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Charter Protection against Unlawful Police Action: Less Black and White Than It Seems

Steve Coughlan*

I. INTRODUCTION

If it is possible to speak about the impact of the *Canadian Charter of Rights and Freedoms*¹ on police investigative powers without sounding trite, I am not one of those able to do so. Generally speaking, I side with those who argue that the Charter has acted to protect individual rights against police investigative techniques, and that that has been a good thing. That is not, however, the argument I am presenting in this paper. Though I believe the Charter has been primarily beneficial for the protection of individual liberty, I want to point to a strand of Charter jurisprudence which has, in some ways, made the protection of individual liberty *worse* than it used to be. That is not the Charter's major impact, but it is the issue I will discuss here.

My basic argument is fundamentally a simple one, which can be presented in several ways. By way of introduction, I shall explain it in three ways: twice with words and once with diagrams.

To begin: pre-Charter, police had limited powers, but frequently did things which fell outside those powers. Police actions in this grey area outside their powers would range from perfectly acceptable to entirely unjustified. That there was such a range did not really matter, however, because no effective mechanism for holding police accountable for actions in this grey area existed, except in the most egregious cases. In practical terms, then, police were able to operate outside the strict limits of their "powers" with relative impunity.

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

The Charter shone a flashlight into these grey areas. It created a mechanism by which it was possible to ask of every single piece of behaviour by police officers, “did they have the authority to do that?” In theory, the Charter could eliminate this grey area completely, potentially forcing every action taken to be classed as black or white, as within police powers or not. Much early Charter jurisprudence can be seen as doing exactly this.

There has been some retrenchment by courts since the early Charter days, and one of the forms of that retrenchment is the view that a certain amount of grey area might not be such a bad thing after all. It might be neither possible nor desirable to place every single action by the police into the black or white categories, and so later decisions have tried to restore the grey area.²

That alone is not necessarily a difficulty. The difficulty is the *manner* in which the grey area is being restored. Essentially, courts have moved toward an interpretation which restores the grey area by potentially making lawful everything which had fallen within it. That can be seen as worse than the pre-Charter situation. Pre-Charter, although there might have been no formal mechanism for declaring actions within the out-reaches of that grey area unacceptable, it would have been clear to everyone that some violations were within the penumbra of acceptability, while others were not. If courts adopt a test declaring everything in the grey area to be potentially authorized, however, then one can hardly complain if police take that to heart and act accordingly.

Let us now consider the same point in a second, slightly different way. The Court said in *Mann* that: “Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law.”³

That principle is not one that simply post-dates the Charter. It is the fundamental premise of a liberal democracy — the principle of legality — and it has, at least in theory, been a part of the law of Canada for as

² To say “later” artificially presumes “phases” which do not neatly exist. The interpretive move which tries to eliminate grey area in searches was the decision in *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) [hereinafter “*Collins*”] that “unreasonable” can be equated with “unlawful” for purposes of s. 8. The equivalent decision for s. 9 — that “arbitrary” can be equated with “unlawful” — was not made for more than 20 years, in *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32 (S.C.C.) [hereinafter “*Grant*”], long after retrenchment was well underway in s. 8.

³ *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, at para. 15 (S.C.C.) [hereinafter “*Mann*”].

long as there has been a law of Canada.⁴ Put in simple terms, this principle means that the question we should ask about the actions of individuals in society would be, “is there anything saying they can’t?”, while the question we should ask about actions of the police would be “is there anything saying they can?”

We bump up here again, however, against the absence of an enforcement mechanism pre-Charter. In practical terms, in many complaints about police behaviour, it would not have been sufficient to show that the police had fallen technically outside of the behaviour which was specifically authorized: rather, one would have to show that what had occurred was actually an offence or tort. In other words, in the absence of an enforcement mechanism, the *real* question being asked of police action was “is there anything saying they can’t?”

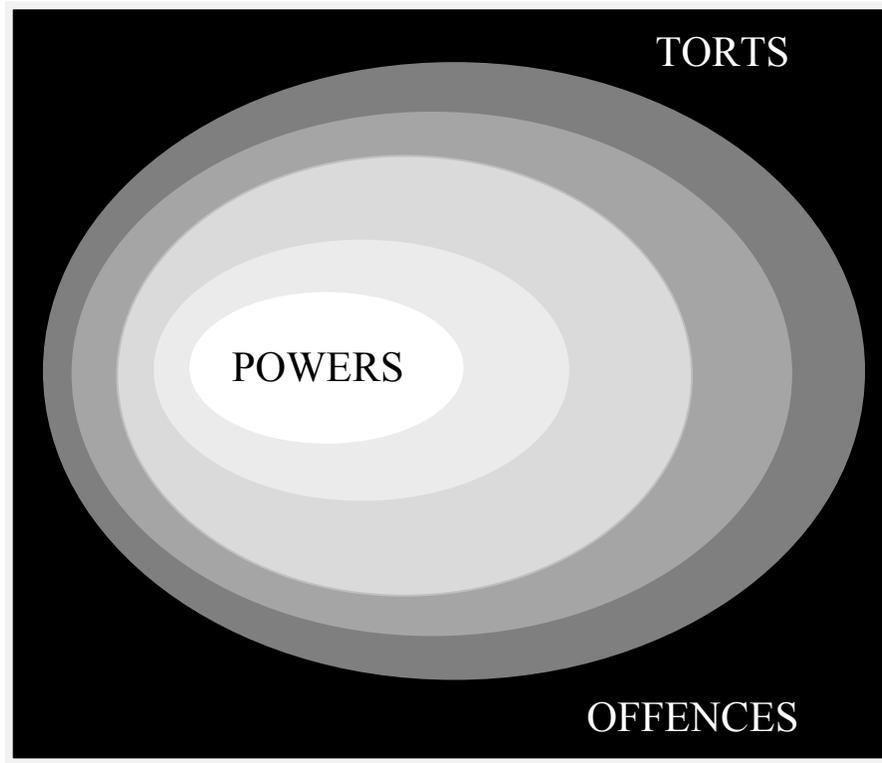
Once again, the Charter changed this situation. For purposes of section 8, a search not authorized by law will be unreasonable, and for purposes of section 9, a detention not authorized by law will be arbitrary. This does shift the focus to ask the right question: “is there anything saying they can?”

However, more recent decisions have tended to construe police powers in a much broader way. Courts have begun to ask whether there are policy reasons which should mean that the actions of the police fell outside what they ought to be permitted to do. Once again this amounts to asking whether there is something saying the police cannot do what they did, which returns us to the pre-Charter position or worse.

Finally (and briefly), let us consider the same overview by means of diagrams. The pre-Charter position, where police action can be classed as falling within their powers, as constituting some identifiable wrong, or as falling into the grey area in between, can be represented in this way:

⁴ See the very thorough discussion of this point in James Stribopoulos, “*In Search of Dialogue: The Supreme Court, Police Powers and the Charter*” (2005) 31 Queen’s L.J. 1, at 6-13. [hereinafter “Stribopoulos”].

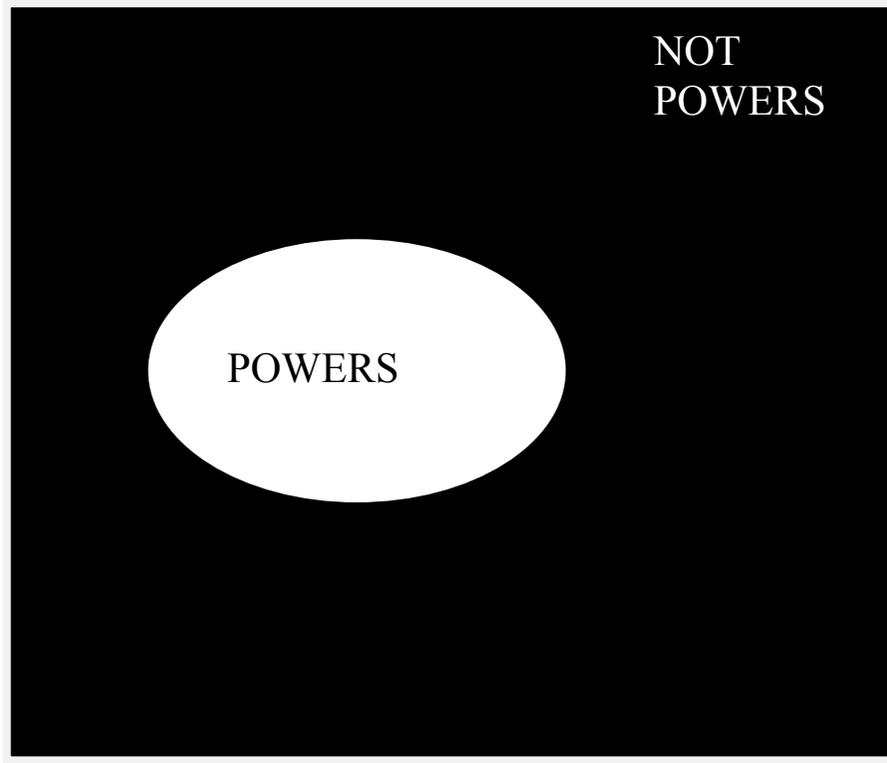
FIGURE ONE



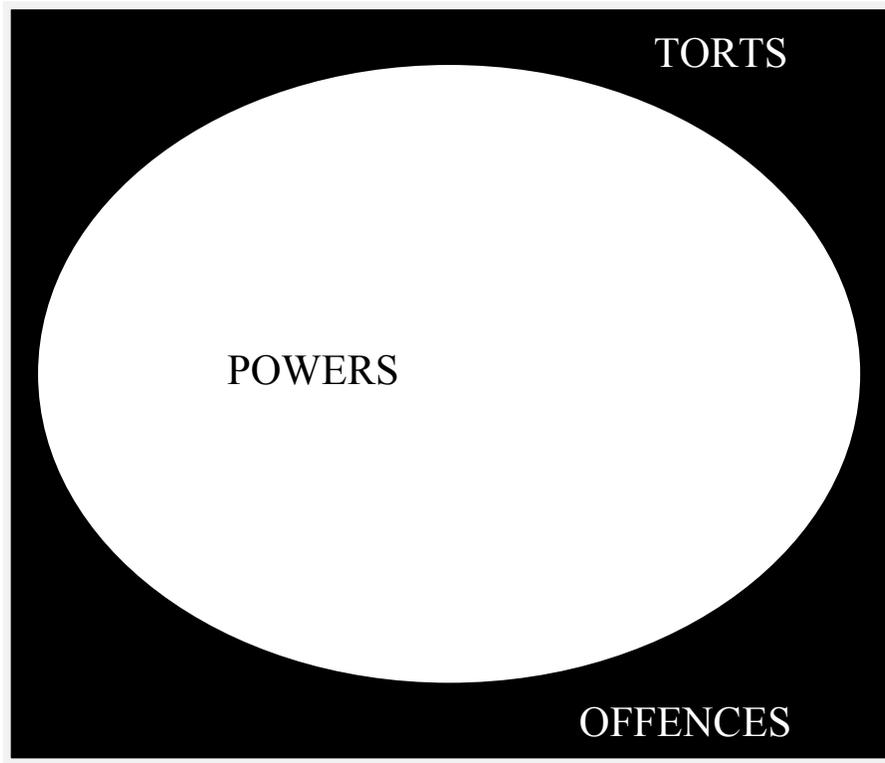
The principle of legality tells us that the right question to ask is whether the actions of the police fall inside the innermost circle. In practical terms, without any enforcement mechanism like the Charter designed to limit police to only that behaviour, the only assessments of police action actually possible asked whether their behaviour fell outside the outermost circle.

Since some of the actions taken by the police in the absence of strict authority to do so probably should have been seen as appropriate and acceptable, one would expect that shining the Charter flashlight would put some of the grey areas in the light while leaving others outside it. In other words, it would be reasonable to anticipate something like this:

FIGURE TWO



The concern I am raising is that the expansive approach courts have begun to take in defining police powers actually seems far more like saying that everything which fell in the grey area is now permitted, so that the situation now looks more like this:

FIGURE THREE

One might perhaps include a few more labels beyond the outer circle: “racial profiling”, for example. Fundamentally, however, that does not change the approach that is beginning to be adopted, where courts look for something the police have done which can be identified as “wrong”, and in the absence of finding any such thing conclude that the officers had the power to do what was done. As noted earlier, this has the effect of rendering all the grey area white, thereby expanding police powers.

That is, fundamentally, the argument I will present: anything from here on is simply elaboration. I shall consider three phases: the pre-Charter period, the Charter flashlight period and the later Charter approach.⁵

⁵ As noted in footnote 2, these phases are more conceptual than temporal.

II. THE PRE-CHARTER PERIOD

Three related things need to be shown here: that police did act outside their powers; that it was not necessarily seen as inappropriate when they did so; and that only the most egregious violations attracted the potential for a remedy.

The first point — that police sometimes acted outside their powers — is trivial: for any set of rules there will be occasions when people do not obey them. The more important point to recognize is that these violations would not all have been regarded as inappropriate, and in many cases would be seen as normal behaviour despite being in violation of the rules.

One demonstration of this attitude can be found in a Law Reform Commission of Canada Working Paper, “Police Powers — Search and Seizure in Criminal Law Enforcement”. The Commission notes that when they began studying the issue of search and seizure in 1978, a common attitude was that there was no need to do so — not because the law was always complied with, but because it did not matter if it was not:

To be sure, it was acknowledged that police practices might not always conform strictly to legal requirements, and that, occasionally at least, judicial officers responsible for the issuance of search warrants might exercise their discretion rather less judicially than their office required. For the most part, however, it was urged upon us that the law of search and seizure stood in no need of close scrutiny, much less fundamental reform.⁶

As a matter of fact, the Commission found that less than 40 per cent of warrants were validly issued, and that the concerns were more often matters of substance than form.⁷

Similarly, in that same Working Paper, the Commission commented on search incident to arrest, observing that:

... the *practice* of such searches clearly predated the existence of any specific authority for them, and it may fairly be said that these searches seem to have simply been assumed over the course of time to be proper

⁶ Law Reform Commission of Canada, *Police Powers – Search and Seizure in Criminal Law Enforcement* (Ottawa: Minister of Supply and Services, 1983), at 8 [hereinafter “LRC”].

⁷ LRC, *id.*, at paras. 212-213. Note that this discussion was given the heading, “The Gulf Between Law and Practice”.

and valid. This is due in large part to the historical tolerance of intrusive and indeed violent acts towards persons accused of crimes.⁸

Further evidence of the prevailing attitude is found in Paul Weiler's observations, made in 1968, about the use of the arrest power by police. He notes that the power was often used not to ensure the arrestee's attendance at trial, but rather for some other purpose such as investigation of a crime, prevention of further crimes, harassment of undesirables, or as "rough social service" such as taking someone who is drunk into custody.⁹ He observes in the same context that many take the view that there is no need to legally extend police powers to allow for these police practices, precisely because "the increased powers sought are actually exercised".¹⁰

To similar but more dramatic effect showing that the failure of police to stay within their powers was a diminished concern, note the observation in *Policing in Canada* that "[s]ometimes during an appearance in court an offender who has been in custody complains of police beatings and shows bruises to substantiate his claims. But courts seldom pay any more than cursory attention to them as they are rarely connected with the charges and are someone else's problems."¹¹

Perhaps the claim that a failure to hold police to the limits of their powers was not seen as problematic is plausible enough that it does not require extensive evidence. It is worth noting, though, that this means there were limited mechanisms allowing a court to say, "what that officer did in that case was wrong".

At a purely theoretical level, an arrest carried out without authority is the offence of assault: as a practical matter, very few assault charges were (or are) laid against police. As Weiler observed, criminal charges, even for something which was more than just technically an assault would be rare: "a prosecuting attorney could be stirred into action by blatant police brutality, for example, where it results in death".¹² The use of prosecutions as a means of limiting police action is an approach which, to think about this in relation to Figure One, is not a question

⁸ LRC, *id.*, at para. 117.

⁹ Paul Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in Allen M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968), at 434. [hereinafter "Weiler"].

¹⁰ *Id.*, at 437. Weiler also observes on the same page that "[t]here is little doubt that the police presently operate outside the law, as, for instance, in mass stopping of automobiles to check for impaired drivers." (Cited also in Stribopoulos, *supra*, note 4.)

¹¹ W. Kelly & N. Kelly, *Policing in Canada* (Toronto: MacMillan of Canada, 1976), at 209.

¹² Weiler, *supra*, note 9, at 444.

which asks whether the police behaviour fell within the innermost circle, but rather whether it is beyond the outermost.

One might look to tort law as a check on police action, as some pre-Charter cases did.¹³ Tort actions as well, however, are essentially asking of the police the outer circle question: “is there anything saying they can’t?” Tort actions will only be brought in egregious cases, because the plaintiff will bear the financial burden of pursuing the action and will have the burden of proof. In addition, tort actions would have frequently required more than just a showing that the police acted outside their powers. Malicious prosecution would require proof of malice, and any negligence claim would run up against a problem Weiler pointed to, that “the individual police officer’s conduct, while technically a deviation from the legal rule, is not in breach of the normal practice of his department, a practice which may be considered by the police to be not only necessary but desirable”.¹⁴

Even a claim for false arrest, as a practical matter, would often require more than a simple showing that the police officer did not comply with the arrest power.¹⁵

Exclusion of evidence, pre-Charter, was not a realistic control mechanism. Relevant evidence obtained illegally was generally admissible, with only a residual exclusionary rule where the evidence was gravely prejudicial, its admissibility was tenuous, and its probative force was trifling.¹⁶

¹³ Consider the many pre-Charter tort decisions which are significant to the development of Canadian criminal law: *Koehlin v. Waugh*, [1957] O.J. No. 105, 118 C.C.C. 24 (Ont. C.A.); *Reynen v. Antonenko*, [1975] A.J. No. 428, 20 C.C.C. (2d) 342 (Alta. S.C.); *Eccles v. Bourque*, [1974] S.C.J. No. 123, [1975] 2 S.C.R. 739 (S.C.C.); *Priestman v. Colangelo*, [1959] S.C.J. No. 42, [1959] S.C.R. 615 (S.C.C.); *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.); *Chartier v. Quebec (Attorney General)*, [1979] S.C.J. No. 56, [1979] 2 S.C.R. 474 (S.C.C.); *Rice v. Connolly*, [1966] 2 All E.R. 649 (Q.B.), and others.

¹⁴ Weiler, *supra*, note 9, at 444. Weiler makes this observation in the context of the difficulty of using the criminal law against police officers. Note that the Supreme Court has much more recently found, in the context of the tort of negligent investigation, that the standard of care is that of a reasonable officer in all the circumstances, a standard which “accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care”: *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] S.C.J. No. 41, 2007 SCC 41, at para. 73 (S.C.C.).

¹⁵ *Kennedy v. Tomlinson*, [1959] O.J. No. 164, 126 C.C.C. 175 (Ont. C.A.) suggests that a person arrested without reasonable and probable grounds at the time might not have a claim if later evidence shows they were in fact guilty. There must also be a “continuation of the act which caused the damage”: *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397, 2007 ONCA 79, at para. 103 (Ont. C.A.). See also *Chartier v. Quebec (Attorney General)*, [1979] S.C.J. No. 56, [1979] 2 S.C.R. 474 (S.C.C.).

¹⁶ *R. v. Wray*, [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.).

Even cases which did act to control what police could do, such as *Eccles v. Bourque*, adopt an “outer circle” approach to decision-making. The whole point of the “castle rule”, limiting the ability of police to enter a private residence, is based on special protection of a person’s home: that is, the decision rests on finding a reason the police were *not* entitled to enter, rather than on looking for an authority to enter.¹⁷

Remaining pre-Charter control mechanisms would similarly have had this “outer circle” focus. In unusual cases, there might be a public inquiry or Royal Commission, but only in cases where police behaviour fell well outside the limits of their powers. Police complaints might be brought, though these were notoriously unsatisfactory and again focused on issues beyond, simply, “did the police comply with the strict limits of their powers”.

III. THE CHARTER FLASHLIGHT

In *Collins*, the Supreme Court decided that an unlawful search — that is to say, one for which there is no lawful authority — is an arbitrary one.¹⁸ That simple manoeuvre, in the context of searches, renders the inner circle and the outer circle the same. Its effect is to say that whenever the police conduct a search which does not comply with their powers, they have violated section 8 of the Charter. It collapses the distinction between “is there anything saying they can” and “is there anything saying they can’t”: if the answer to the former question is “no”, the answer to the latter is automatically “yes”. Subsequently (though much later and after some equivocation), the Court adopted the same interpretative approach to detentions, in *Grant*.¹⁹

The effect is to make possible the micro-management of police activity. Further, it puts the option of invoking that micro-management in the hands of the accused.

This effect is pervasive but can be illustrated with just a few examples. Consider, for example, the facts in *Clayton*, where police stopped vehicles leaving a parking lot after they received a tip that there was a gun. As the accused arrived at the exit, they were stopped and a brief conversation took place, following which one accused fled and both were arrested. The Ontario Court of Appeal (quite understandably) found it

¹⁷ *Eccles v. Bourque*, *supra*, note 13.

¹⁸ *Collins*, *supra*, note 2.

¹⁹ *Grant*, *supra*, note 2.

necessary to consider this interaction of a minute or two at most in three phases, to determine separately whether there was a Charter violation in making the vehicle stop at all, in the interaction once the vehicle was stopped, and in the arrest flowing from that interaction.²⁰

Similarly, consider the detention in *Grant*. The test for detention requires that a court consider all the circumstances, which in effect invites a sentence-by-sentence and action-by-action analysis of the behaviour of the police.²¹ In *Grant* itself, the Court concluded that there was no detention when one officer stepped in front of the accused and began asking him questions, but that, as of the direction to keep his hands in front of him, followed immediately by two other officers arriving and showing their badges, the accused *was* detained. Perhaps such an approach is necessary and even desirable, but it does evaluate police action against Charter standards on a second-by-second basis.

Similarly, think about breathalyzer stops. Cases have now separately litigated: whether stopping vehicles for breath testing purposes at all (on either a fixed or roving basis) violates the Charter; whether a person is entitled to counsel before a breathalyzer demand; whether a person is entitled to counsel before a roadside screening device demand; whether an officer who smells alcohol on an accused's breath raises Charter rights by asking "have you had anything to drink?"; whether doing sobriety testing in advance of a breathalyzer demand raises Charter issues, and so on. Indeed, a significant area of litigation in breath cases today is around the issue of right to counsel before a roadside screening device demand: it is common to see decisions around an alleged denial of section 10(b) hinging on questions of whether the screening device arrived (or could be expected to arrive) within six or seven minutes as opposed to 12 or 13 minutes, whether the accused had a cell phone, whether the accused

²⁰ *R. v. Clayton*, [2005] O.J. No. 1078, 27 C.R. (6th) 197 (Ont. C.A.), revd [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.) [hereinafter "*Clayton*"].

²¹ In *Grant*, *supra*, note 2, at para. 42, the Court observes, for example, that:

The length of the encounter said to give rise to the detention may be a relevant consideration. Consider the act of a police officer placing his or her hand on an individual's arm. If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's liberty has been curtailed. At the same time, it must be remembered that situations can move quickly, and a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed.

knew a particular lawyer's telephone number, whether that lawyer was likely to be in the office at the particular time, and so on.²²

Finally, note as well that, if the use of the arrest power as "rough social service" in the case of the intoxicated has not disappeared, the Charter flashlight now shines on it as well.²³

IV. THE LATER CHARTER APPROACH

It is possible to determine after the fact, of every police action, whether it did or did not violate some Charter right. Whether one could do so *in advance* is a different question, but is the one raised by asking whether police have a particular power, *i.e.*, that is the point of a power, that it is predetermined. There is scope for debate over whether it is desirable to try to do so. However, it might not be necessary to engage in that debate, because as a practical reality it is pretty likely that, desirable or not, the task is impossible. Put simply, a certain amount of grey area is inevitable. The later Charter approach, as I am labelling it here, is a recognition of that fact and is an attempt to reincorporate a grey area.

Consider, for example, a situation such as the G20 protest in Toronto in 2010. Many of the things police did in response to the situation were within their powers, while others were not: some arrests or detentions were unlawful, for example.²⁴ Some of the things police did were simply reactions to a developing situation. No doubt it would have been possible to particularize more rules around some tactics used: kettling, for example, could be explicitly made either allowable or not.²⁵ But it simply

²² As a very incomplete but generally representative list, see *R. v. Torsney*, [2007] O.J. No. 355, 2007 ONCA 67 (Ont. C.A.); *R. v. Walker*, [2007] O.J. No. 1423, 2007 ONCJ 167 (Ont. C.J.); *R. v. Singh*, [2000] O.J. No. 4992, 79 C.R.R. (2d) 166 (Ont. S.C.J.); *R. v. McMurray*, [2006] O.J. No. 3554, 38 M.V.R. (5th) 15 (Ont. S.C.J.); *R. v. Yanka*, [2011] O.J. No. 283, 267 C.C.C. (3d) 81 (Ont. S.C.J.); or *R. v. Fildan*, [2009] O.J. No. 3604, 69 C.R. (6th) 65 (Ont. S.C.J.).

²³ See, as two recent examples, *R. v. Donald*, [2010] S.J. No. 564, 79 C.R. (6th) 93 (Sask. Prov. Ct.), aff'd [2011] S.J. No. 683, 90 C.R. (6th) 279 (Sask. Q.B.) and *R. v. De Lima*, [2010] O.J. No. 2673, 79 C.R. (6th) 82 (Ont. C.J.).

²⁴ One might also note the quite shocking deliberate deception of the public as to what powers the police actually had with regard to the security fence erected during the summit: see <<http://www.theglobeandmail.com/news/toronto/police-admit-no-five-metre-rule-existed-on-security-fence-law/article4349840/>>.

²⁵ Kettling has very recently (March 15, 2012) been found by the European Court of Human Rights not to violate article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 262 (entered into force 18 May 1954): see *Austin and Others v. The United Kingdom*, [2012] E.C.H.R. 459 (Grand Chamber). On the other hand, the Toronto Police have apparently decided in light of their G20 experience, not to use the tactic again: J. Poisson, J. Yang & B. Kennedy, "Exclusive: Toronto Police Swear Off G20 kettling tactic", *Toronto Star* (June

would not be possible to anticipate the details of *every* encounter there might be between an officer and a protester and decide the precise limits of the officer's power.

It is not accurate to call a recognition that some grey area is inevitable only a late discovery: it is the foundation of section 24(2) of the Charter. The very point of that section was to create an exclusionary rule which had more teeth than the common law *Wray* rule (*i.e.*, some) but which was not an automatic exclusionary rule. The recent revivification of the approach to 24(2) in *Grant* was also based on the premise that the test had to remain fluid. If the patterns are too rigid, particularly with regard to inclusion, then a new police power has effectively been created.²⁶

Incorporating a grey area at the remedy stage makes a great deal of sense. It permits a court to assess how far outside the defined powers police action fell: if it was within the penumbra of technically unlawful but obviously acceptable behaviour, the evidence should be allowed in, whereas if it falls further from that core in a more shadowy area (though still well short of a tort or offence) it should be excluded. This is precisely the way that the grey area should be taken account of.

The recent trend, however, attempts to reintroduce the grey area, not at the remedy stage, but at the stage of determining whether there has been a Charter violation at all. There is now a tendency to work this grey area into the definition of police powers themselves. This tends to result in *all* activity in the grey area being found to be authorized, which amounts to an expansion of police powers. Put another way, the recent trend in Charter analysis is to focus again on the outer circle rather than the inner one: to ask whether there is a reason not to allow the police to act as they did, rather than to ask whether they were within their powers.

One example of this trend relates to common law police powers. There is, of course, a debate about the advisability of creating common law powers at all, but that is not the question I wish to address.²⁷ What I

22, 2011), online: <<http://www.thestar.com/news/article/1012959--exclusive-toronto-police-swear-off-g20-kettling-tactic?bn=1>>.

²⁶ One can say that police do not have the power to search the trunk of a vehicle for drugs. If the inevitable result of a s. 24(2) analysis was that after an illegal search of a vehicle's trunk for drugs the evidence was allowed in, however, it is a distinction without a difference to say the police did not have the power to search. On this subject, generally, see Don Stuart, "Eight Plus Twenty-Four Two Equals Zero" (1998) 13 C.R. (5th) 50.

²⁷ Among the great deal which has been written, see, for example, Stribopoulos, *supra*, note 4, or Steve Coughlan, *Criminal Procedure*, 2d ed. (Toronto: Irwin Law, 2012), at 17-20 for views opposed to their creation, or Don Stuart, "The Charter Balance against Unscrupulous Law and Order Politics", in this volume, for support of them.

want to observe is that there is nothing inherent in the fact that a rule arises from the common law which requires it to be imprecise or incompletely defined. The common law defence of officially induced error, for example, has been quite precisely articulated as a six-step test by the Supreme Court: the defence of necessity has similarly been precisely defined.²⁸ The police power to enter a premises in response to a disconnected 911 call is closely enough defined that other courts can apply the test and determine whether it has or has not been satisfied.²⁹ Powers can be created at common law but be precise nonetheless.

The important point here is that although this *can* be done, it is *not* being done: the trend is towards less and less precision in the definition of common law powers. In *Mann*, for example, the power of investigative detention was stated to be “police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary”.³⁰

That concluding word “necessary” conceals a great deal of ambiguity. Earlier in the decision the Court had explained that:

The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is 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.³¹

Mann does not actually create a power at all: it creates a method of assessing after the fact whether a particular investigative detention was or was not authorized. It creates some criteria — a nexus to a recent or ongoing offence — but then adds a generalized assessment of whether or not the detention was a good idea. It inserts the existence of a grey area into the test for the power itself. Further, subsequent developments in

²⁸ Respectively *Lévis (City) v. Tétreault*, [2006] S.C.J. No. 12, 2006 SCC 12 (S.C.C.) and *R. v. Latimer*, [2001] S.C.J. No. 1, 2001 SCC 1 (S.C.C.).

²⁹ See *R. v. Godoy*, [1998] S.C.J. No. 85, [1999] 1 S.C.R. 311 (S.C.C.), for the test itself, and *R. v. Timmons*, [2011] N.S.J. No. 216, 2011 NSCA 39 (N.S.C.A.), as an example of a court finding the test not met.

³⁰ *Mann*, *supra*, note 3, at para. 45.

³¹ *Id.*, at para. 34.

lower courts have decreased the importance of the fixed criteria and thereby increased that of the grey area.³²

Consider further the Court's decision in *Clayton*, concluding that police had acted within their powers in setting up a roadblock in response to a report of a handgun. Justice Binnie, in a concurring judgment, found that the police had the power to do so, articulating a five-part test.³³ It is simply not possible to say with any precision, however, what the parameters of the power created by the majority are. Indeed, one cannot actually say that the majority even created a power, which is quite remarkable in the circumstances. The whole point of the case was to ask whether there was a section 9 violation because the police did not act within their powers: one would have thought that identifying a power which authorized them to act would be essential. However, the majority reject the Charter challenge, saying only that:

In the totality of the circumstances, therefore, the initial detention in this case was reasonably necessary to respond 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 when it was set up. The initial stop was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to s. 9 of the *Charter*.³⁴

This approach to reasoning is not based on the inner-circle question: "did the police have the power?" At a conceptual level, it ignores that there *is* an inner circle of identifiable powers, and engages in reasoning that treats as inconsequential the fact that the police action did not accord with a power. The reasoning assumes that everything potentially lies in a grey area, and that the only question is where in that grey area does the action lie.

The effect of this approach is not to ask whether police acted lawfully: it is to ask whether they acted reasonably. It is far too easy for that question to turn into, "was there any good reason they should not have

³² See *R. v. Nesbeth*, [2008] O.J. No. 3086, 2008 ONCA 579 (Ont. C.A.), leave to appeal refused [2009] S.C.C.A. No. 10 (S.C.C.), holding that the crime to which there is a nexus need not be identified precisely, and *R. v. Langlois*, [2011] J.Q. no 9033, 2011 QCCA 1316 (Que. C.A.) to the same effect. See also *R. v. Yeh*, [2009] S.J. No. 582, 2009 SKCA 112 (Sask. C.A.), holding that the power arises where a crime is merely suspected, rather than known to have occurred.

³³ *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 89 (S.C.C.).

³⁴ *Id.*, at para. 41.

done what they did?” or in other words, the outer circle question, “was there anything saying they can’t?” The danger is that this allows the scope of the power to expand to fill in all of the grey area until there is some positive reason *not* to allow the police behaviour.³⁵

This is an observable trend in police powers decisions today. Consider *Aucoin*, for example, in which a police officer placed the accused in the back of a police vehicle, but searched him prior to that and found narcotics. The majority of the Nova Scotia Court of Appeal found that the search was lawful: the dissenting judge points out, however, that nowhere in the trial judge or majority’s reasons is there any discussion of whether the officer had a power to detain the accused in the first place. He notes:

[w]hether it was reasonable to request the appellant to be seated in the rear of the police vehicle is not the test that imbues the police with power to interfere with the liberty of a person. Of course, if the police have a power to do something, it must be exercised reasonably, but merely finding police conduct to be reasonable is, in my opinion, insufficient.³⁶

That is exactly correct: it is also, as noted, the dissent.

Similarly, see *Trieu*, where the accused was detained as he left his house because of an investigation into a theft of electricity, and then detained a further 25 minutes while his house was searched so that he would not alert anyone else of the investigation.³⁷ The Court of Appeal considered separately the initial stop and the 25-minute extension. The initial stop was a valid investigative detention. As for the further 25 minutes, the Court of Appeal did not attempt to identify a particular power authorizing the detention, concluding instead that:

In the result, primarily for the reasons relied on by the Crown, I am not persuaded, on the requisite balance of probabilities, that the continued detention of Mr. Trieu gave rise to an arbitrary detention in these circumstances, or that it amounted to a *de facto* arrest. In my view, the further relatively short period of detention was necessary to ensure that the police were not placed in jeopardy should Mr. Trieu alert any occupants of either his own or the other residences of the impending searches.³⁸

³⁵ As a further instance of expansion, see *R. v. Plummer*, [2011] O.J. No. 2034, 2011 ONCA 350 (Ont. C.A.), expanding the common law power of search incident to arrest to include a search of a vehicle, not just a pat-down search of the accused.

³⁶ *R. v. Aucoin*, [2011] N.S.J. No. 380, 86 C.R. (6th) 310, at para. 65 (N.S.C.A.).

³⁷ *R. v. Trieu*, [2010] B.C.J. No. 2387, 272 C.C.C. (3d) 237 (B.C.C.A.).

³⁸ *Id.*, at para. 73.

To conclude that a detention is not arbitrary because it was necessary is to ignore the need to find a police power.

Finally, see *Nelson*, where an accused was arrested for murder in circumstances where the police acknowledged that they did not actually have reasonable grounds to believe he had committed the offence at the time. The accused was already under arrest for assault when he was rearrested for murder, which led the Court of Appeal to find that there was no section 9 violation: “although it would have been preferable that the detective waited to arrest the appellant for murder until after the detective had reasonable and probable grounds, no harm was done.”³⁹

It is difficult to disagree with the Court of Appeal’s conclusion that no harm was done: as they observe, the effect was to make the accused better aware of the jeopardy he faced. But to go directly from “no harm done” to “no section 9 violation” is to ignore the need for police to have the power to do what they have done. That is particularly apposite in this case where the police frankly acknowledged that they did *not* have that power. A conclusion that no remedy should be given to the accused for the section 9 violation would be easy to understand; the conclusion that there was no section 9 violation at all can only be based on ignoring the inner-circle question, “was there anything saying they can?”

None of this is meant to argue that a “reasonable grounds” standard can have no place in defining police powers; of course it can. But there is a significant difference between making one consideration in arrest for an indictable offence the question of whether the officer has reasonable grounds to believe the accused committed that offence, and the much broader and basically undefined question, “did the police behave reasonably?” To adopt the latter approach is to abandon a focus on police powers.⁴⁰

A second trend in evaluating investigative powers also reveals this shift to look at the outer circle rather than the inner circle. Compare the decisions in *Jarvis*⁴¹ and *Nolet*⁴² on the approach to finding when a police power has been misused. In *Jarvis*, there was an issue as to whether an audit power given to a Revenue Canada official had been employed for

³⁹ *R. v. Nelson*, [2010] A.J. No. 1329, 265 C.C.C. (3d) 273, at para. 27 (Alta. C.A.).

⁴⁰ Finally, on this point, see *R. v. Farrah*, [2011] M.J. No. 200, 87 C.R. (6th) 227 (Man. C.A.), where the Manitoba Court of Appeal found no Charter violation in a warrantless entry based not on finding a common law power based on the ancillary powers doctrine, but simply upon the finding that the entry was reasonable in all the circumstances.

⁴¹ *R. v. Jarvis*, [2002] S.C.J. No. 76, 2002 SCC 73 (S.C.C.) [hereinafter “*Jarvis*”].

⁴² *R. v. Nolet*, [2010] S.C.J. No. 24, 2010 SCC 24 (S.C.C.) [hereinafter “*Nolet*”].

the purposes of conducting an investigation into an offence. It is well settled that the Charter provides different levels of protection in different contexts: a person would be entitled to less protection against self-incrimination if the context were liability for tax than if it were for penal liability. As a result, the Court found in *Jarvis* that powers ought only to be used for their proper purpose: if the predominant purpose of an investigation had become investigation rather than audit, the audit powers were no longer available.

The trial judge in *Nolet* applied this reasoning to find a section 8 violation. The police officer in the case had stopped a vehicle using a provincial *Highway Traffic Act* power. However, the trial judge concluded that the officer quickly had suspicions of criminal activity which outweighed the highway traffic concerns: in the trial judge's view, the officer had used provincial regulatory search powers when his predominant purpose was to investigate a crime. On that basis, the trial judge found a Charter violation: the police officer had not acted within his powers, because he had no power permitting him to search for criminal purposes.

The Supreme Court, however, rejected not only this result but this method of reasoning, holding that the predominant purpose test was not useful here. The question was not, they held, whether the officer had a predominantly criminal law purpose, but whether any provincial regulatory purpose still remained. The only limit on the use of the regulatory search power would be when "a nominally lawful aim is but a plausible facade for an unlawful aim".⁴³

It is important to recognize how this shift from *Jarvis* to *Nolet* changes the fundamental approach to reasoning. In *Jarvis*, the concern was to ask whether the police behaviour fell within that which had been specifically authorized: were the state actors acting within the powers given to them? *Nolet*, on the other hand, finds that there will only be a Charter violation where the police try to carry out an "unlawful aim": where there is something positively saying they are not allowed to do it.

This point is even more clearly seen in *Brown v. Durham (Regional Municipality) Police Force*,⁴⁴ a decision cited in *Nolet*. In that case, the police had, on a systematic basis over a long period of time, used

⁴³ *Id.*, at para. 36, quoting *R. v. Ladouceur*, [2002] S.J. No. 343, 2002 SKCA 73 (Sask. C.A.).

⁴⁴ [1998] O.J. No. 5274, 43 O.R. (3d) 223 (Ont. C.A.) [hereinafter "*Brown*"]. Surely it is no coincidence that, as with the pre-Charter situation, this case is an instance of a civil action having an impact on the criminal law.

provincial powers to check the mechanical fitness of vehicles in order to stop all members of the Paradise Riders Motorcycle Club as they went to a cottage they owned. The Ontario Court of Appeal accepted that the police had also used these stops for the purpose of gathering intelligence about the members of the club, which was thought to be a criminal organization. The Court of Appeal dismissed the club's objection to the police stop, though they did agree that the use of a provincial stop power could be invalidated by an "improper" purpose. They did not mean by that, however, a purpose which was not properly within the reason for which the power was granted; rather, they meant a purpose which was improper in and of itself because it was illegal, was an instance of racial profiling, and so on.⁴⁵

It should be quite apparent that this use of "improper" directly reflects a focus on the outer circle rather than the inner circle. If we were being true to asking, "are the police acting within their powers?" then it would be improper to use a power for a purpose other than that for which it was created. It is only if we are looking for an identifiable reason the police cannot do something — if we are asking whether the behaviour falls outside the outermost circle — that "improper" would mean "improper in and of itself".

If there were more space, other examples could be pursued, demonstrating how the focus of analysis is becoming the outer-circle question rather than the inner-circle question. The increased willingness of courts to find that an accused does not have a reasonable expectation of privacy, for example, removes the need for analysis of whether a power to search existed: whatever investigation it was that took place was not a "search" at all and so no power need be found. In that event, the only relevant question becomes whether there was something saying the police could not do what they did.

As a final example of the way in which the reintroduction of the grey area has resulted in less protection of an accused's rights, consider the use of wiretaps. Pre-Charter a failure to follow the wiretap provisions resulted in the automatic exclusion of evidence: now it is treated as a

⁴⁵ *Brown, id.*, at 239 (O.R.):

When I refer to improper police purposes, I include purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police officer's public duty. Officers who stop persons intending to conduct unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that person, all act for an improper purpose.

violation of section 8 and the evidence may or may not be excluded under section 24(2).⁴⁶

V. CONCLUSION

The Charter has meant that individuals in Canada now have more protection against unjustified state action. The Charter story is not, however, simply one of expanded individual rights. Nor is it solely a story of expansion of rights followed by some contraction here and there. Both of those things are true, but they are not the whole story. There is also a strand which has the effect of returning the treatment of rights to the relative “non-protection” of the pre-Charter period. Indeed, this approach would actually mean that rights were less protected: rather than saying, “the police don’t have that power but there’s little you can do about it,” we would be saying, “the police do have that power and there’s nothing you can do about it”.

Some uncertainty in the extent of police powers is inevitable, and some police behaviour in that grey area will be acceptable. The wrong approach to that fact is to approach police powers broadly and risk permitting more than is intended. The right approach is to find that action without authority does violate rights, but then to do what the Charter envisions and decide under section 24(2) that some action without authority is harmless. Approaching matters in that way is far more likely to achieve an appropriate balance.

⁴⁶ Note that the pre-Charter situation is another example of the fact that it was necessary, at that time, to point to a specific rule prohibiting the police from acting as they did: a failure to follow the wiretap authorization provisions would mean that the police were committing an offence.