb any potential loss that may result.[61]

In response to this dilemma, and largely in the context of false imprisonment suits against large department stores, US courts in the

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[59] Linden, *supra* note 29 at 82, cited in *Briggs*, *supra* note 8 at para 11. See also Lewis Klar, *Tort Law*, 2nd ed, (Toronto: Carswell, 1991) at 100, cited in *Briggs*, *supra* note 8 at para 16.

[60] See "The Law of Citizen's Arrest", *supra* note 19 at 513.

[61] See *Bonkowski v Arlan's Dept Store*, 12 Mich App 88, 162 NW 2d 347 (CA 1968) [*Bonkowski*]; *Cruz v Johnson*, 823 A 2d 1157 (RI SC 2002) [*Cruz*].

mid-20th century began to recognize a limited privilege to briefly detain, for investigatory purposes, customers reasonably believed to have committed theft.[62] At least as early as 1936, American courts embraced this "shopkeeper's privilege" as an acceptable means of balancing the shopkeeper's property rights and the customer's liberty.[63] The Second Restatement of Torts later codified this privilege, providing that "[o]ne who reasonably believes that another has tortiously taken a chattel upon his premises … is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts".[64] This principle protects the shopkeeper from civil liability irrespective of whether a theft occurred.

Every US state has passed legislation codifying (and in some cases expanding) the common law on shopkeeper's privilege.[65] American law professor Ira Robbins offers the following three examples.[66] Alabama's shopkeeper's privilege law provides that "a merchant or merchant's employee who has probable cause that goods … have been unlawfully taken … may … take the person into custody and detain him in a reasonable manner."[67] Indiana's reads: "an owner or agent of a store who has probable cause to believe that a theft has occurred … and who has cause to believe that a specific person has committed or is committing the theft may detain the person and request the person to identify himself or herself."[68] Rhode Island's stipulates that "[a]ny merchant who observes any person concealing or attempting to conceal merchandise on his person … may detain the person for a reasonable time sufficient to summon a police officer to the premises."[69]

While the language of the statutes varies from state to state, and while these differences should not be overlooked, Professor Robbins suggests that shopkeeper's privilege laws in the US generally consist of three main components.[70] First, the shopkeeper or his or her agent must have probable cause, which "generally entails a good faith belief or reasonable grounds to believe that a suspect has attempted or committed shoplifting

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62 *Cruz*, *supra* note 61.

63 See *Collyer v SH Kress Co*, 5 Cal 2d 175, 54 P 2d 20 (SC 1936); *Teel v May Department Stores Co*, 348 Mo 696, 155 SW 2d 74 (SC 1941).

64 Restatement (Second) Torts § 120A (1965), cited in *Cruz*, *supra* note 61, n 1.

65 See John P Gilroy, *The Law of Arrest for Merchants and Private Security Personnel*, 2014 Reissue ed (CreateSpace Independent Publishing Platform, 2014), §§ 7.2(a), 8.1.

66 See Robbins, *supra* note 14 at 584, n 175.

67 Ala Code, § 15-10-14(a) (2015).

68 Indiana Code, § 35-33-6-2(a)(1)(A) (2015).

69 RI Gen Laws, § 11-41-21(b) (2015).

70 See Robbins, *supra* note 14 at 585–87.

or theft."[71] Second, the detention must not exceed a reasonable period of time.[72] Third, the detention must be conducted in a reasonable manner, the use of force being a primary factor to be considered.[73]

Although shopkeeper's privilege did not initially receive judicial recognition and acceptance in all US states,[74] it has since become firmly entrenched in the US jurisprudence, with most cases relying on its various statutory formulations.[75]

B) Shopkeeper's Privilege in Canada

The situation in Canada is different in two main respects. First, Canadian common law has not, until recently, embraced shopkeeper's privilege. This historical position mirrors the situation in the UK, where no common law shopkeeper's privilege has been recognized.[76] Second, Canadian statutes do not contemplate shopkeeper's privilege. Given the absence of any Canadian legislation recognizing shopkeeper's privilege, the discussion below will focus on four leading Canadian cases on shopkeeper's privilege.

1) *Banyasz v K-Mart Canada Ltd* (1986)

One of the first Canadian cases to consider whether to recognize shopkeeper's privilege was *Banyasz v K-Mart Canada Ltd.*[77] There, K-Mart security personnel took the plaintiff into custody because they suspected him of shoplifting. It turned out that the plaintiff left the store with a battery for a walkie-talkie without paying for it. However, upon further investigation, it was determined that the cashier had made an earlier mistake by accidentally failing to charge him for the battery at the checkout counter. Yet the detention continued after this mistake was discovered. The plaintiff sued the store, alleging false imprisonment.

The trial judge found that no criminal offence had been committed, as the plaintiff lacked any intent to commit theft or fraud. However, the trial judge reasoned that because the defendant had reasonable and probable grounds for believing that theft had been committed, the detention was justified. The Ontario Divisional Court disagreed. The court considered the

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71 *Ibid* at 585–86.

72 *Ibid* at 586.

73 *Ibid* at 587.

74 See Gilroy, *supra* note 65, § 5.2.

75 See e.g. *JC Penney Co v Cox*, 246 Miss 1, 148 So 2d 679 (SC 1963); *Cervantez v JC Penney Co*, 24 Cal 3d 579 at 595, P 2d 975 (SC 1979) [*Cervantez*]; *Wal-Mart Stores Inc v Bathe*, 715 NE 2d 954 (Ind CA 1999).

76 See *Mann v Canadian Tire*, *supra* note 1 at paras 20–23.

77 *Banyasz*, *supra* note 6.

law of citizen's arrest and concluded that having reasonable and probable grounds did not suffice, since in order to perform a lawful citizen's arrest the defendant must show that the plaintiff actually committed an offence. Turning to the doctrine of shopkeeper's privilege, the court wrote:

> The problem of shoplifting is a serious one for storekeepers notwithstanding that the law of tort favours the interest in individual freedom over that of protection of property. While there may be a developing privilege of temporary detention for investigation in favour of a property owner (see Prosser, *Handbook of the Law of Torts*, 4th ed. (1971), p. 121), this is not a case where such a privilege should prevail. The continued detention after the cashier admitted her mistake negatives any consideration of such a privilege in this case.[78]

Hence, while the court acknowledged that shopkeeper's privilege might have been developing at the time, it was not willing to recognize its existence in the case before it. The court allowed the appeal, entered a verdict for the plaintiff and remitted the matter for assessment of damages.

2) *Newhook v K-Mart Canada Ltd* (1991)

In *Newhook*,[79] a security officer employed by K-Mart detained the plaintiff as she was trying to leave the store. The security officer did so based on her belief that the plaintiff had fraudulently switched the price tag on an item she had just purchased. The security guard eventually handed the plaintiff over to the police. The plaintiff maintained her innocence and was eventually acquitted on criminal charges. She then sued the store and the security officer for false arrest, false imprisonment, and assault.

After reviewing the law on citizen's arrest, the Newfoundland Supreme Court considered whether the Canadian authorities supported "any 'lesser' proof required to justify arrest and detention."[80] It cited the statement from *Banyasz* that "there may be a developing privilege of temporary detention for investigation in favour of a property owner" and observed that this statement "reflects a concern … as to the practical need to provide some protection to store owners which does not at the same time expose them to civil penalty where their acts are reasonable."[81] However, the court found itself to be bound by appellate authority reaffirming that a defendant must establish that an offence was committed to justify what would otherwise constitute false imprisonment. The court concluded: "In summary, with respect to the defence submission as to a right to arrest and

78 *Ibid* at para 10.
79 *Newhook*, *supra* note 24.
80 *Ibid* at para 89.
81 *Ibid* at paras 89–90.

detain for investigative purposes, on the cases cited here it is not shown that such authority exists."[82]

The court acknowledged that denying defendants a right to detain for investigative purposes "may in some respects seem harsh."[83] However, it affirmed that a citizen's liberty is "a concept highly prized under our system of democracy, and recognized and enshrined itself in various rights preserved under the *Canadian Charter of Rights and Freedoms* insofar as relations between the state and the individual are concerned."[84] Accordingly, the court reasoned, a private citizen's authority to deprive another citizen of his or her liberty is justifiably limited. In the result, the plaintiff succeeded in her false arrest and false imprisonment claims.[85]

3) *Kovacs v Ontario Jockey Club* (1995)

The leading pre-*Mann v Canadian Tire* decision on shopkeeper's privilege in Canada is *Kovacs v Ontario Jockey Club*.[86] There, the plaintiff, an avid fan of horse racing, was detained by security officers at a racetrack due to their suspicions that he had committed fraud relating to credit vouchers. The security officers had been informed that someone had improperly attempted to cash a branded voucher through a teller, and the description of that person matched the appearance of the plaintiff. But during the plaintiff's detention, the teller came by and said that the plaintiff was not the man who had tried to cash the voucher. Accordingly, he was released. He then sued the racetrack operator for false imprisonment.

Justice Cumming, writing for the Ontario General Division, found that the evidence established a *prima facie* case of false imprisonment. Further, the defendant could not justify the detention on the basis of the citizen's arrest provision under section 494(1) of the *Criminal Code* because there was no proof that the plaintiff had committed an indictable offence, nor could the defendant avail itself of the common law privilege of citizen's arrest. Justice Cumming then turned to shopkeeper's privilege. He framed the issue in the following terms:

> The state of the law makes it difficult for shopkeepers and businesses to take action against shoplifters. If the security personnel have reasonable and probable

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82 *Ibid* at para 92.

83 *Ibid* at para 93.

84 *Ibid*. This statement was later adopted in *Chopra*, *supra* note 3 at para 131.

85 The court noted that for the purposes of claims such as the one before it, "the concepts of false arrest and false imprisonment are often treated as in effect interchangeable", and there was no need to distinguish between the two types of claims in the instant case: *Newhook*, *supra* note 24 at para 74.

86 *Kovacs*, *supra* note 2.

> grounds to believe a crime has been attempted and act on that well-founded belief but ultimately cannot justify that position by being able to prove upon a preponderance of evidence that an offence was committed, they are themselves liable in a civil action for the tort of false imprisonment. On the other hand, if they do not detain the person whom they believe has committed a crime, a criminal may well escape being brought to justice.
>
> The concern in these cases is that an offender will be able to leave the premises and escape liability. Should people in authority at these locales be granted special rights of arrest although they are private citizens and not peace officers?[87]

Justice Cumming answered this question in the negative. He observed that shopkeepers in Canada did not appear to enjoy any special rights. Like other private citizens, they could effect a lawful detention only where an actual offence has been committed. He cited Professor John G Fleming, who explained the policy concerns animating this position:

> For appealing as may be the plight of stores and supermarkets in wishing to deal more effectively with the increasing menace of shoplifting, the law has not seen fit to condone any further encroachments on the liberty of the individual beyond those well-recognized situations where arrest, with or without the aid of the police, has been traditionally considered justified. Better that such losses be counted part of the cost of doing business than that they be minimized at the expense of individual freedom.[88]

Justice Cumming reviewed the US jurisprudence on shopkeeper's privilege but ultimately found that: "[c]ommendable as the exception may be, I find that it has yet to find any application in Canada."[89] He stated that, in the absence of clear language in the *Criminal Code* or established common law precedent, he would decline to apply such a privilege. He noted that, although the privilege first arose at common law in the US, more recent decisions in that jurisdiction had focused on the statutory codifications of the privilege, making it "more of a statutory one in the United States than one of common law."[90] He observed that no such codification existed in Canada. Further, he reasoned that the *Charter* and the "continuing expansion of human rights legislation" gave increasing weight to individual freedom.[91] Finally, he stated, "the wording of s. 494(1) of the *Criminal Code*, and the narrow construction of the exception warranted by the case law and general interpretation principles, combine

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87 *Ibid* at paras 88–89.

88 John G Fleming, *The Law of Torts*, 8th ed (Sydney: Law Book Co Ltd, 1992) at 29, cited in *Kovacs*, *supra* note 2 at para 91.

89 *Kovacs*, *supra* note 2 at para 104.

90 *Ibid*.

91 *Ibid* at para 105.

to demonstrate that no shopkeepers' privilege exists at common law in Canada."[92]

In the result, Justice Cumming found that the plaintiff had successfully made out a claim for false imprisonment, as the defendant had failed to justify the detention.

4) *Mann v Canadian Tire Corporation Limited* (2016)

Just over two decades after *Kovacs* was decided, an Ontario court had further occasion to consider the potential existence of shopkeeper's privilege in Canada. In *Mann v Canadian Tire Corporation Limited*,[93] the plaintiff visited a Canadian Tire store to buy some equipment. After making his purchases, he proceeded to the exit, at which point the store security alarm went off. According to the plaintiff, he was then threatened and detained by store staff, who did not permit him to leave. He began filming the episode on his smartphone. He claimed that he was instructed by a store employee that he had to remain in the store so that a manager could delete any video recorded on his phone. Eventually, he left the store. He alleged that while he was walking away, he turned to see two people running towards him, which caused him to panic. He said he began running and accidentally strike his head against some pipes, causing him to black out. He later sued the store for false imprisonment and for the injuries he sustained. The defendant brought a motion for summary judgment arguing, *inter alia*, that it could not be held liable for false imprisonment.

The Ontario Superior Court rejected much of the plaintiff's account of what transpired, calling his description of the incident "vastly exaggerated".[94] Nonetheless, based on video evidence, the court accepted that he had been detained, and this gave rise to a *prima facie* claim for false imprisonment. It also accepted that he had been told not to leave so that a store manager could delete any video he recorded on his phone. Whether that detention could be justified turned on whether shopkeeper's privilege existed and could be invoked on the facts. The court framed the issue as follows:

> Canadian Tire, like most shopkeepers, are in a difficult position in protecting themselves against potential thieves. Security gates which trigger an alarm if goods have not been purchased and scanned are a commonplace feature in today's stores. One would expect shop owners like Canadian Tire to be able to stop and investigate a customer who activates an alarm when exiting the store

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92 *Ibid.*

93 *Mann v Canadian Tire*, *supra* note 1.

94 *Ibid* at para 62.

> premises. That ability, however, is subject to the qualification that an offence must have occurred. In other words, if a store owner is mistaken and no theft has occurred, their detention of a customer makes them liable for the tort of false imprisonment.[95]

Faced with this concern, and without considering the principles of horizontal *stare decisis* (which would have favoured following *Kovacs* unless it could be demonstrated that the decision was "plainly wrong"[96]), the Superior Court parted ways with *Banyasz*, *Newhook*, and *Kovacs* and formally recognized shopkeeper's privilege, stating that "there is a strong need for Canadian shopkeepers to be protected by a limited right to detain those that they have reasonable and probable grounds to believe are or have stolen their merchandise."[97] It cited five main reasons in support of this conclusion.

First, while the *Charter* provides "a bulwark of individual freedom against the actions of the state, it should not be used as a mechanism for depriving other private citizens of their right to be protected from economic loss or injury."[98]

Second, the longstanding principle that a shopkeeper could be denied a defence against false imprisonment on the basis that no theft had in fact occurred seemed out of step with advances in store security. As most stores have theft-prevention devices such as electronic tags that trigger doorway sensors, it would be unreasonable to find that a shopkeeper acting in good faith is powerless to stop and investigate a customer who has set off a security alarm without running the risk of being found liable for false imprisonment if no theft in fact occurred.[99]

Third, mistakes do not always bar defences to intentional torts. For example, a claim of self-defence can succeed where the individual invoking the defence had a reasonable but mistaken belief that his or her safety was threatened. Although self-defence balances harms to the person, whereas shopkeeper's privilege balances property rights against individual liberty, where the harm to a possible shoplifter is minimal, the argument for applying the same mistake principle in the shopkeeper's privilege context is "overwhelming".[100]

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95 *Ibid* at para 16.

96 *R v Scarlett*, 2013 ONSC 562 at para 43, 2013 CarswellOnt 1517 (WL Can). See also *Re Hansard Spruce Mills Ltd*, [1954] 4 DLR 590, 34 CBR 202 (BC SC); *R v Northern Electric Co Ltd*, [1955] OR 431, [1955] 3 DLR 449 (HC).

97 *Mann v Canadian Tire*, *supra* note 1 at para 39.

98 *Ibid* at para 40.

99 *Ibid* at para 41.

100 *Ibid* at para 42.

Fourth, recognition of shopkeeper's privilege would not expand the scope of citizen's arrest and give shopkeepers a "higher right" to arrest. Rather, it would merely grant shopkeepers a "very limited right to detain in order to investigate the facts."[101]

Fifth, in 2012, Parliament amended section 494(2) of the *Criminal Code* to expand the powers of a property owner to detain possible shoplifters even *after* an offence has been committed. This signalled a recognition of the need to safeguard owners' property rights in today's commercial context. Similarly, this expansion is supported by the Law Reform Commission's 1986 recommendation that a reasonable and honest mistake of fact should not deprive a citizen of the *Criminal Code* defence for making an arrest.[102]

Having identified the justifications for recognizing shopkeeper's privilege, the court set out five conditions that must be met before the privilege can be invoked:

> 1) There must be reasonable and probable grounds to believe that property is being stolen or has been stolen from the shopkeeper's place of business. A security alarm triggered when a person is in the process of leaving the store would be sufficient to provide such grounds.
>
> 2) The sole purpose of the detention must be to investigate whether any item is being stolen or has been stolen from the store.
>
> 3) The detention must be reasonable and involves inviting the suspect to participate in a search to resolve the issue. The privilege does not bestow a power upon the store owner to search the detainee without consent.
>
> 4) The period of detention should be as brief as possible and reasonable attempts to determine whether an item of property is being stolen or has been stolen should proceed expeditiously.
>
> 5) If the detained suspect refuses co-operation, the store owner is entitled to detain them using reasonable force whilst summoning the police and until they arrive.[103]

The court also clarified that where a customer volunteers to assist store personnel in the investigation, which it suggested would be the case

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101 *Ibid* at para 43.

102 *Ibid* at para 44.

103 *Ibid* at para 45.

in most instances, the detention should be "as short as possible".[104] Moreover, in all cases, personnel must treat customers with respect, and "[a]ny allegations of unnecessary force, threats or bullying will extinguish the defence and expose the store to liability for false imprisonment."[105]

Turning to the facts, the court found that the plaintiff had been detained by store personnel. The question, then, was whether that detention was justified by shopkeeper's privilege. The court found that the sounding of the security alarm gave rise to reasonable and probable grounds to believe that property was being stolen. The court also found that after the alarm went off, store personnel treated the plaintiff with respect, and the length of the detention was not particularly onerous, lasting about 13 minutes in total. In addition, the court rejected the plaintiff's assertion that he was never given clearance to leave the store.

However, the court found that one essential precondition to shopkeeper's privilege was missing: store personnel had not detained the plaintiff solely for the purpose of determining whether any of the items in his possession had not been paid for. Rather, they had detained him for the purposes of investigating his actions and potentially deleting the video he had taken. Accordingly, the defendants went beyond the parameters of shopkeeper's privilege. In the result, the plaintiff succeeded in his claim for false imprisonment.

4. Recognizing Shopkeeper's Privilege in Canada: A Measured Approach

A) Key Concerns

As the foregoing discussion demonstrates, the weight of judicial authority in Canada disfavours recognizing shopkeeper's privilege. This resistance is perfectly understandable. Our society rightly places a premium on individual liberty, and to the extent that shopkeeper's privilege contemplates deprivations of liberty where the detainee has in fact done nothing wrong, it raises legitimate liberty concerns. Furthermore, there is a risk that in some cases reliance on shopkeeper's privilege may escalate the situation and result in aggressive and/or violent behaviour. These concerns, which are detailed below, must be taken seriously.

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104 *Ibid* at para 46.

105 *Ibid*.

As the Supreme Court explained in *RWDSU v Dolphin Delivery Ltd*,[106] "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution," including the *Charter*.[107] Autonomy, liberty, privacy, and human dignity have all been identified as *Charter* values.[108] While all of these values must be assigned weight in considering whether there is space for shopkeeper's privilege in Canada, liberty stands out as a core consideration, as the gravamen of false imprisonment is an unlawful deprivation of liberty.

The traditional Canadian position affords a high degree of protection to individual liberty. It deters shopkeepers from depriving customers of their liberty in all but the clearest of cases of theft. This is because, as explained above, many Canadian courts have held that shopkeepers who detain customers reasonably believed to have committed theft risk civil liability for false imprisonment if their belief turns out to have been mistaken, and in some cases they may even face criminal charges for forcible confinement.[109] From a rights perspective, this traditional position has much to commend it. Guarding against deprivations of liberty where the customer has done nothing wrong is a compelling objective. As Sir Rufus Isaacs CJ put it in *Walters v W.H. Smith & Son Ltd*,[110] a leading English decision on citizen's arrest, "[i]nterference with the liberty of the subject, and especially interference with a private person, has ever been most jealously guarded by the common law of the land."[111] Similarly, in *R v Mann*,[112] Justice Iacobucci stated that "[i]ndividual liberty interests are fundamental to the Canadian constitutional order."[113] The need to safeguard individual liberty provides a sound rationale for placing careful limits on a citizen's ability to detain another citizen, even where the former's property rights are in play.

Moreover, the experience of being detained as a suspected thief can be embarrassing, humiliating, and even traumatic. This can impact on an individual's human dignity, providing further reason to put in place appropriate legal safeguards in this area.

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106 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 [cited to SCR].

107 *Ibid* at para 39.

108 See *R v Mabior*, 2012 SCC 47 at paras 22, 43, 45, 58, [2012] 2 SCR 584.

109 See *Criminal Code*, *supra* note 7, s 279(2).

110 *Walters*, *supra* note 23.

111 *Ibid* at 602.

112 *R v Mann*, *supra* note 27.

113 *Ibid* at para 35.

There is also a related concern, though not always expressed in the jurisprudence, over allowing ordinary citizens untrained in policing techniques to take investigations into their own hands.[114] The idea seems out of place in an era of organized policing. Shopkeepers authorized to perform investigative detentions based on their own perceptions may make mistakes and handle the matter inappropriately. In doing so, they may succeed only in escalating the situation, thereby putting themselves and others in danger. The potential for conflict is heightened by the hierarchy and power disparity inherent in the shopkeeper-customer relationship: the shopkeeper is a property owner (or lawful possessor) who has control over the space in which the interaction takes place, while the customer is a mere invitee. To mitigate the risk of escalation, conflict, and rights violations, it may be best to leave it to the experts—i.e., trained police officers—to investigate suspected theft.

A related concern is that shopkeeper's privilege may invite abuse. In particular, even if the privilege does not condone such conduct, aggressive or violent shopkeepers may attempt to use the privilege as an excuse for acting aggressively or violently towards others. Such abuse may have a disproportionate impact on minority groups. Self-defence laws have been used to legitimize violence against racialized minorities,[115] and there is

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114 In the United States, Florida's "stand your ground" laws, which eliminated the duty to retreat before using force, have received criticism on the basis that they encourage dangerous vigilante justice and have a disproportionate effect on racialized minorities. See e.g. Ahmad Abuznaid et al, "'Stand Your Ground' Laws: International Human Rights Law Implications" (2014) 68:4 U Miami L Rev 1129; Mario L Barnes, "Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovation in Self-Defense Laws" (2015) 83:6 Fordham L Rev 3179; Daniel Sweeney, "Standing Up to 'Stand Your Ground' Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence" (2016) 64:3 Cle St L Rev 715; American Bar Association, "ABA Panel Finds 'Stand Your Ground' Laws Ineffectual and Dangerous" (7 February 2016), online: *American Bar Association* <www.americanbar.org/news/abanews/aba-news-archives/2016/02/aba_panel_finds_sta/>. Such laws can, according to one Tampa Bay editorial, "[escalate] common disputes into deadly confrontations". See "Editorial: 'Stand Your Ground' Law Triggers Vigilante Justice", *Tampa Bay Times* (23 July 2018), online: <www.tampabay.com/opinion/editorials/Editorial-Stand-your-ground-law-triggers-vigilante-justice_170249268>. Similar concerns apply in the context of shopkeeper's privilege. The privilege may encourage individuals untrained in proper policing techniques, and in a state of heightened emotion, to take matters into their own hands—which, as the experience of Florida's "stand your ground" laws demonstrates, can result in tragedy.

115 See e.g. Caroline E Light, *Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense* (Boston: Beacon Press, 2017) (exploring how, in the United States, violent self-defence has been legalized for the most privileged and used as a weapon against the most vulnerable). In Canada, the *Khill* case raised concerns about how Canada's self-defence laws may legitimize violence against Indigenous people. In that case, Peter Khill,

a risk that shopkeeper's privilege might similarly be used to legitimize detentions or violence targeting racialized minorities. Moreover, research demonstrates that store security personnel rely on race, gender, age, and other demographic factors to profile potential shoplifters, and the substance of these profiles generally fits the stereotypical images of shoplifters as young persons, minorities, and persons of lower class status.[116] To the extent that shopkeeper's privilege may encourage shopkeepers to act on such profiling, it would tend to have a disproportionate effect on members of these profiled groups.

Beyond these concerns, modern commercial realities may militate against recognizing shopkeeper's privilege. The court in *Mann v Canadian Tire* suggested that modern innovations in store security—such as electronic tags—favour the recognition of shopkeeper's privilege, reasoning that "[t]he principle that 'without a felony, there could be no suspicion' seems unsuited to an era where most shops have installed theft-prevention apparatus such as electronic tags that trigger doorway sensors."[117] Similarly, in its 1985 decision in *Allen v C Head Ltd*,[118] the Newfoundland Supreme Court suggested that the law on citizen's arrest was, at that time, already out of step with modern merchandising practices.[119] But the advent of new technologies might militate *against* recognizing shopkeeper's privilege, as they can provide alternative mechanisms for protecting shopkeepers' property rights that do not

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a white man, was charged with second degree murder after he shot and killed Jonathan Styres, an Indigenous man. Khill claimed that he shot Styres in self-defence, as he thought the latter, who was trying to steal his truck, was armed. Khill was acquitted by a jury. The case drew comparisons to the *Stanley* case, where Gerald Stanley, a white farmer, was charged with second degree murder after he shot and killed Colten Boushie, a 22-year-old Indigenous man. Stanley, who claimed that the shooting was an accident, was acquitted by an all-white jury. The case sparked outrage and protests within the Indigenous community. For more on these two cases, see Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (McGill-Queen's University Press, 2019); Kent Roach, "Khill Verdict Should Make Us Think Twice About Our Self-Defence Laws", *The Globe and Mail* (4 July 2018), online: <www.theglobeandmail.com/opinion/article-khill-verdict-should-make-us-think-twice-about-our-self-defence-laws>.

116 See Dean A Dabney et al, "The Impact of Implicit Stereotyping on Offender Profiling: Unexpected Results from an Observational Study of Shoplifting" (2006) 33:5 Crim Just & Behavior 646 at 650. In addition, as the authors of the study summarize, "trained observers, when allowed to deviate from a clearly specified random selection protocol, oversampled shoppers on the basis of race, gender, and perceived age, thus misrepresenting these factors as predictors of shoplifting behavior": *Ibid* at 646.

117 *Mann v Canadian Tire*, *supra* note 1 at para 41.

118 *Allen v C Head Ltd*, 4 Nfld & PEIR 1081985, CarswellNfld 115 (SC (TD)) (WL Can) [*Allen* cited to WL Can].

119 See *Ibid* at para 46.

require a deprivation of a customer's liberty.[120] Facial recognition software, product tracking technology, and other innovations, both existing and future, may reduce the need to resort to investigatory detentions, even rendering them obsolete.

These concerns are real. Shopkeeper's privilege must therefore be approached cautiously and in a way that is acutely sensitive to the risks associated with it. But as I will develop, that does not mean there is no space in Canada for the privilege, provided it is carefully circumscribed.

B) Shopkeeper's Privilege—A Measured Approach

On the spectrum of criminality, shoplifting is generally regarded as a minor transgression. Still, on an aggregate scale, shoplifting in Canada has appreciable negative economic effects. A survey of medium and large Canadian retailers revealed that loss of inventory, or "retail shrinkage", translated to over $3 billion in losses in 2008 ($8.5 million per shopping day).[121] Further, shoplifting is not uncommon. Statistics Canada reported that in 2017 there were approximately 108,150 incidents of shoplifting under $5,000 in Canada, and this of course captures only reported incidents.[122] Moreover, from a victim's perspective, the economic losses and stress caused by shoplifting can be real. Accordingly, to protect shopkeepers' legitimate interests, there is a need to ensure timely and effective legal mechanisms to respond to suspected shoplifting where there is reasonable basis for doing so.

Furthermore, the need to provide adequate legal tools to guard against theft should not be viewed solely from the perspective of shopkeepers. Society has an interest in investigating crime and punishing

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120 See Alex Boissonneau-Lehner, "Ontario Court Recognizes the Defence of Shopkeeper's Privilege for False Imprisonment Actions" (24 August 2016), online: *Suliman Lehner Barristers & Solicitors* <www.sllegal.ca/single-post/2016/08/24/Ontario-Court-Recognizes-the-Defence-of-Shopkeeper's-Privilege-for-False-Imprisonment-Actions> (suggesting that the advent of new anti-theft tools may not "warrant changing the standard for justifying detention from one where a shoplifter needed to be caught red handed to one where reasonable suspicion is enough").

121 See PricewaterhouseCoopers & Retail Council of Canada, "Canadian Retailers Lose over $3 Billion Annually to Crime" (16 September 2009), online: *News Wire* <www.newswire.ca/news-releases/canadian-retailers-lose-over-3-billion-annually-to-crime-retail-council-ofcanada-pricewaterhousecoopers-survey-538583252.html>.

122 See Statistics Canada, Table 35-10-0177-01, "Incident-Based Crime Statistics, by Detailed Violations", online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>.

wrongdoers.[123] All members of society have a shared interest in seeing that the standards of conduct governing the society are observed, and where there is a reasonable basis for believing that those standards have been breached, they also have a shared interest in seeing the matter investigated and resolved.

The court in *Mann v Canadian Tire* identified several rationales for recognizing shopkeeper's privilege in Canada. But the most compelling rationale may also be the simplest: it is unfair to place shopkeepers in the position of having to choose between (a) rolling the dice and performing a citizen's arrest, knowing that they may face a false imprisonment suit (and potentially even criminal charges) if their reasonable belief that a theft has occurred turns out to have been mistaken; and (b) letting someone who they reasonably believe committed theft simply walk away, potentially with unpaid merchandise. Creating a middle ground—one that gives due weight to the property rights of shopkeepers and the broader societal interest in responding to suspected crime where there is a reasonable basis for doing so—seems justified.

Canada's legal framework, including the values animating the *Charter*, can accommodate a form of shopkeeper's privilege, provided it is carefully circumscribed. As for how this can be achieved, the five conditions identified in *Mann v Canadian Tire* offer a useful starting point. These conditions can be summarized as follows:

1. **Reasonable grounds.** The shopkeeper must have reasonable grounds to believe property is being stolen or has been stolen from the shopkeeper's place of business.

2. **Purpose.** The sole purpose of the detention must be to investigate whether a theft is being or has been committed.

3. **Reasonableness.** The detention itself must be reasonable, and the privilege does not allow the shopkeeper to perform a search without consent.

4. **Length.** The detention must be as brief as possible.

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123 See *R v Genest*, [1989] 1 SCR 59 at 63, 91 NR 161, citing Polyvios G Polyviou, *Search and Seizure: Constitutional and Common Law* (London: Duckworth, 1982) at vii; *R v Singh*, 2007 SCC 48 at para 1, [2007] 3 SCR 405.

5. **Use of force.** If the suspect refuses to cooperate, the shopkeeper may detain the suspect using reasonable force until police arrive.[124]

While this framework provides a useful starting point, uncertainties remain and refinements can be made. Without attempting to exhaustively define and address the outstanding issues, I will briefly address ten key points below.

1) Parties Who Can Benefit from the Privilege

Although it is implicit in the court's reasons in *Mann v Canadian Tire*, it is worth making explicit that the privilege can also be invoked by persons who do not fit the traditional mould of a "shopkeeper" or "merchant". Formal distinctions should not bar a person, whether natural or corporate, who offers goods to the public, as well as their agents, from invoking the privilege. There is then the more difficult question of whether the privilege might be available outside the commercial setting. Libraries and their staff, for example, have a legitimate interest in protecting their collections from theft, even though they do not hold out goods for sale. In principle, there seems to be no reason why the privilege could not be invoked in such a setting.

2) Investigatory Detention vs Arrest

The court in *Mann v Canadian Tire* did not explain its understanding of the distinction between an "investigatory detention" and an "arrest". The US jurisprudence in this area is of some assistance. In *Cervantez v J.C. Penney Co.*,[125] the Supreme Court of California stated that a "detention" in the context of shopkeeper's privilege consists of "briefly stopping a person for questioning or other limited investigation."[126] It also cautioned that the line between an arrest and a detention "at times may be a fine one."[127] It nonetheless affirmed that a detention results in a "lesser intrusion upon a person's liberty" than an arrest,[128] though there is no doubt that both a detention and an arrest result in a deprivation of liberty. In short, according to the US jurisprudence, an investigatory detention involves briefly stopping someone for the purpose of carrying out a limited investigation, which does not amount to an arrest. This seems a sensible way to define the concept. In Canada, an "arrest" involves taking a person

124 See *Mann v Canadian Tire*, *supra* note 1 at para 45.
125 *Cervantez*, *supra* note 75.
126 *Ibid* at 582.
127 *Ibid*, n 9.
128 *Ibid*.

into custody and continuing to hold that person in custody until delivered into the hands of an authority.[129] This goes further than a brief detention for investigatory purposes.

3) Reasonable Grounds

While the court in *Mann v Canadian Tire* used the phrase "reasonable and probable grounds" when defining the first condition of its framework, the Supreme Court of Canada has confirmed that the standard of "reasonable and probable grounds" under the *Criminal Code* is no different from the standard of "reasonable grounds".[130] Although this conclusion was reached in the context of the *Criminal Code*, the proposition that "reasonable and probable grounds" does not differ from "reasonable grounds" should apply equally in the civil context. Using the language "reasonable grounds" also ensures harmony with the citizen's arrest provisions under the *Criminal Code*, as section 494(1)(b), the "fresh pursuit" power, refers to "reasonable grounds" rather than "reasonable and probable grounds".

As for what may satisfy the "reasonable grounds" threshold, that will depend on the circumstances and require a fact-specific inquiry. However, we can identify several things that will not constitute reasonable grounds. A mere hunch or general suspicion will not constitute reasonable grounds, and courts should be on guard against bare claims that someone "looked suspicious", as such claims may be little more than veiled excuses for profiling. Moreover, good faith is necessary but insufficient. There must also be objective evidence sufficient to substantiate a reasonable belief that a crime is being or has been committed. Such evidence may, for example, take the form of a security alarm going off.

4) Reasonable Grounds vis-à-vis a Particular Individual

The conditions formulated by the court in *Mann v Canadian Tire* do not expressly require that the shopkeeper have reasonable grounds to believe that *the detainee* was the one who committed the suspected theft. As a practical matter, this is perhaps of little moment, as in most cases of suspected theft there will be only one suspect. As a doctrinal matter, however, it is fair to insist that the shopkeeper have reasonable grounds to believe not only that a theft has occurred, but also that the detainee was the one who did it. Among other things, this would guard against shopkeepers detaining patrons indiscriminately.

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129 See *Asante-Mensah*, *supra* note 10 at paras 33–34.

130 See *R v Loewen*, 2011 SCC 21 at para 5, [2011] 2 SCR 167.

5) Reasonableness

Reasonableness is a touchstone of shopkeeper's privilege. The decision to detain must be based on reasonable grounds, and the detention itself must also be reasonable. Reasonableness may be said to both permeate and justify the privilege. The Supreme Court of Canada has described the standard of reasonableness as a "flexible criterion that permits adjustments to different situations."[131] In the shopkeeper's privilege context, the reasonableness requirement constrains the scope of the privilege and allows for a flexible, fact-specific inquiry that balances the rights and interests at play. However, to some degree this flexibility comes at the expense of certainty, as the line between what is reasonable and what is unreasonable is not always clear. Consequently, there is a risk that shopkeepers may inadvertently exceed the scope of their privilege based on an honest but mistaken belief that they are acting reasonably. A judicial determination that they were not would of course come only after the damage had already been done. Still, as Chief Justice McLachlin wrote in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*,[132] "the law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness."[133] While it does not guarantee an ability to predict outcomes with perfect accuracy, the reasonableness standard has long been recognized as a workable legal concept.

In my view, if shopkeeper's privilege is to be adopted in Canada without inviting an unreasonable risk of conflict escalation and aggressive and/or violent behaviour, reasonableness in this context should encompass, among other things, the need to treat individuals with respect and dignity. To strike an appropriate balance between the rights and interests of the shopkeeper and those of the customer, any shopkeeper seeking to invoke shopkeeper's privilege must treat the customer with respect and dignity throughout the interaction. Any failure to satisfy this requirement would be unreasonable and would therefore result in the scope of the privilege being exceeded. This restriction can assist in addressing some of the concerns expressed above about the risk of aggressive and/or violent behaviour on the part of shopkeepers. This is not an unduly onerous requirement, and in fact all parties have an interest in seeing that shopkeepers treat their customers, including those suspected of crime, with respect and dignity. Shopkeepers who disrespect their customers are likely to develop a bad reputation, which limits their ability to attract

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131 *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 377, 122 DLR (4th) 1, La Forest J.

132 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76.

133 *Ibid* at para 27. See also *Tele-Mobile Co v Ontario*, 2008 SCC 12 at para 66, [2008] 1 SCR 305, (noting that the standard of reasonableness "is a familiar one in law").

future business. In sum, stipulating that shopkeepers who seek to invoke shopkeeper's privilege must treat the customer with respect and dignity throughout the interaction is both sensible and essential to maintaining a proper balance between the rights and interests of the shopkeeper and those of the customer.

6) Acceptable Level of Force

The court in *Mann v Canadian Tire* made arguably inconsistent statements about the level of force that may be used to prevent a suspect from leaving the shopkeeper's premises while awaiting the arrival of the authorities in the event the suspect refuses to cooperate. On the one hand, it stated that the shopkeeper may use "reasonable force".[134] On the other hand, it stated that the use of "unnecessary force" would result in the shopkeeper exceeding the scope of the privilege.[135] These two statements may be reconciled on the basis that the level of force that is "reasonable" in detaining another citizen is limited to that which is necessary. Any use of force that goes beyond this level will render the detention unreasonable and expose the shopkeeper to civil liability. This is consistent with the common law governing arrests, which provides that any use of force must be no more than is "reasonably necessary".[136] Whether any particular use of force falls within the scope of the privilege will of course depend on the circumstances. Clearly, however, the use of lethal force in the context of a simple property offence in the retail setting can never be justified, and the use of any level of force should be a last resort taken only in extraordinary circumstances.

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134 *Mann v Canadian Tire*, *supra* note 1 at para 45.

135 *Ibid* at para 46.

136 See *Asante-Mensah*, *supra* note 10 at para 51, citing *Dedman v The Queen*, [1985] 2 SCR 2 at 35, 20 DLR (4th) 321 and *R v Godoy*, [1999] 1 SCR 311 at para 22, 168 DLR (4th) 257. See also Robbins, *supra* note 14 at 587 (noting that in the US, the use of force in the context of shopkeeper's privilege is treated the same as with citizen's arrests in general, meaning that the level of force used by the arrestor cannot exceed what is necessary to prevent the arrestee's escape). Note that, following the enactment of Bill C-26 (SC 2012, c 9, assented to 11 March 2013), ss 34(1)(c) and 35(1)(d) of the *Criminal Code*, *supra* note 7, which address self-defence and defence of property, require that the accused's actions be "reasonable in the circumstances". For a critical analysis of these amendments, see Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16:3 Can Crim L Rev 275.

7) Acceptable Length of Detention

While some US states have passed legislation imposing a hard ceiling on the acceptable length of detention,[137] the crucial limitation, in my view, is that the detention must last no longer than is reasonably necessary to complete the legitimate investigatory objective. This limitation, which is effectively a minimal impairment requirement, protects against deprivations of liberty that extend beyond what is reasonably necessary. This limitation dovetails with the overarching requirement that shopkeepers seeking to invoke shopkeeper's privilege must act reasonably, including by treating the customer with respect and dignity.

8) Prohibition of Searches Without Consent

Prohibiting shopkeepers from searching detainees without consent is a sensible limitation. This limitation has been adopted in some US states, such as Iowa, where a shopkeeper is permitted to conduct a reasonable search of a detainee only where (1) the search is performed under the direction of a peace officer or (2) the detainee has consented to the search.[138] If a detainee has been asked to participate in a search but has declined to do so, it would be an unacceptable intrusion on the detainee's privacy rights and bodily integrity for the shopkeeper to perform a search over the detainee's protests, and such a search could cause the detainee unnecessary embarrassment, humiliation, and discomfort. The better solution is to defer the search until the authorities arrive, at which point the search can be performed in a professional and discreet manner. Further, since the shopkeeper is legally authorized to detain the suspect until police arrive (provided the detention was performed reasonably), there is no urgent need to perform the search immediately.

9) Territorial Limitation

The court in *Mann v Canadian Tire* did not consider whether shopkeeper's privilege should be limited to the store's premises or may instead extend beyond those premises. In the US, state legislation varies on this point: some states permit detention on or off the business's premises, some permit detention on or in the vicinity of the premises, some permit detention only on the premises, and some are silent on the matter.[139]

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137 See David B Owen, "Retailer's Rights: Understanding" (1995) 39:11 Security Management 48 at 50 (noting, for example, that at the time of writing, Louisiana and Minnesota allowed for a one-hour detention, while Maine and Montana capped the permissible length at 30 minutes).

138 See Iowa Code Ann, § 808.12 (2017).

139 See Owen, *supra* note 137 at 49–50.

The Second Restatement of Torts left this question open, stating: "the Institute expresses no opinion as to whether there may be circumstances under which this privilege may extend to the detention of one who has left the premises but is in their immediate vicinity."[140] However, some US courts have recognized, through the common law, that shopkeeper's privilege may apply even after the suspect has left the premises, provided the individual is in the immediate vicinity of the premises.[141] This broader application seems justified, as the fact that a suspect has stepped outside the shopkeeper's premises should not, as a matter of principle, defeat the privilege, provided the criteria for its application are otherwise satisfied.

10) Common Law or Legislation

Finally, the framework described above could be adopted either through the common law or through legislation. Some may argue that the nuanced exercise of striking an appropriate balance between the rights and interests of shopkeepers and those of customers is a policy matter that should be left to elected representatives. Moreover, it may be said that a statutory response—or lack thereof, depending on the will of the legislature—would provide greater clarity on the conditions under which shopkeeper's privilege may be invoked. That said, the Supreme Court of Canada has emphasized that courts "share responsibility for ensuring that the common law reflects current and emerging societal needs and values."[142] As such, there is no reason why courts could not intervene through the common law, as the court did in *Mann v Canadian Tire*.

Conclusion

The Ontario Superior Court's decision in *Mann v Canadian Tire* opens up a new chapter in the story of shopkeeper's privilege in Canada. No doubt, there are legitimate concerns over the effect that recognizing such a privilege may have on individual liberty and other important rights and interests in Canadian society. Yet, provided shopkeeper's privilege is carefully circumscribed, there is good reason to believe there is space for it in Canada. By taking a measured approach to shopkeeper's privilege, Canadian law can protect individual liberty while giving due weight to the property rights of shopkeepers and the broader societal interest in responding to suspected crime where there is a reasonable basis for doing so.

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140 See Restatement (Second) of Torts at 202, cited in *Bonkowski*, *supra* note 61.

141 See e.g. *Bonkowski*, *supra* note 61; *Montgomery Ward & Co Inc v Freeman*, 199 F 2d 720 (Fla CA 1952).

142 *R v Mann*, *supra* note 27 at para 17, citing *R v Salituro*, [1991] 3 SCR 654 at 670, 9 CR (4th) 324.