

Fleming v. Ontario: Policing Through Common Law Powers

“An intrusion upon liberty should be a measure of last resort.”

Topic Overview

To serve and protect. That is the motto many of us have come to recognize as a staple of policing in Canada today. That motto represents the safeguarding of democratic values like the right to life, liberty, and security of the person that each Canadian citizen is afforded. When those rights are violated by the very people that were appointed to protect them, the legal system in this country is the measure of last resort. It picks up sword and shield to defend against the abuses of power that threaten the values of our system. Unbeknownst to most Canadians, police in this country are afforded powers that go beyond statute. These other powers which are found in the common law can be much more difficult to understand, yet they are still valid policing powers. In *Fleming v. Ontario*, the Supreme Court of Canada (SCC) was faced with determining the legality of an arrest carried out by the Ontario Provincial Police (OPP) against an individual acting lawfully at a protest. The case is highly intriguing because the arresting officers in it rely solely on the aforementioned common law policing powers to justify depriving a lawful citizen of his liberty. This blog attempts to bring some clarity to common law policing powers by exploring the SCC decision in *Fleming v. Ontario, 2019*.

Fleming v. Ontario, 2019 SCC 45

On May 24, 2009, Randolph Fleming was walking down the road to participate in a protest and express his personal opinions around the issues of a land dispute that was occurring in his town of Caledonia, Ontario. As he approached the protest grounds the OPP started to shout commands at him which caused confusion, as he knew that he had done nothing wrong. When he refused to stop walking and give into the OPP commands he was detained by an officer, forced to the ground, and handcuffed. He was subsequently put into the back of a police transport van and taken to a holding cell.

In March 2011, Mr. Fleming filed a statement of claim against the Province of Ontario, and the OPP. He sought damages for assault, battery, wrongful arrest, false imprisonment, and damages for Charter violations of s. 2, 7, 9 and 15¹. The case made its way through the Ontario courts. First stopping at the Ontario Superior Court of Justice, then the Court of Appeal for Ontario, and finally ending up at the Supreme Court of Canada. Many of the issues were resolved in the lower court decisions; however, the one which remained was the most intriguing. The SCC was faced with one major question that revolved around the issue of arrest; did the OPP act lawfully in arresting Mr. Fleming?

Legality and Common Law Powers of Arrest

The police are granted powers in two ways. First, in the form of statute powers which are codified in the Criminal Code of Canada, and second, in the form of common law powers. The latter is a bit foggier as they are not codified in the same way that the Criminal Code of Canada codifies powers. Rather, these powers can be found in case law. For example, looking at case law as per *R v. Mann*

¹ *Fleming v. Ontario, 2019 SCC 45*

(2004), “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.’”² When determining whether or not a policing action which relied on common law authority is a valid power granted to police, the courts will apply the ancillary powers doctrine. The doctrine is a legal test derived of stages that must be passed in order to deem whether the asserted police action was lawful or not. The courts will come to one of two conclusions; the common law power did exist, or the common law power did not exist. If the common law power did not exist, the charges will be dropped, and the accused turned plaintiff may seek criminal and/or civil outcomes against the police and parties involved.

Ancillary Powers Doctrine

The doctrine consists of one preliminary stage, and two main body stages; the second of which is filled with a number of balancing questions. When applying the doctrine, the first (preliminary) stage is simply a definitional analysis of the asserted police power, and the overall liberty interests that are at stake. From here the doctrine is broken down into two stages:

Stage One

The court must ask whether the police conduct at issue falls within the general scope of a statutory or common law police duty.

Stage Two

The court must determine whether the conduct involves a justifiable exercise of police powers associated with that duty. During this stage the court must then ask if the impugned police action was reasonably necessary for the fulfillment of the duty, at which point the court then takes into consideration three factors that must be weighed:

1. The importance of the performance of the duty to the public good;
2. The necessity of the interference with the individual liberty for the performance of the duty;
3. The extent of the interference with individual liberty.³

The Outcome

In applying the ancillary powers doctrine in *Fleming*, the SCC found that there is no common law power to arrest someone who is acting lawfully, in order to prevent an apprehended breach of the peace, and that the acting police officers did not have lawful authority to arrest Mr. Fleming.⁴ The court found that there are statutory powers that would have sufficed in order for police to carry out their duties, and that there was no such common law power for them to arrest Mr. Fleming that day. This case is an important one because it brings to the attention of the average Canadian citizen, who has little-to-no knowledge of the law, an understanding of policing powers in this country. If you were to ask your parents, friends, or coworkers how policing powers are defined, few would point to the Criminal Code of Canada, and even fewer would jump up and say, “well via common law powers of course!” *Fleming v. Ontario* can now serve as a reference point for Canadians to show that this country does indeed have powers afforded to police outside of statute, and furthermore, that the SCC will determine whether given the circumstances, if those common law powers are exercised with lawful authority.

² *R v. Mann*, 2004 SCC 52 at para 26

³ *Fleming*, *supra* note 1

⁴ *ibid* at para 102

