# A FAILED EXPERIMENT? INVESTIGATIVE DETENTION: TEN YEARS LATER

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*Ten years ago, the Ontario Court of Appeal introduced the investigative detention power to Canada with its decision in* R. v. Simpson. *After providing some necessary background about the realities of police detention practices, the author offers a critical evaluation of* Simpson *and the ancillary powers doctrine that it relied upon to create this new police power. The author then proceeds to consider how well the investigative detention experiment has fared over the last decade, examining whether it has lived up to the goal that provided its inspiration, namely, the regulation of police detention practices. The author advances two major claims. First, the investigative detention cases have done little to regulate but much to legitimize police detention practices, mostly serving to blur the line between the detentions they endorse and conventional arrests. Second, the investigative detention experiment holds larger lessons about the dangers inherent when courts, as opposed to legislatures, create police powers. Given these dangers, the paper contends that the ancillary powers doctrine should be rejected as a device for creating complex police powers, like investigative detention. Instead, the author draws upon the dialogue model, already embraced by the Supreme Court of Canada, to offer an alternative approach. He concludes by outlining steps the Court could take to encourage Parliament to finally enact the sort of clear, comprehensive, and prospective rules and procedures that are essential if police detention practices are to be effectively regulated in the future.*

*Il y a dix ans, avec la décision* R. c. Simpson, *la Cour d'appel de l'Ontario a introduit le pouvoir de détention par enquête au Canada. Après avoir fourni de l'information nécessaire au sujet des réalités des pratiques de détention, l'auteur donne une évaluation critique de l'affaire* Simpson *et de la doctrine de la compétence accessoire qui a servi de base à ce nouveau pouvoir de police. L'auteur examine ensuite le succès que cet essai de pouvoir de détention a connu depuis dix ans examinant s'il a permis d'atteindre l'objectif don't il a été inspiré, notamment la réglementation des pratiques de détention de la police. L'auteur fait valoir deux points très importants. Tout d'abord que les cas de détention par enquête ont fait peu de choses en termes de réglementation, mais ont plutôt légalisé les pratiques de détention de la police, c'est-à-dire que cela a surtout permis d'estomper la ligne entre les détentions qu'elle endosse et les arrestations habituelles. Ensuite, cet essai nous donne une meilleure leçon au sujet des risques présentés lorsque les tribunaux, contrairement aux autorités législatives, créent des pouvoirs policiers. Compte tenu de ces risques, l'article prétend que la doctrine de la compétence accessoire devrait être rejetée à titre de recours de création de pouvoirs complexes de la police, comme cette forme de détention. L'auteur s'inspire plutôt du modèle de dialogue, déjà adopté par la Cour suprême du Canada, comme solution de rechange. Il conclut qu'en établissant des étapes que la Cour pourrait suivre pour encourager le Parlement pour, en définitive, adopter les règles et les procédures claires, complètes et prospectives qui sont essentielles si l'on veut réglementer efficacement les pratiques de détentions policières à l'avenir.*

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## I. INTRODUCTION

It has been ten years since the term "investigative detention" first entered the Canadian criminal justice lexicon. Prior to 1993, with very few exceptions, Canadian law did not authorize the police to detain individuals short of arresting them. At least in theory, the police had only two options when dealing with persons they suspected of wrongdoing: arrest (assuming they possessed the required reasonable and probable grounds) or let them go. All of this changed when the Ontario Court of Appeal decided *R. v. Simpson*.[1]

In *Simpson*, the Court was convinced that, despite a lack of formal authority, investigative stops were a routine part of police patrol practices. It was in a stated effort to "regulate" such encounters that the Court went on to recognize a police power at common law to detain for investigative purposes in situations where the police have articulable cause (that is, reasonable suspicion) to believe that an individual is implicated in criminal activity.[2] In the

1 *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (Ont. C.A.) [*Simpson* cited to C.C.C.].

2 *Ibid.*, indicating at 498 that "[u]nless and until Parliament or the legislature acts, the common law ... must provide the means whereby the courts *regulate* the police power to detain for investigatory purposes" [emphasis added].



intervening years, most Canadian appellate courts have followed *Simpson*, granting this new investigative tool to police officers across the country.[3]

To date, the Supreme Court of Canada has not directly addressed these developments.[4] It appears as though this is about to change, however, as the Court recently granted leave in a case that will place the status of this new police power squarely before it.[5] Accordingly, this seems a fitting time to evaluate how effective the investigative detention experiment has been in achieving the goal that provided its inspiration: the regulation of police detention practices.

This article begins in Part II with some essential background, examining the historic divide between the formal limits on police investigative stops and the realities of police practices. This section is followed in Part III by a careful examination of the decision in *Simpson*. That judgment is critically evaluated, as is the "ancillary powers doctrine" the Court relied upon to create a police investigative detention power. Once this essential background is in place, the focus shifts in Part IV to a consideration of whether *Simpson* has lived up to its goal of "regulating" police investigative stops. In making this assessment, the article proceeds from the assumption that the best way to control police power is by confining, structuring, and checking the exercise of discretion.[6] Finally, Part V explores the larger lessons to be learned from the investigative detention experiment.

The article advances two major claims. First, *Simpson* and its progeny have raised more questions than they have answered. In the process, the investigative detention cases have done little to "regulate," but much to expand and thereby legitimize police authority. The result has been a blurring of the line between the investigative detentions endorsed by these cases and those encounters historically characterized as arrests. Second, the investigative detention experiment holds larger lessons about the dangers inherent when courts, as opposed to legislatures, create police investigative powers. Although the authority to conduct investigative stops is of critical importance to the police, the creation of a new police power of detention is better left to Parliament. Unfortunately, as long as the courts remain willing to fill the legislative lacuna, meaningful controls will not be forthcoming, as Parliament will continue to lack any incentive to take needed action in this area.

3 See *R. v. Ferris* (1998), 162 D.L.R. (4th) 87, 126 C.C.C. (3d) 298 (B.C.C.A.) [*Ferris* cited to C.C.C.]; *R. v. Dupuis* (1994), 162 A.R. 197 (C.A.) [*Dupuis*]; *R. v. Lake* [1997] 5 W.W.R. 526, (1996), 113 C.C.C. (3d) 208 (Sask. C.A.) [*Lake* cited to C.C.C.]; *R. v. G.(C.M)* (1996), 113 Man. R. (2d) 76 (C.A.); *R. v. Pigeon* [1993] R.J.Q. 2774, (1993), 59 Q.A.C. 103 (Que. C.A.); *R. v. Carson* (1998), 207 N.B.R. (2d) 39, 39 M.V.R. (3d) 55 (C.A.); *R. v. Chabot* (1993), 126 N.S.R. (2d) 355, 86 C.C.C. (3d) 309 (C.A.); *R. v. Burke* (1997), 153 Nfld. & P.E.I.R. 91, 118 C.C.C. (3d) 59 (Nfld. C.A.).

4 See *infra* note 106, detailing those cases in which the Supreme Court has cited *Simpson* yet carefully avoided passing upon the investigative detention power that it created.

5 See *R. v. Mann* [2002] 11 W.W.R. 435, (2002), 169 C.C.C. (3d) 272 (Man. C.A.) [*Mann* cited to C.C.C.], leave granted 27 March 2003 S.C.C. Bulletin, 2003 at 511.

6 See Kenneth Culp Davis, *Police Discretion* (St. Paul: West Publishing Co., 1975). In his groundbreaking work, Davis recognized the dangers of too little and too much discretion, arguing that "[u]nnecessary discretion must be eliminated. But discretion often is necessary and often must be preserved. Necessary discretion must be properly confined, structured, and checked" (*ibid.* at 170). See also Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University, 1969) at 25-26, 42, 94-95 [Davis, *Discretionary Justice*].

## II. INVESTIGATIVE STOPS: LAW VS. REALITY

### A. THE ABSENCE OF A COMMON LAW POWER

The Anglo-Canadian common law constitution has long required that any interference with individual liberty be based on lawful authority. This central tenet of the rule of law — known as the "principle of legality" — demands that "every official act must be justified by law."[7] Absent some legal justification suggesting otherwise, the right to liberty is presumed. In effect, individuals are considered to be in a state of perpetual freedom. Restraints on liberty are viewed as the exception and not the rule.

A lawful arrest has long been considered one of these exceptions. Historically, first at common law[8] and later through legislation,[9] police officers have had the authority to interfere with an individual's liberty by carrying out an arrest, provided that the officer possessed the requisite reasonable and probable grounds.[10] Short of that, however, the cases and the commentary seemed clear: police did not have the power to detain for investigative purposes.[11] In fact, prior to *Simpson*, this proposition seemed virtually unassailable,

7 See Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf ed. (Toronto: Carswell, 1997), who refers to it as the "principle of validity" at 31-4). See also L.H. Leigh, *Police Powers in England and Wales*, 2nd ed. (London: Butterworths, 1985), who refers to it as the "principle of legality" at 32-33. For a classic statement of this principle of English constitutional law, see also Albert V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, 8th ed. (London: Macmillan, 1915) at 198, 203-204.

8 At common law, a constable had both a right and a duty to arrest if he had reasonable grounds to believe that an individual had or was about to commit a felony. In contrast, warrantless misdemeanour arrests were only permitted in cases involving a breach of the peace. See James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225 (outlining the common law relating to arrest powers at 235-36).

9 See *Criminal Code*, S.C. 1892, c. 29, s. 552 (authorizing the warrantless arrest of persons "found" committing certain enumerated offences). Today, arrest powers remain in the *Criminal Code*. See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 494 and 495 [*Criminal Code* or *Code*].

10 See *Criminal Code*, *ibid.*, s. 495(1)(a) which contains the arrest power most commonly resorted to by police. It authorizes a police officer to arrest without a warrant a person who, "on reasonable grounds, he believes has committed or is about to commit an indictable offence" (*ibid.*). See also *R. v. Storrey* [1990] 1 S.C.R. 241, (1990), 53 C.C.C. (3d) 316 [*Storrey* cited to C.C.C.], holding that a police officer must subjectively believe reasonable grounds exist and that those grounds must also be objectively reasonable.

11 See *R. v. Klimchuk* (1991), 67 C.C.C. (3d) 385 at 403, 8. C.R. (4th) 327 (B.C.C.A.) [*Klimchuk* cited to C.C.C.]; *R. v. Hicks* (1988), 42 C.C.C. (3d) 394 at 400 (Ont. C.A.), aff'd on other grounds [1990] 1 S.C.R. 120, (1988), 54 C.C.C. (3d) 575; *R. v. Moran* (1987), 36 C.C.C. (3d) 225 at 258 (Ont. C.A.); *R. v. Esposito* (1985), 53 O.R. (2d) 356, 24 C.C.C. (3d) 88 at 94 (Ont. C.A.), leave to appeal to S.C.C. refused, [1986] 1 S.C.R. viii [*Esposito* cited to C.C.C.]; *R. v. Dedman* (1981), 32 O.R. (2d) 641, 59 C.C.C. (2d) 97 at 108-109 (C.A.), aff'd on other grounds [1985] 2 S.C.R. 2, (1985), 20 C.C.C. (3d) 97 [*Dedman* cited to C.C.C. at S.C.C.]; *Cluett v. The Queen* (1982), 3 C.C.C. (3d) 333 at 347-48 (Ont. C.A.), rev'd on other grounds [1985] 2 S.C.R. 216, (1985), 21 C.C.C. (3d) 318; *R. v. Guthrie* (1982), 39 A.R. 435, 69 C.C.C. (2d) 216 at 218-19 (Alta. C.A.); *Moore v. The Queen* [1979] 1 S.C.R. 195, (1978), 43 C.C.C. (2d) 83 at 89-90; *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), 118 C.C.C. 24 at 26-27 (Ont. C.A.); Peter Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough: Carswell, 1992) at 1072; Alan Young, "All Along The Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329 at 330, 343; David C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) at 303-304; Canada, Law Commission of Canada, *Arrest*, Working Paper 41 (Ottawa: Supply & Services Canada, 1985) at 33, 37; Steve Coughlan, "Police Detention for Questioning: A Proposal" (1985) 28 Crim. L.Q. 64 at 66, 77; Canada, Report of the Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 56-57 (Chair: Roger Ouimet).



especially given the clarity with which some of the most respected criminal law jurists in the country had spoken on the topic. For example, Chief Justice Dickson had stated:

> Short of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation.... [P]olice lack legal authority to detain a person for questioning or for purposes of investigation at common law, even on suspicion, short of arrest.[12]

Similarly, Justice Martin of the Ontario Court of Appeal had indicated that:

> A police officer, when he is endeavouring to discover whether or by whom an offence has been committed, is entitled to question any person, *whether suspected or not*, from whom he thinks that useful information can be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he, as a general rule, has no power to compel the person questioned to answer. *Moreover, he has no power to detain a person for questioning, and if the person questioned declines to answer, the police officer must allow him to proceed on his way unless he arrests him on reasonable and probable grounds.*[13]

Again, the implications of these cases and the quoted passages could not have been clearer: Canadian police did *not* have a power to detain suspected wrongdoers except by arresting them.

### B. THE REALITY OF POLICE PRACTICES

Despite this historic lack of formal power, police investigative stops based on grounds falling short of those required for an arrest have long been a reality in Canada.[14] This is not at all surprising. In the field, the distinction between mere suspicion and the reasonable and probable grounds needed for an arrest can be meaningless. Rather, if a police officer encounters someone who arouses his or her suspicions, that person will be approached, questioned, and possibly searched. If the individual does not acquiesce to police authority, some level of physical restraint will follow. In either case, the suspect will remain under police control until the officer's suspicion of wrongdoing is either confirmed (leading to an arrest) or dispelled (resulting in release). Such stops will persist regardless of their legal status because the police understandably see such street-level detentions as essential to the

12 *Dedman*, *ibid.* at 104, 106, Dickson C.J.C., dissenting. The majority did not take exception to these general statements of principle; *ibid.* at 121. *Dedman* is discussed in detail below; see *infra* notes 61 through 80 and accompanying text.

13 *Esposito*, *supra* note 11 at 94 [emphasis added].

14 Young argued that detention short of arrest is a mainstay of aggressive patrol practices and advocated for judicial and legislative efforts to regulate such practices; *supra* note 11 at 330-41, 367-68. See also Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Canadian Tort Lawyer" in Allen M. Linden, *Studies in Canadian Tort Law: A Volume of Essays on the Law of Torts Dedicated to the Memory of the Late Dean C.A. Wright* (Toronto: Butterworths, 1968) 416, writing in the pre-*Charter* era, he noted at 437-40 that "detention for investigation" was common, although "outside the law."

performance of their functions. They are "part and parcel of the routine activities of all police forces."[15]

Indeed, much can be said in favour of vesting the police with the authority to conduct investigative detentions. The fiction in the pre-*Simpson* cases is difficult to deny. The idea that police officers readily distinguish between suspicion and the reasonable and probable grounds needed for an arrest has not been borne out by experience.[16] Policing is a complicated and challenging business. In court, viewed calmly through the dispassionate lens of the trial process, with the benefit of hindsight, the options available to a police officer can seem deceptively clear. In contrast, for that same officer on the street, as events unfold quickly, there may be little opportunity for self-reflection when making a decision. If a suspicious situation presents itself, an officer must be able to take immediate action in response. The sophisticated but guilty suspect — astute enough to ask "am I under arrest?" — should not be able to scuttle a police officer's inquiries by choosing to walk away before an officer's legitimate suspicions have crystallized into grounds for an arrest. In such cases, a police officer should be legally entitled to briefly maintain the *status quo* in order to quickly get to the bottom of things. To refuse the police such a power is to deny them a needed tool in the performance of their difficult duties.

### C. THE POTENTIAL FOR ABUSE

Nevertheless, it would be naive to think that the police should be granted such a power unconditionally. Throughout the twentieth century, Canadian police have increasingly come to see themselves as "crime fighters" engaged in a war against crime and those who perpetrate it.[17] Even though this crime-fighting self-image is more rhetoric than reality,[18] its potential influence on how the police fulfill their crime control and order maintenance functions should not be underestimated. On the street, the unchecked enthusiasm of some police officers can undoubtedly lead to unjustified stops. Given the recent move in many

15 Young, *supra* note 11 at 330.

16 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). The Commission noted that RCMP officers "do not always distinguish between evidence that creates a suspicion from evidence that constitutes reasonable grounds for believing that a person has committed a crime" (*ibid.* at 14).

17 See Greg Marquis, "Power from the Street: The Canadian Municipal Police" in R.C. Macleod & David Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 24 at 30-31.

18 See Jack R. Green & Carl B. Klockars, "What Police Do" in Carl B. Klockars & Stephen. D. Mafstrofski, eds., *Thinking About Police: Contemporary Readings*, 2d ed. (New York: McGraw-Hill, 1991) 273, noting at 275 that studies suggest that only a small fraction of police work involves fighting crime.



Canadian cities[19] towards "community policing"[20] models whose crime reduction benefits are said to be linked to "aggressive field interrogation and proactive citizen street contacts,"[21] the potential for police abuses can only increase.[22] In deciding whom to target for detention as part of these efforts, police officers will frequently rely upon intuitive assessments that a particular individual seems "out of place" or "suspicious."[23] As a result, the potential for unjustified stops is ever-present. Even more troubling, however, is the mounting evidence that these sorts of discretionary judgments by Canadian police are not free from the oblique influence of factors such as an individual's age, sex, socio-economic status, or race.[24] Although using any of these personal characteristics as a proxy for individualized suspicion is troubling, the most pernicious and, therefore, most controversial variable on this list is obviously race.

Over the last decade, the existence of racial discrimination within the Canadian criminal justice system has received official recognition, initially through the findings of government

19 See Curt Taylor Griffiths, Richard B. Parent & Brian Whitelaw, *Community Policing In Canada* (Scarborough: Nelson Thomson Learning, 2001) at 19, who noted that in Canada, "the philosophy of community policing is having a significant impact on the structure and delivery of policing services." Community policing strategies have been implemented by police forces in cities and regions across the country (*ibid.* at 178-200). See also Paul F. McKenna, *Foundations of Community Policing in Canada* (Scarborough: Prentice Hall Allyn and Bacon Canada, 2000) at 295-334.

20 In theory, "community policing" contemplates a cooperative dynamic between citizens and the police aimed at solving contemporary community problems related to crime, fear of crime, social and physical disorder, and neighbourhood conditions. See Robert Trojanowicz *et al.*, *Community Policing: A Contemporary Perspective*, 2d ed. (Cincinnati: Anderson, 1998) at 3-24. In practice, this often translates into little more than taking officers out of patrol cars and putting them on the street "through foot patrols, park-and-walk patrols and fixed police posts"; see David H. Bayley, "Community Policing: A Report From The Devil's Advocate" in Jack R. Green & Stephen D. Mastrofksi, eds., *Community Policing: Rhetoric Or Reality* (New York: Praeger, 1988) 225 at 229 [*Rhetoric or Reality*].

21 Lawrence W. Sherman, "Policing Communities: What Works?" in Albert J. Reiss, Jr. & Michael Tonry, eds., *Communities and Crime, Vol. 8* (Chicago: University of Chicago Press, 1986) 343, noted that studies have shown that these sorts of contacts result in lower recorded crime rates at 369. But see Jack R. Greene & Ralph B. Taylor, "Community-Based Policing And Foot Patrol: Issues Of Theory And Evaluation" in *Rhetoric or Reality*, *ibid.* 195 at 206-19, questioning whether the studies actually support crime-reduction claims.

22 See Stephen M. Mastrofski, "Community Policing As Reform: A Cautionary Tale" in *Rhetoric or Reality*, *ibid.* at 47. Mastrofski noted that "aggressive order maintenance strategies" are often integral components of community policing efforts and can include "rousting and arresting people thought to cause public disorder, field interrogations and roadblock checks, surveillance of suspicious people, vigorous enforcement of public order and nuisance laws, and, in general, much greater attention to the minor crimes and disturbances thought to disrupt and displease the civil public" (*ibid.* at 53). See also Griffiths *et al.*, *supra* note 19 at 64, who noted that, as part of community policing efforts, "aggressive patrol may involve car stops, person checks, zero-tolerance enforcement, and other crackdowns" and cautioned that "officers must ensure that their actions do not violate the citizens' rights guaranteed in the *Canadian Charter of Rights and Freedoms*."

23 See *e.g. R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.) at 268; the officer testified that he approached the accused because he was "continuing to watch the cruiser as it approached" and, according to the officer, there was "something not quite kosher" about such behaviour.

24 See Richard V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 16-17, 200-201, noting that the police tend to proactively stop young males of lower socio-economic status and that, depending on the region, race may also play a role — for example, blacks in certain urban areas or Native Canadians in rural areas on the Prairies.

commissions and inquiries, and later in the opinions of Canadian courts.[25] In the case of Aboriginal people, a number of studies have acknowledged the existence of widespread racism, resulting in systemic discrimination in the criminal justice system.[26] Similarly, the *Commission On Systemic Racism in the Ontario Criminal Justice System* found that blacks are subject to discriminatory treatment at several key stages of the criminal process.[27] The official studies served to confirm what anecdotal evidence had long suggested, namely, that the Aboriginal and black communities are over-policed.[28]

Cogent evidence has recently emerged to suggest that both Aboriginals[29] and blacks[30] are stopped by police at considerably higher rates than members of other racial groups. For example, after surveying respondents about their experiences over a two year period, a study by the *Commission on Systemic Racism in the Ontario Criminal Justice System* found that, "after controlling for other variables, blacks are twice as likely as whites or Asians to experience a single stop ... four times more likely to experience multiple stops ... and almost

25 See *R. v. Williams*, [1998] 1 S.C.R. 1128, (1998), 124 C.C.C. (3d) 481 at 504 and *R. v. Gladue*, [1999] 1 S.C.R. 688, (1999), 133 C.C.C. (3d) 385 at 411, each acknowledging the existence of "widespread racism" and "systemic discrimination" against Aboriginals in the criminal justice system. See also *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, (1997), 118 C.C.C. (3d) 353, wherein the Court acknowledged "widespread and systemic discrimination against black and aboriginal people" at 372; *R. v. Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.), acknowledging "anti-black racism" at 366-69. See also *R. v. Brown* (2003), 173 C.C.C. (3d) 23, 170 O.A.C. 131 (C.A.) at paras. 7-9 [*Brown*]; and *R. v. C.R.H.* (2003), 174 C.C.C. (3d) 67, 2003 MBCA 38 at para. 49, acknowledging the existence of and potential for "racial profiling." See *e.g. R. v. Peck*, [2001] O.J. No. 4581 (S.C.J.) (QL), in which the Court found that the race of the accused — a young black male — was consciously relied upon in deciding to make a stop.

26 See Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996) at 33; Canada, Royal Commission On The Donald Marshall, Jr. Prosecution, *Digest of Findings And Recommendations* (Halifax: The Commission, 1989) at 162. See also Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991) at 96-113 [*Report on Aboriginal Justice in Manitoba*]; Canada, Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force, 1991) at 2-5, 2-46 to 2-51 [*Justice on Trial*].

27 See Ontario, Commission On Systemic Racism In The Ontario Criminal Justice System, *Report* (Toronto: Queen's Printer for Ontario, 1995) [*Report On Systemic Racism In The Ontario Criminal Justice System*].

28 See Julian V. Roberts & Anthony N. Doob, "Race, Ethnicity and Criminal Justice in Canada" in Michael Tonry, ed., *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives*, vol. 21 (Chicago: University of Chicago Press, 1997) 469 at 519, noting that: "[c]ommon to the research on Aboriginals and blacks is the finding that discrimination effects are probably strongest at the policing stage."

29 See *Report on Aboriginal Justice in Manitoba*, *supra* note 26 at 595; *Justice on Trial*, *supra* note 26 at 2-6, 2-48, 2-49.

30 See *Report On Systemic Racism In The Ontario Criminal Justice System*, *supra* note 27 at 349-60. See also Scot Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice (Paper presented at the 48th Annual Conference of the American Society of Criminology, Chicago, November, 1997) Criminol. [forthcoming] [Wortley]; Carl James, "'Up To No Good:' Black on the Streets and Encountering Police" in Vic Satzewich, ed., *Racism and Social Inequality in Canada: Concepts, Controversies, and Strategies of Resistance* (Toronto: Thompson Educational, 1998) at 157; Robynne Neugebauer, "Kids, Cops, and Colour: The Social Organization of Police-Minority Youth Relations" in Robynne Neugebauer, ed., *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars' Press, 2000); Jim Rankin *et al.*, "Police Target Black Drivers Star analysis of traffic data suggests racial profiling" *Toronto Star* (20 October 2002) A8.



seven times more likely to experience an unfair stop."[31] These studies serve to reveal an unfortunate truth: in carrying out proactive stops, Canadian police sometimes use race as a substitute for objectively reasonable grounds.

None of this is intended to suggest that overt racism is rampant among Canadian police; the empirical evidence does not go that far. Nevertheless, it is undeniable that racism exists in Canada. Given this fact, it would be dangerous to presume that discretionary decision-making by police officers is somehow immune from its caustic effects. As with any group, there are undoubtedly some police officers who consciously act on the basis of racial stereotypes. Sadly, in deciding who to stop, these officers will invariably target members of minority groups whom they consider more likely to be engaged in wrongdoing and therefore more deserving of closer scrutiny.[32]

A much more likely danger, however, is that many police officers subconsciously operate on the basis of stereotypical assumptions regarding visible minorities. For these officers, the facts that tweak suspicion — "the commission of a 'furtive gesture,' an 'attempt to flee,' 'evasive' eye movements, 'excessive nervousness' — will not be accurate renditions of the suspect's actual behavior, but rather, a report that has been filtered through and distorted by the lens of stereotyping."[33] In a recent decision, the Ontario Court of Appeal made clear that regardless of whether a stop is the product of conscious or subconscious racial bias, the appropriate label for such discriminatory police practices is "racial profiling."[34] For our

31 Wortley, *ibid.* at 19. For comparative purposes, this study controlled for age, gender, income, employment status and education — "unfair stops" were those that respondents self-reported as involving "unfair" treatment by police.

32 If police attitudes are reflective of those within Canadian society, this conclusion is somewhat inescapable. See Roberts & Doob, *supra* note 28 at 485, citing a 1995 Gallup poll of Canadians in which 45 percent of respondents indicated that there was a link between ethnicity and crime and, of this group, two-thirds identified blacks as the minority most likely to be involved in crime.

33 Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment" (1999) 74 N.Y.U.L. Rev. 956 at 991.

34 *Brown*, *supra* note 25. At para. 7, the Court cited Rosenburg J.A. who, in an earlier judgment (*R. v. Richards* (1999), 26 C.R. (5th) 286), explained that

> [r]acial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

The Court in *Brown* continued: "The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping" (*ibid.* at para. 8). For a discussion of racial profiling in Canada, see David M. Tanovich, "Using the Charter To Stop Racial Profiling: The Development of An Equality Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145.

purposes, the important point is that race can sometimes inappropriately influence the police in choosing whom to stop for investigative purposes.[35]

A final consideration in outlining the divide between law and reality in this area is the low visibility of unjustified street level detentions. Arguably, of all police practices none is more secluded and, therefore, as susceptible to abuse as street level detentions. This flows from the very nature of such encounters. If an individual is detained without cause, chances are that he or she is innocent of any wrongdoing, in which case such stops do not yield evidence of criminality. It is only in those comparatively rare cases of unjustified detentions where a person happens to be guilty of wrongdoing and evidence of this is fortuitously acquired during the stop — for instance, the individual confesses or a search reveals contraband — that an arrest and charge(s) follow. Otherwise, in most instances, the victim of a groundless detention is ultimately released. As a result, courts get a very incomplete picture of what is taking place on the street; the cases they see "are only the tip of the iceberg."[36]

With this necessary background in place, we are now ready to embark on a consideration of *Simpson* and the investigative detention power that it created. Before moving forward, it is useful to briefly reiterate the lessons from this Part. First, although the common law foreclosed the possibility of investigative detentions by police, in reality these sorts of stops have long been a part of police practice. Second, irrespective of their legal status, such stops will continue because the police consider them essential to the effective performance of their functions. Third, given both their inevitability and their importance to the effective discharge of police duties, it makes sense to formally vest the police with an investigative detention power. Fourth, due to the very real risk of abuse, any such power should be carefully regulated. Finally, when assessing which branch — the legislative or the judicial — is best suited to create and regulate such a power, it ought to be remembered that courts only see a very small fraction of the cases in which police authority to detain has been abused.

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35 In some circumstances, it is perfectly legitimate for police to rely upon an individual's race in deciding to effect a stop; see Samuel R. Gross & Debra Livingston, "Racial Profiling Under Attack" (2002) 102 Colum. L. Rev. 1413 at 1415:

> It is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating. That use of race — which usually occurs when there is a racially specific description of the criminal — does not entail a global judgment about a racial or ethnic group as a whole.

36 Young, *supra* note 11 at 355. See also Stephen D. Mastrofski & Jack R. Greene, "Community Policing and the Rule of Law" in David Weisburd & Craig Uchida, eds., *Police Innovation and Control of the Police: Problems of Law, Order, and Community* (New York: Springer-Verlag, 1993) 80 at 85 [Police Innovation and Control], noting that "the system for monitoring police compliance is limited to those relatively few instances where police actions are made visible in cases that receive review in court."



## III. *R. v. Simpson*: The Birth of Articulable Cause Investigative Detentions

### A. Clearing the Way for an Investigative Detention Power

The facts in *Simpson* are straightforward.[37] On the evening of 5 December 1989, Constable Wilkin was on routine patrol. He had recently read an internal police memo citing an unidentified street source that described a particular residence as a "suspected crack house." That night, he observed a car in the driveway of that house. The driver, a woman, exited the car and entered the house, where she stood in the doorway. A short time later, she and a man (Simpson) emerged from the house and drove off in the car. Constable Wilkin followed. He testified to having had "every intention of pulling them over to ask them where they had been, to see what story they were going to give me, see whether any of their story would substantiate what I believed my information to be at the time … I was looking for them … to trip themselves up to give me more grounds for an arrest."[38]

After a short drive, Constable Wilkin pulled the vehicle over. He directed the woman, who was driving, to sit in the police cruiser and she complied. The officer then directed Simpson to step out of the car, which he did. During their short conversation, the officer noticed a bulge in Simpson's front pant pocket. The officer reached out and felt the bulge, which was hard. Nonetheless, when asked what it was, Simpson insisted that it was nothing. At that point, Constable Wilkin directed Simpson to remove the object. Simpson took it from his pocket quickly, in an apparent effort to throw it away. After a short struggle, the officer managed to remove a baggie containing cocaine from Simpson's hand. Simpson was then arrested and charged with possession of a narcotic for the purpose of trafficking.[39]

At his trial, Simpson unsuccessfully argued that the cocaine should be excluded from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.[40] The argument had two bases: first, he contended that the vehicle stop had violated his s. 9 *Charter* right "not to be arbitrary detained"[41] and second, he claimed that the direction to empty his pocket had violated his s. 8 *Charter* right "to be secure against unreasonable search or seizure."[42] Simpson renewed these same arguments on appeal.

The Ontario Court of Appeal judgment in *Simpson* began with an analysis of the s. 9 *Charter* issue of whether Simpson had been arbitrarily detained. To trigger the protection of s. 9, the encounter had to be considered sufficiently coercive to constitute a "detention." Not every interaction between an individual and the police qualifies for this label: under the case law, some element of "compulsory restraint" — physical or psychological — is necessary. Although physical restraint is sufficient, it is not essential. A demand or direction by a law enforcement official that effectively assumes control over an individual's freedom of

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37 *Supra* note 1 at 486.

38 *Ibid.* at 487.

39 *Ibid.*

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

41 *Supra* note 1 at 488, referencing the *Charter*, *ibid.*, s. 9.

42 *Supra* note 1 at 505, referencing the *Charter*, *ibid.*, s. 8.