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ARTICLE

Supreme Court of Canada Addresses Common Law Police Powers

In the recent decision of *Fleming v. Ontario*, 2019 SCC 45, the Supreme Court of Canada declared that there is no common law police power to arrest individuals acting lawfully to prevent an apprehended breach of the peace by someone else. Applying the ancillary powers doctrine, the Court found that this ostensible power was not reasonably necessary to fulfil valid police duties.

Background

The plaintiff/appellant was a resident of Caledonia, Ontario, who in 2009 intended to join a counter-protest against First Nations protestors who were occupying a local property. As he entered the disputed premises, eight protestors began moving toward him, and he ignored instructions from Ontario Provincial Police (OPP) officers to stop and leave the scene. He was then arrested and transported to the local OPP detachment, and later sued the OPP and its officers for assault and battery, wrongful arrest, false imprisonment and damages stemming from breaches of his *Charter* rights.

In an unreported trial decision, the plaintiff was successful and was awarded \$139,711.90 in damages, plus costs. The trial judge found that the officers had no legal authority to arrest the plaintiff, as he had not breached any law. Moreover, the facts did not disclose any imminent risk of a breach of the peace that might justify his arrest under a common law police power.

On appeal reported at 2018 ONCA 160, the majority reversed the ruling, finding that the protestors represented a real risk to the plaintiff's safety, and that given the history of violence at protests in Caledonia, the officers were justified in arresting the plaintiff to prevent a breach of the peace. The dissent found no palpable and overriding errors in the trial judge's factual analysis and agreed that there was no imminent threat of violence. The Court dismissed all of the plaintiff's claims except excessive force and ordered a new trial on that issue alone.

The Ancillary Powers Doctrine

In order to determine whether an exercise of a police power is valid at common law, a court must ask:

1. Does the police action at issue fall within the general scope of a statutory or common law police duty?
2. Does the action involve a justifiable exercise of police powers associated with that duty?

The Supreme Court easily concluded that the first branch of the test was satisfied, as preventing breaches of the peace, which entail violence and a risk of harm, fall squarely within the core of common law police duties.

Does the action involve a justifiable exercise of police powers associated with that duty?

Moving to the second stage of the ancillary powers analysis, the Supreme Court began by reasoning that the bar for justifying the exercise of police powers in this case would be high for three reasons.

First, the power had been exercised against a plaintiff who was not suspected of any criminality or even breach of the peace himself, but rather whose entirely lawful behaviour could have provoked others into acting unlawfully. Second, the alleged power would be purely preventive, rather than a reaction to crime or danger. Finally, the power would not lend itself to judicial oversight, as persons arrested in order to prevent a breach of the peace may not be charged with any offence and may not choose to sue the police afterward.

Drawing on its ancillary powers analysis in *R v. MacDonald*, 2014 SCC 3, the Court addressed the importance of the performance of the duty to the public good, the necessity of the interference with individual liberty for the performance of the duty, and the extent of the interference with individual liberty.

The Court acknowledged that preventing breaches of the peace is deeply important to the public good, but noted that an arrest is the most serious form of interference with individual liberty.

Critically, the Court found that this interference was not necessary, as less drastic alternatives existed to address the same class of situations. For example, section 129 of the *Criminal Code* makes it an offence to obstruct a peace officer in the execution of his or her duties, or even to omit, without reasonable excuse, to assist a peace officer in preserving the peace. Since this is an indictable offence, an officer can arrest someone committing it without a warrant by virtue of section 495(1) of the *Code*.

The Court also rejected an argument accepted by the majority below to the effect that the arrest must have been justified because it had successfully prevented a breach of the peace. The Court found that this argument was not made out on the facts, and even if it was, it did not prove that less invasive steps would not have sufficed.

The Court of Appeal's judgment was thus overturned, and the trial verdict restored in full.

Comment


The decision is consistent with previous decisions where courts have been reluctant to extend common law police powers as justifying arrests to prevent apprehended future breaches of the peace. The decision does not address situations where police arrest or detain pursuant to statutory authority or where police arrest a person on reasonable grounds whose own actions give rise to an apprehended breach of the peace.

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