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Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence

Vanessa MacDonnell

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I. INTRODUCTION

It has been said that one of the paradoxes of the entrenchment of the *Canadian Charter of Rights and Freedoms* is that it has led to the expansion of police powers.[1] While both Parliament and the courts have contributed to this expansion, Parliament's involvement has been largely confined to the search and seizure context.[2] Following a string of early post-Charter decisions in which the Supreme Court concluded that the police's actions infringed the section 8 rights of the accused, Parliament amended the *Criminal Code*[3] to amplify the search powers of police.[4] The courts, meanwhile, have used the ancillary powers doctrine to carve out expanded powers for the police. Thus, alongside Charter cases that delineate the rights of the accused and the limits of state power can be found cases in which the ancillary powers doctrine has been successfully

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[*] Assistant Professor, Faculty of Law, University of Ottawa (Common Law Section). Thank you to Leo Russomanno and Jula Hughes for helpful conversations about this paper, to the anonymous reviewers for their very useful comments, and to Julia Finniemore and Colin Heighton for their research assistance. Thank you also to members of the Faculty of Law, University of Ottawa (Common Law Section) for useful comments made in the context of a related paper that also greatly assisted in framing this piece. This paper builds upon James Stribopoulos' considerable body of scholarship on common law police powers in Canada.

[1] See 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) 351, at 359 [hereinafter "Stribopoulos, 'Crime Control'"]. Technically speaking, the powers of the police have not actually been expanded, since the idea is that the power existed all along but had simply not been articulated until that moment. Following Stribopoulos, however, I will refer to the ancillary powers cases as creating "new" police powers. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[2] James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1 [hereinafter "Stribopoulos, 'In *Search* of Dialogue'"].

[3] R.S.C. 1985, c. C-46.

[4] Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 64-67.

invoked to uphold the actions of police against claims of unauthorized police conduct.[5] In the latter cases, the courts have dismissed the accused's Charter claim after recognizing a new common law police power authorizing the officer's actions *ex post*.

James Stribopoulos has been critical of the role that courts have played in the expansion of police powers since 1982.[6] In his view, judicial elaboration of police powers is a departure from the Supreme Court's "historic role of standing firm between the individual and the state, and refusing to make up for shortcomings in police powers".[7] Stribopoulos argues that it is simply not the Court's role in adjudicating cases under the Charter to ensure that the police are equipped with the powers they need to investigate crime. He suggests that Parliament is better suited to the task of balancing the "competing goals and purposes" inherent in defining the scope of the police's authority, particularly since those powers have an impact upon individual rights.[8]

In this paper I explore the factors that may have led the Supreme Court to assume a role in articulating new police powers since 1982. I also attempt to situate the ancillary powers cases within the context of a larger jurisprudential trend of balancing individual rights and "societal interests"[9] outside of section 1 that has emerged in the Charter case law.[10] I will suggest that courts may be disposed to create new common law police powers because in some cases, the police have infringed the Charter rights of a suspect in a manner that the court concludes is reasonable or justifiable, but the constitutional machinery upon which it normally relies to give effect to such arguments — that is, section 1 — is functionally unavailable.[11] Since the police are not typically authorized to violate Charter rights in carrying out their duties, their actions will rarely satisfy section 1's prescribed by law requirement.[12] Precluded from justifying the rights violation under section 1, the only remaining question is whether any evidence gathered should be excluded pursuant

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5 *Id.*

6 *Id.*, at 54-55.

7 *Id.*, at 55.

8 *Id.*, at 55-56.

9 The term "societal interests" has been used throughout the Supreme Court case law. For an example in the police powers context, see, *e.g.*, *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 15 (S.C.C.) [hereinafter "*Mann*"]. I will use this term throughout.

10 See Vanessa MacDonnell, "Interrogating the Supreme Court's decision in *R v Sinclair*" 38 Queen's L.J. (forthcoming in 2012) [hereinafter "MacDonnell, '*Sinclair*'"].

11 *Id.*

12 Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. (Toronto: Carswell, 2010), at 27 [hereinafter "Stuart, *Charter Justice in Canadian Criminal Law*"].

to section 24(2) of the Charter. In practice, this means that the court is unable to consider arguments that go to justification, such as the argument that society has an "interest in effective policing"[13] or that the conduct is otherwise proportional, unless the court identifies a common law source of authority for the police's actions and/or considers such arguments at some other stage of the analysis.

Both the jurisprudence and the academic commentary suggest that the way that courts conceive of and approach their role in Charter cases is influenced significantly by the "two-stage", infringement-justification structure of Charter analysis.[14] The presence of section 1 means that courts are free to interpret rights robustly at the first stage of the analysis;[15] it is only if a Charter violation is established that the court moves on to consider whether the limitation on Charter rights can be justified.[16] The two-stage mode of analysis thus preserves the integrity of the Charter's individual rights guarantees while also making it possible for the government to limit those rights in cases where it can proffer sufficient justification.[17]

It is of more than trifling significance, then, that the two-stage mode of Charter analysis is not a feature of most criminal procedure cases.[18] As I have noted, the section 1 inquiry is greatly truncated in most legal rights cases because of the impossibility of satisfying the prescribed by law requirement. For this reason, it is not surprising that courts have searched for ways of giving effect to justification-type arguments outside of section 1. In this paper I argue that, whether intentionally or not, the functional unavailability of section 1 in police powers cases has led the courts to elaborate a doctrine of ancillary powers that is virtually indistinguishable from the justification analysis prescribed in *R. v. Oakes*.[19]

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[13] *Mann*, *supra*, note 9, at para. 15. I will use this language throughout.

[14] See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"]; Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 S.C.L.R. 469, at 472 [hereinafter "Weinrib, 'Section One'"]. I will use this terminology throughout.

[15] See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[16] Notable exceptions include the jurisprudence under ss. 7 and 10(b) and 11(b) of the Charter: see MacDonnell, "*Sinclair*", *supra*, note 10.

[17] *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, at 977 (S.C.C.) [hereinafter "*Swain*"].

[18] There are two circumstances where this is not the case. The first is where Parliament or a provincial legislature has enacted a statutory framework to govern the police's exercise of authority. There are few such examples outside the s. 8 context, where Parliament has created a statutory scheme to govern search and seizure. The second involves the ancillary powers cases, which I discuss in this paper.

[19] *Supra*, note 14.

Rather than concluding that the police's unauthorized conduct violated the accused's Charter rights but that the infringement is justified under section 1 (something the Court is unable to do for the reasons identified above), the Court instead concludes that the police's actions can be justified under the ancillary powers doctrine. By curing the deficiency which previously raised a credible Charter issue — that is, the lack of authority to detain or search — the Charter analysis is effectively pre-empted.[20] At the very least, the section 1 justification mechanism becomes available, the prescribed by law issue having been resolved by recognizing a new source of police power grounded in the common law.[21]

I begin this paper by attempting to substantiate the claim that the functional unavailability of the section 1 analysis in most police powers cases has led the Supreme Court to develop a doctrine of ancillary powers that mirrors the *Oakes* test. I then discuss the concerns that arise from this "end run"[22] around the Charter. The first is that the ancillary powers doctrine precludes the courts from engaging in an assessment of the Charter compliance of police conduct that may give rise to a credible Charter claim. Instead, the focus of the analysis is on whether a new police power should be recognized. While the courts do not ignore the Charter in the context of this inquiry, its role is nonetheless diminished, resulting in a legal analysis that underemphasizes the constitutional status of the accused's legal rights.[23] Second, the ancillary powers doctrine empowers courts to mete out additional law enforcement powers, a function that is more legislative than judicial.[24] The better approach, as Stribopoulos suggests, is to leave the expansion of police powers to Parliament.[25] I conclude by briefly discussing possible criticisms that might be raised in response to the theory outlined in this paper and by addressing the relevance of section 24(2) to my analysis.

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[20] *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725, at para. 79 (S.C.C.) [hereinafter "*Clayton*"], *per* Binnie J.

[21] If a common law police power has been recognized but the police exceed that power, the deprivation of rights is similarly not prescribed by law.

[22] *Clayton*, *supra*, note 20, at para. 79. I will use this term throughout.

[23] *Id.*, at para. 78, *per* Binnie J.

[24] Stribopoulos, "In *Search* of Dialogue", *supra*, note 2.

[25] *Id.*; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 380-81, 390-92.

II. SIMILARITIES BETWEEN THE ANCILLARY POWERS TEST AND *R. V. OAKES*

In the past three decades, the Supreme Court of Canada has developed a doctrine of ancillary powers that is virtually indistinguishable from the justification analysis prescribed by *Oakes*. The strongest support for this claim can be found in the ancillary powers cases themselves. Beginning in the Supreme Court's decision in *R. v. Dedman*[26] and continuing through *Cloutier v. Langlois*,[27] *R. v. Mann*,[28] *R. v. Clayton*,[29] *R. v. M. (A.)*[30] and *R. v. Kang-Brown*,[31] the Supreme Court "refined and incrementally applied the *Waterfield* [ancillary powers] test"[32] until it closely resembled the *Oakes* test in both form and function.

Dedman was the first ancillary powers case to be heard by the Supreme Court. There, a majority of the Court adopted the common law police powers test established by the British Court of Appeals two decades earlier in *R. v. Waterfield*, that is, "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."[33] As under section 1, the focus of the *Waterfield* test was on whether the exercise of police power was *justified* in the circumstances. Although the inquiry into justification did not take place against the backdrop of an infringement of constitutional rights (*Waterfield* was not a Charter case), it was clear that whatever powers were conferred on the police subtracted from the liberty of individual citizens.[34] This gave rise to a requirement of justification.

Justice Le Dain, writing for the majority, qualified the nature of the liberty at stake in *Dedman*. He noted that

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[26] [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.) [hereinafter "*Dedman*"].

[27] [1990] S.C.J. No. 10, [1990] 1 S.C.R. 158 (S.C.C.).

[28] *Supra*, note 9.

[29] *Supra*, note 20.

[30] [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) [hereinafter "*M. (A.)*"].

[31] [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456 (S.C.C.) [hereinafter "*Kang-Brown*"].

[32] *Mann*, *supra*, note 9, at para. 25.

[33] *R. v. Waterfield; R. v. Lynn*, [1963] 3 All E.R. 659, at 661 (C.C.A.) [hereinafter "*Waterfield*"], cited in *Dedman*, *supra*, note 26, at para. 20.

[34] See Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 8, citing T.R.S. Allan, "Constitutional Rights and Common Law" (1991) 11 Oxford J. Legal Stud. 453, at 457. See generally Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481.

> In applying the *Waterfield* test to the random stop of a motor vehicle for the purpose contemplated by the R.I.D.E. program, it is convenient to refer to the right to circulate in a motor vehicle on the public highway as a "liberty" ... In assessing the interference with this right by a random vehicle stop, one must bear in mind, however, that the right is not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property.[35]

In the cases that followed *Dedman*, the individual liberty interest at stake was often significantly weightier. In *R. v. Golden*,[36] for example, the Court was asked to decide whether the common law authorized the police to perform a strip search of a suspect incident to arrest. Even where this lesser liberty interest was concerned, however, the Court in *Dedman* concluded that the exercise of police powers must be both *necessary* and *reasonable* to survive the justification inquiry.[37] The R.I.D.E. program challenged in *Dedman* met these requirements because it was necessary to ensure the safety of other motorists and reasonable "having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference".[38] One can see in this analysis traces of the *Oakes* test, including requirements of a pressing and substantial objective, minimal impairment and proportionality.

In the subsequent case of *Cloutier v. Langois*,[39] the Supreme Court was asked to determine whether the police had a common law power to search a suspect incident to arrest. *Cloutier v. Langois* is revealing because here the full extent of the similarity between the ancillary powers doctrine and *Oakes* emerges. The Court explained that the common law authorized the police to search a suspect incident to arrest where the search "m[et] the underlying objectives" of the common law power, was conducted "for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused", and was not performed "in an abusive fashion".[40] The "frisk" at issue in *Cloutier v. Langois* fell within these parameters, the Court explained, because "a brief search

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35 *Dedman*, *supra*, note 26, at para. 68.

36 [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679 (S.C.C.) [hereinafter "*Golden*"].

37 *Dedman*, *supra*, note 26, at para. 69.

38 *Id.*

39 *Supra*, note 27.

40 *Id.*, at 187 S.C.R., paras. 61, 62. See also Stuart, *Charter Justice in Canadian Criminal Law*, *supra*, note 12, at 252.

does not constitute, in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested," nor were there "less intrusive means of attaining these objectives".[41]

The parallels between this analysis and *Oakes* are obvious. The Court began by identifying a rights infringement (in common law terms, a deprivation of "liberty"[42]) caused by the exercise of police power. It then asked whether the infringement furthered a pressing and substantive objective (the "effective control of criminal acts"[43] by police), whether there was a rational connection between the exercise of the power and the objective sought to be achieved ("necessary in order for the peace officers to perform their duty"[44]), whether the measure was minimally impairing (are there "less intrusive means of attaining these objectives"?[45]) and proportional ("reasonable in light of the public purposes served ... on the one hand and on the other respect for the liberty and fundamental dignity of individuals"[46]).

The stages of the *Waterfield* test thus mirror the *Oakes* analysis with startling precision. The Court's broader framing of the ancillary powers doctrine also mimics the section 1 inquiry, insofar as the Court has acknowledged that police powers cases permit the courts to "balance" society's interest in effective law enforcement and individual rights. In *Mann*, for example, the majority's reasons for judgment began by noting that the appeal "offer[ed] another opportunity to consider the delicate balance that must be struck in adequately protecting individual liberties and properly recognizing legitimate police functions."[47]

In the more recent police powers cases, some members of the Court have acknowledged the functional similarity between the ancillary powers doctrine and section 1. The justices who have drawn this link are critical of the expansion of police powers that has occurred under the doctrine. In *Clayton*, for example, the majority applied the ancillary powers doctrine to conclude that the police were justified in setting up a roadblock at the exits of a strip club after receiving a call that several males were brandishing handguns in the parking lot of the club. The majority noted that the police had reasonable grounds to detain vehicles

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41 *Cloutier v. Langlois*, *supra*, note 27, at 186 S.C.R., para. 58.
42 *Id.*, at 183. See also Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 2.
43 *Cloutier v. Langois*, *supra*, note 27, at 181 S.C.R., para. 50.
44 *Id.*
45 *Id.*, at 186 S.C.R., para. 58.
46 *Id.*, at 181-82 S.C.R., para. 50.
47 *Mann*, *supra*, note 9, at para. 1.

as they were leaving the parking lot because the alleged offence was grave and posed a threat to the broader public, and the scope of the roadblock was limited in its duration and geographic scope.[48] The majority also found that the subsequent search incident to investigative detention was justified in the circumstances.

In concurring reasons, Binnie J., writing for three members of the Court, chastised the majority for doing an "end run" around the Charter.[49] He argued that the *Waterfield* test and section 1 were not and should not be "duplicative of one another".[50] Crafting a common law test for police powers that rendered the Charter analysis redundant moved the analysis out of the constitutional framework and into the much more discretionary realm of the common law. There, Binnie J. pointed out, the Charter rights of the accused had no logical priority over other interests.[51] The majority responded that the ancillary powers doctrine did not effect an "end run"[52] around the Charter because "Charter values" informed the articulation of the police's common law powers.[53]

I will address the substance of the criticisms raised by the concurring justices in *Clayton* in the following section. For the moment, it is sufficient to note that while the justices seem divided on the question of whether the similarities between the *Oakes* test and the ancillary powers doctrine are problematic, the existence of these similarities is not lost on the Court. Not only do these similarities emerge through a careful parsing of the cases, therefore, but they have also been acknowledged by the Court in the more recent ancillary powers cases.

III. THE CHARTER AS INTERPRETATIVE TOOL AND OTHER CONCERNS

Against the backdrop of the functional unavailability of section 1 in police powers cases, the Court appears to have reconstructed the *Oakes* analysis at the stage of determining whether the police were authorized

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48 *Clayton*, *supra*, note 20, at paras. 33-41.

49 *Id.*, at para. 79, *per* Binnie J.

50 *Id.*, at para. 78, *per* Binnie J.

51 *Id.* For a related critique made in the context of the Supreme Court's "Charter values" jurisprudence, see J.A. Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery Ltd.*" (1987) 19 Ottawa L. Rev. 413.

52 *Id.*, at para. 79, *per* Binnie J.

53 *Id.*, at para. 21.

by the common law to detain and/or search the accused. In this section I canvass concerns that are raised by this approach.

The first concern is that the ancillary powers doctrine effects an "end run" around the Charter.[54] To take just one example, recognition of a power to search incident to arrest in *Cloutier v. Langois* has significantly altered the dynamic involved in challenging such searches under the Charter. In cases involving a search incident to arrest, the inquiry now begins by asking whether the police had a common law power to search incident to arrest. If they did not, a section 8 violation is automatically established. If the police were authorized by the common law to conduct the search, then two of the three requirements for finding a search "reasonable" within the meaning of section 8 are satisfied, in that the search is authorized by the common law and reasonableness of common law rule will have been established by the *Waterfield* test.[55] In theory, the section 8 inquiry then shifts to the manner in which the search was conducted. If the search incident to arrest was carried out in a reasonable manner, then there is no violation of section 8.[56] But the context-specific nature of the *Waterfield* test is such that this third question is also bound up in the determination of whether the police were authorized to act as they did. In other words, the question for the Court under the ancillary powers doctrine is "did the police, in the circumstances of this case, act within the scope of the authority conferred on them by the common law?" If the answer is yes, then it seems as though all three of the requirements for a reasonable search have been satisfied. The majority appears to confirm this in *Clayton* when it stated, in relation to Charter challenges under sections 8 and 9 of the Charter, that "[if] the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their *Charter* rights."[57] In a very real sense, then, the *Waterfield* test is

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[54] *Id.*, at para. 79, *per* Binnie J.

[55] Section 8 of the Charter provides that "everyone has the right to be free from unreasonable search and seizure." As the Court in *Mann* explained, citing the Supreme Court's earlier decision in *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) [hereinafter "*Collins*"], "[u]nder *Collins*, warrantless searches are deemed reasonable if (a) they are authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable": *Mann*, *supra*, note 9, at para. 36. By recognizing a power to search incident to arrest, the Supreme Court effectively neutralizes the first two of these requirements. Note, however, that a majority of the Court in *Golden*, *supra*, note 36, did consider whether the common law rule authorizing the police to conduct strip searches incident to arrest for limited purposes was unreasonable.

[56] *Collins*, *id*.

[57] *Clayton*, *supra*, note 20, at para. 19. See also paras. 43-44, 49.

serving in at least some cases as a substitute for *both* stages of the Charter analysis.[58]

On some level, this is desirable. If it were possible to succeed on a constitutional challenge to a common law police power, it would mean that the court had promulgated an unconstitutional common law rule, something that seems to be particularly problematic.[59] As LeBel J. stated in *Kang-Brown*:

> The common law has long been viewed as a law of liberty. Should we move away from that tradition, which is still part of the ethos of our legal system and of our democracy? This case is about the freedom of individuals and the proper function of the courts as guardians of the Constitution. I doubt that it should lead us to depart from the common law tradition of freedom by changing the common law itself to restrict the freedoms protected by the Constitution under s. 8 of the *Charter*.[60]

Yet this is exactly what LeBel J., concurring in the reasons of Binnie J. in *Clayton*, suggested just a year before penning his judgment in *Kang-Brown*.[61] After noting that the Constitution, and not the common law, should be employed to decide the issue before the Court, the three concurring justices in *Clayton* proceeded to carve out a common law police power that they acknowledged was in violation of section 9 of the Charter.[62] The justices then went on to find that the rights violation could be saved under section 1. A constitutionally compliant common law rule in hand, Binnie J. then assessed whether the police acted within the scope of their common law powers in conducting the roadblock, and, finding that they did, would have allowed the appeal.[63]

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[58] See also *Mann*, *supra*, note 9.

[59] As a general rule, the Supreme Court has taken the position that if the constitutional infirmity can be cured through an incremental change to the common law, the courts will adapt the rule accordingly. If, on the other hand, the changes required to bring the common law into compliance with the Charter are of such a degree that they could only be accomplished by departing significantly from the common law mode of incremental development, then the Court must go on to decide whether the rule should be "saved" under s. 1: see *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.) [hereinafter "*Salituro*"]; *Swain*, *supra*, note 17. While I have difficulties with this approach, I would note that the considerations are quite different when a *new* common law rule is being created. In those circumstances, I would suggest, it is inappropriate for the courts to craft a new common law rule that is not Charter-compliant.

[60] *Supra*, note 31, at para. 12.

[61] See *Clayton*, *supra*, note 20, at paras. 58-59.

[62] In so doing, Binnie J. noted that this was not unprecedented: see *Clayton*, *id.*, at para. 105, citing *Swain*, *supra*, note 17; *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.); *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.).

[63] *Clayton*, *id.*, at para. 121.

While the nature of common law reasoning might place certain limits on the Court's ability to bring existing common law into compliance with the Charter,[64] it is very difficult to see how it could ever be justifiable to craft new common law rules that are inconsistent with the Charter. Moreover, creating a common law rule that requires justification under section 1 inevitably requires the courts to do what the government would otherwise be required to do — that is, to demonstrate that the interests served by the newly created common law rule are sufficiently important to warrant overriding constitutional rights.[65] This task places courts in a very awkward position.[66] Thus, whatever the problems raised by the Court's ancillary powers jurisprudence, the answer does not lie in the hybrid approach adopted by the concurring Justices in *Clayton*.[67] Rather, the most principled course of action is for the courts to analyze these cases relying solely on the framework provided by the Charter.

So what *is* the precise nature of the problem created by the "end run" in these cases? After all, we know that the ancillary powers doctrine builds in an analogous degree of protection for the individual's common law liberty interests and for "Charter values" as section 1. This suggests that the ancillary powers test developed by the Court protects, or is at least sensitive to, individual rights. The problem, in brief, is that in these cases, which typically raise a credible Charter issue, the Charter is nowhere to be found, other than lurking as a system of values to which courts might or ought to have resort in resolving the question of the extent of the police's powers. In other words, the problem is that the Court's mode of analysis engages the Charter in a manner that seems inconsistent with its status as supreme law.[68] One of the main features of the Charter's two-stage mode of analysis is that individual rights are the focal point of the inquiry. Even at the section 1 stage, where the Court is asked to inquire into whether a deprivation of rights can be justified, the analysis is oriented so as to recognize the primacy of individual rights.[69] Chief Justice Dickson explained the dual character of section 1 in *Oakes* as follows:

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64 See *Salituro*, *supra*, note 59.

65 Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 55-56.

66 *Id.*

67 On my best reading of the case law, the majority of the Court has never applied this type of reasoning in the ancillary powers context.

68 See *supra*, note 51.

69 Weinrib, "Section One", *supra*, note 14.

> It is important to observe ... that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*."[70]

Yet this rights orientation is conspicuously absent when the police powers inquiry takes place at the level of the common law. There, the focus is not on individual rights but on the extent of the police's powers. In some sense, then, the ancillary powers doctrine, though incorporating a form of proportionality analysis, has the inverse of a rights orientation. Rather than being anchored in a theory of rights as limits on police powers, the ancillary powers doctrine is anchored in a theory of police powers as limits on rights.

A related problem that arises from the Supreme Court's approach in the ancillary powers cases is that it downgrades the Charter from constitutional document to mere interpretative tool. In *Clayton*, the majority responded to the criticisms of the concurring justices by explaining that the Charter was not irrelevant to the analysis in ancillary powers cases. Rather, Charter "values" informed the inquiry into whether the common law authorized the police to act in the manner they did. The ancillary powers doctrine, the majority explained:

> ... 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.[71]

In other words, the majority seemed to be of the view that the requirements of reasonableness and necessity adequately safeguarded the Charter "interests" of the accused. On some level, of course, they are correct. The fact that the ancillary powers test essentially replicates the

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[70] *Oakes*, *supra*, note 14, at 135-36 S.C.R.

[71] *Clayton*, *supra*, note 20, at para. 21.

analysis under section 1 means that sufficient justification must be provided to support the expansion of police powers.[72] But in characterizing the accused's rights as Charter "values", the Court treats the Charter as a mere interpretative tool in a case involving the unauthorized exercise of power by a state actor.

A third concern raised by the Supreme Court's ancillary powers jurisprudence is "institutional".[73] As Stribopoulos explains, the courts have typically been regarded as defenders of rights rather than amplifiers of police powers.[74] The ancillary powers cases thus raise the question of whether courts are qualified to carve out new police powers and, assuming they are qualified, whether it is appropriate for them to do so.[75] Stribopoulos suggests that courts are not suited to this task for several reasons. When the courts take the lead in expanding police powers, he argues, lacunae in police powers "[are] unlikely to make [their] way onto Parliament's agenda"[76] and a potentially productive "dialogue" between Parliament and the courts about the appropriate scope of police powers in a constitutional state is precluded.[77] This approach also leaves police powers to be developed on a case-by-case basis rather than in a wholesale manner by the political branch of government.[78] Stribopoulos also suggests that when courts give new powers to the police, they are overly optimistic about the degree to which the police will understand the limits of those powers and deploy them appropriately.[79] This is especially problematic given that police powers carved out by the courts are usually "open-ended" and therefore susceptible to misuse.[80]

When Parliament chooses to legislate new police powers, they must be prepared to advance sufficient justification for any rights infringements that result. When the *courts* ground new police powers in the common law, they must supply this justification. In recognizing additional common law police powers, therefore, the courts become partners in rights limitation.[81] This is simply not a position that courts ought to take, or can take credibly.

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72 *Id.*
73 Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 55.
74 *Id.*
75 *Id.*
76 Stribopoulos, "Crime Control", *supra*, note 1, at 362.
77 Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 61, 63-67.
78 *Id.*, at 70.
79 *Id.*, at 49-50.
80 *Id.*, at 50.
81 Stribopoulos, "In *Search* of Dialogue", *supra*, note 2, at 55-56.

IV. THE CRITICS AND THE ROLE OF SECTION 24(2)

Before concluding, I will respond very briefly to the primary critique that might be raised in response to the theory I have advanced here. It might be said that the argument I make in this paper wrongly assumes that courts ought never to seek to give effect to societal interests, such as the interest in effective policing that drives the creation of new police powers, outside of the strict framework of the section 1 analysis. Indeed, there are many examples of Charter cases in which the courts have given effect to societal interests at the stage of defining the content of the right at issue.[82] However, this approach has proven controversial.[83] The most coherent accounts of the two-stage mode of Charter analysis insist upon a conceptual distinction between the two stages.[84] As Lamer C.J.C. stated in his majority reasons in *Swain*, the concern with considering societal interests at the first stage of the Charter analysis is that it undermines the Charter guarantees of the accused.[85] In my opinion, this view extends to the development of new police powers under the ancillary powers doctrine. I would also suggest that doctrinal clarity and coherent constitutional method requires that societal interests be reserved for the section 1 stage of Charter analysis. When these arguments surface elsewhere, the integrity of Charter analysis tends to be compromised.

A final word about the role of section 24(2) of the Charter in this analysis. I have referred throughout this paper to the "two-stage" model of Charter analysis. In many criminal procedure cases, of course, there is a "third" stage. If the court concludes that the state has unjustifiably limited the Charter rights of the accused, the court moves on to the question of remedy and specifically, to the question of whether any evidence gathered in breach of the Charter should be excluded. One of the practical effects of the ancillary powers doctrine is that courts simply never reach the stage where the exclusion of evidence is considered, since the recognition of a new police power almost always presages the failure of the accused's Charter claim. Thus, section 24(2) simply does not play a meaningful role in this analysis in police powers cases. It should also be noted that section 24(2) cannot serve as a meaningful

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[82] MacDonnell, "*Sinclair*", *supra*, note 10. The most prominent examples are to be found in the ss. 7, 10(b) and 11(b) jurisprudence.

[83] Compare *Swain*, *supra*, note 17, with the more recent *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.), which gave rise to a very strong, four-person dissent [hereinafter "*Singh*"].

[84] See, *e.g.*, Weinrib, "Section One", *supra*, note 14; *Singh*, *id.*, *per* Fish J.; *Swain*, *id*.

[85] *Swain*, *id.*, at 977 S.C.R.

substitute for section 1 in cases where the section 1 analysis is functionally unavailable because section 1 and section 24(2) serve different functions. The concerns that animate the section 1 inquiry are primarily related to the costs associated with limiting Charter rights in a particular case. The section 24(2) analysis, on the other hand, is concerned with the "long-term repute of the justice system".[86]

V. CONCLUSION

In this paper I have argued that in ancillary powers cases, the Supreme Court appears to have relocated the section 1 justification analysis to the stage of determining whether the police were acting within the scope of their common law police powers when they detained and/or arrested an accused. I have suggested that one possible explanation for this state of affairs is the functional unavailability of the section 1 analysis in cases where the police have violated Charter rights without prior legislative or common law authorization.

It is clear that the ancillary doctrine incorporates a similar requirement of justification as section 1, meaning that police powers will be crafted in a manner that satisfies a standard of proportionality. But this departure from the standard mode of Charter analysis still raises concerns, for the reasons I have explained in this paper. There are many reasons why courts ought not to be engaged in the incremental expansion of police powers, the principal one being that it casts courts in the role of facilitating the progressive erosion of Charter rights.[87] Rights are far weightier than the common law interpretative tools that courts have imagined them to be in the police powers context. This fact has been obscured by the ancillary powers doctrine that has developed in Canada since *Dedman*. When Charter rights are but one among many competing interests to consider in fashioning common law rules, the evidence suggests that individual rights are sacrificed. For all these reasons, then, courts should be reluctant to continue expanding police powers under the ancillary powers doctrine.

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[86] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 70 (S.C.C.).

[87] James Stribopoulos, "Has Everything Been Decided? Certainty, the Charter and Criminal Justice" (2006) 34 S.C.L.R. (2d) 381, at 405.