

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

B E T W E E N:

RANDOLPH 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. COURTNEY 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)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Respondent police service is not an ordinary litigant. It has the power to effect a common law arrest in order to prevent a breach of the peace, but only when justified. It can also decline to exercise this power completely. Within this continuum of discretion is both legal and factual uncertainty and, as this appeal demonstrates, potential legal liability. It is this uncertainty that divided the Court of Appeal for Ontario that the CLA wishes to address in these submissions.

PART II – THE CLA’S POSITION ON THE QUESTIONS IN ISSUE

2. The arrest of a citizen in Canada who is acting lawfully and exercising their *Charter*-protected rights is extraordinary. While the existence of this arrest power is not an issue in this appeal, the power is fraught with the potential for abuse. This arises from the elasticity of the *Waterfield* ancillary common law power doctrine.¹ The CLA submits that this elasticity, and the uncertainty it brings, could be addressed by this Court adopting the following approach distilled from the CLA’s reading of the relevant case law:

Stage 1 of *Waterfield*:

The *existence* of the arrest power should be defined by the objective of police duty to prevent a breach of the peace that is both imminent and would result in violence but for the arrest;

Stage 2 of *Waterfield*:

As the claimant of the power, the police have an *evidentiary onus* to establish that the preventive arrest was necessary and proportionate in the circumstances to discharge this duty; and

No Criminal Law Purpose

The Court must be satisfied that the arrest does not have a colourable criminal law purpose.

¹ By common law powers the CLA refers to those arrest powers that exist outside of ss. 30 and 495 of the *Criminal Code*. These statutory arrest powers are not at issue in this proceeding.

PART III – STATEMENT OF ARGUMENT

3. The CLA submits that the legal issues in this case fall to be decided under the first stage of the *Waterfield* test, as the threshold requirement of imminence should to be considered in whether the police action falls within the common law duty to preserve the peace.

4. Separating the threshold requirement of imminence into the first stage of *Waterfield* rather the inherently discretionary balancing stage has three distinct benefits: (a) it provides for greater certainty regarding use of the arrest power, (b) it ensures consistency with the common law source of the power and, (c) it serves as a clear limitation on the common law authority to execute a preventive arrest, ensuring that this power appropriately remains an extraordinary one. This approach would help define the evidentiary burden on the police at the second stage of the *Waterfield* test and also guard against the colourable use of the preventive arrest power for criminal law purposes.

A. THE ARREST POWER AT COMMON LAW

Stage 1: The Duty to Preserve the Peace – The Imminence and Risk of Violence Define the Scope of the Common Law Duty

5. In Canada, police powers are located at the intersection of the common law and statute. In Ontario, as with some other provinces, the *Police Services Act* provides:

Duty of the Police

42 (1) The duties of a police officer include,
 (a) preserving the peace,...

Powers and duties of common law constable

(3) A police officer has the powers and duties ascribed to a constable at common law. R.S.O. 1990, c. P.15, s. 42 (2, 3).²

² *Police Services Act*, R.S.O. 1990, c. P.15. See also: *Police Act*, R.S.B.C. 1995, c. 367, s. 7; *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, s. 36; *The Police Services Act*, C.C.S.M. c. P94.5, s. 25; *Royal Newfoundland Constabulary Regulations*, C.N.L.R. 802/96, s. 6; *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 18.

In some provinces the statutory police duties are phrased differently and do not include a specific duty to preserve the peace: see *Police Act*, C.Q.L.R. c. P-13.1, s. 48; *Police Act*, S.N.B. 1977, c. P-9.2, s. 12; *Police Act*, S.N.S. 2004, c. 31, ss. 30-31; *Police Act*, R.S.P.E.I. 1988, c. P-11.1, s. 7

6. The *Police Services Act* does not define “preserving the peace”. Nor does it distill what this duty requires at common law. This task falls to the courts. The leading decision on this issue in Canada is *Brown v. Durham (Regional Municipality) Police Force*, where Doherty J.A. held that “[i]n determining whether police conduct comes within the common law ancillary doctrine, *the nature of the police duty giving rise to that conduct is important*”.³ The nature of the duty serves to define the validity of the power because, as Doherty J.A. held, “police conduct which may not be justified as ancillary to the performance of one duty may be justified if the police are performing some other duty”.⁴ Some precision is thus necessary at the first stage of *Waterfield*.

7. This Court has never uncritically accepted a claimed *Waterfield* power, but has insisted that the power be defined with some precision in relation to the scope of the authorizing duty. For example, in *R. v. Godoy*⁵ this Court considered whether the police power to forcibly enter a residence existed at common law. It did not automatically derive this power from *Waterfield*. Rather, Lamer C.J. concluded that this power existed under the police duty to protect life and safety, but that this duty itself was only triggered by a 911 call.⁶ The power did not exist in the abstract, and the police could only be acting within the scope of their duty to protect life and safety if they had a reason to believe that life or safety was in peril. In *Godoy*, the distress call acted as a threshold requirement setting the scope of the police duty, with the necessity of the police action in forcibly entering a residence justified in relation to that duty.

8. *Waterfield*, like this Court’s prior decisions recognizing common law police powers, was a criminal case. This Court has generally only considered common law police powers in criminal cases.⁷ The questions presented by this case raise questions of first instance for this Court.⁸

³ *Brown v. Durham (Regional Municipality) Police Force* (1998), 43 O.R. (3d) 223, [1998] O.J. No. 5274 (C.A.) at para. 63.

⁴ *Ibid.*

⁵ [1999] 1 S.C.R. 311.

⁶ *Ibid* at paras. 15-16. A similar approach was utilized in *R. v. MacDonald*, 2014 SCC 3 per Lebel J. at para. 33.

⁷ *Godoy, supra*, was a criminal case as the accused was arrested for assaulting his wife after the police entered the apartment in response to the wife’s 911 call. However, Lamer C.J. was careful to state that the duty to respond to distress calls is not limited to cases of suspected criminal activity (at para. 16).

While it is beyond dispute that the police have a duty to preserve the peace, the central issue in this appeal is *what does this mean and when can it authorize the interference with individual liberty outside of the criminal law*. The CLA submits that this Court should define the nature and the scope of the duty to preserve the peace at common law restrictively, lest powers ancillary to this duty become ones of abuse.

9. A key starting point is the reasons of Doherty J.A. in *Brown*, where he held that:

[T]wo features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice.⁹

Doherty J.A. made no mention of whether this element of imminence fell to be considered at the first or second stage of the *Waterfield* test, only stating:

To properly invoke either power, the police officer *must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained*.¹⁰

10. Courts have similarly tended to assume that the element of imminence ought to be considered at the second stage of the *Waterfield* test, without any authoritative statement either way.¹¹ This Court has never made any ruling on this issue. Given the uncertainty on where the concept of imminence fits in, the CLA submits that English common law is instructive on this point.

⁸ This Court has occasionally referenced the duty to preserve the peace in other criminal cases, but has never been asked to justify a police power that is purely ancillary to this duty: see, e.g., *R. v. Landry*, [1986] 1 S.C.R. 145 at para. 54; *R. v. A.M.*, 2008 SCC 19 at para. 161.

⁹ *Ibid* at para. 74. He defined a breach of the peace as follows:

“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. A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone.” (at para. 73)

¹⁰ *Brown*, *supra* at para. 74.

¹¹ See, e.g., *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 at paras. 92-100.

11. In *R. (Laporte) v. Chief Constable of Gloucestershire Constabulary*,¹² the House of Lords interpreted the nature of the preventive arrest power restrictively in the context of civil protests and expressive activity in analogous circumstances.¹³ Four opinions were rendered, with the majority rejecting a deferential ‘reasonableness’ test to justify the exercise of the preventive arrest power. Key to each judge’s ruling was the concept of imminence: it is only where a breach of the peace is imminent that any police interference with liberty can be justified at all. Imminence, therefore, serves as a threshold. This was expressed most succinctly in the reasons of Lord Mance:

I regard the reasonable apprehension of an imminent breach of the peace as an important threshold requirement, which must exist before any form of preventive action is permissible at common law. Where a reasonable apprehension of an imminent breach of the peace exists, then the preventive action taken must be reasonable or proportionate. *But the threshold for preventive action is neither a broad test of reasonableness nor flexible.*

.....

The requirement of imminence is relatively clear-cut and appropriately identifies the common law power (or duty) of any citizen including the police to take preventive action as a power of last resort catering for situations about to descend into violence.¹⁴

12. Focusing on the imminence and risk of violence objective as the defining elements of the scope of the duty under the first stage of *Waterfield* has a number of benefits. First, it provides greater certainty for when the police can act *at all* – an issue that divided the Court below. For the majority, the prior events of Caledonia integrally informed the *nature of the duty*. For the dissenting judge, this was of no moment. Huscroft J.A. held that:

...[t]he public interest in reconciliation and negotiation with Indigenous communities is not a relevant consideration in determining the lawfulness of Mr. Fleming’s arrest for

¹² [2006] UKHL 55.

¹³ In *Laporte*, the applicant was on her way to protest the Iraq war at a military base. Violent protests had occurred at that base in the past, and the police implemented a protocol to prevent violence at this protest. The police stopped several buses of protestors on the way to the event, searched the buses, arrested several protestors, and then forced the rest to turn back to London. The House of Lords was asked to determine whether the police action was validly exercised pursuant to the common law police duty to preserve the peace.

¹⁴ *Laporte, supra* at para. 141.

breaching the peace. The exercise of his rights is not contingent on acknowledging or endorsing reconciliation and negotiation or any other government policy. Mr. Fleming was entitled to attend and participate in the Flag Rally regardless of its effect on the government's political goals at Caledonia or anywhere else, and, in particular, regardless of whether the Flag Rally was considered provocative by the government or the protesters.¹⁵

This debate largely vanishes if the duty to preserve the peace is confined to an imminent risk of violence which is the very wellspring of its common law existence.

13. Second, this duty to preserve the peace at common law should not be untethered from its underlying *objective of preventing violence*. Put differently, injecting policy considerations, such as fostering the process of reconciliation, into the common law duty would not only create uncertainty but could be dangerous in the long term. In terms of uncertainty, how could the police ever divine how an arrest would further the process of reconciliation, much less a reviewing court? Worse, if government policy is a marker for police duties when a citizen is acting (i) lawfully and, (ii) outside a regulated sphere, police powers could become limitless. This has extraordinary chilling potential. Any attempt to broaden the scope of the police duty to preserve the peace must be rejected and police powers should be constrained by the *objective* that the duty seeks to fulfill: prevention of violence and not furthering the policy objectives of the government of the day.

14. Third, the approach advocated by the CLA is consistent with this Court's prior jurisprudence on *Waterfield*. This Court has consistently taken a purposive approach when recognizing common law police powers, as it has consistently identified an integral connection between the *existence* of the police power and the *purpose* of the applicable common law duty. In *Dedman*, the preventive roadside sobriety check was integrally tied to the objective of the common law duty to protect life and property, given the danger that impaired drivers pose to the life and property of others on the highway. In *MacDonald*, the common law duty to protect life and property authorized the police to conduct a safety search where the search was reasonably necessary to eliminate an imminent threat to the safety of the public or police.¹⁶ In *Mann*, the duty to investigate and prevent crime required the police to have a reasonable suspicion of

¹⁵ *Fleming v. Ontario*, 2018 ONCA 160 at para. 99.

¹⁶ *MacDonald, supra* at para. 40.

criminal activity before any investigative detention could be lawful.¹⁷ A similar result should follow here. The common law arrest power must be integrally connected to the purpose of the common law duty to protect the peace which requires the police to demonstrate, as part of their onus to prove they were acting within the scope of their common law duty, that they had reasonable and probable grounds to believe there was an imminent risk of violence.

Stage 2: The Evidentiary Burden

15. Once the nature and scope of duty is defined, the evidentiary inquiry becomes more focused for both the parties and the reviewing court. Thus, as here, where the police assert that they were acting to prevent a breach of the peace and that they had reasonable and probable grounds to believe that a breach of the peace was imminent, the evidence should focus on how the arrest actually discharges that duty. This is the second stage of the *Waterfield* test, which examines the importance of the duty to the public good; the extent to which it is necessary to interfere with liberty to perform the duty; and the degree of interference with liberty. The CLA submits that the evidentiary onus must be on the police to justify the interference with individual liberties at the second stage of the *Waterfield* test.

B. No Criminal Law Purpose: The Preventative Arrest Power Ends Where the Criminal Law Begins

16. The CLA submits that the preventative arrest power must be distinct from the exercise of a detention or arrest effected for a criminal law purpose, lest it become a power of abuse that could mask colourable detention, arrest and search powers.¹⁸ This Court in *R. v. Mann*¹⁹ was careful to put parameters around the criminal law investigative detention power. The Court held:

The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the

¹⁷ *R. v. Mann*, 2004 SCC 52 at para. 34.

¹⁸ *Figueiras*, *supra* at para. 46.

¹⁹ 2004 SCC 52, [2004] 3 S.C.R. 59.

officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation.

...

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.²⁰

17. The CLA submits that courts must ensure that the common law preventive arrest power does not usurp the careful criminal law limits imposed by Parliament or seep into the investigative detention power that this Court staked out in *Mann*. Specifically, the CLA is concerned that the preventative arrest power at issue here could be used for a colourable purpose to expand criminal law powers of detention, interrogation and search. While the CLA submits that a threshold requirement of imminence at the first stage of the *Waterfield* test goes a significant way toward curbing potential colourable uses of this extraordinary power, the CLA further submits that an arrest effected to prevent a breach of the peace should have two hallmarks:

- (i) The arrest must be *qualitatively* limited. It cannot be exercised where the arrestee is suspected to have engaged in criminal activity unrelated to the apprehended breach of the peace.²¹ Nor would search powers necessarily follow, although this Court need not decide this issue in this case; and
- (ii) The arrest must be *quantitatively* limited. A detention may initially suffice, followed by a preventative arrest that must end the moment the risk of a breach to the peace dissipates.

18. The CLA submits that these two factors would serve as important control to ensure that preventive arrests do not become criminal law investigative detentions or arrests whose purpose are very different than the power at issue in this appeal.

²⁰ *Ibid* at paras. 34-35.

²¹ As Doherty J.A. explained in *Brown, supra*, at para. 75:

Neither the power to arrest in anticipation of the commission of an indictable offence nor the power to arrest for an apprehended breach of the peace is meant as a mechanism whereby the police can control and monitor on an ongoing basis the comings and goings of those they regard as dangerous and prone to criminal activity

C. CONCLUSION

19. The common law power to effect a preventative arrest where a citizen is acting both lawfully and exercising their *Charter* rights is extraordinary. The power, to the extent it exists at all, should be subject to clear limits in order to meet the benchmark set by Doherty J.A. in *Brown* that “we want to be safe, but need to be free.” The CLA submits that imposing a threshold requirement for an imminent risk of violence at the first stage of the *Waterfield* test effectively addresses the tension so concisely identified by Justice Doherty. The CLA submits that anything less will result in an unwarranted expansion of the power beyond that which the common law has ever recognized or should ever tolerate.

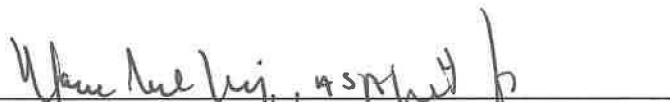
PART IV – SUBMISSIONS ON COSTS

20. The CLA does not seek costs, and requests that no costs be awarded against it.

PART V – NATURE OF THE ORDER REQUESTED

21. The CLA requests that it be allowed 5 minutes to provide oral argument at the hearing of the appeal. The CLA takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2019.


Per Louis P. Strezos and Michelle M. Bidulph
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PART VI – TABLE OF AUTHORITIES

Jurisprudence

Citation	Paragraph(s)
<i>Brown v. Regional Municipality of Durham Police Service Board</i> (1998) 131 CCC (3d) 1	6, 9, 17, 19
<i>R. v. Godoy</i> , [1999] 1 S.C.R. 311	7
<i>R. v. MacDonald</i> , 2014 SCC 3	7, 14
<i>R. v. Landry</i> , [1986] 1 S.C.R. 145	8
<i>R. v. A.M.</i> , 2008 SCC 19	8
<i>Figueiras v. Toronto (Police Services Board)</i> , 2015 ONCA 208	10, 16
<i>R. (Laporte) v. Chief Constable of Gloucestershire Constabulary</i> , [2006] UKHL 55	11
<i>Fleming v. Ontario</i> , 2018 ONCA 160	12
<i>R. v. Mann</i> , 2004 SCC 52	14, 16
<i>Dedman v. The Queen</i> , [1985] 2 S.C.R. 2	14

Legislation

Citation	Paragraph(s)
<i>Criminal Code</i> , R.S.C. 1985, c. C-34, ss. 30, 495 <i>Code criminel</i> (L.R.C. (1985), ch. C-46), ss. 30, 495	2
<i>Police Services Act</i> , R.S.O. 1990, c. P.15, s. 12 <i>Loi sur les services policiers</i> , LRO 1990, c P.15, s. 12	5
<i>Police Act</i> , R.S.B.C. 1996, c. 367, s. 7	5
<i>The Police Act, 1990</i> , S.S. 1990-91, c. P-15.01, s. 36	5
<i>The Police Services Act</i> , C.C.S.M. c. P94.5, s. 25 <i>Loi sur les services de police</i> , C.P.L.M. c. P94.5, s. 25	5
<i>Royal Newfoundland Constabulary Regulations</i> , C.N.L.R. 802/96, s. 6	5
<i>Royal Canadian Mounted Police Act</i> , R.S.C. 1985, c. R-10, s. 18 <i>Loi sur la Gendarmerie royale du Canada</i> (L.R.C. (1985), ch. R-10),	5

s.18	
<i>Police Act</i> , C.Q.L.R. c. P-13.1 <i>Loi sur la police</i> , P-13.1	5
<i>Police Act</i> , S.N.B. 1977, c. P-9.2 <i>Loi sur la police</i> (L.N.-B. 1977, ch. P-9.2)	5
<i>Police Act</i> , S.N.S. 2004, c. 31, ss. 30-31	5
<i>Police Act</i> , R.S.P.E.I. 1988, c. P-11.1, s. 7	5