S.C.C. File No. 38087

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)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL OF THE RESPONDENTS
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Respondents, Her Majesty the Queen in right of Ontario ("Ontario" or "the Crown") and Constables Miller, Bracnik, Cudney, Courty, Lorch, Cole and Gibbons (collectively the "Respondent Officers") of the Ontario Provincial Police ("OPP"), respectfully submit that the issues raised on this Application for leave to appeal a decision of Ontario Court of Appeal, dated February 16, 2018, do not raise any issue of national or public importance that would warrant this Honourable Court's consideration.

2. This case turned on the court's assessment of the facts. The majority of the Ontario Court of Appeal found that the Trial Judge's conclusion that the Applicant's arrest was unlawful, was tainted by palpable and over-riding errors.[1] The majority based their assessment on the evidence in the record which includes a videotape of the events. The dissent disagreed with the majority's conclusion, would have accorded deference to the Trial Judge's findings of fact and found that certain palpable errors were not over-riding.[2]

3. There is no uncertainty in the law regarding the application of the *Waterfield* test where *Charter* rights are at issue, nor is there any uncertainty that concepts of minimal impairment and proportionality have been incorporated into the necessity and balancing aspects of the *Waterfield* test. Further, the majority's application of the law is entirely consistent with decisions of this Honourable Court and subsequent jurisprudence, including decisions of the Ontario Court of Appeal in *R v Figueiras*[3] and *R v Brown.*[4] Arriving at a different result from the Trial Judge "in light of all the circumstances" does not create a conflict in the law warranting this Honourable Court's attention.

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[1] *Fleming v Ontario*, 2018 ONCA 160 at para 38 ["*Fleming*"], **Application for Leave to Appeal of the Applicants ("LTA"), Tab 4, p 110.**
[2] *Fleming* at paras 80-81, **LTA, Tab 4, p 126.**
[3] *Figueiras v Toronto Police Services Board,* 2015 ONCA 208, 383 DLR (4th) 512 ["*Figueiras*"].
[4] *Brown v Durham Regional Police Force* (1998), 43 OR (3d) 223, 167 DLR (4th) 672 (ONCA) ["*Brown*"].

4. For these reasons, Ontario respectfully submits that this Application for leave to appeal should be dismissed.

B. FACTUAL BACKGROUND

5. The majority of the Ontario Court of Appeal found many factual findings of the Trial Judge gave rise to palpable and over-riding errors. The dissent found some errors though palpable were not over-riding and would have accorded deference to the findings of fact of the Trial Judge. Some of the relevant findings of fact of the majority are set out below.

6. The Applicant's claim arises out of events that took place on May 24, 2009, near Argyle Street South in the Town of Caledonia but it is directly related to a longstanding dispute involving Indigenous land claims in the Caledonia area of Ontario.[5]

7. On February 28, 2006, a dispute over land between the Six Nations of the Grand River and the Crown led to the occupation of the Douglas Creek Estates ("DCE") in the Town of Caledonia by Indigenous protestors. As part of the occupation of the DCE, certain Indigenous flags were hung at different times on Argyle Street, located at the front entrance of the DCE.

8. In response, other individuals and groups began their own campaigns counter-protesting the occupation of the DCE, the flying of Indigenous flags on Argyle Street, and what was alleged by them to be the OPP's "race-based policing" of the Caledonia conflict. The Crown's decision to purchase the DCE from its owner, Henco Industries Ltd, and allow DCE protesters to remain on it, and the OPP's policing policies in Caledonia, have been the subject of criticism, protest and litigation ever since.[6]

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[5] *Fleming* at para 1, **LTA, Tab 4, p 98.**

[6] *Fleming* at paras 3-4, **LTA, Tab 4, p 98-99.** See also: See *Henco Industries Limited v Haudenosaunee Six Nations and Confederacy Council* (2006), 82 OR (3d) 721, 154 ACWS (3d) 183 (ONCA), ["*Henco*"] - paras 1-5; 14-19; 43-45 re Six Nations land claims issues leading to occupation of Caledonia; paras 5, 45, 49-50, 64, and 74 re Crown's purchase of DCE and 'political decision" to allow DCE protestors to remain on it; and para 64 re Crown as owners entitled to allow the DCE protesters to remain on it.

9. Many of the counter-protests in Caledonia have been violent, including protests on May 21, 2006, December 1, 2007 and September 1, 2008, where violence increased as the two sides were allowed to come within proximity of each other. All of the Respondent Officers and Inspector Skinner, the Aboriginal Critical Incident Commander on May 24, 2009, had been deployed to Caledonia numerous times since the beginning of the conflict and were aware of the potential for the number of protesters to rapidly increase and the situation to rapidly escalate from peaceful to violent with little warning as large numbers of individuals arrived onto DCE from the Six Nations' territory located immediately behind DCE, sometimes, within minutes of a phone call being made.[7] The Applicant, who attended these counter-protests, agreed that rallies in the past were "inundated with violence".[8] However, all parties agreed that the level of confrontation and violence has diminished since 2006.[9]

10. Some months prior to May 24, 2009, it came to the OPP's attention that a flag-raising rally was being organized by the Canadian Advocates for Charter Equality ("CANACE") to protest the occupation of DCE, the Indigenous flags flying on Argyle Street, and what was viewed by the protesters as "race-based policing" by the OPP ("Flag Rally"). It was the intention of the Flag Rally organizers to march south on Argyle Street and hang Canadian flags directly across the front entrance of DCE where DCE protesters are known to stand.[10]

11. The "Ontario Provincial Police Haldimand County Detachment Operational Plan Flag Rally" ("Operational Plan") was designed by Inspector Skinner in accordance with the Framework for Police Preparedness for Aboriginal Critical Incidents ("Framework") and other relevant OPP policies. Formulating the Operational Plan for the Flag Rally involved, amongst other things, meeting with members of the Indigenous community, the local city council (who informed him that they did not support the Flag Rally), and the organizers of the Flag Rally.[11]

12. As a result of his past experience in Caledonia and information received from the Aboriginal Relations Teams of the OPP as to what kinds of events would raise the tensions on the DCE, Inspector Skinner was of the view that the two groups needed to be kept apart in order

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[7] *Fleming* at paras 5-7, **LTA, Tab 4, pp 99-100.**
[8] *Fleming* at para 7, **LTA, Tab 4, p 100.**
[9] *Fleming* at para 7, **LTA, Tab 4, p 100.**
[10] *Fleming* at para 8, **LTA, Tab 4, p 100.**
[11] *Fleming* at paras 9-11, **LTA, Tab 4, pp 100-101.**

to preserve the peace and that the potential for conflict would increase as their proximity to each other decreased. His view was not altered by any information he received up to and including the day of the Flag Rally.[12]

13. Inspector Skinner advised the Flag Rally organizers that they had a right to protest in a peaceful manner but that the march would not be permitted near the vicinity of DCE.[13] He also conveyed to them at some point that individuals other than the DCE protesters, were not permitted onto the DCE.[14]

14. Based on his past experience policing in Caledonia, Inspector Skinner determined that two public order units of 30 officers each, were required. The Alpha Unit, in "soft tac", was to be initially deployed on Argyle Street while the Bravo Unit, in "hard tac", was held back at the Oneida Public School a few kilometres away.[15]

15. At the morning briefing on May 24, 2009, Inspector Skinner communicated the Operational Plan's threefold mission to all the officers:

i. Maintain order and ensure public safety to the residents, community members and police.
ii. Allow Flag Rally protestors to exercise their lawful rights and cause the least possible disruption to others.
iii. Maintain the safe and orderly flow of traffic on Argyle Street South in the Town of Caledonia and Highway 6 By-Pass.[16]

16. Inspector Skinner also advised at the briefing that the Flag Rally protest would not be allowed within the vicinity of the DCE and that they should stop anyone from going onto the DCE. However, whether this would be done through communication or physical restraint would depend upon the circumstances and officer discretion.[17]

17. Inspector Skinner planned on keeping the Flag Rally protesters and the DCE protesters apart initially through negotiation and discussions but ultimately, if necessary, by creating a buffer between them - with the Flag Rally protesters on Argyle Street some distance north of the

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[12] *Fleming* at para 12, **LTA, Tab 4, pp 101-102.**
[13] *Fleming* at para 13, **LTA, Tab 4, p 102.**
[14] *Fleming* at para 13, **LTA, Tab 4, p 102.**
[15] *Fleming* at para 14, **LTA, Tab 4, p 102.**
[16] *Fleming* at para 15, **LTA, Tab 4, pp 102-103.**
[17] *Fleming* at para 16, **LTA, Tab 4, p 103.**

front entrance of the DCE while the DCE protesters at the front entrance would not be permitted north to approach the Flag Rally protesters.[18]

18. On the afternoon of May 24, 2009, the Applicant was at the Brown's residence, the first private residence south of the entrance of the DCE on Argyle Street, attending a barbeque where t-shirts were being sold to pay the court costs of protesters opposed to the occupation of the DCE and who were arrested in and around Caledonia. He began walking north on the western shoulder of Argyle Street towards the front entrance of the DCE carrying a flag attached to a wooden pole between 40 to 42 inches in length. His intention was to join the Flag Rally.[19]

19. Two vans containing the Respondent Officers being deployed to a church parking lot immediately north of the front entrance of DCE, drove north on Argyle Street past the Applicant. They turned around in the church parking lot to drive back south on Argyle Street to approach the Applicant, when directed by Sergeant Huntley to deploy between the Brown's residence and the front entrance of the DCE because a "flag was coming up the road".[20]

20. The Applicant saw the approaching vehicles and left the shoulder because the vans were approaching him with speed. After leaving the shoulder, however, he voluntarily continued walking in a westward direction "a fair distance" – down a grassy ditch, through the ditch and up the other side, over a low fence marking the territory of the DCE, and then a few steps onto the DCE - in order to get on level ground[21]. The Applicant heard the Respondent Officers' yelling various commands, such as "return to the shoulder", "stop" and "stay away from DCE", but he did not comply because he did not think they were talking to him as he claimed he knew he "wasn't doing anything wrong".[22]

21. The Applicant's entry onto the DCE caused an "immediate reaction" from the DCE protesters at the front entrance of the DCE. They became "angry and upset" and approximately 8-10 DCE protesters started moving towards the Applicant.[23] The Respondent Officers were

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[18] *Fleming* at para 17, **LTA, Tab 4, p 103.**
[19] *Fleming* at paras 18-19, **LTA, Tab 4, p 103.**
[20] *Fleming* at paras 20-21, **LTA, Tab 4, p 104.**
[21] *Fleming* at para 22, **LTA, Tab 4, pp 104-105.**
[22] *Fleming* at para 23, **LTA, Tab 4, p 105.**
[23] *Fleming* at para 24, **LTA, Tab 4, p 105.**

concerned for the Applicant's safety[24] and it was clear that the Applicant was also concerned, as he testified in chief:

> A. My first, my initial thought was who do I take my chances with? That was my initial thought. Do I, do I walk down to the entrance of the [DCE] and met the people coming out or do I turn around and, and walk back into the police? Honest, that was my first thought.
>
> Q. Okay.
>
> A. Fairly quickly decided it would likely be better if I turned and went with the police.
>
> Q. Why was that?
>
> A. Well, that would diffuse [*sic*] the situation. It was – I mean I wasn't there to prove a point or anything. I, I just – I was disappointed when I realized they were talking to me.[25]

22. Officer Miller followed the Applicant over the fence, told him that he was under arrest to prevent a breach of the peace in accordance with OPP policy, and took the Applicant's right arm and escorted him over the low fence and off the DCE.[26] During his arrest, the Applicant was ordered to drop the flag as Officer Miller, and some of the other Respondent Officers, viewed the flag pole as a potential weapon.[27] The Applicant refused to let go. His evidence was that he had no intention of allowing the officers to take his flag.[28] A struggle ensued and the Applicant and some of the Respondent Officers went to the ground. Eventually, the flag was wrestled from the Applicant's hands and he was handcuffed during which time his left elbow was injured.[29]

23. Some but not all of the events were captured on a video recording. Due to the presence of a large bush the video does not show the Applicant being taken down, relinquishing his flag or being handcuffed.[30]

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[24] *Fleming* at para 24, **LTA, Tab 4, p 105.**
[25] *Fleming* at para 25, **LTA, Tab 4, pp 105-106.**
[26] *Fleming* at para 26, **LTA, Tab 4, p 106.**
[27] *Fleming* at para 27, **LTA, Tab 4, p 106.**
[28] *Fleming* at para 27, **LTA, Tab 4, p 106.**
[29] *Fleming* at para 28, **LTA, Tab 4, p 106.**
[30] *Fleming* at para 29, **LTA, Tab 4, p 107.**

C. PROCEDURAL BACKGROUND

1. The Trial Decision

24. The Applicant claimed damages for assault, battery, wrongful arrest, false imprisonment, breaches of his common law right to pass and repass, and breaches of his rights under sections 2(b), 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

25. Justice Carpenter-Gunn of the Superior Court of Justice for Ontario concluded that the Applicant was falsely arrested and wrongfully imprisoned and that Ontario was liable for assault and battery, breach of the Applicant's common law mobility rights, and breaches of sections 7, 9 and 2(b) of the *Charter*. Her Honour declined to award punitive or aggravated damages[31] and found that there was no breach of the Applicant's section 15 rights under the *Charter*.[32]

26. The Trial Judge made a number of findings criticizing the OPP's policies and policing strategy on the date of the Flag Rally. Specifically, the Trial Judge found that neither the Flag Rally nor the Applicant walking up Argyle Street were "Aboriginal Critical Incidents" and criticized the Framework's use in formulating the Operational Plan on the basis that Indigenous persons were present on the DCE because "***the occupiers were not forced to be present…and they had chosen to become involved in a flag rally that was entirely lawful***.."[33]

27. The Trial Judge further found that the use of the Framework, specifically consultation with various Indigenous community members in respect of potential responses to the Flag Rally, was wrong in that it "***put the demands of the occupiers ahead of the rights of other Canadian citizens including Mr. Fleming***"[34] and was tantamount to the OPP taking "***steps to curtail the rights of protesters involved in the flag rally…in order to appease…***" those consulted.[35]

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[31] Honourable Madam Justice Carptenter-Gunn of the Superior Court of Justice, dated September 22, 2016 at p 75, lines 15-18 and p 85, lines 26-29 ("Trial Judgement"), **LTA, Tab 2, pp 80, 90.**
[32] Trial Judgement at p 57, lines 1-8, **LTA, Tab 2, p 62.**
[33] Trial Judgement at p 21, lines 9-13 [emphasis added], **LTA, Tab 2, p 26.**
[34] Trial Judgement at p 63, lines 30-31, and p 64, lines 1-2 [emphasis added], **LTA, Tab 2, pp 68-69.**
[35] Trial Judgement at p 63 lines 7-14 [emphasis added], **LTA, Tab 2, pp 68.**

28. In applying the *Waterfield* test, the Trial Judge framed the threshold issues as "***whether the OPP had the legal authority to arrest Mr. Fleming as he walked up Argyle Street and then up onto DCE with his Canadian flag***".[36]

29. In the first stage of the *Waterfield* test, the court must determine "whether the action falls within the general scope of a police duty imposed by statute or recognized at common law".[37] The Trial Judge found that the Respondent Officers' actions did not fall under the general scope of the police duty to preserve the peace because the Respondent Officers "***were not preserving the peace***".[38] No other reason was given for refusing to acknowledge that the Respondent Officers' actions fell within the general scope of their duties to preserve the peace.

30. In the second stage of the *Waterfield* test, the court is required to balance "the competing interests of the police duty and of the liberty interests at stake". This aspect of the test requires a consideration of whether the police action is "reasonably necessary for the carrying out of the particular duty in light of all the circumstances."[39] The Trial Judge found that the arrest to prevent a breach of the peace was not justifiable because the apprehended breach was not imminent and the risk that the breach would occur was not substantial.[40] In doing so, the Trial Judge criticized any assessments the Respondent Officers made, in respect of the likelihood of a breach of the peace, based on their past experience policing in Caledonia.[41] Her Honour also found that if the approaching DCE protesters were upset, they were upset with the Respondent Officers and not the Applicant and that it was the Respondent Officers' conduct and not the Applicant's conduct that caused "a conflict".[42]

2. The Court of Appeal

31. The Crown appealed the Trial Judge's findings on liability and the Applicant cross-appealed with respect to the quantum and type of damages awarded. The appeal was granted by a majority of the Ontario Court of Appeal, the cross-appeal was dismissed, and a new trial ordered on the sole issue of whether excessive force was used when the Applicant was arrested

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[36] Trial Judgement at p 36, lines 15-18 [emphasis added], **LTA, Tab 2, pp 41.**
[37] *R v MacDonald*, 2014 SCC 3 at para 35, 298 CRR (2d) 190.
[38] Trial Judgement at p 40, lines 14-24 [emphasis added], **LTA, Tab 2, p 45.**
[39] *MacDonald, supra* note 37 at para 36.
[40] Trial Judgement at p 41, lines 21-27, **LTA, Tab 2, p 46.**
[41] Trial Judgement at p 42, lines 16-24 and p 44, lines 13-24 **LTA, Tab 2, pp 47 and 49.**
[42] Trial Judgement at p 59, lines 28-31 **LTA, Tab 2, p 64.**

and if so, what damages follow.[43] The dissent would have dismissed both the appeal and cross-appeal.

32. The majority found it "difficult to see" how the Flag Rally could be reasonably characterized as anything other than an Aboriginal Critical Incident and it was "difficult to understand" why the Trial Judge was critical of the OPP "for using the Framework to both plan for the event and in an effort to avoid any clash between the protesting sides."[44] The dissent found that even if the Trial Judge made palpable errors in so finding, they were not over-riding errors.[45]

33. The majority further noted that the Trial Judge moved from finding that the Flag Rally was not an Aboriginal Critical Incident to Her Honour's central finding, set out below, that the Respondent Officers arrested the Applicant without lawful cause:[46]

> The O.P.P prevented Mr. Fleming from exercising his lawful rights of walking up Argyle Street with a Canadian flag and violently arrested him without cause. The court finds the evidence is clear that the O.P.P. intended to prevent Mr. Fleming from walking up Argyle Street with a Canadian flag, and that he was arrested a few feet onto DCE.

34. The majority then concluded that the Trial Judge's central finding was tainted by palpable and over-riding errors in that there was "no evidence" that the Respondent Officers prevented the Applicant from walking up Argyle Street with his flag or intended to prevent the Applicant from walking up Argyle Street.[47] The majority found it clear on the evidence that: "the [Applicant] chose to leave the shoulder of Argyle Street and walk some distance westward onto DCE"; it was "simply unknown" what would have transpired between them had the Applicant remained on the shoulder after the Respondent Officers arrived; and the Applicant was arrested on DCE and not on Argyle Street.[48] The majority noted that the Trial Judge's "frequent erroneous references to the police interfering with the respondent's right to walk on Argyle Street

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[43] Order of the Court of Appeal for Ontario, dated February 16, 2018 at paras 1-4, **LTA, Tab 5, p 144.**
[44] *Fleming* at para 34, **LTA, Tab 4, p 109.**
[45] *Fleming* at para 82, **LTA, Tab 4, pp 126-127.**
[46] *Fleming* at para 35, **LTA, Tab 4, p 109.**
[47] *Fleming* at paras 36-38, **LTA, Tab 4, p 110.**
[48] *Fleming* at para 37, **LTA, Tab 4, p 110.**

may be what led her into the wrong analysis and conclusion" in respect of the *Waterfield* test.[49] The dissent disagreed and would have deferred to the factual findings of the Trial Judge.[50]

35. In determining whether the Applicant's arrest was lawful, the majority of the Ontario Court of Appeal applied the *Waterfield* test as articulated in *Brown.* At the first stage of the *Waterfield* test, the majority disagreed with the Trial Judge and found there was "no doubt" that the police were acting in the execution of their duties to keep the peace and protect the public.[51] The dissent agreed with the majority's finding at this stage of the *Waterfield* test.[52]

36. At the second stage of the *Waterfield* test, as per *Brown,* the majority found that the apprehended breach of the peace was imminent and the risk of a breach was substantial because the DCE protestors were "rush[ing] towards the [Applicant] in a threatening fashion"[53] posed a risk to the public peace and the Applicant. The Trial Judge's conclusion to the contrary could not be reconciled with the videotape of the events or the Applicant's own evidence that the situation was "perilous".[54] The majority further found that the Trial Judge's speculation that the DCE protesters may have been angry with the Respondent Officers had "...no foundation in the evidence."[55]

37. The majority relied upon decisions of this Honourable Court in *R v MacDonald*[56] and the *R v Dedman*[57] and *R v Mann*[58] line of cases[59] and determined that the arrest of the Applicant was reasonably necessary and a justifiable interference with his liberty in order for the Respondent Officers to carry out their duties.[60] The majority concluded that the alternatives suggested by the Trial Judge, such as instituting a buffer zone between the Applicant and the protestors, or calling

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[49] *Fleming* at para 54, **LTA, Tab 4, p 116-117.**
[50] *Fleming* at paras 90-92, **LTA, Tab 4, pp 130-131.**
[51] *Fleming* at para 40, **LTA, Tab 4, p 111.**
[52] *Fleming* at para 96 , **LTA, Tab 4, p 132.**
[53] *Fleming* at para 52, **LTA, Tab 4, p 116.**
[54] *Fleming* at para 53, **LTA, Tab 4, p 116.**
[55] *Fleming* at para 53, **LTA, Tab 4, p 116.**
[56] *R v MacDonald, supra* note 37.
[57] *R v Dedman*, [1985] 2 SCR 2, 20 DLR (4th) 321 ["*Dedman*"].
[58] *R v Mann,* 2004 SCC 52, 241 DLR (4th) 214 ["*Mann*"].
[59] *Fleming* at paras 45-46, **LTA, Tab 4, p 113.**
[60] *Fleming* at paras 54-56, **LTA, Tab 4, pp 116-117.**

for back-up from other available officers, would not have resulted in a more minimally invasive alternative.[61]

38. The dissent agreed that the police may in "exceptional circumstances" arrest someone to avoid a breach of the peace even if that person has broken no law,[62] however, in this instance, would have accorded deference to the Trial Judge's conclusion.[63]

Part II – QUESTIONS IN ISSUE

39. Pursuant to section 40(1) of the *Supreme Court Act,* the issue to be determined by this Honourable Court is whether this application raises issues of national or public importance that warrant the granting of leave to appeal. Ontario respectfully submits that it does not.

Part III – STATEMENT OF ARGUMENT

40. Leave to appeal should not be granted because there is no uncertainty in the law regarding the application of the *Waterfield* test where *Charter* rights are at issue, nor is there uncertainty that concepts of minimal impairment and proportionality have been incorporated into the necessity and balancing aspects of the *Waterfield* test. The majority's decision in that respect is consistent with that of this Honourable Court in *R v Clayton*[64] and *R v Godoy*[65] and cases involving the common law power to arrest a person to prevent an apprehended breach of the peace – *Brown*[66] and *Figueiras.*[67]

A. THERE IS NO UNCERTAINTY IN THE LAW

41. Contrary to the Applicant's submission at paragraphs 44 and 45 of the Applicant's Memorandum of Argument, there is no uncertainty in the law regarding the application of the *Waterfield* test where *Charter* rights are at issue. This was addressed by the majority in *Clayton*

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[61] *Fleming* at para 57, **LTA, Tab 4, p 118.**
[62] *Fleming* at para 100 **LTA, Tab 4, p 134.**
[63] *Fleming* at para 117 **LTA, Tab 4, p 141.**
[64] *R v Clayton,* 2007 SCC 32, 281 DLR (4th) 1 ["*Clayton*"].
[65] *R Godoy,* [1999] 1 SCR 311, 168 DLR (4th) 257 ["*Godoy*"].
[66] *Brown*, *supra* note 4.
[67] *Figueiras*, *supra* note 3.

(per Abella J.) which held that an exercise of police power that complies with the *Waterfield* test will necessarily be consistent with *Charter* values:

> The common law regarding police powers of detention, developed building on *R v Waterfield,* [1963] 3 All E.R. 659 (C.A.), and *Dedman v The Queen,* [1985] 2 SCR 2, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.[68]

42. Nor is there uncertainty in the law that concepts of minimal impairment and proportionality are incorporated in the necessity and balancing aspect of the *Waterfield* test. In *Godoy* this Honorable Court held that what is necessary and reasonable will be considered in the given context of each case and that police interference with liberty must not go beyond what is necessary for carrying out the police duty, effectively invoking the standards of minimal impairment and proportionality:

> In *Dedman, supra,* at p.35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. Each case will be considered in its own context, keeping in mind all of the surrounding circumstances.[69]

43. Appellate courts across the country have applied *Waterfield* consistently.[70]

44. In the context of a detention or arrest for an apprehended breach of the peace, the Ontario Court of Appeal in *Figueiras*[71] makes it clear that the *Waterfield* analysis is the proper test to define the limits of police powers where *Charter* rights are implicated: "...when police act in

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[68] *Clayton, supra* note 64 at para 21 (Abella J.). Binnie J., concurring, would have applied s.1 of the *Charter* to determine whether the police power is justified as a reasonable limit on *Charter* rights.

[69] *Godoy supra* note 65 at para 22. See also: *R v Zouhri,* 2018 ABQB 291 at para 51; *R v Larson,* 2011 BCCA 454 at paras 50-51, 246 CRR (2d) 305; and *R v Dillon,* [2006] OJ No 1366 at para 50, 141 CRR (2d) 1.

[70] See for example: *R v Squires,* 2016 NLCA 54 at para 14, 134 WCB (2d) 125; *R c Lacasse,* 2017 QCCA 808 at para 35; *R v Schrenk,* 2010 MBCA 38 at paras 65-67, 254 CCC (3d) 277. See also: *R v Vander Griendt,* 2015 ONSC 6644 at paras 42-45, 343 CRR (2d) 239.

[71] *Figueiras, supra* note 3.

accordance with their common law ancillary powers, the internal limits of these actions are respected, and there is no *Charter* breach that must be justified by s.1".[72] Equally clear is the Court's consideration of the concept of minimal impairment in the second stage of the *Waterfield* test when considering whether the police intrusion on the rights at issue is necessary.[73]

B. THERE IS NO CONFLICT WITH PRIOR JURISPRUDENCE

45. The majority decision is consistent with this Honourable Court's approach in *Clayton* and *Godoy* and other jurisprudence. In concluding that the police were justified in taking the steps they did to arrest the Applicant and remove him from the area of conflict in order to avoid an apprehended breach of the peace, the majority considered alternative options that the Applicant argued were more minimally impairing and proportionate. Specifically, the majority considered the Applicant's submissions that the officer could have instituted a buffer zone and/or called for backup as an alternative to arresting the Applicant, and found that there was no reason to believe they would have been effective in preventing a breach of the peace, as opposed to inflaming tensions and resulting in a larger confrontation.[74] The majority further concluded that the actions of the Respondent Officers were undertaken to avoid a beach of the peace and that they were effective at doing that, in that the Applicant was removed from the area without any further issue or confrontation with protesters.[75]

46. In respect of the common law power to arrest to prevent a breach of the peace, the majority's decision is also consistent with the Ontario Court of Appeal's approach in *Brown* and *Figueiras*; specifically, their emphasis on two key features: the apprehended breach must be imminent and the risk that the breach will occur must be substantial.[76] In concluding that the apprehended breach was imminent and the risk that the breach would occur was substantial, the majority considered the evidence, including that of the Respondent Officers, the videotape of

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[72] *Figueiras*, *supra* note 3 at para 52.
[73] *Figueiras*, *supra* note 3 at paras 92-100. See also: *Brown*, *supra* note 4 at para 78 (WestLaw) and at p 35-36 (CanLII), and *R v Faulkner*, [1988] BCJ No 449 at para 9, 4 WCB (2d) 207 (BCCA).
[74] *Fleming* at para 57, **LTA, Tab 4, p 118.**
[75] *Fleming* at para 56, **LTA, Tab 4, p 117.**
[76] *Brown*, *supra* note 4 at para 74 (WestLaw) and p 33-34 (CanLII), *Figueiras*, *supra* note 3 at paras 98-100.

events, and the Applicant's own testimony that the situation was "perilous"[77], and found that the Trial Judge's conclusion to the contrary was "fundamentally flawed and cannot stand".[78]

47. The fact that the detentions were found to be unlawful in *Brown* and *Figueiras*, yet lawful by the majority in this case, thereby differing in end result, does not mean that they are in conflict on the law. The *Waterfield* test is necessarily a fact-specific inquiry.[79] It was on the specific facts of this case that the majority found the Applicant's arrest was lawful and reasonably necessary in the circumstances. Similarly, on the facts, the dissent disagreed.

C. CONCLUSIONS

48. The majority's decision reflects the uncontroversial application of this Honorable Court's decisions in *Clayton* and *Godoy* and is entirely consistent with prior decisions of the Ontario Court of Appeal in *Brown* and *Figuieras.* In accordance with the legal framework set out in those cases, this case turned entirely on the assessment of the facts. This case raises no issues of national or public importance meriting the further attention of this Honourable Court.

Part IV – SUBMISSIONS ON COSTS

49. Ontario requests that costs be granted in favour of the Respondents.

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[77] *Fleming* at para 53, **LTA, Tab 4, p 116.**
[78] *Fleming* at para 59, **LTA, Tab 4, p 119.**
[79] *Figueiras*, *supra* note 3 at para 47; *Brown*, *supra* note 4 at para 62 (WestLaw) and p 29 (CanLII); *Clayton*, *supra* note 64 at paras117-118.

Part V – ORDER SOUGHT

50. Ontario requests that the Application for Leave to Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 2018

ONTARIO MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office Civil

Judie Im
Ayah Barakat

Constitutional Law Branch
Sean Hanley

Counsel for the Respondents

Part VI – TABLE OF AUTHORITIES

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Part VII – LEGISLATION

(None)