IN THE MOOT COURT OF THE GALE CUP
ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

KEVIN FEARON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE RESPONDENT

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PART I: OVERVIEW AND SUMMARY OF THE FACTS

1. Overview of the Case

[1] Crime detection and individual liberty are routinely in opposition. The rule of law requires a perpetual balance between these competing interests. In the courts below, the long-standing police power to search incident to arrest (SITA) grappled with heightened privacy interests in cell phones.

[2] The majority of the Supreme Court of Canada (SCC) correctly determined that SITA was the appropriate framework for searches of digital devices incident to arrest, with some additional tailoring and diligence to make the power fully *Charter*-compliant. This approach strikes the correct balance between an individual's privacy interest in their cell phone, and the public's interest in the prompt investigation of crimes.

2. Summary of the Facts

[3] The Respondent agrees with the statement of facts and procedural history set out in the Appellant's factum at paragraphs 5-9. Additionally, the Respondent relies on the following facts:

a. police seized a car, gun and red hoodie matching witness descriptions that belonged to Mr. Fearon's co-accused, Junior Chapman (*Fearon* ONCA);

b. Mr. Fearon confessed to the robbery in a videotaped statement (*Fearon* ONCA); and,

c. when seeking a warrant for a full search, Det. Nicol disclosed the previous warrantless searches in the Information to Obtain (ITO) (*Fearon* ONCJ).

R v Fearon, 2013 ONCA 106 at paras 10-11, 20, 24 [*Fearon* ONCA].
R v Fearon, 2010 ONCJ 645 at paras 29 [*Fearon* ONCJ].

PART II - RESPONSE TO THE APPELLANT'S ISSUES

[4] The SCC sought to formulate common law guidelines for searches of digital devices that balanced the privacy interests of individuals with valid law enforcement objectives. The majority based their framework on the well-recognized SITA power, with a few additional restrictions to properly protect *Charter* rights. They established that a digital device may be searched incident to arrest where:

1. The arrest is lawful;
2. The search is truly incident to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purpose in this context are:
    a. Protecting the police, the accused, or the public;
    b. Preserving evidence; or
    c. Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the [device] incident to arrest;
3. The nature and extent of the search are tailored to the purpose of the search; and
4. The police take detailed notes of what they have examined on the device and how it was searched.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
R v Fearon, 2014 SCC 77 at para 83.

[5] By contrast, the dissent elected to construct a framework based on the principles of exigent circumstances. This would allow searches only for the purposes of safety and the preservation of evidence, and would unnecessarily limit the ability of police respond quickly to criminal activity.

Fearon at para 137.

[6] The majority's decision should be upheld as it is consistent with the principles of SITA and the evolution of the common law.

1. SITA is the appropriate framework

[7] Since its inception at common law, the SITA power has been an exercise in balancing privacy rights against valid law enforcement objectives (*Cloutier*). To this end, the common law restricts SITA in several ways:

a. the search must be incidental to the lawful arrest (*Caslake*);

b. the search may only occur when it is necessary (*Cloutier*);

c. the search must be for a valid law enforcement objective (*Cloutier*, *Caslake*);

d. there must be a reasonable basis to conduct the search (*Caslake*); and

e. the search should occur within a reasonable time after the arrest (*Caslake*).

Cloutier v Langlois, [1990] 1 SCR 158 at paras 54-56, 61-62.
R v Caslake, [1998] 1 SCR 51 at paras 17, 19-20, 24.

1.1 SITA allows for the effective pursuit of valid law enforcement objectives

[8] SITA is a fundamental tool for police. As L'Heureux-Dubé J. stated in *Cloutier*, "[t]he system depends for its legitimacy on the safe and effective performance of this function by the police."

Cloutier at para 54.

[9] In *Caslake*, the SCC found the power "does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy." Similarly, in *Beare*, the SCC observed that SITA powers had developed to address "the felt need in the community to arm the police with adequate and reasonable powers for the investigation of crime."

Caslake at para 17.
R v Beare, [1988] 2 SCR 387 at para 34.

[10] While these powers must be respectful of privacy interests, they should not be so limited as to prevent peace officers from carrying out their essential functions.

1.2 SITA properly protects privacy interests

[11] Section 8 *Charter* rights aim to protect an individual's reasonable expectation of privacy. However, no rights are absolute. It is the role of the court to establish what protections are necessary at common law to prevent unreasonable intrusions and ensure *Charter* rights are respected (*Saeed*).

R v Saeed, 2016 SCC 24 at para 38.

1.2.1 A warrant is not always required to search a digital device

[12] Digital devices generally import a heightened privacy interest. In *Vu*, the SCC found that computers demand increased protection and so searches will generally require preauthorization. Significantly, Cromwell J. was clear in not extending this requirement to all searches of digital devices:

> It is not my intention to create a regime that applies to all computers or cellular telephones that police come across in their investigations, regardless of context. [...] [P]olice may discover computers in a range of situations and it will not always be appropriate to require specific, prior judicial authorization before they can search those devices. For example, I do not, by way of these reasons, intend to disturb the law that applies when a computer or cellular phone is searched incident to arrest…
>
> *R v Vu*, 2013 SCC 60 at paras 45, 49, 63.

1.2.2 The privacy interest in digital devices is not high enough to warrant exclusion from SITA

[13] SITA has repeatedly been upheld in situations engaging a heightened privacy interest. Only one type of search has ever been categorically excluded from SITA: taking an accused's bodily samples incident to arrest (*Stillman*). A warrant requirement was implemented in that case due to the extremely high interest in bodily integrity and the lack of urgency in collecting the samples. However, in *Golden* and *Saeed*, strip searches and penile swabs were permitted under SITA, albeit with some additional restrictions. In these cases, urgency was central, as police needed to act swiftly in gathering and preserving evidence. The SCC did not elect to require a warrant, or even restrict such searches to exigent circumstances, despite the extremely high privacy interest.

> *R v Stillman*, [1997] 1 SCR 607 at para 49.
> *R v Golden*, 2001 SCC 83.
> *Saeed*.

[14] An intrusion on one's bodily integrity is highly invasive. In *Golden*, the SCC likened the experience of a strip search to a sexual assault. These searches cannot be done without infringing privacy rights (*Golden*) and constitute perhaps "the ultimate affront to human dignity" (*Stillman*).

> *Golden* at paras 83, 90.
> *Stillman* at para 39.

[15] Searching a digital device, by contrast, is not inherently invasive (*Fearon*). Lamer J.'s statement that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home" can equally be applied to digital devices (*Pohoretsky*). A properly tailored and limited search by police will not reach the threshold established by *Stillman* to exclude the search from SITA, as the rationales for the restrictions differ. The correct approach is not to exclude the power, but to properly circumscribe it.

> *Fearon* at para 55.
> *R v Pohoretsky*, [1987] 1 SCR 945 as cited in *Stillman* at para 42.

1.2.3 Heightened interests can be addressed through appropriate search limits

[16] The majority added restrictions to those already established within the basic SITA framework:

a. the scope of the search of the device must be tailored to its specific purpose;

b. a search to discover evidence is only authorized where the investigation would be stymied or significantly hampered absent the ability to promptly search the device; and,

c. officers must take detailed notes regarding how and why they searched the device.

Fearon at paras 76, 80, 82.

[17] These refinements ensure the common law power is *Charter*-compliant. They are sensitive to both law enforcement needs and the unique features of such devices.

1.3 Application of SITA to digital devices

[18] Together, the well-established criteria set out for SITA combined with the additional protections imported by the majority provide the necessary protection of privacy interests in digital devices.

1.3.1 The search must be truly incident to arrest

[19] SITA prohibits searches for evidence of unrelated criminal activity. This means searches will generally only be appropriate for serious offences, as there will rarely be a reasonable basis to search a phone for minor offences (*Fearon*). The search must also be for a valid law enforcement objective, which further limits the types of searches that will be permitted (*Caslake*).

Fearon at para 79.
Caslake at para 20.

1.3.2 Reasonable basis is the correct standard

[20] Under SITA, a reasonable basis is required to conduct a search, assessed on a modified objective standard. There is no duty to search upon arrest and so the circumstances of the arrest must indicate that a search is necessary to achieve a law

enforcement objective (*Cloutier*). A search of a cell phone, therefore, will never occur as a matter of process after an arrest.

> *Cloutier* at para 62.

[21] The authority for a SITA arises from the lawful arrest that precedes it (*Caslake*). In *Brown*, the Court observed that the "societal harm done by the commission of the crime and the suspect's connection to that event provide the justification for state action which interferes with individual freedoms." Further grounds of reasonable belief or suspicion for the search are not needed in this context.

> *Caslake* at para 43.
> *Brown v Regional Municipality of Durham Police Service Board*, 167 DLR (4th) 672 at para 64 (Ont CA) [*Brown*].

[22] Indeed, the requirements imposed by the dissenting judges are not substantially different from the reasonable basis standard. While Karakatsanis J. adopted the language of reasonable grounds and suspicion from exigent circumstances, she required only that the search "may" serve to prevent harm or preserve evidence (*Fearon*). This use of "may" instead of "will" has been described as "a very low standard" (*Hunter v Southam*) and amounts to little more than the reasonable basis consistently required under SITA.

> *Fearon* at paras 176-179.
> *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.*, [1984] 2 SCR 145 at para 42 [*Hunter v Southam*].

1.3.3 A search will only be authorized in urgent circumstances

[23] In *Hunter v Southam*, the SCC established that it is preferable to obtain a warrant prior to conducting a search. However, some circumstances make even a telewarrant either

impractical or impossible. SITA is a well-established exception to the general rule in *Hunter v Southam*, in part because it operates in such a context (*Stillman*, *Golden*).

Hunter v Southam at para 29.
Stillman at para 33.
Golden at para 23.

[24] Ensuring safety and preserving evidence are intrinsically tied to an element of urgency. It is precisely that any delay could result in irreparable harm or the destruction of evidence that justifies the search absent judicial preauthorization.

[25] The majority further emphasized the urgency requirement that already applies to the discovery of evidence (*Lim*). A search will be permitted only where an investigation will be stymied absent the ability to search promptly. Officers intending to search a device for evidence should be prepared to explain why waiting for a warrant was not possible or practical in the circumstances (*Fearon*).

R v Lim, [1990] OJ No 3261, 1 CRR (2d) 136 at para 42 (Ont H Ct J).
Fearon at para 80.

[26] Several cases applying *Fearon* have excluded evidence on this basis. In *Gambilla*, a *Fearon* analysis was not strictly required because the cell phone in question was abandoned. However, the trial judge determined that the search would have violated s. 8 rights, had they existed, because the officers gave no reason why the cell phone needed to be searched immediately.

R v Gambilla, 2015 ABQB 40 at paras 233-234.

[27] Similarly, in *Rasul*, all of the suspects and locations had already been secured by police before the search of the cell phone occurred. There was, therefore, no investigative necessity or urgency to authorize a search.

R v Rasul, 2016 NLTD(G) 7 at paras 65-66.

1.3.4 The discovery of evidence remains a valid law enforcement objective

[28] Both the majority and dissent agreed that a warrantless search of a digital device for the purposes of safety or preserving evidence is permissible. The discovery of evidence objective was excluded by the dissent, despite the potential importance of this evidence to police investigation and the liberty interests of an arrestee. Under SITA, access to this valuable information can be maintained with sufficient safeguards.

[29] The discovery of evidence as a valid objective of a SITA was established in Canadian law by 1949 (*Brezack*). In *Cloutier*, L'Heureux-Dubé J. highlighted its important role in the investigation of criminal activity: "The effectiveness of the system depends in part on the ability of peace officers to collect evidence that can be used in establishing the guilt of a suspect beyond a reasonable doubt."

> *R v Brezack*, [1949] OR 888 cited in *Cloutier* at para 40 (CA).
> *Cloutier* at para 54.

[30] The information obtained during an arrest is often essential in laying the correct charges or determining whether a suspect can and should be held in custody (*Lim*). As the Court in *Balendra* stated, "charges are often upgraded or downgraded depending on evidence discovered during a search incident to arrest." This information can also quickly reveal an individual's innocence (*Lim*).

> *Lim* at paras 42-43.
> *R v Balendra*, 2016 ONSC 5143 at paras 49, 55.

[31] Privacy is protected because only searches for information that is crucial to investigations at or around the time of arrest will be permitted. This may include the whereabouts of additional suspects or evidence of drug trafficking (*Fearon*).

> *Fearon* at para 80.

[32] The value of this information has been demonstrated in cases applying *Fearon*. In *Artis*, two individuals were arrested after accepting a package known to contain heroin. Their cell phone messages demonstrated knowledge of the contents, which was essential to laying charges.

R v Artis, 2016 ONSC 2050.

[33] In *Jones*, a search incident to an arrest for drug possession led to a further arrest for trafficking. The Court found:

> The discovery of evidence is an important function necessary for police officers to effectively carry out their duties. Police are not limited to exigent or emergency circumstances when conducting a search incidental to arrest because the timely search of items which may indicate the arrestee's innocence or guilt is of fundamental importance in criminal investigations.

R v Jones, 2015 SKPC 29 at para 53.

[34] An exigent circumstances framework that excludes the discovery of evidence deprives police of urgently needed information that will allow them to properly proceed. It also creates an artificial distinction between the discovery and preservation of evidence, since the device searched and the evidence obtained may be the same. Because urgency is the driving force behind both the preservation and discovery of evidence, information gleaned from a digital device that is similarly pressing should be similarly treated.

1.3.5 Tailoring the search prevents unreasonable breaches of privacy

[35] The majority also limited the scope of the search to further protect privacy interests. They explained:

> … [I]t is not enough that a cell phone search in general terms is truly incidental to the arrest. Both the nature and the extent of the search

> performed on the cell phone must be truly incidental to the particular arrest for the particular offence.
>
> *Fearon* at para 76.

[36] A SITA "does not give the police a license to rummage around in a device at will" (*Fearon*). Instead, searches will generally be limited to recent communications or photos. For example, a reasonable basis to think an accused has summoned backup would authorize a limited search of recent calls or messages. This tailoring ensures any intrusion on privacy will be minimal while allowing police access the basic information they require. A full forensic analysis of the phone would require a warrant.

> *Fearon* at paras 76, 78.

[37] The effect of this limitation can already be seen in the case law. In *Rasul*, for example, the Court found the *Fearon* criteria was not met because the SITA for drug offences extended to photos and text messages going back over a month, neither of which were truly incidental to the arrest.

> *Rasul* at paras 68-69.

[38] By contrast, in *Jones*, drug possession charges were upgraded after evidence indicated trafficking. The search was upheld, as the officer only reviewed recent text messages. The Court stated:

> Text messaging is the lifeblood of Dial-A-Dope drug dealers. The officer performed only a cursory search and did not stray into other areas or applications on the phone that would not have yielded further evidence of an offence. As such, I find the officer tailored the nature and extent of his search of the cell phone at the scene and station to the purpose of the search.
>
> *Jones* at para 62.

1.3.6 The duty to make notes ensures careful consideration of all aspects of the search

[39] When conducting a search of a digital device, officers are now required to take detailed notes regarding what they searched and why. Where there is a breach of *Charter* rights, this provides the court with the information needed to implement a proper remedy.

[40] However, the need to produce notes will also prevent breaches by forcing officers to critically consider each step of their search *as they do it*. Knowing that they must justify every click means their actions will be measured and deliberate, resulting in a less intrusive search.

1.4 A flexible framework is required

[41] The circumstances of an arrest cannot always be anticipated (*Lim*). The Court's comments on ancillary powers in *Brown* are apposite:

> The infinite variety of situations in which the police and individuals interact and the need to carefully balance important but competing interests in each of those situations make it difficult, if not impossible, to provide pre-formulated bright-line rules which appropriately maintain the balance between police powers and individual liberties.
>
> *Lim* at para 31.
> *Brown* at para 62.

[42] Peace officers need a framework that is flexible enough to adapt to unpredictable situations and ever-changing technology. The majority's framework does this by honing the general parameters and guidelines for SITA that inform the on-the-spot decision

making by peace officers and building on their extensive training. This is not unlike the contextual framework established for investigative detention in *Mann* (Coughlan).

> *R v Mann*, 2004 SCC 52 at para 34.
> Steve Coughlan, "Common Law Police Powers and Exclusion of Evidence: the Renaissance of Good Faith", (2006) 36 CR-ART 353.

[43] Our justice system is built on a foundation of good faith in the ability of peace officers to enforce the law. There is strong evidence to conclude that SITA is the most commonly conducted search in Canada (Quigley, *Golden*). Just as officers are trusted every day to determine whether there are grounds to arrest, or whether exigent circumstances are present, so too can they determine whether SITA is necessary in the circumstances. They have been doing so for decades. The framework established by the majority provides the necessary foundation and essential criteria to make this determination, while at the same time providing the mechanisms required to address any mistakes when they do occur.

> Tim Quigley, "R. v. Fearon: A Problematic Decision", (2015) 15 CR-ART 281.
> *Golden* at para 84.

2. The evidence should be admitted under s. 24(2) of the *Charter*

[44] The majority of the SCC acknowledged Mr. Fearon's s. 8 *Charter* rights had been breached because the police failed to provide "detailed evidence about precisely what was searched, how and why" (*Fearon*). They then properly concluded the evidence should be admitted pursuant to s. 24(2) of the *Charter*, following an analysis of the three factors laid out in *Grant*:

a. the seriousness of the *Charter*-infringing state conduct;

b. the impact of the breach on the *Charter*-protected interests of the accused; and,

c. society's interest in the adjudication of the case on its merits.

Fearon at para 87.
R v Grant, 2009 SCC 32 at para 71.

[45] Courts must weigh these factors to establish whether admitting the evidence would bring the administration of justice into disrepute. In this case, the state's transgression was not serious, the impact of the breach was low, and society's interest in seeing this case properly adjudicated was high. All three elements militate towards inclusion of the evidence.

Grant at para 71.

2.1 The Charter-infringing state conduct was not serious

[46] The law surrounding SITA of digital devices was unsettled when the search occurred. The "dominant view at the time" was that the well-established SITA power included cell phones, as the careful limits set out by the majority had not yet been established (*Fearon*). Based on this, the trial judge found the search to be lawful, since the police reasonably believed there could be relevant information on Mr. Fearon's phone. The Court of Appeal unanimously upheld the legality of the search. The *Charter* breach, then, was only recognized retroactively and the mistake was understandable (*Grant*).

Fearon at paras 34-35, 93.
Grant at para 133.

[47] The police acted in good faith in conducting the search. There was no "[w]ilful or flagrant disregard of the *Charter*" that would require the court to distance itself from the police action (*Grant*). Indeed, the officers disclosed the warrantless searches on their

subsequent warrant application, demonstrating their genuine belief that the initial search was authorized (*Fearon*).

> *Grant* at para 75.
> *Fearon* at para 93.

[48] The police were looking for evidence that could lead them to the location of the jewelry or gun. The draft text message and photographs obtained from Mr. Fearon's phone were not core biographical information (*Fearon*). The search results and their evidence at trial suggest that they tailored the search to that purpose.

> *Fearon* at paras 8, 36.

2.2 The impact of the breach on the Charter-protected interests of the accused was low

[49] This factor measures the impact of the breach upon the individual's interest—in this case, Mr. Fearon's privacy interest—rather than its impact on the individual. In *Coté*, the Court observed:

> If a search warrant *could* have been validly issued at the time the search was conducted […], the intrusiveness of the illegal search arises from the fact that it was not authorized in advance by a judicial officer. This, on its own, tends to reduce the impact of this breach on the appellant's Charter-protected reasonable expectation of privacy. (emphasis added).

> *R v Côté*, 2011 SCC 46 at paras 6, 33, 84.

[50] The second *Grant* factor also favours inclusion of the evidence, as the breach of Mr. Fearon's privacy rights was not significant (*Fearon*). Mr. Fearon did not challenge the search warrant obtained later for the full contents of the phone, effectively conceding that reasonable grounds existed. This means the SITA did not reveal any information the police would not have seen otherwise. Further, the Appellant had a diminished privacy interest because he was lawfully arrested: "[t]heir status as arrested persons necessitates and

justifies otherwise unreasonable police intrusions into the lives of those individuals" (*Lim*). The extent of the *Charter* breach, therefore, was minimal.

> *Fearon* at para 96.
> *Lim* at para 34; see also *Beare* at para 62.

2.3 Society's interest in the adjudication of this case on its merits is high

[51] The third step of the *Grant* analysis engages a number of factors: the reliability of the evidence, the seriousness of the offence, and the relative importance of the evidence to the Crown's case (*Grant*). Courts must weigh all factors to "balance the interests of truth with the integrity of the justice system" (*Mann*).

> *Grant* at paras 81-84.
> *Mann* at para 57.

2.3.1 The evidence is cogent and reliable

[52] Neither party disputes this element of the third *Grant* factor.

2.3.2 Robbery is a serious offence

[53] Seriousness of the offence has "the potential to cut both ways" (*Grant*) and has received less weight since *Grant* (*Cole*). But, where police have acted in good faith, the seriousness of the offence has tended to be either neutral or favour inclusion (see e.g. *Chuhaniuk*, *Cole*). In the circumstances of this case, the seriousness of robbery factors towards inclusion.

> *Grant* at para 84.
> *R v Cole*, 2012 SCC 53 at para 134.
> *R v Chuhaniuk*, 2010 BCCA 403 at para 90.

2.3.3 The evidence is highly important to the Crown's case

[54] Mr. Fearon's draft text message and the photograph of the gun are the only evidence connecting him to the robbery other than his videotaped statement (*Fearon*). All other physical evidence—e.g. the car, hoodie and gun—implicated Mr. Chapman alone. Eyewitness identification of Mr. Fearon by strangers is notoriously frail evidence with which to secure a conviction (*Hay*).

> *Fearon* ONCA at paras 10-11, 14, 20, 24.
> *R v Hay*, 2013 SCC 61 at para 40.

[55] The text message, by giving real-time evidence of Mr. Fearon's involvement in the robbery, is highly important to the Crown's case. His confession appears less reliable because of his spurious insistence that the gun used in the robbery was fake and that they threw it away (*Fearon* ONCA). By contrast, the text message was intended as a private communication to his accomplice and is, therefore, a more reliable indication of his state of mind.

> *Fearon* ONCA at para 24.

2.3.4 Society's interest in the adjudication of this case on its merits demands inclusion of this evidence

[56] The evidence is cogent and reliable, it pertains to a serious offence, and it is crucial to the Crown's case. The third *Grant* factor favours inclusion.

2.4 In balancing all factors, the evidence must be included

[57] The *Grant* analysis requires courts to weigh all relevant factors to determine whether exclusion of the evidence is an appropriate remedy. In this case, good faith of

police, a technical breach of the new SITA test, minimal impact on the privacy interests of the accused, and a serious robbery demand inclusion of the highly reliable evidence obtained from Mr. Fearon's phone.

Grant at para 71.

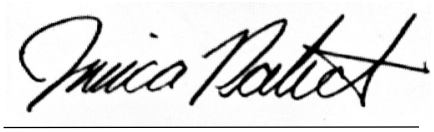
PART III: ADDITIONAL ISSUES AND ARGUMENTS

[58] The Respondent raises no additional arguments.

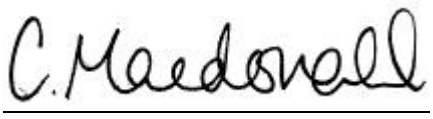
PART IV: ORDER SOUGHT

[59] The Respondent respectfully requests that this Honourable Court dismiss this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2017.



Jessica Patrick
Counsel for the Respondent



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APPENDIX A: AUTHORITIES CITED

JURISPRUDENCE **CITED AT PARAGRAPH**

Brown v Regional Municipality of Durham Police Service Board, 167 DLR (4th) 672 ..... 21, 41
Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc., [1984] 2 SCR 145 ..... 22, 23
Cloutier v Langlois, [1990] 1 SCR 158 ..... 7, 8, 20, 29
R v Artis, 2016 ONSC 2050 32
R v Balendra, 2016 ONSC 5143 30
R v Beare, [1988] 2 SCR 387 ..... 9, 50
R v Brezack, [1949] OR 888 29
R v Caslake, [1998] 1 SCR 51 ..... 7, 9, 19, 21
R v Chuhaniuk, 2010 BCCA 403 53
R v Cole, 2012 SCC 53 53
R v Côté, 2011 SCC 46 49
R v Fearon, 2010 ONCJ 645 3
R v Fearon, 2013 ONCA 106 ..... 3, 54, 55
R v Fearon, 2014 SCC 77 ..... 4, 5, 15, 16, 19, 22, 25, 31, 35, 36, 44, 46, 47, 48, 50
R v Gambilla, 2015 ABQB 4 26
R v Golden, 2001 SCC 83 ..... 13, 14, 23, 43
R v Grant, 2009 SCC 32 ..... 44, 45, 46, 47, 51, 53, 57
R v Hay, 2013 SCC 61 54
R v Jones, 2015 SKPC 29 ..... 33, 38
R v Lim, [1990] OJ No 3261, 1 CRR (2d) 136 ..... 25, 30, 41, 50
R v Mann, 2004 SCC 52 ..... 42, 51
R v Pohoretsky, [1987] 1 SCR 945 15
R v Rasul, 2016 NLTD(G) 7 ..... 27, 37
R v Saeed, 2016 SCC 24 ..... 11, 13
R v Stillman, [1997] 1 SCR 607 ..... 13, 14, 15, 23
R v Vu, 2013 SCC 60 12

SECONDARY SOURCES **CITED AT PARAGRAPH**

Steve Coughlan, "Common Law Police Powers and Exclusion of Evidence: the Renaissance of Good Faith", (2006) 36 CR-ART 353 42
Tim Quigley, "R. v. Fearon: A Problematic Decision", (2015) 15 CR-ART 281 43

APPENDIX B: RELEVANT LEGISLATION

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.**

8. Everyone has the right to be secure against unreasonable search or seizure.

24. **(1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.