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June 14, 2018

HAND-DELIVERED

Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
K1A 0J1

Attention: Registry Branch

Dear Sir or Madam:

Re: Randolph (Randy) Fleming v. Her Majesty the Queen in Right of Ontario et al
SCC File No. 38087
Our File No. 18-2684

As the Applicant can succinctly provide his Reply submissions within the two pages afforded to him by s.28 of the *Rules of the Supreme Court of Canada* (SOR/2002-156), this correspondence comprises the Applicant's Reply to the Response to Application for Leave to Appeal of the Respondents (the "Response") filed June 4, 2018.

The Respondents do not deny that uncertainty with respect to the nature of the *Waterfield* test (including whether minimal impairment and proportionality form part of the test) would be a matter of public and national importance. They deny that such uncertainty exists.

The Respondents do not dispute that there is no decision of this Honourable Court that has directly addressed the application of the *Waterfield* test to the arrest of a person who was acting lawfully in order to prevent an apprehended breach of the peace by others.

The key passage in the Response can be found at paragraph 37: "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 for back-up from other available officers, would not have resulted in a more minimally invasive alternative." This passage contains inaccuracies that obscure the fact that the majority abandoned considerations of minimal impairment and proportionality altogether.

The majority did not consider whether an arrest—the most invasive option in the circumstances, breaching the common law and *Charter* rights of the Applicant—was a minimal impairment or a proportional response. The majority's sole considerations were (1) the police duty to maintain the public peace, and (2) whether the decision to arrest Mr. Fleming was effective (see i.e. paras 42, 46, 47, 56 and 57 of the majority decision).

As noted by Huscroft JA (para 113 of the dissent), an arrest will almost always be "effective", but effectiveness is not the only factor to be considered in the *Waterfield* test. Necessity, minimal impairment and proportionality are also to be taken into account. The majority's statements that "[t]here was no need to institute a buffer zone" if an arrest could be made instead, and that "the basis for the trial judge's criticism of the officers is unclear" (para 57 of the majority decision) makes apparent their abandonment of important parts of the test. The basis for the Trial Judge's criticism of the officers was clear—she was applying the full *Waterfield* test, not the majority's truncated version, and she found (cited at para 113 of the dissent) "[t]here were many other less invasive options that could have been implemented to defuse the situation."

Moreover, the various alternatives to arresting Mr. Fleming were not "suggested by the Trial Judge". They were acknowledged by the Respondent police officers to have been available. That is, there was no question at trial that the most heavy-handed, invasive alternative had been used—and used as a first resort.

In considering the factor of necessity, the majority's 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 the Applicant did not flow from an actual analysis of those factors (para 114 of the dissent). Instead, it appears to have flowed from the majority's view (para 57 of the majority decision) that the police "have a great deal more training and experience than do judges" and are entitled to be insulated from criticism of their tactical actions, rather than being subject to the Courts' rigorous oversight. This is in clear conflict with *Brown*, in which all of the factors forming the *Waterfield* test were considered in the Court's analysis, and the central statement in *Brown* (cited at para 97 of the dissent) that the *Waterfield* balancing ought to be weighted in favour of individual rights even if doing so makes the exercise of police powers more difficult.

In finding that the arrest of the Applicant was effective, and therefore justified, without considering the factors of minimal impairment and proportionality, the majority has abandoned fundamental parts of the *Waterfield* test. Given the prior jurisprudence, and the precedential value of decisions of the Ontario Court of Appeal, this will produce confusion and conflicting decisions across Canada. Clarifying the scope of the police power to curtail *Charter* and common law rights of citizens acting lawfully, confirming the Courts' ability to prevent abuses of that police power, and ensuring that minimal impairment and proportionality remain as factors to be considered in the *Waterfield* test are matters of public and national importance meriting the attention of this Honourable Court.

Yours truly,

Michael Bordin
MB:sc

cc. Ms. Judie Im
Mr. Colin S. Baxter