S.C.C. File No. 38087

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

RANDOLPH (RANDY) FLEMING

Appellant

- and -

HER MAJESTY THE QUEEN in the RIGHT OF THE PROVINCE OF ONTARIO, PROVINCIAL CONSTABLE KYLE MILLER OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE RUDY BRACNIK OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE JEFFREY CUDNEY OF THE ONTARIO PROVINCIAL POLICE , PROVINCIAL CONSTABLE MICHAEL C. COURTY OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE STEVEN C. LORCH OF THE ONTARIO PROVINCIAL POLICE, PROVINCIAL CONSTABLE R. CRAIG COLE OF THE ONTARIO PROVINCIAL POLICE and PROVINCIAL CONSTABLE S. M. (SHAWN) GIBBONS OF THE ONTARIO PROVINCIAL POLICE

Respondents

- and -

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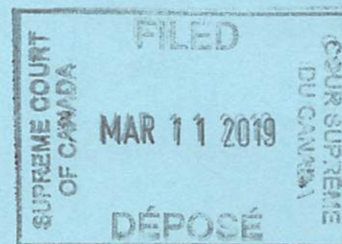
Interveners

FACTUM OF THE INTERVENER, CANADIAN CONSTITUTION FOUNDATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)



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INDEX

TABLE OF CONTENTS

PAGE

PART I— OVERVIEW 1

PART II— STATEMENT OF QUESTION IN ISSUE 2

PART III— STATEMENT OF ARGUMENT 2

PART IV— SUBMISSIONS CONCERNING COSTS 10

PART V— ORDER REQUESTED 10

PART VI— TABLE OF AUTHORITIES 11

PART I—OVERVIEW

1. Freedom of expression exists to protect the dissent.[1] As this case illustrates, political expression may be controversial, so much so that it sparks hostility in others. Such hostility may ripen into an imminent breach of the peace. When it does, the exercise by the police of their common law power of preventative arrest risks giving the "heckler's veto" the force of law.[2]

2. The Canadian Constitution Foundation (the "**CCF**") intervenes to ask that this Court reject such state-sponsored censorship, save in narrow situations in which the speaker's incitement to violence is such that their expression is not protected under s. 2(b) at all. While the police may exercise a common law power of arrest to halt violence or threats thereof, they should not do so in a way that limits expression that is constitutionally guaranteed.

3. Section 2(b) does not contain internal limitations. This distinguishes it from other *Charter* rights, such as the right to be free from "unreasonable" searches and seizures in s. 8, or from "arbitrary" detention in s. 9. The exercise of auxiliary police powers cannot infringe these other, internally limited *Charter* rights and yet be lawful at common law. Because s. 2(b) lacks internal limitations, however, it can be infringed by an ancillary police power even when the exercise of that power might otherwise meet the test for authorization at common law. This is a problem because, in the context of police activity, limitations on s. 2(b) should be accepted only when they arise from delegated statutory authority with precise and accessible limits, not from the exercise of arbitrary, ancillary discretion.

4. This appeal requires the Court to address this distinctive feature of the s. 2(b) right. It should do so by recognizing that the exercise of a common law police power that interferes with freedom of expression is necessarily unlawful, regardless of whether it meets common law standards such as minimal impairment and proportionality. The contrary approach would chill

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[1] See *R. v. Zundel*, [1992] 2 S.C.R. 731, at 752-753; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 826-27, per McLachlin J. (dissenting); *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at 968-969, per McLachlin J. (dissenting in part); M. Heath, "Policing and Self-Policing in the Shadow of the Law" (1999), Law in Context 15, at 16, CCF BOA, tab 5.

[2] G. Wright, "The Heckler's Veto Today" (2017), 68:1 Case Western L. Rev. 159, at 159.

lawful expression and result in a significant judicial expansion of the powers of police. This Court should reject it.

PART II—STATEMENT OF QUESTION IN ISSUE

5. This appeal asks the Court to define the limits of the common law police power to arrest an individual to prevent a breach of the peace. Specifically, the question is whether the lawfulness of such a preventative arrest, when the arrested individual is engaged in *Charter*-protected expression before a "hostile audience", turns on minimal impairment and proportionality under the rubric of the "*Waterfield* test". The CCF submits that the answer is "no", because the *Waterfield* test is not the proper governing standard in such cases.

PART III—STATEMENT OF ARGUMENT

6. Since the English Court of Appeal first articulated the common law test for the ancillary powers of police officers in *R. v. Waterfield*,[3] this Court has applied the test to determine whether interferences with an individual's liberty or property were authorized in several contexts. Most recently, in *Reeves*, Moldaver J. (concurring) summarized the test as follows:

> (1) Does the police conduct at issue fall within the general scope of their statutory or common law duties? Common law duties include keeping the peace, preventing crime, and protecting life and property.
>
> (2) Does the conduct involve a justifiable use of police powers associated with that duty? The conduct is justifiable if it is reasonably necessary, with regard to:
>
> > (a) the importance of the performance of the duty to the public good;
> >
> > (b) the necessity of the interference with an individual's liberty or property for the performance of the duty; and
> >
> > (c) the extent of the interference.[4]

7. The ancillary powers to which this test has been applied include the common law police power to arrest or detain individuals in order to prevent a breach of the peace.[5]

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[3] [1964] 3 All E.R. 659 (Eng. C.A.), CCF BoA, Tab 2.

[4] *R. v. Reeves*, 2018 SCC 56, ¶78. **See also** *R. v. MacDonald*, 2014 SCC 3, ¶35-37.

[5] *Brown v. Durham Regional Police Force,* 1998 CarswellOnt 5020 (C.A.), ¶57-80, appeal

8. Nonetheless, virtually all of this Court's jurisprudence since the enactment of the *Charter* in which the *Waterfield* test has been considered involved interference by ancillary police powers with either: (a) the right to be secure against "unreasonable" searches or seizures in s. 8; or (b) the right not to be "arbitrarily" detained or imprisoned.[6] These *Charter* rights are different from the freedom of expression in s. 2(b), because they contain ***internal limitations*** on the scope of the right. A person is only entitled to be secure from a search under s. 8 when it is "unreasonable", or free from detention under s. 9 if it is "arbitrary".

9. In contrast, the freedom of expression is ***not*** constrained by the text of s. 2(b). The only limitation imposed on it by the *Charter* is the general limitation in s. 1: "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

10. This distinction has important consequences for the application of the *Waterfield* test when a common law police power is used to interfere with freedom of expression. In the case of *Charter* rights with internal limitations, like ss. 8 and 9, the *Waterfield* test is a perfectly suitable framework for determining if the exercise of the power is lawful. A conclusion that the police action is "reasonably necessary" to carry out the particular duty *ipso facto* entails that the search or detention, while "***prima facie*** an unlawful interference with an individual's liberty or property",[7] is not in fact "unreasonable" or "arbitrary". As this Court explained in *Clayton*:

> ***If the police conduct in detaining and searching*** Clayton and Farmer ***amounted to a lawful exercise of their common law powers, there was no violation of their Charter rights.*** If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the right under the Charter not to be arbitrarily detained or subjected to an unreasonable search or seizure.
>
> The following passages from *Mann* are instructive:
>
>> A detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny. Section 9 of the *Charter*, for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that ***a lawful detention is not "arbitrary"*** within the meaning of that provision. Consequently, ***an investigative detention that is carried out in accordance with the common law***

discontinued, [1999] S.C.C.A. No. 87.

[6] *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Mann*, 2004 SCC 52; *R. v. Clayton*, 2007 SCC 32; *R. v. Kang-Brown*, 2008 SCC 18; *R. v. Aucoin*, 2012 SCC 66; *R. v. MacDonald*, 2014 SCC 3.

[7] *R. v. Mann*, 2004 SCC 52, ¶24, *emphasis added.*

> ***power recognized in this case will not infringe the detainee's rights under s. 9 of the Charter.***
>
> …
>
> Thus, ***a detention which is found to be lawful at common law is, necessarily, not arbitrary under s. 9 of the Charter. A search done incidentally to that lawful detention will, similarly, not be found to infringe s. 8 if the search is carried out in a reasonable manner and there are reasonable grounds to believe that police or public safety issues exist.***
>
> The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from *Charter* scrutiny… The common law regarding police powers of detention, developed building on ***R. v. Waterfield*,** [1963] 3 All E.R. 659 (C.A.), and *Dedman v. The Queen*, [1985] 2 S.C.R. 2, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.[8]

11. Properly applied, therefore, the *Waterfield* test ensures that ancillary police powers that meet its requirements will not result in an infringement of internally limited *Charter* rights.

12. Freedom of expression is different. It is not internally limited under s. 2(b). As a result, the conclusion that a common law police power satisfies the *Waterfield* test does not also mean that s. 2(b) is not infringed. Instead, the *Waterfield* test in such cases can only operate as a substitute for s. 1 of the *Charter*. Rather than ensure that no infringement of a *Charter* right takes place, as it does with respect to ss. 8 and 9, the common law justifiability inquiry is asked to do different work where s. 2(b) is engaged. Specifically, the question at the second step of the *Waterfield* test implicitly morphs from "is the *Charter* right infringed?" to "is the infringement a reasonable, demonstrably justifiable limit?" As Rouleau J.A. put it in *Figueiras*:

> 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… 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… ***As a result, when police act in accordance with their common law ancillary powers, the***

[8] *R. v. MacDonald*, 2014 SCC 3, ¶19-21, *underlining in original, bolding and italics added.*

> ***internal limits of these sections are respected, and there is no Charter breach that must be justified by s. 1.***
>
> ***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****…* Thus, to the extent that the police conduct in this case infringed Mr. Figueiras' 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).[9]

13. The Appellant's submissions make the point. He seeks to import considerations of minimal impairment and proportionality into the second branch of the *Waterfield* test, which are the standards that govern the s. 1 analysis under *Oakes*. This would effectively convert *Waterfield* into a s. 1 analysis, and transform common law police powers into a vehicle for infringing *Charter* rights – but only where certain rights are concerned.

14. There are fundamental difficulties with this approach. The modified *Waterfield* test would operate differently – and accord less protection to individual liberty – when a common law arrest infringed s. 2(b), or another *Charter* right without internal limitations. Where common law police powers engage internally limited *Charter* rights, a common law justification (as opposed to s. 1 justification) would continue to ensure that those *Charter* rights' internal limits were respected. Only with respect to internally limitless guarantees, like the freedom of expression, would the modified *Waterfield* test countenance the infringement of a *Charter* right.

15. The Appellant seeks to hold the police in this case to a higher standard than the majority of the Court of Appeal did. Yet, because he relies on the *Waterfield* framework, his proposed approach would create a double standard for s. 2(b), the results of which would be paradoxical; the *Waterfield* test would end up being less protective of the freedom of expression than it would be of other, internally limited *Charter* rights. The lawfulness of an arrest would turn not on whether no *Charter* rights were thereby infringed – as it does with respect to ss. 8, 9, and 10 – but rather

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[9] *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208, ¶52-53 (and ¶51), *emphasis added*. **See also** R. 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, at 365.

on whether the police's infringement of the s. 2(b) right was justified, effectively on the s. 1 standard. This would be an unwelcome, and inappropriate, development in the law.

16. The s. 1 analysis is intended to apply to limits on *Charter* rights that are "prescribed by law". As this Court pointed out in *Doré*, this makes s. 1 "poorly suited" to reviewing *ad hoc* exercises of government power:

> … ***Some of the aspects of the Oakes test are, in any event, poorly suited to the review of discretionary decision***s, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be ***"prescribed by law"*** has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are ***sufficiently accessible and precise to those to whom they apply***"…[10]

17. The requirement that *Charter* limits be "sufficiently accessible and precise to those to whom they apply" exists to "preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves".[11] It is clear that the *Waterfield* test does not meet this standard. As Doherty J.A. pointed out in *Brown*:

> ***Those who prefer hard and fast rules are troubled by the fact-specific nature of the ancillary power doctrine as enunciated in Waterfield***, adopted in *Dedman* and applied in *Simpson*. Obviously, ***clear and readily discernible rules governing the extent to which the police can interfere with individual liberties are most desirable***. The infinite variety of situations in which the police and individuals interact and the need to carefully balance important but competing interests in each of those situations make it ***difficult, if not impossible, to provide pre-formulated bright-line rules which appropriately maintain the balance between police powers and individual liberties***. …[12]

18. The consequence of this lack of clarity will be chilled expression and even self-censorship. A controversial speaker might reasonably fear that the police will choose to arrest her rather keep dissenters from provoking public disorder by seeking to shut down her speech. As the Federal Court of Appeal put it more than three decades ago in *Luscher*:

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[10] *Doré v. Barreau du Québec*, 2012 SCC 12, ¶37.

[11] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, ¶53 (and ¶50, 73).

[12] *Brown v. Durham Regional Police Force,* 1998 CarswellOnt 5020 (C.A.), ¶62, appeal discontinued, [1999] S.C.C.A. No. 87, *emphasis added*.

> … ***If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is in fact lawful and not prohibited.*** Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally-protected rights and freedoms. While there can never be absolute certainty, ***a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences***.[13]

19. Further, the framework which the *Doré* Court adopted to replace the s. 1 analysis applies only to "[a]n administrative decision-maker exercising a discretionary power under his or her ***home statute***".[14] In contrast, the ancillary powers of police officers arise from ***common law***, not delegated grants of statutory discretion.

20. This is underscored by the ancillary power at issue here. Parliament's decision not to authorize arrests to prevent breaches of the peace was not an oversight. The *Criminal Code* empowers police to make preventative arrests in other contexts, such as where there are reasonable grounds to believe that the arrestee is about to commit an indictable offence.[15] However, so far as breaches of the peace are concerned, the police officer must either witness the arrestee committing the breach, or else reasonably believe that the arrestee is about to join in or renew it.[16] These restrictions accord with Doherty J.A.'s observation in *Brown* that "[a]ctions which amount to a breach of the peace may or may not be unlawful standing alone".[17]

21. Finally, the use of *Waterfield* to limit *Charter* rights through a modified s. 1 analysis inspired by *Doré* ignores the exceptional nature of the powers at issue. Given the "authoritative and coercive character of police action",[18] the police are not akin to administrative tribunals. Instead, they are entrusted with the most intrusive powers available to the state. Allowing those

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[13] *Luscher v. Deputy Minister of National Revenue (Customs & Excise)*, 1985 CarswellNat 196 (F.C.A.), CCF BoA, Tab1, ¶11, *emphasis added.*

[14] *Doré v. Barreau du Québec*, 2012 SCC 12, ¶47, *emphasis added*. **See also** *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, ¶57-58.

[15] *Criminal Code,* s. 495(1)(a).

[16] *Criminal Code*, s. 31(1). **See also** J. Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003), 48 McGill L.J. 225, at 239.

[17] *Brown v. Durham Regional Police Force,* 1998 CarswellOnt 5020 (C.A.), ¶73, appeal discontinued, [1999] S.C.C.A. No. 87. **See also** *R. v. K.B.*, 2004 MBCA 97, ¶41.

[18] *R. v. Dedman*, [1985] 2 S.C.R. 2 at 28.

powers to be exercised in interference with *Charter* rights not internally limited by the *Charter* itself will create a chill on activity that is fundamental to the health of Canadian democracy.

22. In this case, for instance, the police arrested a citizen who was engaged in political expression, lawful in itself, because the police became apprehensive that it may provoke a hostile response in others. Given "the intimidating nature of police action and uncertainty as to the extent of police powers",[19] an approach to common law preventative arrests that accepts such limits on the freedom of expression, without any legislative authorization or prescribed standards beyond the arbitrary discretion of police officers, risks the criminalization of dissent.[20] This will have significant negative consequences for the rule of law. As Huscroft J.A. observed below:

> ***Political expression will often be provocative, and so considered problematic, but there is no doubt that its protection is a core purpose of freedom of expression***. I emphasize this point in order to reinforce the ***importance of protecting the rights of those who would take part in political protest.*** Although the police may, in exceptional circumstances, arrest someone to avoid a breach of the peace even if that person has broken no law, ***police efforts should be directed towards those who would threaten violence – not those exercising their constitutionally protected rights to protest peacefully***.[21]

23. The solution is not to enlarge the *Waterfield* test by incorporating elements of minimal impairment and proportionality into its second step, as the Appellant suggests. Nor is it to simply accept that the existing *Waterfield* framework authorizes common law police powers that infringe *Charter* rights without internal limits, like s. 2(b), which is the Respondent's position.

24. Instead, the Court should clarify that *Waterfield* is limited to ensuring that ancillary powers are not exercised in a way that infringes internally limited *Charter* rights like ss. 8 and 9 at all. In cases where the liberty interest at stake is s. 2(b), which operates without internal limitation, the *Waterfield* test should be inapplicable and any interference with the right by a common law police power will be an unauthorized infringement.

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[19] *R. v. Dedman*, [1985] 2 S.C.R. 2 at 29.

[20] F. Schauer, "The Hostile Audience Revisited" (December 2017), Knight First Amendment Institute of Columbia University, ''Emerging Threats series'' (2017), at 1, CCF BoA, Tab 3; J. Esmonde, "The Policing of Dissent—The Use of Breach of the Peace Arrests at Political Demonstrations" (2002), 1 J.L. & Equal. 246 at 249, 275, CCF BOA, tab 1.

[21] *Fleming v. Ontario*, 2018 ONCA 160, ¶100 (dissenting), *emphasis added.*

25. This will not leave the police powerless to arrest a speaker who openly incites others to violence. The Court has already held that violence and threats of violence are beyond the scope of s. 2(b)'s protection.[22] If the *Charter* right is not engaged, there can be no infringement.

26. In this regard, American jurisprudence offers helpful insights. Because the First Amendment to the U.S. Constitution is not subject to an equivalent to s. 1, American courts devote their attention to circumscribing the freedom of speech, rather than to justifying limits on it.[23] The result is a rich body of case law from which Canadian courts may draw in identifying expressive conduct that is not protected by s. 2(b) – i.e., conduct with which police may lawfully interfere in making a preventative arrest.

27. American courts have long held that "fighting words" – those "which by their very utterance inflict injury or tend to incite an imminent breach of the peace"[24] – "may be regulated because of their constitutionally proscribable content".[25] Still, the threshold is high; only that which "incit[es] or produc[es] imminent lawless action and is likely to incite or produce such action" is excluded from the First Amendment's protection.[26] Expression short of violence is protected,[27] and "[i]t is firmly settled that… the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers… or simply because bystanders object to peaceful and orderly demonstrations".[28]

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[22] *R. v. Khawaja*, 2012 SCC 69, ¶70-71. **See also** *Bracken v. Fort Erie (Town)*, 2017 ONCA 668, ¶31.

[23] *R. v. Keegstra*, [1990] 3 S.C.R. 697, at 743-743, per Dickson C.J.; *Reference re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, at 498; G. Huscroft, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" (2006), 25:1 U. Queensland L.J. 181, at 185-187; A. Borovoy et al., "Language As Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation" (1988), 37:2 Buff. L. Rev. 337, at 348-349.

[24] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[25] *Rav v. St. Paul*, 505 U.S. 377, 383 (1992).

[26] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[27] See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978).

[28] *Bachellar v. Maryland*, 397 US 564, 567 (1970). **See also:** *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

28. The U.S. Supreme Court has framed the limits of constitutional protection in relation to violence by recognizing that "[i]t is one thing to say that the police cannot be used... for the suppression of unpopular views, and another to say that, when... the speaker passes the bounds of argument ... and undertakes incitement to riot, they are powerless to prevent a breach of the peace."[29] This Court should draw a similar distinction here.

29. Unless an individual's expression amounts to incitement – or, indeed, to violence – the right to free expression cannot abide "prior restraints".[30] In Canada, in all other circumstances, the s. 2(b) guarantee applies, and the common law cannot authorize the police to intervene.

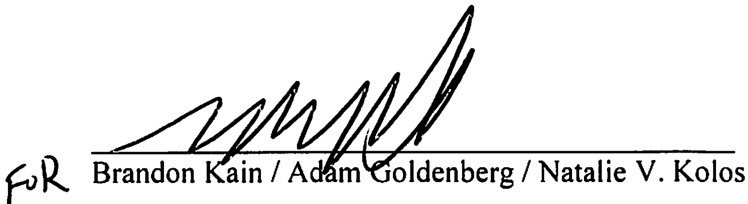
PART IV—SUBMISSIONS CONCERNING COSTS

30. The CCF requests that no costs be awarded either for or against it.

PART V—ORDER REQUESTED

31. Further to the Order of Brown J., dated February 14, 2019, the CCF requests five minutes to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2019.



FOR Brandon Kain / Adam Goldenberg / Natalie V. Kolos

[29] *Feiner v. New York*, 340 U.S. 315, 321 (1951).

[30] See, e.g., *Nebraska Press Assn. v. Stuart* (1976), 427 U.S. 539; *Near v. Minnesota* (1931), 283 U.S. 697.

PART VI—TABLE OF AUTHORITIES

Authority	**Paragraph(s) Referenced in Memorandum of Argument**
Bachellar v. Maryland, 397 US 564 (1970)	27
Bracken v. Fort Erie (Town), 2017 ONCA 668	25
Brandenburg v. Ohio (1969), 395 U.S. 444	27
Brown v. Durham Regional Police Force, 1998 CarswellOnt 5020 (C.A.), appeal discontinued, [1999] S.C.C.A. No. 87	7, 17, 20
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892	1
Chaplinsky v. New Hampshire (1942), 315 U.S. 568	27
Collin v. Smith (1978), 578 F.2d 1197 (7th Cir.)	27
Cox v. Louisiana (1965), 379 U.S. 536	27
Doré v. Barreau du Québec, 2012 SCC 12	16, 19
Feiner v. New York (1951), 340 U.S. 315	28
Figueiras v. Toronto Police Services Board, 2015 ONCA 208	12
Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component, 2009 SCC 31	17
Hess v. Indiana (1973), 414 U.S. 105	27
Law Society of British Columbia v. Trinity Western University, 2018 SCC 32	19
Luscher v. Deputy Minister of National Revenue (Customs & Excise), 1985 CarswellNat 196 (F.C.A.)	18
Near v. Minnesota (1931), 283 U.S. 697	29
Nebraska Press Assn. v. Stuart (1976), 427 U.S. 539	29
R. v. Aucoin, 2012 SCC 66	8
R. v. Clayton, 2007 SCC 32	8
R. v. Godoy, [1999] 1 S.C.R. 311	8
R. v. K.B., 2004 MBCA 97	20
R. v. Kang-Brown, 2008 SCC 18	8
R. v. Keegstra, [1990] 3 S.C.R. 697	1, 26
R. v. Khawaja, 2012 SCC 69	25

Authority	**Paragraph(s) Referenced in Memorandum of Argument**
R. v. MacDonald, 2014 SCC 3	6, 8, 10
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Secondary Sources	
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F. Schauer, "The Hostile Audience Revisited" (December 2017), Knight First Amendment Institute of Columbia University, ‘‘Emerging Threats series’’ (2017), at 1	22
G. Huscroft, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" (2006), 25:1 U. Queensland L.J. 181, at 185-187	26
G. Wright, "The Heckler's Veto Today" (2017), 68:1 Case Western L. Rev.159, at 159	1
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J. Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003), 48 McGill L.J. 225, at 239	20
M. Heath, "Policing and Self-Policing in the Shadow of the Law" (1999) Law in Context 15, at 16	1
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Criminal Code, R.S.C. 1985, c. C-46, s. 31(1), 495(1)(a)	20