



Case in Brief: **Fleming v. Ontario**

Judgment of October 4, 2019 | On appeal from the Court of Appeal for Ontario
Neutral citation: 2019 SCC 45

Police can't arrest someone who isn't breaking the law to prevent others from breaching the peace, the Supreme Court has ruled.

Mr. Fleming was on his way to join a protest in Caledonia, Ontario in 2009. The protest was against the occupation of a piece of land by a First Nations group. He was carrying a Canadian flag on a wooden pole and walking down a street beside the occupied land.

Police officers saw him as they drove by. There had been violence in the past, and they were planning to keep the groups apart. The officers turned their vehicles around and sped toward him. Mr. Fleming got off the road and crossed a low fence. He said he did this to get away from the speeding vehicles and onto level ground. The officers were yelling. Mr. Fleming said he didn't think they were yelling at him because he hadn't done anything wrong.

The people occupying the land came toward him. When they were about ten or twenty feet away, the police told Mr. Fleming he was under arrest. They ordered him to drop his flag. He refused. Officers forced him to the ground, took his flag, and handcuffed him. Mr. Fleming said they injured his arm. The police took him to jail but let him go a few hours later. He was charged with obstructing a police officer (preventing a police officer from doing their job). He went to court a dozen times to fight the charge, which was later dropped.

In 2011, Mr. Fleming sued the Province of Ontario and the officers involved in his arrest. He said the officers acted wrongfully. He said they assaulted and battered him, wrongfully arrested him, and falsely imprisoned him. He also said they violated several of his rights under the *Canadian Charter of Rights and Freedoms*, part of Canada's Constitution.

Police officers get their powers from statutes (like the *Criminal Code*) and common law (the law made by judges deciding cases). They can only act within those laws. Under the common law, the police can limit someone's freedom (for example, arrest them) if it's reasonably necessary to carry out their duties. The police argued they had the power to arrest Mr. Fleming under the common law. They said it was to prevent a "breach of the peace." A breach of the peace is more than a disturbance. It means there is a risk of violence and that someone will get hurt.

The trial judge said the police didn't have the power to arrest Mr. Fleming. She said he should be compensated because officers violated his rights. The majority at the Court of Appeal disagreed. It said the police *did* have the power to arrest him. It said arresting him was necessary because officers thought there was going to be a breach of the peace. It did say there should be a new trial about whether the officers used too much force, though.

The Supreme Court unanimously said the officers didn't have the power to arrest Mr. Fleming. The police can't arrest someone acting lawfully just because they think it will stop others from breaching the peace. They already have other powers to deal with these situations under the *Criminal Code*. Since they had these less drastic options, arresting Mr. Fleming wasn't really necessary.

The Court noted that preserving the peace, preventing crime, and protecting life and property are the main duties of police officers under the common law. They have the power to take actions to support these duties, even if these actions aren't specifically set out in the *Criminal Code*. Preventing breaches of the peace is obviously related to preserving the peace, preventing crime, and protecting life and property. But the Court said it wasn't reasonably necessary to arrest someone to prevent a breach of the peace, if that person hadn't done (and wasn't about to do) anything wrong.

Police are allowed to use as much force as reasonably necessary to carry out their duties. But in this case, they weren't allowed to arrest Mr. Fleming, so no amount of force was justified.

Taking away someone's freedom, even temporarily, is serious. Often, in situations like Mr. Fleming's, the person wouldn't have any way to challenge their arrest in court, because there wouldn't be any charges. The only option would be an expensive civil lawsuit. This was another reason the Court said the standards for judging police actions should be strict.

Breakdown of the decision: *Unanimous*: Justice Suzanne [Côté](#) allowed the appeal (Chief Justice [Wagner](#) and Justices [Abella](#), [Moldaver](#), [Brown](#), [Rowe](#), and [Martin](#) agreed)

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