

## Three Significant Supreme Court Cases from 2019: Fleming, Goldfinch and Le

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As 2019 comes to end, it is important to reflect on how Canadian law has changed over the past three hundred and sixty-five days. Specifically, how have Charter issues in criminal law been reconciled and what are the implications? This blog post will outline what I believe to be the three most significant decisions of the Supreme Court of Canada this past year.

### ***R v Fleming:***

*R v Fleming*, the most recent SCC case on Charter issues in Criminal Law has altered the way one analyzes police ancillary powers. Mr. Fleming was protesting the occupation of First Nations land and was headed towards the occupied area carrying a Canadian flag. Knowing that violence had erupted days prior, police presence was concentrated in the 'buffer zone' where Mr. Fleming was located. The police sped towards Mr. Fleming, causing him to climb over a fence into the occupied land. He claimed that the purpose of his actions was to avoid the speeding car. Individuals occupying the land began moving towards Mr. Fleming which raised officer suspicion that a breach of the peace would occur. The police arrested Mr. Fleming. Soon after, the accused filed a civil suit against the police claiming his section 2(b) rights were violated.<sup>1</sup>

To determine whether the arrest was justified, the court reaffirmed the *Waterfield* test set out in *R v Macdonald*. The court concluded law that the police cannot arrest someone who is "acting lawfully in order to prevent an apprehended breach of the peace by others".<sup>2</sup> Mr. Fleming had not done anything unlawful prior to being arrested nor was there evidence that he was about to commit an offence. Therefore, the police were not justified in interfering with the accused's liberty.

In coming to the conclusion, the court stressed that the only recognized common law police powers that justified an interference with liberty were related to a criminal activity. If the court had decided otherwise, it would have had many implications on police ability to arrest individuals who are not committing any type of crime.<sup>3</sup> This is especially important as there is an increased trend of individuals using protest as a form of expression. An example includes the recent Climate Change Strike that occurred across Canada. While none of the protests turned violent, it is now set in law that police cannot arrest people in hopes of shutting down protests that they fear could become violent.

### ***R v Goldfinch:***

Another landmark case of 2019 was *R v Goldfinch*. Mr. Goldfinch was in a 'friends with benefits' relationship with a woman he had previously dated. After a night of drinking, the woman claimed she told Mr. Goldfinch she did not want to have intercourse with him. Despite her contention, he dragged her into the bedroom and forced her to have sex. He was subsequently charged with sexual assault.<sup>4</sup>

Section 276 of the Criminal Code sets out rules regarding what information about a complainant's sexual history should be disclosed.<sup>5</sup> The issue was whether Mr. Goldfinch could tell the jury that he

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<sup>1</sup> *Fleming v Ontario*, 2019 SCC 45 [*Fleming*].

<sup>2</sup> *Ibid* at headnote.

<sup>3</sup> *Ibid*.

<sup>4</sup> *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*].

<sup>5</sup> *Criminal Code*, RSC 1985, c C-46, s 276 [CC].

and the complainant's relationship was one of 'friends with benefits'. It was critical to stress that their relationship had been sexual in nature. The Crown agreed to tell the jury. The Supreme Court of Canada ultimately concluded that the information should not have been disclosed. The information was only useful to suggest that since woman had consented to sex in the past, she had consented that night. However, consent does not carry over from one context to another and must be given at the time of each act.<sup>6</sup>

The significance of this case is tied to Bill C-51 which was introduced to amend provisions of the Criminal Code. The judges in the case affirmed the amended provisions in regard to admissibility of evidence and document disclosure. As stated in the preamble of the Bill;

“ at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant... its admission should be subject to particular scrutiny.”<sup>7</sup>

Sexual assault is seen as a gendered crime as women are most often the victims. Emphasizing a female's sexual history can lead to secondary victimization and has a large effect on a woman's reasonable expectation of privacy. Therefore, the amendment as well as the decision reinforce Parliament's goal of excluding evidence that could perpetuate rape myths and disadvantage victims.

## ***R v Le***

In a case decided in March, *R v Le* impacted the police's ability to detain individuals. Mr. Le was in his backyard with four of his friends when they were approached by officers. They had not been called for a specific reason nor did they have a warrant. They had been notified that the house was a common place for drug dealing. Although the men still had not done anything wrong, Mr. Le's bag was searched and he was arrested for possession of drugs and firearms.<sup>8</sup>

At trial, Mr. Le argued that the items found could not be used as evidence because his Charter rights were violated. Although the judges agreed; the issue that remained was at what moment was Mr. Le detained. The trial judge concluded that he was detained when the bag was searched as the police officers had a reasonable suspicion.<sup>9</sup>

The SCC overturned the decision and reaffirmed that someone is detained when an ordinary person in a similar situation would think they could not leave until they complied with police demands. The court, in their reasoning, discussed racialized communities and their higher contact with police. A member of a racialized community such as Le who lived in a low-income area was more likely to have negative experiences with the police. Therefore, an ordinary person in Mr. Le's situation would be more likely to comply with police orders.<sup>10</sup>

A case such as this is significant as it stresses the importance of equal police actions no matter one's income or racial background. Individuals may have different perceptions of the police as a result of

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<sup>6</sup> *Goldfinch*, *supra* note 4.

<sup>7</sup> Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1<sup>st</sup> session, 42<sup>nd</sup> Parliament, 2017, preamble (Received Royal Assent December 13, 2018).

<sup>8</sup> *R v Le*, 2019 SCC 34 [*Le*].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

their race and prior experiences. Although a police interaction may be short lived, it could have significant implications on individuals' subsequent exchanges with the police and therefore, must be considered in the analysis of police detention.

Although the aforementioned decisions have varied significance, the common thread is that what might have been the law yesterday might not be the law today. As society continues to evolve and technology progresses, one must consider what the law will be ten years from now. Will the Canadian Charter of Rights be interpreted in new ways? Will police exist in their current form, or will artificially intelligent technologies patrol our streets using the ancillary powers doctrine? The future is uncertain and interesting.