



SUPREME COURT OF CANADA

CITATION: Fleming v. Ontario, 2019 SCC 45

APPEAL HEARD: March 21, 2019

JUDGMENT RENDERED: October 4, 2019

DOCKET: 38087

BETWEEN:

Randolph (Randy) Fleming
Appellant

and

Her Majesty The Queen in 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

- and -

Attorney General of Canada, Attorney General of Quebec, Canadian Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Association of Chiefs of Police, Canadian Association for Progress in Justice and Canadian Constitution Foundation
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 120)

Côté J. (Wagner C.J. and Abella, Moldaver, Brown, Rowe and Martin JJ. concurring)

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FLEMING v. ONTARIO

Randolph (Randy) Fleming

Appellant

v.

Her Majesty The Queen in 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

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File No.: 38087.

2019: March 21; 2019: October 4.

Present: Wagner C.J. and Abella, Moldaver, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Police — Powers — Common law power of arrest — Breach of peace — Counter-protestor, acting lawfully, arrested to prevent apprehended breach of peace by others — Counter-protestor charged with obstructing police officer but charge later withdrawn — Counter-protestor filing statement of claim against Province and police officers seeking general damages for assault and battery, wrongful arrest and false imprisonment, aggravated or punitive damages and damages for violation of various constitutional rights — Whether police have common law power to arrest someone acting lawfully in order to prevent apprehended breach of peace by others.

F was arrested while walking to a counter-protest flag rally organized in response to Six Nations protestors' occupation of a piece of Crown land. The police became aware of the flag rally in the months preceding it and had developed an operational plan, given the contentious atmosphere in the community which had on numerous occasions culminated in violent clashes between the two sides. The plan included keeping protestors and counter-protestors apart, and flag rally counter-protestors were informed that they were not allowed on the occupied property. When the police spotted F walking on the shoulder of the road running along the occupied property, they headed toward him with the intention of placing

themselves between him and the entrance to the property. To avoid the police vehicles, F stepped onto the occupied property, which appeared to cause a reaction in a group of protestors, some of whom began moving toward him. An officer then approached F and told him he was under arrest to prevent a breach of the peace. When F refused to drop the flag he was carrying, he was forced to the ground, handcuffed, placed in an offender transport unit van, moved to a jail cell and released two and a half hours later. The Crown eventually withdrew the charge of obstructing a police officer which had been laid against F for resisting his arrest. F subsequently filed a statement of claim against the Province and the police officers who had been involved in his arrest. He claimed general damages for assault and battery, wrongful arrest and false imprisonment, as well as aggravated or punitive damages and damages for violation of his rights under ss. 2(b), 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*. F was successful at trial, but a majority of the Court of Appeal set aside the award of damages on the basis that the police had the authority at common law to arrest him. The Court of Appeal ordered a new trial solely on the issue of excessive force. F appeals to the Court on the issue of whether the police acted lawfully in arresting him, and on whether a new trial should have been ordered on the question of excessive force.

Held: The appeal should be allowed and the trial judge's order restored.

F's arrest was not authorized by law, and there is no basis for intervening in the trial judge's conclusion that the Province and the police were liable for battery

for their use of force in unlawfully arresting him. As a result, no new trial is needed on the issue of excessive force.

To determine whether a particular police action that interferes with individual liberty is authorized at common law, the ancillary powers doctrine must be applied. At the preliminary step of the analysis, the police power that is being asserted and the liberty interests that are at stake must be clearly defined. The analysis then proceeds in two stages. First, the court must ask whether the police conduct at issue falls within the general scope of a statutory or common law police duty. Second, the court must determine whether the conduct involves a justifiable exercise of police powers associated with that duty. At the second stage, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty. There are three factors to be weighed in answering that question: (1) the importance of the performance of the duty to the public good, (2) the necessity of the interference with individual liberty for the performance of the duty, and (3) the extent of the interference with individual liberty. Throughout the analysis, the onus is always on the state.

The second stage of the ancillary powers doctrine must always be applied with rigour to ensure that the state has satisfied its burden of demonstrating that the interference with individual liberty is justified and necessary. The standard of justification must be commensurate with the fundamental rights at stake, and in the unique context of a purported power of arrest such as the one in the present case, that

standard is especially stringent for a number of reasons. First, the purported power would enable the police to interfere with the liberty of someone acting lawfully. Such a power is extraordinary in nature and it is especially important for the court to guard against intrusions on the liberty of persons who are neither accused nor suspected of committing any crime. Second, the purported police power is preventative, and the court must be very cautious about authorizing police actions merely because an unlawful or disruptive act could occur. Vague or overly permissive standards in such situations would sanction profound intrusions on liberty with little societal benefit. Third, because the purported power of arrest would generally not result in charges, judicial oversight of its exercise would be rare. As a result, any standard outlined at the outset would have to be clear and highly protective of liberty.

In the present case, the purported police power is a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others. It targets individuals who are not suspected of being about to break any law or to initiate any violence themselves, in situations in which the police nonetheless believe that arresting the individuals in question will prevent a breach of the peace from occurring. The proposed power would involve substantial *prima facie* interference with significant liberty interests. Indeed, few police actions interfere with an individual's liberty more than arrest — an action which completely restricts the person's ability to move about in society free from state coercion. It would have a direct impact on a constellation of rights that are fundamental to individual freedom in our society, and it would directly undermine the expectation of all individuals, in

the lawful exercise of their liberty, to live their lives free from coercive interference by the state.

This purported power falls within the general scope of the police duties of preserving the peace, preventing crime and protecting life and property recognized at common law. Preventing breaches of the peace, which entail violence and a risk of harm, is plainly related to those duties.

However, the purported police power is not reasonably necessary for the fulfilment of those relevant duties. While preserving the peace and protecting people from violence are immensely important, and while there may be exceptional circumstances in which some interference with liberty is required in order to prevent a breach of the peace, an arrest cannot be justified under the ancillary powers doctrine. There is already a statutory power of arrest that can be exercised should an individual resist or obstruct an officer taking other, less intrusive measures. In addition, the mere fact that a police action was effective cannot be relied upon to justify its being taken if it interfered with an individual's liberty. If the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort.

As there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others, the police in this case did not have lawful authority to arrest F. The trial judge specifically found

that F had not done anything unlawful before being arrested; there was no evidence before her that he had committed any offence in walking along the street, entering the occupied property or standing there with his Canadian flag. Nor was there evidence that he had himself been about to commit an indictable offence or a breach of the peace. The Province and the police have not sought to challenge that finding on appeal, nor have they cited or relied on any statutory power to arrest F. They rely entirely on a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by other persons — a power that does not exist. In light of this conclusion, a new trial on the issue of excessive force is not necessary. As the police were not authorized at common law to arrest F, no amount of force would have been justified for the purpose of accomplishing that task.

Cases Cited

By Côté J.

Applied: *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37; **referred to:** *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Waterfield*, [1963] 3 All E.R. 659; *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721; *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Reeves*, 2018 SCC 56; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641; *R. v. Godoy*, [1999] 1 S.C.R.

311; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. (on the application of Hicks) v. Metropolitan Police Comr*, [2017] UKSC 9, [2018] 1 All E.R. 374; *R. (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary*, [2006] UKHL 55, [2007] 2 All E.R. 529; *Frey v. Fedoruk*, [1950] S.C.R. 517; *R. v. Penunsi*, 2019 SCC 39; *R. v. Knowlton*, [1974] S.C.R. 443; *R. v. C.E.*, 2009 NSCA 79, 279 N.S.R. (2d) 391; *Bibby v. Chief Constable of Essex Police*, [2000] EWCA Civ. 113; *Austin v. Metropolitan Police Comr*, [2007] EWCA Civ. 989, [2008] 1 All E.R. 564; *O’Kelly v. Harvey* (1883), 14 L.R.I. 105; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Swain*, [1991] 1 S.C.R. 933.

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APPEAL from a judgment of the Ontario Court of Appeal (Cronk, Huscroft and Nordheimer JJ.A.), 2018 ONCA 160, 140 O.R. (3d) 684, 420 D.L.R. (4th) 728, 45 C.C.L.T. (4th) 244, [2018] O.J. No. 841 (QL), 2018 CarswellOnt 2369 (WL Can.), setting aside a decision of Carpenter-Gunn J. of the Ontario Superior Court of Justice, No. 11-26190, dated September 22, 2016. Appeal allowed.

Michael Bordin and Jordan Diacur, for the appellant.

Judie Im, Sean Hanley, Baaba Forson and Ayah Barakat, for the respondents.

Anne M. Turley and Zoe Oxaal, for the intervener the Attorney General of Canada.

Éric Cantin and Stéphane Rochette, for the intervener the Attorney General of Quebec.

Sean Dewart, Adrienne Lei and Tim Gleason, for the intervener the Canadian Civil Liberties Association.

Louis Strezos and Michelle M. Bidduph, for the intervener the Criminal Lawyers' Association (Ontario).

Bryant Mackey, for the intervener the Canadian Association of Chiefs of Police.

Ryan D.W. Dalziel and Kayla Strong, for the intervener the Canadian Association for Progress in Justice.

Brandon Kain and Adam Goldenberg, for the intervener the Canadian Constitution Foundation.

The judgment of the Court was delivered by

CÔTÉ J. —

I. Overview

[1] On May 24, 2009, officers of the Ontario Provincial Police (“O.P.P.”) arrested the appellant, Randolph (Randy) Fleming, in Caledonia, Ontario. He had

committed no crime. He had broken no law. He was not about to commit any offence, harm anyone, or breach the peace. In essence, the O.P.P. officers claimed to have arrested Mr. Fleming for his own protection. The question before this Court is whether Mr. Fleming's arrest was lawful.

[2] Police officers are tasked with fulfilling many important duties in Canadian society. These include preserving the peace, preventing crime, and protecting life and property. The execution of these duties sometimes necessitates interference with the liberty of individuals. However, a free and democratic society cannot tolerate interference with the rights of law-abiding people as a measure of first resort. There is a line that cannot be crossed. The rule of law draws that line. It demands that, when intruding on an individual's freedom, the police can only act in accordance with the law.

[3] In most cases, police powers are clearly outlined in statutes enacted by legislatures. But statute law is not the only source of police powers. This Court has long held that the common law may also serve this role in certain circumstances.

[4] When our courts are asked to recognize new common law police powers, it is important to keep in mind the words of La Forest J. in *R. v. Wong*, [1990] 3 S.C.R. 36, that "it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties" (p. 57).

[5] The common law has long striven to defend individuals against abuses of state power. The courts of this country, as custodians of the common law, must act cautiously when asked to use it to authorize actions that interfere with individual liberty. This is never truer than in cases like the one at bar, in which the exercise of the police power in question would restrict lawful activities of individuals. In such circumstances, the courts must apply the test for common law police powers with particular stringency so as to ensure that any powers that might result in intrusions on liberty are in fact necessary.

[6] The respondents in this case, the Province of Ontario and seven named O.P.P. officers, do not rely on any statute to justify the lawfulness of their arrest of Mr. Fleming. Instead, they argue that their actions were authorized at common law by application of the ancillary powers doctrine that was originally laid down by the United Kingdom Court of Criminal Appeal in *R. v. Waterfield*, [1963] 3 All E.R. 659, at pp. 660-62. They claim that, according to that doctrine, there is a common law police power to arrest an individual in Mr. Fleming's circumstances in order to prevent an apprehended breach of the peace. In essence, the respondents propose a common law power to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves. For the purposes of these reasons and for the sake of simplicity, I will refer to this power as the power to "arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace".

[7] As I will explain, no such power exists at common law. The ancillary powers doctrine does not give the police a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. A drastic power such as this that involves substantial interference with the liberty of law-abiding individuals would not be reasonably necessary for the fulfillment of the police duties of preserving the peace, preventing crime, and protecting life and property. This is particularly so given that less intrusive powers are already available to the police to prevent breaches of the peace from occurring.

[8] In this case, Mr. Fleming's arrest was not authorized by law. The O.P.P. officers had no power of arrest in the circumstances on May 24, 2009. As a result, Mr. Fleming's arrest was unlawful, and I would allow his appeal.

II. Facts

[9] This case has its origins in a longstanding land dispute between the Crown and the First Nation of Six Nations of the Grand River. That dispute resulted, in February 2006, in the occupation by Six Nations protestors of a piece of land in Caledonia known as Douglas Creek Estates ("D.C.E.") (I will refer to this group of protestors as the "D.C.E. Protesters"). In the course of the protest, some D.C.E. Protesters also hung Indigenous flags along Argyle Street, which runs in front of the property. In June of that year, the Crown purchased D.C.E. and permitted the D.C.E.

Protesters to continue to occupy the property. The early stages of the dispute were discussed in detail by the Ontario Court of Appeal in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721.

[10] The occupation of D.C.E. sparked other groups in the community to organize counter-protests against the occupation and against the response of the Ontario government and the O.P.P. The contentious atmosphere in the community culminated in violent clashes between the two sides. On numerous occasions, the O.P.P., including many of the respondent officers, were called in to deal with the violence. Police lines and buffer zones were occasionally used to allow the two groups to demonstrate peacefully near one another. The violence peaked in 2006, but declined steadily after that.

[11] One counter-protest group decided to hold a “flag rally” on May 24, 2009 to protest the occupation of D.C.E., the flying of Indigenous flags along Argyle Street and the O.P.P.’s actions. The plan for the rally was that participants would march south on Argyle Street and raise a Canadian flag across the street from D.C.E.’s front entrance.

[12] The O.P.P became aware of the flag rally in the months preceding it and developed an operational plan. The goal of the plan was to ensure public safety while allowing all groups to express themselves peacefully. The operational plan was developed in accordance with O.P.P policies, including the Framework for Police Preparedness for Aboriginal Critical Incidents (“Aboriginal Critical Incidents

Framework”). The Aboriginal Critical Incidents Framework is a policy document that provides guidance to the police for managing relationships with Indigenous peoples. It applies “before, during and after any Aboriginal related critical incident where the source of conflict may stem from assertions associated with Aboriginal or treaty rights”, such as “a demonstration in support of a land claim” (A.R. Vol. V, at p. 50). In addition, the officer in charge of developing the operational plan met with members of the local Indigenous community, the city council, and the flag rally organizers.

[13] Ultimately, the O.P.P. determined that the flag rally participants and the D.C.E. Protesters should be kept apart and that no flag rally participants would be permitted to enter D.C.E. The O.P.P. thus informed the organizers of the flag rally that they would not be allowed on D.C.E. land. However, no police line or buffer zone was put in place on the day of the rally. The operational plan included two public order units, each with about 30 officers, that were to be present in Caledonia on May 24.

[14] Mr. Fleming was a resident of Caledonia who intended to participate in the flag rally in order to express his views about the contentious issues surrounding the D.C.E. occupation. On the day of the rally, Mr. Fleming began walking north along Argyle Street towards the place where it was to be held, where he planned to meet up with the rest of the participants, who were marching from the opposite direction. He was carrying a Canadian flag on a 40- to 42-inch wooden pole.

[15] As Mr. Fleming walked on the shoulder of Argyle Street, one of the O.P.P. squads — including the respondent officers — was driving north on the street in three vehicles: two minivans, one marked and one unmarked, and an offender transport unit van. The officers spotted Mr. Fleming as they drove past him, turned around and headed towards his location with the intention of placing themselves between him and the entrance to D.C.E.

[16] Mr. Fleming saw the vans as they moved to the shoulder of the road and continued to drive fast towards him. To avoid the approaching vehicles, he moved off the shoulder, walking down into a grassy ditch, up the opposite side and over a low fence onto D.C.E. property. He claimed to have crossed the fence in order to get to level ground. The officers exited their vehicles and began yelling various commands at Mr. Fleming, including “stop” and “return to the shoulder”. He did not realize that the officers were speaking to him, as he believed he was not doing anything wrong.

[17] Mr. Fleming stepping onto D.C.E. property appeared to cause a reaction in a group of D.C.E. Protesters who were at the entrance of the property, approximately 100 metres away. Eight to ten of them began moving towards his location, some walking and some jogging. None of the protesters were carrying weapons and none uttered any threats. Mr. Fleming did not say anything to them. With the protesters still ten to twenty feet away, Officer Miller approached Mr. Fleming and told him that he was under arrest.

[18] Officer Miller took Mr. Fleming by the arm and led him back across the fence, off of D.C.E. property. The officers then ordered Mr. Fleming to drop his flag. He refused. The officers then forced him to the ground, took his flag and handcuffed him. Mr. Fleming says that as he was being handcuffed, his left arm was yanked behind his back, causing him severe pain and a lasting injury.

[19] The incidents surrounding Mr. Fleming's arrest were captured on video, though some of them are obscured on the video by a bush. This video was entered as evidence at the trial.

[20] After being arrested, Mr. Fleming was placed in an offender transport unit van and moved to a jail cell at the local O.P.P. detachment. He was eventually released approximately two and a half hours after his arrest.

[21] In relation to these events, Mr. Fleming was charged with obstructing a peace officer for resisting his arrest by Officer Miller. He appeared in court on 12 separate occasions to defend himself on this charge before it was eventually withdrawn by the Crown almost 19 months after having been laid.

[22] In March 2011, Mr. Fleming filed a statement of claim against the Province of Ontario and the seven O.P.P. officers who had been involved in his arrest. He claimed general damages for assault and battery, wrongful arrest, and false imprisonment, as well as aggravated or punitive damages and damages for violations

of his rights under ss. 2(b), 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*.

III. Procedural History

A. *Ontario Superior Court of Justice (Carpenter-Gunn J.), 11-26190, September 22, 2016*

[23] At the conclusion of the trial, Carpenter-Gunn J. found in Mr. Fleming's favour and ordered the respondents to pay a total of \$139,711.90 in general damages, special damages, tort damages and *Charter* damages. She also ordered the respondents to pay Mr. Fleming's costs in an agreed-upon amount of \$151,000.

[24] The trial judge found as a fact that the O.P.P. had intended "to prevent Mr. Fleming from walking up Argyle Street with a Canadian flag, and that he was arrested for walking a few feet onto [D.C.E. property] and standing there for a few seconds with a Canadian flag" (A.R., vol. I, at p. 42). She noted that a crucial question in the case was whether the officers had had legal authority to arrest Mr. Fleming. She stressed that the respondents had adduced no evidence that he had broken any laws prior to his arrest.

[25] The trial judge, relying on the Ontario Court of Appeal's decision in *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, accepted that the police have a common law power of arrest to prevent an apprehended breach of the

peace, provided that the apprehended breach is imminent and the risk of it occurring is substantial. However, she concluded on the facts of the case at bar that the officers' conduct had not been authorized at common law. She found that by taking the actions they did, the officers had not been "preserving the peace". She noted that a "breach of the peace" involves violence and harm to individuals and that, since neither had occurred in this case, there had been no actual breach of the peace. She also found that any apprehended breach of the peace by the approaching D.C.E. Protesters had not been imminent and that the risk of it occurring had not been substantial. She explained that the officers' concern over Mr. Fleming's safety had been based not on the actual events of the day, but rather on a generalized concern rooted in past violence. The trial judge stated that there were less invasive options that could have defused the situation, such as setting up a buffer zone between Mr. Fleming and the protesters.

[26] The trial judge also criticized the O.P.P.'s use of the Aboriginal Critical Incidents Framework in developing its operational plan. In her view, the flag rally was not an "Aboriginal Critical Incident".

[27] As a result of these findings, the trial judge concluded that Mr. Fleming's claims for false arrest and unlawful imprisonment were made out. She also determined that the respondents were liable for battery because the force they had used could not be justified.

[28] In considering Mr. Fleming's claims for *Charter* damages, the trial judge found that his rights under ss. 2(b), 7 and 9 had been violated when the police had unlawfully arrested him and prevented him from attending a political demonstration. She also held that no breach of s. 15 had been established on the facts of the case. She ultimately awarded Mr. Fleming an additional \$5,000 in *Charter* damages for the s. 2(b) breach.

B. *Court of Appeal for Ontario (Cronk, Huscroft and Nordheimer J.J.A.), 2018 ONCA 160*

[29] A majority of the Court of Appeal allowed the appeal, concluding that the O.P.P. officers had had the authority at common law to arrest Mr. Fleming for an anticipated breach of the peace. The majority set aside the trial judge's award of damages and ordered a new trial solely on the issue of excessive force.

[30] Nordheimer J.A., writing for himself and Cronk J.A., identified a number of supposed errors in the trial judge's analysis. In his view, the trial judge had been wrong to focus on the actions of the police as an isolated event rather than considering them in the context of ongoing disputes in Caledonia. He was also of the opinion that the Aboriginal Critical Incidents Framework was clearly relevant to the flag rally; he found it hard to understand why the trial judge had criticized the O.P.P. for using it in developing the operational plan. Nordheimer J.A. further concluded that there was no evidence to support the trial judge's finding that the officers had prevented Mr. Fleming from walking along Argyle Street with his flag, or that they

had intended to do so. In particular, he explained that “nothing [had] occurred” until Mr. Fleming had entered D.C.E., and that Mr. Fleming had willingly chosen to leave the shoulder of the street. As a result of these errors, Nordheimer J.A. concluded that it was necessary to determine afresh whether the arrest had been lawful.

[31] Nordheimer J.A. determined that the officers had been acting in the execution of their duty to keep the peace and protect the public. On the issue of whether the interference with Mr. Fleming’s liberty was justifiable, he emphasized that the O.P.P. had been dealing with clashes related to the occupation of D.C.E. for years, and they knew that minor incidents could escalate quickly with little warning. In this context, Mr. Fleming’s actions amounted to an unexpected event that required the police to react.

[32] Further, Nordheimer J.A., relying on Mr. Fleming’s own testimony, explained that the D.C.E. Protesters rushing towards Mr. Fleming had posed a real risk to his safety and that the trial judge’s conclusion that there had been no threatened breach of the peace could not be reconciled with this evidence. The officers had therefore been justified in taking action to prevent harm to Mr. Fleming and a likely breach of the peace. Nordheimer J.A. noted that, while other options may have been available, there was no need to resort to them if the situation could be easily addressed by removing Mr. Fleming from D.C.E. property, especially since alternative measures could have inflamed tensions.

[33] However, Nordheimer J.A. added that having lawful authority to effect an arrest does not give the police permission to use excessive force in doing so. The trial judge found that excessive force had been used, but Nordheimer J.A. explained that this finding was tainted by her erroneous conclusion that the arrest had been unlawful. He noted that the record did not make it possible to determine which officer had yanked Mr. Fleming's left arm back, how this had been done, or why. As a result, the Court of Appeal could not decide whether excessive force had been used. Nordheimer J.A. therefore ordered a new trial on this one issue.

[34] Huscroft J.A. dissented, finding no basis to interfere with the trial judge's conclusion that the officers had not been justified in arresting Mr. Fleming. He disagreed that any of the purported errors could in fact be characterized as palpable and overriding.

[35] Huscroft J.A. did not agree that the appellate court was entitled to substitute its own factual findings in this case for those of the trial judge. In his view, Mr. Fleming's arrest had not been a valid first resort, even in the face of potential illegal violence, the risk of which was neither imminent nor substantial. He explained that the police power to arrest someone for an apprehended breach of the peace is exceptional, and that exercising it was not justified in this case. Huscroft J.A. would therefore have dismissed the appeal.

IV. Issues

[36] The central issue in this case is whether the police acted lawfully in arresting Mr. Fleming on May 24, 2009. To answer this question, we must determine whether, and in what circumstances, the police have a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace. Does the common law permit police officers to arrest individuals who have not committed any offence, who are not about to commit any offence, who have not already breached the peace and who are not about to breach the peace themselves?

[37] A secondary issue is whether the Court of Appeal erred in ordering a new trial on the issue of excessive force.

V. Analysis

A. *The Ancillary Powers Doctrine*

[38] The police, in fulfilling the important duties they are tasked with in a free and democratic society, are sometimes required to interfere with the liberty of individuals. This is a fact that legislatures and courts in common law jurisdictions have long recognized. However, the rule of law requires that strict limits be placed on police powers in this regard in order to safeguard individual liberties. In *Dedman v. The Queen*, [1985] 2 S.C.R. 2, Dickson C.J., dissenting but not on this point, set out the foundation for the analysis on this subject:

It has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law. Laskin C.J. dissenting, in *R. v. Biron*, [1976] 2 S.C.R. 56, made the point at pp. 64-65:

Far more important, however, is the social and legal, and indeed, political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. Only to the extent to which it so provides can a person be detained or his freedom of movement arrested.

Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they act unlawfully. [pp. 10-11]

[39] When interfering with the freedom of individuals, the police must act in accordance with the law. In many cases, their powers are clearly outlined in statutes, such as the *Criminal Code*, R.S.C. 1985, c. C-46. But, as this Court recognized in *Dedman*, statute law is not the only source of legal authority for police powers. In particular circumstances, the common law may also provide a legal basis for carefully defined powers.

[40] In this Court, the respondents do not cite or seek to rely on any statute to authorize their arrest of Mr. Fleming while he was standing on D.C.E. Rather, they rely entirely on a common law power of arrest the exercise of which, they submit, was justified in the circumstances of this case. This appeal therefore requires the Court to determine whether the common law power in question exists.

[41] Before embarking on an analysis of common law police powers, it is important to consider the appropriate role of the courts in such an exercise. Establishing and restricting police powers is something that is well within the authority of legislatures. Accordingly, the courts should tread lightly when considering proposed common law police powers.

[42] That being said, the courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist (see *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 17; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 6, 10, 50-51, and 61). This Court has in fact relied on the ancillary powers doctrine to recognize the existence of common law powers in many circumstances in the past. As Moldaver J. explained in concurring reasons in *R. v. Reeves*, 2018 SCC 56, the ancillary powers doctrine has been used

to affirm many common law police powers now considered fundamental. For example, the R.I.D.E. program stops (*Dedman v. The Queen*, [1985] 2 S.C.R. 2), investigative detentions (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59), searches incident to arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158), 911 home entries (*R. v. Godoy*, [1999] 1 S.C.R. 311), sniffer dog searches (*R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456), and safety searches (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37) were all affirmed through the *Waterfield* framework. [para. 77]

Referring to whether this Court should exercise its authority to recognize ancillary police powers, Binnie J. stated: “We have crossed the Rubicon” (*Kang-Brown*, at para. 22). Of course, the legislature always retains the power to expand, modify, restrict or abolish such common law powers, subject to constitutional limits.

[43] To determine whether a particular police action that interferes with individual liberty is authorized at common law, this Court applies the framework that was originally set out in *Waterfield*. This approach has often been referred to as the “*Waterfield* test”. I prefer to use the terminology of the “ancillary powers doctrine”. This is because, as Binnie J. observed in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, “*Waterfield* is an odd godfather for common law police powers” (para. 75). At issue in *Waterfield* was whether a certain constable had been acting in the execution of his duties when he was assaulted; the case did not actually concern the recognition of a purported new common law police power. However, regardless of the doctrine’s origins, this Court has consistently applied the test set out by the majority in *Dedman*.

[44] Furthermore, the English court in *Waterfield* was concerned with actions related to investigating crime. But the ancillary powers doctrine has a broader reach than that: it can be applied to purported police powers — with appropriate clarifications that I will discuss below — even where no crime is alleged.

[45] The basis of the doctrine is that police actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties. Intrusions on liberty are accepted if they are reasonably necessary — in accordance with the test set out below — in order for the police to fulfill their duties.

[46] At the preliminary step of the analysis, the court must clearly define the police power that is being asserted and the liberty interests that are at stake (*Figueiras*

v. Toronto Police Services Board, 2015 ONCA 208, 124 O.R. (3d) 641, at paras. 55-66). The ancillary powers doctrine comes into play where the power in issue involves *prima facie* interference with liberty. The term “liberty” here encompasses both constitutional rights and freedoms and traditional common law civil liberties (see *Clayton*, at para. 59; *Figueiras*, at para. 49). Once the police power and the liberty interests have been defined, the analysis proceeds in two stages:

- (1) Does the police action at issue fall within the general scope of a statutory or common law police duty?

- (2) Does the action involve a justifiable exercise of police powers associated with that duty?

(*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 35-36; *Reeves*, at para. 78)

[47] At the second stage of the analysis, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty (*MacDonald*, at para. 36). As this Court stated in *Dedman*:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35]

In *MacDonald*, the majority of the Court set out three factors to be weighed in answering this question:

1. the importance of the performance of the duty to the public good;
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty. [para. 37; citations omitted.]

[48] Throughout the analysis, the onus is always on the state to justify the existence of common law police powers that involve interference with liberty.

[49] The ancillary powers doctrine has repeatedly been applied by this Court to determine whether — and in what circumstances — a particular power exists at common law. In each case, the Court has endeavoured to define the power at issue and to clearly specify the particular conditions for its use (see *MacDonald*, at paras. 39-40; *Mann*, at paras. 34 and 40; *Reeves*, at para. 95 (per Moldaver J.); *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 22; *Kang-Brown*, at paras. 58-60 (per Binnie J.), and 169 (per Deschamps J.); *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 185-86). Once the Court has defined the parameters of the power, it has then considered whether the police action in question fit within those parameters (i.e. did the police act in accordance with their common law power).

[50] For example, this Court held in *Mann* that a power of investigative detention exists at common law where (a) the officer has reasonable grounds to

suspect that there is a clear nexus between an individual and a recent or ongoing criminal offence, and (b) the decision to detain is reasonable, based on an overall assessment of all the circumstances (see para. 34).

[51] Similarly, in *MacDonald*, a majority of this Court held that police officers have a common law power to conduct a “safety search” in a private home if the officer “believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search” (para. 41). The majority then went on to consider whether the officer in that case had had the requisite reasonable grounds for his belief (see para. 44).

[52] This approach sets clear guidelines for the police, who are expected to react quickly and flexibly to real-life situations that can evolve rapidly. It is important for the courts to give officers the clearest possible guidance as to what common law powers are available to them within the general scope of their duties. The police will then be able to apply these guidelines to their day-to-day operations.

[53] While the ancillary powers doctrine concerns police action that interferes with liberty — a term that, as noted above, encompasses many constitutional rights — determining whether a common law power exists does not itself require the court to apply s. 1 of the *Charter* (*Clayton*, at para. 21). That being said, the two frameworks are not completely unrelated.

[54] Certain concepts which play a significant role in the *Charter* justification context — such as minimal impairment and proportionality — have clear parallels in the ancillary powers doctrine analysis (see R. Jochelson, “Ancillary Issues with *Oakes*: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory” (2012-13), 43 *Ottawa L. Rev.* 355; J. Burchill, “A Horse Gallops Down a Street . . . Policing and the Resilience of the Common Law” (2018), 41 *Man. L.J.* 161, at p. 175). For example, the three factors from *MacDonald* require a proportionality assessment. Moreover, the concept of reasonable necessity requires that other, less intrusive, measures not be valid options in the circumstances. If the police can fulfill their duty by an action that interferes less with liberty, the purported power is clearly not reasonably necessary (see *Clayton*, at para. 21).

[55] Ultimately, the ancillary powers doctrine is designed to balance intrusions on an individual’s liberty with the ability of the police to do what is reasonably necessary in order to perform their duties (see *Clayton*, at para. 26).

[56] With this general context in mind, I will now move on to consider the particular police power that the respondents are asserting in this case.

B. *The Preliminary Step: Defining the Power and the Liberty Interests at Issue*

[57] At the outset, it is important to clearly define the power at issue and the liberty interests with which it *prima facie* interferes. The purported power in this case is a power to arrest someone who is acting lawfully in order to prevent an

apprehended breach of the peace. In targeting someone who is acting lawfully, this proposed power is aimed at individuals who have not committed, and are not about to commit, either an indictable offence or a breach of the peace.

[58] The term “breach of the peace” requires elaboration. Violence lies at the core of this concept. At common law, a breach of the peace has always involved “danger to the person” (G. L. Williams, “Arrest for Breach of the Peace”, [1954] *Crim. L. R.* 578, at p. 579). The United Kingdom Supreme Court recently stated in *R. (on the application of Hicks) v. Metropolitan Police Comr*, [2017] UKSC 9, [2018] 1 All E.R. 374, that “[t]he essence of a breach of the peace is violence” (para. 4) (see also *R. (on the application of Laporte) v. Chief Constable of Gloucestershire Constabulary*, [2006] UKHL 55, [2007] 2 All E.R. 529, at para. 27). In *Brown*, Doherty J.A., writing for the Ontario Court of Appeal, defined the concept as follows: “A breach of the peace contemplates an act or actions which result in actual or threatened harm to someone” (p. 248 (footnote omitted.)). In *Frey v. Fedoruk*, [1950] S.C.R. 517, Kerwin J. (as he then was), in concurring reasons, proposed the following definition of a breach of the peace:

It may be difficult to define exhaustively what is a breach of the peace but, for present purposes, the statement in Clerk and Lindsell on Torts, (10th edition), page 298, may be accepted: —

A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence is not a breach of the peace. Thus a householder — apart from special police legislation — cannot give a man into custody

for violently and persistently ringing his door-bell. [Emphasis added; p. 519.]

[59] As these authorities make clear, an act can be considered a breach of the peace only if it involves some level of violence and a risk of harm. It is only in the face of such a serious danger that the state's ability to lawfully interfere with individual liberty comes into play. Behaviour that is merely disruptive, annoying or unruly is not a breach of the peace.

[60] It is also essential at this point to be clear about what police powers are *not* at issue. Specifically, as I indicated above, the case at bar does not concern a power to arrest a person for the purpose of preventing *that person* from breaching the peace. It appears that such a power may have existed historically at common law (see *Hicks*, at para. 4). Indeed, the Ontario Court of Appeal considered this very power in *obiter* in *Brown* and suggested that it does exist, stating that “a police officer may also arrest or detain a person who is about to commit a breach of the peace” (p. 248 (emphasis added)). While it is not necessary to decide this in the instant case, I seriously question whether a common law power of this nature would still be necessary in Canada today.

[61] The *Criminal Code* provides explicitly for a number of warrantless arrest powers that obviate the need for such a common law power. In particular, under s. 31(1), a police officer can arrest anyone found committing a breach of the peace or who the officer believes is “about to join in or renew the breach of the peace”. In

addition, s. 495(1)(a) provides that an officer can arrest any person “who, on reasonable grounds, he believes has committed or is about to commit an indictable offence”. This applies to all offences that may be prosecuted by indictment (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a); S. Coughlan and G. Luther, *Detention and Arrest* (2nd ed. 2017), at pp. 22-23), a category that encompasses — and extends beyond — the activities which have historically been classified as breaches of the peace, such as various forms of assault (ss. 264.1 to 269), mischief (s. 430), careless use of a firearm (s. 86) and taking part in a riot (s. 65) (see: Williams, at pp. 578-579). Thus, police officers already have extensive powers to arrest, without a warrant, a person they reasonably believe is about to commit an act which would amount to a breach of the peace. I therefore have difficulty seeing any need for the courts to fill a legislative gap by recognizing a common law power of arrest for the purpose of preventing individuals from committing breaches of the peace themselves. I make no comment about other possible powers short of arrest in such circumstances.

[62] This case does not concern a situation in which an arrested individual was about to commit a breach of peace. Instead, the power at issue in this case would target individuals who are not suspected of being about to break any law or to initiate any violence themselves, in situations in which the police nonetheless believe that arresting the individuals in question will prevent a breach of the peace from occurring. For example, these individuals might themselves be the targets or victims of anticipated violence. They could be “provocateurs” whose lawful actions or words are feared to be prompting others to respond violently. In such a situation, the police

might believe that removing the person from the area will defuse the situation, avert the apprehended violence and even protect him or her.

[63] It has long been recognized that such “provocative” conduct is not itself unlawful. As far back as 1950, a majority of this Court held:

I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the Criminal Law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action. If such a principle were admitted, it seems to me that many courses of conduct which it is well settled are not criminal could be made the subject of indictment by setting out the facts and concluding with the words that such conduct was likely to cause a breach of the peace.

(*Frey*, at p. 526)

Yet the effect of the respondents’ position, on the facts of this case, is to claim a power to arrest individuals engaged in non-criminal conduct of this nature in order to prevent the violence the conduct could provoke.

[64] Neither of the courts below highlighted the distinction between a power to arrest someone who is personally about to breach the peace and a power to arrest someone whose lawful conduct may provoke others to breach the peace. They relied, as do the respondents, on the *obiter* comments from *Brown* to conclude that, where certain conditions are met, the police have the power to arrest an individual in order “to avoid a breach of the peace” (see Trial Judge’s Reasons, A.R. vol. I, at p. 47). As I explained above, however, *Brown* concerned only the first situation, that of arresting

“a person who is about to commit a breach of the peace”, which does not reflect the circumstances of the case at bar. The court in *Brown* did not discuss the common law power actually at issue in this appeal: the power to arrest someone who is not about to breach the peace in order to prevent an apprehended breach of the peace by other persons. Whether such a power is reasonably necessary for the purpose of fulfilling a police duty in accordance with the ancillary powers doctrine does not appear to have been addressed in any Canadian case. It is therefore necessary for this Court to do so now.

[65] This proposed power of arrest would involve substantial *prima facie* interference with significant liberty interests. Indeed, few police actions interfere with an individual’s liberty more than arrest — an action which completely restricts the person’s ability to move about in society free from state coercion. As this Court recently noted, “placing a person under arrest inherently infringes his or her liberty” (*R. v. Penunsi*, 2019 SCC 39, at para. 73). Freedom from arbitrary arrest and detention is of course itself constitutionally guaranteed by s. 9 of the *Charter*. Further, where the police use force to effect an arrest, they also directly engage a general liberty interest in being free from the exercise of force by the state as well as the interests in liberty and security of the person protected by s. 7 of the *Charter*.

[66] In many cases, such as that of Mr. Fleming, the lawful activity that is being restricted by the arrest may itself be protected by the *Charter*. Where a police action prevents individuals from lawfully expressing themselves because their

expression might provoke or enrage others, freedom of expression as guaranteed by s. 2(b) is also implicated. Indeed, the trial judge specifically found, correctly in my view, that the respondents' actions in this case had infringed Mr. Fleming's right under s. 2(b) (see A.R., vol. I, at pp. 59-61).

[67] The purported power in this case would directly impact on a constellation of rights that are fundamental to individual freedom in our society. It would directly undermine the expectation of all individuals, in the lawful exercise of their liberty, to live their lives free from coercive interference by the state.

[68] In light of the substantial *prima facie* interference with liberty that may be occasioned by this power of arrest, the next question in the ancillary powers doctrine analysis is if — and when — such a power would be justified for the purpose of fulfilling a valid police duty.

C. *The First Stage: The Police Duty*

[69] In this case, the purported police power falls within the general scope of the duties of preserving the peace, preventing crime, and protecting life and property.

[70] These duties have been acknowledged as “principal duties” of the police at common law (P. Ceyssens, *Legal Aspects of Policing* (loose-leaf), at p. 2-1). As far back as *Dedman*, Le Dain J. noted that preserving the peace and protecting life and property are among the common law duties of police officers (p. 32). In Ontario, the

duty to preserve the peace is also explicitly enumerated in legislation in s. 42(1)(a) of the *Police Services Act*, R.S.O. 1990, c. P.15.

[71] Preventing breaches of the peace, which entail violence and a risk of harm, is plainly related to these duties.

[72] With respect, the trial judge's conclusion on this stage of the ancillary powers doctrine was erroneous. In a single sentence on the issue, she found that, "on the specific facts of this case with respect to Mr. Fleming, the defendants were not 'preserving the peace'" (A.R., vol. 1, at p. 46). This statement confused the different stages of the test.

[73] Although the trial judge's comments were brief, she appears to have concluded that the respondents' actions were not justified — on the basis that there was no serious risk of a breach of the peace — and that, as a result, they could not meet the requirements of the first stage. Whether the power is necessary in order to achieve the goal of preserving the peace is a question that is properly left for the second stage. At the first stage, it is clear that actions to prevent a breach of the peace do further the police duties of preserving the peace, preventing crime, and protecting life and property.

[74] Because the requirements of the first stage are met, the key question in this case concerns the second stage.

D. *The Second Stage: Reasonably Necessary*

(1) The Unique Context of the Power at Issue in This Case

[75] Courts must always apply the second stage of the ancillary powers doctrine with rigour to ensure that the Crown has satisfied its burden of demonstrating that the interference with individual liberty is justified and necessary.

As Abella J. stated in *Clayton*:

In determining the boundaries of police powers, caution is required to ensure the proper balance between preventing excessive intrusions on an individual's liberty and privacy, and enabling the police to do what is reasonably necessary to perform their duties in protecting the public.
[para. 26]

[76] The unique context of the respondents' purported power of arrest makes it particularly difficult to justify at the second stage of the analysis. This Court has held that "[t]he standard of justification must be commensurate with the fundamental rights at stake" (*Clayton*, at para. 21). There are a number of reasons why the "standard of justification" is especially stringent here. The characteristics of the power, and in particular its impact on law-abiding individuals, its preventative nature and the fact that it would be evasive of review, all mean that it will be more difficult to justify as reasonably necessary compared to other common law powers. The bar is higher.

[77] Firstly, the purported police power would expressly be exercised against someone who is not suspected of any criminal wrongdoing or even of threatening to breach the peace. In the past, this Court has only recognized common law police powers that involve interference with liberty where there has been some connection with criminal activities. In these cases, the powers were restricted to circumstances in which there was at least a suspicion that the person affected by the exercise of the power was involved in, or might commit, some offence. For example, this Court has accepted powers intended to prevent an assault on the person of a foreign dignitary (*R. v. Knowlton*, [1974] S.C.R. 443), detect impaired driving (*Dedman*) or eliminate threats to officers posed by weapons (*MacDonald*; *Mann*). In other cases, the recognized powers related directly to the investigation of particular crimes (*Godoy*; *Mann*; *Clayton*; *Kang-Brown*).

[78] The instant case is different. Here, the respondents are proposing a power that would enable the police to interfere with the liberty of someone who they accept is acting lawfully and who they do not suspect or believe is about to commit any offence. It would be difficult to overemphasize the extraordinary nature of this power. Such a power would constitute a major restriction on the lawful actions of individuals in this country. It is especially important for the courts to guard against intrusions on the liberty of persons who are neither accused nor suspected of committing any crime (see *Penunsi*, at para. 68).

[79] As Lord Mance stated in *Laporte*, “wherever possible, the focus of preventive action should, on any view, be on those about to act disruptively, not on innocent third parties” (para. 149). Similarly, Lord Brown of Eaton-Under-Heywood noted that “the police’s first duty is to protect the rights of the innocent rather than to compel the innocent to cease exercising them” (para. 124).

[80] The fundamental nature of the liberty interests at stake coupled with the extraordinary proposition of interfering with those interests where the affected individual is under no suspicion of unlawful conduct mandates a stringent and exacting justificatory analysis.

[81] Secondly, the purported police power in the case at bar is preventative. The respondents propose a power that would enable the police to act to prevent breaches of the peace before they arise.

[82] The ancillary powers doctrine does not limit police actions to cases in which a crime has already been committed or a breach of the peace has already taken place. The common law police duties of preserving the peace, preventing crime and protecting life and property clearly entail an ability to act proactively when appropriate. In this sense, I agree with Doherty J.A. that:

Not all law enforcement is reactive. The police duty to prevent crime and maintain the public peace commands proactive measures on their part.

. . . Proactive policing is in many ways more efficient and effective than reactive policing.

(*Brown*, at p. 246)

[83] Where such preventative actions do not interfere with individual liberty, the police do of course have broad latitude. Once invasive police actions do intrude upon individual liberty, however, the courts must be very cautious about authorizing them merely because an unlawful or disruptive act could occur in the future. Vague or overly permissive standards in such situations would sanction profound intrusions on liberty with little societal benefit. As a general rule, it will be more difficult for the state to justify invasive police powers that are preventative in nature than those that are exercised in responding to or investigating a past or ongoing crime (*Figueiras*, at para. 45; see also *Brown*, at paras. 249-51).

[84] Thirdly, the exercise of the respondents' purported police power would be evasive of review. Since this power of arrest would generally not result in the laying of charges, the affected individuals would often have no forum to challenge the legality of the arrest outside of a costly civil suit (see J. Esmonde, "The Policing of Dissent: The Use of Breach of the Peace Arrests at Political Demonstrations" (2002), 1 *J.L. & Equality* 246, at pp. 254-55). Judicial oversight of the exercise of such a police power would therefore be rare. For this reason, any standard outlined at the outset would have to be clear and highly protective of liberty.

[85] These factors demonstrate that the application of the ancillary powers doctrine to the purported police power at issue in this case must be particularly stringent at the second stage. The standard of justification will be onerous and the respondents bear a heavy burden if they are to establish that the power is reasonably necessary.

[86] This restrictive approach to justification is consistent with how courts have treated similar or related common law powers whose purpose is to prevent breaches of the peace both in this country (see *Brown; Figueiras; R. v. C.E.*, 2009 NSCA 79, 279 N.S.R. (2d) 391, at paras. 36-39) and in other common law jurisdictions (see *Bibby v. Chief Constable of Essex Police*, [2000] EWCA Civ. 113; *Austin v. Metropolitan Police Comr*, [2007] EWCA Civ 989, [2008] 1 All E.R. 564; *Laporte*).

[87] I will now turn to the application of the second stage of the ancillary powers doctrine to the particular police power at issue in the instant case.

(2) The Power to Arrest Someone Who is Acting Lawfully in Order to Prevent an Apprehended Breach of the Peace

[88] In applying the second stage of the ancillary powers doctrine stringently in this case, it becomes clear that a police power to arrest someone who is acting lawfully in order to prevent a breach of the peace is not reasonably necessary for the fulfillment of the relevant duties.

[89] I will begin my analysis with the three factors from *MacDonald*. Regarding the importance of the duty, there is no doubt that preserving the peace and protecting people from violence are immensely important. Breaches of the peace can threaten the safety and lives of individuals and can erode the public's sense of security.

[90] Concerning the necessity of the infringement for the performance of the duty, there may be exceptional circumstances in which some interference with liberty is required in order to prevent a breach of the peace.

[91] With respect to the extent of the infringement, any interference with individual liberty will be justified only insofar as it is necessary in order to prevent the breach of the peace from occurring (see *MacDonald*, at para. 39). As I mentioned earlier, an arrest is one of the most extreme intrusions on individual liberty available to the police. Where there are less invasive measures that would be effective in preventing the breach, they must be taken instead.

[92] On considering these factors, I do not see how so drastic a power as that of *arrest* can be reasonably necessary. I cannot conceive of circumstances in which a common law power of arrest will be required in order to prevent violence from occurring where there are no other means — available either at common law or in legislation — that would serve this purpose.

[93] In this regard, it is important to note the statutory powers of arrest that are already available to police officers in such situations. Section 129 of the *Criminal Code* reads:

Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so

...

is guilty of

(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(e) an offence punishable on summary conviction.

Additionally, s. 270 creates an offence for assaulting “a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer”. All of these offences may be prosecuted by indictment, which means that under s. 495(1)(a), an officer may arrest a person who is committing one of them without a warrant.

[94] Consequently, if an individual fails to comply with less intrusive measures taken by a police officer to avert a breach of the peace — by “resist[ing] or willfully obstruct[ing]” the officer in the lawful execution of his or her duty,

assaulting the officer, or omitting to assist the officer in preserving the peace after “having reasonable notice” of a requirement to do so — a statutory power of arrest already exists under the *Criminal Code*.

[95] The respondents’ purported power of arrest would result in serious interference with individual liberty. As a result, such an arrest cannot be justified under the ancillary powers doctrine. There is already a statutory power of arrest that can be exercised should an individual resist or obstruct an officer taking other, less intrusive measures. It is not reasonably necessary to recognize another common law power of arrest in such circumstances. Therefore, to be clear, the only available powers to arrest someone in order to prevent an apprehended breach of the peace initiated by other persons are the ones that are expressly provided for in the *Criminal Code*. In my view, these statutory powers are sufficient, and any additional common law power of arrest would be unnecessary.

[96] To the extent that the judges in the majority of the Court of Appeal concluded that Mr. Fleming’s arrest was justified under the ancillary powers doctrine because it had been effective in preventing any breach of the peace from occurring, they were respectfully in error. Nordheimer J.A. stated:

The trial judge faults the officers for not instituting a buffer zone between the respondent and the protestors and for not calling for back up from other available officers, as alternatives to arresting the respondent. While both of these routes were available, the basis for the trial judge’s criticism of the officers is unclear. 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. [para. 57]

[97] Firstly, the argument that Mr. Fleming's arrest was effective in preventing violence is not very persuasive, given the trial judge's finding that there was not a real risk of such violence (A.R., vol. I, at p. 49). In other words, Mr. Fleming's arrest cannot be said to have prevented violence if violence was unlikely to occur even had he not been arrested.

[98] Secondly, the mere fact that a police action was effective cannot be relied upon to justify its being taken if it interfered with an individual's liberty. For an intrusion on liberty to be justified, the common law rule is that it must be "reasonably necessary". If the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be. An intrusion upon liberty should be a measure of last resort, not a first option. To conclude otherwise would be generally to sanction actions that infringe the freedom of individuals significantly as long as they are effective. That is a recipe for a police state, not a free and democratic society.

[99] The courts have held that police powers that involve interference with liberty will not be justified if they are *ineffective* at preventing breaches of the peace. For example, in *Figueiras*, the Ontario Court of Appeal said: "If the interference with

individual rights bears no rational connection to the duty being performed or is not effective in furthering the police duty, then surely it is not a ‘necessary’ interference” (para. 93). This is not the same as saying that any powers are justified if they are effective.

[100] As Binnie J. stated in his concurring reasons in *Clayton*, “[w]hile the effectiveness itself of police action does not confer legitimacy, the *absence* of likely effectiveness would argue strongly against a valid blockade” (para. 99 (emphasis in original)). Thus, the respondents cannot rely merely on the fact that arresting Mr. Fleming was effective in order to establish that doing so was justified.

E. *Was Mr. Fleming’s Arrest Lawful?*

[101] In light of the above conclusion, Mr. Fleming’s arrest on May 24, 2009, was not authorized at common law.

[102] Because there is no common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace, the officers in this case did not have lawful authority to arrest Mr. Fleming. The trial judge specifically found that Mr. Fleming had not done anything unlawful before being arrested; there was no evidence before her that he had committed any offence in walking along Argyle Street, entering D.C.E. property or standing there with his Canadian flag (A.R., vol. I, at pp. 66-67). Nor was there evidence that he had himself been about to commit an indictable offence or a breach of the peace. The respondents have not

sought to challenge this finding on appeal, nor have they cited or relied on any statutory power to arrest Mr. Fleming. They do not claim that the arrest was authorized pursuant to s. 129, s. 270, s. 495(1)(a) or any other provision of the *Criminal Code*. They rely *entirely* on a common law power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by other persons — a power that I have found to be non-existent.

[103] One purported error by the trial judge — relied on by both the majority of the Court of Appeal and the respondents in this appeal to challenge her conclusion that Mr. Fleming’s arrest was not lawful — lies in her comments that the flag rally was not an “Aboriginal Critical Incident” and that the O.P.P. was wrong to apply the Aboriginal Critical Incidents Framework in developing its operational plan. Some of the trial judge’s comments in referring to the O.P.P.’s use of the framework and her criticism of the O.P.P.’s consultation with local Indigenous groups were unfortunate and unwarranted.

[104] That being said, it is my view that this purported error is largely irrelevant to the central legal issues in this case. How the O.P.P. characterized the event in advance has no impact on the question of whether the respondents’ actions in arresting Mr. Fleming were lawful. I agree with Huscroft J.A. that any error on the trial judge’s part in this regard could not be legally relevant, because:

Nothing follows from it: the O.P.P.’s policy had no special status in law. Even assuming that the trial judge erred — assuming that the flag rally was an “Aboriginal Critical Incident” and the police were following the

policy they had established — the lawfulness of Mr. Fleming’s arrest [did] not [depend] on whether it complied with police policy [para. 82]

[105] The conclusion that the respondents’ purported common law power of arrest does not exist is on its own sufficient for this Court to allow the appeal, as it leads inevitably to the result that the respondents had no authority at common law to arrest Mr. Fleming in the circumstances of this case. As no other legal authority was proposed for the arrest, it was therefore unlawful.

[106] At the hearing of this appeal, however, the question arose whether the police have the power to require a person to temporarily move out of immediate harm’s way in fulfillment of their common law duty to protect life. This discussion concerned an unlikely, but conceivable, situation in which an angry mob is about to attack someone who is lawfully exercising his or her freedom of speech and the person refuses to voluntarily accompany a lone police officer at the scene. Counsel for Mr. Fleming accepted that such a power “must be able to exist in certain type[s] of restricted circumstances” (Transcript, at p. 10).

[107] Over the years, some courts have recognized that a common law police power short of arrest may exist “in truly extreme and exceptional circumstances” for the purpose of preventing an imminent breach of the peace (*Austin*, at para. 119). Stringent standards have been developed to ensure that any such substantial police interference with a person’s liberty was demonstrably and reasonably necessary. The limited number of cases on this subject show that the exercise of such powers, if they

exist, will generally not be found to be reasonably necessary unless, at a minimum, the apprehended breach of the peace is imminent, the risk of violence is sufficiently serious, the risk of it occurring is substantial, and no less intrusive measures are reasonably available (see the Irish case of *O'Kelly v. Harvey* (1883), 14 L.R.I. 105 (C.A.), at p. 109, and the decision of the House of Lords in *Laporte*, at paras. 62, 66, 68-69, 101-02, 114 and 141). Additionally, it must be demonstrated that the exercise of the power can in fact be effective in preventing the breach of the peace (see *Figueiras*, at para. 93).

[108] It is neither necessary nor advisable for this Court to comment on whether, when fulfilling their duties of preserving the peace, preventing crime, and protecting life and property, the police may have some other common law powers short of arrest to prevent an apprehended breach of the peace. The instant case was not advanced on the basis that such a power exists at common law in Canada. Any such power is clearly not the power the respondents exercised against Mr. Fleming in the instant case: they intended to arrest Mr. Fleming, and that is plainly what they did. There is no dispute on this point. Therefore, it is not necessary to determine whether such powers exist and whether one of them would have been available to the respondents in the circumstances of this case.

[109] Further, in Canada, because any such hypothetical power would infringe on individual liberty (see *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 25), it would also need to be justified under the ancillary powers doctrine. It would be

inconsistent with the cautious and restrained approach to common law police powers that courts are required to take if we were to recognize this power in this case on the basis of hypothetical scenarios. I would therefore leave the recognition of such a power, if one exists, either to Parliament or to a court hearing a case in which the power is raised squarely on the facts.

F. *The Breach of Mr. Fleming's Right Under Section 2(b) of the Charter*

[110] The trial judge held that the actions of the police had violated Mr. Fleming's right to freedom of expression by preventing him from taking part in the flag rally and expressing his views about contentious political issues in his community. The respondents have not challenged this conclusion specifically other than by endorsing the Court of Appeal's conclusion that Mr. Fleming's arrest was lawful. I will only make a few additional comments on this issue.

[111] The ancillary powers doctrine has been applied by this Court previously in the context of *Charter* rights that are qualified by the language used in the *Charter* itself—such as the right to be secure against *unreasonable* search and seizure as provided for in s. 8 or the right not to be *arbitrarily* detained as provided for in s. 9. The Court has held that, where a police action is authorized by the common law, there is no infringement of these *Charter* rights, because the internal limits of the rights are respected. For example, a lawful detention pursuant to a common law power was held not to be *arbitrary* for the purposes of s. 9 in *Clayton and Mann*; likewise, a lawful search pursuant to a common law power was held not to be *unreasonable* for the

purposes of s. 8 in *MacDonald*. The internal limits of those rights require that the police conduct be authorized by law, which can include the common law. Provided that the remaining criteria of the applicable internal limits are satisfied, there will be no *Charter* breach, and therefore no need to justify a breach pursuant to s. 1.

[112] However, some of the interveners in this appeal are suggesting — as the Ontario Court of Appeal did in *Figueiras*, at para. 53 — that the analysis is different in the case of rights that are guaranteed by the *Charter* in unqualified language, such as the right to freedom of expression under s. 2(b) (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 43-6). These interveners argue that the ancillary powers doctrine is insufficient to demonstrate the absence of a *Charter* breach where such rights are limited by police powers, since the language of the relevant *Charter* provisions does not restrict infringements to “unreasonable” or “arbitrary” state action. They submit that, where a common law police power limits freedom of expression, the state would still be required to justify the limit under s. 1 of the *Charter* by means of the familiar test from *R. v. Oakes*, [1986] 1 S.C.R. 103. In their opinion, the fact that the limit is authorized by the common law — and is therefore “prescribed by law” (see *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 978-79) — does not mean that the limit can be demonstrably justified in a free and democratic society.

[113] It is unnecessary to resolve this issue in this case. Given that the actions that limited Mr. Fleming’s freedom of expression were not authorized at common

law, they were not “prescribed by law” and therefore cannot possibly be justified under s. 1 (see *Clayton*, at para. 19, per Abella J., and at para. 80, per Binnie J.). The issue of whether the *Oakes* test must be applied in order to justify a limit on a s. 2(b) right where the limiting action is the valid exercise of a common law police power is best left for another case in which it arises squarely and is fully argued.

G. *Excessive Force*

[114] The majority of the Ontario Court of Appeal, having found that Mr. Fleming’s arrest was lawful, ordered a new trial solely on the issue of whether the respondents had used excessive force. In light of my earlier conclusions, a new trial on this issue is not warranted.

[115] Section 25(1) of the *Criminal Code* states:

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer,

...

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[116] This section authorizes police officers to use “as much force as is necessary” in the execution of their duties. It affords them a defence to a claim of battery, provided that the section’s requirements are satisfied. The provision will not shield officers from liability if the force they used is found to be excessive.

[117] However, police officers cannot rely on s. 25(1) to justify the use of force if they had no legal authority — either under legislation or at common law — for their actions (see *Figueiras*, at para. 147; Coughlan and Luther, at p. 32).

[118] Because the respondents were not authorized at common law to arrest Mr. Fleming, no amount of force would have been justified for the purpose of accomplishing that task. They were not doing what they were “required or authorized to do” within the meaning of s. 25(1).

[119] As a result, no new trial is needed on the issue of excessive force. There is no basis for intervening in the trial judge’s conclusion that the respondents were liable for battery for their use of force in unlawfully arresting Mr. Fleming.

VI. Conclusion

[120] For the foregoing reasons, I would allow the appeal, set aside the order of the Ontario Court of Appeal and restore the trial judge’s order. Costs are awarded throughout: costs in this Court and the agreed-upon trial and appeal costs of \$151,000 and \$48,000 respectively.

Appeal allowed.

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Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

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Solicitor for the intervener the Canadian Association of Chiefs of Police: City of Vancouver, Law Department, Vancouver.

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