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Improving the Current Law of Warrantless Cellphone Searches after *R v Fearon*

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Can police officers conduct warrantless searches of a person's cellphone incidental to arrest? Following the landmark Supreme Court of Canada decision in *R v Fearon*,¹ the answer is yes. The case undoubtedly marks one of the most significant expansions of police powers to conduct invasive searches affecting a person's intimate privacy interests. While the majority of the Court in *Fearon* has attempted to circumscribe the power in order for it to meet the constitutional right to be free from unreasonable search

and seizure,² the current state of the law lacks certain oversight mechanisms which are easy to implement and which would provide increased constitutional protection to persons whose cellphones are searched. This case comment begins by discussing the facts in *Fearon*, followed by the majority and dissenting opinions. Next, the implications of this decision and concerns related to the majority's ruling are analyzed. The case comment concludes with two recommendations on how to better constrain the power of cellphone searches incidental to arrest.

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¹ 2014 SCC 77, [2014] 3 SCR 621 [Hereafter: *R v Fearon*].

² *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Hereafter: *Canadian Charter*].

I. *R v Fearon*: the case

A. Facts

A jewelry merchant was loading up her car at the end of her work shift when she was approached by two males, one of which pointed a gun at her and demanded that she open the vehicle's trunk.³ When she complied, the suspects grabbed the bags and fled with the stolen jewelry in a black Acura, the license plate of which was recorded by witnesses and was quickly given to police officers.⁴ The police traced the vehicle's license plate to its owner and the police soon focused their investigation on Kevin Fearon and Junior Chapman, who were both arrested later that evening.⁵ Until that point, neither the stolen jewelry nor the handgun were located.⁶

When the officers arrested Fearon, they conducted a pat-down search incidental to his arrest and found the accused's cellphone which was not locked or password protected.⁷ They searched the cellphone without a warrant and found a draft message which stated "We did it were the jewlery at n**** burrrrrrrrrrr", as well as photos of a handgun and other men.⁸ When the Acura was eventually searched after obtaining a warrant, a loaded handgun was found which matched the gun in the photo.⁹ Fearon was tried and convicted for robbery with a firearm as well as

other related offences. The Ontario Court of Appeal upheld the conviction¹⁰.

B. A divided decision

The main issue before the Supreme Court of Canada was whether there existed at common law a police power to search cellphones incidental to arrest, and if so, whether it had to be circumscribed in order to meet the constitutional right to be free from unreasonable searches and seizures.¹¹

1. Supreme Court of Canada Majority Opinion: Cromwell J (McLachlin CJC and Moldaver and Wagner JJ concurring)

The Majority determined that the power to search a cellphone must be tied to a valid law enforcement objective and be truly incidental to the arrest,¹² in such a way that it permits the police officers to pursue their investigation and promptly provide evidence related to their guilt or innocence.¹³ Valid law enforcement objectives include discovering evidence related to the crime,¹⁴ preserving evidence, preventing the accused's escape, ensuring public safety,¹⁵ and locating

³ *R v Fearon*, 2014 SCC 77 at para 6, [2014] 3 SCR 621.

⁴ *Ibid.*

⁵ *Ibid* at para 7.

⁶ *Ibid.*

⁷ *Ibid* at para 8.

⁸ *Ibid* at paras 8, 30.

⁹ *Ibid* at para 8.

¹⁰ *R v Fearon*, 2013 ONCA 106.

¹¹ See *Canadian Charter*, *supra* note 2, s 8; *R v Fearon*, *supra* note 3 at para 15.

¹² *R v Fearon*, *supra* note 3 at para 16.

¹³ *Ibid.* See also *R v Beare*, [1988] 2 SCR 387 at 404, cited in *R v Fearon*, *supra* note 3.

¹⁴ See *R v Nolet*, 2010 SCC 24 at para 49, [2010] 1 SCR 851, cited in *R v Fearon*, *supra* note 3 at para 25.

¹⁵ See *Cloutier v Langlois*, [1990] 1 SCR 158 at 186. In that case, the three afore-

accomplices¹⁶. The officers undertaking the search must believe that there is a reasonable prospect that they will find evidence related to the offence in question.¹⁷ The basis for such searches is the connection of the search to the crime in question.¹⁸ In order to balance the competing interests of privacy and effective law enforcement, the Majority recognized that the power to search cellphones incidental to an arrest and without a warrant had to be circumscribed, by imposing strict conditions for the search to be lawful. Neither reasonable and probable grounds, nor exigent circumstances are required in order to undertake such searches.¹⁹ For such cellphone searches to be lawful, the following four conditions must be fulfilled.

Firstly, the arrest must be lawful. Secondly, the search in question must truly be incidental to the lawful arrest in the sense that it is undertaken for one of the aforementioned law enforcement objectives. Thirdly, the search must be tailored to the objective in question.²⁰ “The police must be able to explain, within the permitted purposes, what they searched and why.”²¹ Such searches should generally, but not exclusively, be limited to “only recently sent or drafted emails, texts, photos and the call log”, as only such content will usually fulfil the

required nexus between the search and its objective.²² In cases where the search is undertaken for the law enforcement objective of discovering evidence, the immediacy of the search must be necessary in the sense that the investigation will be hampered by not conducting it. It must therefore serve an “immediate investigative purpose”, as waiting for a warrant in the circumstances would be impractical but not impossible.²³ The objective of discovering evidence will not on its own suffice to justify conducting such searches if it is merely for securing additional evidence which is not on the verge of disappearance.²⁴ Fourthly, officers must take detailed notes of the content that they examine, including the content searched, time, duration of search and purpose.²⁵

Applying the facts to the case, the majority of the Court ruled that the search was undertaken for the valid law enforcement objectives of protecting public safety in attempting to locate the handgun, preserving the evidence of the stolen jewelry, as well as locating an accomplice believed to be involved in the robbery.²⁶ However, the officers failed to take detailed notes and were unable to recall what was accessed and how.²⁷ Following an application of the *Grant* test,²⁸ the Court ruled that the admission of the

mentioned law enforcement objectives were set out.

¹⁶ *R v Fearon*, *supra* note 3 at para 33.

¹⁷ *R v Caslake*, [1998] 1 SCR 51 [Hereafter: *R v Caslake*]. See *R v Fearon*, *supra* note 3 at para 22.

¹⁸ *Ibid.*

¹⁹ *R v Fearon*, *supra* note 3 at paras 63–73.

²⁰ *Ibid* at para 76.

²¹ *Ibid*, citing *R v Caslake*, *supra* note 17 at para 25.

²² *R v Fearon*, *supra* note 3 at para 76. Furthermore, the Court states that in some circumstances, the search may extend beyond the aforementioned content.

²³ *R v Fearon*, *supra* note 3 at para 80.

²⁴ *Ibid.*

²⁵ *Ibid* at para 82.

²⁶ *Ibid* at para 33.

²⁷ *Ibid* at para 87.

²⁸ *R v Grant*, [2009] 2 SCR 353.

draft text message and the photo of the gun would not bring the administration of justice into disrepute.²⁹ The evidence was admitted, and the majority of the Supreme Court of Canada upheld Fearon's conviction.

2. Supreme Court of Canada Dissenting Opinion: Karakatsanis J (LeBel and Abella JJ concurring)

In the dissenting judges' view, warrantless searches of cellphones ought to only be undertaken in exigent circumstances, as prior judicial authorization is required to adequately balance the law enforcement objectives with the important privacy interests and dignity concerns inherent to such searches.³⁰ They concluded that warrantless searches of cellphones would only meet *Charter*³¹ scrutiny, "when (1) there is a reasonable basis to suspect a search may prevent an imminent threat to safety or (2) there are

reasonable grounds to believe that the imminent loss or destruction of evidence may be prevented by a warrantless search."³² Their conclusions were based primarily on the distinct and wide privacy interests inherent to modern cellphones.³³

They also noted the difficulty in conducting targeted searches of cellphone content, and that attempts to do so will inadvertently reveal even more information, notably due to the need to search several applications to find the desired content.³⁴ Thus, in their view, the majority's requirements, including fastidious note taking and limiting the perusing of content, are impractical³⁵, and *ex-post facto* judicial exclusions of unlawfully obtained evidence will not remedy the profound privacy violations.³⁶ Noting the lack of exigent circumstances in the case at hand³⁷, they concluded that the search was illegal and that admitting

²⁹ Notably, the seriousness of the *Charter* infringing conduct was minor due to the officer's good faith and dominant legal position at the time that such cellphone searches were permissible. Secondly, the impact of the state conduct on the accused's *Charter* protected rights was minimal, as the latter failed to demonstrate that the extent of the privacy infringement was grave, particularly by failing to challenge the warrant to search the flip phone. Finally, because the evidence was cogent and reliable, its admission would not bring the administration of justice into disrepute. Thus, all factors militated towards the admission of the unlawfully obtained evidence.

³⁰ *R v Fearon*, *supra* note 3 at paras 105-106.

³¹ See *Canadian Charter*, *supra* note 2, s 8.

³² *R v Fearon*, *supra* note 3 at para 137. The same requirements apply to peace officers who penetrate into a dwelling house under exigent circumstances to arrest an individual without a warrant. See *Criminal Code*, RSC 1985, c C-46, s 529.3.

³³ *Ibid* at paras 101-106, 124, 152-153.

³⁴ *Ibid* at para 164.

³⁵ *Ibid* at para 171.

³⁶ *Ibid* at para 172.

³⁷ Notably, there were no reasonable grounds to suspect imminent risk of bodily harm to the public, and no reasonable grounds to believe that the evidence would be destroyed by an accomplice who would remotely erase the data from the phone, or by the accused themselves removing the data manually. See *R v Fearon*, *ibid* at para 181.

the evidence would bring the administration of justice into disrepute.³⁸

II. Legal implications of the *Fearon* case

A. Expansion of Police Powers

The *R v Fearon* decision marks an expansion of police powers to conduct warrantless searches incidental to arrest, by allowing them to search through devices which contain some of our most intimate private information and opinions. As the dissenting opinion points out: “These devices provide a window not just into the owner’s most intimate actions and communications, but into his mind, demonstrating private, even uncommunicated, interests, thoughts and feelings. Thus, like the search of the body and of the home, the warrantless search of personal digital devices as an incident of arrest is not proportionate to our privacy interests.”³⁹

Though homes and computers require warrants to be searched due to their important privacy interests, we now find ourselves in a legal landscape where cellphones can be searched without a warrant even though they contain as much, if not more, private information.⁴⁰

Permitting police officers to search applications such as photos and text messages⁴¹, will not only impact the privacy interests of the accused, but also those of third parties.⁴² After all, people use their cellphones to take pictures of others that they may understandably wish to keep private, and text message conversations are not unilateral exchanges but private conversations between two parties. As a result, cellphone searches affect the privacy interests of third parties who will remain unaware that some of their private information, pictures, conversations, or opinions have been seen by the police. Though third party privacy concerns have, in some cases, been an important aspect in determining whether searches were carried out in a reasonable manner, such considerations were absent from the majority’s reasons.⁴³

The strict requirements set forth by the majority are also difficult to practically implement and more oversight of such a power would be welcome. Even though the power to search cellphones is constrained by certain requirements there is no meaningful way to ascertain which information was actually accessed by police officers. Notably, there is no information which will be provided as to when certain content was last viewed and for what duration. Thus, if there are discrepancies between what the police officers actually viewed during the search and what their notes indicate, in all likeli-

³⁸ *Ibid* at para 181-182.

³⁹ *Ibid* at para 152.

⁴⁰ With respect to search warrants targeting dwelling houses, see *R v Feeney* [1997] 2 SCR 13. See also: *R v Golub* (1997), 34 OR (3d) 743, 1997 CanLII 6316 (Ont CA) [warrantless searches of a dwelling house incidental to arrest are generally not permitted]. With respect to computer searches, see *R v Vu*, 2013 SCC 60, [2013] 3 SCR 657.

⁴¹ *R v Fearon*, *supra* note 3 at para 76.

⁴² Western Journal of Legal Studies Editorial Board, “*R v Fearon* Case Commentary” (2015) 5:4 *UWO J Leg Stud* 6, online: <<http://ir.lib.uwo.ca/uwojls/vol5/iss4/6>>.

⁴³ See notably: *R v Thompson*, [1990] 2 SCR 1111 at 1113

hood, nobody will know. Despite these shortcomings, there are two important ways in which the current law of warrantless cellphone searches can easily be improved by providing increased oversight mechanisms which are currently lacking.

B. Two Ways to Improve the law of Warrantless Cellphone Searches

1. Requiring that the accused be informed that their cellphone was searched

First, the majority does not require that the police inform the accused that their cellphone was searched incidental to an arrest. In many other search and seizure contexts, where the accused is not aware that a search and seizure took place, the law requires that the accused be given notice of the existence of the search. For instance, in cases where a general warrant is issued which allows the police to conduct a search and seizure by means of a covert entry, and the investigative technique would otherwise constitute an unreasonable search and seizure, the *Criminal Code* requires the accused to be informed within a certain time of its existence.⁴⁴ Other investigational procedures which would otherwise constitute invasions of privacy also require that the accused be informed that the search took place, notably in the case of wiretaps.⁴⁵ The lack of any notice

⁴⁴ See *Criminal Code*, *supra* note 32, s 487.01 (5.1).

⁴⁵ See *Criminal Code*, *supra* note 32, s 196, with respect to the obligation to inform a

requirement was one reason for which the former emergency wiretap provisions found in section 184.4 of the *Criminal Code* were deemed unconstitutional in *R v Tse*.⁴⁶

The Supreme Court of Canada has held that being informed of the fact that one's private information was intercepted or searched is an important aspect of Section 8 of the *Canadian Charter*.⁴⁷ In *R v Tse*, the Supreme Court approved the observations of the intervener, the Criminal Lawyers' Association, stating that:

notice is neither irrelevant to s. 8 protection, nor is it a "weak" way of protecting s. 8 rights, simply because it occurs *after* the invasion of privacy. A requirement of after-the-fact notice casts a constitutionally important light back on the statutorily authorized intrusion. The right to privacy implies not just freedom from unreasonable search and seizure, but also the ability to identify and challenge such invasions, and to seek a meaningful remedy. Notice would enhance all these interests. Such a notice requirement has been deemed an important aspect of the constitutional right to be protected from unlawful search and seizure.⁴⁸

It is important for the accused to be informed that an invasive search was undertaken in order to move to exclude certain evidence at trial if it was uncon-

person whose private communications were intercepted by wiretap.

⁴⁶ See *R v Tse*, 2012 SCC 16, [2012] 1 SCR 531.

⁴⁷ *Ibid* at para 83. See also: *R v Telus Communications Co.*, 2013 SCC 16 at para 30, [2013] 2 SCR 3. See also: *R v Chehil*, 2013 SCC 49, at para 58, [2013] 3 SCR 220; *Wakeling v United States of America*, 2014 SCC 72 at para 70, [2014] 3 SCR 549.

⁴⁸ *R v Tse*, *supra* note 46 at para 83.

stitutionally obtained, or, in order to sue for constitutional damages.⁴⁹ An accused who is unaware that their cellphone has been illegally searched would be unable to seek the latter remedy. A pertinent example where this may occur is in instances where the accused is in a state of intoxication when he is arrested, his cellphone is confiscated by the police, and a cellphone search incidental to his arrest is conducted. If he was so intoxicated during the arrest that he does not even realize that his cellphone was taken and unlawfully searched, it would not occur to him to raise a *Charter* claim to vindicate the breach of his constitutional right to be free from an unreasonable search and seizure. Imposing a notice requirement would give important legal recourse to persons whose cellphones are illegally searched in such contexts.

Moreover, if an arrested person who is not charged with a crime inquires to the arresting officers as to whether his cellphone was searched, officers could presumably refuse to answer the question under the basis that the *Fearon* ruling does not create a constitutional obligation to inform persons whose cellphones were searched incidental to their arrest. To quote the Supreme Court of Canada, establishing a notice requirement “provides some additional transparency and serves as a further check that the extraordinary power is not being abused”.⁵⁰

⁴⁹ With respect to exclusion of evidence, see *Canadian Charter*, *supra* note 2, s 24(2) and *R v Grant*, *supra* note 28. With respect to suing for constitutional damages, see *Canadian Charter*, *supra* note 2, s 24(1) and *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28, respectively.

⁵⁰ *R v Tse*, *supra* note 46 at para 84.

Given the highly private degree of information stored in cellphones, in addition to the potential for abuse without any notice requirement, police officers ought to be obliged to inform the person that their cellphone was searched irrespective of whether or not that person is eventually prosecuted.

2. Requiring that the officers justify the reason for the search in their notes before the search takes place

Secondly, *Fearon* requires police officers to take detailed notes explaining the reasons for which they are undertaking a cellphone search. The majority of the Court explained:

given that we are dealing here with an extraordinary search power that requires neither a warrant nor reasonable and probable grounds, the obligation to keep a careful record of what is searched and how it was searched should be imposed as a matter of constitutional imperative. The record should generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration. After-the-fact judicial review is especially important where, as in the case of searches incident to arrest, there is no prior authorization. Having a clear picture of what was done is important to such review being effective. In addition, the record keeping requirement is likely to have the incidental effect of helping police officers focus on the question of whether their conduct in relation to the phone falls squarely within the parameters of a lawful search incident to arrest.⁵¹

⁵¹ *R v Fearon*, *supra* note 3 at para 82.

Although the majority is correct in emphasizing the importance of justifying the search within the officer's notes in order to verify whether it satisfies the relevant law enforcement objectives, there is no requirement that the officer justifies the reason for the search *before* they undertake it. Officers should be obliged to explain in their notes why they are conducting a search before it is carried out for two interconnected reasons.

First, as the majority of the Court explained in *Fearon*, the notetaking requirement is to counterbalance the lack of prior judicial authorization and to also prove that their search falls within the scope of valid law enforcement objectives.⁵² However, there is an inherent danger that officers can use the evidence of illegal activity they find during the search, to *ex post facto* justify its purpose.⁵³ If police officers search a cell-phone, they should not be able to justify the purpose of the search on the basis of the inculpatory evidence which was discovered during the search.⁵⁴

⁵² *R v Fearon*, *supra* note 3 at para 82.

⁵³ See the concerns raised in: *R v Wong*, [1990] 3 SCR 36 at 49.

⁵⁴ See for example: *R v Kokesch*, [1990] 3 SCR 3 at 29; *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at 160; *R v Monney* (1997), 120 CCC (3d) 97, 1997 CanLII 979 (Ont CA) at para 58; *R v Patrick*, 2009 SCC 17 at para 32, [2009] 1 SCR 579; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after Mann" (2007) 52 Crim LQ 299 at 325; David Dias, "Supreme Court allows warrantless cell phone searches: Top court rules investigative necessity outweighs privacy rights" [december 2014] Canadian Lawyer Magazine, online: <[http://www.canadianlawyermag.com/legalfeeds/2426/supreme-](http://www.canadianlawyermag.com/legalfeeds/2426/supreme-court-allows-warrantless-cell-phone-searches.html)

Second, the Supreme Court of Canada has explained in the context of other searches incidental to an arrest, officers should not be justifying the scope of their search after the fact, based upon the fruits of said search, but must "turn their mind to this scope before searching".⁵⁵ Requiring officers to write the purpose of the search in their notes before carrying it out would act as an additional safeguard to help prove that they considered the scope of the search prior to undertaking it. This would provide an additional degree of *ex ante* protection inherent to the right to be protected against unreasonable searches and seizures.⁵⁶ Such a measure would strike a balance between the lack of urgency or reasonable grounds requirements, while also offering some type of compromise between requiring prior judicial authorization and the absence of a duty that officers justify the search before it was undertaken. Moreover, given the fact that there is normally no exigency to conduct other types of searches incidental to an arrest of the property belonging to the accused, such as searches of vehicles incidental to an arrest, requiring the purpose of an officer's search to be prospectively justified in their notes could also help reduce the likelihood that the fruits of the search justify its initial purpose.

There is another inherent danger resulting from the majority's decision in *Fearon*. Notably, it is possible that inculpatory evidence unrelated to the particular offence will be discovered in the

court-allows-warrantless-cell-phone-searches.html>.

⁵⁵ *R v Caslake*, [1998] 1 SCR 51 at para 27. See also: *R v Funk*, 2008 SKQB 365 at para 44 (CanLII)

⁵⁶ See *R v Dymont*, [1988] 2 SCR 417 at 430.

course of a warrantless cellphone search. Although this is not in itself problematic, problems may arise if information found during the search is used to substantiate the reasonable grounds required to obtain a warrant in order to conduct a more extensive search, even though the purpose of the initial cellphone search was never prospectively justified. Such a scheme would risk circumventing the traditional requirement that reasonable grounds exist before a search warrant is issued, especially where the initial purpose of the warrantless search does not have to be noted before it is carried out.⁵⁷ By requiring that officers indicate the purpose of the search in their notes prior to it being performed, it could also act to minimize the potential for this eventual circumvention of the reasonable grounds requirement.

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It has been argued that the *Fearon* decision constitutes an important expansion of police powers to conduct invasive cellphone searches which affect the privacy interests of the accused and third parties. Unfortunately, the power to conduct such searches as provided by the Majority of the Court lacks certain easily implementable oversight measures which would allow for the vindication of *Charter* rights in the case of unlawful searches, as well as ensure that officers do not allow the fruits of the search to justify the initial purpose for which it was undertaken. These oversight measures include

⁵⁷ See notably: *Hunter et al. v Southam Inc.*, *supra* note 54 at 168. See also: *Criminal Code*, *supra* note 32, s 487(1).

informing persons that their cellphones were searched, and that officers write the purpose of the search in their notes before it is carried out. Moreover, given the lack of exigency requirements, implementing the aforementioned recommendations to other types of searches incidental to an arrest where the person is unaware of the existence of such searches, would also allow the accused to later challenge the lawfulness of the search before courts or to seek remedies where appropriate.

