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Policing Arbitrariness: Fleming v. Ontario and the Ancillary Powers Doctrine

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Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine

Terry Skolnik & Vanessa MacDonnell*

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I. INTRODUCTION

In 2019, the Supreme Court of Canada released its decision in *Fleming v. Ontario*.[1] The case is significant because it is one of the very few police powers cases in the past three decades in which the Supreme Court has declined to recognize a new power.[2] Since the pivotal case of *Dedman*,[3] police powers jurisprudence has been characterized by the recognition of increasingly more intrusive common law powers to detain, investigate and search. This trend seemed to reach its zenith in *Saeed*, in which a majority of the Court recognized a common law power to conduct a warrantless penile swab incident to arrest — by force if necessary — to preserve evidence of a possible sexual assault.[4]

It is therefore notable that in *Fleming*, the Supreme Court refused to recognize a new common law police power to preventatively arrest a law-abiding individual in

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[1] [2019] S.C.J. No. 45, 2019 SCC 45 (S.C.C.) [hereinafter "*Fleming* SCC"].

[2] Richard Jochelson *et al.*, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Crit. Criminol. 107, at 116, 118.

[3] *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

[4] *R. v. Saeed*, [2015] S.C.J. No. 24, 2016 SCC 24 (S.C.C.).

order to protect them from harm by third parties.[5] In declining to embrace such a power, the Court emphasized that police powers represent a significant intrusion on individual liberties.[6] For Côté J., this counselled caution in the application of the *Waterfield* test (also known as the ancillary powers doctrine), the framework currently used to determine whether the Court should recognize a novel common law police power. Only powers that fall within the general scope of police duties and that are reasonably necessary should be recognized, and any such power should be narrowly construed.[7]

While the Court's statements about the importance of individual liberties and the need for narrow tailoring will no doubt be invoked by defence counsel in future police powers cases, it is unlikely that *Fleming* represents a turning point in the jurisprudence. The weight of authority continues to favour the recognition of police powers. Moreover, the decision is likely to be distinguishable on the basis that the power sought was an "extraordinary" one: authority to arrest a law-abiding individual to prevent a breach of the peace by third parties.[8] Indeed, some of the Court's statements in *obiter* might actually be relied upon to expand the scope of the police's power to detain in future cases.

Fleming's progress through the courts serves a reminder of the doctrinal "creep" that can result from a police powers analysis that proceeds by asking what powers the police "need" rather than whether individual rights were respected.[9] The fact that a majority of the Ontario Court of Appeal was able to conclude that a power to preventatively arrest an innocent person was justified in the circumstances is evidence of the pull the ancillary powers doctrine exerts on courts. It is also evidence of the degree to which the state has succeeded in convincing judges that courts should grant powers to the police that the legislature has failed to confer upon them, even if those powers infringe individual rights.

The Supreme Court of Canada ultimately rejected the proposed preventive arrest power, explaining that it was unnecessary because the police have other options available to them to prevent a breach of the peace. As we explain in this article, however, the real problem with the power sought was not that it failed to satisfy *Waterfield*'s demand of reasonable necessity. The issue was that it would have permitted the police to arrest a person not suspected of wrongdoing.

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[5] *Fleming* SCC, at para. 7.

[6] *Fleming* SCC, at para. 5.

[7] *Fleming* SCC, at paras. 38, 41.

[8] *Fleming* SCC, at para. 78.

[9] *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 78 (S.C.C.), *per* Binnie J; *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 2005 SCC 37, at para. 81 (S.C.C.), LeBel J. See generally Dov Fox, "Interest Creep" (2014) 82 Geo. Wash. L. Rev. 273, at 277-78. See also Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of *Charter* Jurisprudence" (2012) 57 S.C.L.R. (2d) 225, at 228.

Arrest is a critical moment in the criminal process. It is generally the point at which an individual becomes an "accused" and the criminal process is triggered.[10] The requirement that police have reasonable grounds to believe that a person committed, is committing or will commit a crime (the *Criminal Code*[11] standard for a valid warrantless search) acts as a safeguard against the unjustified application of the criminal law by requiring objective evidence of probability of guilt before an individual is arrested. Preventative arrests of law-abiding individuals do not satisfy this standard and, we argue, should be considered "arbitrary" within the meaning of section 9 of the *Canadian Charter of Rights and Freedoms*.[12] While the absence of "reasonable necessity" is one reason why such a power would be unlikely to be saved under section 1 of the Charter, it does not capture the essential reason why the Court rightly rejected the power proposed in *Fleming*.

This article is structured as follows. Part II provides a brief overview of the Supreme Court's decision in *Fleming*. In Part III, we consider what impact *Fleming* might have on the ancillary powers jurisprudence, before explaining why the case exemplifies the *Waterfield* test's inherent dangers in Part IV.

II. THE CASE

In May 2009, Randolph Fleming was arrested by the Ontario Provincial Police (O.P.P.) while attempting to participate in a protest near the Douglas Creek Estates (D.C.E.) in Caledonia, Ontario.[13] The historical and social context of the D.C.E. are key to understanding the circumstances that led to Fleming's arrest.[14] The D.C.E. and the surrounding territory are subject to land claims by the Six Nations dating back several decades.[15] In 2006, the Henco Corporation began to develop a new

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[10] James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225, at 227.

[11] R.S.C. 1985, c. C-46.

[12] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. On the importance of the "reasonable and probable grounds to believe" standard, see Terry Skolnik, "The Suspicious Distinction Between Reasonable Suspicion and Reasonable Grounds to Believe" (2016) 47 Ottawa L. Rev. 223, at 247; Steven Penney, "Standards of Suspicion" (2017) 65 Crim. L.Q. 23, at 30-35; James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225, at 227.

[13] *Fleming* SCC, at para. 9.

[14] For an overview of the conflict over the D.C.E., see Laura Devries, *Conflict in Canada: Aboriginal Land Rights and the Rule of Law* (Vancouver: University of British Columbia Press, 2011), ch. 2-4; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 325, note 63.

[15] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at paras. 14-15 (Ont. C.A.).

subdivision on the D.C.E. lands.[16] This led to the ongoing occupation of the D.C.E. by members of the Six Nations and their allies as well as a road blockade.[17] The Province of Ontario eventually bought the D.C.E. in an effort to resolve the situation, and the Government permitted the protests to persist on the land.[18] Protests continued after the purchase.[19] Other individuals and groups organized counter-protests that resulted in violent encounters and police interventions.[20]

Fleming's arrest took place during a "flag rally" that had been planned for several months by counter-protestors.[21] Individuals associated with the Six Nations had flown Indigenous flags along Argyle Street, which ran in front of the D.C.E.[22] In response, the counter-protestors decided to march down Argyle Street and hang a Canadian flag near the D.C.E.[23] The O.P.P. told the organizers of the counter-protest that they were prohibited from walking onto D.C.E. land.[24] Shortly before the scheduled counter-protest, police officers observed Fleming carrying a large flag and walking down Argyle Street to join the other counter-protestors. The police headed toward Fleming to prevent him from entering the D.C.E.[25] Fleming then went onto the shoulder of Argyle Street, walked down a ditch, walked up its other side, and stepped over a fence onto D.C.E. land.[26] Officers yelled at Fleming to stop and step back onto the shoulder. Fleming explained that he did not realize that the officers were speaking to him.[27]

Once Fleming crossed onto D.C.E. land, a group of eight to ten unarmed protestors who were occupying the land headed toward Fleming, with some individuals walking while others jogged.[28] The protestors did not threaten Flem-

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[16] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 17 (Ont. C.A.).

[17] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 19 (Ont. C.A.).

[18] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 49 (Ont. C.A.).

[19] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 49 (Ont. C.A.).

[20] *Fleming* SCC, at para. 10.

[21] *Fleming* SCC, at para. 11.

[22] *Fleming* SCC, at paras. 9, 11.

[23] *Fleming* SCC, at paras. 9, 11.

[24] *Fleming* SCC, at para. 13.

[25] *Fleming* SCC, at para. 15.

[26] *Fleming* SCC, at para. 16.

[27] *Fleming* SCC, at para. 16.

[28] *Fleming* SCC, at para. 17.

ing.[29] A police officer approached Fleming and told him that he was under arrest.[30] He then escorted Fleming from the property and insisted that he put down the flag.[31] When Fleming refused, the officer pulled Fleming's arm behind his back and handcuffed him, which caused significant pain and a chronic injury.[32] Although Fleming was charged with obstructing a police officer, the charges were dropped 19 months later.[33] Fleming brought a civil action against both the Province and several police officers, alleging that the police had arrested him unlawfully.[34] In response, the Province and the O.P.P. officers argued that the police had a common law power to conduct a preventive arrest for Fleming's own protection.[35]

The trial court ruled in Fleming's favour, concluding that the police lacked the power to conduct a preventative arrest in the circumstances. In the trial judge's view, although the police have a common law power to arrest an individual to prevent a breach of the peace, the threat to public peace must be imminent, substantial, and involve violence or harm for the power to be exercised lawfully.[36] The trial judge concluded that those conditions were not met because the protestors who approached Fleming were not violent.[37] The court awarded damages to Fleming.

A majority of the Ontario Court of Appeal reversed the trial judge's decision. They concluded that the police do have a power of preventive arrest that can be exercised for the arrestee's own protection and, furthermore, that Fleming's arrest was lawful.[38] The majority disagreed with the trial judge's findings of fact and found that the arrest was necessary because "[t]he rushing protestors posed a risk, both to the public peace and to the respondent individually".[39] Justice Huscroft dissented. In his view, the majority had interfered with the trial judge's findings of fact and inflated the risk of harm to Fleming, notably by suggesting that the protesters rushed toward him and that he was in imminent and substantial danger.[40] Since there was

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[29] *Fleming* SCC, at para. 17.

[30] *Fleming* SCC, at para. 17.

[31] *Fleming* SCC, at para. 18.

[32] *Fleming* SCC, at para. 18.

[33] *Fleming* SCC, at para. 21.

[34] *Fleming* SCC, at para. 22.

[35] *Fleming* SCC, at para. 6.

[36] *Fleming* SCC, at para. 25. The trial court relied on *Brown v. Durham Regional Police Force*, [1998] O.J. No. 5274, 43 O.R. (3d) 223 (Ont. C.A.) to conclude that there was common law power to conduct arrests to prevent a breach of the peace.

[37] *Fleming* SCC, at para. 25.

[38] *Fleming* SCC, at para. 29.

[39] *Fleming v. Ontario*, [2018] O.J. No. 841, 2018 ONCA 160, at para. 53 (Ont. C.A.) [hereinafter "*Fleming* ONCA"].

[40] *Fleming* ONCA, at paras. 109-110.

no such danger, it was not necessary to arrest Fleming to prevent a breach of the peace.[41] Justice Huscroft concluded that Fleming's arrest was unlawful because he was exercising his constitutional right to freedom of expression and did not commit a criminal offence.[42]

The Supreme Court of Canada unanimously allowed the appeal and concluded that Fleming's arrest was unlawful. The Court applied the *Waterfield* test to determine whether the proposed ancillary power should be recognized in the circumstances.[43] Writing for the Court, Côté J. concluded that the state had satisfied the first part of the *Waterfield* test by demonstrating that the power to conduct preventive arrests was consistent with a valid law enforcement duty, namely protecting life and property.[44] However, she then went on to find that the power was not reasonably necessary to protect life and property, for several reasons. The proposed preventive arrest power impacted law-abiding citizens, was justified principally on grounds of deterrence, would be difficult for courts to review properly, and statutory powers of arrest already existed.[45] Justice Côté observed that a police power to conduct preventive arrests of law-abiding citizens would be "extraordinary", especially because the police could limit individual freedom without suspecting or believing that the person was involved in criminal activity.[46] For these reasons, the Court rejected the proposed ancillary power and found Fleming's arrest to be unlawful.[47]

III. SIGNIFICANCE OF *FLEMING* FOR THE POLICE POWERS JURISPRUDENCE

From unlikely origins, the ancillary powers doctrine has emerged as a major source of police powers in Canada. Indeed, when one examines the range of common law powers the police now enjoy, it is difficult to see how the term "ancillary" remains apt. The power to detain for investigative purposes, to search incident to investigative detention, to stop vehicles at random, and to search incident to arrest are at the core of everyday police work.[48]

The Supreme Court of Canada first articulated the test for recognizing new common law police powers in *Dedman*, decided in 1985. In doing so, the majority drew heavily on the English case of *R. v. Waterfield*.[49] *Waterfield* was not a police

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[41] *Fleming* ONCA, at paras. 109-110.

[42] *Fleming* ONCA, at para. 112.

[43] *Fleming* SCC, at para. 101.

[44] *Fleming* SCC, at paras. 69-73.

[45] *Fleming* SCC, at paras. 76, 93-95.

[46] *Fleming* SCC, at para. 78.

[47] *Fleming* SCC, at para. 101.

[48] See, *e.g.*, Jeffrey Fagan *et al.*, "Stops and Stares: Street Stops, Surveillance, and Race in the New Policing" (2016) 43 Fordham Urb. L.J. 539, at 561.

[49] [1964] 1 Q.B. 164.

powers case. Rather, it was concerned with whether the accused had committed the offence of "assaulting a police officer in the due course of their duties". To determine whether the offence was made out, the English Court of Appeal set out a two-part test for evaluating whether police action falls within the course of their duties.[50] In *Dedman*, the *Waterfield* test was re-imagined as a framework for determining whether new common law police powers should be recognized. Applying the test in that case, the majority concluded that the police had been acting within the scope of their common law powers when they stopped Dedman during a random roadside R.I.D.E. program to check for signs of impairment.

In its current formulation, the ancillary powers doctrine requires the Supreme Court to begin by "clearly defin[ing] the police power that is being asserted and the liberty interests that are at stake".[51] The Court then applies the *Waterfield* test. At the first stage of the test, the Court asks whether "the police action at issue fall[s] within the general scope of a statutory or common law police duty".[52] If the answer is yes, the Court proceeds to the second stage, where the question is whether "the action involve[s] a justifiable exercise of police powers associated with that duty".[53] To be justified, the power must be reasonably necessary. The Court has identified several factors to consider in determining whether reasonable necessity is made out, including: "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".[54] The burden of satisfying these requirements rests with the state.[55]

In police powers cases, the courts have invariably concluded that the power sought is sufficiently connected to the officer's general statutory and common law duties, which include "preserving the peace, preventing crime, and protecting life and property".[56] The analysis has thus tended to focus on the second stage of the test, where the state must establish reasonable necessity.[57] This stage requires courts to balance the need for the power against the intrusion on individual rights.[58] As the

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[50] *R. v. Waterfield*, [1964] 1 Q.B. 164; *Fleming* SCC, at para. 43; James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 18.

[51] *Fleming* SCC, at para. 46.

[52] *Fleming* SCC, at para. 46.

[53] *Fleming* SCC, at para. 46.

[54] *Fleming* SCC, at para. 47. See also *R. v. MacDonald*, [2014] S.C.J. No. 3, 2014 SCC 3, at para. 37 (S.C.C.).

[55] *Fleming* SCC, at para. 48.

[56] *Fleming* SCC, at para. 79.

[57] Steve Coughlan, "Arbitrary Detention: Whither – or Wither? – Section 9" (2008) 40 S.C.L.R. (2d) 147, at 172.

[58] *Fleming* SCC, at paras. 47, 55.

Court noted in *Fleming*, and as has been noted elsewhere, there are similarities between this stage of the *Waterfield* test and the proportionality analysis set out in *R. v. Oakes*.[59]

The application of the ancillary powers doctrine has resulted in the recognition of a range of new common law police powers, including the power to: detain an individual briefly for investigative purposes;[60] search incident to arrest;[61] conduct random vehicle stops;[62] conduct a strip search incident to arrest;[63] take a penile swab upon arrest to preserve evidence of a possible sexual assault;[64] conduct canine sniff searches in public places, including schools and bus stations and at the roadside;[65] set up a roadblock following a tip that a gun is in the vicinity;[66] and set up a roadblock to screen for signs of impairment, among others.[67]

From the beginning, judicial recognition of police powers has been controversial. Much of the criticism has focused on the propriety of courts creating new police powers as opposed to legislatures. James Stribopoulos has argued that courts should not recognize new common law police powers at the expense of individual liberties because it is inconsistent with their rights-protecting role.[68] He has also noted that judges' willingness to recognize new police powers has resulted in courts being primarily responsible for creating these powers as opposed to democratically elected

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[59] [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.). See *Fleming* SCC, at para. 54. See also Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of *Charter* Jurisprudence" (2012) 57 S.C.L.R. (2d) 225, at 228; Richard Jochelson, "Ancillary Issues with *Oake*s: The Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory" (2012-13) 43 Ottawa L. Rev. 355, at 365-69; Richard Jochelson, "Crossing the Rubicon: of Sniffer Dogs, Justifications, and Preemptive Deference" (2008) 13 Rev. Const. Stud. 209, at 219-24.

[60] *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

[61] *Cloutier v. Langlois*, [1990] S.C.J. No. 10, [1990] 1 S.C.R. 158 (S.C.C.).

[62] *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.).

[63] *R. v. Golden*, [2001] S.C.J. No. 81, 2001 SCC 83 (S.C.C.).

[64] *R. v. Saeed*, [2015] S.C.J. No. 24, 2016 SCC 24 (S.C.C.).

[65] *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18 (S.C.C.); *R. v. M. (A.)*, [2008] S.C.J. No. 19, 2008 SCC 19 (S.C.C.); *R. v. Chehil*, [2013] S.C.J. No. 49, 2013 SCC 49 (S.C.C.); *R. v. MacKenzie*, [2013] S.C.J. No. 50, 2013 SCC 50 (S.C.C.).

[66] *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

[67] *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

[68] James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1 at 55; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 352, 382-83. See also David Paciocco, "Constitutional Deflation and the Rebound Effect: The *Charter* and the Enhancement of State Power" (2007) Can. Iss. 89, at 92; Tim Quigley, "The Impact of the *Charter* on the Law of Search and Seizure" (2008) 40 S.C.L.R. (2d) 117, at 139.

lawmakers.[69] This raises legitimacy concerns.

Courts may also lack the institutional competence to create police powers that do not misfire and/or lead to injustices.[70] While the quality of the legislative process may vary, statutory police powers are nonetheless the product of a democratic process by which lawmakers gather information, debate potential provisions, receive input from stakeholders and committees, and refine the law prior to Royal Assent.[71] Courts do not follow such a process, nor can they. Judges are unable to gather information like other branches of government, and are bound by whatever evidence the parties and interveners present.[72] Courts' democratic and informational deficits may lead judges to develop police powers that produce errors and/or create adverse consequences: lack of police accountability, racial profiling, and *ex-post* justifications by the police for otherwise unlawful conduct, among others.

Scholars have also raised questions about the *Waterfield* test itself, which was not designed for the purpose it now serves and is propelled by an assessment of what powers the police require rather than by a focus on individual rights.[73] David Paciocco argues that *Waterfield* has resulted in "constitutional deflation", meaning that constitutional rights are weakened as courts accord greater importance to the state interests that are said to justify police powers.[74] A quick glance at the jurisprudence confirms the impact of this development. In the vast majority of police powers cases since *Dedman*, the Supreme Court has granted rather than withheld powers.[75] In some cases, it has recognized the existence of a common law power but then gone on to conclude that the scope of the power was exceeded on the facts of

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[69] James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 55. See also Glen Luther, "Police Power and the Charter of Rights and Freedoms: Creation or Control" (1986) 51 Sask. L. Rev. 217, at 227.

[70] Martin Friedland, "Criminal Justice in Canada Revisited" (2004) 48 Crim. L.Q. 419, at 448-50; James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" 2005) 31 Queen's L.J. 1, at 56-57.

[71] Cass Sunstein, "The Most Knowledgeable Branch" (2016) 164 U. Pa. L. Rev. 1607, at 1616-17.

[72] Cass Sunstein, "The Most Knowledgeable Branch" (2016) 164 U. Pa. L. Rev. 1607, at 1613-15.

[73] *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 78 (S.C.C.), *per* Binnie J; *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, 2005 SCC 37, at para. 81 (S.C.C.), LeBel J. See generally Dov Fox, "Interest Creep" (2014) 82 Geo. Wash. L. Rev. 273, at 277-78. See also Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of *Charter* Jurisprudence" (2012) 57 S.C.L.R. (2d) 225, at 228.

[74] David Paciocco, "Constitutional Deflation and the Rebound Effect: The *Charter* and the Enhancement of State Power" (2007) Can. Iss. 89, at 89-91.

[75] Richard Jochelson *et al.*, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged Charter" (2020) 28 Crit. Criminol. 107, at 116, 118.

the case. In *Mann*, for example, the Court held that a police officer may conduct a pat-down search incident to investigative detention for reasons of officer safety, but that the officer in *Mann* had acted outside the scope of his authority when he reached into Mann's pocket after feeling a soft object inside it.[76] Once a common law power is created, however, it may be validly exercised by the police as long as the circumstances justify it, regardless of whether the power was exercised properly in the case in which it was first recognized.[77]

Perhaps because "we have crossed the Rubicon", as Binnie J. put it in *Kang-Brown*,[78] more recent debates have tended to focus on the standard for invoking powers to detain, investigate and search rather than on whether such powers should be recognized at all. The tendency toward expansive recognition of police powers has been accompanied by the adoption of less demanding standards for triggering the exercise of common law powers. For example, the power to detain briefly for investigative purposes recognized in *Mann* is triggered on a standard of reasonable suspicion, as is the power to conduct a canine search of a public area.[79] In some circumstances, standards are jettisoned completely, as is the case with R.I.D.E. programs, during which individuals may be subjected to questions about their sobriety in the absence of any evidence to believe that they might be impaired by alcohol.

Finally, there is serious concern about how the expansion of common law powers impacts over-policed communities.[80] As the list of common law police powers grows, the range of tools the police have at their disposal to police marginalized communities expands.[81] Counterintuitively, the less intrusive powers may cast the longest shadow. Routine, "low-visibility" encounters with the police are often sites of discrimination and harassment, particularly since many such encounters do not result in charges being laid or judicial review of police misconduct.[82] One of the

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[76] *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.). The Supreme Court took a similar approach in *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.); *R. v. Golden*, [2001] S.C.J. No. 81, 2001 SCC 83 (S.C.C.); *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18 (S.C.C.); and *R. v. M. (A.)*, [2008] S.C.J. No. 19, 2008 SCC 19 (S.C.C.).

[77] We are grateful to Oliver Abergel for pointing this out to us.

[78] Cited in *Fleming* SCC, at para. 42.

[79] *R. v. M. (A.)*, [2008] S.C.J. No. 19, 2008 SCC 19 (S.C.C.); *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18 (S.C.C.); *R. v. Chehil*, [2013] S.C.J. No. 49, 2013 SCC 49 (S.C.C.); *R. v. MacKenzie*, [2013] S.C.J. No. 50, 2013 SCC 50 (S.C.C.).

[80] James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 18; David M. Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905, at 928-29.

[81] James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1, at 18.

[82] *R. v. Le*, [2019] S.C.J. No. 34, 2019 SCC 34, at para. 87 (S.C.C.), citing *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32, at para. 154 (S.C.C.), Binnie J. See also James

most significant problems with the ancillary powers doctrine, therefore, is that it provides cover for arbitrary exercises of police power.

Against this backdrop, *Fleming* stands out as an exception to a problematic pattern of courts authorizing new common law police powers. For that reason alone, it is significant. Although the Court did not seek to distance itself from its past jurisprudence in *Fleming*, it stated that common law police powers must be "carefully defined"[83] and individual rights centered in the ancillary powers analysis.[84] Justice Côté explained that the power sought in the case "would involve substantial *prima facie* interference with significant liberty interests", including the right to be free from arbitrary arrest, the right to life, liberty and security of the person, and freedom of expression, since Fleming was taking part in a protest. She emphasized that "few police actions interfere with an individual's liberty more than arrest — an action which completely restricts the person's ability to move about in society free from state coercion".[85]

In addition, she explained, the power sought in *Fleming* would permit the police to arrest an individual not suspected of wrongdoing. Noting that "[t]he [*Waterfield*] standard of justification must be commensurate with the fundamental rights at stake", Côté J. stated: "There are a number of reasons why the 'standard of justification' is especially stringent here. The characteristics of the power, and in particular its impact on law-abiding individuals, its preventative nature and the fact that it would be evasive of review, all mean that it will be more difficult to justify as reasonably necessary compared to other common law powers. The bar is higher."[86] When weighed against the liberty interests at stake, the Court concluded that the balance favoured individual rights. Specifically, the power could not be shown to be necessary because there were other options available to the police to prevent a breach of the peace.

Despite the Court's strong language, however, it seems unlikely that *Fleming* will slow the development of common law police powers. The case law remains heavily inclined toward the recognition of ancillary powers. Judges have largely embraced the role of authorizing new powers where they perceive existing police powers to be deficient. In recent cases, courts have tended to be more preoccupied with the appropriate standard for triggering the use of the power and with ensuring that

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Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 344, 357; Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97 Columbia L. Rev. 551, at 592; Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*", in this volume.

[83] *Fleming* SCC, at para. 39.

[84] *Fleming* SCC, at para. 38.

[85] *Fleming* SCC, at para. 65.

[86] *Fleming* SCC, at para. 65.

powers are tailored so as to minimize overreach. *Fleming* does not provide guidance on either of these issues, and, as such, its precedential value is likely to be limited.

One of the most problematic aspects of the *Fleming* decision is that it may in fact provide a basis for *expanding* police powers in future cases. In *Fleming*, the Supreme Court observed that courts in England and Ireland have recognized a common law power to detain individuals not suspected of wrongdoing to prevent a violent breach of the peace that is imminent and likely to occur, provided that no less intrusive means are available.[87] Yet the Court did not expressly rule out that power's existence, meaning that the possibility of preventive detention of law-abiding people — especially during protests or broader civil unrest — could be recognized in the future. The decision sends an unfortunate signal to police officers that there is *some* precedent for conducting preventive detentions that operate on the margins of legality.

While *Fleming* places a great deal of emphasis on the way the power sought would negatively impact individual liberties, the Court has recognized other common law powers that have a significant effect on individual rights, such as the power to conduct a strip search and a penile swab. In other words, the courts have rarely considered a power too intrusive to warrant recognition, particularly where they are of the view that it corresponds to an urgent law enforcement need. What seems to distinguish *Fleming* from these cases is that the proposed power would have a significant impact on the rights of a person *not suspected of wrongdoing*. In other words, the key defect in the police power sought in *Fleming* was that it would have authorized the arrest of an innocent person.

In our view, such an arrest power, if recognized, would violate the prohibition on arbitrary detention and imprisonment found in section 9 of the Charter. Prior to the Charter, an arrest was considered lawful if it was authorized by a statutory or common law rule.[88] For an arrest to be valid in the Charter era, we argue, the arrest must be authorized by law, the law must not be arbitrary and the arrest cannot be carried out arbitrarily.[89] The Supreme Court's jurisprudence on arbitrary detention supports this view. In *Grant* and *Suberu*, the Supreme Court explained that a detention will be arbitrary for section 9 purposes if it is not authorized by law, or if

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[87] *Austin v. Metropolitan Police Comr*, [2007] EWCA Civ. 989, [2008] 1 All E.R. 564 and *O'Kelly v. Harvey* (1883), 14 L.R.I. 10, both cited in *Fleming* SCC, at para. 107.

[88] Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2d ed. (Toronto: LexisNexis Canada, 2017), ch. 2.

[89] Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2d ed. (Toronto: LexisNexis Canada, 2017), ch. 2. See also *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.); *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32, at para. 56 (S.C.C.), citing *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.). See also *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 60 (S.C.C.), Binnie J., on the requirement that police powers be properly "exercised".

"the law authorizing the detention is itself arbitrary".[90] It held that the minimum constitutional standard for conducting an investigative detention is reasonable grounds to suspect that an individual is engaged in criminal activity. Detentions in the absence of reasonable suspicion are considered arbitrary because there is insufficient evidence that the accused transgressed the law and did something wrong.

While the Supreme Court has yet to rule on the minimum constitutional standard for a valid warrantless arrest, we agree with Stribopoulos that the standard in the criminal context ought to be reasonable grounds to believe that an individual has committed, is committing or will commit a criminal offence.[91] It has never been suggested that anything other than reasonable grounds could justify the exercise of the power of arrest; indeed, this is partly what led the Court in *Mann* to develop a common law power to detain individuals briefly for investigative purposes on a standard of reasonable suspicion.[92] It has certainly never been suggested that the requirement of some belief in wrongdoing could be dispensed with entirely so as to permit the police to arrest an individual who is not the subject of any suspicion. While this view is partly informed by a standard established by the *Criminal Code* — reasonable grounds is what is required by the general arrest power, for example — the Supreme Court's case law suggests that this standard is now the constitutional baseline. The investigative detention cases set the minimum standard for a valid investigative detention at reasonable suspicion. An arrest limits individual liberty to a greater extent than investigative detention. Furthermore, officers who arrest individuals also have the authority to search them, their property and their immediate environment. Given that arrest restricts liberty to a greater degree than investigative detention, it stands to reason that the constitutional threshold for arrest must be higher: reasonable and probable grounds should be necessary.

The fact that an arrest frequently triggers the criminal process against an accused also militates in favour of a constitutional standard of reasonable and probable grounds. As the crime control model of criminal justice teaches us, once the system is engaged, it is designed to produce a guilty plea or a finding of guilt at the end of a trial.[93] Arrests are often the first step toward an array of police interactions — such

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[90] *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32, at para. 54 (S.C.C.); *R. v. Suberu*, [2009] S.C.J. No. 33, [2009] 2 S.C.R. 460 (S.C.C.).

[91] James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225, at 282-83. For a general discussion of "minimum constitutional standards" under s. 9, see Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2d ed. (Toronto: LexisNexis Canada, 2017), ch. 2.

[92] *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32, at para. 55 (S.C.C.).

[93] Herbert Packer, "Two Models of the Criminal Justice Process" (1964) 113 U. Pa. L. Rev. 1, at 11. See generally James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" 2005) 31 Queen's L.J. 1, at 18.

as police investigations, interrogations and remand in custody — that can lead to wrongful convictions or incentivize innocent people to plead guilty.[94] For this reason, the criminal process should only be triggered where there is sufficient justification, in the form of objectively discernible facts showing that a particular person is probably guilty of a particular crime.[95] This high standard guards against the wrongful invocation of the criminal process and its devastating collateral consequences.

The application of the ancillary powers doctrine in *Fleming* obscures the fact that the failure to meet the constitutional threshold for arrest was the central issue in the case. Instead of focusing on that issue, the Court first asked whether the power fell within the general scope of the police's duties, and then whether it was reasonably necessary. The Court concluded that the power was not reasonably necessary because the police had other tools at their disposal to prevent a breach of the peace. But this outcome is unsatisfactory because it does not capture the constitutional defect in the power sought. In other words, the Court in *Fleming* arrived at the right outcome for the wrong reasons.

In our view, the absence of the essential safeguard of reasonable and probable grounds is what may well have struck the Court in *Fleming* as problematic. The fact that this key element is buried in an analysis trained on the "reasonable necessity" of the power demonstrates the dangers inherent in the ancillary powers test. Occasionally, the courts will muddle through the analysis and conclude that the burden on rights is insufficiently justified, as the Court did here. But we know that *Fleming* is an exception to a well-entrenched practice of recognizing new police powers. Indeed, both the trial court and the majority of the Court of Appeal concluded that the police had a power to preventatively arrest innocent individuals for their own protection, though they disagreed on whether the circumstances justified the application of the power in the case before them. This is what the *Waterfield* test permits, and, by its structure, often encourages.

Dov Fox contends that when judges recognize the importance of state interests (such as public safety) to justify governmental power, it can result in "interest creep".[96] Judges will increasingly rely on that interest in future decisions, strengthening its jurisprudential value and often broadening its definition.[97] Ultimately, the weight and scope of the governmental interest will expand and creep into other areas of the law at the cost of individual rights.[98] Similarly, the cumulative effect of prior decisions that recognize new police powers frame how judges decide future cases.

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[94] Rachel A. Harmon, "Why Arrest?" (2016) 115 Mich. L. Rev. 307, at 313-15.

[95] Terry Skolnik, "The Suspicious Distinction Between Reasonable Suspicion and Reasonable Grounds to Believe" (2016) 47 Ottawa L. Rev. 223, at 247-48.

[96] Dov Fox, "Interest Creep" (2014) 82 Geo. Wash. L. Rev. 273, at 277-78.

[97] Dov Fox, "Interest Creep" (2014) 82 Geo. Wash. L. Rev. 273, at 277-78.

[98] Dov Fox, "Interest Creep" (2014) 82 Geo. Wash. L. Rev. 273, at 277-78.

When courts decide cases in ways that expand police powers at the expense of individual rights, subsequent decisions that build on that precedent and further constrain individual rights seem less extreme than they otherwise would.[99] This partly explains how the Supreme Court of Canada was able to recognize a common law power to conduct warrantless penile swabs. The Court compared that measure's intrusiveness to warrantless strip searches, a common law power that the Supreme Court of Canada recognized several years earlier.[100] The cumulative weight of jurisprudence affirming new police powers pulls judges toward condoning police conduct that is not expressly authorized by law and, as we explain now, that bears many of the hallmarks of inconsistency with the rule of law: arbitrariness, retroactivity and unpredictability.

IV. ANCILLARY POWER AND THE RULE OF LAW

The Supreme Court of Canada's decision in *Fleming* highlights the importance of interpreting the ancillary powers doctrine restrictively to protect individuals against arbitrary exercises of police power. The Supreme Court of Canada has observed that the ancillary powers doctrine serves to fill "perceived gaps in the law".[101] Judges affirm the existence of new common law police powers they deem necessary to further certain law enforcement objectives in circumstances where Parliament has not legislated such a power.[102] The corollary of this is that judges should not generally recognize new police powers or expand existing ones where Parliament appears to have exhaustively set out a power's scope. If a court broadens law enforcement's authority beyond the legal framework Parliament has provided — here, arrest on reasonable grounds — the court undermines the constitutional protection against arbitrary police action.

In various decisions, the Supreme Court of Canada has noted that state power is exercised arbitrarily when it is not authorized by law, a consideration the Court relied on heavily in deciding *R. v. Le* this year, yet which it overlooked in *Fleming*.[103] When Parliament sets out a police power's scope prospectively, the legislator determines what is — and what is not — authorized by law. In doing so,

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[99] Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116 Harv. L. Rev. 1026, at 1100-1101.

[100] *R. v. Saeed*, [2015] S.C.J. No. 24, 2016 SCC 24, at paras. 62-72 (S.C.C.), citing *R. v. Golden*, [2001] S.C.J. No. 81, 2001 SCC 83 (S.C.C.).

[101] Quoted portion in *R. v. Kang-Brown*, [2008] S.C.J. No. 18, 2008 SCC 18, at para. 6 (S.C.C.). See also *Fleming* SCC, at paras. 42, 61. James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" 2005) 31 Queen's L.J. 1, at 31.

[102] Richard Jochelson, "Ancillary Issues with *Oake*s: The Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory" (2012-13) 43 Ottawa L. Rev. 355, at 364; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2006) 52 Crim L.Q. 299, at 299.

[103] *R. v. Le*, [2019] S.C.J. No. 34, 2019 SCC 34, at para. 124 (S.C.C.); *R. v. Grant*, [2009]

the legislator draws a bright line, signalling that conduct not authorized by the law should be considered arbitrary. This is true of the police's powers of arrest. Penney, Rondinelli and Stribopoulos explain that "[p]olice arrest powers have long been codified in Canada. When it comes to arrests for criminal offences, the *Criminal Code* contains a comprehensive set of police powers", which sit alongside arrest powers found in provincial trespass and other legislation.[104]

Section 495 of the *Criminal Code* provides the general legal framework for warrantless arrests. Subsection 495(1)(a) states that a police officer has the power to arrest an individual without a warrant where the officer has reasonable grounds to believe that the individual committed or will commit an indictable offence. Section 31(1) of the *Criminal Code* empowers peace officers to arrest a person to prevent a breach of the peace, meaning conduct that is violent and creates a risk of harm.[105] This latter provision largely overlaps with section 495 of the *Criminal Code* because violent conduct that creates a risk of harm to others is likely captured by some existing indictable offence. Section 495.1 allows for a warrantless arrest of a person "if a peace officer has reasonable grounds to believe that an accused has contravened or is about to contravene a summons, appearance notice, undertaking or release order". These provisions exhaustively set out the circumstances in which police officers may conduct preventive arrests and in which cases such arrests are unlawful and arbitrary.[106] The law does not authorize police to arrest individuals for prospective summary conviction offences. Nor does it authorize the police to preventatively arrest individuals to prevent harm to those individuals. Both of these types of preventative arrests are unlawful and arbitrary because they are not authorized by law within the meaning of section 9 of the Charter.

If the Supreme Court of Canada were to recognize an ancillary power to conduct preventive arrests that Parliament has not authorized, the concept of arbitrariness would lose much of its importance. Arbitrariness would be defined more by what judges authorize after the fact and less by what Parliament dictates is lawful before the fact. Such an approach would raise fairness concerns and place the legitimacy of a judicially created preventive arrest power into question. Since the criminal law profoundly impacts the accused person's interests, courts should interpret statutory police powers narrowly rather than use the ancillary power doctrine to expand them.[107]

S.C.J. No. 32, 2009 SCC 32, at para. 56 (S.C.C.); *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at para. 23 (S.C.C.).

[104] Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2d ed. (Toronto: LexisNexis Canada, 2017), at 2.151.

[105] *Fleming* SCC, at paras. 58-59.

[106] Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 2d ed. (Toronto: LexisNexis Canada, 2017).

[107] See, *e.g.*, T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge L.J. 111, at 120-21.

The Supreme Court of Canada's decision in *Fleming* thus contributes to our understanding of the relationship between statutory police powers and arbitrariness. It suggests that where Parliament has exhaustively defined a police power such that there is no legislative gap for courts to fill, as is the case with the power of arrest, police action is arbitrary when it goes beyond what Parliament has authorized.

The *Fleming* decision demonstrates the tension between common law police powers and the rule of law in a second way. A crucial aspect of the rule of law is that the law — and the scope of public officials' powers — should be known in advance.[108] When police powers are clearly set out in a statute, individuals can understand the scope of their rights, comprehend the limits of state power and seek redress when officers exceed their authority.[109] Statutory police powers also promote the rule of law by helping the police understand which types of action are lawful and incentivizes them to act lawfully in order to avoid sanctions.[110]

If courts dilute the importance of arbitrariness by expanding the scope of exhaustively legislated powers, individuals cannot know in advance whether police action is legitimate.[111] Furthermore, police can act at the margins of legality and invoke the ancillary powers doctrine to justify their *prima facie* unlawful conduct after the fact.[112]

One response might be to say that Parliament can modify or constrain a judicially recognized police power that misfires. Yet Parliament rarely does so. Moreover, as Stribopoulos points out, the ancillary powers doctrine disincentivizes lawmakers from modifying judicially created police powers.[113]

V. CONCLUSION

In this article, we have suggested that a critical analysis of the *Fleming* decision produces a number of important insights. First, it highlights the essential conceptual link between the power of arrest and wrongdoing by the accused. It demonstrates why it is unconstitutional and arbitrary for the police to arrest innocent individuals,

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[108] Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 C.R. (6th) 266, at 266-67; Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), at 39. James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" 2005) 31 Queen's L.J. 1, at 54.

[109] Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), at 216.

[110] Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), at 216.

[111] Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 C.R. (6th) 266, at 266-67.

[112] Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 C.R. (6th) 266, at 266-67.

[113] James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" 2005) 31 Queen's L.J. 1, at 70-71.

including for their own protection. Second, it strongly suggests that the minimum constitutional standard for arrests in the criminal context is reasonable grounds to believe that the individual committed, is committing or will commit a crime. Third, it illustrates the importance of interpreting the notion of arbitrariness broadly when assessing the lawfulness of police action. It shows why police action that exceeds the scope of exhaustively legislated powers is arbitrary, and, furthermore, why courts should not dilute the importance of arbitrariness by enlarging police powers beyond their exhaustively defined statutory limits. It suggests that the Supreme Court of Canada has normalized arbitrary police action through its police powers jurisprudence by retroactively condoning police conduct that was not authorized by Parliament at the time it was taken.

The need to maintain a central role for arbitrariness as a check on police power explains why Parliament should specifically legislate law enforcement powers and why courts should be reluctant to recognize new common law arrest powers. Yet this article's arguments are equally applicable to other sections of the Charter as well. Courts should also be particularly reluctant to recognize new search powers because it also normalizes arbitrariness within section 8 Charter jurisprudence.

Although the Supreme Court of Canada has shown an increasing willingness to recognize novel police powers within the past several decades, *Fleming* breaks with the trend. However, it remains to be seen whether the Court's decision will ultimately expand police powers in the long-term, notably, by opening the door to preventative detentions of law-abiding individuals to prevent violent and imminent breaches of the peace. When the Court is faced with another such case, it should demonstrate a renewed commitment to the basic values that the ancillary powers doctrine has progressively diminished over time: the rule of law, the separation of powers and the protection of minority groups.[114]

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[114] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).