Ancillary Police Powers in Canada

A Critical Reassessment

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Judicial Oversight of Police Powers in Canada

This book explores police powers from varying perspectives and viewpoints. Specifically, we interrogate the powers conferred to police by Canadian courts. While there is a real need for police to protect the public and prevent crime, the way in which they do so must be carefully circumscribed to protect our rights and freedoms. That is to say, the police do not have limitless power in Canada. When investigating crime, searching, detaining, or arresting individuals, police are always required to obey the law. While many laws controlling state powers are defined by the legislature through statute, laws relating to state powers also exist in the legal decisions written by judges. This book explains how common law police powers came to be, what the powers are, how and when Canadian courts have generated and deployed these powers, and the potential dangers of expanding these powers further.

Our collective of authors has assembled a text that surveys the history, current application, and future development of these judge-made police powers in Canada. The generation, deployment, and legality of police powers is a complex area of legal study that requires nuanced review and analysis. Thus, we have approached this book from a multidisciplinary standpoint informed by varied theoretical perspectives. By blending our expertise in historical perspectives, critical legal theories, and empirical analysis, we offer the reader a unique and thought-provoking journey into the essence of policing in Canada.

From our provincial and territorial trial courts, through provincial superior and appellate courts, all the way to the Supreme Court of Canada, judges in Canada make law every day. Their decisions interpret statutory law (as enacted by Parliament and the provincial legislatures), and while our perspectives are intentionally diverse, the authors have written this book with two goals in mind. First, we want the reader to understand what the police are permitted to do and why. Where do the police derive their significant powers to investigate and prevent crime? What are the limits of police powers, and how can our citizens better understand their rights when they come into contact with the police? The courts have bestowed the police with many powers to stop, search, and otherwise investigate us in the pursuit of public safety and crime prevention. We can therefore all benefit from an increased understanding of these powers. In essence then, the following chapters seek to build a picture of common law police powers that is both accessible and thorough.

Second, and perhaps most importantly, we want the reader to think critically about the powers of our policing agencies. We examine not simply what the law is but also why the law exists and, indeed, whether the law is justifiable. To this end, we offer critiques of how and why courts have continued to distribute powers to the police. We suggest that unquestioning acceptance of police powers paves the road to unjust oppression and that Canadians can, and should, demand their elected representatives direct the apparatus of the state to benefit its ordinary citizens. The open-minded reader will be asked to seriously consider the propriety of common law police powers in Canada.

In the recent jurisprudence, the Supreme Court of Canada has noted that a new common law police power requires, first, that a *prima facie* interference with the liberty of a person takes place at the hands of the police; once established, a court needs to consider if the purported police power falls within the general scope of the duties of preserving the peace, preventing crime, and protecting life and property; and, last, a court must consider whether the police power used is reasonably necessary: "In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public."[1]

Certainly, support for the creation and use of common law police powers remains popular for police services. In the context of initial jurisprudential static for the use of sniffer dogs as a common law power, Tom Stamatakis,

vice-president of the Canadian Police Association in 2008, infamously expressed his dissatisfaction, noting: "We're no longer going to be able to show up and randomly search."[2] As we will learn in the upcoming chapters, the ancillary powers doctrine, a calculus originally deployed in a British case, was ultimately applied in the Canadian context, perhaps most famously in *Dedman and the Queen*.[3] The use of the test in the concoction of new police powers in Canada, rather than its original use as an element of establishing offences against police acting in the course of their duties, is a frequent critique; the transmogrification turned the ancillary powers test in Canada into a net-widening exercise rather than the UK approach that considered the test an element of a discrete offence committed against police officers.[4]

Whatever the utility of ensuring crime prevention, public peace, safety, and the preservation of evidence, an early critique in the Canadian context has been that the basic tenets of the rule of law have been compromised by frequent use of the test:

> James Stribopoulos describes the Court's use of the ancillary power doctrine as 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." Steadfast adherence to the rule of law would support the principle of legality – the notion that liberty is residual and that everything not expressly forbidden is permitted. 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." In this sense, Stribopoulos argues that the Court has moved away from its "long-established role" and toward a function "traditionally reserved for Parliament."[5]

Indeed, if the Court is creating police powers through judicial decisions, there are analogies between the concoction of police powers that invoke the critique of the judiciary as activist and intruding on the purview of the legislature, since discrete proliferations of police powers could arguably be better left to the parliamentarian.[6] This sort of activism is contestable since the calculation for raising an activism critique is usually understood as a judicial end-run against legislatures. However, it is certainly possible to argue that the use of the ancillary powers test is activist in a broader sense

when one considers the dialogue that occurs in a constitutional democracy between the courts and Parliament:

> 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 post-decision 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 post-decision approval that occurs in these other spheres, the less activist the decision.[7]

As we shall see in the upcoming chapters, the ancillary powers test has been powerfully promulgated in recent years, with a seemingly recent retraction the endurance of which will only be determined in the fullness of time. There is little doubt that in the last forty years, as the jurisprudence has disseminated, the Supreme Court of Canada has attempted to articulate new ancillary powers in a way that respects constitutional principles. Nonetheless, the dynamic raises the issue of who will question the Court's deployment of these powers if the Court drafts the powers while policing the boundaries of those same powers. In earlier work, this conundrum was described as pre-emptive deference:

> [T]he 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 rejection of the Court's traditional role as a defender of individual liberties. In this context, deferential utilitarianism is abandonment of first principles in a rights culture – the belief that when "courts uphold core values" they are not being activist.[8]

There are certainly alternatives to court creation of common law police powers. Some have advocated for a legislative solution like the British *Police and Criminal Evidence Act*.[9] Such approaches are capable of being critiqued for a lack of flexibility and responsiveness to novel policing situations. These approaches, though, do preserve the abilities of courts to challenge the

constitutionality of police conduct in the consequence of existing legislation. The benefits include fair notice to citizenry and preservation of the constitutional guardianship of courts. The detriments include that police officers might feel unduly reined in during emergent situations for fear of court sanction. Legislation is a complex process involving an investment of resources and deep study – an expensive proposition.

Yet when courts take on the role of police power creation, they do so in a limited context between only an accused and a police officer – should courts be asked to make broad policing pronouncements on the basis of limited scope, expertise, and evidence? On the other hand, no two police-citizen encounters are the same, and the common law approach allows context and real-time events to influence the lawfulness of the encounter. The tension between legislated police powers mirrors the age-old tension between crime control and due process concerns.[10]

In the expanse of scholarly discourse on the law and society, the profound challenges surrounding the representation of Indigenous communities have predominantly found their place in discussions of incarceration and charging rates, as explored by Patricia Monture in 2014.[11] However, a noticeable lacuna persists within the existing literature – an oversight that extends to the treatment meted out to Indigenous individuals during detention or arrest, as illuminated by the Aboriginal Justice Inquiry (AJI).[12] Indeed, the AJI called for a comprehensive overhaul of the justice system to meet the requirements, needs, and rights of Indigenous persons.[13] Curiously less common in the Canadian scholarly treatment is appropriate attention directed toward the experiences of Indigenous persons upon detention or arrest. There exists in the literature robust discussion that suggests ancillary powers provide disconcerting moments for arbitrary police discretion to enter the state-citizen equation – for example, some contend that common law police powers provide the police officers with authority to engage in racial profiling under the guise of a random stop.[14] It is relatively uncontroversial to note that police stop Indigenous and racialized persons more frequently, creating an inference that common law police power creation might suffer from the same deficiency.[15] Certainly, some empirical evidence supports this proposition in the context of Indigenous persons, even as racial profiling in the context of Black detainees is more extensively studied.[16]

Some scholars contend that delving into the intricacies of participation within the Canadian justice system is fraught with the shadows of colonial coercion, a compelling narrative that, perhaps, has stifled the pursuit of comprehensive inquiry. Alternatively, it could be posited that the academic

spotlight has been fixated on the more conspicuous realms of criminal trial or sentencing, inadvertently sidelining the critical nuances embedded within police encounters, as articulated by the AJI. The absence of a fully developed literature addressing the systemic issues inherent in police encounters (in the context of common law police power articulations) with Indigenous individuals is a palpable gap that must be bridged. An important first step is understanding the issues that manifest in the creation of police powers by courts.

In recent years, there are further examples of how lived experiences affect those being policed, a matter that we explore in the chapters below. While many see the police as an essential component of a just and safe society, there are significant groups in society that have had, and continue to have, troubled relationships with law enforcement. A Statistics Canada study by Adam Cotter notes that

> according to the 2020 General Social Survey (GSS) on Social Identity, one in five Black (21%) and Indigenous (22%) people have little or no confidence in police, double the proportion among those who were neither Indigenous nor a visible minority (11%) ... Relative to the overall population, Black people and Indigenous people had particularly negative perceptions of the ability of police to treat people fairly and be approachable and easy to talk to.[17]

Historical state racism and the over-policing of marginalized, racialized, and Indigenous communities have perpetuated environments of social harm in Canada. Many communities across Canada have been impacted by violence, and some of this violence has been caused by state institutions and policing. This too is reflected in Cotter's report:

> Perceptions of the police and other institutions were more negative among Black and Indigenous people. Black and Indigenous people were about twice as likely as non-Indigenous, non-visible minority people to state that they had little or no confidence in police. Linked to this, Black and Indigenous people more commonly felt that police were performing poorly in at least one part of their job.[18]

The unjustified state killing of citizenry has led to social movements such as Defund the Police and Black Lives Matter. These movements capture the public disapprobation of police violence and, by extension, police powers.[19]

Our critical analysis of the generation and deployment of police powers is therefore informed by the wider social framework of a concerned citizenry committed to safer communities.

Over and above what is granted to the police by statute, the common law recognizes that police have a general duty to preserve the peace, protect life and property, and prevent crime. Courts have used this general duty to generate and deploy specific police powers to detain, search, and investigate the public. In the chapters that follow, we suggest that police powers must not be uncritically accepted as an imperative to this general duty of policing. If we simply acquiesce to the continued expansion of common law police powers, we risk diminishing the rights of individuals to live free from state intrusions into their private lives. This is particularly troubling in the context of the constitutional rights conferred to us all under the *Canadian Charter of Rights and Freedoms*.[20]

We have divided our discussion of judge-made police powers into three parts. Chapters 1 and 2 introduce the reader to the history of common law police powers in Canada. Here, we explore the history of police powers and offer a detailed examination of how these powers took hold in Canadian jurisprudence. Chapters 3 and 4 look at the judicial expansion of police powers by detailing specific powers and explaining how courts have constitutionalized and expanded these powers over time. Chapters 5, 6, and 7 offer a critique of police powers through a theoretical examination of state domination and an in-depth analysis of the specific problem of over-policing Black Canadians through the abuse of stop-and-frisk powers.

Part 1: History and Context

Chapter 1: The Common Law Constable

Chapter 1 explores and examines the origins, traditions, and purpose of policing. The author investigates the history of policing, starting in the ancient world. By examining the long history of policing, the reader has a better understanding of its role in the era of judge-made common law police powers. This chapter traces the origin of the word "police" from ancient Athens, through to continental Europe, and into the Anglo-Saxon lexicography. From there, we engage with the development of police and the authority they held in England up until the Norman conquest.

Once we have explored the roots of the word "police," we will shift focus toward the role of the constable. We pay heed to the "authority," "duty," and "powers" that emanate from the role of a constable. By analyzing the early

modern understandings of the role of a constable, we build the groundwork for an in-depth discussion of police powers that are derived from statute. Research indicates that guidance on the duties and powers of police can be traced to legislation from the Middle Ages, such as the *Ordinance for the Preservation of the Peace* in 1242 and the *Statute of Winchester*.[21] Thereafter, the discussion moves to the early modern period up until the industrial age to engage with texts that have developed the conception of police duties and powers. Here, we look at jurisprudence from the nineteenth century that shaped the limits and boundaries of police powers in that period. Courts of the era developed the principle that officers had a duty to preserve the peace and could encroach justifiably on individual rights to do so.

Once Chapter 1 builds a broader understanding of how the duties of police officers are intimately connected with common law powers, we pivot to the Canadian context to connect the Canadian model to that of the English model that developed over the course of centuries. In the early years of the Confederation and the *Constitution Act, 1867 (British North America Act)*, we can see that Canadian legislators were keen on adopting the English justice system in Canada, with Newfoundland taking the lead pursuant to the *Royal Proclamation* of 1729.[22] Gradually, other provinces and cities began to create the bedrock of what would become modern-day policing in Canada. This examination of the Canadian historical perspective inevitably leads us to the Canadian common law adoption of the *Waterfield* test, which is the nub of this book and the central test that has facilitated the expansion of police powers in the Canadian common law.[23]

Chapter 2: The Supreme Court's Embrace of the Ancillary Powers Doctrine

In Chapter 2, we delve deeper into the *Waterfield* test or what is now more commonly known as the ancillary powers doctrine, which truly takes on a life of its own in the case of *Dedman v The Queen*.[24] More specifically, we present and analyze the most notable ancillary powers cases over the last thirty-five years that have impacted policing in Canada. Shortly after the enactment of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada had the tall task of interpreting this newly minted constitutional document. Sections 7–14 of the *Charter* were enacted to protect individuals from the encroachment of the state on civil liberties. Thus, it was incumbent upon the Supreme Court justices to interpret and develop the common law principles that were to become first principles of *Charter* jurisprudence with respect to the criminal law and policing.

In the wake of the *Charter*, *Dedman* came before the Supreme Court, a case centred on a roadside detention at a police check point, and it gave the majority of the Court an opportunity to articulate and apply the *Waterfield* test to an unregulated policing practice. Thus, *Dedman* signifies the beginning of a vast expansion of powers when novel or unregulated police conduct falls before a court. From *Dedman*, Chapter 2 moves to consider *R v Orbanski* and *R v Elias* and the right to counsel at roadside stops. We then examine the seminal case of *R v Godoy* that recognized police entry into the home in response to an emergency call as a valid police power under the common law.[25]

Chapter 2 highlights how these seminal cases have helped to expand and shape police powers and, thus, protect certain police conduct from *Charter* scrutiny. Post-*Dedman*, courts took it upon themselves to develop search-and-seizure jurisprudence under the *Waterfield/Dedman* test. Cases such as *R v MacDonald* provided future decisions with expanded criteria for a reviewing judge to determine whether a police search and seizure was lawful.[26] Close to twenty years after *Dedman*, the Supreme Court of Canada recognized the powers of investigative detention and search incident to detention in *R v Mann*.[27] *Mann* developed the reasonable suspicion standard as the test to determine whether police justifiably detained a suspect in an investigation.

Moreover, Chapter 2 engages with the sniffer dog cases of *R v Kang-Brown* and *R v A.M.* as well as *R v Clayton*, which detail the examination of the scope of roadblocks and safety searches.[28] We endeavour to present how the Supreme Court's articulation of the *Waterfield* test developed as the decades rolled on into the new century. We end the chapter with consideration of a key recent decision by the Supreme Court – *Fleming v Ontario* – where the Court decided against recognizing the power to arrest an individual, who was acting lawfully to prevent a breach of the peace.

Part 2: Judicial Expansion of Police Powers

Chapter 3: Search Incident to Arrest

Chapter 3 centres on the police power of search incident to arrest, formalized under the common law in *Cloutier v Langlois*.[29] Search incident to arrest has since been developed extensively in Supreme Court jurisprudence in the past several decades since *Cloutier*. Chapter 3 provides insight into the scope and refinement of this power. The chapter first acknowledges and discusses

the unique and critical question of whether the right to search a person who has been lawfully arrested arises incidental to the arrest. Then, the chapter tracks the language in *Cloutier* to illuminate how such a search is minimally intrusive on the person in custody.

After a discussion of *Cloutier*, Chapter 3 explicates the Supreme Court of Canada's development of search incident to arrest in several high-profile cases. In the wake of *Cloutier*, *R v Golden* examines whether the common law authorized police to perform a strip-search incident to arrest.[30] This invasive technique led to the establishment of preconditions that must be satisfied before police can conduct a strip-search of the arrestee. Further, the chapter examines the majority's reasoning as to how strip-searches must be conducted in a manner that does not infringe section 8 of the *Charter*.

As well, Chapter 3 engages with a highly intrusive form of search incident to arrest that produces bodily samples from the individual under custody. The first of these cases discussed – *R v Stillman* – provides us with limitations on the extraction of samples subsequent to arrest.[31] In *Stillman*, the justices determined that police actions were abusive and that the power itself was limited to deter *carte blanche* conduct. The second of these "bodily sample" cases reviewed in this chapter – *R v Saeed* – focuses the discussion on the use of penile swabs to retrieve a complainant's DNA.[32] In *Saeed*, the majority of the Supreme Court found that DNA taken from the arrestee's penis did not breach his section 8 rights. The majority maintained that the accused did not have a significant privacy interest in the complainant's DNA and, thus, could not avail themselves of section 8 protections.

Chapter 3 segues from bodily samples and DNA to searches of property incident to arrest. Naturally, where one is domiciled, one's vehicle, and one's personal smart phone attract varying levels of section 8 protection under the common law. Here, we look at *R v Caslake* and *R v Fearon* to determine whether search incident to arrest has any readily ascertainable limits on its scope.[33] As far back as *Cloutier*, the Supreme Court has maintained that search incident to arrest could expand to include premises and property. This notion was realized in *Caslake*. In *Caslake*, we see a Supreme Court majority posit that the "need for law enforcement authorities to gain control of things or information" outweighs an individual's privacy rights that are protected under section 8 of the *Charter*.

The Supreme Court continued its expansion of the scope of search incident to arrest in *Fearon* to include cell phones. In *Fearon*, the Supreme Court was divided as to how searches of cell phones should be reviewed by a court. The

dissenting opinion of Justice Andromache Karakatsanis identified the majority's approach as impractical and that the digital revolution created a new, intensely private, and personal sphere for Canadians that should not be trammelled.

Chapter 4: An Empirical Analysis of Ancillary Powers Generation and Deployment

In Chapter 4, we turn to empirical data that has been retrieved by our researchers that shows how common law police powers have expanded at the hands of the ancillary powers doctrine. While the *Charter* imbues the judiciary with the role and responsibility of protecting constitutional rights and freedoms, it has also been used by the judiciary to limit and restrict rights and freedoms. As such, Chapter 4 examines hard evidence in the Canadian common law that shows how rapidly the expansion and application of police powers has taken place in the *Charter* era. We infer from our findings that the ancillary powers doctrine has had a vastly disproportionate effect on racialized minorities and Indigenous people in Canada.

We return to the case of *R v Mann* as an example of how the recognition of powers such as investigative detention and search incident to detention has had a negative impact on certain populations over others. We identify that the absence of race-based discussions in *Mann* to limit the scope of investigations on predominantly racialized neighbourhoods was a missed opportunity by the Supreme Court of Canada, especially when considering the proliferation of street checks across the country in the wake of *Mann*.

After revisiting *Mann*, we turn to more recent case law to propose that the current iteration of the Supreme Court appears to be signalling a more cautious approach to recognizing new police powers, primarily in *Fleming v Ontario*.[34] Our discussion of *Fleming* flanks the presentation and analysis of the empirical data that is central to Chapter 4. We use the methodology of generation cases where a new power is created, and the deployment (application) of those powers as tools is used to assist in measuring and categorizing powers into discreet units. Our findings are grouped by levels of court and types of power and time frames. The data that has been extrapolated from various legal databases uncovers the proliferation of these powers since *Dedman* and shows a steady rise in generation and deployment cases in the several decades that have been analyzed. Our most recent data is given particular attention when determining whether the Supreme Court's decision in *Fleming* marks a turning point in the jurisprudence.

After our analysis of the empirical data, we assess three appellate-level cases that have been released since the ruling in *Fleming* to identify nuances in the decisions and to highlight the complexity within which the ancillary powers doctrine generates and deploys novel and unregulated police powers in the common law.

Part 3: Critiquing Police Powers

Chapter 5: The Doctrine's Proportionality Problem

Chapter 5 looks at some of the proportionality constraints imposed by the *Waterfield* test. Courts only authorize ancillary police powers that are reasonably necessary to fulfill law enforcement duties. As part of the proportionality analysis, courts evaluate the importance of an ancillary police power, its impact on liberty, and whether it is necessary for officers to restrict liberty to fulfill a police duty. The ancillary powers doctrine's proportionality analysis is similar to the analysis under section 1 of the *Charter*. However, in Chapter 5, we argue that the ancillary powers doctrine's proportionality test is flawed in many respects and employs a weaker proportionality framework compared to section 1 of the *Charter*. For example, when applying the ancillary powers doctrine, judges may not consider how common law police powers can result in selective enforcement and racial profiling, which will be further discussed in Chapter 6.

Chapter 5 argues that the ancillary powers doctrine's proportionality framework has fundamental problems that undermine the legitimacy of common law police powers. It advances the following three arguments. First, the ancillary powers doctrine's proportionality analysis fails to consider three types of harms: collective, non-egalitarian, and repetitive. Yet these types of harms can justify stronger transparency and oversight mechanisms for a particular common law police power or militate against the creation of a new ancillary police power altogether. Second, the ancillary powers doctrine's proportionality analysis is inaccurate due to information failures. When applying the *Waterfield* test, courts authorize common law police powers that apply to the future. For this reason, judges tend to lack information about how police officers have exercised – and will exercise – this power. Years later, empirical studies may reveal that officers have enforced a particular police power disparately or selectively. Third and interrelatedly, there is the judiciary's inability to conduct accurate proportionality analysis, which undermines the ancillary powers doctrine's justifiability. Inaccurate proportionality

assessments erode the validity of such justifications and ultimately corrode the ancillary powers doctrine's legitimacy.

Chapter 6: Ancillary Police Powers and the Black Experience in Canada

Chapter 6 explores the tenuous relationship between Black communities and police stop and search in Canada. We explore this relationship through a historical lens and provide further contextualization by examining public perceptions of police bias. The chapter engages with both official and unofficial sources of data to investigate the disproportionality of police stop-and-search practices on Black communities. Our analysis begins by focusing on the latter part of the twentieth century when Canada's Black population experienced rapid growth, and many Black immigrants settled in the Greater Toronto Area. Several high-profile killings of Black males by police officers sparked community mobilization in Toronto in the 1970s. These incidents were followed by more shootings involving Black men in the 1980s, prompting further turmoil and mobilization in the community. These events prompted a review of police practices in the province and, ultimately, the creation of new oversight mechanisms, such as Ontario's Special Investigations Unit.

Chapter 6 then explores significant events and related activism in the 1990s and 2000s where public concern about relations between the police and Black communities shifted to focus on the frequency and nature of police contacts with Black people. Amid this persistent issue, the *Toronto Star* published the first of a series of profiles on the relationship between the police and Toronto's Black communities. We identify the *Toronto Star*'s work as pivotal in shining a light on racial profiling in policing and raising public consciousness about the issue.

We then move into a discussion of the public perceptions of police bias through an examination of various large-scale surveys that were administered in the last several decades to gain a sense of the perception of how Black individuals are treated by police. The discussion then pivots to a look at the difficulty of gaining access to official sources of data about the stop and search of citizens that are disaggregated by race. We identify how, slowly, researchers are gaining access to police stop-and-search data. Through this data, researchers have drawn findings that support the conclusions drawn from Black communities that Black individuals are more likely to have police encounters than other races. Chapter 6 moves to consider the consequences of such police activity on Black communities. We examine

how undue police encounters detrimentally impact the mental health of racialized individuals and contribute to their criminalization. Furthermore, Chapter 6 engages with how these systematic stops of racialized minorities negatively impacts the functioning of the criminal justice system.

Chapter 7: The Doctrine as a One-Way Ratchet

Chapter 7 argues that judicially created police powers result in a one-way ratchet in criminal procedure, especially in the context of street-level policing. The term "one-way ratchet" implies that courts have expanded police powers but have not broadened the scope of fundamental rights and remedies for police misconduct commensurately. The opening parts of Chapter 7 discuss the three prominent critiques of the ancillary powers doctrine. First, in criminal procedure, the Supreme Court of Canada's role has evolved from guardian of constitutional rights to a creator of police powers that endangers these rights. Second, the ancillary powers doctrine is inconsistent with the rule of law because courts authorize new common law police powers retroactively. As a result, police officers and individuals cannot know the scope of law enforcement powers. Third, courts tend to ignore how a novel common law police power can contribute to racial profiling and discrimination.

Chapter 7 then demonstrates how and why ancillary police powers produce a one-way ratchet in criminal procedure. It shows how courts have created new law enforcement powers but have not expanded the scope of individual rights or legal remedies commensurately. Despite the growth of police powers, remedies such as *Charter* damages and tort law have largely failed to prevent and counteract unlawful police action. This chapter explains how the ancillary powers doctrine creates perverse institutional incentives that contribute to these tendencies. The judicial creation of police powers discourages lawmakers from enacting new police powers or restricting existing ones and encourages judges to act as legislators in the domain of criminal procedure.

Drawing on the republican conception of freedom as non-domination, Chapter 7 explains how the ancillary powers doctrine subjects individuals to unilateral and uncontrolled threats of interference. It discusses how low-visibility ancillary police powers, such as traffic stops, frisk searches, and investigative detentions, can breed distrust that discourages cooperation with law enforcement. As a result, ancillary police powers can undermine the very law enforcement objectives that justify their existence: preventing crime, protecting people and property from harm, and maintaining public order. The concept of a one-way ratchet explains why the ancillary powers

doctrine can contribute to greater domination, especially for racialized and Indigenous persons.

The concluding part of this chapter describes why individuals seek to protect themselves against domination that flows from ancillary police powers. Individuals resort to certain forms of self-help, such as counter-surveillance and cop watching, because they cannot rely on courts to protect their fundamental rights and interests adequately. Ultimately, this chapter deepens our understanding of why the ancillary powers doctrine is objectionable for reasons that are typically overlooked.

In conclusion, our exploration traverses the historical origins of policing, evolving through the development of police powers in England and subsequently altering the Canadian legal approach to common law policing. We examine the Canadian context, with a focus on the Supreme Court's embrace of the ancillary powers doctrine, exemplified by the influential *Waterfield* test. We place the approach under empirical scrutiny, unravelling the proportionality challenges within the ancillary powers framework, exploring its impact on the policing of Black people in Canada, and noting that the doctrine operates as a one-way ratchet in criminal procedure. This holistic examination not only sheds light on the historical and legal intricacies surrounding police powers but also highlights the consequences of their expansion, urging a nuanced revaluation of the delicate balance between law enforcement necessities and individual rights in the Canadian justice system.

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