COURT OF APPEAL FOR ONTARIO

CITATION: Figueiras v. Toronto (Police Services Board), 2015 ONCA 208
DATE: 20150330
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Rouleau, van Rensburg and Pardu JJ.A.

BETWEEN

Paul Figueiras

Applicant (Appellant)

and

Toronto Police Services Board, Regional Municipality of York Police Services Board, and Mark Charlebois

Respondents (Respondents)

Kiel Ardal and Murray Klippenstein, for the appellant

Kevin A. McGivney and Damian Hornich, for the respondents

Christine Mainville and Samuel Walker, for the intervener the Canadian Civil Liberties Association

Heard: November 21, 2014

On appeal from the judgment of Justice Frederick L. Myers of the Superior Court of Justice, dated April 4, 2014, with reasons reported at 2014 ONSC 2142.

Rouleau J.A.:

OVERVIEW

[1] This is an appeal about the proper scope of common law police powers, and in particular, whether police acted within the scope of their common law

powers when, during the 2010 G20 summit in Toronto, they targeted demonstrators walking down a public street and required that they submit to a search of their belongings if they wished to proceed. This appeal is not about how the police conducted themselves generally in the course of that summit. Rather, it deals with the tactics used by a particular group of police officers in a particular section of the downtown core.

[2] On Sunday, June 27, 2010, the second day of the summit, Paul Figueiras and some friends went downtown to demonstrate in support of animal rights. They were walking down University Avenue just north of King Street when they were stopped by a group of police officers. The officers told them that if they wished to proceed any further, they would have to submit to a search of their bags. Mr. Figueiras refused. He explained that while he had nothing to hide, he regarded the officers' request as a violation of his civil rights. One of the officers told him, "There's no civil rights here in this area. How many times do you got to be told that?" The officer also told him, "This ain't Canada right now." Mr. Figueiras maintained his refusal to submit to a search. Eventually he abandoned his plans to demonstrate and returned home.

[3] Mr. Figueiras subsequently applied for a declaration that the police officers had violated his rights to freedom of expression, peaceful assembly, and liberty under ss. 2(b), 2(c), and 7 of the *Canadian Charter of Rights and Freedoms*. He

also sought a declaration that one of the officers, Sgt. Mark Charlebois, had committed the tort of battery by grabbing and pushing him.

[4] Mr. Figueiras's application was dismissed. The application judge held that the officers' conduct was authorized under the test for ancillary police powers set out in *R. v. Waterfield*, [1963] 2 All E.R. 659 (C.C.A.), and the Canadian jurisprudence that has followed it. He further held that the alleged battery was *de minimis* at worst and in any event was justified under s. 25 of the *Criminal Code*, R.S.C. 1985, c. C-46. That section permits a peace officer to use "as much force as is necessary" in the course of his or her law enforcement duties, provided that he or she acts on reasonable grounds and that the actions taken are authorized by law.

[5] Mr. Figueiras appeals both aspects of the application judge's decision. For the reasons that follow, I would allow the appeal.

FACTS

(1) Mr. Figueiras's interaction with police

[6] On June 26-27, 2010, world leaders from the G20 group of countries gathered in Toronto for an economic summit. The summit was held at the Metro Toronto Convention Centre on Front Street, at the south end of the city's downtown core.

[7] The G20 summit drew a large number of people demonstrating in support of various causes. Regrettably, those demonstrations were not all peaceful. On the afternoon of June 26, looting, violence, and vandalism occurred over a broad area of downtown Toronto, including along King Street, Bay Street, Yonge Street, and College Street, and around Queen's Park. Some of the demonstrators engaged in "black bloc" tactics, in which persons bent on violent activity would wear balaclavas, ski masks, goggles, and bandanas to conceal their identities. After committing unlawful acts, they would fade into a crowd of peaceful protesters and change into nondescript clothing.

[8] Later on the first day of the summit, police arrested large groups of protesters *en masse* at various locations in downtown Toronto, in a practice known as "kettling". Many of those arrested were held overnight in a makeshift detention centre before being released without charge. Suffice it to say, the situation was tense for all involved.

[9] At approximately 3:00 p.m. on the following day, Mr. Figueiras and some friends were walking southbound along University Avenue toward King Street West. The intersection of King and University was one city block north of the security fence that had been erected to enclose the summit site.

[10] Mr. Figueiras and his group had met earlier in the day, intending to join a demonstration at Queen's Park. They planned to demonstrate in favour of animal

rights. Having found no demonstrations at Queen's Park, Mr. Figueiras and his friends decided to move to the general vicinity of the security fence to see if there was a demonstration they could join there. One of Mr. Figueiras's friends was carrying a placard that read "It is animal blood that fuels the machine of profit." Another carried a megaphone. A third had pamphlets advocating veganism.

[11] Mr. Figueiras was wearing blue jeans and a black t-shirt with a red, white, and black design that read "Animal liberation, human liberation", as well as a black cap and reflective aviator sunglasses. He was carrying a backpack. Mr. Figueiras's friends were similarly casually dressed in shorts, t-shirts, and baseball caps. Several were also carrying bags.

[12] As the group walked toward the intersection at King Street, a group of officers stopped them. The officers told them that if they wanted to cross the street going south, they would have to submit to a search of their bags.

[13] The interaction that followed was recorded on two separate videos taken by friends of Mr. Figueiras. The videos were later uploaded to YouTube, where they have been viewed more than 100,000 times. Both the application judge and the panel of this court have watched the videos, the authenticity of which is not disputed.

[14] The videos show the officers first searching the bags of Mr. Figueiras's friends. Sgt. Charlebois then demanded to search Mr. Figueiras's bag, saying:

"Either we look through it, or you can go. What's it going to be?" Mr. Figueiras replied, "I don't consent to a search." Sgt. Charlebois, who is approximately a foot taller than Mr. Figueiras, then stepped forward, wrapped his arm around Mr. Figueiras's shoulder, and gripped him firmly by the shirt. Pulling Mr. Figueiras toward him so they were face-to-face, Sgt. Charlebois said, "You don't get a choice." Sgt. Charlebois then pushed Mr. Figueiras away and said, "Get moving." This interaction forms the basis of Mr. Figueiras's battery claim.

[15] After pushing Mr. Figueiras away, Sgt. Charlebois repeatedly told him to "get moving" if he would not consent to a search of his bag. Mr. Figueiras asked why a search was necessary. Another officer explained that the search was for everyone's safety. Sgt. Charlebois gestured for the group to head back north and responded, "This is our area. Away you go."

[16] Noting that Sgt. Charlebois's uniform read "York Regional Police", Mr. Figueiras stated, to laughter from his friends, "This is actually more our area." The following exchange then occurred:

> Sgt. Charlebois: Not anymore. Not anymore. Have you missed the point? How old are you?
>
> Mr. Figueiras: Old enough to know better.
>
> Sgt. Charlebois: Yeah, but not smart enough to listen when you're told to do something. You haven't opened up your bag, so take off.

[17] By this point, Sgt. Charlebois had taken two steps toward Mr. Figueiras to close the gap between them. Mr. Figueiras was now standing near the edge of a stairway leading down to the subway. He began to say, “In Canada, that’s something…”, but Sgt. Charlebois cut him off: “This ain’t Canada right now. Take off.” Mr. Figueiras’s friends can be heard laughing sardonically. “This ain’t Canada right now?” one of them asked off-camera. Sgt. Charlebois shook his head and replied, “No. No.” Another officer said, “You’re in G20 land now.” Sgt. Charlebois agreed: “That’s right.”

[18] Next, Sgt. Charlebois again told Mr. Figueiras to open his bag or “get going.” A friend pointed out that Mr. Figueiras was in danger of falling down the stairs to the subway, so he moved to his left into the middle of the sidewalk. Sgt. Charlebois followed and stood directly next to him. Sgt. Charlebois reminded Mr. Figueiras that his friends had not objected to having their bags searched. Mr. Figueiras shrugged and said, “I just don’t like to have my civil rights violated.” Sgt. Charlebois responded: “There’s no civil rights here in this area. How many times you gotta be told that?” Mr. Figueiras said again, “But this is Canada.” Another officer who had come up next to him said, “Yeah, and there’s unlawful assemblies going on all around us and guess what – if you want to participate in them here, then you gotta participate in all the procedures.”

[19] At that point, Sgt. Charlebois lifted up the sleeve of Mr. Figueiras’s t-shirt and noticed a phone number written on his arm. He noted that that was “a sign of

the people … causing trouble." Sgt. Charlebois said: "You've got a lawyer's number on your arm, alright? So either we look in the bag, or you get stepping, buddy."

[20] At that point, Mr. Figueiras backed away and retreated north on University Avenue with his friends. The officers followed close behind them for approximately half a block before the videos end. In his affidavit on the application, Mr. Figueiras explained that he went home after this incident, fearing he would be arrested if he stayed downtown.

(2) Sgt. Charlebois's evidence

[21] In his affidavit, Sgt. Charlebois stated that he and 50 to 100 other officers attended a briefing early in the morning of June 27 that lasted between ten and fifteen minutes. They were briefed on the previous day's events and were told to be vigilant given the vandalism and violence that had occurred. Sgt. Charlebois testified that there were heightened concerns due to the previous day's events. At the conclusion of the briefing, the officers were dispatched to their assigned areas. Sgt. Charlebois and his team of five officers were assigned to the King and University area. Their instructions were to patrol the street and the underground pathway linking various buildings in that area. They were to ensure that no one entered the network of underground pathways.

[22] Sgt. Charlebois decided that whenever he and his team were outside patrolling the streets in his assigned area, they would stop anyone who looked like a demonstrator and demand that they submit to a search of their belongings if they wished to cross King Street and continue walking south. In his cross-examination, Sgt. Charlebois explained: “[A]nybody that looked like they were involved in the protests were asked to show that they had no weapons before they proceeded further [south].”

[23] There was no suggestion in the record that the other teams deployed to patrol other streets in the downtown core were stopping people – whether or not they looked like demonstrators – and requiring them to submit to a weapons search of their belongings should they wish to get close to the summit area. Sgt. Charlebois appears to have adopted this strategy on his own initiative and without any instructions from above. His team was the only one implementing this strategy. On cross-examination, he agreed that no one had instructed him to adopt this strategy, but explained: “That would be like telling me how to put my clothes on. Alright?”

[24] Sgt. Charlebois stated that over the course of the day, his team may have stopped between 70 and 100 people: about 50 before Mr. Figueiras was stopped and 20 to 50 after that. Because Sgt. Charlebois and the officers were patrolling a large area, as well as the underground pathway system, demonstrators who did not happen to be walking within the area patrolled by Sgt. Charlebois’s group,

or who did not happen to encounter the officers, could proceed uninhibited to the fence enclosing the perimeter of the summit site. Similarly, nothing prevented a demonstrator who was initially turned back by Sgt. Charlebois's team from approaching the security fence via another route.

[25] The videos taken by Mr. Figueiras's friends show that throughout the approximately seven minutes that Mr. Figueiras was talking to the officers, dozens of people passed by unimpeded around them. Cars passed through the intersection of King and University in an east-west direction, and pedestrians and people on bicycles passed through in all directions, including south on University past King Street, without being stopped by police. Near the end of one of the videos, a young woman wearing a backpack walked right through Sgt. Charlebois's team and continued to the south (i.e. toward the security fence) without being stopped.

(3) The application

[26] Mr. Figueiras applied to the Superior Court of Justice for declarations that the respondent police services boards and Sgt. Charlebois had violated his rights under ss. 2(b), 2(c), and 7 of the *Charter*, and that these violations could not be justified under s. 1. He also sought a declaration that Sgt. Charlebois had committed the tort of battery by grabbing and pushing him.

THE DECISION BELOW

[27] Before the application judge, the parties agreed that the officers had no statutory authority, whether under the *Criminal Code* or otherwise, to demand that Mr. Figueiras consent to a search of his bag as a precondition to walking down a public street in the direction of his choosing. The question was therefore whether the officers' actions were authorized under the common law ancillary powers doctrine. Counsel on both sides agreed that if they were, Mr. Figueiras's *Charter* rights were not breached.

[28] As Watt J.A. recently summarized in *R. v. Peterkin*, 2015 ONCA 8, at paras. 37-38, where an officer's conduct has led to a *prima facie* interference with an individual's liberty or property, the court applies a two-part test to determine whether the impugned conduct falls within the officer's common law ancillary powers. The test, originally articulated by the English Court of Criminal Appeal in *Waterfield*, asks:

> (1) Does the police conduct in question fall within the general scope of any duty imposed on the officer by statute or common law?
>
> (2) 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?

See also *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at paras. 24-26; *R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 33-40.

[29] Here, the parties agreed that the officers' conduct met the first part of the *Waterfield* test – they were acting in furtherance of the recognized police duty to preserve the peace. Only the second stage of the *Waterfield* test was in issue.

[30] The application judge accepted at the outset of his analysis that the officers' "requests" to search Mr. Figueiras's bag "were not necessarily politely made at all times." He explained, at para. 12:

> There is no denying the words used by the police officers as quoted in paragraph 4 of Mr. Figueiras's affidavit above [i.e. "This is our area"; Mr. Figueiras was "not smart enough to listen"; "This ain't Canada right now"; "We're in G20 land"; and "There is no civil rights here in this area"]. Those and others plainly audible on the video recording were not appropriate words. They do not represent either a correct statement of the law or the proper description of the role of the police that day. However, viewed in context, it is clear that Detective Charlebois was not willing to have a debate with Mr. Figueiras about the finer points of constitutional law and simply wished him to move on. In any event, the issues in this proceeding do not turn on the words used by the officers but upon their conduct.

[31] After reviewing *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, and *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223 (C.A.), the application judge concluded that the officers' conduct was justified and met the second stage of the *Waterfield* test. The application judge was of the view that the officers could properly conclude that there was "imminent … apprehended harm [of] specifically identifiable breaches of the peace, rioting, property damage, looting, and efforts to unlawfully disrupt the G20 summit" based on the previous

day's events (at para. 21). As a result, preventing demonstrators who refused to submit to a search of their bags from reaching King Street and proceeding south was a minimal intrusion on the right to move about freely.

[32] In addition to relying on the officers' duty to preserve the peace, the application judge relied on *R. v. Knowlton*, [1974] S.C.R. 443, to conclude that the police had the power to cordon off areas in order to protect foreign dignitaries from harm. As Sgt. Charlebois stated in his affidavit, the police were concerned that efforts would be made to disrupt the summit meeting. The intersection of University and King was close to the security fence and to where some of the unlawful acts had occurred on the previous day. In the application judge's view, therefore, the police would have been well within their authority to require every person seeking to continue south to open his or her bag. The fact that the police were searching only suspected demonstrators did not render the police conduct an abuse of authority. On the contrary, he held that this tailoring rendered the interventions minimally intrusive. As a result, the police did not exceed their authority or act arbitrarily.

[33] The application judge analogized the searches carried out here to those carried out of persons seeking to enter courthouses and airports. As in the case of courthouses and airports, there was a clear need for security in the area of King and University. Preventing a person who refused to consent to a weapons

search from getting closer to the summit site was, therefore, a reasonable exercise of police powers at common law.

[34] As to Mr. Figueiras's claim that his ss. 2(b) and 2(c) rights had been violated, the application judge held that, having found the police conduct to be lawful, there could be no violation of these rights.

[35] The application judge also held that, had he found a breach of the *Charter*, he would have upheld the police conduct under s. 1 as a reasonable limit on Mr. Figueiras's *Charter* rights. In his view, protecting the peace was a pressing and substantial objective, and conducting a minimally intrusive search was rationally connected to that objective. Minimal infringements of this type are, he explained, "routinely accepted throughout our society in the complete absence of any imminent threat or any reasonable grounds of suspicion as existed in this case" (at para. 30).

[36] Finally, the application judge held that Sgt. Charlebois had not committed the tort of battery because his touching of Mr. Figueiras was *de minimis*, and in any event, Sgt. Charlebois was immune from liability pursuant to s. 25(1) of the *Criminal Code*.

ISSUES

[37] Mr. Figueiras maintains that the *Charter* rights at issue in this appeal are his right to liberty under s. 7, as well as his rights under ss. 2(b) and 2(c), namely

freedom of expression and freedom of peaceful assembly. The respondents, for their part, argue that the relevant *Charter* right is the s. 9 right not to be arbitrarily detained.

[38] The essence of Mr. Figueiras's complaint is that Sgt. Charlebois and the other officers unlawfully stopped him from travelling down a public street and prevented him from carrying on his peaceful demonstration at a location nearer to the summit site. This course of police conduct engaged Mr. Figueiras's common law right to move unimpeded on a public highway and his s. 2(b) right of freedom of expression. As I will explain, I do not consider it necessary to deal with the alleged violations of Mr. Figueiras's ss. 2(c) and 7 rights. I also do not agree with the respondents' position that the focus of the *Charter* analysis is necessarily that conducted under s. 9.

[39] The central issue on appeal is, therefore, whether the application judge erred in his application of the *Waterfield* test and in his conclusion that the police had the common law power to restrict Mr. Figueiras's movements and right to protest as they did here.

[40] A secondary issue is whether the application judge erred by holding that Sgt. Charlebois had not committed battery.

ANALYSIS

(1) Common law police powers and *Waterfield*

[41] Rule of law is a fundamental principle of the Canadian constitution: *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721. One crucial aspect of the rule of law is the principle that "the exercise of all public power must find its ultimate source in a legal rule": *Reference re Remuneration of Provincial Court Judges*, [1997] 3 S.C.R. 3, at para. 10. As a result, "police officers … only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties": *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 28.

[42] Police powers arise both from statute (e.g. *Police Services Act*, R.S.O. 1990, c. P.15; *Criminal Code*) and from the common law itself. In the latter case, this is referred to as the "ancillary powers doctrine", reflecting the fact that police *powers* are ancillary to police *duties*.

[43] Police officers are given broad duties to preserve the peace and prevent crime. The powers conferred on them to execute those duties, however, are not correspondingly broad. As Doherty J.A. explained in *R. v. Simpson* (1993), 12 O.R. (3d) 182, at p. 194:

> The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive.

> Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law.

[44] Doherty J.A. later reinforced this point in *Brown*, where he noted that "[t]he common law ancillary power doctrine has never equated the scope of the police duties with the brea[dth] of the police powers to interfere with individual liberty in the performance of those duties" (at p. 250).

[45] *Brown* also stands for the proposition that it will be more difficult for police to justify the existence and exercise of a power on the basis of preventive policing compared to when the police investigate a past or ongoing crime (*Brown*, at pp. 249-51).

[46] Courts play an important role in regulating the exercise of preventive policing due to the low-visibility nature of preventative stops and their potential for abuse. As the Supreme Court explained in *Mann*, at para. 18: "[T]he unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role." When courts exercise their custodial role, this will sometimes involve recognizing a police power and imposing a legal framework on its exercise, as occurred in *Mann*. But it may result in the wholesale rejection of a purported police power, as occurred in *Brown,* and as I propose to do here.

[47] The *Waterfield* analysis is contextual, and one of the most important elements of context is the degree to which the police can link an individual whose rights are affected by police conduct to an actual or anticipated crime.

[48] The *Waterfield* test involves a careful balancing of competing interests. On one side of the scale is the state's interest in effective policing, including keeping the peace and crime prevention. On the other side is a consideration of the liberty interests of citizens, such as Mr. Figueiras, affected by the power that police exercise (or purport to exercise).

[49] *Waterfield* was imported into the Canadian jurisprudence in the pre-*Charter* case of *Dedman*. After the *Charter*'s adoption, the Supreme Court effectively integrated the analysis of the impact on *Charter* rights into the *Waterfield* analysis. As the concurring minority in *Clayton* explained, the reference to "liberty" in the *Waterfield* test is a reference to all of a citizen's civil liberties, which in a post-*Charter* era mean both common law liberties, such as those at stake in *Dedman* and *Waterfield* itself, as well as constitutional rights and freedoms, such as those protected by the *Charter* (*Clayton*, at para. 59).

[50] Over time, the Supreme Court has modified the *Waterfield* test to emphasize the importance of *Charter*-protected rights. For example, the *Waterfield* test was summarized in *Mann*, at para. 26, as follows:

> At the first stage of the *Waterfield* test, police powers are recognized as deriving from the nature and scope of

> police duties, including, at common law, "the preservation of the peace, the prevention of crime, and the protection of life and property" (*Dedman*, *supra*, at p. 32). The second stage of the test requires a balance between the competing interests of the police duty and of the liberty interests at stake. This aspect of the test requires a consideration of
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> > whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals. (*Cloutier*, *supra*, at pp. 181-82)
>
> The reasonable necessity or justification of the police conduct in the specific circumstances is highlighted at this stage. Specifically, in *Dedman*, *supra*, at p. 35, Le Dain J. provided that the necessity and reasonableness for the interference with liberty was to be assessed with regard to the nature of the liberty interfered with and the importance of the public purpose served.

[51] The Supreme Court continues to apply the *Waterfield* analysis to define the limits of common law police powers. It has done so in accordance with *Charter* values, and in some cases has expressly integrated the *Waterfield* test into existing *Charter* frameworks, such as the *R. v. Collins*, [1987] 1 S.C.R. 265, analysis for the reasonableness of searches: see *MacDonald*. Accordingly, some commentators have argued that the Supreme Court has imported into the application of the *Waterfield* test an analysis akin to *R. v. Oakes*, [1986] 1 S.C.R. 103 (see e.g. Richard Jochelson, "Ancillary Issues with *Oakes*: The

Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory" (2012-2013) 43:3 Ottawa L. Rev. 355).

[52] The potential interplay between *Waterfield* and *Oakes* is particularly important given the liberties at stake in this case. The existing *Waterfield* jurisprudence deals predominantly, if not exclusively, with rights under ss. 8, 9, and 10 of the *Charter*, which have internal limits built into the rights they guarantee (i.e. s. 8 guarantees the right to be secure against *unreasonable* search and seizure; s. 9 guarantees the right not to be *arbitrarily* detained or imprisoned). The Supreme Court has held that a detention that is found to be lawful at common law is, necessarily, not arbitrary under s. 9 (*Clayton*, at para. 20). Similarly, a search conducted incidentally to a lawful arrest or detention will not be found to infringe s. 8 if the search is carried out in a reasonable manner and reasonable grounds for the search exist (*Mann*; *R. v. Caslake*, [1998] 1 S.C.R. 51). As a result, when police act in accordance with their common law ancillary powers, the internal limits of these sections are respected, and there is no *Charter* breach that must be justified by s. 1.

[53] By contrast, s. 2(b) guarantees an unqualified right to freedom of expression, without internal limits, the infringement of which falls to be justified under s. 1: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., loose-leaf (Toronto: Carswell, 2007), at p. 43-6. Thus, to the extent that the police conduct in this case infringed Mr. Figueiras's expressive rights, it is not immediately

apparent that that conduct should be analyzed under *Waterfield* rather than under s. 1 (and, in particular, under the "prescribed by law" branch of the *Oakes* test).

[54] In my view, nothing turns on the approach taken. Whichever approach is used here, the outcome of the appeal depends on whether the officers were validly exercising a common law police power. In any case, as I explained above, the parties agreed before the application judge that if the impugned conduct passed muster under *Waterfield*, there was no breach of Mr. Figueiras's *Charter* rights. In light of that position, I will follow the *Waterfield* analysis – as the application judge did – to decide this appeal.

(2) Threshold issues

[55] Before undertaking the *Waterfield* analysis, I will address two threshold issues: (a) defining the police power at issue, and (b) identifying the liberty interests at stake.

(a) Defining the police power

[56] Defining what police power was being exercised in the present case is not straightforward. Various types of powers present themselves as possible candidates.

[57] At first glance, Sgt. Charlebois and his team were exercising a police power to control access to a defined area. There are a variety of circumstances where such a police power has been recognized in the case law.

[58] In some instances, statutes provide the police with the power to control access to an area. For example, there are statutes that regulate the public's access to buildings such as courthouses (in Ontario, the *Public Works Protection Act*, R.S.O. 1990, c. P.55) and airports (see the *Aeronautics Act*, R.S.C. 1985, c. A-2, and associated regulations). These statutes typically require individuals to consent to a search before access to a building will be granted. In Manitoba, it was held that absent statutory authority, police were not authorized to carry out searches of those seeking to enter courthouses (*R. v. Gillespie* (1999), 142 Man. R. (2d) 96 (C.A.)). However, both this court and the Manitoba Court of Appeal have held that searches conducted at courthouses were *Charter*-compliant, provided that the power was granted to police by statute (*R. v. Campanella* (2005), 75 O.R. (3d) 342 (C.A.); *R. v. Lindsay*, 2004 MBCA 147, 187 Man. R. (2d) 236).

[59] There is no comparable statute here. Accordingly, the police must rely on their common law powers. Examples of the common law police power to control access to an area include establishing a perimeter around a police officer who is executing an arrest (*R. v. Wutzke*, 2005 ABPC 89, at paras. 60-66), establishing a perimeter around a police officer who is questioning a suspect or a witness (*R.*

v. Dubien, [2000] Q.J. No. 250, at paras. 14-26 (C.M.)), establishing a perimeter around a crime scene to preserve evidence (*R. v. Edwards*, 2004 ABPC 14, 25 Alta. L.R. (4th) 165, at paras. 4-6, 24-48, 66), and establishing a perimeter around a hazardous area to preserve public safety (*R. c. Rousseau*, [1982] C.S. 461, at pp. 461-62, 463-64 (Qc.)). It has also been recognized that the police can establish a security perimeter around a potential target of violent crime in order to ensure the target's protection (*Knowlton*, at pp. 447-48).

[60] As the case law demonstrates, even in the absence of statutory authority, the police must be taken to have the power to limit access to certain areas, even when those areas are normally open to the public. However, this is not a general power; it is confined to proper circumstances, such as fires, floods, car crash sites, crime scenes, and the like.

[61] However, the power exercised by Sgt. Charlebois and his team in this case was not merely a power to control access to an area; rather, it was a power to compel those entering an area to submit to a search, and to exclude those who refused. It was also a power that was applied selectively, targeting only demonstrators. This power was not provided by any statute or regulation. It was also significantly different from any of the situations recognized under common law and described in previously reported cases.

[62] I would frame the power exercised in this case as follows: 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.

(b) Identifying the liberty interests at stake

[63] As noted earlier, the parties disagree about which liberties (in the sense of common law civil liberties or *Charter* rights) are implicated here. As a result, even though Mr. Figueiras had requested declaratory relief based on his ss. 2(b), 2(c), and 7 *Charter* rights, the bulk of the application judge's reasons focussed on s. 9. In my view, the unusual situation presented in this case makes the task of identifying the *Charter* issues less straightforward than it appears from the application judge's reasons.

[64] For example, one could argue that the s. 8 right to be free from unreasonable search is at play. After all, it was the police's desire to search Mr. Figueiras that led them to deny him access to the perimeter zone in the first place. However, the case law establishes that the operative moment for assessing a s. 8 violation is the moment at which the search is actually carried out (*Clayton*, at para. 48; *Peterkin*, at para. 62). I agree with the intervener the

Canadian Civil Liberties Association that in this case, because there was no search, that moment was never reached.

[65] Similarly, the s. 9 right not to be arbitrarily detained may well not apply here. On one hand, there could arguably have been a detention at some point during the interaction between police and Mr. Figueiras, but on the other hand, Mr. Figueiras was free to walk away from the officers, albeit not in the direction he had intended (See *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at paras. 20-21). Indeed, Mr. Figueiras himself argued that he was not detained and that his s. 9 rights were not engaged.

[66] In my view, the police conduct in this case was a *prima facie* infringement of two liberties: freedom of expression under the *Charter* and the common law right to travel unimpeded down a public highway. I will address each in turn.

(i) *Charter* s. 2(b) freedom of expression

[67] Mr. Figueiras and his friends were demonstrating in favour of animal rights when they were stopped by Sgt. Charlebois and his team. It is undisputed that Mr. Figueiras and his friends intended to join with other demonstrators who may have gathered along the perimeter of the G20 summit site. Not only was Mr. Figueiras prevented from carrying on his demonstration as intended, but he also felt sufficiently intimidated by the officers' conduct that he abandoned his demonstration altogether.

[68] The test for a violation of s. 2(b) is the three-step test first adopted by the Supreme Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 978, and restated in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 56, 82:

(1) The plaintiff is engaged in expressive activity;

(2) Nothing about the method or location of the expressive activity removes it from the scope of protected expression; and

(3) The impugned government action has either the purpose or the effect of restricting freedom of expression.

[69] The first step of the test is satisfied here because demonstrating is a well-established expressive activity. Indeed, this court has held that "the right to protest government action lies at the very core of the guarantee of freedom of expression": *Ontario Teachers' Federation v. Ontario (Attorney General)* (2000), 49 O.R. (3d) 257, at para. 34.

[70] It is clear that Mr. Figueiras was engaged in expressive activity at the time he was stopped. Mr. Figueiras and his friends were wearing t-shirts bearing animal rights slogans and symbols. Two of Mr. Figueiras's friends carried a megaphone and a large placard, respectively. Another handed a pamphlet to one of the officers and explained its contents.

[71] The second step of the test is satisfied because nothing about Mr. Figueiras's conduct would remove his intended expressive activity from the scope of s. 2(b) protection: see *2952-1366 Québec Inc.*, at paras. 62-81. Neither the method nor the location of Mr. Figueiras's intended activity conflicts with the values protected by s. 2(b) (i.e. self-fulfilment, democratic discourse, and truth finding): *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 37. In particular, public streets are "clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted": *2952-1366 Québec Inc.*, at para. 81. Demonstrating around the G20 site, including the area adjacent to the security fence, was a perfectly lawful – and indeed reasonably expected – activity.

[72] In the third step of the test, there are two branches under which freedom of expression could be violated: either the "intent" branch or the "effects" branch. Courts should first consider the intent or purpose of the government activity. If the intent was to restrict freedom of expression, there is no need to go on and consider the effects branch of the test: *Irwin Toy*, at p. 972, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 331-32, 334.

[73] In the "intent" branch of the third step, "if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee" (*Irwin Toy*, at p. 976).

[74] In the “effects” branch of the third step, freedom of expression will be violated if the government imposes a limitation or precondition that must be complied with in order to exercise freedom of expression: *Canadian Broadcasting Corp.*, at para. 54.

[75] The third step is satisfied here because Sgt. Charlebois admitted during cross-examination that his intent was to stop “anybody that looked like they were involved in the protests [or] … looked like they were there for the purpose of protesting” and demand that they either consent to a search or leave the area. When asked how he identified demonstrators, Sgt. Charlebois explained that he looked for people carrying placards or pamphlets. The intention motivating the police conduct was therefore to stop everyone who appeared to be exercising their freedom of expression, and to impose an onerous condition upon them.

[76] In his affidavit, Sgt. Charlebois claimed that he did not intend to violate freedom of expression. This claim is of little weight given the admissions I have just reviewed. Moreover, his after-the-fact denial of any intent to interfere with freedom of expression is difficult to reconcile with his contemporaneous statements that “[t]his ain’t Canada right now” and that “[t]here’s no civil rights in this area.” Such statements are far more probative indicators of Sgt. Charlebois’s intentions than after-the-fact denials contained in an affidavit prepared by counsel.

[77] In any case, stopping protesters and requiring that they submit to a search as a condition to being able to carry on their protest as they walk down a public street has the effect of restricting freedom of expression. This conduct thus constitutes a *prima facie* infringement of Mr. Figueiras's freedom of expression under both branches of the *Irwin Toy* test. As I will explain later in my reasons, where the search imposed is not authorized by statute or under the common law, a violation of the right will be made out.

[78] Having found a s. 2(b) violation, there is no need to address Mr. Figueiras's s. 2(c) argument. In my view, issues related to Mr. Figueiras's freedom of assembly are subsumed by the s. 2(b) analysis, as was the case in *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association Assn.*, 2009 BCCA 39, 306 D.L.R. (4th) 144, at para. 39, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 160, [2009] S.C.C.A. No. 161.

(ii) Common law liberty

[79] Quite apart from s. 7 of the *Charter*, everyone has a common law right to liberty. This is apparent from the Supreme Court's decision in *Dedman*. *Dedman* was a pre-*Charter* case concerning roadside sobriety checks conducted at random as part of a RIDE program. Although the majority and minority differed over whether the deprivation of liberty was reasonable or not, they both held that

these random stops infringed the liberty of those stopped. The references to "liberty" were to the common law right to liberty, since the *Charter* was not in force at the time of the impugned stops. The *Dedman* majority stated, at p. 35, that the "right to circulate in a motor vehicle on the public highway" was a "liberty" for the purpose of the *Waterfield* test. The majority went on to note, at p. 35, that this liberty to drive on a highway "is not a fundamental liberty *like the ordinary right of movement of the individual*" (emphasis added). Thus the majority recognized the fundamental common law liberty of individuals to circulate freely along public roadways, particularly on foot.

[80] In fact, *Dedman*'s emphasis on the civil liberty to move unimpeded on public highways is part of a long common law tradition. The right to move freely on public highways (often called the right to "pass and repass" in older cases) has been upheld many times by appellate courts, including the Supreme Court, Britain's House of Lords, and this court. See e.g. *Vancouver (City) v. Burchill*, [1932] S.C.R. 620, at pp. 624, 626; *Director of Public Prosecutions v. Jones*, [1999] UKHL 5, [1999] 2 A.C. 240, at p. 257, per Irvine L.C.; *Hydro-Electric Power Commission v. Grey (County)* (1924), 55 O.R. 339, at p. 344 (C.A.).

[81] When Mr. Figueiras was stopped by the police, he was walking peacefully along a public highway, since at common law, a "highway" includes the sidewalk of any public street. The police stop clearly resulted in an infringement of his common law liberty, namely his right to "pass and repass" unhindered along a

public highway. Mr. Figueiras was prevented from reaching King Street and beyond. This infringement of Mr. Figueiras's right is to be weighed in the *Waterfield* analysis.

[82] Because I have found a *prima facie* infringement of the common law right to liberty and given my conclusion on the *Waterfield* analysis, I need not deal with Mr. Figueiras's allegation that preventing him from walking down a public street infringed his s. 7 rights. As the Alberta Court of Appeal held in *R. v. S.A.*, 2014 ABCA 191, 575 A.R. 230, at paras. 222-25, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 373, courts should avoid constitutionalizing disputes if those disputes can be decided on the basis of common law principles.

(3) Application of the *Waterfield* test

[83] I turn now to the application of the *Waterfield* test to the facts of this case. For convenience, I will again set out the two stages of the test.

[84] In the first stage, "the court must ask whether the action falls within the general scope of a police duty imposed by statute or recognized at common law" (*MacDonald*, at para. 35).

[85] In the second stage, the court must strike a "balance between the competing interests of the police duty and of the liberty [or other] interests at stake" (*Mann*, at para. 26). Put another way, is the police action "reasonably

necessary for the carrying out of the particular duty in light of all the circumstances" (*MacDonald*, at para. 36)?

[86] In *MacDonald*, at para. 37, the Supreme Court explained that the factors to be weighed in the second stage include:

(1) The importance of the duty to the public good;

(2) The extent to which it is necessary to interfere with liberty to perform the duty; and

(3) The degree of interference with liberty.

[87] As I have explained, the parties agree that the officers' conduct in this case passes the first step of *Waterfield*. Sgt. Charlebois's actions fell within the scope of the police duty to preserve the peace and prevent damage to property or persons. The controversy lies in the application of step two.

(a) The importance of the performance of the duty to the public good

[88] Keeping the peace and preventing property damage or personal injury are clearly important duties. The June 27, 2010, deployment of 50 to 100 officers tasked to keep the peace demonstrates the seriousness of the perceived threat that day. If a riot were to occur, the events of the previous day suggested that significant property damage and, potentially, personal injury would follow.

(b) The extent to which it is necessary to interfere with liberty to perform the duty

[89] The application judge found that, because on the previous day there had been breaches of the peace, rioting, property damage, looting, and efforts to unlawfully disrupt the G20 summit, police believed that similar unlawful acts were "imminent" on June 27, 2010. The previous day's unlawfulness occurred in areas where demonstrations were being held, and, in some cases, the perpetrators of the unlawfulness may have been demonstrators, or may have received the aid of demonstrators to hide amongst them using "black bloc" tactics. Consequently, Sgt. Charlebois decided to target only those persons who appeared to be demonstrators and demand that they submit to a search as a precondition of continuing down University Avenue. This, in the application judge's view, constituted the minimum intrusion that was reasonably necessary in the circumstances.

[90] As I explained earlier, the application judge analogized Sgt. Charlebois's searches to the permissible searches conducted of those entering a courthouse or boarding an airplane. The application judge did not view Sgt. Charlebois's decision to stop only demonstrators as being problematic, as it constituted only a minimal intrusion. He could not see "the logic in finding that stopping less people was an excess of authority when detaining more people would have been permissible" (at para. 25). He did not think that "in exercising his discretion to

tailor his intrusions to those most rationally connected with the objective of his activity, Detective Charlebois can be said to have behaved arbitrarily or exceeded his authority at common law" (at para. 25).

[91] In my view, the application judge erred in his analysis of this factor. Having found that unlawful acts similar to those committed the previous day were "imminent" and that police had a duty to protect against their commission, the application judge did not adequately assess whether the police power exercised here and the resulting interference with Mr. Figueiras's liberty was *necessary* for the performance of the duty. He also erred in analogizing Sgt. Charlebois's selective searches to searches conducted at the entrances to courthouses and airports. I will discuss these errors in more detail below.

(i) Was the exercise of the power necessary?

[92] Where, in carrying out his or her duties, a police officer interferes with an individual's liberty, it must be shown that the interference is necessary to the performance of the duty: *Dedman*, at p. 35.

[93] In other words, where the power being exercised is in furtherance of the police duty to keep the peace, it must be rationally connected to the risk sought to be managed (that is, the risk that the peace will be breached), and it must be an effective means of materially reducing the likelihood of that risk occurring. If the interference with individual rights bears no rational connection to the duty

being performed or is not effective in furthering the police duty, then surely it is not a “necessary” interference.

[94] In *Clayton*, both the majority and the minority found that the impugned police conduct – stopping all cars leaving a parking lot immediately after a witness reported seeing several men with guns in the parking lot – was an effective and rational way to respond to the circumstances. It was therefore a justifiable use of police powers. Indeed, the minority highlighted, at para. 99, that “[w]hile the effectiveness itself of police action does not confer legitimacy, the *absence* of likely effectiveness would argue strongly against a valid blockade” (emphasis in original).

[95] Similarly, in *R. v. Godoy*, [1999] 1 S.C.R. 311, the Supreme Court recognized that police officers possess a common law power of entry into private homes to investigate disconnected 911 calls. The recognition of such a power was justified because forcible entry was the only effective means of enforcing the 911 system; any lesser power would have been ineffective in accomplishing the police duty of protecting life.

[96] Effectiveness also played a key role in several *Charter* decisions concerning the justification of powers granted to police by statute. In *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, a case concerning random police stops of motorists to check licences, insurance, mechanical fitness of cars, and drivers’

sobriety, the Supreme Court, in this case applying the *Oakes* test, focused on effectiveness. When applying the *Oakes* test, the Court concluded that, although random stops interfered with the rights of drivers, they provided the only effective means of taking unauthorized drivers off the road. A similar result was reached a decade later in *R. v. Hufsky*, [1998] 1 S.C.R. 621.

[97] In the present case, the application judge found that there was an "imminent" threat of a repeat of the previous day's violence and that it was the duty of the police deployed that day to prevent it. While I accept that finding for the purpose of this appeal, I note that the application judge's definition of "imminent" would appear to be more generous than the one this court adopted in *Brown*. Although there was a legitimate concern that the previous day's breaches of the peace would be repeated, there were no indications that any breach of the peace was ongoing or imminent in the area of King and University.

[98] In *Brown*, this court held that while the *Highway Traffic Act*, R.S.O. 1990, c. H.8, empowered police to conduct preventive stops of vehicles on a road leading to a biker gang's rural property, those same stops were not authorized under the *Waterfield* ancillary powers doctrine. Writing for the court, Doherty J.A. explained, at p. 249:

> Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. *The apprehended breach must be imminent and the risk that the breach will occur must be*

> *substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice.* These features of the power to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. That is not to say that the two powers are co-extensive. Many indictable offences do not involve a breach of the peace and, as indicated above, conduct resulting in an apprehended breach of the peace need not involve the commission of any offence. *Both powers are, however, rooted in the recognition that intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained*. [Emphasis added.]

[99] Similarly, in *Mann*, at para. 40, the Supreme Court cautioned that a search incidental to an investigative detention "cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition."

[100] Even assuming that Sgt. Charlebois and his team faced an "imminent" risk of a repeat of the previous day's lawlessness, in my view the application judge erred in concluding that the power they exercised vis-à-vis Mr. Figueiras was necessary to respond to the risk of a breach of the peace. I say this for two reasons: the power was not effective, and it was not rationally connected to the purpose. I will address each in turn.

Effectiveness

[101] Effectiveness in the context of police powers is not measured by whether a risk does or does not in fact materialize. Rather, the effectiveness of a given power is determined by considering whether, objectively, the measure serves to materially reduce the risk of a breach of the peace.

[102] Sgt. Charlebois's team was only one of many patrolling the downtown. The briefing that was given to the 50 to 100 officers deployed to secure the downtown that day did not include a directive or even a suggestion that would-be demonstrators should be targeted and searched for weapons, nor had Sgt. Charlebois's superiors decided that demonstrators should be prevented from gathering in any specific area. The authorities in charge obviously did not consider mandatory searches at the corner of University and King as necessary to manage the risk that the second day of the G20 summit would mirror the chaos of the first. The officers' instructions were simply to ensure that no one entered the underground pathway and to be vigilant when patrolling outside on the streets.

[103] Given that the concern for violence applied to the entire downtown core, encompassing Queen's Park to the north, Spadina Avenue to the west and Yonge Street to the east, sporadic stops by one group of officers of only those persons who appeared to be demonstrators would have virtually no impact. Sgt.

Charlebois's evidence was that his team stopped only 70 to 100 people out of the thousands who were in the downtown core that day. Further, anyone whom Sgt. Charlebois's team turned back could simply have taken an alternate route south to the security fence. Therefore, even to the extent that the concern related to the area near the fence surrounding the G20 site, any would-be troublemakers could easily have reached the area by another route.

Rational connection

[104] Sgt. Charlebois's team decided to conduct a weapons search of only those people who appeared to be demonstrators. All others went by unimpeded. While it was apparent that demonstrations had turned violent the previous day, it was not clear that the violence was initiated by demonstrators as opposed to people who infiltrated and mixed into the groups of demonstrators. Sgt. Charlebois's conclusion that persons such as Mr. Figueiras who were clearly demonstrators were at fault for the previous day's violence was largely speculative.

[105] Additionally, the lawlessness of the previous day was not limited to the area south of King Street. It occurred throughout large portions of the downtown. As Sgt. Charlebois explained, "black bloc" tactics had in fact been used on Yonge and College Streets, well east and north of the intersection of King and University. Turning back protesters who did not submit to a search from the intersection of King and University bore no rational connection to the "imminent"

threat of a repeat of the previous day's lawlessness in the entire downtown core of Toronto.

[106] Finally, I note that the lawlessness that occurred on June 26 did not involve the use of weapons such as might be secreted in a backpack. Sgt. Charlebois filed a video as an exhibit to his affidavit to demonstrate the type of conduct that took place on June 26 and that the police were aiming to prevent on June 27. The video shows people using uprooted newspaper boxes, street signs, sandwich boards, and even bricks pried loose from a paved boulevard to smash shop windows. The destruction was wanton, senseless, and utterly disheartening. But there is nothing in the record to indicate it would have been prevented by random weapon searches of demonstrators' bags at the corner of University and King, or indeed, anywhere else. The respondents' own evidence showed that those engaged in violence acquired improvised weapons on the spot, rather than carrying them to the scene in backpacks.

[107] Thus, unlike the police conduct in *Clayton*, the police conduct at issue here was *not* "temporally, geographically and logistically responsive to the circumstances known by the police when it was set up" (*Clayton*, at para. 41).

(ii) The stops are not analogous to searches at courthouses and airport

[108] The application judge also erred by analogizing what Sgt. Charlebois was doing to searches carried out of all persons entering buildings such as the courthouse in Toronto. I say this for several reasons.

[109] First, and most significantly, searches carried out in Ontario courthouses are provided for by statute. They are not expressions of a common law police power. This court upheld the validity of these searches on a statutory basis, and that holding cannot be mechanically applied to a common law police powers analysis (*Campanella*). Indeed, the Manitoba Court of Appeal found that courthouse searches were illegal when carried out without statutory authority (*Gillespie*).

[110] Second, such searches are effective in achieving the objectives sought – ensuring that members of the public do not bring weapons or other contraband into courthouses – because the search is required of everyone entering the premises, other than those having a special exemption (typically, lawyers and court staff).

[111] Third, the public is told, in advance, of the requirement of and reasons for the search. In addition, equipment is provided and a space is allocated to aid in

making the search the least intrusive possible; it is not, as here, conducted on a public street.

[112] Fourth, these are general searches that do not target identifiable groups. Searches that target only specific groups raise different considerations. In *Brown*, this court held that stops that target an identifiable group must be "carefully scrutinized" (at para. 41). Similarly, in *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, the Supreme Court held, at para. 40, that "profile characteristics are not a substitute for objective facts that raise a reasonable suspicion of criminal activity. Profile characteristics must be approached with caution precisely because they risk undermining a careful individualized assessment of the totality of the circumstances." As explained earlier, the basis for targeting would-be demonstrators, as a group, is weak and does not, in my view, rise to the level of reasonable suspicion.

[113] The stop and the subsequent demand that Mr. Figueiras and his friends submit to a search flowed from Sgt. Charlebois's generalised suspicions of demonstrators as a group, not as a result of an individualized objective assessment of who Mr. Figueiras and his friends were or what they said and did in response to his questioning (see *Chehil*, at paras. 39-43).

(c) The degree of interference with liberty

[114] As noted earlier, the parties disagreed over which liberty interests were involved in this case. The application judge seems to have accepted the respondents' position that the only relevant liberty interest was Mr. Figueiras's s. 9 right not to be arbitrarily detained. At para. 15 of his reasons, he stated: "It seems to me that the only liberty interest at play in this application is Mr. Figueiras's right to move about freely without arbitrary detention."

[115] Later in his reasons, the application judge referred to Mr. Figueiras's submission that the relevant right is the right to travel freely on public streets. However, the only clear finding made by the application judge as to which *Charter* or other liberty interests were affected is the finding set out above respecting Mr. Figueiras's s. 9 right not to be arbitrarily detained. There was no real analysis of Mr. Figueiras's other *Charter* rights or common law liberties.

[116] As a result, it is difficult to discern from the reasons what liberty interests the application judge considered in the balancing exercise he carried out as required by *Waterfield*. He simply concluded his analysis as follows, at para. 26:

> Refusing to allow someone to get close to the G20 summit who did not wish to show that he did not have weapons in his knapsack, in the circumstances that existed on June 27, 2010, was a reasonable exercise of police powers authorized under section 42 of the *Police Services Act*, at common law and it meets the standards applicable to *Charter* scrutiny set out in *Clayton* and the other Supreme Court of Canada jurisprudence.

[117] What is clear, however, is that this conclusion was reached without any consideration of the interference with Mr. Figueiras's other *Charter* rights, including freedom of expression. The fact that these rights were not taken into account in the application judge's *Waterfield* analysis is apparent from para. 28 of his reasons. This paragraph followed the conclusion quoted above.

[118] At para. 28, the application judge rejected Mr. Figueiras's argument that his ss. 2(b) and 2(c) rights were violated simply on the basis that "[h]aving already found that the conduct of Detective Charlebois was lawful, this argument must fail too." The application judge erred by failing to consider the interference with all of the *Charter* rights impacted by the police conduct, and by failing to squarely address Mr. Figueiras's common law liberty rights in his *Waterfield* analysis.

[119] When considering the extent of police interference with an individual's liberty, the court must have regard to the cumulative impact on all of the individual's liberty interests. In other words, the court must not carry out a separate *Waterfield* analysis for each of the liberties or *Charter* interests that is affected. The overall impact of the police conduct on all of the claimant's civil liberties must be considered in the balancing exercise. Both Mr. Figueiras's common law liberty to proceed unhindered down a public street and his s. 2(b) right to freedom of expression were interfered with in this case. Both rights must be weighed in the balance, together.

(d) The balancing exercise

[120] In *Brown*, Doherty J.A. framed the principles that inform the final balancing required under *Waterfield* in a preventive policing context, at p. 251:

> The balance struck between common law police powers and individual liberties puts a premium on individual freedom and makes crime prevention and peacekeeping more difficult for the police.… The efficacy of laws controlling the relationship between the police and the individual is not, however, measured only from the perspective of crime control and public safety. We want to be safe, but we need to be free.

[121] As I explained above, the application judge committed several errors both in his analysis as to whether the officers' actions were necessary to carry out their duty, and in his assessment of the rights that the officers' actions interfered with.

[122] In my view, the application judge also erred in how he approached the balancing exercise, in two ways.

[123] First, the application judge misinterpreted the concept of minimal impairment. He found that, by targeting only apparent demonstrators, the officers had tailored "their activities to the minimum intrusions reasonably necessary in the circumstances" (at para. 25). In effect, he equated "minimal impairment" with minimizing the number of people affected, but did not consider whether the impact on those targeted by the police conduct could be minimized.

[124] The fact is that for a demonstrator such as Mr. Figueiras, the impairment of his rights was in no way lessened because the officers had determined to interfere with only the rights of people “like him.” The number of people who are the target of the intrusion is reduced, but the intrusion felt by each target is neither minimized nor reduced. The officers not only stopped and questioned would-be protesters, they also insisted that these would-be protesters submit to a search if they wished to proceed, regardless of the answers they gave in response to the officers’ questions. Additionally, it is arguable that by targeting demonstrators and making it known that only demonstrators were being stopped and searched as a condition of passage, those stopped might justifiably feel an even greater sense of state interference, since they knew they were the only ones being targeted. The decision to target demonstrators in no way lessens the impairment of Mr. Figueiras’s rights.

[125] Second, the application judge explicitly gave no weight to the words the officers used in exercising their powers and instead focused only on their conduct. In my view, the two cannot be so easily separated.

[126] Sgt. Charlebois justified his demand to search Mr. Figueiras’s bag by explaining, “This ain’t Canada right now” and “There’s no civil rights here in this area.” This was, as the application judge found, both an incorrect statement of the law and an improper description of the role of the police. In my view, the

officers' remarks further undermine the reasonableness of their conduct, and aggravate the harm to Mr. Figueiras's liberty.

[127] Finally, the application judge's reliance on *Clayton* was to a large extent misplaced, and he erred in his application of *Brown* to the present case. *Clayton* involved the investigation of a serious ongoing crime, and was not a preventive policing case; that alone is a compelling reason to distinguish it from the facts before us. But *Clayton* also involved a more carefully tailored police response than was employed here. The officers in *Clayton* did not search everyone who was stopped by their checkpoint. Instead, they conducted a brief investigative detention by asking motorists a few questions, and only if the behaviour of those stopped gave rise to further suspicion did they initiate a search. Here, Sgt. Charlebois's team searched everyone they stopped, regardless whether there were particularized grounds to justify a search.

[128] As to *Brown*, the application judge found that it was distinguishable, since he found that five of the six factors that Doherty J.A. relied on in that case were not present on the facts before him. In *Brown*, at p. 250, Doherty J.A. highlighted the following six factors, which undermined the basis for a finding that the police had acted pursuant to their ancillary common law powers:

> (1) Any apprehended harm was not imminent;
>
> (2) 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;
>
> (3) 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;
>
> (4) 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;
>
> (5) 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
>
> (6) [T]he 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.

[129] The application judge found, at para. 21, that the facts before him addressed five of the six concerns enunciated in *Brown* (the application judge's reasons do not address the fourth factor, namely the importance of the liberties interfered with):

> At para. 77 of the *Brown* decision the Court of Appeal noted six factual deficits in the justification tendered by the police. At least five of the facts that did not exist in the *Brown* case do exist in this case. [Factor 1] Here, the apprehended harm was imminent. [Factor 2] The apprehended harm was specifically identifiable breaches of the peace, rioting, property damage, looting, and efforts to unlawfully disrupt the G20 summit

> near the security fence in the downtown financial core of Toronto. [Factor 3] The police concern was not based on amorphous lifestyle similarities of members of a biker gang, but on similar acts committed just the day before in the same places which were clearly threatened again. [Factor 5] The denial of access to those with a closed bag to within a block of the perimeter of the G20 summit site was a minimal intrusion on the applicant's right to move about freely. [Factor 6] Finally, alternative measures, *i.e*. a large police presence, had not succeeded the day before in preserving the peace. In my view, the criteria listed by the Court of Appeal in *Brown* are met in this case and therefore support the conclusion that was not available on the facts in that case.

[130] In effect, the application judge found that the facts before him were a mirror-image reversal of those in *Brown*. I disagree. Many of the concerns raised in *Brown* are also present here.

[131] Granted, some concerns are satisfied on these facts. First, for the purposes of this appeal, I accept that it was open to the application judge to find that the risk of harm was "imminent." Second, I agree that the police sought to prevent a specific and identifiable harm, namely a repetition of the previous day's disorder and violence. The events of the previous day provided police with sufficient specificity. However, with the exception of these two factors, the remaining problematic factors that were highlighted in *Brown* remain unaddressed here.

[132] With respect to the third factor, the police did not have a particularized concern that could justify stopping Mr. Figueiras and his friends. Instead, police

stopped individuals on the basis of generalized “lifestyle” concerns. Targeting activists and demonstrators is no more precise than targeting members of a motorcycle club. In fact, “demonstrators” are arguably a much broader and more amorphous group than the members of a particular motorcycle club.

[133] Turning to the fourth factor, the liberty interests at stake here include both foundational common law civil liberties and fundamental constitutional freedoms. The common law liberty infringed here was the right to circulate freely in the community, just as in *Brown*. In addition, unlike in *Brown*, the police stops here had both the effect and the *intent* of infringing freedom of expression.

[134] On the fifth factor, there was a substantial interference with liberty, both with respect to the number of interferences and their severity. A single team of police officers stopped between 50 and 100 people. This cannot be characterized as a minor or trivial number of stops. Additionally, for the reasons outlined above, these interferences were substantial. In terms of timing alone, the videos submitted by Mr. Figueiras document that the police encounters lasted more than seven minutes. Even after Mr. Figueiras and his friends turned back the way they came, the police tailed them for half a block, thereby prolonging the encounter.

[135] With respect to the sixth factor, the police conduct here was unnecessary to keep the peace. As I explained earlier, the impugned police conduct was

neither rationally connected to the performance of a police duty, nor was it effective in accomplishing that duty.

[136] Finally, I would add that searches played a key role in the police power exercised here. By contrast, the police in *Brown* did not conduct systematic searches of those stopped.

[137] In light of the above, *Brown* is an imperfect authority to support the legitimacy of the police conduct at issue. The application judge erred in law by relying on it to justify his application of the ancillary powers doctrine.

(4) Conclusion on *Waterfield*

[138] The police power purportedly exercised here falls short of meeting the *Waterfield* test when it is weighed against the significant infringement of Mr. Figueiras's liberty interests. The actions taken by Sgt. Charlebois and his team were not reasonably necessary and had little, if any, impact in reducing threats to public safety, imminent or otherwise. Had the authorities responsible for policing on June 27, 2010, determined that, based on intelligence they had gathered, effective exclusion zones such as were created in *Knowlton* were necessary, and steps were taken to create and enforce them, the result may have been different. This is not, however, the factual matrix we are presented with.

[139] Since I have concluded that the police did not have the power to target apparent demonstrators and require that they submit to a search in order to

continue down a public street, it follows that the respondents' interference with Mr. Figueiras's common law liberty and s. 2(b) *Charter* rights was not prescribed by law. As a result, s. 1 of the *Charter* has no application and cannot be used to justify the breaches. A declaration should issue accordingly.

(5) The tort of battery

[140] The application judge described Sgt. Charlebois's "touching" of Mr. Figueiras as "*de minimis* at worst" (at para. 31). He also found that Sgt. Charlebois's actions were protected by s. 25(1) of the *Criminal Code*.

[141] In my view, those findings cannot stand. First, a review of the video demonstrates that the contact is much more than a "touching". Mr. Figueiras accurately describes the encounter in his affidavit:

> Detective Charlebois then suddenly grabbed me by putting his left arm all the way around my back to the opposite shoulder and grasping my shirt and the shoulder strap of my backpack. He pulled me in towards him and leaned down so that his face was within approximately three inches of my face, and stated "you don't get a choice." He then pushed me away and told me to "get moving."

[142] The tort of battery is committed whenever someone intentionally applies unlawful force to the body of another (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 246). There is no requirement to prove fault or negligence (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 8-10). Nor is there a requirement to prove damage or injury (*Norberg*, at

p. 263). Relatively simple acts can constitute a battery, such as restraining a person by grabbing their arm (*Collins v. Willock*, [1984] 1 W.L.R. 1172 (Eng. Div. Ct.), at p. 1180), or maliciously grabbing someone's nose (*Stewart v. Stonehouse*, [1926] 2 D.L.R. 683 (Sask. C.A.), cited in *Scalera*, at para. 16).

[143] However, not every act of physical contact is a battery. As the Supreme Court has put it, battery requires "contact 'plus' something else" (*Scalera*, at para. 16). That is, there must be something about the contact that renders that contact either physically harmful or offensive to a person's reasonable sense of dignity (*Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.), at p. 423).

[144] The classic example of non-actionable conduct is tapping someone on the shoulder to get that person's attention, or the regular jostling that occurs in any crowded area. Something more than that is required to constitute a battery.

[145] The contact with Mr. Figueiras in this case was more than just a "*de minimis*" touching. It was the kind of unnecessary manhandling that, in my view, would offend the dignity of a person and serve to intimidate that person. As a result, I find that the elements of the tort of battery have been made out.

[146] The sole defence raised to excuse officer Charlebois's conduct was s. 25(1) of the *Criminal Code*. This section provides a limited form of protection to police officers who use force while discharging their duties. It reads as follows:

> 25(1) *Every one who is required or authorized by law* to do anything in the administration or enforcement of the law
>
> …
>
> (b) as a peace officer or public officer,
>
> …
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. [Emphasis added.]

[147] I have emphasized the opening words of s. 25(1) because they make it clear that this section cannot be relied on if the officer does not possess statutory or common law authority for his or her actions.

[148] This is illustrated by this court's decision in *Hudson v. Brantford Police Services Board* (2001), 204 D.L.R (4th) 645. In that case, this court considered a civil claim brought by a plaintiff who was arrested by officers who had entered his home without a warrant and without any common law power of entry. In its decision, the court found that the officers' entry was unlawful, and rejected a defence based on s. 25(1). At paras. 24 and 26, this court held as follows:

> In effect, s. 25(1) protects the officer from civil liability for reasonable mistakes of fact and justifies the use of force. *It does not protect against reasonable mistakes of law, such as mistake as to the authority to commit a trespass to effect an arrest*.
>
> …

> Despite her findings of fact and law concerning the illegality of the entry and the arrest, the trial judge dismissed the claim because of her view that under s. 25 and at common law it is a defence if the officers are acting in good faith and on reasonable and probable grounds.… *[T]his is too broad an application of s. 25(1). The issue is not whether the officers were acting unreasonably or in bad faith generally but whether they had authorization to trespass. They did not, and s. 25(1) affords them no defence*. [Emphasis added.]

[149] This court's interpretation of s. 25(1) has been followed by the Manitoba Court of Appeal: *Tymkin v. Ewatski*, 2014 MBCA 4, 299 Man. R. (2d) 294, at para. 122, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 75.

[150] As I have concluded that Sgt. Charlebois lacked any common law police power to stop Mr. Figueiras and require that he submit to a search in order to proceed down University Avenue, he cannot rely on s. 25(1) to shield him from civil liability.

[151] In any event, even if Sgt. Charlebois was authorized to stop Mr. Figueiras and demand that he submit to a search, I do not accept that the grabbing and pushing that occurred here were "necessary" to achieve this purpose.

[152] Sgt. Charlebois committed the tort of battery.

CONCLUSION

[153] I would allow the appeal. The appellant asked only for declaratory relief. Accordingly, I would grant a declaration that the respondents violated Mr. Figueiras's common law right to travel unimpeded on a public highway, and that

they also violated his *Charter* right to freedom of expression. I would also declare that the respondent Sgt. Charlebois committed the tort of battery.

[154] I would award Mr. Figueiras his costs here and in the court below, each fixed in the amount of $5,000, inclusive of disbursements and applicable taxes.

Released: (PR) March 30, 2015 “Paul Rouleau J.A.”

“I agree K. van Rensburg J.A.”

“I agree G. Pardu J.A.”