

Setting Limits and Forging Our Own Path: *Fleming v Ontario*, 2019 SCC 45

By: F Kamran

In today's day and age, it is common to hear of many instances of police brutality and abuses of power. Although many of these stories come from our neighbours down south, Canadian authorities have also been involved in allegations of abuse of power. Undoubtedly, we share many similarities with the United States, but it is integral to our constitution and our rights as Canadians that we not follow their example in many ways, one of which is police brutality and abuse of authority.

The Supreme Court of Canada enforced this view in their decision in *Fleming v Ontario*. This case involved an individual (Fleming) who was walking to a counter-protest flag rally in response to a Six Nations protest. Now, although I cannot speak on his views and beliefs which led to him attending this rally, I can definitely speak about the events which unfolded as a result.

The police had been aware of this rally for months and were also aware of the possibility of violent clashes between the two sides. They had developed a plan to keep these protesters apart and had informed counter-protesters that they were not to be allowed on the property occupied by the protesters. Fleming was walking along the shoulder of the road with a flag but in order to avoid police vehicles, stepped onto the occupied property which caused some protesters to advance towards him. He was then approached by police who informed him that he was under arrest to prevent a breach of the peace. Fleming refused to drop the flag and was then forced to the ground, handcuffed, arrested and charged with obstructing a police officer. He then claimed damages for assault, battery, wrongful arrest, and false imprisonment. He also claimed damages for a violation of his *Charter* rights, pertaining to sections 2(b), 7, 8, and 15. At trial court, Fleming was successful. However, the Court of Appeal set aside the damages and claimed that the police had the authority at common law to arrest him. They also ordered a new trial on the issue of excessive force. Fleming appealed the issue of whether the police did in fact lawfully arrest him and whether a new trial should have been ordered.

Enter the Supreme Court (*cue heroic music*). The Supreme Court ruled that the arrest was NOT authorized by law, and that the police were liable for battery for their use of force during the unlawful arrest. They also decided that no new trial was needed on the issue of excessive force.

The Supreme Court analyzed the issue at hand using the ancillary powers doctrine. This doctrine determines whether a particular police action which interferes with an individual's liberty is authorized at common law. This is done by first defining the police power being asserted and the liberty interests which are at stake. In this situation, this was the police power to arrest someone who is acting lawfully, in order to prevent a breach of peace by others. In other words, police believed that arresting this individual would prevent the protesters from breaching the peace.

The next stage of the ancillary powers doctrine involves the question of whether police action is reasonably necessary to fulfill their duty. The 3 factors used to determine the answer to this were (1) the importance of the performance of the duty to the public good, (2) the necessity of the interference with individual liberty for the performance of the duty, and (3) the extent of the interference with individual liberty. The Court determined here that it was not reasonably necessary for the police to exercise their power to fulfill their duties. In other words, they decided that if the police can achieve the same results by means which intrude less on a person's liberty, then they must do so. They also stated that an intrusion of one's liberty should be a measure of last resort. This is regardless of whether the police action succeeded in achieving the means intended.

The Supreme Court went on to state that overly permissive standards in these types of situations would sanction intrusions on liberty with little societal benefit. They acknowledged the impact of this on individual freedom in our society. The courts did acknowledge that the purported police power does fall within the scope of their duties in preserving the peace, but that other courses of action were available.

In summary, they found that nothing unlawful was done by Fleming prior to his arrest and that the police did not have the lawfully authority to arrest him. The power to arrest someone who is acting lawfully to prevent a breach of peace by others is a power that does not exist.

In my opinion, this judgement sets a bar on how police must conduct themselves in our society. Giving police absolute power cannot lead to anything which is in line with our Charter rights and freedoms. To be a Canadian means that we are guaranteed these essential rights. Being detained without committing an unlawful act is far removed from the scope of these rights and could have set the wrong example for future occurrences.

This decision also establishes our justice system as being here for the people and not favouring authoritative parties. Establishing limits on police powers is crucial to having a just and fair legal system. We are not an authoritarian state and as such, need to continue to provide citizens with the protection from unlawful acts by those enforcing the law. Citizens should feel safe in the presence of police and be able to rely on them to achieve justice in a manner which is beneficial to society as a whole. Fear invites violence and being fearful of the police will only put us on a path which significantly raises occurrences of police violence, brutality, and a general distrust of government. The Supreme Court indeed established that our justice system is here for our societies benefit and set a standard for police to follow. Take notes, America.