

Examining the Creation of Common Law Police Powers in Canada

A Thesis Submitted to the College of
Graduate Studies and Research
in Partial Fulfillment of the Requirements
for the Degree of Master of Laws
in the College of Law
University of Saskatchewan
Saskatoon

By
Nathan Forester

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Abstract

In recent times, the Supreme Court of Canada has utilized the ancillary powers doctrine as a means of expanding police powers at common law. Less apparent is the fact that the proliferation of these coercive powers has been achieved solely on the basis of the Court's unorthodox—and, indeed radical—use of precedent. Put shortly, it is my thesis that the ancillary powers doctrine has precipitated the undemocratic expansion of both state *and* judicial power. The actual powers created by the Court are, in themselves, fraught with deficiencies and incapable of delivering on the twin promises of providing fairness and predictability in the law. This is due to the fact that any *ad hoc* judge-made power will be created retrospectively and shown to lack comprehensiveness. Correspondingly, the constitutional protections available to Canadians have waned in strength, leaving them more susceptible to governmental intrusion.

In constructing this thesis, I have reviewed both the historic and contemporary case law that has forged the ancillary powers doctrine in Canada. Significantly, the emergence of this doctrine could not have occurred without Parliamentary acceptance and condonation of the Court's actions. However, it is on the basis of the Court's perception that Parliament has failed to close off supposed “gaps” in police powers that the Court has been willing to enter the lawmaking fray. Moreover, the Court's actions have effectively obviated the need for government to legislate and prospectively stipulate the powers possessed by its agents. Therefore, I have situated this institutional interplay within the “theory of gaps” devised by Hans Kelsen. This model is offered as a plausible explanation for how *Waterfield/Dedman* became conceived in Canada and, why, it has been permitted to take root. Importantly, the Kelsenian analysis that I advance is explanatory only. It does not present a defence or justify for the proliferation of common law powers in favour of the police or judiciary.

The lawmaking paradigm, as described above, has had a pernicious effect upon constitutionalism in Canada. It is for this reason, I argue that the ancillary powers doctrine holds an illegitimate place in Canadian law, and should be reversed.

Acknowledgments

I wish to express my gratitude to my first supervisor, Tim Quigley, for helping cultivate my initial interest in the topic of common law police powers and for his encouragement of my pursuit of graduate studies in criminal law. My writing and precision in thought improved under his tutelage. With any luck and some further practice this will continue. I also wish to acknowledge and thank the members of my thesis committee, Michael Plaxton and Mark Carter, for their helpful comments and collegiality. I further recognize the resourcefulness of current and former Associate Deans, Martin Phillipson and Barbara von Tigerstrom in providing a positive learning environment and intellectually enriching community. To all of them, and my LL.M. classmates, I appreciate their camaraderie in the critical study of the law. Finally, I am especially indebted to Glen Luther, my thesis supervisor, for shepherding me through the crucial stages of my thesis preparation and for generously investing his time to not only see this project through to its end, but to help ensure that the end product was the best that it could have been. He has, and continues to be, a most valued mentor to me.

Next, I must gratefully acknowledge the generous financial assistance that I have received in support of my research. Without such funding, my pursuit of advanced legal education would not have been possible. Specifically, I wish to thank the following benefactors: the Law Society of Saskatchewan for its decision to award me a E.M. Culliton Scholarship; the College of Law for, in particular, awarding me a Moxon Scholarship; and the University of Saskatchewan for the distinct privilege of being awarded a Graduate Teaching Fellowship during the second year of my studies. Although, the monies are now gone, these are honours that shall endure and remain dear to me.

Most of all, I thank my family to whom this work is dedicated. Their unwavering support of my efforts has proven invaluable and was instrumental in my ability to realize the completion of this degree. Without their unflagging willingness to listen to my ideas and to encourage me, this thesis would not have come to fruition. I am truly appreciative of their sufferance during my labours and for their moral support throughout the entirety of this process. It was a long road to travel and I could not have had any better company with me.

Dedication

To my parents, Ken and Marilyn

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Introduction

Since the passage of the *Canadian Charter of Rights and Freedoms*,¹ the Supreme Court of Canada (SCC) has assumed an increasingly larger role in the formation of criminal justice policy in Canada. This is reflected by both the volume and breadth of decisions that the Court has rendered on matters of substantive criminal law, rules of evidence and criminal procedure. In its capacity as the nation's highest court, the Supreme Court is entrusted with, *inter alia*, overseeing the criminal justice system and ensuring that constitutional standards are met by the state. Not infrequently, this entails hearing challenges brought by those accused of criminal offences contesting either the substance of legislation or the investigative actions of the police. It is the latter range of activities, that of judicially determining the lawfulness (or impropriety) of exercises of coercive power by the police, that shall be the dominant focus of this thesis.

Consistent with the prescriptions of the “rule of law”² (ROL), the government and its agents—including the police—are at all times bound by the “supreme law of Canada”³ as set out in the *Constitution Act, 1982*,⁴ which includes the *Charter*. The Court's role as stewards over the constitutional rights of Canadians, along with its authority to make declarative rulings on the legality of state action is derived from the *Charter* itself and is thus an outgrowth of the democratic process. This is an important point to be borne in

¹ *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*].

² *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385 [*Secession Reference*]. See also Glen Luther, “Extra-Legal Police Powers in Canada: The Rule of Law and the Enigma of Retroactive Decision Making” in Kelly Gorkoff & Richard Jochelson, ed, *Thinking About Justice: A Book of Readings* (Winnipeg: Fernwood, 2012). See generally Jose Maria Maravall & Adam Przeworski, eds, *Democracy and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2003); Allan C Hutchinson & Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987); John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb, IL: Northern Illinois University Press, 2004); James S Hart, Jr, *The Rule of Law, 1603-1660: Crowns, Courts and Judges* (New York: Pearson/Longman, 2003).

³ *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴ *Ibid.* See also *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 115, 18 DLR (4th) 321 and *R v Oakes*, [1986] 1 SCR 103 at para 63, 26 DLR (4th) 200.

mind as we later ponder the architecture and operational design of “constitutionalism”⁵ in Canada, and in particular, where its functionality will be shown to have gone awry as a consequence of the Supreme Court’s ancillary powers doctrine (APD) jurisprudence.

In light of the foregoing, the greater role that is played by the Supreme Court in establishing the limits and bounds of state power through the process of judicial review is unsurprising and to be expected. Indeed, it is *prima facie*, a natural byproduct of the mandate given to the Court under the *Charter*. However, the expanded role of the SCC in the post-*Charter* era has also been mirrored by the growth of evermore, expansive police powers at common law. This we might find to be more than a little surprising, particularly in light of the Supreme Court’s recognized role as “guardians of the Constitution and of individuals’ rights under it.”⁶ It is the paradox of this development that I set out to examine in my thesis. More precisely, I will research the advent of judicially-created police powers in Canadian law and concentrate, firstly, on the Court’s decisions predicated on the APD, and secondly, the reaction that these judgments have elicited from Parliamentarians.

As my research will demonstrate, the APD and its conduit the “*Waterfield test*”⁷ stand as the chief vehicles through which freestanding police powers are generated at common law. However, the use of other “hands-on”⁸ adjudicative methods used by the Court in the broadening of law enforcement powers will also be explored. While the general expansion of police powers can be seen as a matter of concern, it is not the growth of government power alone that is troubling. Rather, it is the non-democratic process through which this proliferation has occurred that is most disconcerting. The

⁵ See *Secession Reference*, *supra* note 2 at para 32 where alongside federalism, democracy, the rule of law, and respect for minorities, constitutionalism was acclaimed by the Supreme Court as fundamental and organizing principle of the Canadian constitutional framework. For commentary see Joel Colon-Rios, “The End of the Constitutionalism-Democracy Debate” (2010) 28 Windsor Rev Legal Soc Issues 25; and see also Adam M Dodek, “The Protea and the Maple Leaf: The Impact of the Charter on South African Constitutionalism” (2005) 17 NJCL 353.

⁶ *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 641.

⁷ *Reference re: Judicature Act (Alberta)*, s. 27(1), [1984] 2 SCR 697 at 718, 14 DLR (4th) 546.

⁸ Aileen Kavanagh, “Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape” (2011) 9 Intl J Const L 172 at 174.

issues engaged in this thesis are much larger and more complex than simply whether or not the police ought to possess a particular investigative power. These are policy choices that centre upon the appropriateness of allocating coercive powers in the hands of the police for use against the citizenry. Ultimately, I contend that such decisions can only properly be made democratically and through the legislative process in the first instance. Thereafter, the Court may be called upon to ascertain whether the balance that has been struck between the state's interest in "crime control"⁹ and the "due process"¹⁰ rights of Canadians that are enshrined in the *Charter*. This is how Canadian constitutionalism is designed to operate. And, it is when these conditions are being met that the criminal justice systems can be said to exist in well-functioning state. However, as will be shown, the APD effectively stymies each of these processes and purports to treat them as superfluous (or substitutable) exercises that need not be engaged. Yet, as I shall argue, APD jurisprudence is neither an equivalent substitute (nor legitimate) replacement for democratic lawmaking and the kind of governmental accountability that is ensured under Section 1 of the *Charter*.¹¹ Each of these prerequisites is a barometer of constitutional good health and each of them has been unduly dispensed with under the APD. Therefore, this body of jurisprudence illuminates—and provides an entry point to examine—a much more pressing problem for Canadian constitutionalism and democracy. As I will demonstrate, APD jurisprudence has fostered (and further reinforced) anti-democratic

⁹ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 153.

¹⁰ *Ibid.*

¹¹ See generally Sujit Choudry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 *Osgoode Hall LJ* 1.

tendencies and a stifling of the “dialogue”¹² between the legislative and judicial branches of government.¹³

In recent times the SCC has announced unprecedented police powers enabling state agents to, *inter alia*, enter private dwellings in response to disconnected 911 calls,¹⁴ stop and search citizens without a warrant,¹⁵ to erect impromptu road blockades to detain and interrogate motorists and other persons,¹⁶ and to use sniffer dogs during investigative detentions.¹⁷ None of these investigatory powers were provided for by legislation. These judicially-created powers are each worrisome in their own unique ways and have been roundly criticized. However, to focus the bulk of our scrutiny on these limited doctrinal issues is in the words of Professor John Hart Ely, “to lose the forest in the trees.”¹⁸ Taken together the judicial conferral of these investigative powers reveals a more fundamental and far more pernicious problem in Canadian law. I agree with the suggestion of Professor James Stribopoulos that the most “sensible target of criticism is...not the growth in the official authority of the police, but rather, its source.”¹⁹ Critical attention will therefore be directed towards examining the transformative role that the SCC has played in enlarging the ambit of state power. Ultimately, it is my argument that while we are right to be concerned with where the lines demarcating the bounds of permissible

¹² See *Vriend v Alberta*, [1998] 1 SCR 493 at paras 136-142, 156 DLR (4th) 385; and *R v Mills*, [1999] 3 SCR 668 at paras 20 and 57, 180 DLR (4th) 1. See also Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 at 29 and Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts And Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

¹³ Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24 Can JL & Soc 231 at 244 [Jochelson, “Multidimensional”].

¹⁴ *R v Godoy*, [1999] 1 SCR 311, 168 DLR (4th) 257.

¹⁵ *R v Mann*, 2004 SCC 52 at para 3, [2004] 3 SCR 59.

¹⁶ *R v Clayton*, 2007 SCC 32 at para 41, [2007] 2 SCR 725. See also *Dedman v The Queen* [1985] 2 SCR 2, 20 DLR (4th) [Dedman].

¹⁷ *R v Kang-Brown*, 2008 SCC 18 at paras 25, [2008] 1 SCR 456.

¹⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 16.

¹⁹ James Stribopoulos, “Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada” in Margaret E Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 363.

state conduct are drawn, in principle, it matters a great deal more by whom they are drawn and how the state's adherence to them is subsequently measured. The jurisprudence of the Supreme Court under the APD is indicative of a restructuring of the conventions of constitutionalism in Canada. This phenomenon threatens to undercut not only the protections available to individuals under the *Charter*, but the constitutional framework itself. I intend to show that the Supreme Court's utilization of the ancillary powers doctrine in criminal jurisprudence is irretrievably flawed and deserving of discontinuance.

In the course of advancing my argument, I will show that, *at law*, the APD is wholly contingent upon the Court's unorthodox (and, indeed radical) use of judicial precedents.²⁰ Indeed, without the repeated (yet, still questionable) acts of judicial ingenuity that we find in APD cases, the Court would be unable to satisfy the "principle of legality"²¹ (POL) and the creation of common law police powers would be at an end. Briefly, what the POL demands is that any official encroachment by the state into areas that impair an individual's liberty must be clearly authorized in law.²² The ideals reflected by the POL were an integral component—and a bedrock principle—of the Anglo-Canadian common law constitutional framework.²³ Importantly, these are not antiquated notions or mere historical relics. Rather, the principle of legality continues to survive today and as the Supreme Court unanimously reaffirmed in the recent cases of *R v Mann*,²⁴ "[a]bsent a law to the contrary, individuals are free to do as they please. By contrast, *the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law.*"²⁵ This is the quintessence of POL made famous by Professor A.V. Dicey.²⁶ Thus, I will interrogate through my analysis, how the Court

²⁰ See especially Chapter Four.

²¹ James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 *Queen's LJ* 1 at 2, 6-13 [Stribopoulos, "In Search"].

²² TRS Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge LJ* 111 at 116 [footnote omitted].

²³ Stribopoulos, "In Search", *supra* note 21 at 5, 9.

²⁴ 2004 SCC 52, [2004] 3 SCR 59.

²⁵ *Ibid* at para 15 [emphasis added].

²⁶ See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 3d ed (London: Macmillan & Co) at 194-195 where in his articulation of the principle of legality, Dicey wrote, "The right to personal liberty as understood in England means in substance a

purports to comply with the requirements of the POL whilst simultaneously creating *ex post facto* police powers on an *ad hoc* basis. As will be shown, these matters are diametrically opposed and fundamentally irreconcilable in nature. I will also question why, *in practice*, the government has chosen to accept these novel adjudicative practices. This entails some consideration of the socio-political environment that has surrounded the Court's judgments where the APD has been utilized and enabled it to flourish.

Under the existing law, common law police powers can be forged in one of two ways: first, the Court may recognize the existence of a historical police power that predated Canadian law,²⁷ assuming that it is *Charter*-compliant, or, second, the Court may confer a new power upon the police using the APD. Indisputably, and irrespective of one's view of the merit or undesirability of this non-legislative avenue to enlarge state power,²⁸ this *is* the prevailing law in Canada. Thus, the common denominator is that police actions must have *a* foundation in law in order to be upheld as lawful. However, it will be argued that former category of powers have now (almost certainly) been extinguished by case authorities or overtaken by statute, and in respect of the latter, it will be asserted that the APD is an illegitimate platform to expand state power on the basis that it is incompatible with the Court's assigned role within the Canadian constitutional framework and its failure to comply *bone fides* of the POL. Moreover, the judicial

person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." The implications of this statement for exercises of coercive powers by police or other state actors becomes clearer—and is amplified—when read in conjunction with his earlier remarks at 33, that, "every action against a constable or collector of revenues [or, other agents of the state] enforces the greatest of all such principles, namely, that obedience to administrative orders is no defence to an action or prosecution for acts done in excess of legal authority."

²⁷ *Cloutier v Langlois*, [1990] 1 SCR 158, 53 CCC (3d) 257. See also *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 at 930-931, 89 DLR (4th) 609, where, the Court, in an analogous way, affirmed the existence of the ancestral common law offence of criminal contempt of court as being constitutionally compliant.

²⁸ While I am adamantly opposed to the judicial creation of coercive state powers, other commentators do not hold the same objections. See Michael Plaxton, "Police Powers After Dicey" (2012) 38 Queen's LJ 99. See also Malcolm Thorburn, "Two Conceptions of Equality Before the (Criminal) Law" in Francois Tanguay-Renaud and James Stribopoulos eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational and International Criminal Law* (Oxford: Hart Publishing, 2011) at 3.

creation of common law police powers evinces a series of policy choices and thereby needlessly exposes the Supreme Court to charges of judicial activism on the basis of its chosen policymaking path.²⁹ Although I acknowledge that the requirement of legal authority for state actions interfering with individual liberties (or personal property) may be satisfied by the common law, I will advance a process-based argument and assert the position that the POL is best (and most legitimately) fulfilled when coercive state actions are stipulated in legislation that is amenable to constitutional challenge and judicial scrutiny. These arguments will be developed more fully and in due course.

Having indicated in a general sense what will be addressed, I shall now briefly outline some of the matters that fall beyond the purview of this thesis. The critique that I advance is not concerned with any dimension of substantive criminal law and will reserve comment on the range of conduct that the state has chosen to criminalize.³⁰ Moreover, I take a largely disinterested view of the substantive allocations of coercive power that have been made in favour of the state agents—either by the state itself through the legislative process or the accretion of additional powers in judicial decisions. To the extent that criticisms of particular police powers are presented, these discussions serve to illuminate the flaws in their pedigree and not in their form.³¹ In particular, my critique will be focused on signaling the problems associated with the Court’s use of the APD and less upon the doctrinal rules created by it.

It is also not the intention of this work to fully explicate the police function. This thesis is not about police practices *per se*. Rather, a look at the Court’s jurisprudence will suffice to show how the art of policing is developing in a manner that is more intrusive, increasingly adversarial and too often left without adequate guidance or oversight. While police powers in Canada are ripe for comprehensive law reform,³² I will not attempt to

²⁹ See especially Jochelson, “Multidimensional”, *supra* note 13 at 231-232 and 247-248. See also Tim Quigley, “Brief Investigatory Detention: A Critique of *R. v. Simpson*” (2004) 41 *Alta L Rev* 935 at 949-950 [Quigley, “Brief Investigatory”].

³⁰ See generally Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008).

³¹ Chapter Three is where the bulk of these discussions will be concentrated.

³² See generally Don Stuart, “Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution” (2001) 28 *Man LJ* 89 at 89-90. See also JL Clendenning, “Police Power and Civil Liberties” (1966) 4

specify what I believe to be the appropriate bounds of state power or how police powers should be structured. That task is one reserved for another day and one that demands a different forum. Not only are such efforts bound to fall short, the devising of such a scheme (although, not without merit)³³ would be antithetical to the solution that I ultimately propose. The prescription that is advanced in this thesis is procedural in nature and entails two primary parts: first, the enactment of legislation by the government that prospectively and definitively stipulates the powers possessed by its agents, and; second, the provision of judicial supervision ensuring that the laws empowering the police are themselves constitutional and that police have acted in compliance with *Charter* standards during criminal investigations. This overarching argument is consonant with the balance of Canadian scholarship on the topic.³⁴ However, each of these requirements is presently being stymied in the litigation and adjudication of police powers under the APD. Although it is apparent that the government has failed to modernize the law governing the exercise of police powers during criminal investigations, its agents have

Osgoode Hall LJ 174 at 194. See also Quigley, “Brief Investigatory”, *supra* note 29 at 950; and Don Stuart, “Annotation” (1985) 46 CR (3d) 194 at 195 where writing in response to the case of *Dedman*, *supra* note 16, Stuart remarked, “It is high time for Parliament to consider enacting a comprehensive scheme after a full debate on civil liberties and the interests of the police in having clear and adequate power.”

³³ For example of a commendable proposal aimed at readdressing the problem of racial profiling by government actors see Kent Roach, “Making Progress on Understanding and Remediating Racial Profiling” (2004) 41 *Alta L Rev* 895.

³⁴ This view is in accordance with the position taken by a number of commentators, including that of Quigley, “Brief Investigatory”, *supra* note 29 at 949-950 [emphasis added] where he writes, “Another drawback of the judicial creation of police powers is that it blurs the role of the judiciary as a guardian of constitutional rights. When there are legislated police powers, the courts may undertake their proper role to assess arguments against the constitutionality of the law... Perhaps more fundamentally, the proper place to settle on the parameters of police powers [and the state, more broadly] over citizens is surely through the democratic process. While we may lament that Parliamentary scrutiny of legislation is not as thorough, informed, vigorous as it might be, it is preferable to judges establishing rules without the opportunity for debate and amendment... *It would be far better to have clear legislative prescriptions for the extent of the powers of state actors that might then be applied to individual cases, rather than adapting the common law to suit new situations with the attendant risks of expanding state power and increasing discriminatory effects.*” See also Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis Canada, 2011) at 66.

seldom been hampered by its inattentiveness to the task of law reform in this area. Rather, the Court has elected to pick up the slack and has taken it upon itself to expand the range police powers. Plainly, in doing so the Supreme Court has lapsed in its insistence upon the POL in the conventional sense. Indeed, the rise of the APD in Canadian criminal law could not have occurred without the Court's simultaneous retreat from the Diceyan conception of the POL. It is only through the SCC's self-devised, self-reinforcing and unorthodox use of judicial precedent that the common law police powers have burgeoned. As will be argued, the propagation of common law police powers through the application of the APD is wholly incongruous with this idea and the *Charter's* "affirm[ation] [of] the continued importance of the principle of legality"³⁵ in Canadian law and jurisprudence. By drawing attention to this dysfunction and institutional disordering, my aim is to highlight the magnitude and gravity of the problem posed by the presence of the common law police powers in Canada that have been created by the Court and embraced lawmakers. It is hoped that through this effort my thesis will contribute to the existing body of literature on the subject and serve to encourage a more focused discourse about the importance of safeguarding individual rights against governmental intrusion.

Outline of Chapters

This thesis is organized into five separate chapters. Following these introductory remarks, there are four substantive chapters and then a conclusion. Chapter One shall review the Canadian constitutional framework and how the activities (or inaction) of the relevant institutional actors within the criminal justice system have the capacity to influence and immediately effect the ability of citizens to exercise their civil liberties. Chapter Two will document the reception of the "*Waterfield* test" and its evolution in Canadian jurisprudence. It is this test that has given rise to the APD and the associated problems. In Chapter Three, I will further discuss a series of recent Supreme Court judgments in which the APD was employed and led to the introduction of new common law police powers. The aim of this exercise is to illuminate problems endemic to judge-made law. Chapter Four will situate the APD within the realm of legal theory and

³⁵ Stribopoulos, "*In Search*", *supra* note 21 at 17.

present a deconstruction of the Court's "*Waterfield* calculus."³⁶ By employing Kelsenian analysis, I will explore the Court's identification of "gaps"³⁷ in police powers, how it has set about filling them and offer an explanation for *why* Parliament has tolerated this judicial impertinence. Chapter Five will serve to review the dominant themes presented throughout the course of this thesis and provide a platform to reassert my argument which is that the APD as it is presently applied by the SCC should be jettisoned from Canadian law.

³⁶ Jochelson, "Multidimensional", *supra* note 13 at 239.

³⁷ Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1946) at 147. See generally Don Stuart, "*Godoy*: The Supreme Reverts to the Ancillary Powers Doctrine to Fill a Gap in Police Power" (1999) 21 CR (5th) 225.

Chapter One: Constitutionalism and Individual Rights in Canada

1.0 Overview

The purpose of this chapter is to review the established framework for law and governance in Canada and the roles assigned to the relevant institutional actors, as well as members of the general public. In particular, I shall explore the legal status of individual rights since the inception of the *Canadian Charter of Rights and Freedoms*¹ and how these constitutionally enshrined rights may be effected by the actions (or inaction) of various parties in the criminal justice system, including the police, the courts and elected government representatives.

1.1 Identifying the Key Institutional Actors

While it is the Supreme Court of Canada (SCC) that shall receive the greatest attention in this thesis, the Court is not the only institution implicated in, or responsible for, the present state of affairs that I am to problematize. Each of the four groups identified will be addressed in the forthcoming analysis. First, citizens at large constitute the all-encompassing group from which the others are derived. Although holding no official power, ordinary people have a hand in the democracy that they enjoy. This is not to suggest the existence of a linear principal-agent relationship, as there are simply too many layers of complexity for such to hold. But citizens do elect the government and they owe a measure of responsibility for the institutions that act on their behalf. The citizenry also has a vested interest in seeing that their constitutional rights are protected and that these liberties are preserved. Second, are the legislators that have been chosen by the population to represent them and give expression to their collective interests. They are responsible for enacting the governing laws and amending them from time to time in response to changing sensibilities or conditions in society. Elected governments stand at the apex of the policymaking function in society and give effect to it through the passage of legislation. The Canadian federal government will receive the most scrutiny, given its legislative prerogative and exclusive constitutional competency in matters of criminal law. Accordingly, the actions (and inaction) of Parliament will be reviewed. Third, are the state-organized policing agencies that are given primary responsibility for

¹ *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*].

the investigation of criminal events and enforcement of the criminal law. Police also play an instrumental (if nebulously defined)² role in the maintenance of the social order. Of the institutions mentioned, it is the police who most regularly come into direct contact with members of the public. Fourth, stands the judiciary, who are assigned the task of interpreting and applying the law. Court systems provide an oversight mechanism that supervises the relationship between the government (the governors) and individuals (the governed)—including persons under investigation or facing potential criminal sanctions. As a transparent public forum to monitor citizen-state relations, the existence of such a body is vital to the health of democracy. In concluding this simplistic sketch, it is to be recognized that each group is subject to various constraints and that they exert varying degrees of influence on these processes, and each other. Like any complex problem, the proliferation of judge-made police powers is one that results from a series of multifaceted and overlapping contributing causes. Correspondingly, correcting this problem will require changes of thinking and conduct to occur within each of the four constituent groups.

1.2 The Canadian Criminal Justice System

1.2.1 The State Apparatus and the Role of Government

Canada is a nation that is steeped in the traditions of liberalism.³ It emerges from the work of seminal liberal thinkers such as Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant that “individual freedom, understood as independence from the arbitrary will of others”⁴ was viewed as “the most basic value in political life.”⁵ These ideals were foundational to the conceptualization and actualization of the democratic nation states that would be subsequently formed in this spirit. This is the

² Jerome H Skolnick, “Democratic Order and the Rule of Law” in KRE McCormick & LA Visano, eds, *Understanding Policing* (Toronto: Canadian Scholars’ Press, 1992) at 47 [Skolnick, “Democratic Order”]. See also Eric J Miller, “Role-Based Policing: Restraining Police Conduct ‘Outside the Legitimate Investigative Sphere’” (2006) 94 Cal L Rev 617 at 658.

³ Richard Devlin, A Wayne MacKay & Natasha Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a ‘Triple P’ Judiciary” (2000) 38 Alta L Rev 734 at 738 [Devlin, “Reducing”].

⁴ Malcolm Thorburn, “Reinventing the Night-Watchman State?” (2010) 60 UTLJ 425 at 441 [Thorburn, “Reinventing”].

⁵ *Ibid.*

basic premise of democracy and the grand promise of representative forms of government. Of course, “[t]his conception of liberalism predates the modern welfare state and the increasing acceptance of state interventions to maximize the ‘common good’ and allocate resources”⁶ for the purpose of improving conditions for the aggregate community and to soften the harsher edges of libertarianism. Thus, today standing alongside the “idealization of liberty and the pursuit of freedom”⁷—an ethos commonly embodied in modern bills of rights—is “a growing awareness of the need to balance liberty against other rights, values, and interests,”⁸ which we can also locate within modern Canadian constitutional instruments and even within their precursors.

Considering briefly the constraints imposed by the substantive criminal law, it follows from the preceding discussion that the law should, in theory,⁹ be indifferent toward “an individual [who] chooses to engage in conduct that the rest of us deem to be unwise or even immoral so long as this conduct does not infringe others’ freedom to use their bodies and property as they see fit in the same way.”¹⁰ One would think that this is evermore compelling in a pluralistic society where people will share different conceptions of the “good”¹¹ and espouse sharply divergent views as to what constitutes acceptable conduct. To mediate the conflicts that invariably emerge between people, there must therefore be an entity that is both impartial and qualified to impose binding decisions on individuals. It is for this reason and “in order to fulfill these demands that we must have a state.”¹² Lacking such a conduit, human societies would be left with subjectivist, vengeance-based systems of justice reminiscent of those that were

⁶ Devlin, “Reducing”, *supra* note 3 at 738.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland: Hart Publishing, 2007) at 89-90 where the distinction between proscribed conduct that is inherently wrongful (*mala in se*) and that which has been declared illegal (*mala prohibita*) on the basis of some other intended societal aim considered worthy of pursuit by those holding political power.

¹⁰ Thorburn, “Reinventing”, *supra* note 4 at 441 [footnote omitted].

¹¹ Richard Devlin, “Reducing”, *supra* note 3 at 738.

¹² Thorburn, “Reinventing”, *supra* note 4 at 441.

predominate in earlier times.¹³

Properly understood, the state, stands conceptually prior to either the criminal law or the constitutional framework. As Professor Malcolm Thorburn explains:

For the state, if properly constructed, can both represent us collectively (and thus speak in the name of all when determining the precise contours of our rights, adjudicating disputes, and enforcing the law) and yet speak for no private party in particular. *The justification for the state's existence – and for its special powers [to proscribe particular forms of conduct and interfere with an individual's liberty] – rests on our need for someone to perform the tasks that only the state can perform and on the state's ability to perform those tasks moderately well.*¹⁴

Significantly, it is only when these conditions are present that any meaningful notion of equality can be capably practiced in society. And the existence of equality is, of course, vital to our conception of the rule of law (ROL).

1.2.2 Balancing Liberty Against the Need For Collective Security

The question of where to draw the dividing lines that establish points at which the interests of personal autonomy and individual liberty are properly made to yield to broader collective concerns is one that should captivate all Canadians. The resolution of these questions carries profound implications for the ability of citizens to exercise their rights and lead their lives as they see fit. In his articulation of the paradigmatic dilemma faced by the criminal law in free societies, Professor Herbert Wechsler, principal architect of the *Model Penal Code*,¹⁵ wrote:

Whatever view one holds about the penal law, no one will question its importance to society. This is the law on which men [and women] place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, *penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.* If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. *The law that carries such responsibilities should surely be as rational*

¹³ Graham J Steele, “A Brief History of Canadian Criminal Law” in Joel E Pink & David C Perrier, eds, *From Crime to Punishment: An Introduction to the Criminal Justice System*, 6th ed (Toronto: Thomson Carswell, 2007) at 14 [Steele, “Brief History”].

¹⁴ Thorburn, “Reinventing”, *supra* note 4 at 441-442 [emphasis added].

¹⁵ See the discussion of Paul H Robinson & Markus D Dubber, “The American Model Penal Code: A Brief Overview” (2007) 10 *New Crim L Rev* 319 at 322-323.

*and just as law can be. Nowhere in the entire legal field is more at stake for the community and for the individual.*¹⁶

As a general postulate few are apt to quibble with the basic sentiments expressed within these words. No one will deny the need for a body of rules to prohibit certain forms of conduct, or, that these prohibitions should be reinforced with penalty provisions to prospectively deter these unwelcome occurrences and punish those who commit unlawful transgressions. Whereas there is wide-scale acceptance of the overall framework used to establish and maintain the balance in society, the appropriateness of the various balance points are, by contrast, beset with matters of persistent and deep controversy. Plainly, the content of the criminal law and the range of law enforcement measures used in its administration attract divergent views. While the primary responsibility for effectuating the appropriate balance is vested in the government that enacts the law, whatever balance has been struck is not immutable. Nor it is immune from challenge. It requires careful attention and a principled approach that must be balanced and comply with constitutional standards. That the law be clear, ascertainable and proportionate are undeniably laudable objectives that ought to be deeply engrained in the criminal justice system. Equally, it is important that we remind ourselves that “[a]nother part of the criminal law...*regulates the conduct of state officials* charged with processing citizens who are suspected, accused, or found guilty of a crime.”¹⁷ Too often this aspect of criminal law and procedure is overlooked or given inadequate attention within the wider socio-political discourse. The presence of these countervailing forces to constrain government actors is imperative and must be of paramount concern for any system of justice deserving of the name.¹⁸ At its heart, this entails the cultivation of conditions which ensure that the state is not rendered impotent to enforce the laws that have been enacted whilst simultaneously safeguarding individuals from heavy-handed conduct brought by agents of the state, who if left unchecked and to their own devices, may be inclined towards overzealous and

¹⁶ Herbert Wechsler, “The Challenge of a Model Penal Code” (1952) 65 Harv L Rev 1097 at 1098 [emphasis added].

¹⁷ Skolnick, “Democratic Order”, *supra* note 2 at 38 [emphasis added and footnoted omitted].

¹⁸ Don Stuart, "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2001) 28 Man LJ 89 at 89 [Stuart, “Recodify”].

unprincipled enforcement of the law. Fortunately, we can locate numerous procedural and substantive constraints in the *Criminal Code*¹⁹ aimed at securing these objectives. Matched to these stand the “legal rights” enumerated in the *Charter* which inhibit the roughshod pursuit of law enforcement objectives as declared by law enforcement officials themselves or other state actors. Cumulatively, the broad framework presented by Wechsler is harmonious with the assertion offered by Professors Steve Coughlan and Glen Luther that, “[t]he central goal of a proper criminal justice system must be to maintain a balance between the individual interest of private citizens to carry on their lives free from state interference, and the communal interest in maintaining a safe society.”²⁰ At bottom, the resolution of these competing tensions are political choices that are properly placed, in the first instance, in the democratic arena and with a residual oversight role preserved for the judiciary to see that the balance that has been struck accords with constitutional standards.

The law of criminal procedure has been aptly described as “a field of conflicting values.”²¹ It is on this field that the ongoing battle “between the interests of the state to ensure the collective security of its subjects and the interest of those subjects liberty and privacy”²² is pitched. It is also here upon this terrain that my thesis is situated. However as stated previously, I will take a largely agnostic view of existing police powers and instead analyze the deficiencies surrounding the state’s acquisition of coercive law enforcement powers beyond those specified in criminal legislation. Quite apart from the question of what substantive aims the government may pursue through its invocation of the criminal law,²³ stands the question of what means it can employ to serve these ends. Law is of course meaningless if it is unenforceable or merely left unenforced. It must also be recognized that the law can become a retrograde force in society and undercut its

¹⁹ RSC 1985, c C-46.

²⁰ Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 1 [Coughlan, *Detention*].

²¹ Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 4 [Coughlan, *Criminal*].

²² *Ibid* at 3.

²³ Douglas Husak, *Philosophy of Criminal Law* (Totowa, NJ: Rowman & Littlefield, 1987) at 224 [Husak, *Philosophy*].

own objectives if it is enforced capriciously by those entrusted with its administration.²⁴ Incidents involving the uneven application of the law are corrosive to the credibility of the legal enterprise as a whole. The criminal justice system demands that government actors be equipped to administer the laws that are in force—to investigate, apprehend, and prosecute those who violate the law. They must, however, be exercised judiciously and in a manner that is proportionate to the harms that are to be averted. Where the state seeks to curtail individual liberty or impose punitive sanctions on citizens, we can attach further obligations on the state under the ROL rubric. The ROL requires that everyone shall be governed by and subject to the same body of laws.²⁵ This is not to suggest that the law cannot draw distinctions between different classes of persons, for instance, by providing additional powers to police that are not available to ordinary citizens. In the domain of criminal law these conditions become necessary preconditions for the legitimate exercise of state power. Harmonious with this is another basic tenet of the criminal law, the “principle of legality”²⁶ (POL). The POL requires that any interference with individual liberty or personal property be based on lawful authority.²⁷ Within the context of Canadian criminal law—shot through as it is with constitutional thresholds—I suggest that the only legitimate way for the state to take coercive actions that impair, or seize an individual’s liberty (or property) is through the passage of a competent statute. In my estimation, the prospect of uncovering any further pre-Canadian common law powers stands as an extremely remote possibility. Therefore, when measured against the POL, the creation of common law police powers through the ancillary powers doctrine (APD) is a wholly illegitimate form of lawmaking.

It stands to reason that police should be given “sufficient power to protect the public and to enforce [the law], but not so much power that the police become a law unto

²⁴ See generally David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); and Todd Gordon, *Cops, Crime and Capitalism: The Law-and-Order Agenda in Canada* (Halifax: Fernwood Press, 2006).

²⁵ See generally Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 LQR 195.

²⁶ James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) 31 Queen’s LJ 1 at 2 [Stribopoulos, “In Search”].

²⁷ *Ibid.*

themselves.”²⁸ However, it is of even greater importance that we understand the process by which these thresholds are established to ensure that this framework is properly enforced. The legitimacy of the determinations made in the “politicolegal”²⁹ arena hinge upon whether the decisions regarding the balancing of these opposing forces were informed and demonstrably supported by principle. Moreover, in a representative democracy such as Canada, *bone fide* decisions must take into account a full array of the appropriate principles bearing on the issue or issues at stake and treat each with due regard.³⁰ Otherwise, the policy choices that have been made rest on faulty foundations and provide inadequate bases to claim legitimacy.

Incidents involving the uneven (or “checkerboard”)³¹ application of the law are corrosive to the credibility of the legal enterprise as a whole. As it is manifest that penal law represents “society’s most destructive and intrusive form of intervention against the individual,”³² it must be exercised judiciously and in a manner that is proportionate to the harms it is directed to combat. Providing individuals with protection against abuses of power is therefore necessary and harkens the need for independent third party oversight. Indeed, in a participatory democracy that is committed to, *inter alia*, the ROL, there must be well-defined limits placed on state power. As Professor Jerome Skolnick perceptively writes,

[W]hen law is used as the instrument of social order, it necessarily poses a dilemma. The phrase ‘law and order’ is misleading because it draws attention away from the substantial incompatibilities existing between the two ideas. Order under law suggests procedures different from achievement of ‘social control’ through threat of coercion and summary judgment. Order under law is concerned

²⁸ Dennis Forcese, “Police and the Public” in Robin Neugebauer, ed, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars’ Press, 2000) at 180.

²⁹ David Erdos, “Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact” (2009) 34 *Law & Soc Inquiry* 95 at 95.

³⁰ See generally Graham Mayeda, “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” (2010) 50 *SCLR* (2d) 41.

³¹ Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 1986) at 179.

³² David C Perrier, “An Introduction to Criminal Law” in Joel E Pink & David C Perrier, eds, *From Crime to Punishment: An Introduction to the Criminal Justice System*, 6th ed (Toronto: Thomson Carswell, 2007) at 12.

not merely with the achievement of regularized social activity but with the means used to come by peaceable behavior, certainly with procedure, but also with positive law... In short, 'law' and 'order' are frequently found to be in opposition, because law implies rational restraint upon the rules and procedures utilized to achieve order. Order under law, therefore, subordinates the ideal of conformity to the ideal of legality.³³

It is therefore the case that the criminal law is “not merely an instrument of order, but may frequently be its adversary.”³⁴ Thus, there is a vital distinction between law on the one hand and the bald assertion of authority by the state on the other—even when both forces are aimed at ostensibly similar objectives. While it is apparent that the objectives of law enforcement are oftentimes antagonistic to the maintenance and exercise of civil liberties, the balancing of these competing interests is not a zero sum equation in which one side can fully eclipse the other. Notwithstanding the fact that, in reality, “perfect”³⁵ or full-enforcement of the law is not truly possible,³⁶ it must be said that, if it were, such a state of affairs would not be desirable.³⁷ As Professor Herbert Packer neatly summarizes, “if the criminal law were followed to its strict letter the results would be intolerable.”³⁸ Adding some gloss on the point, Stanley Beck indicates correctly that, “there are many powers we deny to the police that, if granted, would undoubtedly increase their efficiency. Yet we withhold the grant, not because we wish to hamper law enforcement, but because there are values we place above efficient police work.”³⁹ This harkens our attention to the need for the thorny issues associated with allocations of police powers to be publicly declared through the democratic process for the twin reasons that: one, this stands as the site at which the government can later be held politically accountable for unpopular policy choices; and two, the enactment of

³³ Skolnick, “Democratic Order”, *supra* note 2 at 39-40.

³⁴ *Ibid* at 38 [footnote omitted].

³⁵ Michael Plaxton, “Offence Definitions, Conclusive Presumptions, and Slot Machines” (2010) 48 Osgoode Hall LJ 145 at 164.

³⁶ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 286 [Packer, *The Limits*].

³⁷ Stanley A Cohen, “Invasion of Privacy: Police and Electronic Surveillance in Canada” (1982) 27 McGill LJ 619 at 636 [Cohen, “Invasion”].

³⁸ Packer, *The Limits*, *supra* note 36 at 290.

³⁹ Stanley M Beck, “Electronic Surveillance and the Administration of Criminal Justice” (1968) 46 Can Bar Rev 643 at 687 [emphasis added].

legislation stipulating the limits of state power (and, at least implicitly, the corresponding diminishment of civil liberties) provides further oversight of government activities by making these actions amenable to challenge under s. 1 of the *Charter*.

1.2.3 Individual Rights and Judicial Review

The legal effect of the repatriated *Constitution* (and the entrenchment of the *Charter*) cannot be overstated. It profoundly altered the very framework for law and governance in Canada. Undoubtedly, the vesting of the SCC with authority as the final arbiter on questions of constitutionality stands amongst the greatest changes precipitated by the *Charter*. However, in addition to the aggrandized duties assigned to judicial institutions, the *Charter* simultaneously imposed important limitations on government power vis-à-vis citizens and for the first time conferred constitutional protections on the individual rights of citizens. Under the *Charter* these rights are enforceable against the state and backstopped by justiciable remedies.⁴⁰

Prior to 1982, individual rights were not enshrined in any constitutional instrument and could be abridged at will by governments. In this era, the federal and provincial governments were free to legislate in ways that allowed for the disparate treatment of citizens and other persons,⁴¹ provided that the legislation in question fell within one of the government's spheres of legislative competency as set out in the *Constitution Act, 1867*.⁴² Indeed, under the terms of the original constitution no limits were placed upon the powers of government vis-à-vis citizens.⁴³ It is unsurprising then, that prior to the *Charter* any "gaps in the patchwork of statutory and common law rules relating to police powers were rarely of any practical concern to law enforcement."⁴⁴ Thus, the police enjoyed virtually unfettered discretion in deciding how to act and faced

⁴⁰ *Charter*, *supra* note 1, s 24 and 52.

⁴¹ Stribopoulos, "In Search", *supra* note 26 at 3. For example see *R v Quong-Wing*, (1914) 49 SCR 440.

⁴² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

⁴³ James Stribopoulos, "Constitutional Controls on Police Powers In Canada as Compared to Japan" (2004) 5 J Centre Int'l Stud 31 at 31 [Stribopoulos, "Constitutional Controls"].

⁴⁴ Stribopoulos, "In Search", *supra* note 26 at 4.

little, if any, consequence where they were found to have violated an individual's civil liberties in court.⁴⁵

The advent of the *Charter* heralded a new day for law and governance in Canada. The Court's role expanded significantly with the responsibility of scrutinizing legislative and executive exercises to confirm their constitutional compliance.⁴⁶ Courts must determine not only whether a law authorizes a particular state intrusion on liberty or privacy, but assess whether the authorizing source meets with constitutional standards.⁴⁷ Implicit in the design, is the requirement that judges are now compelled to interpret and give meaning to the clauses set out in the *Charter*. In addition, the drafters of the *Charter* also saw fit to expressly provide the judiciary with the authority to grant broad, discretionary remedies.⁴⁸ Such oversight powers should not be seen as conflicting with democratic principles,⁴⁹ rather, when used properly these powers work to preserve and strengthen our democracy.⁵⁰ At least in theory, this is how things are supposed to work. As will be shown, the Court's actions under the APD (coupled with the inaction of Parliament) have, however, called some of these foundational premises into question.

The *Charter* expressly invites the enforcement of the rights and freedoms that it guarantees and provides a mechanism for the vindication of constitutional rights. Engrained in the *Charter* is the basic idea that constitutional rights exist to place limits upon the means through which the government may pursue its chosen ends. It does not, in itself, compel state action.⁵¹ This notion was first articulated by Mr. Justice Dickson

⁴⁵ *Ibid* [footnote omitted].

⁴⁶ James Stribopoulos, "Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada" in Margaret E Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 351-352 [Stribopoulos, "Crime Control"].

⁴⁷ Stribopoulos, "In Search", *supra* note 26 at 15.

⁴⁸ *Charter*, *supra* note 1, s 24.

⁴⁹ Robert J Sharpe & Katherine E Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 182 [Sharpe, *The Charter*].

⁵⁰ *Ibid*.

⁵¹ Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005) at 4-5 [Quigley, *Procedure*].

(as he then was) for a unanimous Court in *Hunter v Southam*,⁵² where he informed Canadians that:

The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. *It is intended to constrain governmental action inconsistent with those rights and freedoms*; it is not in itself an authorization for governmental action.⁵³

Although a significant pronouncement, it must be said, however, that the rights contained in the *Charter* are neither absolute nor inviolable. The “misnomer”⁵⁴ contained in the reputed guarantee of rights in Section 1 of the *Charter* has been pointed out by Professor Don Stuart who illuminates the reality that in actual fact this provision provides an entryway for the Court to confirm the limitations of these rights that have been stipulated in legislation. Nevertheless, where the government wishes to pursue actions that infringe upon rights, it now must establish that its chosen course of action is demonstrably justified and reflects reasonable limits on the rights that are to be abridged.⁵⁵ Moreover, incursions by the state into *Charter*-protected areas must be “prescribed by law”⁵⁶ in order to be upheld as constitutional exercises of state authority. This requirement is the embodiment of the POL and reflective of its constitutionalization. If the government fails in this regard it risks having its legislation declared invalid and set aside by the courts. Therefore, it is important that we recognize that the Court’s use of the APD deprives individual’s of the ability to access their rights under s. 1 of the *Charter* and concomitantly the state of need for it to provide a compelling justification for its actions.

Section 32 of the *Charter* extends its reach beyond the simple review of legislation to ensure that it is constitutionally fit. It goes further to place all government actions under the watchful gaze of the Court and “put the legality of police actions into question.”⁵⁷ The legal rights (ss. 7-14) stipulated in the *Charter* address the most

⁵² [1984] 2 SCR 145, 11 DLR (4th) 641.

⁵³ *Ibid* at 155 [emphasis added].

⁵⁴ Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2010) at 2 [Stuart, *Charter Justice*].

⁵⁵ *Charter*, *supra* note 1, s 1.

⁵⁶ *Ibid*.

⁵⁷ Glen Luther, “Police Power and the *Charter of Rights and Freedoms*: Creation or Control?” (1986) 51 Sask L Rev 217 at 218 [Luther, “Police Power”].

prevalent investigative tactics used during citizen-police encounters.⁵⁸ Consequently, improper or unlawful conduct on the part of the police during a criminal investigation can now trigger remedial relief for a defendant facing trial.⁵⁹ This was a significant advancement in Canadian law and is compatible with the edicts of the ROL. As such, the *Charter* is foundational to our conception and understanding of lawful policing measures as it directly imposes limitations on law enforcement power.⁶⁰ Not only does it establish certain baseline parameters for the police to meet, it also serves as the yardstick against which police actions are to be measured. The inclusion of the remedial provisions contained in s. 24 of the *Charter* has precipitated an unprecedented volume of state actions being challenged by individuals. Those contesting the propriety of state action now have many planks upon which to advance their arguments. So, when the police deviate from these threshold constitutional standards, the state, is now liable, and stands to incur legal consequences for the unlawful actions of its agents. In short, the *Charter* defines the relationship between the governed and the governors. It sets the limits, provides the rules of the game and expects that the Court is there to officiate. As will be demonstrated however, the use of the *Waterfield* test by the judiciary has seriously impaired this dynamic and forces us to reexamine—if not, reposition altogether—our understanding of the Court’s role in the administration of the criminal justice system.

1.2.4 The Principle of Legality and the Canon of Strict Construction

As stated previously, we need not cling to the view that the principle of legality exclusively demands the legislative conferral of police powers. Rather, we can (and, indeed must) broaden our conception of the POL to include those common law powers that pre-date Canadian law.⁶¹ This articulation of the POL—and the allowance that is

⁵⁸ Stanley A Cohen, “Controversies in Need of Resolution: Some Threshold Questions Affecting Individual Rights and Police Powers Under the Charter” (1984) 16 *Ottawa L Rev* 97 at 113.

⁵⁹ See Nancy Reichman, “Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Practices” in Kip Schlegel & David Weisburd, eds, *White-Collar Crime Reconsidered* (Boston: Northeastern University Press, 1992) at 254 where a distinction between “mis- and malfeasance” is drawn.

⁶⁰ Luther, “Police Power”, *supra* note 57 at 218.

⁶¹ See also the Supreme Court’s decision in *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609 where the Court reached a parallel decision in relation to substantive criminal law. It bears noting, however, that the SCC’s

made for common law police powers—is harmonious with the law as established by early English jurisprudence and thus, the Anglo-Canadian common law tradition.⁶² The case of *Entick v Carrington*⁶³ is illustrative of how the common law is properly used when determining the limits of executive power. There it was observed that judges are to "see if such a justification can be maintained by the text of the statute law, *or by the principles of common law*,"⁶⁴ which is necessary in order to sanctify, as lawful, any state intrusion upon the "sphere of personal sovereignty"⁶⁵ that resides with citizens. Where recognized common law rules were found to exist, they then became applicable in the case at bar. Subject to the demands of the *Charter*, this position has retained its currency and remains the law in Canada. In this way, we are able to accept, for instance, the Supreme Court's recognition in *Cloutier v Langlois*⁶⁶ of the historically rooted common law power permitting searches as incident to lawful arrest as being consistent with the POL. However, we should equally (and vigorously) reject the announcement of novel investigative powers created through the APD. The reason for this is that the common law power recognized in *Cloutier* is predicated on a substantive rule that is amenable to the application of *stare decisis* in the ordinary course—and also, *Charter* scrutiny. By contrast, police powers generated by the Court using the APD are not forged from any articulable *substantive* common law rule. Rather, the Court's APD-based lawmaking derives exclusively from *Waterfield/Dedman* and amounts to a *procedural* rule in favour of the Court—one made by the Court itself—permitting it to fashion unprecedented police powers after-the-fact, if and when, it sees fit to do so in a given case. That is the linchpin and sole legal basis for the rules generated through APD jurisprudence. Plainly, this sets the Court's post-*Charter* ancillary common law police powers apart from—and

judgment dealt solely with the common law offence of contempt of court and the Court's ruling was confined solely to that offence.

⁶² TRS Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge LJ 111 at 116 [Allan, "Legislative"].

⁶³ (1765), 19 State Trials 1029, 95 ER 807 [*Entick*].

⁶⁴ *Ibid* at 1066 [emphasis added].

⁶⁵ Malcolm Thorburn, "Two Conceptions of Equality Before the (Criminal) Law" in Francois Tanguay-Renaud and James Stribopoulos eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational and International Criminal Law* (Oxford: Hart Publishing, 2011) at 8.

⁶⁶ [1990] 1 SCR 158, 53 CCC (3d) 257 [*Cloutier*].

stands them on markedly different legal footing—those common law powers that do comply with the POL. It also reveals the Court’s accretion of lawmaking authority in this area to have been self-authorized, which must be seen as a deeply troubling development in Canadian law.

Before proceeding, there is another important concept that emerges from *Entick*. The case stands for the proposition that where unambiguous legal authorization is found to be wanting, courts are required to disclaim the police actions as *ultra vires* assertions of state power. Thus, we find that the POL stands in close proximity (and is intimately related)⁶⁷ to the canon of strict construction. Hence, in his explanation of the POL, Professor TRS Allan, writes that its primary significance,

lies in the court’s insistence that the burden of establishing the requisite executive authority to act is borne by him who asserts it. In the absence of convincing proof that the issue and execution of general warrants of search and seizure were sanctioned in law, the conclusion must be that they were not.⁶⁸

Continuing this exposition, Allan rightly observes that, “the refusal of courts to sanction departures from the ordinary law in the interests of the state, as those interests were interpreted by officials [in favour of themselves]”⁶⁹ is in precise conformity with what the POL demands. It follows from the preceding discussion that the preserve of individual liberty remains wide and unimpeded, save for those areas that have been impacted by valid legal authority. Placed in the context of the post-*Charter* legal framework this should compel the finding that unauthorized police actions are, on their face, illegal in nature. Following that determination, it remains open to the state to argue under s. 24(2) that any ill-gotten evidence should nevertheless be admitted against an accused in support of the criminal conviction that is being sought. But it should also be abundantly clear that POL-abridging violations of the *Charter* do not provide an appropriate legal foundation to confer common law police powers on state actors. This adjudicative model is one that has been adopted previously by the SCC in police powers cases.⁷⁰ However, the Court has not been consistent in its approach and has demonstrably retreated from the

⁶⁷ Skolnick, “Democratic Order”, *supra* note 2 at 39.

⁶⁸ Allan, “Legislative”, *supra* note 62 at 115.

⁶⁹ *Ibid.*

⁷⁰ For example see *R v Wong*, [1990] 3 SCR 36, 60 CCC (3d) 460.

Diceyan model in recent times.⁷¹ Yet, in doing so, the Court has failed to offer a cogent explanation (much less a convincing rationale) for why it has seen fit to depart from its traditional role as protectors of civil liberties against untoward encroachments from the state. Even if we are to regard the substantive allocations of power that have been made in favour of the state as ones that are desirable in nature, for instance, permitting the forcible entry into homes in response to 911 emergency calls to determine public safety needs, we must not allow the Court's apparent pragmatism to blind us to the fact that these powers have been doled out non-democratically. Moreover, the *Waterfield/Dedman* test is not properly attuned (or designed) to weigh the competing principles that are inherent in policymaking, for, it is itself an *ad hoc* and undemocratic creation. As I will show, the use of the APD stands as an unnecessary and unpredictable mechanism to determine important matters of social policy effecting the individual rights of Canadians, particularly as we find that it has been used to unfairly (and uniformly) benefit the state. Additionally, and notwithstanding the apparent legal position occupied by the APD in Canadian law, there remains ample reason for us to oppose the undemocratic expansion of coercive state power by an unelected judiciary. At root, these objections are located in equality-based principles and the need for courts to safeguard citizens (especially those most vulnerable in society) against oppressive or otherwise unconstitutional treatment at the hands of the state. This is especially so once it is seen that there is a substantial risk that discretionary police powers may be misapplied on a disproportionately basis against certain communities;⁷² ones that are comprised of

⁷¹ Michael Plaxton, "Police Powers After Dicey" (2012) 38 Queen's LJ 99 at 101 [Plaxton, "Police Powers"].

⁷² For example see *R v Golden*, 2001 SCC 83 at para 83, [2001] 3 SCR 679 where the Supreme Court declared that, "African-Canadians and Aboriginal people are over-represented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches." Similar conclusions pertaining to the injurious effects of systemic racism and prejudice pervading the Canadian criminal justice system—along with recognition of the underlying problem itself—were unanimously identified by the Court in, *inter alia*, *R v Spence*, 2005 SCC 71, [2005] 3 SCR 48; *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 and *R v Williams* [1998] 1 SCR 1128, 159 DLR (4th) 493. See also the report of the Ontario Human Rights Commission, *Paying The Price: The Human Cost of Racial Profiling* (Inquiry Report) (2003) online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling>>.

persons who are socially marginalized, economically disadvantaged or otherwise vulnerable and that are effectively excluded from the political processes that could (and should) offer and afford greater equitableness within the criminal justice system. Hence, if courts are seen to be not only consistently siding with the state, but also failing to give meaningful effect to the *Charter* as I contend occurs under the established APD jurisprudence of the Supreme Court, then a great disservice occurs and grave injuries are inflicted upon the constitutional rights of Canadians. It also results in a duplication of the lawmaking function and signals that the rights-protection post has been essentially abandoned, or, at least relegated to status as an afterthought. It would seem inevitable that the gradual erosion of *Charter* rights, alongside the refashioning of constitutionalism to favour its participating institutions at the expense of individual rights, would lead to the diminished esteem and public confidence that is essential to any proper functioning of court and democratic processes in Canada.

1.3 Policing in Canada

The presence of police officers on Canadian streets is not merely accepted, but rather an expected aspect of public life. However, beyond the bare expectation that police services be provided, seemingly little thought is given to the various functions and roles performed by police in society. Indeed, as Stanley Cohen notes, “almost since the appearance of the modern police force the purposes and tasks of the police have been mixed.”⁷³ Policing is comprised of a number of distinct elements, which can be described in terms of order-maintenance, community service and law enforcement.⁷⁴ As Erica Pasmenny states, “the police exert tremendous power; they choose whether or not to ignore certain behaviour, to issue an unofficial caution or to initiate proceedings which will channel the suspect into the formal justice process.”⁷⁵ In this way the police act as the gatekeepers to the criminal process.⁷⁶ Undeniably, they play an indispensable and

⁷³ Cohen, “Invasion”, *supra* note 37 at 623.

⁷⁴ *Ibid* at 620.

⁷⁵ Erica Pasmenny, “Aboriginal Offenders: Victims of Policing and Society” (1992) 56 Sask L Rev 403 at 403-404 [footnote omitted].

⁷⁶ Clifford D Shearing, “Subterranean Processes in the Maintenance of Power: An Examination of the Mechanisms Coordinating Police Action” in KRE McCormick & LA Visano, eds, *Understanding Policing* (Toronto: Canadian Scholars’ Press, 1992) at 350 [footnote omitted].

front line role in the administration of the criminal justice system.⁷⁷ Nowhere is this contested. I do, however, wish to contest the legal framework that has thrust the police into the role of *de facto* interpreters of constitutional rights in the first instance, which frequently permits them to self-determine and exercise their own mandate in dealing with citizens. For reasons that I will explore later in my thesis, unlike Professor Michael Plaxton,⁷⁸ I do not see the police as administrative actors whose decisions should be presumptively entitled to deference from the judiciary.⁷⁹ Instead, the application of coercive, discretionary authority over citizens must be closely analyzed and carefully monitored to ensure its continual compliance with constitutional standards.

1.3.1 Duties

Writing prior to the *Charter*, Clayton Ruby explained the common law duties incumbent upon the police as follows:

[Police] constables have a duty to prevent crime and a duty when a crime is committed to bring the offender to justice; to preserve for use in court evidence of crime which has come into their possession without wrong on their part; to prevent apprehended breaches of the peace; and to enforce statutes and by-laws.⁸⁰

The Supreme Court affirmed this in *Dedman v The Queen*⁸¹ where it was held that, “at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property.”⁸² For the most part these duties have now been codified and statutorily incorporated into police services legislation.⁸³ Although the Supreme Court has stated that, “[p]olice powers and police duties are not necessarily correlative,”⁸⁴ it is evident nonetheless that such broadly

⁷⁷ Peter M Brauti & Candice Welsch, “Illegal Police Conduct in the Course of a Bona Fide Investigation” (1999) 43 CLQ 64 at 64.

⁷⁸ *Supra* note 71.

⁷⁹ *Ibid* at 120.

⁸⁰ Clayton C Ruby, “Obstructing a Police Officer” (1973) 15 CLQ 375 at 394 [footnotes omitted].

⁸¹ [1985] 2 SCR 2 para 35, 20 DLR (4th) 321.

⁸² *Ibid* at para 65.

⁸³ Stanley Cohen, “Policing Security: The Divide Between Crime and Terror” (2004) 15 NJCL 405 at 434. See also Rosemary Cairns Way, “The Law of Police Authority: The McDonald Commission and the McLeod Report” (1985) 9 Dalhousie LJ 693 [Cairns Way, “The Law”].

⁸⁴ *R v Mann*, 2004 SCC 52 at para 35, [2004] 3 SCR 59 [*Mann*].

defined duties do not tell us very much about what the police may do in furtherance of their duties.⁸⁵ The most troubling and problematical of these duties in both legal and practical terms is the duty to prevent crime.⁸⁶ As Cohen points out, the assertion “that one of the prime functions of the police is the ‘prevention of crime’ is largely uncontroverted due to the looseness which attends to the use and meaning of the phrase.”⁸⁷ Thus, rather than calling attention to the fact that such an overarching duty is neither self-executing nor self-limiting, it has instead become accepted as a homily.⁸⁸ As will be shown in Chapter Two, the considerable breadth of police duties is directly implicated in the *Waterfield* test and has had an important effect on its application.

1.3.2 Sources of Police Power

The “lack of specificity in police powers”⁸⁹ is a regrettable hallmark of Canadian law. In Canada, police powers have seldom been conveyed with exactitude. Indeed, as Luther and Coughlan have pointed out, imprecision and a general “lack of clarity”⁹⁰ has long shrouded the governing limits on the exercise of coercive authority by police.⁹¹ Much of this problem stems from the absence of comprehensive statutory provisions. In this regard, Canada as a country lags significantly behind other Commonwealth nations.⁹² To the extent that existing legislation fails to provide clear directives, and where internally developed policing policy leaves the individual officer on the street with no clear mandate, it is then left to officers to determine and to interpret for themselves what they should be doing at a given time or in a particular circumstance.⁹³ This should be

⁸⁵ Luther, “Police Power”, *supra* note 57 at 218.

⁸⁶ Cohen, “Invasion”, *supra* note 37 at 624.

⁸⁷ *Ibid* at 625.

⁸⁸ *Ibid*.

⁸⁹ Glen Luther, “Consent Search and Reasonable Expectations of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada” (2008) UBC L Rev 1 at 7.

⁹⁰ Coughlan, *Detention*, *supra* note 20 at 5.

⁹¹ Cohen, “Invasion”, *supra* note 37 at 624.

⁹² *Tim Quigley, "Reforming Criminal Procedure" in Don Stuart et al, Making the Criminal Law Clear and Just: A Criminal Reports Symposium (Toronto: Carswell, 1999).* See also *R v Clayton*, 2007 SCC 32 at para 74, [2007] 2 SCR 725, and *R v Kang-Brown*, 2008 SCC 18 at para 131 and 253 [*Kang-Brown*].

⁹³ JA Blake, “The Role of Police in Society” in William T McGrath & Michael P Mitchell, eds, *The Police Function in Canada* (Toronto: Methuen Publications, 1981) at 77 [Blake, “The Role”]. See also George L Kelling & Catherine M Coles, *Fixing Broken*

troubling to everyone, including the police. Presently, individual police officers in Canada are allocated an unnecessarily broad level of discretion when discharging their responsibilities as law enforcement agents.⁹⁴ And, as my analysis will demonstrate they are subject to inadequate oversight measures. This is unfortunate, given that greater clarity in the law would benefit everyone holding a stake in the administration of justice in society.

Policing is a matter of overlapping and concurrent jurisdiction within the Canadian constitutional framework, and as Coughlan explains, “[b]oth Parliament and the provincial legislatures have the jurisdiction to create police forces and both levels of government have done so.”⁹⁵ Indisputably, the enactment of statutory powers is the most authoritative way to confer authority upon agents of the state.⁹⁶ Additionally, the legislative process carries the benefit of being the clearest and most comprehensive way to specify the lawful bounds of police conduct. For example, s. 495 of the *Criminal Code*⁹⁷ grants the police the authority to arrest persons without a warrant and then goes on to itemize the criteria that must be satisfied in order to trigger this power. In other words, it stipulates on a prospective basis the parameters of the warrantless arrest power. This is the most optimal way to delineate and structure police powers—both in terms of substance and *process*. By contrast, the creation of *ex post facto* common law powers on an *ad hoc* basis leads to incomplete (and sometimes nebulous)⁹⁸ rules that tend to raise more questions than they answer.⁹⁹ It will be argued throughout this thesis that the democratic process is to be preferred over the adjudicative process when it comes to the matter of introducing new or expanded forms of coercive investigative powers. Indeed,

Windows: Restoring Order and Reducing Crime in Our Communities (New York: Free Press, 1996) at 167 where it is stated that, “when police are not provided with explicit authority to deal effectively with the problems they encounter and/or that citizens call to their attention, they often unwittingly become dirty workers, furtively ‘doing what has to be done’ through the exercise of their discretion.”

⁹⁴ Luther, “Police Power”, *supra* note 57 at 220.

⁹⁵ Coughlan, *Criminal*, *supra* note 21 at 9.

⁹⁶ Coughlan, *Detention*, *supra* note 20 at 10.

⁹⁷ RSC 1985, c C-46.

⁹⁸ The problem of lack clarity surrounding judge-made police powers is examined more extensively in Chapter Three.

⁹⁹ Stribopoulos, “In Search”, *supra* note 26 at 27.

the position that I advance holds that the legislative process is not only the most efficacious, it is only *legitimate* means of extending state power over citizens because it complies with the POL and enables the application of s. 1 analysis. In short, this is the only way in which for police powers to be “structured, confined and checked”¹⁰⁰ that demands lawmakers and the Court to perform their respective—yet, separate and severable—constitutionally-assigned functions.

Unfortunately, legislation is not the only method through which the police derive their authority. Court decisions have also been a wellspring of police powers. Indeed, this phenomenon is the central preoccupation of this thesis. Given that the APD will be examined extensively throughout the remainder of this work, it is appropriate now to take a brief look at the other non-statutory sources of police power. First, there have been several instances where the Court has recognized exercises of state power as being implicitly stated within legislation. On a number of occasions the Supreme Court has professed to find “implied statutory powers”¹⁰¹ (ISP) during the interpretation of legislation offered by the state in support of the lawfulness of impugned police actions. Conceptually, in such cases the Court stops short of creating police powers “out of whole cloth”¹⁰² as they do when using the APD. However, such adjudicative techniques still evince a form of “hands-on”¹⁰³ judicial instrumentalism.¹⁰⁴ Explaining the distinction between ISP-based reasoning and the APD, Mr. Justice LeBel writing in dissent—and with no shortage of irony—in the case of *R v Orbanski; R v Elias*,¹⁰⁵ elucidated in his remarks, that, “[i]f there is something missing in the statute, let us *read in* the necessary powers [using ISP-anchored logic]. Failing that, let us go to the common law and *find* or

¹⁰⁰ Stanley A Cohen, “Invasion of Privacy: Police and Electronic Surveillance in Canada” (1982) 27 McGill LJ 619 at 643. See also Kenneth Culp Davis, *Police Discretion* (St. Paul, MN: West Publishing, 1975) at 170.

¹⁰¹ *R v Landry*, [1986] 1 SCR 145 at para 21, 26 DLR (4th) 368. See also *R v Shoker*, 2006 SCC 44 at para 35, [2006] 2 SCR 399.

¹⁰² James Stribopoulos, “Unchecked Power: The Constitutional Regulation of Arrest Reconsidered” (2003) 48 McGill LJ 225 at 233 [Stribopoulos, “Unchecked”].

¹⁰³ Aileen Kavanagh, “Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape” (2011) 9 Intl J Const L 172 at 174.

¹⁰⁴ Nathan Forester, “Electronic Surveillance, Criminal Investigations, and the Erosion of Constitutional Rights in Canada: Regressive U-Turn or a Mere Bump in the Road to *Charter* Justice?” (2010) 73 Sask L Rev 23 [Forester, “Electronic Surveillance”].

¹⁰⁵ 2005 SCC 37, [2005] 2 SCR 3 [*Orbanski*].

create something there [through *Waterfield*].”¹⁰⁶ However, in spite of their analytical differences, the practical effect is the same: both courses of action have served to enlarge the ambit of state authority. Second, there exists a pool of common law powers that predated not only the *Charter*, but also Canadian law.¹⁰⁷ Much like the use of handcuffs to restrain arrested individuals, the police routinely conduct incidental searches of those under arrest, which “can vary in intrusiveness from a mere pat-down to a complete strip search.”¹⁰⁸ Interestingly, all of the search powers alluded to by Stribopoulos have found their genesis in Supreme Court jurisprudence and are each common law creations. The decision in *Cloutier v Langlois*¹⁰⁹ gave the police the power to search as an incident of a lawful arrest,¹¹⁰ *R v Golden*¹¹¹ permitted the use of strip searches and, more recently, the Court in *R v Mann*¹¹² authorized protective pat-down searches in circumstances where a person has been detained, but not yet arrested. The bedrock for each of these historic powers was found to reside in ancestral judicial precedents and then adapted to fit the circumstances of these cases. There is an important caveat impeding the future recognition of lingering, unarticulated common law powers: they must be *Charter* compliant. If they are not,¹¹³ then the Court must modernize these residual powers and bring them in line with constitutional standards or else repudiate them.¹¹⁴ Thus although not extinguished, historical common law powers have likely been exhausted.

Finally, and although not a source *per se*, we must confront the presence of “*de facto* or default police powers.”¹¹⁵ These powers derive not from any special powers given to the police, but rather are ones that flow from an individual officer’s capacity as a

¹⁰⁶ *Ibid* at para 69 [emphasis added].

¹⁰⁷ Coughlan, *Criminal*, *supra* note 21 at 14

¹⁰⁸ Stribopoulos, “Unchecked”, *supra* note 102 at 231 [footnote omitted].

¹⁰⁹ *Supra* note 66.

¹¹⁰ For commentary arguing that, in some instances, the unsettled scope of these powers are likely irreconcilable with s. 8 standards, see Peter Sankoff, “Articulable Cause Based on Searches Incident to Detention—This *Cooke* May Spoil the Broth” (2002) 2 CR (6th) 41 at 48; and Steve Coughlan, “Articulable Cause: Proceed with Caution or Full Stop?” (2002) 2 CR (6th) 49 at 61-62.

¹¹¹ 2001 SCC 83, [2001] 3 SCR 679.

¹¹² *Supra* note 84.

¹¹³ For example see *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609 [*Feeney*].

¹¹⁴ Sharpe, *The Charter*, *supra* note 49 at 67.

¹¹⁵ Coughlan, *Detention*, *supra* note 20 at 23.

citizen. As agents of the state, when an individual takes on the position of a police officer, he or she acquires a new series of responsibilities and rights that set them apart from the rest of the community. Individual police officers each possess dual-capacities. To begin, they possess in their capacity as private citizens and all of the rights and privileges enjoyed by everyone else in the community. However, in their capacity as law enforcement officials acting on behalf of the state, they are imbued with the further privileges and duties. Accordingly, many common police actions that would otherwise be illegal are permitted because they have been allocated by either authorization or justification in law.¹¹⁶ This meshes with the rule of law, for as Dicey long ago articulated:

*[N]o man is above the law...every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary [courts and] tribunals....In[deed] the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary Courts, has been pushed to its utmost limit [such that] every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.*¹¹⁷

Therefore, it is because—and only because—the law provides for these exceptions that the police can legitimately claim the right to exercise what are extraordinary powers vis-à-vis other members of the same political community.¹¹⁸ Importantly then, the aggrandized power enjoyed by law enforcement officials requires a recognized source in law to be considered valid. Otherwise police officers act unlawfully when undertaking coercive actions against others and risks legal consequences for the state along with the prospect of personal liability.¹¹⁹ Yet, as Stribopoulos has observed, “[t]he reality is that *much coercion and control take place on an informal level through orders of legally*

¹¹⁶ Malcolm Thorburn, “Criminal Law as Public Law” in Antony Duff and Stuart Green eds, *Philosophical Foundations of Criminal Law* (New York: Oxford University Press 2011) at 38.

¹¹⁷ AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 7th ed (London: Macmillan & Co, 1908) at 189 [emphasis added].

¹¹⁸ See Quigley, *Procedure*, *supra* note 51 at 5-1, 5-2, where Quigley notes that, “the tenets of our legal system recognize individual liberty unless it is expressly constrained by the law and because the police do not possess any greater powers than other citizens except as the law permits, it would follow that there must be some legal source for police powers.”

¹¹⁹ Plaxton, “Police Powers”, *supra* note 71 at 124.

dubious quality, directing individuals to move along or to desist from behaviour that an officer considers undesirable”¹²⁰ even though the police have no legal authority to justify their actions as legitimate in the circumstances. Irrespective of whether it is guided by “a respect for or fear of authority,”¹²¹ it remains the fact that “where the law is unclear or unstated, the police in practice control most situations where they interact with the public.”¹²² These are the practical realities that govern social relations between the police and the citizenry on Canadian streets.¹²³ In addition, it has been suggested the courts tend to take an “idealized view”¹²⁴ of policing and commonly display a deferential posture with respect to police decision-making.¹²⁵ These points must be kept in mind, for later, when we consider how the confluence of undemocratic decision-making by the police and the judiciary has led expansion of both state *and* judicial powers in Canada.

1.4 The Politicization of the Criminal Law

The rise of judge-made police powers has not happened in a vacuum. Paralleling the increased activity of the Court has been the noticeable inactivity of Parliament, and as I will argue one could not have happened without the other. Let us now briefly explore the prevailing political climate that has accompanied the expansion of ancillary police powers. To begin, we must understand the ethos that is dominant within Parliament when it does exercise its legislative prerogative under s. 91(27) of the *Constitution Act*, 1867¹²⁶ to create criminal law. From there, when we confront the episodic idleness of Parliament following Supreme Court judgments dealing with the common law limits of police powers, inferences can be drawn about the desirability of the Court’s rulings under the APD from the perspective of elected lawmakers. It is not my argument that Parliament has ceded ground to the Court generally or that it is prepared to permit a more robust course of judicial lawmaking in Canada. Rather, my assertion is more modest. It

¹²⁰ Stribopoulos, “Unchecked”, *supra* note 102 at 247 [footnote omitted and emphasis added].

¹²¹ Quigley, *Procedure*, *supra* note 51 at 5-3.

¹²² Coughlan, *Detention*, *supra* note 20 at 21.

¹²³ *Ibid.*

¹²⁴ Stribopoulos, “In Search”, *supra* note 26 at 48.

¹²⁵ See generally Aman S Patel, “Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police” (2001) 45 CLQ 198.

¹²⁶ *Supra* note 42.

is simply that the *results* arising from the policymaking path that the Supreme Court has undertaken in relation to police powers is consistent with Parliament's orientation and conforms to its objectives. Hence, the government has seemingly been content to simply avoid the task of reforming police powers legislatively and gladly accepted the delivery of police powers by the Court.¹²⁷ If Parliament were to instead take up the task of comprehensively regulating police powers this would mark a significant step forward in Canadian criminal law and be a welcomed development; and, this would hold regardless of whether such actions arose from an independent choice by Parliament to do so of its own volition, or, if these measure were only undertaken in response to external pressures, for instance, when met by the refusal of the Court to supply its agents with ancillary common law powers during the litigation process, which it may perceive as an adverse judicial ruling and contrary to its interests.

1.4.1 The Rhetoric of Crime and the Burgeoning of Police Power

Over time there has been a “rhetorical shift from ‘crime prevention’ or ‘crime control’ to ‘war on crime’”¹²⁸ and a byproduct of this discourse has been to firmly entrench the power of law enforcement officers to intrude into the lives of citizens,¹²⁹ on the basis of supposed necessity. Contemporaneously, Canadian policing agencies have come to view themselves as crime fighters engaged in a war against those who perpetrate it.¹³⁰ In this constructed “us-them world view,”¹³¹ the police are cast as the bulwark against society's descent into chaos. Yet, this ignores the fact that, in actuality, law enforcement makes up only a small fraction of what police officers do.¹³² Research has

¹²⁷ Kent Roach, “Dialogic Judicial Review and Its Critics” (2004) 23 SCLR (2d) 49 at 102. See also Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24 Can JL & Soc 231 at 236 [Jochelson, “Multidimensional”].

¹²⁸ Cohen, “Invasion”, *supra* note 37 at 627.

¹²⁹ See generally David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001).

¹³⁰ Stribopoulos, “Unchecked”, *supra* note 102 at 245.

¹³¹ Alan Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991) 29 Osgoode Hall LJ 329 at 338 [Young, “Watchtower”].

¹³² Greg Marquis, “Power from the Street: The Canadian Municipal Police” in RC Macleod & David Schneiderman, eds, *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) at 32. See also Young, “Watchtower”, *supra* note 131 at 334.

shown that police spend the majority of their time—between 75 and 80 percent—engaged in activities that are not directly related to either the investigation of crime or the apprehension of criminal suspects.¹³³ All of this suggests that the police spend significantly less time than is commonly thought engaged in the investigation of criminal violations and indicates that lawmakers should give closer consideration to the nature of the police function.¹³⁴ An objective determination of what the police actually do is essential and sits logically prior to making any normative decision about what powers that police should possess. Policymaking that is informed by anecdote, conjecture and speculation—or, simply an incomplete host of facts—is bound to miss its mark, as it fundamentally aimsless. Yet, as George Harrison once wrote, “[i]f you don’t know where you’re going, [a]ny road will get you there.”¹³⁵ Even though the “crime fighting self-image is more rhetoric than reality, it exerts a considerable influence upon how... police officers exercise their discretion,”¹³⁶ how citizens respond to police commands and how the oversight of these discretionary actions unfolds. Concerning the latter point, one that is pertinent to the primary topic of this thesis, I will suggest that these conditions have cumulatively led to the police being afforded undue deference too frequently at the street-level and in courtrooms alike.¹³⁷

Underlying the resistance to clarify and modernize the criminal law is the fact that the public is generally misinformed and largely ignorant of the actual machinations of the criminal justice system and the importance of “due process”¹³⁸ rights. As Professor Douglas Husak observes, “[f]ew persons empathize with potential defendants and understand that *these rights protect the general public*, and are not devices contrived by clever lawyers to enable the guilty to escape their just deserts.”¹³⁹ This is a point that cannot be overstated. Explaining its centrality, Professor Alan Young writes:

¹³³ Blake, “The Role”, *supra* note 93 at 78.

¹³⁴ Debra Livingston, “Police, Community Caretaking, and the Fourth Amendment” (1998) U Chi Legal F 261 at 263. See also Charles E Silberman, *Criminal Violence, Criminal Justice* (New York: Random House, 1978) at 203.

¹³⁵ George Harrison, “Any Road” on *Brainwashed* (London: Parlophone, 2002).

¹³⁶ Stribopoulos, “Constitutional Controls”, *supra* note 43 at 37 [footnotes omitted].

¹³⁷ *Supra* note 123.

¹³⁸ Packer, *The Limits*, *supra* note 36 at 153.

¹³⁹ Husak, *Philosophy*, *supra* note 23 at 34 [emphasis added].

Charter rights may incidentally benefit individual litigants, yet their essential benefit must be to ensure that the state remains within its constitutionally-limited authority. A *Charter* violation must be remedied not only to shield the individual from prejudice, arising from unconstitutional conduct, but also to force the state to comply with the prescriptions of the *Charter* in future cases.¹⁴⁰

The police should not be crippled in their ability to investigate and apprehend those that cause serious harm in society. Such would be contrary to the public interest. Yet, and offering an important caution to those favouring law enforcement and “crime control”¹⁴¹ at the expense of civil liberties (or even the ROL), Skolnick writes that, “it is equally in the public good that police power should be controlled and confined so as not to interfere with personal freedom”¹⁴² unnecessarily or disproportionately. Both objectives are worthy and do require protection. There is wisdom in the observation of Beck who writes that:

In a time when crime has become a major public issue, we are prone to grant the police the powers they claim they need to protect us. But it is just such a time that we should be most careful to scrutinize the validity of such claims.¹⁴³

Calibrating the desirable extent of police power thus becomes a political question and one that should be resolved democratically in the political arena.

1.4.2 Fostering a Healthy “Dialogue” About Police Powers in Canada

The “law and order”¹⁴⁴ bent of Parliament is underpinned by a misguided public perception of the magnitude of the problems at hand and a basic ignorance on the part of citizens of what is really at stake whenever individual liberty is bartered for the promise of increased collective security. But when “[t]here are no votes in being soft on crime,”¹⁴⁵ as Stuart suggests, it is hardly surprising that law and policy have taken on a

¹⁴⁰ Young, “Watchtower”, *supra* note 131 at 396.

¹⁴¹ Packer, *The Limits*, *supra* note 36 at 153.

¹⁴² Jerome H Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley & Sons, 1967) at 10.

¹⁴³ Stanley M Beck, “Electronic Surveillance and the Administration of Criminal Justice” (1968) 46 *Can Bar Rev* 643 at 687.

¹⁴⁴ Stuart, *Charter Justice*, *supra* note 54 at 10-12. See also Stuart, “Recodify”, *supra* note 18 at 89.

¹⁴⁵ *Ibid* at 14. See also Kent Roach, “A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?” (2008) 40 *SCLR* (2d) 717 at 742 writes, “Once left-of-centre political parties fear that they are vulnerable to criticism

decidedly more punitive and retributive edge.¹⁴⁶ As Young has remarked, “[t]here have been no significant crime waves to warrant the sudden return to overcriminalization, yet there has [nevertheless] been a perception that urban society has been hit by a tidal wave of crime.”¹⁴⁷ This popular discourse is fueled by how crime related issues are framed in the media.¹⁴⁸ In spite of declining crime statistics, Canadian “[p]oliticians of all stripes have been unable to resist the political expediency of pandering to the perceived need to toughen penal responses.”¹⁴⁹ Therefore, when judicial decisions come down in favour of expanding coercive state power they reflect a windfall that is perceived to be a boon to the state and not as indicative of a pressing problem that warrants correction.

Conversely, when Supreme Court judgments refuse to extend the reach of police into areas not covered by legislation, the government seemingly has a much stronger incentive to act. Indeed, history is replete with examples of cases where the Court having identified “gaps”¹⁵⁰ in the law has nevertheless exercised restraint and declined to create new police powers.¹⁵¹ Adjudication of this kind is consonant with what Packer labels the

that they are ‘soft on crime’ or ‘soft on terrorism’, there is a real danger of a punitive spiral in criminal justice policies. The fuel for such spirals is often social anxiety rather than evidence about either the threat or the effectiveness of a punitive response.” Nor, in my view, is the public giving an accurate portrayal of the impact that proposed legislative measures will have upon *Charter* rights and lives of those most susceptible to state intrusion who are likely to bear the brunt of state exercises of power.

¹⁴⁶ For example see Don Stuart, “The Anti-terrorism Bill (Bill C-36): An Unnecessary Law and Order Fix that Permanently Stains the Canadian Criminal Justice System” (2002) 14 NJCL 153. See also Don Stuart, “The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 Should Be Withdrawn” in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); and Kent Roach, “Panicking over Criminal Organizations: We Don’t Need Another Offence” (2000) 44 CLQ 1.

¹⁴⁷ Alan N Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of the Criminal Law” (2008) 40 SCLR 441 at 454.

¹⁴⁸ See generally, Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006).

¹⁴⁹ Stuart, *Charter Justice*, *supra* note 54 at 14.

¹⁵⁰ See *Kang-Brown*, *supra* note 92 at paras 4, 6 and 50; *Orbanski*, *supra* note 105 at para 83; and *Reference re: Judicature Act (Alberta)*, s. 27(1), [1984] 2 SCR 697 at 727, 14 DLR (4th) 546.

¹⁵¹ Don Stuart, “The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain” (1999) 25 Queen’s LJ 65 at 85.

“strict construction doctrine.”¹⁵² This posits that, courts, when called upon, are to err in favour of individual liberty rather than empowering state agents with any additional authority over citizens that have not been stipulated in statutory form.¹⁵³ Underlying this judicial philosophy is the idea that one of the principal functions of the judiciary is to protect individual liberties by standing firmly between individuals and the state.¹⁵⁴ This view also meshes well with conventional conceptions of the Supreme Court’s post-*Charter* role in Canadian society. Regrettably, however, it is equally clear that the Court has faltered in this regard and has slipped away from fidelity to the POL. Indeed, the Court’s departure from the Diceyan ideal has been essential to the development of common law police powers under the APD.

In the instances where the Court has declined to create new police powers and instead “explicitly called for Parliamentary action,”¹⁵⁵ the calls have been heeded and consistently answered.¹⁵⁶ For example, where the Court refused to legitimate the use of video surveillance in *R v Wong*,¹⁵⁷ a practice not then covered by legislation, Parliament responded swiftly by introducing warrant provisions to allow the police to pursue this form of investigation.¹⁵⁸ A similar dynamic was repeated with respect to the following police tactics and technologies: the seizure of teeth impressions,¹⁵⁹ the extraction of blood¹⁶⁰ and bodily samples for DNA testing,¹⁶¹ the use of participant surveillance in the making of surreptitious electronic recordings,¹⁶² tracking devices,¹⁶³ and warrantless

¹⁵² Packer, *The Limits*, *supra* note 36 at 93, 95-96. See also Don Stuart, *Canadian Criminal Law: A Treatise* 2d ed (Toronto: Carswell, 1987) at 34.

¹⁵³ Cairns Way, “The Law”, *supra* note 83 at 701 [footnote omitted].

¹⁵⁴ Stribopoulos, “In Search”, *supra* note 26 at 2-3.

¹⁵⁵ Quigley, *Procedure*, *supra* note 51 at 5-33.

¹⁵⁶ Michal Fairburn, “Twenty-Five Years in Search of a Reasonable Approach” (2008) 40 SCLR (2d) 55 at 63.

¹⁵⁷ [1990] 3 SCR 36, 60 CCC (3d) 460.

¹⁵⁸ Forester, “Electronic Surveillance”, *supra* note 104 at 60.

¹⁵⁹ *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193.

¹⁶⁰ *R v Borden*, [1994] 3 SCR 145, 119 DLR (4th) 74.

¹⁶¹ *Stillman*, *supra* note 159.

¹⁶² *R v Duarte*, [1990] 1 SCR 30, 65 DLR (4th) 240. See also *R v Wiggins*, [1990] 1 SCR 62, 53 CCC (3d) 476.

¹⁶³ *R v Wise*, [1992] 1 SCR 527, 70 CCC (3d) 193.

entry powers into private dwellings.¹⁶⁴ The application of the canon of strict construction in this line of authorities is reflective of the best traditions of the Court.¹⁶⁵ It is consistent with well-established orthodoxies of criminal law and in particular, judicial fidelity to the principle of legality. Additionally, whenever the court has taken such a stance, Parliament has often responded by enacting statutory powers to ameliorate the position of its agents, the Crown and the police.¹⁶⁶ Regardless, of one's view of the substantive allocations of power given to the police, one great benefit accrues when legislatures are spurred to action: improved clarity and predictability in the law. The provision of certainty in the law is always welcome and to be welcomed by all. Moreover, the fact that these powers are brought into being through the democratic process is immeasurably preferable. That the legislative replies have tended to be reactionary and underwhelming is not a valid reason to condemn the inter-institutional "dialogue"¹⁶⁷ that has emerged between Parliament and the Supreme Court. At its crux, this interplay evinces a well-functioning legal structure in which the dominant actors perform the roles entrusted to them by the constitutional framework in Canada. Thus, in both process and form there is reason to prefer the creation of statutory police powers to those created on an *ad hoc*, *ex post facto* basis by court decisions.

¹⁶⁴ *Feeney*, *supra* note 113. For commentary see Robert W Fetterly & Daniel A MacRury, "Arrest of Persons in Dwelling-House (Feeney Warrants—The First Three Years), Part I" (2001) 45 CLQ 101.

¹⁶⁵ For additional example where the Court took this judicial posture and staunchly applied the rule of strict construction see *Colet v The Queen*, [1981] 1 SCR 2, 119 DLR (3d) 521. See also *R v Kokesch*, [1990] 3 SCR 3, 61 CCC (3d) 207.

¹⁶⁶ Coughlan, *Detention*, *supra* note 20 at 18 [footnote omitted].

¹⁶⁷ See generally Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1 at 29 and Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts And Legislatures (Or Perhaps The Charter Of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

Chapter Two: The Origins and Evolution of the Ancillary Powers Doctrine

2.0 Overview

In this chapter, I will trace the origins of the ancillary powers doctrine (APD) and its ascendancy in Canadian jurisprudence. My analysis will begin in the United Kingdom with a look at the decision of the Criminal Court of Appeal in *R v Waterfield*,¹ which propounded a common law test to determine whether the police in that case had been acting lawfully and in the execution of their duties. The “*Waterfield* test”² involves a two-stage inquiry that asks: first, whether the police conduct in question fell within the scope of any recognized statutory or common law duty; and if so, second, whether the impugned conduct involved an unjustifiable use of police powers in the circumstances.³ From there I will examine the reception of this test into Canadian criminal law. The cases will demonstrate that the Canadian version of *Waterfield* bears little resemblance to its English predecessor. While the two-pronged test articulated in *Waterfield* remains essentially intact, the test has undergone a radical transformation in the manner and purpose for which jurists in Canada now apply it. Yet, in spite of these alterations, *Waterfield* has become interchangeable with the APD and the two remain synonymous.⁴ As will be shown, the characterization of *Waterfield* as “an odd godfather for common law police powers”⁵ by Mr. Justice Binnie in *R v Clayton*⁶ is an apt one. It is also revealing in its candour.

¹ [1963] 3 All ER 659 (Eng CA), [1964] 1 QB 164 [*Waterfield*].

² Steve Coughlan, “Police Detention for Questioning: A Proposal (Part I)” (1985-1986) 28 CLQ 64 at 81, 86-87. See also James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detentions After *Mann*” (2007) 52 CLQ 297 at 303; Alec Fiszauf, “Articulating Cause—Investigative Detention and Its Implications” (2007) 52 CLQ 327 at 331; Nathan JS Gorham, “Police Discretion, Racial Profiling and Articulate Cause” (2004) 49 CLQ 50 at 55-56, 67; Lesley A McCoy, “Some Answers from the Supreme Court on Investigative Detention...and Some More Questions” (2004) 49 CLQ 268 at 273; Lesley A McCoy, “Liberty’s Last Stand? Tracing the Limits of Investigative Detention” (2002) 46 CLQ 319 at 320-322; and Heather Pringle, “Kicking in the Castle’s Doors: The Evolution of Exigent Circumstances” (1999) 43 CLQ 86 at 97.

³ Tim Quigley, “Brief Investigatory Detention: A Critique of *R. v. Simpson*” (2004) 41 Alta L Rev 935 at 936 [Quigley, “Brief Investigatory”]. See also Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005) at 5-34 [Quigley, *Procedure*] and Aman S Patel, “Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police” (2001) 45 CLQ 198 at 200.

⁴ James Stribopoulos, “Has Everything Been Decided? Certainty, the Charter and Criminal Justice” (2006) 34 SCLR 831 at 400 [Stribopoulos, “Has Everything”].

⁵ *R v Clayton*, 2007 SCC 32 at para 75, [2007] 2 SCR 725 [*Clayton*].

⁶ *Ibid.*

Although the APD has emerged as the preeminent lawmaking tool in police powers cases and been proclaimed as an adjudicative touchstone by the Supreme Court of Canada (SCC),⁷ this has not always been so.⁸ Rather, the Court's record when confronted with deficiencies in codified police powers reveals a deeply conflicted body of cases.⁹ A certain degree of oscillation by the SCC over a period of time and across differently constituted panels might be understandable and perhaps even expected.¹⁰ However, within the Court's police powers jurisprudence we are also able to identify instances of vacillation by particular members of the Court during their tenure. Drawing attention to the waffling of individual judges is therefore instructive. I will suggest that the presence of such ambivalence and intra-court "judicial flip-flopping"¹¹ calls into question the cogency of the Court's judgments and should give us reason to be suspect of the APD (and other judicial lawmaking devices) as a legitimate means of expanding state power.

2.1 The Introduction of *Waterfield* into Canadian Law

2.1.1 The English Decision

*Waterfield*¹² involved two individuals: Eli Waterfield and Geoffrey Lynn, both of whom were convicted of offences related to their dealings with police officers who had been investigating a motor vehicle accident. Each appealed to the Court of Criminal Appeal (CCA), Lynn against convictions for assaulting a police constable during the due execution of his duties and for driving a motor vehicle in a dangerous manner on a roadway and Waterfield for having

⁷ *R v Kang-Brown*, 2008 SCC 18, [2008] 1 SCR 456 [*Kang-Brown*].

⁸ Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 CR (6th) 266 at 266 [Coughlan, "Common Law"].

⁹ Stribopoulos, "Has Everything", *supra* note 4 at 400-401.

¹⁰ James Stribopoulos, "Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases" (2009) 47 SCLR 35 at 51-52 [Stribopoulos, "Sniffing Out"]. See also Donald A Dripps, "Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School" (2005) Ohio St J Crim L 125 at 134-135 and 159.

¹¹ Michael D Cicchini, "Judicial (In)discretion: How Courts Circumvent the Confrontation Clause Under *Crawford* and *Davis*" (2008) 75 Tenn L Rev 753 at 761. See also David L Berland, "Stopping the Pendulum: Why Stare Decisis Should Constrain From Further Modification of the Search Incident to Arrest Exception" (2011) U Ill L Rev 695 at 729, footnote 310.

¹² *Supra* note 1.

counseled, procured and commanded Lynn to commit the assault and for inciting Lynn to drive dangerously.¹³

The central issue before the court was whether the police had acted lawfully and in the scope of their duties when they surrounded the appellants' vehicle and attempted to detain the men for questioning. This was a necessary precondition that the Crown needed to establish in order to advance its case and overcome the finding of a non-suit. In deciding the appeal, Lord Justice Ashworth found the police actions were not authorized by any statute. Following a review of the jurisprudence that had developed in the United Kingdom, the court found there to be ambiguities with respect to the scope and extent of the duties that were to be discharged by the police.¹⁴ Ashworth J. then proceeded to enunciate what has come to be known as the "*Waterfield* test."¹⁵ He wrote:

In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.¹⁶

Having already determined there to be no legislative provision capable of supporting the police, the CCA went on to confirm that the police actions failed to satisfy the enunciated standard at common law and acquit the accused.

Thus, the case stands for the proposition that the police are not permitted to execute their duties—the duty to preserve evidence of crime in this instance—in a manner that interferes with an individual's right of property or liberty in the absence of statutory or common law authorization.¹⁷ Seen in this light the CCA's holding is harmonious with the "principle of legality"¹⁸ (POL) and not antithetical to it. The POL demands that any coercive action taken by the state against an individual be expressly and prospectively declared in a competent legislative

¹³ *Ibid* at 660.

¹⁴ *Ibid* at 661.

¹⁵ *Reference re: Judicature Act (Alberta), s. 27(1)*, [1984] 2 SCR 697 at 718, 14 DLR (4th) 546 [*Wiretap Reference*].

¹⁶ *Waterfield*, *supra* note 1 at 661.

¹⁷ Clayton C Ruby, "Obstructing a Police Officer" (1973) 15 CLQ 375 at 415.

¹⁸ James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's LJ 1 at 9-11 [Stribopoulos, "In Search"].

provision. Indeed, as Professor Rosemary Cairns Way indicates, *Waterfield* provides “a strong judicial statement of the distinction between duty and authority since, *even though the police officers were acting within the scope of their duty, they lacked the requisite authority to breach common law rights.*”¹⁹ In other words, police powers do not flow axiomatically from their duties and the two are not necessarily correlative. This is an important point. Beyond its refusal to uphold the actions of the police that were challenged in *Waterfield*, the judgment similarly declined to create any enduring “general police powers”²⁰ that would be available to police in future investigations. Lastly, it bears noting that *Waterfield* has never been used in the United Kingdom to broaden police powers.²¹ As will be shown, this stands in stark contrast with the SCC’s current application of *Waterfield*, which has reconstituted it as a mechanism to stipulate ancillary police powers far and wide.²²

2.1.2 The First Wave of *Waterfield* in Canada

As the first instance in which the SCC applied the *Waterfield* test, *R v Stenning*²³ is a decision of historical importance. The facts can be succinctly distilled. In response to a reported disturbance, the police entered a building without a warrant or any statutory authorization that would permit them access to the premises. Police questioned the occupants of the building and instructed them to identify themselves. The occupants, however, refused to cooperate and an altercation ensued. This resulted in Stenning being charged with assaulting a peace officer in the execution of his duties. The accused was acquitted at trial, however on appeal the SCC unanimously reversed this decision and substituted a conviction. Given the dramatic swing in the outcome of the case, we might have expected a comprehensive and well-reasoned opinion from the Court. Yet, what one finds instead is a judgment that is remarkable only for its brevity, the absence of any Canadian authority and the paucity of reasoning it provides.²⁴ The two and a

¹⁹ Rosemary Cairns Way, “The Law of Police Authority: The McDonald Commission and the McLeod Report” (1985) 9 Dalhousie LJ 683 at 709 [emphasis added] [Cairns Way, “The Law”].

²⁰ Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 17.

²¹ Patrick Healy, “Investigative Detention in Canada” [2005] Crim LR 98 at 104 [Healy, “Investigative Detention”]. See also James Stribopoulos, “Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada” in Margaret E Beare ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 359 [Stribopoulos, “Crime Control”].

²² Quigley, *Procedure*, *supra* note 3 at 5-16.

²³ [1970] SCR 631, 10 DLR (3d) 224 [*Stenning*].

²⁴ Cairns Way, “The Law”, *supra* note 19 at 712.

half page decision concentrates primarily on the underlying facts of the case and makes only a fleeting reference to *Waterfield*—quite strange, considering it was used to anchor the Court’s holding. We are therefore left to ponder why the SCC was not “more circumspect when considering whether to adopt *a single reference in a solitary case* [from] a country with a somewhat different attitude towards legislating police powers.”²⁵ The question asked is one deserving of an answer, but unfortunately a compelling one was not and has not been delivered.

The basis of the Court’s opinion was articulated by Martland J. who reasoned as follows:

Assuming that [the police officer] did, technically, trespass on the premises, the fact remains that he was there to investigate an occurrence which had happened earlier in the evening...He had been sent out for that purpose. He was charged, under s. 47 of *The Police Act*, R.S.O. 1960, c. 298, with the duty of preserving the peace, preventing robberies and other crimes, and apprehending offenders. He was in the course of making an investigation, in the carrying out of that duty, when he was assaulted by the respondent.²⁶

In short, the Supreme Court in *Stenning* equated the overarching duties of the police as being correlative with their powers. No measures were taken to delimit the scope of police powers. Nor did the Court take any steps to qualify its pronouncement that potential or actual illegality on the part of the police does not necessarily render an officer beyond the ambit of his or her duties.²⁷ This is directly at odds with *Waterfield*. By carving out such a patently results-oriented decision,²⁸ the SCC effectively declared that laws, for instance, those forbidding trespasses or breaking and entering may be broken by agents of the state provided that they are acting pursuant to one of the broadly cast duties to enforce the law. Needless to say, this calls into question the foundational premise inherent in the rule of law that all persons are subject to the same laws. Moreover, and before proceeding any further, let us pause to note how the facts in *Stenning* are in no way similar or any way analogous to those in *Waterfield*. This fact alone should challenge our basic conception of the use of judicial precedents and begs the question of why it used by the Supreme Court, for, it is apparent that the Court’s ruling sits uncomfortably on the bedding of *stare decisis*. This unconventional use of precedent, which will emerge as a persistent theme in Canadian APD cases shall be explored more fully in Chapter Four.

²⁵ Quigley, “Brief Investigatory”, *supra* note 3 at 939.

²⁶ *Stenning*, *supra* note 23 at 636.

²⁷ *Ibid.* See generally, Healy, “Investigative Detention”, *supra* note 21 at 99.

²⁸ Cairns Way, “The Law”, *supra* note 19 at 712.

*R v Knowlton*²⁹ was the next occasion in which the Court invoked *Waterfield*. The accused has been charged with obstructing a police officer in the course of his duties as a result of refusing to comply with police demands that he restrict his movements. The issue was whether the police had acted lawfully when they erected a barricade and cordoned off a section of sidewalk forbidding members of the public to circulate freely. It was common to the appeal that the police actions were not expressly authorized by statute. Equally, it was beyond dispute that citizens have the *prima facie* right to move unimpeded by police. In resolving the appeal in favour of the state, the Court again emphasized that the police were subject to far-reaching duties requiring them, *inter alia*, to preserve the peace and prevent crime pursuant to both provincial legislation and the *Criminal Code*. To bolster its opinion, the Court referred to the *Alberta Police Act*,³⁰ which purported to grant the police “the power to...perform all duties that are assigned to police officers.”³¹ Once again, broad duties were met with commensurately broad powers in the Court’s opinion. In the wake of this judgment, seemingly any measures taken in furtherance of recognized police duties would be upheld as justified under *Waterfield*. The vagaries of these decisions were not lost upon Professor Alan Grant, who wrote,

This is not a very satisfactory basis [to assess the propriety of police actions] since it appears to be *almost limitless in practical application*. It would be very difficult to conceive of cases where police officers would not be able to claim to be engaged in investigating some occurrence or other police action with a sufficient nexus to one of the sweeping duties recognized by the Court.³²

Moreover, determining the legality of actions taken by the police on an *ex post facto* basis is a cumbersome and inefficacious method of protecting individuals against overzealous policing.³³

In sum, *Stenning* and *Knowlton* evince a jurisprudence which impliedly assumes that a policeman acting in the course of his duties may not be resisted,³⁴ even though this cannot be determined at the actual time that a police-citizen encounter occurs. Compounding the difficulties of such an assessment is the near limitless treatment given to the range of police

²⁹ [1974] SCR 443, 33 DLR (3d) 755 [*Knowlton*].

³⁰ RSA 1971, c 85, ss 2(1), 3(1) and 26(1).

³¹ *Ibid.*

³² Alan Grant, “The Supreme Court of Canada and the Police: 1970-76” (1978) 20 CLQ 152 at 156 [emphasis added].

³³ Cairns Way, “The Law”, *supra* note 19 at 712.

³⁴ James Leavy, “Self-Defence Against the Police” (1973) 19 McGill LJ 413 at 422 [footnote omitted].

duties. It seems clear that the Court's abhorrence for the prospect of putative wrongdoers going unpunished precipitated the initial use of *Waterfield*. Lamentably, these cases were not relegated to the annals of history. Nor can they be dismissed as mere byproducts of the pre-*Charter* era.

2.2 The Supreme Court's Transformation of *Waterfield*

Following its maiden voyage across the Atlantic Ocean, *Waterfield* arrived in Canada to little fanfare. Indeed, at the time of its reception by the SCC in early 1970s—and for a significant period thereafter—the *Waterfield* test was met by a muted response from legal commentators. Perhaps the greatest explanation for the paucity of criticism and general dearth of commentary is attributable to the fact that these decisions came prior to the passage of the *Canadian Charter of Rights and Freedoms*.³⁵ During this period citizens had few legal recourses through which to challenge state actions.³⁶ Accordingly, the lawfulness of police conduct was not a serious matter of concern, nor was it amenable to vigorous judicial scrutiny of the kind that is possible today. Moreover, the *Waterfield* test was seldom applied and was, strictly speaking, only dispositive of the narrow question of whether or not an officer had been acting in the course of his or her duties as a “peace officer”³⁷ at the time of a given police-citizen encounter. The Court did not, at this stage in history, license police actions generally nor propound any freestanding powers under the aegis of *Waterfield*. All of this changed in *Dedman v The Queen*.³⁸

The appeal in *Dedman* arose from the appellant's challenge to his conviction for having refused to provide a breath sample when demanded to do so by an officer. The accused had been randomly stopped at a police checkpoint that had been established in order to investigate the possible intoxication of motorists. He had not been driving in a manner contrary to any highway traffic rule or done anything to arouse police suspicion. Using highway traffic concerns as pretext to make a stop, police would signal drivers to pull over and then demand to see a valid licence and proof of insurance and engage them in conversation. The real aim of the stop program, as the Court concluded, was to assess the driver's apparent level of sobriety and where

³⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

³⁶ James Stribopoulos, “Constitutional Controls on Police Powers In Canada as Compared to Japan” (2004) 5 J Centre Int'l Stud 31 at 32.

³⁷ *Criminal Code*, RSC 1985, c C-46, s 2(c) [*Criminal Code*].

³⁸ [1985] 2 SCR 2, 20 DLR (4th) 321 [*Dedman*].

the officer formed a suspicion that an individual was impaired by alcohol to then demand a breath sample. Although the use of these investigative tactics was not uncommon at the time,³⁹ there was no legislative authorization for their use.⁴⁰

The accused argued before the Supreme Court that he had been arbitrarily detained and that the police lacked the legal authority to conduct the investigation in question. On the basis of existing law, one might have thought the Court would have quickly dispatched with this appeal and ruled in favour of the accused. But this is not what happened. Rather than simply giving effect to the principle of legality, a narrow majority of the SCC instead took the novel step of applying *Waterfield* and using it to *create* new police powers. This began the “ill-conceived transformation [of the *Waterfield* test] into an expansive law-making device”⁴¹ and is for this reason a landmark judgment.

Speaking for the Court, Mr. Justice Le Dain stated that, “I do not think there can be any doubt that it fell within the general scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic”⁴² and thus concluded that the first branch of the *Waterfield* test was easily satisfied. This echoed the expansive treatment given to the police duties in the earlier Canadian jurisprudence that was decided under *Waterfield*. At the second stage of the analysis Le Dain J. relied upon the following factors to uphold the police actions: the seriousness of the problem of impaired driving; the fact that the privilege of driving is a licensed activity which the state regulates in a variety of ways; the police policy and the program that it instituted had been widely publicized such that the adverse psychological effect upon drivers would be lessened; and finally, the inconvenience suffered by those detained would be marginal given the short duration of the detention.⁴³ Implicit in this sort of reasoning is a form of utilitarian “cost-benefit analysis.”⁴⁴ As Stribopoulos explains, the Court’s application of *Waterfield* “involve[d] a weighing of the apparent benefits...for law enforcement and public

³⁹ Stribopoulos, “In *Search*”, *supra* note 18 at 18.

⁴⁰ *Ibid.*

⁴¹ James Stribopoulos, “Unchecked Power: The Constitutional Regulation of Arrest Reconsidered” (2003) 48 McGill LJ 225 at 233.

⁴² *Dedman*, *supra* note 38 at para 68.

⁴³ RJ Delisle, “Judicial Creation of Police Powers” (1993) 20 CR (4th) 29 at 29 [Delisle, “Judicial Creation”].

⁴⁴ James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41 Alta L Rev 335 at 349-350.

safety...against any resulting interference with individual liberty interests”⁴⁵ to determine the legality of the measures taken by the police. On the cost side of the ledger we find the arbitrary nature of the detentions approved of by the Court, the recognized psychological discomfort that those subjected to detention by the police will experience and the potential for the misuse (or abuse) of these discretionary powers.⁴⁶ Offsetting these harms, on the benefit side of the equation, the Court relied upon “the importance of the public purpose served”⁴⁷ in providing police with tools aimed at “the deterrence and detection of impaired driving, a notorious cause of injury and death.”⁴⁸ The Court did not require the state to establish the magnitude of the harms to be averted. Instead, they were merely assumed in the *ad hoc* “means-ends”⁴⁹ assessment. As a corollary, the government was not called upon to justify the nexus between the means chosen to pursue its desired ends and the proportionality of these measures. Yet, this is not surprising, as the Court did not take the *Charter* into account during its analysis, given that the case arose from an incident that happened prior to 1982.⁵⁰ The Court’s judgment did not therefore squarely address whether the police powers generated by its decision complied with constitutional standards. Nor did the Court assess the *Charter* fitness of the *Waterfield* test itself. All of these matters were left unresolved. Spurred by what it perceived to be a terrible social problem, that of drunk driving, the Court concluded that redressing the problem required the police to be equipped with extraordinary law enforcement powers and they were prepared to provide them,⁵¹ rather than await legislative action to tackle these concerns. In the result, the Court effectively held that the police had the power at common law to randomly stop and detain motorists for the

⁴⁵ Stribopoulos, “Sniffing Out”, *supra* note 10 at 35-36.

⁴⁶ Stribopoulos, “In Search”, *supra* note 18 at 20.

⁴⁷ *Dedman*, *supra* note 38 at para 69.

⁴⁸ *Ibid* at para 68.

⁴⁹ Graham Mayeda, “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” (2010) 50 SCLR 41 at 47 [Mayeda, “Between Principle”].

⁵⁰ Quigley, *Procedure*, *supra* note 3 at 5-37.

⁵¹ Glen Luther, “Random Stopping: A Right to Discriminate?” (1989) 19 Victoria U Wellington LR 11 at 17. See also *Clayton*, *supra* note 5 at para 98, where Binnie J. observed that, “[a]uthority [to make law] was found in *Dedman* because of the major problem of road carnage produced by mixing alcohol and driving.”

purposes of determining their sobriety at any time and in any place that the police should choose.⁵²

What is lost from the proportionality assessment in *Dedman* is any meaningful consideration of the more diffuse costs that are borne by the Court's decision. I would argue that we must broaden our conception of costs and by whom (and with what) they are being paid. We must take into account the lack of clear guidance given to the police in exercising their nascent powers, the retrospective application of law against the accused, and the non-democratic nature of the powers implemented by the judiciary. Each of these problems constitutes a serious matter of concern, and each of them attaches to the Court's "*Waterfield/Dedman*"⁵³ jurisprudence. Unfortunately, these are expenses that are paid in the currency of individual rights and the diminution of Parliamentary responsibility.

Chief Justice Dickson, writing in dissent, was sharply critical of the Court's adoption of *Waterfield* and more precisely the adaptation given to it by his brethren. In response to the Court's re-conceptualization of the *Waterfield* test he declared that, "[a]ny such principle would be nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual's rights."⁵⁴ Surely, this is the preferable view and the one that is most in keeping with the Court's role and the longstanding traditions of the common law.⁵⁵ Seen in this light the actions of the majority were a clear anachronism at the time. I unequivocally agree with the position asserted by Stuart that, "it would have been more appropriate for the Supreme Court to hold that such random stop programs were unlawful and to await a legislative scheme."⁵⁶ This was hardly a speculative suggestion, as legislation was passed enabling these programs, even after the SCC granted its imprimatur to them at common law.

⁵² Delisle, "Judicial Creation", *supra* note 43 at 29.

⁵³ *Kang-Brown*, *supra* note 7 at paras 50-52, 56 and 62. See also *R v Sinclair*, 2010 SCC 35 at paras 114 and 191, [2010] 2 SCR 310. Interestingly, and indicative of the malleability of the test in Canadian law, it is variously referred to as the "*Dedman/Waterfield* test at paras 110, 114 and 191 in two separate dissenting opinions.

⁵⁴ *Dedman*, *supra* note 38 at para 24.

⁵⁵ Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis Canada, 2011) at 66.

⁵⁶ Don Stuart, "Annotation" (1985) 46 CR (3d) 194 at 195.

Building on the foundations established in *Dedman*, the Supreme Court subsequently upheld the use of both fixed⁵⁷ location and random, roving⁵⁸ checkstops that had been provided for in amended Ontario highway traffic legislation. Unlike the Court's use of *Waterfield* in *Stenning* (or indeed in *Dedman*), these are the sort of incremental changes that are associated with normal developments of the common law and the orthodox use of judicial precedents. In each instance, the SCC identified a violation of s. 9 of the *Charter*, finding that the legislation permitted the police to stop individuals on arbitrary grounds without specifying any criteria or placing any fetters on police decisions of whom to stop.⁵⁹ Nevertheless, in each case the Court found that legislation was saved under s. 1 analysis—implicitly confirming that the common law detention power created in *Dedman* under the *Waterfield* test was consistent with the *Charter*. To overcome the infringement of s. 9 that flows self-evidently from “the unlimited right of police officers to stop motor vehicles”⁶⁰ conferred by the statute, the Court decided that it was appropriate for it to imply limitations into the impugned provision. Specifically, in *R v Ladouceur*⁶¹ the SCC stipulated that in order for these detentions to be considered lawful, they must be undertaken for one or more of the following purposes: to check driver sobriety, the driver's licence, insurance and registration, or the mechanical fitness of the vehicle.⁶² None of these limitations however were contained in the open-ended grant of power provided to the police in the authorizing legislation.⁶³ Instead, it was solely through the SCC's reining-in of the enabling statute and its “contraction”⁶⁴ of the statutory language that the legislation was upheld as constitutional. While it would have been preferable for the Court to have simply struck down this legislation on the basis of vagueness or overbreadth,⁶⁵ the Supreme Court's reasoning in *Ladouceur* at least

⁵⁷ *R v Hufsky*, [1988] 1 SCR 621, 40 CCC (3d) 398.

⁵⁸ *R v Ladouceur*, [1990] 1 SCR 1257, 56 CCC (3d) 22 [*Ladouceur*].

⁵⁹ Stribopoulos, “In Search”, *supra* note 18 at 45.

⁶⁰ *Ladouceur*, *supra* note 58 at para 1.

⁶¹ *Supra* note 58.

⁶² Quigley, *Procedure*, *supra* note 3 at 5-16.

⁶³ Stribopoulos, “Crime Control”, *supra* 21 at 360.

⁶⁴ Stribopoulos, “In Search”, *supra* note 18 at 17.

⁶⁵ Regrettably, the Court's subsequent jurisprudence on these matters has established a very high threshold for an accused to meet and provided significant latitude to government. For example, see *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 643, 93 DLR (4th) 36 where it was held that, “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.” See also *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCR 4 at paras 15-17, [2004] 1 SCR 76. For

engages the use of Section 1 of the *Charter* and places a legal onus upon the government to justify its actions and policy choices. This necessity under the *Oakes* test is dispensed with under *Waterfield*.⁶⁶ Thus, one of the most immediate consequences arising from the Court's APD jurisprudence is the bypassing of s.1 analysis and the neutering of this constitutional right in police powers cases where *Waterfield/Dedman* is used.

2.3 Venturing Across the Adjudicative Rubicon: *Waterfield's* Second Wave

2.3.1(i) *R v Godoy*

Following the 1985 decision of the Court in *Dedman*, the APD fell into disuse and "seemed to lie dormant"⁶⁷ on the Canadian legal landscape. Indeed, for a significant period of time it stood out as an anomalous judgment. For many years it appeared as though the Court's decision in that case marked an aberrational application of foreign legal doctrine and was destined to be regarded as a historical relic. Regrettably, any such optimism was proven to have been misplaced when the *Waterfield* test was reasserted by the SCC in *R v Godoy*.⁶⁸

Harkening back to the days of *Stenning*, the accused in *Godoy* faced a charge of having assaulted a peace officer in the course of his duties. The police were responding to a 911 call that was received by a dispatcher. In the circumstances, however, the caller was interrupted and the call terminated before she could communicate the whole of her message. Upon arriving at the residence from where the call had been placed, the police encountered the appellant. He indicated that everything was fine and refused to allow access to the apartment. Ignoring his refusals, the police forcibly entered the dwelling and became entangled with Godoy who resisted against the police, protesting that they were unlawfully occupying his residence. During the investigation of the premises, the police located the appellant's common law partner and discovered that she had been recently beaten. This resulted in Godoy being charged with two separate counts of assault. At trial both counts were dismissed. Applying *Waterfield*, the

commentary see Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed (Toronto: Thomson Carswell, 2007) at 391-397; Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed (Markham, ON: LexisNexis Canada, 2009) at 6-7, 78-85; and Don Stuart, "Criminal Justice in the McLachlin Court: Many More Kudos Than Brickbats" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) at 338-342.

⁶⁶ Quigley, "Brief Investigatory", *supra* note 3 at 949.

⁶⁷ Stribopoulos, "Sniffing Out", *supra* note 10 at 47.

⁶⁸ [1999] 1 SCR 311, 168 DLR (4th) 257 [*Godoy*].

Ontario Court of Appeal (ONCA) reversed the lower court decision and ordered a new trial. Rejecting the position asserted by the appellant, the SCC confirmed the ONCA decision in both substance and form.

After retracing the lineage of the APD in Canada,⁶⁹ Chief Justice Lamer went on to state that:

If police conduct constitutes a *prima facie* interference with a person’s liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty?⁷⁰

This iteration of the *Waterfield* test led the Court to the unanimous conclusion that “police have a duty to enter a private dwelling where they reasonably believe the occupant is in distress and entry is necessary not to arrest, but to protect life, prevent death [or] serious injury.”⁷¹ Nowhere is this power explicitly contained in any statute. Rather, it was derived from the overarching duties incumbent upon the police and then used as the springboard to generate the new power articulated by the Court. In the result, the SCC constructed a narrow power to enter domiciles in order to locate the originator of an emergency call, determine the reasons for the call and to provide assistance to the caller where required.⁷² This at least reflects a somewhat restrained application of the APD. The judgment did not construe the power more broadly or make it applicable in other emergency situations. Nor did *Godoy* grant licence to the police to investigate or search in relation to matters unrelated to the call they had received—this is a laudable dimension of the decision. Therefore, the ancillary power generated by the Court was limited to the purpose of ensuring public safety and not permitted as a means of facilitating a criminal investigation. Though it did not resonate with the Court, Professor Tim Quigley is correct in his observation that, “there is a great deal of difference between using the *Waterfield* approach to determine whether a police officer, already engaged in a duty imposed by statute or common law, has unjustifiably used the powers associated with the duty,”⁷³ which was the

⁶⁹ *Ibid* at para 12.

⁷⁰ *Ibid*.

⁷¹ Robert W Fetterly & Daniel A MacRury, “Arrest of Persons in Dwelling-House (Feeney Warrants—The First Three Years), Part I” (2001) 45 CLQ 101 at 123.

⁷² Quigley, *Procedure*, supra note 3 at 5-33.

⁷³ Quigley, “Brief Investigatory”, supra note 3 at 939.

original purpose of the *Waterfield* test and the manner it was used by the Court in *Godoy*. Moreover, the chosen ends-means reasoning of the Court and the invocation of the APD may well have been unnecessary to resolve the case. Although finding the police entry unlawful would have negated *Godoy*'s culpability for assaulting the officer in the course of duties, he could have potentially still been found guilty of assault *simpliciter* on the basis of having used excessive force to ward off the police.⁷⁴ Had the Court embarked upon this path of reasoning then *Dedman* might have still been left to wither. Lastly, if the Court had applied the rule of strict construction and instead declined to create the power that it did, it is foreseeable that such a decision would have sparked a legislative response from Parliament.⁷⁵ Giving effect to an ostensibly desirable social purpose, even where predicated on a commonsensical and pragmatic basis,⁷⁶ cannot make up for the fact that an enlargement of state power has occurred and that it was delivered by non-democratic means.

2.3.1(ii) *R v Mann*

Following the Court's 1999 decision in *Godoy*, another lull of activity surrounded the APD and its tide again seemed to have receded. However, this was only a temporary and relatively brief period of idleness. Beginning with *R v Mann*,⁷⁷ we can identify the cresting of a third wave of cases that owe their genesis to *Waterfield/Dedman*. Encompassed in this body of cases are the high court's judgments in *R v Clayton*,⁷⁸ *R v Kang-Brown*⁷⁹ and its companion case *R v AM*.⁸⁰ It is this recent proliferation of cases and the momentum that has gathered around the APD that will be subject of analysis in the next chapter. Bearing this in mind, I will introduce the main APD-laced decisions here for the purpose of isolating instances of analytical meandering on the part of certain justices.

The accused in *Mann* was walking down the street when the police detained him because he matched the general description of the suspect in a reported break-in that had recently

⁷⁴ *Ibid.*

⁷⁵ For discussion see Chapter One at 38-40.

⁷⁶ Edgar Bodenheimer, "Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion" (1977) 11 Ga L Rev 1143 at 1169.

⁷⁷ 2004 SCC 52, [2004] 3 SCR 59 [*Mann*].

⁷⁸ *Supra* note 5.

⁷⁹ *Supra* note 7.

⁸⁰ 2008 SCC 19, [2008] 1 SCR 569 [*AM*].

occurred nearby.⁸¹ The issue at bar was whether the police were lawfully entitled to detain citizens for any reason short of arrest. It is beyond dispute that on a *de facto* basis the police had been detaining and questioning individuals routinely for decades.⁸² Echoing its pronouncement in *Godoy*, the SCC again approved of an application of *Waterfield* by the ONCA. In particular, the Court confirmed the reasoning of the ONCA's decision in *R v Simpson*,⁸³ an earlier case touching on the issue that had been adopted in many other Canadian jurisdictions. Specifically, in *Mann*, the Court declared that the police are entitled at common law to subject individuals to brief investigative detentions (BID) where the police can establish "reasonable grounds to suspect...[that an] individual is connected to a particular crime and that such a detention is necessary"⁸⁴ in the "totality of the circumstances"⁸⁵ present at the time. Separately, the Court grafted on to the detention power, an additional power permitting police to conduct pat-down searches incidental to a BID when certain conditions are met. What cannot be overlooked when reviewing the grants of power given to the police by the Supreme Court is that the police in *Mann* overshot in their execution of these powers in the case and violated the s. 8 rights of the accused. This infringement ultimately led to an acquittal following s. 24(2) analysis. Nevertheless, the Court deemed these facts to present a sufficient platform to institute freestanding police powers. Given the impossibility of compliance with rules not yet in force, the police can be forgiven for failing to abide by the standards set by the Court. However, this does not provide an excuse for why the police were gambling with *Charter* rights in the first place. As a framework that is reliant upon the police exercising unauthorized powers unilaterally against individuals and in the course risking *Charter* breaches, it is one that should be revisited by jurists and hopefully repudiated.

Before proceeding it is important that we distinguish police actions predicated under *Waterfield/Dedman* from other sorts of tactical or interpretive decision-making taken by the police. It is fair to suggest that the police are entitled to rely upon a presumption that legislation authorizing their actions is constitutionally valid until it is proven otherwise. It is also fair to

⁸¹ Richard Barnhorst & Sherrie Barnhorst, *Criminal Law and the Canadian Criminal Code*, 5th ed (Toronto: McGraw-Hill Ryerson, 2009) at 105-106.

⁸² Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall LJ 329 at 341 [Young, "Watchtower"].

⁸³ (1993) 12 OR (3d) 182, 79 CCC (3d) 482.

⁸⁴ *Mann*, *supra* note 77 at para 45.

⁸⁵ *Ibid* at para 34.

suggest that the police are entitled to estimate certain limits pertaining to their powers and what is permissible in the authorization given to them by legislation where statutory language is opaque and open to more than one plausible interpretation.⁸⁶ However, there is no reason for police decisions to be afforded any measure of deference in the determination that they have made in relation to prescribed limits of their statutory powers. In other words, at law, the police must both correctly interpret and apply the powers entrusted to them. Where the police have faltered in their compliance with the law these actions should be rebuked by the Court, not rewarded by the conferral of new enduring common law powers. In cases where the police are found to have erred in their decision-making, or, where placed wholesale reliance upon legislation that is subsequently declared unconstitutional and run afoul of the law, this should only allow for the presentation of an argument under s. 24(2) and no more. The crucial difference between the scenarios just discussed and that, which occurs under the APD, is that with the latter, the police, cannot point prospectively to any ascertainably legal authority for their actions. By contrast, if the police were to anchor their actions under the “general warrant” power, for example,⁸⁷ instead of engaging in speculative gambles, then they would not expose themselves (on behalf of the state) to the critique that their actions are merely unilateral (and putative) assertions of authority by street-level policymakers. It is, of course, open to Parliament to craft sweeping police powers, but the government must be able to justify them and demonstrate their constitutionality when called upon to do so. Significantly, the government must also be prepared to be held politically accountable for its actions and policy choices.⁸⁸

2.3.1(iii) *R v Orbanski; R v Elias*

During the interval of time between the decisions in *Godoy* and *Mann* the composition of the Court changed significantly. Yet, this did not immediately disrupt the harmony surrounding the APD. The Court was unanimous in *Godoy* in its use of *Waterfield* and again in *Mann* there was full consensus in concluding that it was appropriate for the APD to be used to create non-statutory police powers. Iacobucci J. who was joined by several other members of the Court, including Justices Fish and LeBel, authored the reasons of the majority in *Mann*. The dissenting judgment of Madam Justice Deschamps related only to the s. 24(2) determination which is not

⁸⁶ See generally Michael Plaxton, “Police Powers After Dicey” (2012) 38 Queen’s LJ 99.

⁸⁷ These matters will be discussed more fully in Chapter Four.

⁸⁸ See generally Sujit Choudry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 Osgoode Hall LJ 1.

pertinent to the Court’s use of the APD in the case—so on this, the primary matter, the SCC was in fact unified. As we shall shortly see, the unanimity of the Court soon came unraveled.

The cases of *R v Orbanski*; *R v Elias*⁸⁹ did not involve the use of the APD. Rather, the results in these cases were achieved through another “hands-on”⁹⁰ form of adjudication. As in *R v Ladouceur*⁹¹ before it, a majority of the Court saw fit to imply (or read in)⁹² limitations to the broad grants of power given to the police. These cases dealt with some of the unresolved issues related to the investigation of impaired driving. In these jointly decided cases the police had detained the motorists to determine whether the drivers might have been intoxicated. Different investigative measures were used in each of the cases. In *Orbanski*, the accused was requested by the police to perform field sobriety tests along the roadside, while the accused in *Elias* was questioned about his prior consumption of alcohol.

Common to both appeals was a failure by the police to advise the individuals under detention of their right to counsel. In light of the s. 10(b) violations found by the SCC, the issue then became whether the limitations placed on this *Charter* right were “prescribed by law” during s. 1 analysis.⁹³ The Court concluded in each instance that they were, and correspondingly that the police actions were constitutional. The determination of these questions however splintered the Court. These judgments exposed deep fissures within the ranks of the high court on the matter of its role and the appropriateness of using the common law to generate ancillary police powers.

⁸⁹ 2005 SCC 37, [2005] 2 SCR 3 [*Orbanski*].

⁹⁰ Aileen Kavanagh, “Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape” (2011) 9 Intl J Const L 172 at 174.

⁹¹ *Supra* note 58.

⁹² Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 at 8-10. For examples of where the SCC has purported to imply statutory powers not expressly stated in the applicable legislation see *R v Lyons*, [1984] 2 SCR 633, 14 DLR (4th) 482 where the Court granted the police the ability to make covert entries into a private dwelling in order to install electronic surveillance equipment, a scenario not then contemplated in the *Criminal Code*; the case of *R v M(MR)*, [1998] 3 SCR 393, 166 DLR (4th) 261 held that school officials are competent to conduct personal searches of their pupils; and *R v Monney*, [1999] 1 SCR 652, 171 DLR (4th) 1 the Court concluded that detentions powers available to customs agents were expansive enough to allow for the search of an individual’s alimentary canal and the use of drug loo facilities.

⁹³ Susan L Gratton, “Standing at the Divide: The Relationship Between Administrative Law and the *Charter* Post-*Multani*” (2008) 53 McGill LJ 477 at 495 [Gratton, “Standing”].

The majority, led by Madam Justice Charron stated that this conferral of authority arose “by necessary implication from the operational requirements of the combined provincial and federal statutes,”⁹⁴ even though it was not expressly provided for in the legislation before the Court. In reaching this decision the Court rejected the argument that “unless a statute prescribes specific investigatory measures, a police officer has a duty to provide motorists with their right to counsel before taking any steps to assess their sobriety.”⁹⁵ Furthermore the court went on to decry as “impractical,”⁹⁶ the idea that Parliament and the various legislatures could together “legislate exhaustive details as to how [these detentions] must be conducted.”⁹⁷ While this is perhaps so, it ignores the fact that exhaustive detail is unnecessary and obfuscates the real issue enveloping the limitation on the right to counsel. What makes this even more remarkable is that between the time of the incident giving rise to the appeal and the hearing of the matter by the SCC, the legislature in Manitoba had amended its legislation to provide precisely the limitation that the Court saw fit to imply. Moreover, as Susan Gratton points out:

[T]hat the officer’s conduct was [found to be] prescribed by law because it was ‘necessarily implicit’ in the operating requirements of the statute...is simply inaccurate. The officer’s decision to deny the accused the right to counsel was not *necessarily* implicit in the provision... The limit was not precluded by the language of the provision but neither was it included; the officer’s conduct was simply an exercise of discretion under neutral enabling legislation.⁹⁸

Therefore, although purporting to locate the limitation of s. 10(b) rights within the operational requirements of legislation, the practical consequence of the Court’s decision was to accord full deference to an investigating officer’s own assessment of his or her authority from the imprecise grant of power contained in the statute.⁹⁹ Seen in this light, the emanating view from the Court is one reflective of pragmatic concerns and that affords undue deference to the police.¹⁰⁰ This was laid bare when the SCC professed that, “it cannot be disputed that the police had the general power, indeed the duty, to check the sobriety of Orbanski and Elias and that, logically, certain

⁹⁴ *Orbanski, supra* note 89 at para 51.

⁹⁵ *Ibid* at para 45.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Gratton, “Standing”, *supra* note 93 at 497 [footnote omitted and emphasis in original].

⁹⁹ *Ibid* at 496-498.

¹⁰⁰ Mayeda, “Between Principle”, *supra* note 49 at 66.

measures could lawfully be taken to fulfill this duty.”¹⁰¹ Respectfully, this conflates duties with powers and begins to encroach upon the rejection of powers being correlative with an officer’s duties as the Court disclaimed in *Mann*.¹⁰²

Justices Fish and LeBel, who had been newcomers to the Court in *Mann*, subsequently broke ranks with the rest of the SCC in *Orbanski* and issued a scathing dissent in the process. Although the Court utilized other methods to broaden police powers in the case, the reasons of LeBel J. squarely addressed the perceived missteps of the Court in its utilization of the APD. Cautioning against “the lodestar of our constitutional law...becom[ing] the needs of the police,”¹⁰³ LeBel J. offered the reminder that, “[w]e must bear in mind the differing constitutional functions and responsibilities of the courts on the one hand, and of legislatures on the other. Also, legislatures are better equipped to investigate and assess the need for enhanced police powers.”¹⁰⁴ In admonishing the development of police powers by the Court at common law, the dissent in *Orbanski* declared:

The adoption of a rule limiting *Charter* rights on the basis of what amounts to a utilitarian argument in favour of meeting the needs of police investigations through the development of common law police powers would tend to give a potentially uncontrollable scope to the doctrine developed in the *Waterfield-Dedman* line of cases, which—and we sometimes forget such details—the court that created it took care not to apply on the facts before it (*R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)). *The doctrine would now be encapsulated in the principle that what the police need, the police get, by judicial fiat if all else fails or if the legislature finds the adoption of legislation to be unnecessary or unwarranted. The courts would limit Charter rights to the full extent necessary to achieve the purpose of meeting the needs of the police. The creation of and justification for the limit would arise out of an initiative of the courts.* In the context of cases such as those we are considering here, this kind of judicial intervention would preempt any serious *Charter* review of the limits, as the limits would arise out of initiatives of the courts themselves.¹⁰⁵

Strong words, but ones that speak to the gravity of the situation and aptly recount what is at stake in these cases when the Court places the wrong constitutional shoe on the wrong institutional foot. This I suggest is precisely what occurred and what the majority confused in *Mann*. The

¹⁰¹ *Orbanski*, *supra* note 89 at para 44.

¹⁰² *Mann*, *supra* note 77 at para 35.

¹⁰³ *Orbanski*, *supra* note 89 at para 82.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* at para 81 [emphasis added].

analytical schism that erupted in *Orbanski* and the depth of these fractures are matters that will be revisited in later discussions as we see them resurface in the Court's jurisprudence.

2.3.1(iv) *R v Clayton*

The 2007 decision in *Clayton* was the next case to display the Court's embrace of the APD. The appeal in *Clayton* was brought by two appellants who had been stopped by the police at an impromptu road blockade erected by the police in response to a report of several men brandishing handguns in the parking lot of a strip club. Police detained the appellants as they attempted to exit the parking lot. Following questioning, a search of the car and its occupants revealed the presence of firearms precipitating the charges that were filed in the case. Litigation in the case concentrated on determining the lawfulness of the police decision to detain the appellants. In essence, the SCC approved the use of a "*Mann* stop"¹⁰⁶ in the context of a vehicle stop to detain the driver and his passenger. Writing for the majority, Madam Justice Abella found that the police actions "were reasonable"¹⁰⁷ and "sufficiently tailored to the circumstances"¹⁰⁸ such that the "detention was [held to be] constitutionally permissible."¹⁰⁹ It was on the basis of the precedent established in *Mann* that the Court failed to identify any violation of the appellants' *Charter* rights under s. 9. Some of the more worrisome aspects of the Court's fact-finding process and the ruling in the case will be reviewed in subsequent chapters.

Although concurring in the ultimate disposition of the case, Mr. Justice Binnie authored an erudite judgment in which he proposed a new analytical approach for how common law police powers should be assessed. Justices Fish and LeBel joined Binnie J. in supporting the approach he championed. In recognition of the "growing elasticity of the concept of common law police powers,"¹¹⁰ Binnie J. opined that any such powers, if they are to be legally affirmed, "must...be subjected to explicit *Charter* analysis."¹¹¹ In short, the Binnie-LeBel-Fish triumvirate reasoned that judicial analysis in cases like *Mann* or *Clayton* should parallel ordinary s. 1 analysis under the test established by the Court in *R v Oakes*.¹¹² The most appreciable hazard in the majority approach, according to Binnie J., is that by "[c]onflating in a *Waterfield*-type

¹⁰⁶ Christina Skibinsky, "Regulating *Mann* in Canada" (2006) 69 Sask L Rev 197 at 201.

¹⁰⁷ *Clayton*, *supra* note 5 at para 40.

¹⁰⁸ *Ibid* at para 37.

¹⁰⁹ *Ibid* at para 42.

¹¹⁰ *Ibid* at para 59.

¹¹¹ *Ibid*.

¹¹² [1986] 1 SCR 103 at paras 69-71, 26 DLR (4th) 200.

analysis the consideration of the individual's [*Charter*] rights and society's s. 1 interests...[this] sidestep[s] the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework for *Charter* analysis"¹¹³ and only "add[s] to the problematic elasticity"¹¹⁴ of discretionary police powers. The minority went on to lament the fact that in applying the APD, the Court in essence enables the state litigants to circumvent the requirements of the *Charter* under s. 1.¹¹⁵ Continuing in this vein Binnie J. expressed the view that *Dedman* analysis and s. 1 analysis are not duplicative of one another and the latter *Charter*-based standard is a higher one to meet.¹¹⁶ Therefore, under the position advanced by the minority in *Clayton* it would be possible for a common law power asserted by the police/Crown to survive *Waterfield* analysis, but still fail the *Oakes* test.¹¹⁷ Indeed, even though in every instance where *Waterfield/Dedman*-reasoning has been engaged by the Court it has led to either the expansion of police powers or results otherwise favouring the Crown, the eventuality contemplated by the dissent in *Clayton* should continue to be seen as tenable, at least theoretically.

Nevertheless, and in spite of the bold remarks of the Binnie J.-led contingency, the minority was still prepared to *potentially* engage in judicial lawmaking and to create common law police powers. While we can find reason to be sympathetic to the difficult realities faced by courts and police alike, this does not justify circumventing the constitutional order and having the Court step into fill the void. To their credit the minority openly invited Parliamentary intervention "to address the issue of police powers in a comprehensive way"¹¹⁸ and even pointed to other common law jurisdictions as examples that Canadian legislators might consider replicating.

Drawing attention to one of the principal problems associated with the Court's utilization of the APD, Professor Richard Jochelson explains that:

The Court encourages dialogic silence when it used the ancillary powers test, an embedded (tacitly hidden) jurisprudential tool, to create police powers. This in turn allows Parliament—its attention not forced to address the issue—to [continue] avoid[ing]

¹¹³ *Clayton, supra*, note 5 at para 59.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at para 79.

¹¹⁶ *Ibid* at para 78.

¹¹⁷ *Ibid* at para 79.

¹¹⁸ *Ibid* at para 95.

the policy debate inherent in the legislative process. The Court, on the basis of its own policy objectives and in the absence of legislative process, is allowed to create *de facto* police powers in lieu of Parliament.¹¹⁹

Quite simply, the SCC cannot engage in a dialogue with Parliament “when it assumes the role of legislator, particularly when it assumes the Court has ‘enacted’ a policy that comports with governmental objectives”¹²⁰ enabling the state greater control over crime. In applying the adjudicative model they prescribe, the minority found that police actions were overbroad in their scope and identified a violation of s. 9 of the *Charter*. Thus, if the opinion of Binnie J. had garnered a wider plurality of support and prevailed in the case, we might have anticipated a legislative response from Parliament.

The ruling of the majority in *Clayton* is appreciably different from those in *Dedman*, *Godoy*, and *Mann* in that it failed to confer an enduring power upon the police. In this way it resembles *Stenning* and *Knowlton*, the earliest cases to utilize *Waterfield*. While it may be appealing at first blush to think judgments such as *Clayton* are preferable to those that introduce freestanding powers in that they are essentially confined to the exigencies of the case, I suggest that these decisions are actually more troubling and should give us greater reason to be concerned about the SCC’s use of the APD.¹²¹ Both types of powers suffer from the usual flaws of being non-democratic and imposed retroactively. However, in cases like *Godoy*, *Mann* and as we shall see shortly in *Kang-Brown*, there is at least an effort made to structure and confine police powers. This is not so with *Clayton*-style decisions. Rather, these judgments present a bare contest on whether or not whatever the police chose to do was reasonable. Given that this assessment will always be made on after the fact and virtually always in cases involving a factually guilty accused, there is reason to be suspect of the fairness and proportionality of these assessments.

¹¹⁹ Richard Jochelson, “Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference” (2008) 13 Rev Const Stud 209 at 236 [Jochelson, “Crossing”].

¹²⁰ *Ibid* at 235.

¹²¹ See Coughlan, “Common Law”, *supra* note 8 at 266 where he offers the view that, “the Supreme Court seems to have begun to interpret the ancillary powers doctrine in a way which ceases to think of the police as having actual ‘powers’ at all, but rather as whether we should retroactively approve or disapprove of the decision made on the spot by the individual officer. If a court approves, the power existed: if a court did not approve, the power did not exist. Ultimately that approach would challenge foundational notions of our criminal justice system, because it will amount to rule by people, not by law.”

2.3.1(v) *R v Kang-Brown* and *R v AM*

The twin cases of *Kang-Brown* and *AM* marked the next occasion in which the SCC deployed the APD. What we find in these companion cases is a continuation of the Supreme Court’s demonstrated willingness “to reserve its power to create new police search powers, in the absence of any legislative impetus, while in its disposition [finding] the actions of the police unreasonable”¹²² on the facts before them.

Using criminal profiling tactics devised by American law enforcement agencies,¹²³ the police in *Kang-Brown* focused their attention on the South Asian accused who was traveling through a Greyhound bus terminal—a place the police considered to be a possible site of drug trafficking—even though they had no specific information to warrant suspicion of either the accused or the location. The search conducted in *AM* was of a high school building with the police acting on an open invitation that had been given to them by the principal to search for drugs. The police were not investigating any specific occurrence or complaint. In both cases, the SCC held that the illicit drugs uncovered by the police had been secured through unconstitutional means and went on to exclude the ill-gotten evidence under s. 24(2) analysis. This, of course, says nothing about the Court’s determination of the *general* propriety of the asserted police powers that were challenged by each of those accused. Putting aside the dispositions in these cases and taking a more expansive view, I suggest that at the macro-level it was the police combined with the state’s interest in “crime control”¹²⁴ that were the real winners.

¹²² Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24 Can JL & Soc 231 at 231.

¹²³ David M Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 Osgoode Hall LJ 145 at 151. As a leading scholar on the prevalence of racial profiling by Canadian law enforcement, Tanovich has been a frequent critic of these police tactics. See also David M Tanovich, *The Colour of Justice* (Toronto: Irwin Law, 2006) at 91-94; David M Tanovich, “Operation Pipeline and Racial Profiling” (2002) 1 CR (6th) 52; David M Tanovich, “Res Ipsa Loquitur and Racial Profiling” (2002) 46 CLQ 329 at 335; David M Tanovich, “E-Racing Racial Profiling (2004) 41 Alta L Rev 905 at 913; David M Tanovich, “A Powerful Blow Against Police Use of Drug Courier Profiles” (2008) 55 CR (6th) 379. These investigative techniques have, however, drawn, the ire of other commentators including Don Stuart, “The Charter Is a Vital Living Tree and Not a Weed to Be Stunted: Justice Moldaver Has Overstated” (2006) 21 NCJL 245 at 252; Sonia N Lawrence & Toni Williams, “Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing” (2006) 56 UTLJ 285 at footnote 169.

¹²⁴ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 153.

It is safe to say that in the overwhelming number of cases once the litigation process has been exhausted or otherwise terminated by an individual litigant, that his or her interest in any legal issue implicated by their case sharply wanes. This is not so with the state. Its interest extends far more widely and endures beyond the exigencies or particular circumstances of a given case. In Chapter Three, I will present the argument that cases like *Kang-Brown*, *Mann* and *Godoy* can be conceptualized as state-initiated contests in which the government has, through its various agents, selected individuals to be guinea pigs in the criminal process and the subjects of criminal prosecutions to determine, *inter alia*, the limits of police powers. Without further pursuing this path of inquiry here, suffice it to say that the Crown wins more (and more often) than it loses. And even where they “lose” as in *Kang-Brown*, still they gain more from the perspective of crime control on a go-forward basis.

Returning to the instant cases, it must be noted that no statute authorized the police use of drug detecting dogs during criminal investigations.¹²⁵ Thus, the legality of the warrantless use of sniffer dogs by police to search bags containing personal property was the central legal issue before the Court.¹²⁶ After reserving its decision for a period of 11 months,¹²⁷ the Court splintered on a number of sub-issues making the decision extremely complex and challenging to interpret.¹²⁸ Concerning the assessment of the ability of the police to use sniffer dogs during criminal investigations, a cobbled together majority of the Court ruled that police can, at common law,¹²⁹ initiate sniffer dog searches against citizens and their personal effects on a warrantless basis.¹³⁰ To do so, however, the investigating officers must have formed a “reasonable suspicion”¹³¹ in relation to a subject or object that is to be searched. In this way the decision mirrored the standard set out in *Mann* to govern BIDs.¹³² Prior to effecting a search

¹²⁵ Stribopoulos, “Sniffing Out”, *supra* note 10 at 45.

¹²⁶ Jochelson, “Crossing”, *supra* note 119 at 217-218.

¹²⁷ Don Stuart, “Revitalising Section 8: Individualised Reasonable Suspicion is a Sound Compromise for Routine Dog Sniff Use” (2008) 55 CR (6th) 376 at 376.

¹²⁸ *Ibid.*

¹²⁹ Steven Penney, “Conceptions of Privacy: A Comment on *R. v. Kang-Brown* and *R. v. A.M.*” (2008) 46 Alta L Rev 203 at 203.

¹³⁰ Gerry Ferguson & Benjamin L Berger, “Recent Developments in Canadian Criminal Law” (2009) 33 Crim LJ 263 at 271.

¹³¹ For commentary see David Dalrymple, “Reasonable Suspicion: Two Competing Approaches” (2011) 84 CR (6th) 94.

¹³² Jochelson, “Crossing”, *supra* note 119 at 206.

against an individual using a sniffer dog, the police are required to possess a reasonable suspicion that is particularized to the individual that is to be stopped and searched.¹³³

In deciding these cases, the SCC was divided sharply over the assessment of the lawfulness of the impugned police actions, and more importantly on the legitimacy of using the APD. Of the eight sets of reasons that were cumulatively rendered in *Kang-Brown* and *AM*, only two warrant closer scrutiny and both were issued in *Kang-Brown*. Let us now compare the divergent positions asserted by LeBel J. and Binnie J. on the core issue in the cases: the *Court's* role in assessing the legality of state actions and the formulation of any common law police powers. Beginning with the judgment of Mr. Justice LeBel, it is interesting first to see who sided with him in these cases. The stalwart support of Fish J. was hardly surprising given that he and Justice LeBel had sat in league in *Mann*, *Orbanski* and *Clayton* previously. However, few could have predicted that Madam Justice Charron who authored the majority opinion in *Orbanski* and Madam Justice Abella who less than a year earlier delivered the judgment of the Court in *Clayton* would reverse course and align with Justices LeBel and Fish. But they did. And, did so without offering any explanation for this reorientation. Yet, what is even more startling is the altered direction taken by Mr. Justice Binnie in which he not only broke ranks with LeBel and Fish JJs, but he completely resiled from the dissenting position he asserted in *Clayton*.

Turning first to the judgment of LeBel J., we find a deep concern for the institutional division of labour between the SCC and Parliament. It is a judgment that attempts to revive the jurisprudential legacy of former Chief Justice Dickson and Justice La Forest who previously expressed grave concerns about the Court-led expansions of coercive state power. According to LeBel J., “any perceived gap in the present state of the law on police investigative powers arising from the use of sniffer dogs is a matter better left to Parliament.”¹³⁴ This is harmonious with the idea that “courts must remain alive and sensitive to the fact that they are ultimately the guardians of constitutional rules, principles and values.”¹³⁵ In addition, existing judicial “precedents do not mean the Court should always expand common law rules, in order to address perceived gaps in police powers or apprehended inaction by Parliament.”¹³⁶ As noted by the minority of justices, when the Court grants license to liberty-impairing police powers, “ironically, this erosion [of

¹³³ Stribopoulos, “Sniffing Out”, *supra* note 10 at 42.

¹³⁴ *Kang-Brown*, *supra* note 7 at para 4.

¹³⁵ *Ibid* at para 7.

¹³⁶ *Ibid* at para 6.

civil liberties] derive[s] not from state action or from the laws of Parliament, but from decisions of the court themselves.”¹³⁷ Heeding its own caution, this four-member segment of the Court refused any “attempt to create or discover a common law police power”¹³⁸ in these appeals. They were not prepared to have the Court slide further down this slippery slope.¹³⁹

Looking now at the judgment that prevailed within the “polarized”¹⁴⁰ Court, we find a starkly different orientation asserted by Binnie J., who was joined directly by Chief Justice McLachlin and inferentially by Justices Deschamps, Rothstein and Bastarache. Amongst this consortium of judges the only discrepancies to arise surrounded the requisite standard to be applied before a dog sniff search could be considered lawful. While ultimately the *Mann*-based standard of a “reasonable suspicion” was declared, Bastarache J. was more hawkish and would have actually gone even further down the path to crime control by permitting the police to use sniffer dogs on the basis of a mere generalized suspicion. For her part, Deschamps J. agreed that a “reasonable suspicion” was the appropriate standard to be applied, but disagreed with the dominant position, which found that the police had not satisfied such in the cases. All of the justices in this camp were, however, prepared and willing to confer new common law police powers, which they did.

Although again professing to welcome parliamentary intervention,¹⁴¹ as he did in *Clayton*,¹⁴² Justice Binnie this time refused to abide “an approach that effectively renders sniffer dogs useless until Parliament chooses to enact legislation.”¹⁴³ Finding this to be unpalatable and unduly burdensome on the police, Binnie J. later stated, “it is not necessary for the police to keep returning to Parliament for authority to make use of [investigative] tools deployed in full public view.”¹⁴⁴ This is at odds with the SCC’s earlier recognition of the low-visibility nature of police-citizen encounters.¹⁴⁵ Moreover, it fails to explain why the police should be absolved from adhering to the strictures of the principle of legality, or, why we should accept that one of the

¹³⁷ *Ibid* at para 10.

¹³⁸ *Ibid* at para 17.

¹³⁹ See Joseph R Marin, “*R. v. Mann: Further Down the Slippery Slope*” (2005) 42 *Alta L Rev* 1123 [Marin, “Slippery Slope”].

¹⁴⁰ *Kang-Brown*, *supra* note 7 at para 19.

¹⁴¹ *Ibid* at para 22.

¹⁴² *Clayton*, *supra*, note 5 at paras 76 and 95.

¹⁴³ *Kang-Brown*, *supra* note 7 at para 22.

¹⁴⁴ *Ibid* at para 54.

¹⁴⁵ *Mann*, *supra* note 77 at para 18.

basic premises behind the rule of law be undercut given that at the time of the occurrence the scope (and existence) of the asserted police powers were both unknown and unknowable. Nevertheless, the continuation of this paradigm has been tacitly encouraged by the actions of the SCC in these cases and *expressly* supported in *Kang-Brown* where it was asserted by Binnie J. that:

In fairness to litigants, the Court ought not...waver unpredictably between the willingness of the Court to explore adjustments in the common law of detention or search and seizure based on reasonable suspicion...and the ‘hands off’ or ‘leave it to Parliament’ attitude...How are litigants to anticipate whether they will find the Court in a ‘can do’ mode or a ‘leave it to Parliament’ mode? In my view, *Mann* and *Clayton* resolved the Court’s attitude to this particular area of common law police powers in favour of the former. *We have crossed the Rubicon.*¹⁴⁶

None of this, however, dislodges the more basic point that at all times Parliament remains capable (subject only to the constraints imposed by the *Charter*) of granting the impugned powers to the police that are being sought through the litigation process. What makes the announcement of the Court’s traversal of the adjudicative Rubicon all the more confounding is the identity of the author. Ironically, in delivering the Court’s last—and purportedly final—word on the subject in *Kang-Brown*, Binnie J. has himself become “an odd godfather”¹⁴⁷ for common law ancillary police powers.

2.4 Chapter Conclusion

The rise of *Waterfield* in Canada reflects an uncommon development of the common law. This “Canadianization,”¹⁴⁸ and co-opting of the original test that we find within APD jurisprudence has dramatically impacted the law governing exercises of coercive power by Canadian police forces. Whereas there was “minimal precedential value in the *post hoc* determination of whether [or not] the police acted”¹⁴⁹ reasonably under the original *Waterfield* test, cases decided under the reconstituted “*Waterfield/Dedman*”¹⁵⁰ test, in contradistinction, are of considerable jurisprudential importance. This is true in the narrow sense that any powers generated by the Supreme Court are themselves applicable in future cases and serve as the platform to then broaden existing common law ancillary powers. It is also true in a broader

¹⁴⁶ *Kang-Brown*, *supra* note 7 at para 22 [emphasis added].

¹⁴⁷ *Supra* note 5.

¹⁴⁸ Marin, “Slippery Slope”, *supra* note 139 at 1130.

¹⁴⁹ Young, “Watchtower”, *supra* note 82 at 394.

¹⁵⁰ *Kang-Brown*, *supra* note 7 at paras 50-52, 56 and 62.

sense, in that, the spawning of novel powers by the SCC tends to propel the further judicial expansion of police powers at every court level, which, in turn, helps to reify the practice under *Waterfield*. The reformation of *Waterfield* has been the catalyst emboldening the Court to undertake farther-reaching exercises of judicial lawmaking, whilst wading deeper into the waters of policymaking where it does not belong. To the extent that the Court has enlarged the ambit of its common law lawmaking authority under *Waterfield/Dedman*, the growth of state power has expanded in lockstep where the APD has been dispatched in Canadian criminal law. This development is inessential for the government if its goal is to achieve such results and secure greater police powers for its investigative agents; and, for its part, the Court, insofar as it accrues a greater role in the formation of criminal law and procedure through the APD, so too, does it depart from its role as the safekeeper of constitutional rights for Canadians. While this phenomenon can be untangled and these institutions can return to their proper quarters, the Court cannot simultaneously decouple itself from the stinging charges of judicial activism and maintain the APD.

Chapter Three: Police Powers and the Limitations of Judge-Made Law

3.0 Overview

Following the Supreme Court of Canada's (SCC) announcement in *R v Kang-Brown*¹ that “We have crossed the Rubicon,”² it becomes necessary for us to probe deeper into this statement and try to determine what it entails for the continued litigation of police powers. As a preliminary observation, the “we” that is referred to in this declaration has at least two meanings and is aimed at an equal number of subjects. First, when read as a personal pronoun, the “royal we” is addressed to the justices of the Supreme Court. Importantly, it is also asserted on their behalf to indicate that the Court, as an institution, has embarked upon a new path and is committed to a particular jurisprudential philosophy. Although open to the obvious challenge that Mr. Justice Binnie was not speaking for a unanimous Court, he was speaking for a dominant plurality of it and did express the prevailing view in the case. Moreover, the force of these words remains undiminished by any subsequent decision of the high court. This position has endured even as the composition of the Court has changed over time. Second, it was the express intention of Binnie J. to signal to everyone—lawmakers, lower courts, legal counsel, the police and citizens-cum-litigants alike—that collectively, we, are all standing on new legal terrain. Where it was once considered to be anomalous,³ or, thought inappropriate for the Court to expand coercive state power at common law in criminal cases,⁴ the ruling in *Kang-Brown* makes it clear that when questions arise about the scope or existence of police powers, the ancillary powers doctrine (APD) will now ordinarily be applied by the Supreme Court.

¹ 2008 SCC 18, [2008] 1 SCR 456 [*Kang-Brown*].

² *Ibid* at para 22.

³ James Stribopoulos, “Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases” (2009) 47 SCLR (2d) 35 at 36 [Stribopoulos, “Sniffing Out”]. See also Don Stuart, “*Godoy*: The Supreme Reverts to the Ancillary Powers Doctrine to Fill a Gap in Police Power” (1999) 21 CR (5th) 225 [Stuart, “*Godoy*”].

⁴ For example, it was by a unanimous Court in *R v Wong*, [1990] 3 SCR 36 at para 35, 60 CCC (3d) 460 [*Wong*] that, “[I]t does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.”

In championing the APD, the Court professed a concern for *predictability* and *fairness* to those engaged in criminal litigation.⁵ Indeed, these dual concerns formed the basis of the Court’s justification for staking its claim on the other side of the adjudicative Rubicon. By asserting these objectives the Court has given us both the criteria and the benchmarks against which we can measure the utility of the APD as a lawmaking tool. In light of the Supreme Court’s self-expressed transition into “‘can do’ mode,”⁶ it is prudent to explore the efficacy of the Court’s rationale and assess whether the “*Waterfield/Dedman* test”⁷ is capable of delivering on the twin promises that have been made on its behalf. Using the metrics of predictability and fairness, I will isolate problems associated with judge-made law generally, before delving into particular troubles arising from the Supreme Court’s application of the APD. As I proceed to interrogate these terms, allow me to state at the outset what I mean by them. Predictability is easily defined. It is met when the law delivers clarity about what the expectations or demands are upon those subject to a given rule. When the law is predictable it is capable of providing guidance to individuals when determining their actions and alerting them in advance of the potential repercussions arising from a chosen course of conduct. Fairness is, at first blush, a more elusive concept. It can mean different things in different contexts and it is inherently more subjective in nature, particularly when considering it in substantive terms. There the beauty (or blight) is in the eye of the beholder. However, that is not how I shall be conceptualizing it. Rather, I will be evaluating “fairness” in terms of process and procedural regularity whilst maintaining an agnostic view of the actual content of the powers created by the Court. In this respect the APD is quite different from the Parliamentary process and, as I will show, far less fair.

For its part, the SCC offers little assistance, functionally speaking, in unpacking the contents of this taxonomy and the presented division of terms. Accordingly, there is some difficulty apparent in trying to untangle where a concern rooted in predictability ends and where a fairness-based concern begins. There is simply too much overlap for

⁵ *Kang-Brown*, *supra* note 1 at para 22.

⁶ *Ibid.*

⁷ *Ibid* at paras 50-51.

them to be easily (or artificially) severed. That said, in organizing this critique, we can divide our concerns broadly into two main areas: first, those concerning the efficacy of the doctrine and its capacity to specify clearly-defined limits for the exercise of state power during criminal investigations; and second, the more fundamental and principle-based challenges that surround the APD and the legitimacy of common law police powers within the constitutional framework.

Accordingly, I will contest the capability of ancillary powers doctrine jurisprudence to provide the sort of *predictability* and certainty in the law that is desirable for all stakeholders. There are a number of procedural impediments and constraints built into the court structure and adjudicative processes that detract from the ability of judges to fulfill this objective. These deficiencies relate primarily to the *ad hoc*, fact-specific nature of criminal proceedings. There are, however, further collateral problems that emerge whenever the APD is engaged and these too will be illuminated. The troubles here are traceable to the design and mandate that is given to courts. Additionally, I will separately challenge the *fairness*-based prong of the Court's justification. In particular, I will argue that this concern has been fundamentally mischaracterized given that the state invariably stands as one of the litigants in criminal cases. In this task, I will explore how the government is uniquely situated in its ability to enact, enforce and prosecute the criminal law; and why it is thus inappropriate—and equally *unnecessary*—for the state to seek to broaden its powers in the context of a criminal trial or a subsequent appeal. In this chapter attention will be devoted to recent Supreme Court decisions where the APD has been utilized, including *R v Mann*,⁸ *R v Clayton*,⁹ *Kang-Brown*¹⁰ and its companion case *R v AM*.¹¹

3.1 Predictability-Based Concerns

3.1.1 Institutional Shortcomings

Unlike administrative tribunals that deal exclusively with a defined scope of subject-matter, Canadian courts are tasked with resolving disputes in an array of matters. Judges are thus generalists heading non-specialized bodies. Courts are also designed to

⁸ 2004 SCC 52, [2004] 3 SCR 59 [*Mann*].

⁹ 2007 SCC 32, [2007] 2 SCR 725 [*Clayton*].

¹⁰ *Supra* note 1.

¹¹ 2008 SCC 19, [2008] 1 SCR 569 [*AM*].

be reactive institutions and cannot be faulted for either the volume or nature of the cases brought before them. Principally, judicial decisions resolve finite problems in a series of one-off contests, so any criticism of the judiciary for dealing with issues on a case-by-case basis is thus misplaced. The piecemeal construction of case law is axiomatic of the court function. Indeed, it is a defining feature of common law legal systems and the only way for non-statutory law to develop under such regimes. In and of itself this is not problematic, however these characteristics do not lend themselves to the development of a comprehensive and logically sequenced body of rules. Nor, I would add, does it sit well for courts to be the entity seen to be expanding the coercive reach of the state. Another signature element of the “judicial process”¹² is the manner in which facts are found. Courts are repositories of evidence, which they must then assess and weigh on an *ex post facto* basis. They do not conduct independent research or undertake their own fact-finding missions.¹³ Judges are instead reliant upon the materials marshaled by those participating in litigation to inform their analysis in a given dispute. This has the effect of narrowing the scope of information that is available to their decision-making processes. This stands in sharp contrast with the unlimited range of materials that may be considered by elected lawmakers when they are drafting (or amending) legislation and proposing policy changes. In short, what may be a virtue in court proceedings and an integral component of the litigation process are commonly manifest as vices that impede the formation and implementation of policy choices. Courts of course do have an effect on policymaking, but ordinarily these effects are incidental to its function. However, recent jurisprudence under *Waterfield* has seemingly miscast these roles and displaced the burden of policymaking that properly rests with the government.¹⁴ In these cases policy is reactively established by judges in response to actions taken by the police on their own accord. Yet, unlike elected lawmakers who face re-election, judges are not accountable to the electorate and enjoy security in tenure. This belies the non-democratic nature of judge-made law and is one of the many places where concerns about the predictive utility of the APD dovetails with those anchored in fairness. The Court subordinates its own

¹² See generally Roscoe Pound, “The Judicial Process in Action” (1955) 1 NYLF 11.

¹³ Terence G Ison, “The Operational Realities of the *Charter*” (2012) 25 Can J Admin L & Prac 1 at 15 [Ison, “Operational Realities”].

¹⁴ *Ibid* [emphasis in original].

proclamation that democracy is one of the bedrock principles underwriting the Canadian constitutional order when *Waterfield/Dedman* is used to make law.¹⁵ This is not assuaged by the tepid concession offered in *R v Clayton* that the APD is an imperfect solution to the problems the Court is attempting to stamp out.¹⁶ Additionally, courts are limited in the level of oversight that they can provide after the fact and are ill-equipped to supervise the policy choices that they implement.¹⁷ Against this backdrop, we cannot predict with any certainty which issues will be litigated, when they will arise or how courts across the country may choose to resolve them.

3.1.2 Delays

Developing the law and fleshing out doctrinal rules to govern police actions through a series of *ad hoc* judicial decisions is a time-consuming, multistep process. Delays are inherent in every stage of the criminal justice system. Following an initial determination at trial, a case must be appealed, and then appealed again, before it is finally capable of being heard by the SCC. The appellate process is complex and many steps are involved as a case ascends through the court system.¹⁸ The salient point is that the overall period of delay from the time that a police-citizen encounter occurs, until the SCC finally settles the matters in dispute can be quite significant and is often measured in terms of years. Furthermore, the Supreme Court sometimes reserves its judgments in

¹⁵ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385.

¹⁶ *Clayton*, *supra* note 9 at para 76.

¹⁷ See generally Steven Penney & James Stribopoulos, “‘Detention’ under the Charter after *R. v. Grant* and *R. v. Suberu*” (2010) 51 (2d) SCLR 439. See also the media reports detailing the overuse of strip searches by Toronto police in contravention with the Supreme Court’s ruling in *R v Golden*, 2001 SCC 83, [2001] 3 SCR 679. For example, see Jennifer Pagliaro, “Toronto police watchdog seeks to reduce ‘unnecessary’ strip searches”, *Toronto Star* (18 February 2013) online: Toronto Star <http://www.thestar.com/news/crime/2013/02/18/toronto_police_watchdog_seeks_to_reduce_unnecessary_strip_searches.html>; and “60% of Toronto arrests lead to strip searches”, *CBC News* (17 August 2011) online: CBC News <<http://www.cbc.ca/news/canada/toronto/story/2011/08/17/police-strip-search.html>>. See also Timothy Appelby, “Toronto boy, 13, has gun charges stayed over ‘egregious’ police strip search”, *The Globe and Mail* (29 April 2013) online: <<http://www.theglobeandmail.com/news/toronto/toronto-boy-13-has-gun-charges-stayed-over-egregious-police-strip-search/article11610186/>>.

¹⁸ See generally Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 351-375 [Coughlan, *Criminal*].

cases involving matters of criminal procedure and the exercise of police powers for inordinate lengths of time.¹⁹ Naturally, when this occurs it only prolongs the process of having an issue dispositively determined in the court system.

Beyond the systemic and procedural delays that we find ingrained in the criminal justice system,²⁰ further delays arise from the nature of the judicial function itself. Courts are expected to exercise restraint in the opinions that they offer and convention holds that it is not appropriate for judges to stray from the issues at bar. Avoiding the issuance of *obiter dicta* is commendable; however, we can take umbrage with a judicial refusal to deal with issues that are placed squarely before a court when it is competent to decide the matter. This is especially so in respect of constitutional rights. Yet there have been instances where the Supreme Court has flatly refused to address such issues. For instance, in *Mann*²¹ the Court expressly declined to consider the effect of s. 10(b) of the *Canadian Charter of Rights and Freedoms*²² when it gave the police the power to conduct brief investigative detentions (BIDs).²³ In the wake of *Mann* it could not be ascertained whether a person subjected to a BID was entitled to exercise his or her right to consult legal counsel. As consequence of the Supreme Court's omission, this determination was left to the full discretion of the police to be made in individual cases. It was not until five years later that the Court ended the uncertainty when it ruled in *R v Suberu*²⁴ that an individual's right to counsel is engaged at the commencement of a "Mann stop."²⁵ This should have been obvious in light of the SCC's previous finding that BIDs are captured by s. 9 of the *Charter*. Yet, it should be pointed out this was a

¹⁹ Don Stuart, "Revitalising Section 8: Individualised Reasonable Suspicion is a Sound Compromise for Routine Dog Sniff Use" (2008) 55 CR (6th) 376 at 376. See also Tim Quigley, "Was it Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009) 66 CR (6th) 88 at 88.

²⁰ See generally Daniel M Scanlan, "Issues in Digital Evidence and Privacy: Enhanced Expectations of Privacy and Appellate Lag Times" (2012) 16 Can Crim L Rev 301 [Scanlan, "Lag Times"].

²¹ *Supra* note 8.

²² *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*].

²³ *Mann*, *supra* note 8 at para 22.

²⁴ 2009 SCC 33 at para 2, [2009] 2 SCR 490 [*Suberu*].

²⁵ Steve Coughlan, "Great Strides in Section 9 Jurisprudence" (2009) 66 CR (6th) 75 at 81.

relatively expeditious timeframe to resolve the outstanding s. 10(b) issue when we consider that it took 11 years for the underlying lawfulness of BIDs to be determined by the Supreme Court after the Ontario Court of Appeal approved them for use in that province in *R v Simpson*.²⁶ Indeed, beginning with the seminal case of *Dedman v The Queen*²⁷ and the cases that it spawned,²⁸ delays have long cast a shadow over the APD in Canadian criminal law.

The principal harm that results from these indeterminate periods of delay is the underlying lack of clarity in the law and uncertainty that persists until such time as the SCC recognizes the existence of a police power. When the Court stipulates ancillary police powers, it frequently does so in a way that leaves the outer limits of these powers undefined. Therefore, it is difficult to see how the incremental amelioration of formal deficiencies in the law governing police powers by *ad hoc* decisions in particular cases improves the overall character from the perspective of predictability. This is a problem for the APD and one that must be accounted for by its defenders. Moreover, the inexactitude of state power presents practical problems for law enforcement, which, in turn, begets further litigation over the legality of police actions breeding further delays. It also poses thorny conceptual questions for a legal system that is committed to the rule of law. The latter concern will be addressed more fully when we consider the Court's account of the APD in terms of assuring fairness.

Before departing this discussion, I will attend to the arguments of those who would be willing to concede that delays are, in fact, inescapable in the judicial process but contend that the delays described above are equally applicable in circumstances where courts are asked to interpret statutory powers or in assessing the constitutionality of legislative provisions. Of course, the same basic delays can arise. The difference then, is one of degree and directionality. When Parliament introduces legislation and enacts a new legal rule it speaks with one voice and the law is implemented from the top-down. By comparison, any rules created under the APD emerge from the bottom-up and can be

²⁶ (1993) 12 OR (3d) 182, 79 CCC (3d) 482.

²⁷ [1985] 2 SCR 2, 20 DLR (4th) 321 [*Dedman*].

²⁸ See the discussion in Janine Benedet et al, "30th Anniversary of the *Canadian Charter of Rights and Freedoms: The Impact on Criminal Justice*" (2012) 91 CR (6th) 71 at 86-88 [Benedet, "The Impact"].

created by any number of trial (or appellate-level) courts, which are each free under *Waterfield* to institute new police powers at common law. Moreover, unlike legislation created by Parliament that is applicable uniformly across Canada, judge-made laws are only binding within the jurisdictional bounds of the court that propagated them. Thus, the powers that are created by courts can (at least for a time)²⁹ vary widely from one province or territory to the next. Inter-jurisdictional court rulings may also conflict directly with each other. The potential for an indeterminate number of police powers being spawned by lower courts is surely less predictable when compared with the alternative. New legislation will sometimes be interpreted differently across jurisdictions before it is ultimately settled by the high court. However, in the interim, the potentiality for a divergence of views is numerically more limited and finite in nature. It is difficult to imagine any scenario in which the interpretation of a given piece of legislation could be construed in more than a handful of different ways. This does not hold with judge-made police powers. Rather, these may be far more diffuse and freewheeling in both substance and quantity. Thus, we find another reason to prefer the Parliamentary process over judicial avenues when it comes to the formation of new investigative powers and the conferral of them upon state agents. Lastly, the additional volume of litigation that is propelled by lower court APD rulings diverts finite judicial resources away from other matters. In this way, the adjudication of matters under *Waterfield* contributes to delays in the processing of other disputes on court dockets.³⁰ For a court system that is bogged down by a scarcity of resources and concerned about access to justice,³¹ the recognition of these concerns should resonate.³² While heal-dragging by Parliament undoubtedly occurs, it is not inevitable. Nor is it a legitimate reason for courts to enter the lawmaking fray.

3.1.3 Lack of Clarity, Non-Comprehensiveness and Limit Testing

²⁹ Scanlan, “Lag Times”, *supra* note 20 at 311.

³⁰ Ison, “Operational Requirements”, *supra* note 13 at 18.

³¹ See generally Patricia Hughes & Mary Jane Mossman, “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses” (2002) 13 Windsor Rev Legal Soc Issues 1; and Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 Queen’s LJ 139.

³² Ison, “Operational Requirements”, *supra* note 13 at 13-14 and 18.

It has been observed that APD-based judgments have a tendency to yield more questions than answers.³³ As a function of the Court’s case-by-case jurisprudence we find a lack of thoroughness and an underlying inability to demarcate bright line limits. As Professor Kent Roach indicates, the ensuing uncertainty of the law “means that citizens and police officers have to live with a lack of clarity about the extent of their powers.”³⁴ Consequently, the prospect of the misapplication of police powers and the overshooting of their authority in derogation of the *Charter* is increased.³⁵ Measured in terms of its lack of thoroughness, such failures demonstrate the problems inherent when courts exceed their institutional capacities and begin creating unprecedented police powers.³⁶ This deficit in clarity flows directly from the non-comprehensive nature in which judge-made law is assembled. Where we gain a marginal level of clarity on a particular aspect of policing in a given case, many closely related issues remain in the penumbra. For instance, beyond the s. 10(b) issue that was explicitly left unresolved in *Mann*, the Supreme Court in that case left many other questions related to the parameters of the common law detention and search powers it created unanswered. The ancillary powers stipulated by the Court failed to provide sufficient guidance on a number of important aspects of BIDs including: the acceptable duration of a so-called brief investigative detention;³⁷ when the *Charter* will apply to these detentions³⁸ and under what circumstance a detainee’s right to counsel will be engaged;³⁹ which party will bear

³³ Stribopoulos, “Sniffing Out”, *supra* note 3 at 48.

³⁴ Kent Roach, “A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?” (2008) 40 SCLR (2d) 717 at 754.

³⁵ Stribopoulos, “Sniffing Out”, *supra* note 3 at 48.

³⁶ *Ibid.*

³⁷ Lesley A McCoy, “Liberty’s Last Stand? Tracing the Limits of Investigative Detention” (2002) 46 CLQ 319 at 323-325 [McCoy, “Last Stand”]. See also James Stribopoulos, “The Limits of Judicially Created Police Powers: Investigative Detentions After *Mann*” (2007) 52 CLQ 297 at 309 [Stribopoulos, “The Limits”].

³⁸ Tim Quigley, “Mann, It’s a Disappointing Decision,” (2004) 21 CR (6th) 41 at 43 [Quigley, “Disappointing”].

³⁹ Eric V Gottardi, “*R. v. Mann*: Regulating State Intrusions in the Context of Investigative Detentions” (2004) 21 CR (6th) 27 at 37.

the onus of proof in establishing the reasonableness of a detention;⁴⁰ how close the temporal and geographic nexus must be to permit a BID;⁴¹ the degree of imprecision or variance from the description provided to the police of a suspect that is nevertheless tolerable in electing to detain someone; when an incidental search will be held to be unnecessary and therefore unreasonable;⁴² whether a detainee can be moved⁴³ or transported to another location;⁴⁴ and whether, and if so, to what extent, the police are entitled to use force to effect or continue a detention.⁴⁵ This of course a non-exhaustive list of the residual issues to be resolved through the adjudicate process.⁴⁶ Although *Suberu*⁴⁷ addressed some of these issues, many more still linger and await resolution. Similar difficulties envelop the powers generated by the Court in *Kang-Brown*, particularly where they intersect with the loose strands of *Mann*.⁴⁸

The vacancy of well-defined answers provided in APD cases is problematic for the reasons indicated above, but there are additional problems associated with it. Even if one takes a disinterested view of the *substance* of the police powers conferred by the SCC and suspends any criticisms that may lurk on that front,⁴⁹ there remains good reason

⁴⁰ Benjamin L Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 CR (6th) 58 at 63 [Berger, “Erasure”]. See also David M Tanovich, “E-Racing Racial Profiling (2004) 41 Alta L Rev 905 at 931 [Tanovich, “E-Racing”].

⁴¹ McCoy, “Last Stand”, *supra* note 37 at 328.

⁴² Quigley, “Disappointing,” *supra* note 38 at 43.

⁴³ Michael A Johnston, “Come On *Mann* Don’t Search Me! A Case Comment on *R. v. C.J.F.*” (2009) 47 Alta L Rev 277 at 281.

⁴⁴ McCoy, “Last Stand”, *supra* note 37 at 325.

⁴⁵ Berger, “Erasure,” *supra* note 40 at 63.

⁴⁶ See also Alec Fiszauf, “Articulating Cause – Investigative Detention and Its Implications” (2007) 52 CLQ 327 at 336-337 where he asks the following barrage of questions: “How is someone to know if they are detained or just chatting with the officer? What sort of s. 10(a) reasons is a person entitled to in the absence of a specific charge?...What if a person starts to walk away in the mistaken belief that he or she need not remain unless there is an arrest? Are they escaping lawful custody? When are they liable to a conviction for assaulting or obstructing a police officer if they do not acquiesce?” See generally Alec Fiszauf, *The Law of Investigative Detention* (Markham, ON: LexisNexis, 2008) [Fiszauf, *The Law*].

⁴⁷ *Supra* note 24.

⁴⁸ See David Dalrymple, “Reasonable Suspicion: Two Competing Approaches” (2011) 84 CR (6th) 94 [Dalrymple, “Reasonable Suspicion”].

⁴⁹ For example see Graham Mayeda, “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” (2010) 50 SCLR (2d)

for us to be concerned with the *form* of these powers. Seldom are the holdings in *Waterfield*-based judgments clear-cut and careful study is required in order for these decisions to be interpreted properly. Even legal scholars have expressed difficulty in gleaned precisely what the Court has declared and judgments may be open to more than one interpretation.⁵⁰ This says much about the ancillary powers doctrine and its supposed delivery of predictability in the law.

In addition to not being self-evident, the rules created by the Court are not self-applying. APD decisions rarely provide definitive rules to guide police in their decision-making or stipulate prescriptive solutions to recurrent problems that arise during police-citizen encounters. Consequently, the police are thrust into the position of having to decipher the law that has been created and to then approximate the limits of their powers. Regrettably, research has shown that police forces are not particularly adept at interpreting and adapting to court decisions in order to bring their practices in line with judicial opinions.⁵¹ It stands to reason that the more speculative a rule, the more likely the police are to intrude upon citizens' constitutional rights. For example, owing to the lesser standard stipulated by the Court in *Mann* and *Kang-Brown* to detain and search someone, Canadians are now more susceptible to a greater range of warrantless intrusions

41 at 44 [emphasis in original] [Mayeda, "Between Principle"], where it is asserted that, "[t]he relevant community of judgment is that which takes into account the *actual* parties that are involved in the litigation and the position of non-litigants who will be affected by the decision as represented by interveners." It is apparent that the potential for disparate (and abusive) policing of marginalized groups, including racialized Canadians have not been adequately taken into account during APD litigation. As Mayeda proceeds to argue at 45, "[D]emocracy requires courts to provide justifications for the infringement of citizens' rights that are responsive to the concerns of those whose rights are being infringed. A deferential approach to government, on the other hand, promotes a view of democracy that is essentially majoritarian—it presumes that the legislative choices of a democratically elected body represent the interests of citizens. However, [such a view]...fails to recognize that non-representative bodies like courts are sometimes better suited to promoting and protecting the rights of individuals whose interests are marginalized in the political forum, and whose interests are consequently not reflected in legislative policy choices."

⁵⁰ Gerry Ferguson & Benjamin L Berger, "Recent Developments in Canadian Criminal Law" (2009) 33 Crim LJ 263 at 272.

⁵¹ Ison, "Operational Requirements", *supra* note 13 at 13. See also James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1 at 49 [Stribopoulos, "In Search"].

upon their privacy. Paralleling this, a greater number of *unwarranted* police actions are likely to occur as a consequence of the diminished standard of suspicion required to conduct a BID; and the nebulous way in which the Court chose to articulate the standard.⁵² Concerning the former, it is plain that the “reasonable suspicion”⁵³ threshold can be satisfied by facts or information that is both less reliable and less credible than what is required to support reasonable grounds to arrest someone.⁵⁴ In respect of the latter, what constitutes a “constellation of objectively discernible facts”⁵⁵ is surely open to more than one plausible interpretation and will be situationally contingent.⁵⁶ Without declarative laws to specify the limits of police power it has fallen to the courts to scrutinize the front-line interpretations made by the police,⁵⁷ and to either endorse or reject them after the fact.⁵⁸ The making of this determination will vary from officer to officer and from judge to judge on the basis of his or her own “personal threshold of reasonable suspicion”⁵⁹ on the same set of facts. Hardly a harbinger of predictability in the law, or an effective assurance that due process rights will get their due attention during street-level law enforcement activities. Cumulatively, the investigatory powers created by the Court remain ill-defined. Hence, it is difficult to predict *how* the police will choose to exercise these powers, impossible to know *when* citizens will present a court challenge to the actions of the police or *where* a reviewing court will draw the dividing lines between civil liberties and the limits of coercive state authority.

⁵² *Infra* note 55.

⁵³ *Kang-Brown*, *supra* note 1 at paras 1 and 25. For commentary see Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005) at 5-39 [Quigley, *Procedure*]; and Tim Quigley, “Brief Investigatory Detention: A Critique of *R. v. Simpson*” (2004) 41 *Alta L Rev* 935 at 941 [Quigley, “Brief Investigatory”].

⁵⁴ *Ibid* at 5-40. See generally Dalrymple, “Reasonable Suspicion”, *supra* note 48 at 94.

⁵⁵ *Mann*, *supra* note 8 at para 27.

⁵⁶ Dalrymple, “Reasonable Suspicion”, *supra* note 48 at 95 and 100-101.

⁵⁷ Dennis Forcese, “Police and the Public” in Robin Neugebauer, ed, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars’ Press, 2000) at 175.

⁵⁸ See Michael Plaxton, “Police Powers After Dicey” (2012) 38 *Queen’s LJ* 99 [Plaxton, “Police Powers”], where a presumption in favour of police judgments and their exercises of discretionary authority is proposed.

⁵⁹ Dalrymple, “Reasonable Suspicion”, *supra* note 48 at 95.

Another deficiency with *Waterfield*, as an *ex post facto* test, is that it simply cannot deliver pre-event certainty to a particular police-citizen encounter.⁶⁰ The APD is only triggered in cases where the Court has found that two conditions have been met: first, there is no legislative authorization for the contested police actions; and, second, an earlier judicial precedent has not endorsed the impugned police conduct. Conceptually, in APD cases we find an arm of the state, the Crown, asking for the Court to declare the powers necessary to gain a conviction and enforce them retroactively against an accused. *Waterfield* cannot guide one's actions or decision-making during the actual time that the incident occurs. It can only confirm or deny the lawfulness of past conduct. Hence, neither the officer who initiates the investigation nor the person who is the subject of it can be aware of the legality of the police actions being deployed at the time that they are asserted. In short, the APD does nothing to prevent *Charter* violations before they occur and provides little shielding to guard against future breaches.

3.1.4 Deference to Police

Deference to the police is a common thread running through the Supreme Court's APD jurisprudence as Plaxton has observed.⁶¹ From a results standpoint, the SCC has never applied *Waterfield* in a manner consistent with the original English application of the test.⁶² In every instance where the Court has engaged *Waterfield* the result has been either: the recognition of police actions as lawful;⁶³ the grant of new, freestanding common law powers;⁶⁴ or, both.⁶⁵ Sometimes deference is manifest by specifically condoning police actions that have been taken. Other times the deference that is displayed takes on a more generalized form. The latter occurs when, the Court, although rebuking particular police actions in a given case proceeds nonetheless with stipulating

⁶⁰ Rosemary Cairns Way, "The Law of Police Authority: The McDonald Commission and the McLeod Report" (1985) 9 Dalhousie LJ 692.

⁶¹ Plaxton, "Police Powers", *supra* note 58 at 106-114.

⁶² Patrick Healy, "Investigative Detention in Canada" [2005] Crim LR 98 at 104 [Healy, "Investigative Detention"].

⁶³ *R v Stenning*, [1970] SCR 631, 10 DLR (3d) 224; *R v Knowlton*, [1974] SCR 443, 33 DLR (3d) 755; and *Clayton*, *supra* note 9.

⁶⁴ *Mann*, *supra* note 8; *Kang-Brown*, *supra* note 1 and *AM*, *supra* note 11.

⁶⁵ *Dedman*, *supra* note 27 and *R v Godoy*, [1999] 1 SCR 311, 168 DLR (4th) 257 [Godoy].

ancillary police powers of general application. These powers become entrenched and are designed to endure beyond the exigencies of the case in which they were created.

Kang-Brown is illustrative of *general deference* to the police and crime control. It is a judgment where the Court disapproved of the police actions at the micro-level and in the context of the case, but condoned the investigative tactics in question at the macro-level and cleared them for use in other cases. In this case the SCC applied the APD to allow the use of sniffer dogs during a pre-arrest investigative detention. In essence, what the police attempted was something akin to a “Mann stop”⁶⁶ with the inclusion of a search dog to assist. Only, as the Court found, they lacked a reasonable basis to suspect the accused and to detain him.⁶⁷ Additionally, the SCC also concluded that the police could not point to a recent or ongoing offence that they were investigating, as *Mann* requires in order for a BID to be utilized.⁶⁸ The police had no actual knowledge that anything illicit was occurring at the bus terminal. They did not observe anything amiss firsthand. Nor did they receive a tip from a third party that Mr. Kang-Brown was transporting narcotics. Instead, they sought the cooperation of the accused, and for a time he was compliant. But when he ceased to be so, the police brought in the sniffer dog to search his personal belongings. The sole reason for the presence of the dog at the scene was to search for drugs. Hence, the search that was conducted in *Kang-Brown* was, by definition, not a “Mann search.”⁶⁹ It was directed at a fundamentally different purpose. As the Court stipulated in *Mann*, a search incidental to a BID, is a separate power and does not flow axiomatically from a valid detention. The search power recognized in that case was limited to a protective pat-down where an officer could substantiate a legitimate concern of officer or public safety. None of these criteria were met in *Kang-Brown*. A majority of the Court concluded that the police lacked lawful grounds to commence a search, as there was never any safety concern raised. An acquittal was entered, but without expressly stating so the SCC nevertheless went on to introduce further common law investigative powers into Canadian law. This time, the Supreme Court granted the

⁶⁶ *Supra* note 25.

⁶⁷ *Kang-Brown*, *supra* note 1 at para 26.

⁶⁸ *Mann*, *supra* note 8 at para 34.

⁶⁹ Michal Fairburn, “*Mann* Oh Man – We’ve Only Just Begun” (2005) 17 NJCL 171 at 182.

police the authority to conduct a warrantless search for contraband unrelated to public or officer safety—and to utilize a dog in the evidence gathering process. Therefore, even though the police were found to have acted unlawfully, they (along with all other Canadian police officers) were nevertheless rewarded with new investigative powers for use in future cases.

The Court's judgment in *Clayton*⁷⁰ evinces a different sort of problem from the standpoint of predictability. It is an example of *specific deference* to the discretion exercised by the police in that case, where officers decided to stop every motorist attempting to exit the premises. This included the stopping of the accused's vehicle even though it was not one of the vehicles explicitly described in the 911 call. Ultimately, the Court did not identify anything amiss with the police tactics from a *Charter* standpoint and approved of the police actions, full stop. Where *Clayton* differs from cases like *Dedman v The Queen*,⁷¹ *R v Godoy*,⁷² *Mann* and *Kang-Brown* is that it did not license any articulable and enduring police power. At best the case impresses a watermark to assist in the demarcation of the limits of common law police powers. But it can be used as a proxy or barometer to help the police estimate the lawfulness of an investigative tactic before initially implementing it. There are problems abound with such a framework.⁷³

According to Professor Graham Mayeda:

The majority does not engage in principled reasoning. As a result, it is not clear how, in the absence of particularized suspicion, the power the Court grants to police properly balances the individual's right to autonomy and privacy against the state's interest in preventing handgun-related crimes. All the Court seems to require is a close temporal connection between the call and the police response, and close physical proximity between the roadblock and the location of the

⁷⁰ *Supra* note 9.

⁷¹ *Supra* note 27.

⁷² *Supra* note 65.

⁷³ See Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 20 [Coughlan, Detention] where the authors express the view that, “[I]t remains a bit of mystery as to how a court should decide whether to apply the *Waterfield* test to a given situation...The current attitude seems to conflate the two branches of *Waterfield* into a single question that asks: ‘Do the police need this power to carry out their general duties?’ If so, the answers seems to be that ‘they shall have it.’”

alleged offence. Neither of these requirements substitutes for the particularized suspicion of an *individual*...that would justify violating an *individual's* rights.⁷⁴

Moreover, it was impossible for the police to know how a court would later deem their actions, but they were prepared to take that risk. Evidently, once met by a fruitful investigation that ferreted out firearms, the Court's deference was inclined to side with the police. The hazards present with a judgment like *Clayton* and the chain of reasoning underpinning it has been well-expressed by Coughlan. As he argues,

[C]ommon law powers are much less certain than statutory powers and therefore are less desirable for a number of reasons. They remove predictability from the law, but beyond that they are easily susceptible to 'slippage.' Where the question 'Did the police have the power to do this?' becomes roughly equivalent to 'Did the police behave reasonably?' there is a danger. If we become accustomed to thinking of particular behavior as reasonable, then something close to it but not quite as respectful of rights can be seen as reasonable too. But then that slight diminution becomes our new norm for 'reasonable,' and a further small step away is easy to justify—and so on, and so on.⁷⁵

Thus, we can rightly wonder about the utility of the s. 10(b) right recognized in *Suberu* in circumstances where the police assert themselves as being competent to do something that has no legislative foundation and that has not been previously approved by the judiciary. What is a prudent lawyer to advise his or her client? Should counsel anticipate "slippage"⁷⁶ in the common law and that the police actions will be affirmed following judicial review? Or, should the client be encouraged to remain silent and later launch an argument predicated upon the principle of legality? This is seemingly the only avenue for an individual to pursue given that an argument under s. 1 of the *Charter* is rendered inapplicable under *Waterfield*.

It has been suggested that where "an accused has been searched or detained in the absence of any statutory authority, courts have been faced with a choice between finding

⁷⁴ Mayeda, "Between Principle", *supra* note 49 at 63 [footnote omitted and emphasis in original].

⁷⁵ Steve Coughlan, "Comment" in Janine Benedet et al, "30th Anniversary of the *Canadian Charter of Rights and Freedoms: The Impact on Criminal Justice*" (2012) 91 CR (6th) 71 at 91 [footnote omitted] [Coughlan, "Comment"].

⁷⁶ *Ibid.*

a *Charter* violation or finding a new common law power authorizing the police action.”⁷⁷ While the stark dichotomy presented is enticing in simplicity, it is inconsistent with the actual practice of the Court in APD jurisprudence. Sometimes *both* have arisen within the same judgments. As we saw in *Mann* and *Kang-Brown*, the Supreme Court identified *Charter* breaches and acquitted those accused, but the Court was nevertheless willing to carve out new police powers. The falsity of this choice has also been revealed by judgments pointing in the opposite direction. In *Godoy*, for instance, the Court did not identify a *Charter* violation and still went on to announce the existence of a new power to enter domiciles without a warrant. The uniformity of the outcomes favouring “crime control” in APD cases alone should be enough to give us pause. But, when combined with the Court’s expressed desire to provide *predictability* in the law there is even greater reason for concern.

3.2 Fairness Under *Waterfield* or Fairness Underwater?

3.2.1 Jurisdictional Concerns and the Uneven Development of the Law

Elsewhere in this thesis I have described the common law police powers created by the SCC as being “unprecedented”⁷⁸ in nature. In doing so, I am mindful that this term risks confusion and invites misinterpretation. Specifically, the characterization presented opens the door to the criticism that each of the powers conferred by the Supreme Court arose from the affirmation of a lower (trial or appellate-level) court decision, and as such, were built on the foundations of previous judicial precedents. In a narrow sense this is of course correct. However, this articulation overlooks a significant limitation that is inherent in the conception of ancillary police powers under *Waterfield*. There is a dimension of formal inequality that follows in lockstep with utilization of the APD by lower courts. These matters have not been fully accounted for in the prevailing narrative about common law police powers in Canada and so they warrant further examination. Specifically, I suggest that the powers created by the Supreme Court, though facially neutral, remain open to challenge on the basis of their inability to satisfy more substantive conceptions of equality.⁷⁹

⁷⁷ Coughlan, *Criminal*, *supra* note 18 at 10.

⁷⁸ Stribopoulos, “Sniffing Out”, *supra* note 3 at 49.

⁷⁹ *Supra* note 49.

The construction of court-generated powers is constrained by the jurisdictional scope of the court propounding them. Judges can only implement police powers within their territorial jurisdiction. Moreover, even if we accept that informal pressure is exerted upwardly by lower court rulings to expand police powers,⁸⁰ the actual authority and thrust of *stare decisis* is only ever directed downwardly. Similarly, the opinion of one court is not binding upon another that is laterally situated with it.⁸¹ Consequently, only the Supreme Court is competent to authoritatively interpret criminal law and institute common law police powers on a national level. Thus, until such time as the SCC approves of a particular police tactic, it cannot be said to exist in a province or territory that had not previously recognized the power stipulated by the Court on identical terms. Only in such situations could the ratification of the power be fairly viewed as having confirmed an earlier precedent. Everywhere else, and under all other circumstances, the power can only be regarded as “unprecedented” in nature. Thus, a decision of the high court declaring a common law police power will always be unprecedented. This is significant given that criminal law is a matter of national concern and it should be applied uniformly across the nation. As stated, these rulings do deliver formal equality by harmonizing the law and making it applicable to all. This is a rare welcomed aspect of APD jurisprudence at the Supreme Court level. Yet, we cannot allow these marginal gains to divert our attention from the reality that the SCC’s use of *Waterfield* simultaneously encourages lower courts to themselves apply the APD and these decisions cannot deliver the same harmonization to the law. Nor can we lose sight of the fact that although everyone is amenable, at law, to BIDs and other discretionary police powers, it remains the case that, in fact and on Canadian streets, certain communities appear more susceptible to these forms of state intervention.⁸²

Although the existence of a police power in another jurisdiction is, at law, immaterial to the determination of its legality in the other jurisdiction, this does not mean

⁸⁰ Stribopoulos, “The Limits”, *supra* note 37 at 325.

⁸¹ Glen Luther, “Consent Search and Reasonable Expectations of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada” (2008) 41 UBC L Rev 1 at 16.

⁸² Fisztauf, *The Law*, *supra* note 46 at 5 and 35. See also Kent Roach, “Making Progress on Understanding and Remediating Racial Profiling” (2004) 41 Alta L Rev 895 at 897; and Allan C Hutchinson, *It’s All in the Game: A Non-Foundationalist Account of Law and Adjudication* (Durham, NC: Duke University Press, 2000) at 317.

that the ruling by one court is not influential in the decision-making of another court. Increasingly, lower courts have been willing to bridge the gulf between the existing law and the actions of the police in the absence of recognized, pre-existing lawful authority. This has contributed significantly to the growth of police powers under *Waterfield* and the entrenchment of the APD itself in Canadian law. As Quigley writes of this phenomenon:

[T]here is a distressing tendency by the judiciary to create new common law police powers in response to particular fact situations...[which] are subsequently expanded by judges in other cases. The result is an increase in police powers but without the checks and balances of democratic Parliamentary and public debate.⁸³

Of course, the lower court proclivity for fashioning novel police powers under *Waterfield* has been matched (and encouraged) by the SCC's demonstrated predilection for approving them at common law. One feeds into and reinforces the other.

From an equality perspective, troubles arise whenever the courts in a particular province or territory choose to license police actions that were unauthorized by the *Criminal Code*⁸⁴ or another federally competent statute. As indicated, these newfound coercive powers become applicable in the place of their creation, but do not apply elsewhere. Yet, in practical terms, there is little reason to think that *any* positive judicial precedent in favour of the police in another jurisdiction will have any effect other than to embolden the police in their actions. Therefore, reports of a trial court decision upholding police actions at common law can be seen as suggestive that police in another jurisdiction might procure a similar result. The likelihood of this is even greater should an appellate court decide in favour of expanding police powers. If the police in one province are granted the ability to do something that is not authorized by statute then it is foreseeable that other police forces will institute similar practices if they believe them to be effective tools. Conversely, the establishment of an adverse precedent by a lower court in another jurisdiction can be simultaneously discounted and ignored for the reason that I have asserted: it does *not* apply to them. Surely, it is unfair that Canadian police officers can plausibly (and concurrently) present both arguments.

3.2.2 Non-Representative Cases and Adjudicative Acontextualism

⁸³ Quigley, *Procedure*, *supra* note 53 at 5-2.

⁸⁴ RSC 1985, c C-46 [*Criminal Code*].

In many ways the cases confronted by the courts during APD litigation are outliers. One effect of this, I will suggest is the obscuring of the fact that it is not simply the determination of the limits of police power, or, what some might refer to as a measuring of the “government’s right”⁸⁵ to control crime in society that are at issue. Rather, the individual rights of Canadians as enshrined in the *Charter* are engaged and directly impacted by these court decisions. Yet, when framed principally as contests about police actions the result has been the gradual diminution in the range of personal liberty. The Court has consistently privileged security concerns over civil liberties when resolving these competing tensions under *Waterfield*. If however, courts were to be presented with a fuller compendium of police-citizen encounters, we might then see a greater reluctance to grant common law powers to state agents and a judicial posture that is more attuned to equality-based concerns.⁸⁶

Procedural and resource advantages favour the state and contribute to the distortions found in these cases. APD cases are illustrative of the convergence of the state’s singular interest in crime control being exercised through its various branches. This involves the police, prosecutors and legislators working symbiotically along the same vector and working towards the expansion of state power.⁸⁷ Professor James Kelly has observed it that, “[u]nder the crime control model, the police, who work in conjunction with Crown prosecutors, are provided with wide- and far-reaching investigative techniques that serve to filter out factually weak cases and secure convictions through guilty pleas during the investigative phase.”⁸⁸ It is axiomatic that the cases brought before the Court are ones in which the government’s agents have determined to be favourable and bode well in their quest to enlarge the ambit of state power. Weaker cases can be weeded out, charges stayed and prosecutions discontinued in an effort to avoid the establishment of adverse precedents. It also stands to reason that in cases where the police misconduct is egregious in nature that the Crown will exercise

⁸⁵ Hon Beverly McLachlin, “Charter Myths” (1999) 33 UBC L Rev 23 at 29.

⁸⁶ Berger, “Erasure”, *supra* note 40 at 61-63.

⁸⁷ William J Stuntz, “The Pathological Politics of Criminal Law” (2001) 100 Mich L Rev 505 at 534.

⁸⁸ James B Kelly, *Governing With the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: UBC Press, 2005) at 108.

its discretion and elect not to proceed against a factually guilty accused.⁸⁹ Alternatively, in such cases the Crown could still attempt to come to terms on a disposition whereby the accused pleads guilty to an offence in exchange for having additional counts stayed or a less severe penalty.⁹⁰ These are bargaining chips not held by individual citizens. As an ever-present backdrop to *Waterfield* cases, these disparities and the imbalance in resources between the state and the individual must loom larger and be taken into account from the perspective of "fairness."

Instances where law-abiding citizen have been needlessly subjected to coercive police measures without lawful justification are seldom the subject of civil litigation and rarely are police officers prosecuted criminally for behavior occurring in their capacity as officers.⁹¹ Non-adjudicative processes such as police complaint commissions also siphon off cases that might otherwise be brought as civil actions before courts. Although such forums have been criticized for their impotency in redressing police misconduct,⁹² to the extent that legitimate complaints are diverted from the court system and into other remedial arenas for redress, it does serve to reduce the volume of cases coming before the judiciary. Although nothing precludes citizens from challenging police actions in civil proceedings, it is clear that citizens seldom pursue such recourses. In light of the Supreme Court's recent decision in *Vancouver (City) v Ward*⁹³ affirming an award of \$5,000 damages arising from the strip search of an individual—himself a prominent litigation lawyer—who had been wrongly imprisoned by the police, it is unlikely that we will see a proliferation of similar cases being filed in civil court.⁹⁴

⁸⁹ For an example to the contrary see *R v Bonds*, 2010 ONCJ 561, 79 CR (6th) 119. For commentary see David M Tanovich, "Bonds: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power" (2011) 79 CR (6th) 132.

⁹⁰ Quigley, "Brief Investigatory", *supra* note 53 at 947.

⁹¹ See Fiszau, *The Law*, *supra* note 46 at 10 he writes, "Unless evidence is discovered, or further grounds for an arrest and charge develop, *and* the accused pleads not guilty *and* brings a successful Charter challenge, the encounter will not likely come to the attention of senior police officials or the courts" [emphasis in original].

⁹² Tanovich, "E-Racing", *supra* note 40 at 925-926. See also Ray Kuszeleski & Diane L Martin, "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law" (1997) 35 Osgoode Hall LJ 835 at 845-846, 851-852, 855, 857-860.

⁹³ 2010 SCC 27, [2010] 2 SCR 28.

⁹⁴ See generally Carol A Aylward, *Canadian Critical Race Theory*, (Winnipeg: Fernwood Press, 1999) at 134-172; and David M Tanovich, *The Colour of Justice*:

Concomitantly, cases involving members of the public who have been shown to be factually guilty of an offence predominate and appear disproportionately in courtrooms relative to the overall number of police investigations commenced against citizens. As Stribopoulos asserts:

Invariably, individuals who are in fact guilty of criminal wrongdoing make these sorts of Charter claims. After all, *these are the cases in which police action paid off*, where a detention, arrest, search, or interrogation led to the acquisition of incriminating evidence and culminated in a prosecution. *Lost from view* under this system for regulating police authority *are cases involving innocent individuals whose civil rights were violated.*⁹⁵

Most people are simply unaware of the precise limits of the powers possessed by the police or the protections available to them under the *Charter*.⁹⁶ Accordingly, many innocent people will not pursue a remedy for the improper treatment they have experienced at the hands of the police.⁹⁷ This is unfortunate for judicial determinations of police actions are thus contingent upon an individual bringing a challenge in the context of criminal proceedings in which he or she stands accused. Yet, as Coughlan and Luther assert, “every criminal accused that brings a *Charter* challenge to police conduct in her case *de facto* represents other persons who may have been subjected to a similar police exercise of power.”⁹⁸ Although the Court has noted this recently in *R v Grant*,⁹⁹ it remains that challenges to state conduct are underutilized. Seemingly, the absence of a large volume of cases implicating police misconduct in trial or appellate courts has an effect upon the judicial perspective of the police function and on the results that are

Policing Race in Canada (Toronto: Irwin Law, 2006) at 121-150 [Tanovich, *The Colour*].

⁹⁵ James Stribopoulos, “Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada” in Margaret E Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 360 [Stribopoulos, “Crime Control”]. See also Stribopoulos, “In Search”, *supra* note 51 at 23.

⁹⁶ Quigley, “Brief Investigatory”, *supra* note 53 at 944.

⁹⁷ *Ibid* at 947.

⁹⁸ Coughlan, *Detention*, *supra* note 73 at 24.

⁹⁹ 2009 SCC 32, [2009] 2 SCR 353 [*Grant*]. As the majority wrote at para 75, “It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge.”

arrived at through court processes. Plainly, the structuring of these *ex post facto* inquiries is viewed by the state as beneficial. It is, however, less so from the vantage point of the accused, as the analytical “gaze”¹⁰⁰ of the Court is frequently coloured by the gathering of contraband or the presence of criminality revealed through police actions. Describing this dimension of *Waterfield* jurisprudence, Stribopoulos writes that, “[a]s a result, courts adjudicating these disputes are inclined to be sympathetic to state claims that the police behaved reasonably and should therefore be officially granted the power to do whatever it is that they did in acquiring the evidence tendered against the guilty accused.”¹⁰¹ The defensibility of such judicial reasoning is more tenable under s. 24(2) analysis where only the accused is affected by the court’s decision.¹⁰² However, by contrast, determinations under *Waterfield* carry with them immediate implications for everyone and the emergence of coercive powers that are effective against all.

The point that must remain in focus throughout all of this is that the effect of any APD-based case is bigger than the rendering of a decision and carries consequences extending beyond those immediately embroiled in the litigation of a dispute. The issues that are engaged are not confined to the resolution of individual cases or private disputes. Nor are the impacts of these judgments limited to the parties to the litigation. It is not simply a question of whether to convict or acquit someone accused of a criminal offence. Rather, these are cases that decide important issues in public law and have far-reaching implications on constitutional rights. Any enlargement of state power impacts everyone. Therefore, the analysis within the APD, if it is to be regarded as legitimate, must account for the gravity of what is at stake in terms of the constitutional rights of individuals and for constitutionalism more broadly. It must also confront another distressing current running through *Waterfield* in Canada: the marked overrepresentation of “racialized”¹⁰³

¹⁰⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Second Vintage Books, 1995) at 184.

¹⁰¹ Stribopoulos, “Crime Control”, *supra* note 95 at 360.

¹⁰² See for example *R v Wong*, [1990] 3 SCR 36 at para 35, 60 CCC (3d) 460 and *R v Kokesch*, [1990] 3 SCR 3, 61 CCC (3d) 207 where notwithstanding the finding that the police acted wrongly and in breach of the *Charter*, the accused were convicted in each case. Importantly, however, the police were not given further extensions of power to use in other cases.

¹⁰³ Tanovich, *The Colour*, *supra* note 94 at 1-3.

persons in cases where the underlying lawfulness of police assertions of authority over citizens is at issue.¹⁰⁴

3.2.3 “Guinea Pigging” and Gambling with Constitutional Rights

When considering the ambit of judicially recognized police powers we must also be mindful of court rulings where the protections of the *Charter* are simply not engaged. Not infrequently such cases arise in the context of s. 8 litigation where it is found that an accused did not possess a reasonable expectation of privacy.¹⁰⁵ For instance, in *R v Tessling*¹⁰⁶ the Court concluded that individuals do not enjoy a reasonable expectation of privacy in the heat emanations from their homes or other places. This finding vested the police with the right to use forward-looking infrared technology on an indiscriminate basis. More recently, the SCC used similar reasoning to declare in *R v Patrick*¹⁰⁷ that state investigators are free to gather and sift through garbage that has been discarded outside of one’s place of dwelling. These are searches and seizures that fail to attract constitutional protection. Hence, these are police actions that are left entirely unregulated and to the full discretion of the police themselves to administer.

Packer wrote that, “[t]he criminal law is neither a slot machine nor a computer.”¹⁰⁸ He was right. Clearly, the police in these cases do not have the advance knowledge or certitude that is implied in the computer. And, if the police do harbour

¹⁰⁴ It is to be noted those accused in *Mann, Clayton, Kang-Brown* are each members of minority communities. In addition, so were the accused in *R v Simpson*, (1993) 12 OR (3d) 182, 79 CCC (3d) 482 and *Terry v Ohio*, 392 US 1 (1968) which helped to lay the groundwork for the Court’s ruling in *Mann*. Moreover, the subsequent jurisprudence about brief investigative detention in *Grant, supra* note 99 and *Suberu, supra* note 24 again involved racialized Canadians. Finally, and though not argued under *Waterfield*, the decision in *R v Asante-Mensah*, 2003 SCC 38, [2003] 2 SCR 3 which addressed the limits of police power under provincial legislation in Ontario was similarly on facts involving a visible minority as the accused.

¹⁰⁵ For example see *R v Edwards*, [1996] 1 SCR 128, 132 DLR (4th) 31, which held that an individual did not possess a reasonable expectation of privacy in his girlfriend’s apartment; and *R v Belnavis*, [1997] 3 SCR 341, 151 DLR (4th) 443 where the Court concluded that a passenger in a motor-vehicle was not entitled to s. 8 protections. See also *R v Boersma*, [1994] 2 SCR 488, 31 CR (4th) 386.

¹⁰⁶ 2004 SCC 67, [2004] 3 SCR 432 [*Tessling*].

¹⁰⁷ 2009 SCC 17, [2009] 1 SCR 579 [*Patrick*].

¹⁰⁸ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 290 [Packer, *The Limits*].

suspicions that they believe to be well-founded, the question that must then be asked, why, in these cases have the police forgone prior judicial authorization and not sought a warrant, particularly when telewarrants are readily available? Thus, they behave instead as one does seated before a slot machine and partake in a game of chance. What is being gambled with, however, is not for the police (and the state more broadly) to play with in this manner. For in effect they are gambling with the constitutional rights of citizens. Therefore, we must first ask, why, the Court has not insisted that the police, as state agents, utilize the powers that have legislated exclusively for their use by the state; and, second, and perhaps more importantly, *why*, the Court has viewed itself as competent to sidestep the law on the books and to supply the police with coercive powers? As we ponder these questions, the fact that the Court has provided not only the powers sought by the police, but also the legal basis for them should be discomfiting. It is evident, however, that the police sometimes win outright in these contests and that the APD will not always be necessary, as *Tessling* and *Patrick* illustrate. Although even when they “lose” it is difficult to see how they have incurred any loss. The conceptual difficulty of equating compliance with the “principle of legality”¹⁰⁹ (POL) with some detrimental loss is compounded by cases such as *R v Wong*¹¹⁰ and *R v Duarte*.¹¹¹ In these cases, even though the police conduct was rebuked and the Court declined to create new common law powers, the accused were still convicted of the offences charged. The particular police still prevailed against the particular persons they were targeting. So in a narrow sense, the police nonetheless won. It is only in a broad sense that the police could be possibly said to incur a detriment. And, of course, that only holds if we presuppose that other police forces wish to engage in similar conduct. To the extent that other prosecutions were pending and contingent upon the police conduct being upheld in *Wong* or *Duarte*

¹⁰⁹ Stribopoulos, “In *Search*”, *supra* note 51 at 2.

¹¹⁰ In *Wong*, *supra* note 4, the police conduct covert video surveillance in a hotel room and uncovered evidence of illegal gaming. At the time of the investigation there was no statutory authorization for video surveillance. Parliament responded to the Court’s judgment with the introduction of “general warrants” in s. 487.01. For discussion see Steve Coughlan, “General Warrants at the Crossroads: Limit or Licence?” (2003) 10 CR (6th) 269 and Daniel W Watt, “General Warrants Take the Wrong Path: Challenging the Constitutionality of Section 487.01 of the Code” (2008) 12 Can Crim LR 297.

¹¹¹ [1990] 1 SCR 30, 65 DLR (4th) 240 [*Duarte*]. See also *R v Wiggins*, [1990] 1 SCR 62, 53 CCC (3d) 476.

then the loss is more widespread. But none of this dislodges the most basic point that, at all times Parliament was capable of granting the impugned powers to the police.

Moreover, this is precisely what happened in the wake of *Wong, Duarte* and other cases like it where the Court has refused to confer powers on the police at common law.¹¹²

When the SCC has upheld the POL in cases where it has been exposed that the police have acted without the foil of statutory authority, Parliament has consistently responded with legislation to redress the situation. This provides a key benefit for citizens in that once powers are codified, they can be challenged under s. 1 of the *Charter*. In this way, statutory powers are fairer from the vantage point of an accused and also from the wider community whose rights are also impacted and for whom the accused represents as *de facto* litigant. It should not be up to the police to use individuals as the ends through which to glean the limits of their powers.

Although the police were denied convictions in *Mann, Kang-Brown* and *AM*, they were still awarded new, freestanding discretionary powers to be used in future cases. In *Mann*, although the Court found the detention of the accused to be legitimate, it went on to hold that the search of the accused to have occurred in violation of s. 8 of the *Charter*. Nevertheless, the Supreme Court felt entitled to create enduring ancillary common law powers enabling law enforcement officers to detain, and subsequently search those individuals who have been detained by the police during BIDs. Viewed from the state's perspective and seen through the lens of "crime control" it is a trade-off that is apt to pay exponential dividends, especially once it is conceded that "perfect"¹¹³ enforcement of the law is never possible anyway.¹¹⁴ Within the macro-level cost-benefit analysis of *Waterfield* the exclusion of evidence in one case and the possibility of an acquittal reflect the nominal costs that are paid by the state in exchange for the ongoing power to use similar tactics in an untold number of future cases. Surely, there is "considerable

¹¹² In *Duarte, ibid*, the police tried to sidestep the requirements of Part IV.1 (now Part VI Invasion of Privacy) of the *Criminal Code*, which governs the use of surreptitious, listening devices in criminal investigations by having one of its agents participate and consent to the interception of the communications. The Court struck down this practice.

¹¹³ Michael Plaxton, "Offence Definitions, Conclusive Presumptions, and Slot Machines" (2010) 48 Osgoode Hall LJ 145 at 164.

¹¹⁴ Packer, *The Limits*, *supra* note 108 at 286.

irony”¹¹⁵ in the fact that notwithstanding the police exceeded their powers in breach of the *Charter* in both *Mann* and *Kang-Brown*, the Court still believed that “fairness” would be advanced by granting extensions of power to the police.

Fairness inclines that we should have reservations about the Crown adopting unlicensed police actions and conducting what amounts to a quasi-reference case on the propriety of an asserted police power during the prosecution of an individual. This is to use an accused as a “guinea pig”¹¹⁶ and to treat people as though they are merely the means to end.¹¹⁷ This sort of litigation is qualitatively different from situations where an accused challenges the constitutional *bone fides* of legislation or the exercise of known police powers. There litigants are aware of the rules prospectively and call the state to answer for its actions under s. 1 analysis. In these APD-based gambles, however, the police-Crown state axis is playing with the house’s money and has effectively nothing to lose. Under this premise, the worst-case scenario for the state is not bad at all and it risks very little. If the Court refuses to read-in or otherwise generate the power sought,¹¹⁸ the state has other channels to pursue its objective. While there could be a time when the government perceives itself to be *politically* constrained in fashioning a legislative response to deliver additional or more intrusive powers on its agents, *legally* however, there is nothing that would prevent the state from doing so and implementing its desired ends. Parliament remains entitled to enact virtually any law it chooses and deems to be desirable.

Before moving onwards, there are two other issues that I wish to raise. The first concerns the dearth of prosecutions brought by the Crown against police officers for

¹¹⁵ Patrick Healy, “Investigative Detention”, *supra* note 62 at 99.

¹¹⁶ Keramet Reiter, “Experimentation on Prisoners: Persistent Dilemmas in Rights and Regulations” (2009) 97 Cal L Rev 501 at 546.

¹¹⁷ Immanuel Kant, *Groundwork on the Metaphysics of Morals*, edited and translated by Mary J Gregor, (New York: Cambridge University Press, 1998) at 38. See also R George Wright, “Treating Persons As Ends In Themselves: The Legal Implications of a Kantian Principle” (2002) 36 U Rich L Rev 271.

¹¹⁸ See *R v Orbanski; R v Elias*, 2005 SCC 37 at para 69, [2005] 2 SCR 3, where, writing in dissent, Mr. Justice LeBel characterized the approach taken by a majority of the Court as being tantamount to declaring: “If there is something missing in the statute, let us read in the necessary powers. Failing that, let us go to the common law and *find or create* something there.” Unfortunately, the view of LeBel J. neatly and accurately encapsulates the Supreme Court’s current stance in police powers cases.

overzealous policing. Typically, when police members are prosecuted it is for instances of criminality that relate to their conduct when off-duty acting in their capacity as private citizens and are thus clearly severable from policing activities. Where police officers are brought before the courts as defendants for actions made in the course of their duties, and in their official capacity as state agents, such cases are likely to centre on allegations of excessive uses of force, or, willful actions that reveal the abuse of power. What is missing for this landscape is the initiation of criminal proceedings against police officers who in the course of testing the limits of their authority, push the envelope a bit too far and run afoul of the *Charter*. As Plaxton has observed, “police officers *can* be called to account for their day-to-day actions, and made to explain themselves in a criminal trial.”¹¹⁹ And, as he goes on to write, “where police officers misuse the powers given to them by Parliament, or *exercise authority they do not have*, they can no longer rely upon the defence of lawful authority, and *they are in precisely the same position as any Canadian citizen* who commits an assault, a kidnapping, or a theft.”¹²⁰ Agreeing with this analysis, the question becomes why in a case like *Mann* or *Kang-Brown* the offending officers were not charged with false imprisonment, assault, or, some other criminal offence once the Court found them to have acted *ultra vires* their powers and in violation of the *Charter* rights of Canadians? Plainly, the Crown has no incentive to prosecute such individuals. Indeed, it would be perverse for the Crown to rely upon the police actions to prosecute an individual accused to then turn around and prosecute the person or persons who enabled the original prosecution for their actions. Yet, this realization should serve to draw attention to the repugnance of the APD. If, however, the Crown were to take such actions it is foreseeable that this would have a chilling effect on police behaviour. Surely then, the police would be more reticent to gamble with the *Charter* rights of Canadians were they to face a realistic potential of being themselves held criminally liable for their investigative tactics. Following the conviction of a police officer on this basis, one would expect there to be considerable pushback from police forces and demands for them to be given a clear mandate. Hence, the observation of Plaxton, if taken in earnest by the Crown could provide the impetus necessary to provoke a

¹¹⁹ Plaxton, “Police Powers”, *supra* note 58 at 124 [emphasis in original].

¹²⁰ *Ibid* [emphasis added].

comprehensive legislative re-tooling of the law governing police powers in Canada. What form that might take is impossible to tell. However, assuming that immunity was extended to police officers, in order to shield them from liability for unlawful actions undertaken in the course of their duties, an individual should still be seen as competent to seek a remedy under s. 24(1) or pursue an action against the state in civil court for the actions of its agents.

Second, I wish to challenge what seems to be an underlying assumption that seems to have permeated cases such as *Tessling* and *Patrick*. More precisely, it is the view that conduct that is not expressly proscribed by law remains available to the police. It is my view, that while this is true that anyone wishing to pursue any non-prohibited action remains free to do, this proposition does not hold in respect of police officers *qua* police officers. Rather, in order for coercive police actions to be declared lawful they must be expressly endorsed by law.¹²¹ Therefore, where the Crown seeks to impose criminal sanctions against an accused, that individual is entitled to demand that the actions of the state agents that led to his or her detention and arrest were expressly authorized by law and that the substantive offence that is being prosecuted is expressly prohibited by law. This is the default position in Canadian law. Citizens are permitted to do as they please and behave in any manner they choose provided that their chosen course of action is not expressly prohibited.¹²² By contrast, the police, can only act and may only do that which the law has expressly authorized when acting in their official capacity as agents of the state. On a superficial level, this is not inconsistent with Court's pronouncement in *Mann*. However, once subjected to greater scrutiny and the aberrant nature of the judicial precedents used to propagate common law police powers under the APD are revealed, the Court's radical rejigging of the POL becomes unsustainable. Either the Court must declare the POL to be a dead letter—and in doing so, overturn a foundational pillar of Anglo-Canadian common law—or, it must require that coercive state actions be predicated upon statutory authorization, and thereafter assess the constitutional fitness of the legislation in question when called upon to do. There is no

¹²¹ *Mann*, *supra* note 8 at para 15.

¹²² Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley, CA: University of California Press, 1967) at 243.

middle ground position and nor is there any safe harbor on the other side of the Rubicon for the Court to take: these questions must be squarely confronted.

Clearly, without any advance notice or warning that they will face jeopardy, a person is deprived of the opportunity to forgo the illicit activity. This is the reason why the criminal law does not tolerate the imposition of judge-made common law offences.¹²³ In addition, without a legislative foundation for government action, individuals are dispossessed of their ability to challenge the state's position and call them to account—as is the right of everyone under s. 1 of the *Charter*. As I shall argue the force of this argument is equally applicable to the law of criminal procedure—the site at which judge-made police powers have been created—as it is to the substantive criminal law. To allow the one whilst proscribing the other is incongruous and illogical.

3.2.4 Retrospectivity

In APD cases, the focus of the inquiry is on the legality of the coercive authority that has been exercised by the police in the absence of statutory authorization. Therefore, in these disputes the challenged police actions cannot fairly be regarded as “police powers” in the legal sense at the time they are asserted. Rather, it is a display of *power* in the ordinary sense of the word by a state actor, which the Crown later adopts, and thereafter seeks the judicial seal of approval for long after the fact. It follows that any law created under *Waterfield* was unknown—and in fact, unknowable—at the time that the police-citizen encounter took place. In the words of Professor Glanville Williams, “[t]he law should tell us with reasonable clarity what it expects of us,”¹²⁴ for any obscurity or obliqueness in the law yields both, “insufficient guidance to the citizen and correspondingly too wide a discretion to law-enforcement agencies,”¹²⁵ which is as intolerable as it is unnecessary.¹²⁶ Viewed from the perspective of the accused, who

¹²³ *Criminal Code*, *supra* note 84, s 9.

¹²⁴ Glanville Williams, *Textbook of Criminal Law*, 2d ed (London: Stevens & Sons, 1983) at 7.

¹²⁵ *Ibid.*

¹²⁶ H Archibald Kaiser, “*Gomboc*: The Supreme Court Weakens the Search Warrant Requirement and Facilitates Police Investigations, Again” (2011) 79 CR (6th) 245 at 250. See also *R v Ferguson*, 2008 SCC 6 at para 72, [2008] 1 SCR 96, where a unanimous Supreme Court led by Chief Justice McLachlin stated, “The divergence between the law on the books and the law as applied -- and the uncertainty and unpredictability that result

could not fairly have known or been able to predict what the Court would ultimately decide, the *unfairness* is manifest. As is recognized in s. 9 of the *Criminal Code*, which forbids the creation of common law offences it is fundamentally unfair to punish someone without any advance warning of the jeopardy they face.¹²⁷

Understood in this way, the architecture of APD-based prosecutions deeply detracts from the Court's claim of using *Waterfield* as a means of advancing fairness in the litigation process. When an individual is prosecuted and it is determined that the actions of the police were unauthorized by statute, yet after the fact deemed lawful, the accused has involuntarily become the means to the government's end. It is elemental as Dicey wrote,

We mean in the first place that *no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary Courts of the land*. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority [whether in law or in fact] of wide, arbitrary, or discretionary powers of constraint.¹²⁸

Enforcement of the law must, of course, run concurrently with the law. The two should be seen as seamless. Importantly, it is only *after* the SCC has declared its position that a given police power is brought into being that it can be used to support police actions. The significance of this is that it can only happen long after the actual event. When the Supreme Court hears a case, the lawfulness of the police conduct is unknown and the

-- exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly -- a fundamental tenet of the rule of law." Welcome words, yet the strength (and practical meaning) of this pronouncement remains in question and must be evaluated in context. When this is done and these remarks are read in light of the Court's decision in *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609, which stands for the proposition that, at least insofar as the crime of contempt of court is concerned, the substance of criminal offences need not be codified as a constitutional imperative; and, of course, alongside the APD jurisprudence that has amassed under the McLachlin Court, the force and aspirational quality of them is diminished. Although the Chief Justice's rhetoric in *Ferguson* is agreeable, it would preferable to see it be given more meaningful effect in the form of a SCC refusal to broaden the ambit of police powers on, *inter alia*, the very basis that she has articulated in the passage quoted.

¹²⁷ Jerome Hall, "Nulla Poena Sine Lege" (1938) 47 Yale JL 165 at 165.

¹²⁸ AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 7th ed (London: Macmillan & Co, 1908) at 174.

scope of any power remains indeterminate until such time as the judgment is handed down. This poses an irresolvable problem for the APD when it is confronted by the legal maxim *nullum crime sine lege, nulla poena sine lege*, which posits that there can be no crime without law and no punishment without law.¹²⁹

The retroactive application of law is unavoidable under the mechanics of the *Waterfield* test and arises by necessary implication. Thus, the problem of “retrospectivity”¹³⁰ in the law surfaces in every case where the ancillary powers doctrine is used to fashion a new police power. One of the aims of the criminal law is to deter certain forms of conduct. This objective cannot be realized, however, if at the time of an occurrence an individual was not given any reason to avoid the proscription that has been brought to their attention after the fact.¹³¹ *Waterfield* cannot provide pre-event certainty or guide conduct at the relevant time, given that any new common law powers it creates are only known to exist after the fact. Furthermore, in light of the fact that we cannot know in which cases it will be advanced by the Crown or utilized by the Court, the lingering possibility of the creation of new law retrospectively at any given time introduces an element of uncertainty into the existing law.¹³²

To the extent that APD decisions do provide a measure of clarity to the law, these developments offer cold comfort to an accused who, like Mr. Dedman, Mr. Godoy, Mr. Farmer or Mr. Clayton were convicted on the basis of the Court’s retrospective announcement of police powers. Even if cases like these reflect only a “kind of ‘one-off’

¹²⁹ Don Stuart, *Canadian Criminal Law: A Treatise* 2d ed (Toronto: Carswell, 1987) at 20-21 [Stuart, *Canadian Criminal*]. See also Jonas Nilsson, “The Principle of *Nullum Crimen Sine Lege*” in Olaoluwa Olusanya, ed, *Rethinking International Criminal Law: The Substantive Part* (Groningen: Europa Law Publishing, 2007) at 40; and Stefan Glaser, “*Nullum Crimen Sine Lege*” (1942) 24 J Comp Leg & Int’l L 29 at 32.

¹³⁰ See generally Charles Sampford, *Retrospectivity and the Rule of Law* (New York: Oxford University Press, 2006).

¹³¹ Stuart, *Canadian Criminal*, *supra* note 128 at 25. See also Stanley A Cohen, “Invasion of Privacy: Police and Electronic Surveillance in Canada” (1982) 27 McGill LJ 619 at 633 where he remarks, “Human behaviour cannot be guided by law unless it is discoverable, open, clear and relatively stable. Furthermore, since it is impossible for anyone to be guided [citizens and police officers alike] by a retroactive law, the law should only have application to future acts; that is, it should only be prospective in its operation.”

¹³² Coughlan, *Detention*, *supra* note 73 at 19.

discontinuity from the knowability of the law,”¹³³ the judicial process must still account for the fact that it is reliant upon individual citizens to make the law knowable and capable of communication to others. When this is done, any gain made in predictability is lost and more than offset on the fairness side of the scale. Nor can the acquittals in *Mann*, *Kang-Brown* and *AM* be taken to suggest that the individuals accused in those cases were treated as anything other than guinea pigs. The only difference is that they were not punished on the basis of the Court retroactively affirming the police actions as lawful. It is true that the creation of a common law police power is not the same thing as the creation of a common law offence. However, from the perspective of an accused subjected to the criminal process it is a distinction without a difference. This may be a step-removed from something that the law abhors,¹³⁴ but it is closely enough related to warrant, at minimum, further explanation. Especially, from a Supreme Court that has espoused its concern for fairness.

3.2.5 Separation of Powers and the Ancillary Powers Doctrine

3.2.5(i) Who Is Watching the Watchers With *Waterfield*?

In *R v Collins*,¹³⁵ the Court enunciated a test establishing the governing standard to assess the lawful propriety of searches falling within the purview s. 8 of the *Charter*. The state is required to establish on a balance of probabilities that the search meets the following criteria: it is authorized by law; the law authorizing the search is itself reasonable; and lastly, that the search has been conducted in a reasonable manner in order for it to be upheld as constitutional.¹³⁶ Let us now consider the search powers that have been created via the APD in *Mann* and *Kang-Brown*. These are searches that, by definition, will only occur before an arrest is made. It follows axiomatically from this that these searches will be conducted without a warrant. However, unlike searches incidental to a warrantless arrest that derive their lawful status from the reasonable and probable grounds necessary to make the arrest, searches incidental to a BID are permitted

¹³³ Steve Coughlan, “Common Law Police Powers and the Rule of Law” (2007) 47 CR (6th) 266 at 268.

¹³⁴ *Criminal Code*, *supra* note 80, s 9.

¹³⁵ [1987] 1 SCR 265, 38 DLR (4th) 508 [*Collins*].

¹³⁶ Jason A Nicol, “‘Stop in the Name of the Law’: Investigative Detention” (2002) 7 Can Crim LR 223 at 235.

on the lower threshold of a reasonable ground to suspect. Thus, searches of this kind are *prima facie* unreasonable and the state must overcome the hurdles placed by *Collins* to rebut the presumption of unreasonableness that attaches to it. Difficulties arise from the fact that in course of generating these powers, the Court failed to explain how, and more importantly why, powers created at common law under *Waterfield* are to be regarded as reasonable laws in themselves, as *Collins* requires. Rather, the Court seems content to ignore the issue and disregard questions surrounding the *bone fides* of its use of *Waterfield* as a source of police powers. Although the Court did consider, and purported to apply the *Collins* test in its analysis in *Mann*, *Kang-Brown* and *AM*, I would argue that the Court failed to properly scrutinize its own unique—and instrumental—role in reaching the conclusions that it did.

It is clear from the case authorities that the Court has concluded that *Waterfield* provides common law authorization for the power to briefly detain someone for investigative purposes when a reasonable suspicion is present. This was the holding in *Mann* and the Court has since affirmed it. Again, using *Waterfield* as its linchpin, the Court ruled in *Mann* that pat-down personal searches of detainees were permissible and thus authorized by law. Clearly, the Court resolved the first branch of *Collins*. The SCC was however equally unequivocal that the police did not act reasonably in conducting the searches in *Mann* on account of the unnecessarily invasive nature of the search, thereby falling short of the requirement stipulated in the third prong of *Collins*. Similarly, it was held in *Kang-Brown* that because the police were acting purely on speculation, they had no reason to detain the accused in the first place. To its credit the Court found the police acted wrongfully and overstepped their lawful authority in these particular instances. But this misses the broader point. It was only by sidestepping the second stage of *Collins* that the Court enabled itself to generate the novel powers that it did. This is the more significant matter and carries greater consequences.

Looking at the jurisprudence, and with the first and third branches out of the way, the stickiest issue remains: the resolution of the second branch of *Collins*. How can it be said that the law authorizing the search is reasonable when it was effectively written by

the Court's hand and never subjected to *Charter* scrutiny?¹³⁷ The Supreme Court has conflated its *Collins* analysis with *Waterfield*. Nowhere does the Court directly confront the question of whether the law authorizing the search is itself reasonable. Rather, it is dealt with only through sheer avoidance. Seemingly, it regards the question as unseemly—or needlessly redundant—but either way it does not provide us with an immediate answer. It was correctly stated in *Mann* that the “appeal mark[ed] the first opportunity for the Court to discuss whether a search incident to an investigative detention is authorized by law.”¹³⁸ However, in answering the question that it posed in the affirmative—and establishing the springboard to the “*Mann* search” power—the SCC left us in the dark about how it derived its answer. The Court's inadvertence to squarely confront this fundamental question is remarkable. This omission exposes a significant frailty within APD-based reasoning and the legal foundations upon which subsequent police powers have been forged. Although, it is hardly surprising that the Court was not about to declare its own work unreasonable, it remains the case that it stands as the sole

¹³⁷ See *Clayton*, *supra* note 9 at 61, where Mr. Justice Binnie, before later reversing course and steering the Court across the Rubicon, wrote:

It seems to me problematic in a case like this, however, to say the authorizing law is subject to *Charter* scrutiny without in fact subjecting the authorizing law to any recognizable *Charter* scrutiny. My preference is to conduct "*Charter* scrutiny" using our usual *Charter* framework of analysis rather than calling in aid a British case like *Waterfield* decided almost 20 years before the Canadian *Charter* came into existence. No reason is given by my colleague for creating a different scheme of *Charter* scrutiny for common law police powers from that which the courts have developed for statute law (and applied, as will be seen, to other areas of the common law). The *Oakes* test, unlike *Waterfield*, is based on the wording of the *Charter* itself. Moreover, common law police powers illustrate a serious difficulty, I believe, with my colleague's approach. On occasion an Attorney General will argue (as here) that a common law which authorizes police conduct that infringes individual *Charter* freedoms may be justified in the larger interest of society. In a number of cases we have held that a common law power may infringe a *Charter* right but nevertheless be upheld under s. 1, or as it is sometimes put, we have found a *Charter* infringement but not a *Charter* violation. Conflating in a *Waterfield*-type analysis the consideration of the individual's ss. 8 and 9 rights and society's s. 1 interests can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of *Charter* analysis.

¹³⁸ *Mann*, *supra* note 8 at para 37.

source of the legal authorization for the powers it has bestowed. The Court's utilization of *Waterfield* as a self-authorizing, self-propelling and self-regulating precedent will be explored more fully in the next chapter.

3.2.5(ii) The Bypassing of Section 1 Analysis

Broadly stated, the process of judicial review in Canada involves a two-stage process; first, there must be an identifiable infringement of a *Charter* right; and where such a violation is found it must then be determined, secondly, whether the law in question can be justified under s.1 analysis.¹³⁹ Hence, the finding of a *Charter* breach does not automatically inure a remedy for an accused. Rather, in cases where a *Charter* violation has been identified by the Court, it must then consider whether the infringement of the right (or multiple legal rights) is nevertheless constitutionally permissible and to be tolerated. However, as I have alluded to in this chapter when *Waterfield* is employed in APD cases, the SCC has consistently limited *Charter* rights by analyzing police powers, and purporting to balance them against individual rights without subjecting them to the *Oakes* test.¹⁴⁰ This clearly bypasses the proportionality analysis that is to be undertaken pursuant to Section 1 of the *Charter*.

It was declared by the Court in *Clayton* that:

[The test created under] *Waterfield* and *Dedman* is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk...[and] [t]he standard of justification must be commensurate with the fundamental rights at stake.¹⁴¹

Respectfully, it strains the imagination to see how the Court can plausibly present this argument, or, how it can equate an *ex post facto* assessment of the mere “reasonableness”¹⁴² of government actions with the more exacting onus that is placed upon the state during s. 1 analysis. It is difficult to discern how permitting the police to

¹³⁹ Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supplemented, vol 2 looseleaf (Scarborough, ON: Thomson Carswell, 2007) at 36-21.

¹⁴⁰ Fisztauf, *The Law*, *supra* note 46 at 8.

¹⁴¹ *Clayton*, *supra* note 9 at para 21.

¹⁴² Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24 Can JL & Soc 231 at 243 [Jochelson, “Multidimensional”].

act in ways that threaten or directly intrude on *Charter* rights in the absence of express statutory authorization, can ever be regarded as reasonable or how this is reconcilable with the Court's custodial role over constitutional rights. As Mr. Justice Binnie, principal author and leading advocate for the Court's post-Rubicon adjudicative model once stated,

An asserted common law police power that is challenged on *Charter* grounds should be subjected to the usual *Charter* analysis that requires the Court to articulate the individual's asserted *Charter* right (here ss. 8 and 9) and measure it against the countervailing societal interests (s. 1) in an open and candid manner. The growing elasticity of the concept of common law police powers must, I think, be subjected to explicit *Charter* analysis.¹⁴³

Although Binnie J. has made an about-face and since resiled from this position,¹⁴⁴ the underlying logic of his view in *Clayton* remains compelling. Indeed, no explanation was given for why we should no longer ascribe to this view—one that has continued to be championed by the dissenting justices in *Kang-Brown* and *AM*.

Unquestionably, one of the most troubling aspects of powers created under *Waterfield* is that they are not subjected to s. 1 analysis.¹⁴⁵ This means that even where the Court has identified a *Charter* violation while forming an ancillary power, the accused is deprived of his or her right to demand that the government justify the actions of its agents.¹⁴⁶ Looking at this through the lens of fairness, it is difficult to see how absolving one of the litigating parties, the state, of its responsibility under the constitution whilst simultaneously depriving the other party, the individual accused, of the ability to access assurances contained within the same constitutional instrument is in any way fair or equitable. Moreover, these actions place the Court into a conceptually awkward position, while at the same time removing any incentive for Parliament to legislate police powers.¹⁴⁷ For its part, the Supreme Court seems to have grown increasingly comfortable with doing the legwork for Parliament, but not the heavy-lifting required in providing a convincing explanation for why it has been willing (or why it sees itself as *able*) to generate police powers. Nor has the SCC confronted the fact that by invoking the APD,

¹⁴³ *Clayton*, *supra* note 9 at para 59.

¹⁴⁴ Stribopoulos, "Crime Control", *supra* note 95 at 364. Stribopoulos, "In Search", *supra* note 51 at 5.

¹⁴⁵ Quigley, *Procedure*, *supra* note 53 at 5-34, 5-35 [footnote omitted].

¹⁴⁶ *Ibid.*

¹⁴⁷ Jochelson, "Multidimensional", *supra* note 142 at 236.

the Court has exposed itself to a host of criticisms pertaining to its policymaking choices in the cases where it has been deployed. Beyond the usual criticisms that may be levied about judicial decisions which have been reached in individual cases, this body of jurisprudence is susceptible to the more foundational charge that APD-based judgments are anchored in a self-designed, self-authorized common law power to permit the undertaking of these policymaking endeavors and thereby results from non-democratic footings. In sum, although *Waterfield* has supplanted the *Oakes* test in police powers litigation, it is not an equivalent (nor legitimate) substitute. Whereas the *Oakes* test in its proportionality assessment demands a consideration of the relative costs and benefits across the full spectrum of society, the determination that is made under *Waterfield* looks only at the particular actions of the police against an individual accused. In simple terms, it is an “end run”¹⁴⁸ around the *Charter*. And, in circumventing the demands of s. 1, citizens are effectively dispossessed of “a mechanism that would make it possible for [them] to oppose the State”¹⁴⁹ and, *inter alia*, the range of coercive actions undertaken by police officers during criminal investigations.

3.3 Chapter Conclusion

As has been demonstrated, the powers created under the APD result from “a fact-specific, *ex post facto* inquiry that is vague and speculative”¹⁵⁰ in nature. Accordingly, the process of forming ancillary common law powers is incapable of delivering predictability or securing fairness in the law. Indeed, the Court’s use of *Waterfield/Dedman* provides a poor means of structuring, confining and regulating exercises of coercive state powers in Canada, especially when compared to what is possible under the alternative.¹⁵¹ This is not to besmirch judges or the general utility of adjudication. Rather, it simply speaks to the nature of courts and the function of the

¹⁴⁸ Clayton, *supra* note 9 at para 79.

¹⁴⁹ Sébastien Lebel-Grenier, “The Charter and Legitimization of Judicial Activism” in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001) at 95.

¹⁵⁰ Don Stuart, “Comment” in Janine Benedet et al, “30th Anniversary of the *Canadian Charter of Rights and Freedoms: The Impact on Criminal Justice*” (2012) 91 CR (6th) 71 at 92. See also Stuart, “*Godoy*”, *supra* note 3 at 226.

¹⁵¹ Kenneth Culp Davis, *Police Discretion* (St. Paul, MN: West Publishing, 1975) at 139. See also Stribopoulos, “*In Search*”, *supra* note 51 at 72-73.

judiciary. Many of the difficulties associated with judge-made law are attributable to the design, structure and operation of the courts. Procedural rules and resource-based constraints make the adjudicative process ill-equipped to determine and thereafter implement important matters of public policy such as delimiting the bounds of police power. The variables described—and the variability they present—are however part and parcel of the adjudication of common law police powers under the APD, which Binnie J. once referred to as the “least worst solution.”¹⁵²

Alternatively, the democratic process is more capable of securing predictability in the law and better situated to deliver fairness to those affected by it—which in the case of criminal and constitutional law is everyone. There is simply nothing lost by the state if the Court were to close the APD door. The government has other means available to pursue its ends. Conversely, from the perspective of citizens, much would be gained by having the limits of police powers spelled out prospectively in legislative form. Given that everyone is both owed and benefitted by clarity in the law,¹⁵³ the enactment of statutory law is demonstrably preferable. Beyond the greater degree of transparency it offers, the Parliamentary process also enables wider avenues for participation in the debate and subsequent formation of these policy choices. This fundamentally alters the character and legitimacy in grants of coercive powers to state actors. Moreover, by re-opening the door for individuals to challenge government actions pursuant to the right contained in s. 1 of the *Charter*, which is presently being “backdoored”¹⁵⁴ under the APD, this would mark a significant advancement in securing greater *fairness* between the litigants.

Although espousing a litigant-centred approach in APD cases,¹⁵⁵ the Court has actually used this characterization in order to advance its own self-styled utilitarian model

¹⁵² *Clayton*, *supra* note 9 at para 76.

¹⁵³ W Wesley Pue & Robert Diab, “The Gap in Canadian Police Powers: Canada Needs ‘Public Order Policing’ Legislation” (2010) 28 Windsor Rev Legal Soc Issues 87 at 89.

¹⁵⁴ See generally Quin M Sorenson, “Backdooring *Batson*: The Improper Use of Racial Memory and Other Peculiar Characteristics in Juror Challenges” (2003) 35 Colum Hum Rts L Rev 71; and Bennett L Gershman, “Prosecutorial Misconduct in Presenting Evidence: ‘Backdooring’ Hearsay” (1995) 31 Criminal Law Bulletin 99.

¹⁵⁵ *Kang-Brown*, *supra* note 1 at para 22.

of judging.¹⁵⁶ Eschewing meaningful *Charter* analysis in favour of *Waterfield/Dedman*, it is one that foregoes s. 1 analysis and extends the Court's *de facto* lawmaking territory. I would argue, however, that this ground has not been formally (nor fully) ceded to the Court by Canada's elected lawmakers. Rather, Parliamentarians have been keen to avoid dealing with the thorny task of criminal law reform—including, the codification and regulation of police powers—and have been content to amass greater powers through this non-democratic process. In this way, Parliament has only given the Court a conditional and limited-term lease in the lawmaking field, not a freehold grant. To the extent that politicians have ceded ground to the judiciary, it has only been done in order to permit the seeds of *Waterfield/Dedman* to grow. Seen in this light, the latitude that the Court enjoys is contingent upon it reaching results that are pro-government and remains otherwise revocable. Thus, if Court were to reach a decision that was deemed unfavourable to the government's interests, the SCC's ability to establish criminal justice policy would be rescinded. As history instructs, when the Court refuses to ameliorate the law in favour of the police and the state's broadly-defined interest in "crime control" then Parliament is found to be adequately incentivized to enact legislation.

Absent prodding,¹⁵⁷ Parliament is loath to fulfill its duties and to undertake the task of modernizing the law governing police powers. This is a longstanding problem

¹⁵⁶ David Luban, "Law's Blindfold" in Michael Davis & Andrew Stark, eds, *Conflict of Interest in the Professions* (New York: Oxford University Press, 2001) at 40.

¹⁵⁷ Another way to conceptualize this problem is by reference to Newton's Laws of Motion. Although, I do not offer these physical laws as solutions or even as directed analogs to the metaphysical problems posed by the possibility of so-called "gaps" in the legal order, a brief allusion to them is nonetheless instructive. It may be recalled, that the first of Newton's law states that an object at rest will remain at rest, unless and until such time as an external force is applied to it. To this we take Parliament as our object and an adverse judicial ruling to be the force exerting pressure upon it. Skipping over the second law momentarily, the third law states that for every action there is an equal yet opposite reaction. Thus, if we take the Court's negative (as opposed to negating) action, that of refusing to supply a police power found to be wanting, then we are apt to a legislative response providing the power necessary for the state to claim its agents acted lawfully in future cases touching upon the same issues. On this point, the history of "dialogic" relations has established precisely such a relationship and Parliament has issued legislative replies to redress the problem (and reversing the illegality) faced by its agents. Returning now to the second law (and the loosest of these analogies) there we find an equation involving three variables: force, acceleration and mass. Under this formula, the

and one that extends more broadly into the criminal law as a whole as a number of commentators have observed. This project has been further hampered by the federal government's elimination of the Law Reform Commission of Canada. Clearly, the Court is content with the post-Rubicon *status quo* and the enlarged power that it enjoys within this framework. Thus, the SCC is unlikely to provide any impetus leading to the democratic reform of the law governing exercises of coercive power by police. In addition, it is important to recognize that the charges of judicial activism that properly vest whenever the APD is utilized (and which envelop it fully) have yet to resonate sufficiently with members of the public or galvanize into political demands for the cessation of this judicial practice. Hence, we find the absence of any formalized antagonism—or, indeed any objection coming from official corridors—to the Court's self-led venture into these areas of lawmaking. As I have argued, there has been no opposition forthcoming from the government because the results of APD jurisprudence have been consistently beneficial to the state. Nor can we expect to see any resistance to this dynamic as long as the Crown remains content to advance arguments that are wholly reliant upon *Waterfield/Dedman* to justify police actions. Evidently, the government is satisfied with the emergence of this doctrine and in being absolved of its legal responsibilities. Specifically, the APD dispenses with the need for Parliament to legislate the powers possessed by its agents when investigating the conduct it has proscribed, and derivatively, under this model the government is able to evade accountability altogether under s. 1 of the *Charter* because in these cases it does not rely upon a legal source that is amenable to constitutional challenge to support its actions. Accordingly, *Waterfield/Dedman* model is not only detrimental to utilization (and protection) of *Charter* rights, but stands as a direct affront to the designs of constitutionalism in Canada. Quite simply, the nation's supreme law is not being properly observed or obeyed. This

amount of force and the resulting acceleration necessary to move the mass of a resting body at a particular rate is equivalent and inversely proportionate to the mass of the object at rest. The vectors of force and acceleration are trained in the same direction. Using these as proxies, a SCC judgment revealing the absence of a police power will provide a degree of force to jar Parliament from its objective place of rest and pull it away from its perch on the sidelines where there is a sufficient reaction from spectators (whether in the House of Commons, media reports or public outcry) to accelerate the legislative response.

should be seen as offensive to all fair-minded persons and its persistence should not be tolerated. Therefore, it remains the task of commentators, defence counsel and legal advocates receiving intervener status in court proceedings and other non-governmental organizations to cast greater light on this inter-institutional dysfunction and to make the case for why this phenomenon should be immediately and forever discontinued.

Chapter Four: Theorizing the Ancillary Powers Doctrine

4.0 Overview

The upsurge in the Supreme Court of Canada's (SCC) use and increased reliance upon the "ancillary powers doctrine"¹ (APD) in the adjudication of criminal cases has rightfully elicited a strong reaction from jurists, legal practitioners and academics alike. Yet, in spite of the frequent and trenchant criticisms that have been levied against the Supreme Court's APD jurisprudence, academic treatment of this topic nevertheless remains underdeveloped and critical blind spots persist. The existing literature on the subject has been animated principally by critiques addressing doctrinal concerns and expositing the worrisome aspects of the substantive results it has yielded. Illuminating the myriad problems associated with the Court's APD rulings in "the *Waterfield-Dedman* line of cases"² is surely a worthwhile pursuit. It is not though, the whole of the matter. Indeed, we must not allow ourselves to focus solely on what the Court has said through its rulings anchored in "*Waterfield/Dedman*."³ Instead, equal, if not more, critical attention must be paid to how the Court arrived at the place where it believed it was competent to speak at all in these cases—let alone in the manner that it has—and finally then, what these bouts of judicial impertinence says about the state of "constitutionalism"⁴ in Canada today. It is folly to examine the fruits of the Court's labour without seriously examining the tree that has borne them and the conditions that have allowed them to flourish. Hence, it is useful for us to examine this body of jurisprudence from the perspective of legal theory to see what it can tell us about the burgeoning tide of judge-made police powers.

¹ LH Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975) at 33. See also *Dedman v The Queen*, [1985] 2 SCR 2 at para 67, 20 DLR (4th) 321 [*Dedman*]; and *R v Clayton*, 2007 SCC 32 at para 16, [2007] 2 SCR 725 [*Clayton*].

² *R v Orbanski; R v Elias*, 2005 SCC 37 at para 81, [2005] 2 SCR 3 [*Orbanski*].

³ *R v Kang-Brown*, 2008 SCC 18 at paras 50-52, 56 and 62, [2008] 1 SCR 456 [*Kang-Brown*]. See also *R v Sinclair*, 2010 SCC 35 at paras 114 and 191, [2010] 2 SCR 310.

⁴ Richard Albert, "Counterconstitutionalism" (2008) 31 *Dalhousie LJ* 1 at 2. Albert offers a helpful articulation of "constitutionalism" where in defining the term, he writes that, "Its purpose is, first, to design the structures of the state that will exercise authority within a defined territory and over a group of identifiable persons and, second, to define the border separating the citizen from the state."

It has been suggested by Professor Allan Hutchinson that, “there is nothing so practical as a good theory.”⁵ Taking these words as an invitation, the objective of this chapter is to assist in the development of a theory that will help to better account for, and *explain*, the proliferation of common law police powers that we have witnessed since the passage of *Canadian Charter of Rights and Freedoms*.⁶ To date, the Court has not advanced a compelling explanation for why its actions under *Waterfield* have been necessary,⁷ and, for its part, Parliament has not seen fit to demand one. Nor has the government taken any actions to forestall the Court’s lawmaking ventures in this area. Rather, the “hands-on”⁸ approach of the SCC has been met by a noticeable absence of legislative energy from Parliament to correct the problems apprehended by the Court in these cases and a muted “dialogue”⁹ about police powers in Canada. Thus, we have been left only with the meek assertion by the Court the reigning *status quo* is the “least worst solution”¹⁰ to the problems brought forth by the process of litigation. This is hardly an apology and certainly not a principle-based justification for such adjudicative largesse.

Furthermore, in my view, the Court must also substantiate a more cogent legal basis for its law generation under *Waterfield/Dedman*. As I proceed to problematize these matters, I will call into question the only proffered legal source of authority that has been advanced by the Court to permit the kind of juridical lawmaking that we uniquely

⁵ Allan C Hutchinson, “Crits and Cricket: A Deconstructive Spin (Or Was It a Googly?)” in Richard F Devlin, ed, *Canadian Perspective on Legal Theory* (Toronto: Edmond Montgomery Publications, 1991) at 246.

⁶ *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*].

⁷ Graham Mayeda, “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” (2010) 50 SCLR (2d) 41 at 88 [Mayeda, “Between Principle”].

⁸ Aileen Kavanagh, “Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape” (2011) 9 Intl J Const L 172 at 174 [Kavanagh, “Constitutionalism”].

⁹ See generally Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 at 29 and Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts And Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75. See also Carissima Mathen, “Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on ‘*Charter* Dialogue Revisited’” (2007) 45 Osgoode Hall LJ 125.

¹⁰ *Clayton*, *supra* note 1 at para 76.

find in APD cases. It will be argued that the Court's jurisprudence hinges solely upon a self-propagated, self-sustaining and self-justified grant of power; and, that as such, these case authorities have been ill-founded and are anchored in a radically misplaced use of judicial precedent. It is, however, equally clear that the judgments of the Supreme Court and the police powers created through its application of the APD constitute binding case authorities and are valid in Canadian law. Indeed, this much is beyond dispute. Yet, even if these decisions—and the process through they have been derived—may not be *ultra vires* exercises judicial power, the Court's prerogative and expressed preference to undertake the task of stipulating unprecedented expansions of state power is nevertheless objectionable.¹¹ In other words, even if the “Trojan horse”¹² that is *Waterfield-Dedman* has escaped from the barn and the APD is now commonly regarded as unimpeachable from a legal standpoint, still it remains an unseemly development and one that is unbecoming the judiciary, especially the SCC in the post-*Charter* era. Put shortly, by resorting to the APD, the Court inescapably entangles itself in the realm of policymaking and partakes in actions that are fundamentally (and inherently) political in nature.¹³ This is an unwise position for courts to occupy. Fortunately, for the Court it is within its power to reverse course and right the ship of constitutionalism in Canada.

¹¹ See Sébastien Lebel-Grenier, “The Charter and Legitimization of Judicial Activism” in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) at 96-97 where he asserts that, “In fact, the adoption of the *Charter* has increased an antidemocratic tendency. Despite the fact that the Supreme Court has stressed many times that the Canadian courts must interpret the Charter in such a way as to ensure that it does not become an ‘instrument of exclusion’ and they should assist ‘discrete and insular minorities,’ it remains that in practice the courts are an inappropriate forum for responding to such considerations. *They are not representative of the social realities to which they claim to respond and often address them with a certain lack of understanding mingled with good faith.* Moreover, and this is more serious, Charter justice is often not accessible to those who need it either because of a lack of information and education or insufficient means. The latter problem has increased with federal government cutbacks to the assistance funds formerly available to support challenges to government measures. In fact, Supreme Court precedents dealing with the Charter have often led to the protection of interests *a priori* incompatible with those it claims to be of principal concern [emphasis added].”

¹² Patrick Healy, “Investigative Detention in Canada” [2005] Crim LR 98 at 107.

¹³ Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) at iii, 4, 68 and 158

Using Professor Hans Kelsen as my chief interlocutor, I will employ the “theory of gaps”¹⁴ (TOG) that he has devised to construct the theoretical foundations of my objections to the Supreme Court’s use of *Waterfield/Dedman* as a means of extending the ambit of discretionary police powers and to support the overarching argument of this thesis: that the APD should be immediately and permanently discontinued. As will be shown, the Kelsenian model of adjudication offers great utility in its ability to explain, first, *how* the APD is made applicable by Court in the cases where it is deployed, and second, *why* these policymaking incursions have been condoned, and not condemned, by Parliament. My reasons for utilizing Kelsen’s theoretical model are simple and two-fold: first, the analysis offered by Kelsen is best conforms with my own conceptualization of the problems at hand and thus most reflective of the position that I advance in this thesis; second, and immediately related to the first point, the TOG is invaluable analytical tool because of its concentration on both the supply *and* demand-side of the equation. In other words, the TOG succeeds in drawing our attention to the intersection of Parliamentary idleness and the overreaching of the Court in these cases. Thus, the Kelsen-based critique that I present will aid conceptually in our understanding of the APD and the implications it holds for Canadian constitutionalism. It is hoped that my efforts here will help propel, and contribute however modestly, to a re-framing and wider discussion of the Supreme Court’s APD lawmaking activities.

4.1 The Kelsenian Model of Adjudication and the “Theory of Gaps”

Although forming a unified and comprehensive account of juridical lawmaking, Kelsen’s “theory of gaps” (TOG), is in fact, a multivariable theory. In my analysis, I will separate and distill the TOG into three parts, each of which is integral to the Kelsenian conception of the law and adjudication. However, beyond being essential to Kelsen’s conceptual framework, my analysis will show that all of these interlocking components are directly applicable to the functioning and maintenance of the APD in Canada. Before proceeding further, I wish to make explicit something that was already indicated implicitly above and provide a qualifier about Kelsen’s gap theory. What is offered is not a justification for the sort of judicial ingenuity and interventionist posture that we find in

¹⁴ Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1946) at 147 [Kelsen, *General Theory*].

Waterfield-laden judgments. Rather, what gap theorization presents is simply a plausible—and in my view, superlative—explanation for the sort of adjudicative maneuvering and non-democratic policymaking found in APD cases. Using Kelsen’s theory as my vehicle, I will argue jointly for a reconceptualization of the Court’s utilization of the APD, and as well, the corresponding acceptance of it by Parliament.

I will now briefly set out the key postulates of the theory of gaps. First, Kelsen begins by espousing the view that the law is *gapless* in nature.¹⁵ The notion, that there are no gaps existent in the law, I will refer to as “K1.” To accept this premise, and what constitutes “law” from the Kelsenian perspective, we need not invest ourselves fully in a positivist account of the law. Rather, I suggest only that this view holds in relation to the criminal law and the powers that are vested in the police as state agents. Either the police possess a particular power or they act *ultra vires* of their official capacity. There is no middle ground, no penumbral zone and no ambiguity; under this view only those coercive powers that have been prospectively granted to the police through the democratic process can form the basis of legitimate exercises to state power. That presupposes, of course, that the legislation conferring the power is constitutionally valid—either as confirmed through the process of judicial review under s. 1 or s. 52 of the *Charter*, or, alternatively, by the shield of s. 33 that permits the government to circumvent this process and immunize its legislation against such scrutiny. Second, no matter how well-intentioned (or efficacious it is perceived to be in the result) that a court judgment may be, where a court purports to fill in a gap in the law, what is really occurring is that the actually valid law is being ignored by the judiciary and substituted with an outcome that is deemed more desirable in the eyes of the court.¹⁶ The process through which “so-called ‘gaps’ in the law”¹⁷ are created and filled by the judiciary we can label “K2.” Third, the final pillar of this theory indicates that legislatures have to be willing to accept the policy choices of an overactive judiciary and neglective of their own legislative duties.¹⁸ For without such

¹⁵ *Ibid.*

¹⁶ Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley, CA: University of California Press, 1967) at 246 [Kelsen, *Pure Theory*].

¹⁷ Hans Kelsen, *Principles of International Law* (New York: Reinhart & Co, 1956) at 304 [Kelsen, *Principles*].

¹⁸ Kelsen, *Pure Theory*, *supra* note 16 at 248.

intransigence on the part of lawmakers, it would be impossible for courts to make law and implement its preferred policy choices. This institutional interplay in which courts take an overly “hands-on”¹⁹ approach whilst legislators assume a “hands off”²⁰ posture, I will refer to as “K3.”

Each of the features of Kelsen’s gap theory, of course, requires further unpacking. I will now isolate and examine each of the three planks in turn. Along the way, I will demonstrate how the actions of the SCC and the inaction of Parliament bear all of the markings of the TOG posited by Kelsen. Discussion of the individual components of Kelsen’s work do provide linkages to other theorists and also to other branches of theory. However, the pursuit of these other strands of analysis—though ripe for, and deserving of, further critical reflection—fall beyond the scope of this thesis and will not be explored. For present purposes, I will limit my work to simply shining a light on some potential avenues (and their intersections) where additional research could help to broaden our understanding of these problems and also provide further weight to incline the collapse the APD.

4.1.1 The Illusion of Gaps (K1)

The most basic objection that I wish to raise about the SCC’s use of a “gap-filling power like *Waterfield*,”²¹ is the sheer presence of these supposed gaps in the law that render this lawmaking tool applicable in the eyes of the Court. Therefore, I will begin my Kelsenian critique of judge-made police powers by contesting the existence of these supposed gaps in the law.²² This is an obvious first step given that the Court’s use of the APD in police powers cases is wholly contingent upon its identification of a hole or “gap”²³ in the law. Indeed, the practical importance of these “perceived gaps”²⁴ cannot be overstated. For without the proclamation of an identified gap in law, the APD remains immobilized and will not be triggered. It is the identification of these lacunae that have

¹⁹ *Supra* note 8.

²⁰ *Kang-Brown, supra* note 3 at para 22.

²¹ Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24 *Can JL & Soc* 231 at 245 [Jochelson, “Multidimensional”].

²² Kelsen, *Principles, supra* note 17 at 304.

²³ *Orbanski, supra* note 2 at para 83; and *Kang-Brown, supra* note 3 at paras 4, 6, and 50.

²⁴ *Kang-Brown, supra* note 3 at para 6.

served as the keys for the Court to unlock *Waterfield/Dedman* and to then fashion the sort of innovative judicial outcomes that we have witnessed in recent times.

In my view, rather than locating gaps in the law, what the Supreme Court has actually done in APD cases is correctly identify gulfs between the actions of the police and the legal authorization for these actions at the time they were commenced. Thus, my quarrel lies not in the identification of lacunae by the Court, but in the *filling* of them and in the unwarranted judicial re-jigging of the law. That is where the harm lies. Rather than referring to them as “gaps” as the Court has been apt to do,²⁵ I suggest that it is preferable that we re-term these phenomena and identify them for what they objectively are: *perceived legislative deficiencies*. No more and no less. By adopting this nomenclature, we can more readily see how the Court’s conception of these lacunae presents a blind view of the source of these voids and miscasts our attention. It is not as if these supposed holes in the law—which the Court see fits to mend using the APD—have arisen inexplicably. Whatever shortcomings exist within the range of lawfully recognized police powers from the perspective of the police-Crown, it must not be forgotten that either by legislative act or omission, these are solely the creation of Parliament. Nor can we overlook the fact that the police, Crown and Parliament are aligned in these cases and seeking the same ends. If we harken back to the previous chapter and bring into the discussion the Court’s proclaimed quest to deliver *fairness*, then surely the apparent void in the law is perceived differently on the basis of one’s vantage point or from which side of the aisle one is standing. It is really only a gap from the perspective of the state and its agents. For, from the perspective of the accused that is being prosecuted in an APD case, there is a clear discrepancy between what the police have done and what they were actually authorized to do. Of course, the Supreme Court’s construction and subsequent filling of these gaps obfuscates both the source of these voids and the legal grounding for the Court’s re-making of the law in APD cases.

Even if we assume, *arguendo*, that police actions, like those of the accused, have been negatively permitted insofar as they have not expressly proscribed, Kelsen posits that:

²⁵ *Ibid* at para 50.

In this situation the court must dismiss the action even if it is directed against a permitted behavior of the [accused] by which a permitted behavior of the [police] is prevented or impaired...and the court has to acquit the accused. *The application of the valid law may be considered unsatisfactory in such a case because it refrains from protecting an interest which, from some points of view, is regarded as worthy of protection.* But since a legal order cannot protect all possible interests but only specific interests by prohibiting their violation it has to leave unprotected the ever-present counterinterests.²⁶

The determination of which interests are to be privileged in the law, and at what expense, are political questions that must be answered in the democratic forum and through the legislative process. Quite simply, it is not for the police acting at their own behest (yet, at all times in the name of the state) to assert a particular interest in “crime control” and implement their chosen means of fulfilling these goals, as they define them. Nor is it appropriate for the Crown to adopt these policy choices on behalf of the state after they have been unilaterally implemented by police forces. From a law creation (and law enforcement) standpoint, this is akin to the tail wagging the dog.

It is important thus that we distinguish between the offence committed by the accused, and the methods and manner in which the police uncovered it. Plainly, the law has different aims depending on where (and at whom) it is aimed. The substantive law that is applicable to the person who is the subject of a criminal investigation differs from the law of criminal procedure that governs the investigation and the officers conducting it. For example, it is not disputed that the individuals prosecuted in *R v Mann*,²⁷ *Clayton* and *Kang-Brown* were factually guilty of the offences charged. In each case the accused were shown to have been in possession of contraband. Interestingly, in these cases none of those accused were doing anything that was patently unlawful or objectively suspicious when their actions are framed in neutral terms. No offence is committed by simply walking down a public street or bus terminal, or, in occupying a motor vehicle. These points were never in contest. Instead, the issue in each case was the legality of police actions where the criminality of the accused was revealed and whether the police had acted lawfully in making these discoveries.

²⁶ Kelsen, *Pure Theory*, *supra* note 16 at 243 [emphasis added].

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

Building on the previous point, Kelsen writes that, “the legally not prohibited, and in this sense permitted, behavior of an individual can be guaranteed by the legal order by obligating other individuals to tolerate this behavior, that is, not to prevent or impair it.”²⁸ From this, it follows that the police must tolerate the conduct of citizens if it has not been legally proscribed, even if they consider that conduct to be objectionable in nature or thought repugnant to them. Similarly, the police must abide and *tolerate* the limits on their powers. When the two sides do come into conflict, as often happens, in the streets and continuing thereafter in courtrooms, the judiciary is tasked with resolving the matter by giving effect to the law. As Kelsen explains, when confronted with the task of resolving the competing claims of the litigating parties courts are faced with two (and only two) choices:

Either the court ascertains that the defendant or accused has committed the delict as claimed by the plaintiff or public prosecutor and has thereby violated an obligation imposed on him by the legal order; then the court must find for the plaintiff or condemn the accused by ordering a sanction...Or the court ascertains that the defendant or accused has not committed the delict and therefore has not violated an obligation imposed on him by the legal order; then the court must dismiss the action or acquit the accused.²⁹

Applied to the police actions in *Mann* and *Kang-Brown*, it emerges that the individuals in those cases were exposed to unlawfully coercive treatment by the police and subjected to exercises of power inconsistent with actually valid law. In the resolution of these cases, the Court’s finding of illegality of the part of the police was, to this point, consistent with the Kelsenian view. However, the Court then fell into error according to Kelsen’s model when it took the further (and needless)³⁰ steps of creating common law investigative powers to endure beyond these cases, as I will soon discuss in relation to K2. Suffice it to say, that if we were to accept for the purposes of argument that *Waterfield/Dedman* represents a valid means to create newfound police powers, it remains to be answered how in cases like *Kang-Brown* and *Mann*, the Court’s decision to take things a step further than was necessary to resolve the issues at bar are not, by definition, *obiter dicta*

²⁸ Kelsen, *Pure Theory*, *supra* note 16 at 243.

²⁹ *Ibid* at 242.

³⁰ Sandra Berns, *Concise Jurisprudence* (Sydney: Federation Press, 1993) at 31 [Berns, *Concise*].

statements lacking the force of law. I would suggest that this remains an open question that dogs the Court's APD jurisprudence and further mires any claims to its legitimacy. Plainly, if the state intends to exercise coercive authority over individuals in a manner that infringes on their personal liberty, then the government should set out the scope of any such measures expressly by enacting constitutionally compliant legislation. Otherwise, the actions of its agents are ill-founded and *ultra vires* shows of power.

Under the Kelsenian model of adjudication, when the Court rejects police conduct that is not founded in legislation, it serves to protect the individual rights of citizens to remain free from state intrusion and gives effect to “the negative rule that nobody must be forced to observe conduct to which he [or she] is not obliged by law.”³¹ Anchored in the POL, this rule is one that does not apply bilaterally and instead should operate in favour of citizens. The judicial assertion of this proposition—the default position that I argued for in Chapter Three—is in no way punitive or even dismissive of the police who can still assert arguments under s. 24(2) in support of their actions. Rather, the countervailing argument does not apply symmetrically in support of police officers by virtue of the fact that agents of the state when acting in their official capacities are imbued with additional statutory duties and powers that are inapplicable to (or inaccessible by) ordinary citizens. Perhaps the clearest example—and strongest support—for this proposition comes from the asymmetry that we find in relation to arrest powers. There we find that the lawful powers of arrest given to police officers, quite wisely, far outstrip those available to laypersons. This is an appropriate division to make, but it is one that does sharply differentiate the legal position of the police on the one hand and citizens on the other. Put simply, it is only when police members are off-duty can they can be said to stand on the same footing as ordinary citizens and exercise the same residually flexibility as the individuals they investigate. Otherwise, police actions no matter how benign in nature must be expressly authorized by statute in order for them to comply with the POL and be considered lawful under the Kelsenian account of the law.

As we ponder the SCC's handling of legislative lacunae in police powers cases, it is important that we recognize the fact that the Court has been inconsistent in the

³¹ Kelsen, *General Theory*, *supra* note 14 at 147.

responses that it delivered.³² On this point Mr. Justice LeBel expressed the view in *Kang-Brown* that, “these [APD] precedents do not mean that the Court should always expand common law rules, in order to address *perceived gaps in police powers or apprehended inaction by Parliament*, especially when rights and interests as fundamental as personal privacy and autonomy are at stake.”³³ Although Binnie J. ultimately professed his agreement with this basic proposition on behalf of the majority,³⁴ there is an even sharper and logically prior point to be made in support of the position advanced by LeBel J. It can be convincingly argued that any supposed gaps are, in both fact and law, illusory and any subjective assessment by jurists in locating a legislative omission or oversight is immaterial. Indeed, the strongest argument that there is to be made for the non-existence of “gaps” comes from the Supreme Court itself.

For instance, in the case of *R v Wong*³⁵ there was never any dispute about the fact that the law in force at the time did not provide the police with the power to use video surveillance technologies during criminal investigations. Hence, by Kelsen’s terms, the “actually valid law”³⁶ that was applicable in the case was abundantly clear. The law plainly did not allow for this tactic to be used. There was no a “gap” in the law. To equate a “gap” with a legislative omission or to presume that something is absent on the basis of inadvertence is an erroneous claim and one that is purely speculative. As another example, we can look to the ruling in *Colet v The Queen*,³⁷ which is illustrative of what Kelsen terms “technical”³⁸ or “the so-called true gaps.”³⁹ The Court’s reasoning in *Colet* can be read as suggesting that the relevant legislation might very well have been errantly deficient in its drafting and lawmakers may have left an unintended hole in the law. The difference between these and other gaps is not of kind, only degree. In both *Wong* and *Colet*, the Court refused to sanctify the police actions. More importantly, it refrained

³² Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 13 [Coughlan *Detention*].

³³ *Kang-Brown*, *supra* note 3 at para 6 [emphasis added].

³⁴ *Ibid* at para 51.

³⁵ [1990] 3 SCR 36, 60 CCC (3d) 460 [*Wong*].

³⁶ Kelsen, *General Theory*, *supra* note 14 at 148.

³⁷ [1981] 1 SCR 2, 119 DLR (3d) 521.

³⁸ Kelsen, *Pure Theory*, *supra* note 16 at 249.

³⁹ *Ibid*.

from engaging in the art of judicial lawmaking. As Mr. Justice La Forest declared in *Wong*:

[T]he respective roles of the courts and Parliament when *Charter* rights and freedoms are at issue. As I stated there, it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.⁴⁰

Continuing in the same vein, La Forest J. wrote that,

On my view of the matter, the courts would be forgetting their role as guardians of our fundamental liberties if they were to usurp the role of Parliament and purport to give their sanction to video surveillance by adapting for that purpose a code of procedure dealing with an altogether different surveillance technology. It is for Parliament, and Parliament alone, to set out the conditions under which law enforcement agencies may employ video surveillance technology in their fight against crime. Moreover, the same holds true for any other technology which the progress of science places at the disposal of the state in the years to come. Until such time as Parliament, in its wisdom, specifically provides for a code of conduct for a particular invasive technology, the courts should forebear from crafting procedures authorizing the deployment of the technology in question. The role of the courts should be limited to assessing the constitutionality of any legislation passed by Parliament which bears on the matter.⁴¹

Although commentators such as Plaxton have argued effectively that the support for this position has waned in the Court,⁴² this position is only supportable in empirical terms.

The task of dislodging the normative thrust of the “legality approach”⁴³ remains for

⁴⁰ *Wong*, *supra* note 35 at para 35. See also *Attorney General of Quebec v Royal Bank of Canada et al*, (1985) 18 CCC (3d) 98 at para 8, 44 CR (3d) 387, which held that, “The law may well be unsatisfactory, but that is not for us to say, nor, as the trial judge noted, is it for the courts to fill in lacunae, however desirable such a course may seem. That must be left to the legislator.”

⁴¹ *Ibid* at para 36.

⁴² Michael Plaxton, “Police Powers After Dicey” (2012) 38 Queen’s LJ 99 at 101 [Plaxton, “Police Powers”]. See also James Stribopoulos, “Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada” in Margaret E Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) at 364 where it is written, “without ever acknowledging any apparent inconsistency, the Court has unapologetically done an about-face.”

⁴³ James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) 31 Queen’s LJ 1 at 6 [Stribopoulos, “In Search”].

propagating the APD and its proponents. Arguments based in efficiency or the need for adjudicative finality present insufficient bases to permit the state to skirt its legislative responsibilities and circumvent the ability of citizens to insist that the government account for its chosen course of action and see that it is justifiable under s. 1 of the *Charter*.

In addition, just because the police do not possess a particular investigative power it does not follow that they should have the tool that they desire. Indeed, as Professor Arthur Lenhoff contends, “[t]he fact that a specific problem or situation is not dealt with in a piece of legislation dedicated to the whole subject matter need not necessarily lead to the conclusion of a ‘gap.’”⁴⁴ This remains undiminished by the fact that a “consequence of the absence of a specific regulation might be the denial of relief as demanded”⁴⁵ by the prosecution or the unavailability of tactics sought by the police. If that should be seen as problematic, then the state can avail itself to the legislative sphere and correct the problem. In this discussion, it would be remiss not mention that the Court’s rulings in *Wong* (and *R v Wise*)⁴⁶ sparked a “dialogue” with Parliament and culminated in the introduction of new statutory powers. In fact, a discussion of the legislation produced in response these to judgments will be featured in the discussion of K2. In sum, it is not the recognition of the disparity between police actions and the scope of the legislative authority that it is problematic; instead, it is only when the Court purports to fill these supposed “gaps” that troubles arise.

4.1.2 The Judicial Creation and Curing of Gaps (K2)

Having previously delved into the reasoning process and the Court’s conflation of the two-prongs of the “*Waterfield/Dedman* test,”⁴⁷ it now useful for us to consider the analytical machinations that leads the Court to utilize the APD in the cases where it is invoked. Based on the existing corpus of jurisprudence it would appear that the SCC has quietly established a decision-tree to determine the lawfulness of police actions. While

⁴⁴ Arthur Lenhoff, “Extra-Legislational Progress of Law: The Place of the Judiciary in the Shaping of New Law” (1949) 28 Neb L Rev 542 at 565.

⁴⁵ *Ibid* at 565-566.

⁴⁶ [1992] 1 SCR 527, 70 CCC (3d) 193.

⁴⁷ *Kang-Brown*, *supra* note 3 at para 50. For discussion and analysis of this test see Chapter Two.

there can be no assurance that the Court will remain wedded to the schematic that I set out, presently at least, we can separate the deliberative steps into three distinct stages. Before proceeding, however, it bears repeating that this reasoning process will only be engaged—and a so-called gap can only materialize—when Court chooses to ignore the canon of strict construction.

First, the Court will look to see if the police actions have been authorized by statute. Assuming that there is an identifiable statutory source of authority, the question then becomes whether the relevant legislation is constitutionally valid. Further assuming that it found to be so, it remains to be determined whether the police complied with the strictures of the statute. Second, where there is not express authorization to support the actions of the police, the Court will then explore whether there is any legislative provision that has a plausible nexus to the actions undertaken by the police. If, such can be located, the next exercise becomes whether that legislation can be construed creatively enough or made sufficiently elastic to sustain a reading of the provision that would support the finding of an implied statutory power.⁴⁸ Clearly, any judicial elucidation of a latent police power involves a second-guessing of legislative intent and engages the art of judicial prognostication. This brand of judging simply reflects a sidestepping of the valid law and the substitution of it with the Court's own preferred policy choice.⁴⁹ Third, and only after the other avenues have proven fruitless, will the Court be in a position to unbridle the APD. Of course, once it has been unfurled the only limitations on the APD are those that Court chooses to self-impose. Unlike the first two branches of the decision-tree, here an accused cannot advance arguments under s. 1 or 52 of the *Charter*, as there is no statutory authority and thus no legislation to be challenged. Indeed, in this way, where the APD is used the Court stands on comparable footing with the police given that no legislation has authorized the actions that it has taken. There is no legislative support for this sort of judicial lawmaking. Rather, it has arisen only because of the Court's seizure and novel application of *Waterfield*. It is through the methodology just described that the Court has found its entry point to engage in judicial lawmaking and to undertake the interventionist orientation that we find in APD-based decisions.

⁴⁸ For discussion see Stribopoulos, “In Search”, *supra* note 43 at 31-40.

⁴⁹ Kelsen, *Pure Theory*, *supra* note 16 at 248.

Under the Kelsenian view, the Court’s actions amount to a bald second-guessing of Parliament and its policies. As stated, Kelsen is resolute in his assertion that “[t]he legal order cannot have any gaps.”⁵⁰ Ironically, the Court is seemingly of the same view. Yet, the high court has taken a diametrically opposite interpretation of what this statement entails. It would appear the SCC has taken the position that when presented with perceived legislative deficiencies another doctrine is simultaneously engaged—that of *res ipsa loquitur*—ostensibly compelling the use of the APD (or other lawmaking tools) and suggesting by implication that the Court had no other choice but to act and rectify any encountered legislative voids. Derivatively, by taking this position the Courts allows itself to function as though it were the legislature and permits itself to alter the law when it purports to fill in the “gaps” that it has engineered. The authority for the judiciary to take up this role as of law-creator derives, according to Kelsen, “indirectly, [and] by way of fiction.”⁵¹ As he explains, “It is the fiction that the legal order has a gap,—meaning that prevailing law cannot be applied to a concrete case because there is no general norm which refers to this case.”⁵² Thus, it remains inescapable that any “assumption of the court...that the legislator would have formulated the law differently if he had foreseen the case usually rests on an *unprovable guess*.”⁵³ And, it is only by virtue of such second-guessing that one can point to a difference between a positive law that *does* exist and a desired law, which does not.⁵⁴ As Kelsen observes, it is not unknown for legislation to contain something that is seen as nonsensical to some or even foolhardy, but bearing in mind that “laws are man-made, this is not impossible.”⁵⁵ These laws and policies are however implemented democratically by the body of elected representatives that are uniquely qualified to establish government policy in the area of criminal law. It follows then, that the SCC’s decisions in these cases reflect the substituted policy preferences of the Court on the issues illuminated during litigation.

⁵⁰ Kelsen, *General Theory*, *supra* note 14 at 147.

⁵¹ *Ibid* at 146.

⁵² *Ibid*.

⁵³ Kelsen, *Pure Theory*, *supra* note 16 at 248.

⁵⁴ *Ibid* at 249.

⁵⁵ *Ibid*.

On Kelsen's account, if, the defect, or, perceived *legislative deficiency* as I prefer to call it, is seen as "unsatisfactory, unjust, [or] inequitable"⁵⁶ then the Court is able to create new law that is able to overcome the undesired state of the law. This is nakedly revealed by Binnie J. in *Clayton*⁵⁷ where he opined on the catalysts that had spurred the Court to act in APD cases. As he explained,

Authority was found in *Dedman* because of the major problem of road carnage produced by mixing alcohol and driving. The blockade in *Murray* was held to be authorized because of reliable information about "dangerous criminals in fresh flight" and the limited number of escape routes which made the blockade likely to be effective. "Imminent danger" characterized the situation in *Godoy* where the 911 caller's message was suddenly terminated without explanation. In *Simpson* and *Mann*, the police power was held to authorize the stop because "individualized suspicion" of the persons being stopped tilted the balance in favour of police action.⁵⁸

It is therefore seen that the Court plays an important—and indeed, defining—role in the framing of the issues at stake before it. Consequently, the vantage point that is taken will greatly influence how the judicial opinions in a given case will be tailored. Given that the initial determination of the existence of a "gap" in the law is an inherently subjective one, it follows axiomatically that the choice of which materials and the content used to fill the gaps is equally subjective. On this point, Kelsen offers the view that:

The condition under which the judge is authorized to decide a given dispute as legislator is not—as the theory of gaps pretends—the fact that the application of the actually valid law is logically impossible, but the fact that the application of the actually valid law is—according to the opinion of the judge—*legally-politically inadequate*.⁵⁹

In expounding on the inadequacy that may be apprehended by jurists Kelsen makes it clear that this is a judgment that is politically motivated and rooted in one's own moral view of things.⁶⁰ Thus, it is patently subjective and out of step with what it demanded of judges in their treatment of criminal matters. Indeed, under this framework the SCC

⁵⁶ Kelsen, *General Theory*, *supra* note 14 at 147.

⁵⁷ *Supra* note 1.

⁵⁸ *Ibid* at para 98.

⁵⁹ Kelsen, *General Theory*, *supra* note 14 at 147-148 [emphasis added].

⁶⁰ *Ibid* at 149. See also Kelsen, *Pure Theory*, *supra* note 16 at 248; and Kelsen, *Principles*, *supra* note 17 at 306.

itself acts as a fetter during this adjudicative process. Under this construction not only is the preliminary determination of what constitutes a so-called “gap” left to the Court’s full discretion, but also the degree or width of the gap and ultimately the content with which it is subsequently filled. Surely, it is quite unsatisfactory from a *predictability* standpoint that “the boundaries are never closed: it is always possible for new common law police powers to be created.”⁶¹ There is no legislative support for this sort of judicial lawmaking. Any supposed shortcoming in the legislation can only be presented as a so-called “gap”⁶² in the law if we accept the view that the police lacked an essential power that was unauthorized, and as a result were incapable of performing the job assigned to them, and further that this was contrary to the wishes of lawmakers. It is apparent that the SCC has made the leaps needed, and seized upon these perceived gaps to create new police powers. As the saying goes, “the proof of the pudding is in the eating”⁶³ and it is clear from the body of *Waterfield*-based jurisprudence that the Court has concluded the law of police powers is awash in lacunae. Furthermore, it has taken the position that when these holes are exposed through the litigation process, that it is its job to fill them—and with whole cloth if need be. Clearly, the ongoing and rancorous dissension within the ranks of the high court has not inhibited the use of the APD. Nor can we ignore the fact that many of its pronouncements under *Waterfield-Dedman* have been enunciated following the finding of *Charter* violations committed by the police. Further to this, they were propounded in a way that exceeded what was necessary to resolve the immediate issues before it, and were thus made in *obiter*.⁶⁴ In the end, it seems that the Supreme Court’s patience has grown thin with Parliament and that in rendering judgment in APD cases that the Court has permitted pragmatism to triumph over principle.⁶⁵

As Coughlan writes,

There seems to have been no case which has considered the possible interplay between section 487.01 of the *Code* (the general warrant provision, which allows

⁶¹ Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 17 [Coughlan *Criminal*].

⁶² Kelsen, *Principles*, *supra* note 14 at 304-305.

⁶³ Allan C Hutchinson & Kathleen Strachan, “What’s the Difference? Interpretation, Identity and *R. v. R.D.S.*” (1998) 21 Dalhousie LJ 219 at 225.

⁶⁴ Jochelson, “Multidimensional”, *supra* note 21 at 241-242.

⁶⁵ Stribopoulos, “In Search”, *supra* note 43 at 22.

police to obtain a warrant to ‘do any thing’ that would constitute a seizure of a person, among other things) and the ancillary powers doctrine. The very purpose Parliament had in creating the general warrant provision was to eliminate possible ‘gaps.’ No doubt in some circumstances their use would be cumbersome, but that is quite a different matter from saying that Parliament has not acted.⁶⁶

As Coughlan has illustrated the SCC’s decision to create a roadblock power in *Clayton* was in contravention of Parliamentary intent and thus consecrated through anti-democratic means—and a clear usurpation of the lawmaking function. Plainly, the impromptu *ex post facto* amendment made to the criminal law by the Court in that case was done to suit the alleged needs of the police and was undertaken without requiring anything more than the assertion of the police that they require such powers to do their job.⁶⁷ It would have been preferable for the Court to have, after correctly determining that the police did not have the statutory power to initiate the roadblock, to decline from creating yet another new—and loosely defined—police power. Had the desire to denounce gun possession not proven irresistible, then minimally, the Supreme Court should have followed the precedent that it established in *Wong*: convict a factually-guilty accused of the offence charged, but refrain from creating a freestanding common law police power. While this would have been a cold comfort to Msrs. Clayton and Farmer who would have encountered the same result and received no benefit from the Court, it would have been immeasurably better for Canadian criminal and constitutional law. It may also have reopened the “dialogue”⁶⁸ with Parliament. The thrust of this point, however, was equally true in respect of the emergency assistance powers created in *Godoy* before this and it remained true in respect of the use of sniffer dogs in *Kang-Brown* and *AM*.

4.1.2(i) Minding the Gaps That Have Been Manufactured

It is of course true that legislators are not prescient and cannot conceive of every problem, as they come in many shapes and sizes. They also have the capacity to appear and to be perceived differently on the basis of one’s vantage point. This is quintessential

⁶⁶ Steve Coughlan, “Comment” in Janine Benedet et al, “30th Anniversary of the *Canadian Charter of Rights and Freedoms: The Impact on Criminal Justice*” (2012) 91 CR (6th) 71 at 92.

⁶⁷ Coughlan, *Detention*, *supra* note 32 at 20.

⁶⁸ *Supra* note 9.

phenomenology. Whatever problems or shortcomings exist within the range of lawfully recognized police powers from the perspective of the police-Crown, it must not be forgotten that these voids are solely the creation of government. Parliament, and to a lesser extent the legislatures, are the organs authorized by the constitution to stipulate the general norms in society that are backed by legal sanctions. While legislators can (and undoubtedly do) recognize the prospect that the norms that they have legislated may conceivably lead to unjust or inequitable results in some instances, they are incapable of foreseeing in advance all of the concrete cases where their legislative drafting will yield such unintended outcomes.⁶⁹ This is not to deny the fact that lawmakers will not be able to envisage prospectively every future scenario and provide a contingency. But that is life. Sometimes the law will be ahead of the curve in society and other times it will lag as in *Wong*. But it is not the Court's job to guess. Instead, it is the legislature's task to correct a problem, if and when, they perceive there to be one. The law has had to adapt to countless changes. In the realm of criminal law, we find these incremental adaptations in relation to introduction internet-based offences combating cyber crime and continual updating of the legislation that classifies and outlaws new chemical compounds, declaring them as illicit drugs. This is the nature of life in a democracy. Things change and society must address them in one way or another. But it is not for the judiciary to presume—or even to approximate from the earlier handling of arguably analogous matters—how the government of the people *would* have dealt with them. Instead, the role of the court is to signal to everyone—lawmakers and the citizenry alike—that there is a new matter afoot. It may or may not be regarded as problematic to the polity. The point is that it is up to the government to decide how it *will* respond, if at all. Sometimes the government will remain ahead of the litigation curve and legislate in contemplation or in response to changes in society. However, where it has not done so, it is not for the Court to take the lead and to assume lawmaking authority that it does not legitimately hold.

Another circumstance that must be accounted for are the occasions where the Court has spoken out of turn in constitutional “dialogue.” For instance, I am in full

⁶⁹ Kelsen, *General Theory*, *supra* note 14 at 148.

agreement with Coughlan who points out in his discussion of *Clayton*⁷⁰ that the Supreme Court made a fundamental error in concluding that Parliament had not enacted *any* legislation touching upon the ability of the police to implement a roadblock.⁷¹ Rather, it is evident from a plain reading of the case that the Court in *Clayton* misconstrued legislative silence on a particular issue—that of the police authority to erect a road blockade in response to a 911 call—and then proceeded to mischaracterize this omission as though it were indicative of legislative silence generally on the range of authority given to its investigative agents. Even if this errant view were to have been correct it still does not, of course, compel judicial intervention and the invocation of the APD. Nor does it provide any answer to the question of “why [in APD cases] the Court has never suggested that the failure to legislate should be seen as an intentional omission [and a conscious decision] on the part of legislators,”⁷² and one that is deserving of deference from the judiciary. This analytical misstep did not merely colour the SCC’s treatment of the ultimate issue, it also stands as the linchpin for the Court’s decision to confer license upon itself to enter the policymaking field. As Coughlan explains:

A police roadblock is an investigative procedure which constitutes a search, and an unreasonable one if not authorized [by law]. No provision in the *Criminal Code* specifically authorizes roadblocks—which means that *the police here could have obtained a general warrant under section 487.01 authorizing them to act as they did. Further, under section 487.01(7) they could have obtained that general warrant by telephone, using the telewarrant provisions.* Parliament in fact has acted in a way to cover precisely this situation, and indeed virtually all situations, since section 487.01 allows a warrant ‘to do any thing.’⁷³

Hence, we find a rejection of the valid law and see that it was supplanted by the Court’s preferred resolution to the matter. Another troublesome aspect of *Clayton* is that it only became necessary for the Court to engage the APD because the police did not utilize the law on the books. While it is true that:

The police might claim that there was not time in this situation even to obtain a telewarrant, since immediate action was necessary. In that regard it is worth

⁷⁰ *Supra* note 1.

⁷¹ Steve Coughlan, “Arbitrary Detention: Whither—or Wither?—Section 9” (2008) 40 SCLR (2d) 147 [Coughlan, “Arbitrary Detention”].

⁷² Coughlan, *Detention*, *supra* note 32 at 18.

⁷³ Coughlan, “Arbitrary Detention”, *supra* note 71 at 175 [emphasis added and footnote omitted].

noting Parliament's action in creating section 487.11 of the *Criminal Code*, allowing some powers to be exercised in exigent circumstances where grounds for a warrant exist but it is impracticable to obtain one. Note, though, that *although Parliament made that provision available for search warrants in section 487, it did not make them available for general warrants in section 487.01*. On the other hand, this 'exigent circumstances' exception, which was added to the Code after the general warrant provisions, does apply to section 492.1 tracking warrants, which were added to the Code at the same time as general warrants. *It seems hard to escape the conclusion that Parliament deliberately did not make the powers available under general warrants available without judicial scrutiny in exigent circumstances. That deliberate decision is not an 'absence of Parliamentary action' [as Binnie J. claimed in Clayton]: it is a conscious policy choice. Further, it is a conscious policy choice ignored and contradicted by [the Supreme Court's decision] creating a common law power to exactly the opposite effect.*⁷⁴

It would be immeasurable preferable for the Crown to arguing that the police actions were supported by legislation such is found in s. 487.01 than to avail itself to the common law. The chief reason for this is that it would mean that the police have acted *prima facie* in accordance with the law and it would re-open the door to an accused to challenge the constitutionality of this legislation. In the context of this discussion it is worth remembering that the catalyst for the above-mentioned amendments to the *Criminal Code* was the earlier decisions of the SCC in *Wong* (and *R v Wise*)⁷⁵ where the Court exercised restraint in a manner consistent with its role as protector of constitutional rights, mindful of its own limited institutional competencies, and refused to create new laws ameliorating the position of the state.

4.1.2(ii) The Unorthodox Use of Precedent

Given that one of the primary purposes of this chapter is to raise questions about the Supreme Court's use of the APD here is an obvious one to be asked:

[I]f the common law is to be developed in accordance with Charter values, and the Charter is to be interpreted to constrain—not create—state action, then how could the learned [justices] give powers to police that did not previously exist?⁷⁶

⁷⁴ *Ibid* at 175-176 [footnote omitted].

⁷⁵ [1992] 1 SCR 527, 70 CCC (3d) 193 [*Wise*].

⁷⁶ Aman S Patel, "Detention and Articulate Cause: Arbitrariness and Growing Judicial Deference to Police" (2001) 45 CLQ 198 at 201.

The answer to this question, it would seem, lies in *Dedman*;⁷⁷ a judgment which has refused to lay dead. Instead, it has been reincarnated and gathered sufficient strength to do the Supreme Court's heavy lifting and to usher the Court across the Rubicon.

There is no legislation in place that authorizes the Court to act as a lawmaker in the manner that it does in APD cases. And, if there were to be such a rule, let us be clear about what the rule would be providing the judiciary. As Kelsen explains,

[It would amount to a] rule authorizing the law-applying organs not to apply existing law but to create a new law in case the application of existing law is, though logically possible, morally or politically unsatisfactory, [and the conferral of] an extraordinary lawmaking power upon the law-applying organs.⁷⁸

Although Parliament has been recalcitrant in its handling of matters pertaining to police powers—and criminal law reform, in general—no such delegation of authority has been made by it in favour the Court. Surely then, it is even more extraordinary that the Supreme Court has been engaged in this sort of freewheeling law production without any formal license to do so. Indeed, the only positive rule enabling such judicial lawmaking powers is the self-propagating one that was consecrated by the Court itself in *Dedman* and as built upon in the line of APD cases that have followed in its wake. It is only from that seminal decision where the Supreme Court arrogated to itself the ability to delineate ancillary common law powers that the Court can present any *legal* justification for the investigative powers it has spawned. What emerges from this is the creation of a contest between two competing common law rules. On the one hand, we have the principle of legality (POL) and on the other, we find a rule that declares, in essence, that the Court has the authority to create *ad hoc* police powers whenever it deems this to be necessary and sees fit to do so on the basis of *Waterfield/Dedman*. The former is, of course, a bedrock common law rule providing for residual liberty in favour of citizens—and concomitantly, demanding from the state that any coercive actions taken against citizens be founded on lawful authority—while the latter, is a newfound common law rule that speaks only to the purported competency of the judiciary to expand state power. Concerning the latter, it is apparent also that the Court sees the rule that it has contrived as being capable of supporting not only the generation of new police powers, but also in applying them

⁷⁷ *Supra* note 1.

⁷⁸ Kelsen, *Principles*, *supra* note 17 at 306.

retroactively against an accused as the cases of *Dedman*, *Clayton* and *R v Godoy*⁷⁹ illustrate. Plainly, the two rules are brought into direct collision in these cases and they are diametrically opposed. However, given that the Court's unorthodox use of precedent pits the common law rule it has created through *Waterfield/Dedman* against another common law rule, it is little wonder that the Court has chosen to prefer the rule bolstering its lawmaking ability. Distilled further, what this amounts to is a contest between two competing views wherein the proponent of one of the positions, the Court, is also responsible for determining the outcome of the dispute. This is a radical idea, but one that fairly attaches to the Supreme Court's APD jurisprudence. Seen in this light, the Court's role in APD cases becomes somewhat akin (if not, is tantamount) to that of a party to the litigation and quasi-participant to the adversarial process. Once again, this is as unseemly as it is unnecessary.

Upon closer examination and going back to *R v Stenning*,⁸⁰ the introduction of *Waterfield* to Canadian criminal law, it is apparent that there is very little factual similarity between the two cases. The facts in *Stenning* have nothing to do with those in *Waterfield*. Had *Waterfield* dealt with a scenario closely approximating those in *Stenning*—and assuming further that the then existing Canadian case authorities were silent on the issue—it might have made sense to look to *Waterfield* as a persuasive, non-binding authority. However, to find a common denominator between these two cases, we must cast a very broad net and say that the police were investigating reported crimes to find any nexus between them. Advancing in our review of the case, we do not find any immediate improvements. Thus, when we look at the Court's reliance upon *Waterfield* in *Dedman*, again we find the absence of any analogous factual circumstances and this trend has continued virtually unabated throughout the *Waterfield/Dedman* line of cases. As we move into the *Charter* era to glance back at *R v Godoy*,⁸¹ the first post-*Dedman* judgment to apply the APD, this point is brought into even sharper focus. There is no close analogy between the actions of the police in these cases. The facts bear no resemblance whatsoever to each other. The use of *Dedman* by the Court in *Mann* is equally jarring

⁷⁹ [1999] 1 SCR 311, 168 DLR (4th) 257 [*Godoy*].

⁸⁰ [1970] SCR 631, 10 DLR (3d) 224.

⁸¹ *Supra* note 79.

and again for the same reason. The precedent in that case had no immediate application to the matters in issue. *Dedman* dealt with the random stopping of motorists for the purposes of investigating driver impairment, *Mann* dealt with the targeted detention of an individual walking along a sidewalk (a pedestrian) in the vicinity of a recently reported crime. In short, the substance of the police power created by the Court in *Dedman* had nothing to do with the substantive investigative power that it went on to declare in *Mann*. Instead, the Court's earlier precedent was used purposively and as the means for the Court to find a way to remediate the problem that it had identified, that of police impotence to detain persons short of arrest. Thus, the Court conjured up *Dedman* and leveraged it as the vehicle to licence itself competent to create new police powers. Put another way, we must now read *Dedman* as standing for two separate and very different propositions: first, it can be cited as authority enabling the police to conduct checkstops to investigate sobriety; and secondly, when confronted with a "gap" or other problem that it wishes to correct, the Court has the power to make curative solutions at common law. In respect of the former, the incremental adaptation of the ruling in *Dedman* is found in the *R v Hufsky*⁸²-*R v Ladouceur*⁸³ line of authorities. This is in line with the orthodoxies of *stare decisis*. By contrast, the latter represent an unorthodox—and indeed, radical—contortion of our understanding of the use of precedents in the common law. And so, here we find another basis to oppose the APD.

Similarly, the announcement of the road blockage power in *Clayton* was not anchored in the substance of *Dedman* as Binnie J. noted in his judgment.⁸⁴ It was, however, firmly rooted in *Waterfield* and the adjudicative *process* that birthed it. Only on the heels of *Mann* do we find in *Kang-Brown*, the fodder that would support the sort of analogy-based reasoning that is associated with the development of legal principles at common law. Strangely, this is not a point of emphasis in the Court's reasoning. It is not presented as a *Mann* stop plus the inclusion of a dog sniff search. Understood in this way, the Court's novel interpretation—and the subsequent application—of judicial precedents in cases where the APD is utilized stands out starkly and is even more novel

⁸² [1988] 1 SCR 621, 40 CCC (3d) 398.

⁸³ [1990] 1 SCR 1257, 56 CCC (3d) 22.

⁸⁴ *Clayton*, *supra* note 1 at paras 85-86.

in nature than any of the actual police powers that have been created under it. Properly understood, the APD is not only a means of generating ancillary common law police powers; it is also the sole common law authority enabling the judicial lawmaking found in these cases. Hence, and contrary to Court's suggestion,⁸⁵ the use of the APD is nothing like the sort of measured, incremental development of legal principles that is ordinarily associated with evolution of the common law.

In order to tap into its self-professed lawmaking powers under *Waterfield* and deploy APD-based reasoning, the Court must either reject or choose to disregard each of the following: its own earlier precedents disavowing such activities;⁸⁶ the ongoing opposition to this judicial practice as expressed by the dissenting members within its own ranks;⁸⁷ the Kelsenian theory of gaps; conventional application of the principle of legality; and, finally, certain statutory provisions bearing on these issues.⁸⁸ Even when viewed in isolation, any one of these objections and strands of argument should be sufficient to call the SCC's foray into lawmaking into question. However, when taken together, the force of the opposition to this species of judge-made law becomes formidable and demands a compelling justification from those who would have us accept it as a legitimate dimension of Canadian constitutionalism. None of this is assuaged by remarks contained in Supreme Court judgments signaling the trite fact that Parliament is capable of legislating police powers or in the veiled invitations that have been given to government to do so.⁸⁹ Respectfully, the Court's actions speak far louder than its words, especially when viewed in the context of Parliament's lingering idleness. What is also interesting in the discussion of SCC precedents and the TOG is the fact the Court did not speak of any "gaps" in *R v Suberu*⁹⁰ when it held that s. 10(b) rights are engaged at the moment a BID crystallizes. Surely, there is some bitter irony in this given that the Court

⁸⁵ *Mann*, *supra* note 27 at para 17.

⁸⁶ For example see *Wong*, *supra* note 35; and *Wise*, *supra* note 75.

⁸⁷ See especially the judgments authored by Justice LeBel in *Orbanski*, *supra* note 2 and *Kang-Brown*, *supra* note 3.

⁸⁸ *Criminal Code*, RSC 1985, c C-46, s 487.01.

⁸⁹ See *Kang-Brown*, *supra* note 3 at paras 22, 51 and 61; and *Mann*, *supra*, note 27 at para 18.

⁹⁰ 2009 SCC 33, [2009] 2 SCR 490.

itself was directly implicated in the persistence of this hole in the law, but also in the fact that the provision of the *Charter* contains the phrase “without delay.”

4.1.2(iii) An Oblique Form of Judicial Activism

It is beyond dispute that when courts depart from the terrain of statutory interpretation and law application they enter on to the field of law creation and into the domain of policymaking. Once judges begin to act as policymakers, they expose themselves to an array of criticisms broadly defined as “judicial activism.” I am in agreement with Stribopoulos that the Court’s creation of police powers via the APD reflects “a form of ‘judicial activism’ under the *Charter* that has largely escaped academic or public scrutiny.”⁹¹ However, it is not of the kind most commonly associated with the phrase. Many of the critiques centre upon the desirability of having a few select individuals who have been unelected (and do not face re-election) and enjoy tenure in their positions, equipped with the power to overturn laws that have been democratically enacted. In answer to this charge, jurists in Canada have a powerful reply at their disposal. Indeed, courts can offer as a full-defence, the reality that *all* of the powers they enjoy in this regard were given to them by the legislature—either directly through the *Charter* and post-*Charter* legislation, or, through acquiescence and by allowing pre-existing common law authorities (ones that can be overwritten through legislative action) to remain in force. Let us pause thus briefly to differentiate what transpires under *Waterfield/Dedman* from other forms of juridical lawmaking and judicial remedies. To be clear, the focus of my thesis—and preoccupation of this chapter—is on the Court’s use of the APD as a lawmaking tool in the area of criminal procedure. That said, it is helpful to distinguish the APD from other forms of judicial lawmaking that occurs under the *Charter*. For instance, it could be claimed that the Court regularly engages in lawmaking under s. 15 of the *Charter*. However, this is distinguishable on two important bases: first, there is an appreciable difference between the extension of legal rights or other benefits to individuals and the removal or diminishment of civil liberties and the range protection available under the *Charter*; and second, there is actual legislative support for the sort of

⁹¹ Stribopoulos, “In Search”, *supra* note 43 at 73. See also Richard Jochelson, “Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference” (2008) 13 Rev Const Stud 209 at 209.

lawmaking that occurs under s. 15 and it is contained in the language of that section itself. There is nothing comparable about the lawmaking that happens under the APD, which is supportable only by judicial precedents created by the Court itself.

Linking this back to the TOG, it is worth mentioning that in cases where the Court strikes down legislation that it has found to be unconstitutional, a natural consequence of such ruling is the creation of a gap in the law. Such a description is even more apt in cases where the Court severs and finds inoperative a portion of otherwise valid legislation. In such cases, the exact contours of a gap are traceable against the backdrop of the legislative scheme that remains in force minus the *ultra vires* or otherwise *Charter* offending provisions. This however is not the sort of gap that is contemplated by Kelsen's theory. Importantly, where the Court renders judgment against the state in the manner just described it does so pursuant to the powers entrusted to it in *Charter*. This is in stark contrast with what occurs when the Court renders judgment in favour of the state by expanding police power via *Waterfield/Dedman* where it is only the Court's own precedent that supports its ability to make such rulings. Plainly, there would be no reason for the government to accept any adjudicative repudiation of its legislation by the judiciary if the authority allowing for such a contingency had not been expressly granted to the courts. Otherwise, the proffered judgment would amount to nothing more than a rogue judicial pronouncement that could rightly be ignored. Logically then, there is no reason for us to accept the Court's expansion of its judicial prerogative in the opposite direction to favour the state—particularly when it is utilized in a way that reduces the range of constitutional protections and marginalizes the *Charter* rights granted to individuals. In my view, the lawmaking powers of the Court, just like the powers of the police secured through *Waterfield*, are ill-gotten. One is descendant from the other. In short, the *Charter* rights of Canadians have been watered down as a result of the Court's adoption and active transformation of *Waterfield*.

4.1.3 The Convergent Expansion of State and Judicial Power (K3)

Canadian constitutionalism and the administration of the criminal justice system can be said to be well-functioning when the following conditions are met: Parliament passes laws through the democratic process; citizens have access to a forum to challenge the legislation; and the judiciary is there to rule upon the constitutionality of the statutory

provisions and ensure that police actions conform with the *Charter*.⁹² Not incidentally, this matches with the pillars of the Kelsenian framework. Under the APD, however, each of these attributes have been either been thwarted or abandoned. In addition, the machinations of the APD have undercut the foundational principles of “democracy, constitutionalism and the rule of law, and respect for minorities,”⁹³ that uphold the framework for law and governance in Canada. Hence, there is a need to unravel the “politicolegal”⁹⁴ backcloth that enmeshes APD jurisprudence and attempt to see where things have gone awry.

Although it is apparent that the Court is deeply entangled in these matters, it is only implicated in the supply-side of the equation. The demand-side of the problem is attributable solely to the government and also warrants further interrogation. This, in turn, entails a brief look at the prevailing socio-political context that has allowed the APD to take root in Canadian criminal law. Putting aside the content of the law that has been developed to govern the exercise of police powers and the manner in which it has been created two things are immediately discernable: first, we can identify a trend that has seen the Court adopt an increasingly “hands-on”⁹⁵ adjudicative tack;⁹⁶ and, second,

⁹² See Kelsen, *Pure Theory*, *supra* note 16 at 238 [footnote omitted], where he describes this dynamic as follows:

The court that has to apply the general valid norms of a legal order to a concrete case, must decide the question of whether the norm to be applied is constitutional, that is, created in a legislative procedure determined by the constitution or by custom delegated by the constitution. This fact, to be ascertained by the court, is as much a condition for the sanction stipulated by the court in a concrete case as the fact, to be ascertained by the court, that a delict had been committed. The legal rule describing this situation—for example when a criminal law of a democratic legal order is applied—is this: if the constitutionally elected parliament, by way of a procedure prescribed by the constitution, has passed a statute, according to which a certain behavior ought to be punished, as a crime, in a certain way; and if the court has ascertained the fact that a certain individual has behaved in that way; then the court ought to impose the punishment prescribed by the statute.

⁹³ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49, 161 DLR (4th) 385.

⁹⁴ David Erdos, “Judicial Culture and the Politicolegal Opportunity Structure: Explaining Bill of Rights Legal Impact” (2009) 34 *Law & Soc Inquiry* 95 at 95.

⁹⁵ *Supra* note 8.

⁹⁶ Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005) at 5-2.

matched to this we find that Parliament, has taken a decidedly “hands off”⁹⁷ approach to the structuring of police powers. The recalcitrant posture taken by Parliamentarians has not only facilitated, but also tacitly encouraged, the more robust judicial intervention that has transpired. The emergence of this inter-institutional dynamic has been propelled by “the abdication of the legislator in favor of the judge,”⁹⁸ which is the quintessence of K3. Absent this piece of the puzzle, the legislative neglect of Parliament in our case, the TOG would be impossible. Indeed, this is belied by the history of the “dialogic”⁹⁹ relations between the Supreme Court and Parliament; and, one could not have been accomplished without the other. Stated differently, if Parliament wanted to foreclose the Court’s use of the APD it could do so by comprehensively legislating the range of powers that its agents, the police, may use during criminal investigations. That it has not done so is telling. Instead, we have been left situation in which both institutions are shown to have needlessly strayed from their respective and *necessary* roles.

4.1.3(i) Lopsided Outcomes

I concur with Luther that, “[n]o test should be adopted without an objective look at the result achieved by the application thereof.”¹⁰⁰ Thus, while it is fine (and logically unimpeachable) for Binnie J. to remark that, “I am not suggesting that in a particular case the outcome [of an APD case] will always or even generally be in favour of the existence of a police power”¹⁰¹ as he did in *Kang-Brown* when leading the charge across the Rubicon, it is a statement that nonetheless rings hollow when measured against the Court’s actual record in applying *Waterfield/Dedman*. The SCC’s rulings in these cases have uniformly led to the expansion of state power. This is true even in cases where the police have run afoul and have been found to have acted illegally.¹⁰² Indeed, to understand why the government has tolerated these judicial misadventures, we need not

⁹⁷ *Kang-Brown*, *supra* note 3 at para 22.

⁹⁸ Kelsen, *General Theory*, *supra* note 14 at 148.

⁹⁹ Kent Roach, “Sharpening the Dialogue Debate: The Next Decade of Scholarship” (2007) 45 Osgoode Hall LJ 169 at 175. See generally Kent Roach, “Dialogic Judicial Review and Its Critics” (2004) 23 SCLR (2d) 49.

¹⁰⁰ Glen Luther, “Police Power and the *Charter of Rights and Freedoms*: Creation or Control?” (1986) 51 Sask L Rev 217 at 223.

¹⁰¹ *Kang-Brown*, *supra* note 3 at para 51.

¹⁰² This trend is reflected in the Court’s decisions in *Mann* and *Kang-Brown*.

look any further than the substantive results where the APD has been utilized. When this is done it is clear that *Waterfield* has functioned as a failsafe for the government and its prosecutorial agents. In short, the APD has been a boon for the state. This fact must loom large when think about the APD. If *Waterfield/Dedman* were to have been applied in a way that did not enlarge police power, it might be regarded as more effective in delivering evenhanded balancing. But this has never happened and so the lopsidedness must be taken seriously.¹⁰³ As Mr. Justice LeBel observed in *Orbanski*,¹⁰⁴

The doctrine would now be encapsulated in the principle that what they police [claim to] need, the police get, by judicial fiat if all else fails or if the legislature finds the adoption of legislation to be unnecessary or unwarranted. The courts would limit *Charter* rights to the full extent necessary to achieve the purpose of meeting the [professed] needs of the police. The creation and justification for the limit [placed on Canadians' *Charter* rights] would arise out of an initiative of the courts [rather than through legislation enacted by government].¹⁰⁵

In essence, nothing is ventured and everything is gained by Parliament when the APD is utilized. The muted “dialogue” and the dearth of legislative responses that have followed APD judgments does, however, speak volumes.

4.2 Chapter Conclusion

Through Kelsen’s theory, I have explored the formation of common law police powers in Canada. I have demonstrated that the APD is needless feature of Canadian criminal law and one for which no compelling justification has been advanced. As Mayeda points out, the Supreme Court has “never explain[ed] why it is legitimate for courts to fill in the gaps of incomplete government legislation on police powers when the conferral of such powers involves striking the [supposedly] right balance between public security and individual liberty.”¹⁰⁶ Indeed, based on the words and actions of the Court in APD cases, we remain flummoxed in our understanding of what the high court has rightly accomplished in this line of authorities and why it has embarked upon its chosen path. Nevertheless, the Supreme Court has thus far succeeded in propounding

¹⁰³ This prospect was, at least, contemplated in the dissenting jointly authored judgment of Chief Justice McLachlin and Mr. Justice Fish in *R v Gomboc*, 2010 SCC 55 at paras 144-145, [2010] 3 SCR 211.

¹⁰⁴ *Supra* note 2.

¹⁰⁵ *Ibid* at para 81. See also *Coughlan, Detention*, *supra* note 32 at 20.

¹⁰⁶ *Supra* note 7.

freestanding (and frequently nebulous) ancillary powers without seriously calling into question the legitimacy of the practice. The advent of this adjudicative phenomenon “wrongfoots”¹⁰⁷ the administration and development of criminal and constitutional law in Canada, and has effectively miscast the prevailing discourse on the Court’s lawmaking function in this area. The critical attention that has been paid to the doctrinal rules created by the Supreme Court through its *Waterfield*-based judgments in these cases has been well warranted. However, it remains the case that not enough of the right questions have been asked and concomitantly proper answers from the Court have not been received.

In a remark that is apropos of the Court’s usage of the APD in criminal cases, Thomas Pynchon once quipped that, “[i]f they can get you asking the wrong questions, they don’t have to worry about answers.”¹⁰⁸ This neatly captures one of the most pressing problems surrounding the increasing volume and breadth of judicially-created police powers in Canada: the absence of a compelling justification (legal or otherwise) for the sheer existence of the APD on the jurisprudential landscape given that it is utterly unnecessary. For its part, the Court, has effectively eluded this question and sought refuge on the other side of the Rubicon. Moreover, the SCC has tried to dissuade further interrogation of its actions and quell criticism by declaring “we,” meaning both commentators and the Court itself, ought not “try to re-cross the Rubicon to retrieve the fallen flag of the *Dedman* dissent.”¹⁰⁹ Respectfully, however, it is not (and certainly no longer) for Binnie J. to make declarations of this sort or attempt to relegate the APD merely to “a matter of historical and academic interest,”¹¹⁰ as he termed it in *Clayton*.

Therefore, as we continue to ponder what Professor H. Archibald Kaiser has described as the “Court’s tolerant, incrementalist, case-by-case analytical approach”¹¹¹ to the resolution of cases pitting the state’s interest in detecting and prosecuting crime, against the rights of citizens to remain presumptively free from governmental intrusion,

¹⁰⁷ Kevin Dawkins, “Defence Disclosure in Criminal Cases” (2001) NZ L Rev 35 at 39.

¹⁰⁸ Thomas Pynchon, *Gravity’s Rainbow* (New York: Viking Press, 1973) at 251.

¹⁰⁹ *Kang-Brown*, *supra* note 3 at para 51.

¹¹⁰ *Clayton*, *supra* note 1 at para 77.

¹¹¹ H Archibald Kaiser, “*Gomboc*: The Supreme Court Weakens the Search Warrant Requirement and Facilitates Police Investigations, Again” (2011) 79 CR (6th) 245 at 257.

the question of why the government does not simply confer the powers that it wishes for its agents directly looms large, and must be vociferously asked. Parliament not only has the ability to do this, but also is uniquely competent to legislate in the area of criminal law, and is its obligation to discharge. Quite simply, it is unacceptable for the state to be making these requests through the litigation process, and for the Court to accede to them. By placing emphasis on the fact that it is a *request* for power by the state, and that the Court is free and capable of refusing,¹¹² it emerges that the Court has consciously chosen to adopt a narrative that is consistent with the broadening of its own lawmaking power. It is, however, wholly irreconcilable with its own earlier pronouncements, and reflects a disavowal of the declared role as the safe-keepers of *Charter* rights. In taking this path and in expanding its capacity for law creation, the Supreme Court, has in turn aggrandized the law generation abilities of lower courts on a commensurate basis. Moreover, the further that the Court goes down this misguided path the more it becomes duplicitous in the non-democratic enlargement of state power. It also becomes institutionally duplicative as a law-creating body, doubling the efforts of Parliament to control crime. Yet, it is apparent that under the existing framework, however, that challenges to the Court's insistence upon filling in perceived legislative deficiencies will not emanate from the Crown. Consequently, the APD remains effectively immune from opposition. Under the APD, the state has ventured little and gained greatly. In addition, it has not been waylaid by its legislative idleness. In short, the APD has been a boon for the state.

For the reasons argued in Chapter Three, not only is it unnecessary for the government to seek to broaden its investigative and coercive powers through the adjudicative process, the state must be taken to be aware of the limits of the powers they have invested in their agents. Thus, it is unfair for the Crown to argue that these deficits in police powers were not previously determined by or known to the state. Moreover, any supposed deficiency can be cured. But the only appropriate way for the government to do so is through the legislative process. Also, in the context of s. 24(2) an argument predicated on ignorance of the law should be summarily dismissed. Instead, of resorting

¹¹² See the Court's ruling in *Wong*, *supra* note 35, for an empathic example of this adjudicative posture.

to *ad hoc* judicial lawmaking to correct the discrete problems raised in particular cases, the Court should instead render judgment against the state and find the investigative actions illegal. And, it must stop there. Although, one would think this to be an obvious point, the Supreme Court's ruling in, *inter alia*, *Mann* and *Kang-Brown* demonstrate how the Court has taken to refashioning the common law and introducing new freestanding powers into Canadian law even in cases where the actual police conduct has been found to violate the *Charter*.

As Professor Sandra Berns writes, “[j]udicial power is, by its very nature, not open to abstention. The posture of judicial deference is itself an activist posture.”¹¹³ Thus, as Professor Lon Fuller concurs, “judges must decide the case”¹¹⁴ that is presented to them. Importantly, it does not amount to a non-decision or an act of judicial abstention where a court refuses to make up for legislative shortcomings.¹¹⁵ Hence, the finding of a gap in police powers does not lead inexorably to the conclusion that courts must fill a legislative lacuna whenever one is encountered. Declining to make up law is *not* tantamount to the Court doing nothing. Rather, it is applying the law as it stands. All that is required once a matter is before the court it is that a decision be rendered. If there is any abdication of responsibility to attributed, then this traceable to the legislature, not the judiciary. Courts should simply give effect to the principle of legality and find against the state, whose agents have acted unilaterally and in a manner that is inconsistent with the ROL. This would place the issue squarely back in the hands of Parliament to address it as they see fit. If it evokes a strong public reaction or is otherwise viewed by lawmakers as a matter of pressing importance then a legislative response is apt to be forthcoming. This is the history of dialogic relations between the

¹¹³ Berns, *Concise*, *supra* note 30 at 31.

¹¹⁴ Lon L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964) at 56.

¹¹⁵ Elsewhere, it is explained by Kelsen, *Pure Theory*, *supra* note 16 at 24 that the Court will face two choices, “Either the court ascertains that the defendant or accused has committed the delict as claimed by the plaintiff or public prosecutor and has thereby violated an obligation imposed on him by the legal order; then the court must find for the plaintiff or condemn the accused by ordering a sanction...*Or the court ascertains that the defendant or accused has not committed the delict and therefore has not violated an obligation imposed on him by the legal order; then the court must dismiss the action or acquit the accused* [emphasis added].”

Supreme Court and Parliament concerning police investigatory powers. Corrections of government policy are only properly made in the legislative arena. The Court acquits itself well by staying within the confines of its own silo and not straying from the institutional mandate it has been given. The APD is no substitute for s. 1 analysis and the more searching inquiry that it demands—nor analogous to the burden that the state is obliged to displace.¹¹⁶ If the government wishes to imbue its agents with additional coercive powers or to equip them with new investigative tactics, then it should take the positive steps available at its disposal and introduce legislation spelling out these changes. Once the law has been altered through the democratic process, citizens (along with the police, lawyers and judges) will have public notice of the changed circumstances and the information needed to prospectively guide their actions and decision-making. Of course, this also enables individuals to contest the legislation on constitutional grounds thereby re-open the door to s. 1 analysis, which has been shuttered by the APD. All of these reflect benefits to be welcomed. In sum, if there are “gaps” in the law, then it is for Parliament, not the Court, to bridge them.

¹¹⁶ Tim Quigley, “Brief Investigatory Detention: A Critique of *R. v. Simpson*” (2004) 41 *Alta L Rev* 935 at 950.

Chapter Five: Conclusion

5.0 Overview

Throughout the course of this thesis, I have investigated and critically engaged with the issues surrounding the proliferation of common law police powers in Canada. In the process I have reviewed the relevant jurisprudence of the Supreme Court of Canada (SCC), and in particular, its use of the ancillary powers doctrine (APD) in the determination of the limits, scope and basis of police powers. I have also examined and brought challenge to the underlying source of the Court's professed lawmaking authority under "*Waterfield/Dedman*."¹ The pertinent academic literature on the subject has similarly been canvassed. It has been my aim to build upon this scholarship and to help contribute to our understanding of the problems reflected by the presence of the APD on the landscape of Canadian criminal and constitutional law. My research into the development of the APD has illuminated a myriad of problems associated with it. The deleterious effects can be gleaned from—and are traceable to—the manner in which institutions purport to exercise their authority within the APD-based framework, whether based in law or merely in *de facto* terms, and in how the constitutional rights enjoyed by Canadians have come to be undervalued and under-protected against governmental intrusion in the process. Accordingly, I have taken the position that the APD is not simply an unnecessary feature of Canadian law, but a pernicious one that is detrimental to the vitality of constitutionalism in Canada and that should be jettisoned immediately.

Ultimately, it remains my argument that while we are right to be acutely concerned with where the lines demarcating the bounds of permissible state conduct are drawn, in *principle*, it matters a great deal more by whom they are drawn and how the state's adherence to them is subsequently measured. For, if the procedural apparatus designed to supervise the substantive limits placed upon state power falters, or, is altered and itself eroded, it follows that there is no meaningful countercurrent to stem the escalating tide of coercive state action and to see that constitutional limits are upheld.

¹ *R v Kang-Brown*, 2008 SCC 18 at paras 50-52, 56 and 62, [2008] 1 SCR 456 [*Kang-Brown*]. See also *R v Sinclair*, 2010 SCC 35 at paras 114 and 191, [2010] 2 SCR 310.

Indeed, if the “checks and balances”² that the constitutional framework demands are absented then the auditing party, the Court, instead becomes the underwriter of state exercises of power that abridge civil liberties. Surely, only a perverse conception of the Supreme Court’s self-acknowledged duty to act as the “guardians of the Constitution and of individuals’ rights under it”³ can support such a dystopian paradigm; one in which constitutional rights, alongside the institutional architecture designed to preserve them, are able to conjointly atrophy. While unsettling, this portrait nevertheless provides an accurate depiction of the law—and legal system—governing the exercise of police powers against members of the Canadian public and the socio-political conditions that have enabled it. Under the reigning *Waterfield/Dedman* paradigm, neither Parliament nor the Court is properly fulfilling the functions that they have been assigned and entrusted to perform; and, consequently, the conventions of constitutionalism have been undemocratically rearranged on a *de facto* basis. The APD is inconsistent with the principles of constitutional democracy that underpin the *Canadian Charter of Rights and Freedoms*.⁴ It is also discordant with the best traditions of the Anglo-Canadian common law in the area of criminal law and procedure. Accordingly, the prevailing *status quo* is unacceptable and ripe for abolition. What is required instead is the reemergence of mutuality and institutional independence as envisioned in Canada’s constitutional instruments.

5.1 Re-conceptualizing and Correcting the Problems Presented by the APD

5.1.1 Reframing What Is At Stake and What Has Gone Awry

The underlying premise of these cases must be more carefully scrutinized and challenged more vigorously. Far too often the issues are cast as quasi-plebiscites on whether or not the police are entitled to do something. Of course, this obfuscates the fact that, in most instances,⁵ the police have already preemptively (and acting unilaterally at

² David Jenkins, “The Lockean Constitution: Separation of Powers and the Limits of Prerogative” (2011) 56 McGill LJ 543 at 545.

³ *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 169, 11 DLR (4th) 641.

⁴ *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*].

⁵ An exception to the prevailing trend arose in *Reference re: Judicature Act (Alberta)*, s. 27(1), [1984] 2 SCR 697 at 727, 14 DLR (4th) 546 [*Wiretap Reference*], where the Alberta government sought to clarify and confirm the status of police powers by means of

their own behest) gone ahead with the actions they are championing in court. It also overlooks the fact that, if, there is any apparent ambiguity about the legality of police actions, or, ascertainable voids in the powers stipulated in policing legislation, the source of these lacunae is the state. This stark reality and its implications cannot be overstated. From a purely procedural standpoint, there is nothing to prevent the state from enacting legislation to confer the powers that are sought by the police in these cases. This fact must not be forgotten, for, in my view the legislature is sole place that is competent to impose burdens on citizens that are backed by criminal sanction, which it is entitled to do at any time. Moreover, from a substantive point of view, save for the requirements of the *Charter*, the government is also free to enact any legislation it chooses and equip its agents with whatever powers it deems to be appropriate or necessary. The Court's task is to oversee these legislative measures, and in appropriate instances, to act as an editor by modifying the laws that have been passed by Parliament to achieve constitutional compliance. It is not, however, for the SCC to become itself the author of laws that imperil the most basic rights and freedoms of Canadians. Yet, this is exactly what it has done in the instances where it has resorted to the APD.

The Court is supposed to closely supervise the actions of the police in order to see that the actual measures taken by them are in conformity with the *Charter* and to signal where they fall short of constitutional thresholds. Yet, the analytical "gaze"⁶ of the judiciary in these cases is frequently coloured by fact the police actions have revealed the presence of criminality or the gathering of contraband, which "exerts a subtle pressure to uphold police conduct,"⁷ defer to police decision-making and to incline results favouring the expansion of police powers on a freestanding basis. By proceeding from this platform, the outcomes reached in cases where the APD is utilized read as though predetermined and as if addressing rhetorical questions about the existence of police powers that are to be answered only in the affirmative. Evidence of criminality on the

a reference case. However, contemporaneously, police forces in British Columbia saw no such need for caution and more constrained approach, choosing instead to take the actions that they unilaterally deemed appropriate irrespective of the future consequences.

⁶ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Second Vintage Books, 1995) at 184.

⁷ James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 *Queen's LJ* 1 at 23 [Stribopoulos, "In Search"].

part of an individual is an improper basis to sustain a jaundiced view of individual rights generally or to enlarge the ambit of state power. Nor can the identification of criminal conduct on the part of an individual blind us to the fact that the illicit actions of the accused were only exposed through investigatory gambling and the reckless treatment of *Charter* rights by the police for whom it was impossible to know in advance that a reviewing court would later side with them and uphold their actions as lawful. In addition, where the Crown's argument for a conviction is contingent upon *Waterfield/Dedman* and the recognition of a new police power, an individual accused is required to be treated as a "guinea pig" in the litigation process for the purposes of expositing the scope of police powers. This is another inescapable (and unwholesome) feature of the APD. Surely, seen in this light, these imbalances and inequities should resonate as greater and more pressing concerns than whether or not a factually guilty person evades conviction. Indeed, when considering cases of this kind it is imperative that we remind ourselves that lying at the heart of the APD jurisprudence are questions about the limits of coercive powers that may be visited upon all citizens by the instrumentalities of the state.⁸ Hence, what is really at stake and what is being exposed to irrevocable harm in APD cases are the constitutional rights of Canadians and protection against the use of coercive government power. Conversely, the police in these cases stand to lose nothing apart from the potential exclusion of ill-gotten evidence under s. 24(2) analysis and a possible acquittal of a factually guilty accused. This lopsidedness detracts further from the APD as a means of law creation in democratic state and sits at odds with conventional conceptions of the rule of law; not to mention that these judgments are an affront to the principle that bars the retroactive application criminal sanctions against those who have been "guinea pigged" in these prosecutions.

It is therefore unacceptable to allow these issues to be so narrowly and one-dimensionally framed for us by the Court, particularly when done (as it invariably is) in a manner that miscasts the core matters at hand and disproportionately favours the state's interest in law enforcement as the precedential outcomes reveal. When this occurs it leads the Court to look not only at the propriety (legality) of the powers sought by the

⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) at 74.

police, but also the desirability (efficacy) of these powers. And while only the former is a legitimate concern for the Supreme Court's consideration, regrettably, it would seem that is nevertheless the latter, which has increasingly inclined the Court towards supplying the powers claimed by the police on the basis of a simple "assertion that they need the power."⁹ This type of pseudo-proportionality analysis¹⁰ overemphasizes certain variables and excludes others (notably equality-based concerns)¹¹ altogether. In addition, given that the APD is not a legitimate replacement for Section 1 analysis, as I have previously argued, it must be empathically denounced.

As I have demonstrated, the APD rests on precarious footings in Canadian law and is, at law, driven solely by the Court's radical and unorthodox use of precedent. It is thus a self-delivered grant of lawmaking power by the Court for use by the judiciary. If we are to accept the APD as a legitimate lawmaking vehicle, then the task of justifying the rise of common law police powers under the APD falls to its proponents, passive (Parliament and certain commentators)¹² and active (police agencies and Crown counsel)

⁹ Tim Quigley, "Mann, It's a Disappointing Decision" (2004) 21 CR (6th) 41 at 41.

¹⁰ Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Preemptive Deference" (2008) 13 Rev Const Stud 209 at 219-224.

¹¹ See especially Graham Mayeda, "Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court" (2010) 50 SCLR (2d) 41 at 44-45. See also Benjamin L Berger, "Race and Erasure in *R. v. Mann*" (2004) 21 CR (6th) 58 at 62.

¹² For example see Michael Plaxton, "Police Powers After Dicey" (2012) 38 Queen's LJ 99, where it is proposed that police officers be regarded as administrative actors and their decision-making be presumptively entitled to deference. See also Malcolm Thorburn, "Two Conceptions of Equality Before the (Criminal) Law" in Francois Tanguay-Renaud and James Stribopoulos eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational and International Criminal Law* (Oxford: Hart Publishing, 2011) at 3. See also Don Stuart, "Criminal Justice in the McLachlin Court: Many More Kudos Than Brickbats" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) at 348 [emphasis added] where he suggests that, "Both citizens and the police officer need to know what state powers are in advance. But what of Parliament's inaction on the many recommendation by the Law Reform Commission of Canada in the 1980s to clarify police powers? And what of Parliament's record of the past fifteen years of almost always favouring arguments of law and order expediency and listening to like-minded lobby groups—in this context, police and prosecutors? *There is now a significant body of caselaw since the Charter to suggest that, in applying the ancillary powers*

alike, and those who directly propagate its use (judges, led by the SCC). Its defenders must also account for the Supreme Court's decision to needlessly embroil itself in contentious matters of social policy and why the Court's insertion into these heady waters is to be seen as acceptable. Alternatively, if the APD is to be regarded as merely a stopgap measure and temporary fix as the Court has outwardly asserted—that is, to be excused rather than granted the safe harbour and housing of a full justification—then we must ask what the underlying problem is and strive to articulate it precisely so that it can be squarely confronted. As I have shown the problem cannot be simply the hazard that an individual accused who has been shown to be factually guilty of some offence or another *might* escape conviction. The inclusion of remedial provisions in the *Charter* makes this clear. Equally apparent, missteps made by state actors during criminal investigations are not automatically fatal to the government's quest to punish wrongdoers. Therefore, a one-off evasion of criminal liability by someone is surely not an adequate basis to endlessly expand the coercive arm of the state and its punitive reach over everyone. This is particularly so given that the state retains at its disposal the full currency of the legislative process and can take corrective action to better enable its law enforcement agents, if it so chooses, following a court decision that refuses to recognize an asserted non-statutory power. Thus, there is no reason to prefer the *ad hoc* policy choices of an unelected (and tenured) judiciary to those reached through the democratic process by those who been chosen to the task and can be held politically accountable for their decisions. Beyond affirming the intrinsic value of democracy, the Parliamentary process carries with it the additional benefits of transparency and prospectivity. Moreover, the democratic arena has the capacity to deliver statutory provisions that are more comprehensiveness and that offer greater clarity in the law than can any court decision.

Furthermore, opposition to the Court's creation of common law police powers and the skirting off s.1 analysis must take into account the fact that the powers created under the APD are typically not confined to the exigencies the particular case brought before it for resolution. Rather, the established record of Supreme Court's rulings under

doctrine, our independent judges do a much better job than Parliament in balancing minority rights of accused against the interests of law enforcement and public safety."

Waterfield/Dedman shows that these decisions regularly result in the stipulation of freestanding investigative powers to which everyone is subject—at least, in law, if not in fact.¹³ These judgments also reflect a marked advancement of the Supreme Court’s “crime control”¹⁴ orientation. This imbalance is perhaps best exemplified by the decisions in *R v Mann*¹⁵ and *R v Kang-Brown*¹⁶ where notwithstanding the finding that the police exceeded their actual authority, violated the *Charter* and impermissibly used coercive power against citizens, the Court went ahead to declare unprecedented and enduring powers for use in future cases. Judgments such as these fail to evince a principled and even-handed approach to the countervailing civil liberties concerns that are both systemically and structural underrepresented in litigation—particularly where s. 1 is rendered inapplicable as it is in APD cases. Accordingly, this paradigm must be roundly rejected and replaced by an adjudicative approach that is alive to the competing claims of citizens, which it must be pointed out are, owing to their anchoring in constitutionally entrenched rights, more deserving of judicial affirmation than are the facile, *ex post facto* pleas of the police for enriched discretionary powers. Additionally, this positioning would be in keeping with the professed guardianship role of the Court. The simple solution for the Court is henceforth to analyze police powers with reference to

¹³ It is indisputable that the powers created in APD cases are, at law, applicable to everyone equally and can be utilized against anyone by the police. Therefore, in propounding these facially neutral powers, the requirements of formal equality in the law are met by Court-generated rules. Equally, however, there is reason to be suspicious about the manner in which these discretionary powers exercised in situations of low-visibility are actually deployed and how evenly they will be dispensed across the spectrum society. In light of the mounting body of evidence detailing instances and institutional patterns of racial (and ethnic) profiling by police, it becomes difficult to accept that these rules, in fact, satisfy more substantive conceptions of equality. It is nothing (if not interesting) that all of the recent APD cases have featured racialized Canadians—a point that the Court has heretofore given inadequate attention. For commentary about racial profiling see David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006). See also Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 64-68; and Todd Gordon, *Cops, Crime and Capitalism: The Law-and-Order Agenda in Canada* (Halifax: Fernwood Press, 2006) at 22-25, 47-50 and 124-128.

¹⁴ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 153.

¹⁵ 2004 SCC 52, [2004] 3 SCR 59.

¹⁶ *Supra* note 1.

Charter standards and subject these exercises of state power to constitutional scrutiny under s.1 analysis. This is the normal procedure. Thus, the sidestepping of this mechanism illuminates the extraordinary character of ancillary common law police powers *and* the source of judicial lawmaking under *Waterfield/Dedman*.

If the “*Waterfield/Dedman* test”¹⁷ is to be maintained in Canadian criminal law, at all, then it should circumscribed on the narrowest of terms and used only in two sets of circumstances: first, the test could be used to assist the Crown in an inquiry under s. 24(2) on the admissibility of evidence; and, second, the test could be utilized in the assessment of a remedial request brought by an innocent person pursuant to s. 24(1) to vindicate the breach of one’s *Charter* rights that have occurred at the hands of the police.¹⁸ However, and for the reasons that I have argued, it should no longer be used asserted as a legal basis for the generation of unprecedented police powers *or* the foundation for juridical lawmaking powers in Canada.

5.1.2 Restoring Institutional Roles and Responsibilities

Canadian law has long since communicated its abhorrence for common law based offences. In a symmetrical way, it is time for the law to definitively denounce the judicial veiling of coercive exercises of state authority in the absence of competent authorizing legislation, or, what have come to be known as ancillary common law police powers. The elimination of this practice would be both logically consistent with the removal of judge-made common law offences and normatively preferable. Presently however, the APD stands not only as the chief vehicle through which freestanding police powers are generated at common law, but as a primary source of police powers in Canada writ large. This is unfortunate and badly in need of reversal. Not only does this reflect disfavouredly upon the democratic and judicial institutions that underpin Canadian constitutionalism, but the emergence of this phenomenon also offers an unsettling bellwether for the sturdiness and durability of *Charter* rights.

¹⁷ *Ibid* at paras 50-51.

¹⁸ See generally Kent Roach, “A Promising Spring for Charter Damages: *Ward v. Vancouver*” (2011) 29 NJCL 135.

Unquestionably, there remains “serious deficiencies in the scattered collection of statutory and common law rule that make up the law of police powers in Canada.”¹⁹ However, the insertion of the Court as the diviner of *ad hoc*, non-comprehensive police powers does a disservice in the correction of these shortcomings. These problems are only perpetuated and the resulting harms are exacerbated by judicial intervention and misguided attempts to ameliorate the law. If the police are to have a particular power, then as agents of the state, it is for the state to give it to them. The judiciary should not dole out grants (or extensions) of coercive powers.²⁰ Rather, “the institutional value of effective law making and the proper roles of Parliament and the courts”²¹ should be respected as the SCC unanimously stated in *R v Ferguson*.²² As the court of last resort in the adjudicative hierarchy, the Supreme Court’s role in the domain of criminal law should be to assess legislation for constitutional validity and then to determine whether government actions have been lawfully applied. Whenever police or legislators lapse in meeting their constitutional obligations, the Court must be there to point out these shortcomings and vigorously disclaim them. This is how the Canadian criminal justice system was designed and it is what the law demands. The judiciary does not exist to do the government’s bidding. Nor is inappropriate for the Court to attempt to correct identified errors and make up for any perceived omissions in legislation or state policy. If either is found, then the judiciary should signal these problems by rendering judgment

¹⁹ Stribopoulos, “In Search”, *supra* note 7 at 4.

²⁰ For example, see *Schachter v Canada*, [1992] 2 SCR 679 at paras 107-108, 93 DLR (4th) 1 [emphasis added] where in a concurring judgment in Mr. Justice La Forest differentiated between the institutional role entrusted to the judiciary and that which is the domain of the legislature in the context of police powers. As La Forest J. wrote,

[T]his Court has repeatedly stated...that it was not the business of the courts to invent schemes that had the effect of increasing police powers...The rationale for this was not so much the complexity of possible schemes...but rather that this could distract the courts from their fundamental duty under the *Charter* to protect the rights guaranteed to the individual...*The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not.* This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws.

²¹ *R v Ferguson*, 2008 SCC 6 at para 72, [2008] 1 SCR 281.

²² *Ibid.*

against the state. It thereafter falls to the state to devise a new course of action and to determine a recourse that is constitutionally compliant. In the context of criminal proceedings, the Court must forbear from filling any of the supposed “gaps”²³ in police powers and instead anchor its rulings in the principle of legality. When the Crown, on behalf of the state, is seeking a power deemed to be necessary to secure a conviction or sustain a prosecution—then the Court must remind the prosecuting party that at all times it is within the state’s power to proactively confer the desired investigative power or powers on its agents. The government should not be rewarded for inattention to its legislative mandate or absolved its responsibilities. Nor should the Court be permitted to enlarge its own lawmaking powers and allowed to pick up the slack, if and when, it see fit do so.

Naturally, correction of this problem posed by the presence of the APD in Canada rests with parties most responsible for its occurrence. Thus, either Parliament must take on the challenge of modernizing the legislative framework that governs police conduct, or, the Supreme Court must give meaningful effect to the principle of legality (POL). In actual fact both of these efforts are necessary and to be keenly encouraged. For its part, Parliament can avail itself to legislation that has been passed in comparable “sophisticated constitutional democrac[ies]”²⁴ such as England,²⁵ Australia²⁶ and New Zealand²⁷ when determining how to best ensure that the police possess “sufficient power to protect the public and to enforce [the law], but not so much power that the police become a law unto themselves.”²⁸ The task of the Court is simpler. The high court must simply insist that when undertaking actions that threaten personal liberty, the police, as

²³ *R v Orbanski; R v Elias*, 2005 SCC 37 at para 83, [2005] 2 SCR 3 and *Kang-Brown*, *supra* note 1 at paras 4, 6 and 50.

²⁴ Craig Brannagan, “Police Misconduct and Public Accountability: A Commentary on Recent Trends in the Canadian Justice System” (2011) 30 Windsor Rev Legal Soc Issues 61 at 62.

²⁵ *Police and Criminal Evidence Act 1984* (UK), 1984, c 60.

²⁶ *Police Powers (Vehicle Interception) Act 2000* (Tas), 2000, No. 46; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), 2002, No 103; and *Police Powers and Responsibilities Act 2000* (Qld), 2000, No 5.

²⁷ *Crimes Act 1961* (NZ), 1961, No 43.

²⁸ Dennis Forcese, “Police and the Public” in Robin Neugebauer, ed, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars’ Press, 2000) at 180.

state actors, do so under the canopy of a pre-announced statutory provision sanctioning their actions. Where the state is unable to point to any legislation authorizing the actions of its agents—and satisfy the POL—then issues must be resolved in favour of the accused person and the unauthorized police conduct must be flatly rebuked. As history shows, the reinstatement of this model of adjudication would likely serve to re-open a long stalled “dialogue”²⁹ with Parliament about the permissible exercises of police powers in Canada and culminate in the enactment of democratically devised policing legislation. We can hope further that a new statutory regime will be alive to civil libertarian concerns and respectful of constitutional standards. But should Parliament fail in this regard and over-privilege the interests of the police at the expense of citizens’ rights then the Court must boldly declare this, confirm the vitality of the *Charter* and uphold the supreme law of the land to which all persons and government institutions are bound. However, until such time as there is another ideological shift within the ranks of the SCC and the moral conviction to re-cross the Rubicon, or, sufficient public pressure is brought to bear on elected politicians to reform the law governing exercises of police power, then little is apt to change. Given that there has been little occasion for such optimism about the eventuality of either contingency in recent memory, it is prudent that members of the academic community, those working for non-governmental organizations and thoughtful Canadians alike, continue to further expose the plaguing problems of the APD.

5.2 Concluding Thoughts

During the construction of my arguments, I have sought to isolate and separately problematize the Court’s usage in the supply of coercive investigative powers to agents of the state on the one hand and the continued demand that has been made for them by the state during the litigation process on the other. Each of these components has been integral to the development and sustainment of the APD in Canada. Without the legislative inattentiveness of Parliament to police powers, or, the subsequent condonation

²⁹ See *Vriend v Alberta*, [1998] 1 SCR 493 at paras 136-142, 156 DLR (4th) 385; and *R v Mills*, [1999] 3 SCR 668 at paras 20 and 57, 180 DLR (4th) 1. See also Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1 at 29 and Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts And Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

from government of the Court's accretion of the non-statutorily based lawmaking powers revealed by these judgments, the APD would not have arisen and could not have been allowed to flourish to the degree that it has in Canadian law. As I have argued, the reluctance of Parliament to forestall the judicial creation of common law police powers is attributable to the fact that the Court's utilization of the APD has resulted uniformly in the expansion of state power. Yet, if the Supreme Court's jurisprudence under *Waterfield/Dedman* had not also led simultaneously (and unflinchingly) to the expansion of its own lawmaking authority, then it is unlikely that the high court would have chosen to this burden to bear. Put shortly, the non-democratic extension of state power over citizens for use during criminal investigations that has been precipitated through the APD reveals that the country's legislative, judicial and executive branches are now each intertwined in this milieu. Hence, we find symbiotic relations that have delivered significant benefits to the codependent institutions involved—the police, Crown counsel, Parliamentarians and the judiciary. These aggrandizements, however, have come at great expense to the constitutional order and the costs have been paid in the diminishment of civil liberties and the currency of *Charter* rights. Moreover, this institutional disordering that has been occasioned through *ad hoc*, undemocratic means serves to contribute to broader anti-democratic tendencies existing in society. All of this is out of step with actual framework for law and governance in Canada, and so, for this reasons alone, the prevailing dynamic exposed in this thesis should be repudiated.

It is hoped that these matters shall soon gather greater critical attention and find a more central location in the public discourse about how to best preserve the individual rights and freedoms of Canadians against untoward—and undemocratic—encroachment from the state. As I have outlined in this thesis, only modest reforms and the restoration of certain constitutional and common law principles are required to return the regulation of police conduct (alongside the concomitant protection and preservation of constitutional rights) to a well-functioning state. All that is required to meet this benchmark is a legal system in which Parliamentarians enact laws, police act pursuant to the authority vested in them by these statutory provisions, citizens are able to bring constitutional challenges to the enabling legislation and to demand the court ensures that *Charter* rights are respected and that the police comply with the limits of the law; these conditions and

criteria, if met, would signify that Canadian institutions are working properly and serving the interests of the public. These are small asks to be made. The trouble with the APD is that it fails on each of these rudimentary metrics.

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