The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 47 Article 3

2009

Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases

James Stribopoulos
Osgoode Hall Law School of York University

Citation Information

Stribopoulos, James. "Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 47. (2009).
DOI: https://doi.org/10.60082/2563-8505.1171
https://digitalcommons.osgoode.yorku.ca/sclr/vol47/iss1/3

Sniffing Out the Ancillary Powers Implications of the Dog Sniff Cases[‡]

James Stribopoulos[*]

I. INTRODUCTION

Last spring the Supreme Court of Canada released judgments in a pair of cases involving the use of drug-sniffing dogs by police: *R. v. Kang-Brown*[1] and *R. v. M. (A.).*[2] These decisions received considerable media attention, mostly for what they had to say about the constitutionality of the police employing drug-sniffing dogs.[3] Lost in the media coverage, which was confused by the sheer length of the Court's opinions and the fact that the justices issued four separate sets of reasons in each case, was a larger controversy regarding the Court's continued use of the "ancillary powers doctrine" as a means of creating new common law police powers.

The ancillary powers doctrine allows for the recognition of police powers by deploying what is essentially a cost-benefit analysis. This law-making device has two parts. First, it begins with a query as to whether the impugned actions of a police officer fall within the scope of his or her broad duties.[4] Assuming the answer is "yes",[5] the second step involves a weighing of the apparent benefits, usually for law enforcement and public safety, as against any resulting interference with individual liberty

---

‡ A much earlier version of this case comment was originally published on Osgoode Hall Law School's Blog, online at: <http://www.TheCourt.ca>, and then reproduced with permission in (2009) 30(2) *For the Defence, Criminal Lawyers' Association Newsletter* 26. The research assistance of Yulia Pesin (Osgoode, LL.B. 2011) is gratefully acknowledged.

* Associate Professor, Osgoode Hall Law School at York University.

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

2 [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) [hereinafter "*M. (A.)*"].

3 See, *e.g.*, Kirk Makin, "Top court puts leash on random searches by sniffer dogs", *The Globe and Mail* (April 26, 2008), A15.

4 The source of police duties is derived from legislation, usually the legislation governing the police in the particular jurisdiction, and tends to define police duties in rather broad terms: "preserving the peace", "preventing crimes and other offences", "apprehending criminals and other offenders" *etc.* See, *e.g.*, *Police Services Act*, R.S.O. 1990, c. P.15, s. 42.

5 It invariably will be, unless the officer is involved in some entirely illegitimate activity completely unrelated to his or her official duties. See *Brown v. Durham Regional Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 116-17 (Ont. C.A.).

interests. If the benefits are characterized as outweighing the costs, the action is said to be "justifiable" and a new police power is born.[6]

Ever since the Supreme Court of Canada first used the ancillary powers doctrine to fashion a new police power in *Dedman*,[7] criticism of the doctrine has been unrelenting. Originally, it came in the form of a scathing dissent by Dickson C.J.C. He categorically rejected that *R. v. Waterfield*,[8] the English decision that the majority fastened upon as supplying the authority for an ancillary powers doctrine, authorized courts to create new police powers. Chief Justice Dickson expressed serious reservations regarding this move, which he saw as "nothing short of a fiat for illegality on the part of the police whenever the benefit of police action appeared to outweigh the infringement of an individual's rights".[9] For him, it was "the function of the legislature, not the courts, to authorize ... police action that would otherwise be unlawful as a violation of rights traditionally protected at common law".[10]

While members of the judiciary voiced initial criticism regarding the use of the ancillary powers doctrine to create new police powers, over the last 25 years skepticism has come almost exclusively from commentators.[11] In the interim, the Supreme Court has uncritically

---

[6] See *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.) [hereinafter "*Dedman*"]. See also *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at para. 24 (S.C.C.) [hereinafter "*Mann*"].

[7] *Dedman*, *id.*, was the first case in which the Supreme Court of Canada recognized the doctrine as a bases for creating new police powers. In that case, it was a power to briefly detain motorists at sobriety check-stops.

[8] [1964] 1 Q.B. 164 (Ct. Crim. App.) [hereinafter "*Waterfield*"].

[9] *Dedman*, *supra*, note 6, at 15 (quoting *Reference re Judicature Act (Alberta), s. 27(1)*, [1984] S.C.J. No. 64, [1984] 2 S.C.R. 697, at 718-19 (S.C.C.), Dickson J., dissenting) [hereinafter "*Wiretap Reference*"].

[10] *Id.*

[11] See generally Howard Chisvin, "*R. v. Dedman*: Annotation" (1985) 34 M.V.R. 165; Glen Luther, "Police Power and *The Charter of Rights and Freedoms*: Creation or Control" (1986) 51 Sask. L. Rev. 117; R.J. Delisle, "Judicial Creation of Police Powers" (1993) 20 C.R. (4th) 29; Heather Pringle, "The Smoke and Mirrors of Godoy: Creating Common Law Authority While Making Feeney Disappear" (1999) 21 C.R. (5th) 227; Don Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 Man. L.J. 89; Aman S. Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2000) 45 Crim. L.Q. 198; Steve Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002) 2 C.R. (6th) 49; Lesley A. MCoy, "Liberty's Last Stand? Tracing the Limits of Investigative Detention" (2002) 46 Crim. L.Q. 319; Peter Sankoff, "Articulable Cause Based Searches Incident to Detention — This *Cooke* May Spoil the Broth" (2002) 2 C.R. (6th) 41; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335 [hereinafter "Stribopoulos, A 'Failed Experiment?'"]; Lesley A. McCoy, "Some Answers from the Supreme Court on Investigative Detention … and Some More Questions" (2004) 49 Crim. L.Q. 268 [hereinafter "McCoy, 'Some Answers … More Questions'"]; Tim Quigley, "Mann, It's a Disappointing

accepted use of the ancillary powers doctrine as bases for recognizing a host of entirely unprecedented police powers. For example:

- a power to briefly detain motorists at sobriety checkstops;[12]
- a power to enter premises in response to disconnected 911 calls;[13]
- a power to briefly detain individuals who are reasonably suspected of involvement in recently committed or unfolding criminal activity, and to conduct protective weapons searches of such individuals where an officer has well-founded safety concerns;[14]
- a power to ask drivers questions about alcohol consumption and request their participation in sobriety tests without first complying with s. 10(b) of the *Canadian Charter of Rights and Freedoms*;[15] and
- a power to conduct criminal investigative roadblock stops where such a stop is tailored to the information possessed by police, the seriousness of the offence being investigated, and the temporal and geographic connection between the situation being investigated and the timing and location of the roadblock.[16]

Kang-Brown and *M. (A.)* represent a continuation of this judicial law-making trend. As explained in Part II, below, these judgments effectively recognize that when reasonable grounds exist to suspect an individual is carrying narcotics, the police have the common law authority to use a drug detecting dog to sniff the individual suspect, as

---

Decision" (2004) 21 C.R. (6th) 41; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L. Rev. 93; Patrick Healy, "Investigative Detention in Canada" [2005] Crim. L.R. 98 [hereinafter "Healy"]; Joseph R. Marin, "*R. v. Mann*: Further Down the Slippery Slope" (2005) 42 Alta. L. Rev. 1123 [hereinafter "Marin, 'Further Down the Slippery Slope'"]; James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1 [hereinafter "Stribopoulos, 'In *Search* of Dialogue'"]; Christina Skibinsky, "Regulating Mann in Canada" (2006) 69 Sask. L. Rev. 197; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*" (2007) 52 Crim. L.Q. 299 [hereinafter "Stribopoulos, 'Limits'"]; Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 C.R. (6th) 266; Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's L.J. 65; Don Stuart "*Godoy*: The Supreme Reverts to the Ancillary Powers Doctrine to Fill a Gap in Police Power" (1999) 21 C.R. (5th) 225. However, in fairness, Don Stuart seems to have changed his mind recently about the ancillary powers doctrine. See Don Stuart, "Charter Standards for Investigative Powers: Have the Courts Got the Balance Right?" in Jamie Cameron & James Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham, ON: LexisNexis Canada, 2008) 4.

[12] *Dedman*, *supra*, note 6.

[13] *R. v. Godoy*, [1999] S.C.J. No. 85, [1999] 1 S.C.R. 311 [hereinafter "*Godoy*"].

[14] *Mann*, *supra*, note 6.

[15] *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Orbanski & Elias*"]. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[16] *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.) [hereinafter "*Clayton*"].

well as his or her belongings, in order to confirm or refute that suspicion. Although these judgments are noteworthy for what they say about police use of drug-sniffing dogs, they are far more significant for what they say about the ancillary powers doctrine.

In *Kang-Brown* and *M. (A.)*, for the first time since Dickson C.J.C.'s dissent in *Dedman*, disagreement has broken out between the Supreme Court judges regarding the propriety of the Court using the ancillary powers doctrine to create new police powers.[17] This disagreement strongly suggests that the fate of this doctrine as a future source of police powers may suddenly be in doubt.

This short paper will critically evaluate the Court's judgments in *Kang-Brown* and *M. (A.)*. Part I will explain the Court's conclusion that the use of drug-sniffing dogs involves an intrusion upon reasonable privacy expectations, so as to engage the protections found in section 8 of the Charter. What section 8 demands before such searches will be considered "reasonable" is explored in Part III. Finally, Part IV will address the unexpected disagreement that has emerged between the judges on the use of the ancillary powers doctrine to create new police powers. This will include a critical evaluation of both sides in this emerging, and long overdue, judicial debate.

II. DOGS "SEARCH" WHEN THEY SNIFF FOR NARCOTICS

Importantly, all nine justices (essentially) agreed that when a police dog trained to sniff out narcotics focuses its olfactory powers on an individual's knapsack or luggage, the target's reasonable privacy expectations are encroached upon. In other words, this constitutes a "search" for section 8 Charter purposes, a conclusion that triggers the "reasonableness" requirements of the guarantee.

This conclusion may seem obvious to many. After all, if the dog isn't "searching" when it is "sniffing" at someone's bag, what is the point of the sniff? Amazingly, however, the answer did not seem entirely clear-cut as these two cases made their way before the Supreme Court of Canada. This was primarily because the United States Supreme Court long ago decided that dog sniffs do not constitute a "search" for Fourth

---

[17] To be clear, in dissent in *Orbanski & Elias*, *supra*, note 15, LeBel J. (joined by Fish J.) did express strong skepticism toward the use of "law-making powers by the courts", including the expansion of the common law, to fill gaps in formal police powers. *Id.*, at paras. 69-70, 80-84. But unlike in *Kang-Brown*, *supra*, note 1, the majority in *Orbanski & Elias* did not take the opportunity to respond directly to these concerns.

Amendment purposes. In *United States v. Place*,[18] the U.S. Supreme Court came to this conclusion because, as O'Connor J. explained for the majority:

> … the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent's luggage, which was located in a public place, to a trained canine — did not constitute a "search" within the meaning of the Fourth Amendment.[19]

In light of this decision, there was concern that our top court might come to a similar conclusion. More specifically, it was feared that the Court might draw too ready a parallel between the odour of drugs emanating from luggage and waste heat emanating from a home.[20] In *R. v. Tessling*,[21] the Supreme Court of Canada held that police use of the FLIR (Forward Looking Infra-Red device), a heat detecting device used to spot unusual amounts of heat escaping from a home, a tell-tale sign of marijuana grow lamps, did not constitute a "search" for section 8 purposes. In *Tessling*, the Court characterized the information gleaned from the FLIR as "meaningless" because poor insulation, a pottery kiln, a hot bath or a sauna could also have caused the unusually hot heat signature.[22] Thankfully, in *Kang-Brown* and *M. (A.)* the Court recognized

---

[18] 462 U.S. 696 (1983) [hereinafter "*Place*"].

[19] *Id.*, at 707.

[20] See, *e.g.*, Don Stuart, "*R. v. M. (A.):* Annotation" (2006) 37 C.R. (6th) 372 and the cases he cites applying *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.) [hereinafter "*Tessling*"] in this way.

[21] *Id.*

[22] Although such information, in the abstract, may seem unimportant and inconsequential, in *Tessling*, *id.*, when combined with a confidential informant's tip, it proved sufficient for the issuance of a search warrant: hardly "meaningless", to be sure. See Steve Coughlan & Marc S. Gorbet, "Nothing Plus Nothing Equals … Something? A Proposal for FLIR Warrants on Reasonable Suspicion" (2005) 23 C.R. (6th) 239.

a significant difference between the use of the FLIR and the use of drug detecting dogs.

A properly trained dog is capable of telling its handler something extraordinarily meaningful, that a narcotic is being secreted. The Supreme Court of Canada refused to follow the lead of its American counterpart, remembering its earlier precedents, which make clear that the unlawful nature of the targeted conduct does not vitiate an individual's reasonable privacy expectations.[23] To hold otherwise, Binnie J. recognized, writing on behalf of a majority of the justices in *Kang-Brown* on this point, would mean that all Canadians, innocent or guilty, would henceforth be subject to having their persons and effects sniffed at by police drug detecting dogs, at the whim of law enforcement, whenever they happened to move through public spaces. This possibility, Binnie J. concluded, is not at all in keeping with the idea of a free society.[24]

Although Binnie J.'s concerns about the impact of allowing police to use drug-sniffing dogs at their sole discretion may seem alarmist to some, the experience in the United States in the aftermath of *Place* suggests otherwise. There, the holding that the Fourth Amendment is not engaged has meant that drug-sniffing dogs have become a routine part of American life, with dogs sniffing at individuals and their belongings when they happen to be in transit, either by plane, bus, train or car. Beyond travellers, schools and their students are also regularly targeted for visits by police officers and their drug-sniffing dogs. Absent any constitutional constraints, the only real limits on the use of such dogs are police ingenuity and resources.[25] Remembering that experience, the Supreme Court of Canada was undoubtedly right to conclude that our Constitution should demand more.

III. "REASONABLENESS" AND DRUG-SNIFFING DOG SEARCHES

Consensus among the justices broke down, however, when it came to passing on what section 8 of the Charter demands for such searches to be

---

[23] See, *e.g.*, *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 (S.C.C.) [hereinafter "*Wong*"].

[24] *Kang-Brown*, *supra*, note 1, at para. 71.

[25] See, *e.g.*, Hope Walker Hall, "Sniffing Out the Fourth Amendment: United States v. Place — Dog Sniff — Ten Years Later" (1994) 46 Me. L. Rev. 151, at 171-84, who details the steady expansion of *Place* to a variety of different contexts. For a review and critique of the United States Supreme Court's jurisprudence on the use of drug-sniffing dogs, see Ken Lammers, "Canine Sniffs: The Search That Isn't" (2003) 1 N.Y.U. J.L. & Liberty 845.

considered "reasonable". *R. v. Collins*[26] long ago established that to be "reasonable" a search or seizure must satisfy three preconditions: (1) it must be authorized by law; (2) the law itself must be reasonable; and (3) it must be carried out in a reasonable manner.[27] Disagreement among the nine justices regarding the first and second preconditions is what led to four separate sets of reasons in *Kang-Brown* and *M. (A.)*.

We will return to their disagreement regarding *Collins*' first requirement in Part IV, as that discussion involves the ancillary power doctrine and supplies our main focus. For now, a few words about the controversy surrounding the second requirement, that the law authorizing the search be reasonable. With respect to that precondition the judges were sharply divided on the evidentiary threshold required to justify the use of drug-sniffing dogs.

Four justices (McLachlin C.J.C. and Binnie, Deschamps and Rothstein JJ.) were of the view that reasonable suspicion that a person is carrying narcotics is what section 8 demands before a drug-sniffing dog can be used by police. This bloc emphasized that relative to other kinds of searches, a dog sniff is comparatively less intrusive and, therefore, should be permitted on a less exacting standard than that normally required by section 8, *i.e.*, reasonable and probable grounds.[28]

In contrast, four of the other justices (LeBel, Fish, Abella and Charron JJ.) concluded that the more exacting reasonable and probable grounds standard is indeed what section 8 requires, refusing to countenance a lessening of the standard in this context. For this bloc, even though physically less intrusive, the information gleaned through the use of drug sniffing dogs is just as private and worthy of protection as it would be if the police instead reached inside an individual's pockets or looked inside an individual's bag to probe for evidence.

The tie-breaker on this important issue was Bastarache J. He went much further than Binnie J. was prepared to go, agreeing that reasonable suspicion is indeed the appropriate standard, but expressing the view that

---

[26] [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.) [hereinafter "*Collins*"].

[27] *Id.*, at 278. See also *R. v. Evans*, [1996] S.C.J. No.1, [1996] 1 S.C.R. 8, at 23 (S.C.C.).

[28] In both judgments, Binnie J., effectively writing for the majority on the applicable constitutional standard, emphasized that the dogs were used for "routine crime investigation" and that the cases did not involve "explosives, guns or other public safety concerns". See *Kang-Brown*, *supra*, note 1, at para. 18, *per* Binnie J., and *M. (A.)*, *supra*, note 2, at para. 3, *per* Binnie J. In *M. (A.)*, he goes on to suggest that where a potential threat to public safety is the motivation, "even if speculative", "the legal balance would have come down on the side of the use of sniffer dogs to get to the bottom of a possible threat": *id.*, at para. 37, strongly suggesting that sniffer dogs trained to detect guns and explosives could be used to counter threats to public safety without the need for particularized suspicion.

it need not be individualized to justify the use of such dogs. Rather, a generalized suspicion, for example, that drugs are routinely being trafficked through a particular location (like a bus depot or an airport), would be enough to justify the use of drug-detecting dogs to sniff at travellers and their belongings.

The effect of Bastarache J.'s vote is that reasonable suspicion emerges as the controlling constitutional standard in this context. And, given that four of the justices insisted that it be of a particularized nature, the clear implication would seem to be that before police can use such dogs to sniff at an individual or his or her belongings, section 8 of the Charter requires that they possess reasonable grounds to suspect that the person is carrying narcotics on his or her person or inside his or her belongings.

The emergence of reasonable suspicion as the controlling constitutional standard for the use of drug-sniffing dogs for criminal investigative purposes seems like a sensible compromise. Had the Court held that "reasonable and probable grounds to believe" was the applicable standard, which was the position of the minority, the use of such dogs would have been rendered practically unimportant. If the police possess reasonable and probable grounds to believe an individual is carrying a controlled substance they are legally entitled to arrest that person.[29] Once an individual is lawfully arrested the police are then entitled to search his or her person, belongings and surroundings.[30] In fact, such a search may even precede the arrest, provided that the requisite grounds are in place at the time of the search.[31] Consequently, there would be no practical need for police to resort to drug-sniffing dogs if reasonable and probable grounds had emerged as the controlling constitutional standard.

Practicalities aside, the reasonable suspicion standard also makes good sense in this context as a matter of constitutional principle. *Hunter v. Southam Inc.*[32] made clear that reasonableness is a context-specific determination.[33] This left an opening for requiring less onerous safeguards

---

[29] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 495(1)(a). On the reasonable and probable grounds standard, as it applies to arrest, see *R. v. Storrey*, [1990] S.C.J. No. 12 [1990] 1 S.C.R. 241 (S.C.C.).

[30] See generally *R. v. Caslake*, [1998] S.C.J. No. 3, [1998] 1 S.C.R. 51 (S.C.C.).

[31] See *R. v. Debot*, [1986] O.J. No. 994, 30 C.C.C. (3d) 207, at 223-25 (Ont. C.A.), affd [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193 (S.C.C.) but without addressing this discrete issue.

[32] [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 (S.C.C.) [hereinafter "*Hunter v. Southam*", cited to C.C.C.].

[33] For example, the Court noted that where "the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is

for searches in the regulatory, administrative, customs and school contexts.[34] Admittedly, where the state's purpose is criminal law enforcement, the Supreme Court has usually insisted on strict adherence to *Hunter v. Southam*'s requirements,[35] including the need for reasonable and probable grounds as a precondition for a constitutional search or seizure.[36] There are, however, some sensible exceptions that have also been carved out in the criminal investigative realm.

The rationale behind these exceptions has been twofold: first, the privacy expectation involved and, second, the intrusiveness of the search power being considered. In cases where privacy expectations are high and the search power is quite intrusive, such as where state action would interfere with an individual's bodily integrity, the Supreme Court has indicated that even greater protections than those demanded by *Hunter v. Southam* are required.[37] In contrast, where privacy expectations are diminished and the search power is not very intrusive, the Supreme Court has accepted as constitutional slight deviations from the reasonable and probable grounds standard.[38]

---

not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one", *id*., at 114-15.

[34] With respect to border searches, see *R. v. Simmons*, [1988] S.C.J. No. 86, [1988] 2 S.C.R. 495 (S.C.C.) [hereinafter "*Simmons*"]; *R. v. Jacques*, [1996] S.C.J. No. 88, [1996] 3 S.C.R. 312 (S.C.C.); *R. v. Monney*, [1999] S.C.J. No. 18, [1999] 1 S.C.R. 652, 133 C.C.C. (3d) 129 (S.C.C.) [hereinafter "*Monney*", cited to C.C.C.]. With respect to administrative searches, see *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] S.C.J. No. 7, [1994] 2 S.C.R. 406 (S.C.C.); *Thomson Newspapers v. Canada*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.); *R. v. McKinlay Transport Ltd.*, [1990] S.C.J. No. 25, [1990] 1 S.C.R. 627 (S.C.C.). With respect to school searches, see *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.).

[35] For example, the Court has specifically cautioned "that departures from the *Hunter v. Southam* standards that will be considered reasonable will be exceedingly rare". See *Simmons*, *id.*, at 319.

[36] *Hunter v. Southam*, *supra*, note 32, at 112-15. The other requirements are a warrant, where it is feasible to obtain one (*id*., at 109-10) and the need for someone capable of acting judicially (*i.e.*, a judge or justice of the peace) to pass on the adequacy of the grounds for the issuance of the warrant (*id*., at 112-15).

[37] See *R. v. Dyment*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, 45 C.C.C. (3d) 244 (S.C.C.) ("when the search and seizure relates to the integrity of the body rather than the home, for example, the standard is even higher than usual", at 262 C.C.C.). See also *Monney*, *supra*, note 34, at 151-52; *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, at 342 (S.C.C.); *R. v. Golden*, [2001] S.C.J. No. 81, [2007] 3 S.C.R. 679, at para. 88 (S.C.C.).

[38] See, *e.g.*, *R. v. Wise*, [1992] S.C.J. No. 16, [1992] 1 S.C.R. 527, 70 C.C.C. (3d) 193, at 229 (S.C.C.) [hereinafter "*Wise*"] (after noting that the privacy expectation in one's vehicle is "markedly diminished" relative to one's home or office, the Court indicated that given that an electronic tracking device only reveals a vehicle's location, it is "a less intrusive means of surveillance than electronic audio or video surveillance. Accordingly, a lower standard such as a 'solid ground' for suspicion would be a basis for obtaining an authorization from an independent authority, such as a justice of the peace, to install a device and monitor the movements of a vehicle"). Arguably, the pat-down protective search power recognized in *Mann*, *supra*, note 6, also

Although a dog sniff is self-evidently a "search", relative to other searches it is arguably at the more benign end on the spectrum of intrusiveness.[39] To be effective it requires little more than the target briefly holding still as the dog passes by in close enough proximity to sniff at the person and his or her belongings. Unlike most other searches, there is no need for law enforcement officials to physically handle either the individual or his or her personal items. In short, the majority's conclusion that "reasonable suspicion" strikes the right constitutional balance between state and individual interests in this context seems conceptually sound.

A closer reading of LeBel J.'s judgment in *Kang-Brown* suggests that the minority might have been inclined to agree, had the deviation from *Hunter v. Southam* standards come from Parliament rather than from the majority's judgment. Justice LeBel explains this subtle but important distinction:

> A statutory provision on the appropriate use of sniffer dogs in law enforcement on grounds that fall short of the standard established in *Hunter v. Southam* might require justification under s. 1, but state action would not be foreclosed so long as the standard for justification was met under the relevant constitutional test. A requirement that Parliament act first would put the courts in a better position to address the competing interests at play and would ensure that the justification process meets constitutional standards. The extension of common law police powers as proposed in this case would shortcut the justification process and leave the Court to frame the common law rule itself without the full benefit of the dialogue and discussion that would have taken place had Parliament acted and been required to justify its action.[40]

In other words, deviations from *Hunter v. Southam*'s basic constitutional requirements are something that should be left for Parliament, with the

---

falls into this category. That power would seem to be contingent on the detaining officer having reasonable grounds to suspect that the individual detained may be carrying a weapon, an understandable deviation from the "reasonable and probable grounds" standard, in light of the less intrusive nature of the search (a pat-down, with no probing into pockets or under clothing) and the important and limited interest being served (police safety rather than evidence acquisition). See *Mann*, *id.*, 14 at paras. 36-45. Unfortunately, the Court's choice of language in *Mann* in articulating the relevant standard is itself confusing. See Stribopoulos, "Limits", *supra*, note 11, at 310-11.

[39] Of course assuming that the dog is well behaved. Obviously if police use an ill-tempered dog different considerations arise; for example, concerns about the reasonableness of the manner in which the search is carried out, under the third prong of *Collins*, may arise. See *supra*, notes 26-27 and accompanying text.

[40] *Kang-Brown*, *supra*, note 1, at para. 14.

Court's role limited to whether in a particular situation a legislated exception can be reasonably justified under section 1 of the Charter. This leads directly to a much larger controversy regarding the role of the Supreme Court of Canada under the Charter on questions pertaining to the source and scope of police powers.

IV. THE LARGER IMPLICATIONS: THE FATE OF JUDICIALLY CREATED POLICE POWERS

No statute authorizes the use of drug-sniffing dogs by police. As a result, legal authority for their use, if it exists, must be derived from the common law. If one were to examine the "common law" as it has been historically understood in England and throughout the Commonwealth, *i.e.*, the written reasons of judges from previously decided cases, one will find no mention of drug-sniffing dogs. I do not mean to suggest by this that the common law is somehow static. To the contrary, the great genius of the common law system is indeed its organic nature; specifically, the ability of judges to apply established tools of legal reasoning to *incrementally* expand existing principles in response to the changing needs of society.[41]

Historically, when it came to government interfering with individual liberties, our courts were very reluctant to use their law-making authority to expand state powers. In fact, in this context, the common law courts traditionally showed much restraint. That restraint eventually became the bedrock of English constitutional law, taking the "principle of legality" as its label. Applying that principle, common law courts have long insisted that any interference with individual liberty or property rights be premised on clear legal authority. Absent such authority, the common law erred on the side of individual freedom.[42] It is in this sense that the

---

[41] See generally Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988), who explains the common law ideal of "doctrinal stability", which finds expression in the concept of *stare decisis*. According to Eisenberg, "the courts must establish and apply rules that are supported by the general standards of society or the special standards of the legal system, and must adopt a process of reasoning that is replicable by the profession." *Id.*, at 47. Eisenberg goes on to provide a very useful taxonomy of the various modes of common law legal reasoning, which include: (1) Reasoning from Precedent; (2) Reasoning from Principle; (3) Reasoning by Analogy; (4) Reasoning from Doctrines Established in the Professional Literature; (5) Reasoning from Hypotheticals. *Id.*, at 50-103.

[42] For a detailed discussion of the principle of legality, including its origins and its recognition in Canadian law, see Stribopoulos, "In *Search* of Dialogue", *supra*, note 11, at 6-13.

common law has been viewed, in the words of LeBel J. as the "law of liberty".[43]

In the search and seizure context the principle of legality has a very long lineage. It can be traced all the way back to *Entick v. Carrington*,[44] one of England's earliest and most celebrated search cases. In that judgment the court refused a government request that it recognize, for the first time, an entirely unprecedented power on the part of the Secretary of State for the Northern Department to issue search warrants. In rejecting that request, Lord Chief Justice Camden remarked:

> What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.[45]

This same approach carried forward to Canada. In the early years of the Charter there was only one anomalous exception: *Dedman*.[46] In that case a slim (five-judge) majority of the Supreme Court seized on what was, up until that time, a relatively obscure decision of the English Court of Criminal Appeals in *Waterfield*,[47] which had set down a two-part test for assessing whether a police officer was acting in "execution of his duty".[48] (This was an element of the offence charged in that case.) In *Dedman*, however, the majority fastened on this test, and the cost-benefit analysis that it endorsed, transforming it into a basis for recognizing entirely new police powers. The power ultimately recognized in *Dedman* was the authority of police to conduct sobriety check-stops. As noted above, Dickson J. wrote a scathing dissent, strikingly reminiscent of Camden J.'s opinion in *Entick v. Carrington*, in which he admonished

---

43 *Kang-Brown*, *supra*, note 1, at para. 12, LeBel J. concurring.

44 (1765), Howell's State Trials 1030.

45 *Id.*, at 1068.

46 *Dedman*, *supra*, note 6.

47 *Waterfield*, *supra*, note 8.

48 The relevant passage from *Waterfield*, *id.*, provides, at 661:

> In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of police powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.

the majority for taking on a law-making role that more appropriately belonged to Parliament.

For a while, at least, the law-making authority that *Dedman* recognized seemed to lie dormant. In the interim, the Supreme Court of Canada repeatedly refused to recognize new police powers in response to Charter challenges under section 8, thereby engaging Parliament in a form of dialogue that led to the creation of a number of much needed legislated search powers.[49] During this period, the Supreme Court sent strong signals that it would not again use the ancillary powers doctrine to create new police powers. As La Forest J. explained, on behalf of the majority in *Wong*:

> The common law powers of search were extremely narrow, and the courts have left it to Parliament to extend them where need be … it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice.[50]

This is how things remained throughout most of the 1990s under the Lamer Court, with only one isolated exception.[51]

The turning point seemed to come in *Mann*,[52] when the Supreme Court used the ancillary powers doctrine to recognize a police power to briefly detain an individual if a police officer has reasonable grounds to suspect that the individual is involved in recently committed or unfolding criminal activity. That power was combined with a limited protective pat-down search power, available where police have objectively based grounds to be concerned for their safety. Rather ironic was the Supreme Court's failure to acknowledge the extensive body of case law, cases that predated lower court developments that applied the *Waterfield* test to recognize an investigative detention power, which had clearly and consistently held that at *common law* there is no power to detain for investigative purposes short of actual arrest.[53]

---

[49] I have elsewhere chronicled all this in far greater detail: see Stribopoulos, "In *Search* of Dialogue", *supra*, note 11.

[50] *Supra*, note 23, at 56.

[51] See *Godoy*, *supra*, note 13, applying the *Waterfield* test to recognize a police power to enter private premises to investigate disconnected 911 calls.

[52] *Mann*, *supra*, note 6.

[53] See *R. v. Hicks*, [1988] O.J. No. 957, 42 C.C.C. (3d) 394, at 400 (Ont. C.A.), affd on other grounds, [1988] S.C.J. No. 7, [1988] 1 S.C.R. 120 (S.C.C.); *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225, at 258 (Ont. C.A.), leave to appeal refused, [1988] S.C.C.A. No. 213 (S.C.C.);

With few exceptions, *Mann* has been widely criticized by commentators (myself included).[54] The chief complaint regarding the decision is that it tends to raise more questions than it answers, and in the process creates much confusion and thereby increases the chances of unjustified and abusive police stops.[55] In this sense, it provides a textbook example of the problems inherent when the courts exceed their institutional capacities and begin creating entirely new and unprecedented police powers, taking on an almost legislative rather than judicial role.[56]

Nevertheless, given the complexity of the issues raised by *Mann*, the case seemed to signal that any reluctance the Supreme Court had periodically expressed about creating new police powers had fallen by the wayside. Since *Mann* was decided, the Supreme Court has used the ancillary powers doctrine to recognize some rather significant and entirely unprecedented police powers.[57]

And then came the Supreme Court's decisions in *Kang-Brown* and *M. (A.)*. Suddenly, for the first time since *Dedman*, a debate broke out among the justices regarding the legitimacy and efficacy of using the ancillary powers doctrine to create new police powers.

In a concurring judgment in *Kang-Brown*, LeBel J. (joined by Fish, Abella and Charron JJ.) refused to use the ancillary powers doctrine to recognize a "common law" power on the part of police to use drug-sniffing dogs. In a judgment strongly reminiscent of the Supreme Court's pronouncements in the 1980s and early 1990s, this group rejected the idea that it was the Court's role to fill the gaps in formal police powers. Justice LeBel wrote:

R. v. Esposito, [1985] O.J. No. 1002, 24 C.C.C. (3d) 88, at 94 (Ont. C.A.), leave to appeal refused, [1986] S.C.C.A. No. 63, [1986] 1 S.C.R. viii (S.C.C.); *R. v. Dedman*, [1981] O.J. No. 2993, 59 C.C.C. (2d) 97, at 108-109 (Ont. C.A.), affd on other grounds [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.); *R. v. Cluett*, [1982] N.S.J. No. 542, 3 C.C.C. (3d) 333, at 347-48 (N.S.C.A.), revd on other grounds [1985] S.C.J. No. 54, 21 C.C.C. (3d) 318 (S.C.C.); *R. v. Guthrie*, [1982] A.J. No. 29, 69 C.C.C. (2d) 216, at 218-19 (Alta. C.A.); *R. v. Moore*, [1978] S.C.J. No. 82, [1979] 1 S.C.R. 195, 43 C.C.C. (2d) 83, at 89-90 (S.C.C.); *Rice v. Connolly*, [1966] 2 Q.B. 414, at 419 (C.A.); *Kenlin v. Gardner*, [1967] 2 Q.B. 510 (C.A.); *Koechlin v. Waugh and Hamilton*, [1958] O.J. No. 105, 118 C.C.C. 24, at 26-27 (Ont. C.A.).

[54] See *supra*, note 11.

[55] See for example McCoy, "Some Answers … More Questions", *supra*, note 11; Marin, "Further Down the Slippery Slope", *supra*, note 11; Stribopoulos, "Limits", *supra*, note 11.

[56] See generally Stribopoulos, *id*.

[57] See *supra*, notes 15 and 16 and accompanying text. Although LeBel and Fish JJ. had expressed strong skepticism about this sort of *ad hoc* law-making in their dissenting judgment in *Orbanski & Elias*, *supra*, note 15, their vote in favour of recognizing a police power at "common law" to conduct roadblocks for criminal investigative purposes in *Clayton*, *supra*, note 16, seemed to signal a possible change of heart.

> The common law has long been viewed as a law of liberty. Should we move away from that tradition, which is still part of the ethos of our legal system and of our democracy? This case is about the freedom of individuals and the proper function of the courts as guardians of the Constitution. I doubt that it should lead us to depart from the common law tradition of freedom by changing the common law itself to restrict the freedoms protected by the Constitution under s. 8 of the Charter.[58]

More practically, LeBel J. explained this reluctance by noting: "the courts are ill-equipped to develop an adequate legal framework for the use of police dogs".[59]

It is difficult to quarrel with these observations about the historic importance of the common law in protecting liberty and the need for courts to act with restraint before recognizing new police powers, especially where those powers would have complex and far-reaching consequences.

The only troubling aspect of LeBel J.'s analysis is his failure to convincingly explain why it was appropriate in *Mann* and *Clayton* to use the ancillary powers doctrine in this way, whereas it was inappropriate to do so in these cases. The complexity of the various issues raised by investigative detention power (for example, the use of force to effect such detentions, the temporal and geographic limits on them, the difficulty in reconciling this power with the right to counsel on detention found in section 10(b) of the Charter, and what, if any, corresponding obligations the power might impose on those detained, *etc*.[60]) suggests that, if anything, the dog-sniff power is better suited for recognition under the ancillary powers doctrine than were investigative detentions.

In his concurring reasons in *Kang-Brown*, Binnie J. (joined by McLachlin C.J.C.) took exception to this sudden trepidation on the part of LeBel, Fish, Abella and Charon JJ. For Binnie J., the use of the ancillary powers doctrine to create new police powers is part of a long tradition of "incremental" expansion of the common law. That doctrine simply provides courts with a methodology, like many judge-created methodologies used by common law courts over time, to develop the law in a particular area.[61]

With respect, the difficulty with this view is that it largely ignores the fact that there is nothing at all "incremental" about how new police

---

58 *Kang-Brown*, *supra*, note 1, at para. 12.
59 *Id*., at para. 15.
60 See generally Stribopoulos, "Limits", *supra*, note 11.
61 *Kang-Brown*, *supra*, note 1, at paras. 50-51.

powers are created under the cost-benefit analysis supplied by the ancillary powers doctrine. The truth is, our courts have used the doctrine to create police powers out of whole cloth. These new powers have no linkage to earlier judgments, and sometimes serve to implicitly overrule cases that pronounced on the absence of any such power (*i.e.*, investigative detention providing the best example). This reality seems to contradict Binnie J.'s rather charitable characterization of the ancillary powers doctrine.

In addition, Binnie J.'s defence of the ancillary powers doctrine in *Kang-Brown* runs up against his rather frank acknowledgment in *Clayton*, where he agrees "with the critics that *Waterfield* is an odd godfather for common law police powers".[62]

That said, Binnie J. does seem to have the better argument at points. In his reasons in *Kang-Brown* he rightly complains that the approach advocated by LeBel J. would breed even greater uncertainty. Litigants would have no way of knowing what approach the Court might be inclined to employ in a given case, one in which it is receptive to creating new police powers under the *Waterfield* test or one in which it insists on deferring such law-making responsibilities to Parliament.[63]

For Binnie J. the question was settled long ago. The only way forward, he insists, is for the courts to "proceed incrementally with the *Waterfield/Dedman* analysis of common law police powers rather than try to re-cross the Rubicon to retrieve the fallen flag of the *Dedman* dissent".[64]

One is left to wonder, however, whether "crossing the Rubicon" is ever an appropriate analogy when it comes to judicial decision-making. For example, would it have answered the claim made in *Brown v. Board of Education*[65] that the United States Supreme Court had already crossed the Rubicon when it decided in *Plessy v. Ferguson*[66] that "separate but equal" was consistent with the equal protection clause of the Fourteenth Amendment?

Or, looking for a more contemporary and Canadian example, how sound a response would it have been for the Supreme Court of Canada in *R. v. Henry*[67] to refuse to reconsider its earlier judgments because it had

---

62 *Clayton*, *supra*, note 16, at para. 75.
63 *Kang-Brown*, *supra*, note 1, at para. 22.
64 *Id.*, at para. 51.
65 347 U.S. 483 (1958).
66 163 U.S. 537 (1896).
67 [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.).

already crossed the Rubicon under section 13 of the Charter by repeatedly embracing the unworkable incrimination versus impeachment distinction?

My point is, even questions that seem settled are not always so. As I have argued elsewhere:

> In part, the long-term viability of any common law constitutional system very much depends on the authority and willingness of its final court of appeal to revisit established doctrine when experience has demonstrated that one of its earlier judgments is either being misconstrued or was wrongly decided. This seems especially true in a system such as ours in Canada where the Constitution is considered to be a "living tree".
>
> Just as important, for reasons going to its institutional integrity, the Court must proceed with great caution before substantially revamping established precedent or taking the drastic step of overruling an earlier judgment. If the Court appears too eager to revisit established principles then the authority of its judgments will be undermined and its institutional integrity will needlessly suffer. In other words, the institutional integrity of the Court would seem to depend both on its willingness to reconsider its past decisions when the reasons for doing so are compelling and the resolve to refrain from doing so when they are not.[68]

As Justice Patrick Healy has correctly pointed out, the ancillary powers doctrine crept into our law like "something of a Trojan-horse for the expansion of police powers".[69] As a result, the debate that has finally broken out among the justices at the Supreme Court of Canada on its continued use and utility is most welcome and long overdue.

In *Kang-Brown*, Bastarache J. clearly had no difficulty with the idea of the Supreme Court taking the responsibility of filling gaps in police powers. He was quite willing to grant the police this new power based on little more than generalized suspicion. With his retirement, it remains to be determined how his replacement, Cromwell J., might feel about the place of the ancillary powers doctrine within our constitutional democracy. It is Cromwell J. who would seem to hold the decisive vote on the future of this controversial source of new police powers. Unfortunately, there

---

[68] James Stribopoulos, "Has Everything Been Decided? Certainty, the Charter, and Criminal Justice" (2006) 34 S.C.L.R. (2d) 381, at 385.

[69] Healy, *supra*, note 11.

are no solid clues as to the position he might ultimately take on this important constitutional question.[70]

V. CONCLUSION

One thing is certain, the Supreme Court of Canada will have plenty of opportunities in the future to decide whether this doctrine should continue as a part of our law or whether the cases that facilitated its covert entry into our legal system should be overruled. This is because, in the absence of a comprehensive code of criminal procedure in Canada, which is unlikely as long as the Supreme Court is willing to fill the gaps in police powers through its use of the ancillary powers doctrine, these sorts of cases will increasingly become a routine part of the Court's work.

[70] During his tenure on the Nova Scotia Court of Appeal, Cromwell J. was never involved in a case in which the ancillary powers doctrine was at issue.