The Ancillary Powers Doctrine: Curbing Non-Existent Police Powers

The common law ancillary powers doctrine potentially gives the police new powers on a case-by-case basis, in order to fill gaps in the law.[1] The thing is, these ancillary police powers are a difficult topic to discuss, as they do not yet actually exist as specific powers. They are only created as each case is judged, and this creates a "legal grey area"[2] where the courts must decide what constitutes an ancillary police power. In this instance, Fleming v Ontario 2019 SCC 45, the power discussed is a power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others. This power would involve a significant interference with an individual's liberty; their ability to move throughout society free from state interference. As this power is exercised, and the accused faces courts that retroactively create a police power,[3] how far are the courts willing to go in allowing the police new ancillary powers? With a doctrine such as this, in which laws that do not yet exist are discussed, where is the line drawn as to where the police can or cannot go?

One of these laws appears in the case of Fleming v Ontario, where Randolph Fleming was walking to a counter-protest flag rally in Caledonia, Ontario in 2009. This flag rally was in response to the First Nation of Six Nations of the Grand River protestor's occupation of Crown land. As violence had occurred between the two sides in the past, the police were not to allow counter protestors such as Fleming onto the Six Nations property, and the counter-protestors were aware of this. As Fleming was walking down a street adjacent to the Six Nations property towards the protest, he was carrying a Canadian flag atop a wooden pole. When police officers saw Fleming on the road, they sped towards him in their vehicles with the intention of placing themselves in between Fleming and the Six Nations property entrance. The officers were yelling, and as Fleming did not want to be in the way of the vehicles, he stepped onto the occupied property. This caused a reaction in some of the Six Nations protestors, who began to move towards Fleming. Fleming did not realize the police officers were yelling at him, and he did not believe he was doing anything wrong. As the protestors moved closer to Fleming, the police entered the property and told Fleming he was under arrest to prevent a breach of the peace. Fleming refused to drop the flag, so the officers forced him to the ground, handcuffed him, placed him in an offender transport van, and moved him to a jail cell, where he was released two and a half hours later.[4] Fleming did not resist or obstruct the police officers; he just did not want to put down his flag. Fleming claimed damages for assault and battery, wrongful arrest and false imprisonment, as well as punitive damages for violation of his rights under ss. 2(b), 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms*.

The ancillary powers doctrine was applied, and the courts had to ask if the police conduct at issue falls within the general scope of a statutory common law police duty, which includes preserving the peace, preventing crime and protecting life and property recognized at common law. The court then had to ask whether the conduct involved a justifiable exercise of police powers associated with that duty. They had to discern whether the use of force, arrest, and imprisonment of Fleming was reasonably necessary. The police claimed to arrest Fleming for his own protection, but there was not a reasonable risk that he was about to be harmed, nor was there a realistic impending breach of peace. Fleming was simply trying to get out of the way. None of the Six Nations protestors were carrying weapons, nor did they utter threats, and Fleming did not say anything to them. During

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[1] Richard Jochelson, Kirsten Kramar & Mark Doerksen, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Halifax & Winnipeg: Fernwood Publishing, 2014) at 43.
[2] *Ibid*.
[3] *Ibid* at 58.
[4] Fleming v Ontario 2019 SCC 45 at 4 [*Fleming*].

Fleming's arrest, when he was forcibly handcuffed, he stated that he suffered severe pain and lasting injury.[5] In this instance, instead of using the purported police power to arrest someone who is acting lawfully in order to prevent an apprehended breach of the peace by others, why not just speak to Fleming in a reasonable manner? As the police officers got closer, Fleming may have heard them more clearly, and the protestors were not doing anything wrong either.

Although the protests between Six Nations and the counter-protesters had become high stress situations resulting in violence in the past, regardless of rising tensions in Fleming's situation, it was reasonable to assume that a violent outburst, or breach of peace, was not about to occur. The Six Nations protestors did not utter threats, and the police were already standing less than ten feet away. They had the capacity and the opportunity in this situation to address it verbally without resorting to a physical intervention, yet the only violence that occurred here was caused by police officers.

Mr. Fleming's safety had been based not on the actual events of the day, but rather on a generalized concern rooted in past violence.[6] The pending police power was judged to fall under the general scope of statutory common law police duties. However, it was not reasonably necessary for the fulfillment of these duties, and it was ruled that an arrest cannot be justified under the ancillary powers doctrine. The court stated that the mere fact of a police action being effective cannot justify its being taken if it interfered with an individual's liberty.[7] If this was allowed, it could be considered a "recipe for a police state, not a free and democratic state."[8] Fleming had not actually committed an offence in entering the Six Nations property. The police argued that the ancillary power to arrest someone who is acting lawfully in order to prevent a breach of the peace by other persons, was validly utilized here. However, they had relied on a power that does not exist. As Fleming was "standing there for a few seconds with a Canadian flag,"[9] the police did not have legal authority to arrest him, and his arrest being argued as preventing violence holds no ground here as the assumed violence itself was unlikely to occur.

As the common law power that the police argue in this case was non-existent, any amount of force thought necessary was also non-existent. The Supreme Court ruled that the police officers were found liable for battery, and Fleming's rights under ss. 2(b), 7, and 9 had been violated. Fleming was awarded damages. As ancillary police powers continue to be a topic raised for discussion in Canadian courts, the undetermined police power being excluded here can act as a guideline for administering the ancillary powers doctrine in future cases. It can also help to serve as a guideline for the ways police should address situations such as these, and not resort to force and violence but attempt to mitigate tension in a more peaceful manner. Cases such as this show that the courts are not willing to let police powers grow further than the statutory powers given to them when the situation does not call for it. Although that does not necessarily show where a line is drawn in regard to police powers, it is definitely helpful in narrowing the scope of what can be considered within ancillary police powers.

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[5] Fleming v Ontario, 2019 SCC 45 at para 18 [*Fleming*].
[6] *Ibid* at para 25.
[7] *Ibid* at 8.
[8] *Ibid* at para 98.
[9] *Ibid* at para 24.

Sources:

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