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 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)

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN ASSOCIATION OF CHIEFS OF POLICE, CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE and CANADIAN CONSTITUTION FOUNDATION

INTERVENER'S FACTUM
CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE, INTERVENER

(Rule 42 of the *Rules of the Supreme Court of Canada*)

Ryan D. W. Dalziel
Kayla Strong
Norton Rose Fulbright Canada LLP
1800 – 510 West Georgia Street
Vancouver, B.C. V6B 0M3
Tel: (604) 641-4881
Fax: (604) 646-2671
E-mail: ryan.dalziel@nortonrosefulbright.com

Counsel for the Canadian Association for Progress in Justice, Intervener

Matthew J. Halpin
Norton Rose Fulbright Canada LLP
1500 – 45 O'Connor Street
Ottawa, Ontario K1P 1A4
Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Agent for the Canadian Association for Progress in Justice

Michael Bordin
Jordin Diacur
Gowling WLG (Canada) LLP
1500 – 1 King Street West
Hamilton, Ontario L8P 1A4
Tel: (905) 523-5666
Fax: (905) 523-8098
E-mail: mbordin@esblawyers.com

Counsel for the Appellant

D. Lynne Watt
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: lynne.watt@gowlingwlg.com

Agent for the Appellant

Judie Im
Baaba Forson
Ayah Barakat
Sean Hanley
Ministry of the Attorney General
Crown Law Office – Civil; and
Constitutional Law Branch
8th Floor, 720 Bay Street
Tel: (416) 326-3287
Fax: (416) 326-4181
E-mail: judie.im@ontario.ca

Counsel for the Respondents

Karen Perron
Borden Ladner Gervais LLP
1300 – 100 Queen Street
Ottawa, Ontario K1P 1J9
Tel: (613) 369-4795
Fax: (613) 230-8842
E-mail: kperron@blg.com

Agent for the Respondents

Anne M. Turley
Zoe Oxaal
Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
5th Floor, 50 O'Connor Street
Ottawa, Ontario K1A 0H8
Tel: (613) 670-6291
Fax: (613) 954-1920
E-mail: anne.turley@justice.gc.ca

Counsel for the Attorney General of Canada,
Intervener

Christopher Rupar
Attorney General of Canada
Department of Justice Canada
Civil Litigation Section
5th Floor, 50 O'Connor Street
Ottawa, Ontario K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Attorney General of Canada

Stéphane Rochette
Ministère de la Justice du Québec
1200, Route de l'Église, 3e étage
Québec, Québec G1V 4M1
Tel: (418) 643-6552
Fax: (418) 643-9749
E-mail: stephane.rochette@justice.gouv.qc.ca

Counsel for the Attorney General of Québec, Intervener

Sylvie Labbé
Noël & Associés
111, rue Champlain
Gatineau, Québec J8X 3R1
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: s.labbe@noelassocies.com

Agent for the Attorney General of Québec

Sean Dewart
Adrienne Lei
Mathieu Bélanger
Dewart Gleason LLP
102 – 366 Adelaide Street West
Toronto, Ontario M5V 1R9
Tel: (416) 971-8001
Fax: (416) 971-8001
E-mail: sdewart@dgllp.ca

Counsel for the Canadian Civil Liberties Association, Intervener

Moira Dillon
Supreme Law Group
900 – 275 Slater Street
Ottawa, Ontario K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for the Canadian Civil Liberties Association

Louis P. Strezos
Sherif Foda
Louis P. Strezos and Associate; and
Michelle M. Biddulph
Greenspan Humphrey Weinstein LLP
15 Bedford Road
Toronto, Ontario M5R 2J7
Tel: (416) 944-0244
Fax: (416) 369-3450
E-mail: lps@15bedford.com

Counsel for the Criminal Lawyers' Association (Ontario), Intervener

Marie-France Major
Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, Ontario K2P 0R3
Tel: (613) 695-8855
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Criminal Lawyers' Association (Ontario)

Bryant Mackey
Canadian Association of Chiefs of Police
100 – 300 Terry Fox Drive
Kanata, Ontario K2K 0E3
Tel: (604) 871-6385
Fax: (604) 873-7445
E-mail: bryant.mackey@vancouver.ca

Counsel for the Canadian Association of Chiefs of Police, Intervener

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 282-2896
E-mail: msobkin@sympatico.ca

Agent for the Canadian Association of Chiefs of Police

Brandon Kain
Adam Goldenberg
Natalie V. Kolos
McCarthy Tetrault LLP
5300 Toronto Dominion Bank Tower
Toronto, Ontario M5K 1E5
Tel: (416) 601-8200
Fax: (416) 868-0673
E-mail: bkain@mccarthy.ca

Counsel for the Canadian Constitution Foundation, Intervener

Matthew Estabrooks
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: matthew.estabrooks@gowlingwlg.com

Agent for the Canadian Constitution Foundation

TABLE OF CONTENTS

PART I – OVERVIEW OF POSITION

1. The freedom of peaceful assembly is among the most cherished – and celebrated – rights in any liberal democracy. A glance at the pages of history – from the Suffrage Parade, to the Women's March; from Ghandi's Salt March, to MLK's March on Washington; from Tiananmen Square to Ukraine's Orange Revolution – justifies that assessment, amply. Events such as these have come to be viewed as moments that showcase the very best of humanity, through the purest and most courageous exercise of democratic power. It is not for nothing that, in countries like ours, peaceful protest has been said to be a hallmark of democracy.

2. Yet amidst all the light cast by this aspect of human endeavour, there are patches of darkness. Too often, protest and demonstrations have been marred by violence and discord. Rioters and phalanxes of armoured police have become sadly frequent features of the Western exercise of fundamental freedoms by large groups. In Canada, the anti-globalization demonstrations that began with APEC in Vancouver, and extended through the Summit of the Americas in Quebec City to the G20 in Toronto (and there are others), have brought that home. Abuses by demonstrators and police alike have left their blemishes on the Canadian experience. Black blocs, vandals and provocateurs, on one side, have been met with hard tac, tear gas, and kettling detentions on the other. The freedom of the peaceful protestor has been caught in the middle – at times, quite literally. In all this, we have learned that checks are needed on *both* citizen *and* state, if the right to peaceful assembly is to flourish.

3. The issues in this case summon up that vast canvas as their backdrop. For the first time in the *Charter* era, the Court is asked to consider the scope of an "ancient" form of state authority: the common law power of the police to arrest, in order to prevent a breach of the peace (*R. (on the application of Hicks and others) v. Commissioner of Police for the Metropolis*, 2017 UKSC 9, para. 4). Both the extent of the power at common law, and its constitutional and statutory limits, are before the Court in this case.

4. What is *not* in issue is the existence of the power. However, the judgments below and the submissions of the parties reveal substantially different understandings of its scope. In the Court of Appeal, Nordheimer and Huscroft JJ.A. both applied the test extracted from Doherty J.A.'s judgment in *Brown v. Regional Municipality of Durham Police Service Board* (1998), 167

D.L.R. (4th) 672 (Ont. C.A.): "The apprehended breach [of the peace] must be imminent and the risk that the breach will occur must be substantial" (para. 74; and see Court of Appeal, paras. 44, 105). All the same, they divided over the application of that test, both with regard to the "imminence" of the risk and the necessity of arrest in response.

5. Nordheimer J.A.'s approach is arguably inconsistent with the spirit of *Brown* (though not its letter), but nevertheless it is a step in the right direction. *Brown*, with respect, is both too narrow and too complex. Too narrow, in that its imminence and substantial risk requirements could, if taken literally, excessively impede the reasonable exercise of police discretion intended to prevent harm before it occurs. And too complex, in that its many factors are too difficult for officers to accurately or consistently apply in the seconds available to them in the field, and instead invites micromanagement by the courts using hindsight reasoning. Without gainsaying the basic wisdom of the *Brown* test, or the legitimacy of the concerns that informed it, still the test should be refined and clarified, to reflect the principle that has animated this Court's police powers jurisprudence since *R. v. Dedman*, [1985] 2 S.C.R. 2: the police may do what is *reasonably necessary*, in furtherance of their duties.

6. Reasonable necessity is the inherent limit of the common law power; but there are also constitutional and statutory limits that complete the picture. Police action that is authorized at common law by reasonable necessity will, by definition, not be "unreasonable" for purposes of s. 8 of the *Charter*, or "arbitrary" for purposes of s. 9 – but it still may infringe s. 2, or s. 10. These infringements must be justified under s. 1. Likewise, police action that is authorized at common law must still comply with the *Criminal Code* – including its injunction against excessive force, in s. 25. These constitutional and statutory restraints respond to distinct facets of the problems that may arise in this area. Each needs to be assessed and calibrated appropriately, if an approach that adequately safeguards the public's right to assemble and to protest *safely* – safe from their fellow citizen, *and* safe from the police – is to be found.

PART II: POSITION ON THE QUESTIONS IN ISSUE

7. Mr. Fleming raises two issues: first, whether "minimal impairment of individual rights and proportionality [are] to remain factors in the balancing exercise at the second stage of the *Waterfield* test"; and second, whether the Court of Appeal was right to have found that the trial

judge committed errors (appellant's factum, para. 88). This intervener's submissions will be directed at the first issue.

8. The short answer is "no" – it would be wrong in principle to import *Oakes* elements into the police powers analysis, and both unnecessary and undesirable in practice – for four reasons that the balance of this factum will develop:

A. The guiding principle for the existence of a police power is reasonable necessity.

B. The common law power to arrest arises where there reasonably is an apprehension of violence in the near future, in response to which arrest is reasonably necessary.

C. Any ensuing infringement of a *Charter* right must be justified under s. 1.

D. Excessive force under s. 25 of the *Criminal Code* should be sensitive to the importance of protecting the physical integrity of peaceful demonstrators.

PART III: ARGUMENT

A. *The Guiding Principle: Reasonable Necessity*

9. Common law police powers, it is worth recalling, do essentially two things. First, and most frequently, they are used to establish that police action is "authorized by law" and "prescribed by law" for purposes of the *Charter*, absent specific statutory authority. That was the very reason the *Dedman* Court invoked *Waterfield*, and began the jurisprudential progression that led to this case. Second, they make lawful that which would otherwise be an intentional tort, such as battery or false imprisonment, and perhaps also a crime. That defensive function is invoked in this case, as it was when this Court discovered a common law power of search incidental to arrest, to answer a criminal charge in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158.

10. These functional aspects of the common law help to explain the proliferation of common law powers that have been recognized over the decades since *Dedman* authorized roadblocks for sobriety checks. Common law powers have proven to be a useful tool. Reasonably-tailored powers provide an appropriate vehicle for *Charter* scrutiny of police action, rather than stopping the analysis at its first step by finding the action unauthorized and thus unlawful. Further, common law powers prevent the ordinary application of civil and criminal laws to police action, where such laws otherwise may inhibit or discourage the carrying out of essential police duties.

And concerns about the democratic legitimacy of crafting police powers at common law are at their lowest where the Legislature has decided simply to adopt by reference whatever the common law may be from time to time, as *per* s. 42(3) of the *Police Services Act*, R.S.O. 1990, c. P-15: "A police officer has the powers and duties ascribed to a constable at common law."

11. Thus, while there has been understandable judicial reluctance to effectively *make* law that impinges upon Canadian liberties (see *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, paras. 5-15, *per* LeBel J. (concurring); and *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, paras. 17-18), the dominant tide of this Court's jurisprudence has been the recognition, not the rejection, of proposed police powers. Not only has the Court "crossed the Rubicon", as Binnie J. put it in *Kang-Brown* (para. 22),[1] it has camped decisively on the opposite shore. In fact, under *Waterfield* this Court appears *never* to have said there is "no" power; the Court's analysis has if anything been about defining the *extent* of the various powers.[2]

12. What unites the jurisprudence, from *Dedman* to *MacDonald* (most recently), is the concept of *reasonable necessity*. That was the "suggestion of the correct test" by Le Dain J., for the *Dedman* majority (p. 35), that was then applied explicitly by Justice Abella, for the majority in *Clayton* (para. 31). Justice Moldaver observed for a later majority that *Clayton* "moved our jurisprudence from debating the existence of such a power to considering whether its exercise was reasonably necessary in the circumstances of a particular case": *Aucoin*, para. 36. The *MacDonald* Court unanimously confirmed that principle: "the police action must be reasonably necessary for the carrying out of the particular duty in light of all the circumstances" (para. 36).

---

[1] Binnie J.'s choice of metaphor is curious, in light of LeBel J.'s concern in that case about the democratic legitimacy of expanding police powers at common law. Presumably Binnie J. did not intend, as Caesar did when he made his crossing, to destroy democratic government and establish a judicial dictatorship.

[2] The length of the post-*Charter* list is striking: *Dedman* (vehicle stops to check sobriety); *Cloutier* (search of a person incident to lawful arrest, later extended to vehicles in *R. v. Caslake*, [1998] 1 S.C.R. 51, and cell phones in *R. v. Fearon*, 2014 SCC 77, [2014] S.C.R. 621); *R. v. Godoy*, [1999] 1 S.C.R. 311 (forced entry into home to investigate 911 call); *Mann* (investigative detention and incidental safety search); *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725 (stopping vehicles leaving parking lot after 911 call); *R. v. Aucoin*, 2012 SCC 66, [2012] 3 S.C.R. 408 (detaining suspect in police cruiser); *Kang-Brown* and *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 (sniffer dog searches); and *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37 (safety search at entry of residence).

13. At the same time, the existence of an overarching "reasonable necessity" principle should not preclude – and has not precluded – the articulation of specific tests to control specific categories of cases. Two examples are notable: the "reasonable grounds to suspect a connection to a particular crime" test for investigative detention in *Mann* (para. 45), and the "reasonable suspicion of a drug-related offence" test for using a sniffer dog in *Chehil* (para. 37). For other, less systemized types of cases, like the sudden safety imperative to search that arose in the doorway in *MacDonald*, the reasonable necessity principle exists as a conceptual backstop.

14. The power to arrest to prevent a breach of the peace should, for reasons of clarity and consistency of application, attract its own reasonable and internally-balanced test. That is the next subject.

B. *Arrest (and Detention) to Preserve the Peace*

15. In *Brown*, Doherty J.A. articulated an "imminent and substantial risk" test that was informed by six distinct factors (see para. 77). *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208, 383 D.L.R. (4th) 512, then interwove the *Brown* test and factors with *Oakes*-like considerations such as rational connection and proportionality (albeit while also using the language of "reasonable necessity"; see paras. 135-138).[3]

16. As a first observation, and with respect, the incorporation of *Oakes anticipates* a *Charter* infringement that *will not occur* if the police exercised an appropriately-crafted common law power. The task here is to craft a framework that will *respect* the *Charter*; it is not to assume and then attempt to justify an infringement along *Oakes* lines.

17. The test in *Brown* "puts a premium on individual freedom" – which is of course desirable – but to such an extent that Doherty J.A. allowed that "[i]n some situations, the requirement that there must be a real risk of imminent harm before the police can interfere with individual rights will leave the police powerless to prevent crime" (para. 79; emphasis added) – which is not. As

[3] It should be said at once that *Brown* and *Figueiras* are perfectly right about what they actually decided. Doherty J.A. was right not to find a general power to detain motorcycle gang members on a highway in *Brown*; and Rouleau J.A. was right to find that police cannot randomly detain demonstrators for searches in *Figueiras*, despite prior but unrelated violent events. The difficulty with these decisions, with respect, is in their articulation of the relevant framework.

Justice Abella stated in *Clayton*, the police have a "duty to respond … to the seriousness of the circumstances" (para. 37). What was true of the risk described in the 911 call in *Clayton* should equally be true of the risks presented by public disturbances.

18. The police should have the power at common law to arrest where (reasonably): the police have an *apprehension of violence*; the apprehended violence would occur in the *near future*; and arrest is a *necessary* means of avoiding violence. As in *Mann* and *Chehil*, this test translates the reasonable necessity principle into an appropriately-balanced rule for this context.

19. *All three* of those elements should be assessed for their reasonableness, in light of the totality of the circumstances. The police can work with that. As Binnie J. (dissenting) pointed out in *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para. 105: "[p]olice deal with 'reasonableness' issues all the time. It is one of the organizing principles that govern their professional work." So too when the court later considers the police action, that which is "reasonably necessary" will necessarily involve an analysis imbued with reasonableness.

20. The first element – the apprehension of violence – reflects the fact that when we talk about "the peace", we are really concerned with its inverse: the outbreak of violence. As Lord Toulson said, speaking for a unanimous Supreme Court of the United Kingdom, "[t]he essence of a breach of the peace is violence" (*Hicks*, para. 4; emphasis added).[4] *Apprehension*, rather than belief or suspicion (*cf*. *MacDonald*, para. 66, *per* Moldaver and Wagner JJ.), is appropriate given that the violence feared is a future event rather than an existing condition.

21. In *Brown*, as noted, Doherty J.A. required a "substantial" or "real risk" of a "breach" (paras. 74, 78). Respectfully, such thresholds are insufficiently clear – and potentially too high, depending on what officers and judges find "substantial". Better instead that the analysis begin by focussing the attention of courts and officers alike on the matter of true concern: a reasonable apprehension of violence to persons; violence to property; or, possibly, violence to one's self.

22. Second, there is the temporal element. It is essential to the existence of the power that the apprehension of violence involves a measure of urgency and immediacy. This is the element

[4] Indeed, in the Canada of 2019, it might be thought archaic to continue to invoke the "Queen's peace" as the justification for a deprivation of liberty.

that is perhaps of greatest importance. The timing must be tight enough to potentially justify resort to arrest, while remaining broad enough to allow the power to still be efficacious in preventing violence. The temporal element has also proven somewhat difficult to describe.

23. The House of Lords focussed its attention on this element – which the English courts, like Doherty J.A., cast in the language of "imminence" – in *R. (on the application of Laporte) v. Chief Constable of Gloucestershire*, [2006] UKHL 55. In that case, their Lordships unanimously (but for reasons given in five separate opinions) held that there was insufficient time-sensitivity to justify detaining bus coaches filled with protestors (including a few suspected extremists), when the coaches had not yet departed for the protest site.[5]

24. Lord Rodger of Earlsferry, echoed in various ways by his colleagues, said that the imminence requirement prevents the duty to preserve the peace from becoming "a recipe for officious and unjustified intervention in other people's affairs" (para. 62). He recounted the various ways courts had expressed "imminence": "about to take place", "about to be committed", "in the immediate future", "the near future" (para. 62). He ultimately settled on the last of those phrases: if an officer "reasonably apprehends that a breach of the peace is likely to occur in the near future, the officer's duty is to take reasonable steps to prevent it" (para. 62; emphasis added). Subsequently, in *Hicks*, the Supreme Court unanimously adopted this part of Lord Rodger's opinion as the law of the United Kingdom (para. 4).

25. *Hicks* calibrates the temporal element correctly. The language of "imminence", by contrast, may suggest too high a bar. The "near future", reasonably understood in the circumstances, creates the requisite temporal nexus between the violence feared, and the arrest intended to stop it. Police officers should not be expected to wait until the first punch or rock is about to be thrown. The risk of an uncontrollable conflagration may at that point be too great; and as Nordheimer J.A. emphasized, "[t]he point of the common law power is to avoid violence, not simply to deal with its aftermath" (para. 56). Where the situation presents a reasonable apprehension of violence (*per* the first element), it is enough that the police can "see it coming".

[5] As an illustration of where their Lordships would have drawn the line, four of them were of the view that "imminence" nonetheless could arise where, for instance, there was a potentially violent clash between two groups a few miles apart, in circumstances where one group had assembled a convoy of cars to make the journey (see paras. 51, 71, 102, 118, approving *Moss v. McLachlan*, [1985] IRLR 76 (Div.Ct.)).

The existence of some degree of physical separation is not determinative of this: a possibly hostile (but oncoming) group could be a few miles' drive away, or on the other side of a field, and the threat of violence would exist in "the near future" all the same.

26. If those two elements are present, arrest must still be a reasonably necessary response. In this case, Nordheimer J.A. found that arrest was a "necessary step", based on the safety threat and Mr. Fleming's refusal to obey police orders (para. 54); whereas Huscroft J.A. considered that the majority's approach "turn[ed] … necessity on its head", by treating arrest "as a *first* option in preserving the peace rather than a last resort" (paras. 113, 112; italics in original).

27. With respect, Nordheimer J.A.'s approach ought to be preferred on this point. A "last resort" requirement would ask too much of the police, in this context. Where there is a reasonable apprehension of violence in the near future, reasonable necessity allows the police to meet the threat consistently with their judgment, experience, and common sense, through means that minimize the risk to themselves and others. As Justice Moldaver reminded us in *Aucoin*, "police are often required to make split-second decisions in fluid and potentially dangerous situations" (para. 40). Circumstances involving impending violence are, by definition, among such cases. When making near-instant decisions in potentially chaotic and dangerous situations, with limited manpower and incomplete information, police cannot be expected to reserve arrest as a "last resort", when there has already been a potentially dangerous defiance of their orders.

28. Two further observations supplement the foregoing description of the test, with particular reference to the protest context. One is that in *R. v. Knowlton*, [1974] S.C.R. 443, this Court approved the use of "buffer zones" (or "exclusion zones"); and see *Figueiras*, para. 138. This is a limited form of detention that may, given any proximate history of violence or similar factor, be readily justified. Once a zone is constituted, police may reasonably (as in *Knowlton* itself) treat any incursion as requiring immediate response, and arrest if disobeyed. In short, the police may reasonably choose to keep two groups separated; and will be entitled to apprehend violence if their lawful directives in that regard are not followed. Similarly, the police may choose in such circumstances to set up a security perimeter, and require brief weapons searches as a "condition of entry": see *Stewart v. Toronto Police Services Board*, 2018 ONSC 2785, para. 61. The categories of permissible police action when managing large-scale protests and

demonstrations should not be closed, so long as the rights and freedoms of Canadians are presumptively respected.

29. Second, absent a buffer zone or other perimeter violation, arrest or detention of a potential *victim* rather than a perpetrator of violence should be exceptional. It is true that, as the House of Lords surveyed in *Laporte*, the common law can support the arrest of the non-threatening provocateur (see para. 78 *et seq*., *per* Lord Rodger). And, true, it flows from the discussion above that the police *may*, depending on the circumstances, reasonably choose to arrest *that* person rather than those who approach him in anger, if in their judgment that is truly the safest way to proceed. However, if injury to the innocent arrestee ensues, the choice to arrest the feared victim must weigh heavily in the assessment of whether the police used excessive force – as discussed briefly below.

C. *Infringements of Freedom of Expression and Assembly, and the Role of Section 1*

30. Given the balancing inherent in the police powers analysis, as set out above, an arrest or detention pursuant to the common law power will not violate s. 9's prohibition against arbitrary detention: *Dedman*, *Mann*, *Clayton*. Likewise, a search authorized at common law will not be unreasonable for purposes of s. 8: *Cloutier*, *Mann*, *Kang-Brown*, *MacDonald*. The extent of the common law power is congruent with the limits of those two rights.

31. However, where the exercise of a common law power of arrest or detention results in an impingement of *another Charter* right, one not captured internally by the common law, then s. 1 will determine the lawfulness of *that* infringement. That was the approach taken by this Court in *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3, in which Charron J. for the majority tested the *Dedman* power to detain and conduct sobriety checks of drivers against s. 1, in light of its infringement of the s. 10(*b*) right to counsel.

32. As a result, peaceful demonstrators will *always* be able to argue that even the valid exercise of common law powers to protect the peace had, in the circumstances of their cases, a disproportionate impact on freedom of expression or freedom of peaceful assembly – where, for instance, the measures deployed by police were manifestly too restrictive, relative to the level of tangible risk. It is here, not within *Waterfield*, that the *Oakes* test has its proper role.

33. Detaining (and, if necessary, arresting) someone whose safety is at risk for displaying the "wrong message in the wrong place at the wrong time" may well be a justified limit of his rights; detaining someone only because his message is offensive or provocative will not be.

D. *Necessary Force and Peaceful Demonstrators*

34. Section 25 of the *Criminal Code* confers upon police officers exercising a lawful power of arrest or detention a "limited immunity" (*R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, para. 62), that includes immunity from tort liability: see *Priestman v. Colangelo, Shynall and Smythson*, [1959] S.C.R. 615. In the language of s. 25(1), the immunity applies insofar as the officer used "as much force as is necessary" to effect the arrest or detention.

35. This Court has cautioned with respect to s. 25 that "[p]olice actions should not be judged against a standard of perfection": *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, para. 35. All the same, it is hard to see why the peaceful demonstrator who somehow finds himself at odds with the police should be subjected to anything beyond minimal force, even if there is (unsurprisingly, given the demonstrator's innocence) a measure of resistance to the arrest. What is "necessary force" must be sensitive to the entire context, including the officer's decision to arrest *protectively*. A protective arrest should not, in general, treat the arrestee like a criminal.

36. After all, it is one thing to allow the police, through the common law, to control crowds and prevent violent harm. But it is quite another for the police, through their chosen tactics, to proceed to harm the very people they are purporting to protect. Doing so can only erode the trust between citizen and police that is essential, if the exercise of the right to peacefully assemble is to reach its full potential.

PARTS IV, V AND VI: COSTS, ORDER SOUGHT AND SENSITIVITY

37. This intervener seeks no order as to costs. This intervener takes no position on the appropriate order. This intervener is aware of no basis for sensitivity.

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

Norton Rose Fulbright Canada LLP

Ryan D. W. Dalziel

Kayla Strong

PART VII: TABLE OF AUTHORITIES

CASES	CITED AT PARA.
Brown v. Regional Municipality of Durham Police Service Board (1998), 167 D.L.R. (4th) 672 (Ont. C.A.) http://canlii.ca/t/6gkq	4, 5, 15, 17, 21, 23
Cloutier v. Langlois, [1990] 1 S.C.R. 158 http://canlii.ca/t/1ft0h	9, 11, 30
Figueiras v. Toronto (Police Services Board), 2015 ONCA 208, 383 D.L.R. (4th) 512 http://canlii.ca/t/ggwxd	15, 28
Priestman v. Colangelo, Shynall and Smythson, [1959] S.C.R. 615 http://canlii.ca/t/1tvpf	34
R. v. Asante-Mensah, 2003 SCC 38, [2003] 2 S.C.R. 3 http://canlii.ca/t/51p4	34
R. v. Aucoin, 2012 SCC 66, [2012] 3 S.C.R. 408 http://canlii.ca/t/ftzsm	11, 12, 27
R. v. Caslake, [1998] 1 S.C.R. 51 http://canlii.ca/t/1fqww	11
R. v. Chehil, 2013 SCC 49, [2013] 3 S.C.R. 220 http://canlii.ca/t/g0qbs	11, 13, 18
R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725 http://canlii.ca/t/1rxzv	11, 12, 17, 30
R. (on the application of Laporte) v. Chief Constable of Gloucestershire, [2006] UKHL 55 https://www.bailii.org/uk/cases/UKHL/2006/55.html	23, 24, 29
R. (on the application of Hicks and others) v. Commissioner of Police for the Metropolis, 2017 UKSC 9 https://www.bailii.org/uk/cases/UKSC/2017/9.html	3, 20, 24, 25
R. v. Dedman, [1985] 2 S.C.R. 2 http://canlii.ca/t/1ftwf	5, 9, 11, 12, 30
R. v. Fearon, 2014 SCC 77, [2014] S.C.R. 621 http://canlii.ca/t/gflcd	11

CASES	**CITED AT PARA.**
R. v. Godoy, [1999] 1 S.C.R. 311 http://canlii.ca/t/1fqpk	11
R. v. Kang-Brown, 2008 SCC 18, [2008] 1 S.C.R. 456 http://canlii.ca/t/1wnbc	11, 30
R. v. Knowlton, [1974] S.C.R. 443 http://canlii.ca/t/1xtz2	28
R. v. Mann, 2004 SCC 52, [2004] 3 S.C.R. 59 http://canlii.ca/t/1hmp1	11, 13, 18, 30
R. v. MacDonald, 2014 SCC 3, [2014] 1 S.C.R. 37 http://canlii.ca/t/g2ng9	11-13, 20, 30
R. v. Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R. 206 http://canlii.ca/t/2848x	35
R. v. Orbanski; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 http://canlii.ca/t/1l0b0	31
R. v. Sinclair, 2010 SCC 35, [2010] 2 S.C.R. 310 http://canlii.ca/t/2cvjs	19
Stewart v. Toronto Police Services Board, 2018 ONSC 2785 http://canlii.ca/t/hthfv	28
STATUTES	
Criminal Code, R.S.C. 1985, c. C-46, s. 25 English: https://laws-lois.justice.gc.ca/eng/acts/C-46/section-25.html French: https://laws-lois.justice.gc.ca/fra/lois/C-46/section-25.html	6, 34, 35
Police Services Act, R.S.O. 1990, c. P-15, s. 42 English: https://www.ontario.ca/laws/statute/90p15#BK65 French: https://www.ontario.ca/fr/lois/loi/90p15#BK65	10