Court File No. 38087

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

B E T W E E N:

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. For over five decades, Canadian courts have measured the justifiability of police conduct against the two-step test articulated by the UK Court of Appeal in *R v Waterfield*[1](the *Waterfield* test). Since this Court first applied the *Waterfield* test in 1970 in *R v Stenning*, it has "adopted, refined and incrementally applied the test" [2]. The test also applies beyond policing to a wide array of statutory actors with enforcement powers.

2. The *Waterfield* test's highly contextual approach ensures its adaptability and flexibility. In *R v Clayton*, the majority of the Court determined that the test continues to be relevant post-*Charter* because it requires the justification of interference with liberty based on criteria which are consistent with *Charter* values.[3] There is no basis for recasting or redefining the *Waterfield* test as advocated by the appellants. The second stage of the test provides the necessary flexible framework for courts to undertake the careful balancing of the competing interests at stake – police powers and individual liberties.

3. In considering the range of factors relevant to the balancing exercise, the Court should not impose an overly formalistic approach. Contextual considerations, such as historical acts of violence in an ongoing conflict and policing plans that are appropriately sensitive to the particular circumstances, are relevant in assessing police conduct. The section 1 *Charter* considerations of minimal impairment and proportionality are already incorporated within the *Waterfield* test and do not need to be superimposed as additional formal requirements. Finally, there is no support for the application of a "last resort" criteria to the exercise of police powers. Such a criteria would be ill-suited to the practical realities of policing.

4. The Attorney General of Canada (Canada) takes no position on the facts.

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[1] *R v Waterfield*, [1963] 3 All ER 659

[2] *R v Mann*, 2004 SCC 52 at para 25. The *Waterfield* test has been applied by the Court in the following cases: *R v Stenning*, [1970] SCR 631; *Knowlton v The Queen*, [1974] SCR 443; *Dedman v The Queen*, [1985] 2 SCR 2; *R v Godoy*, [1999] 1 SCR 311; *Mann*, *supra* note 2; *R v Clayton*, 2007 SCC 32; *R v Macdonald*, 2014 SCC 3; *R v Reeves*, 2018 SCC 56, Moldaver J, concurring

[3] *Clayton*, *supra* note 2 at para 21

PART II – POSITION ON THE QUESTIONS IN ISSUE

5. Canada intervenes to provide its perspective on the following issues related to the second stage of the *Waterfield* test:

a. Relevant contextual considerations - whether historical acts of violence in an ongoing conflict is a relevant consideration in assessing the lawfulness of police conduct;

b. Minimal impairment and proportionality – whether these s. 1 *Charter* concepts should be incorporated; and

c. Last resort – whether necessity should be interpreted as implying a requirement of last resort.

PART III – ARGUMENT

6. The two-step *Waterfield* test defines the lawful scope of ancillary police powers.[4] At the first stage of the test, courts must determine whether the police were acting within their statutory or common law duties. The second stage involves a balancing exercise – whether, in the totality of the circumstances, the police conduct was a justifiable interference with individual liberty.[5] This appeal concerns the second stage of the test.

A. Broad Application of the *Waterfield* Test

7. While this appeal concerns the lawful authority to arrest for breach of the peace, the *Waterfield* test has been applied in various policing contexts such as searches, use of force, RIDE program stops and detentions.[6] These powers, as recognized and developed through the common law,[7] are important tools relied upon by officers across the country during potentially any call for service.

8. Outside of policing, the *Waterfield* test applies in diverse contexts encompassing an array of actors, from private security guards[8] to border services officers.[9] As recognized by this Court, many

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[4] *Mann*, *supra* note 2 at paras 25-26; *Dedman*, *supra* note 2 at paras 66-69
[5] *Macdonald*, *supra* note 2 at paras 35-36; *Clayton*, *supra* note 2 at para 26
[6] *Reeves*, *supra* note 2 at para 77; *Macdonald*, *supra* note 2 at para 34; *Mann*, *supra* note 2 at para 25
[7] *Clayton*, *supra* note 2 at para 98; *Mann*, *supra* note 2 at paras 17-18, 25
[8] *R v Asante-Mensah*, 2003 SCC 38
[9] *R v Brode*, 2012 ONCA 140 at para 44

provincial and federal statutes provide peace or public officers with the power of arrest.[10] These include, for example, federal statutory enforcement officers upholding environmental protection and public health.[11] These enforcement officers also possess any ancillary powers that are reasonably necessary to accomplish their statutory objectives.[12] The scope of such powers has been defined by the courts through the *Waterfield* test.[13]

9. Any re-articulation of the *Waterfield* test must be cognizant of its broad potential impact and remain sufficiently flexible to take into account the range of contexts in which it may apply. The test must reflect the varied operational realities when exercising ancillary powers on the ground from, an enforcement officer performing duties under the *Canadian Environmental Protection Act*, a private security guard arresting for trespass under a provincial trespass act, to the police officer arresting for breach of peace as in this case.

B. Relevant Contextual Considerations

10. Context is a key part of the second stage of the *Waterfield* test. Police must take into account relevant contextual considerations in exercising their powers and the courts must, in turn, assess that exercise in light of those relevant contextual factors. In terms of an arrest for breach of the peace, historical acts of violence are relevant considerations in assessing the use of police powers.

11. In balancing the competing interests, courts must consider whether the police action was *reasonably necessary* for the carrying out of the particular duty *in light of all the circumstances*.[14] The fact-specific nature of the inquiry was emphasized by the Ontario Court of Appeal in *Brown v Regional Municipality of Durham Police Services Board*: the "infinite variety of situations" in which

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[10] *Asante-Mensah*, *supra* note 8 at paras 64-67
[11] See for example: *Canadian Environmental Protection Act*, *1999*, SC 1999, c 33, s 222.1; *Coastal Fisheries Protection Act*, RSC, 1985, c C-33, s 8; *Quarantine Act*, SC 2005, c 20, s 18; *Visiting Forces Act*, RSC, 1985, c V-2, s 10; *Excise Act*, RSC, 1985, c E-14,s 75; *Fisheries Act*, RSC, 1985, c F-14, s 50; *Migratory Birds Convention Act*, *1994*, SC 1994, c 22, s 6; *Customs Act*, RSC, 1985, c 1 (2nd Supp.), s 163.5
[12] *Interpretation Act*, RSC 1985, c I-21, s 31(2)
[13] See for example: *Brode*, *supra* note 9 at para 44; *R v Murray*, (1999) 136 CCC (3d) 197 ff Part IV
[14] *Macdonald*, *supra* note 2 at paras 36-37, 47; *Clayton*, *supra* note 2 at paras 31, 41

police and individuals interact which "make it difficult, if not impossible, to provide pre-formulated bright-line rules."[15]

12. This Court has stressed the importance of considering the "totality of the circumstances"[16] when assessing whether police conduct amounts to a justifiable interference with liberty or other interests. In *Clayton*, the majority determined that courts must look at what information was available to the police and whether the action taken was "responsive to the circumstances known by the police when it was set up".[17]

13. Consideration of the "totality of the circumstances" must include all relevant contextual factors that impacted or influenced the police action, including any historical context. Policing is a risk-based activity and situational awareness is critical for operational decisions. Specifically, in terms of police response to a demonstration or protest, historical context, such as prior incidents of violence, is highly relevant information in developing contingency plans.

14. Consistent with the overarching public duty of the police to keep the peace and prevent crime, facilitating peaceful, lawful and safe demonstrations is integral to police operations. Police must understand and appreciate the broader context surrounding any conflict, including cultural or historical dynamics, and take appropriate measures to ensure a safe environment for individuals exercising their constitutional rights.[18]

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[15] *Brown v Regional Municipality of Durham Police Service Board*, (1998), 131 CCC (3d) 1 ff Part VII

[16] *Macdonald*, *supra* note 2 at para 47; *Clayton*, *supra* note 2 at paras 30, 41; *Mann*, *supra* note 2 at paras 34, 40, 44

[17] *Clayton*, *supra* note 2 at para 41

[18] The Ipperwash Inquiry recommended that "policing strategies should ensure that they address the uniqueness of Aboriginal occupations and protests, with particular emphasis on the historical, legal and behavioural differences of such incidents". See: Report of the Ipperwash Inquiry, May 31, 2007, Volume 4 Executive Summary, Volume 1 "Investigations and Findings" Recommendation 9, p 96

15. In this case, the Ontario Court of Appeal properly concluded that courts cannot "compartmentalize the history of events" and "isolate individual incidents from one another" in assessing police action, particularly where there has been an ongoing dispute.[19]

> ….the police had a long history of dealing with disputes in the Caledonia area. They were aware of the potential for clashes to occur with little warning and for what might appear to be minor skirmishes to escalate very quickly. It was the obligation of the O.P.P. to be prepared and to take reasonable steps to avoid confrontation.[20]

16. The appellant adopts the dissenting judge's internally inconsistent opinion about the relevance and role of history.[21] On the one hand, the judge acknowledges that an evaluation of the circumstances existing at the time of arrest is properly "informed by the relevant history". But, on the other hand, states that the court's determination of the lawfulness of the arrest must be "based on extant circumstances".[22] This latter conclusion ignores the importance of considering the "totality of the circumstances".

17. Furthermore, contrary to the dissenting judge's opinion, there is no underlying assumption that "a history of conflict justifies the exercise of police power in all future circumstances" (emphasis added).[23] This is a factual determination for a trial judge in assessing the sufficiency of the evidence justifying the conduct. There is no pre-determined answer. In one case, the evidence may reasonably support that a history of conflict supports the police action, whereas in another the opposite conclusion may be reached. The result is wholly dependent on the weighing of the relevant factors in any given case, including the duty being performed, the extent to which some interference with individual liberty is necessary in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.[24]

18. Police efforts to build relationships in communities or with groups may also be a relevant consideration as part of the underlying factual matrix. Lawful police measures ancillary to core

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[19] Reasons for Judgment of the Majority of the Court of Appeal for Ontario dated February 16, 2018 (OCA majority), para 48, Appellant's Record, Vol 1, Tab 5, p 118
[20] *Ibid*, para 47, Appellant's Record, Vol 1, Tab 5, p 118
[21] Appellant's factum, para 121
[22] Reasons for Judgment of the Minority of the Court of Appeal for Ontario dated February 16, 2018 (OCA minority), para 84, Appellant's Record, Vol 1, Tab 5, pp 131-132
[23] *Ibid*
[24] *Macdonald*, *supra* note 2 at paras 37, 39

policing functions may include initiatives that build relationships with communities.[25] They may also include policies and practices that take into account the history and cultural perspectives of the particular community. These policies and practices may inform or influence the police response to a given situation. As such, they should form part of the courts' assessment of the reasonableness of police action to keep the peace and protect the public.

19. Similarly, if officers were acting in furtherance of broader police policies and specific critical incident plans, those are relevant to assessing the justifiable use of police powers. Policies and critical incident plans play a key role in guiding police action when dealing with demonstrations and protests and can assist the courts in understanding and assessing steps taken to address critical incidents. Stakeholder consultations, discussions and community engagement inform police policy and planning and can be part of the important contextual backdrop for assessing police response to specific incidents.

20. In *Figueiras v Toronto Police Services Board*, the Ontario Court of Appeal noted the lack of a broader police plan or policy to implement searches of demonstrators during the G20 demonstrations.[26] The officer had unilaterally decided to implement such searches. The Court concluded that this context pointed to the lack of effectiveness of the measure that the officer sought to implement. Conversely, where, as in the present case, the police conduct in question can be seen as supporting an operational plan to prevent flag rally demonstrators from entering the occupied land, that context should also inform the analysis. Here, the Ontario Provincial Police Aboriginal Framework was specifically developed because of "the long history of violent confrontations over Indigenous land claims".[27]

21. While policy and historical context cannot, in and of themselves, justify police action, the history of violence in an ongoing conflict is an appropriate consideration for an officer to take into account in his or her decision to arrest for breach of peace. It is also a relevant factor for courts when assessing the reasonableness of police action. Moreover, in the circumstances of a demonstration or

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[25] For example: Relationship Building Protocol between the Assembly of First Nations and the Royal Canadian Mounted Police, July 2016 https://www.afn.ca/uploads/files/afn-rcmp.pdf
[26] *Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208 at paras 101-103
[27] OCA majority, para 33, Appellant's Record, Vol 1, Tab 5, p 112

protest, the focus should not be restricted to the specifics of an individual plaintiff's interaction with the police, when police action is guided by the broader context.

C. *Waterfield* Test Incorporates Justification Factors in Second Stage Balancing Exercise

22. The *Waterfield* test, as presently articulated and applied by this Court, requires police conduct that interferes with individual liberties to be justified as "reasonably necessary" in the specific circumstances of the case.[28] Most recently in *R v Macdonald*, the majority reiterated that a number of factors must be weighed to balance the police duty against the liberty interest, including: (i) the importance of the duty; (ii) the necessity of the infringement for the performance of the duty; and (iii) the extent of the infringement.[29]

23. In the present case, the majority of the Court of Appeal did not depart from the *Waterfield* test.[30] Neither did the minority fundamentally diverge on the test.[31] Rather, their difference was in the test's application. Indeed, the appellant's position is that "the majority failed to apply the entire *Waterfield* analysis".[32]

24. There is no reason to import s. 1 *Charter* concepts of minimal impairment and proportionality into the balancing exercise as advocated by the appellant.[33] The test, as formulated and understood, ensures that police conduct is subjected to a rigorous standard of justification. Introducing minimal impairment and proportionality, specific concepts used in the s. 1 *Oakes* analysis, will only confuse the well-established *Waterfield* test.

25. The majority in *Clayton* rejected superimposing a formal *Oakes* test on the *Waterfield* analysis. Abella J. determined that the common law regarding police powers of detention building on *Waterfield*, is consistent with *Charter* values because it requires the state to justify the interference with liberty. This justification is based on criteria which focus on whether the interference with liberty

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[28] *Macdonald*, *supra* note 2 at para 36; *Clayton*, *supra* note 2 at paras 21, 29; *Mann*, *supra* note 2 at para 39
[29] *Macdonald*, *supra* note 2 at paras 37, 39. See also: *Reeves*, *supra* note 2 at para 78; *Clayton*, *supra* note 2 at paras 21, 26, 31
[30] OCA majority, paras 32, 41-50, 55, Appellant's Record, Vol 1, Tab 5, pp 112, 115-119, 121
[31] OCA minority, paras 95-103, Appellant's Record, Vol 1, Tab 5, pp 136-139
[32] Appellant's factum, para 136
[33] *Ibid*, para 99

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.[34]

26. In any event, it is essentially a question of semantics, with nothing turning on the result.[35] While the minority in *Clayton* preferred to apply the *Oakes* test, Binnie J. acknowledged that there is no significant difference between the "proportionality" of the conduct and the standard applied under the *Waterfield* test by the court below and the majority – whether the conduct was "reasonably tailored" to the information the police had.[36] Binnie J concluded that "tailored" was more or less synonymous with "proportionality".[37] The majority and the minority reached the same ultimate conclusion – that the police conduct was justified in the circumstances.

27. Post-*Clayton*, in *Figueiras*, the Ontario Court of Appeal considered the potential interplay between *Waterfield* and *Oakes*. The Court's discussion[38] of whether a s. 1 *Charter* analysis should be a direct part of the *Waterfield* test left the theoretical question unresolved as it found that "nothing turns on the approach taken" as the parties had agreed that "that if the impugned conduct passed muster under *Waterfield*, there was no breach of Mr. Figueiras's *Charter* rights."[39] The Court of Appeal decided to approach the matter from the standard *Waterfield* perspective.

28. The prevailing jurisprudence leaves the balancing of individual liberties and *Charter* rights with police objectives within the second stage of the *Waterfield* analysis. The existing, stringent articulation of the *Waterfield* test ensures that the powers derived from it meet s. 1 minimal impairment and proportionality requirements. It is not necessary for minimal impairment and proportionality to be textually incorporated in the formulation of the common law test for this to be achieved.

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[34] *Clayton*, *supra* note 2 at para 21
[35] Burchill, John, "A Horse Gallops Down a Street: Policing and the Resilience of the Common Law" (2018), 41:1 *Man LJ* 161 at 174-175, 208
[36] *Clayton*, *supra* at para 40 (majority), para 118 (minority)
[37] *Ibid* at para 118
[38] *Figueiras*, *supra* note 26 at paras 47-54
[39] *Ibid* at para 54

D. No Requirement of "Last Resort"

29. Necessity is an aspect of the *Waterfield* test: the exercise of police powers must be "reasonably necessary" in the circumstances.[40] However, that a power be exercised as a "last resort" is not required, nor should such a requirement be imposed by this Court.

30. Relying on the minority reasons in this case,[41] the appellant suggests that a requirement of last resort should apply.[42] The justification offered is that police action is "not truly *necessary*" unless it is a last resort.[43] The appellant argues that absent the imposition of a last resort requirement, the result will be "a significant expansion of the use of such police powers".[44]

31. The concern is, however, already addressed in this Court's strict articulation of necessity. In *Macdonald*, the majority held that the necessity requirement ensures that police powers are not "unbridled" because the legality of police conduct "turns on its reasonable, objectively verifiable necessity in the circumstances of the matter".[45]

32. A requirement that police prove their action was taken as a "last resort" would be ill-suited to the operational circumstances under which police employ their powers. Officers will not necessarily have a practical opportunity to first try and fail in applying a series of alternative techniques. Rather, they will have to make a quick judgment call based on the particular circumstances using their professional judgment as to which techniques have a reasonable chance of success. These are situations where a test of last resort is inappropriate.

33. By analogy, in the context of the interception of communications under the *Criminal Code*, this Court has rejected arguments that necessity imparts a requirement of last resort. More particularly, the proposition that the standards of "investigative necessity" and "immediately necessary" established in interception cases require that interception could only be used as a matter of last resort

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[40] *Macdonald*, *supra* note 2 at paras 36-37, 47
[41] OCA minority, paras 112-113, Appellant's Record, Vol 1, Tab 5, p 143
[42] Appellant's factum, paras 7, 86, 99
[43] *Ibid*, para 99
[44] *Ibid*, para 86
[45] *Macdonald*, *supra* note 2 at para 41

was rejected.[46] While the Court's conclusion in those cases is grounded in statutory interpretation, it also reflects a more general concern that effective police techniques should not to be unduly restricted.

34. These practical considerations have resonance to the *Waterfield* test and the notion of "last resort" should equally be rejected. In addressing the delicate balance between individual liberty rights and society's interest in effective policing, this Court has recognized that police must be afforded a certain degree of latitude and flexibility.[47]

> Given their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing.[48]

Recasting necessity in terms of last resort would fundamentally alter the necessary flexibility inherent in the *Waterfield* test.

PART IV – COSTS

35. Canada does not seek costs and asks that no costs be awarded against Canada.

PART V – ORDER SOUGHT

36. The appeal should be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 11 day of March, 2019.

Anne M. Turley
Zoe Oxaal
Of Counsel for the Intervener, The Attorney General of Canada

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[46] *R v Tse*, 2012 SCC 16 at para 43; *R v Araujo*, 2000 SCC 65 at paras 33-35
[47] *Clayton*, *supra* note 2 at para 53; *Asante-Mensoh*, *supra* note 8 at para 73; *Mann*, *supra* note 2 at para 16. See also: OCA majority, para 58, Appellant's Record, Vol 1, Tab 5, pp 122-123
[48] *Mann*, *supra* note 2 at para 16. See also: *R v Cornell*, 2010 SCC 31 at para 24; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 68

PART VII – TABLE OF AUTHORITIES

Case Law		**Cited at para**
1	*Brown v Regional Municipality of Durham Police Service Board*, (1998) 131 CCC (3d) 1	11
2	*Dedman v The Queen*, [1985] 2 SCR 2	1, 6
3	*Figueiras v Toronto (Police Services Board)*, 2015 ONCA 208	20, 27
4	*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41	34
5	*Knowlton v R*, [1974] SCR 443	1
6	*R v Araujo*, 2000 SCC 65	33
7	*R v Asante-Mensah*, 2003 SCC 38	8, 34
8	*R v Brode*, 2012 ONCA 140	8
9	*R v Clayton*, 2007 SCC 32	1, 2, 6, 7, 11, 12, 22, 25, 26, 34
10	*R v Cornell*, 2010 SCC 31	34
11	*R v Godoy*, [1999] 1 SCR 311	1
12	*R v MacDonald*, 2014 SCC 3	1, 6, 7, 11, 12, 17, 22, 29, 31
13	*R v Mann*, 2004 SCC 52	1, 6, 7, 12, 22, 34
14	*R v Murray*, (1999) 136 CCC (3d) 197	8
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16	*R v Stenning*, [1970] SCR 631	1
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2	*Coastal Fisheries Protection Act*, RSC 1985, c C-33 s 8	*Loi sur la protection des pêches côtières*, LRC 1985, ch C-33 art 8	8
3	*Customs Act*, RSC 1985, c 1 (2nd Supp) s 163.5	*Loi sur les douanes*, LRC 1985, ch 1 (2e suppl.) art 163.5	8
4	*Excise Act*, RSC 1985 c E-14 s 75	*Loi sur l'accise*, LRC 1985, ch E-14 art 75	8
5	*Fisheries Act*, RSC 1985 c F-14 s 50	*Loi sur les pêches*, LRC 1985, ch F-14 art 50	8
6	*Interpretation Act*, RSC 1985 c I-21 s 31(2)	*Loi d'interprétation*, LRC 1985, ch I-2 art 31(2)	8
7	*Migratory Birds Convention Act, 1994*, SC, 1994 c 22 s 6	*Loi de 1994 sur la convention concernant les oiseaux migrateurs*, LC 1994, ch 22 art 6	8

8	*Quarantine Act*, SC 2005 c 20 s 18	*Loi sur la mise en quarantaine*, LC 2005, ch 20 art 18	8
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