The Pitfalls of the SCC's use of the *Waterfield* test to Justify New Common Law Police Powers *by* EWD Tisdall

Within *Privacy in Peril*,[1] Jochelson and Ireland argue how the *Waterfield*[2] test has allowed the Supreme Court of Canada to justify new police powers through the common law. It will be argued that while the court has given the police new powers in order to justify intrusions into individual's privacy, there are also concerns that the court had to assess when determining whether to grant police more powers of search and seizure. While the concerns that could be raised by the court do have merit, the infringement on privacy rights cannot be justified within the constitutional democracy that the Canadian judicial system is built upon.

The *Waterfield* test was first adopted from the British case law to justify new common law police powers by the SCC in the case of *R. v. Dedman*, where it was used to justify a new police power in regards to a roadside spot check program.[3] Through the *Waterfield* test, the court was able to establish a new common law police power, and thus allow an increased right to search and seizure than previously recognized at law.[4] This notion of the judiciary being able to create new police powers in order to justify police intrusions into individual's privacy rights is deeply concerning, since it clearly gives the judiciary a great amount of power without being accountable to the public at large. This goes strictly against the notion that Canada exists as a liberal, democratic state, since this power allows the possibility for an unelected body to discount an individual's privacy rights by appealing to previously unknown powers of the police (which by extension is the powers of the state

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[1] Richard Jochelson & David Ireland, *Privacy in Peril*, (Vancouver: UBC Press, 2019).
[2] *R v Waterfield*, [1964] 2 CCC 286, [1964] 3 All ER 659 [*Waterfield*].
[3] *R v Dedman*, [1985] 2 SCR 2, 20 DLR (4th) 321 [*Dedman*].
[4] Jochelson, *supra* note 1 at 74.

itself). While this ability for the court to erode individual privacy rights through the *Waterfield* test seems to go against the core of Canadian democracy, there are other considerations that must be taken into account when determining if the court is going beyond their power as judiciary.

It might be argued that while the judiciary does seem to be making laws regarding police power that should be left to Parliament, the judiciary is simply using its limited common law power in order to protect police and the public in individual cases. This can be argued by the fact that the court allows these police powers with full knowledge that statute can always get rid of them. The court might reason that on individual cases that the police ought to have had such a power (through the circumstances of the case), and that it would be against public interest in that case to allow a criminal to walk free due to some minor privacy breach. In doing so, the court creates a new police power, and if the larger public disagrees with the potential uses of this new common law power, it would be up to Parliament to legislate such a power out of use. This ability for Parliament to enact statute helps dispel the notion that the judiciary is able to create powers out of thin air that are not accountable to the citizens of Canada, as Parliament is always able to right the common law's wrong.

While this does dispel some of the concern of the judiciary allowing the police more search powers within Canada, there is still a concern regarding the overlap that will undoubtably come about between the expansion of police powers and individual privacy rights. The most striking problem is the fact that if the court continues to push the power of the police against the *Charter*'s privacy protections, it leaves Canadians in the dark of where the limits of individual privacy rights end and police powers begin.[5] This is due to the fact that if the court is continually adding more police powers through the *Waterfield* test, it is completely unknown how far the court is willing to go

[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

to push aside the *Charter*'s privacy protections.[6] Without a strong line between legal police power and right to privacy, it allows the court to too much discretion in matters that ought to have the highest protection in Canadian law, that being the individual rights that are enshrined within the *Charter*. Without strict protections and guidance from the *Charter*, the court is no longer making law that is distinctly Canadian, which ought to be of extreme importance for all Canadians who value their distinctly Canadian rights and freedoms.

The court's abandonment of utilizing the *Charter* to guide the legitimacy of all Canadian law seems to go directly against what the *Charter*'s intention as a constitutional document entails.[7] By expanding the search and seizure powers of the police through the *Waterfield* test, thus causing extreme overlap with individual privacy rights, the courts are dismissing the liberal interpretation that the *Charter* deserves to have.[8] Without this liberal interpretation, the *Charter* is reduced to simply another government action, in which the courts have great discretion to either follow or circumvent if the desire arises. This continual dismissal of the intent of the *Charter* is an extreme departure from the constitutional democracy that Canada is designed to exist as. Without the correct interpretation of the *Charter*, the Supreme Court is going distinctly beyond its power as judiciary, in creating new law that goes against both the constitution as the supreme law of Canada and Parliament's power to create law.

As it has been shown, although the courts could justify that the *Waterfield* test is simply a just and accountable exercise of their common law power, there are much deeper concerns that must be considered. Through the *Waterfield* test, the court has been able to discount the standard that all law

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[6] *Ibid*, s 8.
[7] *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, [1984] 2 SCR 145 at para 17, [1984] 6 WWR 577 [*Hunter*].
[8] *Ibid.*

within Canada must be judged upon, the *Charter*, and therefore it ought to be of great concern that through the *Waterfield* test, that the courts have been able to diminish the constitutionality of our law to something that can be overridden by common law.