Court File No.: 38087

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

B E TWE E N:

RANDOLPH (RANDY) FLEMING

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN IN 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 STEPHEN C. LORCH OF THE ONTARIO PROVINCIAL POLICE, PROVINICIAL CONSTABLE R. CRAIG COLE OF THE ONTARIO PROVINCIAL POLICE and PROVINCIAL CONSTABLE S. M. (SHAWN) GIBBONS OF THE ONTARIO PROVINCIAL POLICE

RESPONDENTS
(Appellants)

- and -

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INTERVENERS

INTERVENER'S FACTUM

FILED ON BEHALF OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA)*

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I. PART I – OVERVIEW AND STATEMENT OF FACTS

1. In *Brown v. Durham Regional Police Force*, Justice Doherty wrote that those "who prefer hard and fast rules are troubled by the fact-specific nature of the ancillary powers doctrine."[1] The Canadian Civil Liberties Association is firmly in the camp of those who are troubled by granting ill-defined and uncodified powers to police to arrest people who are acting lawfully in the pursuit of their right to express themselves and to engage in political protest. The CCLA submits that a common law power that allows police to deprive people of their fundamental *Charter* rights should be precisely and narrowly defined, *especially* if it can be exercised in myriad circumstances.

2. The CCLA does not suggest that the use of ancillary powers can never be justified. No reasonable person would challenge the necessity of police investigating apparent domestic violence after a 911 call for assistance is abruptly disconnected.[2] Like all other police powers, however, the use of the power should be subject to a rigorous *Charter* analysis, particularly where it is deployed to supress lawful free speech as opposed to being enlisted for the enforcement of the criminal law. The reasons of the majority in the Court of Appeal allude briefly to the appellant's right to walk on a public highway and participate in political protest, but focus almost entirely on the efficacy of the appellant's arrest.[3] As this Court has previously observed, "a state that valued police efficiency and effectiveness above other values, would be a police state."[4]

3. The ancillary common law powers of the police, which have been used to justify warrantless searches, spontaneous road blocks and the detention of pedestrians for investigative purposes, have been described as "beset with both uncertainty and controversy".[5] The power to arrest for apprehended breach of the peace is particularly concerning, as it is employed against persons who have neither committed an offence nor threatened to do so. This arrest power is evasive of curial review because, unlike an arrest where an offence has allegedly been committed and charges are laid, the circumstances giving rise to the deprivation of liberty rarely come before a court. The present civil claim is exceptional. In addition to all of the usual barriers to justice, the pecuniary damages associated with an isolated unlawful arrest do not ordinarily justify

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[1] (1998), 43 OR (3d) 223 ["*Brown*"] at ¶62
[2] *R. v. Godoy*, 1 SCR 311, 1999 CanLII 709 (SCC)
[3] *R. v. Godoy*, CanLII 557 (ON CA), [1997] OJ No 1408 at ¶37, 40, 56, 58
[4] *R. v. Clayton*, 2 SCR 725, 2007 SCC 32 (CanLII) ["*Clayton*"] at ¶68
[5] *Ibid* at ¶58

litigation. The societal cost is nevertheless very real where freedom of expression in respect of political matters is thwarted, undermined or chilled.

4. The CCLA takes no position on the facts of this case, beyond noting several key points that are not in dispute: When the appellant was arrested, he was engaged in political protest. He had not committed any offence, nor had he threatened to do so. In particular, he was not threatening violence, nor was violence threatened against him.[6]

II. PART II – STATEMENT OF POSITION ON QUESTIONS IN ISSUE

5. The CCLA's position concerning the questions in issue is as follows: The exercise of ancillary powers by police should be subject to a *Charter* analysis as proposed by Justices Binnie, LeBel and Fish in their concurring reasons in *Clayton*.

III. PART III - ARGUMENT

A. The Importance of Political Protest

6. The "importance of freedom of expression and of the protection of that freedom in a democratic society can never be overstated".[7] Both freedom of expression and freedom of peaceful assembly are fundamental to a functioning democratic society. They foster democratic discourse, truth finding and self-fulfilment.[8] The right to protest government activity lies at the very core of the guarantee of freedom of expression.[9]

7. Individuals engage in public debate, amplify their opinions and contribute to a democratic society through assemblies, which may include demonstrations, pickets, strikes, processions, rallies or sit-ins. This is inherently collective activity. Public streets are "clearly areas of public,

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[6] Appellant's Record ["AR"], Vol. IV, Tab 78, p 123, ln 18-24; AR Vol. IV, Tab 79, p 124, ln 9-17; AR Vol. IV, Tab 101, p 155, ln 2-6; Respondents' Record ["RR"], Vol. 1, Tab S, p 189, ln 21-32, p 190, ln 4-7

[7] *Morasse v. Nadeau-Dubois*, [2016] 2 SCR 232, 2016 SCC 44 (CanLII), *per* Wagner J., as he was, dissenting but not on this point.

[8] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 1 SCR 19, 2011 SCC 2 (CanLII) at ¶2

[9] *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 (CanLII), 124 OR (3d) 641 ["*Figueiras*"] at ¶69

as opposed to private, concourse, where expression of many varieties has long been accepted".[10] Chief Justice Lamer confirmed that:

> … in an open democratic society, the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; ***the generosity and empathy with which such facilities are made available is an index of freedom***.[11]

8. Like lawsuits and labour strikes, political protests are not tea parties.[12] Legitimate political protests represent "a continuum of expressive activity" that runs the gamut from a handful of protestors walking back and forth carrying placards to rowdy crowds "shaking fists, shouting slogans, and blocking the entrances of buildings".[13]

9. The strike-zone for speech that will not only be tolerated, but must be facilitated, should be generous. Ideas which one age may regard as obvious, a later age may regard as absurd, and *vice versa*.[14] More than 60 years ago, this Court held that the proper functioning of government "demands the … virtually unobstructed access to, and diffusion of, ideas", which is achieved by liberation of the individual "from subjective as well as objective shackles".[15]

10. In the present case, the appellant was (literally) shackled without having committed an offence or having threatened to do so. Similarly, during the Group of 20 protests in Toronto in 2010, hundreds of passers-by, never mind peaceful protesters, were subjected to mass arrest and confinement. In these and countless other examples, police have relied on common law power to effect arrests for an apprehended breach of the peace. As this is a common law power, it is incumbent on courts to confine and restrict its use in a manner that ensures that the ancient right to freedom of expression is not reduced to a hollow and pious aspiration. In dealing with

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[10] *Montréal (City) v. 2952-1366 Québec Inc.*, 3 SCR 141, 2005 SCC 62 (CanLII) at ¶81
[11] *Committee for the Commonwealth of Canada v. Canada*, 1 SCR 139, 1991 CanLII 119 at ¶3 [Emphasis added]
[12] *RWDSU Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, 1 SCR 156, 2002 SCC 8 (CanLII) ["*Pepsi*"] at ¶90 and *Groia v. Law Society of Upper Canada*, 1 SCR 772, 2018 SCC 27 (CanLII) at ¶3
[13] *Pepsi*, *supra* at ¶30
[14] Mills, John Stuart, *On Liberty and Considerations on Representative Government*, Edited by R. B. McCallum (Oxford: Basil Blackwell, 1946) cited in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at ¶13
[15] *Switzman v. Elbling and A.G. of Quebec*, [1957] SCR 285 at ¶58

investigative detention in *R v Mann*, the majority held the potential for abuse inherent in a low-visibility exercise of discretionary power is a pressing reason for the Court to exercise its custodial role.[16]

B. The Problem with *Waterfield*

11. The common law powers that are ancillary to a police constable's duty to *inter alia* preserve the peace derive from the English Court of Appeal decision in *R v Waterfield*. In his concurring reasons in *R v Clayton*, Justice Binnie observed that *Waterfield* "is an odd godfather for common law police powers" in Canada, and noted that the case "has lived a rather modest existence" in its country of origin.[17] Justice Le Dain observed in *Dedman v The Queen* that "it must be said respectfully that neither *Waterfield* nor most of the cases which have applied it throw much light on the criteria for determining whether a particular interference with liberty is an unjustifiable use of [police] power".[18] All of this is correct. The test in *Waterfield* is entirely circular: the determination of whether the use of an amorphous and uncodified police power is justified, ought not to be determined on the basis of whether or not it can be justified.

12. Beginning in *Dedman*, Canadian courts have simultaneously extended and attempted to more precisely define the scope of ancillary police powers. In a modest improvement over *Waterfield*, this Court held in *Dedman* that the exercise by police of a power that interferes with liberty must be "necessary" for effecting a proper duty, and must be "reasonable, having regard to the nature of the liberty interfered with".[19] This test was further refined in *R v MacDonald*, in which this Court held that in addition to determining if the infringement of liberty is necessary, a reviewing court will consider the importance of the duty, and the extent of the interference with individual liberty. The majority in *MacDonald* also referred with approval to the "powerful dissent" in the *Wiretap Reference*, in which Chief Justice Dickson "stressed the critical importance of a narrow reading of the *Waterfield* test".[20]

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[16] *R. v. Mann*, 3 SCR 59, 2004 SCC 52 (CanLII) ["*Mann*"] at ¶18
[17] *Ibid*, at ¶75
[18] *Dedman v. The Queen*, [1985] 2 SCR 2, 1985 CanLII 41 (SCC) ["*Dedman*"] at ¶69
[19] *Ibid*, at ¶69
[20] *R. v. MacDonald*, SCC 3, [2014] 1 SCR 37 at ¶38

13. The power to arrest for apprehended breach of the peace is a remarkable example of ancillary police powers, as it is used against those who are acting entirely lawfully. In *Brown*, the Court of Appeal for Ontario understandably held that it may only be deployed if the apprehended breach is imminent and the risk that the breach will occur is substantial.[21] An arrest power that is predicated on a police officer's assessment of what a person may do in the future requires exactitude.[22] Notably, the Court in *Brown* was clear that 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."[23]

14. Thus, in order to justify their conduct in the case before the Court, the police were required to satisfy the trial judge that there was a (i) substantial risk of (ii) imminent harm to someone, that (iii) no less intrusive course of action was available and it was therefore (iv) necessary to arrest the appellant to maintain the peace, and that this was (v) a reasonable course of action in circumstances where the appellant was not only acting entirely lawfully, but engaging in constitutionally protected expressive activity.[24]

15. This was no small hill to climb. Political protests are sometimes accompanied by the risk of violence, particularly where there is a counter-protest or where a protest is composed of diverse groups. The same is true with labour picketing, which "is a vital and constitutionally sanctioned means of collective expression", but also a potential "occasion of social conflict" in "what is often a charged atmosphere". In these "evolving human dramas, … risks of property damage, personal injury or obstruction of lawful entry are best controlled by flexible and even-handed policing".[25]

16. State authorities should be required to plan responses to political protest in order to de-escalate tensions, reduce the risk of violence and further the ability of protesters to continue to

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[21] *Brown, supra*
[22] *Brown, supra*
[23] *Brown, supra*
[24] Appellant's Record ["AR"], Vol. IV, Tab 78, p 123, ln 18-24; AR Vol. IV, Tab 79, p 124, ln 9-17; AR Vol. IV, Tab 101, p 155, ln 2-6; Respondents' Record ["RR"], Vol. 1, Tab S, p 189, ln 21-32, p 190, ln 4-7; *Brown, supra*
[25] *Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Workers of Canada, Local 2693,* 2001 CanLII 24071 (ON CA) at ¶16

engage in legitimate protest.[26] Any heightened duties the police may owe to persons apparently threatening violence, including the duties that are rightly owed to indigenous protesters under the Aboriginal Critical Incident framework, should not vitiate the rights and freedoms of other protesters, including counter-protesters. That is, police should be required to establish that precautionary measures were put in place and that efforts to de-escalate were exhausted before they will be vindicated in a decision to arrest protesters who are behaving lawfully.

17. The police cannot credibly assert that it is 'necessary' to drag a peaceful and law-abiding protester off the field of protest unless they can establish that they have first explored alternatives. A policy that is fixed in advance cannot, by definition, assess the imminence of a threat of the breach of the peace in a subsequent, dynamic situation, the extent of the risk, or the measures short of shackling a protester that may be available in order to address the risk.[27] The narrative in the case at Bar is missing the part where, upon approaching the appellant, the police simply asked him to step back to the road.

18. Significant resources were devoted to planning the police response to the Flag Day protest. This culminated in an Operational Plan that directed that protesters be charged with a criminal offence immediately upon crossing whatever line a police officer might draw.[28] There is nothing in the Plan about how any potential breaches of the peace might be addressed by measures that would permit expressive political activity to continue if police detected a risk of violence. As the majority in the Court of Appeal correctly noted, the officer who arrested the appellant "told him that he was under arrest to prevent a breach of the peace *in accordance with OPP policy*".[29]

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[26] United Nations General Assembly, Human Rights Council, *Joint Report of the Special Rapporteurs on the Rights to Peaceful Assembly and Extrajudicial, Summary or Arbitrary Executions and the Proper Management of Assemblies*, ¶52, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016)

[27] *Ibid,* dissenting reasons of Huscroft J.A. at ¶84

[28] AR, Vol. V, Tab 118, p 11. Specifically, the Plan contemplates that protesters could be "processed" (i.e. arrested) "once they make" (i.e. as soon as) any "attempt to breach or circumvent [a] certain point [that has been] identified by [an] officer".

[29] *Fleming v. Ontario*, 2018 ONCA 160 (CanLII) at ¶26 [Emphasis added]

19. Two recent cases arising from police misconduct at the G20 meetings in Toronto demonstrate that the formulaic invocation of the power to arrest for apprehended breach of the peace, in order to prevent peaceful protest, results in the unlawful deprivation of basic liberties.

20. In *Fenton v. Toronto Police Service*, the senior ranking police officer at the G20 who ordered the mass arrest and detention of hundreds of entirely peaceful demonstrators and by-standers was disciplined under the *Police Services Act*. The Hearing Officer concluded that he purposely invoked the arrest power for apprehended breach of the peace "as a means to an end" without regard to whether the legal requirements were satisfied.[30] The officer "decided to make the orders and worry about the fallout later."[31]

C. The Need for a *Charter* Analysis

21. In *Figueiras v Toronto Police Service*, another proceeding arising from police misconduct at the G20, ancillary powers were abused by a frontline officer who decided to stop people and conduct random warrantless searches of their belongings. As in this case, an officer determined in advance that he was going to curtail the rights of protesters. He interfered with the protesters' liberty interests based on his "generalized suspicions of demonstrators as a group, not as a result of an individualized objective assessment".[32]

22. In *R v Clayton*, this Court held that police could invoke their ancillary powers to justify erecting a roadblock in response to a reliable report that men carrying handguns had been sighted in public. Writing for the majority, Justice Abella held that the police conduct was necessarily constitutional provided it was lawful. The *Waterfield* test was said to be:

> "... consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk.[33]

23. In concurring reasons, Justice Binnie, writing for himself and Justices LeBel and Fish, disagreed with the majority's endorsement of the *Waterfield* test. Asking whether the use of a

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[30] *Fenton, Supt. Mark v Toronto Police Service*, 2017 ONCPC 15 (CanLII) at ¶¶100, 113 and 146
[31] *Ibid*, at ¶113
[32] *Figueiras, supra* at ¶113; AR, Vol. III, Tab 17, pp. 15-16
[33] *Clayton, supra*, at ¶21

police power is reasonably necessary "is not a *Charter* test, and is not an adequate substitute for proper *Charter* scrutiny".[34] Justice Binnie referred to academic commentary that characterizes *Waterfield* as "something of a Trojan horse for the expansion of police powers", and concluded that the "growing elasticity of the concept of the common law police powers must … be subjected to explicit *Charter* analysis:"

> It seems to me problematic in a case like this, however, to say the authorizing law is subject to *Charter* scrutiny without in fact subjecting the authorizing law to any recognizable *Charter* scrutiny. My preference is to conduct '*Charter* scrutiny' using our usual *Charter* framework of analysis rather than calling in aid a British case like *Waterfield* decided almost 20 years before the Canadian *Charter* came into existence. ... The *Oakes* test, unlike *Waterfield*, is based on the wording of the *Charter* itself. … Conflating in a *Waterfield*-type analysis the consideration of the individual's ss. 8 and 9 rights and society's s. 1 interests can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of *Charter* analysis.[35]

24. The *Waterfield* test, even as refined in *Dedman* and later Canadian cases, does not duplicate a *Charter* section 1 analysis, most notably because there is no express recognition of the presumptive paramountcy of the rights or freedoms with which the state has interfered, or the requirement that the Crown demonstrably justify the exercise of the power as a reasonable limit on *Charter* protected rights. Nor is there express reference to minimal impairment. As Justice Binnie noted, the *Charter* standard is higher: "*Dedman* should not provide an end run around *Oakes*".[36]

25. While some might argue that the distinction is more imagined than real, it has immediate significance in cases where there are a number of rights and freedoms at stake, particularly freedom of expression.

26. In *Figueiras*, a police officer invoked ancillary powers to prevent a demonstrator from attending a political protest in support of animal rights at the G20 summit unless he submitted to a warrantless search of his belongings. At the Court of Appeal for Ontario, Justice Rouleau wrote for a unanimous court that the interplay between *Waterfield* and *Oakes* is "particularly important"

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[34] *Ibid*, at ¶58
[35] *Ibid*, at ¶59
[36] *Ibid*, at ¶79

given the nature of the freedoms with which the state had interfered. He noted that the *Waterfield* jurisprudence deals predominantly with rights under ss. 8, 9 and 10 of the *Charter*, which have internal limits. The majority reasons in *Clayton* concerning the constitutionality of a police roadblock turned on this very point: "A detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the *Charter*."[37] When police are found to have acted in accordance with their common law ancillary powers, the internal limits in ss. 8 and 9 (*unreasonable* search, *arbitrary* detention) are deemed to have been respected, and there is no *Charter* breach that must be justified under s. 1.

27. Justice Rouleau noted in *Figueiras* that the same is not true with respect to a breach of s. 2 rights:

> By contrast, s. 2(b) guarantees an unqualified right to freedom of expression, without internal limits, the infringement of which falls to be justified under s. 1: Peter W. Hogg, *Constitutional Law of Canada*, … at p. 43-6. Thus, to the extent that the police conduct in this case infringed Mr. Figueiras's expressive rights, it is not immediately apparent that that conduct should be analyzed under *Waterfield* rather than under s. 1 (and, in particular, under the "prescribed by law" branch of the *Oakes* test).[38]

28. The starting point of Justice Rouleau's analysis was that the police conduct was a *prima facie* infringement of two liberties: freedom of expression under the *Charter* and the common law right to travel unimpeded on a public highway.[39] Justice Rouleau engaged in a comprehensive *Charter* analysis (applying the three-step test in *Irwin Toy Ltd. v Quebec*) and found that stopping a protester and requiring him to submit to a search as a condition of being permitted to proceed to the protest, had the effect of restricting freedom of expression and constituted a *prima facie* infringement of the protester's s. 2(b) right.[40]

29. Having determined a *prima facie* infringement of the right to freedom of expression, Rouleau J.A. proceeded to apply the *Waterfield* test, however in doing so he gave considerable weight to factors that are typically considered under a s. 1 *Oakes* test. In determining that the exercise of the power was not necessary, he noted that it was not rationally connected to the risk

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[37] *Ibid*, at ¶20
[38] *Figueiras, supra*, at ¶53
[39] *Figueiras, supra*
[40] *Ibid*

it sought to manage. He also engaged in a minimal impairment test, asking himself whether the effect on those targeted by the police conduct could have been minimized, and concluded that it could.[41] Thus, the Court held that the infringement of the demonstrator's s. 2(b) *Charter* rights was not prescribed by law, and that s. 1 of the *Charter* had no application and could not be used to justify the breaches.[42]

30. The CCLA submits that this approach commends itself. An explicit *Charter* analysis must be brought to bear on every exercise of ancillary powers, particularly when the power interferes with political speech to enure a healthy democracy that fosters free and public discussion.[43]

31. Finally, the CCLA submits that this Court should clarify that when an arrest for apprehended breach of the peace is justified, the arrestee should be released immediately, as soon as the risk of the breach of the peace has passed. "To hold otherwise, would be to sanction the imprisonment of a citizen without trial, something prohibited since Magna Carta."[44]

IV. PART IV - COSTS

32. The CCLA does not seek costs and asks that none be awarded against it.

V. PART V – NATURE OF THE ORDER REQUESTED

33. The CCLA takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 11, 2019

Sean Dewart/Tim Gleason/Adrienne Lei/Mathieu Bélanger
Counsel for the CCLA

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[41] *Ibid*
[42] *Ibid*
[43] *Mann, supra,* at ¶35
[44] *R. v. Grosso,* 1995 CarswellBC 2965, [1995] BCWLD 2188, at ¶56, as cited in J. Esmonde, "The Policing of Dissent: The Use of Breach of the Peace Arrests at Political Demonstrations" (2002) 1:2 JL & Equal 246

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