**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

---

# APPELLANT'S FACTUM

---


**COUNSEL FOR THE APPELLANT**

**McGill University**
Faculty of Law
Old Chancellor Day Hall
3644 Peel Street
Montreal, QC
H3A 1W9

**Anna Gilmer**
Email: anna.gilmer@mail.mcgill.ca

**Katrina Sole Kähler**
Email: katrina.sole-kahler@mail.mcgill.ca

**COUNSEL FOR THE RESPONDENT**

**Queen's University**
Faculty of Law
Macdonald Hall
128 Union Street
Kingston, ON
K7L 3N6

**Katrina Crocker**
Email: katrina.crocker@queensu.ca

**Pail Socka**
Email: paul.socka@queensu.ca

## PART I: OVERVIEW

[1] Privacy "is at the heart of liberty in a modern state" and is fundamental to democracy, human dignity, and freedom of expression. In an era of technological advancement, however, law enforcement and security concerns threaten privacy, and traditional legal mindsets fail to adequately uphold this essential right. Cell phones—the main communication device of the 21st century—epitomize this concern. This case provides an opportunity to restrain the covert erosion of privacy rights and exercise vigilance against the increasing normalcy of privacy infringements.

*R v Dyment*, [1988] 2 SCR 417 at para 17.

[2] The Appellant, Kevin Fearon, appeals from the Supreme Court of Canada decision admitting evidence from the search of his cell phone on arrest, in violation of his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. The majority established a modified search incident to arrest (SITA) framework for searching cell phones. Applying that framework, they found a violation of the Appellant's s. 8 rights, but nonetheless admitted the evidence under s. 24(2).

*Canadian Charter of Rights and Freedoms*, ss 8, 24(2), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[3] The Appellant respectfully submits that the majority's framework cannot stand. The traditional SITA framework would not have permitted searches of cell phones, and regardless, the majority's framework inadequately protects the privacy interests at stake. Judicial pre-authorization, exigent circumstances, and new tools allow law enforcement to effectively pursue their objectives without compromising privacy rights.

[4] Upon recognizing the full extent of the privacy interests at stake, it becomes clear that the repute of the administration of justice demands exclusion of the evidence.

## PART II: FACTS

[5] On 26 July 2009, the Appellant, Kevin Fearon, was arrested in connection with the armed robbery of a jewellery merchant. At that time, the police had not located the stolen jewellery or the firearm used in the robbery, but had located the getaway vehicle.

*R v Fearon*, 2014 SCC 77 at paras 6, 7, 107 [*Fearon* SCC].

[6] Sgt. Hicks conducted a pat-down search incident to the Appellant's arrest, found a cell phone, and "had a look through" it. He recalled manipulating the keypad to access text messages and photographs. He found a draft text message stating "We did it," and photographs of a handgun and of males. He could not recall further details of the search.

*Fearon* SCC, *supra* para 5 at paras 8, 43.
*R v Fearon*, 2013 ONCA 106 at para 15 [*Fearon* ONCA].

[7] At the station, Det. Const. Abdel-Malik and Det. Nicol also looked through the cell phone. In total, the officers searched it at least six times throughout the night. At trial, none could recall specifics of what was examined during these further searches.

*Fearon* SCC, *supra* para 5 at paras 10, 30, 43.

[8] The search did not lead the officers to locate the gun or the jewellery. The gun was found in the car two days later, on July 28, when the officers executed a warrant.

*Fearon* SCC, *supra* para 5 at paras 8, 32.

[9] Months later, in February 2010, Det. Nicol obtained a warrant to download the contents of the phone. The resulting search revealed no new relevant evidence.

*Fearon* SCC, *supra* para 5 at paras 108, 110.

[10] At trial, the Appellant argued that the search of the cell phone violated his s. 8 rights, and sought exclusion of the evidence under s. 24(2). The trial judge applied the traditional SITA framework, found no violation, and admitted the evidence.

*R v Fearon*, 2010 ONCJ 645.

[11] The Ontario Court of Appeal dismissed the Appellant's appeal. While it was suggested that it would not have been permissible to search a locked phone without a warrant, no such exception applied where, as here, the cell phone was not locked.

*Fearon* ONCA, *supra* para 6 at paras 73–75.

[12] A four-judge majority on a panel of seven at the Supreme Court of Canada also dismissed the appeal. They held that SITA applied, but privacy interests required a modified framework. Accordingly, SITA of cell phones comply with s. 8 and are permissible where:

1. The arrest was lawful;
2. The search is truly incidental to the arrest in that it is objectively justified by one of the following law enforcement purposes:
    a. Protecting the police, the accused, or the public;
    b. Preserving evidence; or
    c. Discovering evidence, where failing to promptly search a cell phone will stymie or significantly hamper the investigation;
3. The nature and extent of the search are tailored to its purpose; and
4. The police take detailed notes of what they have examined on the device and why.

Pursuant to that framework, the Appellant's s. 8 rights were violated, but the resulting evidence was not excluded under s. 24(2).

*Fearon* SCC, *supra* para 5 at paras 83, 85–98.

## PART III: ARGUMENT

### 1. The traditional SITA framework would not permit searches of cell phones

[13] The Appellant respectfully submits that the majority erred in finding that the traditional SITA framework permitted cell phone searches. The law has always restrained SITA to an arrested person or their immediate surroundings. In the Appellant's view, cell phones' contents are in a space distinct from that where the physical cell phone is found.

*Cloutier v Langlois*, [1990] 1 SCR 158 at 180–81.

[14] In analyzing the applicability of SITA to searches of cell phones, the majority did not properly qualify the location of the data contained in the cell phone. Had they done so, they would have concluded that it was outside the spatial boundaries of SITA and that the search conducted here was without colour of right on the part of the State.

[15] The Appellant recognizes that the cell phone searched in this case was secured through a spatially constrained pat-down search of his person. However, it is respectfully submitted that the same conclusion cannot meaningfully attach to the cell phone's contents. As Cromwell J. explained in *Vu*, this distinction is a real one: "[w]hile documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer."

*R v Vu*, 2013 SCC 60 at para 44 [*Vu*].

[16] Particularly when connected to the Internet or to a network, cell phones—like computers—act as portals to information stored in other locations. This is truer now than ever, as cell phones are increasingly connected. The Appellant therefore submits that a cell phone must be treated as a space distinct from that where the hardware is found.

*Vu*, *supra* para 15 at paras 44, 51.

[17] It follows from the foregoing that SITA cannot extend to that separate space, accessible through the cell phone. Just as finding a key during a pat-down does not allow law enforcement to search the home that it opens incident to arrest, "seizing the key to the user's digital life should not justify a wholesale intrusion into that realm." To allow as much is to do away with the locational limits of SITA in the context of cell phones.

*Fearon* SCC, *supra* para 5 at para 132 (Karakatsanis J).

[18] While the majority aimed to *limit* the SITA power through their framework, they in fact *expanded* it. Indeed, prior to the ubiquity of cell phones, law enforcement required

a warrant to record our conversations or to access the photographs and letters that we usually kept at home. But oral conversations have become text messages, physical photographs digital ones, and letters emails, and all are stored on our cell phones. In fact, while in 2003 51.6% of Canadian households reported having at least one cell phone, by 2014 85.6% reported the same. The majority's framework permits law enforcement to access those materials without a warrant and without need for reasonable and probable grounds relative to the contents.

> *Criminal Code*, RSC 1985, c C-46, s 184.2, s 487 [*Criminal Code*]; see also *R v Feeney*, 1997 2 SCR 13 at para 45 [*Feeney*].
> *R v TELUS*, 2013 SCC 16 at para 5 (Abella J).
> Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2015: Canada's Communications System: An Overview for Citizens, Consumers, and Creators, Table 2.0.5* (22 October 2015), online: <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2015/cmr2.htm#t205>.
> Statistics Canada, *Survey of Household Spending, 2014* (12 February 2016), online: <http://www.statcan.gc.ca/daily-quotidien/160212/dq160212a-eng.pdf>.

[19] Permitting this state of affairs to continue would run counter to the Court's reluctance "to accept the idea that, as technology developed, the sphere of protection for private life must shrink." Privacy interests must be protected with the same rigour regardless of changes in locale or form: if the privacy interests engaged by intercepting communications or exploring someone's personal photograph album demanded judicial pre-authorization before, so should they now.

> *R v Tessling*, 2004 SCC 67 at para 16.

**2. <u>The majority's framework is insufficient to protect the privacy interests at stake</u>**

[20] In the alternative, even if SITA applies to cell phone searches, the modified SITA framework affords meagre protection to the privacy interests attaching to cell phones.

### A. Tailoring the nature and extent of a search is an inefficient criterion

[21] In an effort to impose "meaningful limits" on privacy infringements during cell phone searches, the majority modified the SITA framework by requiring law enforcement to tailor the nature and extent of their search to the purpose pursued. The majority was of the view that, in practice, this criterion would mandate the search of only "recently sent or drafted emails, texts, photos, and the call log." The Appellant submits, however, that the modern structures of cell phones, the sheer volume of information they contain, and the lack of knowledge on the part of the police as to their contents, impedes this result.

*Fearon* SCC, *supra* para 5 at paras 63, 76, 83.

[22] Cell phones engage a critical expectation of privacy in part due to the colossal amount of personal information they contain that is deeply intertwined with human dignity, integrity, and autonomy. These devices create a detailed, expansive, and daily account of every aspect of an individual's life that may date back decades. This account includes contact lists, agendas, diaries, personal photographs, dating applications, and a host of financial and medical information revealing "our interests, likes and propensities." The prodigious volume of information renders even a cursory examination of a cellular device a significantly intrusive invasion of privacy.

*Vu*, *supra* para 15 at paras 38, 40.
*R v Manley*, 2011 ONCA 128 at para 39; *Vu* at para 40.
*R v Morelli*, 2010 SCC 8 at paras 2–3 [*Morelli*].

[23] The attempt to limit the scope of a search through the "nature and extent" criterion does not account for the modern structure of cell phones. In practice, a user cannot access only one image, email, or text message. All of this information is generally presented on a uniform page: opening an images or email tab, for instance, often results in a display of all the images and emails on a single page. Similarly, opening the text

messages function opens a single page listing numerous names and conversations. The information presented on these uniform pages is not limited to recent activities, barring police from attempting to view only recent information.

[24] This issue is further exacerbated by the fact that texts and images are no longer only found in one location on a cell phone. There are now a multitude of applications for sending images and text messages available to users. GO SMS Pro, Google Messenger, or WhatsApp are but some examples of text messaging applications, and authorizing police to search "recent text messages" sanctions the search of all of these applications. As a result, police will have access to a volume of information much broader than contemplated by the majority in this case.

[25] The limitations sought to be imposed by the majority are additionally unattainable due to the inability of officers to foresee, in good faith, the information available on a device. It is impossible to predict where information may be found on a cell phone, especially given that users can meticulously customize the organization of their devices. Officers are therefore required to search numerous areas of a phone, including images, applications, and text messages, to find the information. In other words, the test proposed by the majority provides minimal guidance to police on how to limit a search and virtually guarantees that officers will access a wealth of irrelevant private information prior to *potentially* finding a relevant piece of evidence.

*Vu*, *supra* para 15 at para 58.

### B. The modified "discovery of evidence" purpose for the SITA of a cell phone will lead to unjustified and overbroad searches

[26] In an attempt to increase privacy protections for the SITA of cell phone searches, the majority held that law enforcement would be able to search for the purpose of

discovering evidence only where the investigation would be stymied or significantly hampered absent a search. This modification is overbroad and provides deficient protection for privacy interests in a cell phone.

*Fearon* SCC, *supra* para 5 at para 80.

[27] The ineffectiveness of the majority's modification is inherent in the limited knowledge that police officers have in invoking the "discovery of evidence" purpose. The majority indicated that, for an investigation to be stymied or significantly hampered, the search would have to serve an immediate investigative purpose that could not be pursued in a timely manner by obtaining a warrant. As the majority recognized, however, arrests can occur very early on in an investigation, at which point law enforcement has minimal information about the usefulness of the phone. Since the police cannot know what will be found on a phone, they must speculate about whether an investigation will be stymied or significantly hampered absent a search. The modification ultimately requires a level of omniscience on the part of police that cannot be reasonably expected.

*Fearon* SCC, *supra* para 5 at paras 69, 80.

[28] Instead of protecting the heightened privacy interests in a cell phone, the modified discovery of evidence purpose encourages courts to be indulgent of an officer's speculative, generalized claims to justify a cell phone search. While generalized statements by police that they are "looking for evidence" are usually insufficient to justify a search without some prospect or compelling reason, cases applying the majority's framework since *Fearon* have exemplified the concern that the modified SITA framework unduly relaxes the burden on police to justify a search. Consider *R v Jones*, where an officer searched text messages on a phone after smelling marijuana on teenagers: the Crown successfully claimed that the officer reasonably believed the phone

would provide information on drug trafficking and this investigation would be significantly hampered if the phone could not be searched immediately. In other words, under the modified SITA framework, an officer's general belief that drug trafficking often involves the use of cell phones was sufficient, without more, to justify a search.

*R v Hiscoe*, 2011 NSPC 84 at para 78 [*Hiscoe*].
*R v Jones*, 2015 SKPC 29.

[29] The matter at hand also involved tolerance of generalized and speculative statements under the majority's framework. Det. Nicol, for instance, justified the search of the cell phone by stating that, in his experience, "people take photographs of things they steal, places they go, targets of their offences." Such a statement could apply to most—if not all—crimes, and it is easy to assert that a cell phone could retain evidence based on this claim without any additional support on reasonable grounds.

*Fearon* SCC, *supra* para 5 at para 38.

### C. The note-taking requirement cannot render the majority's framework acceptable

[30] In light of the lack of prior judicial authorization, the majority held that officers searching cell phones incident to arrest had to keep detailed notes of their search to permit after-the-fact review. However, this requirement, though laudable, is unlikely to be properly implemented by law enforcement. Furthermore, even assuming that it could, it cannot cure the deficiencies of the other aspects of the majority's SITA framework.

*Fearon* SCC, *supra* para 5 at para 82.

[31] Notes taken pursuant to the majority's framework would be unlikely to permit fruitful after-the-fact review. In *Vu*, the Court stated that it would be "desirable" for a police officer to take notes during a warranted search of a computer or cell phone. Importing that suggestion to the SITA context, however, is ineffective. Unlike in *Vu*, the

Supreme Court of Canada's majority opinion in this case rests on the purported "urgency" of cell phone searches. That same sense of urgency means that officers acting in good faith will have little time to write notes. As articulated in *Tse*, in situations of urgency, it is "impractical to require contemporaneous detailed record keeping."

> *Vu*, *supra* para 15 at para 70.
> *Fearon* SCC, *supra* para 5 at para 49.
> *R v Tse*, 2012 SCC 16 at para 92.

[32] Subsequent validation through after-the-fact review cannot remedy a breach of privacy. As explained in *Hunter v Southam*, the purpose of s. 8—"to protect individuals from unjustified state intrusions upon their privacy"—demands "a system of prior authorization, not one of subsequent validation." The majority in this case was correct that "[a]fter-the-fact judicial review is especially important where, as in the case of searches incident to arrest, there is no prior authorization." But it cannot render acceptable an otherwise deficient framework. The framework itself must *prevent* breaches of privacy interests, not simply account for them after-the-fact. The majority's framework fails in this regard.

> *Hunter v Southam*, [1984] 2 SCR 145 at 160 [*Hunter*].
> *Fearon* SCC, *supra* para 5 at para 82.

### 3. Warrants, the doctrine of exigent circumstances, and new police tools will effectively address law enforcement concerns

[33] The recognition of significant privacy rights in cell phones is well established in legal jurisprudence. The majority's modified SITA framework, however, fails to strike an equitable balance between privacy rights and law enforcement interests. The locational limits inherent in SITA and the significant difficulties with modernizing the framework to a digital context indicate that SITA is inappropriate for cell phone searches.

[34] In light of the gradual erosion of privacy rights in the modern age and the important privacy interests involved with cell phones, the Appellant argues that judicial pre-authorization, absent exigent circumstances, provides a more meaningful and time-tested framework for cell phone searches.

> Arthur J. Cockfield, "Who Watches the Watchers? A Law and Technology Perspective on Government and Private Sector Surveillance" (2003) 29 Queen's LJ 364.

**A. Prior judicial authorization is the preferred standard for cell phone searches**

i) *Prior authorization is a preferred avenue to protect privacy rights*

[35] There is significant and well-settled jurisprudence affirming that the right to be secure against unreasonable search and seizure is preferably protected by judicial pre-authorization. Protecting privacy requires a means "of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place." Prior authorization ensures public confidence that invasions of privacy are justified in advance, especially since—as noted by Karakatsanis J. in dissent—exclusion of evidence after such an infringement cannot remedy the breach and the effect on one's sense of freedom and security.

> *Hunter*, *supra* para 32 at 160, [1984] SCJ No 36.
> *Morelli*, *supra* para 22 at para 111.
> *Fearon* SCC, *supra* para 5 at para 169.

[36] This contrasts with SITA, which is an extraordinary power and a *narrow exception* to the rule that searches require pre-authorization. Such exceptions apply only where a state interest is compelling and therefore overrides the significant privacy interest. They ought to remain "exceedingly rare," especially in criminal proceedings. The significant privacy interests in cell phones and the difficulty of remedying a breach of these interests indicates that this exception is inappropriate for cell phone searches.

*R v Liew and Yu*, 2012 ONSC 1826 at para 130 [*Liew*].
*R v Grant*, [1993] 3 SCR 223 at 239 [*Grant* 1993].

[37] The majority's modified SITA framework unpersuasively disregards the advantages of judicial pre-authorization and forces the framework to lapse into "subsequent validation." As noted above, the difficulties in predicting what may be found on a cell phone and in determining whether a search will be "stymied or significantly hampered" may prompt law enforcement officials to search a device and then provide *ex post facto* justifications for overbroad and inadequately documented searches.

*Hunter*, *supra* para 32 at 160.

[38] This prospect remains unacceptable even in the context of an arrest. Indeed, given that the "authority for a search does not arise as a result of a reduced expectation of privacy of the arrested individual," an arrestee's privacy rights are equally as worthy of constitutional protection.

*Fearon* SCC, *supra* para 5 at para 56.
*R v Caslake*, [1998] 1 SCR 51 at para 17.

ii) *Prior authorization is a more suitable standard given the possibility of establishing a search protocol to limit the infringement of privacy rights*

[39] Establishing judicial pre-authorization has the additional advantage of enabling the incorporation of search protocols into cell phone searches. *Vu* noted that search protocols could be useful to prevent police from indiscriminately scouring a device, especially in regards to the development of technology and computer searches. Justices of the peace have the discretion to enact requirements akin to a search protocol in order to "assure themselves that the warrants they issue fulfil the objectives of prior authorization." Judges in the U.S. similarly have the ability to establish search protocols

where necessary, which provides crucial oversight to ensure police do not indiscriminately search electronic devices.

> *Vu*, *supra* para 15 at paras 57, 61–62.
> *R v Millard and Smith*, 2016 ONSC 348 at paras 25, 43 [*Millard*].
> *Re Search of 3817 W West End*, 2004 US Dist LEXIS 26895, 321 F Supp 2d 953.

[40] Pre-authorization would encourage the regular use of search protocols. This regular use could, in turn, develop into a common practice that provides further clarity, predictability, and guidance to the police, while maintaining sufficient protection of the high privacy interests in a cell phone.

iii) *Warrants can be obtained in an efficient and timely manner*

[41] Requiring police to obtain a warrant through prior authorization for cell phone searches achieves an appropriate standard that both protects privacy rights and meets various law enforcement objectives.

[42] Contrary to the majority's concerns that such a standard disregards law enforcement objectives, warrants aptly meet the needs of officials to promptly pursue an investigation. Previous jurisprudence has held that requiring a warrant in the search of a cell phone does not restrict the police unduly in collecting and gathering evidence. In fact, there have even been cases analogous to the one at hand where police have on their own initiative sought a warrant prior to a search despite there being a gun involved in the crime. This suggests that such an obligation is feasible.

> *Liew*, *supra* para 36 at para 125; see also *Hiscoe*, *supra* para 28 at para 92.
> *R v Young*, 2008 BCCA 513.

[43] Furthermore, telewarrants can be obtained in a short amount of time, preventing potential destruction of evidence and upholding public or police safety. In *Gallinger*, for instance, a telewarrant was requested at 4:43pm in a firearms investigation due to

concerns with public safety and received at 5:15pm on the same day. Attaining a telewarrant also only requires meeting a "relatively low threshold" of impracticable circumstances, which demands more than a mere inconvenience but is far below the standard of urgency, exigency, or impossibility of personal attendance before a justice.

> *Criminal Code*, *supra* para 18, s 487.1(1).
> *R v Gallinger*, 2012 ONCJ 600 at para 32.
> *Millard*, *supra* para 39 at para 19.

**B. Exigent circumstances and police tools protect law enforcement objectives**

[44] It has been demonstrated that judicial pre-authorization is the preferred standard for cell phone searches and strikes the appropriate balance between privacy interests and law enforcement objectives. This approach—coupled with new police tools, as well as the doctrine of exigent circumstances where a warrant cannot be obtained in due time—responds to concerns that pre-authorization could hamper the ability of law enforcement officials to protect the public or the integrity of evidence.

[45] The exigent circumstances doctrine allows a warrantless search where there are reasonable and probable grounds for the search, it is not feasible to obtain a warrant, and there is a valid reason for a warrantless search. These reasons usually involve the protection of law enforcement interests, such as an "imminent danger of the loss, removal, destruction or disappearance of the evidence sought"—where a warrant would delay the search or seizure—or where immediate action is required to protect the police or the public. A reasonable belief is required to support the claim of destruction of evidence, while a lower burden of reasonable suspicion is required to protect safety.

> *Hunter*, *supra* para 32.
> *Grant* 1993, *supra* para 36 at 224; *Feeney*, *supra* para 18 at para 52.
> *Criminal Code*, *supra* para 18, s 529.3.

[46] Even where police cannot readily establish imminent danger of destruction of evidence, other measures are available to protect law enforcement objectives in the interim. For instance, a computer forensic analyst in *Cater* confirmed that removing the battery of a phone or placing the device in a Faraday Bag to block wireless communications can prevent the remote destruction of evidence.

*R v Cater*, 2012 NSPC 2 [*Cater*]; *Liew*, *supra* para 36 at para 144.

[47] While the majority rejected the effectiveness of the doctrine of exigent circumstances on the basis that it requires "too much knowledge on the part of the police" at a very early point in an investigation, search and seizure cannot be used for a fishing expedition. The jurisprudential preference for pre-authorization exists because the Constitution will not tolerate "a low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude." Reasonable grounds for arrest do not necessarily implicate that the case against the arrestee is conclusive. By using a low standard under SITA, however, police may be encouraged to arrest an accused prematurely in the hopes of strengthening their case by searching the veritable gold mine of information on a cell phone.

*Fearon* SCC, *supra* para 5 at para 69.
*Hunter*, *supra* para 32 at 167.

[48] The inherent fragility of digital evidence may in fact mandate that cell phones only be searched in emergencies to avoid accidental data corruption. In *Cater*, an analyst noted that the "best practice standard for preserving and discovering evidence from a cell phone is a forensic examination by a qualified forensic analyst utilizing procedures and software that prevent any corruption or deletion of information." Indeed, there are complex computer programs used to analyze digital evidence that can both assist with

finding hidden files, narrow a search to relevant parameters to limit privacy infringements, and prevent damage to data. A cursory search of a cell phone may therefore actually risk loss or damage to valuable evidence, and should not be undertaken unless there is urgency (or exigent circumstances). In that sense, a warrant or exigent circumstances may better protect potential investigative leads, as compared to encouraging careless and rushed cell phone searches.

> *Cater*, *supra* para 46 at paras 50–51.
> Lisa Jorgensen, "In Plain View?: R v Jones and the Challenge of Protecting Privacy Rights in an Era of Computer Search" (2013) 46:791 UBC L Rev at paras 10–11.

## 4. Application to the case at hand

[49] The Appellant agrees with the majority below that the Appellant's s. 8 rights were violated. The Appellant's submissions diverge from the majority with respect to the severity of the violation and the appropriate remedy for that violation.

### A. The evidence was taken in a manner that infringed the Appellant's s. 8 rights

[50] It is clear from the decision below that the evidence was taken in a manner that infringed the Appellant's s. 8 rights. Under the majority's framework, the dearth of evidence about the extent of the search precluded the Crown from proving that the search was reasonable. But while the majority would have allowed the police into the phone, an exigent circumstances standard would have barred the police from searching the cell phone at all. The breach was more significant than the majority's framework suggests.

> *Fearon* SCC, *supra* para 5 at paras 87–88.

[51] As Karakatsanis J. stated in dissent, "the facts of this case fall far below" the exigency standard. The police lacked reasonable suspicion that any search of the cell phone was necessary to prevent imminent bodily harm or imminent loss of evidence. In

any case, any urgency arising from a gun on the street or a concern that the jewellery would be disposed of permitted an application for a telewarrant, which was not attempted. As such, the search was unreasonable and violated the Appellant's s. 8 rights.

*Fearon* SCC, *supra* para 5 at para 181.
*R v Watts*, 2012 ONSC 1865 at para 8.

**B. The majority erred in admitting the evidence after a s. 24(2) analysis**

[52] In *Grant*, the Supreme Court of Canada identified three factors to be considered in determining whether the admission of evidence would bring the administration of justice into disrepute and thus demand exclusion pursuant to s. 24(2) of the *Charter*:

1. the seriousness of the *Charter*-infringing conduct;
2. its impact on the *Charter*-protected rights of the accused; and
3. society's interest in adjudicating the case on its merits.

The Appellant respectfully submits that the majority erred in admitting the evidence in this matter.

*R v Grant*, 2009 SCC 32 at paras 72-86 [*Grant*].

i) *The seriousness of the Charter-infringing conduct favours exclusion*

[53] The Appellant submits that the majority erred finding that the *Charter*-infringing conduct was not serious. The officers should have known that they were engaging with a heightened expectation of privacy and proceeded cautiously. Instead, they demonstrated a lack of concern for the Appellant's privacy, and none could recall details of the search.

[54] The majority correctly stated that "the police cannot choose the least onerous path whenever there is a gray area in the law" and, in general, should err on the side of caution and protection of accused's rights. However, the majority erred in holding that that the officers in this case were dealing with, at most, "a very light shade of gray."

*Fearon* SCC, *supra* para 5 at para 94.

[55] It is true that, at the time of the search, the courts were divided on the availability and scope of SITA of cell phones. However, common sense dictates that we have a heightened expectation of privacy in our cell phones, and most Ontario judges who contemporarily considered expectations of privacy in cell phones or computers agreed.

[56] For instance, in *Lefave* (2003) Dunn J remarked, "[s]urely an owner of a computer has a fairly high expectation of privacy." In *Cross* (2007), Brennan J stated: "In my view the very nature of a 'personal computer' places it and the data it contains within the 'biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state.'" Finally, in *Choudhry* (January 2009), Patillo J held that the accused had a "very high expectation of privacy" in his computer and its data.

> *R v Lefave*, [2003] OJ No 3861 (SC) at para 26.
> *R v Cross*, [2007] OJ No 5384 (SC) at para 2, citing *R v Plant*, [1993] 3 SCR 281.
> *R v Choudhry*, [2009] OJ No 84 (SC) at para 80.

[57] Faced with uncertainty about the legality of SITA of cell phones and their permissible scope, and with judicial recognition of digital privacy, the officers should have proceeded cautiously. They should only have conducted searches that they reasonably believed could not wait for judicial pre-authorization.

[58] The photograph search was certainly outside of that scope: the evidence so obtained would not have been lost, and could not reasonably have assisted in ensuring safety or locating evidence. The officers should have similarly refrained from conducting the several searches at the station: they have been unable to provide any cogent reason for engaging in them.

[59] The seriousness of the breach therefore militates in favour of exclusion.

ii) *The breach had a significant impact on the Appellant's s. 8 rights*

[60] The majority erred in their assessment of the second *Grant* factor by overemphasizing discoverability, leading to their conclusion that the impact on the Appellant's rights weighed only weakly in favour of exclusion. In the Appellant's respectful view, the invasive breach significantly impacted his s. 8 rights.

*Fearon* SCC, *supra* para 5 at para 96.

[61] The discoverability of the evidence could not overcome the otherwise serious intrusion into the Appellant's privacy. Under *Grant*, discoverability is not determinative, but is one of several considerations that qualify the impact of a breach. Courts focus on whether the breach was "fleeting and technical" or "profoundly intrusive." In the context of s. 8, that means that the unlawful search of an area "in which the individual reasonably enjoys a high expectation of privacy" is a more serious breach.

*Grant*, *supra* para 52 at paras 121, 76, 78.

[62] The breach in this case was on an area in which the appellant enjoyed a heightened expectation of privacy. As such, any illegal state violation of that expectation is serious and cannot be cured by discoverability.

[63] Focused on discoverability, the majority glossed over the issue of intrusiveness, stating only that searches of cell phones have "the potential" to be significantly invasive. Had they properly accounted for the heightened expectation, the majority would have found that the second factor militates strongly in favour of exclusion.

*Fearon* SCC, *supra* para 5 at para 96.

iii) *Society's interest in adjudicating the case on its merits is neutral*

[64] The majority focused too narrowly on the reliability of the evidence, to the exclusion of other considerations. As the Court in *Grant* explained, the importance of the

evidence to the prosecution's case is significant. In this case, excluding the evidence would not "gut" the Crown's case: other evidence is available, most significantly the firearm and witness testimony. Overlooking that fact led the majority to err in their evaluation of the third factor. In the Appellant's view, a proper consideration of this factor leads to the conclusion that its effect is neutral on the *Grant* analysis.

> *Fearon* SCC, *supra* para 5 at para 97.
> *Grant*, *supra* para 53 at para 83.

iv) *The Grant factors demand exclusion of the evidence*

[65] Admitting the evidence would bring the administration of justice into disrepute. The first two *Grant* factors favour exclusion, and none favour admission. Upon balancing the three factors, it is clear that the evidence must be excluded pursuant to s. 24(2).

## PART IV: ORDER SOUGHT

[66] The appellant respectfully requests that this Honourable Court grant this appeal, find that the search of the cell phone violated s. 8 of the *Charter*, exclude the resulting evidence from the proceedings pursuant to s. 24(2), and order a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF JANUARY, 2017

Anna Gilmer

Katrina Sole Kähler
Counsel for the Appellant

## TABLE OF AUTHORITIES

## CONSTITUTIONAL & STATUTORY AUTHORITIES

### *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 and 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.

### *Criminal Code*, RSC 1985, c C-46.

**184.2** (1) A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3).

(2) An application for an authorization under this section shall be made by a peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, *ex parte* and in writing to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, and shall be accompanied by an affidavit, which may be sworn on the information and belief of that

peace officer or public officer or of any other peace officer or public officer, deposing to the following matters:

(a) that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
(b) the particulars of the offence;
(c) the name of the person who has consented to the interception;
(d) the period for which the authorization is requested; and
(e) in the case of an application for an authorization where an authorization has previously been granted under this section or section 186, the particulars of the authorization.

(3) An authorization may be given under this section if the judge to whom the application is made is satisfied that

(a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
(b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
(c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

(4) An authorization given under this section shall

(a) state the offence in respect of which private communications may be intercepted;
(b) state the type of private communication that may be intercepted;
(c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
(d) contain the terms and conditions that the judge considers advisable in the public interest; and
(e) be valid for the period, not exceeding sixty days, set out therein.

(5) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under any of sections 487, 487.01, 487.014 to 487.018, 487.02, 492.1 and 492.2 if the judge is of the opinion that the requested warrant or order is related to the execution of the authorization.

**487** (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

(2) If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.

(2.1) A person authorized under this section to search a computer system in a building or place for data may

(a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(b) to obtain a hard copy of the data and to seize it; and

(c) to use or cause to be used any copying equipment at the place to make copies of the data.

(3) A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

(4) An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the

things seized in accordance with section 489.1 or as otherwise provided by law.

**487.1** (1) Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

(2) An information submitted by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing, shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the record or a transcription of it, certified by the justice as to time, date and contents.

(2.1) The justice who receives an information submitted by a means of telecommunication that produces a writing shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the information certified by the justice as to time and date of receipt.

(3) For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(3.1) A peace officer who uses a means of telecommunication referred to in subsection (2.1) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath.

(4) An information submitted by telephone or other means of telecommunication shall include

(a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;

(b) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;

(c) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and

(d) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

(5) A justice referred to in subsection (1) who is satisfied that an information submitted by telephone or other means of telecommunication

(a) is in respect of an indictable offence and conforms to the requirements of subsection (4),

(b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and

(c) discloses reasonable grounds, in accordance with subsection 256(1) or paragraph 487(1)(a), (b) or (c), as the case may be, for the issuance of a warrant in respect of an indictable offence,

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 256(1) or 487(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

(6) Where a justice issues a warrant by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

(a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(b) the peace officer, on the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting on its face the name of the issuing justice and the time, date and place of issuance; and

(c) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(6.1) Where a justice issues a warrant by a means of telecommunication that produces a writing,

(a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(b) the justice shall transmit the warrant by the means of telecommunication to the peace officer who submitted the information and the copy of the warrant received by the peace officer is deemed to be a facsimile within the meaning of paragraph (6)(b);

(c) the peace officer shall procure another facsimile of the warrant; and

(d) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(7) A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

(9) A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as

soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

(a) a statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;

(b) a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and

(c) a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.

(10) The clerk of the court shall, as soon as practicable, cause the report, together with the information and the warrant to which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information or warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

(12) A duplicate or a facsimile of an information or a warrant has the same probative force as the original for the purposes of subsection (11).

**529.3** (1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer

(a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or

(b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.