

SUPREME COURT OF CANADA

CITATION: R. *v.* Fearon, 2014 SCC 77

DATE: 20141211
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BETWEEN:

Kevin Fearon
Appellant
and
Her Majesty The Queen
Respondent
- and -
Director of Public Prosecutions of Canada, Attorney General of Quebec, Attorney General of Alberta, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, British Columbia Civil Liberties Association, Criminal Trial Lawyers' Association (Alberta), Canadian Civil Liberties Association, Canadian Association of Chiefs of Police and Criminal Lawyers' Association
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 99)	Cromwell J. (McLachlin C.J. and Moldaver and Wagner JJ. concurring)
DISSENTING REASONS: (paras. 100 to 198)	Karakatsanis J. (LeBel and Abella JJ. concurring)

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Kevin Fearon *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions of Canada,

Attorney General of Quebec,

Attorney General of Alberta,

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,

British Columbia Civil Liberties Association,

Criminal Trial Lawyers' Association (Alberta),

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Canadian Association of Chiefs of Police and

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Indexed as: R. *v.* Fearon

2014 SCC 77

File No.: 35298.

2014: May 23; 2014: December 11.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Search and seizure — Search incident to arrest — Cell phone found on accused and searched without warrant — Text message and photos on cell phone introduced as evidence at trial — Whether general common law framework for searches incident to arrest needs to be modified in case of cell phone searches incident to arrest — Whether search of cell phone incident to arrest was unreasonable and contrary to accused's right to be secure against unreasonable search or seizure — If so, whether evidence discovered in search should be excluded — Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Police — Powers — Search incident to arrest — Warrantless search of cell phone — Text message and photos on cell phone introduced as evidence at trial of accused — Whether common law police power to search incident to arrest permits cell phone searches — Whether search of cell phone incident to arrest was

unreasonable and contrary to accused's right to be secure against unreasonable search or seizure — Canadian Charter of Rights and Freedoms, s. 8.

Two men, one armed with a handgun, robbed a merchant as she loaded her car with jewellery. The robbers grabbed some bags, one of which was filled with jewellery, and fled in a black vehicle. The police became involved very shortly afterward. At that point, they had not located the jewellery or the handgun. Later that evening, they located and secured the getaway vehicle, and arrested F and C. During the pat-down search of F conducted incident to arrest, police found a cell phone in F's pocket. Police searched the phone at that time and again within less than two hours of the arrest. They found a draft text message which read "We did it were the jewelry at nigga burrrrrrrrrrr", and some photos, including one of a handgun. A day and a half later, when police had a warrant to search the vehicle, they recovered the handgun used in the robbery and depicted in the photo. Months later, police applied for and were granted a warrant to search the contents of the phone. No new evidence was discovered.

On a *voir dire*, the trial judge found that the search of the cell phone incident to arrest had not breached s. 8 of the *Charter*. She admitted the photos and text message and convicted F of robbery with a firearm and related offences. The Court of Appeal dismissed an appeal.

Held (LeBel, Abella and Karakatsanis JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **Cromwell**, Moldaver and Wagner JJ.: The common law power to search incident to a lawful arrest permits the search of cell phones and similar devices found on the suspect, although some modification of the existing common law framework is necessary because the search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest.

The power to search incident to arrest is extraordinary in that it permits reasonable searches when the police have neither a warrant nor reasonable and probable grounds. That the exercise of this extraordinary power has been considered in general to meet constitutional muster reflects the important law enforcement objectives which are served by searches of people who have been lawfully arrested. This power must be exercised in the pursuit of a valid purpose related to the proper administration of justice and the search must be truly incidental to the arrest.

Like other searches incident to arrest, prompt cell phone searches incident to arrest may serve important law enforcement objectives: they can assist police to identify and mitigate risks to public safety; locate firearms or stolen goods; identify accomplices; locate and preserve evidence; prevent suspects from evading or resisting law enforcement; locate the other perpetrators; warn officers of possible impending danger; and follow leads promptly. Cell phone searches also have an element of urgency, which supports the extension of the power to search incident to arrest.

Safeguards must be added to the law of search of cell phones incident to arrest in order to make that power compliant with s. 8 of the *Charter*. Ultimately, the purpose of the exercise is to strike a balance that gives due weight to the important law enforcement objectives served by searches incidental to arrest and to the very significant privacy interests at stake in cell phone searches. Consequently, four conditions must be met in order for the search of a cell phone or similar device incidental to arrest to comply with s. 8. First, the arrest must be lawful. Second, the search must be truly incidental to the arrest. This requirement should be strictly applied to permit searches that must be done promptly upon arrest in order to effectively serve the law enforcement purposes. In this context, those purposes are protecting the police, the accused or the public; preserving evidence; and, if the investigation will be stymied or significantly hampered absent the ability to promptly conduct the search, discovering evidence. Third, the nature and the extent of the search must be tailored to its purpose. In practice, this will mean that only recently sent or drafted emails, texts, photos and the call log will, generally, be available, although other searches may, in some circumstances, be justified. Finally, the police must take detailed notes of what they have examined on the device and how they examined it. The notes should generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration. The record-keeping requirement is important to the effectiveness of after-the-fact judicial review. It will also help police officers to focus on whether what they are doing in relation to the phone falls squarely within the parameters of a lawful search incident to arrest.

None of the three main modifications to the common law power to search cell phones incident to arrest previously suggested in the case law strike the balance required by s. 8. First the considerations that prompted the Court to take a categorical approach with respect to the non-consensual seizure of bodily samples are entirely absent in this case. Second, police will rarely have reasonable and probable grounds to search for safety purposes or to believe that evidence of the offence will be found on the phone at the time of arrest. Third, allowing cell phone searches only in exigent circumstances would share the pitfalls of imposing a standard of reasonable and probable grounds, and would give almost no weight to the law enforcement objectives served by prompt searches. Moreover, the search incident to arrest exception to the warrant requirement is not a subset of the exigency exception.

In this case, the initial search of the cell phone, which disclosed all of the cell phone evidence tendered by the Crown at trial, breached F's s. 8 rights. Although they were truly incidental to F's arrest for robbery, were for valid law enforcement objectives, and were appropriately linked to the offence for which F had been lawfully arrested, detailed evidence about precisely what was searched, how and why, was lacking.

Despite that breach, the evidence should not be excluded. The impact of the breach on F's *Charter*-protected interests favours exclusion of the evidence, but it does so weakly. Although any search of any cell phone has the potential to be a very significant invasion of a person's informational privacy interests, the invasion of F's

privacy was not particularly grave. Further, as he did not challenge the warrant that was subsequently issued for the comprehensive search of the cell phone, his privacy interests were going to be impacted and the particular breach did not significantly change the nature of that impact. However, other factors favour inclusion. As to the seriousness of the *Charter*-infringing state conduct, the dominant view at the time of the search approved cell phone searches incident to arrest. In addition, the police fully disclosed the earlier searches when they decided to obtain the warrant to search the cell phone. While the police should, when faced with real uncertainty, choose a course of action that is more respectful of the accused's potential privacy rights, an honest mistake, reasonably made, is not state misconduct that requires the exclusion of evidence. Society's interest in the adjudication of the case on its merits also favours admission: the evidence is cogent and reliable, and its exclusion would undermine the truth-seeking function of the justice system.

Per LeBel, Abella and **Karakatsanis** JJ. (dissenting): Searches of personal digital devices — including personal computers — risk serious encroachments on privacy and are therefore not authorized under the common law power to search incident to arrest. Only judicial pre-authorization can provide the effective and impartial balancing of the state's law enforcement objectives with the intensely personal and uniquely pervasive privacy interests in our digital devices. Section 8 of the *Charter* provides constitutional protection for privacy, which includes the right to be free of the threat of unreasonable intrusions on privacy and the right to determine when, how, and to what extent we release personal information.

Generally, the law enforcement interests will outweigh the privacy interest that an arrested person has in the physical items in his immediate vicinity. However, because the privacy interest in a digital device is quantitatively and qualitatively different from that in other physical items traditionally subject to such searches, the constitutional balance between privacy and the needs of law enforcement with respect to the search of cell phones and similar digital devices incident to arrest must be reassessed, using first principles.

A cell phone cannot be treated like any other piece of physical evidence that may be found on an arrestee and searched incident to arrest. Individuals have a high expectation of privacy in their digital devices because they store immense amounts of information, are fastidious record keepers, retain files and data even after users think they have been destroyed, make the temporal and territorial limitations on a search incident to arrest meaningless, and can continue to generate evidence even after they have been seized.

The law enforcement interests relate to the three purposes justifying searches incident to arrest: safety, the preservation of evidence, and the discovery of evidence. Digital devices are not physically dangerous weapons and they cannot conceal such a weapon. The mere possibility that a phone could have been used to summon backup or that evidence on the cell phone could be remotely deleted should not justify a search incident to arrest. Although the delay of obtaining a warrant may

come at a cost to the prompt pursuit of the investigation, this cost must be weighed against the privacy interest in a personal digital device.

The most pressing state interests can be accommodated by the existing doctrine that permits warrantless searches under exigent circumstances. Exigent circumstances exist 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 destruction of evidence can be prevented by a warrantless search. Where exigent circumstances do not exist, a telewarrant can usually be obtained relatively quickly and with little harm to the investigation.

Thus, the weighty privacy interest that an arrested person has in a personal digital device will outweigh the state interest in performing a warrantless search incident to arrest, except in exigent circumstances.

Searches that treat a cell phone merely as a physical object continue to be permissible incident to arrest since it is the information that attracts a heightened expectation of privacy. As such, the police may usually seize a phone incident to arrest in order to preserve the evidence, but will require a warrant before they can search its contents.

In performing a search of a cell phone, whether under exigent circumstances or pursuant to a warrant, the police officers must not extend that search beyond the scope of the grounds permitting the search.

Tailoring the scope of the common law power to search incident to arrest does not adequately protect the reasonable expectations of privacy in personal digital devices. The majority's proposed modifications generate problems of impracticality, police uncertainty, and increased after-the-fact litigation. And while detailed note-taking may be desirable, it may prove to be an impractical requirement, and it is not an adequate remedy to what would be an extraordinary search power. Fundamentally, the police are not in the best position to determine whether the law enforcement objectives clearly outweigh the potentially significant intrusion on privacy in the search of a digital device, and, if they are wrong, the subsequent exclusion of the evidence will not remedy the initial privacy violation.

Here, the searches of F's phone were not justified and unreasonably infringed his privacy, in violation of s. 8 of the *Charter*. The facts of this case fall far below either standard for exigency.

The evidence which was unconstitutionally obtained should be excluded. The state conduct was not particularly objectionable, given that the police acted in good faith, and the evidence is reliable; however, the high privacy interest individuals have in their electronic devices tips the balance in favour of exclusion. Unwarranted searches undermine the public's confidence that personal communications, ideas and beliefs will be protected on their digital devices. This is particularly important given the increasing use and ubiquity of such technology. It is difficult to conceive of a sphere of privacy more intensely personal — or indeed more pervasive — than that

found in an individual's personal digital device or computer. To admit evidence obtained in breach of this particularly strong privacy interest would tend to bring the administration of justice into disrepute.

Cases Cited

By Cromwell J.

Distinguished: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Stillman*, [1997] 1 S.C.R. 607; **referred to:** *R. v. Giles*, 2007 BCSC 1147 (CanLII); *R. v. Otchere-Badu*, 2010 ONSC 1059 (CanLII); *Young v. Canada*, 2010 CanLII 74003; *R. v. Howell*, 2011 NSSC 284, 313 N.S.R. (2d) 4; *R. v. Franko*, 2012 ABQB 282, 541 A.R. 23; *R. v. Cater*, 2014 NSCA 74 (CanLII); *R. v. D'Annunzio* (2010), 224 C.R.R. (2d) 221; *R. v. Polius* (2009), 196 C.R.R. (2d) 288; *R. v. Hiscoe*, 2013 NSCA 48, 328 N.S.R. (2d) 381; *R. v. Mann*, 2014 BCCA 231, 310 C.C.C. (3d) 143; *R. v. Liew*, 2012 ONSC 1826 (CanLII); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Caslake*, [1998] 1 S.C.R. 51; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Debot*, [1989] 2 S.C.R. 1140; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Pohorestsky*, [1987] 1 S.C.R. 945; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *United States v. Santillan*, 571 F.Supp.2d 1093 (2008); *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. Khan*, 2013 ONSC 4587, 287 C.R.R. (2d) 192; *R. v. Rochwell*, 2012 ONSC 5594, 268 C.R.R. (2d) 283; *Riley v. California*, 134 S. Ct. 2473 (2014); *R. v. Feeney*, [1997] 2

S.C.R. 13; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Finnikin*, 2009 CanLII 82187; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215.

By Karakatsanis J. (dissenting)

R. v. Caslake, [1998] 1 S.C.R. 51; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Spencer*, 2014 SCC 43; *R. v. Duarte*, [1990] 1 S.C.R. 30; *United States v. White*, 401 U.S. 745 (1971); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Golub* (1997), 34 O.R. (3d) 743; *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657; *R. v. White*, 2007 ONCA 318, 85 O.R. (3d) 407; *R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3; *R. v. Polius* (2009), 196 C.R.R. (2d) 288; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679; *R. v. Kelsy*, 2011 ONCA 605, 283 O.A.C. 201; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34.

Statutes and Regulations Cited

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Armstrong and Watt JJ.A.), 2013 ONCA 106, 114 O.R. (3d) 81, 302 O.A.C. 284, 296 C.C.C. (3d) 331, 100 C.R. (6th) 296, 277 C.R.R. (2d) 126, [2013] O.J. No. 704 (QL), 2013 CarswellOnt 1703, affirming the accused's conviction for armed robbery and related offences. Appeal dismissed, LeBel, Abella and Karakatsanis JJ. dissenting.

Sam Goldstein and *Shelley Flam*, for the appellant.

Randy Schwartz, for the respondent.

Kevin Wilson and *W. Paul Riley*, for the intervener the Director of Public Prosecutions of Canada.

Dominique A. Jobin, for the intervener the Attorney General of Quebec.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Written submissions only by *Tamir Israel*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Gerald Chan and *Nader R. Hasan*, for the intervener the British Columbia Civil Liberties Association.

Dane F. Bullerwell and *Jeffrey W. Beedell*, for the intervener the Criminal Trial Lawyers' Association (Alberta).

Matthew Milne-Smith, for the intervener the Canadian Civil Liberties Association.

Leonard T. Doust, *Q.C.*, and *Bronson Toy*, for the intervener the Canadian Association of Chiefs of Police.

Written submissions only by *Susan M. Chapman*, *Jennifer Micallef* and *Kristen Allen*, for the intervener the Criminal Lawyers' Association.

The judgment of McLachlin C.J. and Cromwell, Moldaver and Wagner JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] The police have a common law power to search incident to a lawful arrest. Does this power permit the search of cell phones and similar devices found on the suspect? That is the main question raised by this appeal.

[2] Canadian courts have so far not provided a consistent answer. At least four approaches have emerged. The first is to hold that the power to search incident to arrest generally includes the power to search cell phones, provided that the search is truly incidental to the arrest: *R. v. Giles*, 2007 BCSC 1147 (CanLII); *R. v. Otchere-Badu*, 2010 ONSC 1059 (CanLII); *Young v. Canada*, 2010 CanLII 74003 (Nfld. Prov. Ct.); *R. v. Howell*, 2011 NSSC 284, 313 N.S.R. (2d) 4; *R. v. Franko*, 2012 ABQB 282, 541 A.R. 23; *R. v. Cater*, 2014 NSCA 74 (CanLII); *R. v. D'Annunzio* (2010), 224 C.R.R. (2d) 221 (Ont. S.C.J.). The second view is that "cursory" searches are permitted: *R. v. Polius* (2009), 224 C.R.R. (2d) 288 (Ont. S.C.J.). A third is that thorough "data-dump" searches are *not* permitted incident to arrest: *R. v. Hiscoe*, 2013 NSCA 48, 328 N.S.R. (2d) 381; *R. v. Mann*, 2014 BCCA 231, 310 C.C.C. (3d) 143. Finally, it has also been held that searches of cell phones incident to arrest are not permitted except in exigent circumstances, in which a "cursory" search is

permissible: *R. v. Liew*, 2012 ONSC 1826 (CanLII). These divergent results underline both the difficulty of the question and the need for a more consistent approach.

[3] In order to resolve the issue, we must strike a balance between the demands of effective law enforcement and everyone's right to be free of unreasonable searches and seizures. In short, we must identify the point at which the "public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60.

[4] In my view, we can achieve that balance with a rule that permits searches of cell phones incident to arrest, provided that the search — both what is searched and how it is searched— is strictly incidental to the arrest and that the police keep detailed notes of what has been searched and why.

II. Overview of the Facts, Proceedings and Issues

[5] The issue on appeal concerns the admissibility at Mr. Fearon's armed robbery trial of a draft text message and two photos found by police on his cell phone. The issue arises out of the investigation of a crime that has become depressingly routine.

[6] Two men, one armed with a handgun, robbed a merchant as she loaded her car with jewellery. The robbers grabbed some bags, one of which was filled with

jewellery, and fled in a black vehicle. The police became involved very shortly afterward and at that point, they reasonably believed that there was a handgun on the streets and that the robbers had taken a large quantity of readily-disposable jewellery. It was obviously important to locate the gun before it could be used again and the jewellery before it could be disposed of or hidden.

[7] The investigation quickly centred on the appellant, Kevin Fearon, and Junior Chapman. Later that same evening, police arrested both men, but had not at that point located any jewellery or the handgun. Police also quickly located the getaway vehicle and secured it, but they did not search it until a day and a half later when they had a warrant to do so.

[8] When Mr. Fearon was arrested, Sgt. Hicks conducted a pat-down search incident to the arrest. He found a cell phone in Mr. Fearon's right front pants pocket. Police searched the phone at that time and again within less than two hours of the arrest. They found a draft text message referring to jewellery and opening with the words "We did it." They also found a photo of a handgun and photos of males. Police later recovered a handgun during their search of the getaway vehicle and, at trial, the judge found that it was the handgun used in the robbery and depicted in the photo found on Mr. Fearon's cell phone: trial judge's oral reasons. Months later, police applied for and were granted a warrant to search the contents of the phone. No new evidence was discovered.

[9] At his trial for robbery, Mr. Fearon argued that the search of his cell phone had violated s. 8 of the *Canadian Charter of Rights and Freedoms* and that admitting the photographs and text message into evidence would bring the administration of justice into disrepute. On a *voir dire*, the trial judge found that the search of the cell phone incident to arrest had not breached s. 8 of the *Charter* and that the photos and text message were admissible. She convicted Mr. Fearon of robbery with a firearm and related offences.

[10] The Court of Appeal unanimously dismissed Mr. Fearon's appeal. The court affirmed the trial judge's conclusion that the search incident to arrest had not violated Mr. Fearon's s. 8 rights.

[11] The appeal to this Court raises two main questions:

1. Was the search incident to arrest unreasonable and therefore contrary to s. 8 of the *Charter*?
2. If so, should the evidence be excluded under s. 24(2) of the *Charter*?

III. Analysis

A. *First Issue: The Search Incident to Arrest*

(1) The Analytical Framework

[12] A search is reasonable within the meaning of s. 8 of the *Charter* if it is authorized by a reasonable law and is conducted reasonably: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 10. The main question on appeal therefore concerns the proper scope of the common law power to search incident to arrest: is a cell phone search incident to arrest authorized by a reasonable law?

[13] This question about the scope of the power to search incident to arrest cannot be answered in too categorical a fashion. As Lamer C.J. explained in *Caslake*, the permissible scope of a search incident to arrest turns on several different aspects of the search including the nature of items seized, the place of search and the time of search in relation to the time of arrest: paras. 15-16. Each of these aspects may engage distinct considerations that cannot be addressed in very general terms. Moreover, arrests relate to many different crimes and are made in many different circumstances. It follows that the permissible scope of searches incident to arrest will be affected by the particular circumstances of the particular arrest. The courts will rarely be able to establish any categorical limit applicable to all arrests and all purposes incidental to them.

[14] There is no question that there is a common law police power to search incident to arrest. The question here — and it is a novel one for this Court — relates to whether this power permits the particular cell phone searches in issue here. To determine the precise scope of this common law power, the Court must weigh the

competing interests involved, particularly whether the search "is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals": *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 181-82; *Caslake*, at para. 17. The Court's task is "to delineate the scope of the common law power . . . in a way that is consistent with the *Charter* right to be protected against unreasonable search and seizure": *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 87.

[15] This task may be approached in more than one way. I approach it by considering first whether the search falls within the existing general framework of the common law power to search incident to arrest. Having decided that it does, I go on to ask whether that framework must be modified so that the common law search power complies with s. 8 of the *Charter* in light of the particular law enforcement and privacy interests at stake in this context. The Court followed this analytical approach in *R. v. Stillman*, [1997] 1 S.C.R. 607, and *Golden*, two important cases which considered whether searches incident to arrest were *Charter* compliant, and it serves equally well in this case. My conclusion is that some modification of the existing common law framework is necessary.

(2) The Common Law Police Power to Search Incident to Arrest

[16] Although the common law power to search incident to arrest is deeply rooted in our law, it is an extraordinary power in two respects. The power to search incident to arrest not only permits searches without a warrant, but does so in

circumstances in which the grounds to obtain a warrant do not exist. The cases teach us that the power to search incident to arrest is a focussed power given to the police so that they can pursue their investigations promptly upon making an arrest. The power must be exercised in the pursuit of a valid purpose related to the proper administration of justice. The central guiding principle is that the search must be, as the case law puts it, truly incidental to the arrest.

[17] The Court affirmed the common law power of the police to search incident to arrest in *R. v. Beare*, [1988] 2 S.C.R. 387. La Forest J., for the Court, noted that the search incident to arrest power exists because of the need "to arm the police with adequate and reasonable powers for the investigation of crime" and that "[p]romptitude and facility in the identification and the discovery of indicia of guilt or innocence are of great importance in criminal investigations": p. 404; see also *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1146. Thus, the need for the police to be able to promptly pursue their investigation upon making a lawful arrest is an important consideration underlying the power to search incident to arrest.

[18] The power was further affirmed and explained in *Cloutier v. Langlois*, at pp. 180-81, where L'Heureux-Dubé J. summed up Canadian common law to that point:

> . . . it seems beyond question that the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him.

[19] The Court held, in *Cloutier*, that a "'frisk' search incidental to a lawful arrest reconciles the public's interest in the effective and safe enforcement of the law . . . and . . . its interest in ensuring the freedom and dignity of individuals": p. 185. The search "must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused", and it "must not be conducted in an abusive fashion": p. 186.

[20] The Court next considered search incident to arrest in *Stillman*, paras. 27-50, a case that considered whether taking teeth impressions, hair samples and buccal swabs from a suspect after his lawful arrest for murder fell within the scope of the power to search incident to arrest. The Court affirmed that, in order for a search incident to arrest to be lawful, the arrest itself must be lawful, the search must be an incident of that arrest, and the manner in which it is conducted must be reasonable: para. 27. Turning to the specific issue of whether the common law power of search incident to arrest extends to the seizure of bodily substances, the Court ruled that it did not. Seizure of bodily substances "invades an area of personal privacy essential to the maintenance of . . . human dignity" and is "much more serious" than an intrusion into the suspect's office or home: at para. 42, quoting with approval *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 432; see also *R. v. Pohorestsky*, [1987] 1 S.C.R. 945, at p. 949. Seizing bodily samples gives rise to "completely different concerns" because of the impact on a person's bodily integrity, which may be "the ultimate affront to human dignity": para. 39. Moreover, there is no need for prompt access to

the information: there is no danger of the bodily samples disappearing, or that the suspect's teeth impressions or DNA will change with the passage of time: para. 49.

[21] That brings me to the leading case from this Court, *Caslake*. The case concerned an inventory search of a suspect's vehicle six hours after he was arrested for possession of narcotics. The Court concluded that the search did not fall within the scope of lawful search incident to arrest. Lamer C.J. articulated the justification of the common law power as being the need for law enforcement authorities to gain control of things or information, a need which outweighs the individual's interest in privacy: para. 17. Whether the search is justified depends on whether the search is truly incidental to the arrest: para. 17. This means that the police must be attempting to achieve some valid purpose connected to the arrest. That turns on what they were looking for and why. The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted, and the officer conducting the search must reasonably believe that this purpose may be served by the search.

[22] This is not a standard of reasonable and probable grounds, but simply a requirement that there be some reasonable basis for doing what the police did. For example, if the purpose of the search is to find evidence, there must be some reasonable prospect of finding evidence of the offence for which the accused is being arrested: *Caslake*, at paras. 19-24. Lamer C.J. summarized the law as follows:

> If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search

> must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation. [Emphasis added; para. 25.]

[23] The Court next considered search incident to arrest in *Golden*. The question before the Court was whether the common law power to search incident to arrest includes the power to strip search (i.e. a search involving "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female) or undergarments": para. 47). The Court concluded that, because of the intrusive nature of a strip search, as compared with the frisk search in issue in *Cloutier*, a higher degree of justification was required. A serious infringement of privacy *and* personal dignity was "an inevitable consequence of a strip search": para. 99 (emphasis added). In addition, the Court noted that strip searches are rarely required to be done promptly given the low risk of disposal or loss of the evidence: para. 93.

[24] For these reasons, strip searches will only be reasonable when they are conducted in a reasonable manner "as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reasons

for the arrest" *and* the police "have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest": paras. 98-99.

[25] I turn finally to *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851. One of the issues was whether the search of a vehicle some two hours after the driver's arrest for possession of the proceeds of crime was lawful. The Court unanimously upheld the legality of the search as being incidental to the accused's lawful arrest. Binnie J. reiterated the important point made in *Caslake* and *Golden* that a search is properly incidental to arrest when "the police attempt to achieve some valid purpose connected to the arrest, including ensuring the safety of the police and the public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence": para. 49, quoting *Caslake*, at para. 19. As Binnie J. put it, "[t]he important consideration is the link between the location and purpose of the search and the grounds for the arrest": para. 49. He repeated the propositions, settled in other cases, that, first, reasonable and probable grounds are not required, and second, the basis of the warrantless search is not exigent circumstances, but connection or relatedness to the crime for which the suspect has been arrested: paras. 51-52.

[26] In light of this review, I turn to the two analytical steps. The first is whether the search here falls within the general common law parameters for searches incident to arrest. If it does, the second issue is whether, having regard to the appropriate balance between the need for effective law enforcement and the suspect's

privacy interests, some further restrictions must be imposed and if so, what they should be.

(3) Were the Searches Truly Incidental to a Lawful Arrest?

[27] The common law framework requires that a search incident to arrest must be founded on a lawful arrest, be truly incidental to that arrest and be conducted reasonably. In my view, the initial searches of the cell phone in this case satisfied these requirements.

[28] Mr. Fearon was lawfully arrested for robbery, and that satisfies the first requirement.

[29] There is no serious suggestion in this Court that the cell phone searches that led police to the text message and the photo of the handgun were other than truly incidental to the arrest, or, in other words that they were not conducted in pursuit of "a valid purpose connected to the arrest", as required by: *Caslake*, at para. 19. To understand why, we need at this point to review the facts in more detail.

[30] Recall that, upon his arrest, Mr. Fearon was subjected to a pat-down search that led the police to seize a cell phone found in his pants pocket. Mr. Fearon does not complain about this search or the seizure of the phone resulting from it. Sgt. Hicks, the officer conducting the pat-down search, had "a look through the phone": para. 20. Sergeant Hicks "explained that he manipulated the key pad to the

extent that he entered into different modes to access text messages and photographs on the phone": trial judge's ruling on cell phone search, 2010 ONCJ 645 (the "Ruling"), at para. 22. He did not remember specifics, but believed that he saw photos of males and a photo of a gun. This occurred between the time of arrest at 9:15 p.m. and the time Mr. Fearon was placed in the police van at 9:24 p.m. Sergeant Hicks kept custody of the phone. Shortly before 10:50 p.m., Sgt. Hicks showed the phone to the investigating detectives, Det. Const. Abdel-Malik and Det. Nicol at the police station. He testified that he pointed them to the photos as well as a text message. The message, apparently unsent, read: "We did it were the jewelry at nigga burrrrrrrrrrr": Ruling, at para. 24. Detective Constable Abdel-Malik understood this to mean "We did it" and to ask where the jewellery was. Detective Constable Abel-Malik testified that he looked at the phone "a little bit more" for about two minutes to see if the text message had been sent.

[31] Sergeant Hicks and the two detectives inspected the contents of the phone "a few times" throughout the early morning following the arrest as the unfolding investigation led them to think that there could be more relevant information on it. Detective Constable Abdel-Malik "looked into the phone . . . after learning that there was a third suspect who went by the name of 'Swipes' and that his contact number should be in the cell phone": Ruling, at para. 25. Officers checked some of the phone numbers called by Mr. Fearon to see if they led to possible associates including the then-unidentified 'Swipes'": *ibid*. Sometime after 3:51 a.m., Det. Const. Abdel-Malik got information that "Swipes" telephone number would be in Mr. Fearon's phone. He

confirmed, however, that the main, key components of what they required were the picture of the handgun and the words of the text message.

[32] The police eventually obtained a warrant to search the black vehicle that they had seized and secured shortly after the robbery. That search took place in the early morning hours of the second day following the robbery. The search revealed a loaded Smith and Wesson silver semi-automatic handgun which the trial judge found was the same gun shown in the cell phone picture. The police also obtained a warrant some months later to search and download the contents of the cell phone. The trial judge noted that there was no dispute that the photographs and text message originally viewed by Sgt. Hicks were the same items obtained as a result of the search warrants and sought to be admitted.

[33] In my view, the searches of the cell phone that lead to the discovery of the text message and the photos that the Crown introduced as evidence at trial were truly incidental to the arrest. It is clear from the record and the trial judge's findings that the search was directed at public safety (locating the hand gun), avoiding the loss of evidence (the stolen jewellery) and obtaining evidence of the crime (information linking Mr. Fearon to the robbery and locating potential accomplices).

[34] At trial, Mr. Fearon submitted that Sgt. Hicks did not have grounds to believe subjectively or reasonably that the cell phone could afford evidence prior to looking into its contents. However, the trial judge rejected this contention and found

that Sgt. Hicks reasonably believed that the cell phone might contain evidence of the robbery for which Mr. Fearon had been arrested. She found:

> . . . Sgt. Hicks was justified in his belief that the cell phone may contain evidence relevant to the armed robbery for which Mr. Fearon was being arrested. . . . By the time he received direction to arrest Mr. Fearon for armed robbery at 9:15 p.m., he also knew: (1) that more than one perpetrator committed the robbery; (2) approximately three hours had elapsed since the robbery; and (3) there was a gun or imitation gun involved in the robbery.
>
> In these circumstances, I find that there was a reasonable prospect of securing evidence of the offence for which the accused was being arrested in searching the contents of the cell phone. In particular, it was reasonable for Sgt. Hicks to believe that the arrestee, Mr. Fearon, may have had communication through the cell phone before, during or after the robbery with other perpetrators or with third parties. [Ruling, at paras. 43-44]

[35] The trial judge's conclusion on this point is not challenged and it is amply supported by the evidence.

[36] Detective Constable Abdel-Malik testified that it was important to the investigation to know if the text message had been sent to someone. The message suggested that the intended recipient knew where the jewellery was. It was an important goal of the investigation to recover the stolen property, which was easy to dispose of or to hide. Thus, finding someone who knew where it was would be important and needed to be done promptly. Detective Constable Abdel-Malik also testified that information likely to be on the cell phone such as telephone numbers related to names, calendar dates, text messages and photographs would be helpful to the investigation.

[37] Defence counsel at trial put to Det. Const. Abdel-Malik that he could have obtained a search warrant for the cell phone as soon as Sgt. Hicks told him about the information he had seen on the phone in his initial look at it. Detective Constable Abdel-Malik rejected this contention. He emphasized that they faced a situation in which they believed there was a handgun on the street and stolen property unaccounted for and the information on the cell phone could help them locate both promptly:

> I mean we've got an outstanding gun, an outstanding property and now we know that this cell phone could have information that's going to lead us to this property and to this gun. So since it was definitely relevant to the investigation and as it unfolded, it -- it was relevant, I think at that time the -- right thing to do was to look through the phone and see if it would assist us with the investigation . . . .

[38] Detective Nicol's evidence was also clear and detailed about the link between the arrest and the search of the cell phone. He referred to the need to look through the cell phone to see if there was any contact information that could lead the police to the identity of the as-yet-unidentified suspect, the jewellery, or the firearm. He was asked to explain how looking through the cell phone could help expedite finding the gun and the jewellery. His answer is instructive:

> Well, based on any text messages sent between them and a party assisting them in hiding or moving stolen property, that would be something I'd want to know right away so I could attempt to recover that evidence. If there was other messages indicating locations and -- where they went after the robbery, that would be something I'd want to know because those are places I'd want to investigate to see if there was evidence being jewellery or firearms, clothing worn by the suspects, anything left behind at those addresses would be places that we'd have to

> attend. You know, based on my experience, people take photographs of things they steal, places that they go, targets of their offences. There -- there's a number of -- of things that people contain on phones and I hoped that any of those items might be on that phone that we can act on and subsequently locate evidence. [Emphasis added.]

[39] Detective Nicol also testified that it was important to follow up all leads immediately because they still had outstanding jewellery, a firearm and an unidentified suspect. When he was asked in cross-examination why he thought that he did not need a warrant initially to search the cell phone, he replied:

> And, and [my] understanding it's still that, um, that an investigation where I'm looking for jewellery, I'm looking for outstanding suspects, I'm looking for, um, the gun that's outstanding, and I have concerns that -- those items might go missing, destroyed, um, and then I have the chance to recover those items, that I'm able to look through that phone and ensure that, that there's anything there to assist my investigation at the time, I can, I can use that information.

[40] He testified that his primary concerns were to recover the handgun and the jewellery. The jewellery, he noted, was "evidence, it's property . . . that, um, they can move very quickly, be sold very quickly, hidden, any, any number of things that can happen to it and you have to act quickly in order to recover it".

[41] There is no basis to disturb the judge's finding that the searches of the cell phone were for valid law enforcement objectives and were appropriately linked to the offence for which Mr. Fearon had been lawfully arrested. The searches were, in short, truly incidental to Mr. Fearon's arrest for robbery.

[42] The judge did not explicitly address the third element of the test: whether the search was conducted reasonably. However, she did find the examination of the phone at the arrest scene was "brief and cursory" and there was "no suggestion that this was an expansive or abusive search": Ruling, at para. 44. She also noted that it was common ground that the evidence presented by the Crown from the phone — the photos and the text message — was that originally found by Sgt. Hicks in his initial search of the phone and within about an hour and a half of the arrest. I conclude that the third element of the test was satisfied under the general framework for search incident to arrest. However, as I will explain, my view is that some revision of the general framework is necessary in relation to searches of cell phones incident to arrest.

[43] I therefore conclude that the searches of the cell phone resulting in finding the photos and text message fell within the scope of the common law police power, subject to assessing whether the common law's general framework must be modified in order to make it compliant with s. 8 of the *Charter*.

(4) Does the Common Law Test Need to Be Modified in Light of the *Charter*?

[44] As *Stillman*, *Caslake* and *Golden* illustrate, the common law police power to search incident to arrest must be defined and applied in a way that gives effect to the right to be free of unreasonable searches and seizures. In both *Stillman* and *Golden*, the Court modified the common law power in relation to particularly invasive types of searches in order to make that power consistent with s. 8 of the

Charter. What is required is an assessment of the importance of the legitimate law enforcement objectives served by the search and of the nature and extent of the infringement of the detainee's reasonable expectation of privacy.

[45] The Court has repeatedly affirmed that, in general, the common law power to search incident to arrest permits reasonable searches within the meaning of s. 8 of the *Charter*: *Cloutier v. Langlois*, at p. 182; *Stillman*, at para. 27; *Caslake*, at paras. 12 and 14; *Golden*, at paras. 44, 49, 75 and 104; *Nolet*, at paras. 49 and 52. We should not pass too quickly over this fundamental point. As I have explained, this common law power is extraordinary because it requires neither a warrant nor reasonable and probable grounds. That the exercise of this extraordinary power has been considered in general to meet constitutional muster reflects the important law enforcement objectives which are served by searches of people who have been lawfully arrested. As was said in *Caslake*, in the context of arrest, the need for police "to gain control of things or information . . . outweighs the individual's interest in privacy": para. 17.

[46] The record shows how a prompt search of a suspect's cell phone may serve important law enforcement objectives. The police were on the scene of a violent crime — the robbery — very promptly. They faced a situation in which there was weak identification of the perpetrators, the subject matter of the crime — the stolen jewellery — was easily hidden or otherwise disposed of, there was an indication that there may have been more people involved than the two persons observed at the

scene, there were reports that a handgun had been used, and that handgun had not been located. The police were justified in their belief that the cell phone could contain evidence relevant to the armed robbery. The record also justifies the conclusion that the search served the purposes of public safety and preventing the loss of evidence because it might lead the police to the firearm and the jewellery.

[47] I conclude that the cell phone search incident to arrest in this case served important law enforcement objectives.

[48] Beyond the facts of this case, there are other types of situations in which cell phone searches conducted incidental to a lawful arrest will serve important law enforcement objectives, including public safety. Cell phones are used to facilitate criminal activity. For example, cell phones "are the 'bread and butter' of the drug trade and the means by which drugs are marketed on the street": *Howell*, at para. 39. Prompt access by law enforcement to the contents of a cell phone may serve the purpose of identifying accomplices or locating and preserving evidence that might otherwise be lost or destroyed. Cell phones may also be used to evade or resist law enforcement. An individual may be a "scout" for drug smugglers, using a cell phone to warn criminals that police are in the vicinity or to call for "back up" to help resist law enforcement officers: see, e.g., *United States v. Santillan*, 571 F.Supp.2d 1093 (D. Ariz. 2008), at pp. 1097-98. In such situations, a review of recent calls or text messages may help to locate the other perpetrators before they can either escape or

dispose of the drugs and reveal the need to warn officers of possible impending danger.

[49] I conclude that prompt cell phone searches incidental to arrest may serve important law enforcement objectives. The evidence in this case shows why prompt follow-up of leads may be necessary and how the search of a cell phone may assist those efforts. In this respect, cell phone searches are unlike the taking of dental impressions, buccal swabs and hair samples discussed in *Stillman*. There, the Court noted that there were no relevant considerations of urgency supporting the extension of the power to search incident to arrest to these procedures: there was no risk that the accused's teeth or DNA would be lost or destroyed if the procedures were not carried out promptly: para. 49. And, of course, such searches, unlike cell phone searches, are very unlikely to allow police to identify and mitigate risks to public safety or to assist them to preserve evidence that might otherwise be lost or destroyed. Similarly, in *Golden*, while the strip search incident to arrest was aimed at the discovery of illegal drugs on the accused's person, there was little reason to think that the search needed to be performed promptly upon arrest in order to fulfill this purpose: paras. 92-93.

[50] Having considered the law enforcement objectives potentially at stake, we must look at the individual and societal interests in privacy and the extent to which a cell phone search incident to arrest interferes with those interests.

[51] It is well settled that the search of cell phones, like the search of computers, implicates important privacy interests which are different in both nature

and extent from the search of other "places": *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 38 and 40-45. It is unrealistic to equate a cell phone with a briefcase or document found in someone's possession at the time of arrest. As outlined in *Vu*, computers — and I would add cell phones — may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information that is in no meaningful sense "at" the location of the search: paras. 41-44.

[52] We should not differentiate among different cellular devices based on their particular capacities when setting the general framework for the search power. So, for example, the same general framework for determining the legality of the search incident to arrest should apply to the relatively unsophisticated cellular telephone in issue in this case as it would to other devices that are the equivalent of computers: see *Vu*, at para. 38.

[53] I pause here for a moment to note that some courts have suggested that the protection s. 8 affords to individuals in the context of cell phone searches varies depending on whether an individual's phone is password-protected: see, e.g., Court of Appeal judgment, 2013 ONCA 106, 114 O.R. (3d) 81, at paras. 73 and 75; Ruling, at para. 49; *R. v. Khan*, 2013 ONSC 4587, 287 C.R.R. (2d) 192, at para. 18; *R. v. Hiscoe*, 2013 NSCA 48, at paras. 80-81. I would not give this factor very much weight in assessing either an individual's subjective expectation of privacy or

whether that expectation is reasonable. An individual's decision not to password protect his or her cell phone does not indicate any sort of abandonment of the significant privacy interests one generally will have in the contents of the phone: see, e.g., *R. v. Rochwell*, 2012 ONSC 5594, 268 C.R.R. (2d) 283, at para. 54. Cell phones — locked or unlocked — engage significant privacy interests. But we must also keep this point in perspective.

[54] First, while cell phone searches — especially searches of "smart phones", which are the functional equivalent of computers — may constitute very significant intrusions of privacy, not every search is inevitably a significant intrusion. Suppose, for example, that in the course of the search in this case, the police had looked only at the unsent text message and the photo of the hand gun. The invasion of privacy in those circumstances would, in my view, be minimal. So we must keep in mind that the real issue is the potentially broad invasion of privacy that may, *but not inevitably will*, result from law enforcement searches of cell phones.

[55] In this respect, a cell phone search is completely different from the seizure of bodily samples in *Stillman* and the strip search in *Golden*. Such searches are *invariably* and *inherently* very great invasions of privacy and are, in addition, a significant affront to human dignity. That cannot be said of cell phone searches incident to arrest.

[56] Second, we should bear in mind that a person who has been lawfully arrested has a lower reasonable expectation of privacy than persons not under lawful arrest: *Beare*, at p. 413.

[57] Third, the common law requirement that the search be truly incidental to a lawful arrest imposes some meaningful limits on the scope of a cell phone search. The search must be linked to a valid law enforcement objective relating to the offence for which the suspect has been arrested. This requirement prevents routine browsing through a cell phone in an unfocussed way.

[58] All of that said, the search of a cell phone has the potential to be a much more significant invasion of privacy than the typical search incident to arrest. As a result, my view is that the general common law framework for searches incident to arrest needs to be modified in the case of cell phone searches incident to arrest. In particular, the law needs to provide the suspect with further protection against the risk of wholesale invasion of privacy which may occur if the search of a cell phone is constrained only by the requirements that the arrest be lawful and that the search be truly incidental to arrest and reasonably conducted. The case law suggests that there are three main approaches to making this sort of modification: a categorical prohibition, the introduction of a reasonable and probable grounds requirement, or a limitation of searches to exigent circumstances. I will explain why, in my view, none of these approaches is appropriate here and then outline the approach I would adopt.

(a) *Categorical Prohibition*

[59] *Stillman* excluded the non-consensual seizure of bodily samples from the scope of the power to search incident to arrest. The Court took this categorical approach for two reasons. First, seizures of bodily samples give rise to "completely different concerns" than other types of searches: they impact on a person's bodily integrity, which may be, as Cory J. put it, "the ultimate affront to human dignity": para. 39. Second, the Court noted that there was no risk that evidence would be lost if it were not obtained immediately: there was no risk of the teeth impressions or the DNA in hair follicles changing or being destroyed: para. 49. Thus, the potentially important law enforcement ability to act promptly could be given little, if any, weight in this context: *Beare*, at p. 404, per La Forest J.

[60] Adopting this categorical approach would mean that, although the police may lawfully seize a cell phone found in the course of a search incident to arrest where there is reason to believe it contains evidence relevant to the offence, the phone may not be searched, at all, without a warrant. The Supreme Court of the United States essentially adopted this approach in *Riley v. California*, 134 S. Ct. 2473 (2014). I would not follow suit for two reasons.

[61] First, the only case from this Court to adopt a categorical exclusion from searches incident to arrest is *Stillman*. But the considerations that prompted the Court to take a categorical approach in that case are entirely absent in this case. The record in this case shows that important law enforcement objectives are served by the power to search cell phones promptly incident to arrest. This is unlike the *Stillman* situation,

in which the Court concluded that the prompt access to the suspect's bodily samples did little to serve law enforcement objectives incidental to the arrest. Moreover, and in marked contrast to the bodily sample seizures at issue in *Stillman*, while cell phone searches have the potential to be a significant invasion of privacy, they are neither *inevitably* a major invasion of privacy nor *inherently* degrading. Looking at a few recent text messages or a couple of recent pictures is hardly a massive invasion of privacy, let alone an affront to human dignity.

[62] Second, I am not as pessimistic as some about the possibility of placing meaningful limits on the manner and extent of cell phone searches incident to arrest. Meaningful limits, rather than blanket exclusions, have been imposed in other settings. For example, the Court did not categorically preclude all strip searches incident to an arrest. Instead, the Court limited the purposes for which they could be conducted, imposed a reasonable grounds threshold, and established rules governing how the searches should be conducted (essentially search protocols): *Golden*. The Court took this approach even though it found strip searches to be "inherently humiliating and degrading . . . regardless of the manner in which they are carried out": para. 90.

[63] A cell phone search engages very significant informational privacy interests. However, it is not as invasive as a strip search. It seems to me that s. 8 would require a categorical prohibition on cell phone searches only if this Court were to find that it is impossible to impose meaningful limits on the purposes, threshold

and manner of such searches. As I discuss below, I am not satisfied that this is the case.

[64] I therefore reject the idea that s. 8 of the *Charter* categorically precludes any search of a cell phone seized incidental to a lawful arrest.

[65] The question becomes what safeguards must be added to the law of search of cell phones incident to arrest in order to make that power compliant with s. 8 of the *Charter*.

(b) *Imposing a Reasonable and Probable Grounds Requirement*

[66] One possibility is to require reasonable and probable grounds for the search, as the Court did in *Golden.* This Court has described the higher threshold of "reasonable and probable grounds" as requiring "reasonable probability" or "credibly-based probability": *Debot*, at p. 1166; *Hunter v. Southam Inc.*, at p. 167. In my respectful opinion, imposing that threshold here would significantly undermine the important law enforcement objectives in this context. A main rationale of search incident to arrest, in addition to safety of the police, the suspect and the public, is to allow the police to promptly pursue their investigation: see, e.g., *Beare*, at p. 404, per La Forest J. Investigations have many leads and many dead ends. To restrict a cell phone search to situations in which the officers have reasonable and probable cause to believe that evidence of the offence will be found on the cell phone, to my way of thinking, effectively precludes prompt access to what may be very important

information which is required for the immediate purposes of the unfolding investigation.

[67] The record in this case demonstrates this. A prompt search of a cell phone may lead investigators to other perpetrators and to stolen and easily disposed of property. At the point of arrest, police will rarely have reasonable and probable grounds to believe that evidence of the offence will be found on the phone, and yet some limited access to its contents may be, as here, an important investigative step that needs to be taken promptly. As Det. Nicol testified, there were in this investigation — as there will be in many investigations — information and leads that needed to be followed up immediately. Imposing a "reasonable and probable grounds" requirement for all cell phone searches will cut off access to this important step in virtually all cases.

[68] Further, in my view, requiring reasonable and probable grounds to search for the purpose of protecting the police, the accused, or the public overshoots the point at which the public's interest in being left alone by government must give way to intruding on an individual's privacy to advance law enforcement objectives. A case such as this one is instructive: the police knew a dangerous weapon was on the streets. In this type of situation, it is reasonable to be concerned that the weapon could be used to commit another offence or could be disposed of in a public area, endangering the safety of innocent individuals. As with the case of discovery of evidence, the police may not have reasonable and probable grounds to believe that a

search of the cell phone is necessary to protect them, the accused or the public. However, they may have reason to think that searching the cell phone may further those objectives. A standard of reasonable and probable grounds, in my view, has the potential to unreasonably compromise the safety of the police, the accused, or the public. It strikes an inappropriate balance between those important law enforcement objectives and the accused's privacy interests.

(c) *Exigent Circumstances*

[69] Another possibility is to allow cell phone searches only in exigent circumstances, as the appellant urges us to do: A.F., at paras. 41 and 53. The Ontario Superior Court of Justice adopted this approach in *Liew*, but, so far as I have been able to determine, it has not been followed in any other Canadian case. As I see it, that standard requires too much knowledge on the part of the police, given the very early point in an investigation at which a search incident to arrest will often occur. It shares the pitfalls of imposing a standard of reasonable and probable grounds and, if applied in the manner proposed by my colleague, Karakatsanis J., would go even further to prohibit a cell phone search in all but the most exceptional circumstances.

[70] This approach, in my view, gives almost no weight to the law enforcement objectives served by the ability to promptly search a cell phone incidental to a lawful arrest. If, as is my view, importing a standard of reasonable and probable grounds would significantly undermine these objectives, then imposing a requirement of urgency and restricting the purposes for which the search may be

conducted would effectively gut them. This standard, in my respectful view, fails to strike the balance required by s. 8 between the privacy interests of the individual and the state's interest in protecting the public.

[71] Finally, to prohibit cell phone searches in all but "exigent circumstances" is simply not consistent with the structure of our law relating to search incident to arrest. As P. Brown observes in relation to American case law, which has relied on exigent circumstances to justify a cell phone search incident to arrest.

> If an actual danger of destruction of evidence were required to trigger the [search incident to arrest] exception to the warrant requirement, then [search incident to arrest] would be a mere subset of the exigency exception. . . . The reasoning in [some] cases is therefore flawed because it silently reads the [search incident to arrest] exception out of existence by rendering it a restatement of the exigency exception.

("Searches of Cell Phones Incident to Arrest: Overview of the Law as It Stands and a New Path Forward", (2014) 27 *Harv. J. L. & Tech.* 563, at p. 572)

[72] I also resist reliance on the statutory provisions adopted in response to this Court's decision in *R. v. Feeney*, [1997] 2 S.C.R. 13, to set a standard that would permit searches of cell phones incident to arrest. This Court has yet to make any pronouncements regarding the constitutionality of s. 529.3 of the *Criminal Code*, R.S.C. 1985, c. C-46, and I prefer not to rely on its assumed constitutionality in setting the constitutional parameters of cell phone searches incident to arrest.

[73] To be clear, nothing in my reasons changes the existing law in relation to warrantless searches in exigent circumstances.

(5) Other Steps

[74] The focus of our attention, in my view, should not be on steps that effectively gut the usefulness of searches incident to arrest. Rather, we should concentrate on measures to limit the potential invasion of privacy that may, but does not inevitably result from a cell phone search. This may be done by making some modifications to the common law power to search cell phones incidental to arrest. Ultimately, the purpose of the exercise is to strike a balance that gives due weight, on the one hand, to the important law enforcement objectives served by searches incident to arrest and, on the other, to the very significant privacy interests at stake in cell phone searches.

[75] The requirement that the search of the cell phone be truly incidental to the arrest should be strictly applied to permit searches that are required to be done promptly upon arrest in order to effectively serve the purposes of officer and public safety, loss or destruction of evidence, or discovery of evidence. Three modifications to the general rules would give effect to this approach.

[76] First, the scope of the search must be tailored to the purpose for which it may lawfully be conducted. In other words, it 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. In practice, this will mean that, generally, even when a cell phone search is permitted because it is truly incidental to the arrest, only recently sent or drafted emails, texts, photos and the call log may be examined as in most cases only those sorts of items will have the necessary link to the purposes for which prompt examination of the device is permitted. But these are not rules, and other searches may in some circumstances be justified. The test is whether the nature and extent of the search are tailored to the purpose for which the search may lawfully be conducted. To paraphrase *Caslake*, the police must be able to explain, within the permitted purposes, what they searched and why: see para. 25.

[77] This approach responds to the privacy concerns posed by the virtually infinite storage capacity of cell phones by, in general, excluding resort to that capacity in a search incident to arrest. It would also provide these protections while preserving the ability of the police to have resort to basic cell phone data where this serves the purposes for which searches incident to arrest are permitted.

[78] There is a parallel here with the Court's decision in *Vu*. A warrant to search a computer does not give the police "a licence to scour the devices indiscriminately": para. 61. Similarly, the fact that some examination of a cell phone is truly incidental to arrest does not give the police a licence to rummage around in the device at will. The nature and extent of the search must be truly incidental to the arrest in order for it to fall within the scope of the common law rule and respect s. 8

of the *Charter*. I agree with the Courts of Appeal in British Columbia and Nova Scotia that, generally, the search of the entire contents of a cell phone or a download of its contents is not permitted as a search incident to arrest: *Mann*, at para. 123; *Hiscoe*, at paras. 63 and 79.

[79] The law enforcement objectives served by searches incident to arrest will generally be most compelling in the course of the investigation of crimes that involve, for example, violence or threats of violence, or that in some other way put public safety at risk, such as the robbery in this case, or serious property offences that involve readily disposable property, or drug trafficking. Generally speaking, these types of crimes are most likely to justify some limited search of a cell phone incident to arrest, given the law enforcement objectives. Conversely, a search of a cell phone incident to arrest will generally not be justified in relation to minor offences.

[80] A further modification is that the third purpose for which searches incident to arrest are permitted — the discovery of evidence — must be treated restrictively in this context. The discovery of evidence, in the context of a cell phone search incident to arrest, will only be a valid law enforcement objective when the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest. Only in those types of situations does the law enforcement objective in relation to the discovery of evidence clearly outweigh the potentially significant intrusion on privacy. For example, if, as in this case, there is reason to think that there is another perpetrator who has not been located, the search

of a cell phone for that purpose will be truly incidental to the arrest of the other suspects. As Det. Nicol testified, there were matters that needed to be followed up immediately in this case. If, on the other hand, all suspects are in custody and any firearms and stolen property have been recovered, it is hard to see how police could show that the prompt search of a suspect's cell phone could be considered truly incidental to the arrest as it serves no immediate investigative purpose. This will mean, in practice, that cell phone searches are not routinely permitted simply for the purpose of discovering additional evidence. The search power must be used with great circumspection. It also means, in practice, that the police will have to be prepared to explain why it was not practical (and I emphasize that this does *not* mean impossible), in all the circumstances of the investigation, to postpone the search until they could obtain a warrant.

[81] The approach taken by the trial judge in *D'Annunzio* is instructive. The accused was arrested for sexual assault immediately after a young girl complained that he had inappropriately touched her in a grocery store. A search incident to that arrest discovered a cell phone. The officer seized it and searched for photos or videos of a sexual nature that were related to the offence, and for other inappropriate sexual content. At trial, the accused challenged the admissibility of two photos and a video found on the phone during this search. The trial judge ruled that the search was not truly incidental to the arrest. The search was "not done to further a legitimate purpose incidental to [the] arrest . . . The cell phone was in the possession of the police at all times and there was no urgency": paras. 23-24. To put this differently, the prompt

search of the cell phone was not sufficiently linked to an important law enforcement objective.

[82] Finally, officers must make detailed notes of what they have examined on the cell phone. The Court encouraged this sort of note keeping in *Vu* in the context of a warranted search: para. 70. It also encouraged that notes be kept in the context of strip searches: *Golden*, at para. 101. In my view, 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.

[83] To summarize, police officers will not be justified in searching a cell phone or similar device incidental to every arrest. Rather, such a search will comply with s. 8 where:

(1) The arrest was lawful;

(2) The search is truly incidental 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 purposes 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 cell phone incident to arrest;

(3) The nature and the 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.

[84] In setting out these requirements for the common law police power, I do not suggest that these measures represent the only way to make searches of cell phones incident to arrest constitutionally compliant. This may be an area, as the Court concluded was the case in *Golden*, in which legislation may well be desirable.

The law enforcement and privacy concerns may be balanced in many ways and my reasons are not intended to restrict the acceptable options.

B. *Application of the Framework to the Present Case*

[85] The initial search of the appellant's cell phone incidental to his arrest revealed a relevant draft text message and photographs. Although there were subsequent searches, no additional evidence was found and the evidence from the cell phone tendered by the Crown at trial was that originally viewed by Sgt. Hicks: Ruling, at para. 30. It is therefore only necessary to rule on the legality of his initial searches of the cell phone.

[86] As I discussed in detail earlier in my reasons, there were important law enforcement objectives to be served by a prompt search of aspects of the phone. The police believed that to be the case, and their belief was reasonable. However, the officers' evidence about the extent of the cell phone search was not satisfactory. Sergeant Hicks said that he "had a look through the cell phone" but could not recall specifics: Ruling, at para. 20. Detective Constable Abdel-Malik said that he later did "some quick checks" for about two minutes, but, again, his evidence is not very specific: Ruling, at para. 24. There were subsequent examinations of the phone by Sgt. Hicks, Det. Const. Abdel-Malik and Det. Nicol, but they were not able to provide many specifics of exactly what was examined.

[87] The Crown bears the burden of establishing that the search incident to arrest was lawful. In my view, that burden is not met, absent detailed evidence about precisely what was searched, how and why. That sort of evidence was lacking in this case, and the lack of evidence, in turn, impedes meaningful judicial review of the legality of the search. As I mentioned earlier, this after-the-fact review is particularly important in the case of warrantless searches where there has been no prior judicial screening as occurs when a warrant is required.

[88] I conclude that the initial search was not reasonable and it therefore breached Mr. Fearon's s. 8 rights.

C. *Should the Evidence Be Excluded?*

[89] Section 24(2) of the *Charter* provides that evidence obtained in a manner that infringes the accused's rights "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". This requires courts to assess and balance the effect of admitting the evidence in light of three factors: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71. The party seeking to have the evidence excluded bears the burden of proving its exclusion is required.

[90] The trial judge found no breach, but conducted a s. 24(2) analysis in the event she erred in that respect. Her findings of fact in this regard, like her other findings of fact, are entitled to deference on appeal.

[91] The first factor is the seriousness of the *Charter*-infringing state conduct. An important consideration is whether admission of the evidence may send a message that the court condones serious state misconduct.

[92] The trial judge made strong findings relevant to this factor. She concluded that, "if there was a breach, it was not conduct on the serious end of the scale": Ruling, at para. 54. She also found that the police acted in good faith:

> Sgt. Hicks and later Abdel-Malik and Nicol believed that they were acting within their powers of search incident to arrest at the time they looked into the contents. To date, there is no clear binding jurisprudence that would have directed the police to treat the cell phone in any way other than they did upon arrest. Detective Nicol applied for and obtained a warrant to do a comprehensive search and download of the phone six months after the initial searches with those searches fully disclosed in the information to obtain. He did this after learning about a case, subsequent to the searches on July 26 and 27, 2009, that ruled that he should get a warrant to have the Technological Crime Lab search and download the information stored in the cell phone. [*ibid.*]

[93] The trial judge's summary of the state of the law at the time of the search is a fair one, in my view. At the time, the decision most favourable to the appellant's position was that of the Ontario Superior Court of Justice in *Polius*, but it was issued only slightly more than a month before the search and it contemplated "cursory" searches of cell phones incident to arrest: paras. 39 ff. (I note that *R. v. Finnikin*, 2009 CanLII 82187 (Ont. S.C.J.), to which the trial judge referred was decided several months after the search in this case.) As the trial judge pointed out, there were cases at the time approving cell phone searches incident to arrest. In fact, it is fair to say that this was the dominant view at the time of the arrest. The Court of Appeal's

unanimous decision upholding the legality of the search in this case supports the conclusion that the officer's view of the law was reasonable. The officer's subsequent conduct in obtaining the warrant which fully disclosed the earlier searches supports the trial judge's conclusion that the police acted in good faith.

[94] Of course, the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with real uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of the accused's potential privacy rights. But here, if the police faced a gray area, it was a very light shade of gray, and they had good reason to believe, as they did, that what they were doing was perfectly legal.

[95] In my view, the first factor favours admission of the evidence. There is not here even a whiff of the sort of indifference on the part of the police to the suspect's rights that requires a court to disassociate itself from that conduct. The police simply did something that they believed on reasonable grounds to be lawful and were proven wrong, after the fact, by developments in the jurisprudence. That is an honest mistake, reasonably made, not state misconduct that requires exclusion of evidence.

[96] The second factor concerns the impact of the breach on the *Charter*-protected interests of the accused. Any search of any cell phone has the potential to be a very significant invasion of a person's informational privacy interests. But, in the particular circumstances of this case, the trial judge found, in

effect, that Mr. Fearon had not established that the invasion of his privacy had been particularly grave. This conclusion is supported by the fact that Mr. Fearon did not challenge the warrant that was subsequently issued for the comprehensive search of the cell phone. This amounts to a concession that, even if the findings of the initial search were excised from the information to obtain that warrant, reasonable and probable grounds were still made out. As the trial judge noted, "[t]he unchallenged warrant mitigates against both the seriousness of the assumed earlier breach and the impact on [Mr. Fearon's] *Charter* protected interests": Ruling, at para. 54. So we are not here concerned with a search that could not have been legally conducted at all. Mr. Fearon's privacy interests were going to be impacted one way or the other, and the particular breach of his s. 8 rights in this case did not significantly change the nature of that impact: see, e.g., *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 84. While this factor favours exclusion, it does so weakly.

[97] The final factor is society's interest in the adjudication of the case on its merits. The evidence here is cogent and reliable. As the trial judge found, its exclusion "would undermine the truth seeking function of the justice system": Ruling, at para. 55. This factor favours admission.

[98] I conclude that the evidence should not be excluded.

IV. Disposition

[99] I would dismiss the appeal.

The reasons of LeBel, Abella and Karakatsanis JJ. were delivered by

KARAKATSANIS J. —

I. Introduction

[100] We live in a time of profound technological change and innovation. Developments in mobile communications and computing technology have revolutionized our daily lives. Individuals can, while walking down the street, converse with family on the other side of the world, browse vast stores of human knowledge and information over the Internet, or share a video, photograph or comment about their experiences with a legion of friends and followers.

[101] The devices which give us this freedom also generate immense stores of data about our movements and our lives. Ever-improving GPS technology even allows these devices to track the locations of their owners. Private digital devices record not only our core biographical information but our conversations, photos, browsing interests, purchase records, and leisure pursuits. Our digital footprint is often enough to reconstruct the events of our lives, our relationships with others, our likes and dislikes, our fears, hopes, opinions, beliefs and ideas. Our digital devices are windows to our inner private lives.

[102] Therefore, as technology changes, our law must also evolve so that modern mobile devices do not become the telescreens of George Orwell's *1984*. In

this appeal, we are asked to decide when police officers are entitled to search a mobile phone found in the possession or vicinity of an accused person upon arrest. Because this new technology poses unique threats to peoples' privacy, we must turn to first principles to determine the appropriate response.

[103] An individual's right to a private sphere is a hallmark of our free and democratic society. This Court has recognized that privacy is essential to human dignity, to democracy, and to self-determination. Section 8 of the *Canadian Charter of Rights and Freedoms* protects the right to be free from *unreasonable* search and seizure. In defining the contours of a *reasonable* search, the law balances legitimate state interests, including safety and securing evidence in law enforcement, with the privacy interests of individuals. This balance generally requires judicial pre-authorization for a search, and a warrantless search is *prima facie* unreasonable.

[104] Nonetheless, our law recognizes that pre-authorization is not always feasible, such as when a search is reasonably necessary to effect an arrest. For this reason, the police have a limited power to search lawfully arrested individuals and their immediate vicinity. However, this police power does not extend to searches which encroach on the arrested person's most private spheres — searches of the home, or the taking of bodily samples. In my view, searches of personal digital devices risk similarly serious encroachments on privacy and are therefore not authorized under the common law power to search incident to arrest.

[105] The intensely personal and uniquely pervasive sphere of privacy in our personal computers requires protection that is clear, practical and effective. An overly complicated template, such as the one proposed by the majority, does not ensure sufficient protection. Only judicial pre-authorization can provide the effective and impartial balancing of the state's law enforcement objectives with the privacy interests in our personal computers. Thus, I conclude that the police must obtain a warrant before they can search an arrested person's phone or other personal digital communications device. Our common law already provides flexibility where there are exigent circumstances — when the safety of the officer or the public is at stake, or when a search is necessary to prevent the destruction of evidence.

[106] In this case, the appellant was arrested in connection with an armed robbery. Upon arrest, the police searched his cell phone and discovered incriminating evidence. The police had no grounds to suspect there was an imminent threat to safety and no grounds to believe there was an imminent risk of the destruction of evidence. Consequently, I conclude that the search was unreasonable and unconstitutional. The police were required to obtain a warrant before searching the phone, although they were entitled to seize the phone pending an application for a warrant. I would exclude the evidence so obtained.

II. Facts

[107] Kevin Fearon was arrested in connection with the armed robbery of jewellery at a market in Toronto in July 2009. A pat-down search by police, incident

to arrest, revealed a cell phone in Fearon's pocket. The phone was not locked, and an arresting officer accessed its text messages and photographs, including a photograph of a gun. That evening, the phone was examined by another officer, who discovered an unsent text message reading "We did it were the jewlery at nigga burrrrrrrrrrr" (trial judge's ruling on cell phone searches, 2010 ONCJ 645 (CanLII), at para. 24 (Ruling)). The officer saved the message and checked the cell phone four more times throughout the night.

[108] In early 2010, the officers came to believe a warrant was required in order to submit the phone to the Technological Crime Unit and download its contents. They therefore sought a warrant, which was granted in February 2010. Apart from the photograph and unsent text found shortly after the arrest, no further incriminating evidence was found during the subsequent examination.

[109] At trial, Fearon unsuccessfully argued that the warrantless search of the cell phone constituted an unreasonable search and seizure in violation of s. 8 of the *Charter*. Oleskiw J. held that the officers had a reasonable prospect of securing evidence of the offence when they searched the phone, as required by this Court's decision in *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 22, and the search was therefore reasonable. The trial judge concluded that, while the information in a cell phone is private, the information in this particular cell phone was not sufficiently connected to the dignity of the person for the court to create an exception to the

power to search incidental to arrest. The evidence was admitted, and Fearon was ultimately convicted of armed robbery and related offences.

[110] Fearon appealed to the Ontario Court of Appeal, in part on the basis that the search of his cell phone incident to arrest was in violation of s. 8. The Court concluded that the initial search by the arresting officer was within the ambit of the power to search incident to arrest. The cell phone was not password-protected or otherwise "locked" and the police officers had a reasonable belief that they might find relevant evidence. While the court considered that the subsequent searches of the cell phone at the police station that evening may have gone beyond the power to search incident to arrest, they found no palpable and overriding error with the trial judge's conclusion.

[111] The court declined to create an exception to the power of search incident to arrest with respect to cell phones. They concluded that such an exception would mark a significant departure from the existing state of the law on a record that does not suggest it is necessary. They considered it particularly significant that the cell phone was not password-protected or otherwise "locked", and suggested that it would not have been appropriate to search a locked phone without a warrant. The court dismissed the appeal.

III. Analysis

A. *Privacy and the Power to Search Incident to Arrest*

[112] Our *Charter* jurisprudence recognizes the concept of a "sphere of privacy" to define the proper limits of state authority in a free and democratic society. It recognizes that privacy — a sphere of protection for private life — is essential to personal freedom and dignity (see *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 16). Privacy gives us a safe zone in which to explore and develop our identities and our potential both as individuals and as participants in our society.

[113] On our digital devices, we may choose to investigate an idea on the Internet without wishing to attach ourselves to it. We may take pictures in the context of an intimate relationship, but not wish that these pictures be seen by others and redefine our public image. We may debate controversial ideas through text message or email, but not intend to commit to the opinions expressed.

[114] Individuals should be free to choose the audiences with whom they share their ideas, habits, experiments and movements. We should be free to act, think, feel, and ponder outside the public gaze.[1] We should feel free to take actions that may elicit negative reactions, or which may be inherently "incompatible with . . . putting on a public face": L. Austin, "Privacy and the Question of Technology", (2003), 22 *Law & Phil.* 119, at p. 146, citing T. Nagel, "Concealment and Exposure" (1998), 27 *Phil. & Publ. Aff.* 3, at pp. 18-20. But individuals would fear to do these things if there were no private arena; no place for connections shared only between intimately connected people; no controversial discussion and debate. As Professor Austin

[1] Professor L. M. Austin casts this freedom as the "capacity for self-presentation": "Control Yourself, or at Least Your Core Self" (2010), (30) *Bull. Sci., Tech. & Soc.* 26.

argues, at pp. 146-47, we need this private space in order to grow as distinct individuals, and in order to have an "authentic inner life and intimate relationships".

[115] A private inner life is essential to the autonomous individual that forms the basis of a free and democratic society as envisioned by the *Charter*. Privacy is a shield for autonomy and freedom, both for their own sake, and because they are prerequisites for our social and political structures.

[116] This Court has recognized both the intrinsic value of privacy and the importance of privacy to the fulfillment of other *Charter* rights and values. La Forest J. summarized this dual role in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28:

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

More recently, in *R. v. Spencer*, 2014 SCC 43, at para. 15, Cromwell J. wrote that privacy is "a prerequisite to individual security, self-fulfilment and autonomy as well as to the maintenance of a thriving democratic society".

[117] This Court has also pronounced on the dangers of putting "its *imprimatur*" on practices tending to give individuals reason to fear arbitrary or unjustified intrusions upon their privacy. The *threat* of unreasonable intrusions on

privacy (and not only the unreasonable intrusion itself) is enough to undermine the values served by privacy. In *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 54, La Forest J. adopted the words of Harlan J., dissenting, in *United States v. White*, 401 U.S. 745 (1971), at pp. 787-88:

> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.

[118] As this Court noted in *Duarte*, Canadians value "the right to live in reasonable security and freedom from surveillance, be it electronic or otherwise. And it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society" (p. 53). Our personal autonomy includes our right to determine when, how, and to what extent we release personal information (p. 46).

[119] Section 8 of the *Charter* provides constitutional protection for privacy. It recognizes the right to be "secure against unreasonable search or seizure". Of course, interests protected by the *Charter* are not absolute, and only *unreasonable* searches and seizures are prohibited; thus, the protection strikes a balance between the public

interest in effective law enforcement and society's interest in protecting privacy. As Dickson J. wrote in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60:

> This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[120] *Hunter v. Southam* established that, when feasible, there must be prior judicial authorization of a search. A warrantless search is *prima facie* unconstitutional, and the onus is on the Crown to establish the reasonableness of the search. The search will be *reasonable* under s. 8 if it is authorized by law; if the law itself is reasonable, and if the search is executed in a reasonable manner (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278). The issue in this case is whether a warrantless search of a cell phone, incident to arrest, is *authorized by law*.

[121] A search may be authorized by a common law police power if it is reasonably necessary to the execution of a recognized police duty, in light of all the circumstances (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at paras. 39-40; *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725, at paras. 21 and 29). This Court has long recognized that police officers have a common law power to conduct a search of the individual and the immediate surroundings, as an incident to arrest (*Cloutier v. Langlois*, [1990] 1 S.C.R. 158, pp. 180-82). This limited power was born of necessity, in order to secure an arrest. In *Cloutier*, this Court recognized that it will

often be necessary to perform a "pat down" or "frisk" search (1) to ensure the safety of the police, the public and the accused, and (2) to preserve evidence (*Cloutier*, at pp. 182 and 186). A warrant will often not be feasible to respond to these purposes. In *Caslake*, this Court highlighted the third law enforcement purpose that may justify a search connected to the arrest: (3) the discovery of evidence which can be used at trial (para. 19).

[122] The power to search incident to arrest evolved as a common law exception to the general requirement of judicial pre-authorization. It permits the physical search of items in the possession of the accused and authorizes searches that are reasonably necessary to conduct the arrest. Thus, a warrantless search is justified when the immediate needs of law enforcement authorities outweigh the individual's privacy interest (*Caslake*, at para. 17).

[123] Consistent with the balancing inherent in a s. 8 analysis, subsequent cases have recognized that a heightened privacy interest in a place or a piece of information may tilt the balance in favour of protecting privacy and preclude a search incident to arrest. In *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 159, this Court concluded that the heightened privacy interest in the home weighs against warrantless arrests in dwelling houses. In *R. v. Golub* (1997), 34 O.R. (3d) 743, at pp. 756-57, Doherty J.A. of the Ontario Court of Appeal applied this reasoning to conclude that searches of the home incident to arrest are generally prohibited because the privacy interest in the home outweighs the state interest in performing a warrantless search, barring exceptional

circumstances. Similarly, in *R. v. Stillman*, [1997] 1 S.C.R. 607, at paras. 49-50, this Court concluded that the warrantless taking of bodily samples including hair samples and teeth impressions following arrest was unlawful.

[124] The key principle emerging from this jurisprudence is that the law enforcement interests in ensuring safety, preserving evidence, and gathering evidence on arrest will generally outweigh the privacy interest that an arrested person has in the physical items in his immediate vicinity, justifying a search incident to arrest. But where the underlying assumptions change — be it due to the exigencies of law enforcement or the privacy interest impacted by the search — the constitutional balance must be reassessed.

[125] This case examines whether the police power to search incident to arrest includes a power to search a cell phone or other digital device. Because the privacy interest in such a device is quantitatively and qualitatively different from that in other physical items traditionally subject to such searches, this analysis must begin with the consideration of first principles: what constitutes a *Charter* compliant "reasonable" balance between privacy and the needs of law enforcement with respect to the search of cell phones and similar devices incident to arrest. I will first consider the privacy interest in such digital devices, then the law enforcement interest in performing a warrantless search upon arrest, and conclude by discussing the appropriate balance between the two.

B. *Privacy Interest in Digital Devices*

[126] All parties agree that individuals have a high expectation of privacy in their cell phones.

[127] However, a cell phone cannot be treated like any other piece of physical evidence that may be found on an arrestee and searched incident to arrest. The analogy to a "briefcase" is not apt. In *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 38 and 47, this Court recognized that a computer or cell-phone is fundamentally unlike a conventional "receptacl[e]". The four reasons Cromwell J. identified in that case are equally applicable here.

[128] First, computers and cell phones store immense amounts of information, some of which will be highly private in nature (*Vu*, at para. 41). In the case of a cell phone, this will include private communications in the form of texts and emails, potentially dating back years. The data storage capacity of a phone can vastly exceed what an individual could carry on their person or in a briefcase: thousands of pictures, messages, or videos. When combined in sufficient quantities, even individually mundane pieces of information have the potential to reveal aspects of our most private lives.

[129] Second, computers and cell phones are "fastidious record keeper[s]" (*Vu*, at para. 42). These digital devices can generate records of websites visited, documents read and created, and the details of the uses of almost all programs on the device. Cell phones in particular retain records of messages, both drafted and sent, calls made, and files transmitted and received. The ability of a cell phone to generate

an exhaustive record of seemingly trivial aspects of a person's day-to-day life means that it contains a far more thorough picture of what that person thought, said and did than any conventional form of data storage ever could. Because cell phones record details about so many aspects of our lives that would otherwise disappear, any intrusion into the device compromises our privacy interest in an unprecedented way. Our cell phones, on a daily basis, perform a level of surveillance which can generate and allow access to information ranging from social media communications to personal habits, and from tracked news feeds to medication schedules.

[130] As well, digital devices can retain files and data even after users think they have been destroyed (*Vu*, at para. 43). This problem may be even more pronounced with respect to cell phones, on which detailed manipulation of background files can be even more challenging for the average user.

[131] Finally, the limitation inherent in searches incident to arrest — limiting a search to a particular place or item — is not a meaningful restriction, since modern digital devices are portals to vast stores of information that is not "in" the device, but is instead stored on servers, or on third party devices (*Vu*, at para. 44). For example, if a user logs in to an Internet browser on both her home computer and on her cell phone, the browser on the cell phone may contain not just a fastidious record of Internet usage on the cell phone, but also on the home computer. Similarly, social media applications may allow the holder of the cell phone to review messages and information generated by the user on other devices. Emails which have never been

sent or read from the cell phone may be accessible through email applications (potentially including those sent many years ago). Files which have never been opened or created on the cell phone may be accessible through applications that allow the user to store files remotely. Moreover, someone examining the device may not be able to identify what is stored remotely.

[132] In short, the cell phone acts like a key or portal which can allow the user to access the full treasure trove of records and files that the owner has generated or used on any number of devices. It is not just the device itself and the information it has generated, but the gamut of (often intensely) personal data accessible via the device that gives rise to the significant and unique privacy interests in digital devices. The fact that a suspect may be carrying their house key at the time they are arrested does not justify the police using that key to enter the suspect's home. In the same way, seizing the key to the user's digital life should not justify a wholesale intrusion into that realm. Indeed, personal digital devices are becoming as ubiquitous as the house key. Increasingly large numbers of people carry such devices with them everywhere they go (be they cell phones, mobile computers, smart watches, smart glasses, or tablets).

[133] Cell phones and other wireless communications devices can continue to generate evidence even after they have been seized. The cell phone can continue to receive calls, text messages and emails even when out of the owner's control. Some of the concerns associated with searches of desktop computers identified in *Vu* — that

the computer can generate information unknown to the user and that such information is difficult to delete — are magnified with phones that can generate and record that information when out of the owner's hands and without her knowledge. This information, along with many of the records on the phone, will also implicate the privacy interests of third parties who sent the communications, collaborated in their creation, or have given the owner access to their files.

[134] Thus, like the search of a private home, a strip search or the seizure of bodily samples, the search of the portal to our digital existence is invasive and impacts major privacy interests. The privacy interest in a cell phone or other digital communication and storage device is extremely high. The ability of these devices to generate, store, process, communicate and share truly massive quantities of deeply private information explains their usefulness and the way in which they have revolutionized modern society. At the same time, these impressive capacities underlie the necessity for rigorous protection of users' privacy. The incredible and unique power of modern digital communications devices as portals to vast stores of information — and their ability to expose our private lives — means that they can be even more threatening to our privacy than the search of our homes.

C. *Law Enforcement Interest in Searching Digital Devices*

[135] The respondent and aligned interveners argued that, although the privacy interest in a cell phone may be high, there are also pressing state interests that require warrantless searches of cell phones.

[136] I will address these law enforcement interests through the three purposes justifying searches incident to arrest: safety, the preservation of evidence, and the discovery of evidence.

[137] I conclude that, while searching a cell phone will often be very useful for law enforcement, it will be an exceptional case where a warrantless search will be justified on that basis. In my view, the most pressing state interests can be accommodated by the existing doctrine that permits warrantless searches under exigent circumstances — 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. (I will discuss the doctrine of exigent circumstances in greater detail below.)

[138] Where exigent circumstances do not exist, a telewarrant can usually be obtained relatively quickly and with little harm to the investigation. Excluding cell phones from the power to search incident to arrest does not necessarily mean they cannot be searched. Rather, it means that police officers will have to seek a warrant to do so from a judicial officer who will ensure that individuals' privacy is appropriately safeguarded.

(1) Safety

[139] In *Cloutier*, at p. 182, this Court described the first rationale for the power to search incident to arrest as follows:

> . . . a search of the accused for weapons or other dangerous articles is necessary as an elementary precaution to preclude the possibility of their use against the police, the nearby public or the accused himself.

[140] Clearly a cell phone (or any other digital communication device) is not a physically dangerous weapon and, unlike a physical receptacle like a briefcase, cannot conceal such a weapon. However, digital communications capacity can generate new types of threats. For example, a cell phone could be used to summon violent backup, posing an imminent threat to the arresting officer or the public.

[141] When an arresting officer has a reasonable suspicion that a cell phone has been used to generate such a threat, this constitutes an exigent circumstance, justifying a warrantless search. For example, in *R. v. White*, 2007 ONCA 318, 85 O.R. (3d) 407, the suspect acted in a manner that indicated he realized he was under investigation and was heard to remark "Yeah, they're here now" into his cell phone immediately before being arrested (paras. 10-12). However, this will be an exceptional case. The mere possibility that a phone *could* have been used to summon backup does not justify a search incident to arrest any more than the theoretical possibility that the suspect's home *could* contain accomplices justifies a search of the home.[2] This does not rise to the level of imminent risk to safety.

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[2] For example, in *Golub*, officers entered a home and searched it incident to arrest to search for a potential accomplice or shooting victim. The Court of Appeal recognized, at p. 759, that they were "not acting on an unsubstantiated hunch" but on information available to them including the arrested person's behaviour, his physical and mental condition, his delay in exiting the apartment when instructed to do so, the location of the arrest, his answers when asked if anyone else was inside the apartment, his failure to leave the apartment door open when asked to do so and a reasonable belief that there was a loaded and dangerous weapon inside the apartment.

(2) Preservation of Evidence

[142] The respondent raised two main concerns relating to the preservation of evidence: first, evidence on the phone itself may be remotely deleted, either by an accomplice or automatically, and second, an accomplice may destroy physical evidence while the police are delayed by the need to wait for a warrant.

[143] It seems to me (on this record) that there will rarely be reasonable grounds to believe an accomplice is destroying evidence, and that a search of the cell phone is required to prevent such action. However, where there is such a reasonable basis, this could, in principle, constitute an exigent circumstance justifying a search.

[144] Usually the information on the cell phone will remain available pending the acquisition of a search warrant. This case is an example. The mere *possibility* that evidence on the cell phone could be remotely deleted should not justify a search. Furthermore, even if the suspect has an accomplice with the technological skills to wipe the cell phone remotely, this threat is easily addressed by removing the cell phone's battery or placing it in a "Faraday bag", an inexpensive receptacle which blocks wireless communications.

(3) Discovery of Evidence

[145] In practice, the most common benefit of a police search of a cell phone or other digital device incident to arrest is that it can provide police with information

that may assist in the investigation — a cell phone is a virtual gold mine of information. This is exactly the same reason that a cell phone attracts a heightened expectation of privacy. The fact that a cell phone may keep and access meticulously taken records about almost every aspect of a person's life explains both why searching it would be so useful to law enforcement and why such a search may be so offensive to the person's dignity.

[146] The text messages and photographs discovered in this case are examples of incriminating evidence that generally would not disappear if police wait to acquire a warrant.

[147] However, often a contact list will allow the police to immediately track down associates who may be involved in the offence or identify witnesses. Other forms of communication such as emails, voice messages and call histories may be similarly useful. Cromwell J. identifies the "prompt" pursuit of the investigation as an important law enforcement objective (paras. 49, 59 and 66). The immediate acquisition of this information is valuable because of what the Canadian Association of Chiefs of Police referred to as "investigative immediacy". The value of information may decline as witnesses, accomplices or evidence disappears, and so the police want to act before the trail goes cold. While telewarrants can be acquired quickly,[3] even small delays may come at a cost to the investigation.

[3] For example, the Ontario Telewarrant Centre operates 24 hours a day to ensure that it is always possible to acquire a warrant.

[148] This problem may be exacerbated by the difficulty of bypassing password protection on certain cell phones. For example, counsel for the respondent suggested that accessing a locked iPhone can take months as they must be sent to Apple Inc. in the United States. However, there is no evidence before us that this is a common problem, or that there are many instances in which the police have a brief window to access a phone incident to arrest while it is still unlocked. In any event, this justification would only apply to phones that are password-protected but unlocked at the moment they are seized. (It may, for example, justify entry for the limited purpose of disabling the password protection.)

[149] Finally, there may be valuable information on a phone that the police will be unable to obtain a warrant to acquire. The police need only a reasonable basis to conduct a search incident to arrest. To acquire a warrant, they require reasonable grounds to believe that relevant information will be found on the cell phone. This higher standard may mean that relevant evidence is simply never discovered.

[150] There is a cost to requiring police officers to obtain a warrant before searching an arrestee's phone. Searches for the purposes of imminent risks to safety or the preservation of evidence are permitted under exigent circumstances, answering the most serious of these concerns. However, the requirement to obtain a warrant will sometimes mean that the police are unable to discover potentially valuable evidence or that their investigation will be delayed. This cost must be weighed against the privacy interest in a phone.

D. *Balance When Searching Digital Devices*

[151] All parties agreed that there is a heightened privacy interest in personal digital devices. These devices give rise to significant and unique privacy interests. However, they disagreed on how that interest would impact the authority to search.

[152] In my view, the inherent limitations of the search incident to arrest — the fact that it is targeted to the offence, that it requires reasonable grounds, and that it must be proximate in time and place to the arrest — do not adequately limit the intrusion on the privacy interest in digital devices, unlike physical items. For tangible items, the intrusion on privacy is necessarily limited by the temporal and territorial dimensions. However, the nature of the privacy interest in a personal digital device is qualitatively and quantitatively different from that in a purse, briefcase or filing cabinet (*Vu*, at para. 47). A modern digital device is a portal to vast stores of information that are not truly on the device, and digital information has the potential to be more intensely and extensively personal than what might be found in a briefcase. Particularly for the "digital generation", these devices contain far more information, and information far more personal, than does a private home. 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.

[153] In my view, the weighty privacy interest an arrested person has in her cell phone will outweigh the state interest in performing a warrantless search incident to arrest, except in exigent circumstances. The police may usually *seize* a phone incident to arrest in order to preserve the evidence, but will require a warrant before they can *search* its contents.

[154] Consequently, the police may lose the opportunity to immediately follow up on leads that the cell phone may disclose, or may not be able to access certain evidence. But our system of law has long recognized that the state interest in acquiring evidence is not absolute. Doubtless, the ability to always search a suspect's home upon arrest would be useful to law enforcement, but the high expectation of privacy in our homes dictates otherwise. When it comes to cell phones and other such personal digital devices, privacy demands no less protection.

[155] This approach only protects the digital information stored on such devices, and not the physical devices themselves, because it is the information that attracts a heightened expectation of privacy. Searches that treat a cell phone (or other similar device) merely as a physical object continue to be permissible incident to arrest. For example, seizing a cell phone, searching for hidden compartments, testing that cell phone for fingerprints, or reading the identification number physically inscribed on the cell phone, do not interfere with the heightened expectation of privacy in the accessible information.

[156] Similarly, since it is the nature of the information accessible through the device that is relevant, the form of the digital device is immaterial. To the extent that devices such as tablets, smart watches, laptop computers and smart glasses may provide access to or generate the same types of information, they will likely be subject to the same treatment.

[157] As Cromwell J. recognized in *Vu*, protocols limiting the way in which a computer may be searched are not, as a general rule, constitutionally *required* for a warrant to be issued: para. 53. The same reasoning applies to cell phones, although the development of such protocols is not precluded.

[158] In performing a search of a cell phone, whether under exigent circumstances or pursuant to a warrant, the police officers must not extend that search beyond the scope of the grounds permitting the search. The grounds for the search only outweigh the suspect's privacy interest in the device with respect to specific purposes — it is hard to think of a ground that would justify the unlimited abrogation of the powerful privacy interest in a digital device. If exigent circumstances justify a warrantless safety search because of fears of armed backup, those grounds will only justify a search of relatively recent messages. Grounds to search a cell phone for a specific purpose cannot provide *carte blanche* to roam the suspect's digital life without restraint.

(1) Alternative Approaches

[159] I have concluded that the correct balance is struck under s. 8 of the *Charter* by the requirement of judicial pre-authorization, absent exigent circumstances. The parties to this appeal, the courts below, and other courts throughout the country have advanced alternative solutions to address the enhanced privacy interest in a cell phone. In my view, none of these alternatives adequately protect our reasonable expectations of privacy in our personal digital devices.

[160] First, unlike the Ontario Court of Appeal, I do not see how the considerable privacy interest in a cell phone could be overcome when it is not password-protected or otherwise locked. Leaving a cell phone without password protection cannot be said to constitute a waiver of the privacy interest in the vast web of digital information accessible through the phone, nor does it demonstrate a subjectively diminished expectation of privacy. Like the private sphere of the home, our digital devices remain intensely personal, even when we do not take every possible precaution to protect them. An individual who leaves her front door unlocked does not forfeit her privacy interest in her home to the state; the same is true of her phone.

[161] Second, I agree with my colleague and the parties to this appeal that there is little value in drawing a distinction between smart and dumb cell phones. Even dumb cell phones enable access to text message history, which can provide a transcript of years of private conversations (*R. v. TELUS Communications Co.*, 2013 SCC 16, [2013] 2 S.C.R. 3, at para. 34), as well as pictures, call history, and contacts.

Many dumb cell phones can provide access to the Internet and email even when they lack the touch screens or keypads that make such uses *easier*. Officers cannot, based on a brief visual inspection of a phone, assess how it has been used or the depth of private information it can access. The Crown advocated against such a distinction, submitting that it would place an unworkable burden on police to differentiate between dumb and smart phones, particularly given the rapid rate of technological evolution.

[162] Third, certain decisions have adopted an approach that would allow a limited or "cursory" search of a cell phone incident to arrest (*R. v. Polius* (2009), 196 C.R.R. (2d) 288, at para. 39). While the notion of a brief, targeted search that could quickly identify evidence without significantly invading the suspect's privacy is appealing, based upon the current record, such an approach is neither practical nor principled. Consequently, this approach was also rejected by both parties.

[163] Given that the information that can be accessed through a cell phone is highly private, it would be unprincipled to countenance a cursory infringement of the owner's privacy — much as it is not permissible to take a cursory walk inside a suspect's home.

[164] Moreover, it is very difficult — if not impossible — to perform a meaningfully constrained targeted or cursory inspection of a cell phone or other personal digital device. For example, recent communications could have been transmitted via a text message, an email, an instant messaging application, a social

networking application, a conventional voice call or a "data" voice call, a message board, through a shared calendar or cloud folder, a picture messaging application, or any number of websites. In short, a cursory inspection for recent communications will need to search a host of applications — the privacy infringement may be far from minimal and the inspection far from quick. Similarly, a cursory inspection of photos may involve any number of private and personal photographs of the individual — and of third parties.

[165] Further, as the Crown argued, the difficulty inherent in setting a standard for a cursory search would generate uncertainty for the police and result in increased after-the-fact litigation of searches. That same uncertainty would also result in increased numbers of searches that were later determined to be unconstitutional.

[166] Fourth, the Director of the Public Prosecutions Services of Canada suggested that searches of cell phones incident to arrest could be limited to a manual search, that is, a search that the officer could perform using the capacities of the device itself, as opposed to downloading or analysing its contents using other equipment as part of a full technical examination. However, as with a cursory examination, even a brief manual examination means that individuals would not feel secure in the privacy of their digital devices. Moreover, this approach mistakenly suggests that it is the *technical* nature of a search that poses the threat, when the use of technology can cut both ways. When an officer manually searches a cell phone, she cannot tell, without opening it, whether a particular photograph or text message is

deeply private and irrelevant, or highly relevant to the investigation — she opens them all alike. However, a computer search could be used to identify only certain types of files containing certain key words that are likely to be relevant, and then display only those files to the officers. In this way, the privacy interest of the individual may be *better* protected by a targeted high tech search, as opposed to a manual one.

[167] On the other hand, a technical search can also create new vulnerabilities. For example, the use of technology can expose patterns in the information on or use of the cell phone that may not otherwise be obvious in a manual search. It is the degree to which private information is revealed that is relevant — not whether the search is high or low tech.

[168] The intervener, the Canadian Association of Chiefs of Police, suggested that this Court should permit a search of a phone incident to arrest, but raise the standard to permit that search to "reasonable and probable grounds", as this Court did in *R. v. Golden*, 2001 SCC 83 [2001] 3 S.C.R. 679, with respect to strip searches. This approach would only yield usable evidence in cases where a warrant would *necessarily* have been obtainable since the standards for a search and to obtain a warrant would be the same. Police would therefore gain the time and resources otherwise needed to seek a warrant.

[169] However, this modest gain is outweighed by a significant cost to privacy. If a police officer searches a cell phone, mistakenly believing that she has reasonable

grounds, the exclusion of the evidence obtained at a subsequent trial does not render the search harmless. The arrested person's privacy will have been unjustifiably infringed, and their general sense of freedom and security affected, even if any information thereby obtained cannot be used against her. Only a requirement of pre-authorization can give people confidence that their privacy will be respected. As La Forest J. wrote in *Dyment*, at p. 430:

> . . . if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. . . . Dickson J. made this clear in *Hunter v. Southam Inc.* After repeating that the purpose of s. 8 of the *Charter* was to protect individuals against unjustified state intrusion, he continued at p. 160:
>
> > That purpose 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. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. [Emphasis added.]

[170] My colleague concludes that modifications to the common law power to search cell phones or personal computers incident to arrest would adequately limit the invasion of privacy and render judicial pre-authorization unnecessary (paras. 75-84). He emphasizes that the scope of the search must be truly incidental to the particular arrest (para. 78). He limits the objective of discovering evidence to that which serves an immediate investigative purpose, and notes that law enforcement objectives will most likely justify the search in relation to serious offences (paras. 79-80). In addition, he requires the police to keep detailed notes of what they have searched and why (para. 82).

[171] In my view, Cromwell J.'s proposed tailoring of the search's scope encounters the same problems of impracticality, police uncertainty, and increased after-the-fact litigation as the cursory search discussed above. My colleague draws a parallel between his approach and the approach set out by this Court in *Vu*, but *Vu* provides that a *judge* may determine the scope of a search of a computer when issuing the warrant (para. 62). And while detailed note-taking of what the police have searched and why may be desirable (*Vu*, para. 70, in the context of a search under warrant), it may prove to be an impractical requirement in the context of a time-sensitive investigation. It is not, in my view, an adequate remedy to what would be "an extraordinary search power" (para. 82).

[172] Fundamentally, my colleague's approach puts the balancing decision in the hands of the police. I doubt not that police officers faced with this decision would act in good faith, but I do not think that they are in the best position to determine "with great circumspection" whether the law enforcement objectives clearly outweigh the potentially significant intrusion on privacy in the search of a personal cell phone or computer (para. 80). If they are wrong, the subsequent exclusion of the evidence will not remedy the initial privacy violation.

E. *The Scope of "Exigent Circumstances" Justifying a Search Incident to Arrest*

[173] The doctrine of exigent circumstances, as expressed in the common law and the *Criminal Code*, R.S.C. 1985, c. C-46, recognizes that privacy protections may

be overridden under exigent circumstances. This doctrine is an exception to the general requirement to obtain a search warrant.

[174] Under s. 487(1)(*b*), the police may obtain a search warrant if "there are reasonable grounds to believe that a search 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". Section 487.11 provides:

> A peace officer . . . may, in the course of his or her duties, exercise any of the powers described in subsection 487(1) . . . without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

Thus, the requirement for a warrant to search a personal digital device can be dispensed with under exigent circumstances, if the conditions for obtaining a warrant exist. These provisions, however, do not define exigency.

[175] At common law, exigent circumstances have been defined to include (1) the imminent loss or destruction of evidence or (2) an imminent threat to police or public safety (*Feeney*, at para. 52, citing J. A. Fontana, *The Law of Search and Seizure in Canada* (3rd ed. 1992); J. A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada* (8th ed. 2010), at p. 1066; *R. v. Kelsy*, 2011 ONCA 605, 283 O.A.C. 201, at para. 24.)

[176] The definition of exigency in s. 529.3 of the *Criminal Code* is consistent with the common law. That provision authorizes the police to enter a home, without a warrant, under exigent circumstances, which are defined in s. 529.3(2) as circumstances in which the 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.

[177] This provision provides for a lower standard for exigency to protect safety (reasonable suspicion) than to preserve evidence (reasonable belief). Similarly, in *Golub*, at pp. 758-59, the Ontario Court of Appeal recognized the power to search a home incident to an arrest in exceptional circumstances, based on a *reasonable suspicion* that an armed person or injured victim may have been inside.

[178] In my view, the existing common-law standards of exigency are equally applicable to the search of a cell phone. The usual standard of *reasonable belief* is appropriate for the preservation of evidence. However, the standard to infringe an arrested person's privacy interest is lower when the search is reasonably necessary to safely and effectively perform an arrest. When an accused has summoned backup, the arrest itself is potentially jeopardized by threats to the police and the public. The highest purpose of law enforcement is to protect the public, and officers are entitled to ensure their own safety in carrying out their dangerous and necessary duties. Thus,

a *reasonable suspicion* that the search of a cell phone is necessary to prevent imminent bodily harm or death will justify a warrantless search.

[179] Therefore, a warrantless search of a cell phone on arrest will be justified 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.

IV. Application

[180] The search of a cell phone without a warrant cannot be justified under the common law power of search incident to arrest.

[181] In my view, the circumstances of this case did not justify a warrantless search of the appellant's phone, as the facts of this case fall far below either standard for exigency. There was no reasonable basis to suspect that it was necessary to search the cell phone for the purposes of safety. The mere use of an unrecovered firearm in the commission of the offence — the presence of a gun on the streets — is insufficient to ground a reasonable suspicion of *imminent* bodily harm or death. This case demonstrates the appropriateness of such restraint — the handgun was later found in the getaway car, which had already been secured but not yet searched. Nor was there any basis to suspect that violent backup had been called for. The officer did not observe the appellant making a call or sending a text, nor did he have any basis to think that the appellant knew an arrest was imminent. Similarly, there were

no reasonable grounds to believe that the destruction of evidence was imminent, either by remote wiping of the phone or destruction of physical evidence by a possible accomplice.

[182] Therefore, the searches of the appellant's phone were not justified and unreasonably infringed his privacy, in violation of s. 8 of the *Charter*.

A. *Exclusion of the Evidence*

[183] The evidence which was unconstitutionally obtained from the appellant's phone should be excluded.

[184] The trial judge found no *Charter* infringement but nonetheless directed her mind towards s. 24(2), concluding that, even if unconstitutionally obtained, the evidence on the phone should not be excluded. While trial judges' decisions under s. 24(2) are generally entitled to considerable deference (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 86), that is not the case when an appellate court reaches a different conclusion on the breach itself. That said, absent palpable and overriding error, the trial judge's underlying factual findings are always entitled to deference (*Grant* (2009), at para. 129; see also *R. v. Grant*, [1993] 3 S.C.R. 223, at p. 256.)

[185] In *Grant* (2009) this Court established a three-part test to determine whether unconstitutionally obtained evidence should be excluded under s. 24(2):

> . . . (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. [para. 71]

(1) Seriousness of the *Charter*-Infringing State Conduct

[186] The first factor considers the seriousness of the offending state conduct — the more severe or deliberate the conduct, the greater the need for the courts to dissociate themselves from it to maintain public confidence in the justice system.

[187] The trial judge found that the police acted in good faith. The police believed they were acting within their powers and there was no clear precedent that directed them to treat a cell phone differently than other receptacles. Moreover, when the police later learned of a case that they believed required them to obtain a warrant, they promptly applied for and obtained such a warrant. In doing so, the police made full disclosure of their prior searches of the phone.

[188] I find no reviewable error in the trial judge's conclusion. The searches took place before this Court released its decision in *R. v. Morelli*, [2010] 1 S.C.R. 253. That decision marked a sea change in the law's approach to digital devices by making it clear that individuals have a very strong privacy interest in their computers (and, by extension, similar devices). Before that decision, many appellate courts had endorsed a broad power to search receptacles such as purses or briefcases incident to

arrest and this Court had not indicated that the police should treat a cell phone differently.

[189] As Fish J. concluded in *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, a mistaken understanding about the power to search without a warrant is much more understandable in an unsettled area of law (para. 86). In my opinion the state conduct factor weighs against exclusion.

(2) Impact on the *Charter*-Protected Interests of the Accused

[190] The second factor considers the extent to which the seriousness of the breach undermined the interests protected by the right infringed. As these reasons make clear, individuals have an extremely high expectation of privacy in their digital devices, much as they do in their homes. The information contained in such devices is often extensive, private and highly personal. Consequently, the impact of an unwarranted search of a cell phone will tend to be very severe. Any such *Charter* breach must be treated seriously.

[191] In this case, the police searched text messages and photographs. I have concluded that the fact that the phone in question was a dumb phone, as opposed to one with greater data storage and computing capacities, does not reduce the need to obtain a warrant. In practice, it may be that the search of a dumb phone has the potential to reveal less personal information than a more thorough search of a smart phone. However, even this simple modern cell phone contained private text message

conversations, photographs, and call histories. Individuals reasonably expect that such highly personal information will remain private. The breach of the privacy interest was very serious.

[192] This factor strongly favours the exclusion of evidence.

(3) Society's Interest in an Adjudication on the Merits

[193] The third factor asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion.

[194] There is no reason to be concerned about the reliability of the evidence. Unlike an improperly obtained confession, for example, nothing about the police conduct in this case undermined the reliability of the messages or photographs retrieved from the phone. I agree with the trial judge that the evidence was reliable and cogent.

[195] However, even though armed robbery is a serious offence, this case would not have been "gutted" by the exclusion of the cell phone evidence, given the existence of witness testimony and physical evidence — most particularly a firearm found in the "getaway" car that matched the description of that used in the commission of the offence.

[196] Consequently, this factor is of limited assistance.

B. *Conclusion*

[197] In my opinion, the evidence should be excluded. The state conduct was not particularly objectionable, given that the police acted in good faith, and the evidence is reliable. However, the high privacy interest individuals have in their electronic devices tips the balance in favour of exclusion. Judicial pre-authorization is an essential bulwark against unjustified infringements of individual privacy. Unwarranted searches undermine the public's confidence that personal communications, ideas and beliefs will be protected on their digital devices. This is particularly important given the increasing use and ubiquity of such technology. It is difficult to conceive of a sphere of privacy more intensely personal — or indeed more pervasive — than that found in an individual's personal digital device or computer. To admit evidence obtained in breach of this particularly strong privacy interest, one of concern to an ever-increasing majority of Canadians, would tend to bring the administration of justice into disrepute.

[198] Accordingly, I would allow the appeal.

Appeal dismissed, LEBEL, ABELLA *and* KARAKATSANIS JJ. *dissenting.*

Solicitors for the appellant: Sam Goldstein, Toronto; Shelley Flam, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Ruby Shiller Chan Hasan, Toronto.

Solicitors for the intervener the Criminal Trial Lawyers' Association (Alberta): Pringle, Chivers, Sparks, Teskey, Edmonton; Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Davies Ward Phillips & Vineberg, Toronto.

Solicitor for the intervener the Canadian Association of Chiefs of Police: City of Vancouver, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association: Ursel Phillips Fellows Hopkinson, Toronto.