

# TOP FIVE 2015

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

## ***R v FEARON,*** **2014 SCC 77, [2014] SCR 621.**

Date Released: December 11, 2014

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14502/index.do>

### **Facts**

Kevin Fearon was arrested in connection with the armed robbery of a jewellery vendor. A police officer conducted a pat down search and found a cell phone in Mr. Fearon's pocket. The cell phone was not password-protected or locked. The officer examined the contents of the cell phone and found photographs of a gun and cash as well as an incriminating text message. The cell phone was searched again without a warrant at the police station to determine to whom the text message was sent. The examination showed that it was only a draft that had not been sent to anyone. Months later a warrant was obtained and another search conducted, but this yielded no new evidence.

### ***Canadian Charter of Rights and Freedoms***

**8.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

**24(2).** Where [...] a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

## Procedural History

At trial, Mr. Fearon argued that the first two examinations of his phone violated his s. 8 rights and that the evidence gathered through these searches should be excluded under s. 24(2). The trial judge found that the warrantless searches did not constitute a breach of his rights under s. 8 of the *Charter*, and the photos and text message were admissible as the search of the cell phone was incident to Mr. Fearon's arrest. The accused was found guilty of robbery with a firearm and related offences. The Court of Appeal for Ontario (ONCA) unanimously dismissed the accused's appeal. Mr. Fearon appealed to the Supreme Court of Canada (SCC).

## Issues

1. Does the exercise of the common law power to search incident to a lawful arrest extend to the search of cell phones and similar devices found on an accused person?
2. If so, under what conditions, if any?
3. If so, were the pictures and text messages collected as evidence against Mr. Fearon admissible in his trial?

## Decision

In a split decision, the appeal was dismissed and the evidence against Mr. Fearon was ruled admissible.

## Ratio

The common law power to search incident to a lawful arrest permits the search of cell phones and similar devices found on the suspect without a prior warrant. The SCC modified the existing common law framework governing the constitutionality of police searches during arrest to account for the risk of significant invasion of privacy posed by warrantless searches of portable digital communication devices.

## Reasons

The Court affirmed that the common law power to search incident to a lawful arrest without a warrant is a powerful and important tool for law enforcement that can allow police to prevent harm to officers, the public and the arrested and prevent the destruction of evidence. Four of the seven SCC judges found that searching a cell phone during an arrest should be allowed without a warrant under certain conditions, in order to meet important law enforcement goals.

Justice Cromwell, on behalf of the majority, sought to define "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." For the majority, the key question was whether the common law power underpinning a cell phone search incident to arrest was reasonable. Historically, the Court has affirmed that reasonable searches within the scope of this power do not violate s. 8 of the *Charter*. To ensure this power does not encroach upon the guarantees in s. 8, the Court held that police officers will be justified in searching a cell phone or similar device incidental to arrest only if:

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:
  - Protecting the police, the accused, or the public;
  - Preserving evidence; or
  - Discovering evidence, including locating additional suspects, in situations in which the investigation would be significantly impeded without the ability to promptly search the cell phone at the time of the 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.

Applying these conditions to Mr. Fearon's case, the majority found that:

- (1) The arrest was lawful, as he had been arrested for robbery;
- (2) The search was truly incidental to the arrest, as it was carried out for valid law enforcement reasons such as locating a gun used in the crime, protecting the public and discovering additional suspects or evidence;
- (3) The nature and extent of the search was appropriate for these law enforcement goals, because it was a brief search of recent cell phone applications that were open at the time of the search and it was reasonable to believe that information related to the purpose of the arrest might be discovered in this way; but
- (4) Police failed to take adequate notes about what they examined and how they conducted the search.

The majority held that the failure to take adequate notes constituted a violation of Mr. Fearon's rights under s. 8. Because it found this infringement, the Court had to determine whether the evidence against Mr. Fearon should be excluded. To do this, it weighed Mr. Fearon's privacy interest in this case against the public interest in having the case decided on its merits. The Court determined that the public's interest was greater than Mr. Fearon's and retained the evidence against him.



## Dissenting Opinion

Contrastingly, three dissenting judges found that the most urgent of the law enforcement goals in searching a cell phone without a warrant could already be met by other means. They reasoned that the amount and personal nature of information that can be stored on digital devices means that individuals have an extraordinarily high privacy interest in them, and that warrantless searches should only be permitted under much more urgent conditions than those laid out by the majority.

The three dissenting judges found that the encroachment on privacy posed by the search of cell phones incidental to an arrest is much more dire and violating than the sort of search that is otherwise justified under the common law power. They argued that while generally, law enforcement objectives outweigh the already diminished privacy interest of the accused, there is a quantitative and qualitative difference when the object of the search is a digital device that has a larger data storage capacity. This means that even if police are acting in good faith, there is a significant risk of privacy violations not connected to the valid reasons for the arrest.

Writing for the minority, Justice Karakatsanis found that police should be required to obtain a warrant in all but the most urgent circumstances. As an alternative to the four conditions laid out by the majority, the minority proposed that a warrantless search is permissible only when:

- (1) The police have a reasonable belief that searching the device could prevent an imminent threat to safety; or
- (2) The police have reasonable grounds to believe that searching the device could prevent the imminent loss or destruction of evidence.

In reaching this conclusion, the minority noted that these powers already exist in the common law and that police still have the option of seizing cell phones without searching them to preserve what evidence they might hold until they can lawfully obtain a warrant to search them.

The minority found that the police did not have reasonable grounds to believe that searching the phone could have prevented imminent harm or the destruction of evidence, and would have excluded the photo and text message evidence against Mr. Fearon.

## DISCUSSION

1. How much could a person learn about you if they were able to examine your cell phone?  
Without being specific, is any of this private?
2. Do people the police suspect of crimes still have a right to privacy?
3. Why do you think there are laws in place that allow police to search suspects without a warrant during the course of an arrest?
4. Refer to the rules the Court set out for determining whether a warrantless search of a cell phone during an arrest has been constitutional. In your own words, what does it mean?
5. Whose framework for determining whether a search is lawful makes more sense to you: that of the majority or that of the minority?  
Why?



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