

A Comment on the Fleming 2019 Case

Brenden Roberts

Backstory

The roots of this case stem from a long-lasting dispute over a piece of land, which was occupied by the First Nation of Six Nations of the Grand River but owned by the Crown. Both the occupants, and the locals who opposed their occupation, had engaged in many protests and counter protests over the years, with several leading to violence. Some of the local counter-protestors had planned a flag rally to be held on May 24th 2009 at the land in dispute. The Ontario police became aware of this, and ultimately decided that the two groups should be kept separate, and that none of the locals attending the flag rally would be allowed to step foot onto the property. Both groups were informed of this, as the police wanted to ensure that each side could peacefully protest, but a formal police barrier was not established.

Mr. Fleming

Mr. Fleming was a local resident of the area who wished to participate in the flag rally, as he wasn't happy with the current occupation of the property in question. On the day of the rally, he was walking along a road on the edge of the property. Police cars driving past him turned around with the intention of getting in-between Mr. Fleming and the property so he could not enter it. As they approached him, Mr. Fleming moved onto the side of the road in order to avoid being hit by the cars, and thus entered the property. The officers began to instruct and yell at Mr. Fleming to get off the property, although he did not realize they were talking to him. At the same time, occupants of the land saw that Mr. Fleming had entered the property and began to run towards him, albeit they carried no weapons or threats. In order to avoid what the officer's thought was about to be a violent engagement, they arrested Mr. Fleming. Mr. Fleming fought the charge of obstructing a police officer, and it was eventually dropped. He sued the Ontario government and the police officers involved for general damages for assault, battery, wrongful arrest, and false imprisonment. He also included claims for aggravated or punitive damages and damages for violations of certain rights under the *Canadian Charter of Rights and Freedoms*.

The Issue

The case went to trial, and the judge agreed with Mr. Fleming that his rights were violated and that the police had no power to arrest him in this situation. The judge sided with Mr. Fleming on the claims of false arrest, unlawful imprisonment, and battery. This ruling was appealed, and the Court of Appeal disagreed with the trial judge. The Court of Appeal ordered a new trial on the sole issue of whether excessive force had been used by the police officers when arresting Mr. Fleming. However, the main issue to be determined in this case is whether or not the arrest of Mr. Fleming was lawfully executed, as if it wasn't then any force would be seen as excessive. In this case, the police are arguing that they hold a common law power to arrest an individual in Mr. Fleming's situation, who is not committing or about to commit any illegal acts, but merely to prevent a dangerous situation from developing.

The Test

The court states that when determining the legality of an arrest, the *Waterfield* test is the standard, although this court prefers the term "*ancillary powers doctrine*." This test has two stages, and is designed to strike a balance between police duties and civilian rights. At the first stage the question is asked of whether or not the particular police power under investigation is authorized either through a statute or common law under police duties. After answering this question, the next stage begs the question of whether or not the action referred to in the first stage can be justified as an appropriate exercise of police power in relation to the duty they are purporting to be carrying out. The *Macdonald* case set out 3 considerations that courts are to weigh when carrying out the second stage of this test. These factors include 1) How important it is to the public to carry out the duty that the action is being authorized under, 2) How necessary the violation of an individual's rights is to the execution of that duty, and 3) The severity of which an individual's rights are violated in carrying out this action. It must be noted that in order to answer both of these questions, it is key to define what the police power is as well as any rights that may be violated.

Applying the Test

In applying this test, the court defined the police power in question as the ability of the police to arrest someone who has done nothing illegal, and is not about to do something illegal, in an effort to prevent a violent interaction from occurring between others. Several rights guaranteed under the *Canadian Charter of Rights and Freedoms* are violated by this, notably s.9 and s.7, which protect against arbitrary arrest and detention, as well as security of the person.

Under the first step of the test, the court found that this police power could be held to fall within the common duty of police to prevent crime and preserve the peace. These actions are clearly related to this duty. The court noted that this power was up against a very high bar in order to match the extreme violation of the individual's rights it would carry with it, as it would allow police to arrest someone for having done nothing wrong. It was also brought up that a consequence of this would be that it would be almost impossible for someone to appeal such an arrest, based on the fact that no evidence is required to execute it.

In looking at the second stage, the court considered and weighed the three factors as listed in *Macdonald*. The importance of the preventing crime was noted as high, as it is a main goal of policing. The necessity of the violation was seen to have some validity in very particular circumstances, while the severity of the violation was deemed to be allowed only when absolutely necessary. The court reasoned that under the circumstances of arresting someone who has done nothing wrong and is not about to do anything wrong, no such violation can be allowed. There already exist offences that allow an individual to be placed under arrest if they fail to comply with a police instruction in relation to preventing a violent situation from occurring. If this were tolerated police would be allowed to violate individuals' *Charter* rights for simply being law abiding citizens.

Mr. Fleming Revisited

Coming back to the facts of the case, it was determined that the arrest of Mr. Fleming was not lawful. Mainly given that as the test stated, there existed no police power to arrest him under the circumstances that he had not committed any illegal acts nor was he about to. He had not broken any laws by crossing onto the property, nor had he threatened any violence against the police or other members of the flag rally. It was also questionable of whether or not there was a real threat of violence. It is reasoned to assume that the police could have verbally instructed Mr. Fleming to get off the property once he understood that they were talking to him, and if he refused, they could have arrested him for not cooperating. It is also possible that if the protestors had gotten closer towards him and violence became more of a real possibility, the police could have arrested him, but the court did not comment on this, as it was not the case in this instance. On the claim of excessive force, given that the arrest was unlawful, the judges of the Supreme Court determined that the trial judge's original verdict should stand.

Future Implications?

This case deals with the important questions of police powers, the discretion allotted to them, and the ability to violate an individual's *Charter* rights. Here, the police used their discretion to execute an arrest on a law-abiding citizen, and deemed it appropriate because of their power and duty to prevent crime. However, as the judge's illustrated, the balance between the police powers and the rights of individuals is a fine one, which is not easily navigated. The police serve an important function in our society, often acting under high stress situations in order to protect the public. Even so, sometimes we face difficult task of having to weigh the consequences of their actions, even if they are done with noble intentions. The judge's in this case were aware of the implications of authorizing a right to arrest law-abiding citizens in order to prevent a violent situation. Would it stop the situation from arising? It's possible, but on the other hand it would be a severe violation of the individual's rights, something that is valued extremely highly in our country. And without a clear indication that the violence is immediate, they were not willing to allow such a power to exist. A question this case begs to ask is at what cost are we willing to allow police to pursue the goal of preventing crime?

Notes

<https://www.scc-csc.ca/case-dossier/cb/2019/38087-eng.aspx>

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17947/index.do>

<https://scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=38087>

