

## Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory

**RICHARD JOCHELSON\***

This article reviews the development of the ancillary powers test in the Canadian criminal law context. The test bears striking similarities to the analytical framework postulated by the Supreme Court of Canada in the famous *R v Oakes* case. The ancillary powers test has British roots and its insertion into Canadian law has proven troubling for some members of the Court. This article addresses these concerns by demonstrating that, despite the analytical similarities of the two tests (the ancillary powers test and *Oakes*), the ancillary powers test creates unique problems in constitutional theory that raise serious issues about its legitimacy and appropriateness. This article also considers some of the socio-legal implications of the proliferation of the ancillary powers test. Finally, it concludes by agreeing with the dissenters at the Supreme Court of Canada who have argued that future cases should move away from using the test.

Dans cet article, on examine l'évolution du critère des pouvoirs accessoires dans le contexte du droit criminel canadien. Ce critère présente de frappantes similitudes avec le cadre analytique établi par la Cour suprême du Canada dans le célèbre arrêt *R c Oakes*. Le critère des pouvoirs accessoires a des origines britanniques et son intégration au droit canadien a posé quelques difficultés à certains membres de la Cour. L'article aborde ces questions en faisant la démonstration que, malgré les similitudes d'ordre analytique entre les deux critères (critère des pouvoirs accessoires et celui établi dans *Oakes*), le critère des pouvoirs accessoires entraîne, pour la théorie constitutionnelle, des problèmes qui remettent en cause sa légitimité et son bien-fondé. Cet article examine en outre les répercussions sociojuridiques de la prolifération du critère des pouvoirs accessoires. Il conclut son analyse en abondant dans le sens des juges dissidents à la Cour suprême du Canada, soit qu'il vaudrait mieux à l'avenir éviter de recourir à ce critère.

\* Associate Professor (of the Bar of MB), Department of Criminal Justice, University of Winnipeg

## Table of Contents

<b>357</b>	I.	INTRODUCTION
<b>358</b>	II.	THE DEVELOPMENT OF ANCILLARY POWERS
<b>365</b>	III.	THE <i>OAKESTEST</i> IN <i>WATERFIELD</i>
<b>369</b>	IV.	A PROBLEM OF FUNDAMENTAL THEORY
<b>376</b>	V.	CONCLUDING THOUGHTS – A PROBLEM OF LIBERAL CONSTITUTIONALISM

# Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory

RICHARD JOCHELSON

## I. INTRODUCTION: THE *OAKES* IN THE ANCILLARY

The section 1 test (the *Oakes* test), first delineated by Chief Justice Dickson in *R v Oakes*,<sup>1</sup> utilizes a type of harm test that excuses governmental infringements of protected civil rights when the quantum of societal harm to be remediated is high enough and if certain legal contexts are met. This calculus is used to examine whether governmental infringement of protected constitutional rights is a justifiable encroachment in Canadian society. This paper will demonstrate that this same calculus has been duplicated in the ancillary powers approach to police powers (also known as the *Waterfield* test).<sup>2</sup> The ancillary powers test is an innovation of the Supreme Court of Canada (the Supreme Court or the Court) that allows for the justification of new police powers based on a nexus between current police conduct and common law police duties. This paper will demonstrate that the test has a justificatory component that borrows heavily from the *Oakes* calculus.

The *Oakes* approach has become the format by which otherwise inexcusable state conduct is countenanced, and its elasticity has allowed profound changes in criminal procedure law in the last ten years. This paper will explore whether the justificatory reasoning embedded in *Oakes* is a legitimate analytic to be imported into a legal test that creates new police powers (the ancillary powers test).

If one considers the legacy of *Oakes*, beyond its reach as a balancing test in judicial review of legislative impingement of guaranteed rights, and considers its impact on other criminal law balancing tests, such as the ancillary powers test, the impact of *Oakes* might be read more equivocally. On the one hand, *Oakes* has been a mainstay of virtually all cases that have resulted in hard fought *Canadian Charter of Rights and Freedoms*<sup>3</sup> victories. However, in the ancillary powers context one could

---

1 [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

2 *R v Waterfield*; *R v Lynn* (1963), [1963] 3 All ER 659, [1964] 1 QB 164 (CA) [*Waterfield* cited to All ER].

3 *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*].

argue its legacy is a security calculus that has been embraced by the Supreme Court and that raises questions about the legitimacy of judicial action. *Oakes* was, of course, a judicial creation that grew from the wording of section 1 of the *Charter*, and its use has become prolific—almost routine—in the *Charter* era.<sup>4</sup> This paper queries whether the duplication of *Oakes*-style reasoning in criminal procedure law through ancillary powers may cross the line from interpretive tool into improper legislative impetus by an adjudicating body (for example, one could question the ability of a court, rather than Parliament, to countenance *ad hoc* police powers).

This paper is divided into three parts. In part II, it explores the development of the ancillary powers test in Canada and traces it through to its current state in Canadian law. In part III, it will attempt to demonstrate how the test, as it was crafted by the Court, came to borrow some pivotal elements from the *Oakes* analysis. Lastly, in part IV, it will demonstrate some analytical pitfalls in the use of the ancillary powers analysis that render its use more problematic than the *Oakes* test and raise serious questions about the legitimacy of ancillary powers as a judicial tool.

## II. THE DEVELOPMENT OF ANCILLARY POWERS

The *Waterfield* test developed from an English Court of Appeal case of the same name in 1963.<sup>5</sup> The test has come to be understood as a means by which a court places limits on police authority to interfere with the liberty or property of individuals. The case dealt with very limited contextual circumstances. The police were investigating a dangerous driving incident in which a car had crashed into a wall. The car, though owned by Eli Waterfield, had been purportedly operated by a friend of his, Geoffrey Lynn. The police could not make arrests without clarifying information as to the actual driver.

After the crash, Lynn was occupying the automobile while the car was parked, and two officers approached him with intent to search the car. Waterfield arrived at the scene, instructed the police that they could not impound the car and asked Lynn to drive away. While the officers blocked Lynn, he drove forward at Waterfield's behest, forcing an officer to move out of the way. This action resulted in assault charges against Waterfield and Lynn. In particular, it raised the issue of whether the two had assaulted an officer in the execution of his duties.

The test that the Court of Appeal created was very limited in scope. It was intended to determine whether the assaults occurred in the context of an officer carrying out a common law police power that in some way connected to common law duties. The test developed was not intended to create *ad hoc* police power outside of this context.

---

4 See e.g. *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469 (the Supreme Court allowed a self-induced intoxication automatism defense to a gruesome sexual assault offence. However, Parliament effectively overturned this with its implementation of s 33.1 of the Criminal Code, which prohibited the defence in the case of self-induced intoxication in situations of violence.

5 *Supra* note 2.

In his oral decision, Justice Ashworth (speaking for Chief Justice Lord Parker and Justice Hinchcliffe) quashed the conviction for assault. In doing so, Justice Ashworth outlined what would become known as the *Waterfield* test in Canada:

[I]t would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. 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.* Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.<sup>6</sup>

Thus, the Court of Appeal was not using the test as a means of developing new police powers. Rather, it was using the test as a means of determining whether an assault occurred in the context of police acting in a professional manner (i.e. within the scope of the office) in order to substantiate an assault against an officer in the course of executing his duties. The Court of Appeal decided that since “neither of the appellants had been charged or was under arrest... the two police constables were not acting in the due execution of their duty at common law when they detained the car.”<sup>7</sup> On this reasoning, the conviction for assault was quashed.

Prior to the *Charter*, the *Waterfield* test gained some traction in Canadian jurisprudence. For example, in *Knowlton v R*,<sup>8</sup> the Supreme Court had to consider a similar problem as in the British case—whether Knowlton unlawfully obstructed a peace officer in the execution of his duty. The police had cordoned off an area to the entrance of a hotel where the Premier of the USSR was visiting. Knowlton indicated to two constables that he wished to proceed past the cordoned off area to take pictures of the dignitary. When informed by the constables that such action would result in an arrest, Knowlton refused to take notice and tried to push past the constables. He was then arrested.

---

6 *Waterfield*, *supra* note 2 at 661 [emphasis added].

7 *Ibid* at 662.

8 [1974] SCR 443, 33 DLR (3d) 755 [*Knowlton* cited to SCR]; See also *R v Stenning*, [1970] SCR 631, 10 DLR (3d) 224.

Chief Justice Fauteux repeated the *Waterfield* test for the Court:

The police having interfered with the liberty of the appellant, or more precisely, with his right to circulate freely on a public street, the questions to be determined are, as formulated by the Court of Criminal Appeals in *Regina v. Waterfield*...

- (i) whether such conduct of the police falls within the general scope of any duty imposed by statute or recognized at common law and
- (ii) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.<sup>9</sup>

The Court found that the police were “duty bound” to take “reasonable steps” to impede public access and that without extenuating reasons (to be provided by Knowlton), the officers were justified in impeding his access.<sup>10</sup> Thus, the officers were acting in execution of their duties and Knowlton had committed the offence.<sup>11</sup> Following this case, the scope of the *Waterfield* test remained somewhat limited and constrained until 11 years later, when the Supreme Court would use the *Waterfield* test in a manner that justified police power in the absence of a charge against an accused of impeding an officer’s execution of his or her duties. In other words, the Court used the test to produce new police powers as opposed to as an element of substantiating the *actus reus* of a criminal offence.

Such was the case in *Dedman v R*.<sup>12</sup> The Court in *Dedman* allowed the *Waterfield* test to be used as a mechanism for police power creation. The appellant had complied with the request of a police officer to bring his vehicle to a halt as part of a checkstop program. The officer checked the license of the accused and noted the smell of alcohol emanating from the accused’s breath, and thus demanded a breath sample. The appellant refused and was charged with failing to comply without reasonable excuse. The legitimacy of the checkstop was impugned, as there was no legislative or common law impetus for the stop. The Court cited *Waterfield* and noted that in determining the lawfulness of the stop one would need to consider: a) whether the police were engaging in a *prima facie* interference with the accused’s liberty or property; b) if so, whether the conduct falls within the general scope of the duty imposed by statute or developed by common law; and if both conditions are met, c) whether the conduct of the officer involved an unjustifiable use of powers associated with the duty.<sup>13</sup>

---

9 *Knowlton*, *supra* note 8 at 446.

10 *Ibid* at 447.

11 *Ibid* at 448.

12 [1985] 2 SCR 2, 20 DLR (4th) 321 [*Dedman* cited to SCR].

13 *Ibid* at 33.

The Court found that the ability to stop the accused in this case was a justifiable police power. The Court admitted that an interference with the liberty or property of an accused had occurred, but it held that the detention fell within the scope of common law duties of police officers—most notably the control of traffic linked to the common law duties of crime prevention and protection of life.<sup>14</sup> The Court was cautious to note that an officer's conduct in such situations must be "reasonable" and must interfere with liberty as little as possible; however, the determination depends on the public purpose served by the interference as well as the nature of the liberty in question.<sup>15</sup> Since the context here was regulatory, the activity interfered with was licensed, occurred for a short time and was merely an inconvenience, and since the public purpose of deterrence in the context of road safety was important and also well publicized, the Court found that the police conduct was justifiable.<sup>16</sup>

*Dedman* thus represented an important benchmark in the development of the *Waterfield* test. First, it was a case that used the three-pronged test of *Waterfield* for the creation of *ad hoc* police powers. Second, it was a case that occurred at the threshold of the *Charter* era.<sup>17</sup> Though *Dedman* resulted in the creation of police common law power in the checkstop context, it did not answer cogently what constitutional effect such powers would have. The precise answer to this question would not be realized for dozens of years, but the promulgation of the *Waterfield* test into the arsenal of judicial review and its use in subsequent to create police powers was significant in the nascent jurisprudence.

In *R v Godoy*,<sup>18</sup> the Supreme Court once again utilized the *Waterfield* test as a means of police powers creation. The case involved the response of two police officers to a 911 emergency dispatch call from the apartment of the accused. The call to 911 was disconnected. Four officers reported to the residence and they knocked on the door. The accused opened the door part-way and said that there was no problem. On further questioning about the context, the accused attempted to close the door, however, an officer prevented this from occurring, and the officers gained entry into the house. Once inside, an officer heard crying sounds and the officers found the accused's spouse, who had sustained facial injuries, lying curled in the bedroom. The officers arrested the accused for assault.

The Court admitted that the actions of the police interfered with the liberty and property of the accused. The Court was thus concerned with whether the conduct of the officers was connected to a common law duty, and whether the conduct was an unjustifiable use of the powers stemming from that duty.<sup>19</sup> It was obvious to the Court that the police response was connected to the common law

---

14 *Ibid* at 35.

15 *Ibid*.

16 *Ibid* at 35-36

17 For more discussion see generally Richard Jochelson, "Crossing the Rubicon: of Sniffer Dogs, Justifications, and Preemptive Deference" (2008) 13(2) *Rev Const Stud* 67 at 209 [Jochelson, "Rubicon"].

18 [1999] 1 SCR 311, 41 OR (3d) 95 [*Godoy* cited to SCR].

19 *Ibid* at para 12.

powers of protection of life of the citizenry and investigation of crime.<sup>20</sup> Thus, the Court was mostly concerned with whether the intrusion was justifiable.<sup>21</sup> Given the context (i.e. that the police were responding to a 911 hang up), the Court found that the police were justified in attempting to ascertain the reason for the call, so long as they acted proportionately.<sup>22</sup>

In *R v Mann*,<sup>23</sup> the Court further expanded the *Waterfield* test to create a power of investigative detention and correlative search powers. Two police officers were responding to a break and enter call when, in the vicinity of the event, they saw a person who matched the description of the suspect (Mann). Mann complied with an officer's request for a pat-down search for weapons, and the officer felt a soft object in Mann's pocket. The officer reached into the pocket and found a baggie of marijuana. Other baggies were also found, and the police arrested Mann for possession for the purposes of trafficking.

The Court held that the common law had evolved such that *Waterfield* allowed for investigative detention on reasonable grounds.<sup>24</sup> The reasonableness of these grounds would be based on the objective totality of the circumstances, including the connection between the detention and recent or ongoing criminal activity.<sup>25</sup> This reasonableness test would purportedly meet the *Waterfield* prong that asks for a connection between police officer conduct and a common law duty, since presumably an investigative detention would connect with crime investigation duties. However, the Court would still need to consider the justifiability of police officer conduct in order to meet the final prong of *Waterfield*.<sup>26</sup> The majority found that there were reasonable grounds to detain Mann given the description of the suspect and geographic proximity to the crime scene.<sup>27</sup> These grounds also necessitated a correlative pat-down power to ensure officer safety.<sup>28</sup>

The Court held that this search power should not extend beyond what is justifiable to ensure officer safety. In particular, a search of pockets on the touch of soft objects would not be a justifiable use of police powers. However, *Mann* does seem to make clear that the combination of reasonable grounds requirements and the *Waterfield* justification analysis would allow for constitutional investigative detentions under section 9 of the *Charter* (the right to be free from arbitrary detention), so long as the detention was justifiable under the *Waterfield* calculus. Further, the new common law power would come equipped with a new constitutionally valid power of protective search (presumably this is constitutionally allowable under the

---

20 *Ibid* at para 17.

21 *Ibid*.

22 *Ibid* at para 23.

23 2004 SCC 52, [2004] 3 SCR 59 [*Mann*].

24 *Ibid* at para 34.

25 *Ibid*.

26 *Ibid*.

27 *Ibid* at para 47.

28 *Ibid* at para 48.

section 8 *Charter* guarantee of protection from unreasonable search and seizure) so long as the test of justifiability was met. Thus, the case provided a constitutionalization of the *Waterfield* test. That is, *Mann*, provided tacit evidence that the ancillary powers test could not only create *ad hoc* police powers, but could provide a test of justification that would pass constitutional muster (perhaps in much the same way as *Oakes* does for legislation).

In *R v Orbanski; R v Elias*,<sup>29</sup> the majority used the *Waterfield* test as a gap-filling tool in the context of a section 10(b) right to counsel *Charter* violation. Here, officers had stopped a vehicle driven by Orbanski that ran a stop sign. Elias was pulled over at a random roadside stop. In both cases officers detected the odour of alcohol and asked if the accuseds had been drinking. Orbanski failed a roadside sobriety test, and Elias failed an approved screening device test. The Crown conceded that while both had been detained, neither was informed of their right to counsel until after they were arrested. They both failed their breath sample tests and were charged with impaired driving. The majority found that the right to counsel was violated in both instances when Orbanski and Elias were not informed of this right upon detention. The majority found that the ability to detain and inquire roadside were powers that were necessary and justified using the ancillary powers test because they connected to provisions of the relevant highway traffic act and the criminal impairment driving prohibitions.<sup>30</sup>

Yet, the Court found that this ancillary power was an infringement of the right to counsel and subjected the newly created power to a section 1 *Oakes* analysis.<sup>31</sup> Since the need to protect the public from the carnage of impaired driving was compelling, this infringement was considered to be limited and justifiable.<sup>32</sup> It is worth asking why the majority resorted to the *Oakes* analysis in this context to inquire as to whether the ancillary power met constitutional muster as opposed to turning to *Mann*, where the test itself conveyed constitutional validity. The Court did little to clarify this matter, but it seems germane that in this case the Court connected the ancillary power to legislation, whereas in *Mann* the ancillary power was footed in common law. Perhaps the legislative context was one in which the majority felt more secure in applying *Oakes* rather than a *Mann*-style investigative detention test.<sup>33</sup>

The Court in *R v Clayton* further clarified the use of *Waterfield* in the constitutional development of investigative detention.<sup>34</sup> In *Clayton*, police responded to a dispatch call regarding four “black guys” displaying guns in the parking lot of an exotic nightclub. Four vehicles were identified. The police responded within four

---

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

30 *Ibid* at paras 35-45, 49-53.

31 *Ibid* at para 54.

32 *Ibid* at paras 54-60.

33 This point will be discussed in more detail in the next part of this paper, which takes up the dissent's critique of the majority's reasoning.

34 *R v Clayton*, 2007 SCC 32, [2007] 2 SCR 725 [*Clayton* cited to SCR].

minutes of the call and set up a roadblock at the back of the club, where they detained and ultimately arrested suspects who were in the car that was stopped.

Here again, the majority found that while the liberty and property of the accuseds was interfered with, the officers were clearly acting in a manner that linked with their common law crime investigation and prevention duties.<sup>35</sup> The majority noted that the justifiability of the detention (in this case the roadblock) would depend on the nature of the situation, the seriousness of the offence, the information known to police about the suspect and crimes, the reasonable responsiveness of the police given the extent of the risk and prudent limitations on police intrusion.<sup>36</sup> Further, the majority made clear that whether the stop was justifiable would depend on the temporal, geographic and logistical responsiveness of the police.<sup>37</sup> The majority posited that the *Waterfield* test, in this context, was both a gap-filling test for the *de facto* creation of police powers as well as a litmus test for determining whether a stop was arbitrary under section 9 of the *Charter*.<sup>38</sup> The majority found that the police conduct was justifiable, given the short time period, the geographic proximity of the response and the nature of the alleged crime (involving guns).

More controversially, the constitutional implications of *Waterfield* were explored by the Court more fully in the decisions of *R v Kang-Brown*<sup>39</sup> and *R v AM*<sup>40</sup>. Both cases allowed for the possibility of lawful, warrantless sniffer dog searches, yet both cases found that the police's actions had not passed constitutional muster. The Court made these determinations through uneasy coalitions of oblique majorities on different issues (the detailed description of which, for the sake of brevity, I will defer for another paper). *Kang-Brown* involved the use of a warrantless sniffer dog search in a bus depot. *R v AM* involved the warrantless use of sniffer dog backpack searches in a school gymnasium. In both cases, coalitions of judges in the majority found that warrantless sniffer dog searches could occur if a reasonable suspicion of criminal activity had crystallized. The basis for this new standard was the gap-filling function of *Waterfield*.<sup>41</sup>

Chief Justice McLachlin and Justice Binnie noted that such searches, while an infringement of liberty, clearly align with the common law crime investigation duties of police.<sup>42</sup> Sniffer dog searches could be justifiable because the searches are of special assistance and precision when police are properly in place to investigate crimes.<sup>43</sup> Justices Deschamps and Rothstein noted that the justifiability of the

---

35 *Ibid* at para 23.

36 *Ibid* at para 31.

37 *Ibid* at para 41.

38 *Ibid* at para 19.

39 2008 SCC 18, [2008] 1 SCR 456 [*Kang-Brown*].

40 2008 SCC 19, [2008] 1 SCR 569.

41 *Kang-Brown*, *supra* note 39 at para 50.

42 *Ibid* at paras 52-54.

43 *Ibid* at para 57.

searches could be made out where there was an important public purpose at play, such as curbing the illicit drug trade. In such circumstances, well-trained and accurate sniff searches would be minimally intrusive given the standard of reasonable suspicion.<sup>44</sup> Thus, sniffer dog searches could be justifiable and, more importantly, this would appropriately balance the constitutional privacy interest of an accused with the societal interest in curbing the drug trade.<sup>45</sup> A majority in both cases did not find that officers met the constitutional standard; however, a differently constituted majority (consisting of McLachlin CJ and Binnie, Deschamps, Rothstein and Bastarache JJ) found sniffer dog searches could be prospectively allowable when reasonable suspicion combined with circumstances that passed the *Waterfield* justification requirement.

Therefore, in the evolution of the *Waterfield* test we see the Supreme Court's recent willingness to use the test as a means of creating police powers. We also see an increasing tendency by the Court to view *Waterfield* as a means to constitutionally inoculate a police power; as a quasi-*Oakes* test of justification. This constitutional function of the *Waterfield* test has not been without anxiety for some members of the Court. The next section will briefly explore further the connection between *Waterfield* and *Oakes* and describe some of the tensions raised by dissenters in the Court who seem to object to the proliferation of *Waterfield* as a constitutional standard of sorts.

### III. THE *OAKES* TEST IN *WATERFIELD*

This section will briefly explore some of the similarities between the *Oakes* test and the *Waterfield* test. The author does not intend to argue that one informs the other through law, but rather that through the justification stage in both analyses, courts engage in similar balancing tests. The contention is that the justification logic of *Waterfield* has been used increasingly in the *Charter* era, and that many of the same analytical tools are used in both tests. These similarities help to bring into focus critiques about justification analyses and allow us to inquire into the legitimacy of *Waterfield* as a tool of police power creation and justification. These critiques are discussed in part IV below. This is not to suggest that *Waterfield* replaces *Oakes*, or even that it should. The aim is rather to direct the reader's attention to the similar moves made in both tests. While there has been little, if any, academic debate on this topic, the Justices in *Clayton* (discussed above, and elaborated upon below) clearly flirted with these tensions. This section will conclude by summarizing some of the judicial unease that has plagued the use of the *Waterfield* test in recent years.

The educated reader has likely encountered the *Oakes* formula many times. The author does not wish to belabour the point. *Oakes* was, of course, Chief Justice

---

44 *Ibid* at paras 187, 191.

45 *Ibid* at para 191.

Dickson's formulation of how to use section 1 of the *Charter* in situations where *Charter* rights of an accused have been infringed. In such cases, the government has the burden of demonstrating justifiable infringement by government action (typically legislation). The broad analysis consists of a two-pronged approach, wherein the second prong contains three inquiries. The first prong asks the government to demonstrate that the purpose of the legislation is sufficiently pressing and substantial to justify limiting the rights of an accused. The second prong explores the proportionality of the legislation and inquires whether there is a rational connection between the effects of the legislation and its objective (rational connection), whether the legislation impairs the rights of an accused as little as is reasonably possible (minimal impairment) and whether there is a proportionality between the effects of the law and the objective, taking into account whether the importance of the objective and its salutary effects outweigh the deleterious effects of the law (costs versus benefits).<sup>46</sup>

Certainly we see echoes of the Oaksian requirements of a pressing and substantial objective of the legislation in the *Waterfield* test. The *Waterfield* test asks the court to identify whether the police power in question relates to a valid common law power—typically crime investigation and control, securing order and keeping the peace. This inquiry asks the decision maker to find something in the analysis that equates the police conduct with a laudable purpose. Often, in the ancillary powers cases judges note the importance of the police power in the case at hand. For instance, in *Kang-Brown* Justices Deschamps and Rothstein note the importance of the crime control function in sniffer dog searches and the correlated need to curb the illicit drug trade.<sup>47</sup> In *Clayton*, the majority of the Court also buttresses its analysis with the importance of the police objective in containing the physical threat from a serious firearm offence.<sup>48</sup> Similar reasoning is also laid out in *Godoy* when the Court discusses the importance of police response in potentially life-threatening situations.<sup>49</sup> This purpose alone is not enough though; the ancillary powers inquiry (like *Oakes*) asks us to then inquire whether the use of power is justified, and it is this final step of *Waterfield* that echoes the second prong of *Oakes*.

Like the second prong of *Oakes*, the *Waterfield* test is concerned with whether the state power (in this case, police power) is a well-tailored response. *Waterfield* analyses frequently look for rational connections between the actions of the police and the achievement of the common law police objective. In the sniffer dog case of *Kang-Brown* for example, Chief Justice McLachlin and Justice Binnie describe the reasonable response of sniffer dog use in crime investigation, noting that their accuracy makes it more likely that the police objective will be achieved.<sup>50</sup> This is an

---

46 *Oakes*, *supra* note 1 at 138-40.

47 *Supra* note 39 at para 184-85.

48 *Supra* note 32 at para 41.

49 *Supra* note 18 at para 16.

50 *Supra* note 39 at para 57.

observation echoed by Justices Deschamps and Rothstein as well.<sup>51</sup> Often, the rational connection analysis is wielded by describing the responsiveness of the police<sup>52</sup> and noting that the conduct of police has been meted out on a reasonable basis.<sup>53</sup> In *Clayton*, this reasonableness assessment depended on the geographic, temporal and logistical response of the police to the dispatch call (in this case the police action occurred within minutes of the call, close to the scene of the alleged crime and was informed by the description of the events and suspects).<sup>54</sup>

We also see echoes of minimal impairment in the Court's *Waterfield* approach. Here, we see the concerns of some Justices with the intrusiveness of the power wielded. For example, in *Kang-Brown* Justices Deschamps and Rothstein describe that the sniffer dog search is relatively non-invasive and typically consists of a dog sitting down to indicate positive detection of drugs.<sup>55</sup> The minimal intrusion doctrine sometimes operates on a prospective basis. In *Godoy*, the Court was aware of the home entry power they had created. The Justices noted that in order to minimally impair the rights of the accused, the home search power in response to a 911 call should not extend further than locating the caller, determining why the call occurred and assisting as appropriate—the search should not be a fishing expedition.<sup>56</sup> The nature of the accused's conduct certainly appears to mediate how minimally intrusive an officer ought be in acting. For example, in *Dedman*, the fact that the police stop occurred in the context of driving—a licensed and regulated activity—suggested that the police would be given more leniency in executing common law powers.<sup>57</sup>

Last, the analogy with *Oakes* is made complete when the Justices utilizing *Waterfield* attempt to assess justification in the totality of the circumstances—an analysis that resembles the costs and benefits final stage of a section 1 analysis. This analytical tool is usually briefly rendered and often seems to merely summarize the previous findings of the Court. As one illustration, the Court in *Godoy* notes that the use of a home search power in response to 911 calls is justified because of the potential threat to life and that privacy rights, while normally protected, must yield to the overarching police objective of protecting life.<sup>58</sup> In general, courts using *Waterfield* are engaging in cost benefit analyses when they speak of the totality or constellation of the circumstances that justify the police power(s) at issue.<sup>59</sup>

This brief discussion illustrates that there is an affinity in the approaches to reasoning that inform both the *Oakes* and *Waterfield* tests. The pointed similarities suggest a conscious decision by the judiciary to apply similar principles. Yet certain

---

51 *Ibid* at para 185.

52 *Clayton*, *supra* note 34 at para 39.

53 *Godoy*, *supra* note 18 at para 22.

54 *Supra* note 34 at para 41.

55 *Supra* note 39 at para 186.

56 *Supra* note 16 at para 22.

57 *Supra* note 12 at paras 68-69.

58 *Supra* note 16 at para 23.

59 See e.g. *Clayton*, *supra* note 34 at para 46; *Kang-Brown*, *supra* note 39 at para 198.

dissenting decisions in the cases we have discussed portray a discomfort with using *Waterfield* as a tool for justification of police power. Indeed, in *Dedman*, Chief Justice Dickson expressed his concerns in using *Waterfield* in the Canadian context:

[T]he majority of the Court departs firm ground for a slippery slope when they authorize an otherwise unlawful interference with individual liberty by the police, solely on the basis that it is reasonably necessary to carry out general police duties. The objection to a random stop made without any grounds for suspicion or belief that the particular driver has committed or is committing an offence goes far beyond the unpleasant psychological effects produced for the innocent driver. Even if these would tend to be minimized by the well publicized nature of the...program, the erosion of individual liberty with its ultimately detrimental effect on the freedom of all members of society would remain.<sup>60</sup>

The concerns of the judiciary continued to mount even as the Court began to use the *Waterfield* test more frequently. In *Orbanski*, Justices LeBel and Fish note that “[t]he 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...”<sup>61</sup>

Justices LeBel and Fish go on to note that the doctrine may give too much power to the crime control function of police, enabling a judicial ethic that suggests 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.”<sup>62</sup> Justice Binnie in *Clayton* goes so far as to suggest that the *Waterfield* balancing test is the wrong tool to use in *Charter* cases because “the ‘reasonably necessary’ test is not a *Charter* test, and is not an adequate substitute for proper *Charter* scrutiny. Accordingly, while I agree with Abella J that the appeal must be allowed, I reach that conclusion by a different route.”<sup>63</sup>

Justices Binnie, Fish and LeBel were concerned that the *Waterfield* analysis might replace an *Oakes* analysis that was designed for *Charter* scrutiny and might result in a widening of the net for permissible police powers. They write that “[c]onflating in a *Waterfield*-type analysis the consideration of the individual’s [sections] 8 and 9

---

60 *Supra* note 12 at 17.

61 *Supra* note 29 at para 81.

62 *Ibid* (LeBel and Fish JJ go on to write that the creation of and justification for the limit would arise out of an initiative of the courts).

63 *Supra* note 34 at para 58 (LeBel and Fish JJ concurring). The “different route” referred to by Binnie J is the *Oakes* test (*supra* note 1 at 138-40).

rights and society's [section] 1 interests can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate."<sup>64</sup>

In *Kang-Brown*, the judicial discord over the use of *Waterfield* reached its apex. Justices LeBel, Fish, Abella and Charron suggest that the use of the test impinges on the traditions of the common law as protective of civil liberties. They write: "The common law has long been viewed as a law of liberty."<sup>65</sup> The use of *Waterfield* to expand police powers and subsequently constitutionalize them problematizes the "proper function of the courts as guardians of the Constitution."<sup>66</sup>

More recently the Court has continued this debate as to the validity of *Waterfield* as a *Charter* era test in *obiter* while weighing the utility of reasonableness as a standard of police discretion. In *R v Sinclair*,<sup>67</sup> Justices LeBel and Fish, again, endorse the use of *Oakes* in the assessment of state conduct and question whether the Court's use of *Waterfield* runs counter to the liberty-enhancing ethic of common law. Here, they endorse the words of Justice Jackson of the Saskatchewan Court of Appeal in *R v Yeh*:<sup>68</sup> "It also goes, almost without saying, that an expansion of police powers, by judicial decision alone, precludes any future *Charter* scrutiny of the increased power, and is inconsistent with the usual tenor of the evolution of the common law, which traditionally defends civil liberties and does not infringe them, without cogent evidence of the need to do so."<sup>69</sup>

As this section concludes, the author notes the inherent tension in the development of the jurisprudence. On the one hand, the *Waterfield* test, and its expansion in recent years, demonstrates considerable overlap with the analytical maneuvers of the *Oakes* test. On the other hand, some members of the judiciary are expressing a notable resistance to *Waterfield*, suggesting a return to *Oakes* in the constitutional assessment of common law police power cases. If the tests were substantially similar, why would some judges vehemently oppose the proliferation of *Waterfield*? The answers lie in constitutional theory, but have socio-legal implications beyond the self contained positivism of the law and the structure of the judiciary. The next section will explore some of these theoretical concerns to elucidate concerns that underpin the proliferation of *Waterfield* in the *Charter* era.

#### IV. A PROBLEM OF FUNDAMENTAL THEORY

The *Oakes* test has itself been the subject of much theoretical critique. Some have claimed that it betrays an anti-legislative agenda.<sup>70</sup> These critics tend to view the

---

64 *Supra* note 34 at para 61.

65 *Supra* note 39 at para 12.

66 *Ibid.*

67 2010 SCC 35, [2010] 2 SCR 310 [*Sinclair*].

68 2009 SKCA 112, [2009] 11 WWR 193.

69 *Ibid* at para 147; *Sinclair*, *supra* note 66 at para 193 [emphasis in original].

70 FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 34-53.

use of *Oakes* by courts as something of an excuse to politically trump the will of Parliament. These critiques of the Supreme Court and its use of *Oakes* still persist in circles that tend to have right-wing political views.<sup>71</sup> However, most rigorous social science studies focusing on the Court have not demonstrated that the Court has routinely behaved in an anti-legislative fashion.<sup>72</sup> It is for this reason that most critiques of *Oakes* as an anti-legislative tool focus on the amount it is used to qualify legislation across different eras and times.<sup>73</sup>

This brief discussion of a well-mined critique of *Oakes* does, however, elucidate a key theoretical problem with *Waterfield*. Whether or not one agrees politically with the function of the *Oakes* test, at the least the test is a response to a legislative agenda. That is to say, Parliament acts, a right is infringed and a court determines whether that infringement is justified. In the context of the *Waterfield* test, it is precisely the absence of legislation that forces a court into action. In this legislative void, a court concocts a police power and then after its creation assesses the justification of that power vis-à-vis an accused's infringement of rights. For *Oakes* to apply it requires that a law be prescribed, whereas *Waterfield* operates in a legislative vacuum. This is an analytical incongruity to be sure, but it also provides a fundamental problem of liberal governance. *Oakes* occurs in the context of law—it analyzes a problem that occurs when a rule of law exists.

Yet, our Parliamentary democracy requires that we only obey rules that exist; to require otherwise would create problems of intelligibility for the citizen and create questions about arbitrary law enforcement discretion.<sup>74</sup> Under this model of law, the predominance of law supersedes wide discretion, and liberty maintains itself in a residuary.<sup>75</sup> This foundation of our system of governance requires that anything that is not expressly forbidden be permitted (the principle of legality).<sup>76</sup> *Oakes*, while it creates a technical problem of liberty, avoids the conundrum because it is founded on section 1 of the *Charter*, and thus one can argue that

71 Neil Seeman, "Taking Judicial Activism Seriously" (2003) *Fraser Forum* (special issue: Judicial Accountability in Canada) 3.

72 See Christopher P Manfredi & James B Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49:3 *McGill LJ* 741 at 744 [Manfredi & Kelly, "Comment"]; Leon E Trakman, William Cole-Hamilton, & Sean Gatién, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36:1 *Osgoode Hall LJ* 83.

73 Manfredi & Kelly, "Comment", *supra* note 71 at 753.

74 Lon L Fuller, *The Morality of Law*, revised ed (London: Yale University Press, 1969); see also Glen Luther, "Extra-Legal of Police Powers in Canada: The Rule of Law and the Enigma of Retroactive Decision Making" in Kelly Gorkoff & Richard Jochelson, eds, *Thinking About Justice: A Book of Readings* (Fernwood: Winnipeg, 2012).

75 Jochelson, "Rubicon," *supra* note 17 at 231; TRS Allan, "Constitutional Rights and Common Law" (1991) 11:4 *Oxford J Legal Stud* 453 at 457 [Allan, "Constitutional Rights"]. See also Albert V Dicey, *Introduction to the Study of Law of the Constitution*, 10th ed (London: Macmillan and Company, 1965) at 23-24; James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31:1 *Queen's LJ* 1 at 20, 23-24 [Stribopoulos, "Dialogue"].

76 Allan, "Constitutional Rights," *supra* note 74 at 457. See also Stribopoulos, "Dialogue," *supra* note 74 at 23-24.

Parliament considered this judicial role, which may at times trouble the notion of liberty. Further, its use relies on the existence of a rule. *Waterfield* does not. It is a test not contemplated by Parliament and its function is countenanced in the absence of rules with the sole result of liberty infringement. Hence, *Waterfield* represents a direct assault on traditional understandings of the rule of law.

This problem of rule of law creates another concomitant ripple effect for the use of *Waterfield*. Section 1 of the *Charter* delegates a legislative function of balancing law (using *Oakes*) and that delegation has occurred expressly at the hands of Parliament. *Waterfield* does not derive from a similar legislative edict, and its use is not founded on legislative delegation. Hence, there is a much stronger case to make for the objection that *Waterfield* and its proliferation is a direct usurpation of the legislative role and creates a structural asymmetry between the traditional role of the legislative and judicial branches in Canada.<sup>77</sup>

These structural differences have also resulted in statistical anomalies. The question of whether *Oakes* has resulted in shifts of absolute wins or losses for the rights of accuseds remains statistically unanswered (or the answer remains contestable)<sup>78</sup>, but this is not the case in the context of *Waterfield*. A review of the *Charter* era jurisprudence suggests that, with the exception of three cases, the use of the test more often than not favours the disposition that the state has sought.<sup>79</sup> Even in these cases of so-called losses for the Crown, new prospective police powers were created. This observation dovetails with the concerns of justices who argue that the use of *Waterfield* is a betrayal of the Court's tradition of viewing the common law as the law of liberty.<sup>80</sup> Beyond historic common law traditions though, this trend seems to problematize more recent conceptions of the Court as a guardian of the Constitution.

---

77 See Stribopoulos, "Dialogue," *supra* note 74 at 55. It is interesting to note that while the test has proliferated in Canada, it has not been used to generate police powers in Britain. Further, in its 40-year history in Britain the test has been used less than in Canada. For a discussion of the generative power of the ancillary powers tests see James Stribopoulos, "A Failed Experiment? Investigative Detentions: Ten Years Later" (2003) 41:2 *Alta L Rev* 335 at 348-352; Joseph R Marin, "*R. v. Mann*: Further Down the Slippery Slope" (2005) 42:4 *Alta L Rev* 1123; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41:4 *Alta L Rev* 935 at 938-39.

78 See generally Seeman, *supra* note 70; Manfredi & Kelly, "Comment," *supra* note 71; Morton & Knopff, *supra* note 69; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001); Margit Cohn & Mordechai Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18:2 *Can JL & Jur* 333; Sujit Choudhry & Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 *McGill LJ* 525.

79 The notable exceptions are the sniffer dog cases of *Kang-Brown*, *supra* note 39 and *R v AM*, *supra* note 40. The majority found these particular sniffer dog searches to be warrantless because the officers did not meet the standards that the Court had created (i.e. a search on reasonable suspicion standards). However, the Court found that sniffer dog search powers can and should exist. The other exception is the search power in *Mann*, *supra* note 23. Though the Court did create a stop and search power in that case, the officers simply crossed over this line when they went into the pockets of the accused based on touching a soft object.

80 *Kang-Brown*, *supra* note 39 at para 12, LeBel and Fish JJ.

This guardianship comprises a commitment to the principle of legality to be sure. However, this guardianship also comprises a human rights era breed of constitutionalism.<sup>81</sup> This argument takes issue with traditional notions of the judiciary that see policy debate by the judiciary as anti-democratic. McLachlin J (as she was then) has described this as a post-second world war phenomenon that bloomed into a human dignity-based rights approach.<sup>82</sup> This newfound guardianship of the Constitution places courts as cautious defenders of justice, but ones who defend principles fundamental to the Constitution. These fundamental principles have been described as “thin” in the sense that they are “narrowly defined” values that are “core” to constitutional documents; nonetheless, such “thin” principles still give rise to significant debate as to their precise content.<sup>83</sup> For example, liberty is a core constitutional value protected in section 7 of the *Charter*, but its exact definition has undergone significant evolution since patriation. Nonetheless, there is little doubt that the courts are charged with defending the notion and protecting its constitutional core. The *Waterfield* test disrupts this constitutional guardianship because it asks a court to step aside from its stewardship of the core value and to provide for non-legislative incursions into this core. The proliferation of *Waterfield* can thus be read as a disruption of this guardianship role.

Other structural ripple effects continue to inure if we take the effects of *Waterfield* to their logical conclusion. One of the most articulate defences of *Oakes* analyses is that a section 1 analysis by a court is never final. The legitimacy of *Oakes* is buttressed not just by the notion that it is a delegated legislative function, but also by the fact that judiciary does not have the last word as to the validity of legislation.<sup>84</sup>

---

81 See B McLachlin, “The Role of the Courts in the New Democracy” in Joseph Eliot Magnet, ed, *Constitutional Law of Canada: Cases, Notes and Materials*, vol 2, 8th ed (Edmonton: Juriliber, 2001) 117 [McLachlin, “Role of the Courts”]; Cohn & Kremnitzer, *supra* note 77 at 349-50; The Honourable Sir John Laws, “Is the High Court the Guardian of Fundamental Constitutional Rights?” (1993) PL 59; Alan N Young, “The *Charter*, the Supreme Court of Canada and the Constitutionalization of the Investigative Process” in Jamie Cameron, ed, *The Charter’s Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 1; The Honourable Sir John Laws, “Law and Democracy” (1995) PL 72; TRS Allan, “The Rule of Law as the Rule of Reason: Consent and Constitutionalism” (1999) 115 *Law Q Rev* 221; Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996).

82 McLachlin, “Role of the Courts,” *supra* note 80 at 119.

83 Cohn & Kremnitzer, *supra* note 77 at 349-50.

84 See David Schneiderman, “Kent Roach, *the Supreme Court on Trial: Judicial Activism or Democratic Dialogue*” (2002) 21 *Windsor YB Access Just* 633; Cohn & Kremnitzer, *supra* note 77; 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) 35:1 *Osgoode Hall LJ* 75; Christopher P Manfredi & James B Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37:3 *Osgoode Hall LJ* 513; Peter W Hogg & Allison A Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37:3 *Osgoode Hall LJ* 529; James B Kelly & Michael Murphy, “Confronting Judicial Supremacy: A Defence of Judicial Activism and the Supreme Court of Canada’s Legal Rights Jurisprudence” (2001) 16:1 *CJLS* 3 at 23-24; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995) at 167; W J Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, UK: Cambridge University Press, 2007); Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—Or ‘Much Ado About Metaphors’” (2007) 45:1 *Osgoode Hall LJ* at 32.

Scholars often describe this as a lack of judicial finality since courts, which embark upon *Oakes* analyses, are merely engaging in a type of dialogue: “[T]he *Charter* decisions of the courts, *whether right or wrong*, rarely preclude a legislative sequel, and usually receive one. Collectively, we take comfort in the ability of legislative bodies to respond to those *Charter* decisions where the courts simply ‘get it wrong’.”<sup>85</sup>

Under these accounts of the use of *Oakes*, the Court is described as a partner in the legislative process charged with guarding core values, whose role produces justice and is cooperative as opposed to antagonistic.<sup>86</sup> Even if a court is viewed as antagonistically reversing Parliament or a legislature, it would be open to legislative bodies to re-legislate or to use the constitutional override provisions to establish legislative preeminence.<sup>87</sup> Hogg, Thornton and Wright explain that “[a]n important role of the rule of law is to protect minorities and civil liberties generally. That role would be jeopardized if the legislative or executive branch, which is responsible for enacting and implementing the laws, was also given final authority to interpret the scope of the constitutional restrictions on those responsibilities.”<sup>88</sup>

This quotation summarizes the problem with the creation of police powers through *Waterfield* quite aptly. Unlike in *Oakes* analyses, the role of courts in *Waterfield* analyses is not dialogic. In bequeathing police power to the state a court not only routinely abandons its stewardship of the Constitution and eviscerates its relationship with the rule of law, it also assumes final legislative authority for the power. That is to say, a court’s decision to create a common law power under *Waterfield* is not a dialogue with Parliament, but a monologue. It is a monologue in which the judiciary invents a common law power and then declares that power to be constitutional. As Justices LeBel and Fish wrote in *Sinclair*, “this kind of judicial intervention would pre-empt any serious *Charter* review of the limits, as the limits would arise out of initiatives of the courts themselves.”<sup>89</sup>

The Court in *Waterfield* analyses is both the legislator of police powers and the adjudicator of the constitutional legitimacy of such powers. This not only disrupts the judicial dialogue metaphor, but also disrupts the courts’ traditional role of enforcing a common law culture that views the rule of law as the law of liberty. The same judicial turn represents a movement away from human rights era constitutionalism, which purports to position these courts as guardians of the Constitution. Last, it creates a situation where an accused, due to problems of intelligibility and unknowable law enforcement discretion, is unaware of the powers that police hold over him or her until the subsequent judicial review, creating a type of retroactive

---

85 *Ibid* [emphasis in original].

86 Cohn & Kremnitzer, *supra* note 77 at 340; Madame Justice BM McLachlin, “The *Charter*: A New Role for the Judiciary?” (1991) 29:3 *Alta L Rev* 540.

87 Roach, *supra* note 77; Hogg & Bushell, *supra* note 83.

88 Hogg, Thornton & Wright, *supra* note 83 at 37.

89 *Sinclair*, *supra* note 66 at para 191, citing *Orbanski*, *supra* note 29 at para 81.

judicial fiat of police powers. Justices LeBel and Fish explain that “[m]embers of [the] Court have, in recent years, repeatedly questioned the practice of expanding the scope of police powers by judicial fiat. The common thread linking these opinions is a concern that ‘while *Charter* rights relating to the criminal justice system were developed by the common law, the common law would now be used to trump and restrict them.’”<sup>90</sup>

In short, the *Waterfield* test, despite its analytical affinity with *Oakes*, sounds every alarm bell of unsound judicial practice that has (debatably) been unsuccessfully lobbed at *Oakes*. Yet, in the context of *Waterfield*, the debatable critiques of *Oakes* have failed on every measurable scale. A fractious Supreme Court seems to have settled on allowing the use of the ancillary powers test as both a police power generator and as a constitutional litmus test for such powers. In most such cases the disposition has favoured the Crown. The troubling constitutional theory implications are multiple; however, as this paper reaches its end it is also prudent to place this recent proliferation in a socio-legal context.

Since the terrorist attacks of September 11, 2001 (9/11), influential socio-legal literature has been produced describing the political state of North America as securitized.<sup>91</sup> This state of securitization refers to a societal tendency to organize events and policies in a manner that can best be perceived by the masses as safe and secure. Some have argued that judicial decisions in this time period are “illustrative of the increasingly security focused nature of judicial decisions that govern the law of criminal procedure.”<sup>92</sup> Inherent in these studies is the claim that the events of 9/11 “provided the catalyst for the widening of police surveillance and search authority.”<sup>93</sup> Such enforcement measures are often described as preventative in nature and arise in situations where police apparently otherwise lack the power

- 
- 90 *Sinclair*, *supra* note 66 at para 192, citing *Orbanski*, *supra* note 29 at para 70 [in-text citations omitted].
- 91 Richard Jochelson, “Multidimensional Analysis as a Window into Activism Scholarship: Searching for Meaning with Sniffer Dogs” (2009) 24:2 CJLS 231 [Jochelson, “Sniffer Dogs”]; Richard Jochelson, “Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of *Patrick*” (2009) 72:2 Sask L Rev 199 [Jochelson, “Trashcans”]; Richard Jochelson, “Talking Trash with the Supreme Court of Canada: The Reasonable Expectation of Privacy Under the *Charter*” in Kirsten Kramar, ed, *Criminology: Critical Canadian Perspectives* (Don Mills, Ont: Pearson Education Canada, 2011) at 255; Jochelson, “Rubicon,” *supra* note 17 at 209. See also William Bloss, “Escalating U.S. Police Surveillance after 9/11: An Examination of Causes and Effects” (2008) 4:3 *Surveillance & Society* (Special Issue on ‘Surveillance and Criminal Justice’) at 208.
- 92 Richard Jochelson, Melanie Janelle Murchison & Michael Weinrath, “Searching and Seizing After 9/11: Developing and Applying Empirical Methodology to Measure Judicial Output in the Court’s Section 8 Jurisprudence” (2012) 35:1 Dal LJ 179 at 180.
- 93 Bloss, *supra* note 90 at 208. See also Gerald Posner, *Why America Slept: The Failure to Prevent 9/11* (New York: Random House, 2003); Anthony D Romero, “Living in Fear: How the U.S. Government’s War on Terror Impacts American Lives” in Cynthia Brown, ed, *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (New York: The New Press, 2003); Kevin D Haggerty, “Forward: Surveillance and Political Problems” in Sean P Hier & Josh Greenberg, eds, *Surveillance: Power, Problems, and Politics* (Vancouver: UBC Press, 2009) (for a more sociological treatment); Richard v Ericson and Aaron Doyle, eds, *Risk and Morality* (Toronto: University of Toronto Press, 2003) (an excellent Canadian sociological collection on the topic of security).

to engage in preventative enforcement.<sup>94</sup> In part, the solution to the problem of security has been to employ “public safety strategies” that involve a more “prominent police surveillance and search role.”<sup>95</sup>

A recent study, exploring a discourse analysis of judicial approaches to police powers in the search and seizure canon at the Supreme Court, found a statistically significant use of security-based reasoning in the cases that have followed the attacks of 9/11.<sup>96</sup> It is certainly not surprising that a discourse analysis following events such as 9/11 would show a court reflecting the tensions persisting in a society that is concerned with security. For the purposes of this paper, the trend might help place some of the *Waterfield*-based decisions in context. With the exception of *Dedman* and *Godoy*, the remaining *Charter* era *Waterfield*-based cases have occurred after the events of 9/11. Might it be that the recent proliferation of the *Waterfield* analysis is a temporary blip on the radar of relatively well-circumscribed judicial roles? Could it be the case that in the coming years, as the anxieties caused by the attacks subside, the Court will return to its baseline role of constitutional guardianship upholding of the law of liberty and acting as a constitutional partner in dialogue with Parliament and the legislatures?

It seems certain that if these anxieties do not pass, the use of *Waterfield* will continue to create new *Charter*-proof police powers that have not been subjected to the rigours of the legislative process. It seems certain that continued *Waterfield* proliferation would continue to favour the interests of the state over those of the individual. The Court’s ability to fill gaps in the law should not mean that “the Court should always expand common law rules.”<sup>97</sup> Courts should not stray too far from their “historic role of standing firm between the individual and the state, insisting on adherence to the principle of legality.”<sup>98</sup> As Justices LeBel and Fish argue:

Courts form part of the institutions of a democratic state where democratically elected legislatures debate and enact laws in an open public process. Courts are vital institutions particularly because the Constitution itself protects fundamental human rights. The Constitution does not belong to the courts...but courts must remain alive and sensitive to the fact that they are ultimately the guardians of constitutional rules, principles and values when all else fails.<sup>99</sup>

---

94 David Cole, “The New McCarthyism: Repeating History in the War on Terrorism” (2003) 38:1 Harv CR-CLL Rev 1 at 7; For a Canadian perspective, see David Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers Be Normalized?” 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) 21.

95 Bloss, *supra* note 90 at 209. See also Norman Abrams, *Anti-Terrorism and Criminal Enforcement*, 2d ed (St Paul, MN: Thomson/West, 2005).

96 Jochelson, Murchison & Weinrath, *supra* note 91.

97 *Kang-Brown*, *supra* note 39 at para 6.

98 Stribopoulos, “Dialogue”, *supra* note 74 at 55.

99 *Kang-Brown*, *supra* note 39 at para 7, citing *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, 140 DLR (4th) 193.

V. CONCLUDING THOUGHTS –  
A PROBLEM OF LIBERAL CONSTITUTIONALISM

This paper has explored the proliferation of the ancillary powers test in Supreme Court jurisprudence, particularly in recent years. It has traced the British roots of the test and demonstrated how its *Charter* era application in Canada displays certain affinities with the Court's test under section 1 of the *Charter*, first developed in *Oakes*. Despite some analytical similarities between the tests, members of the Supreme Court have begun to take umbrage with the use of the ancillary powers test as a means of generating new police powers and subsequently finding those powers to pass constitutional muster. Often, those dissenters have called for a return to the *Oakes* analysis as a means of examining state infringement of civil liberties in police powers cases.

The attraction of these jurists to *Oakes* at first blush seems semantic; after all, does the ancillary powers calculus not cover many of the same bases as *Oakes*? These dissenters seem to be on strong theoretical grounds to seek abatement in the use of *Waterfield* as a constitutional litmus test. The ancillary powers test does not survive the analytical scrutiny leveled at (but survived by) *Oakes*. In particular, the ancillary powers test reserves a legislative function for the Court when the seat of police powers properly belongs in Parliament. The ancillary powers approach also situates the constitutional adjudication of those powers with the *de facto* legislative body (in this case, a court). The result is problematic for the principle of legality, embedded in the rule of law, but also creates problems with the human rights era approach to judicial decision making—an approach that situates the Court as a steward of thin constitutional principles.

Under the ancillary powers approach, an accused faces a court that retroactively creates a police power. That police power is then assessed by the same court, which usually finds the power to pass constitutional muster. This not only puts a court in a unique situation of conflict (because it is legislator and adjudicator), but also creates problems of intelligibility and law enforcement discretion. The citizen can never know the bounds of the powers the police possess because the common law power has not yet been held to exist, so the citizen finds themselves beholden to the discretion of the officers. A conscientious citizen cannot respond in such circumstances. A conscientious citizen cannot have fair notice in such circumstances.

Lastly, the statistical valence of the ancillary powers test seems to pull ever more in the direction of the state, aligning with a securitized notion of state power that seems particularly acute in the post 9/11 era. The use of the *Waterfield* test, especially as a constitutional replacement for *Oakes*, not only favours the state (not a problem for everyone), but it disrupts most accepted understandings of constitutional adjudication (a problem for everyone). This problem causes one to question the meaning of liberal constitutionalism in a parliamentary democracy and is theoretically and socio-politically troubling.