Court File No. 38087

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

BETWEEN:

RANDOLPH (RANDY) FLEMING

APPELLANT
(Respondent)

- and -

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

RESPONDENTS
(Appellants)

- and -

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PART I – OVERVIEW OF POSITION

> *"When we speak of the protection of civil liberties in a society, we are really speaking about the nature of the compromises which society has made between civil libertarian values and the competing values recognized by social and economic regulation, which limit individual freedom in pursuit of collective goals."*[1]

1. This appeal provides the Court with a further opportunity to consider the delicate balance that must be struck between legitimate police operational activity and the protection of civil liberties in contemporary Canadian society. It requires the Court to delineate the parameters of common law police power to arrest for anticipated breach of the peace *before* a breach occurs, in circumstances in which the person arrested is exercising a *Charter*-protected right.

2. Apprehended breach of the peace has been defined as follows in the Ontario Court of Appeal's decision in *Brown v. Durham Regional Police Force*:[2]

> Two 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… [Emphasis added.]

3. The Appellant submits that in these circumstances the Court should endorse and adopt a robust minimal impairment component to the controlling legal test for determining the lawfulness of an exercise of common law police power to arrest for apprehended breach of the peace. However, the Canadian Association of Chiefs of Police ("CACP") submits this would have undesirable effects, particularly with respect to public safety.

4. The *Waterfield*[3] test arises in myriad circumstances and, given the operational requirements of policing, does not lend itself to any stringent minimal impairment standard. By way of example, the Court has applied *Waterfield* in matters relating to random vehicle stops, frisk searches incident to arrest, 911 calls and exigent circumstances, strip searches incident to arrest, investigative

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[1] Peter Hogg, *Constitutional Law of Canada*, Student ed. (Toronto: Thompson Canada Ltd, 2007) at 678, quoted in Burchill, John, "A Horse Gallops Down a Street . . . Policing and the Resilience of the Common Law" (2018) 41 Man. L.J. 161 at 164.

[2] [1998] O.J. No. 5274, 116 O.A.C. 126, at para. 74 ("*Brown*").

[3] *R v Waterfield*, [1963] 3 All E.R. 659 (C.A.) ("*Waterfield*").

detentions and searches pursuant to investigative detention, roadside sobriety testing, road blocks, sniffer dog searches, safety searches, and police entry of residences. Thus, any modification to the ancillary powers doctrine and the *Waterfield* test may create profound ripples across a broad range of police operational activities, and the concern of the CACP is that these ripples may ultimately engender risks to public safety. Rather, the CACP says the existing approach in Canada to *Waterfield*, as found in the jurisprudence of this Court, is the most appropriate and most desirable lens through which to analyze the exercise of common law police powers.

5. This is not to say that the extent of police interference in an individual's liberty interest and fundamental freedoms is not an important consideration under the third step of the second stage of *Waterfield*. However, the Appellant's submissions regarding minimum impairment and proportionality create conceptual dissonance. He does not argue for proportionality in the sense of balancing, but rather he argues for the Court to find minimal impairment embedded within the proportionality concept, yet free to emerge to trump police operational discretion in circumstances in which the person arrested is exercising a *Charter*-protected right. The CACP opposes this conception of the ancillary powers doctrine.

6. The Respondents argue in favour of a "*Waterfield-Figueiras*" test, and while the CACP generally supports the Respondents' arguments in this appeal, the CACP suggests, should a hyphenate be adopted, that it be the "*Waterfield-MacDonald*" test. However, fundamentally the CACP suggests that no modification of the name is required at all.

PART II – QUESTIONS IN ISSUE

7. Having been provided with the opportunity to review the factum of the Appellant and the Respondents, the CACP agrees with the statement of questions in issue of the Respondents and would state the questions in issue as follows:

> a. Whether minimal impairment of individual rights and proportionality form part of the balancing exercise at stage two of the *Waterfield* test and whether the majority of the Court of Appeal considered them; and
> b. Whether the Trial Judge made palpable and overriding errors that required appellate intervention.

8. The CACP will only make submissions relative to the first question in issue and submits:

a. Minimal impairment, as set out by the Appellant, is too stringent a standard to be applied in the vast array of circumstances in which the ancillary powers doctrine may arise.

b. The longstanding benefits of the *Waterfield* analysis include its inherent flexibility and adaptability. This is especially so when peace officers are required to respond rapidly to unexpected actions or events that create a risk to individual and public safety, and by extension officer safety.

PART III – STATEMENT OF ARGUMENT

A. LONGSTANDING POWER AND POSITIVE DUTY TO ACT

9. Police officers have statutory duties which include the duties of police officers at common law. This has remained the law in Canada after the proclamation of the *Charter*. This Court has recognized that police duties include positive duties to act to protect life, limb and property.[4] Furthermore, the legislatures of each province have enacted or re-enacted policing statutes confirming and preserving powers, duties and immunities conferred historically on police officers by the common law. No act of Parliament, nor any of the provincial legislatures, has purported to abolish or limit a police officer's powers or duties at common law, and the duties and powers of police officers are necessarily wide ranging and have not been defined exhaustively.

10. Appellate courts have recognized a common law power for police officers to detain without warrant where they reasonably apprehend a breach of the peace as a preventative measure to stop or abate any actions that may give rise to acts of violence.[5] In Canada, police intervention for an apprehended breach of the peace was recognized by the Ontario Court of Appeal as early as 1930, 33 years prior to *Waterfield*.[6] Several long standing and more recent authorities support the proposition that police have a duty to interfere with a person's liberty where they reasonably apprehend an offence will occur.

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[4] *O'Rourke v Schacht,* [1976] 1 S.C.R. 53 at p 66.

[5] *Hayes v Thompson* (1985), 18 C.C.C. (3d) 254, 17 D.L.R. (4th) 751 (BCCA); *R v Khatchadorian*, 127 C.C.C. (3d) 565, [1998] BCJ No. 1867 (CA); *R. v. Alexson (T.L.),* 2015 MBCA 5, at para. 2, 315 Man. R. (2d) 70 at para. 29; *R v Howell* (1981), 73 Cr. App. R. 31, [1981] 3 All E.R. 383.

[6] *R. v. Patterson* (1930), 55 C.C.C. 218 (Ont. C.A.).

B. THE WATERFIELD TEST AND APPREHENDED BREACH OF THE PEACE

11. The duties and powers of police officers in Canada are found in both statute and the common law. However, there is no statutory authority for the arrest for apprehended breach of the peace at issue in this appeal.

12. The common law powers of police officers are often referred to as the ancillary powers doctrine. The accepted test for evaluating whether a police officer has acted within the scope of his or her common law authority was first expressed in *R. v. Waterfield*.[7] The test as set out in that seminal case has been repeatedly affirmed by this Court, most recently in *R. v. Reeves*:[8]

> Whether police have the authority at common law to take an action that interferes with an individual's liberty or property is assessed using the framework set out by the U.K. Court of Criminal Appeals in *R. v. Waterfield*, [1963] 3 All E.R. 659 (Eng. C.A.), at pp. 660-62, per Ashworth J. Canadian courts have used the *Waterfield* framework — sometimes referred to as the ancillary powers doctrine — to affirm many common law police powers now considered fundamental. For example, the R.I.D.E. program stops (*R. v. Dedman*, [1985] 2 S.C.R. 2 (S.C.C.)), investigative detentions (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (S.C.C.)), searches incident to arrest (*Cloutier c. Langlois*, [1990] 1 S.C.R. 158 (S.C.C.)), 911 home entries (*R. v. Godoy* (1998), [1999] 1 S.C.R. 311 (S.C.C.)), sniffer dog searches (*R. v. Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 (S.C.C.) [hereinafter Kang-Brown]), and safety searches (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37 (S.C.C.)) were all affirmed through the *Waterfield* framework.
>
> As this Court explained in *MacDonald*, at paras. 34-37, the *Waterfield* analysis proceeds in two stages:
>
> (1) Does the police conduct at issue fall within the general scope of their statutory or common law duties? Common law duties include keeping the peace, preventing crime, and protecting life and property.
>
> (2) Does the conduct involve a justifiable use of police powers associated with that duty? The conduct is justifiable if it is reasonably necessary, with regard to:
>
> (a) the importance of the performance of the duty to the public good;
> (b) the necessity of the interference with an individual's liberty or property for the performance of the duty; and
> (c) the extent of the interference.

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[7] *Waterfield, supra* note 3.
[8] 2018 SCC 56 ("*Reeves*") at paras. 77-78.

13. In *R. v. Mann* the Court reaffirmed the common law duties of police as including the "preservation of peace, the prevention of crime, and the protection of life and property"[9] and the majority of the Court of Appeal in this case identified correctly the relevant police duties as keeping the peace and protection of the public from harm in an area that had a history of conflict.[10]

14. The majority of the Court of Appeal was also correct in considering the imminence of the apprehended breach of the peace when considering the concept of reasonable necessity. Considering whether there was a serious, immediate and ongoing threat to individual and public safety posed to and by the Appellant in a public place during the Flag Rally accords with this Court's previous definition of "imminence". As stated by this Court in *Smith v. Jones*, imminence must be defined in the context of each situation. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to sometime in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk.[11]

15. The totality of the circumstances will inform the police assessment of whether reasonable grounds exist to suspect an imminent threat to public safety. In this case, the actions of the Appellant and others at a public event, considered against the backdrop of the region's historical conflict, are relevant to considering whether the police had a reasonable basis to conclude there was a serious, imminent threat to individual or public safety and thus a reasonable necessity to act quickly to defuse the situation. The public interest in police action is greater when the duty to protect life and public safety is engaged, and there is a strong public interest in avoiding public confrontations that, given the totality of the circumstances, pose an immediate threat to individual and public safety.

16. Applying the second prong of the *Waterfield* test, the arrest of the Appellant was a justified use of police power. There is a strong public interest in protecting members of the public from harm. It is the position of the CACP that the facts of this appeal engage the police duty to keep the peace, protect life and preserve public safety. The duty to protect life is not only engaged by

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[9] *R. v Mann*, 2004 SCC 52 ("*Mann*") at para. 29; see also *R. v. Godoy*, [1999] 1 S.C.R. 311.
[10] Court of Appeal Reasons, at paras. 40, 42.
[11] *Smith v Jones*, [1999] 1 S.C.R. 455 at para. 84.

circumstances that give rise to an imminent risk.

17. The second stage of the test requires a balancing between the competing interests of police duties and individual liberties. However, this Court has never included a formal "minimal impairment" standard in its assessment under *Waterfield* or the ancillary powers doctrine. In fact, the question of merging an *Oakes*-style analysis with the *Waterfield* test was raised and rejected by a majority of the Court in *R. v. Clayton*.[12] As discussed further below, the CACP submits this outcome and approach is desirable, reasonable and fair.

C. POWER TO ARREST FOR APPREHENDED BREACH OF THE PEACE

18. Prior to the Ontario Court of Appeal's decisions in *Brown*[13] and *Figueiras v. Toronto (City) Police Services Board*,[14] minimal impairment and proportionality were not considered in the numerous authorities that followed *Waterfield* on the issue of reasonable necessity of police action in carrying out a particular police duty.

19. The CACP submits that too great an emphasis on considerations of minimal impairment is undesirable and will: (1) confuse the stage 2 analysis; (2) render the analytical framework impracticable; (3) unduly restrain police discretion, and; (4) lead to undesirable effects (such as a chilling effect, second guessing, and delay), all of which may negatively impact public safety.

20. It is submitted the Court ought to reaffirm its flexible, and not unduly restrictive, approach to the second stage of the *Waterfield* test. This will best reflect the appropriate balance between citizens' rights and the exigencies of modern policing. The approach should continue to be based on objective *reasonable necessity* in all of the circumstances as considered in light of the factors already enumerated in *Mann*[15] and *Reeves*[16] that require consideration of the nature and extent of the liberty interest interfered with in order to balance the public duties of police with the individual interests of citizens. This approach considers the realities of operational policing, which require some leeway and which are deserving of deference. As the Supreme Court of the United States has

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[12] *R v Clayton*, 2007 SCC 32 ("*Clayton*").
[13] *Supra* note 2.
[14] 2015 ONCA 208.
[15] *Mann*, *supra* note 9, at para. 34.
[16] *Reeves*, *supra* note 8, at paras. 77-78.

stated:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. Moreover, the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving [...] thus we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day.[17]

21. Likewise, Canadian courts give deference to police in making operational decisions in the discharge of their duties:

> [20] The justifiability of the officers' conduct must always be measured against the unpredictability of the situation they encounter and the realization that volatile circumstances require them to make quick decisions (see *R. v. Golub (D.J.)* (1997), 102 O.A.C. 176 at paras. 44-45, leave to appeal to S.C.C. dismissed, [1997] S.C.C.A. No. 571 (QL); and *MacDonald* at para. 32). (…)
>
> > As Cromwell J. explained in *Cornell*, judges who review the decisions of officers should be slow to intervene on the basis of hindsight (at para. 24):
> >
> > Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73; *Crampton* [2005 ABCA 81, 363 A.R. 216], at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.[18]

22. At the second stage of the *Waterfield* analysis, when considering the reasonable necessity or the balancing of competing interests of the police duty and the individual interests at issue, the test

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[17] *Graham v Connor* (1989), 490 US 386 at 388, 109 S Ct 1865.
[18] *R v Alexson (T.L.)*, 2015 MBCA 5 at para. 20.

must consider and be reflective of the context in which operational policing decisions are made. Police officers are often called upon to make decisions in a matter of minutes, if not seconds, in highly fluid circumstances, all which may change at a moment's notice. Often the stakes are extremely high in the sense of injury to persons and even death. The analysis must be readily applicable to this operational reality, as above all else Canadians want their law enforcement officers to act decisively and quickly when such action is required. The test cannot become overly complicated with layer upon layer of factors to be considered, as the demands of policing require a flexible and responsive approach to unpredictable and often rapidly changing circumstances. An arrest for apprehended breach of the peace is a justifiable use of police power where the arrest is rationally connected and reasonably necessary to the purpose of preserving the peace and protecting the public from harm.

23. The law relating to ancillary police powers allows some flexibility and discretion. These are essential features of law enforcement and the criminal justice system.[19] The law must recognize that police response will necessarily be on a spectrum of possible responses which will vary according to the circumstances faced by police at any given time. At one end of the spectrum may be less imminent situations posing a lower risk of harm, and the extent of the possible harm may be lower. On the other end of the spectrum are more imminent situations posing greater risk of harm, and possibly a greater extent of harm. In the latter case, and in situations where they must act swiftly and decisively, police officers should be given broader discretion and, by extension, deference from reviewing courts.

D. REASONABLENESS AS OPPOSED TO MINIMAL IMPAIRMENT

24. Although *Waterfield* predates the *Charter* and is a creature of the common law, the current law is sufficiently robust to ensure that *Charter* protected activity is properly considered without recourse to concepts enshrined in the *Oakes* test. Indeed, in evaluating administrative decisions, this Court addresses the justificatory analysis under section 1 without applying the various steps in *Oakes*, including the minimum impairment analysis. Rather, in cases like *Doré*, *Loyola* and *Trinity Western*, the analytical approach of the Court has been to match the alleged *Charter* breaching

[19] *R v Beare*, [1988] 2 S.C.R. 387 at 55.

conduct of state actors with the specific circumstances of their legal authority and actions.[20] While *Oakes* may be a valuable analytical tool to measure the justification put forward by governments when legislation impacts *Charter* rights, it is ill-suited to measure the actions of police utilizing ancillary common law powers to rapidly address highly fluid and unpredictable events.

25. Parliament and legislatures often have the luxury of time and the availability of considerable resources in determining the form and content of legislation. Thereafter, they also have the power to amend legislation should defects be detected prior to a court ruling on its constitutionality. So it is unsurprising that they can and should make laws carefully designed to minimally impair the constitutional rights of citizens while meeting legislators' objectives. Police often do not have such luxuries, and thus review of their actions by the courts under *Waterfield* should account in a meaningful way for the nature of their decision-making and actions, as well as the context in which those decisions are made. Between those two examples of state action sit statutory decision-makers, who may not have the time and resources of legislatures, but who clearly have far more time than peace officers in rendering decisions that may, in some cases, impact *Charter* values.

26. The Court has stated that where a statutory decision-maker by its decision impacts *Charter* values it is not the *Oakes* test, with its minimal impairment component, but rather the concepts of reasonableness and proportionality set against the decision-maker's statutory mandate that govern the section 1 justificatory analysis. The CACP submits that, *a fortiori*, similar considerations should and, according to the jurisprudence of the Court, do apply here in support of maintaining the traditional approach to *Waterfield* as established by the Court in *Clayton*.[21] In that case, by maintaining the traditional approach to the *Waterfield* analysis and rejecting the minority bid to import the *Oakes* test into the *Waterfield* analysis, the Court stated, *inter alia*, its preference for reasonable necessity over minimal impairment in the review of police actions taken under common law powers. In doing so, the Court logically connected the two forms of justification for state action that impact *Charter* rights and their underlying values.

27. Based upon the precepts of modern legal analysis, use of a minimal impairment standard in

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[20] *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 5, 39-42; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 3-4, 38-41; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 79-82.

[21] *Supra* note 12.

the context of this case, or others like it, will either unduly prejudice peace officers in the retrospective examination of their actions[22] or will distort the literal meaning of minimal impairment in Canadian law. While the Court's jurisprudence has provided the minimal impairment standard with a modicum of leeway or flexibility, it is fundamentally distinct from the type of deference required by the legal concept of reasonableness underpinning the third step of the second stage of the *Waterfield* test.

28. Although it is reasonable to expect police officers to understand and apply their common law powers, it is not reasonable to expect frontline police officers, in the middle of a public event coloured by historical friction and conflict, encountering the unanticipated actions of the Appellant, to undertake the same extensive ancillary powers doctrine analysis, as a court retrospectively, and then determine a course of action that minimally impairs the Appellant's rights.

E. CONCLUSION

29. The CACP submits that this Court should confirm the common law permits police to arrest persons for breach of the peace before any breach of the peace occurs. Further, the CACP requests the Court maintain its established approach to the *Waterfield* test, including the avoidance of any explicit minimal impairment standard. This will assure an appropriate balance is struck and a measure of deference is applied which best reflect a respect for individual constitutional rights as refracted through the prism of modern policing operations and its innumerable exigencies.

PARTS IV AND V – COSTS AND ORDER SOUGHT

30. The CACP makes no submissions as to costs and takes no position on the outcome of the appeal as between the parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF MARCH 2019.

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Bryant Mackey
Counsel for the Intervener
Canadian Association of Chiefs of Police

[22] *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, at para 68.

TABLE OF AUTHORITIES

19.	Burchill, John, “A Horse Gallops Down a Street . . . Policing and the Resilience of the Common Law” (2018) 41 Man. L.J. 161	1