Court File No. 38087

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

RANDOLPH (RANDY) FLEMING

APPELLANT
(Respondent)

-and-

HER MAJESTY THE QUEEN in the RIGHT OF THE PROVINCE OF ONTARIO, PROVINCIAL CONSTABLE KYLE MILLER OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE RUDY BRACNIK OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE JEFFREY CUDNEY OF THE ONTARIO PROVINCIAL POLICE , PROVINCIAL CONSTABLE MICHAEL C. COURTY OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE STEVEN C. LORCH OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE R. CRAIG COLE OF THE ONTARIO PROVINCIAL POLICE and PROVINCIAL CONSTABLE S. M. (SHAWN) GIBBONS OF THE ONTARIO PROVINCIAL POLICE

RESPONDENTS
(Appellants)

FACTUM OF THE APPELLANT
(Randolph (Randy) Fleming, Appellant)
(Pursuant to Rule 42(1) of the Rules of the Supreme Court of Canada, S.O.R./2002-156)

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FACTUM OF THE APPELLANT

PART I – OVERVIEW and STATEMENT OF FACTS

"We want to be safe, but we need to be free."

- *Brown v Regional Municipality of Durham Police Service Board* (1998), 43 OR (3d) 223 (CA) ("*Brown*") per Justice D. H. Doherty[1]

A. Overview of the Appellant's Position

1. The Appellant, Randy Fleming ("Fleming") was arrested on May 24, 2009, in Caledonia, Ontario by the 7 Respondent Ontario Provincial Police officers (the "Officers"). Fleming was alone and engaged in a peaceful political protest, walking along a public road carrying a Canadian Flag. His arrest was ostensibly made on the basis of the ancillary common law police power to arrest a person who is acting lawfully in order to prevent an apprehended breach of the peace by others. During this 'protective' arrest, Fleming was permanently injured by the Officers.

2. The analysis for determining whether the exercise of an ancillary common law police power is justified has been developed through case law stretching back to the 1960s. The *Waterfield* test has established the considerations that Courts are to balance, including the extent to which it is necessary to interfere with civil liberties to perform police duties.

3. The principal question this case raises is whether minimal impairment of individual rights and proportionality are factors to be weighed as part of the 'necessity' analysis in the *Waterfield* test. This Court has not previously addressed this question. In two earlier decisions, the Court of Appeal for Ontario addressed this question; the House of Lords has addressed it as well. The decision of the Court of Appeal for Ontario in this case conflicts with that prior jurisprudence.

4. In *Brown*, the 'necessity' portion of the *Waterfield* test was held to involve examining whether the impugned means used by the police could have been avoided (i.e. making an arrest, as compared to other available means).[2] The Court in *Brown* explicitly noted that means other than

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[1] Appellant's List of Authorities ("ALOA"), Tab 1, *Brown v Regional Municipality of Durham Police Service Board* (1998), 43 OR (3d) 223 (CA) ("*Brown*") at para 79.

[2] ALOA, Tab 1, *Brown* at para 76: "The police purpose behind the detentions, the nature of the liberty interest interfered with, the extent of the interference, and the need to employ the impugned means to effectively perform a duty placed upon the police must all be taken into account".

detentions had been available to police.[3] It was also held that the balancing should be weighted in favour of individual rights even if doing so makes the exercise of police powers more difficult.[4]

5. In *Figueiras v Toronto (Police Services Board),* the concept of minimal impairment of individual rights was explicitly considered as part of the *Waterfield* balancing.[5] This ensured that the use of ancillary common law police powers would be proportionate, taking into account the importance of the individual rights involved and any other available options when determining whether the impugned means used by the police were necessary.

6. *Brown* and *Figueiras* have been followed in Ontario and looked to for guidance in other jurisdictions across Canada. In the case at hand, however, the concepts of minimal impairment of individual rights and proportionality were abandoned or ignored by the majority of the Court of Appeal for Ontario. The majority focused instead on the police duty to maintain the public peace and whether the police action was effective in maintaining it. A dissent strongly critical of the majority's position, and supportive of the prior case law and the trial judge's decision, was rendered.

7. The majority's position has created confusion about the Courts' ability to supervise the use of the ancillary common law police powers, including the power to arrest a person who is acting lawfully in order to prevent an apprehended breach of the peace by others. It also permits a significant expansion of the use of such police powers to curtail lawful activities, producing a corresponding chilling effect on the exercise of fundamental civil liberties. Fleming submits that this Honourable Court should confirm that minimal impairment of individual rights and proportionality remain factors to be weighed as part of the *Waterfield* test, and that the arrest of a law-abiding citizen should be a last resort. This would ensure an appropriate emphasis on the importance of individual rights and freedoms in a democratic society.

8. Moreover, Fleming submits that the majority of the Court of Appeal for Ontario purported to identify several errors in the decision of the trial judge in this case that were not in fact made;

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[3] ALOA, Tab 1, *Brown* at para 77: "… - the detentions could not be said to be necessary to the maintenance of the public peace. A large police presence without detention would have served that purpose. In fact, it is arguable that the confrontational nature of the detentions served to put the public peace at risk."

[4] ALOA, Tab 1, *Brown* at para 79.

[5] ALOA, Tab 2, 2015 ONCA 208 at paras 90-91, 121-123 ["*Figueiras*"].

or, in the alternative, any such errors do not rise to the high standard of being palpable and overriding. In particular, it was not open to the majority of the Court of Appeal for Ontario to substitute its own views for those of the trial judge where the findings made by the trial judge were open to her on the evidence adduced before her. Fleming submits that the decision of the trial judge was reasonable, applied the *Waterfield* test, was fully supported by the evidence and should be restored..

B. Statement of Facts

i. Background

9. At the time of his arrest, Fleming was a 49-year-old father of two. He had been employed by Stelco/U.S. Steel for 29 years. He had lived in Caledonia for over 40 years.[6]

10. As set out in the OPP's "Operational Plan"[7], a Flag Rally was planned to occur in Caledonia on May 24, 2009, involving speeches and the raising of a Canadian Flag. The Flag Rally was to occur on the far side of the main thoroughfare in Caledonia, Argyle Street, across from a property owned by the Province of Ontario known as Douglas Creek Estates ("DCE").[8]

11. Fleming gave uncontested evidence that DCE (when owned by a private land developer) had been occupied by Indigenous persons (the "Occupiers") in February, 2006 and that an injunction was granted in March, 2006 ordering the Occupiers off of DCE.[9] Officers Bracnik and Courty testified that they participated in the resulting OPP attempt to enforce the injunction—the OPP raided DCE in April, 2006.[10] The raid failed, and the OPP officers were driven off of DCE by the Occupiers.[11]

12. Officers Cudney[12], Bracnik[13] and Courty[14] confirmed that the protests surrounding the occupation of DCE were most intense in 2006, but had lessened in each succeeding year, and that, by 2009, the protests had substantially declined in size, frequency or intensity from their peak in

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[6] Appellant's Record ("AR"), Part I, Tab 2, p 29 ln 10-15.
[7] AR, Part IV, Tab 118, Exhibit 5A, p 5.
[8] AR Part IV, Tab 124, Exhibit 3.
[9] AR, Part I, Tab 2, p 10 ln 20-26.
[10] AR, Part I, Tab 2, p 10 ln 26-29.
[11] AR, Part I, Tab 2, p 10 ln 30 – p 11 ln 1.
[12] AR, Part III, Tab 11, p 1 ln 23 – p 2 ln 14.
[13] AR, Part III, Tab 12, p 3 ln 17 – p 4 ln 15.
[14] AR, Part III, Tab 13, p 5 ln 20 – p 6 ln 9.

2006.[15] Fleming stated that "early on" protests "were inundated with violence", but agreed that "[i]n 2009, it was different", the "atmosphere had quieted some", and that "every year has changed as the years go by...in '06 it was certainly different than '07 and certainly different in '09".[16]

13. The commanding OPP officer in Caledonia on May 24, 2009 was Inspector Kent Skinner ("Insp. Skinner"). He planned and organized the OPP response to the Flag Rally.[17]

14. The OPP (in a document entitled 'Major Incident Command'[18]) defines a "major incident" as an occurrence that requires mobilization of OPP employees, equipment and other resources beyond those required for normal police service delivery, e.g. a plane crash. A "critical incident" is defined as a high-risk incident requiring the mobilization of the OPP Integrated Response, e.g. a hostage taking. An "Aboriginal Critical Incident", as Insp. Skinner confirmed[19], is defined as a major incident related to an occupation, protest and/or high-risk incident occurring on a First Nations Territory or involving an Indigenous community member or treaty right.

15. The Operational Plan states that an OPP policy, the 'Framework for Police Preparedness for Aboriginal Critical Incidents' (the "Framework") was to be applied on May 24, 2009.[20] The Framework contains the following statement, under the heading "Critical Policy":

> The Ontario Provincial Police (OPP) is committed to safeguarding the individual rights enshrined within Federal and Provincial laws, inclusive of those specifically respecting the rights of Aboriginal persons of Canada as set out in the Canadian Charter of Rights and Freedoms. The OPP recognizes that conflicts may arise as Aboriginal communities and the various levels of government work to resolve outstanding issues associated with matters such as land claims, self-determination and Aboriginal or treaty rights, which may relate to education, hunting and fishing. It is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved parties throughout the cycle of conflict.[21]

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[15] AR Part I, Tab 2, p 11, ln 3-18.
[16] AR, Part III, Tab 14, p 7 ln 22 – p 9 ln 21.
[17] AR, Part I, Tab 2, p 26, ln 15-16.
[18] AR, Part IV, Tab 119, Exhibit 5C, p 1-2.
[19] AR, Part III, Tab 15, p 13 ln 8-24.
[20] AR, Part IV, Tab 120, Exhibit 5B.
[21] AR, Part IV, Tab 120, Exhibit 5B, p 2.

16. Insp. Skinner's evidence was that:

a. The Framework does not supersede the *Canadian Charter of Rights and Freedoms*, the statutes of Canada or Ontario, or the common law rights of individuals, and does not absolve the OPP from carrying out its duties under statute and common law;[22]

b. Fleming's walk along Argyle Street did not involve Indigenous persons, and did not relate to Indigenous self-determination or Indigenous treaty rights with respect to education, hunting or fishing[23];

c. Neither DCE nor Argyle Street were Indigenous territory;[24]

d. No Occupiers were forced to be present on DCE on May 24, 2009; any that were there chose to attend near a planned Flag Rally that was lawful;[25]

e. In the ordinary course, there is nothing unlawful or improper and it is well within the rights of an individual to go down Argyle Street with a Canadian Flag; [26] and

f. He decided to limit the rights of Flag Rally protestors in advance by making what he perceived to be public safety interests the priority over other rights, such as the freedom to walk down the street and freedom of expression.[27]

17. Insp. Skinner chose to apply the Framework on May 24, 2009. The sole criterion Insp. Skinner could point to in support of his decision to apply the Framework was that Occupiers might be on DCE on the day of the Flag Rally, which was planned to occur in "the vicinity of the area" of DCE.[28]

18. The Operational Plan (under the heading "Mission") states that on May 24, 2009, the OPP would "[a]llow protesters to exercise their lawful rights and cause the least possible disruption to others".[29] Insp. Skinner agreed that this did not mean no disruption would be permitted at all.[30]

19. The Operational Plan (under the heading "Public Order Summary of Criminal Code Offences") states "[t]he crowd/individuals must be advised that they cannot go beyond a certain

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[22] AR, Part III, Tab 15, p 10 ln 2 – p 11 ln 2; AR, Part I, Tab 2, p 26 ln 27 – p 27 ln 6.
[23] AR, Part III, Tab 15, p 11 ln 3 – p 12 ln 2.
[24] AR, Part III, Tab 15, p 11 ln 22 – p 12 ln 30.
[25] AR, Part III, Tab 15, p 13 ln 3-26; RC Tab 1, p 21 ln 6-13.
[26] AR, Part III, Tab 17, p 15 ln 26-30.
[27] AR, Part I, Tab 2, p 28 ln 13-18, AR, Part III, Tab 17, p 15 ln 26 – p 16 ln 31.
[28] AR, Part III, Tab 15, p 13 ln 3-9.
[29] AR, Part IV, Tab 118, Exhibit 5A, p 3.
[30] AR, Part III, Tab 18, p 17 ln 11-21.

point as identified by the officer and to do so, constitutes a criminal offence of Obstructing a Peace Officer and that they will be arrested".[31] Insp. Skinner agreed that this requirement was communicated to the Officers on May 24, 2009, and that this was the response to be used whenever someone attempted to cross such a defined police 'buffer zone'.[32] The trial judge noted that none of the Officers warned Fleming not to proceed further or he would be arrested for obstruction as required by the Operational Plan.[33]

20. The trial judge noted that Officers Cudney[34], Courty[35], Cole[36], Miller[37], Lorch[38] and Gibbons[39], as well as Insp. Skinner[40], agreed that police lines and buffer zones had successfully been used in Caledonia from 2006 to 2009 to allow groups of protesters and groups of Occupiers to demonstrate near one another while maintaining order and preventing breaches of the peace.[41] The trial judge noted Officer Lorch's admission that buffer zones had been used successfully right at the entrance of DCE in the past.[42] Officer Courty testified that there had been protests where both sides were present and there were no incidents.[43] As noted by the trial judge, Insp. Skinner conceded there was not a breach of the peace every time there was a protest regarding DCE.[44]

21. The OPP had two Public Order Units ("Alpha" and "Bravo") in Caledonia on May 24, 2009; Alpha and Bravo each contained four main squads, each with seven officers (56 officers total). Alpha was stationed on Argyle Street, while Bravo was stationed nearby ready for quick deployment in hard tac riot gear.[45] Alpha also contained an additional Offender Transport Unit and

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[31] AR, Part IV, Tab 118, Exhibit 5A, p 9, para 2.
[32] AR, Part III, Tab 19, p 18 ln 22 – p 19 ln 16.
[33] AR, Part I, Tab 2, p 17, ln 20-26.
[34] AR, Part III, Tab 20, p 20 ln 6 – p 21 ln 8.
[35] AR, Part III, Tab 13, p 5 ln 20 – p 6 ln 9.
[36] AR, Part III, Tab 21, p 22 ln 25 – p 23 ln 16.
[37] AR, Part III, Tab 22, p 24 ln 11-29.
[38] AR, Part III, Tab 23, p 25 ln 4-11.
[39] AR, Part III, Tab 24, p 26 ln 14 – p 27 ln 4.
[40] AR, Part III, Tab 25, p 28 ln 4-11.
[41] AR, Part I, Tab 2, p 11, ln 11-18.
[42] AR, Part III, Tab 23, p 25 ln 8-10; AR, Part I, Tab 2, p 11 ln 19-20.
[43] AR, Part III, Tab 13, p 6, ln 5-9.
[44] AR, Part I, Tab 2, p 29 ln 7-9.
[45] AR, Part I, Tab 2, p 13 ln 22-26; AR, Part III, Tab 26, p 30 ln 1-16.

a K-9 unit.[46] A command hierarchy of OPP officers was also present, and various municipal police officers (patrol and traffic control) would also have been nearby.[47]

22. The Officers formed one squad, 'Alpha Support'. All 7 of the Officers were Emergency Response Team ("ERT") members who had received extra initial and annual training. ERT members are trained in "containment, canine backup, public order and native awareness".[48] The Officers were in soft tac equipment, which was described at trial as the daily OPP uniform with additional body armour (i.e. bullet resistant ballistic protection, pepper spray, a baton and a .40 caliber sidearm).[49]

23. The planners of the Flag Rally and most of the participating protesters had gathered at the Caledonia Lions' Club Hall, to the north of DCE. Fleming did not go to the Lions' Club Hall; instead, he attended a yard sale at a private home to the south of DCE (the "Brown Residence") and planned to walk over to the Flag Rally from there. Fleming considered May 24, 2009 to be an "important" day because a Canadian Flag was going to be permitted to be raised on Argyle Street.[50] Fleming's uncontested evidence was that the Flag Rally was a response to the fact that, from the start of the occupation of DCE (roughly 30 months as of May, 2009), "no one had been allowed to put up a Canadian Flag on Argyle Street".[51] Fleming wanted to show his support for the protesters by attending the Flag Rally.[52] Fleming was "found to have been sincere regarding his respect for the flag" by the trial judge.[53]

24. Officers Cudney[54], Cole[55] and Miller[56] confirmed that it was part of their duty as OPP officers to form police lines and create buffer zones to preserve the peace during demonstrations.

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[46] AR, Part III, Tab 27, p 31 ln 5-11.
[47] AR, Part III, Tab 26, p 29 ln 30 – p 30 ln 18.
[48] AR, Part III, Tab 28, p 32 ln 13-18.
[49] AR, Part III, Tab 29, p 33 ln 15-30, p 34 ln 9-30.
[50] AR, Part III, Tab 30, p 35 ln 29 – p 36 ln 15.
[51] AR, Part I, Tab 2, p 9 ln 31 – p 4 ln 7.
[52] AR, Part I, Tab 2, p 10 ln 15-17.
[53] AR, Part I, Tab 2, p 10 ln 9-10.
[54] AR, Part III, Tab 20, p 20 ln 21 – p 21 ln 8.
[55] AR, Part III, Tab 21, p 22 ln 25 – p 23 ln 22.
[56] AR, Part III, Tab 22, p 24 ln 11-23.

25. The Officers[57] agreed that they did not know the identity or personal history of any of the Occupiers present on DCE on May 24, 2009. Officers Gibbons[58] and Courty[59] agreed the group of Occupiers present that day may have been completely different from any group of Occupiers who had been involved in any previous protest or act of violence.

26. There was no evidence adduced at trial that there had ever been violence in Caledonia involving a lone protestor being attacked by a group of protestors or Occupiers, or that the presence of a Canadian Flag near or on DCE had ever caused a breach of the peace before.

27. The trial judge heard all of the above evidence, referred to much of it, and found that while there had been violence in the past, it had peaked in 2006 and had substantially declined by 2009. The trial judge also found that use of police lines and buffers zones in the intervening period had successfully kept the peace and protected the rights of all involved.[60]

ii. Fleming walks to the Flag Rally

28. Fleming left the Brown Residence when he was informed that the protesters at the Caledonia Lions' Club Hall were walking to the Flag Rally. Fleming peacefully exercised his common law rights and *Charter* freedoms, walking north on the shoulder of Argyle Street toward the Flag Rally site. Fleming carried a Canadian Flag on a short wooden pole.[61]

29. A video was entered into evidence (the "Video").[62] It captured parts of what transpired.

30. In the area where the Flag Rally was to occur, Argyle Street is a two-lane highway. Argyle Street was open at all times on May 24, 2009, and people and traffic could move freely in the area of Argyle Street, including past the entrance to DCE.[63] The day had been peaceful.[64]

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[57] AR, Part III, Tab 31, p 39 ln 1-27, p 40 ln 18-24; Tab 32, p 41 ln 2-32; Tab 33, p 42 ln 17 – p 44 ln 22; Tab 34, p 45 ln 13-22, p 46 ln 1-11; Tab 35, p 47 ln 7-24; Tab 36, p 48 ln 9 – p 49 ln 10; Tab 37, p 50 ln 18 – p 51 ln 28.
[58] AR, Part III, Tab 37, p 51 ln 24-28.
[59] AR, Part III, Tab 36, p 48 ln 28 – p 49 ln 7-10.
[60] AR, Part I, Tab 2, p 10 ln 20 – p 5 ln 18.
[61] AR, Part I, Tab 2, p 14 ln 3-15
[62] AR, Part IV, Tab 121, Exhibit 9.
[63] AR, Part I, Tab 2, p 13 ln 27 – p 14 ln 1.
[64] AR, Part I, Tab 2, p 8 ln 12.

31. The Officers agreed that, at the time Fleming began walking along Argyle Street, they were moving from their initial staging area to the south of DCE towards the parking lot at Caledonia Baptist Church, to the north of the entrance of DCE. The Officers were in two vans; the first was an unmarked minivan. A third van, the Offender Transport Unit, followed. Two special OPP constables were present in the Offender Transport Unit van.[65] All of the Officers agreed—and the Video clearly shows—that three vans drove past Fleming as he walked up Argyle Street, travelling in the same direction he was.[66]

32. Officer Cudney stated that he was not concerned about Fleming walking up Argyle Street with a Canadian Flag.[67] At their examinations for discovery, and as read-in at trial, Officers Courty[68], Lorch[69] and Cole[70] agreed that Fleming had done nothing unlawful by walking along Argyle Street with a Canadian Flag.

33. As Fleming proceeded alone along Argyle Street, the Officers received an order from a superior officer (identified as Sgt. Huntley): "Going to have to deploy you between Brown's place and the, uh, DCE, entrance to DCE. You're going to have to do that soon as we've got a flag coming down that direction [emphasis added]."[71]

34. Officers Miller[72] and Gibbons[73] indicated that they understood their orders were to deploy between Fleming and the entrance to DCE. This was echoed by the evidence of Officers Courty, Lorch, Cudney and Bracnik, as given at their examinations for discovery as read-in at trial.[74] Officer Cudney testified that he understood they were to speak to Fleming and determine where he was going and what his intentions were.[75] The trial judge found that "the police officers did not do this, despite the fact that many officers were available who could have done so".[76]

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[65] AR, Part I, Tab 2, p 20 ln 6-9.
[66] AR, Part I, Tab 2, p 14 ln 27 – p 15 ln 5; AR, Part IV, Tab 121, Exhibit 9.
[67] AR, Part III, Tab 38, p 52 ln 16-19.
[68] AR, Part III, Tab 39, p 53 ln 17-20; p 54 ln 24 – p 55 ln 4.
[69] AR, Part III, Tab 40, p 56 ln 21-31.
[70] AR, Part III, Tab 41, p 57 ln 25-28.
[71] AR, Part IV, Tab 122, Exhibit 18.
[72] AR, Part III, Tab 42, p 58 ln 32 – p 59 ln 5.
[73] AR, Part III, Tab 43, p 60 ln 29 – p 61 ln 2.
[74] AR, Part III, Tab 44, p 62 ln 15-22, p 63 ln 8-18, p 64 ln 5 – p 66 ln 16, p 66 ln 24 – p 67 ln 3
[75] AR, Part III, Tab 45, p 68 ln 23 – p 69 ln 8; p 70 ln 32 – p 71 ln 7.
[76] AR, Part I, Tab 2, p 23 ln 19-22.

35. Officer Bracnik agreed that if Fleming had been permitted to continue walking north along Argyle his path would not have taken him onto DCE.[77] The Officers turned their vans around at the church parking lot and then drove at Fleming's location as he walked along the shoulder of Argyle Street toward the Flag Rally site; the Offender Transport Unit van followed.[78]

36. Officer Courty, who was driving the second van, testified he drove the speed limit when pulling onto the shoulder at Fleming's location; he believed the speed limit to be 80 km/h.[79]

37. Fleming had walked along the shoulder of Argyle Street before; he made sure he walked on the side of the road facing traffic.[80] He stated that he first became aware of a van approaching when it pulled onto the shoulder at speed. The van was grey and it didn't look like it was slowing down.[81] As the vans drew close, Fleming walked off the shoulder of Argyle Street, into the grassy ditch, out of the ditch, stepped over a low fence, went a few feet onto DCE, stopped and turned around; Fleming stated that he did this to move away from the vans and to reach level ground.[82]

38. Officer Courty stated Fleming stepped down into the ditch when the second van, which he was driving, was roughly 10-15 meters away from Fleming. He agreed that within that 10-15 meter space between the second van and Fleming was the first van, also approaching Fleming.[83]

39. At that point, around 20 Occupiers were present at the main entrance to DCE, about 100 meters away from Fleming. Fleming made no threatening gestures to any of the Occupiers or the Officers. Fleming did not approach the Occupiers or speak to them. Approximately 8-10 male and female Occupiers began to move toward Fleming and the Officers. Several were carrying cameras—some walked; some jogged. They had no weapons and uttered no threats. They were not known to be individuals with a history of violence. The Officers arrived at Fleming's location while the 8-10 Occupiers were still approaching. Ultimately, no Occupiers came close to Fleming or the Officers; they kept their distance.[84] Officer Lorch acknowledged the Occupiers might have been coming over "to see what was going on".[85]

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[77] AR, Part III, Tab 46, p 72 ln 23-32; AR, Part I, Tab 2, p 15 ln 27-30.
[78] AR, Part III, Tab 47, p 73 ln 29 – p 74 ln 5.
[79] AR, Part III, Tab 48, p 75 ln 9-19.
[80] AR, Part III, Tab 49, p 76 ln 5-8.
[81] AR, Part III, Tab 50, p 77 ln 24 – p 78 ln 1.
[82] AR, Part III, Tab 51, p 79 ln 11 – p 80 ln 1.
[83] AR, Part III, Tab 52, p 81 ln 30 – p 82 ln 4.
[84] AR, Part I, Tab 2, p 8 ln 15-30.
[85] AR, Part III, Tab 53, p 83 ln 20 – p 84 ln 30.

40. The trial judge noted that there was confusion among the Officers regarding what they said to Fleming after they exited their vans.[86] Officer Cudney[87] and Officer Bracnik[88] testified that Fleming was told to stop or he would be arrested for breach of the peace. On the other hand, Officer Miller testified that after Fleming stepped onto DCE: "I told him to return to the side of the fence that I was on or he would be arrested to prevent a breach of the peace [emphasis added]".[89]

41. Fleming did not immediately understand that the vans approaching at speed contained police officers (again: the lead van was unmarked); once he realized police officers were present, he did not immediately understand they were speaking to him: "I knew I wasn't doing anything wrong. I didn't know whether someone had come up behind me."[90] When he reached level ground, "I saw the police and then realized that there wasn't anybody else there but me."[91]

42. Fleming's evidence was that, at that point:

a. He saw some people coming from the entrance of DCE "making their way up to, to see what was going on up my way";[92] and

b. His initial thought was "who do I take my chances with? … Do I, do I walk down to the entrance of Douglas Creek Estate and meet the people coming out or do I turn around and, and walk back into the police… Fairly quickly decided it would likely be better if I turned and went with the police."[93]

43. When he was asked why he decided to go with the police, Fleming stated "Well, that would diffuse [*sic*] the situation. It was – I mean I wasn't there to prove a point or anything, I, I just – I was just disappointed when I realized they [the Officers] were talking to me."[94]

iii. Fleming is arrested and injured

44. Despite his peaceful conduct and the few seconds he stood on DCE, Fleming was arrested. Fleming willingly left DCE. His evidence was that that he was not told a reason he was under

[86] AR, Part I, Tab 2, p 8 ln 13-15; p 17 ln 9-19; p 18 ln 14-21.
[87] AR, Part III, Tab 54, p 85 ln 16-22; p 86 ln 10 – p 87 ln 10.
[88] AR, Part III, Tab 55, p 88 ln 7-19; p 89 ln 19 – p 90 ln 9.
[89] AR, Part III, Tab 56, p 91 ln 16-21.
[90] AR, Part III, Tab 58, p 94 ln 2-8.
[91] AR, Part III, Tab 58, p 95 ln 15-20.
[92] AR, Part III, Tab 58, p 94 ln 24-31.
[93] AR, Part III, Tab 58, p 95 ln 25 – p 96 ln 2.
[94] AR, Part III, Tab 58, p 96 ln 3-9.

arrest; he was only commanded to drop the flag and "stop resisting".[95] Fleming tightened his grip on his Canadian Flag, but took no other action.[96] Given that the OPP had not permitted Canadian Flags to be raised on Argyle Street in the previous 30 months, Fleming testified that he was unwilling to give his Canadian Flag on the day of the Flag Rally to a member of the OPP.[97]

45. Fleming was taken to the ground, hard, and pinned by four of the Officers; Fleming's face hit one of the Officers as he was being 'grounded'.[98] Officer Cudney noted that Fleming received a red mark on his face, under one of his eyes.[99]

46. Officer Cudney[100] testified that Fleming and the Officers stumbled and fell to the ground; Officer Bracnik[101] testified that the Officers tumbled down or fell. On the other hand, Officer Miller testified that he used "soft, physical control,"[102] "the minimal amount of force required to put Mr. Fleming face down on the ground"[103] and no slip was involved.[104] The trial judge noted this discrepancy in the Officers' evidence.[105] Officer Miller's evidence, attempting to minimize the amount of force used by him, was rejected by the trial judge as not credible.[106]

47. Fleming lost his Canadian Flag after hitting the ground.[107] Officer Gibbons testified that he "took control of the flag and got it out of the situation".[108]

48. Officer Miller testified that he ordered Fleming to "put his hands behind his back and cooperate" and that Fleming complied.[109] The evidence is clear that upon complying and putting his hands behind his back, Fleming's left hand was jerked upwards towards the base of his head and he felt pain unlike anything before, accompanied by a "pop" or "squish" sound in his left

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[95] AR, Part III, Tab 59, p 97 ln 29 – p 98 ln 14.
[96] AR, Part III, Tab 60, p 99 ln 18- 22.
[97] AR, Part III, Tab 61, p 100 ln 26 – p 101 ln 15.
[98] AR, Part III, Tab 62, p 102 ln 2-10.
[99] AR, Part III, Tab 63, p 103 ln 12-19.
[100] AR, Part III, Tab 64, p 104 ln 27 – p 105 ln 5.
[101] AR, Part III, Tab 65, p 106 ln 3-6.
[102] AR, Part III, Tab 66, p 107 ln 7-9.
[103] AR, Part III, Tab 67, p 108 ln 23-27.
[104] AR, Part III, Tab 68, p 109 ln 3-9.
[105] AR, Part I, Tab 2, p 19 ln 12-16.
[106] AR, Part I, Tab 1, p 66 ln 28 – p 67 ln 7.
[107] AR, Part III, Tab 69, p 110 ln 24-27.
[108] AR, Part III, Tab 70, p 111 ln 19-23.
[109] AR, Part III, Tab 71, p 112 ln 23-27.

elbow. He thought at the time that his left arm had been broken, and said aloud to the Officers, "you just broke my f'ing arm".[110] A photo of Fleming's arrest was entered into evidence; he is grimacing in the photo and appears to be in pain.[111]

49. The trial judge noted Fleming's evidence that his left arm was injured by wrenching *after* he had complied and put his hands behind his back.[112] The trial judge accepted that Fleming suffered a traumatic injury to his left elbow caused by the Officers[113] and found that "it is not clear which of the officers wrenched Mr. Fleming's left elbow and caused the traumatic injury" as Fleming's head was pinned to the ground.[114] The trial judge accepted expert medical evidence that Fleming's injury is permanent and chronic.[115]

50. Fleming was handcuffed by Officer Miller[116] and put in the Offender Transport Unit van. Despite the injury to his left arm, Fleming was handcuffed with his hands behind his back throughout the period he was detained in the van. Fleming reported this felt like 5-6 hours, but later learned it was roughly 2.5 hours.[117] Fleming was transported to the OPP detachment in Cayuga, Ontario and held for another 1.5 hours before being released.[118]

51. Fleming was charged under s. 129(1) of the *Criminal Code* (resists or willfully obstructs) for purportedly resisting Officer Miller in the execution of his duty when attempting to arrest Fleming "for prevent breach of peace".[119] Fleming appeared in Court 12 times to defend himself against the obstruction charge; the Crown withdrew the charge after 18 months.[120]

52. The trial judge's reasons indicate she understood that the Officers claimed that they had arrested Fleming for his own safety—i.e. they concluded that the Occupiers intended to harm Fleming in some unspecified manner—and then charged him with resisting that arrest. The trial judge referred to the formal charge correctly.[121]

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[110] AR, Part III, Tab 72, p 113 ln 18-25.
[111] AR, Part IV, Tab 123, Exhibit 2; AR, Part I, Tab 2, p 29 ln 29-31.
[112] AR, Part I, Tab 2, p 29 ln 22-29.
[113] AR, Part I, Tab 2, p 66 ln 1-6.
[114] AR, Part I, Tab 2, p 64 ln 13-16.
[115] AR, Part I, Tab 2, p 78 ln 9-16.
[116] AR, Part I, Tab 2, p 19 ln 28-29.
[117] AR, Part III, Tab 73, p 114 ln 21-26, p 115 ln 7-32.
[118] AR, Part I, Tab 2, p 24 ln 24 to p 19 ln 1; p 50 ln 1-6.
[119] AR Part I, Tab 2, p 8 ln 31 to p 9 ln 4
[120] AR, Part I, Tab 2, p 9 ln 4-15.
[121] AR, Part I, Tab 2, p 8 ln 31 – p 9 ln 4.

53. Officers Miller and Cudney agreed they were not aware of any breaches of the peace on May 24, 2009, before Fleming's arrest.[122] Insp. Skinner confirmed that "[e]verybody kind of went home" afterwards.[123]

54. The trial judge "found Fleming to be a credible and reliable witness" as well as "a stoic person with a strong work ethic".[124] Certain of Officer Miller's evidence was found to not be credible. The trial judge found that: "Officer Miller refused to admit the truth of evidence given at discovery. When confronted with transcripts, the court finds his evidence was evasive and he refused to provide answers on cross-examination that were self-evident".[125]

iv. Fleming's conduct was lawful

55. Officer Miller, the arresting officer, agreed that Fleming was only required to comply with lawful police commands.[126] Officer Bracnik agreed, after being confronted with his examination for discovery transcript, that if a police officer does not have reasonable and probable grounds to arrest to prevent a breach of the peace, the arrest is not proper.[127]

56. Officers Lorch[128], Bracnik[129], Gibbons[130], Courty[131] and Cole[132] agreed that Fleming's conduct in walking along a street in Canada with a Canadian flag was lawful.

57. Officer Lorch testified[133], and Officer Miller agreed[134], that Fleming was acting peacefully throughout his walk along Argyle Street and did not carry any offensive signs or slogans. After the Officers drove at his position at speed in vans, Fleming simply left the roadway, took a few steps onto DCE and stood there.[135] Fleming made no threats or threatening gestures to the

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[122] AR, Part III, Tab 74, p 116 ln 6-9; p 117 ln 19-26.
[123] AR, Part III, Tab 75, p 118 ln 26-31.
[124] AR, Part I, Tab 2, p 79 ln 28 – p 80 ln 3.
[125] AR, Part I, Tab 2, p 67, ln 2-7.
[126] AR, Part III, Tab 76, p 119 ln 27 – p 120 ln 6.
[127] AR, Part III, Tab 77, p 121 ln 15 – p 122 ln 9.
[128] AR, Part III, Tab 78, p 123 ln 11-13.
[129] AR, Part III, Tab 79, p 124 ln 6-8.
[130] AR, Part III, Tab 80, p 125 ln 1-4.
[131] AR, Part III, Tab 81, p 126 ln 1-4, p 127 ln 22-28.
[132] AR, Part III, Tab 82, p 128 ln 21-29.
[133] AR, Part III, Tab 78, p 123 ln 25-31.
[134] AR, Part III, Tab 83, p 129 ln 4-14.
[135] AR, Part III, Tab 84, p 130 ln 13 – p 131 ln 11.

Occupiers or the Officers. He did not engage with anyone physically or verbally.[136] Officer Miller conceded that Fleming had committed no illegal act.[137] Fleming complied with Officer Miller and came back across the low fence willingly and of his own volition.[138] Once his Canadian Flag was taken from him, Fleming complied with Officer Miller's direction to put his hands behind his back to be handcuffed.[139]

v. The evidence regarding the Occupiers who approached

58. The Video and Insp. Skinner's evidence, including references to his scribed notes, demonstrated that approximately 20 Occupiers were present at the main entrance of DCE a few minutes before Fleming began to walk along Argyle.[140]

59. Officer Cudney[141] testified 8-10 Occupiers approached at various speeds. Officer Bracnik stated that his estimate was that 10 Occupiers approached.[142] Officer Gibbons testified "less than 10" Occupiers approached.[143]

60. The Video confirms about 8-10 Occupiers approached Fleming and the Officers. Officer Cudney confirmed at least half of the Occupiers at the entrance to DCE stayed there.[144]

61. Officers Miller[145], Lorch[146] and Courty[147] agreed that the Occupiers who approached included men and women. Officer Gibbons remembered there being women.[148] Officers Miller[149], Lorch[150] and Cudney[151] agreed that some of the Occupiers were carrying cameras. Officer Courty's

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[136] AR, Part III, Tab 85, p 132 ln 20-29.
[137] AR, Part III, Tab 86, p 133 ln 14-19.
[138] AR, Part III, Tab 87, p 134 ln 12-16, p 135 ln 26-32; AR, Part I, Tab 12, p 12 ln 21-24.
[139] AR, Part III, Tab 71, p 397 ln 23-27.
[140] AR, Part IV, Tab 121, Exhibit 9; AR, Part III, Tab 88, p 137 ln 1-4.
[141] AR, Part III, Tab 89, p 138 ln 28 – p 139 ln 2, p 140 ln 8-17.
[142] AR, Part III, Tab 90, p 141 ln 19-23.
[143] AR, Part III, Tab 92, p 145 ln 18-23.
[144] AR, Part IV, Tab 121, Exhibit 9; AR, Part III, Tab 93, p 146 ln 18-24.
[145] AR, Part III, Tab 94, p 147 ln 9-11.
[146] AR, Part III, Tab 95, p 148 ln 21-28.
[147] AR, Part III, Tab 96, p 149 ln 10-20.
[148] AR, Part III, Tab 97, p 150 ln 2-6.
[149] AR, Part III, Tab 94, p 147 ln 12-13.
[150] AR, Part III, Tab 98, p 151 ln 6-8.
[151] AR, Part III, Tab 99, p 153 ln 7-10.

evidence, read-in at trial, was that "[s]ome had cameras and were taking pictures and filming".[152]

62. Officer Miller[153] and Officer Lorch[154] confirmed that no threats were uttered by the Occupiers, their conduct was not threatening, and none of them were carrying weapons or were doing anything wrong. Officer Cudney testified that if the Occupiers had made threats of harm or exhibited criminal behavior including causing a disturbance they should have been arrested.[155]

63. Officer Gibbons stated that the approaching Occupiers said "get off their land".[156] None of the other Officers testified to hearing the Occupiers say that.[157] Officer Cudney stated at his examination for discovery, as read-in at trial, "[t]hey were a fair distance. No, I don't recall them saying anything".[158] The trial judge did not accept Officer Gibbons' evidence as none of the other Officers recalled the Occupiers saying anything.[159] The trial judge also stated that, even if the Occupiers had said "get off their land", it would not be clear who that statement might have been directed at, Fleming or the Officers.[160] It had been directly put to Officer Cudney at trial that his understanding as of May 24, 2009, was "that the OPP weren't to go on to the DCE", and he did not disagree, stating "[t]here'd be no reason for us to go on there and us going on there would only cause, I believe, conflict as well."[161]

64. Officer Cudney[162] and Insp. Skinner[163] confirmed no charges of any kind were laid against any of the Occupiers; no investigation was made of the Occupiers' conduct; and they were not aware of any witness statements, photographs or videos having been collected from the Occupiers.

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[152] AR, Part III, Tab 100, p 154 ln 20-26.
[153] AR, Part III, Tab 101, p 155 ln 2-6.
[154] AR, Part III, Tab 102, p 156 ln 20 – p 157 ln 8.
[155] AR, Part III, Tab 103, p 159 ln 19-29.
[156] AR, Part III, Tab 92, p 145 ln 14-29.
[157] AR, Part I, Tab 2, p 67 ln 29 – p 68 ln 6.
[158] AR, Part III, Tab 104, p 161 ln 11-24.
[159] AR, Part I, Tab 2, p 67 ln 29 – p 68 ln 6.
[160] AR, Part I, Tab 2, p 67 ln 29 – p 68 ln 6.
[161] AR, Part III, Tab 117, p 181 ln 25-32.
[162] AR, Part III, Tab 105, p 162 ln 8 – p 163 ln 28.
[163] AR, Part III, Tab 106, p 164 ln 17-22.

65. As testified to by Officers Cudney,[164] Bracnik,[165] Courty,[166] and Gibbons,[167] the only basis the Officers had to believe there might be a breach of the peace when Fleming was on DCE was the past history of events in the area.

66. Fleming was grounded in or near the grassy ditch, away from DCE and the low fence, back towards Argyle Street. Officer Gibbons' evidence, read-in at trial, was that the Occupiers stopped 15-20 feet behind the low fence, "well behind the fence area".[168] Officer Bracnik agreed that "the occupiers never came over or crossed the fence line".[169] The trial judge accepted that, based on the evidence, the Occupiers had remained behind the low fence during Fleming's arrest.[170]

vi. Options other than arresting Fleming were available

67. Officer Cudney admitted that there were options available to the Officers other than arresting Fleming.[171] Some options applied when the Officers first drove at speed towards Fleming's location on Argyle Street. Other options applied at the time of Fleming's arrest.

68. Officer Cudney admitted it would have been an option to pull the vans to the side of Argyle Street before turning them around at the church parking lot and to send Officers out in a staged response in order speak with Fleming.[172] Officer Cudney also admitted that the Officers could have set up a buffer zone just past the main entrance of DCE and then sent Officers out to approach Fleming in a peaceful manner and obtain the information they wanted.[173] This evidence was uncontradicted at trial.

69. Officer Lorch admitted that police lines and buffer zones had successfully been used right at the main entrance of DCE on previous occasions.[174]

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[164] AR, Part III, Tab 107, p 165 ln 8 – p 166 ln 7.
[165] AR, Part III, Tab 108, p 167 ln 8-11.
[166] AR, Part III, Tab 109, p 168 ln 8 – p 168a ln 9.
[167] AR, Part III, Tab 110, p 169 ln 27 – p 170 ln 27.
[168] AR, Part III, Tab 111, p 171 ln 4-19.
[169] AR, Part III, Tab 112, p 172 ln 12-17.
[170] AR, Part I, Tab 2, p 68 ln 8-10.
[171] AR, Part III, Tab 113, p 173 ln 5 – p 174 ln 9, p 175 ln 3 – p 177 ln 20.
[172] AR, Part III, Tab 113, p 173 ln 5 – p 174 ln 9.
[173] AR, Part III, Tab 113, p 177 ln 6-20.
[174] AR, Part III, Tab 114, p 178 ln 8-10.

70. At no time prior to Fleming's arrest was there a police line or buffer zone formed.[175]

71. That there was time and an opportunity for the Officers to form a police line and create a buffer zone between Fleming and the Occupiers can be seen from the Video. Fleming left DCE as the 2 or 3 leading Occupiers were still approaching. Immediately after Fleming's arrest, he was surrounded by 6 of the Officers in the grassy ditch; in the Video, this area is obscured by a bush.[176]

72. Together, the Officers were well-equipped to create a police line and buffer zone.[177] They were all specially-trained ERT officers in soft tac uniforms, with significant readily available back-up, including the 2 additional Offender Transport Unit special constables. Only 8-10 Occupiers approached Fleming's general location.

73. The Officers could have called for back-up. None of them did so. Officer Cudney specifically admitted that he knew back-up was readily available.[178] Officer Lorch testified that he had time to radio in that Fleming had been arrested.[179] On the evidence, the trial judge reasonably concluded that there would have been time for one of the Officers to call for backup if it had been needed.[180]

74. The trial judge watched the Video on multiple occasions[181] and heard the evidence, and she found "the police could have used other actions on May 24, 2009, such as police lines and buffer lines. The court finds they had time and the means to do so, they were well equipped to create a buffer".[182] The trial judge found a decision was made to arrest Fleming and remove him from the scene rather than create a buffer between Fleming and the Occupiers.[183]

75. The trial judge found that the Officers "implemented a very heavy-handed reaction to Mr. Fleming's presence", one that merely escalated matters, and held that the option of arresting Fleming should have been the last option.[184]

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[175] AR, Part I, Tab 2, p 13 ln 27 – p 14 ln 1.
[176] AR, Part IV, Tab 121, Exhibit 9; AR, Part I, Tab 2, p 57 ln 21-29.
[177] AR, Part I, Tab 2, p 65 ln 16.
[178] AR, Part III, Tab 115, p 179 ln 6-15.
[179] AR, Part III, Tab 116, p 180 ln 7-20.
[180] AR, Part I, Tab 2, p 20 ln 16-22.
[181] AR, Part IV, Tab 121, Exhibit 9; AR, Part I, Tab 2, p 8 ln 22-27.
[182] AR, Part I, Tab 2, p 65 ln 12-16.
[183] AR, Part I, Tab 2, p 68 ln 10-13.
[184] AR, Part I, Tab 2, p 70 ln 28 – p 71 ln 6; p 23 ln 15 – p 24 ln 7; p 70 ln 15 – p 71 ln 6.

vii. Trial Decision

76. Fleming commenced an action for damages, alleging battery, false arrest, wrongful imprisonment, infringement of common law mobility rights, and breach of *Charter* rights and freedoms.[185] The Officers defended the claim alleging that the arrest was justified by the ancillary common law police power to make preventive arrests, and that they were permitted to use reasonable force in that arrest pursuant to s.25(1)(b) of the *Criminal Code*.[186] The trial involved eight days of testimony with 9 fact witnesses and two expert witnesses. Carpenter-Gunn J rendered an oral Ruling on September 22, 2016 in favour of Fleming.[187]

77. The trial judge applied the *Waterfield* test and found that it was not met. Therefore, the Officers had no common law justification to arrest Fleming and s.25(1)(b) of the *Criminal Code* was not applicable, so no use of force was lawful. The trial judge also found:

a. the Officers caused Fleming's permanent injury;
b. Fleming was falsely arrested and wrongfully imprisoned;
c. Fleming suffered interference with his common law right to walk along public roadways;
d. Fleming suffered interference with his *Charter* rights to freedom of expression, liberty and security of the person, and freedom from arbitrary detention; and
e. The Respondent Crown was vicariously liable.

78. Fleming was awarded $80,000.00 in general damages, $12,986.97 in special damages, $5,000.00 for s. 2(b) *Charter* damages, $10,000.00 for false arrest and wrongful imprisonment, and, on consent, $151,000.00 in costs.

79. The Respondents did not appeal quantum of damages or dispute that the Officers injured Fleming leaving him with a permanent and chronic injury. They did not appeal costs. They appealed the findings of liability only.[188] Fleming cross-appealed with respect to the quantum of damages for breach of the *Charter* and the denial of aggravated and punitive damages.[189]

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[185] AR, Part II, Tab 7, Amended Statement of Claim.
[186] AR, Part II, Tab 8, Amended Statement of Defence; ALOA, Tab 18, *Criminal Code* (RSC, 1985, c C-46), s. 25.
[187] AR, Part I, Tab 2, *passim.*
[188] AR Part II, Tab 9, Notice of Appeal
[189] AR Part II, Tab 10, Notice of Cross-Appeal

viii. Appellate Decision

80. After a hearing on November 14, 2017, the Court of Appeal for Ontario rendered its decision on February 16, 2018.[190] The majority (per Nordheimer JA, Cronk JA concurring) set aside the trial decision and the arrest was held to be justified. A new trial was directed on the sole issue of whether excessive force was used and, if so, what damages follow. The cross-appeal was dismissed. Costs of $25,000.00 were awarded against Fleming.

81. In finding that the arrest of Fleming was justified, the majority's decision focused solely on the existence of a police duty to maintain the public peace and the effectiveness of the police action.[191] The majority's decision implicitly directs Courts to show deference to police who "have a great deal more training and experience than do judges" and directs courts to be "very cautious about criticizing the tactical actions of the police".[192]

82. Huscroft JA wrote a dissenting judgment critical of the majority's decision on a number of fronts, including the majority's treatment of the *Waterfield* test and the role of the Courts in exercising oversight of proactive policing decisions in order to prevent abuses. Fleming adopts the dissenting opinion of Huscroft JA. As noted in the dissent, the majority's decision:

> … understates the importance of both the common law liberty to proceed unimpeded along a public highway and the right to engage in political protest – the heart and soul of freedom of expression in a democracy. At the same time, it overstates the scope of the police power to arrest someone to avoid a possible breach of the peace – a breach that may never occur, and a breach that, if it were to occur, would be caused by the unlawful actions of others. The police power to arrest for a possible breach of the peace is an extraordinary power. Its exercise cannot easily be justified, according to the case law of this court, which is based on the *Waterfield* test.[193]

83. Fleming submits that the nature and implications of the majority's decision in this case are accurately highlighted by Huscroft JA:

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[190] AR, Part I, Tabs 3-5.
[191] AR, Part I, Tab 5 at paras 42, 46, 47, 56 and 57 (per Nordheimer JA; Cronk JA concurring).
[192] AR, Part I, Tab 5 at para 57 (per Nordheimer JA; Cronk JA concurring).
[193] AR, Part I, Tab 5 at para 94 (per Huscroft JA, dissenting).

> [111] In my view, my colleague misconstrues and so minimizes the necessity requirement. He acknowledges that the police could have instituted a buffer zone between Mr. Fleming and the protesters and could have called for backup rather than arresting him, but concludes, at para. 57:
>
> > There was no need to institute a buffer zone *if the matter could be addressed by removing the respondent as the source of the friction*. Further, there is no reason to believe that a buffer zone of six or seven officers against eight to ten rushing protestors (with others available to join that group) would have been effective or whether it would have simply resulted in a larger confrontation. Similarly, there was no reason to call for back-up, and run the risk of inflaming tensions by such a show of force, *if, again, the matter could be addressed by removing the respondent*.
>
> [112] Thus, in the face of concern that illegal violence *might* occur, my colleague sanctions the removal and arrest of Mr. Fleming – whose exercise of *Charter* rights broke no laws – as a *first* option in preserving the peace rather than a last resort.
>
> [113] This turns the concept of necessity on its head. The question is not whether arresting and removing someone might prevent a breach of the peace; the answer to that question will almost always be yes. The question is whether the extraordinary step of a preemptive arrest was *necessary* because a breach of the peace was imminent and the risk that it would occur was substantial, and that breach could not be reasonably prevented by some alternative police action. In this regard, I note that the trial judge found, at pp. 54-65, that "[t]here were many other less invasive options that could have been implemented to defuse the situation."[194] [Emphasis (italics) in original. Emphasis (underline) added.]

84. In the above passages, Huscroft JA identifies the key problem with the failure to consider minimal impairment of individual rights and proportionality as factors to be applied during the *Waterfield* balancing exercise. If the duty of the police and the effectiveness of the police action are emphasized, if the liberty interests of the individuals affected by that police action are minimized or disregarded, and if less invasive alternatives are ignored, the *Waterfield* balancing will be thrown out of proportion. Rather than the balancing exercise putting a premium on individual freedoms (as in *Brown*), it will inexorably be weighted in favour of deference to police decisions, even where those decisions violate common law and *Charter* rights and freedoms. This will result in a dangerous abrogation of the Courts' important role in regulating the exercise of

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[194] AR, Part I, Tab 5 at paras 111-113.

proactive policing. As Huscroft JA underscored:

> [114] … [Nordheimer J.A.'s] conclusion, that the police had reasonable grounds to believe that there was an imminent risk to the public peace and a substantial risk of harm to Mr. Fleming, appears to flow from his view that the police are entitled to deference in such matters. He notes, at para. 57:
>
> > In my opinion, courts ought to be very cautious about criticizing the tactical actions of the police in situations such as that presented here. It should go without saying that the police have a great deal more training and experience in such matters than do judges.
>
> [115] I accept that the police have training and experience that judges do not. I do not accept that their decisions are entitled to deference as a result, especially when they limit the exercise of *Charter* rights. My colleague states that his observations are not intended to suggest that the courts will defer to the police, but in my view his decision does precisely this.[195]

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

85. Fleming submits that the conflict between the decision in this case and those in *Brown* and *Figueiras* has produced a situation of confused appellate authority: do minimal impairment of individual rights and a proportionate balancing form part of the *Waterfield* analysis? As examined below, minimal impairment has been considered as a factor by this Court where the exercise of other ancillary common law police powers is concerned.

86. Fleming submits that abandoning or ignoring minimal impairment and proportionate balancing, thereby authorizing the police to make 'protective' arrests of innocent persons as a first option in the maintenance of the public peace rather than a last resort, after other available options are exhausted, will result in a significant expansion of the use of such police powers. This will lead to the curtailing of fundamental freedoms and a corresponding chilling effect on the exercise of fundamental civil liberties, including the right to walk on a public roadway or attend a political protest. These are the very results that the previous jurisprudence sought to prevent by putting a premium on individual freedom and insisting on minimal impairment of individual rights and a proportionate balancing of individual rights with police duties, even if doing so might make crime prevention and peacekeeping more difficult for the police.

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[195] AR, Part I, Tab 5 at paras 114-115.

87. Moreover, Fleming submits that the majority of the Court of Appeal for Ontario incorrectly classified findings of the trial judge as erroneous and palpable and overriding, improperly substituted its views, recharacterized the evidence, and interposed its inferences for those of the trial judge with respect to the facts and the lawfulness of Fleming's arrest.

88. Fleming therefore submits that the following questions are in issue in this case:

a. Are minimal impairment of individual rights and proportionality to remain factors in the balancing exercise at the second stage of the *Waterfield* test, and did the majority of the Court of Appeal err in failing to consider them?

b. Were any of the alleged errors identified by the majority of the Court of Appeal for Ontario in the decision of the trial judge committed; if so, do any rise to the high standard of palpable and overriding error?

PART III – STATEMENT OF ARGUMENT

A. Resolving the Conflict in the Case Law

i. Common law ancillary powers

89. Police powers arise from both statute and the common law. Common law police powers arise from police duties. Such powers are therefore considered "ancillary" and form part of the "ancillary powers doctrine".[196] The power to arrest a person in order to prevent an apprehended breach of the peace is not created or governed by any statute. It is a common law ancillary power.

90. Police duties and police authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assists in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law.[197]

91. Appellate courts have held that it is more difficult for police to justify the use of a common law ancillary power on the basis of preventative policing than investigation of a past or ongoing crime.[198] It has also been held that the Courts play an important role in regulating the exercise of proactive policing due to the nature of preventative stops and their potential for abuse.[199]

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[196] ALOA, Tab 2, *Figueiras* at para 42.
[197] ALOA, Tab 2, *Figueiras* at para 43.
[198] ALOA, Tab 2, *Figueiras* at para 45, citing ALOA, Tab 1, *Brown.*
[199] ALOA, Tab 2, *Figueiras* at para 46, citing ALOA, Tab 6, *R v Mann*, 2004 SCC 52.

ii. The Waterfield *test*

92. The two-part test to determine whether a police officer's conduct is authorized and justified at law, originally articulated by the English Court of Appeal in *R v Waterfield*[200], has been adopted and summarized by this Court in *Dedman v The Queen*[201], *R v Mann*[202] and *R v MacDonald*[203], and cited and explained by the Court of Appeal for Ontario in *Figueiras*:

> In the first stage, "the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized by law".
>
> In the second stage, the court must strike a "balance between the competing interests of the police duty and of the liberty [or other] interests at stake". Put another way, is the police action "reasonably necessary for the carrying out of the particular duty in light of all the circumstances"?[204]

93. The Court in *Figueiras* went on to explain that the factors to be balanced at the second stage include:

> a. The importance of the duty to the public good;
>
> b. The extent to which it is necessary to interfere with liberty to perform the duty; and
>
> c. The degree of interference with liberty.[205]

94. Court of Appeal decisions in Ontario[206], Saskatchewan[207], and Newfoundland & Labrador[208] have held that, where a police officer exercises the common law ancillary power to make an arrest in order to prevent an apprehended breach of the peace, the following additional

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[200] ALOA, Tab 3, [1963] 3 All E.R. 659.
[201] ALOA, Tab 4, [1985] 2 SCR 2.
[202] ALOA, Tab 5, 2004 SCC 52.
[203] ALOA, Tab 6, [2014], 1 SCR 37.
[204] ALOA, Tab 2, *Figueiras* at paras 84 – 86.
[205] ALOA, Tab 2, *Figueiras* at paras 84 – 86.
[206] ALOA, Tab 1, *Brown* at para 78; ALOA, Tab 2, *Figueiras* at para 91.

[207] ALOA, Tab 7, *R v Houben*, 2006 SKCA 129: "Thus, the Court in *Brown* did not expand police powers to detain beyond the situation where there was 'a real risk of imminent harm.'"

[208] ALOA, Tab 8, *R v Penunsi*, 2018 NLCA 4 at paras 66-67: "I agree with Justice Doherty's reasoning in *Brown* that a preventive arrest, be it pursuant to section 495(1)(a) or the common law, requires *an informant's belief on reasonable grounds* that there is a *substantial risk* that a *specified offence* will occur *imminently*. Such a restrictive interpretation is in keeping with our constitutional values. [emphasis in original]".

considerations are to be included in the analysis:

a. The apprehended breach must be imminent, and

b. The risk that the breach will occur must be substantial.

Before the imminent and substantial criteria are met, proactive policing must be limited to steps which do not interfere with individual freedoms.[209]

95. *Figueiras* was a Toronto G20 case involving *Charter* rights, the common law right to pass and repass on a public highway, and common law police powers to search and exclude persons from a defined area. The police decision to target only apparent demonstrators for searches and exclusion was impugned. The question of "the extent to which it is necessary to interfere with liberty to perform the duty" (i.e. stage 2(b) of the *Waterfield* analysis) was held to involve several considerations. These considerations include the effectiveness of the police action in reducing the likelihood of the risk occurring and the police action's rational connection to the risk sought to be managed. The court considered minimal impairment on individual liberty as a key factor in determining necessity:

> [90] … The application judge did not view Sgt. Charlebois's decision to stop only demonstrators as being problematic, as it constituted only a minimal intrusion. He could not see "the logic in finding that stopping less people was an excess of authority when detaining more people would have been permissible" (at para. 25). He did not think that "in exercising his discretion to tailor his intrusions to those most rationally connected with the objective of his activity, Detective Charlebois can be said to have behaved arbitrarily or exceeded his authority at common law" (at para. 25).
>
> [91] In my view, the application judge erred in his analysis of this factor. Having found that unlawful acts similar to those committed the previous day were "imminent" and that police had a duty to protect against their commission, the application judge did not adequately assess whether the police power exercised here and the resulting interference with Mr. Figueiras's liberty was *necessary* for the performance of the duty.[210] [Emphasis (italics) in original. Emphasis (underline) added]

[209] ALOA, Tab 1, *Brown* at para 78.
[210] ALOA, Tab 2, *Figueiras* at paras 90-91.

and, further:

> [121] As I explained above, the application judge committed several errors both in his analysis as to whether the officers' actions were necessary to carry out their duty, and in his assessment of the rights that the officers' actions interfered with.
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> [122] In my view, the application judge also erred in how he approached the balancing exercise, in two ways.
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> [123] First, the application judge misinterpreted the concept of minimal impairment. He found that, by targeting only apparent demonstrators, the officers had tailored "their activities to the minimum intrusions reasonably necessary in the circumstances" (at para. 25). In effect, he equated "minimal impairment" with minimizing the number of people affected, but did not consider whether the impact on those targeted by the police conduct could be minimized.[211] [Emphasis (underline) added]

96. The Court of Appeal in *Figueiras* went on to find that there was a substantial interference with—not a minimal impairment of—individual liberty, both with respect to the number of interferences and their severity.[212]

97. Fleming submits that the concept of minimal impairment of individual rights is inherent in the *Waterfield* analysis. It is essential to the question of whether the police action is "reasonably necessary for the carrying out of the particular duty in light of all the circumstances", "the extent to which it is necessary to interfere with liberty to perform the duty", and "the degree of interference with liberty" as a result of the police action. As it was put in *Brown*: "The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police."[213]

98. Minimal impairment has been considered by this Court in the analysis of other ancillary common law police powers. In *R v Clayton*, the majority of this Court (per Abella J) suggested that concepts of minimal impairment (the police action is to be "no more intrusive to liberty than reasonably necessary") and proportionality ("[t]he standard of justification must be commensurate with the fundamental rights at stake") applied in the context of a common law police detention and

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[211] ALOA, Tab 2, *Figueiras* at paras 123 and 134.
[212] ALOA, Tab 2, *Figueiras* at para 134.
[213] ALOA, Tab 1, *Brown* at para 79.

search of individuals following a gun complaint.[214] In *Cloutier v Langlois*, this Court (per L'Heureux-Dubé J) held that the minimal intrusion involved in a 'frisk search' incidental to a lawful arrest is necessary to ensure that criminal justice is properly administered.[215] In *R v Godoy*, this Court (per Lamer CJ) upheld a decision of the Court of Appeal for Ontario which had determined that the common law power to search a home in response to a 9-1-1 call was minimally invasive if it was limited to locating the caller, determining why the call occurred and assisting as appropriate.[216] In *R v Kang-Brown*, the majority of this Court accepted that where an investigative technique is minimally invasive (as with the use of a sniffer-dog in circumstances of reasonable suspicion) the police may be authorized by the common law to employ that technique.[217]

99. The common law has developed in the same direction in England, where the House of Lords stated that the lawful exercise of civil rights can only be curtailed by the police where there is a reasonable belief that there are no other means available whereby an imminent breach of the peace can be obviated.[218] This is a test of necessity which it is to be expected can only be justified in extreme and exceptional circumstances.[219] The action taken must be both reasonably necessary and proportionate.[220] That is to say, the ancillary common law police power to arrest a person to prevent an apprehended breach of the peace is a last resort—if other less intrusive options are available, an arrest is not a minimal impairment on individual liberty, is not proportionate, and is not truly *necessary*.

iii. Charter *considerations*

100. As the concurring minority in *Clayton* explained, the reference to "liberty" at the second stage of the *Waterfield* test is a reference to all of a citizen's civil liberties, which in a post-*Charter* era means both common law liberties, such as those at stake in *Dedman* and *Waterfield* itself, as

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[214] ALOA, Tab 9, 2007 SCC 32 at para 21 [emphasis added] ("*Clayton*").

[215] ALOA, Tab 10, [1990] 1 SCR 158 at para 60.
[216] ALOA, Tab 11, [1999] 1 SCR 311 at paras 9, 23.
[217] ALOA, Tab 12, 2008 SCC 18, see i.e. Binnie J (concurring in the result) at para 60.

[218] ALOA, Tab 13, *Austin v Commissioner of Police of the Metropolis*, [2007] EWCA Civ 989 at paras 35, 119, aff'd [2009] UKHL 5 ("*Austin*"); ALOA, Tab 14, *R v Commissioner of Police of the Metropolis*, [2012] EWCA Civ 12 at p 12.

[219] ALOA, Tab 13, *Austin* at paras 35, 119, aff'd [2009] UKHL 5.
[220] ALOA, Tab 13, *Austin* at paras 35, 119, aff'd [2009] UKHL 5.

well as constitutional rights and freedoms, such as those protected by the *Charter*.[221] There is little latitude where *Charter* rights and freedoms are involved—as this Court unanimously held in *R v Nolet*: "Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the *Charter* rights of an accused."[222]

iv. Minimal impairment and proportionality ought to remain as factors

101. The majority of the Court of Appeal for Ontario abandoned or failed to consider minimal impairment of Fleming's rights and proportionality in the balancing required by the *Waterfield* analysis with respect to the police use of the extraordinary ancillary common law power to arrest a person who is acting lawfully in order to prevent an apprehended breach of the peace by others.

102. The majority did not weigh or balance the degree of interference with Fleming's liberties and the importance of the police duties. Instead of applying the full *Waterfield* test, the majority of the Court of Appeal for Ontario applied a truncated version, with exclusive focus on the existence of a police duty to maintain the public peace and the 'effectiveness' of the police action. This utilitarian approach put a premium on the duty to keep the peace and minimized the rights of the individual – Fleming. On the other hand, the trial judge considered minimal impairment of Fleming's rights in her analysis and found that "[t]here were many other less invasive options that could have been implemented to defuse the situation."[223] The result was a proportionate balancing at the second stage of the *Waterfield* test.

103. Fleming submits that Doherty JA's pithy summary of the proper tension between freedom and security in *Brown*—i.e. "We want to be safe, but we need to be free"—must not be inverted by routine police prioritization of perceived public safety interests over individual civil rights like the freedom to walk down the street and freedom of expression.

vi. Conclusion

104. Fleming submits that the *Waterfield* test as it has been defined in cases like *Brown* and *Figueiras* includes considerations of minimal impairment and proportionality at the second stage. Fleming submits that the majority erred in failing to consider minimal impairment of Fleming's

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[221] ALOA, Tab 9, *Clayton* (per Binnie J) at para 59.

[222] ALOA, Tab 15, 2010 SCC 24 (per Binnie J, for the Court) at para 38.

[223] AR, Part I, Tab 5 at paras 113 (per Huscroft JA, dissenting).

rights and failing to balance Fleming's rights with the duty to keep the peace, focusing instead on the effectiveness of the police action. The result was a lack of proportionality. Fleming submits that the majority of the Court of Appeal for Ontario erred in its application of the *Waterfield* analysis and its decision should be set aside. Fleming submits that the trial judge applied the correct test and, as set out below, reached a reasonable conclusion on the facts—her decision should be restored.

B. The Trial Judge's Decision was Reasonable and Supported by the Evidence

105. The majority of the Court of Appeal for Ontario identified several purported errors in the decision of the trial judge. Fleming submits that, in doing so, the majority erred as set out below. In several instances, the majority erred by failing to recognize that the trial judge's findings were amply supported by the evidence. In other cases, the majority erred by improperly substituting its own views for those of the trial judge on matters critical to the outcome of this case.

106. In the alternative, Fleming submits that any errors the trial judge made do not rise to the high standard of palpable and overriding error. Determining credibility, weighing evidence and making findings of fact is the bailiwick of the trial judge[224] unless the trial judge made palpable and overriding errors.

i. The Occupiers' conduct was not threatening

107. The trial judge concluded that:

> On the totality of the evidence, the court finds there was not a breach of the peace. As well, there was not a threatened breach of the peace. The court finds that there was not a proper assessment by the O.P.P., nor any basis for concluding that there was or was about to be a breach of the peace.[225]

108. The majority rejected this conclusion and suggested that the Occupiers "became angry and upset"[226], and proceeded to "rush toward [Fleming] in a threatening fashion"[227]. The majority stated that Fleming "realized he was in trouble" and "knew that the situation was perilous".[228]

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[224] ALOA, Tab 16, *H(F) v McDougall*, 2008 SCC 53 at para 72.
[225] AR, Part I, Tab 2, p 39 ln 6-7.
[226] AR, Part I, Tab 5 at para 24.
[227] AR, Part I, Tab 5 at para 52.
[228] AR, Part I, Tab 5 at para 53.

109. No evidence from any of the Occupiers present on May 24, 2009 was adduced at trial. The evidence of Officer Miller[229] and Officer Lorch[230] that no threats were uttered by the Occupiers, that their conduct was not threatening, and that none of them were carrying weapons or were doing anything wrong is wholly contrary to the re-interpretation imposed by the majority. The clear evidence was that, of the 8 to 10 Occupiers who approached, a number were carrying cameras, which was consistent with Officer Lorch's evidence that the Occupiers may have merely wanted "to see what was going on". The suggestion that the Occupiers had said "get off our land" was not accepted by the trial judge as only one Officer testified to hearing the Occupiers say that, and other Officers testified the Occupiers had said nothing. In any event, even if any of the Occupiers had said that, the trial judge rightly concluded that the Occupiers might have been speaking to the Officers and not Fleming. Officer Cudney had directly acknowledged in his evidence "that O.P.P. presence on DCE would cause conflict".[231]

110. Ignoring all of this evidence, the majority concluded that Fleming was concerned for his own safety. The majority relied upon Fleming's statement that going with the police would 'defuse' the situation. This conclusion does not grapple with the fact that Fleming also stated that he considered speaking to the approaching Occupiers or that he expressed only disappointment, not fear, upon realizing that the Officers were speaking to him. After watching the Video numerous times and hearing the evidence of Fleming and the 7 Officers whose credibility she assessed, the trial judge concluded it was not clear the Occupiers were angry with Fleming and, in any event, they did not engage in any threatening conduct. It was not open to the majority to re-cast the evidence on this subject.

ii. No 'Aboriginal Critical Incident'; No palpable and overriding error

111. The majority concluded that the trial judge had erred in finding "that the flag rally and Mr. Fleming walking up Argyle Street were not 'Aboriginal Critical Incidents" as defined in the O.P.P. policy, and that the [F]ramework was improperly applied."[232] The majority stated that this was an error as the Flag Rally "would undoubtedly lead to a reaction from the [Occupiers]".[233]

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[229] AR, Part III, Tab 101, p 155 ln 2-6.
[230] AR, Part III, Tab 102, p 156 ln 20 – p 157 ln 5.
[231] AR, Part I, Tab 2, p 12 ln 4-6; AR, Part III, Tab 117, p 181 ln 30-32.
[232] AR, Part I, Tab 2, p 63 ln 3-7.
[233] AR, Part I, Tab 5 at para 34.

112. No evidence was adduced at trial to suggest that it was inevitable that the Flag Rally would result in a reaction from the Occupiers. There was significant evidence led that the Officers were well aware that, in the past, peaceful protests had occurred. Moreover, as noted in the dissent[234], nothing to do with the Framework could qualify as a palpable and overriding error in any event. Insp. Skinner correctly conceded that neither the policy defining what an 'Aboriginal Critical Incident' is nor the Framework itself have any special status at law. Even if the Flag Rally and/or Fleming's conduct could have been construed as Aboriginal Critical Incidents, the lawfulness of Fleming's arrest did not depend on whether it complied with police policy, but whether it was justified pursuant to the *Waterfield* analysis.

iii. The OPP prevented Fleming from walking along Argyle Street with his Canadian Flag

113. The trial judge found that "[i]t was the conduct of the defendant officers, in driving directly at Mr. Fleming's location as he was walking along the shoulder of Argyle Street…that caused Mr. Fleming to leave the shoulder…".[235] The trial judge concluded that Fleming's common law mobility rights were infringed "when he was prevented by the [Officers] from walking up Argyle Street".[236] Moreover, the trial judge determined this conduct was intentional: "[t]he OPP intended to prevent Fleming from walking up Argyle with a Canadian flag"[237]; and their "intention was to ensure that Fleming did not continue his protest by proceeding up Argyle with a Canadian flag"[238].

114. On the other hand, the majority concluded that "the O.P.P. did not prevent [Fleming] from walking up Argyle Street with his flag… Nothing occurred between the O.P.P. and [Fleming] until he moved away from Argyle Street onto DCE"[239]. The majority suggested that "[t]he trial judge's frequent erroneous references to the police interfering with [Fleming's] right to walk on Argyle Street may be what led her into the wrong analysis and conclusion."[240]

115. As noted in the dissent, the majority's conclusion is wholly contrary to the "trial judge's key finding" that "Fleming left Argyle Street and stepped onto DCE *because of the police*

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[234] AR, Part I, Tab 5 at para 82.
[235] AR, Part I, Tab 2, p 42, ln 1-12.
[236] AR, Part I, Tab 2, p 43 ln 25-29.
[237] AR, Part I, Tab 2, p 36 ln 20-22.
[238] AR, Part I, Tab 2, p 54 ln 2-5.
[239] AR, Part I, Tab 5 at para 36.
[240] AR, Part I, Tab 5 at para 54.

[emphasis in original]", which finding was "based on all of the evidence, including the video".[241]

116. The dissent does not specifically refer to the order of Sgt. Huntley, which identified Fleming as a "flag coming down that direction" rather than as a person, and which was the impetus for the Officers turning their vans around and proceeding (with an Offender Transport Unit following behind) to intercept Fleming at speed when he was peacefully walking alone along Argyle Street. However, in the following excerpt, which Fleming adopts, Huscroft JA notes that the trial judge's findings are amply supported by the evidence:

> The trial judge's finding is amply supported by the record. It is not contested that, once the police saw Mr. Fleming walking to the Flag Rally from a direction they had not expected, two unmarked police vehicles drove towards him to intercept him. The police drove "with speed" (as my colleague noted, at para 22) and "didn't look like [they were] slowing down" (as the trial judge found, at p 10). Mr. Fleming testified, and the trial judge accepted, that he left the shoulder of the road, walked into the ditch, and stepped onto the DCE to move away from the police vehicles and reach level ground.
> …
>
> Whatever the *intention* of the O.P.P. may have been in approaching Mr. Fleming as they did, their conduct had the *effect* of preventing him from walking up Argyle Street. The trial judge's findings on this issue cannot be construed as a palpable and overriding error. [242] [emphasis in original]

iv. The conflict was not between 'freedom of expression and public peace and security'

117. The majority asserted that the conflict was between Fleming's individual liberty and the public's right to peace and security.[243]

118. As noted in the dissent[244], this is a mischaracterization. The conflict was between the police duty to preserve the peace and Fleming's common law mobility rights and his freedom of expression in the form of a political protest. As set out in *Brown*, in such a conflict Fleming's rights were to enjoy presumptively greater force.

119. The dissent pointed out that mischaracterizing the nature of the conflict in this case led the majority to understate the importance of Fleming's rights, particularly his common law mobility

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[241] AR, Part I, Tab 5 at para 87.
[242] AR, Part I, Tab 5 at paras 88, 90.
[243] AR, Part I, Tab 5 at para 41.
[244] AR, Part I, Tab 5 at para 97.

rights and freedom of expression. The right to engage in political protest is "the heart and soul of freedom of expression in a democracy"[245]. "Political expression will often be provocative, and so considered problematic, but there is no doubt that its protection is a core purpose of freedom of expression."[246] This echoes the words of Dickson CJ (for the majority) in *R v Keegstra*[247]:

> Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

v. Past history cannot justify exercise of police power in all future circumstances

120. The majority disagreed with the trial judge's finding that the police "actions on May 24, 2009 must be based on what happened on that date, not what the situation was in 2006".[248] The majority did so on the basis that "[o]ne cannot compartmentalize the history of events in the Caledonia area and thus isolate individual incidents from one another".[249]

121. Fleming adopts the following statement in the dissent:

> The difficulty with this position is that…the police power to arrest for a possible breach of the peace depends on an evaluation of the circumstances existing at the time of the arrest. Those circumstances are, of course, informed by the relevant history. But the legality of an arrest depends on whether a breach of the peace is imminent and the risk that the breach will occur is substantial. Those determinations must be made based on extant circumstances. It cannot be assumed that a history of conflict justifies the exercise of police power in all future circumstances.[250]

122. As further discussed below, the majority did not analyze the critical factors of whether the potential breach of the peace was imminent and whether the risk that it would occur was substantial.

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[245] AR, Part I, Tab 5 at para 94.
[246] AR, Part I, Tab 5 at para 100.
[247] ALOA, Tab 17, [1990] 3 SCR 697 at p 764.
[248] AR, Part I, Tab 2, p 59 ln 6-9.
[249] AR, Part I, Tab 5 at para 48.
[250] AR, Part I, Tab 5 at para 84.

123. The evidence of Fleming and the Officers with respect to the increasingly peaceful demonstrations in Caledonia between 2006 and 2009 is set out above. That evidence was before the trial judge, she cited that evidence in her decision[251], and she found that the Officers "were primed for a '2006 type of situation'" on May 24, 2009.[252]

124. In *Figuerias*, the infringing police conduct occurred in circumstances where there had been significant violence at G20 protests on the immediately preceding day. Even so, the *Waterfield* analysis was conducted in the context of what was taking place on the day of the search in question. In *Figueiras*, the context of the previous day's violence was said to provide a specific identifiable harm which the search was seeking to prevent.[253] It was still necessary for the court to ask (i) whether that harm was imminent and the risk it would occur was substantial; (ii) whether the police concern rested on what the person being searched had done, or on what others who shared a similar lifestyle had done; (iii) whether the liberty interest interfered with was a qualified one (like the right to drive) or a fundamental right like the right to move about in the community; (iv) whether the interference was substantial; and (v) whether the interference was necessary.[254] In Fleming's case, unlike in *Figueiras*, the evidence was not sufficient to establish a specific identifiable harm. The trial judge explicitly found that "[t]he evidence of historical acts of violence…lacked the specificity in order to allow the court to determine whether similar factors existed on May 24, 2009".[255]

vi. There was no threatened breach of the peace

125. The trial judge found[256]:

> …it is not clear from the evidence that the natural consequence of Mr. Fleming walking up the street in Canada with a Canadian flag, and then walking onto and standing on land owned by the province would provoke others to violence, so as to establish an actual danger to the peace… The court finds on the evidence that any apprehended breach of the peace was neither imminent, nor was the risk that the breach would occur substantial.

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[251] AR, Part I, Tab 2, p 5 ln 5-18.
[252] AR, Part I, Tab 2, p 59 ln 5-11.
[253] AR, Part I, Tab 5 at para 131.
[254] AR, Part I, Tab 5 at paras 128, 131-135.
[255] AR, Part I, Tab 2, p 39 ln 1-4.
[256] AR, Part I, Tab 2, p 43 ln 4-15.

126. The majority concluded that "[t]he trial judge's conclusion that there was no threatened breach of the peace cannot be reconciled with the evidence, particularly with the video of the event… In my view, the officers were reasonably justified in taking action to prevent harm coming to [Fleming] and a corresponding breach of the peace."[257]

127. Fleming submits that it was open to the trial judge to come to the conclusion she did, especially given the evidence that the Occupiers kept their distance from Fleming and the Officers, their conduct was not threatening, that several had cameras and were filming, and that they may have only wanted "to see what was going on". The apprehended breach of the peace was neither imminent nor was there a substantial risk that it would occur. As set out in *Brown*: "The mere possibility of some unspecified breach at some unknown point in time simply will not suffice".[258]

128. Fleming also adopts the following excerpt from the dissent:

> [108] In essence, my colleague concludes that Mr. Fleming's arrest was justified because the [Occupiers] rushed towards him and threatened his safety.
>
> [109] It is not clear that the police would have been justified in arresting Mr. Fleming even assuming the events unfolded as Nordheimer J.A. describes. After all, there were several armed police in attendance, almost equal in number to those my colleague says rushed towards Mr. Fleming, and additional police were close by. But, in any event, my colleague's description of "rushing protestors" is at odds with the findings of the trial judge…
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> [110] Nordheimer J.A. cites an extract from Mr. Fleming's testimony in finding that there were concerns for his safety, but that testimony does not demonstrate the requisite *imminent* and *substantial* risk of harm. The trial judge, who heard the relevant testimony, specifically found that (i) "there were no threats uttered by the occupiers" (at p. 38); (ii) the occupiers' "conduct was not threatening" (at pp.15-16); and (iii) it was unlikely that Mr. Fleming would have been harmed (at p. 38). It is not open to this court to substitute its findings for those of the trial judge on this or any other point of factual disagreement.[259] [emphasis in the original]

vii. No analysis of imminence or substantial risk in majority's decision

129. The dissent notes that the police power to arrest to prevent a breach of the peace is an extraordinary power which cannot be easily justified. The dissent also directly confronts a

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[257] AR, Part I, Tab 5 at paras 53-54.
[258] AR, Part I, Tab 5 at para 74.
[259] AR, Part I, Tab 5 at paras 108-110.

fundamental lacuna in the majority's decision: the failure to address the factors of imminence and substantial risk of harm. As Huscroft JA states, Nordheimer JA rejected the findings of the trial judge regarding these factors, but:

> he does not analyze the requirements of imminence and substantiality, nor does he explain why the trial judge's interpretation and application of the [*Waterfield*] test was wrong. His conclusion, that the police had reasonable grounds to believe that there was an imminent risk to the public peace and a substantial risk of harm to Mr. Fleming, appears to flow from his view that the police are entitled to deference in such matters.[260]

viii. Record supports the possibility that the Occupiers were angry with the OPP

130. The majority stated:

> [t]he trial judge's conclusion that there was no threatened breach of the peace cannot be reconciled with the evidence, particularly with the video of the event. The trial judge appears to have tried to avoid this reality by speculating that the protestors may have been angry with the O.P.P. officers, and not with [Fleming]. That explanation finds no foundation in the evidence.[261]

131. This is incorrect. There was ample foundation in the record for the trial judge's findings about possible anger towards the OPP among the Occupiers. This can be seen in the evidence of Officers Bracnik and Courty who had participated in a failed OPP raid on DCE in April, 2006. The trial judge accepted this evidence and, moreover, correctly noted the evidence of Officer Cudney cited above: "Officer Cudney acknowledged that O.P.P. presence on DCE would cause conflict". In any event, this finding was not necessary for the trial judge to have concluded that there was no imminent risk of a breach of the peace or that the risk was not substantial.

ix. Record is sufficient to determine if excessive force was used

132. The majority found "it is not possible to determine how or why [Fleming's] left arm was yanked, or whether, in the process, excessive force was used."[262]

133. The majority noted that 5 Officers gave evidence that they were "involved in getting [Fleming] handcuffed while he was on the ground" and then noted that "[w]ith the sole exception of Officer Miller, all of the officers said that [Fleming] was actively resisting their efforts to

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[260] AR, Part I, Tab 5 at para 114.
[261] AR, Part I, Tab 5 at para 53.
[262] AR, Part I, Tab 5 at para 69.

handcuff him".[263] The majority did not note why this 'sole exception' was significant: it was Officer Miller who handcuffed Fleming.[264] As such, the fact that "Officer Miller said that [Fleming] was not resisting" was an important admission; in particular, Officer Miller conceded that Fleming complied with his order to place his hands behind his back.[265] Additionally, the majority makes no reference to Fleming's uncontested evidence that it was *after* he complied in putting his hands behind his back that his left arm was wrenched upwards towards the base of his skull or the expert medical evidence that Fleming suffered a permanent injury as a result.

134. The majority refers to the fact that Officer Miller's evidence was not accepted with respect to the amount of force he used to bring Fleming to the ground. This ignores the fact that Officer Miller's admission that Fleming was compliant in being handcuffed was made *against* Officer Miller's interest (and the interest of the Respondents as a whole), whereas his attempt to minimize the amount of force used by him was entirely self-serving and conflicted with the evidence of the other Officers. It was appropriate for the trial judge to accept Officer Miller's admissions against his interest and to reject his self-serving evidence.

135. The dissent correctly notes that if the arrest was unlawful, there would be no need to return the matter for re-trial to determine whether excessive force was used during the arrest—without the protection of s.25(1)(b) of the *Criminal Code*, the Officers were not justified in applying any force to Fleming at all.[266] The dissent also correctly states that the "trial judge's conclusion that the police officers and the Crown are jointly liable regardless of who yanked Mr. Fleming's arm was not challenged on appeal."[267] The trial judge's conclusion was reasonable and supported by the evidence, including the evidence that Fleming was injured when prostrate and compliant, and that he could not identify which Officer had injured his left arm because his head was pinned during his arrest.

x. Conclusion

136. Fleming submits that the trial judge made no palpable and overriding errors as asserted by

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[263] AR, Part I, Tab 5 at para 68.
[264] AR, Part I, Tab 2, p 19 ln 28-29.
[265] AR, Part III, Tab 71, p 112 ln 23-27.
[266] AR, Part I, Tab 5 at para 118.
[267] AR, Part I, Tab 5 at para 118.

the majority of the Court of Appeal for Ontario, or at all. The trial judge made a reasonable, proper and correct decision in which the *Waterfield* test was applied to all of the evidence before her, and her decision should be affirmed. The majority failed to apply the entire *Waterfield* analysis, abandoning or ignoring the factors of minimal impairment on Fleming's rights and proportionality. The decision of the majority of the Court of Appeal for Ontario should therefore be set aside.

PART IV – SUBMISSIONS CONCERNING COSTS

137. As noted above, costs of the trial were awarded to Fleming in the agreed-upon amount of $151,000.00. Costs were also agreed upon before the Court of Appeal for Ontario. In the main appeal, the agreed-upon costs were $53,000.00, with the caveat that Fleming wished to make submissions that he should be considered analogous to a public interest litigant; in the cross-appeal, the agreed-upon costs were $5,000.00. Ultimately, the costs awarded against Fleming by the majority were reduced to $25,000.00 on the basis of his cost submissions. In the dissent, it is stated that in dismissing the main appeal and the cross-appeal Huscroft JA would have awarded Fleming the agreed-upon amount of $53,000.00, less $5,000.00.[268]

138. Fleming submits he should be awarded $151,000.00 as the agreed-upon costs of trial and $48,000.00 (being $53,000.00, less $5,000.00) as the agreed-upon costs before the Court of Appeal for Ontario.

139. Fleming also seeks his costs before this Court.

PART V – ORDERS SOUGHT

140. Fleming seeks an Order:

a. Granting his appeal;

b. Setting aside the Decision and Orders of the Court of Appeal for Ontario rendered on February 16, 2018;

c. Restoring the trial Ruling and Judgment of Madam Justice Carpenter-Gunn issued on September 22, 2016;

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[268] AR, Part I, Tab 5 at para 120.

d. Awarding him his costs before this Court and in the Courts below; and

e. Such further and other relief as this Court considers just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 14th day of January 2019.

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PART VI – LIST OF AUTHORITIES

NO.	CASE OR STATUTE NAME AND CITATION
1.	*Brown v Regional Municipality of Durham Police Service Board*, (1998), 43 OR (3d) 223 (CA)
2.	*Figueiras v Toronto Police Services Board*, 2015 ONCA 208
3.	*R v Waterfield*, [1963] 3 All E.R. 659
4.	*Dedman v The Queen*, [1985] 2 SCR 2
5.	*R v Mann*, 2004 SCC 52
6.	*R v MacDonald*, [2014] 1 SCR 37
7.	*R v Houben*, 2006 SKCA 129
8.	*R v Penunsi*, 2018 NLCA 4
9.	*R v Clayton*, 2007 SCC 32
10.	*Cloutier v Langlois*, [1990] 1 SCR 158
11.	*R v Godoy*, [1999] 1 SCR 311
12.	*R v Kang-Brown*, 2008 SCC 18
13.	*Austin v Commissioner of Police of the Metropolis*, [2007] EWCA Civ 989, aff'd [2009] UKHL 5
14.	*R v Commissioner of Police of the Metropolis*, [2012] EWCA Civ 12
15.	*R v Nolet*, 2010 SCC 24
16.	*H(F) v McDougall*, 2008 SCC 53
17.	*R v Keegstra*, [1990] 3 SCR 697
18.	*Criminal Code* (RSC, 1985, c C-46), s. 25