Court File No. CV-14-00503631-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LUKE STEWART

Plaintiff

- and -

THE TORONTO POLICE SERVICES BOARD

Defendant

FACTUM OF THE INTERVENER
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I – OVERVIEW

1. The question before this Court is whether the *Trespass to Property Act* ("*TPA*") can be interpreted to include police powers to cordon off a public park and to require individual protesters to submit to searches or seizures as a condition of entry to a protest.

2. A broad interpretation of the *TPA*, including an interpretation of sections 2 and 9 of the *TPA* that would confer a broad discretion on the police to determine who has a right to be on property, would work to authorize police powers that interfere with the rights enshrined in the *Canadian Charter of Rights and Freedoms*. A broad interpretation of the *TPA* should be expressly rejected so as to ensure that the *TPA* does not violate *Charter* rights, including freedom of expression, freedom of peaceful assembly, and security against unreasonable search and seizure.

3. The Canadian Civil Liberties Association (CCLA) submits that the appropriate way to achieve this result is by interpreting "a right or authority conferred by law" in section 2(1) of the *TPA* as including a right or freedom conferred by the *Charter*. This would properly limit the breadth of police powers under section 9(1), so that simply exercising one's rights, such as by attending a peaceful protest at a public park, could not alone give rise to reasonable and probable grounds to believe that the offence of trespass is being committed.

4. Whatever the powers under the *TPA* that were conferred on police as agents of the City, those powers do not encompass a right to search or demand to search people entering a public park. Neither the *TPA* nor any relevant municipal by-law contain any language that authorizes such a search. Nor can this power be implied as a necessary adjunct to the legislation.

5. The common law's conferring police powers that are ancillary to the legal duties of police similarly does not provide authority to search or demand to search people entering a

public park. A police power which restricts individual liberty must be connected to a police duty and be justifiable having regard to all the circumstances including the police duty to protect public welfare, its necessity to achieve the police objective, and the extent of infringement on individual liberty.

6. Justification is an especially high bar when police power involves preventive policing. Police powers to prevent crime are justified only where there is an imminent risk of serious harm. Generalized suspicion or concern for public safety is not sufficiently important to justify restricting individual liberty where no crime has been committed. Moreover, the chosen means of preventing disorderly behaviour must be effective and suitably tailored to the objective. Random searches and seizures of individuals entering a park are neither an effective nor a suitably tailored means of policing. They therefore cannot be justified.

7. If this Court determines that the plaintiff's *Charter* rights were breached, *Charter* damages would serve to compensate the plaintiff for the indignity of the search and the violation of his rights. The case would also call our for damages to vindicate *Charter* rights and to deter similar wrongdoing in the future, particularly insofar as this Court finds that any offending police conduct – occurring as it did during some of the largest and most significant protests in Canada's history – may have affected similarly situated individuals who, for various reasons, choose not to bring civil claims.

PART II – FACTS

8. The CCLA takes no position on the facts of this case.

PART III – ISSUES

9. The CCLA, as intervener, makes submissions on four issues:

(a) How should the *TPA* be interpreted?

(b) What is the proper interpretation of the relevant sections of the *TPA*?

(c) Was it an abuse of police power to demand a search as a condition of entry to a public park?

(d) If there was an abuse of police power, what is the appropriate remedy?

PART IV – LAW & ARGUMENT

The *TPA* must be interpreted in a manner consistent with the *Charter*

10. The Supreme Court of Canada has repeatedly held that legislation must be interpreted in a manner consistent with the *Charter*. In *R. v. Sharpe*, the Supreme Court affirmed "the presumption that [the legislature] intended to enact legislation in conformity with the *Charter*." Under this presumption, "[i]f a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted."[1] The Court followed the principle enunciated by Justice Lamer in *Slaight Communications Inc. v. Davidson* that courts should "not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an

[1] *R. v. Sharpe*, 2001 SCC 2 at para. 33 [*Sharpe*], Intervener's Book of Authorities ("IBOA"), **Tab 42**.

imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed."[2]

11. The relevant portion of section 9 of the *TPA* provides as follows:

> **9** (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

12. Section 9 expressly references section 2. The relevant portion of section 2 states:

> **2** (1) Every person who is not acting under a right or authority conferred by law and who,
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> (a) without the express permission of the occupier, the proof of which rests on the defendant,
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> (i) enters on premises when entry is prohibited under this Act, or
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> (ii) engages in an activity on premises when the activity is prohibited under this Act; or
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> (b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $10,000.

13. Any police powers that might be conferred by section 9 of the *TPA* are expressly limited to persons who are "not acting under a right or authority conferred by law." In the CCLA's respectful submission, a person exercising a *Charter* right or freedom – i.e., a person exercising a right or freedom conferred by "the supreme law of Canada"[3] – must be understood to be acting under "a right or authority conferred by law." This would properly limit the breadth of police powers under section 9(1), so that exercising a *Charter* right – such as attending a protest at a public park pursuant to one's freedoms under sections 2(b) and 2(c) of the *Charter* – could not give rise to reasonable and probable grounds to believe that the offence of trespass is being committed, unless the *Charter* right being exercised is properly subject to a "reasonable limit"

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[2] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078 (Lamer J., dissenting in part) [*Slaight Communications*], IBOA, **Tab 51**. Although *Slaight Communications* is an administrative law case, this principle has been applied in a number of criminal cases, including *Sharpe*, *supra*.

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11., s. 52(1).

under the *Charter*. Only such an interpretation would ensure that the *TPA* does not confer police powers that would run afoul of numerous *Charter* guarantees.

14. As set out below, sections 2 and 9 of the *TPA* are ambiguous and capable of an interpretation that will confer an imprecise and unconstitutional discretion on the police that is vulnerable to abuse. Such an interpretation of the *TPA* must be rejected.

Sections 2 and 9 of the *TPA* are ambiguous and vulnerable to abuse

i. Framework of the TPA and abuse of police power

15. The *TPA* was intended "to provide a relatively quick, cheap and intelligible remedy for trespass."[4] It was not intended to be used as a tool to restrict the exercise of *Charter* rights.

16. Sections 2 and 9 of the *TPA* work together. In order to arrest a person for trespass pursuant to section 9(1), a police officer must have "reasonable and probable grounds" to believe two things: (i) that the person was not on the premises under "a right or authority conferred by law" within the meaning of section 2(1); and (ii) that the person has done at least one of the three prohibited activities listed in section 2(1)(a) or section 2(1)(b).[5] The first stage of this inquiry confers a broad discretion on the police to determine who has a right to be on property.

17. The dangers of inadequately circumscribed trespass laws were recently recognized by the Ontario Court of Appeal in *Bracken v. Fort Erie (Town)*. In that case, the Court held that the town's issuance of a trespass notice banning a protestor from all town property for one year had the effect of silencing him and violated his freedom of expression under section 2(b) of the *Charter*.[6] In reaching this conclusion, the Court noted that the *TPA* has "long been used by government as a mechanism to exercise [its] common law power to exclude persons from public

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[4] *R. v. Asante-Mensah*, 2003 SCC 38 at para. 30, IBOA, **Tab 20**.
[5] *Gentles v. Intelligarde International Incorporated*, 2010 ONCA 797 at paras. 51-52, IBOA, **Tab 15**.
[6] *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 at paras. 3, 56, 85 [*Bracken*], IBOA, **Tab 2**.

property." But the Court also warned of the "risk of arbitrary action" under the *TPA*, which "is higher in the absence of a well-crafted by-law" regulating its administration.[7]

18. The Court of Appeal's holding in *Bracken* is directly relevant to this action. The City of Toronto does not have a by-law specifically regulating the administration of the *TPA*, and the City's trespass policy applies only to Parks, Forestry, and Recreation staff.[8] While the City of Toronto purported to appoint the Toronto Police as its agents for the purposes of administering the *TPA*, the letter of appointment dated March 16, 2010, did not provide any substantive direction to the police on how the *TPA* should be applied.[9]

19. Insofar as this Court finds that the police, without clear guidance from by-laws, city policies, or any other authority except the *TPA*, (i) cordoned off a public park, (ii) seized private property and offered to return it after the protest and only if would-be protestors gave up their anonymity, and (iii) conducted sweeping detentions and searches under the colour of the *TPA* (even though the *TPA* does not confer any powers of detention and search), it should also find that the police took precisely the kind of "arbitrary action" that the Court of Appeal warned of in *Bracken*.

20. The consequences of the *TPA's* ambiguity are also apparent in other cases. Various courts have found that police misused the broad wording of section 9(1) in a way that infringed the *Charter*. Of the 31 reported cases involving allegations of police misconduct under the colour of section 9(1) of the *TPA*, ten involved a finding that the police conducted an unreasonable search contrary to section 8 of the *Charter*;[10] nine involved a finding that there were no reasonable and

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[7] *Bracken* at para. 72, IBOA, **Tab 2**.
[8] City of Toronto, Parks, Forestry & Recreation Division, "Suspension and Ban Policy," revised 17 January 2011, IBOA, **Tab 53**.
[9] Letter from City Authorizing Police to Act as Agents under the *TPA*, 16 March 2010, **Exhibit 3A, Tab 2**.
[10] *R. v. Yasi* (1999), 70 C.R.R. (2d) 354 at para. 27 (Ont. C.J.), IBOA, **Tab 49**; *R. v. Marlon Davidson*, 2010 ONSC 1508 at paras. 95, 97, IBOA, **Tab 36**; *R. v. Brown* (2001), 87 C.R.R. (2d) 85 at para. 49 (Ont. Sup. Ct.), IBOA, **Tab 22**; *R. v. Genus*, 1993 CarswellOnt 4400 at para. 22 (Ont. C.J. (Prov. Div.)), IBOA, **Tab 27**; *R. v. Nguyen*, 2016

probable grounds for an arrest, making the arrest unlawful;[11] seven involved a finding that there was an arbitrary detention contrary to section 9 of the *Charter*;[12] two involved a finding that the police used excessive force;[13] and two involved a finding that the police conduct was "abusive" or in "bad faith."[14]

21. These abuses of police power are a result of the current statutory ambiguity in the *TPA*. In the CCLA's respectful submission, any police misuse of the *TPA* is impermissible, and the breach of even a single individual's *Charter* rights must compel a remedy.[15]

22. It has long been recognized that the power to arrest without warrant "may easily be abused and become a danger to the community instead of a protection."[16] The requirement in section 9 of the *TPA* of reasonable and probable grounds for an arrest is intended to prevent such

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ONSC 8048 at paras. 56, 60, IBOA, **Tab 37**; *R. v. S. (O.A.)*, 2002 CarswellOnt 1867 at paras. 17-18 (Ont. C.J.), IBOA, **Tab 39**; *R. v. Gabriel*, 2003 CarswellOnt 9120 at para. 10 (Ont. C.J.), IBOA, **Tab 26**; *R. v. D. (S.)*, 2003 CarswellOnt 5660 at para. 10 (Ont. C.J.), IBOA, **Tab 25**; *R. v. Smith*, 2008 ONCJ 492 at para. 46, IBOA, **Tab 43**; *R. v. Wawrykiewicz*, 2017 ONSC 569 at paras. 17, 38, 41, IBOA, **Tab 47**.

[11] *R. v. Brown* (2001), 87 C.R.R. (2d) 85 at paras. 54-55 (Ont. Sup. Ct.), IBOA, **Tab 22**; *R. v. Genus*, 1993 CarswellOnt 4400 at paras. 21-22 (Ont. Ct. J. (Prov. Div.)), IBOA, **Tab 27**; *R. v. Nguyen*, 2016 ONSC 8048 at paras. 56, 58, 60, IBOA, **Tab 37**; *Carr v. Ottawa Police Services Board*, 2017 ONSC 4331 at para. 40, IBOA, **Tab 7**; *R. v. Gabriel*, 2003 CarswellOnt 9120 at paras. 7-10 (Ont. C.J.), IBOA, **Tab 26**; *R. v. D. (S.)*, 2003 CarswellOnt 5660 at para. 10 (Ont. C.J.), IBOA, **Tab 25**; *Aspden v. P.C. David Maniaci*, [2005] O.T.C. 187 at paras. 45-46 (Sup. Ct.), IBOA, **Tab 1**; *R. v. Williams*, 2005 CarswellOnt 10477 at paras. 17-18 (Ont. C.J.), IBOA, **Tab 48**; *R. v. Wawrykiewicz*, 2017 ONSC 569 at paras. 17, 41, IBOA, **Tab 47**.

[12] *R. v. Yasi* (1999), 70 C.R.R. (2d) 354 at para. 29 (Ont. C.J.), IBOA, **Tab 49**; *R. v. Marlon Davidson*, 2010 ONSC 1508 at para. 94, IBOA, **Tab 36**; *R. v. Brown* (2001), 87 C.R.R. (2d) 85 at para. 45 (Ont. Sup. Ct.), IBOA, **Tab 22**; *Carr v. Ottawa Police Services Board*, 2017 ONSC 4331 at paras. 164-165, IBOA, **Tab 7**; *R. v. Aguirre* (2006), 45 C.R. (6th) 323 at para. 220 (Ont. Sup. Ct.), IBOA, **Tab 19**; *R. v. Smith*, 2008 ONCJ 492 at paras. 24, 45, 49, IBOA, **Tab 43**; *R. v. Salad*, 2006 ONCJ 76 at paras. 32, 35, 43, IBOA, **Tab 40**.

[13] *R. v. Marlon Davidson*, 2010 ONSC 1508 at para. 100, IBOA, **Tab 36**; *Carr v. Ottawa Police Services Board*, 2017 ONSC 4331 at paras. 78-80, 154-156 (excessive force resulted in fractured wrist; potentially suicidal individual left naked in holding cell for more than two hours), IBOA, **Tab 7**.

[14] *R. v. Smith*, 2008 ONCJ 492 at para. 49, IBOA, **Tab 43**; *R. v. Salad*, 2006 ONCJ 76 at paras. 41, 43, IBOA, **Tab 40**.

[15] See *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at paras. 34, 105, IBOA, **Tab 17**; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 122-123, 127, IBOA, **Tab 6**; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 25, IBOA, **Tab 10**.

[16] *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250, IBOA, **Tab 45** [*Storrey*], quoting *Dumbell v. Roberts*, [1944] 1 All E.R. 326 at 329 (C.A.), IBOA, **Tab 11**.

abuse and "safeguard the liberty of citizens."[17] It requires the arresting officer to have an objectively reasonable belief that an offence has been or is about to be committed.[18]

23. But the threshold of "reasonable and probable grounds" is difficult to apply without additional guidance. The courts have held that it is something less than a "*prima facie* case for conviction"[19] but something more than a "reasonable suspicion."[20] This Court has noted the "confusion" surrounding the difference between "reasonable grounds," "reasonable suspicion," and "reasonable and probable grounds."[21] Given that such confusion exists, a bald statutory reference to a legal threshold, without more, cannot be expected to adequately constrain police power and discretion within constitutional limits. Guidance from this Court is needed to clarify such limits.

24. The potential for abuse of police powers increases when, as in this case, an offence is broadly worded and confers an apparently wide discretion on the police. The trespass offence in section 2(1) of the *TPA* requires the police to determine whether they have reasonable and probable grounds to believe that an individual is not acting "under a right or authority conferred by law." This language might be interpreted – contrary to several constitutional guarantees – as leaving an almost unfettered discretion to individual police officers.

25. At present, existing case law interpreting section 2(1) of the *TPA* does not eliminate the ambiguity in the *TPA* and the consequent potential for unconstitutional police action under the guise of statutory authority. Only three appellate decisions have provided substantive direction on the meaning of "a right or authority conferred by law." Based on these decisions, it is clear

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[17] *Storrey* at 249, IBOA, **Tab 45**.
[18] *Storrey* at 250-251, IBOA, **Tab 45**; *Criminal Code*, R.S.C., 1985, c. C-46, s. 495(1).
[19] *Storrey* at 250, IBOA, **Tab 45**, quoting *Dumbell v. Roberts*, [1944] 1 All E.R. 326 at 329 (C.A.), IBOA, **Tab 11**.
[20] *R. v. Grant*, 2009 SCC 32 at para. 55, IBOA, **Tab 28**; *R. v. Le*, 2014 ONSC 2033 at paras. 99-100, IBOA, **Tab 32**, aff'd 2018 ONCA 56, IBOA, **Tab 33**.
[21] *R. v. Le*, 2014 ONSC 2033 at para. 100, IBOA, **Tab 32**, aff'd 2018 ONCA 56, IBOA, **Tab 33**.

that the phrase includes an authority conferred by a regulation,[22] being a resident of the premises or a guest of a resident,[23] and a valid order issued by an administrative tribunal.[24]

26. For instance, the Ontario Court of Appeal has held that the Ontario Labour Relations Board had the jurisdiction to infringe the private property rights of a shopping mall owner to ensure that union organizers could exercise their statutory right to organize and leaflet on mall premises.[25] Holding that shopping mall owners do not have "the unfettered right to control the use of their premises without regard to the provisions of the *Labour Relations Act*," the Court reasoned that the Board properly balanced "the right of access to union communication with the right to exclusive control and possession of private property."[26]

27. As detailed further below, if the *TPA's* protection of private property rights against trespass must bend to a right of association under the *Labour Relations Act*, it is all the more imperative that the property rights of a government actor be properly balanced against the *Charter* rights of Canadians. This would accord with McLachlin J.'s recognition in *Committee for the Commonwealth of Canada* that under the common law, "the Crown as property owner is entitled to withdraw permission from an invitee to be present on its property, subject always to the *Charter*."[27]

28. Moreover, several provincial court decisions have held that the freedoms in section 2 of the *Charter* constitute "a right or authority conferred by law" within the meaning of section 2(1)

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[22] *R. v. Trabulsey* (1995), 22 O.R. (3d) 314 at paras. 39, 48 (C.A.), IBOA, **Tab 46**.
[23] *Gentles v. Intelligarde International Incorporated*, 2010 ONCA 797 at para. 51, IBOA, **Tab 15**.
[24] *R.W.D.S.U. v. T. Eaton Co.* (1987), 62 O.R. (2d) 337 at para. 57 (C.A.), IBOA, **Tab 50.**
[25] *Cadillac Fairview Corp. v. R.W.D.S.U.* (1989), 71 O.R. (2d) 206 at paras. 2, 38 (C.A.) [*Cadillac Fairview*], IBOA, **Tab 5**.
[26] *Cadillac Fairview* at paras. 35, 33, IBOA, **Tab 5**.
[27] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 245 [emphasis added], IBOA, **Tab 8**; see also *Bracken* at para. 71, IBOA, **Tab 2**.

of the *TPA*.[28] The CCLA submits that this Court should follow this interpretation of section 2(1) as necessarily protective of the *Charter's* fundamental guarantees.

ii. This Court should place limits on sections 2 and 9 of the TPA to protect Charter rights

29. In order to interpret section 9(1) of the *TPA* as not allowing *Charter* rights to be infringed, the phrase "a right or authority conferred by law" in section 2(1) of the *TPA* must be interpreted as including a right or freedom conferred by the *Charter*. A statement from the Court to this effect would properly limit the breadth of police powers under section 9(1), so that simply exercising one's *Charter* rights, such as by attending a peaceful protest at a public park, could not give rise to reasonable and probable grounds to believe that the offence of trespass is being committed, unless the *Charter* right being exercised is properly subject to a "reasonable limit" under the *Charter*.

30. Peaceful protest, even if heated and angry, is a form of expression protected by section 2(b) of the *Charter*.[29] Expression in a public place falls outside the protection of section 2(b) only if "the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression."[30] A public park is not like "the airport, utility poles, and streets … whose primary function is not expression."[31] Rather, a public park is like – and often is – the town square, as in *Bracken*: "a place where free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society," and "paradigmatically the place for expression of

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[28] *R. v. Semple*, 2004 ONCJ 55 at paras. 17, 60, IBOA, **Tab 41**; *R. v. Layton* (1986), 38 C.C.C. (3d) 550 at para. 25 (Ont. Prov. Ct.), IBOA, **Tab 31**; *R. v. J. S.*, 1993 CarswellOnt 5453 at para. 6 (Ont. Prov. Ct.), IBOA, **Tab 30**. See also *R. v. Behrens*, 2001 CarswellOnt 5785 at paras. 2-3, 103-104 (Ont. C.J.), IBOA, **Tab 21**. *R v. Semple* has been followed in *Gammie v. South Bruce Peninsula (Town)*, 2014 ONSC 6209 at para. 104, IBOA, **Tab 14**, and *Bracken v. Regional Municipality of Niagara Corporation*, 2015 ONSC 6934 at para. 66, IBOA, **Tab 3**.

[29] *Bracken* at paras. 51, 58-59, IBOA, **Tab 2**.

[30] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para. 42 [*Greater Vancouver Transportation Authority*], IBOA, **Tab 16**.

[31] *Greater Vancouver Transportation Authority* at para. 41, IBOA, **Tab 16**.

public dissent."[32] As then Chief Justice Lamer stated in *Committee for the Commonwealth of Canada*, "[o]ne thinks immediately of parks" as places "which, by their very nature, are suitable locations for a person wishing to communicate an idea."[33]

31. While individuals do not have the unfettered right to use public parks as they see fit, the state does not have the unfettered right to restrict entry into public parks in a manner that violates individuals' *Charter* rights and freedoms.[34] Limits must be placed on the *TPA* so that it does not unwittingly authorize unconstitutional police powers.[35]

The police had no lawful authority to demand searches as a condition of entry

i. There is no express or implied statutory authority for demanding searches

32. The *TPA* does not provide a lawful authority for a demand to search demonstrators entering a public park. As outlined above, section 9 of the *TPA* gives police a power to arrest "trespassers" as defined in the *TPA*. The *TPA* does not grant any powers to detain or search a person. Nor are city by-laws of any assistance. Chapter 608 of the Toronto Municipal Code regulates the use of city parks, but, as with the *TPA*, searches, search demands, and detentions are nowhere to be found.

33. This Court should not create a general power to search or demand search by implication. The case law on whether search powers can be implied into a statutory scheme is sparse. In *R. v. Cole*, a school principal's statutory duty to maintain a safe school environment implied an

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[32] *Bracken* at paras. 33, 54, IBOA, **Tab 2**; *Greater Vancouver Transportation Authority* at para. 41, IBOA, **Tab 16**.
[33] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 153, IBOA, **Tab 8**. This view was echoed by all members of the Court: see La Forest J. at 166 ("I have no doubt that [the freedom of expression] does include the right to use for that purpose streets and parks which are dedicated to the use of the public…"), L'Heureux-Dubé J. at 205 ("[Parks] are 'contemporary crossroads' or 'modern thoroughfares', and thus should be accessible to those seeking to communicate with the passing crowds"), McLachlin J. at 230 ("The right of free speech has traditionally been associated with streets and by-ways and parks—all government property"), Gonthier J. at 226 (concurring with the reasons of McLachlin J.), and Cory J. at 226 (concurring with Lamer C.J. on the use of government property for expressive purposes).
[34] *Cf. Cadillac Fairview* at para. 35, IBOA, **Tab 5** (shopping mall owners do not have "the unfettered right to control the use of their premises without regard to the provisions of the *Labour Relations Act*").
[35] *Sharpe* at para. 33, IBOA, **Tab 42**; *Slaight Communications* at 1078 (Lamer J., dissenting in part), IBOA, **Tab 51**.

authority to search a teacher's computer for child pornography.[36] On the other hand, in *R. v. Spencer*, the Court refused to imply a search power into s. 7(3)(c.1)(ii) of the *Personal Information Protection and Electronic Documents Act*, which allowed service providers to disclose private information to a government institution under "lawful authority."[37]

34. Any statutory duties at play in the present case are not analogous to those in *Cole*. The *TPA* itself imposes no duties on occupiers. An owner may wish to point to the duties on occupiers created by the *Occupiers' Liability Act*.[38] The duty to take reasonable care to ensure the reasonable safety of persons on premises imposed by the *OLA* is a far cry from the duty imposed on teachers in *Cole.* In the latter case, the school principal was required by s. 265 of the *Education Act* "to give assiduous attention to the health and comfort of the pupils."[39] In any event, relying on the *OLA* means asking this Court to use one statute, the *OLA*, to imply a search power into another, the *TPA*. Cross-statute implication was never contemplated by *Cole*.

ii. A common law police power should not be recognized

35. In addition to powers conferred by statutes such as the *TPA* or *Police Services Act*, police have powers at common law. These are often referred to as "ancillary powers" because they are ancillary to the legal duties of police. They exist to help police fulfill their duties.

36. The test for establishing an ancillary or common law police power is the *Waterfield* test.[40] A court may recognize an ancillary power if it answers "yes" to both of the following questions:

(a) Does the police conduct in question fall within the general scope of any duty imposed on the officer by statute or common law?

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[36] *R. v. Cole*, 2012 SCC 53 at para. 62, IBOA, **Tab 24**.
[37] *R. v. Spencer*, 2014 SCC 43 at para. 71, IBOA, **Tab 44**; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 7(3)(c.1).
[38] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, s. 3(1) [*OLA*].
[39] *Education Act*, R.S.O. 1990, c. E.2, s. 265 [emphasis added].
[40] *Dedman v. The Queen*, [1985] 2 S.C.R. 2 at 32-33 [*Dedman*], IBOA, **Tab 9**.

(b) If so, in the circumstances of this case, did the execution of the police conduct in question involve a justifiable use of the powers associated with the engaged statutory or common law duty?[41]

37. The first step of the test is routinely met because of the broad definition of police duties at common law. The common law duties of police include "the preservation of peace, the prevention of crime and the protection of life and property."[42]

38. The breadth of police duties does not imply an equally broad slate of police powers.[43] Police powers that restrict individual liberty must always be justified as reasonably necessary to the fulfillment of police duties having regard to all the circumstances. It will be more difficult to justify preventive policing as opposed to powers to investigate on-going or past crimes.[44]

39. At the second stage of the *Waterfield* analysis, the Court must start by defining the police power and the individual liberty interests at issue.

40. In this case, the police power would be to require that persons submit to a search if they wish to enter a public park. This power would be exercised where no crime is being investigated or believed to be in progress, but solely for the purpose of preventing crime. On its face, the police power would not be limited to situations where officers have particularized reasonable grounds or even reasonable suspicion of the individual being subject to a search. Instead, the power would be triggered any time there are general concerns for public safety.

41. No such power has been recognized thus far and it should not be created by this Court. In *Figueiras v. Toronto Police Services Board*, Rouleau J.A., writing for the Ontario Court of Appeal, extensively reviewed cases that have recognized a common law police power to restrict access to public areas. He concluded that, where the power is not statutory in nature, it "is

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[41] *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208 at para. 28 [*Figueiras*], IBOA, **Tab 13**. See also *R. v. Peterkin*, 2015 ONCA 8 at para. 38, IBOA, **Tab 38**, and *R. v. MacDonald*, 2014 SCC 37 at paras. 35-36, IBOA, **Tab 34**.
[42] *Dedman* at 32, IBOA, **Tab 9**.
[43] *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 at para. 78 (C.A.) [*Brown*], IBOA, **Tab 4**.
[44] *Brown* at paras. 78-79, IBOA, **Tab 4**.

confined to proper circumstances, such as fires, floods, car crash sites, crime scenes and the like."[45]

42. *Figueiras* also involved a police demand for a search during the G20. There, police stopped the plaintiff and demanded a search of his bag as a condition of allowing him to continue walking south on University Avenue in Toronto. Rouleau J.A. found that this amounted to a power to demand search as a condition of access and to exclude access to those who refuse. In addition, the police were acting selectively, demanding to search only those people they thought were demonstrators. Accordingly, the police power (which was found not to have met the *Waterfield* test[46]) was framed in the following way:

> The power of individual police officers to target demonstrators and, where no crime is being investigated or believed to be in progress, but with the intention of preventing crime, to require that they submit to a search if they wish to proceed on foot down a public street.[47]

43. A requirement that persons submit to a search if they wish to enter a public park potentially infringes an individual's section 2(b), 8, and 9 *Charter* rights along with their common law liberty to move about the community. The liberty interests considered in the second stage of the *Waterfield* test include both *Charter* and common law rights.[48] An individual's section 2(b) rights are engaged when the police make the exercise of the right to protest and express oneself in a traditional public forum conditional on submitting to a search. Any search and seizure, along with any detention that took place to facilitate a search, engage an individuals' section 8 and 9 *Charter* rights. Further, as recognized in *Figueiras*, individuals have a common law right to move about the community. Placing conditions on access to a public park clearly restricts this right to free movement.

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[45] *Figueiras* at paras. 59-60, IBOA, **Tab 13**.
[46] *Figueiras* at para. 138, IBOA, **Tab 13**.
[47] *Figueiras* at para. 62, IBOA, **Tab 13**.
[48] *Figueiras* at para. 49, IBOA, **Tab 13**.

44. The guiding question in the balancing exercise at the heart of the *Waterfield* test is whether the police power was a justifiable or reasonably necessary way to fulfill the duty. The factors to be considered include:[49]

(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.

45. Keeping the peace and preventing damage to property or persons are important objectives. A demonstration which turns violent can lead to property destruction and risk to personal safety. The importance of the performance of the duty depends on the degree of risk to the public good.

46. The interference with individual liberty must be necessary to fulfill the police duty. Necessity breaks down into two, inter-related concepts: rational connection and effectiveness.[50] If either is lacking then individual liberty will have been curtailed without advancing the police duty that purported to justify the restriction.

47. Demanding searches and seizures as a condition of entry does nothing to stop individuals from improvising weapons from objects available in a park such as tree branches, loose bricks, or rocks. It is not rationally connected to a risk of breaches of the peace or harm to persons or property, nor is it an effective means of reducing those risks.[51]

48. The extent of the interference with individual liberty is assessed globally. "The court must not carry out a separate *Waterfield* analysis for each of the liberties or *Charter* interests that is affected."[52] It is the "cumulative impact" on the liberty interests that matters. In this respect,

[49] *R. v. MacDonald*, 2014 SCC 37 at para. 37 (citations omitted), IBOA, **Tab 34**.
[50] *Figueiras* at para. 100, IBOA, **Tab 13**.
[51] *Figueiras* at para. 106, IBOA, **Tab 13**.
[52] *Figueiras* at para. 119, IBOA, **Tab 13**.

both the number of people affected and the severity of the intrusion on each person are relevant.[53]

49. Extent also refers to the nature of the interference, meaning that minimal impairment is a crucial factor. A police power is not necessary for the performance of a policy duty where a less infringing option could achieve the same result. It is helpful to consider the constituent elements of the exercise of police power separately. For example, in *Clayton* the police set up a checkpoint at the exits of a strip club parking lot in response to a 911 call about a number of men with illegal guns. The checkpoints were set up within five minutes of the 911 call and only captured the vehicles present in the parking lot at the time. On these grounds, the court concluded that the checkpoints were minimally impairing because they were "temporally, geographically and logistically responsive to the circumstances known to police."[54] Likewise, *Figueiras* distinguished between police stopping individuals to question them and demanding a search of their backpacks.[55]

50. The burden of justifying a police power is especially high in cases of preventive policing. As noted in *Brown*, the police have no common law power to detain a person to prevent a breach of the peace unless there is a "real risk of imminent harm."[56] Short of an imminent and real risk, "proactive policing must be limited to steps which do not interfere with individual freedoms."[57]

51. There are sound policy reasons for the restriction on preventive policing. First, the uncertainty involved in preventive policing gives police greater scope to abuse their powers. Where the police are investigating a past crime, restrictions on individual liberty are justified if the police can show a sufficiently strong connection between the crime and the individual. The

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[53] *Figueiras* at para. 124, IBOA, **Tab 13**.
[54] *R. v. Clayton*, 2007 SCC 32 at paras. 39-41, IBOA, **Tab 23**.
[55] *Figueiras* at para. 113, IBOA, **Tab 13**.
[56] *Brown* at para 78, IBOA, **Tab 4**.
[57] *Brown* at para. 78, IBOA, **Tab 4**.

retrospective application of investigative police powers protects against abuse because "assessments of what has happened and an individual's involvement in those past events are much more likely to be reliable than are assessments of what may happen in the future."[58] Second, preventive police action is more likely to escape judicial regulation or sanction. Detentions or searches where there are no reasonable grounds to believe (or even suspect) that a crime has been committed are less likely to result in arrests and charges and therefore less likely to be reviewed by courts. The potential for abuse and erosion of *Charter* rights is inherent in such "low-visibility" state conduct.[59]

52. In considering the overall balancing of the factors in *Brown* – a case in which preventive policing was found to be insufficiently attentive to the importance of individual liberties – the following are useful guideposts:

- Any apprehended harm was not imminent;
- There was no specific identifiable harm which the detentions sought to prevent. The police had a general concern that the situation could get out of hand unless it was made clear to the appellants, their friends, and associates that the police were in control;
- The police concern that some harm could occur rested not on what those detained had done, but rather on what others who shared a similar lifestyle with those who were detained had done at other places and at other times;
- The liberty interfered with was not a qualified liberty like the right to drive, but rather the fundamental right to move about in the community;
- The interference with individual liberty resulting from the police conduct was substantial in terms of the number of persons detained, the number of times individuals were detained, and the length of the detentions; and
- The detentions could not be said to be necessary to the maintenance of the public peace. A large police presence without detention would have served that purpose. In fact, it is arguable that the confrontational nature of the detentions served to put the public peace at risk. [60]

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[58] *Brown* at para. 65, IBOA, **Tab 4**.
[59] *R. v. Mann*, 2004 SCC 52 at para. 18, IBOA, **Tab 35**.
[60] *Brown* at para. 77, IBOA, **Tab 4**.

Charter damages would be an appropriate remedy

53. In the leading case of *Vancouver (City) v. Ward,* the Supreme Court broke down the *Charter* damages analysis under s. 24(1) of the *Charter* into a four-step process:[61]

(1) Did a state actor breach the applicant's *Charter* rights?
(2) Would damages serve to compensate the applicant, vindicate the right breached or deter future state conduct?
(3) Are there any other factors which would negate the appropriateness of damages?
(4) What is the quantum?

54. The onus lies on the plaintiff to establish, first, that one or more of his *Charter* rights were violated by the state conduct and, second, that an award of damages would be functionally appropriate or would serve some "useful function or purpose."[62] *Charter* damages may be functionally appropriate if they would satisfy any one of the three purposes underlying such awards: (i) compensation for damages suffered by the claimant, (ii) vindication of the right violated, or (iii) deterrence against future breaches by the state.[63]

55. If this Court concludes that there was no statutory or common law power authorizing the state conduct, the plaintiff will have established that his *Charter* rights were infringed. If this Court finds that the police stopped the plaintiff and demanded to search his backpack before entering a public park, this alone would be enough to ground a violation of the plaintiff's section 2(b) rights. Any subsequent detention and search by police would necessarily violate sections 8 and 9 of the *Charter* if done without a valid statutory or common law power.

56. *Charter* damages could also serve the recognized purposes of such awards. *Ward* suggests that non-pecuniary and intangible damages may be more readily recovered as *Charter*

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[61] *Vancouver (City) v. Ward*, 2010 SCC 27 [*Ward*], IBOA, **Tab 52**.
[62] *Ward* at para. 24, IBOA, **Tab 52**.
[63] *Ward* at paras. 25-31, IBOA, **Tab 52**.

damages than under traditional tort law principles.[64] Vindication and deterrence look at the blameworthiness of the state conduct from the public's perspective.[65] Blameworthiness exists on a spectrum from flagrant or reckless breaches on the severe end to minor or technical breaches or cases where the police attempted compliance in an area of legal uncertainty.[66] Insofar as this Court finds that police conduct here may have affected similarly situated individuals who will never bring civil claims, the case would call out for damages to vindicate the right and to deter similar wrongdoing in the future. Any of the following findings should be considered aggravating factors in a *Charter* damages analysis: evidence indicating that the police knew or should have known that basing their legal authority in the *TPA* was tenuous; evidence showing that the police did not turn their minds to *Charter* compliance; and any officer testimony that is misleading about the purpose or reason for the search.[67]

57. If the plaintiff satisfies the first two steps, the onus then shifts to the defendant at the third step to demonstrate factors which negate the appropriateness of damages. The court in *Ward* focused on good governance concerns and the availability of alternative remedies as two possible negating factors.

58. The good governance concerns motivating the limited immunity principle in *Mackin v. New Brunswick (Minister of Finance)* [68] do not shelter police conduct in cases involving arbitrary detentions or warrantless searches.[69] The essence of these breaches is that they are necessarily outside of any validly enacted statute.

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[64] *Ward* at para. 24, IBOA, **Tab 52**.
[65] *Ward* at paras. 28-29, 52, IBOA, **Tab 52**.
[66] *R. v. Grant*, 2009 SCC 32 at paras. 72-75, IBOA, **Tab 28**.
[67] *R. v. Harrison*, 2009 SCC 34 at para. 26, IBOA, **Tab 29**.
[68] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, IBOA, **Tab 18**.
[69] *Ward* at para. 41, IBOA, **Tab 52**.

59. A plaintiff's claim for private law damages does not make *Charter* damages inappropriate. While the combined effect of tort damages and a declaration may partially address concerns for compensation and vindication, they do not preclude *Charter* damages. Compensation in tort can run parallel to compensation under *Ward* principles. For example, in *Elmardy v. TPSB*, the plaintiff was awarded *Charter* damages of $50,000 for an unlawful arrest motivated by racial profiling.[70] The Court found there was a strong need to vindicate and deter the "high-handed and oppressive" police conduct that justified an award well beyond the $5,000 the plaintiff recovered for his tort claim of battery.[71] The parallel nature of private and public law remedies is especially important where the gravamen of the offence includes state action, like an unlawful search, for which there is no direct cause of action in tort.[72] In such contexts, *Charter* damages are essential for ensuring the vindication of *Charter* rights and the deterrence of future unlawful conduct by the state.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February, 2018.

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[70] *Elmardy v. Toronto Police Services Board*, 2017 ONSC 2074 [*Elmardy*], IBOA, **Tab 12**.
[71] *Elmardy* at paras. 35-36, IBOA, **Tab 12**.
[72] *Ward* at para. 68, IBOA, **Tab 52**.

Schedule A – List of Authorities

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2. *Bracken v. Fort Erie (Town)*, 2017 ONCA 668
3. *Bracken v. Regional Municipality of Niagara Corporation*, 2015 ONSC 6934
4. *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.)
5. *Cadillac Fairview Corp. v. R.W.D.S.U.* (1989), 71 O.R. (2d) 206 (C.A.)
6. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
7. *Carr v. Ottawa Police Services Board*, 2017 ONSC 4331
8. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139
9. *Dedman v. The Queen*, [1985] 2 S.C.R. 2
10. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62
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13. *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208
14. *Gammie v. South Bruce Peninsula (Town)*, 2014 ONSC 6209
15. *Gentles v. Intelligarde International Incorporated*, 2010 ONCA 797
16. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31
17. *Henry v. British Columbia (Attorney General)*, 2015 SCC 24
18. *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13
19. *R. v. Aguirre* (2006), 45 C.R. (6th) 323 (Ont. Sup. Ct.)
20. *R. v. Asante-Mensah*, 2003 SCC 38
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28. *R. v. Grant*, 2009 SCC 32
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31. *R. v. Layton* (1986), 38 C.C.C. (3d) 550 (Ont. Prov. Ct.)
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34. *R. v. MacDonald*, 2014 SCC 37
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36. *R. v. Marlon Davidson*, 2010 ONSC 1508
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40. *R. v. Salad*, 2006 ONCJ 76
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42. *R. v. Sharpe*, 2001 SCC 2
43. *R. v. Smith*, 2008 ONCJ 492
44. *R. v. Spencer*, 2014 SCC 43
45. *R. v. Storrey*, [1990] 1 S.C.R. 241
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48. *R. v. Williams*, 2005 CarswellOnt 10477 (Ont. C.J.)

49. *R. v. Yasi* (1999), 70 C.R.R. (2d) 354 (Ont. C.J.)

50. *R.W.D.S.U. v. T. Eaton Co.* (1987), 62 O.R. (2d) 337 (C.A.)

51. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

52. *Vancouver (City) v. Ward*, 2010 SCC 27

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Schedule B – Statutes and Regulations

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

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

***Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11**

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

***Trespass to Property Act*, R.S.O. 1990, c. T.21**

Definitions

1 (1) In this Act,

"occupier" includes,

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

even if there is more than one occupier of the same premises; ("occupant")

"premises" means lands and structures, or either of them, and includes,

(a) water,

(b) ships and vessels,

(c) trailers and portable structures designed or used for residence, business or shelter,

(d) trains, railway cars, vehicles and aircraft, except while in operation. ("lieux") R.S.O. 1990, c. T.21, s. 1 (1).

School boards

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in the *Education Act*. R.S.O. 1990, c. T.21, s. 1 (2).

Trespass an offence

2 (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $2,000. R.S.O. 1990, c. T.21, s. 2 (1).

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of. R.S.O. 1990, c. T.21, s. 2 (2).

Prohibition of entry

3 (1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises. R.S.O. 1990, c. T.21, s. 3 (1).

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited. R.S.O. 1990, c. T.21, s. 3 (2).

Limited permission

4 (1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only. R.S.O. 1990, c. T.21, s. 4 (1).

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited. R.S.O. 1990, c. T.21, s. 4 (2).

Method of giving notice

5 (1) A notice under this Act may be given,

(a) orally or in writing;

(b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or

(c) by means of the marking system set out in section 7. R.S.O. 1990, c. T.21, s. 5 (1).

Substantial compliance

(2) Substantial compliance with clause (1) (b) or (c) is sufficient notice. R.S.O. 1990, c. T.21, s. 5 (2).

Form of sign

6 (1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted. R.S.O. 1990, c. T.21, s. 6 (1).

Idem

(2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited. R.S.O. 1990, c. T.21, s. 6 (2).

Red markings

7 (1) Red markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry on the premises is prohibited. R.S.O. 1990, c. T.21, s. 7 (1).

Yellow markings

(2) Yellow markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted. R.S.O. 1990, c. T.21, s. 7 (2).

Size

(3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it. R.S.O. 1990, c. T.21, s. 7 (3).

Posting

(4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies. R.S.O. 1990, c. T.21, s. 7 (4).

Notice applicable to part of premises

8 A notice or permission under this Act may be given in respect of any part of the premises of an occupier. R.S.O. 1990, c. T.21, s. 8.

Arrest without warrant on premises

9 (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2. R.S.O. 1990, c. T.21, s. 9 (1).

Delivery to police officer

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he or she shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer. R.S.O. 1990, c. T.21, s. 9 (2).

Deemed arrest

(3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the *Provincial Offences Act* applying to his or her release or continued detention and bail. R.S.O. 1990, c. T.21, s. 9 (3).

Arrest without warrant off premises

10 Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his or her name and address, or there are reasonable and probable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant. R.S.O. 1990, c. T.21, s. 10.

Motor vehicles and motorized snow vehicles

11 Where an offence under this Act is committed by means of a motor vehicle, as defined in the *Highway Traffic Act*, or by means of a motorized snow vehicle, as defined in the *Motorized Snow Vehicles Act*, the driver of the motor vehicle or motorized snow vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle or motorized snow vehicle is liable to the fine provided under this Act unless the driver is convicted of the offence or, at the time the offence was committed, the motor vehicle or motorized snow vehicle was in the possession of a person other than the owner without the owner's consent. 2000, c. 30, s. 11.

Damage award

12 (1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage. R.S.O. 1990, c. T.21, s. 12 (1); 2016, c. 8, Sched. 6, s. 2.

Costs of prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or the occupier's interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, despite section 60 of the *Provincial Offences Act*, shall order those costs to be paid by the defendant to the prosecutor. R.S.O. 1990, c. T.21, s. 12 (2).

Damages and costs in addition to fine

(3) A judgment for damages under subsection (1), or an award of costs under subsection (2), shall be in addition to any fine that is imposed under this Act. R.S.O. 1990, c. T.21, s. 12 (3).

Civil action

(4) A judgment for damages under subsection (1) extinguishes the right of the person in whose favour the judgment is made to bring a civil action for damages against the person convicted arising out of the same facts. R.S.O. 1990, c. T.21, s. 12 (4).

Idem

(5) The failure to request or refusal to grant a judgment for damages under subsection (1) does not affect a right to bring a civil action for damages arising out of the same facts. R.S.O. 1990, c. T.21, s. 12 (5).

Enforcement

(6) The judgment for damages under subsection (1), and the award for costs under subsection (2), may be filed in the Small Claims Court and shall be deemed to be a judgment or order of that court for the purposes of enforcement. R.S.O. 1990, c. T.21, s. 12 (6).

***Criminal Code*, R.S.C., 1985, c. C-46**

Arrest without warrant by peace officer

495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

***Occupiers' Liability Act,* R.S.O. 1990, c. O.2**

Occupier's duty

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

(3) The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty. R.S.O. 1990, c. O.2, s. 3.

LUKE STEWART	v.	TORONTO POLICE SERVICES BOARD	Court File No. CV-14-00503631-0000
Plaintiff		Defendant	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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