Court File No. C65779

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

LUKE STEWART

Appellant
(Plaintiff)

- and -

TORONTO POLICE SERVICES BOARD

Respondent
(Defendant)

FACTUM OF THE INTERVENOR, CANADIAN CIVIL LIBERTIES ASSOCIATION ("CCLA")

November 6, 2019

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PART I – OVERVIEW

1. This appeal concerns whether the police have the power to compel law-abiding individuals to submit to a preventative search and seizure of their personal belongings as a precondition to participating in a protest in a public park.

2. This power, if recognized, would constitute a drastic interference with one of the most fundamental rights in a free and democratic society: "the right to protest government action," which "lies at the very core of the guarantee of freedom of expression."[1] It would allow the police to (i) exclude all individuals from a protest unless and until they submit to a search and potential seizure of their personal belongings, (ii) dissuade unknown numbers of people from participating in the protest, and (iii) interfere with the personal privacy, security, and property of every person seeking to participate in the protest, regardless of whether they are suspected of any criminal wrongdoing or even of threatening to breach the peace.

3. Applying this Court's rulings in *Brown* and *Figueiras*, the Supreme Court of Canada recently affirmed that "[a]n intrusion upon liberty should be a measure of last resort, not a first option. To conclude otherwise would be generally to sanction [police] 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."[2]

4. The CCLA submits that the Trial Judge restricted the right to protest in a manner inconsistent with established jurisprudence and the *Trespass to Property Act*. The CCLA offers the following five submissions.

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[1] *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, para. 69 [*Figueiras*], CCLA's Book of Authorities ("BA") **Tab 1**.
[2] *Fleming v. Ontario*, 2019 SCC 45, para. 98 [*Fleming*], BA **Tab 2**.

5. First, the Trial Judge improperly imported s. 1 proportionality considerations into the s. 2(b) *Charter* analysis, thereby diminishing the protection of the free expression guarantee.

6. Second, the Trial Judge's interpretation of the *TPA* was overbroad. She erred in concluding that the *TPA* authorized the police to impose "conditions of entry." Nothing in the *TPA* provides for this authority. The Trial Judge also failed to consider that the state's property rights, including the offence of trespass in s. 2(1) of the *TPA*, are circumscribed by *Charter* rights. This includes the s. 2(b) *Charter* right to protest on public property where the method or location of the protest does not conflict with the purposes of s. 2(b).

7. Third, this Court should affirm its ruling in *Figueiras*—which concerned G20 protests on the same weekend as in this case, but in circumstances where acts of looting and vandalism had already taken place—that common law police powers do not include a power to compel those entering an area to submit to a search, and to exclude those who refuse. This ruling is even more applicable when a seizure of private property is involved.

8. Fourth, the ancillary powers doctrine places "especially stringent" and "exacting" limits on preventative police powers that interfere with the liberty of law-abiding people. If the power to search and seize the property of law-abiding protestors can ever be justified, it is only "in truly extreme and exceptional circumstances."[3]

9. Finally, establishing a search-and-seizure perimeter around a protest is, by its very nature, an overbroad and substantial interference with fundamental freedoms. As such, it cannot be justified under either the ancillary powers doctrine or s. 1 of the *Charter*.

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[3] *Fleming*, *supra* note 2, paras. 76, 80, 90, 107, BA **Tab 2**.

PART II – FACTS

10. The CCLA accepts the facts as found by the Trial Judge. However, the issues raised by this appeal require a proper characterization of the police power being asserted, which in turn requires a proper characterization of the facts found by the Trial Judge.

11. What the Trial Judge described as a "condition of entry" is more concretely described as a "search-and-seizure perimeter." To prevent potential violence, the police formed a "perimeter line" at the edge of Allan Gardens and imposed, as a condition of entry on all protestors, a search of "backpacks, bags, and belongings," including "knapsacks, purses, strollers, and wheelchairs."[4] The police "were instructed to look for weapons, things that could be used as weapons at a protest (e.g., flagpoles, sticks) and items that could be used to defeat police tactics such as goggles, bandanas and vinegar."[5] The police then "seized" such items, including Mr. Stewart's swimming goggles.[6]

12. There were more than 1,000 potential protesters seeking to exercise their ss. 2(b) and 2(c) *Charter* rights in Allan Gardens that day.[7] This is significant: it represents the number of people affected or potentially affected by the search-and-seizure perimeter.

13. The search-and-seizure perimeter excluded all individuals from the protest unless and until they complied with the state's demands. The Trial Judge found that Mr. Stewart "was being denied further entry into Allan Gardens until the condition of entry was enforced."[8] When Mr.

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[4] *Stewart v. The Toronto Police Services Board*, 2018 ONSC 2785, paras. 4, 17, 26, 85 [Judgment], BA **Tab 3**.
[5] *Ibid.*, para. 17, BA **Tab 3**.
[6] *Ibid.*, paras. 22, 43, 87, BA **Tab 3**.
[7] *Ibid.*, paras. 39, 43, BA **Tab 3**.
[8] *Ibid.*, para. 21, BA **Tab 3**.

Stewart refused to comply with the condition, he was forcibly detained, and his belongings were searched without his consent.[9] The search-and-seizure perimeter was indiscriminate: it affected "all" entrants to the protest, regardless of whether they "matched a certain profile or met a certain description."[10]

PART III – ISSUES AND ARGUMENT

A. Analytical distinction between s. 2(b) and s. 1 must be maintained

14. It is "inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in *Irwin Toy* indicates that the preferable course is to weigh the various contextual values and factors in s. 1."[11] Yet the Trial Judge committed precisely this error. She held that the police's "chosen process against the background of the G20 did not result in a breach of Mr. Stewart's freedom of expression or peaceful assembly." She reasoned that the police had "compelling intelligence" that violence could occur and used a "minimally intrusive" means of controlling entry into the park.[12] This is a direct importation of s. 1 proportionality considerations into the s. 2(b) analysis.

15. The Trial Judge also reasoned that the "condition of entry … was aimed at promoting the very civic right of the public to peaceful assembly for all users of the park that day, including Mr. Stewart."[13] As this Court recently affirmed, the purpose of state conduct does not diminish a

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[9] Judgment, *supra* note 4, paras. 19-20, 41-42, BA **Tab 3**.
[10] *Ibid.*, paras. 4, 18, 24, 31, 51, 82, 88, BA **Tab 3**.
[11] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, para. 34 [emphasis in original], BA **Tab 4**. See also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 765-766, BA **Tab 5**.
[12] Judgment, *supra* note 4, paras. 60-61, BA **Tab 3**.
[13] *Ibid.*, para. 61, BA **Tab 3**.

finding that its effect is to limit freedom of expression.[14] Further, where the state limits s. 2(b) rights by requiring individuals to submit to a search as a precondition to expression, "that limitation is not erased by a determination that, from a collective point of view, the right to freedom of expression is encouraged. Those kinds of calculations must be made in the context of a s. 1 analysis."[15]

16. It is important to maintain this analytical distinction between s. 2(b) and s. 1 for three reasons, which together ensure robust protection of the s. 2(b) guarantee. First, the s. 1 analysis is better suited to the task of balancing competing societal interests and values. It requires a court to expressly "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good,"[16] taking "full account of the 'severity of the deleterious effects of a measure on individuals or groups.'"[17] This ensures that "the circumstances surrounding both the use of the freedom and the legislative limit [are] carefully considered."[18]

17. Second, s. 1 shifts the onus to the state to prove that that a limit on *Charter* rights is reasonable and demonstrably justified.[19] This onus-shifting is important. It is an affirmation by the courts that "limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited."[20]

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[14] *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, para. 27 [*Langenfeld*], BA **Tab 6**. See also *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, paras. 83-84 [*Montréal (City)*], BA **Tab 7**.
[15] *Langenfeld*, *supra* note 14, para 27, BA **Tab 6**. See also paras. 28, 32, 43, 47.
[16] *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 122, BA **Tab 8**.
[17] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 76, BA **Tab 9**.
[18] *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 734, BA **Tab 10**.
[19] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-137 [*Oakes*], BA **Tab 11**.
[20] *Ibid.* at 137 [emphasis added], BA **Tab 11**.

18. Third, "[t]hese criteria impose a stringent standard of justification."[21] The state must prove, to "a very high degree of probability," that a limit on constitutional rights is "demonstrably" justified.[22] To satisfy this burden, the state will generally have to adduce "cogent and persuasive" evidence that "make[s] clear to the court the consequences of imposing or not imposing the limit. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions."[23] Limits on political expression will be especially difficult to justify, as the high value of this type of expression means it will not be easily outweighed by the state's objective.[24]

19. By performing the s. 2(b) *Charter* analysis "against the background of the G20" and in light of whether the police conduct was "minimally intrusive" and motivated by "compelling" reasons,[25] the Trial Judge attenuated the broad scope of the s. 2(b) guarantee in a way that ought only be done through the rigours of a s. 1 analysis.

B. Trial Judge's interpretation of the *TPA* was overbroad

(i) TPA *does not authorize "conditions of entry"*

20. The Trial Judge found that the police relied on the *Trespass to Property Act* (the "*TPA*") as their authority for establishing the search-and-seizure perimeter around Allan Gardens.[26] She

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[21] *Oakes*, *supra* note 19, 136, BA **Tab 11**.
[22] *Ibid.* at 137, BA **Tab 11**.
[23] *Ibid.* at 138 [citations omitted], BA **Tab 11**.
[24] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, paras. 91-92 [*Thomson Newspapers*], BA **Tab 12**; *Harper v. Canada (Attorney General)*, 2004 SCC 33, para. 1, McLachlin C.J. and Major J., dissenting in part [*Harper*], BA **Tab 13**. See also *R. v. Sharpe*, 2001 SCC 2, paras. 21-22: "Because of the importance of the guarantee of free expression … any attempt to restrict the right must be subjected to the most careful scrutiny" (para. 22), BA **Tab 14**.
[25] Judgment, *supra* note 4, paras. 60-61, BA **Tab 3**.
[26] *Trespass to Property Act*, R.S.O. 1990, c. T.21 [*TPA*]; Judgment, *supra* note 4, paras. 20, 27, BA **Tab 3**.

held that the perimeter was authorized by ss. 3(1) and 5(1)(a) of the *TPA* and therefore "prescribed by law" within the meaning of s. 1 of the *Charter*.[27]

21. Subsection 3(1) of the *TPA* allows an occupier to prohibit entry on premises "by notice to that effect." Subsection 5(1)(a) provides that this notice may be given orally. The Trial Judge held that "the police exercised this authority by asking all persons entering the park on that day to allow the police to inspect their bags and belongings."[28]

22. This is an overbroad interpretation of the *TPA*. It does not authorize "conditions of entry," let alone search-and-seizure perimeters. It therefore cannot be the law that prescribes the police's conduct for the purpose of the s. 1 *Charter* analysis.

23. The *TPA* does not create any substantive rights. To the extent that the *TPA* "gives the occupiers of premises certain additional rights to those enjoyed at common law," these rights are remedial only—*i.e.*, rights to access the statutory remedies supplied by the *TPA*.[29] None of these remedies purport to give occupiers the power to impose "conditions of entry." Neither this term nor the practice it signifies is found in the *TPA*. There is no judicial precedent for reading it in.

24. Subsection 3(1) of the *TPA* merely sets out the ways in which "entry on premises may be prohibited." It contemplates only an outright prohibition on entry. Specifically, s. 3(1) provides that "[e]ntry on premises may be prohibited by notice to that effect." This means that a sign, for example, must "explicitly forbid entry" to be "effective to bar entry" under the *TPA*.[30] This strict notice requirement reflects "the importance of clarity and certainty when freedom is at stake," as

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[27] Judgment, *supra* note 4, paras. 31, 65, BA **Tab 3**.
[28] *Ibid.*, para. 31, BA **Tab 3**.
[29] *R. v. Asante-Mensah*, 2003 SCC 38, para. 30 [*Asante-Mensah*], BA **Tab 15**; *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, paras. 70-71 [*Bracken*], BA **Tab 16**.
[30] *Revoy v. Beaux Properties*, 2012 ONSC 6963, paras. 10-11, BA **Tab 17**.

it is under the *TPA*.[31] A "condition of entry" does not communicate to the public that entry is forbidden. Indeed, the Trial Judge found just the opposite: "Provided that Mr. Stewart complied with the condition of entry, he was free to enter Allan Gardens…."[32]

25. Where the *TPA* contemplates something other than an outright prohibition on entry, it says so. Subsection 4(2) allows an occupier to impose a "limited prohibition," which prohibits only a "particular activity" and "entry for the purpose." However, this remedy requires the occupier to give "notice … that a particular activity is prohibited." Demanding that individuals perform some act as a condition of entry does not communicate that a "particular activity" is "prohibited."

26. That the *TPA* does not authorize search-and-seizure perimeters is borne out by its purpose. The *TPA* was enacted for a very limited purpose: to help private landowners enforce their property rights by providing a "relatively quick, cheap and intelligible remedy for trespass."[33] It was not intended to become a tool for the state to carry out preventative searches, detentions, and seizures. Nor was it intended to empower the state to interfere with fundamental *Charter* and common law freedoms.

(ii) *State's property rights are circumscribed by the* Charter

27. The Trial Judge held that the when Mr. Stewart breached the search-and-seizure perimeter, the police had reasonable and probable grounds to believe that he had "committed a trespass" contrary to s. 2(1) of the *TPA*.[34] In so holding, the Trial Judge failed to appreciate that

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[31] *R. v. D.L.W.*, 2016 SCC 22, para. 55, BA **Tab 17**; *Asante-Mensah*, *supra* note 29, paras. 26, 35, BA **Tab 15**.
[32] Judgment, *supra* note 4, para. 61 [emphasis added], BA **Tab 3**.
[33] *Asante-Mensah*, *supra* note 29, paras. 25, 30-31, BA **Tab 15**.
[34] Judgment, *supra* note 4, paras. 37, 84, BA **Tab 3**.

the offence of trespass is "a highly specific and limited offence."[35] Only a person "who is not acting under a right or authority conferred by law" may commit the offence.[36] This means that in order to have reasonable and probable grounds to believe that an individual has committed trespass, an occupier must first have an "objectively reasonable" belief that the individual is not acting under a right or authority conferred by law.[37]

28. In the CCLA's submission, "a right or authority conferred by law" necessarily includes a right conferred by Canada's "supreme law."[38] This reflects both the unambiguous meaning of the term "law" and the "general proposition [that] the Crown's proprietary rights are the same as those of a private owner, but in exercising them the Crown is subject to the overriding requirements of the *Canadian Charter of Rights and Freedoms*, including, of course, those flowing from the freedom of expression."[39]

29. Subsection 2(b) of the *Charter* confers the right to (i) perform an activity on public property to convey meaning where (ii) the method or location of the activity does not conflict with the values of self-fulfilment, democratic discourse, and truth-finding.[40] This includes the right to protest peacefully in a public space "traditionally used to express public dissent,"[41] such

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[35] *Asante-Mensah*, *supra* note 29, para. 69, BA **Tab 15**.
[36] *R. v. Trabulsey* (1995), 22 O.R. (3d) 314, para. 38 (C.A.), BA **Tab 19**; *TPA*, s. 2(1).
[37] *Gentles v. Intelligarde International Incorporated*, 2010 ONCA 797, paras. 50-51, BA **Tab 20**.
[38] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 52(1).
[39] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 165, La Forest J. [emphasis added] [*Committee*], BA **Tab 21**.
[40] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, paras. 34, 37, BA **Tab 22**; *Montréal (City), supra* note 14, paras. 62, 74, BA **Tab 7**.
[41] *Bracken*, *supra* note 29, paras. 33, 51-54, BA **Tab 16**; *Montréal (City), supra* note 14, para. 61, BA **Tab 7**.

as a park.[42] Thus, if an individual is attempting to protest in this manner and place, they are acting under a "right or authority conferred by law" that circumscribes the state's property rights.

30. If the Court concludes that this phrase is ambiguous, any ambiguity must be resolved in favour of an interpretation that upholds liberty of the subject and promotes *Charter* principles and values.[43] These include the *Charter* value of free expression and debate—the "very life blood of our freedom and free institutions."[44]

31. Interpreting the term "law" in s. 2(1) of the *TPA* as including the Constitution would avoid *Charter* violations like that in *Bracken*, where municipalities and police forces either intentionally or effectively use the *TPA* to silence protestors on public property.[45] It would provide clear guidance to these organizations that when individuals are peacefully protesting in places traditionally used to express public dissent, they have a constitutional right to be there that circumscribes the state's property rights. Such guidance would help realize the *Charter* value of free expression and debate in public places like parks and town squares, "where one would expect constitutional protection for free expression."[46]

32. This Court has confirmed that property rights must sometimes yield to freedoms contained in ordinary statutes, let alone the Constitution. In *Cadillac Fairview*, this Court held that a shopping mall owner's "property rights were required to yield, at least to the limited extent

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[42] *Committee*, *supra* note 39 at 153 (Lamer C.J.), 166 (La Forest J.), 204-206 (L'Heureux-Dubé J.), 230 (McLachlin J.), 226 (Gonthier and Cory JJ.), BA **Tab 21**.
[43] *Asante-Mensah*, *supra* note 29, para. 41, BA **Tab 15**; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 62, BA **Tab 23**.
[44] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, para. 1, Binnie J, BA **Tab 24**. See also para. 79, Lebel J., partially concurring.
[45] *Bracken*, *supra* note 29, paras. 56, 59, 85, BA **Tab 16**.
[46] *Montréal (City)*, *supra* note 14, para. 74, BA **Tab 7**. See also *Committee*, *supra* note 39 at 153, Lamer C.J, BA **Tab 21**.

ordered by the Board," to "the freedom accorded employees by s. 3 [now s. 5] of the [*Labour Relations Act*] to join a trade union of their choice and to participate in its lawful activities."[47] This was so "notwithstanding that in the result Cadillac Fairview's property rights were infringed."[48] If the property rights of a private person may be required to yield to this statutory freedom, so too may the property rights of the state be required to yield to the "overriding requirements" of the *Charter*,[49] and particularly the "fundamental freedoms" enshrined in s. 2.[50]

C. Ancillary powers doctrine does not authorize search-and-seizure perimeters

33. The Trial Judge appeared to use the common law ancillary police powers doctrine as an additional or alternative basis on which to find that the police conduct was "prescribed by law" and therefore capable of being justified under s. 1 of the *Charter*.[51] In doing so, however, she failed to apply the correct analytical framework.

34. First, "[a]t 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."[52] Next, the court must determine whether the asserted police power is "covered by precedent"—*i.e.*, whether the

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[47] *Cadillac Fairview Corp. v. R.W.D.S.U.* (1989), 71 O.R. (2d) 206, paras. 2, 33 (C.A.) [*Cadillac Fairview*], BA **Tab 25**; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 5. See also *Ontario Harness Horse Assn. v. Ontario (Racing Commission)* (2002), 62 O.R. (3d) 44, paras. 51-55 (C.A.), BA **Tab 26**, where this Court affirmed and applied the principle "that a legislature might intend to limit the free and full enjoyment of individual property rights for the purpose of securing a public benefit or promoting the interests of a larger community…. The focus is on striking an appropriate balance between individual property rights, which remain important, and legislative goals" (para. 54).

[48] *Cadillac Fairview*, *supra* note 47, para. 38, BA **Tab 25**.

[49] *Committee*, *supra* note 39 at 165, La Forest J, BA **Tab 21**.

[50] See, *e.g.*, *R. v. Behrens*, [2001] O.J. No. 245, paras. 69, 86, 93, 98, 103-104 (Ont. Ct. J.), BA **Tab 27**.

[51] Judgment, *supra* note 4, paras. 26, 46, 66, BA **Tab 3**.

[52] *Fleming*, *supra* note 2, para. 46, BA **Tab 2**.

jurisprudence already confirms the existence, or not, of the asserted police power.[53] Only then should the court perform the ancillary powers doctrine analysis. The Trial Judge failed to properly perform each of these preliminary steps. As a result, she recognized a police power more expansive than the one rejected by this Court in *Figueiras*, notwithstanding that *Figueiras* involved circumstances where looting and vandalism had already occurred.

(i) ***Asserted police power represents substantial interference with liberty***

35. The Supreme Court defined the asserted police power in *Fleming* as the 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." The Court summarized this as "the power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace." [54]

36. Although the Trial Judge held that Mr. Stewart was not arrested,[55] the asserted police power in this case is similar to, yet even more expansive than, the one at issue in *Fleming*. The Trial Judge recognized a power to:

(a) establish a search-and-seizure perimeter around a political protest to prevent a "potential" breach of the peace;[56]

(b) require "all" individuals seeking to enter and participate in the protest—potentially more than 1,000 people, including law-abiding individuals who are not about to commit any offence, who have not already breached the peace, and who

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[53] *R. v. Clayton*, 2007 SCC 32, para. 80, Binnie J., concurring [*Clayton*], BA **Tab 28**; *R. v. Comeau*, 2018 SCC 15, para. 26 [*Comeau*], BA **Tab 29**. See also *Fleming*, *supra* note 2, paras. 49-52, BA **Tab 2**.
[54] *Fleming*, *supra* note 2, para. 7, BA **Tab 2**.
[55] Judgment, *supra* note 4, para. 38, BA **Tab 3**.
[56] *Ibid.*, paras. 4, 17, 26, 43, 50, 85, 87, BA **Tab 3**.

are not about to breach the peace themselves—to submit to a search and potential seizure of their personal belongings;[57]

(c) exclude from the protest all those who refuse to submit to the search and seizure;[58] and

(d) forcibly detain any person who attempts to participate in the protest without submitting to the search and seizure, and then conduct the search and seizure without their consent.[59]

37. The liberty interests at stake in this case include:

(a) The right to protest government action free from state coercion and constraint.[60] This right is protected by ss. 2(b) and 2(c) of the *Charter*[61] and "lies at the very core of the guarantee of freedom of expression."[62]

(b) The "fundamental common law liberty" of individuals to circulate freely in the community, particularly on foot.[63]

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[57] Judgment, *supra* note 4, paras. 4, 18, 24, 31, 39, 88, BA **Tab 3**.
[58] *Ibid.*, paras. 19, 21, 61, BA **Tab 3**.
[59] *Ibid.*, paras. 21-22, 41-42, BA **Tab 3**.
[60] *Figueiras*, *supra* note 1, para. 69, BA **Tab 1**; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336, BA **Tab 30**.
[61] *Figueiras*, *supra* note 1, paras. 37, 78, BA **Tab 1**.
[62] *Ibid.*, para. 69, BA **Tab 1**. See also *Thomson Newspapers*, *supra* note 24, para. 92, BA **Tab 12**; *Harper*, *supra* note 24, para. 1, McLachlin C.J. and Major J., dissenting in part, BA **Tab 13**.
[63] *Figueiras*, *supra* note 1, paras. 79, 133, BA **Tab 1**; *Fleming*, *supra* note 2, para. 46, BA **Tab 2**.

(c) The s. 8 *Charter* right to be secure against unreasonable search or seizure, which was engaged the moment the search was carried out.[64] Security searches are "a very real interference with personal privacy and personal security."[65]

(d) The s. 9 *Charter* right to not to be arbitrarily detained or imprisoned, which was engaged when the police placed Mr. Stewart under detention.[66]

38. Thus, as in *Fleming*, 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." It therefore represents a "substantial *prima facie* interference with liberty,"[67] placing a heavy burden on the police to demonstrate "how so drastic a power … can be reasonably necessary."[68]

39. The Trial Judge failed to apply this burden, flowing from her failure to recognize the "extraordinary nature" of a power that would enable the police to interfere with the fundamental freedoms of large numbers of protestors who under are no suspicion of unlawful conduct.[69] Instead, the Trial Judge began by emphasizing the circumstances of the G20.[70] She then framed the issue as whether the police conduct "involved an unjustifiable use of powers associated with

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[64] *Figueiras*, *supra* note 1, para. 64, BA **Tab 1**.
[65] *Langenfeld*, *supra* note 14, para. 32, BA **Tab 6**.
[66] Judgment, *supra* note 4, para. 80, BA **Tab 3**; *Figueiras*, *supra* note 1, para. 65, BA **Tab 1**.
[67] *Fleming*, *supra* note 2, paras. 67-68, BA **Tab 2**.
[68] *Ibid.*, para. 92. See also paras. 48, 107, BA **Tab 2**.
[69] *Ibid.*, paras. 78, 80, BA **Tab 2**; Judgment, *supra* note 4, paras. 39, 43, BA **Tab 3**.
[70] Judgment, *supra* note 4, paras. 43-46, BA **Tab 3**.

the duty [to keep the peace]."[71] This is an error: the onus is on the state to demonstrate that the police conduct is justifiable given the degree of *prima facie* interference with liberty.[72]

(ii) Figueiras *is a controlling authority*

40. After clearly defining the police power and liberty interests at issue, the Trial Judge was required to determine, in accordance with the principle of *stare decisis*, whether there is any controlling authority that has ruled on the existence of the asserted police power.[73] This is because the ancillary powers doctrine analysis is undertaken only "[w]hen our courts are asked to recognize new common law police powers."[74] The analysis must be performed "cautiously" and "incrementally," with close adherence to precedent and a bias against recognizing a new police power.[75]

41. *Figueiras* is a controlling authority. This Court reviewed the existing jurisprudence and held that the common law powers of the police did not include "a power to compel those entering an area to submit to a search, and to exclude those who [refuse]."[76] Nor did they include "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."[77] This was in the context of G20 protests on the same weekend as in this case, but in circumstances where violence and vandalism had already occurred the previous day.[78]

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[71] Judgment, *supra* note 4, para. 46 [emphasis added], BA **Tab 3**.
[72] *Fleming*, *supra* note 2, paras. 46, 48, 68, BA **Tab 2**.
[73] *Clayton*, *supra* note 53, para. 80, Binnie J., concurring, BA **Tab 28**; *Comeau*, *supra* note 53, para. 26, BA **Tab 29**.
[74] *Fleming*, *supra* note 2, paras. 4, 43 [emphasis added], BA **Tab 2**.
[75] *Ibid.*, paras. 5, 41-42, BA **Tab 2**.
[76] *Figueiras*, *supra* note 1, paras. 58-61, 138-139, BA **Tab 1**.
[77] *Ibid.*, paras. 62, 138-139, BA **Tab 1**.
[78] *Ibid.*, para. 7, BA **Tab 1**; Judgment, *supra* note 4, paras. 26, 85, BA **Tab 3**.

42. The holdings in *Figueiras* are even more applicable where the demonstrators are not only being required to submit to a search, but are also having their property seized.[79] And they are just as applicable where the demonstrators are walking in a public park rather than down a public street. As then Chief Justice Lamer stated in *Committee for the Commonwealth of Canada*, "[o]ne thinks immediately of parks or public roads which, by their very nature, are suitable locations for a person wishing to communicate an idea."[80] The Trial Judge was bound to follow *Figueiras*.

D. Limits on preventative police powers are "especially stringent"

43. Nevertheless, if this Court concludes that *Figueiras* is not dispositive and instead performs a fresh justificatory analysis, the police face a "heavy burden if they are to establish that the power is reasonably necessary."[81] This is because the ancillary powers doctrine requires an "especially stringent" and "exacting" standard of justification for preventative police powers that interfere with the liberty of law-abiding people.[82]

44. In *Fleming*, the Supreme Court of Canada identified three factors that made the standard of justification even more rigorous than the already "strict" standard that generally exists under the ancillary powers doctrine.[83] Each factor is applicable here.

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[79] See Judgment, *supra* note 4, paras. 43, 87, BA **Tab 3**.
[80] *Committee*, *supra* note 39 at 153, Lamer C.J. This view was shared by all members of the Court: see La Forest J. at 166, L'Heureux-Dubé J. at 204-206, McLachlin J. at 230, 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-owned property for expressive purposes), BA **Tab 21**.
[81] *Fleming*, *supra* note 2, para. 85, BA **Tab 2**.
[82] *Ibid.*, paras. 76, 80, BA **Tab 2**.
[83] *Ibid.*, para. 38, BA **Tab 2**.

45. First, "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."[84] The Trial Judge found that the search-and-seizure perimeter was being applied against "all" entrants to the protest, [85] potentially exceeding 1,000 people.[86] This includes individuals who were acting lawfully and posing no threat to public safety.

46. Second, "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."[87] The Trial Judge found that the police were executing their "duty to preserve the peace and to prevent harm to persons and damage to property." She found that the perceived harm was only "potential."[88]

47. Third, "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."[89] The Trial Judge found that Mr. Stewart was not charged with any offence.[90] His only recourse was this costly civil suit, which to date has resulted in a $25,000 costs order against him.[91]

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[84] *Fleming*, *supra* note 2, para. 77, BA **Tab 2**.
[85] Judgment, *supra* note 4, paras. 4, 18, 24, 31, 51, 82, 88, BA **Tab 3**.
[86] *Ibid.*, paras. 39, 43, BA **Tab 3**.
[87] *Fleming*, *supra* note 2, para. 81, BA **Tab 2**.
[88] Judgment, *supra* note 4, paras. 26, 85, BA **Tab 3**.
[89] *Fleming*, *supra* note 2, para. 84, BA **Tab 2**.
[90] Judgment, *supra* note 4, para. 50, BA **Tab 3**.
[91] *Stewart v. The Toronto Police Services Board*, 2018 ONSC 4970, para. 6, BA **Tab 31**.

48. This Court has also held that the standard of justification will be higher where, as here, the liberty interfered with is not a qualified liberty like the right to drive, but rather an unqualified or fundamental liberty like the freedom of expression protected by s. 2(b) of the *Charter* or the right to move about freely in the community.[92]

49. In *Fleming*, the Supreme Court declined to decide "whether … the police may have some other common law powers short of arrest to prevent an apprehended breach of the peace."[93] The Court noted, however, that "some courts have recognized that a common law police power short of arrest may exist '<u>in truly extreme and exceptional circumstances</u>' for the purpose of preventing an imminent breach of the peace":[94]

> The limited number of cases on this subject show that the exercise of such powers, <u>if they exist</u>, will generally not be found to be reasonably necessary unless, at a minimum, [i] the apprehended breach of the peace is imminent, [ii] the risk of violence is sufficiently serious, [iii] the risk of it occurring is substantial, and [iv] no less intrusive measures are reasonably available. Additionally, it must be demonstrated that [v] the exercise of the power can in fact be effective in preventing the breach of the peace.[95]

50. In *Figueiras*, this Court further explained that: (vi) the risk of violence must be "specific and identifiable," and not a "general concern that the situation could get out of hand";[96] (vii) to be considered effective, the police measure must serve to "materially reduce" the risk of violence;[97] and (viii) in determining whether the measure is "no more intrusive to liberty than reasonably necessary,"[98] the court must take into account the number and severity of

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[92] *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, paras. 67, 77 (C.A.) [*Brown*], BA **Tab 32**.; *Figueiras, supra* note 1, para. 53, BA **Tab 1**.
[93] *Fleming, supra* note 2, para. 108, BA **Tab 2**.
[94] *Ibid.*, para. 107 [emphasis added], BA **Tab 3**.
[95] *Fleming, supra* note 2, para. 107 [citations omitted; emphasis added], BA **Tab 2**.
[96] *Figueiras, supra* note 1, paras. 128, 131, BA **Tab 1**.
[97] *Ibid.*, para. 101, BA **Tab 1**.
[98] *Clayton, supra* note 53, para. 21, BA **Tab 28**. See also *Figueiras, supra* note 1, para. 123, BA **Tab 1**.

interferences with liberty, the nature of the liberties being interfered with (*e.g.*, whether they are fundamental freedoms or qualified rights), and the cumulative impact of the police conduct on all of the claimant's liberty interests.[99]

E. Interference with liberty is overbroad and substantial

51. Placing a search-and-seizure perimeter around a protest—which, by its very nature, affects all protestors regardless of whether they are suspected of any criminal wrongdoing or even of threatening to breach the peace—is an overbroad and substantial interference with fundamental freedoms. As such, it cannot be justified under either the ancillary powers doctrine or s. 1 of the *Charter*, which are both based on the concepts of minimal impairment and proportionality.[100]

52. This Court should also consider that, "[h]istorically, Indigenous, Black and other racialized communities have different perspectives and experiences with [police] practices such as street checks and carding."[101] They are over-policed,[102] subject to racial profiling,[103] and "at particular risk from unjustified 'low visibility' police interventions in their lives."[104] As a result, search-and-seizure perimeters may have a disproportionate impact on the liberty of members of these groups.

53. ***Overbreadth.*** To be no more intrusive to liberty than reasonably necessary, a decision to stop a specific individual must, at a minimum, be based on a "particularized concern" with that individual and not on "generalized 'lifestyle' concerns," such as the mere fact of someone's

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[99] *Figueiras*, *supra* note 1, paras. 52-53, 119, 128-129, 133-134, BA **Tab 1**.
[100] *Fleming*, *supra* note 2, para. 54, BA **Tab 2**.
[101] *R. v. Le*, 2019 SCC 34, para. 94, BA **Tab 33**.
[102] *Ibid.*, paras. 95, 97, BA **Tab 33**.
[103] *Ibid.*, paras. 90-97, BA **Tab 33**.
[104] *Ibid*., para. 87, BA **Tab 33**.