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Philosophical shift in criminal law in Canada

Keagan Gilfillan[1]

Abstract

There has been a philosophical shift in criminal law for the 40 or so years in Canada that represents a divergence from its earlier forms. The shift to precautionary policing and a securitized society has strongly changed the formation of criminal law protections and policies. This paper maps out some of the relevant case law in criminal law over the last 40 years and discusses some of the precedents that were set from the resulting decision in them. By examining the results, we see that there is a shift in how policing and rights are treated and viewed by the judicial system and the state.

Keywords: criminal law; Canada; civil liberties; charter of rights and freedoms

Cambio filosófico en el derecho penal canadiense

Resumen

En los últimos 40 años, ha habido un cambio filosófico en el derecho penal en Canadá, lo que implica divergencia radical con sus formas anteriores. El cambio hacia una vigilancia policial

[1] Keagan Gilfillan is an Honours BA in Political Science candidate at Algoma University in Sault Ste Marie, Canada and his research areas include criminal law, Canadian politics, and normative political theory. He is the former MPP Green Party Candidate in the Sault Ste Marie riding for the 2022 Ontario Provincial election.

preventiva y una sociedad seguritizada ha cambiado fuertemente la formación de políticas y protecciones del derecho penal. Este artículo traza parte de la jurisprudencia relevante en derecho penal de los últimos 40 años y analiza algunos de los precedentes que se sentaron a partir de la decisión resultante en ellos. Al examinar los resultados, vemos que hay un cambio en la forma en que el sistema judicial y el Estado tratan y ven la actuación policial y los derechos.

***Palabras claves**: derecho penal, Canadá, libertades civiles, carta de derechos y libertades*

I. Introduction

Since the introduction of the Charter in Canada during the mid 1980s, criminal law protections for individuals have slowly, yet consistently, been eroded. While they are protected constitutionally, the stance of the Court in many cases has both expanded ancillary police powers and weakened protections that once belonged to individuals. The influence of 9/11 and the rise of modern technological society has accelerated this shift for various reasons. This paper will argue that over the last three decades criminal law protections in Canada have been slowly eroded and police powers greatly expanded showcasing a philosophical shift to preventative policing. This paper will first track some of the most influential cases in the steady erosion of rights and the influence of the Waterfield test on these cases and how it has been misused. The next section will focus on specific erosions of rights such as privacy and due process. The last section concerns the philosophical shift in criminal law and policing and where it may originate from.

II. Case law and Waterfield test

It is important to first discuss the Waterfield test and its usage throughout the Charter era and showcase the consistence decline in the rights of individuals in favour of the state (Jochelson, 2012).

II. 1. Waterfield test

The Waterfield test originated from outside the Canadian legal system and in the context of the Canadian courts, has been misused based on its original purpose. The test, conceived in 1963 in an English Appeals court, was seen as a means of limiting the authority of police in the interference of an individual's liberty or property (Jochelson, 2012). With this in mind, it is important to note, as Jochelson (2012) writes, "the test developed was not intended to create *ad hoc* police power outside of this context" (p. 358).

II. 2. Dedman v. R.

This was the first post-Charter case wherein the Waterfield test was used to create police powers (R. v. Dedman, [1985] 2 S.C.R. 2). In this case, the appellant was stopped by a compulsory RIDE program which had the intention of finding drunk drivers. After the officer smelled alcohol, they requested that the individual provide a breath sample. The accused refused and was promptly arrested and charged with failing to provide a breath sample. As there was no common law or legislative impetus for the stop, it was eventually impugned (Jochelson, 2012). The SCC did eventually rule in favour of the police power, acknowledging that while the accused liberty was interference with, the "detention fell within the scope of common law duties of police powers –most notably the control of traffic linked to the common law duties of crime prevention and protection of life" (Jochelson, 2012, p. 361). This marked an important turn in the Court's stance on Waterfield, it had now become a gap-filling measure that expanded police powers judicially in cases where the end justified the means (Jochelson, 2008). The dissenting judges –Dickson, Beetz, and Chouinard– posited the opposite verdict, writing that "these random stops by the police under the RIDE program are indistinguishable from detention for question or investigation and, without validity enacted legislation to support them, are unlawful" (1985).

II. 3. R. v. Godoy

In this case, the Court once again used Waterfield as a means to expand police power (Jochelson, 2012). A call to 911 was cut off and the police were dispatched to the location to investigate. After knocking on the door, the accused answered and reassured them everything was alright. The officers gained entry to the house and found the accused's spouse, who had suffered injuries. The accused was arrested for assault (R. v. Godoy, [1999] 1 SCR 311). This created a justification for warrantless home entry powers in response to dropped calls (Jochelson et al., 2020). Just as in Dedman v. R., the conduct of the police was deemed justifiable based on the eventual outcome, the arrest of the accused for assault (Jochelson, 2008).

II. 4. R. v. Mann

The eventual outcome of R. v. Mann expanded the Waterfield test and allowed for powers of warrantless investigative detention and correlative search powers (Jochelson, 2012; Jochelson et al., 2020). In this case, officers were responding to a break and enter. In the same area, they encountered Mann, who then complied with the officer's request for a pat-down search. The officer found a baggie of marijuana in Mann's pocket as well as other baggies, afterward arresting Mann for purposes of trafficking. As Jochelson (2012) writes, "Mann…provided tacit evidence that the ancillary powers test could not only create *ad hoc* police powers, but could provide a test of justification that would pass constitutional muster" (p. 363).

II. 5. R. v. Clayton

In R. v. Clayton, the constitutional development of investigative detention was further clarified in the context of the use of Waterfield (Jochelson, 2012). Police responded to a call about four individuals with guns in the parking lot outside a business. Four different vehicles were included within this call's description. Police ended up setting up a roadblock where they eventually arrested the suspects. The Court did acknowledge that the action interfered with the liberty and property of the accused, but since the officers were acting in line with their duty of investigative and preventive duty, it was allowed (Jochelson, 2012; Jochelson et al., 2020).

II. 6. R. v. Kang-Brown; R. v. AM

In both of these cases, the result allowed for the possibility of warrantless sniffer dog searches, though, as Jochelson (2012) writes, "both cases found the police's actions had not passed constitutional muster" (364). As in the other cases, the judges in the majority believed that the warrantless activity, while an infringement of liberty, falls under the umbrella of common law investigative duties of police (Jochelson, 2012). Both Justice Deschamps and Rothstein determined where there was an important purpose, such as curbing the drug trade, then the searches could be justifiable (Jochelson, 2012; R. v. Kang-Brown, [2008], para. 189). On the opposing end, the minority in Kang-Brown –Justices LeBel, Fish, Abella, and Charron– lamented the abandonment of the tradition of liberty protection (Jochelson, 2008).

II. 7. Further cases and conclusion

The cases provided above are not an exhaustive list and there are many more that showcase the point in hand. Across the modern Charter era in Canada, there are cases and rulings that showcase the slow erosion of liberties in Canada. The follow is more that could be examined (Jochelson et al., 2020, p.113):

> At the Court, ancillary police powers have been advanced further to establish: warrantless police protective searches at the front door of a home when responding to a noise complaint (R. v. MacDonald, 2014); and warrantless drug sniffer dog searches in airports, bus depots, high schools and on roadsides (R. v. Kang-Brown, 2008; R. v. A.M., 2008; R. v. Chehil, 2013; R. v. MacKenzie, 2013). In the search incident to arrest context, common law search powers have proliferated to delineate protective and evidence searches including pat-downs (R. v. Caslake, 1998), strip searches (R. v. Golden, 2001), penile swabs (R. v. Saeed, 2016), and cell phone searches (R. v. Fearon, 2014).

A consistent pattern is shown through the highlighted cases. Through Waterfield usage, the Court developed further police powers, lower reasonable expectation of privacy, and complete lack of

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warrant requirements that support the view of police investigation and actions that focus on the result rather than the process (Jochelson and Ireland, 2019; Jochelson, 2012).

III. Erosion of civil liberties and philosophical shift

As the case studies have shown, the recent developments illustrate a steady trend toward the bolstering of common law police powers at the expense of liberties and a philosophical shift in the way security is done through society (Jochelson et al., 2020; Murphy, 2020; Zedner, 2007). This will be examined further in the proceeding sections.

III. 1. Preventive policing and state of securitization

A shift has taken place from responding to wrongs that have been committed towards a stance on pre-crime policing that focuses on preventative measures, often at the expense of rights (Murphy, 2020; Jochelson, 2012). This trend has been further accelerated by the vast expansions made in technologies over the last decades. With phones and computerized devices common place for all citizens, the realms in which the state can intrude on an individual's privacy and innermost thoughts have expanded greatly, making the ethic of pre-crime policing more effective. This increased visibility feeds into the ethic of pre-crime because of the various modes of surveillance that are available (Jochelson and Ireland, 2019). As Zedner (2007) writes, "the post-crime orientation of criminal justice is increasingly overshadowed by the pre-crime logic of security" (p. 262).

This trend is likely influenced by 9/11 and the resulting focus on maintaining that an event such as that does not take place again. The threat of catastrophic risk increased pressures on governments to maintain a high level of security and anticipate any future events that may take place, requiring a large security apparatus (Zedner, 2007). A likely consequence of this is the expanded police powers we see today. A subtle theme within many of the cases examined is that often the Court acknowledged that interference with protected liberties had taken place, but that the result of the event (imprisonment of the accused) justified the means by which the process started. It showcases a belief that the ends justify the means if the end is considered important enough and prudent. The liberal conception of a rights-bearing society is shifting towards a view of the potential harm to society being a more prudent cause (Murphy, 2020).

III. 2. Threatened civil liberties

Naturally, these developments have severely harmed and threatened existing civil liberties. Various rights have been threatened, including due process, privacy, and property. Court rulings have repeatedly bolstered police powers using the Charter as justification, often at the expense of

due process rights (Jochelson et al., 2020). As this became more common, Courts tended to show a willingness to tolerate unfair practices, especially when given the totality of circumstances that supported the need for intervention (Murphy, 2020). The steady deference of the Court to the state can mean that further due process violations are bound to happen as the Court increasingly weighs security objectives against those of the accused (Jochelson and Ireland, 2019).The reasonable expectation of privacy has also been impacted, which has further implications. As privacy expectation goes down, so do the minimal protections that would be provided (Jochelson and Ireland, 2019).

Overall, as Jochelson and Ireland (2019) write, "the after-the-fact approach to delineating police powers allows an increasing amount of information to be available to the state. The expanded access (...) and broad search powers have in ways not anticipated by the legislature" (p. 135). Over time, civil liberties have taken a backseat to expanded police powers. Liberties are seen to be contextually contingent, and the Courts spend more and more time evaluating the admission of evidence, granting greater leniency to how it was acquired as time goes on (Jochelson and Ireland, 2019).

IV. Conclusion

As has been shown within this paper, the last three or so decades have seen huge reductions in due process and privacy rights in Canada and greatly expanded police powers. This is a worrying trend and if it continues it is hard to predict how much erosion may take place. In all the cases presented a pattern emerges. Courts tend to side with the police and state on issues, fully willing to expand and create new powers based on the circumstances, even if there is no pending or active legislation on the matter (Jochelson and Ireland, 2019). Often when the goal the Court establishes seems urgent, less care is given to liberty issues or long-term ramifications to rights. The philosophical shift and stance towards the prevalent attitude of preventative policing are showcased by these cases. As technologies are expanded and more included by everyday individuals, these implications are likely to get worse. 9/11 forever changed the state of security in Canada and has led to an increased adherence to pre-crime logic. If this trend continues, it is hard to predict where it may lead. Like many sociological trends through history, it may fizzle out and be replaced, or like others, it may become a dominant and permanent feature of the modern state.

Bibliography

- Jochelson, R. (2008). "Crossing the Rubicon: of sniffer dogs, justifications, and preemptive". deference. In *Review of Constitutional Studies*, *13*(2), p. 209.

- Jochelson, R. (2012). "Ancillary issues with Oakes: the development of the Waterfield test and the problem of fundamental constitutional theory". In *Ottawa Law Review*, *43*(3), p. 355.

- Jochelson, R., and Ireland, D. (2019). *Privacy in peril: Hunter v Southam and the drift from reasonable search protections*. Vancouver: UBC Press.

- Jochelson, R., Ireland, D., Ziegler, R., Brenner, E., and Kramar, K. (2020). "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter". In *Critical Criminology, 28*(1), pp. 107-126.

- Murphy, B. (2020). "Regulating Undercover Policing: Subjects, Rights and Governmentality". En *Critical Criminology, 28*(1), pp. 65-84.

- *R. v. Dedman,* [1985] 2 SCR 2, 20 CCC (3d) 97.

- *R. v. Godoy,* [1999] 1 SCR 311, [1998] SCJ N° 85.

- Zedner, L. (2007). "Pre-crime and post-criminology?" In *Theoretical Criminology, 11*(2), pp. 261-281.