Court File No.

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

BETWEEN:

RANDOLPH (RANDY) FLEMING

APPLICANT
(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)

APPLICANT'S MEMORANDUM OF ARGUMENT
(Pursuant to s. 40(1) of the *Supreme Court of Canada Act*)

EVANS SWEENY BORDIN LLP
1500 – 1 King Street West
Hamilton, ON L8P 1A4

Michael Bordin | Jordan Diacur
Tel: (905) 523-5666
Fax: (905) 523-8098
Email: jdiacur@esblawyers.com
mbordin@esblawyers.com

Solicitors for the Applicant

CONWAY BAXTER WILSON LLP/s.r.l.
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Colin S. Baxter
Tel: (613) 780-2012
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for the Applicant

ORIGINAL TO:

THE REGISTRAR
SUPREME COURT OF CANADA
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

MINISTRY OF THE ATTORNEY-GENERAL
Crown Law Office, Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Judie Yung-Mi Im | Erin Rizok
Tel: (416) 314-4370
Fax: (416) 326-4181
Email: judie.im@ontario.ca
erin.rizok@ontario.ca

Lawyers for the Respondents

TABLE OF CONTENTS

OVERVIEW

"We want to be safe, but we need to be free."

- *Brown v Regional Municipality of Durham Police Service Board* (1998), 43 OR (3d) 223 (CA) ("*Brown*") per Justice D. H. Doherty at para 79

1. The process for determining whether the exercise of an ancillary common law police power is justified has been developed through case law stretching back to the 1960s. The *Waterfield* test has established the considerations that Courts are to balance. Among the considerations are the extent to which it is necessary to interfere with civil liberties to perform police duties.

2. This case raises the question of whether minimal impairment and proportionality remain considerations to be weighed as part of the *Waterfield* test. Here, the ancillary common law police power involved is the power to arrest a person who is lawfully exercising common law and *Charter* rights and freedoms in order to prevent an apprehended breach of the peace by others. This Court has not previously addressed this question, but in two earlier decisions the Court of Appeal for Ontario has done so. The decision in this case conflicts with that prior jurisprudence.

3. In *Brown*, the 'necessity' portion of the *Waterfield* test was held to involve examining whether the impugned means used by the police were needed (i.e. an arrest, as compared to using other available means).[1] The Court in *Brown* explicitly noted that means other than detentions had been available to police.[2] It was also held that the balancing should be weighted in favour of individual rights even if doing so makes the exercise of police powers more difficult.[3]

4. In *Figueiras v Toronto (Police Services Board)*, the concept of minimal impairment of rights was explicitly considered as part of the *Waterfield* balancing.[4] This ensured that the use of ancillary common law police powers would be proportionate, taking into account the importance

---

[1] *Brown* at para 76: "The police purpose behind the detentions, the nature of the liberty interest interfered with, the extent of the interference, and the need to employ the impugned means to effectively perform a duty placed upon the police must all be taken into account".

[2] *Brown* at para 77: "… - the detentions could not be said to be necessary to the maintenance of the public peace. A large police presence without detention would have served that purpose. In fact, it is arguable that the confrontational nature of the detentions served to put the public peace at risk."

[3] *Brown* at para 79.

[4] 2015 ONCA 208 at paras 90-91, 121-123 ["*Figueiras*"].

of the individual rights involved and any other available options when determining whether the impugned means used by the police were necessary.

5. *Brown* and *Figueiras* have been consistently followed in Ontario and looked to for guidance in other jurisdictions across Canada.

6. In the case at hand, however, the concepts of minimal impairment and proportionality were abandoned by the majority of Court of Appeal for Ontario. The focus was placed instead on the police duty to maintain the public peace and whether the police action was effective.

7. This conflict in the case law causes significant confusion regarding the Courts' ability to supervise the use of the ancillary common law police powers that are applicable across Canada, including the power to arrest a person who is acting lawfully in order to prevent an apprehended breach of the peace by others. It also permits a significant expansion of the use of such police powers to curtail lawful activities, producing a corresponding chilling effect on the exercise of fundamental civil liberties. A decision of this Honourable Court is needed to restore coherence and consistency to the law in this area and to ensure an appropriate emphasis on the importance of individual rights and freedoms in a democratic society.

PART I – STATEMENT OF FACTS

A. Background

8. The basic facts of this case are not in dispute. On May 24, 2009, the Applicant was lawfully and peacefully exercising his common law rights and *Charter* freedoms, walking north on the shoulder of Argyle Street in Caledonia, Ontario. He was carrying a Canadian flag. He was walking to a long-planned 'flag rally' involving the raising of a Canadian flag and speeches. His goal was to watch the rally.[5]

9. The Respondent Ontario Provincial Police officers set out to intercept the Applicant as he walked. They drove at him in two vans, onto the shoulder of the road at speed, from the opposite direction. The lead van was unmarked. The Applicant turned away from the vans. Carrying his Canadian flag, he walked a few meters through a ditch to higher ground onto land owned by the

[5] The summary of the facts is drawn from the Ruling of the Honourable Madam Justice K. Carpenter-Gunn, dated September 22, 2016 at pp 8-22.

Province of Ontario known as Douglas Creek Estates ("DCE").

10. Within seconds, the Applicant was arrested and wrestled to the ground by the Respondent police officers when he refused to drop his Canadian flag. It is not contested that the Applicant had broken no laws and was acting lawfully at the time of his arrest. It is not contested that the Applicant thereafter complied with police commands to place his hands behind his back. It is not contested that the Applicant's arm was wrenched upwards while he was being handcuffed by the Respondent police officers after he complied, leaving him with a permanent injury and chronic pain condition.

11. For more than three years prior to May 24, 2009, DCE had been occupied by Indigenous persons. The flag rally was to have occurred on the far side of Argyle Street from DCE, a busy two-lane highway. Argyle Street was open to traffic.

12. The Applicant did not approach any persons on DCE or speak to them. The main entrance to DCE where 20 or so occupiers were gathered was about 100 meters away from the Applicant. The day had been peaceful. There was a heavy police presence, with over 30 Ontario Provincial Police officers on the ground—including the 7 Respondent police officers—plus 30 additional officers (in 'hard tac' riot-gear) available in reserve and able to be quickly deployed.

13. After the Respondent police officers had driven their vans at the Applicant and he had left the shoulder of the road, approximately 8-10 male and female occupiers began to approach. Several were carrying cameras—some walked; some jogged. They had no weapons. They uttered no threats. They were not known to be individuals with a history of violence. The occupiers never arrived at the Applicant's location. They kept their distance from him and the police. One of the Respondent police officers acknowledged that the occupiers might have been coming over simply "to see what was going on".

14. The Respondent police officers acknowledged that options were available to them other than arresting the Applicant, including: (a) establishing a 'buffer zone' between the Applicant and the occupiers; (b) calling for readily-available backup; or, (c) sending out an officer or two to speak to the Applicant and determine his intentions instead of driving towards him in vans. Nevertheless, the Respondent police officers asserted that the Applicant was arrested in order to prevent an apprehended breach of the peace, i.e. a concern that the 8-10 approaching occupiers intended to

harm the Applicant in some unspecified manner.

15. The Applicant was placed in the back of an "Offender Transport Unit" van, was charged with obstructing a peace officer contrary to s. 129(1) of the *Criminal Code* and released some 4.5 hours later. The charge was ultimately withdrawn.

16. The commanding Ontario Provincial Police officer, Inspector Skinner, conceded that he had decided well in advance of the flag rally that public safety interests would be prioritized over rights such as the freedom to walk down the street and freedom of expression.

B. Trial Decision

17. The Applicant commenced an action for damages, alleging battery, false arrest, wrongful imprisonment, infringement of common law mobility rights, and breach of *Charter* rights and freedoms. The trial involved eight days of testimony before the Ontario Superior Court of Justice. After extensive closing submissions, Carpenter-Gunn J rendered an oral Ruling on September 22, 2016, in favour of the Applicant.

18. The trial judge found that:

a. the Respondent police officers were not justified in arresting the Applicant;

b. the Respondent police officers used excessive force and caused the Applicant's injury;

c. the Applicant was falsely arrested and wrongfully imprisoned;

d. the Applicant suffered interference with his common law right to walk along public roadways; and

e. the Applicant suffered interference with his *Charter* rights to freedom of expression, liberty and security of the person, and freedom from arbitrary detention.

19. The Applicant was awarded $80,000.00 in general damages, $12,986.97 in special damages, $5,000.00 for s. 2(b) *Charter* damages, $10,000.00 for false arrest and wrongful imprisonment, and, on consent, $151,000.00 in costs. The Respondents did not appeal quantum of damages or dispute that they injured the Applicant leaving him with a permanent injury and chronic pain condition. They did not appeal costs. They appealed the findings of liability only. The

Applicant cross-appealed with respect to the quantum and type of damages awarded.

C. Appellate Decision

20. After a hearing on November 14, 2017, the majority of the Court of Appeal for Ontario (per Nordheimer JA; Cronk JA concurring) rendered its decision on February 16, 2018. The trial decision was set aside and a new trial was directed on the sole issue of whether excessive force was used when the Applicant was arrested and, if so, what damages follow. The cross-appeal was dismissed. Costs of $25,000.00 were awarded against the Applicant.

21. The majority's decision abandoned considerations of proportionality and minimal impairment which were previously part of the test of necessity and the balancing to be conducted as part of the *Waterfield* analysis. Instead, in finding that the arrest of the Applicant was justified, the majority's decision focused solely on the existence of a police duty to maintain the public peace and the effectiveness of the police action.[6] The majority's decision implicitly directs Courts to show deference to police who "have a great deal more training and experience than do judges" and directs courts to be "very cautious about criticizing the tactical actions of the police".[7]

22. Huscroft JA wrote a dissenting opinion critical of the majority's decision on a number of fronts, including the majority's treatment of the *Waterfield* test, and the role of the Courts in exercising oversight of proactive policing decisions in order to prevent abuses. As noted in the dissenting opinion of Huscroft JA, the majority's decision:

> … understates the importance of both the common law liberty to proceed unimpeded along a public highway and the right to engage in political protest – the heart and soul of freedom of expression in a democracy. At the same time, it overstates the scope of the police power to arrest someone to avoid a possible breach of the peace – a breach that may never occur, and a breach that, if it were to occur, would be caused by the unlawful actions of others. The police power to arrest for a possible breach of the peace is an extraordinary power. Its exercise cannot easily be justified, according to the case law of this court, which is based on the *Waterfield* test.[8]

---

[6] Decision of the Court of Appeal for Ontario dated February 16, 2018 at paras 42, 46, 47, 56 and 57 (per Nordheimer JA; Cronk JA concurring).
[7] Decision of the Court of Appeal for Ontario dated February 16, 2018 at para 57 (per Nordheimer JA; Cronk JA concurring).
[8] Decision of the Court of Appeal for Ontario dated February 16, 2018 at para 94 (per Huscroft JA, dissenting).

23. The Applicant submits that the nature and implications of the majority's decision in this case are accurately highlighted by Huscroft JA:

> [111] In my view, my colleague misconstrues and so minimizes the necessity requirement. He acknowledges that the police could have instituted a buffer zone between Mr. Fleming and the protesters and could have called for backup rather than arresting him, but concludes, at para. 57:
>
> > There was no need to institute a buffer zone *if the matter could be addressed by removing the respondent as the source of the friction*. Further, there is no reason to believe that a buffer zone of six or seven officers against eight to ten rushing protestors (with others available to join that group) would have been effective or whether it would have simply resulted in a larger confrontation. Similarly, there was no reason to call for back-up, and run the risk of inflaming tensions by such a show of force, *if, again, the matter could be addressed by removing the respondent*.
>
> [112] Thus, in the face of concern that illegal violence *might* occur, my colleague sanctions the removal and arrest of Mr. Fleming – whose exercise of *Charter* rights broke no laws – as a *first* option in preserving the peace rather than a last resort.
>
> [113] **This turns the concept of necessity on its head.** The question is not whether arresting and removing someone might prevent a breach of the peace; the answer to that question will almost always be yes. The question is whether the extraordinary step of a preemptive arrest was *necessary* because a breach of the peace was imminent and the risk that it would occur was substantial, **and that breach could not be reasonably prevented by some alternative police action**. In this regard, I note that the trial judge found, at pp. 54-65, that "[t]here were many other less invasive options that could have been implemented to defuse the situation."
>
> [Emphasis (italics) in original. Emphasis (bold) added]

24. In the above passages, Huscroft JA identifies the key problem with the abandonment of minimal impairment and proportionality as considerations to be applied during the *Waterfield* balancing exercise. If the duty of the police and the effectiveness of the police action are emphasized, if the liberty interests of the individuals affected by that police action are minimized or disregarded, and if less invasive alternatives are ignored, the *Waterfield* balancing will be thrown out of proportion. Rather than the balance putting a premium on individual freedoms (as in *Brown*),

it will inexorably be weighted in favour of deference to police decisions, even where those decisions violate common law and *Charter* rights and freedoms. This may result in a dangerous abrogation of the Courts' important role in regulating the exercise of proactive policing. As Huscroft JA underscored:

> [114] The trial judge concluded, at p. 43, that there was "no evidence to support a finding that there was a reasonable basis for the O.P.P officers to believe there was an imminent risk that a breach of the peace would occur, or that the risk that it would occur was substantial". Nordheimer J.A. rejects this conclusion, but he does not analyze the requirements of imminence or substantiality, nor does he explain why the trial judge's interpretation and application of the test was wrong. His conclusion, that the police had reasonable grounds to believe that there was an imminent risk to the public peace and a substantial risk of harm to Mr. Fleming, appears to flow from his view that the police are entitled to deference in such matters. He notes, at para. 57:
>
> > In my opinion, courts ought to be very cautious about criticizing the tactical actions of the police in situations such as that presented here. It should go without saying that the police have a great deal more training and experience in such matters than do judges.
>
> [115] I accept that the police have training and experience that judges do not. I do not accept that their decisions are entitled to deference as a result, especially when they limit the exercise of *Charter* rights. My colleague states that his observations are not intended to suggest that the courts will defer to the police, but in my view his decision does precisely this.

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

25. The Applicant submits that the conflict between the decision in this case and those in *Figueiras* and *Brown* has produced a situation of confused appellate authority: do minimal impairment and a proportionate balancing form part of the *Waterfield* analysis or not?

26. This confusion will negatively affect the ability of trial judges and appellate panels to adjudicate future cases, not only where a party acting lawfully is arrested and it is alleged that the arrest is justified on the basis of an apprehended breach of the peace, but also in circumstances where any other ancillary common law police power is exercised. As examined below, minimal impairment has been considered as a factor by this Court where the exercise of other ancillary common law police powers was concerned. There is, however, no decision of this Court that has

directly addressed this question in the context of an arrest to prevent an apprehended breach of the peace, including where it is acknowledged that the arrested person was acting lawfully.

27. The Applicant submits that abandoning or ignoring minimal impairment and proportionate balancing, thereby authorizing the police to make 'protective' arrests of innocent persons as a first option in the maintenance of the public peace rather than a last resort, may result in a significant expansion of the use of such police powers. This may lead to the curtailing of lawful activities and a corresponding chilling effect on the exercise of fundamental civil liberties, including the right to walk on a public roadway or attend a political protest. These are the very results that the previous jurisprudence sought to prevent, by putting a premium on individual freedom and insisting on minimal impairment and a proportionate balancing of individual rights with police duties, even if doing so might make crime prevention and peacekeeping more difficult for the police.

28. The conflicting case law is likely to cause significant confusion in Courts not just in Ontario but across Canada, as *Brown* and *Figueiras* have been looked to as persuasive authority by trial and appellate judges in Newfoundland & Labrador[9], Nova Scotia[10], Manitoba[11], British Columbia[12] and the Court Martial Appeal Court of Canada[13] (regarding ancillary common law police powers and/or the *Waterfield* analysis), and in Quebec (regarding the analysis of s.2(b) *Charter* breaches)[14].

29. The Applicant therefore submits that the Supreme Court of Canada should grant leave to hear this particular case as it raises the following questions with respect to the exercise of common law ancillary police powers applicable across Canada:

a. The legal test applicable to the exercise of ancillary common law police powers (the *Waterfield* test) has been rendered incoherent and inconsistent by the Court of Appeal for Ontario, throwing into doubt guiding principles that have been followed by trial and appellate courts across the country;

---

[9] *R v Woolridge*, 2017 CarswellNfld 384 (Prov. Ct.) at para 51; *R v Stickland*, 2016 CarswellNfld 28 (Prov. Ct.) at para 33.
[10] *R v E (C)*, 2009 NSCA 79 at paras 36-37; *R v MacInnis*, 2014 NSSC 262 at para 46.
[11] *R v B(K)*, 2003 CarswellMan 296 (Prov. Ct.) at paras 29-32, aff'd 2004 MBCA 97
[12] *Akintoye v White*, 2017 BCSC 1094 at para 155.
[13] *R v Wellwood*, 2017 CACM 4 at para 174.
[14] *Garbeau c Montreal (Ville)*, 2015 QCCS 5246 at para 124.

b. In particular, the Court of Appeal for Ontario has abandoned considerations of minimal impairment and proportionality applied in previous cases as crucial parts of the balancing exercise at the second stage of the *Waterfield* test; and

c. It is a question of public and national importance relating to constitutionally-protected rights and ancillary common law police powers to resolve this fundamental incoherence and inconsistency.

PART III – STATEMENT OF ARGUMENT

A. Common Law Ancillary Powers

30. Police powers arise from both statute and the common law. Common law police powers are considered to stem from police duties. Such powers are therefore considered "ancillary", and form part of the "ancillary powers doctrine".[15]

31. The power to arrest a person in order to prevent an apprehended breach of the peace is not created or governed by any statute. It is a common law ancillary power.

32. Police duties and police authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assists in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law.[16]

33. Appellate courts have held that it is more difficult for police to justify the use of a common law ancillary power on the basis of preventative policing than investigation of a past or ongoing crime.[17] It has also been held that the Courts play an important role in regulating the exercise of proactive policing due to the nature of preventative stops and their potential for abuse.[18]

B. The *Waterfield* Test

34. The two-part test to determine whether a police officer's conduct falls within any common

---

[15] *Figueiras* at para 42.
[16] *Figueiras* at para 43.
[17] *Figueiras* at para 45, citing *Brown.*
[18] *Figueiras* at para 46, citing *R v Mann*, 2004 SCC 52.

law ancillary power, originally articulated by the English Court of Appeal in *R v Waterfield*[19], has been adopted and summarized by this Court in *Dedman v The Queen*[20], *R v Mann*[21] and *R v MacDonald*[22], and cited and explained by the Court of Appeal for Ontario in *Figueiras*[23]:

> In the first stage, "the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized by law".
>
> In the second stage, the court must strike a "balance between the competing interests of the police duty and of the liberty [or other] interests at stake". Put another way, is the police action "reasonably necessary for the carrying out of the particular duty in light of all the circumstances"?

35. The Court in *Figueiras* went on to explain that the factors to be balanced at the second stage include:

> a. The importance of the duty to the public good;
>
> b. The extent to which it is necessary to interfere with liberty to perform the duty; and
>
> c. The degree of interference with liberty.[24]

36. Court of Appeal decisions in Ontario[25], Saskatchewan[26], and Newfoundland & Labrador[27] have held that, where a police officer exercises the common law ancillary power to make an arrest in order to prevent an apprehended breach of the peace, the following additional considerations are to be included in the analysis:

---

[19] [1963] 3 All E.R. 659.
[20] [1985] 2 SCR 2.
[21] 2004 SCC 52.
[22] [2014], 1 SCR 37.
[23] *Figueiras* at paras 84 – 86.
[24] *Figueiras* at paras 84 – 86.
[25] *Brown* at para 78; *Figueiras* at para 91.

[26] *R v Houben*, 2006 SKCA 129: "Thus, the Court in *Brown* did not expand police powers to detain beyond the situation where there was 'a real risk of imminent harm.'"

[27] *R v Penunsi*, 2018 NLCA 4 at paras 66-67: "I agree with Justice Doherty's reasoning in *Brown* that a preventive arrest, be it pursuant to section 495(1)(a) or the common law, requires *an informant's belief on reasonable grounds* that there is a *substantial risk* that a *specified offence* will occur *imminently*. Such a restrictive interpretation is in keeping with our constitutional values. [emphasis in original]"

a. The apprehended breach must be imminent, and

b. The risk that the breach will occur must be substantial.

Before the imminent and substantial criteria are met, proactive policing must be limited to steps which do not interfere with individual freedoms.[28]

37. This Court has not addressed a case in which the ancillary common law police power to arrest a person who is acting lawfully in order to prevent an apprehended breach of the peace by others was exercised. The conclusion that such an ancillary common law police power exists and the extent of such power is based to date on appellate decisions like *Brown* and *Figueiras*.

38. *Figueiras* was a Toronto G20 case involving *Charter* rights, as well as the common law right to pass and repass on a public highway, and common law police powers to search and exclude persons from a defined area. The police decision to target only apparent demonstrators for searches and exclusion was impugned. The question of "the extent to which it is necessary to interfere with liberty to perform the duty" (i.e. stage 2(b) of the *Waterfield* analysis) was held to involve several considerations. These considerations include the effectiveness of the police action in reducing the likelihood of the risk occurring, the police action's rational connection to the risk sought to be managed, and minimal impairment:

> [90] … **The application judge did not view Sgt. Charlebois's decision to stop only demonstrators as being problematic, as it constituted only a minimal intrusion.** He could not see "the logic in finding that stopping less people was an excess of authority when detaining more people would have been permissible" (at para. 25). He did not think that "in exercising his discretion to tailor his intrusions to those most rationally connected with the objective of his activity, Detective Charlebois can be said to have behaved arbitrarily or exceeded his authority at common law" (at para. 25).
>
> [91] **In my view, the application judge erred in his analysis of this factor.** Having found that unlawful acts similar to those committed the previous day were "imminent" and that police had a duty to protect against their commission, the application judge did not adequately assess whether the police power exercised here and the resulting interference with Mr. Figueiras's liberty was *necessary* for the performance of the duty.[29] [Emphasis (italics) in original. Emphasis (bold) added]

---

[28] *Brown* at para 78.
[29] *Figueiras* at paras 90-91

39. When conducting the final balancing of factors at the second stage, the Court in *Figueiras* indicated that the concept of minimal impairment again plays a role:

> [121] As I explained above, the application judge committed several errors both in his analysis as to whether the officers' actions were necessary to carry out their duty, and in his assessment of the rights that the officers' actions interfered with.
>
> [122] In my view, the application judge also erred in how he approached the balancing exercise, in two ways.
>
> [123] First, the application judge misinterpreted the concept of minimal impairment. He found that, by targeting only apparent demonstrators, the officers had tailored "their activities to the minimum intrusions reasonably necessary in the circumstances" (at para. 25). In effect, he equated "minimal impairment" with minimizing the number of people affected, but did not consider whether the impact on those targeted by the police conduct could be minimized.[30]

40. The Court of Appeal in *Figueiras* went on to find that there was a substantial interference with—not a minimal impairment of—liberty, both with respect to the number of interferences and their severity.[31]

41. The Applicant submits that minimal impairment is meant to ensure the *Waterfield* balancing is conducted proportionately to the importance ascribed to the other factors in play, especially civil liberties. As it was put in *Brown*: "The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police."[32]

42. Minimal impairment has been considered by this Court in the analysis of other ancillary common law police powers. In *Cloutier v Langlois*, this Court (per L'Heureux-Dube J) held that the minimal intrusion involved in a 'frisk search' incidental to a lawful arrest is necessary to ensure that criminal justice is properly administered. [33] In *R v Godoy*, this Court (per Lamer CJ) upheld a decision of the Court of Appeal for Ontario which had determined that the common law power to search a home in response to a 9-1-1 call was minimally invasive if it was limited to locating the

---

[30] *Figueiras* at paras 123 and 134.
[31] *Figueiras* at para 134
[32] *Brown* at para 79.
[33] [1990] 1 SCR 158 at para 60.

caller, determining why the call occurred and assisting as appropriate.[34] In *R v Kang-Brown*, the majority of this Court accepted that where an investigative technique is minimally invasive (as with the use of a sniffer-dog in circumstances of reasonable suspicion) the police may be authorized by the common law to employ that technique.[35] In *R v Clayton*, the majority of this Court (per Abella J) suggested that the concepts of minimal impairment (the police action is to be "**no more intrusive** to liberty than reasonably necessary") and proportionality ("[t]he standard of justification must be **commensurate with** the fundamental rights at stake") applied in the context of a common law police detention and search of individuals following a gun complaint.[36]

43. The common law has developed in the same direction in England, where the House of Lords has stated that the lawful exercise of civil rights can only be curtailed by the police where there is a reasonable belief that there are no other means available whereby an imminent breach of the peace can be obviated.[37] This is a test of necessity which it is to be expected can only be justified in extreme and exceptional circumstances.[38] The action taken must be both reasonably necessary and proportionate.[39] That is to say, the ancillary common law police power to arrest a person to prevent an apprehended breach of the peace is a last resort—if other less intrusive options are available, an arrest is not a minimal impairment, is not proportionate and cannot truly be called *necessary*.

C. *Charter* Considerations

44. As the concurring minority in *Clayton* explained, the reference to "liberty" at the second stage of the *Waterfield* test is a reference to all of a citizen's civil liberties, which in a post-*Charter* era means both common law liberties, such as those at stake in *Dedman* and *Waterfield* itself, as well as constitutional rights and freedoms, such as those protected by the *Charter*.[40] There is little

---

[34] [1999] 1 SCR 311 at paras 9, 23.
[35] 2008 SCC 18, see i.e. Binnie J (concurring in the result) at para 60.
[36] 2007 SCC 32 at para 21 [emphasis added] ("*Clayton*").
[37] *Austin v Commissioner of Police of the Metropolis*, [2007] EWCA Civ 989 at paras 35, 119, aff'd [2009] UKHL 5 ("*Austin*"); *R v Commissioner of Police of the Metropolis*, [2012] EWCA Civ 12 at p 12.
[38] *Austin* at paras 35, 119, aff'd [2009] UKHL 5.
[39] *Austin* at paras 35, 119, aff'd [2009] UKHL 5.
[40] *Clayton*, per Binnie J at para 59.

latitude where *Charter* rights and freedoms are involved—as this Court unanimously held in *R v Nolet*: "Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the *Charter* rights of an accused."[41]

45. The proportional balancing required at the second stage of the *Waterfield* analysis is consistent with *Charter* values and the direction of this Court in *Doré v Barreau du Quebec*[42], a case concerned with determining how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. In *Doré*, this Court (per Abella J) noted that the protection of *Charter* guarantees is a fundamental and pervasive obligation and that the means of protecting those guarantees was

> [5] …by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: **balance and proportionality**. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.
>
> [6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. … In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker **disproportionately, and therefore unreasonably, limited a *Charter* right**. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
>
> [emphasis added]

D. Abandonment of Proportionality and Minimal Impairment as Considerations

46. The Applicant submits that the Court of Appeal for Ontario in the present case has abandoned proportionality and minimal impairment as considerations in the balancing to be conducted as part of the *Waterfield* analysis, including where the ancillary common law power in question is the extraordinary power to arrest a person who is acting lawfully in order to prevent an

---

[41] 2010 SCC 24 per Binnie J (for the Court) at para 38.
[42] *Doré v Barreau due Quebec,* 2012 SCC 12 at paras 3 – 6

apprehended breach of the peace by others. Instead, the existence of a police duty to maintain the public peace and the effectiveness of the police action have been made the exclusive focus. This directly conflicts with the decisions of the Court of Appeal for Ontario in *Brown* and *Figueiras*, throwing into doubt the nature and content of the applicable test.

47. The Applicant submits that Huscroft JA in his dissent correctly diagnoses the causes of this abandonment. The potential ramifications are severe, including confusion in trial and appellate Court decisions and the curtailing of fundamental rights and freedoms. What are future Courts to do when a particular use of the power to arrest a person (including a person who is acting lawfully and exercising common law and *Charter* rights and freedoms) to prevent an apprehended breach of the peace is impugned? Are minimal impairment and proportionality considerations to be applied or not? If not, and if the Courts are to defer to police operational decisions, what is to prevent an expansion of the use of such common law arrests to suppress protest or simply because it is easier for police to take a heavy-handed approach rather than a proportional one?

48. The Applicant submits that it is a matter of public and national importance worthy of the attention of this Court to ensure that Doherty JA's pithy summary of the proper tension between freedom and security in *Brown*—i.e. "We want to be safe, but we need to be free"—is not inverted by routine police prioritization of perceived public safety interests over civil rights, such as the freedom to walk down the street and freedom of expression.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS

49. The Applicant seeks his costs of this application for leave to appeal.

PART V – ORDER OR ORDERS SOUGHT

50. The Applicant seeks an Order granting leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada.

Dated at Ottawa, Ontario this 27th day of April 2018.

Colin Baxter for
Michael Bordin | Jordan Diacur
EVANS SWEENY BORDIN LLP
1 King Street West, Suite 1500
Hamilton, ON L8P 1A4

Solicitors for the Applicant

PART VI – TABLE OF AUTHORITIES

TAB #	DOCUMENT DESCRIPTION	PARAGRAPH REFERENCED
1.	*Akintoye v White*, 2017 BCSC 1094	28
2.	*Austin v Commissioner of Police of the Metropolis*, [2007] EWCA Civ 989, aff'd [2009] UKHL 5	43
3.	*Brown v Regional Municipality of Durham Police Service Board*, (1998), 43 OR (3d) 223 (CA)	3, 5, 24, 25, 28, 36, 37, 41, 46, 48
4.	*Cloutier v Langlois*, [1990] 1 SCR 158	42
5.	*Dedman v The Queen*, [1985] 2 SCR 2	34, 44
6.	*Doré v Barreau due Quebec*, 2012 SCC	45
7.	*Figueiras v Toronto Police Services Board*, 2015 ONCA 208	4, 5, 25, 28, 30, 32 to 40, 46
8.	*Garbeau c Montreal (Ville)*, 2015 QCCS 5246	28
9.	*R v B (K)*, 2003 CarswellMan 296 (Prov. Ct.), aff'd 2004 MBCA 97	28
10.	*R v Clayton*, 2007 SCC 32	42, 44
11.	*R v Commissioner of Police of the Metropolis*, [2012] EWCA Civ 12	43
12.	*R v E (C)*, 2009 NSCA 79	28
13.	*R v Godoy*, [1999] 1 SCR	42
14.	*R v Houben*, 2006 SKCA 129	36
15.	*R v Kang-Brown*, 2008 SCC 18	42
16.	*R v MacDonald*, [2014], 1 SCR 37	34
17.	*R v MacInnis*, 2014 NSSC 262	28
18.	*R v Mann*, 2004 SCC 52	33, 34
19.	*R v Nolet*, 2010 SCC 24	44

TAB #	DOCUMENT DESCRIPTION	PARAGRAPH REFERENCED
20.	*R v Penunsi*, 2018 NLCA	36
21.	*R v Waterfield,* [1963] 3 All E.R. 659	34
22.	*R v Wellwood*, 2017 CACM 4	28
23.	*R v Woolridge*, 2017 CanLII 61027 (NL PC)	28

PART VII – LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.