S.C.C. 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 RESPONDENTS
(HER MAJESTY THE QUEEN in the RIGHT OF THE PROVINCE OF ONTARIO et al., Respondents)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. At issue on this appeal is the scope of the police's common law power to arrest an individual to prevent a breach of the peace and its duty to keep the peace when two groups are in conflict, particularly when the conflict involves Indigenous persons alleging Indigenous law or Aboriginal and treaty rights.

2. The Appellant was arrested to prevent a breach of the peace on May 24, 2009, in the context of a "Flag Rally" organized to protest the ongoing demonstration on the lands that had been designated for residential development as the Douglas Creek Estates ("DCE") in Caledonia, Ontario. The demonstration against DCE, which began on February 28, 2006, has been an ongoing source of conflict between the Indigenous rights demonstrators ("Indigenous demonstrators") and those, like the Appellant, protesting the demonstration ("Flag Rally protesters"). It is and remains the duty of the Ontario Provincial Police ("OPP") to keep the peace in Caledonia.

3. This Honourable Court has adopted a two-stage test for determining whether police are acting within the scope of their common law powers.[1] Stage one asks whether the police conduct fell within the general scope of a police duty under statute or common law.[2] Stage two looks at whether the interference with liberty is "reasonably necessary" with regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.[3]

4. The Respondent, Her Majesty the Queen in right of Ontario ("Ontario"), and Constables Miller, Bracnik, Cudney, Courty, Lorch, Cole and Gibbons, (collectively "Respondent Officers"), submit that *Charter* principles, in so far as they encompass a consideration of "other less invasive options," are to be considered in stage two of the *Waterfield* test.[4] Specifically, this consideration

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[1] *R v Waterfield*, [1964] 1 QB 164 at 170-171 (CA UK) [*Waterfield*], **RBOA, Tab 1**; *R v Dedman*, [1985] 2 SCR 2 at paras 66-69 (SCC) [*Dedman*]; *R v MacDonald*, 2014 SCC 3 at paras 35-36 [*MacDonald*]; *R v Reeves*, 2018 SCC 56, at para 78 [*Reeves*].
[2] *Dedman*, *supra* note 1 at para 67; *MacDonald*, *supra* note 1 at para 35.
[3] *Dedman*, *supra* note 1 at para 69; *MacDonald*, *supra* note 1 at paras 36-38.
[4] *Waterfield*, *supra* note 1 at 170-171; *Dedman, supra* note 1 at para 69; *MacDonald*, *supra* note 1 at para 36; *Reeves*, *supra* note 1 at para 78.

informs the "reasonably necessary" and balancing aspects of the *Waterfield* test.[5] Ontario also submits that the *Waterfield* test, as modified by the Ontario Court of Appeal in *Brown v Regional Municipality of Durham Police Service Board*[6] and *Figueiras v Toronto Police Services Board*[7] ("*Waterfield-Figueiras* test"), is the appropriate test to be used to determine whether the use of the common law power to arrest to prevent a breach of the peace was justifiable. That, the addition of the "imminent-substantial factors", the apprehended breach be "imminent" and the risk of harm "substantial,"[8] ensures the *Waterfield-Figueiras* test's consistency with *Charter* values in this context.

5. Notably, the Appellant does not dispute the existence of a police common law power to arrest to prevent a breach of the peace – a common law power which has yet to be addressed by this Honourable Court – or the use of the *Waterfield-Figueiras* test. Nor does the Appellant argue that the common law power should not be used to arrest the "provocateur", an individual whose behaviour while otherwise lawful incites a negative reaction from others. Instead, the Appellant argues that its use in the specific circumstances was unjustifiable – that on the facts, the police conduct was not reasonably necessary or the apprehended breach of the peace did not meet the imminent-substantial factors. Ontario disagrees.

6. In this appeal, the majority of the Ontario Court of Appeal found that the Trial Judge made several palpable and over-riding errors, particularly in criticizing the OPP's use of the Indigenous Framework[9] and erroneously concluding that the Respondent Officers prevented the Appellant from walking up Argyle Street.[10] Based on the latter two errors, it then determined on

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[5] *R v Godoy,* [1999] 1 SCR 311 at para 22 (SCC) [*Godoy* SCC], aff'g (1997), 33 OR (3d) 445 (Ont CA) [*Godoy* OCA], **RBOA, Tab 2**; *R v Zouhri*, 2018 ABQB 291 at para 51 [*Zouhri*]; *R v Larson,* 2011 BCCA 454 at paras 39, 50-51 [*Larson*]; *R v Dillon*, [2006] OTC 342 at paras 26, 50 (Ont SCJ) [*Dillon*].

[6] *Brown v Regional Municipality of Durham Police Service Board* (1998), 43 OR (3d) 223 (Ont CA), leave to appeal to SCC granted but discontinued, leave to appeal to SCC granted but discontinued, [1999] SCCA No 87[*Brown*], **RBOA, Tab 3.**

[7] *Figueiras v Toronto Police Services Board*, 2015 ONCA 208 at paras 83-86 [*Figueiras*].

[8] *Brown*, *supra* note 6 at para 74; *Figueiras*, *supra* note 7 at paras 98-100.

[9] A Framework for Police Preparedness for Aboriginal Critical Incidents, May 2009 ("Indigenous Framework"), **AR, Vol V, Tab 120, pp49-57**. In December 2018, changes to the Framework included replacing all references to "Aboriginal" to "Indigenous" which is adopted in this factum.

[10] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 32-38.**

the record before it, including a videotape of the arrest,[11] that the Appellant's arrest on May 24, 2009, was a justifiable interference with the Appellant's individual liberty and "reasonably necessary" given that the apprehended breach of the peace was "imminent" and the risk of harm "substantial."[12] In its view, other options, that with the benefit of hindsight were available, were not reasonable. Ontario agrees.

7. Of particular concern to Ontario is the Trial Judge's finding that the Flag Raising Rally on May 24, 2009, was not an Indigenous Critical Incident because the Indigenous demonstrators were "…not forced to be present…and that they had chosen to become involved in a flag rally that was entirely lawful…"[13] The Trial Judge also characterized the OPP's consultation with Indigenous persons during the course of and planning for the Flag Rally as an "appeasement"[14] despite the OPP's even-handedness in also consulting the Flag Rally organizers and other community members. The majority of the Ontario Court of Appeal correctly found these to be palpable and overriding errors.

8. Moreover, at stage one of the *Waterfield-Figueiras* test, the Trial Judge refused to acknowledge that the impugned police actions fell within the general scope of the police duty to preserve the peace.[15] This lead to fundamental errors in the Trial Judge's application of the *Waterfield-Figueiras* test and preordained its result. This too is a palpable and overriding error.

9. As a result, Ontario respectfully submits that the Trial Judge's conclusions on liability cannot stand, and respectfully requests that this appeal be dismissed.

STATEMENT OF FACTS

A. The Conflict in Caledonia: A History of Violence

10. On February 28, 2006, a dispute between the Six Nations of the Grand River and the Ontario Crown led to the demonstration against DCE in the Town of Caledonia by Indigenous

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[11] Videotape of Mr. Fleming's Arrest, May 24, 2009, **AR, Part IV, Tab 121**.
[12] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 39-59.**
[13] Ruling of Justice Carpenter-Gunn, Superior Court of Justice, dated September 22, 2016 ("Trial Ruling"), **AR, Vol I, Tab 2, p27, L9-13**.
[14] Trial Ruling, **AR, Vol I, Tab 2, p69, L13**.
[15] No other cases have found liability at stage one of the *Waterfield* test. OCA Decision, per majority, **AR, Vol I, Tab 2 at para 40.**

demonstrators. As part of the demonstration against DCE, certain Indigenous flags were hung at different times on Argyle Street, located at the front entrance of DCE.

11. The demonstration against DCE has its origins in Indigenous law or Aboriginal and treaty rights asserted by the Six Nations of the Grand River. The history of the Six Nations dispute with the Ontario Crown, the purchase of DCE by Ontario, and its decision to allow the Indigenous demonstrators to remain on DCE, is discussed in detail by the Ontario Court of Appeal in *Henco Industries Limited v Haudenosaunee Six Nations and Confederacy Council*.[16]

12. In response, other individuals and groups began their own campaigns, rallies and marches protesting the demonstration against DCE, the flying of Indigenous flags on Argyle Street, and the alleged "race-based policing"[17] of the Caledonia conflict by the OPP. Many of these protests in Caledonia have been violent as the two opposing viewpoints and groups conflicted with each other, including protests on May 21, 2006, December 1, 2007 and September 1, 2008, where the level of violence increased when the two sides came within proximity of each other.[18] It was and remains the duty of the OPP to maintain the peace and public order in Caledonia where the demonstration against DCE continues to this day.

13. All of the Respondent Officers, members of the OPP's Emergency Response Team ("ERT"), and Inspector Skinner, the Indigenous Critical Incident Commander ("ICIC"), on May 24, 2009, had been deployed to Caledonia numerous times since the beginning of the conflict to keep the peace during protests. All the officers were aware of the potential for the number of protesters to rapidly increase and the situation to rapidly escalate from peaceful to violent with

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[16] *Henco Industries Limited v Haudenosaunee Six Nations and Confederacy Council* (2006), 82 OR (3d) 721 (Ont CA) [*Henco*]. See paras 1-5; 14-19; 43-45 re Six Nations dispute with Ontario leading to the demonstration against DCE in Caledonia. See paras 5, 45, 49-50, 64, 74 re Ontario's purchase of DCE and decision to permit Indigenous demonstrators to remain on it.

[17] Amended Statement of Claim, **AR, Vol II, Tab 7, p12, paras 49-51.** Fleming incorrectly views the OPP as "allowing" Indigenous persons to demonstrate against DCE and policing in a racially discriminatory manner in violation of his s.15 *Charter* rights. See also *McHale v Ontario*, 2014 ONSC 5179 at paras 3-7, 64-67 [*McHale*].

[18] Operational Plan Flag Rally, May 22, 2009 ("Operational Plan"), **AR, Vol V, Tab 118, pp3-5**. Cross Exam, Fleming, May 17, 2016 ("Fleming Cross"), **RR, Vol I, Tab 2D, pp35-37.**

little warning as, in response to increasing numbers of counter-protesters, within minutes of a phone call being made, increasing numbers of individuals would arrive from the Six Nations' territory located immediately behind DCE.[19] The Appellant, who attended these counter-protests, agreed that similar rallies in the past were "inundated with violence".[20] However, all parties agreed that by May 2009, the level of violence had diminished compared to its height in 2006.[21]

B. The Indigenous Framework

14. The Indigenous Framework is an important policy used by the OPP to create policing strategies/operations for all Indigenous Critical Incidents in Ontario.[22] It is used to create operational plans in Caledonia.[23]

15. The Indigenous Framework is consistent with the declaration of principles in the *Police Services Act* which provides in part:

> Police services shall be provided in Ontario in accordance with the following principles:
>
> 3. The need for cooperation between providers of police services and the communities they serve.
>
> 5. The need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society.[24] [1, 2, 4 and 6 omitted]

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[19] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 5-7;** Direct Exam of Kyle Miller ("Miller Direct"), May 26, 2016, **RR, Vol I, Tab 2N, p158, pp161-162**; Direct Exam of Steve Lorch, May 26, 2016 ("Lorch Direct"), **RR, Vol II, Tab 2T, p1, pp3-4**; Direct Exam Jeffrey Cudney, May 18, 2016 ("Cudney Direct"), **RR, Vol II, Tab 2W, p25, Tab 2X, pp27-29, 33-34;** Cross Exam Jeffrey Cudney, May 18, 2016 ("Cudney Cross"), **RR, Vol II, Tab 2Y, pp38-42, Tab 2CC, pp65-66;** Direct Exam of Rudy Bracnik, May 18, 2016, ("Bracnik Direct"), **RR, Vol II, Tab 2DD, p69, pp72-73;** Direct Exam of Craig Cole, May 18, 2016 ("Cole Direct"), **RR, Vol II, Tab 2GG, p95, pp98-100;** Direct Exam Michael Courty, May 18, 2016 (Courty Direct"), **RR, Vol II, Tab 2HH, p109, pp111-113;** Direct Exam of Shawn Gibbons, May 18, 2016 ("Gibbons Direct"), **RR, Vol II, Tab 2KK, p123, pp125-127, pp132-133;** Direct Exam of Kent Skinner, May 24, 2016 ("Skinner Direct May 24"), **RR Vol I, Tab 2H, p90**; Cross Exam of Kent Skinner, May 24, 2016 ("Skinner Cross"), **RR Vol I, Tab 2J, pp105-106.**

[20] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 7;** Cross Exam of Randy Fleming, May 17, 2016 ("Fleming Cross"), **RR, Vol I, Tab 2D, pp30-32, pp33-34, pp36-39.**

[21] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 7**.

[22] *McHale*, supra note 17 at paras 61, 64.

[23] Direct Exam of Kent Skinner, May 19, 2016 ("Skinner Direct May 19"), **RR, Vol I, Tab 2F, p52, p55, pp59-60, pp63-64**

[24] *Police Services Act*, RSO 1990 c P15, s 1 [*PSA*].

16. Consistent with these duties, consultation with Indigenous communities forms the backbone of the Indigenous Framework. It is, in and of itself, an important and necessary tool for weighing the economic, social and political factors of any given situation the OPP is required to police which may involve Indigenous communities. It has also been recommended by Justice Linden as a good policing policy and best practice in the context of policing conflicts involving the assertion of rights by Indigenous persons.[25]

C. The Flag Rally

17. Some months prior to May 24, 2009, a flag-raising rally being organized by the Canadian Advocates for Charter Equality ("CANACE") came to the OPP's attention. It was in protest of the demonstration against DCE, Indigenous flags flying on Argyle Street, and their incorrect view of "race-based policing" by the OPP ("Flag Rally"). It was the intention of the Flag Rally organizers to march south on Argyle Street and hang Canadian flags directly across the front entrance of DCE where Indigenous demonstrators are known to be present.[26]

i. Creating the Operational Plan in Accordance with the Indigenous Framework

18. When the Flag Rally came to the attention of the OPP, an operational plan, the "Ontario Provincial Police Haldimand County Detachment Operational Plan Flag Rally" ("Operational Plan") was created by Inspector Skinner in accordance with the Indigenous Framework and other relevant OPP policies.[27] He had used it to create operational plans in Caledonia in the past.[28]

19. Formulating the Operational Plan involved consultation with all potential stakeholders and included meeting with members of the Indigenous community, the local city council (who informed him that they did not support the Flag Rally), and the organizers of the Flag Rally.[29]

20. In accordance with Inspector Skinner's past experience in Caledonia and information received from the OPP's Indigenous Relations Teams as to what kinds of events would raise the tensions on DCE, he determined the best way to maintain the peace and public order was to keep

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[25] *Report on the Ipperwash Inquiry*, vol 4 (Ontario: Min. of the Attorney General, 2007), p104.
[26] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 8**.
[27] Skinner Direct May 19, **RR, Vol I, Tab 2F, p60, L21-27, pp63-64**.
[28] Skinner Direct May 19, **RR, Vol I, Tab 2F, p55, L6-14, pp59-60, pp63-64**.
[29] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 9-11;** Skinner Direct May 19, **RR, Vol I, Tab 2F, p66, L13-118, pp67-70;** Skinner Direct May 24, **RR, Vol I, Tab 2H, pp72-73.**

the Flag Rally protesters and Indigenous demonstrators apart as the potential for conflict would increase as the two groups got closer together. His view was not altered by any information he received up to and including the day of the Flag Rally.[30] This ultimately meant not permitting the Flag Rally protesters near the front entrance of DCE where Indigenous demonstrators are located and where it was expected that more would gather in response to the Flag Rally.[31]

21. Prior to the Flag Rally, Inspector Skinner advised the Flag Rally organizers that they had a right to protest in a peaceful manner but that the march would not be permitted near the vicinity of DCE.[32] He also advised that only Indigenous demonstrators were permitted on DCE.

22. Inspector Skinner determined that two public order units of 30 officers each were required. The Alpha Unit, in "soft tac", was to be initially deployed on Argyle Street while the Bravo Unit, in "hard tac"[33], was held back at the Oneida Public School a few kilometres away.[34]

23. At the morning briefing on May 24, 2009, Inspector Skinner communicated the Operational Plan's threefold mission to all the officers in both public order units:

i. Maintain order and ensure public safety to the residents, community members and police.
ii. Allow Flag Rally protestors to exercise their lawful rights and cause the least possible disruption to others.
iii. Maintain the safe and orderly flow of traffic on Argyle Street South in the Town of Caledonia and Highway 6 By-Pass.[35]

24. Inspector Skinner also advised that the Flag Rally march would not be allowed within the vicinity of DCE and that officers should stop Flag Rally protesters from going onto DCE.

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[30] OCA Decision per majority, **AR, Vol I, Tab 5, para 12**; Skinner Direct May 24, **RR, Vol I, Tab 2H, p79, L1-8, pp81, pp83-84, pp89-92;** Operational Plan, **AR, Vol V, Tab 118, p5.**

[31] OCA Decision, per majority, **AR, Part I, Tab 5 at para 13**; Skinner Direct May 19, **RR, Vol I, Tab 2G, p76, L10-25;** Skinner Direct May 24, **RR, Vol 1, Tab 2H, pp83-92.**

[32] Skinner Cross, **RR, Vol 1, Tab 2K, pp113-114.**

[33] "Hard tac" officers wear personal protection gear (helmet, baton, and shield) while "soft tac" officers wear the daily blue uniform: Skinner Direct May 24, **RR, Vol 1, Tab 2H, pp80-81**.

[34] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 14**

[35] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 15**.

However, whether this would be done through communication or physical restraint would depend upon the circumstances and officer discretion.[36]

25. Inspector Skinner planned on keeping the Flag Rally protesters and the Indigenous demonstrators apart, initially through negotiation and discussions but ultimately, if necessary, by creating a buffer between them on Argyle Street- the Flag Rally protesters some distance north of the DCE front entrance while the Indigenous demonstrators at the front entrance would not be permitted north to approach the Flag Rally protesters.[37]

26. On May 24, 2009, a Canadian flag was eventually hung on Argyle Street south of the front entrance of DCE[38]; however, the Flag Rally march was not permitted to go to the front entrance of DCE.[39]

ii. The Appellant Voluntarily Walks onto DCE

27. On May 24, 2009, in and around 2:42 p.m., Alpha Support Squad, one of six squads in the Alpha Unit, made up of the Respondent Officers, was proceeding north on Argyle Street in two vans, the lead van was unmarked, followed by officers driving an Offender Transport Unit ("OTU"). They were being relocated to a church parking lot immediately north of the front entrance of DCE. Their relocation was in preparation for setting up the police buffer between the Flag Rally protesters who were now north of the front entrance of DCE at the Canadian Tire on Argyle Street and the Indigenous demonstrators gathered at the front entrance to DCE.[40]

28. As the Respondent Officers were proceeding north on Argyle Street, they passed the Appellant who was walking in the same direction. They did not know who he was.[41] They agreed that the Appellant was not doing anything unlawful walking on Argyle Street with a flag;

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[36] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 16;** Skinner Direct May 24, **RR Vol 1, Tab 2H, p89, L24-28**.
[37] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 17;** Skinner Direct May 24, **RR Vol 1, Tab 2H, pp83-84, pp89-90;** Skinner Cross, **RR Vol I, Tab 2K, p112, L20-25**.
[38] Skinner Direct May 24, **RR, Vol I, Tab 2H, p92, L16-25**. Skinner Direct May 24, **RR, Vol I, Tab 2H, p92, L16-25**.
[39] Skinner Direct May 24, **RR, Vol I, Tab 2H, pp90-91.**
[40] Direct Exam of Steve Lorch, May 26, 2016 ("Lorch Direct"), **RR, Vol II, Tab 2T, p5;** Cudney Direct, **RR, Vol II, Tab X, p28, L21-31;** Cole Direct, **RR, Vol II, Tab GG, pp101-102**; Gibbons Direct, **RR, Vol II, Tab KK, p127, L18-26, p128, L4-26.**
[41] Lorch Direct, **RR, Vol II, Tab 2T, p5, L5-19**.

however, some of the Respondent Officers expressed concern about the potential response from the Indigenous demonstrators should the Appellant reach the front entrance of DCE.[42]

29. Officer Lorch, the Alpha Support Squad Leader, was waiting for some air time on the radio to advise Sergeant Huntley, the Alpha Unit Team Leader, that the Appellant was walking north on Argyle when Sergeant Huntley advised him that a "flag was coming up the road." Sergeant Huntley directed the Alpha Support Squad to "deploy" between the Appellant and the entrance to DCE.[43] All the vehicles turned around in the church parking lot and proceeded south to approach the Appellant to decipher his intentions.

30. Before the police vans arrived on the shoulder of the road, the Appellant was already off the shoulder and walking towards DCE.[44] The Respondent Officers did not detain the Appellant on Argyle Street nor had the opportunity to detain him on Argyle Street because he had already left the shoulder of the road upon their arrival. This can be seen on the videotape.[45]

31. The Appellant's evidence is that he left the shoulder of Argyle because he saw a van approach him with speed and he feared being struck by the van.[46] However, once the Appellant left the shoulder, he continued walking a fair distance away from it - through the grassy ditch, over a low fence and then a few steps onto DCE.[47] This can also be seen on the videotape. The Appellant did not testify that he was forced into the ditch, over the fence and onto DCE by the officers. In fact, his evidence is that the first vehicle was a grey, unmarked, van and he did not see the police until sometime after he had already left the shoulder and walked onto DCE.[48] The

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[42] Gibbons Direct, **RR, Vol II, Tab 2KK, p133, L2-15**; Bracnik Direct, **RR, Vol II, Tab 2DD, p81-83, L5-15**; Cross Exam of Rudy Bracnik, May 18, 2016 ("Bracnik Cross"), **RR, Vol II, Tab 2EE, p85, L3-14**; Cross Exam of Michael Courty, May 25 2016 ("Courty Cross"), **RR, Vol II, Tab 2JJ, p122, L13-23**.
[43] Transcript of OPP Radio Communications, **AR, Part V, Tab 122, p59**.
[44] Fleming Cross, **RR, Vol I, Tab 2E, pp44-46**; Gibbons Direct, **RR, Vol II, Tab 2KK, pp128-129**; Cudney Direct, **RR, Vol II, Tab 2X, p32, L4-9**; Miller Direct, **RR, Vol I, Tab 2O, p164, L16-22**; Lorch Direct, **RR, Vol II, Tab 2T, p10, L1-3**; Courty Direct, **RR, Vol II, Tab 2II, p115, L2-18, p106, L13-17**.
[45] Videotape of Mr. Fleming's Arrest, **AR, Part V, Tab 121, p58**.
[46] Direct Examination of Randy Fleming, May 16, 2016 ("Fleming Direct"), **RR, Vol I, Tab 2A, p14, L14-28**, **Tab 2B**, **p15, L32–p16, L19.**
[47] Fleming Direct, **RR, Vol I, Tab 2B, pp15-16**; Fleming Cross, **RR, Vol I, Tab 2E, pp41-43**.
[48] Fleming Direct, **RR, Vol I, Tab 2A, p11, p14, L14-19, Tab 2B, p16, p26, L5-19;** Gibbons Direct, **RR, Vol II, Tab KK, p127, L18-26, p128, L4-26.**

Appellant's testimony is that after he left the road, he voluntarily proceeded onto "level ground" to see what was going on.[49]

32. Some of the Respondent Officers speculated as to what they *would* have done if the Appellant had not left the shoulder of Argyle: speak to him to determine his intentions, intercept him to prevent him from going onto DCE and causing a disturbance, and prevent him from walking to the entrance of DCE. However, none of the options were possible once the Appellant began walking towards DCE.[50] None of the officers testified that it was their direction or intention to arrest the Appellant for carrying a flag on Argyle Street or onto DCE.

iii. The Appellant's Presence on DCE Causes an Immediate Response

33. Once the Appellant began walking towards DCE, the Respondent Officers began yelling various commands to the Appellant, including "return to the shoulder", "stop" and "stay away from DCE or you are going to be arrested for a breach of the peace".[51]

34. The Appellant admits to glancing behind him, seeing the officers and hearing them yell. The Appellant admitted to not complying with their commands. The Appellant's evidence was that the officers could not be talking to him because "I knew I wasn't doing anything wrong."[52]

35. The Appellant admits that his presence on DCE caused an immediate reaction. The Appellant saw Indigenous demonstrators approaching his location from the entrance of DCE. Although he could not tell what they were saying, it was readily apparent to the Appellant that the approaching Indigenous demonstrators were angry and yelling at him. The Appellant's evidence in chief was that "... they weren't very happy that I was there...".[53]

36. All the Respondent Officers agreed that the Appellant walking towards and then onto DCE caused an immediate reaction from the Indigenous demonstrators at the entrance of DCE,

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[49] Fleming Direct, **RR, Vol I, Tab 2B, p16**.
[50] Cudney Direct, **RR, Vol II, Tab 2Y, pp38-42**; Cudney Cross, **RR, Vol II, Tab 2Z, pp44-46, Tab 2AA, pp54-57**; Bracnik Direct, **RR, Vol II, Tab 2DD, p81-83, L16-22**; Courty Direct, **RR, Vol II, Tab 2II, p119, L9-22**.
[51] Miller Direct, **RR, Vol I, Tab 2O, p164-165;** Lorch Direct, **RR, Vol II, Tab 2T, p6, L13-16**; Cudney Direct, **RR, Vol II, Tab 2X, p32, L16-30**; Bracnik Direct, **RR, Vol II, Tab 2DD, p76, L23-25;** Gibbons Direct, **RR, Vol II, Tab 2KK, p129, L6-11.**
[52] Fleming Direct, **RR, Vol I, Tab 2B, p16**; Fleming Cross, **RR, Vol I, Tab 2E, p45, L2-7**.
[53] Fleming Direct, **RR, Vol I, Tab 2B, p17-18**; Fleming Cross, **RR, Vol I, Tab 2E, p44, L19-26**.

and that they feared for the Appellant's personal safety.[54] They all agreed that the Indigenous demonstrators were angry and upset.[55] Officer Gibbons testified that the Indigenous demonstrators were yelling at the Appellant to get off their land.[56] Officers Miller, Lorch, Cudney, Gibbons and Bracnik stated there were about 8-10 Indigenous demonstrators approaching the Appellant.[57]

37. Officers Miller and Lorch also stated that they observed a second group of about 20 Indigenous demonstrators coming behind the first 8-10 individuals.[58] Officer Lorch stated the videotape did not show all the Indigenous demonstrators he saw approaching.[59]

iv. The Appellant's Arrest to Prevent a Breach of the Peace

38. During examination-in-chief, the Appellant admitted that the approaching Indigenous demonstrators caused him concern for his personal safety and that the situation would be "diffused" by his removal from DCE.

> A. My first, initial thought was who do I take my chances with? That was my initial thought. Do I, do I walk down to the entrance of the Douglas Creek Estates and meet the people coming out or do I turn around and, and walk back into the police? Honest, that was my first thought.
>
> Q. Okay.
>
> A. Fairly quickly decided it would likely be better if I turned around and went with the police.
>
> Q. Why was that?

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[54] Miller Direct, **RR, Vol I, Tab 2O, pp166-167**; Miller Cross, **RR, Vol I, Tab 2S, p190, L2-7, p192;** Lorch Direct, **RR, Vol II, Tab 2T, p7, L11-19, p8, L25-28**; Cudney Direct, **RR, Vol II, Tab 2X, pp33-34, Tab 2Y, pp38-42**; Cudney Cross, **RR, Vol II, Tab 2Z, pp46-49, L22-24, Tab 2AA, pp56-57;** Bracnik Direct, **RR, Vol II, Tab 2DD, p79, L4-11**; Cole Direct, **RR, Vol II, Tab 2GG, pp102-108, pp106-107;** Courty Direct, **RR, Vol II, Tab 2II, p116, L10-26**; Gibbons Direct, **RR, Vol II, Tab 2KK, pp129-130.**

[55] Miller Direct, **RR, Vol I, Tab 2O, p166, L14-17**; Lorch Direct, **RR, Vol II, Tab 2T, pp7-8**; Gibbons Direct, **RR, Vol II, Tab 2KK, p133, L20-26**.

[56] Gibbons Direct, **RR, Vol II, Tab 2KK, p129, L24-29**, **p119, L25-26**; Read-In of Examination for Discovery of Shawn Gibbons, May 16, 2016, **RR, Vol II, Tab 2MM, p138, L24-26**.

[57] Miller Direct, **RR, Vol I, Tab 2O, p166, L1-12**; Miller Cross, **RR, Vol I, Tab 2S, p187, L13-26**; Lorch Direct, **RR, Vol II, Tab 2T, pp7-8**; Cudney Cross, **RR, Vol II, Tab 2AA, p52, L11-13**; Gibbons Direct, **RR, Vol II, Tab 2KK, p129, L21-23**; Bracnik Direct, **RR, Vol II, Tab 2DD, p77, L28-32**.

[58] Miller Direct, **RR, Vol I, Tab 2O, p166, L1-12**; Miller Cross, **RR, Vol I, Tab 2S, p187, L13-26**; Lorch Direct, **RR, Vol II, Tab 2T, pp7-8, pp10-13, L4-29**.

[59] Re-examination of Steve Lorch, May 26, 2016, **RR, Vol II, Tab 2V, pp16-17**.

> A. Well, that would diffuse 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 were talking to me.[60]

39. Officer Miller, the arresting officer, was the first of the Respondent Officers to reach the low fence. He was closely followed by Officers Cudney and Lorch who remained standing near the low fence and observed the arrest. Officer Lorch also stepped on the low fence to assist Officer Miller going over it before and after the arrest and then assumed a "look-out" position facing the approaching, angry Indigenous demonstrators. [61] Officer Lorch spoke to them.

40. Officer Miller made multiple requests for the Appellant to stop, not go onto DCE and come back over the fence once he was on DCE, or he would be arrested to prevent a breach of the peace.[62] It was Officer Miller's evidence that there was an "imminent threat of violence to Mr. Fleming" from the running, angry Indigenous demonstrators. Officer Miller feared that the Indigenous demonstrators would grab and assault the Appellant.[63] Officer Cudney feared a rapid growth of more Indigenous demonstrators if the Appellant continued standing on DCE.[64] The Appellant did not comply with any of Officer Miller's requests.[65]

41. Officer Miller followed the Appellant over the fence and advised him that he was under arrest to prevent a breach of the peace.[66] He then took the Appellant's right arm and escorted him over the low fence and off of DCE. The Appellant came back willingly but only after he was arrested.[67] The videotape shows that the Appellant stopped walking farther onto DCE and turned to face the officers, but did not make any move to come back over the fence until Officer Miller had the Appellant in custody with his hand on the Appellant's right arm. Officer Cudney confirms that he heard Officer Miller advise the Appellant that he was under arrest *before* taking custody of the Appellant and *before* the Appellant came back over the fence off of DCE.[68]

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[60] Fleming Direct, **RR, Vol I, Tab 2B, p18, L13-25**; Fleming Cross, **RR, Vol I, Tab E, p44, L23-27, p50, L11-14.**
[61] Lorch Direct, **RR, Vol II, Tab 2T, pp7-8;** Cudney Direct, **RR, Vol II, Tab 2X, pp33-34**.
[62] Miller Direct, **RR, Vol I, Tab 2O, p165, L1-27**.
[63] Miller Direct, **RR, Vol I, Tab 2P, p170, L20-24**; Miller Cross, **RR, Vol I, Tab 2S, p189.**
[64] Cudney Direct, **RR, Vol II, Tab 2CC, pp64-66**.
[65] Miller Direct, **RR, Vol I, Tab 2O, pp164-165**.
[66] Miller Direct, **RR, Vol I, Tab 2O, pp166-167**; Ontario Provincial Police Orders: Arrest/Detention, **RR, Vol II, Tab 3D, p157**.
[67] Miller Direct, **RR, Vol I, Tab 2O, p167, L5-14**.
[68] Cudney Direct, **RR, Vol II, Tab 2X, p33, L21-27**.

42. Officer Miller also testified that there was no time or distance to get between the Appellant and the approaching Indigenous demonstrators or speak to them to ascertain their identities and/or history of violence or anything else.[69] Officer Cudney agreed that as the Appellant continued walking towards DCE, the officers were losing the time and space available to them to have a conversation with the Appellant.[70]

43. As demonstrated by the videotape, the events happened quickly. Two minutes and 46 seconds passed from the time the Appellant left the shoulder of Argyle Street and was taken back to the shoulder, post arrest. Only 30 seconds passed from the time the Appellant left the shoulder and Officer Miller placed his hand on the Appellant and advised him that he was under arrest.

44. While other officers were dealing with the Appellant, Officer Lorch spoke to the angry Indigenous demonstrators to try to diffuse the situation. He told them to "stay back" and tried to get them to "settle down."[71]

v. The Appellant Resists Arrest

45. Once the Appellant was over the fence, Officer Miller ordered the Appellant to let go of the flag so that he could be handcuffed in accordance with standard practice and policies.[72] The Appellant admits that he resisted the arrest at this point – that he gripped the flag with both fists and a struggle ensued.[73] His testimony is that he heard Officer Miller's order, knew it was directed at him, but that he quite adamantly did not wish to comply:

> "The last person I ever would have handed my flag to that day would have been a member of the OPP.. I am not sure I can properly convey the anger that I felt but if I had to pick one group on the planet that would be the absolute last that I would have handed my flag to that day it would have been the group asking for it…"[74]

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[69] Miller Direct, **RR, Vol I, Tab 2P, p172, L15-19**; Miller Cross, **RR, Vol I, Tab 2R, pp184-185, Tab 2S, p186, L12-25**.
[70] Cudney Cross, **RR, Vol II, Tab 2AA, p57, L1-9;** Courty Direct, **RR, Vol II, Tab 2II, p119, L9-21**; Gibbons Cross, **RR, Vol II, Tab 2LL, p137**; Lorch Direct, **RR, Vol II, Tab 2T, pp7-8**.
[71] Lorch Direct, **RR, Vol II, Tab 2T, pp8-11.**
[72] Miller Direct, **RR, Vol I, Tab 2N, pp153-154, Tab 2O, p167, L15-27**; Cudney Direct, **RR, Vol II, Tab 2W, pp22-23**; OPP Order: Use of Force, May 2009, **RR, Vol II, Tab 3E, p166.**
[73] Fleming Direct, **RR, Vol I, Tab 2B, pp19-22**; Fleming Cross, **RR, Vol I, Tab 2E, pp46-49**.
[74] Fleming Cross, **RR, Vol I, Tab 2E, p49, L10-17**.

46. The Appellant agreed that he did not stop resisting until the flag was out of his hands sometime *after* he was placed on the ground by Officer Miller.[75] This is consistent with the evidence of Officers Bracnik, Cudney and Lorch who testified that the Appellant continued to resist *after* being placed on the ground.[76] The Appellant further agreed that the grounding was required in order to remove the flag from his hands.[77]

47. Officer Miller grounded the Appellant in accordance with the OPP's Use of Force policies because he refused to let go of the flag and put his hands behind his back for handcuffing.[78] While Officer Miller stated that he used handcuffs for every arrest, he further elaborated that there were exceptions to this general rule, for example "someone very elderly or very young".[79] Moreover, given the Appellant's lack of compliance with all but one of Officer Miller's orders, Officer Miller believed handcuffing the Appellant was necessary.[80]

48. Officer Miller testified that upon arresting an individual, he would also remove any object in the individual's hand because it could be used as a weapon.[81] In this case, the flag was on a 40-42 inch pole.[82] Officer Gibbons, who recovered the flag pole from the ground beside the Appellant after he was grounded, was of the view that the pole was a potential weapon and for everyone's safety needed to be secured inside the van given the crowd that was approaching.[83] The Appellant agreed that the pole could have injured someone accidently during the struggle.[84]

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[75] Fleming Direct, **RR, Vol I, Tab 2B, p22, L10-17, p23, L20-24**.
[76] Bracnik Direct, **RR, Vol II, Tab 2DD, p78, L18-29**; Cudney Direct, **RR, Vol II, Tab 2X, pp36-37**; Lorch Direct, **RR, Vol II, Tab 2T, p9, L4-13**.
[77] Fleming Cross, **RR, Vol I, Tab 2E, pp46-49**.
[78] Miller Direct, **RR, Vol I, Tab 2N, pp151-154, Tab 2O, pp167-168**; Cudney Direct, **RR, Vol II, Tab 2W, pp18-24**; OPP Order: Use of Force, May 2009, **RR, Vol II, Tab 3E, p166**; OPP Order: Arrest/Detention, May 2009, **RR, Vol II, Tab 3D, p157**; Use of Force Wheel, **RR, Vol II, Tab 3F, p174**; Background Information: New Ontario Use of Force Model (2004), **RR, Vol II, Tab 3C, pp154-155**.
[79] Miller Direct, **RR, Vol I, Tab 2N, p154, L6-21**.
[80] Miller Cross, **RR, Vol I, Tab 2Q, pp180-181**.
[81] Miller Direct, **RR, Vol I, Tab 2N, p154, L22-31**.
[82] Fleming Direct, **RR, Vol I, Tab 2A, p12, L11-14**.
[83] Gibbons Direct, **RR, Vol II, Tab 2KK, p130, L8-23**.
[84] Fleming Cross, **RR, Vol I, Tab 2E, p48, L19-31**.

vi. The Detention and Prosecution

49. Once a breach of the peace is no longer apprehended, an individual who has been arrested is released. It is not a *Criminal Code* offence. Moreover, members of the OPP public order units do not lay charges. Rather, the crime unit, comprised of local officers, investigate and lay any charges that may arise from public order policing.[85]

50. Following his arrest, the Appellant was charged with resisting a peace officer.[86] None of the Respondent Officers were involved in the investigation, charge or prosecution. The Appellant was in handcuffs and then custody for about 2.5 and 4.5 hours, respectively.[87] On December 8, 2010, the charges were withdrawn because the Appellant's release conditions at that time were similar to what would have been sought by the Crown at trial.[88]

D. The Procedural Background

51. The Appellant claimed damages against the Respondents for assault, battery, wrongful arrest, false imprisonment, breaches of his common law right to pass and repass, and *Charter* rights (sections 2(b), 7, 9 and 15) in the amount of $500,000. The Appellant's claim of malicious prosecution was abandoned prior to the trial.

52. Ontario pled section 25 of the *Criminal Code* as a complete defence to the claim and, as a result, the Appellant's claims, with the exception of the s.15 *Charter* claim, turned on the lawfulness of the Appellant's arrest to prevent a breach of the peace.

i. The Trial Decision

53. At trial, Ontario called ten witnesses, including the seven Respondent Officers, and the Appellant called three witnesses. At its conclusion, after lengthy oral submissions, Justice Carpenter-Gunn, Ontario Superior Court of Justice, delivered an eighty-six page oral decision.

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[85] Skinner Direct May 24, **RR, Vol I, Tab 2H, p78, L13-28**; Cudney Cross, **RR, Vol II, Tab 2CC, p63, L8-23**.
[86] *Criminal Code*, RSC 1985, c C-46, s 129(a); Certified Copy of Information, **RR, Vol II, Tab 3A, pp141-142.**
[87] Trial Ruling, **AR, Vol I, Tab 2, p25, L1-25.**
[88] Transcript of Proceedings, December 8, 2010, **RR, Vol II, Tab 3B, p145, L8-26.**

54. The Trial Judge concluded the Appellant was falsely arrested and wrongfully imprisoned and Ontario was liable for assault and battery, breach of the Appellant's common law mobility rights, and breaches of sections 7, 9 and 2(b) of the *Charter*. She declined to award punitive or aggravated damages[89] and found no breach of the Appellant's s.15 *Charter* rights.[90]

55. The Trial Judge referred to the *Waterfield-Figueiras* test[91] and found that the Respondent Officers did not have lawful authority to arrest the Appellant. The Trial Judge framed the threshold issues as "…***did the OPP have the legal authority to arrest Mr. Fleming as he walked up Argyle Street and then onto [DCE] with his Canadian flag***".[92] The Trial Judge characterized the Appellant as being prevented from walking up, or detained on, Argyle Street by the officers.

56. The Trial Judge addressed stage one of the *Waterfield-Figueiras* test and found that the Respondent Officers' actions did not fall under the general scope of a police duty to preserve the peace because the Respondent Officers "***were not preserving the peace***".[93] No other reason was given for her refusal to acknowledge that the officers' actions fell within the scope of that duty.

57. Despite concluding liability at stage one, the Trial Judge addressed stage two of the *Waterfield-Figueiras* test and found that the arrest to prevent a breach of the peace was not a "justifiable use of police powers associated with that duty" and it was not effective (i.e. it did not materially reduce the risk of breach) in part because the apprehended breach was not imminent and the risk that the breach would occur was not substantial.[94] In doing so, the Trial Judge was critical of any assessments the Respondent Officers made, in respect of the likelihood of a potential breach of the peace, based on their past experience policing in Caledonia.[95] Her Honour also found that if the approaching Indigenous demonstrators were upset, they were upset with the officers and not the Appellant and that it was the officers' conduct that caused "the conflict".[96] Her Honour concluded that it was not clear that the natural consequence of the Appellant's

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[89] Trial Ruling, **AR, Vol I, Tab 2, pp81-82, p91**.
[90] Trial Ruling, **AR, Vol I, Tab 2, p63, L2-8**.
[91] Trial Ruling, **AR, Vol I, Tab 2, p46, L9-14.**
[92] Trial Ruling, **AR, Vol I, Tab 2, p7, L13-16** [emphasis added].
[93] Trial Ruling, **AR, Vol I, Tab 2, p46, L14-24** [emphasis added].
[94] Trial Ruling, **AR, Vol I, Tab 2, p47, L15-27**.
[95] Trial Ruling, **AR, Vol I, Tab 2, p48, L16-24, p50, L13-24**.
[96] Trial Ruling, **AR, Vol I, Tab 2, p65, L28-31**.

actions would be to provoke violence;[97] there were other options available to the officers;[98] and the interference with the Appellant's rights was substantial.[99]

58. Relevant to her "totality of the circumstances" assessment under stage two of the *Waterfield-Figueiras* test, and her finding that the Appellant's was detained on or prevented from walking up Argyle Street, the Trial Judge also made a number of findings criticizing the basis for Inspector Skinner's decision to keep Flag Rally protesters, like the Appellant, away from the front entrance of DCE and the Indigenous demonstrators. Specifically, the Trial Judge found that Inspector Skinner's use of the Indigenous Framework to come up with an Operational Plan for the Flag Rally, on the basis that Indigenous persons were present on DCE, was wrong. In her view, because "…***the occupiers were not forced to be present…and they had chosen to become involved in a flag rally that was entirely lawful***..."[100] neither the Flag Rally nor the Appellant walking up Argyle Street were "Indigenous Critical Incidents."

59. The Trial Judge further found that Inspector Skinner's consultation with various Indigenous communities, in respect of potential responses to the Flag Rally, in accordance with the Indigenous Framework was wrong in that it "…***put the demands of the occupiers ahead of the rights of other Canadian citizens, including Mr. Fleming…***"[101] and was tantamount to the OPP taking "…***steps to curtail the rights of protesters involved in the flag rally…in order to appease…***" those consulted.[102]

ii. The Decision of the Court of Appeal for Ontario

60. Ontario appealed the Trial Judge's findings on liability and the Appellant cross-appealed with respect to the quantum and type of damages awarded. The majority of the Ontario Court of Appeal allowed the appeal and dismissed the cross-appeal. The majority ordered a new trial on the issue of whether excessive force was used when the Appellant was arrested and if so, what damages follow.[103] The dissent would have dismissed both the appeal and cross-appeal.

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[97] Trial Ruling, **AR, Vol I, Tab 2, p49, L4-10**.
[98] Trial Ruling, **AR, Vol I, Tab 2, p65, L12-24, p68, L10-13**.
[99] Trial Ruling, **AR, Vol I, Tab 2, p49, L23-25**.
[100] Trial Ruling, **AR, Vol I, Tab 2, p27, L9-13** [emphasis added].
[101] Trial Ruling, **AR, Vol I, Tab 2, p69, L30-31, p70, L1-2**.
[102] Trial Ruling, **AR, Vol I, Tab 2, p69, L7-14** [emphasis added].
[103] Order of the Court of Appeal, dated February 16, 2018, **AR, Vol I, Tab 3 at paras 1-4.**

61. The majority found two critical findings of the Trial Judge were tainted by palpable and overriding errors and therefore necessitated its review of the record and determination as to whether the arrest of the Appellant was lawful: (1) that the Flag Rally was not an Indigenous Critical Incident; and (2) that the Appellant was prevented from walking up Argyle Street by the Respondent officers.

62. With respect to the first finding, the majority found it "difficult to see" how the Flag Rally could be reasonably characterized as anything other than an Indigenous Critical Incident and "difficult to understand" the Trial Judge's criticisms of the OPP for using the Indigenous Framework to plan for the Flag Rally and avoid any "clashes" between the protesting sides.[104] The majority found that these criticisms were relevant and central to the Trial Judge's determination that the Appellant's arrest was unlawful, hence was an error that was both palpable and over-riding.[105] The dissent disagreed and found that even if the Trial Judge made a palpable error, it was not an over-riding error because the Indigenous Framework was not relevant to whether the Appellant's arrest to prevent a breach of the peace was lawful.[106] The dissent did not address the fact that the Trial Judge had made it relevant to her assessment.

63. With respect to the second finding, the majority found that the Trial Judge's central finding, that the Appellant was prevented from "…walking up Argyle Street with his Canadian flag..."[107] was tainted by palpable and over-riding errors. The majority found no evidence to support that finding: "Nothing occurred between the O.P.P. and [the Appellant] until he moved away from Argyle Street onto DCE…,"[108] "the [Appellant] chose to leave the shoulder of Argyle Street and walk some distance westward onto DCE…," and, it was "simply unknown" what would have transpired had the Appellant remained on the shoulder after the officers arrived.[109] The majority noted that the Appellant was arrested on DCE, and not on Argyle Street, and that the Trial Judge's "frequent erroneous references to the police interfering with the [Appellant's]

[104] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 34, 47, 49**.
[105] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 35**.
[106] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 82**.
[107] Trial Ruling, **AR, Part I, Tab 2, p70, L6-13.**
[108] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 36**.
[109] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 36-38**.

right to walk on Argyle Street…" may be what led her into the wrong analysis and conclusion in respect of the *Waterfield-Figueiras* test.[110]

64. The dissent disagreed and found that the Trial Judge's error did not rise to the level of palpable error.[111] The dissent had no regard to the uncontroverted evidence that the Appellant was arrested on DCE, the Appellant's own admission that he left the shoulder of Argyle to avoid an approaching grey van, and that he did not see the police until sometime thereafter.

65. The majority applied the *Waterfield-Figueiras* test and found that the Appellant's arrest was justifiable and reasonably necessary[112] and that the Trial Judge had erred in concluding otherwise.[113] The dissent disagreed and would have deferred to the findings of the Trial Judge.

66. At the first stage of the *Waterfield-Figueiras* test, the majority disagreed with the Trial Judge and found there was "no doubt" that the police were acting in the execution of their duties to keep the peace and protect the public.[114] The dissent agreed with majority on this point yet did not address the impact of the Trial Judge's error on the rest of her stage two analysis.[115]

67. At the second stage of the *Waterfield-Figueiras* test, in respect of the importance of the performance of the duty to the public good, the majority discussed the OPP's duty to keep the peace in Caledonia where the officers had a long history of dealing with disputes and were aware of the potential for clashes to occur with little warning and for minor skirmishes to escalate quickly.[116] In these circumstances, the majority found that it was the OPP's obligation and duty to be prepared to take reasonable steps to avoid confrontation and its steps on the date of the Flag Rally were "necessary, and properly, informed by the history of the various confrontations that had occurred."[117] The majority disagreed with the Trial Judge finding otherwise."[118] The dissent was critical of the majority's discussion of the OPP's duty, even though the Trial Judge's refusal to find a police duty was a central issue on the appeal. The dissent was also critical of the use of

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[110] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 54**.
[111] OCA Decision, per dissent, **AR, Vol I, Tab 5 at paras 90-92**.
[112] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 41, 43-59.**
[113] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 59**.
[114] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 40**.
[115] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 96**.
[116] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 47**.
[117] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 48.**
[118] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 47-48**.

officer knowledge of a past history of violence as a basis for arresting the Appellant but disregarded the evidence in the record of an imminent breach and substantial risk of harm.[119]

68. In respect of whether the apprehended breach was imminent and the risk of harm substantial, the majority found that the Indigenous demonstrators were "rush[ing] towards the [Appellant] in a threatening fashion…"[120] and posed a risk to the public peace and the Appellant.[121] The majority found that the Trial Judge's conclusion to the contrary could not be reconciled with the videotape of the events or the Appellant's own evidence - that the Indigenous demonstrators were "not happy"[122] with him and the situation was "perilous".[123] The majority further found that the Trial Judge's speculation that the Indigenous demonstrators may have been angry with the Respondent Officers had "…no foundation in the evidence."[124] The dissent preferred the Trial Judge's findings which disregarded the evidence of the Respondent Officers and the Appellant.

69. In respect of whether the Respondent Officers actions were justifiable or "reasonably necessary" the majority concluded their actions were rationally connected to the risk sought to be managed and an effective means of materially reducing the likelihood of that risk occurring.[125] It found that the alternatives suggested by the Trial Judge, such as instituting a buffer zone between the Appellant and the Indigenous demonstrators, or calling for back-up from other available officers, were not reasonable options in that it could have resulted in a larger confrontation.[126] It was critical of the Trial Judge's conclusions to the contrary and found that hindsight was an inappropriate basis for imposing liability.[127] Although the dissent would have deferred to the findings of the Trial Judge, he agreed that the police could arrest a person otherwise acting lawfully to avoid a breach of the peace "when there is real risk of imminent harm."[128]

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[119] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 84**.
[120] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 52**.
[121] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 53**.
[122] Fleming Cross, **RR, Vol I, Tab 2E, p44, L23-26**.
[123] OCA per majority, **AR, Vol I, Tab 5 at para 53;** Fleming Direct, **RR, Vol I, Tab 2B, p17-18**
[124] OCA per majority, **AR, Vol I, Tab 5 at para 53**; Cudney Cross, **RR, Vol II, Tab 2CC, p68, L2-32.**
[125] OCA per majority, **AR, Vol I, Tab 5 at paras 54-56**; see *Figueiras*, *supra* note 7 at para 93.
[126] OCA per majority, **AR, Vol I, Tab 5 at para 57**.
[127] OCA per majority, **AR, Vol I, Tab 5 at para 58**.
[128] OCA per dissent, **AR, Vol I, Tab 5 at paras 100, 102, 117.**

70. With respect to the issue of excessive force, the majority found that the Trial Judge's findings were based on her erroneous conclusion that the arrest of the [Appellant] was unlawful and hence could not be relied upon.[129] It reviewed the record and the Appellant's admission that he resisted reasonable police orders and found that the amount of force used by the Respondent Officers escalated as a direct result of the Appellant's resistance.[130] It also found that the Appellant's injuries resulted from a "yank" of the Appellant's left arm by one of the Respondent Officers who remained unidentified in the record; hence, the majority was unable to determine if it occurred during the Appellant's resistance. As the latter would be determinative of whether the use of force was excessive, it ordered a new trial on this narrow issue.[131] Given its findings, the dissent did not need to address this issue.[132]

PART II – QUESTIONS IN ISSUE

71. The Respondents submit the following questions are in issue in this case:

i. Whether minimal impairment of individual rights and proportionality form part of the balancing exercise at stage two of the *Waterfield-Figueiras* test and whether the majority of the Court of Appeal considered them; and

ii. Whether the Trial Judge made palpable and overriding errors that required appellate intervention.

PART III – STATEMENT OF ARGUMENT

72. Ontario submits that the Appellant's arguments about how the *Waterfield-Figueiras* test should be applied and the relevant factors to be weighed cannot be divorced from the facts – the rapidly evolving situation that confronted the Respondent Officers when the Appellant walked onto DCE on the date of the Flag Rally. The test should be applied to what the arresting officer knew at the time of the arrest and the time and space that was available to the officer when the Appellant walked onto DCE and the Indigenous demonstrators approached. Nor can this case be divorced from the importance of the OPP's duty to preserve the peace in Caledonia then or today.

73. Ontario further submits that a consideration of "other less invasive options" are to be considered in the full contextual analysis that occurs at stage two of the *Waterfield-Figueiras* test along with other relevant factors including: the imminent-substantial factors and the importance

[129] OCA per majority, **AR, Vol I, Tab 5 at para 64**.
[130] OCA per majority, **AR, Vol I, Tab 5 at para 65.**
[131] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 70-71**.
[132] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 118**.

of the performance of the police duty to the public good. The majority of the Court of Appeal conducted this contextual analysis correctly with due regard to all relevant facts and factors but the Trial Judge did not. The palpable and over-riding errors of the Trial Judge demonstrate that this appeal should be dismissed.

Standard of Review

74. The standard of review on an appeal from a judge's final order is set out by this Honourable Court in *Housen v Nikolaisen*.[133] Further, when an appellate court has reversed a lower court's judgement and findings of fact, a second appellate court should only interfere if it is "clearly satisfied" that the first appellate court's judgement is erroneous.[134]

The Evolution of the *Waterfield* Test in Canada

75. The doctrine of ancillary powers concerns the powers of police officers arising out of, and ancillary to, his or her police duties at common law. The applicable standard for assessing whether police conduct that *prima facie* interferes with an individual's liberty falls within an officer's ancillary common law powers is the two-stage test set out by the English Court of Appeal in *R v Waterfield*[135] and adopted by this Honourable Court in *Dedman*:

> The first question, then, under the *Waterfield* test is whether the random stop fell within the general scope of the duties of a police officer under statute or common law.[136]
>
> […]
>
> Turning to the second branch of the *Waterfield* test, […] The interference with liberty must be necessary for the carrying out of the particular police duty, and it must be reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.[137]

76. In *R v MacDonald,* this Honourable Court identified three factors to be weighed at stage two: (1) the importance of the performance of the duty to the public good;[138] (2) the necessity of

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[133] *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 26-28, 31-36.
[134] *Demers v Montreal Steam Laundry Co,* (1987) 27 SCR 537 at 538-539 (SCC), *Dorval v Bouvier*, [1968] SCR 288 at 294 (SCC); *Scotsburn Co-operative Services Ltd v WT Goodwin Ltd,* [1985] 1 SCR 54 at paras 21-22 (SCC).
[135] *Waterfield*, *supra* note 1.
[136] *Dedman*, *supra* note 1 at para 68.
[137] *Dedman*, *supra* note 1 at para 69.
[138] *MacDonald*, *supra* note 1 at paras 36-37; *R v Mann*, 2004 SCC 52 at paras 26, 39 [*Mann*].

the interference with individual liberty for the performance of the duty;[139] and (3) the extent of the interference with individual liberty[140] (the "*MacDonald* factors").

77. The evolution of the *Waterfield* test in Canada has taken it far from its roots.[141] However, the recognition of its use has been described by Binnie J. as having "crossed the Rubicon."[142] More recently, Moldaver J. in *R v Reeves* recognized that this Honourable Court has used the *Waterfield* framework "to affirm many common law police powers now considered fundamental...;" for example: R.I.D.E. program stops, investigative detentions, searches incident to arrest, 911 home entries, sniffer dog searches, and safety searches.[143]

The Common Law Power to Arrest to Prevent a Breach of the Peace

78. Section 31(1) of the *Criminal Code* authorizes police to arrest a person who has committed a breach of the peace[144] but is limited to situations where breaches of the peace have actually taken place.[145] The power of a police officer to make an arrest to *prevent* a breach of the peace arises out of, and is ancillary to, his or her police duty to maintain the public peace and prevent crime.[146] In Ontario, the common law duty to maintain the public peace is enshrined in sections 1 and 42(1)(a) of the *Police Services Act,* RSO 1990, c P15.[147]

79. The power of a police officer to make an arrest to *prevent* a breach of the peace has long been recognized in England.[148] In Canada, it has been recognized by many provincial courts – first in *R v Patterson*, and then post-*Charter* in *Hayes v Thompson*, and more recently recognized

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[139] *MacDonald*, *supra* note 1 at para 37; *Dedman*, *supra* note 1 at para 69; *R v Clayton*, 2007 SCC 32 at paras 21, 25-26, 31 [*Clayton*].
[140] *MacDonald*, *supra* note 1 at para 37; *Dedman*, *supra* note 1 at paras 68-69.
[141] English courts have used *Waterfield* solely to justify police conduct in cases involving the obstruction of an officer in the execution of his/her duty: *Clayton*, *supra* note 139 at paras 61, 75.
[142] *R v Kang-Brown*, 2008 SCC 18 at para 22.
[143] *Reeves*, *supra* note 1 at para 77.
[144] *Criminal Code*, s 31(1).
[145] *Hayes v Thompson* (1985), 17 DLR (4th) 751 at 5 (BCCA) [*Hayes*].
[146] *PSA*, *supra* note 24, s 1; *Waterfield*, *supra* note 1 at 170-171; *Dedman*, *supra* note 1 at paras 14, 16 ; *Mann*, *supra* note 138 at para 26.
[147] See also *PSA*, *supra* note 24, ss 1, 42(1)(a).
[148] *Laporte v Chief Constable of Gloucestershire Constabulary*, [2006] UKHL 55 at para 30 [*Laporte*]; *R v Howell*, [1982] QB 416 (CA UK), **RBOA, Tab 4**; *Humphries v Connor*, (1864) 17 ICLR 1 (CA UK) [*Humphries*], **RBOA, Tab 5**; *R (Hicks) v Commissioner of Police for the Metropolis*, [2017] UKSC 9 at para 4, aff'g [2012] EWHC 1947 (Admin) [*Hicks* UKSC].

in *R v Penunsi*.[149] In Ontario, this common law power has been recognized by the Ontario Court of Appeal in *Brown* and *Figueiras.*[150]

When An Arrest to Prevent a Breach of the Peace is Justifiable

80. The *Waterfield* test adopted in *Dedman* and modified in *MacDonald* was further modified by the Ontario Court of Appeal in *R v Brown* and *R v Figueiras* ("*Waterfield-Figueiras* test").

81. Specifically, Doherty J.A., in *Brown* enumerated a set of factors drawn from the *Waterfield* test and also the "imminent-substantial factors" – the apprehended breach must be "imminent" and the risk of harm "substantial."[151] A generalized policing concern that a situation will "get out of hand" will not justify the use of this common law power.[152] In English jurisprudence the "common law guards" against abuse of this exceptional common law power by requiring similar imminent-substantial factors.[153]

82. Rouleau J.A. in *Figueiras* incorporated the imminent-substantial factors into stage two of the test. Rouleau J.A. also added to the test, a threshold assessment immediately prior to stage one and two called "defining the threshold issues." The purpose of this threshold assessment was to "settle" what the officer was "actually doing" and identify what liberty interests may have been *prima facie* infringed by the police power at issue.[154]

83. The *Waterfield-Figueiras* test is as follows:

- Defining the threshold issues – Defining the police power at issue and identifying the liberty interests at stake.
- Stage 1 – Whether the impugned police action fell within the general scope of a police duty imposed by statute or derived from the common law.[155]

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[149] *R v Patterson* (1930), [1931] 3 DLR 267 (Ont CA); *Hayes*, *supra* note 145; *R v Penunsi*, 2018 NLCA 4. See also *R v Pavletich* (1932), 58 CCC 285 (Que RC); *R v E(C)*, 2009 NSCA 79; *R v Puddy*, 2011 ONCJ 399; *R v Botten*, [2012] OJ No 5053 (Ont SCJ), **RBOA, Tab 6**; *R v Collins*, [2012] NJ No 170 (NL Prov Ct); *R v MacInnis*, 2014 NSSC 262 [*MacInnis*].
[150] *Brown, supra* note 6. *Figueiras*, *supra* note 7.
[151] *Brown, supra* note 6 at paras 74, 77-78. See *Hayes*, *supra* note 145 at 5-6.
[152] *Brown*, *supra* note 6 at paras 77-79. *Figueiras*, *supra* note 7 at para 131.
[153] *Laporte*, *supra* note 148 at paras 62, 66; *Austin v Commissioner of Police*, [2007] EWCA Civ 989 at paras 20-23, aff'd [2009] UKHL 5 [*Austin*].
[154] *R v Custer*, [1984] 4 WWR 133 at paras 22, 25 (SKCA) ["*Custer*"].
[155] *Waterfield*, *supra* note 1; *MacDonald*, *supra* note 1 at para 35.

- Stage 2 – Whether the police action was a justifiable exercise of powers associated with the duty:
  1) the importance of the performance of the duty to the public good;[156]
  2) the necessity of the interference with individual liberty for the performance of the duty;[157]
     a) the apprehended breach is "imminent" and the risk of harm is "substantial".[158]
     b) whether the power being exercised is rationally connected to the risk sought to be managed;[159]
     c) whether the power being exercised is an effective means of materially reducing the likelihood of that risk occurring;[160] and
  3) the extent of the interference with individual liberty.

84. The threshold issues are of critical importance in that they form the factual and analytical framework for assessing subsequent relevant factors for consideration.[161] Failure to frame the threshold issues correctly will necessarily impact the final result.[162]

85. At stage two, the court must determine whether the arrest was a justifiable use of police powers associated with that duty – whether it was reasonably necessary in the circumstances.[163] It has been described as requiring a balancing between the competing interests of the police duty and the liberty interests at stake,[164] with a "totality of circumstances" approach to the inquiry.[165] Stage two also involves assessing the *MacDonald* factors and imminent-substantial factors. Stage two is a highly fact specific, contextual analysis.

86. Further, as a general principle, the common law power to arrest to prevent a breach of the peace does not require that there be unlawful acts nor does it dictate who the police officer must

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[156] *MacDonald*, *supra* note 1 at para 37; *Mann*, *supra* note 138 at paras 26, 39.
[157] *MacDonald*, *supra* note 1 at para 37; *Dedman*, *supra* note 1 at para 69; *Clayton*, *supra* note 139 at paras 21, 26, 31.
[158] *Brown*, *supra* note 6 at para 74; *Figueiras*, *supra* note 7 at paras 98-100.
[159] *Figueiras*, *supra* note 7 at paras 92-96. See also *Clayton* supra note 139; *R v Ladouceur*, [1990] 1 SCR 311 (SCC).
[160] *Figueiras*, *supra* note 7 at paras 92-96. See also *Clayton* supra note 139; *R v Ladouceur*, *supra* note 159; *R v Hufsky*, [1998] 1 SCR 621(SCC).
[161] *Figueiras*, *supra* note 7 at para 56.
[162] *Custer*, *supra* note 154 at paras 39-44; *Godoy* OCA, *supra* note 5 at paras 27-31.
[163] *Clayton*, *supra* note 139 at para 26; *Figueiras*, *supra* note 7 at para 85.
[164] *Mann*, *supra* note 138 at para 26.
[165] *Brown*, *supra* note 6 at paras 61, 76-77.

arrest. The Ontario Court of Appeal in *Brown* found that acts may amount to a breach of the peace even if they may be lawful standing alone:

> A breach of the peace does not include any and all conduct which right thinking members of the community would regard as offensive, disturbing, or even vaguely threatening. […] Actions which amount to a breach of the peace may or may not be unlawful standing alone.[166]

87. *Brown* did not dictate that the police officer must arrest the "angry crowd" or individuals who are threatening harm or being provoked into violence.[167] The police need not decide the merits of the affair – who is the aggressor, who is defending themselves and/or who is right.[168] This is consistent with the British Columbia Court of Appeal in *R v Faulkner* that found that arresting an individual to prevent a breach of the peace by an angry crowd was justified and not arbitrary.[169] It is also consistent with English cases that have done the same.[170]

Issue 1: Other Less Invasive Options Were Correctly Considered by the Court of Appeal

88. The Appellant argues that *Charter* principles of minimal impairment and proportionality, were not considered by the majority of the Ontario Court of Appeal in stage two of the *Waterfield-Figueiras* test because it did not review "other less invasive options." Ontario disagrees that the majority made any errors in its application of the *Waterfield-Figueiras* test. Ontario submits that the minimal impairment analysis under s.1 of the *Charter,* which applies to legislative decisions, is not an appropriate standard by which to review the exercise of police powers, which must often be undertaken in volatile and rapidly unfolding circumstances. Rather the appropriate analysis involves a consideration of "other less invasive options" at stage two of the *Waterfield-Figueiras* test. This consideration forms part of a full contextual analysis into

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[166] *Brown*, *supra* note 6 at para 73, citing *Percy v DPP* (1994), [1995] 3 All ER 124 at 1392 (QB UK), **RBOA, Tab 7**.
[167] *Brown*, *supra* note 6.
[168] *Austin*, *supra* note 153 at paras 67-69; *Foulkes v Chief Constable of the Merseyside Police,* [1998] 3 All ER 705 at 710-711 (CA UK), **RBOA, Tab 8**; *Moos and McClure v Commissioner of Police*, [2012] EWCA Civ 12 at paras 34, 39[*Moos*]; *Laporte*, *supra* note 148.
[169] *R v Faulkner* (1988), 4 WCB (2d) 207 at para 9 (BCCA) [*Faulkner*], **RBOA, Tab 9**. *R v White* (1994), 24 WCB (2d) 386 at paras 22, 24 (Ont Ct J (Gen Div)), **RBOA, Tab 10**.
[170] *Hicks* UKSC, *supra* note 148 at paras 5-6. See also *Moos, supra* note 168 at paras 36, 39; *Austin*, *supra* note 153 at paras 20, 27-36; *Wise v Dunning*, [1902] 1 KB 167 (UK), **RBOA, Tab 11**; *Humphries*, *supra* note 148.

whether the exercise of the common law power is justifiable in the totality of the circumstances. This assessment should also be informed by the imminent-substantial factors, as explained below.

i. Charter Considerations

89. The majority in *R v Clayton*, per Abella J., reasoned that the common law regarding police powers of detention, building on *Waterfield,* encompasses the principle that, in addition to being necessary, police interference with liberty must be as minimally intrusive to liberty as is reasonable in the circumstances and that this assessment called for a full contextual analysis into the reasonableness of police conduct. The majority in *Clayton* described this common law standard as being consistent with *Charter* values because it requires the state to justify an interference with liberty based on whether it is necessary, and no more intrusive to liberty than reasonably necessary to address the risk.[171]

90. Similarly, in *Godoy* this Honourable Court held that what is necessary and reasonable will be considered in the given context of each case and that police interference with liberty must not go beyond what is necessary for carrying out the police duty:

> In *Dedman, supra,* at p.35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable…Each case will be considered in its own context, keeping in mind all of the surrounding circumstances.[172]

91. For a detention or arrest for an apprehended breach of the peace, the Ontario Court of Appeal in *Figueiras* makes it clear that a consideration of "other less invasive options" is assessed at stage two of the *Waterfield-Figueiras* test – whether police intrusion on the liberty interests at issue is necessary.[173] Equally clear is that this consideration occurs in a "totality of the circumstances" inquiry that includes: whether the imminent-substantial factors are met; whether the police power being exercised is rationally connected to the risk sought to be

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[171] *Clayton*, *supra* note 139 at paras 21-31; *Dillon, supra* note 5 at para 50.
[172] *Godoy* SCC, *supra* note 5 at para 22. See also *Zouhri, supra* note 5 at para 51; *Larson, supra* note 5 at paras 50-51.
[173] *Figueiras*, *supra* note 7 at paras 92-100. See also *Brown*, *supra* note 6 at para 78; *Faulkner*, *supra* note 169 at para 9.

managed; and whether it is an effective means of materially reducing the likelihood of that risk occurring.[174]

92. Of particular relevance are the imminent-substantial factors in that, the more imminent the breach and substantial the risk of harm and, similarly, the speed in which it approaches, the greater the justification to interfere with individual liberty and the decreasing number of reasonable options that may be available to the police to prevent the harm from occurring.[175] Moreover, as with all "totality of the circumstances" inquiries into the reasonableness of police conduct, this Honourable Court has cautioned that hindsight is not an appropriate basis on which to impose police liability.[176] Nor has this Honourable Court mandated that "arrest be the last possible option" divorced from the reasonableness of the available options or a "totality of the circumstances" inquiry or without due regard to the realities of police work and arrest situations that can be volatile and rapidly evolving.[177]

93. The Appellant does not challenge the common law police power to arrest to prevent a breach of the peace – he has not filed a notice of constitutional question. However, to the extent that he argues that the minimal impairment analysis under s.1 of the *Charter* should be applied at stage two of the *Waterfield* test, Ontario disagrees. No case has ever called for such an analysis. Ontario submits that judicial oversight over policing is better informed by the context-specific analysis set out in the extensive body of case law addressing the exercise of police powers and a consideration of the imminent-substantial factors. Minimal impairment precedents, by contrast, arise in the different context of assessing alternate legislative choices, in which consideration of imminent-substantial factors is not applicable.

ii. The Majority of the Court of Appeal Made No Errors and Its Findings are Not Clearly Erroneous

94. In this appeal, the majority of the Ontario Court of Appeal found that the Trial Judge made many palpable and overriding errors that justified appellate review and, then, made a fresh

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[174] *Figueiras*, *supra* note 7 at para 93; *MacDonald*, *supra* note 1 at para 47; *Clayton*, *supra* note 139 at paras 30, 41; *R v Simpson* (1993), 12 OR (3d) 182 at para 55 (Ont CA), **RBOA, Tab 12**.
[175] *Clayton*, *supra* note 139 at paras 45-53.
[176] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 68 [*Hill*].
[177] See e.g. *R v Alexson*, 2015 MBCA 5 at para 20; *R c Bilodeau* (2004), JE 2004-1990 at paras 56-60 (QCCA); *MacDonald, supra* note 1 at para 88; *R v Aucoin,* 2012 SCC 66 at paras 40, 98; *Clayton, supra* note 139 at paras 53, 97, 130.

assessment of the evidence in the record that included a videotape of the relevant event.[178] Its findings are not clearly erroneous and, with respect, should not be disturbed by this Honourable Court.

95. The dissent was critical of the majority's decision in four respects: (1) whether certain errors by the Trial Judge were palpable and overriding; (2) lack of deference to the Trial Judge; (3) police reliance on the history of the conflict in Caledonia; and (4) whether other options were available to arresting the Appellant. Its criticisms are adopted by the Appellant.

96. Firstly, the majority found that critical findings of the Trial Judge were "tainted by palpable and over-riding errors"[179] by finding (1) that the Flag Rally was not an "Indigenous Critical Incident" and (2) the Appellant was prevented from walking up Argyle Street. The dissent disagreed with the former as not an over-riding error and the latter as not a palpable error. As described below, Ontario submits that the majority's findings were correct.

97. Secondly, having found that the Trial Judge made palpable and overriding errors, the majority was entitled to review the record and make its own findings.[180] Deference to the Trial Judge is not required in these circumstances.

98. Thirdly, in respect of police reliance on the history of conflict in Caledonia, the majority correctly concluded that the steps taken by the OPP on May 24, 2009 were "…necessarily, and properly, informed by the history of the various confrontations that had occurred [in Caledonia]," and that the Trial Judge's conclusions to the contrary were incorrect.[181] The dissent conceded that an arrest to prevent a breach of the peace depends on an evaluation of the circumstances existing at the time of the arrest but that it cannot be assumed that a history of conflict will justify future exercises of police power.[182] The dissent ignored the evidence of the Appellant and the Respondent Officers that the Appellant's presence on DCE caused an immediate reaction from the Indigenous demonstrators and that the officers and the Appellant feared for his safety.

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[178] *Madsen Estate v Saylor,* 2007 SCC 18 at para 24 [*Madsen Estate*].
[179] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 38**.
[180] *Madsen Estate*, *supra* note 178 at para 24.
[181] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 48**. See also *MacInnis*, *supra* note 149 at paras 49-56; *R v Wilhelm*, 2014 ONSC 1637 at paras 113-115 [*Wilhelm*].
[182] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 84**.

99. Finally, in respect of other available options, the majority reviewed the alternatives suggested by the Trial Judge, such as instituting a buffer zone between the Appellant and the Indigenous demonstrators, or calling for back-up from other available officers, and found that they were not reasonable as they would have resulted in a larger confrontation.[183] The majority was critical of the Trial Judge's conclusions to the contrary and found that hindsight was an inappropriate basis for imposing liability.[184] The majority's conclusions are supported by the evidence of the officers[185] and the speed in which the events transpired. The assessment of options should not be divorced from the reasonableness of the available options or a "totality of the circumstances" inquiry with due regard to the realities of police work and arrest situations that can be volatile and rapidly evolving.[186]

100. More particularly, the dissent was critical of the majority for conducting an "effectiveness" analysis even though this Honourable Court has considered it in the *Waterfield* test.[187] Moreover, the Ontario Court of Appeal has specified that whether the police power being exercised is "an ***effective*** means of materially reducing the likelihood of that risk occurring" should be considered at stage two of the test.[188]

Issue 2: Palpable and Overriding Errors Made by the Trial Judge

101. The Trial Judge made several palpable and overriding errors in findings of fact and in respect of the *Waterfield-Figueiras* test. Two critical findings were discussed at length by the majority and resulted in its intervention. Other errors were also made that the majority did not need to directly assess. Ontario's position is that all the palpable and overriding errors of the Trial Judge demonstrate that the findings of the majority should be upheld.

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[183] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 57**.
[184] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 58**.
[185] Miller Direct, **RR, Vol I, Tab 2P, p172, L15-19**; Miller Cross, **RR, Vol I, Tab 2R, pp184-185, Tab 2S, p186, L22-25**; Cudney Cross, **RR, Vol II, Tab 2AA, p57, L1-9**; Courty Direct, **RR, Vol II, Tab 2II, p119, L9-21**; Gibbons Cross, **RR, Vol II, Tab 2LL, p137, L8-14**; Lorch Direct, **RR, Vol II, Tab 2T, pp7-8**.
[186] See *Hill*, *supra* note 176 at paras 54-55, 68, 73. See also *Tremblay v Ottawa (Police Services Board)*, 2018 ONCA 497 at para 80; *R v Carelse-Brown*, 2016 ONCA 943 at paras 48, 56; *R v Golub* (1997), 34 OR (3d) 743 at para 18 (Ont CA), **RBOA, Tab 13**.
[187] *Clayton*, *supra* note 139 at paras 33, 72; *Godoy* SCC, *supra* note 5 at paras 16, 21-22, 28. See also *Figueiras*, *supra* note 7 at paras 92-96.
[188] *Figueiras*, *supra* note 7 at paras 92-96.

i. Errors in Respect of the Indigenous Framework

102. The Trial Judge found that the Indigenous Framework had no applicability to the Flag Rally and should not have been used by Inspector Skinner in formulating the Operational Plan. Her Honour also found that Inspector Skinner was wrong to consult with various Indigenous communities as per the Indigenous Framework in formulating the Operational Plan.[189]

103. Inspector Skinner testified that the Indigenous Framework was one of the OPP policies used to formulate the Operational Plan[190] as the Flag Rally was an Indigenous Critical Incident – it was in the vicinity of DCE, which was the subject of an Indigenous rights demonstration, and the Indigenous demonstrators were the subject matter of the Flag Rally.[191] In the Indigenous Framework, Indigenous Critical Incidents are defined broadly as: "a major incident related to an occupation, protest and/or high risk incident… involving an [Indigenous] community member."[192] It is applicable to "any [Indigenous] related critical incident where the source of the conflict may stem from assertions associated with [Indigenous] or treaty rights".[193]

104. The Trial Judge was critical of its application because, "the occupiers were not forced to be present…and that they had chosen to become involved in a flag rally that was entirely lawful…"[194] The Trial Judge further found that the OPP was wrong to consult with various Indigenous communities in respect of potential responses to the Flag Rally because it "put the demands of the occupiers ahead of the rights of other Canadian citizens including Mr. Fleming."[195] Her view was that it was tantamount to the OPP taking steps "to curtail the rights of protesters involved in the flag rally…in order to ***appease***..." those consulted.[196]

105. With respect, it is plainly obvious that whether the Indigenous demonstrators *chose* to be present on DCE does not invalidate the applicability of the Framework to the Flag Rally. If it

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[189] Trial Ruling, **AR, Part I, Tab 2, p27, L7-13, pp69-70**.
[190] Skinner Direct May 19, **RR, Vol I, Tab 2F, pp63-64**.
[191] Skinner Direct May 19, **RR, Vol I, Tab 2F, pp60-61**; Skinner Cross, **RR, Vol I, Tab 2K, pp125-126**.
[192] OPP Order re Major Incident Command, May 2009, **AR, Vol V, Tab 119, p34, s5.1.5**; Skinner Direct May 19, **RR, Vol I, Tab 2F, p64**.
[193] Indigenous Framework (see "Applicability"), **AR, Vol V, Tab 120, p50**.
[194] Trial Ruling, **AR, Vol I, Tab 2, p27, L9-13**.
[195] Trial Ruling, **AR, Vol I, Tab 2, pp69-70.**
[196] Trial Ruling, **AR, Vol I, Tab 2, p69, L7-14** [emphasis added].

did, the Indigenous Framework would never be applicable in Caledonia or other policing contexts throughout Ontario where assertions of Indigenous law or Aboriginal and treaty rights are the subject of the conflict. It would, in essence, prohibit its use and render it useless. Moreover, characterizing OPP consultation with Indigenous persons as an "appeasement" is plainly wrong. Consultation recognizes the imperatives of Reconciliation between Indigenous and non-Indigenous people. It also ignores the OPP's even-handedness – they also consulted the Flag Rally organizers and other community members.

106. The majority found the Trial Judge's failure to find the Flag Rally to be an Indigenous Critical Incident to be a palpable and over-riding error; it was "difficult to understand" why the Trial Judge was so critical of the OPP for using the Indigenous Framework to plan for the event and in an effort to avoid any clash between protesting sides; and it was significant to her finding that the Appellant's arrest was unlawful.[197] Ontario agrees.

107. The dissent found that the error even if palpable was not over-riding because the Framework was not relevant to whether the Appellant's arrest was lawful.[198] However, the Trial Judge found that "as a result of the implementation of the Framework" the OPP took steps to "curtail the rights of [Flag Rally] protesters," like the Appellant,[199] and that the OPP "acted in accordance with the Framework to put the demands of the occupiers ahead of the rights of … Mr. Fleming [and]…prevented Mr. Fleming from exercising his lawful rights of walking up Argyle Street [and]…arrested him without cause."[200] With respect, the Indigenous Framework, its applicability, and its use by the OPP in planning for the Flag Rally was clearly significant to the Trial Judge's finding that the Appellant was arrested unlawfully.

108. These palpable and over-riding errors of the Trial Judge demonstrate that this appeal should be dismissed.

ii. Error in Defining the Threshold Issues and the Totality of the Circumstances Inquiry: The Appellant was not Arrested on or Prevented from Walking up Argyle

109. Defining the police power at issue and identifying the liberty interests at stake "focuses" the totality of the circumstances inquiry – the relevant factual and analytic framework for the

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[197] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 34**.
[198] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 82**.
[199] Trial Ruling, **AR, Vol I, Tab 2, p69.**
[200] Trial Ruling, **AR, Vol I, Tab 2, pp69-70.**

stage two analyses is determined by the threshold issues as defined and identified by the court.[201] The Trial Judge incorrectly framed the threshold issue as "…did the OPP have the legal authority to arrest [the Appellant] as he walked up Argyle Street and then onto [DCE]..."[202] and incorrectly found that the OPP "prevented" the Appellant] from walking up Argyle Street with his flag.[203]

110. With respect, it is plainly obvious that the Appellant was not prevented from walking up Argyle Street and not arrested on DCE. It is a misapprehension of the evidence and a misunderstanding of what constitutes a detention to say that the Appellant was arrested and/or detained while on Argyle Street.[204] While the Trial Judge found that the approaching vans caused the Appellant to leave Argyle Street, there is no evidence that the Appellant was prevented from walking up or detained on Argyle Street by the Respondent officers. The Appellant's own evidence is that it was a grey, unmarked, van and he did not see the officers until sometime after he had already left the shoulder of the road.[205] Moreover, the uncontroverted evidence is that the Appellant was detained/arrested on DCE when Officer Miller placed his hand on the Appellant's right arm and guided him over the fence and off of DCE.[206]

111. As a result of the above error, in stage two of the test, the Trial Judge conducted an irrelevant and speculative assessment of what "could have" or "would have" happened on Argyle Street instead of focusing on the events that actually transpired on DCE:

i. The Trial Judge found that the degree of interference with the Appellant's common law rights was substantial in that his common law mobility rights were breached "when he was prevented from walking up Argyle Street."[207] The Respondents note that the Trial Judge did not consider or find that the Appellant's common law mobility rights were breached when he was arrested on DCE;

ii. The Trial Judge found that there were other options available to the Respondents rather than approaching the Appellant on Argyle Street in their vans;[208]

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[201] *Figueiras*, *supra* note 7 at paras 55-56, 62-63, 66.
[202] Trial Ruling, **AR, Vol I, Tab 2, p7, L14-18**.
[203] Trial Ruling, **AR, Vol I, Tab 2, p70, L6-13.**
[204] See *R v Grant*, 2009 SCC 32 at para 21.
[205] Fleming Direct, **RR, Vol I, Tab 2A, p14, L2-19, Tab 2B, pp15-16, p26;** Fleming Cross**, RR, Vol I, Tab 2E, p44-45.**
[206] Miller Direct, **RR, Vol I, Tab 2O, p167, L5-14**; Fleming Direct, **RR, Vol I, Tab 2A, p14, L13-19,Tab 2B, p18, L29-32**. See *R v Whitfield,* [1970] SCR 46 at 48 (SCC).
[207] Trial Ruling, **AR, Vol I, Tab 2, p49, L23-28**.
[208] Trial Ruling, **AR, Vol I, Tab 2, p15, pp23-24, p65, L7-19**.

iii. The Trial Judge found that it was not unlawful for the Appellant to walk up Argyle Street with a flag;[209] and

iv. The Trial Judge found that the "natural consequence" of walking up Argyle would not provoke others to violence so as to establish an actual danger to the peace.[210]

112. The aforementioned findings are premised on an event that never transpired – the Respondent officers preventing the Appellant from walking up, or detaining him on, Argyle Street – and are not relevant to the totality of the circumstances inquiry required in stage two of the *Waterfield-Figueiras* test. These findings incorrectly formed the basis for the Trial Judge's conclusion that there was no apprehended breach of the peace and that the removal of the Appellant from DCE was not reasonably necessary, which then resulted in the Trial Judge's finding that the arrest was unlawful.

113. Further, the Trial Judge's pointed criticisms of the OPP's policing tactics on the date of the Flag Rally and policies all flow from this misapprehension of the evidence. Recall, the Trial Judge was very critical of the use of the Indigenous Framework to create the Operational Plan; Inspector Skinner's decision to keep the two sides apart and the Flag Rally away from the front entrance of DCE; and the OPP merely approaching the Appellant on Argyle Street. Notably, the majority found that Inspector Skinner's decision, as part of the Operational Plan, to keep the two sides apart was "an entirely legitimate one," that the Appellant's presence was an unexpected event, and it was reasonable for the officers to approach the Appellant to ascertain his intentions.[211] However, what confronted the officers once they approached was the Appellant walking onto DCE and an immediate response of approaching Indigenous demonstrators.[212]

114. The majority ruled that the Trial Judge's finding that the Appellant was prevented from walking up Argyle Street by the officers was a palpable and over-riding error; that the Appellant choose to leave Argyle Street and walk onto DCE and it clearly was not a necessary consequence of the police vans arriving; and it was "simply unknown" what would have transpired should the Appellant have remained on the side of the road.[213] The dissent found that the error was not

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[209] Trial Ruling, **AR, Vol I, Tab 2, p66, L9-11**.
[210] Trial Ruling, **AR, Vol I, Tab 2, p49, L4-10.**
[211] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 49-51**. See *Knowlton v R*, [1974] SCR 443(SCC)
[212] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 52-53**.
[213] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 37**.

palpable because irrespective of the "intent" of the arriving officers, the "effect" was that the Appellant was prevented from continuing up Argyle Street.[214] However, the Appellant of his own volition left Argyle Street and continued onto DCE. His behaviour does not support an assumption that he would have continued up Argyle Street. An assertion of a violation of *Charter* rights by the Respondents must be founded on an event that actually transpired.[215]

115. These palpable and over-riding errors of the Trial Judge demonstrate that this appeal should be dismissed.

iii. Error in Failing to Find a Police Duty and Conduct the Required Balancing: The OPP Have a Duty to Preserve the Peace in Caledonia

116. Stage one of the *Waterfield-Figueiras* test considers whether the impugned police actions fall within the general scope of a police duty recognized by common law. The Trial Judge found that the officers' actions did not fall within the general scope of their duty to preserve the peace because their actions "were not preserving the peace".[216] The Trial Judge incorrectly imported into her stage one assessment, a stage two assessment of whether the Respondents' actions were "an effective means of materially reducing the likelihood of that risk occurring."[217] There are no other reasons given for the Trial Judge's failure to find that the Respondents' actions fell within the general scope of a police duty to preserve the peace.

117. The Trial Judge's error in stage one led directly to errors in stage two of the test; specifically, the Trial Judge failed to consider the first *Macdonald* factor – the "importance of the performance of the police duty to the public good".[218] More specifically, the Trial Judge failed to consider the importance of the Respondents' duty to preserve the peace in Caledonia on the date of the Flag Rally. As a result, the Trial Judge did not and could not conduct the required balancing in stage two of the test.[219] Instead, the Trial Judge proceeded directly to examine the second and third *MacDonald* factors. Without the balancing, the result of the stage two assessment was preordained and the assessment moot.

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[214] OCA Decision, per dissent, **AR, Vol I, Tab 5 at para 90**.
[215] *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 31 (SCC).
[216] Trial Ruling, **AR, Vol I, Tab 2, p46, L18-24.**
[217] *Figueiras, supra* note 7 at para 93.
[218] *MacDonald*, *supra* note 1at para 37; *Figueiras, supra* note 7 at para 88.
[219] *Figueiras, supra* note 7 at para 48; *Mann*, *supra* note 138 at para 26.

118. With respect, it is clear that the Respondent Officers were acting in the execution of their duty to preserve the peace. Both the majority and dissent agreed on this point.[220] Their dispute lies in how the balancing in stage two of the *Waterfield-Figueiras* test should be conducted.

119. The dissent was critical of the majority's stage two analysis. But, by ignoring the Trial Judge's failure to consider the "importance of the public duty to the public good" in her stage two assessment, the dissent unfairly characterises the majority's correction of the Trial Judge's error as undue deference to police duty at the expense of the engaged liberty interests.

120. The dissent was also critical of submissions that were made by Ontario in respect of relevant considerations to the first *MacDonald* factor. In his view, those considerations are not relevant. Ontario respectfully disagrees and submits that the Trial Judge's failure to conduct the balancing required at stage two necessarily ignored the following relevant considerations to the first *MacDonald* factor:

i. It was in the public interest that the peace be preserved in Caledonia and on the day of the Flag Rally;

ii. Given the ongoing conflict in Caledonia, the continuing demonstration against DCE and continuing opposition to it, the OPP presence was required to preserve the peace on the date of the Flag Rally;

iii. The OPP's duty to preserve the peace is to all members of the public in Caledonia which requires them to balance the interests and concerns of the community, the Indigenous demonstrators and the Flag Rally protesters;

iv. The OPP's duty to consider Indigenous interests and the applicability of the Indigenous Framework;

v. There were no violent clashes between the two sides to the conflict on that date because the peace was preserved by the steps taken in the application of the Indigenous Framework;[221] and

vi. The Trial Judge's assumption that the Respondent Officers' actions were based on "generalized" safety concerns rather than on a specific, identifiable harm was not consistent with the rapidly evolving situation confronting the officers when the Appellant walked on to DCE (to be discussed). This specific, identifiable harm was the breach of the peace that would likely have occurred had the Indigenous demonstrators and the Appellant came into contact. The reasonableness of this prediction was also informed by the officers many years of experience policing the conflict, knowledge of the issues and parties to the conflict and having pursued a successful strategy of keeping the two sides apart to reduce the conflict.

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[220] OCA Decision, **AR, Vol I, Tab 5 at paras 40, 96**.

[221] Skinner Cross, **RR, Vol I, Tab 2L, pp146-147**.

121. The Trial Judge's failure to take into account the aforementioned demonstrates that the Trial Judge ignored relevant social and political considerations that inform the importance of the performance of the OPP's duty to preserve the peace in Caledonia for the public good. The performance of this duty benefits both sides involved in the conflict in Caledonia and the greater public interest in Reconciliation and negotiation with Indigenous communities in Canada.

122. These palpable and over-riding errors of the Trial Judge demonstrate that this appeal should be dismissed.

iv. Error in Not Finding an Imminent Breach and Substantial Risk of Harm

123. The Trial Judge made several palpable and overriding errors in determining that the apprehended breach of the peace was not imminent; there was no specific, identifiable substantial risk of harm which the officers' actions sought to prevent, and that the removal of the Appellant from DCE was not reasonably necessary.

124. The Trial Judge misapprehended and/or ignored the following relevant evidence:

i. The Appellant's evidence that his presence on DCE caused an immediate reaction from the Indigenous demonstrators and caused him to fear for his safety. This evidence accords with the evidence of the Respondents and the videotape.[222]

ii. The Appellant's evidence that he only came off of DCE when arrested.[223]

iii. The Respondents' evidence as to how quickly the events transpired, thereby limiting the available options to diffuse the situation.[224] This can be seen on the videotape.

iv. The Appellant's evidence that his removal from DCE would "diffuse" the situation and the evidence that it in fact did.[225]

v. The Respondents' experiences policing the conflict in Caledonia and their knowledge of Caledonia, the two sides to the conflict and the speed with which situations can rapidly escalate.[226]

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[222] Fleming Direct, **RR, Vol I, Tab 2B, pp17-18**; Fleming Cross, **RR, Vol I, Tab 2E, p44, L19-26**; Gibbons Direct, **RR, Vol II, Tab 2KK, pp129-130**; Cudney Direct, **RR, Vol II, Tab 2X, p33-34, Tab 2Y, pp38-42**; Cudney Cross, **RR, Vol II, Tab 2Z, p46, L22-24, Tab 2AA, p56-57**; Bracnik Direct, **RR, Vol II, Tab 2DD, p77**; Miller Direct, **RR, Vol I, Tab 2O, p165-166**; Miller Cross, **RR, Vol I, Tab 2S, p190, L2-7**; Lorch Direct, **RR, Vol II, Tab 2T, p7, L11-19**; Courty Direct, **RR, Vol II, Tab 2II, p116, L11-26**; Cole Direct, **RR, Vol II, Tab 2GG, p102-108**.

[223] Fleming Direct, **RR, Vol I, Tab 2B, pp17-18**.

[224] Miller Direct, **RR, Vol I, Tab 2P, p172, L15-29**; Miller Cross, **RR, Vol I, Tab 2R, pp184-185, Tab 2S, p186, L22-25**; Cudney Cross, **RR, Vol II, Tab 2AA, p57, L1-9**. See also Courty Direct, **RR, Vol II, Tab 2II, p119, L9-21**; Gibbons Cross, **RR, Vol II, Tab 2LL, p137, L8-24**.

[225] Fleming Direct, **RR, Vol I, Tab 2B, p18**.

125. Moreover, on the basis of no evidence, the Trial Judge speculated that the approaching Indigenous demonstrators could have been upset with the Respondents, and not the Appellant, and if they were yelling "get off our land", they were yelling at the Respondents, and not the Appellant. There is no evidence to support the Trial Judge's speculations.

126. The majority considered the evidence, including that of the officers, the videotape of events, and the Appellant's testimony,[227] and found that the apprehended breach was imminent and the risk of harm substantial, and that the Trial Judge's conclusion to the contrary was "fundamentally flawed and cannot stand".[228] The majority also found that the Trial Judge's speculation that the Indigenous demonstrators may have been angry with the Respondent Officers and not the Appellant had "no foundation in the evidence."[229] The dissent disagreed and would have deferred to the findings of the Trial Judge which disregarded the evidence of the Appellant and the officers.

127. With respect, the Trial Judge's findings, in respect of an imminent breach and substantial risk of harm, are "fundamentally flawed" and demonstrates that this appeal should be dismissed.

v. Error in Finding that the Use of Force Was Unreasonable and Excessive

128. Having found that the arrest of the Appellant was unlawful, and therefore the Respondent Officers could not avail themselves of subsection 25(1)(b) of the *Criminal Code,*[230] the Trial Judge proceeded to determine that the use of force to arrest the Appellant was unreasonable and excessive. The majority of the Ontario Court of Appeal correctly determined that the Trial Judge's findings were "irretrievably tainted" by her erroneous conclusion that the arrest of the Appellant was unlawful and could not be relied upon".[231] It cautioned that police are not to be

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[226] Skinner Direct May 24, **RR, Vol I, Tab 2H, pp83-84**; Skinner Cross, **RR, Vol I, Tab 2J, p105, L13-27, p106, L1-7.** See also *MacInnis*, *supra* note 149 at paras 49-56; *R v Wilhelm*, *supra* note 181 at paras 113-115**.**
[227] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 53**.
[228] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 59**.
[229] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 53**.
[230] *Criminal Code*, RSC 1985, c C-46, s 25(1)(b).
[231] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 64**.

held to a standard of perfection and their actions are not to be judged with the benefit of hindsight.[232] Ontario agrees.

129. The majority reviewed the evidentiary record and found that the escalation of the force used to arrest the Appellant was a direct result of the Appellant's refusal to release what the officers perceived to be a potential weapon: [233]

> The last person I would have ever handed my flag to that day would have been a member of the OPP… I'm not sure I can properly convey the anger that I felt but if I had to pick one group on the planet that would be the absolute last that I would have handed my flag to that day it would have been the very group asking for it...[234]

130. The majority also found that the injuries resulted when an unknown officer, prior to the handcuffing, "yanked" the Appellant's left arm.[235] The key issue was *when*, *how* and *why* the Appellant's arm was "yanked" because: "If the Respondent [the Appellant] was struggling the entire time he was on the ground until he was handcuffed, it is possible that the force used to gain control of his arms, remove the flagpole and apply the handcuffs, did not involve the excessive use of force, even if an injury resulted."[236] The majority correctly found that this information is not currently in the record and could be acquired from the officer who did the "yanking" - none of the officers were asked who "yanked" the Appellant's arm before the handcuffs were applied and the Trial Judge did not make any findings on this point.[237]

131. The Appellant's position is that there is sufficient evidence to find liability. In paragraph 133 of his factum, he states that the evidence is uncontested that the Appellant's left arm was yanked after he complied in putting his arm behind his back. The Appellant did not testify that he complied. Rather he testified that his left hand was "put" behind his back before it was "yanked" and before he was handcuffed.[238] Further, the arresting officer was not asked if he

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[232] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 63**. See also *R v Nasogaluak*, 2010 SCC 6 at para 35; *R v DaCosta*, 2015 ONSC 1586 at para 98; *Chartier v Greaves*, [2001] OJ No 634 at para 64 (Ont SCJ), **RBOA, Tab 14**; *Wilsdon v Durham Regional Police*, 2011 ONSC 3419 at para 86; *Webster v Edmonton (City) Police Service*, 2007 ABCA 23 at paras 27-29.
[233] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 27, 65**.
[234] Fleming Cross, **RR, Vol I, Tab 2E, p49, L10-17.** See also: Fleming Direct, **RR, Vol I, Tab 2B, p20, L14-15, p22, L10-16**.
[235] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 28, 66**.
[236] OCA Decision, per majority, **AR, Vol I, Tab 5 at para 69**.
[237] OCA Decision, per majority, **AR, Vol I, Tab 5 at paras 66-71**.
[238] Fleming Direct, **RR, Vol I, Tab 2B, p25, L3-16**.

"yanked" the Appellant's arm or if any other officer did so before he hand-cuffed the Appellant. The majority was correct in finding that there is insufficient evidence to determine the *when, how* and *why* the Appellant's arm was "yanked" and correctly ordered a new trial on this narrow issue.

132. Alternatively, based on the foregoing, the Respondents submit that should this Honourable Court decide that the record is sufficient to determine if excessive force was used, it should find that the Trial Judge made palpable and over-riding errors, her conclusions were unreasonable and unsupported by the evidence, and her decision should not be upheld.

PART IV – SUBMISSIONS CONCERNING COSTS

133. The Appellant, if successful, seeks his costs at trial in the amount of $151,000 and the amount in costs the dissent at the Court of Appeal would have awarded him should he have been successful before that Court ($53,000 for the appeal, less $5,000 for the cross-appeal). The Appellant also seeks his costs before this Honourable Court.

134. At the Court of Appeal, the parties agreed to costs in the amount of $53,000 for the appeal and $5,000 for the cross-appeal. With leave, the Appellant made further written submissions that he should not have to pay costs because his claim against Ontario for $500,000 was "public interest litigation". In an endorsement, signed by all three members of the panel, the Court rejected the Appellant's submission and fixed costs in the amount of $25,000.[239]

135. Ontario submits that should the Appellant be successful, he should only be entitled to the costs awarded by the Ontario Court of Appeal in the amount of $25,000, in addition to the costs of the trial. There is no basis for finding that the Appellant should be awarded more than the costs Ontario was awarded at the Court of Appeal.[240] If Ontario is successful, it should be awarded the agreed upon costs of the trial in the amount of $151,000, costs awarded in the Court of Appeal in the amount of $25,000, and costs of the appeal before this Honourable Court.

PART V – ORDERS SOUGHT

136. Ontario respectfully requests that this appeal be dismissed with costs.

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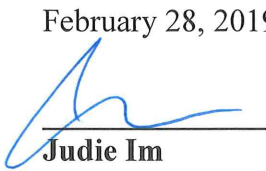
[239] Endorsement of the Court of Appeal re Costs, **RR, Tab 1**.
[240] *Win Sun Produce Co v Albert Fisher Canada Ltd*, 1999 BCCA 94; *Tripkovic v Glober*, [2003] 64 OR (3d) 481 (Ont CA).

PART VI – SUBMISSIONS ON CASE SENSITIVITY

137. Not applicable.

February 28, 2019



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PART VII – TABLE OF AUTHORITIES

No.	JURISPRUDENCE	PARAGRAPH/ PAGE
1.	*Austin v Commissioner of Police*, [2007] EWCA Civ 989, aff'd [2009] UKHL 5.	20-23, 27-36, 67-69
2.	*Brown v Regional Municipality of Durham Police Service Board* (1998), 43 OR (3d) 223 (Ont CA), leave to appeal to SCC granted but discontinued, [1999] SCCA No 87.	61, 73-74, 76-79
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4.	*Demers v Montreal Steam Laundry Co.*, (1987) 27 SCR 537 (SCC).	538-539
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7.	*Foulkes v Chief Constable of the Merseyside Police,* [1998] 3 All ER 705 (CA UK).	710-711
8.	*Hayes v Thompson* (1985), 17 DLR (4th) 751 (BCCA).	5-6
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10.	*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41.	54-55, 68, 73
11.	*Housen v Nikolaisen*, 2002 SCC 33.	8, 10, 26-28, 31-36
12.	*Humphries v Connor*, (1864) 17 ICLR 1 (CA UK).	
13.	*Knowlton v R*, [1974] SCR 443(SCC).	
14.	*Laporte v Chief Constable of Gloucestershire Constabulary*, [2006] UKHL 55.	30, 62, 66
15.	*Madsen Estate v Saylor*, 2007 SCC 18.	24
16.	*McHale v Ontario*, 2014 ONSC 5179.	3-7, 61, 64-67
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18.	*Operation Dismantle Inc v R*, [1985] 1 SCR 441(SCC).	31

19.	*Percy v DDP,* [1995] 1 WLR 1382 (QB UK).	1392
20.	*R (Hicks) v Commissioner of Police for the Metropolis*, [2012] EWHC 1947 (Admin), aff'd [2017] UKSC 9.	4, 5-6
21.	*R c Bilodeau* (2004), JE 2004-1990 (QCCA).	56-60
22.	*R v Alexson*, 2015 MBCA 5 .	20
23.	*R v Aucoin,* 2012 SCC 66.	40, 98
24.	*R v Botten*, [2012] OJ No 5053 (Ont SCJ).	
25.	*R v Carelse-Brown*, 2016 ONCA 943.	48, 56
26.	*R v Clayton*, 2007 SCC 32.	21-31, 33, 41, 45-53, 61, 72, 75, 97, 130
27.	*R v Collins*, [2012] NJ No 170 (NL Prov Ct).	
28.	*R v Custer*, [1984] 4 WWR 133 (SKCA).	22, 25, 39-44
29.	*R v DaCosta*, 2015 ONSC 1586.	98
30.	*R v Dedman*, [1985] 2 SCR 2 (SCC).	14, 16, 66-69
31.	*R v Dillon*, [2006] OTC 342 (Ont SCJ).	26, 50
32.	*R v E(C)*, 2009 NSCA 79.	
33.	*R v Faulkner* (1988), 4 WCB (2d) 207 (BCCA).	9
34.	*R v Godoy* (1997)*,* 33 OR (3d) 445 (Ont CA), aff'd [1999] 1 SCR 311 (SCC).	27-31
35.	*R v Godoy,* [1999] 1 SCR 311 (SCC).	16, 21-22, 28
36.	*R v Golub* (1997), 34 OR (3d) 743 (Ont CA).	18
37.	*R v Grant*, 2009 SCC 32.	21
38.	*R v Howell,* [1982] QB 416 (CA UK).	
39.	*R v Hufsky*, [1988] 1 SCR 621(SCC).	
40.	*R v Kang-Brown*, 2008 SCC 18.	22
41.	*R v Ladouceur*, [1990] 1 SCR 311 (SCC).	
42.	*R v Larson,* 2011 BCCA 454.	39, 50-51
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45.	*R v Mann*, 2004 SCC 52.	26, 39
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47.	*R v Patterson* (1930), [1931] 3 DLR 267 (Ont CA).	
48.	*R v Pavletich* (1932), 58 CCC 285 (Que RC).	
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53.	*R v Simpson* (1993), 12 OR (3d) 182 (Ont CA).	55
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62.	*Webster v Edmonton (City) Police Service*, 2007 ABCA 23.	27-29
63.	*Wilsdon v Durham Regional Police*, 2011 ONSC 3419.	86
64.	*Win Sun Produce Co v Albert Fisher Canada Ltd*, 1999 BCCA 94.	
65.	*Wise v Dunning*, [1902] 1 KB 167 (UK).	
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67.	*Criminal Code*, RSC 1985, c C-46.	25(1)(b), 31(1), 129(a).

68.	*Code criminel* (L.R.C. (1985), c C-46).	25(1)(b), 31(1), 129(a)
69.	*Police Services Act*, RSO 1990, c P15.	1,42(1)(a).
70.	*Services Policiers* (Loi sur les), LRO 1990, c P15.	1, 42(1)(a)