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Investigative detention in Canada

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Résumé

L'article suivant explorera la notion de la détention aux fins d'enquête et son développement dans le droit canadien. Fondée sur un principe de Common Law emprunté du droit américain, la détention pour fins d'enquête permet aux policiers de détenir et de fouiller un individu afin d'obtenir de l'information. Depuis son introduction dans le droit canadien, la détention aux fins d'enquête n'a pas été reconnue par les tribunaux pénaux comme un pouvoir de police légitime. Il n'existe pas de pouvoir général de détention. Cela est dû en partie à l'utilisation de la doctrine des pouvoirs accessoires, qui permet aux tribunaux de créer des pouvoirs de police et qui met en conflit les pouvoirs législatif et judiciaire. En outre, le droit pénal américain d'où la notion de la détention aux fins d'enquête tire ses origines a une structure différente du droit pénal canadien. Afin de déterminer si l'existence de ce pouvoir de police bénéficie des pratiques du droit pénal canadien, l'article suivant évaluera les applications historiques, théoriques et pratiques de la détention aux fins d'enquête.

Abstract

The following article explores the notion of investigative detention and its development in Canadian Common Law. Founded on the existing police power of detention, investigative detention adds an inquiring element in order to obtain information on a recent crime. In the last twenty years, this concept has struggled to gain recognition in Canadian criminal courts as a legitimate police power. This is due in part to the use of the ancillary powers doctrine which allows the courts to create police powers, effectively blurring the lines between the legislative and judicial powers. The issue is further complicated by the fact that investigative detention was originally developed by the American Criminal Law system, which differs significantly in structure to its Canadian counterpart. Therefore, in order to determine whether the existence of this police power benefits Canadian criminal law practices, the following article will evaluate the historical, theoretical and practical applications of investigative detention.

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INTRODUCTION

Investigative detention is a relatively new practice employed by police officers. Founded on the already existing police power of detention, investigative detention adds an inquiring element in order to obtain information on a recent crime. In the last twenty years, the concept of investigative detention has struggled to gain recognition in Canadian criminal courts as a legitimate police power. Following its introduction into Canada in 1985, the courts have progressively taken tentative steps in an effort to legitimize investigative detention. In 1993, *R. v. Simpson*[1] marked a drastic philosophical change in Canada and opened a floodgate that has changed and shaped police detention practices. Since then, Canada has seen a number of cases that have further developed this police power and attempted to regulate it.

Many questions have been raised through the years, including whether the ancillary powers doctrine should be allowed to create police powers, and whether doing so blurs the lines between the legislative and judicial powers. The introduction of the ancillary powers doctrine preceded the implementation of the *Canadian Charter of Rights and Freedoms*.[2] This has led many to question whether the existence of such a doctrine undermines the very rights and freedoms that the Charter was designed to protect.[3]

As it stands, the power of investigative detention remains very much a budding experiment in Canada. As such, some have suggested looking south of the border for clues on how to proceed with this new police power despite the significant differences between the development of Canadian and American common law.[4] American practices such as the Terry Stop can serve an example of a successful and functional application of this police power. However, there are also significant pitfalls associated with such a relatively arbitrary power.[5] The discrepancy between the world imagined by the courts and the reality

[1] (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.).
[2] R.S.C. 1985, app. II, no. 44, schedule B, part I.
[3] James Stribopoulos. «A Failed Experiment? Investigative Detention: Ten Years Later», (2003) 41 *Alta. L. Rev*. 335, 341, 377 and 378 (HeinOnline).
[4] *Id.*, 384.
[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

of police practices can create a potential for abuse despite the legal community's best efforts. Therefore, in order to determine whether or not the existence of this police power is of benefit or detriment to Canadian criminal law practices, it is important to evaluate both the theoretical and practical applications of investigative detention through an in depth look at the case law which has brought this principle to prominence.

I. INVESTIGATIVE DETENTION: A NEW POLICE POWER?

Investigative detention refers to a common law principle borrowed from American criminal law practices. This principle allows police officers to detain and search an individual in order to obtain information on a possible crime without the necessity of proceeding with a formal arrest. As of yet, there is no general power of detention, therefore this relatively new police power is subject to various limitations.[6]

A. Police Powers

One of the main points of contention surrounding the principle of investigative detention is whether an officer's duty to the public justifies the existence of investigative detention. A police officer's duty is not only to keep the peace, but it also extends to include "the prevention of crime, and the protection of life and property."[7] It was acknowledged in *Dedman v. R.* that "police interferences with individual liberty must [...] be founded upon some rule of positive law."[8] As a result, general and specific statutory powers set out by the *Criminal Code*[9] are the most authoritative way for police to proceed with an arrest or detention.[10]

In addition to statutory powers, police powers also stem from common law practices, particularly the ancillary powers doctrine. Also known as the *Waterfield*[11] test, the ancillary

[6] *Simpson*, *supra*, note 1.
[7] *Dedman v. R.* (S.C. Can., 1985-07-31), SOQUIJ AZ-85111062, J.E. 85-781, [1985] 2 S.C.R. 2, para. 65.
[8] *Id*., para. 16. See also L. H. Leigh, *Police Powers in England and Wales*. London: Butterworths, 1975. P. 29.
[9] S.R.C. 1985, c. C-46.
[10] Steve Coughlan and Glen Luther, *Detention and Arrest*. Toronto: Irwin Law, 2010. P. 10.
[11] *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164; [1963] 3 W.L.R. 946; (1964) 48 Cr. App. R. 42; (1964) 128 J.P. 48; (1963) 107 S.J. 833.

powers doctrine allows the courts to create police powers by according a power that is not expressly provided for in the statute.[12] However, after the implementation of the Charter, the ambiguity regarding arrest, detention and search and seize powers created a grey zone in which investigative detention seems to exist. Therefore, the police power of investigative detention stems from both a statutory set of rules and accepted common law practices.[13]

B. Ancillary powers doctrine

The courts have acknowledged that a certain amount of police power stems from the scope of their duties rather than directly from the law itself.[14] The Supreme Court has allowed courts to essentially create police powers by according them powers not explicitly provided for in the law, but rather alluded to. This is basically the crux of the ancillary powers doctrine, which aims to determine how far police authority can encroach onto an individual's personal freedom in the name of police duty.

The *Waterfield* test embodies the ancillary powers doctrine and is used to determine whether police officers have acted beyond their powers. This test, also known as the test of reasonable necessity, was first used in Canada in *Dedman*[15] in an effort to determine "whether the officer had common law authority for what he did". It comprises the following two criteria[16]:

> **(a)** Does the officer's conduct fall within the general scope of any duty imposed by statute or recognized at common law?
>
> **(b)** If so, does such conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty?

As a result, this test is used to determine the reasonable necessity of police powers in conjunction with police duties.

[12] *Op. cit. supra,* note 10, p. 15.
[13] *Id.*, p. 5.
[14] *Dedman, supra*, note 7, 66.
[15] *Id.*, 67.
[16] *Id.*, 66, citing *R. v. Waterfield, supra*, note 11.

Traditionally speaking, it is the duty of Parliament and the legislators to create police powers and the court's duty to enforce them. As a result, there has been much criticism regarding the court's ability to create police powers through the ancillary powers doctrine. One critic in particular believes that "the Canadian articulable cause doctrine is in need of judicial or legislative improvement or rejection".[17] However, seeing as this action has yet to take place, many authors question whether or not the lack of parliamentary action should be viewed as an intentional omission to legislate.[18]

Justice Binnie, in the *Kang-Brown* case[19], which involved the creation of the police power to search using sniffer-dogs, suggested that it is the court's responsibility to "refine police powers" should it feel the need to.[20] The existence of the ancillary powers doctrine demonstrates that common law courts are prepared to create law out of necessity in a bid to inject more certainty into the law. However, common law is uncertain by nature, due to the fact that new powers are created only "after the fact".[21] Investigative detention is a concept that continues to straddle this paradox. It exists in a legal void that the courts attempt to fill, but that can only truly be addressed by parliament who has, until now, been unwilling to act. The courts have accordingly been left with little choice but to fill the legislative void that arises due to the rapidly evolving jurisprudence, and the even more rapidly evolving police practices and social norms.

II. DETENTION

The state of detention is a police power that hinges entirely on the facts present at the moment of the incident. In order to benefit from the protection of sections 9 and 10 of the Charter, there must be a clear element of compulsory restraint constituting a detention. The

[17] Lesley A. McCoy, «Liberty's Last Stand? Tracing the Limits of Investigative Detention», (2002) 46 *Crim. L.Q*. 319, 320, citing A.S. Patel, «Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment», (2001) 45 *Crim. L.Q*. 198, 199.
[18] S. Coughlan and G. Luther, *op. cit. supra*, note 10, p. 18.
[19] *R. c. Kang-Brown* (S.C. Can., 2008-04-25), 2008 SCC 18, SOQUIJ AZ-50487304, J.E. 2008-905, [2008] 1 S.C.R. 456
[20] S. Coughlan and G. Luther, *op. cit. supra*, note 10.
[21] *Id.*, p. 19.

restraint can be either physical or psychological, and may imply the use of motor vehicles, particularly when dealing with detention for investigative purposes. In any of these situations, the officer aims to "assume control over an individual's freedom of movement".[22] As such, the Supreme Court conceived a test in order to determine whether or not an individual is in a state of detention. The test, as explained by Justice Le Dain in *Therens*, [23] states that an individual is considered to be detained if "the person concerned submits [to] the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist". This test applies to both physical and psychological detention, with the addition of several precisions for the latter category.

A. Physical detention

Detention is considered to be physical when the constraint incorporates a physical element. This physical element can be as obvious as an officer grabbing a subject's arm in order to physically prevent him from leaving, such as in *Hanano*.[24] In other situations, the physical elements may be less apparent, but they exist nonetheless. The subject in *Mann*[25] was considered to be physically detained the moment when the officer began conducting a frisk search on his person. In *Chaisson*,[26] the subject was considered to be physically detained the moment that he was placed in the police cruiser following a motor vehicle stop. Despite the clarity of the physical intervention in the above-mentioned cases, a lack of physical contact does not necessarily denote the absence of physical detention. In *Kaminsky*,[27] the officer placed his cruiser in such a way that it obstructed the subject's path to the tavern door. The cruiser acted as a physical barrier, preventing the subject's escape; therefore the court determined him to be in a state of physical detention at that moment.[28]

[22] J. Stribopoulos, *loc. cit. supra*, note 3, 345-346.
[23] *R. v. Therens* (S.C. Can., 1985-05-23), SOQUIJ AZ-85111046, J.E. 85-551, [1985] 1 S.C.R. 613, para. 57 (*Therens*).
[24] *R. v. Hanano*, 2007 MBQB 9, [2007] M.J. No. 11 (Q.L.), paras. 6 and 16.
[25] *R. v. Mann* (S.C. Can., 2004-07-23), 2004 SCC 52, SOQUIJ AZ-50263823, J.E. 2004-1495, [2004] 3 S.C.R. 59, [2004] S.C.J. No. 49 (Q.L.), para. 19.
[26] *R. v. Chaisson* (S.C. Can., 2006-03-30), 2006 SCC 11, SOQUIJ AZ-50364560, J.E. 2006-729, [2006] 1 S.C.R. 415, [2006] S.C.J. No. 11 (Q.L.), 206 C.C.C. (3d) 1.
[27] *R. v. Kaminsky*, 2007 ABPC 68, paras. 51-52.
[28] *Id.*, paras. 82-83.

1. Motor vehicle stops

Motor vehicle stops are a form of statutory detention authorised by the applicable sections of the *Motor Vehicle Act*[29] in each respective province. In British Colombia, section 73 of the *Motor Vehicle Act* defines a motor vehicle stop as one that results either from an identifiable infraction, or from a random roadblock or stop.[30] Motor vehicle stops resulting from an identifiable infraction occur primarily when the police have a "reasonably held belief that the detention and search will afford evidence of an offence."[31] If the stop is conducted without any identifiable offence, then the stop is deemed to be arbitrary. This type of stop is known as a pretext stop and is not authorized by law.[32]

At first glance, the use of random stops may appear to contradict section 9 of the *Charter*, which prohibits arbitrary detentions; however, the Supreme Court ruled in *Dedman v. R.* that the reasonableness of the stop caused it to fall within the officer's duties, thus making it lawful.[33] The court further explained that roadblocks serve to protect the general public by addressing issues such as sobriety and the mechanical fitness of the automobile.[34] The brief infringement on the motorist's freedom was minimal in comparison with the overall objective of safety. In this way, it was deemed to constitute a reasonable limitation of the right in accordance with section 1 of the Charter.[35] Therefore, the police should use these stops only for their intended purpose, and not as a means to conduct unfounded vehicle searches.[36]

Unlike pedestrian stops, where the individual is considered to be detained only if the physical or psychological elements of detention exist, a motorist is deemed to be detained

[29] (R.S.B.C. 1996, c. 318), s. 73.
[30] Michael P. Klein, «Motor Vehicle Stops and the Charter: Points to Consider and Some Interesting Cases» (2013) *Continuing Legal Education Society of British Columbia* 1.1.1, 1.1.3. www.cle.bc.ca/PracticePoints/CRIM/MotorVehicleStops.pdf.
[31] *Id.*, 1.1.2; see also *R. v. Storrey* (S.C. Can., 1990-02-15), SOQUIJ AZ-90111018, J.E. 90-372, [1990] 1 S.C.R. 241, 247, [1990] S.C.J No. 12 (Q.L.).
[32] *Id.*, 1.1.8; see also *R. v. Joseph*, 2011 BCPC 147, paras. 28-37.
[33] *Id.*, 1.1.4; see also *Dedman*, *supra*, note 7, 69.
[34] *R. v. Ladouceur* (S.C. Can., 1990-05-31), SOQUIJ AZ-90111050, J.E. 90-905, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22.
[35] M.P. Klein, *loc. cit. supra*, note 30, 1.1.3.
[36] M.P. Klein, *loc. cit. supra*, note 30, 1.1.4.

the moment that he is pulled over by police.[37] In *Mellenthin*,[38] the court explained that this is due to the fact that "the police assume control over the movements of the motorist under threat of criminal sanction" at the moment that the motor vehicle is pulled over, thus resulting in a detention.[39] This principle applies even if the motor vehicle was not originally in motion.[40] It is important to note that passengers in a vehicle where the driver is deemed to be detained as a result of a motor vehicle stop are also considered to be detained, as has been shown in *R. v. Harris*.[41]

There are certain situations in which a simple motor vehicle stop can turn into a full criminal investigation. In *Ladouceur*, the court gave police the ability to detain motorists "if the purpose of the stop was for traffic safety purposes."[42] The court did not, however, give the police the power to pursue an investigation without the suspicion of wrongdoing. Once the motorist is detained by reason of traffic violations, there are a series of observations that would give the officer reasonable grounds to pursue an investigation. They include visual[43] and olfactory observation, such as the smell of fresh or burnt marijuana[44] and the smell of cocaine.[45]

B. Psychological detention

Psychological detention is the more prevalent form of detention. It arises when the subject experiences a restriction of personal freedom due to the knowledge of specific legal consequences that may arise as the result of a failure to comply with a police request.[46] A distinction is drawn between instances where the subject is informed of specific legal

[37] Alec Fiszauf, *The Law of Investigative Detention.* 2nd ed. Markham (Ont.): LexisNexis, 2013. P. 61.
[38] *R. v. Mellenthin* (S.C. Can., 1992-11-19), SOQUIJ AZ-92111114, J.E. 92-1758, [1992] 3 S.C.R. 615.
[39] *R. v. X* (C.A. (Ont.), 2007-09-05), 2007 ONCA 596, SOQUIJ AZ-50471401, para. 54, cited in A. Fiszauf, *op. cit. supra*, note 37, p. 61; see also, *Mellenthin*, *id.*, paras. 485-486, 622.
[40] A. Fiszauf, *op. cit. supra*, note 37, p. 61.
[41] A. Fiszauf, *op. cit. supra*, note 37, p. 62, citing *R. v. Harris* (C.A. (Ont.), 2007-08-24), 2007 ONCA 574, SOQUIJ AZ-50470866, paras. 19-22 and 46 (*Harris*).
[42] *R. v. Dillabough* 2013 SKPC 76, para. 21 cited in M.P. Klein, *loc. cit. supra*, note 30, 1.1.4.
[43] *R. v. Nguyen* 2012 ABQB 199, para. 95-102; *R. v. Taylor* 2012 BCPC 112, para. 48.
[44] *R. v. Brownridge* 2000 BCSC 795, para. 27; *R. v. Sewell* 2003 SKCA 52, para. 36; *Taylor*, *id.*, 41, para. 58; *R v. Webster* (C.A. (C.-B.), 2008-11-21), 2008 BCCA 458, SOQUIJ AZ-50522561, para. 31; *R. v. Boyd*, (C.A. (C.-B.), 2013-01-17), 2013 BCCA 19, SOQUIJ AZ-50927698, paras. 30-31.
[45] *R v. Khan*, [2004] O.J. No. 3819 (Q.L.), para. 65; *R. v. Goerzen* 2010 ABQB 289, paras. 37-38.
[46] *R. v. Suberu* (S.C. Can., 2009-07-17), 2009 SCC 33, SOQUIJ AZ-50566221, J.E. 2009-1378, [2009] 2 S.C.R. 460, paras. 51-52, affd. (C.A. (Ont.), 2007-01-31), 2007 ONCA 60, SOQUIJ AZ-50470846.

consequences and instances where the subject merely believes that non-compliance will entail such consequences.[47] The latter is known as pure psychological detention.[48] This type of detention arises when the following criteria are met:

1. A demand is made by police. This demand may be direct, or may come in the form of a series of questions.[49]
2. There is voluntary compliance with the demand, resulting in a restriction of personal freedom and/or other serious legal consequences.[50]
3. The subject holds a reasonable belief that there is no other option but to comply with the demand.[51]

As the above has demonstrated, a subject is therefore psychologically detained when he or she believes that there is no other way to act but to submit to the constraint imposed on him or her by a police officer.

In certain situations, the absence of a direct demand by officers makes it difficult for a reasonable person to determine whether compliance is mandatory. This ambiguity was addressed in *Grant*. In this case, the subject was surrounded by police and asked a series of self-incriminating questions. He did not have his rights read to him, nor was he told that he was permitted to leave at any time, as was the case.[52] Furthermore, the manner in which the officers were asking the questions led Grant to feel compelled to respond, despite the fact that he would be incriminating himself. The court determined that Grant was detained by the police at that moment.[53] Ordinarily, general questions posed by police do not, in and of themselves, restrict an individual's freedom.[54] The test as such necessitates the presence of a demand issued by an officer to fulfill the element of constraint necessary in a detention.

[47] *Mann*, *supra*, note 25, 19.
[48] *Ibid*.
[49] A. Fiszauf, *op. cit. supra*, note 37, p. 42.
[50] *Ibid*.
[51] *R. v. Grant* (S.C. Can., 2009-07-17), 2009 SCC 32, SOQUIJ AZ-50566222, J.E. 2009-1379, [2009] 2 S.C.R. 353, paras. 46-52.
[52] A. Fiszauf, *op. cit. supra*, note 37, p. 42.
[53] *Grant*, *supra*, note 51.
[54] *Id.*, para. 41.

This ruling shows that if the circumstances are such that a reasonable person can conclude that he "had no choice but to comply with a police officer's request," then the lack of a direct demand is not detrimental to the existence of a state of detention.[55] In *Moran,*[56] the language employed by the officer led the subject to believe that he was being given a command, despite the fact that the officer was merely requesting information. This demonstrates how circumstance can influence the way in which a reasonable person responds to a police inquiry. The officer's behaviour, the location of the interaction and other elements surrounding an individual's interaction with the police can therefore help to determine whether or not a state of detention exists.

III. HISTORICAL DEVELOPMENT OF INVESTIGATIVE DETENTION THROUGH CANADIAN CASE LAW

A. Orthodox common law tradition

Historically speaking, Canadian common law placed much more emphasis on developing rules that governed police powers of arrest. This was a direct result of the principle of legality, which required that "any interference with individual liberty be based on lawful authority."[57] This way of thinking made it so that any restraint on personal freedom was to be viewed as an exception to the rule of presumed personal liberty.[58] Consequently, the only way to physically restrain an individual while respecting the *Constitution* would be through a lawful arrest based on objectively reasonable and probable grounds.

As a result of the orthodox tradition present in Canadian common law practices, detention without arrest for investigative purposes was explicitly prohibited. Police officers were permitted to question anyone of their choosing; however, they had no "lawful power to compel the person questioned to answer."[59] Individuals who were questioned by police

[55] *Ibid.*
[56] *R. v. Moran*, [1987] O.J. No. 794 (Q.L.), 36 C.C.C. (3d) 225 (C.A.), paras. 80-82.
[57] J. Stribopoulos, *loc. cit. supra*, note 3, 338.
[58] *Ibid*.
[59] *R. v. Dedman*, 1981 CanLII 1631 (Ont. C.A.), p. 13 [PDF].

were thus free to walk away at any point during the investigation.[60] This idea appeared to be virtually incontestable, particularly at a time when nearly every leading legal mind was in agreement on the issue. In fact, Justice Martin clearly stated in *Dedman*[61] that "a police officer has no right to detain a person for questioning or for further investigation".

Despite the clear interdiction of detention without arrest for investigative purposes, the reality of police practices at the time did not always reflect the theoretical structure proposed by the courts, as is often the case. In fact, the Commission for Public Complaints against the RCMP *Annual report of 1997 - 1998* noted that officers "do not always distinguish between evidence that creates a suspicion from evidence that constitutes reasonable grounds" for arrest.[62] Consequently, police patrol practices caused investigative detention to still occur; however, it appeared to exist outside of the law.[63] This may be why, despite the clear consensus by legal professionals on the lack of authority by police to perform investigative detention, nearly every Canadian court later adopted the detention power as described in *R. v. Simpson*.

B. The acknowledgement of investigative detention by Canadian courts

1. Dedman v. R. (1985)

This case is the foundation upon which investigative detention stands today. It began with the implementation of the R.I.D.E. stop and check program, also known as Reduce Impaired Driving Everywhere. Officers would go to areas with a high number of reported DUI's where they would then proceed to arbitrarily pull over motorists in an effort to check sobriety among drivers.[64] It was during one of these random stops that Dedman voluntarily pulled over his vehicle at the request of a police officer. Shortly after doing so, the officer smelled alcohol on Dedman's breath, thereby establishing the necessary grounds to

[60] A. Fiszauf, *op. cit. supra*, note 37, p. 1.
[61] *Dedman, supra*, note 59, p. 19 [PDF].
[62] J. Stribopoulos, *loc. cit. supra*, note 3, 340, citing Canada, Commission for Public Complaints against the RCMP, *Annual Report 1997 – 1998*. Ottawa: minister of Public Works and Government Services Canada, 1999. (Chair: Shirley Heafey).
[63] J. Stribopoulos, *loc. cit. supra*, note 3, 339.
[64] *Dedman, supra*, note 59, p. 2 [PDF].

demand a breathalyser test.[65] The accused refused to submit to the test and was subsequently charged under article 254(5) of the *Criminal Code.* In his defense, Dedman claimed that the stop had been unlawful because there was no legislation or existing common law practice to support the reason for his initial detention.[66]

Dedman's defense created significant division in the Supreme Court. Through the *Waterfield* test, the court determined that preventing impaired driving and ensuring roadway safety were in fact part of a police officer's duties. Furthermore, the stop and check activities performed by the police in the context of R.I.D.E. did not constitute an unjustifiable use of powers because they were a minor inconvenience to drivers compared to the serious consequences of impaired driving.[67] As a result it was decided in a four to three split that the officer had been acting "in execution of his duty" as per the *Waterfield* test.[68] This proved to be a monumental moment in Canadian criminal law history because the Supreme Court had just confirmed, through the application of the ancillary powers doctrine, the constitutionality and unambiguous existence of investigative detention.

Yet critics claim that the *Dedman* case is misleading and that it provides a shaky foundation for investigative detention powers. Chief Justice Dickson in particular was strongly opposed to the majority's view. In his dissenting opinion, he stated the following:[69]

> "[…] To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law. […]"

This statement of Chief Justice Dickson demonstrates that the use of the ancillary powers doctrine as an "expansive law making device" causes the Supreme Court to

[65] J. Stribopoulos, *loc. cit. supra*, note 3, 348.
[66] *Ibid*.
[67] Alexandre Boucher, François Lacasse et Thierry Nadon. «La création de la détention pour enquête en common law: dérive jurisprudentielle ou évolution nécessaire? Un point de vue pragmatique», (2009) 50 *C. de D.* 771, 780 (érudit).
[68] J. Stribopoulos, *loc. cit. supra*, note 3, 349.
[69] *Dedman, supra*, note 7, para. 25.

encroach on Parliament's legislative powers.[70] Consequently, this application of the *Waterfield*[71] test only serves to weaken the delimitations separating the legislative and judicial government powers.

Many authors, professors and modern legal experts share Chief Justice Dickson's views. Assistant Professor of Law, James Stribopoulos of the University of Alberta, claims that the justices did not apply the *Waterfield* test in the way that it had been intended by the English Courts when it was conceived.[72] As shown in *Hoffman v. Thomas*, the *Waterfield* test served to determine "whether the officer had common law authority for what he did".[73] However, the majority's application of the test seems to have changed its original purpose. Originally, it was intended to be used only to determine whether "a police officer was acting in the execution of his duties".[74] Stribopoulos accuses the Supreme Court of having turned this test into an "expansive law-making mechanism" despite the fact that it was never used to this end before.[75] As a result, he questions the legitimacy of investigative detention as a police power, based on its precarious origins.

2. R. v. Simpson (1993)

Following *Dedman*, the ancillary powers doctrine remained dormant for some time in Canada until *Simpson* in 1993, which served to solidify its presence in Canadian criminal law practices. In *Simpson*, the accused was seen leaving a suspected crack house in a car with a woman. The information regarding this house and the possible criminal activity going on within it originated from an internal police memorandum whose source was unknown. As a result, the reliability of this information was impossible to determine.[76] Despite lacking any information of wrongdoing concerning Simpson or the woman he was with, the police officer proceeded to follow them and pull them over. The officer admitted to the court that the detention of the accused had been purely for investigative purposes,

[70] J. Stribopoulos, *loc. cit. supra*, note 3, 352.
[71] *Ibid.*
[72] *Id.*, 352-358.
[73] *Hoffman v. Thomas*, [1974] 2 All E.R. 233, cited in *Dedman*, *supra*, note 7, para. 67.
[74] *Dedman*, *ibid*.
[75] J. Stribopoulos, *loc. cit. supra*, note 3, 351.
[76] *Id.*, 345.

and had in no way been related to any laws regarding motor vehicles. This statement put into question the lawfulness of the stop.[77]

Once detained, Simpson revealed that he had been in trouble with the law before, in an incident involving a knife. As a result of this declaration, the officer proceeded to search Simpson for weapons, but did not find any. Instead, the officer noticed a round hard object in Simpson's pocket, which turned out to be a bag filled with cocaine. Simpson was subsequently arrested for illegal possession of a banned substance.[78] Although the accused had initially unsuccessfully pleaded the violation of his rights protected by sections 8 and 9 of the Charter, the subsequent appeal was accepted. This resulted in the expulsion of the evidence gathered and a dismissal of the conviction.[79]

Due to the appeal's success, the comprehensiveness of investigative detention remained unclear because of the court's rejection of "articulable cause to detain as a general police power" based solely on a suspicion.[80] Therefore, the court determined that there must be a concrete and clear link between the reason for pulling over the accused and the offence being investigated. This guiding principle was later reprised by Justice Iacobucci in *R. v. Mann*, as seen through his interpretation of *Simpson* in the following excerpt:[81]

> "[…] The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. […]"

With this, *Simpson* contributed to the evolution of investigative detention by creating the precedent that articulable cause can be used as a basis for detention.[82]

a) Roots in American case law

The articulable cause standard used in *Simpson*, more commonly known in Canada as the "reasonable grounds to detain" criteria, was not a newly invented concept. In fact, it

[77] *Simpson*, *supra*, note 1, p. 8 [PDF] (II. Trial Proceedings).
[78] J. Stribopoulos, *loc. cit. supra*, note 3, 345.
[79] J. Stribopoulos, *loc. cit. supra*, note 3, 348.
[80] A. Fiszauf, *op. cit. supra*, note 37, p. 4.
[81] *Mann*, *supra*, note 25, para. 34.
[82] A. Fiszauf, *op. cit. supra*, note 37, p. 4.

was borrowed from the "stop and frisk" doctrine found in the American *Fourth Amendment* jurisprudence.[83] This doctrine states that an individual has the right to be "free from unreasonable search and seizure".[84] It was first expressed in *Terry v. Ohio*, where officers had the right to detain or seize a person for investigative purposes. However, they could only do so if they could prove a reasonable suspicion of "imminent or on-going criminal activity".[85] This detention involved an interrogation as well as a frisk search, and became known as the Terry Stop.

Since then, American common law has evolved significantly to allow the detention of suspects in completed criminal felonies, provided that the suspicion originates from articulable facts.[86] It is therefore evident that American case law is light years ahead of its Canadian counterpart when it comes to developing investigative detention. Although it may be tempting to simply transplant the American guidelines involving this police power into the Canadian criminal law system, authors warn against it. This is due to a fundamental difference in the Canadian and American legal systems.

In the United States, the majority of Criminal law is sanctioned by the state, despite the fact that criminal law technically falls under both state and federal jurisdiction.[87] As a result, the states can create "additional protections for their citizens," provided that they stay within the parameters of the *Fourth Amendment*.[88] *Sibron v. New York*[89] demonstrates the relationship between the states and Congress. In this case, the scope of police powers was said to extend all the way to the limits imposed by the Constitution, provided that no additional restraints had been placed on them by the state. Consequently, as long as the U.S. Supreme Court does not explicitly prohibit a certain police practice, it is indirectly creating police powers through its silence.[90]

[83] *Mann*, *supra*, note 25, para. 31.
[84] *Ibid.*
[85] *Id.*, para. 31 citing *Terry*, *supra*, note 5.
[86] *Mann*, *supra*, note 25, 32. See also *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Hensley*, 469 U.S. 221 (1985).
[87] J. Stribopoulos, *loc. cit. supra*, note 3, 384.
[88] *Ibid.*
[89] *Sibron v. New York*, 392 U.S. 40 (1968), para. 60.
[90] J. Stribopoulos, *loc. cit. supra*, note 3, 385.

Unlike the United States, Canadian criminal law falls solely under federal jurisdiction. The Supreme Court's purpose is thus to interpret the Charter and not to create police powers, thereby creating an insurmountable discordance with the American approach to this problem. The U.S. Supreme Court has received much criticism surrounding its overly complex and ultimately ineffective methods to create police power.[91] For these reasons, Canada is discouraged from following American legal practices and encouraged to develop a solution that would better suit the unique legal conditions present in Canada – a feat which it has strived to accomplish.

3. R. v. Mann (2004)

To date, *Mann* is considered to be the leading judgement on investigative detention in Canada. In this case, the Supreme Court unanimously acknowledged the existence of investigative detention as a common law concept.[92] It is through this case that police power began gaining some traction in Canadian criminal law practices. As previously determined in *Simpson*, there could be no detention without reasonable suspicion and reasonable necessity.[93] While *Simpson* had established articulable cause as a basis for justifying investigative detention, it failed to provide a concrete guideline concerning this practice. As a result, most cases involving investigative detention were judged on a case by case basis using the *Waterfield* test and balancing the individual rights in question against society's interest in "effective policing".[94]

Mann began when two police officers received a dispatch concerning an in-progress break and entry. The suspect in question was said to be a "21-year-old aboriginal male, approximately five feet eight inches tall, weighing about 165 pounds, clad in a black jacket with white sleeves".[95] On their way to the crime scene, officers came across a man fitting the exact description of the suspect, several blocks away from the scene of the robbery. The accused was stopped, asked to identify himself and to submit to a pat down, all of

[91] *Ibid.*
[92] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 782.
[93] A. Fiszauf, *op. cit. supra*, note 37, p. 13.
[94] *Mann*, *supra*, note 25, paras. 15 and 34.
[95] *Id.*, para. 4.

which he freely consented to. During the pat down, the officers discovered marijuana in one of his pockets. The accused was subsequently charged with "possession for the purpose of trafficking".[96] Although the court concluded that the detention of the accused did not violate the Charter, the evidence recovered for the drug related charge was dismissed due to the fact that it was recovered on a weapons search and that the "soft object in this pocket" did not fit those criteria.[97] Thus the detention and subsequent search were considered legal because they had been based on reasonable facts.

a) The burden of proof

Under normal circumstances, police officers possess frisk search powers with the right to arrest, often employed to either ensure the safety of the arresting officer or to protect the integrity of evidence.[98] The burden of proof associated with any search is directly related to its level of intrusiveness. Justice Lamer explained that highly intrusive searches require the existence of reasonable and probable grounds, whereas less intrusive searches only require reasonable suspicion.[99] Therefore, the more a search violates a person's expectancy of privacy, the higher the burden of proof needed to carry out that search would be.[100]

Detention differs greatly from situations involving an arrest. The Supreme Court in *Mann*[101] did not recognise investigative detention as a general police power. In order to lawfully detain an individual for investigative purposes, the officer would need reasonable grounds to suspect that a recent offense had been committed and that the individual to be detained had been involved in the said offense.[102]

b) The principle of reasonable suspicion

The principle of reasonable suspicion differs from the objectively reasonable and probable burden of proof necessary to justify an arrest. The former was defined by Justice

[96] *Id.*, para. 6.
[97] *Id.*, para. 5.
[98] *Dupuy v. R.* (C.A., 2012-04-04), 2012 QCCA 633, SOQUIJ AZ-50845528, 2012EXP-1567, J.E. 2012-840, para. 47.
[99] *R. v. Greffe* (S.C. Can., 1990-04-12), SOQUIJ AZ-90111035, J.E. 90-655, [1990] 1 S.C.R. 755, 795-796.
[100] *Ibid.*
[101] *Mann*, *supra*, note 25, para. 17.
[102] *Id.*, para. 34.

Devlin in *Hussein v. Chong Fook Kam*[103] as being "a state of conjecture or surmise where proof is lacking". This concept is adequately summed up by the phrase "I suspect but I cannot prove".[104] Evaluated using the reasonable officer or reasonable person standard, reasonable suspicion is a lesser burden of proof than probable cause, which is used primarily to justify an arrest.

Although reasonable suspicion does not need to be "firmly grounded and targeted on specific facts," there must be a certain factual basis upon which the suspicion is founded.[105] Reasonable suspicion must be more than a simple hunch on the officer's part, or else the arrest will be deemed arbitrary and thus illegal under article 9 of the *Canadian Charter of Rights and Freedoms*.[106] Therefore, reasonable suspicion is often associated with detention rather than with arrest, because it marks the beginning of an investigation where the end goal is to achieve a *prima facie* proof.

c) Burden of proof according to *Mann*

Mann has been fundamental in defining and developing guidelines encompassing investigative detention. Justice Iacobucci employed the modified ancillary powers doctrine and the articulable cause criteria in an effort to regulate this police practice.[107] The ancillary powers doctrine is expressed by the following criteria: first, the existence of a police duty must be determined; secondly, there must be reasonable grounds to justify the encroachment of police duty onto an individual's "liberty and fundamental dignity".[108]

The second element of this test is further divided into two conditions. There must be both reasonable grounds and a justification for the detention.[109] Articulable cause must also be taken into consideration. Therefore, the detention must be "reasonably necessary on an

[103] *Hussein v. Chong Fook Kam*, [1970] A.C. 942, cited in Jonathan Fisher. *The Law of Investor Protection.* 2nd ed. London: Sweet and Maxwell, 2003. P. 491.
[104] *Ibid.*
[105] *R v. Da Silva*, [2006] EWCA Crim 1654, para. 15.
[106] Angela Veng Mei Leong, *The Disruption of International Organised Crime, An Analysis of Legal and Non-Legal Strategies.* Aldershot (England): Ashgate Publishing, 2007. P. 153.
[107] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 782.
[108] *Mann*, *supra*, note 25, para. 26, citing *Cloutier v. Langlois* (S.C. Can., 1990-02-01), SOQUIJ AZ-90111017, J.E. 90-314, [1990] 1 S.C.R. 158, 181-182.
[109] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 782.

objective view of the totality of the circumstances".[110] This simultaneously "objective and subjective" standard rejects the simple evocation of a vaguely criminal conduct in favour of a suspicion grounded in a series of facts. Simply stating that someone looked or behaved suspiciously, or invoking police intuition as motive for the detention is not sufficient to fulfill this element of the test.[111]

Furthermore, the criminal offence for which the detention is being conducted must be recent or ongoing.[112] As previously seen in *Simpson*, there must be a clear link between the crime under investigation and the detainee. Finally, the simple existence of reasonable grounds to suspect is not in and of itself sufficient to justify a detention. The detention must be necessary when all the circumstances have been taken into consideration, and when weighed against the extent of "interference with individual liberty".[113] Taken in its totality, this test is used to determine the conditions necessary for an investigative detention.

Not only did *Mann* define the parameters of investigative detention, but it also explored the police powers associated with it. There is still no general power of investigative detention in Canada. Justice Iacobucci explained that although police officers do not have "*carte blanche*" to detain, they may do so if there is a reasonable suspicion and if it is reasonably necessary.[114] As such, the detention should be "brief in duration" and the detainee is under no obligation to answer any questions posed by the police.[115]

In addition, police powers accessory to investigative detention were developed. A frisk search following an investigative detention is permitted, provided that the officer has "reasonable grounds to believe that his or her safety [...] is at risk".[116] In this way, the protective search was restricted to certain weapons only, which could compromise the safety of officers.[117] As a result, frisk searches intended to reveal or to conserve evidence

[110] *Mann*, *supra*, note 25, para. 34.
[111] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 783.
[112] *Mann*, *supra*, note 25, para. 34.
[113] *Ibid.*
[114] *Id.*, para. 17, 34 and 35.
[115] *Id.*, para. 45.
[116] *Id.*, para. 45.
[117] A. Fiszauf, *op. cit. supra*, note 37, p. 18.

are permitted only if the person is in a state of arrest.[118] It is important to note that although the criteria to proceed with a detention is that of reasonable grounds to suspect, the officer would need reasonable grounds to believe (i.e., a higher burden of proof) to proceed with a frisk search. This is due to the higher expectation of privacy that an individual has with regards to his person. The detention and subsequent search are in no way to be considered a *de facto* arrest, as the two acts must remain separate.[119]

IV. IMPACT OF THE CHARTER

The *Canadian Charter of Rights and Freedoms* was adopted in 1982, but only came into effect in 1985, shortly after *Dedman* opened the door for investigative detention in Canada. As a result, it was not until much later that the court began looking at investigative detention in relation to the Charter. The case law that followed *Mann* emphasised police obligations arising from the Charter in relation to investigative detention.

A. Section 9 – Arbitrary detention

Section 9 of the Charter protects citizens against arbitrary detentions and imprisonment. According to *Simpson*,[120] a lawful detention is not considered to be arbitrary "unless the law authorizing the detention is arbitrary". An analysis involving section 9 of the Charter first requires the determination of whether or not the detention is lawful and then whether it is arbitrary. An unlawful detention is one that is based on "something short of reasonable and probably grounds required by law".[121] As such, a detention which is considered to be unlawful is not necessarily arbitrary.[122] When applying section 9 of the Charter to a detention, it is important to make the distinction between these two concepts.

[118] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 784-785.
[119] *Mann*, *supra*, note 25, para. 35.
[120] *Simpson*, *supra*, note 1, 11-12 [PDF] (Sections III. A).
[121] J. Stribopoulos, *loc. cit. supra*, note 3, 346.
[122] *R. v. Duguay* (S.C. Can., 1989-01-26), SOQUIJ AZ-89111027, J.E. 89-272, [1989] 1 S.C.R. 93, para. 13, 1985 CanLII 112, 50 O.R. (2d) 375 (C.A.).

B. Section 10 – Rights upon arrest or detention

Section 10 of the Charter provides an individual with three rights upon arrest or detention. Subsection 10(*a*) of the Charter provides the right to be informed of the reason for the detention, so that the subject in custody knows the extent of his jeopardy.[123] An individual detained for investigative purposes must be advised of the reason for his detention in "clear and simple language".[124] However, due to the ambiguity of when a psychological detention begins, allowances can be made on this point provided that the individual is informed of his right in a timely fashion.[125] Practicality dictates that the reason for the detention may be vague or non-existent, or that multiple reasons for the detention may exist.[126] The courts have explained that of importance is that the individuals understand the "extent of their jeopardy".[127] A failure to inform the subject of this right would cause the detention to be arbitrary.[128] As such, a lack of comprehension regarding the state of jeopardy may taint any consent given to conduct any subsequent searches.[129]

Subsection 10(*b*) provides the right to counsel. An individual must be advised of his right to counsel "immediately upon detention," unless an imminent security threat prevents the officer from doing so.[130] Despite this, neither *Mann* nor *Suberu* addresses the practical flaws with this right, opting instead to defer the question concerning the applicability of subsection 10(*b*) altogether.[131] If the detention occurs following a pedestrian stop on a street corner, the security and privacy required to contact a lawyer would exceed the reasonable logistics of the situation. The detainee would have to be brought either to the squad car or to the station, and if that were to happen, would the officer need to proceed to a formal arrest?[132] Furthermore, many individuals would find it irrational to contact a

[123] A. Fiszauf, *op. cit. supra*, note 37, p. 121.
[124] *Mann*, *supra*, note 25, para. 21.
[125] A. Fiszauf, *op. cit. supra*, note 37, p. 121.
[126] *Id.*, p. 124.
[127] *Ibid.*
[128] *Id.*, p. 121.
[129] *Id.*, p. 124; *R. v. Evans* (S.C. Can., 1991-04-18), SOQUIJ AZ-91111045, J.E. 91-689, [1991] 1 S.C.R. 869, 888-894.
[130] *Suberu*, *supra*, note 46, para. 42.
[131] A. Fiszauf, *op. cit. supra*, note 37, p. 129.
[132] *Id.*, p. 128-129.

lawyer for a detention that is supposed to be of short duration.[133] The right to counsel may be waved without fully understanding the consequences of this act.

In spite of the recent advancements in case law, there are still some ambiguities regarding the rights protected under section 10 of the Charter and their application in instances of investigative detention. The legal community seems to have come to a general consensus regarding these rights. Its members agree that the right to be informed for the reason of the detention protected under subsection 10(*a*) of the Charter should be respected, but that the right to counsel protected under subsection 10(*b*) of the Charter is impractical when dealing with investigative detention and should be done away with.[134] Despite this consensus, there are many criticisms that center on the lack of concrete criteria. The general vagueness of investigative detention coupled with the lack of clear guidelines regarding the Charter make it difficult for detainees to assert their rights, let alone identify them in such situations.[135]

C. Section 24 – Exclusion of evidence

Significant strides have been made in the exclusion of evidence collected in violation of the Charter, particularly with the *Grant* and *Harrison* cases. The evidence to be excluded is usually physical, and was collected in a manner described in subsection 24(2) of the Charter. The motives for exclusion usually include the degree of the breach, intrusiveness of the search or lack of good faith on the part of the arresting officer.[136] In order to determine whether or not evidence should be excluded on this basis, the test developed in *Grant* is often employed. This takes into consideration the fairness of the trial and the quality of the evidence in question (conscriptive or non-conscriptive).[137] These

[133] *Mann*, *supra*, note 25, para. 22 and 45.
[134] L.A. McCoy, *loc. cit. supra*, note 17 at 327.
[135] Alec Fiszauf. «Articulating Cause: Investigative Detention and Its Implications», (2007) 52 *Crim. L.Q*. 327, 336.
[136] *Id.*, 343.
[137] *R. v. Harrison* (S.C. Can., 2009-07-17), 2009 SCC 34, SOQUIJ AZ-50566224, J.E. 2009-1377, [2009] 2 S.C.R. 494 paras. 12 and 33-34.

developments demonstrate an increasing severity in the standard of evidence admitted due to investigative detention practices.[138]

In terms of investigative detention, section 24 of the Charter would apply mostly to evidence collected during an incidental frisk search. However, much controversy has centered on the admissibility of statements as evidence against the detainee. Although the detainee has the right to remain silent, there is no obligation on the part of the police officer to advise the detainee of this right.[139] Will their statements therefore serve as evidence of their guilt or merely to provide police with further grounds such as in motor vehicle stops?[140] There seems to be no consensus on this issue as of yet; however, the courts have made it clear that if the detainee was not advised of the reason of his detention, then any statement made would subsequently be excluded from evidence.[141]

V. CRITICISMS OF THE INVESTIGATIVE DETENTION DOCTRINE

As with the introduction of any new doctrine, criticisms are never far behind. Investigative detention is no exception to this rule. It is an undisputed fact that *Mann* revolutionised the investigative doctrine in Canada by attempting to effectively regulate encounters of this nature between the police and the public.[142]

In the ten years since *Mann*, little has been done to pursue the effective regulation of this doctrine. Instead, a "wait and see" policy has been adopted, as has been evident in *Mann*'s treatment of section 10 of the Charter and its applicability to investigative detention. Although critics have warned against following in America'' footsteps, Canada seems to be doing just that. *Terry v. Ohio* set the precedent for investigative detention in the United States. In the nearly 35 years of litigation since, there is still a significant lack

[138] A. Fiszauf, *loc. cit. supra* note 135, p. 343.
[139] A. Fiszauf, *op. cit. supra*, note 37, p. 129.
[140] A. Fiszauf, *loc. cit. supra*, note 135, 337.
[141] *R. v. Arkinstall* 2005 BCPC 357, [2005] B.C.J. No. 1805 (Q.L.), 23 W.C.B. (2d) 139 (B.C.S.C.), cited in A. Fiszauf, *loc. cit. supra*, note 135, p. 337.
[142] James Stribopoulos. «The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*», (2007) 52 *Crim. L.Q.* 299, 313.

of basic parameters involving stop and frisk procedures subsequent to an investigative detention.[143]

The progression between *Simpson* and *Mann* seems to have evolved in a similar fashion. Canadian courts have neglected to address the practical applications surrounding investigative detention police practices, leaving much to be desired. Indeed, Jerome Skolnick warns that ambiguity in rules of constraint does more to encourage certain behaviours than to discourage them, eventually leading to an abuse of police powers.[144] This is nowhere more evident than in the increasing prevalence of racial profiling in conjunction with investigative detention practices.

A study in Kingston showed that visible minorities, in particular black men, were three times more likely to be arrested or detained than their white counterparts.[145] If the empirical data collected is not enough, a simple look at the leading cases associated with investigative detention clearly shows the prevalence of racial profiling. Both *Terry* and *Simpson* were black men, while *Mann* was aboriginal.[146] The silence in *Mann*, coupled with a clear dissention between judges in subsequent case law shows that a detailed statutory framework would not only define applicable norms but would greatly reduce potential abuse of this police power.[147]

CONCLUSION

Investigative detention has been the most influential development in Canadian criminal practices in recent memory due to its profound impact on police practices. Great strides have been taken to legitimise this doctrine into a once orthodox based system that explicitly forbade detention for investigative purposes.

[143] *Id.*, 312.
[144] *Id.*, 313.
[145] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 800.
[146] A. Fiszauf, *loc. cit. supra*, note 135, 335.
[147] A. Boucher, F. Lacasse et T. Nadon, *loc. cit. supra*, note 67, 801.

Despite the gradual changes that have been effected, the current state of affairs leaves much to be desired in the way of clarity on practical norms associated with investigative detention. The courts should therefore focus their efforts on developing a system of clear and easily applicable rules. Instead, the courts have spent far too much effort on the application of "law making" devices such as the *Waterfield* test, in an effort to fill the legislative gaps in police power.[148] The American model demonstrates that police powers created in this manner often grow out of proportion to the original intent of the courts.[149]

In response to this issue, critics suggest that a more "restrain[ed] approach" would not only be more effective, but would incite parliament to take action and legislate on this issue.[150] In this way, the limits and parameters of investigative detention would be clearer, which would translate to more effective police work and a better served public. All in all, despite the great strides that have been taken in developing the investigative detention doctrine in Canada, much work remains to be done, and a significant margin for improvement remains before this will be an effective police power.

[148] J. Stribopoulos, *loc. cit. supra* note 142, 315.
[149] *Id.*, 35.
[150] *Id.*, 316.