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Fleming v Ontario 2019 SCC 45: Ancillary Powers Doctrine and the Right to Protest

The ancillary powers doctrine arises in Canadian law in *R v Dedman* which states that "statute law is not the only source of legal authority for police powers and that in particular circumstances, the common law may "provide a legal basis for carefully defined powers."[1] *R v Dedman* allows for the court to confer upon the police an ancillary power at common law so long as the police's conduct falls within the general scope of their duties and that the power is considered a justifiable infringement of the accused's rights when weighed against interests such as public safety.[2]

There are many police powers that have been recognized by the Supreme Court and also in the Provinces. These police powers include ancillary powers related to driving while impaired,[3] entry into a home as a result of a disconnected 911 call,[4] and the ability to use sniffer dogs in various circumstances.[5]But since *Dedman,* there has been recognition by the Court that a general duty to protect life and prevent crime does not confer upon the police the power to use any and all means.[6]

While there has been concern regarding the gradual expansion of police powers within Canada, the Supreme Court of Canada's decision in this case does restrict future application. On May 24, 2009, Fleming was arrested for his own protection while he attempted to exercise his democratic right to protest.[7] The counter-protest was in response to the occupation by Six Nations protesters of Douglas Creek Estates ("D.C.E.") in which the counter-protesters would raise a Canadian flag across the street from the D.C.E.'s front entrance.[8]

1 *Ibid* at para 39.
2 *Dedman v The Queen,* [1985] 2 SCR 2
3 *R v Orbanski,* 2005 SCC 37 at paras 49 and 50 in which the officer is permitted to ask if the driver had been drinking and to request a sobriety test; *R v Elias,* 2005 SCC 37 at para 49 and 50 50 in which the officer is permitted to ask if the driver had been drinking and to request a breathalyser. See generally *Dedman, supra* note 15 that permits police to permit random stops for RIDE programs under the general police duties to prevent crime and to protect life and property by the control of traffic.
4 *R v Godoy,* [1999] 1 SCR 311 at para 28 states police have a duty, under the general duty to protect life and prevent serious injury, to respond to the original caller of a disrupted 911 call. *R v MacDonald,* 2014 SCC 3 at para 44 and 50 recognizes the common law power to conduct searches for safety purposes even in certain circumstances which requires entry into a home.
5 *R v Kang-Brown,* 2008 SCC 18 at paras 54 and 57: a sniffer dog is an investigative tool and not a police power. Police possess the common law authority use of sniffer dogs in places to which they have lawful access for the purpose of criminal investigations; *R v AM,* 2008 SCC 19 at para 140: that a sniffer dog may be deployed by police to search an unattended backpack in a school gymnasium due to the low expectation of privacy and low level of intrusion; *R v Chehil,* 2013 SCC 49 at para 77: the police were permitted to deploy a sniffer dog in luggage at an airport as reasonable suspicion had arisen in the constellation of circumstances; *R v MacKenzie,* 2013 SCC 50 at paras 31-33: the police were entitled to use a sniffer dog to search a vehicle for crime prevention as the police had reasonable suspicion that MacKenzie was involved in a drug-related offence.
6 See Generally the dissent in *Dedman, supra* note 15.
7 *Fleming v Ontario,* 2019 SCC 45 at paras 1, 10, 12 [*Fleming*].
8 *Ibid* at paras 9 and 11.

In *Fleming v Ontario*, the Crown argued that the "purported police power falls within the general scope of the duties of preserving the peace, preventing crime, and protecting life and property," but the Court decided the means were not justifiable and necessary.[9] While the Court has previously recognized the police power to prevent an assault on the person of a foreign dignitary, the police officers had made explicit warnings to the appellant and prior warnings.[10] This did not happen in *Fleming*.

Mr. Fleming entered D.C.E. land and crossed over a fence, without realizing the police officers were ordering him to stop and return to the shoulder of the road.[11] Upon Mr. Fleming entering the occupied space, the D.C.E. protesters began moving towards Mr. Fleming but Officer Miller of the O.P.P. approached Fleming and arrested him, promptly leading him off the property.[12] Fleming refused to drop his flag when directed to by the officer, and the officers forced him to the ground, took his flag, and handcuffed him.[13] An important distinction from other cases is that the Ontario Provincial Police's operational plan utilised 30 officers and their instructions were to simply keep the participants apart and inform that the organizers were not permitted on D.C.E. land; the plan did not require a police line or buffer zone to be created.[14] This is not an overly elaborate plan to keep the peace nor does it explicitly utilise various crowd control strategies one would expect to see if the disruption of peace and violence were significant concerns.

After being arrest, Mr. Fleming was placed in an offender transport unit van and moved to a jail cell at the local O.P.P. detachment and was charged with obstructing a peace officer for resisting his arrest by Officer Miller.[15] The Crown would later withdraw the charges almost 19 months after the charges were laid, and after Fleming had appeared in court on 12 separate occasions.[16] Mr. Fleming later filed a statement of claim against the Province of Ontario and the seven O.P.P. officers who had been involved in his arrest for assault and battery, wrongful arrest, and false imprisonment as well as damages for violations of his rights under ss. 2 (b), 7 , 9 and 15 of the *Canadian Charter of Rights and Freedoms*.[17]

In *Knowlton*, the wilful obstruction of a police officer in the execution of his duty as opposed to false arrest.[18] *Fleming* may have been quite different had the police officers made a more robust plan to prevent counter-protesters from entering into the area and had the warnings about entry into the D.C.E. land been given in advance. But Mr. Fleming did not have a subjective belief that he was disobeying police directions and there was no intention to act

9 *Fleming, supra* note 1 at para 69.
10 *Knowlton v R*, [1974] SCR 443, 1973 CanLII 148 (SCC) at 445. The facts in this case are distinguishable as there was a clearly cordoned off area and prior warnings that entry into the area would result in arrest.
11 *Ibid* at para 16.
12 *Ibid* at para 18.
13 *Ibid.*
14 *Ibid* at paras 12-13.
15 *Ibid* at paras 20-21.
16 *Ibid* at para 21.
17 *Ibid* at para 22.
18 *Ibid* at 448.

disruptively. More importantly, there were other avenues for the police to prevent the unlikely chance of violence through a less intrusive measure.[19] But the Court has refused to comment on other potential police powers short of arrest that would prevent a breach of the peace, such as requiring a person to temporarily move out of immediate harm's way.[20]

While *Fleming* is a rather straightforward analysis, it is an important case as it suggests that the Supreme Court will prevent the expanse of police powers if there is a compelling enough interest to be protected. The right to protest is a fundamental right and is an incredibly significant right for the functioning of a democratic society. But there is always the concern about violence. Concerns about violence often occur whenever there are mass gatherings of the public, regardless of the context. It is for this reason that the conclusion of the majority at the Court of Appeal that the O.P.P. officers had had the authority at common law to arrest Mr. Fleming for an anticipated breach of the peace is troublesome.[21]

While the Supreme Court has been able to restrict the use of ancillary police powers regarding proactive arrests in this case, there are many interactions the public may have with the police that would engage the very general scope of duties of preserving the peace, preventing crime, and protecting life and property. The Supreme Court of Canada only hears a limited amount of cases per year and a large amount of criminal cases will not be appealed to the Supreme Court. This means that the lower courts have the ability to fundamentally shape policing of the public through the ancillary powers doctrine but it will be done inconsistently and with limited recourse for those to which it is applied unless they have the funds, energy and time to continuously appeal until the highest level. *Fleming* highlights the danger that the expansion of the ancillary powers doctrine through the lower courts usage poses as well as the need for better direction to police regarding policing practices from the Legislature and not just the Courts.

[19] *Fleming*, *supra* note 1 at paras 97-98.
[20] *Fleming*, *supra* note 1 at 106 and 108.
[21] *Ibid* at para 29.