CROSSING THE RUBICON: OF SNIFFER DOGS, JUSTIFICATIONS, AND PREEMPTIVE DEFERENCE

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The Supreme Court of Canada, in its recent "sniffer dog" cases, has once again resorted to ancillary powers to create new and constitutionally sound search powers for police. For a second consecutive year, the Supreme Court of Canada has used the once "rare" ancillary powers test to enshrine police powers that were neither contemplated in legislation, nor given express effect in the common law prior to these decisions. In articulating this test, the Court has constructed a calculus that is remarkably similar to section 1 justification analysis under the Canadian Charter of Rights and Freedoms. The synergy between the section 1 test and the ancillary powers test resuscitates grave concerns about judicial activism at the Supreme Court level. However, such activism is more acutely troubling in the context of the judicial invention of police powers. The use of deferential utilitarianism to retrospectively evaluate split-second police decision making, and the concomitant justification and constitutionalization of new common law police powers, effectively stunt the Court's ability to advocate for rights or to effectively engage in dialogue with Parliament. The sort of activism advanced in the recent "sniffer dog" cases is not the simple usurpation of the parliamentary role — it is, rather, a matter of saving parliamentarians from the political heat and the bother associated with the supervision of police powers. This is a troubling species of judicial activism: preemptive deference.

La Cour suprême du Canada, dans les affaires « chiens renifleurs » récentes, a eu recours, une fois de plus, à des pouvoirs accessoires afin de créer des nouveaux pouvoirs de perquisition constitutionnels pour la police. Pour une deuxième année consécutive, la Cour suprême du Canada s'est servi du test des pouvoirs accessoires, autrefois « rare », pour consacrer par la loi des pouvoirs de la police dont on avait ni considéré dans la législation, ni donné effet expressément dans la common law avant ces jugements. En exprimant clairement ce test, la cour a construit un calcul qui ressemble étonnamment à l'analyse de la justification au regard de l'article premier de la Charte canadienne des droits et libertés. La synergie entre le test de l'article premier et le test des pouvoirs accessoires ravive de sérieuses inquiétudes par rapport à l'activisme judiciaire au niveau de la Cour suprême. Cependant, un tel activisme est d'autant plus inquiétant dans le contexte de l'invention judiciaire de pouvoirs de la police. L'emploi de l'utilitarisme déférent pour examiner rétrospectivement la prise de décision éclair des policiers ainsi que la justification concomitante de nouveaux pouvoirs de la police dans la common law et leur constitutionnalisation entrave effectivement la capacité de la cour à promouvoir les droits ou à engager le dialogue avec le Parlement de façon efficace. Le type d'activisme employé dans les affaires « chiens renifleurs » récentes n'est pas une simple usurpation du rôle parlementaire, il s'agit plutôt d'éviter aux parlementaires la pression politique et l'ennui associés au contrôle des pouvoirs de la police. Cela représente une espèce d'activisme judiciaire inquiétante : la déférence préventive.

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I. INTRODUCTION

> I do not favour an approach that effectively renders sniffer dogs useless until Parliament chooses to enact legislation . . . We have crossed the Rubicon.[1]
>
> Justice Binnie and Chief Justice McLachlin

The Supreme Court of Canada in its recent and controversial cases *R. v. Kang Brown* and *R. v. A.M.*,[2] determined, in oddly constituted majorities,[3] that the police searches in question, conducted with the aid of sniffer dogs, were unreasonable under section 8 of the *Charter*.[4] The twin decisions were portrayed in the media as a victory for civil liberties. Frank Addario, president of the Criminal Lawyers' Association, was quoted as saying: "[T]his is a good day for civil liberties . . . The judgment is a reasonable compromise between law enforcement aspirations to search indiscriminately and the right to privacy."[5] Perhaps just as predictably, police forces and the federal Tories decried the decision as another impediment to effective police practices. In a photo opportunity Public Safety Minister Stockwell Day, posing with a sniffer dog, stated that "I don't love the ruling but we respect the rule of law."[6] Tom Stamatakis, vice-president of the Canadian Police Association expressed his dissatisfaction, noting that "[w]e're no longer going to be able to show up and randomly search."[7]

However, the media portrayal of the decisions in *Kang-Brown* and *A.M.* arguably obfuscate the most important facet of these cases — the proliferation

1 *R. v. Kang-Brown*, 2008 SCC 18 per Binnie J. and McLachlin C.J. at para. 22 [*Kang-Brown*].

2 *R. v. A.M.*, 2008 SCC 19 [*A.M.*].

3 The majorities while agreeing on the disposition were split on the existence of the sniffer dog search power – a power that a differently constituted majority agreed existed.

4 *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 [*Charter*].

5 Richard Brennan, "Random Searches Curbed: Bringing in Sniffer Dogs without Justification Violates Privacy Rights, Supreme Court Rules" *The Star* (26 April 2008), online: The Star <http://www.thestar.com/printArticle/418696>; Janice Tibbets, "Supreme Court Muzzles Sniffer Dogs" *The National Post* (25 April 2008), online: The National Post <http://www.nationalpost.com/story.html?id=471857>; Sue Bailey, "Tories Hint at Measures to Offset Court Restrictions on Dog Searches" *The Globe and* Mail (30 April 2008), online: The Globe and Mail <http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FRTGAM.20080430.wtories-dogs0430%2FBNStory%2FNational%2F&ord=112184502&brand=theglobeandmail&force_login=true>.

6 Bailey, *ibid.*; Janice Tibbetts,"Court's Youth Crime Decision a Blow to Tory Crime Agenda" *The National Post* (16 May 2008), online: The National Post <http://www.nationalpost.com/news/story.html?id=520100>.

7 Tibbets, *supra* note 5.

of the use of the *Waterfield* test for police powers.[8] For a second consecutive year, the Supreme Court of Canada has used the once "rare" *Waterfield* test of ancillary powers to enshrine police powers neither contemplated in legislation, nor given express effect in the common law prior to these decisions. While the disposition of the Court, in the majority, found the searches in question unreasonable,[9] a differently constituted majority determined that the police possessed a common law power to search using sniffer dogs without a warrant, on the basis of suspicion.[10]

After the Court's initial use of the *Waterfield* test, more than a decade passed before it revisited its analysis.[11] Subsequently, the Court has used the test to create and justify police powers on five significant occasions: *Kang-Brown*, *A.M*, *R. v. Clayton*,[12] *R. v. Mann*,[13] and *R. v. Godoy*.[14] What happened in the intervening years between the *Waterfield* test's inauguration and its recent utility for the Court? Has the Court shifted its judicial philosophy towards activism, or has the Court merely developed the test with enough sophistication to be more useful in general?

A minority (per Justices LeBel, Fish, Abella, and Charron) in *Kang-Brown* and *A.M.* expressed its dissatisfaction at the repeated use of the *Waterfield* test:

> [J]urisprudence-based solutions advanced in the reasons of certain of my colleagues, who openly or implicitly advocate the creation of new common law rules reducing the standard of scrutiny of state intrusion into privacy, do not represent an appropriate exercise of judicial power in the circumstances of this appeal and of the companion appeal in *A.M.*[15]

Have we "crossed the Rubicon" as the epigraph to this article suggests, or

8 *R. v. Waterfield*, [1963] 3 All E.R. 659 [*Waterfield*]; I will discuss the British use of this case and its limited interpretation under the heading Lessons for Ancillary Powers, while I will discuss the Canadian iteration under the heading: The Evolution of the Waterfield Test in Canada.

9 *Kang-Brown, supra* note 1; and *A.M., supra* note 2 as per McLachlin C.J., Binnie, LeBel, Fish, Abella, and Charron JJ.

10 *Kang-Brown, ibid.* at paras. 26 and 75; and *A.M., ibid.* at paras. 12-14 as per McLachlin, Binnie, Deschamp, and Rothstein JJ who said that the suspicion must be "reasonable"; but see Bastarache J. who said that the reasonable suspicion may be "generalized" in *Kang-Brown, ibid.* at paras. 215, 243-44; and *A.M., ibid.* at para. 152.

11 The Court originally turned to the *Waterfield* test in *Dedman v. The Queen*, [1985] 2 S.C.R. 2 [*Dedman*]; however, it was not until *R. v. Godoy*, [1999] 1 S.C.R. 311 [*Godoy*] that the Court revisited the matter.

12 2007 SCC 32 [*Clayton*].

13 2004 SCC 52, [2004] 3 S.C.R. 59, [*Mann*].

14 *Godoy, supra* note 11.

15 *Kang-Brown, supra* note 1 at para. 11, per LeBel, Fish, Abella, and Charron JJ.

is the Court still the upholder of a common law which has "long been viewed as a law of liberty?"[16] Has the Supreme Court abandoned this notion that was traditionally "part of the ethos of our legal system and of our democracy?"[17]

In this article, I will explore these questions through an examination of the evolution of the *Waterfield* test, its resurgence in recent years, and its resemblance to another *Charter*-era test for justifiable use of government powers: the test of justification under section 1 of the *Charter*. I will ask whether the Court's justificatory *Waterfield* calculus is appropriate for a test which both expands police powers and defends police actions. In the final part of this article, I will explore whether the judicious use of the *Waterfield* test represents a shift in judicial philosophy — in particular, I will explore the question of whether the use of the *Waterfield* test reveals a troubling species of activist agenda.

Key to the arguments presented in this article is the recognition of an affinity between the Court's *Waterfield* calculus and its approach to section 1 of the *Charter*. Evidence of this affinity may be seen in the similarities in justificatory investigation undertaken by a court in both contexts. Critiques levelled at the Supreme Court for its approach towards section 1 justification analyses have problematized the limits of judicial review in that context. Given the similarities between section 1 analysis and *Waterfield*, we can query whether anything is lost in exporting the critiques of the Court which focus on the limits of judicial review in the context of section 1, into the *Waterfield* context. I argue that nothing is lost in this transfer; indeed, the critiques become even more lucid, pronounced, and revealing when applied in the *Waterfield* context. Ultimately, I conclude that the ancillary powers test is an illegitimate judicial tool.

II. THE EVOLUTION OF THE *WATERFIELD* TEST IN CANADA

The *Waterfield* test was introduced as a mechanism for justifying police powers by the Supreme Court in *Dedman v. The Queen*. In *Dedman*, the appellant complied with a police officer's request to stop his vehicle. The stop was part of a spot check program which aimed to detect, deter, and reduce impaired driving. The officer, while checking the licence, smelled a strong odour

16 *Ibid.* at para. 12 per LeBel, Fish, Abella, and Charron JJ.
17 *Ibid.*

of alcohol on the driver's breath and demanded a breath sample. Despite repeated attempts, the appellant failed to provide a sufficient sample. He was charged with failing, without reasonable excuse, to comply with a demand to supply a breath sample. The legal authority for conducting the random stop was in question. Noting that there was no legislative or other recognized rule giving authority for the stop, the majority of the Court relied on the *Waterfield* test. Quoting the *Waterfield* judgment, the majority noted that the task for the Court in considering whether the stop was justified was 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.[18]

The Court noted that driving on a public highway was not a "fundamental liberty like the ordinary right of movement," but a "licensed activity."[19] Nonetheless, there was a *prima facie* unlawful interference with liberty not authorized by statute.[20] However, the detention unquestionably fell within the scope of the duties of a police officer to prevent crime and to protect life and property by the control of traffic.[21]

In considering the justifiability of police conduct in this case, the Court considered that "the interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference."[22] The Court noted that impaired driving was a serious problem in the context of a licensed activity, and that any negative psychological effects on a driver would be mitigated by the "well-publicized nature of the program which is a necessary feature of its deterrent purpose."[23] Since the stop was of a "relatively short duration and of slight inconvenience," the stop was not an "unreasonable interference with the right to circulate on the public highway" and not, therefore, an unjustifiable use of police power.[24]

Therefore, following *Dedman*, it appeared that the *Waterfield* test was not

18 *Dedman, supra* note 11 at para. 66.
19 *Ibid.* at para. 68.
20 *Ibid.*
21 *Ibid.*
22 *Ibid.* at para. 69.
23 *Ibid.*
24 *Ibid.*

merely a *justification* for police conduct in a given context, but more importantly a *gap-filling* measure which could be used to expand police powers on a case-by-case basis, where the conduct was ultimately justifiable. Indeed, following *Dedman* the limits of this stop power was litigated at length before the Court to determine the nature and scope of the newly created police power.[25]

The gap-filling function of *Waterfield* was once again employed in *Godoy*. Two police officers received a call from dispatch concerning a 911 emergency call from the accused's apartment, in which the line had been disconnected before the caller spoke. Four officers arrived at the premises. They knocked on the door. The accused partially opened the door and reported to the officers that there was no problem. One of the officers asked to enter the apartment to investigate but the accused tried to close the door. The officer prevented him from shutting the door and the four officers entered the house. Once inside, an officer heard a woman crying, and then found the accused's common law wife in their bedroom, curled in a fetal position. Her left eye was swollen and she claimed that the accused had hit her. Based on these observations, the accused was placed under arrest for assault.

The Court articulated the *Waterfield* test yet again. If police conduct constituted a *prima facie* interference with a person's liberty or property, as it did here, the Court must consider two questions: "first, does the conduct fall within the general scope of any duty imposed by statute or recognized in common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty."[26] Since the parties did not "seriously debate" whether the police had a common law duty to respond to distress calls, the "real question" concerned the second branch of the *Waterfield* test — justifiability.[27] The intrusion was justifiable in this case based on the totality of the circumstances:

> The police were responding to an unknown trouble call. They had no indication as to the nature of the 911 distress. They did not know whether the call was in response to a criminal action or not. They had the common law duty . . . to act to protect life and safety. Therefore, the police had the duty to respond to the 911 call . . . their duty extended to ascertaining the reason for the call.[28]

The Supreme Court found a new use for the *Waterfield* test in *Mann*,

25 See for example, *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, *R. v. Hufsky*, [1988] 1 S.C.R. 621; and *R. v. Mellenthin*, [1992] 3 S.C.R. 615.

26 *Godoy, supra* note 11 at para. 12.

27 *Ibid.* at para. 17.

28 *Ibid.* at para. 23.

when it used the test to justify an investigative detention. In *Mann*, two police officers approached the scene of a reported break and enter and observed the accused, who matched the description of the suspect, walking. They stopped him. Mann identified himself and complied with a pat-down search for weapons. During the search, one officer felt a soft object in Mann's pocket. He reached into the pocket and found a small plastic bag containing marijuana. He also found a number of small plastic baggies in another pocket. Mann was arrested and charged with possession of marijuana for the purpose of trafficking.

The majority of the Court in *Mann* relied on an Ontario Court of Appeal case, *R. v. Simpson*,[29] in reaching its decision. The majority discussed the principles governing the use of a police power to detain for investigative purposes. According to the majority, "the evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement," required that investigative detentions be "premised upon reasonable grounds."[30] Such reasonable grounds could be established "on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence."[31] However, the overall reasonableness of the decision to detain would be examined in all of the circumstances, including the extent to which the interference with individual liberty was "necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test."[32]

The majority concluded that "the officers had reasonable grounds to detain the appellant."[33] The totality of the circumstances indicated that the ac-

29 (1993), 12 O.R. (3d) 182 [*Simpson*].

30 *Mann, supra* note 13 at para. 34; see also at para. 31, where the Court noted that:

> the articulable cause standard discussed in *Simpson* has been adopted from American Fourth Amendment jurisprudence, namely the "stop and frisk" doctrine with its genesis in *Terry v. Ohio*, 392 U.S. 1 (1968). The doctrine developed as an exception to the Fourth Amendment right to be free from unreasonable search and seizure, where detention is viewed as a "seizure" of the person. The United States Supreme Court held in *Terry* that a police officer may seize an individual reasonably suspected of imminent or on-going criminal activity, ask questions of him or her, and perform a limited frisk search for weapons. Subsequent jurisprudence requires the totality of the circumstances to be taken into account when determining that sufficient reasonable articulable suspicion of criminal activity exists to justify the seizure (see *United States v. Cortez*, 449 U.S. 411 (1981)).

31 *Ibid.* at para. 34.

32 *Ibid.*

33 *Ibid.* at para. 47.

cused "closely matched the description of the suspect," and was "only two or three blocks from the scene."[34] These factors in aggregate allowed "the officers to reasonably suspect that the appellant was involved in recent criminal activity, and at the very least ought to be investigated further."[35] The majority was careful to avoid stigmatizing an individual for being in a high crime area: "[T]he presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals."[36] Using the *Waterfield* test, the Court also found a common law basis for a protective pat-down search during an investigative detention.[37]

The majority in *Mann* made it clear that the *Waterfield* test, combined with a reasonable grounds requirement, vitiated any concerns regarding the constitutionality of the detention under section 9 of the *Charter* (arbitrary detention). The extent of this finding was not clarified completely until the recent *Clayton* case.

Clayton involved the detention of two individuals in a car in the back lot of a strip club. A 911 call, recorded at 1:22 a.m., reported that four "black guys" were openly displaying handguns in the parking lot of a strip club. The caller identified four vehicles. The dispatcher put out a gun call and police responded immediately. At 1:26 a.m., two officers parked their police vehicle in the club's lot at the back exit, and stopped the first car to leave the scene. The officers continued the detention upon noticing suspicious behaviour on the part of the detainees.

The majority noted that the police conduct did indeed fall within the first *Waterfield* branch, since the officers were clearly acting in the course of their duty to investigate and prevent crime when they stopped the car and detained its occupants.[38] While the police had no specific statutory authority for the initial stop, it was "well established that the police power to interfere with individual liberties reaches beyond those powers specifically enumerated in statutes."[39] The majority further articulated the justifiability branch of *Waterfield*:

34 *Ibid.*
35 *Ibid.*
36 *Ibid.*
37 *Ibid.* at paras. 38 and 48.
38 *Clayton, supra* note 12 at para. 23.
39 *Ibid.*

> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive . . . This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.[40]

The majority concluded that the police conduct in the case was justified in the totality of the circumstances. The initial detention was reasonably necessary as a response to "the seriousness of the offence and the threat to the police's and public's safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police."[41] The initial stop was, according to the majority, a justifiable use of common law police powers and not an arbitrary detention under the *Charter*.[42] This last point is particularly salient, since the majority made clear that the *Waterfield* test was both a gap-filling test for the common law and a method for establishing whether a detention was arbitrary in a constitutional sense. Indeed, the majority went to great pains to note that:

> [I]f the police conduct in detaining and searching . . . [the accused] . . . amounted to a lawful exercise of their common law powers, there was no violation of their *Charter* rights. If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the right under the *Charter* not to be arbitrarily detained or subjected to an unreasonable search or seizure.[43]

This passage indicates that the majority sees a twin role for the use of the *Waterfield* calculus. First, the test represents a gap-filling function for police common law powers (in authorizing "new" common law searches, for instance).[44] Second, the test is, indeed, the constitutional analysis for determining the arbitrariness of investigative detention. The second matter is most certainly not what the Court anticipated in *Dedman* when it first endorsed the *Waterfield* test. It was however, the first matter that the Court returned to in its recent decisions of *Kang-Brown* and *A.M.*

Kang-Brown and *A.M* are both cases involving the warrantless use of

40 *Ibid.* at para. 31.
41 *Ibid.* at para. 41.
42 *Ibid.*
43 *Ibid.* at para. 19.
44 For examples, see *Godoy, supra* note 11; *Mann, supra* note 13; *A.M., supra* note 2; and *Kang-Brown, supra* note 1.

sniffer dog searches by police. In *Kang-Brown* the search took place in a bus station, while in *A.M* the searches took place in a high school gymnasium. Both cases advanced search and seizure law, and the majorities in each case found that the searches were conducted unreasonably. The intricacies of those findings are beyond the scope of this work; however, the majority of the justices founded a new common law search power in stating that sniffer dog searches could occur without warrant on the basis of reasonable suspicion, using the *Waterfield* test.[45] The majority in *Kang-Brown* expressly approved of the gap-filling function of the *Waterfield* test, noting that "the common law is forever filling 'gaps' . . . In this case, the relevant methodology adopted and applied by our Court is the *Waterfield/Dedman* test."[46]

Chief Justice McLachlin and Justice Binnie further noted that the first branch of *Waterfield* was easily satisfied: "It cannot be controversial that police have a duty to solve crimes and bring the perpetrators to justice."[47] Chief Justice McLachlin and Justice Binnie found that the use of such a power was justifiable, noting that "dogs assist the police in many crucial ways . . . where the police comply with the requirements of the *Charter*, they possess the common law authority to make use of sniffer dogs in places to which they have lawful access for the purposes of criminal investigations."[48]

Justices Deschamps and Rothstein went even further in espousing the gap-filling function of the *Waterfield* test. They noted that the second branch of the test could be used to determine the constitutional standards required of police in the circumstances: "For the purpose of the second stage of the *Waterfield* test, the determination of the applicable standard must be based on what is *reasonably necessary in light of the totality of the circumstances.*"[49] According to Justices Deschamps and Rothstein, the police in the case were justified in conducting the search based on reasonable suspicion, because the objective being pursued — the curbing of the illegal drug trade — was an important one,[50] the sniffer dogs were "well-trained and highly accurate,"[51] the search was minimally intrusive,[52] and because the police made use of

45 *Kang-Brown* and *A.M.*, *supra* note 10.

46 *Kang-Brown, supra* note 1 at para. 50, per McLachlin C.J. and Binnie J., and subsequently endorsed by Deschamps, Rothstein, and Bastarache JJ.

47 *Ibid.* at para. 52.

48 *Ibid.* at para. 57.

49 *Ibid.* at para. 159 [emphasis in original]; see also para. 169.

50 *Ibid.* at para. 184.

51 *Ibid.* at para. 185.

52 *Ibid.* at para. 186.

"objectively discernible facts" before beginning the search.[53] These factors in aggregate suggested that the use of the reasonable suspicion standard was reasonably necessary, and therefore a justifiable use of police powers, because it struck "an appropriate balance between the appellant's reasonable privacy interest and society's interest in interdicting illicit substances carried on public transportation."[54]

Kang-Brown and *A.M.* demonstrate the Court's willingness to use the *Waterfield* test to create new common law police powers. Indeed, with the release of these decisions, the Supreme Court has used the ancillary powers doctrine four times between 2004 and 2008; this represents the high-water mark of the test's usage at the Supreme Court level. Certainly, this was a matter of great concern to the minority judges in these cases. Justices LeBel, Fish, Abella, and Charron did not dispute that the Court has the power to create common law; they did, however, note that this power does not mean that the Court should necessarily exercise it, particularly in the context of fundamental rights.[55] This concern is indicative of a deep-seated divide in the Court's philosophy regarding its role as guardian of the Constitution. I will return to this matter in the final part of this article, but first I wish to give further meaning and content to the factors weighed by the Court in applying the ancillary powers test. I believe that this meaning and content can be further elucidated by analogizing the *Waterfield* test to section 1 constitutional analysis.

III. ANALOGIZING TO SECTION 1

The *Waterfield* test has been described by some scholars as a bare "cost-benefit analysis."[56] This is an intriguing observation because it reveals the test at its simplest — a balancing act between the pros and cons of police conduct in a particular context. This raises the question of whether the *Waterfield* test has an affinity with other *Charter*-era balancing tests. The answer to this question could prove useful in revealing the judicial strategies behind the use of such a test in the context of the expansion of police powers. I suggest that the *Waterfield* test has an affinity with the section 1 test of justifiability under the *Charter* (also known, of course, as the *Oakes* test[57]).

53 *Ibid.* at para. 187.

54 *Ibid.* at para. 191.

55 *Ibid.* at para. 6.

56 James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's Law J. 1 at 20.

57 *R. v. Oakes*, [1986] 1. S.C.R. 103 [*Oakes*] at paras. 69-72.

A student of the *Charter* would undoubtedly recognize that *Charter* rights and freedoms are by no means absolute and that, under section 1 of the *Charter*, Parliament and legislatures may impose reasonable limits on rights and freedoms as long as they can be "demonstrably justified in a free and democratic society."[58] The *Oakes* analysis posits a test of justifiability when an accused asserts that her rights and freedoms have been infringed (usually by legislative enactment, though any government action may suffice). An infringement may be saved by the application of section 1.

If the rights of an accused are indeed infringed by government action, then the courts will enter the discussion of the justification of that infringement. This phase of analysis requires:[59]

> 1) That the purpose of the legislation be sufficiently pressing and substantial to justify limiting a freedom or right; and
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> 2) That the means employed by the legislation be proportional to its objective. This proportionality requires that:
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> a) there be a rational connection (on reasonable grounds) for the legislation to effectively achieve its objective;
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> b) the legislation limit the right no more than is necessary in order to achieve the objective; and
>
> c) there be proportionality between the effects of the measure limiting rights and the legislative objective; the test is whether the deleterious effects of the legislation, properly administered, exceeds the salutary effect of the legislation and how this compares to the legislative objective.

This justification analysis shares much in common with the *Waterfield* calculus. In *Kang-Brown*, for instance, Justices Deschamps and Rothstein applied *Oakes*-esque reasoning in finding the warrantless sniffer dog search to be authorized by law. Justices Deschamps and Rothstein began their analysis by discussing the important crime control objective behind the use of sniffer dogs. They noted that not only was the objective important, but the consequences of failing to curb the drug trade could be dire: "Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime, but can also destroy lives."[60] Similarly, in *Clayton* the majority also emphasized

58 S. 1 of the *Charter*, *supra* note 4.

59 *Oakes*, *supra* note 57.

60 *Kang-Brown*, *supra* note 1 at para. 184.

the importance of the police objective. The majority noted that the offence in question was "a serious offence, accompanied by a genuine risk of serious bodily harm to the public."[61]

Both of these instances demonstrate reasoning that parallels the first step of the *Oakes* test — a determination of whether the governmental objective, in this case the police objective, is pressing and substantial. In both instances, this emphasis on the importance of the police conduct represents a relatively new trend in *Waterfield* reasoning. In *Mann*, the Court paid scant attention to the importance of the police objective, though in *Godoy* the majority did justify the home entry power of police in response to a 911 call, in part, on the basis of the importance of the police objective of protecting life: "The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined."[62]

In its recent applications of the *Waterfield* test, the Court's reasoning also appears to borrow from the *Oakes* assessment of proportionality. On several occasions, the Court has relied on the demonstration of the rational connection between the police conduct in question, and the achievement of the objective. In *Kang-Brown*, Chief Justice McLachlin and Justice Binnie emphasized the efficacy of police dog conduct, and hence the reasonableness of their use in investigations. They note that the dogs possess an "acute sense of smell,"[63] implying their use is a rational component of police investigations. Justices Deschamps and Rothstein go further in this rational connection analysis. They emphasize the precise way in which the police conduct and sniffer dog activity were rationally connected to the investigation by noting that dogs are highly effective investigative tools, and that the officer in charge of the operation was experienced and well trained.[64]

Similar rational connection analysis was evident in *Clayton*. The majority noted that the police responded in a fashion that reasonably met the needs of the situation: "[T]he police timing was also responsive to the circumstances . . . within five minutes of the 911 call and one minute of their own arrival at

61 *Clayton, supra* note 12 at para. 33; interestingly, the minority, at paras. 59-61, offered a modification of *Waterfield* that would culminate in a s.1 analysis, principally because, in the minority's view, s.1 analysis puts primacy on "the liberty interfered with" (at para. 78) that *Waterfield* did not.

62 *Godoy, supra* note 11 at para. 16.

63 *Kang-Brown, supra* note 1 at para. 57.

64 *Ibid.* at para. 185.

the strip club, they had detained . . . [the] vehicle."[65] In *Godoy,* the majority repeated the *Dedman* proposition "that the interference with liberty must be necessary for carrying out the police duty and it must be *reasonable*"[66] — a statement which reads as the police power analog of *Oakes* rational connection analysis.

Unsurprisingly, the affinity of *Waterfield* with *Oakes* is also evident in the ancillary powers cases, when the Court goes to great pains to note that the police conduct in question represents a minimal impairment of the accused's rights. In *Kang-Brown,* Chief Justice McLachlin and Justice Binnie express this minimal impairment concern by noting that where the police comply with the requirements of the *Charter,* they satisfy the ancillary powers doctrine.[67] Justices Deschamps and Rothstein provide a more traditional minimal impairment analysis, noting that the use of the sniffer dog "could not have been less intrusive — she merely sat down immediately upon entering the foyer to indicate the presence of a controlled substance."[68]

In *Clayton,* the majority noted that the rights of the detainees in the case were impaired minimally, and that the police conduct was well-tailored to the situation. The road block set up at the back of the strip club was "temporally, geographically and logistically responsive to the circumstances known by the police when it was set up."[69] In *Godoy,* the Court was careful to circumscribe the home entry power they created to ensure minimal impairment in future cases. The majority noted that "the privacy interest of the person at the door must yield to the interests of any person inside the apartment."[70] While conducting such searches, an officer's power does not extend further than locating the caller, determining the reason for making the call, and providing the necessary assistance — an officer may not further "search premises or otherwise intrude on a resident's privacy or property."[71]

Indeed, minimal impairment analysis was present at the Court's inauguration of the *Waterfield* ancillary powers doctrine in *Dedman.* The majority in that case noted that the impairment of rights by police conduct was minimized in the context of activities that were not fundamental liberties. The majority noted that driving "is not a fundamental liberty like the ordinary right of

65 *Clayton, supra* note 12 at para 39.
66 *Godoy, supra* note 11 at para. 22.
67 *Kang-Brown, supra* note 1 at para. 57.
68 *Ibid.* at para. 186.
69 *Clayton, supra* note 12 at para. 41.
70 *Godoy, supra* note 11 at para. 23.
71 *Ibid.* at para. 22.

movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property"[72] Hence, the random vehicle stop was not beyond the pale of common law powers.

Predictably, the courts use the aforementioned proportionality criteria to weigh the costs and benefits of the police conduct in question to determine whether impugned police actions are justifiable or not. The cost-benefit analysis is rendered in the language of the totality of the circumstances. This concluding aspect of the *Waterfield* calculus dovetails with the final step in the *Oakes* test. For instance, Justices Deschamps and Rothstein concluded in *Kang-Brown* that "in light of the totality of the circumstances, the police in the case at bar made limited and prudent use of a law enforcement tool that was available to them."[73] In *Clayton,* the majority concluded that the "constellation of circumstances was such that the police were required to, and did, respond quickly and appropriately to the information they had about the possession of guns by individuals in this particular parking lot."[74] In *Godoy,* the Court, in a most acute fashion, distilled the cost-benefit analysis simply and powerfully by noting that "a threat to life and limb more directly engages the values of dignity, integrity and autonomy underlying the right to privacy than does the interest in being free from the minimal state intrusion of police entering an apartment to investigate a potential emergency."[75] These summative calculi rely on the justification analyses that precede them and, much like the *Oakes* equation, rarely represent more than a scant paragraph of concluding assessments. This assessment of the final cost-benefit analysis has been described by some scholars as no more than a conclusion to the rest of the test.[76]

I have argued that the *Oakes* analysis for justifying legislative infringement of *Charter* rights bears a striking similarity to the *Waterfield* test, which is used to determine the arbitrariness of investigative detentions and expand police powers. Indeed, the similarities are so striking that one could query whether the dovetailing of the two tests has been a deliberate crafting of judicial strategy rather than a happy accident (for instance, the minority in *Clayton* actually undertook a detailed section 1 analysis to justify the police conduct). While the analogical evidence proves compelling, one must dig deeper to see whether the similarity between the tests reveals something of the judicial philosophies that underlie their use. A compelling case can be made

72 *Dedman, supra* note 11 at para. 68.

73 *Kang-Brown, supra* note 1 at para. 198.

74 *Clayton, supra* note 12 at para. 46.

75 *Godoy, supra* note 11 at para. 23.

76 Peter W. Hogg, "Section 1 Revisited" (1992) 1 National J. Constitutional Law 1 at 3.

that as the *Oakes* test has evolved, so too has the corresponding philosophy of the *Waterfield* calculus. If we can understand the Supreme Court's views with respect to *Oakes* analysis today — at least in a broad sense — this might provide some inkling of where the Court stands with respect to the lesser-used, if recently prominent *Waterfield* test. Specifically, I wish to address the question of whether concerns raised regarding the limits of judicial review, manifest in the Court's development of the *Oakes* test, are applicable to the Court's development of the *Waterfield* test? After laying out some prominent accounts of the limits of the Court's *Oakes* analysis, I will analyze those concerns in the ancillary powers arena. Ultimately, I conclude that critiques of *Oakes* analysis pose grave concerns for the legitimacy of the *Waterfield* test.

IV. SITUATING *OAKES*

Oakes was originally promulgated as a fairly stringent test. The government had to demonstrate why its measures were both justifiable and reasoned limits on *Charter* rights, and each phase of analysis required cogent and compelling proof. The Court originally spoke of the government demonstrating that its measures achieved pressing and substantial objectives, a standard that surely would not be unduly onerous for a government to meet.[77] Yet over time, this standard has drifted, now requiring of the government only that legitimate and important goals be at stake.[78] The specificity of the objective has been drawn in increasingly broader terms. For instance, in *R. v. Butler*[79] the objective of antipornography legislation was described by the majority as the prevention of harm, specifically the prevention of harm to women, but also more broadly harm to society.[80]

The erosion of the *Oakes* standard continued in the context of the "deference to the legislature" approach, which was gradually developed by the Court. It has noted that in social, economic, and political spheres, where the legislature must reconcile competing interests in choosing one policy among several acceptable options, the courts should accord greater deference to the legislatures' choices because they are in the better position to make such choices.[81] This type of reasoning has allowed the Court to accept that the rational connection test may be satisfied by a "causal connection between the infringe-

77 *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R 927 at 986.
78 *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211 at 291.
79 *R. v. Butler*, [1992] 1 S.C.R. 452 [*Butler*].
80 *Ibid.* at paras. 50, 51-52.
81 *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 59.

ment and the benefit sought on the basis of reason or logic,"[82] on a "balance of probabilities"[83] and, if necessary, without direct evidence when a scientific link is difficult to establish.[84] Similarly, the satisfaction of the minimal impairment phase of the *Oakes* test may in some contexts require no more than that the law fall within a range of reasonable alternatives.[85] This high tolerance for parliamentary justification has been described by some scholars as providing legislators with a "margin of appreciation."[86] The high-water mark of this deferential approach was, perhaps, reached relatively recently in the case of *R. v. Bryan*, which involved election speech.[87] The majority noted that "courts ought to take a natural attitude of deference toward Parliament when dealing with election laws."[88] Hence, the Court created and confirmed a presumptive category of deference for all election-based restrictions.

Some scholars have concluded that, ultimately, the *Oakes* test has become nothing more than a "general reasonableness weighing" as opposed to a strict set of evidentiary bars to be met by government.[89] Even conservative scholars who rail against the "judicial activism" of *Oakes* analysis cite, with some exceptions, relatively modest and stable *Charter*-claimant success rates in the ten-year period in which the Court began to develop its deferential approach.[90] Indeed, Christopher Manfredi and James Kelly write that few political scientists have successfully argued that the courts exercise "countermajoritarian power" under section 1, or that "government loss" or "claimant win" rates have systemically increased over time.[91]

Regardless of whose interests the Court may be favouring — government's or claimant's — charges of undue judicial activism proliferate. Certainly, competing accounts of judicial activism abound; achieving a cogent definition of activism has proven troublesome. Even more troublesome has been the achievement of consensus on the meaning of judicial activism among legal

82 *Harper v. Canada (A.G.)*, 2004 SCC 33, [2004] 1 S.C.R. 827 at para. 104 [*Harper*]; see also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 153 [*R.J.R.*].

83 *R.J.R.*, *ibid.*

84 *Ibid.* at para. 154.

85 *Harper*, *supra* note 82 at para. 110; *R.J.R.*, *ibid.* at para. 160.

86 Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of Oakes and Sparrow Tests" (1999) 62 Saskatchewan Law Rev. 543 at 27.

87 2007 SCC 12, [2007] 1 S.C.R. 527 [*Bryan*].

88 *Ibid.* at para. 9.

89 Newman, *supra* note 86 at para. 30.

90 Neil Seeman, "Taking Judicial Activism Seriously" *Fraser Forum* (August 2003) 3 at 10.

91 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 McGill Law J. 741 at 744.

scholars.[92] In undertaking this discussion, I do not merely endorse the view that judicial activism represents "undue incursions" by the courts into the policy domains of elected representatives;[93] rather, in accordance with some scholars, I suggest that judicial activism is better understood as a site of judicial discretion on issues "outside the normal range of judicial expertise."[94]

In the remainder of this article, I will explore these charges of judicial activism as they relate to the *Oakes* equation, and ask whether the same critiques and concerns apply in the context of the *Waterfield* test. I shall try to determine what any analogy between *Oakes* and *Waterfield* might reveal about the Court's philosophy regarding the adjudication of matters of criminal procedure involving police powers. I conclude that critiques of the Court's *Oakes* jurisprudence pose troubling questions for the Court's *Waterfield* logic in future cases. In the final analysis, it is unclear that *Waterfield,* as practiced by the Court, is a legitimate jurisprudential tool.

V. ACTIVISM AND *OAKES*

In this section, I will explore four prominent positions regarding the charge of judicial activism in the Court's use of the *Oakes* standard. (In the interest of space, I must simplify some of the finer points raised by participants in the activism debate.) The four accounts I will review are: 1) claims that the Court has usurped the legislative role; 2) claims that the *Oakes* approach yields unpredictable results, and is therefore incapable of being abjectly antimajoritarian; 3) claims in defence of judicial review in the *Oakes* context because the Court protects rights and "guards" the Constitution; and 4) claims that the dialogic function of the Court is an antidote to the antimajoritarian premise. I do not undertake the review of these accounts to reach a conclusion on whether *Oakes* has been an activist tool of the Court. Indeed, I believe activist claims under the *Oakes* test have proven ultimately equivocal. Rather, I review these accounts in advance of their transposition into the *Waterfield* context. Once transposed, would the concerns raised by these accounts be alleviated or aggravated? Ultimately, I conclude that all of the concerns regarding judicial activism raised in the *Oakes* context are aggravated not alleviated

92 See generally Kent Roach, The *Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law Books, 2001); Margit Cohn & Mordechai Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18 Canadian J. Law & Jurisprudence 333 at 333-34.

93 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 Law J. 525 at 527; Manfredi & Kelly, *supra* note 91 at 743.

94 Manfredi & Kelly, *ibid.* at 744.

when considered in the *Waterfield* ancillary police powers context.

Charges of judicial activism under the Court's section 1 analysis are certainly not uncommon. Some scholars argue that section 1 represents the murkiest of standards and is therefore ripe for a court's "antilegislative agenda."[95] Demonstrating this agenda has proven difficult, in part, because different interpretations of the meaning of "antilegislative agenda" abound. Quantitative analysis of section 1 judicial activism has, according to some scholars, yielded results that are unequivocal: "[R]easonable people can disagree about whether section 1 activism is higher than it should be, but no one can question whether it is higher in relative terms [compared to, for instance, a *prima facie* determination of rights violations]."[96]

Compelling arguments have been made to support the position that judicial discretion affects success rates under section 1. For instance, "the hierarchy of protected expression" the Supreme Court has created for freedom of expression cases clearly correlates with the ability of governments to successfully argue that their actions are justifiable under section 1 — the less protected the expression, the more deference the government receives.[97] Scholars advancing this kind of argument contend that charges of antimajoritarian judicial activism are a distraction from the real issues to be considered under section 1: judicial discretion and the institutional capacity of the Court.[98] Charges of judicial activism under section 1 can be better understood, these scholars assert, as "judicial micro-management of public policy on the basis of poor evidence."[99] The issues the Court faces under section 1, then, are "outside the traditional boundaries of judicial expertise and depend on subjective assessments of often conflicting social science evidence."[100] Such a contention blends the concerns of antilegislative activism with the charge that government action is receiving undue deference by the courts. This contradictory antilegislative, yet deferential agenda allows the courts to work outside of their "comfort zones," to be swayed by compelling but poorly understood social science evidence, and to apply an unpredictable agenda that cannot be counted on to favour liberty over rights-challenging government policy. Indeed, this

95 For a compelling discussion of the court's usurpation of the legislative role see F. L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 34-53; Christopher P. Manfredi, "Judicial Review and Criminal Disenfranchisement" (1998) 60 The Rev. of Politics 279 at 285-87; see generally, Seeman, *supra* note 90.

96 Manfredi & Kelly, *supra* note 91 at 753.

97 *Ibid.*

98 *Ibid.* at 755.

99 *Ibid.*

100 *Ibid.* at 757.

journey has been described as an evolution "from formal consequentialist tests to principles of institutional deference to competing notions of context and principle."[101] In some respects, then, the approach under section 1 has been a journey into the unknown, or at least the unpredictable.[102]

This view of section 1 activism comports with the notion that the *Oakes* equation is a type of Benthamite cost-benefit calculus, representing a standard" rule of utility — the greatest good for the greatest number.[103] The rational connection and minimal impairment equations represent a rough approximation of a "Paretian principle" — social welfare is advanced if "we improve the welfare of one individual without harming the welfare of any other."[104] The difficulty with this kind of equation is that different assessors, possessing different information, may define "greatest good" and "social welfare" differently. This ambiguity in determining utility may support unpredictability in adjudication. In turn, this unpredictability may encourage some justices to grant deference to a preferred legislative agenda by scrutinizing impugned legislation on a "reasonableness" standard, on the assumption that the legislative branch is the better arena in which to weigh such broad policy concerns. However, the variables involved in determining utility would ultimately breed indeterminacy, and claims that a court is engaged in an antilegislative monopolization of policy would seem, on this argument, tenuous or accidental.

Certainly, this has not been the image that the Court portrays of itself. In the Bell Lecture delivered at Carleton University, Chief Justice McLachlin suggested that the Supreme Court was the guardian of the Constitution and the protector of the law of liberty. In this context, values such as liberty have been described as an appeal to "thin" principles — "narrowly defined core values that remain uncontested in constitutional arenas"; however, the exhaustive content of these uncontested values may still be open to debate (and hence be susceptible to the need for judicial pronouncement).[105] Such claims suggest

101 Newman, *supra* note 86 at para. 52.

102 For a general discussion of the unpredictability of s.1 analysis, see Leon E. Trakman, William Cole-Hamilton, and Sean Gatien, "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall Law J. 83.

103 Newman, *supra* note 86 at para. 11; David Beatty "The End of Law: ... At Least As We Have Known It" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1990) 391 at 393.

104 Newman, *ibid.* at para. 11; Beatty, *Ibid.* at 394.

105 Beverley 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) at 117; McLachlin C.J. is supported by a vast swath of academic research in her contention that as guardian of the Constitution the Court is charged with policing the law of liberty. See specifically, Cohn & Kremnitzer, *supra* note 92 at 349-50; see also generally Sir J. Laws,

that when a Court advances or protects core values in adjudicating constitutional cases, it is not behaving in an activist fashion. Indeed, Chief Justice McLachlin argued that "the thesis that judges are a threat to good government and democracy rests on an inaccurate view of how a modern democratic state functions."[106] Chief Justice McLachlin went on to say that it is self evident that judges should make law, and advocated that "the idea that judicial power is undemocratic rests on the notion that democracy means simply 'the rule of the majority.'"[107] This limited view of democracy would, in Chief Justice McLachlin's view, support the tyranny of the majority and undermine the culture of rights that grew from the experience of the Second World War.[108] However, Chief Justice McLachlin was careful to argue that the courts should engage in their legislative role cautiously. The judge should determine that an injustice mandates change in the law, that further injustices would not occur to others after a decision is rendered, that the change in law should be clear and precise, that the rule of law should be disrupted as minimally as possible, and that excessive governmental expenditure should be avoided.[109]

So far, I have discussed the first three interrelated approaches to understanding the Court's role in adjudicating section 1 disputes. The first approach views the activist nature of the Court as an antimajoritarian usurping of legislative prerogative. Under the second approach, the Court has undoubtedly acted outside of its sphere of expertise in *Oakes* adjudication, but it has done so through a mix of utilitarian calculus and legislative deference. The Court's use of *Oakes*, according to this view, yields an account intended to partially dilute accusations of abject antimajoritarianism with the argument that *Oakes* represents a complex and unpredictable amalgam of context and principle. The third, approach explores the position that the Court's activism should be cautious but is (and should be) inherently rights-based, as it guards the

"Is the High Court the Guardian of Fundamental Constitutional Rights?" (1993) Public Law 59; Alison Young, "The Charter, the Supreme Court of Canada and the Constitutionalizing of the Investigative Process" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 2; The Hon. Sir John Laws, "Law And Democracy" (1995) Public Law 72; Anthony Lester, "English Judges as Law Makers" (1993) Public Law 269; Dawn Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" (1987) Public Law 543; Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999) at 59-63; T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 Law Quarterly Rev. 221; Ronald Dworkin, "Introduction: The Moral Reading of the Majoritarian Premise" in *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) 1 [Dworkin, "Moral"] at 17.

106 McLachlin, *ibid.* at 117.

107 *Ibid.*

108 *Ibid.* at 121.

109 *Ibid.* at 125.

Constitution. There is a fourth prominent account of the Court's agenda in section 1 adjudication, which combines elements of each of the first three competing approaches — the metaanalysis of dialogue theory.

For advocates of this fourth dialogue approach, the presumption of judicial finality is mistaken.[110] The judiciary, on this view, should undertake robust rights-based review of laws; legislators, in turn, have an opportunity to respond to Court rulings either by revising unconstitutional legislation, or by using the constitutional override (section 33 of the *Charter*) in extreme cases. By conceiving of the Court as an interactive player in a constitutional dialogue, this fourth approach uses claims of judicial dialogue or partnership in the *Oakes* context to justify sidestepping the antimajoritarian critique of judicial review because the last word is reserved for Parliament.[111] Kent Roach, for example, likens *Charter* dialogue to the dialogue which necessarily occurs in common law adjudication — judges pronounce on matters of law and fairness, but legislatures can displace those pronouncements as they see fit (or defer to the courts). In this approach, the courts are charged with advancing the law of liberty.[112] Other scholars situate the dialogue in a more complex political landscape, viewing the judiciary as "one member of a constitutional network, comprising the other government branches and various political forces and members of society . . . [which are] entrusted with the protection of

110 David Schneiderman, "Kent Roach, the Supreme Court on Trial: Judicial Activism or Democratic Dialogue" (2002) 21 Windsor Yearbook of Access to Justice 633 at 633; Cohn and Kremnitzer, *supra* note 92; Peter W. Hogg & Allison Bushnell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't a Bad Thing After All)" 1997 35 Osgoode Hall Law J. 75.

111 Schneiderman, *ibid.*; Hogg and Bushnell, *ibid.* at 79; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushnell" (1999) 37 Osgoode Hall Law J. 513; Peter W. Hogg & Allison A. Thornton, "Reply to Six Degrees of Dialogue" (1999) 37 Osgoode Hall Law J. 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 Canadian J. Law & Society 3 at 23-24; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 167-72; William J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007); William Waluchow, "Constitutions as Living Trees: An Idiot Defends" (2005) 18 Can. J. of Law & Jurisprudence 207; See Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited — Or "Much Ado About Metaphors" (2007) 45:1 Osgoode Hall Law J. 1 at 32 [Hogg, Thornton & Wright] where the authors refine the dialogue metaphor by arguing:

> that the *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."

112 Schneiderman, *ibid.*; Roach, *supra* note 92 at 286.

core values."[113] Chief Justice McLachlin, while aware of her Court's ability to cautiously legislate, understands the importance and potential of this court-legislature dialogue:

> We can follow the route of confrontation . . . Or we can continue down the road of mutual deference and cooperation between the judiciary and legislatures upon which we seem to have embarked . . . my hope lies with the latter.[114]

What lessons do these accounts of the judicial role provide in the context of the ancillary powers doctrine? In the coming pages, I will explore whether the *Waterfield* test has the potential to meet the challenges that I have described in the above accounts of judicial decision making. Do the concerns leveled at *Oakes* have any relevance for the ancillary powers calculus?

VI. LESSONS FOR ANCILLARY POWERS?

I have already made the case that there is a synergetic link between the *Oakes* and *Waterfield* calculi, and I have identified four broad, interrelated constructs of the *Oakes* equation. Do the constructs reveal any concerns about the Court's use of the *Waterfield* equation? Certainly it would be difficult to argue, in a broad sense, that the Court's use of the ancillary powers test has worked against the interests of the democratic majority or the governmental will, and so has in that sense been unduly activist. If anything, the expansion of police powers through the *Waterfield* test aligns with broader crime control interests typically advanced by legislatures.

Yet in a narrow sense, there is still an antilegislative concern. James Stribopoulos describes the Court's use of the ancillary powers doctrine as a movement away from the Diceyan notion of the rule of law, in which "the absolute supremacy or predominance of regular law" supersedes "wide discretionary authority."[115] Steadfast adherence to the rule of law would support the principle of legality — the notion that liberty is residual and that everything

113 Cohn & Kremnitzer, *supra* note 92 at 340.

114 Beverley McLachlin, "The Charter: A New Role for the Judiciary?" (1991) 29 Alberta Law Rev. 540; some dialogue theorists see the notions of core values and the law of liberty as part and parcel of the dialogue, and as a matter deeply rooted in the rule of law. For example, Hogg, Thornton & Wright, *supra* note 111 at 37 write that "an 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."

115 Stribopoulos, *supra* note 56 at 8; Albert Venn Dicey, *Introduction to the Study of Law of the Constitution*, 10th ed. (London: Macmillan, 1961) at 23-24.

not expressly forbidden is permitted.[116] The use of the ancillary powers doctrine, in Stribopoulos' view, has allowed the Court to drift from "its historic role of standing firm between the individual and the state, insisting on adherence to the principle of legality, and refusing to make up for shortcomings in police powers."[117] In this sense, Stribopoulos argues that the Court has moved away from its "long-established role" and toward a function "traditionally reserved for Parliament."[118] Stribopoulos' construction of what the Court has done in ancillary powers adjudication is an artful mating of the antilegislative critique of judicial activism, and the contention that, indeed, the Court should be the guardian of liberty. The Court's failures — due to its willingness to adjudicate outside of its expertise and expand police powers — have, according to Stribopoulos, stunted any constructive dialogue between courts and Parliament.[119]

Indeed, the British jurisprudential approach to the *Waterfield* test has been to mute its potentially far-reaching effects. Stribopoulos and Joseph Marin note that the British iteration of the ancillary powers test has been applied in a limited way in the United Kingdom, and that Canadian courts have misused the test by interpreting it as a police power generator.[120] Indeed, the test has never been used in British courts to justify entirely new police powers.[121] In *Waterfield*, the accused was charged with assaulting a police officer; the Court in that case used the test solely to determine whether the officer was assaulted while acting in the course of carrying out police duties.[122] This British approach allowed for nothing more than an "incremental and indirect expan-

116 Stribopoulos, *ibid.*; T.R.S. Allan, "Constitutional Rights and Common Law" (1991) 11 Oxford J. of Legal Studies 453 at 457.

117 Stribopoulos, *ibid.* at 55.

118 *Ibid.*

119 *Ibid.* at 70-71; for other critiques of the ancillary powers test see Eric V. Gottardi, *"R. v. Mann*: Regulating State Intrusions in the Context of Investigative Detentions" 2004 21 Criminal Reports (6th) 27; Jason A. Nicol, "Stop in the Name of the Law": Investigative Detention (2002) 7 Canadian Criminal Law Rev. 223; Steve Coughlan, "Search Based on Articulable Cause: Proceed With Caution or Full Stop?" (2002) 2 Criminal Reports (6th) 49; Lesley A. McCoy, "Liberty's Last Stand? Tracing the Limits of Investigative Detention" (2002) 46 Criminal Law Quarterly 319; Ronald J. Delisle, "Judicial Creation of the Police Powers" (1993) 20 Criminal Reports (4th) 29; Alan 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* (Scarborough: Thomson Canada, 1996) 1.

120 James Stribopoulos, "A Failed Experiment: Investigative Detentions: Ten Years Later" (2003) 41 Alberta Law Rev. 335 at 348-52 [Stribopoulos, "Ten"]; Joseph R. Marin, "R. v. Mann: Further Down the Slippery Slope" (2005) 42 Alberta Law Rev. 1123 at para 44; see also Tim Quigley, "Brief Investigatory Detentions: A Critique of R. v. Simpson" (2004) 41 Alberta Law Rev. 935 at 938-39.

121 Stribopoulos, "Ten," *ibid.* at 349.

122 *Waterfield, supra* note 8; Stribopoulos, "Ten," *ibid.*; Marin, *supra* note 120.

sion of existing police powers."[123] In over forty years of adjudication, British courts have cited *Waterfield* approximately the same number of times as has the Supreme Court of Canada since the test was first introduced in Canada in *Dedman* in 1985.[124] Indeed, one British case, in reference to *Waterfield,* noted that the creation of new police powers is a matter best left to legislators, and that the judicial creation of police powers would be "violent."[125] The British approach to the creation of legislative powers has, indeed, been principally legislative;[126] the Canadian judicial approach has not been so restrained.

The minority judgment in *Kang-Brown* laments this unfortunate result. Justices LeBel, Fish, Abella, and Charron decry the Court's abandonment of the common law tradition of liberty protection.[127] The case, they note, "is about the freedom of individuals and the proper function of the courts as guardians of the Constitution."[128] They write that the Court, in creating a common law power for warrantless sniffer dog searches, is out of its depth: "[H]ere the courts are ill-equipped to develop an adequate legal framework for the use of police dogs."[129] Rather, the minority argues that "departures from [the] constitutional framework ha[ve] to be justified by the state."[130] The presence of common law precedents expanding police powers does "not mean that the Court should always expand common law rules, in order to address perceived gaps in police powers . . . especially when rights and interests as fundamental as personal privacy and autonomy are at stake."[131] Ironically, the minority notes that the erosion of privacy rights at the hands of the majority of the Court is being derived "not from state action or from the laws of

123 Stribopoulos, "Ten," *supra* note 120.

124 *Ibid.* at note 67.

125 *Ibid.* at 350; *McLorie v. Oxford,* [1982] 3 All E.R. 480 at 485.

126 *Ibid.* at footnote 69; see for example the *PACE* legislation: *Police and Criminal Evidence Act* 1984 (U.K.) 1984, c. 60 [*PACE*], and its accompanying codes of conduct, online: <http://police.homeoffice.gov.uk/publications/operationalpolicing/PACE_TITLE_PAGE_PRELIMS.pdf?view=Binary/> which delineate the exercise by police officers of statutory powers to search a person or a vehicle without first making an arrest; the need for a police officer to make a record of a stop or encounter; the details of police powers to search premises, and to seize and retain property found on premises and persons; the requirements for the detention, treatment, and questioning by police officers of suspects not related to terrorism in police custody; the main methods used by the police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records; the tape recording of interviews with suspects in the police station; and the visual recording with sound of interviews with suspects; specialized powers of arrest and the requirements for the detention, treatment, and the questioning of suspects related to terrorism in police custody by police officers.

127 *Kang-Brown,* supra note 1 at para. 12.

128 *Ibid.* at para. 12.

129 *Ibid.* at para. 15.

130 *Ibid.* at para. 10.

131 *Ibid.* at para. 6.

Parliament, but from decisions of the courts themselves."[132] Indeed, these justices are appealing to traditional critiques of the legitimacy of judicial review, in addition to the antimajoritarian premise. Courts only deal with cases that happen to (and, in the appellate court context, are selected to) fill their docket, often hearing only from the parties before them. Thus, the courts are less well situated to explore broad policy concerns; judges are generalists while policy creators, legislative drafters, and legislators are specialists. Consequently, courts are not well situated to monitor effectively the policy implications of their own judgments.[133] Such arguments suggest that the majority is acting outside of its expertise when it creates new common law police powers using the ancillary powers doctrine.

The minority's concerns also indicate that some members of the Court have adopted, in wholesale fashion, the critiques that have plagued the *Oakes* equation, but in the context of ancillary powers. These anxieties include the concern that courts are usurping the role of the legislature, that the Court is abandoning its role as a guardian of liberty and the Constitution, that a utilitarian calculus is not appropriate in the adjudication of police powers, and that the Court's approach is undermining any degree of cogent constitutional dialogue that could have persisted.

These critiques of *Oakes* are even more acute in the *Waterfield* context. Analysis of the justification of new police powers bears remarkable similarity to the structure of the *Oakes* test. I have also noted that some scholars argue that, over time, the *Oakes* calculus has evolved into a more deferential analysis, in part due to its Benthamite overtones, and to the Court's willingness to build "deferential" prerogatives into the calculus. In some respects, that aspect of *Oakes* may be more troubling in the context of *Waterfield.* In *Oakes*, the Court is often asked to evaluate the justifiability of legislative infringement of individual rights; importantly, legislation has been subjected to the procedural and substantive scrutiny of Parliament prior to enactment. By the time any impact on rights has been appreciated, the policies underlying the law have been comprehensively debated by parliamentarians. When the Court evaluates the justifiability of the law's rights infringement, the process of statutory enactment arguably supports the adoption of deferential utilitarianism and, in some cases, a bare assessment of reasonableness.

132 *Ibid.* at para. 10,

133 Stribopoulos, "Ten," *supra* note 120 at 380-83 and footnote 240; See also Alan Young, "Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches" (2002) 16 Supreme Court Law Rev. (2d) 121 at 125.

In the context of the *Waterfield* test, however, such an approach proves less appropriate. An officer's discretion to conduct an unwarranted sniffer dog search, or to engage in an investigative detention, has not been subject to the same substantive and procedural scrutiny as laws undergo in the legislative process. The Court acts beyond its purview if it applies a deferential utilitarian equation or an assessment of reasonableness as the basis for creating new common law powers, or to justify an investigative detention; indeed, it is a determination well "outside the normal range of judicial expertise."[134] There is no basis for it to behave deferentially (on a reasonableness standard) when the Court creates or justifies ancillary police powers, since the Court is the least equipped criminal justice player to pontificate on the impugned powers. After all, the Court is not part of a network of multiple sources exchanging nuanced and in-depth information pertinent to criminal justice policy. I view the Court's actions as an abandonment of its role as guardian of the Constitution and the law of liberty, and an abandonment of true Court-Parliament dialogue. The Court does not guard liberty if it is the legislator of rights-threatening police powers. Nor can the Court engage in a dialogue with Parliament when it assumes the role of legislator, particularly when the Court has "enacted" a policy that comports with governmental objectives.

If we take a broader view of dialogical models, we can elucidate further consequences of the Court's development of the ancillary powers test. Some have preferred to situate a fuller articulation of dialogue in the assessment of postdecision dynamics. For instance, Margit Cohn and Mordechai Kremnitzer argue that legislative, administrative, public, and subsequent judicial responses to the originating judicial decisions all provide useful indicia of the degree of a court's activism — the more subsequent postdecision approval there is in these other spheres, the less activist the decision.[135] As I noted at the outset of this article, societal reaction in the wake of the two recent sniffer dog decisions has been somewhat equivocal, with all parties focused on the nature of the disposition rather than on the Court's use of the *Waterfield* test. Certainly, there has been no legislative response to the use of the judicial tool itself, in answer to any of the Court's ancillary powers cases. Indeed, how could there be? The test is embedded deep within the decision-making process, lying in wait to create new police powers. It is difficult to conceive of lack of legislative or societal response as an affirmation of the test in this context. Using societal reaction to the sniffer dog cases as a litmus test of judicial activism measures only the broadest legal strokes of the disposition, while allowing the Court

134 Manfredi & Kelly, *supra* note 91 at 744.

135 Cohn & Kremnitzer, *supra* note 92 at 347.

to keep its jurisprudential tools hidden from the legislature. In turn, this immunizes the Court's creation or justification of new police powers from the expertise and complex policy machinations of the legislative wringer.

Just as important as the disposition is the Court's use of law-generating tools such as the ancillary powers test — a test which on a reasonableness standard propagates common law powers, while subsequently (and in the case of investigative detentions completely) rendering the power itself constitutional. If a dialogic model of judicial review is considered an appropriate constitutional apparatus, then it is all the more concerning that the ancillary powers test frustrates that apparatus. The Court encourages dialogic silence when it uses the ancillary powers test, an embedded (tacitly hidden) jurisprudential tool, to create police powers. This in turn allows Parliament — its attention not forced to address the issue — to avoid the policy debate inherent in the legislative process. The Court, on the basis of its own policy objectives and in the absence of legislative process, is allowed to create *de facto* police powers in lieu of Parliament — it engages in preemptive deference. Certainly, one could argue that the Court's recent and rampant use of the *Waterfield* test comports with broadly shared crime control objectives — it may even echo the federal Conservative policy approach to crime control in fostering a pro-police agenda. Doubtless, the federal Tories and the Court itself would deny any such suggestion, but the Supreme Court's use of the ancillary powers test four times since 2004 could, in some eyes, be suggestive of such a link (whether intentional or incidental). In a conservative era, where the Court Challenges Programs and Law Commission have been dismantled, and where harsher punishments for youth and an increase in mandatory minimum sentences are being advocated, such a suggestion ought not be dismissed (indeed, it would be an interesting project to scrutinize this hypothesis).

The ancillary powers test is a justification analysis conducted on a reasonableness standard. It results in the proliferation of Constitution-proof police powers, justified on the basis of newly created Constitution-proof standards. The nature of the dialogue that takes place in *Oakes* analysis of legislation can be defended on the standard of reasonableness. After all, Parliament often enacts complex laws in a complex societal context, using tools such as legislative debate, drafting, public consultation, and committee reports. A court may justifiably assess such a law on a reasonableness standard, and scholars could rationally defend such a position; however, the same cannot be said of the *Waterfield* test. Impugned police powers have not normally been legislatively enacted — they are usually emanations of police practice that have not been through legislative review. The creation of those powers by a court, prior

to legislative debate, seems to be more than legislation in the interstices of legislative law and policy. The result of *Waterfield* adjudication is the creation of new constitutional boundaries and new police powers, which result in immediate policy implications for all police forces nationwide. The creation of new constitutional boundaries for police powers on the basis of a reasonableness standard seems to set the bar keeping police powers from interfering with constitutional liberties lower than it would be if Parliament were to develop legislation related to police powers; in the context of the judicial creation of police powers, there is no review body guarding the Constitution. Moreover, judicial creation of police powers occurs in a context less rich than Parliament's in terms of the exposure of decision makers to a multiplicity of policy positions, and social science-based policy information. Dialogue should not start with the Court, it should begin with the legislature. Where there is a judicial response, it should end with the legislature responding to (or affirming) the work of the courts. Legislation by the courts through the mechanism of embedded law-generating tools such as ancillary police powers tests represents an expanded, but illegitimate, judicial role.

Some have pointed out that when the Court adjudicates police powers by subjecting them to an exclusion of evidence analysis, it is fulfilling a constitutionally sound function. When evidence gathered by police is excluded, James Kelly and Michael Murphy have argued, judicial activism has not occurred because the Court is "checking the discretionary powers" of an unelected state actor — in this case, the police.[136] Embedded in this claim is the assumption that the Court is protecting the liberty of an individual, and that any interference with liberty is all the more egregious when unelected officials are responsible for the interference. In its use of the *Waterfield* test, the Court is, in fact, expanding the discretion of unelected officials. Worse, as it is an unelected entity, the Court is limiting the liberty of an individual while granting itself unfettered discretion. The very function that Kelly and Murphy suggest is normatively desirable for the judiciary to perform is undermined by the Court's use of the *Waterfield* test. The unfortunate result is that the Court acts in a tautological manner when it creates or justifies new police powers using the ancillary powers test. The resulting police powers, according to the Court, are not an abandonment of its role as guardian of the Constitution; nor are they an unjustifiable intrusion into the fundamental rights of an individual because the Court has declared these powers to be not only legal but, subject to its own enacted standard, also constitutional. The guardian of the Constitution has declared it so. The Court's position is not an example of con-

136 Kelly & Murphy, *supra* note 111 at 6.

stitutionally sound reasoning so much as a form of monotheism — the Court believes in itself because it is the Court.

Finally, the use of the *Waterfield* test encourages uncertainty in the law. We do not expect perfect knowledge regarding our fundamental liberties, and an informed constitutional scholar knows that the constitutional margins are always in flux. Nevertheless, the *Waterfield* test leaves even the most informed citizen unaware of the blunt limits of police powers. Assume, for example, that the most articulate student of constitutional law and police powers is tending to her own business when suddenly she is faced with the prospect of a seemingly arbitrary police search that has never before been adjudicated before the Supreme Court. Knowing the shadow of *Waterfield* lurks in the background, how can she ever assert her right to be free of the unreasonable search? Must she now presume its constitutionality? Everyone ought to be concerned about the retroactive effect of the way in which the Court has used the *Waterfield* test — will this seemingly heretofore unknown search power be retroactively validated by the Court, and concomitantly declared constitutional? What was once a rare fear has become a justified anxiety in the wake of recent Supreme Court *Waterfield* fetishism. Indeed, one ought to be wary, in the example just provided, that the Court will defer to such police discretion and will preemptively render a judgment in accordance with what the Court perceives to be Parliament's crime control agenda.

In sum, the Court's use of deferential utilitarianism (in the form of preemptive deference) to retrospectively evaluate split-second police decision making and justify the creation of new, constitutionally impervious, common law police powers effectively stunts the Court's ability to advocate for rights or to effectively engage in a dialogue with Parliament. This seems to be a rejection of the Court's traditional role as a defender of individual liberties. In this context, deferential utilitarianism is an abandonment of first principles in a rights culture — the belief that when "courts uphold core values" they are not being activist.[137] At the very least, it is an abandonment of Chief Justice McLachlin's conception of courts in the post-Second World War era.

VII. CONCLUDING THOUGHTS

In *Kang-Brown* and *A.M.*, the majority of the Supreme Court of Canada

137 *Ibid.* at 336; Dworkin, "Moral," *supra*, note 105 at 17; see generally, Martin Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) at 206-29; Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 134.

continues to blaze a new and forceful trail in the use of the *Waterfield* test to "fill gaps" in police powers. The media response that followed the decision portrayed a government that was disappointed in the roadblocks set up by the Supreme Court in front of its law and order agenda. The informed layperson might have thought that the Court had once again favoured due process over crime control by declaring the sniffer dog searches unreasonable in these cases. However, focusing on the ends of these cases, especially given the peculiar combinations of justices that formed the ultimate disposition, distracts from important issues that arise from the decisions.

The majority of the Court favours the use of the ancillary powers doctrine to retrospectively justify police conduct. In doing so, the Court creates new common law powers, justifies past police conduct, and in the process creates new constitutional law. The Court mines a utilitarian calculus bearing a striking resemblance to the justification analysis of legislative *Charter* infringements — a judicial strategy that has been subject to its fair share of "activism"-based critiques. The critiques that have been leveled (arguably unfairly) at *Oakes* are fitting, however, when applied to the *Waterfield* analysis. Reasonableness-based utility has no place in the after-the-fact justification of previously unknown police powers, especially in the absence of spirited and thorough parliamentary debate.

In *Kang-Brown*, Chief Justice McLachlin and Justice Binnie argue that it is too late to rein in *Waterfield* and the activism of the Court in its development of police powers policy — "we have crossed the Rubicon"; *Waterfield* is here to stay.[138] When Julius Caesar crossed the Rubicon in 49 B.C. there truly was no going back. But we might ask whether the same is true of the ancillary powers doctrine. The justices do not explain why the Rubicon has been crossed, nor do they justify why there is no going back. They see the *Waterfield* test as a point of no return, though what is at stake is much more than the use of a legal test. We stand to compromise a constitutional philosophy. This Rubicon is not merely the power of the Court to deliberate on matters traditionally outside of its area of expertise. This Rubicon is the Court's willingness to give to police, new and sweeping powers in the absence of fulsome legislative debate. It is the Court's willingness to abandon its stewardship of the Constitution in exchange for a utilitarian calculus which countenances and constitutionalizes police conduct. Ironically, and to Chief Justice McLachlin's chagrin, it is also to give prominence to the notion "that democracy means simply 'the rule of

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

the majority.'"[139] This is a Rubicon we ought not to have crossed. Even more troubling is that the sort of judicial turn advanced in *Kang-Brown* and *A.M.* is not the simple usurpation of the parliamentary role — it is, rather, a matter of saving parliamentarians from the political heat and the bother associated with a democratically developed police powers policy. This is a troubling species of judicial activism: preemptive deference.

139 McLachlin, *supra* note 105 at 117.