R v Fearon Case Commentary

Abstract
The widespread use of smart phones and similar devices for data management has created significant constitutional and criminal law issues. This is evident in the context of protection by the Charter with respect to unreasonable search and seizure. When an individual’s section 8 rights are breached, an assessment of the admissibility of evidence under section 24(2) of the Charter is required. In R v Fearon, the Supreme Court of Canada established new limits on the police power to search cell phones and similar devices incident to arrest. Cromwell J stated that these measures do not “represent the only way to make searches of cell phones incident to arrest constitutionally compliant” and left open the possibility that law enforcement and privacy concerns may be balanced in numerous other ways. Further, the court commented that legislation may be desirable in this area. Karakatsanis J dissented, proposing an alternative mechanism for balancing individual privacy rights and law enforcement, namely the permission of warrantless searches only in exigent circumstances.

This article is helpful for readers seeking to learn more about:

- search incidental to arrest, unreasonable search and seizure, cell phones, privacy interests and rights, law enforcement, warrantless searches, admissibility of evidence, Charter-protected interests, state conduct, societal interests, policy considerations, protecting the public, threshold for justification, personal data, infringing rights, limits of encroachment

Topics in this commentary include:

- administration of justice, cursory searches, balance of competing rights and obligations, data spillover effects on innocent third parties, reasonableness standard, data-dump searches, pat-down search, vehicle search, Toronto Police Service, robbery, grounds for arrest

Authorities cited in this commentary include:

- R v Fearon, 2010 ONCJ 645
- R v Fearon, 2013 ONCA 106
- R v Fearon, 2014 SCC 77
- R v Collins, [1987] 1 SCR 30
- R v Golden, 2001 SCC 83
- R v Stillman, [1997] 1 SCR 607
- R v Manley, 2011 ONCA 128
- R v Polius, [2009] OJ No 3074

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INTRODUCTION

Law enforcement and respect for individual privacy are often competing objectives. In particular, the widespread use of smartphones raises significant questions for constitutional and criminal law in the context of the Canadian Charter of Rights and Freedoms. In R v Fearon, the majority of the Supreme Court of Canada (SCC) established new guidelines for searches of cell phones and similar devices incident to arrest.

I. R V FEARON

Kevin Fearon and his accomplice robbed a store merchant at gunpoint while she was loading jewelry into her vehicle. Fearon was later apprehended. The identity of his accomplice was unknown to authorities. Without a warrant, members of the Toronto Police Service conducted a search incident to arrest and located a cell phone in Fearon’s pocket. The handgun and the jewelry were still missing. A search of Fearon’s phone revealed a draft text message that read, “We did it we're the jewelry at nigga brrrrrrrrrr [sic].” Police also discovered a photo of the missing handgun. The phone was repeatedly searched after the initial inspection: once two hours after the first search and multiple times the following morning. The missing gun was later found in the getaway vehicle. The police did not receive a warrant to search the phone until almost five months later.

II. LEGAL ISSUE IN FEARON

Police are generally required to obtain a warrant to search a person or a place; however, police may conduct a search incident to arrest without a warrant. Canadian courts have provided inconsistent guidance on whether cell phones or other devices are
included in this search incident to a lawful arrest. In Fearon, the SCC attempted to clarify this inconsistency regarding the permissibility of searches of cell phones and similar devices incident to arrest.

Fearon argued the warrantless cell phone search incident to arrest infringed on the protections guaranteed by section 8 of the Charter and was inadmissible under section 24(2). Section 8 guarantees protection from “unreasonable search or seizure.” Section 24(2) grants courts discretion to exclude evidence that was “obtained in a manner that infringed or denied” a Charter right if admitting the evidence “would bring the administration of justice into disrepute.”

Both the trial judge and the Court of Appeal held that the search was not a breach of Fearon’s section 8 Charter rights and, in the alternative, that the evidence was admissible under section 24(2) because the police had a “reasonable prospect of securing evidence of the offence.” The private information stored on the phone was held not to be “so connected to the dignity of the person” as to justify limiting police power to search incident to arrest. Further, excluding the evidence would undermine the interests of a just judicial system. The Ontario Court of Appeal unanimously upheld the judgment, citing R v Caslake which held that cursory searches incident to arrest are permissible.

III. LEGAL HISTORY

If a search is authorized by law and conducted reasonably, section 8 is not violated. Caslake and R v Golden established that a search is incidental to arrest when police are attempting to achieve a valid purpose. This is not a matter of reasonable or probable grounds. Instead, the lawfulness of these warrantless searches hinges on the much lower standard of “what [the police] were looking for and why.” Binne J clarified in R v Nolet that the “important consideration [in determining whether a search is incident to arrest] is the link between location and purpose of the search and the grounds for arrest.”

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9 Charter, supra note 1.
10 Ibid.
11 Fearon Ct J, supra note 4 at para 51.
12 Fearon, supra note 2 at paras 190–192.
13 R v Fearon, 2013 ONCA 106 at paras 73.
14 [1998] 1 SCR 51 [Caslake].
16 2001 SCC 83 [Golden].
17 Fearon, supra note 2 at para 25.
18 Ibid at para 21.
19 2010 SCC 24 at para 49.
A higher threshold for justification is required where searches intrude on bodily integrity, such as with strip searches and seizure of bodily substances. These methods are considered more serious invasions of individual privacy, and are distinguished from other searches such as pat-downs or vehicle searches. The permissibility of warrantless searches varies based on the degree of the privacy interest at stake. An important consideration in this context is that cell phones and similar devices have the potential to store more personal data than other forms of personal property. As a result, Canadian courts established four main approaches regarding these searches. First, if the search is genuinely incidental to arrest, then cell phones can be searched. Second, cell phone searches are permissible if they are “cursory.” Third, “data-dump” searches incident to arrest are prohibited. Fourth, in exigent circumstances only, cursory cell phone searches are permitted incident to arrest.

IV. THE SCC MAJORITY JUDGMENT

With McLachlin CJ, Moldaver and Wagner JJ concurring, Cromwell J delivered the majority judgment upholding the Court of Appeal decision. The court held that although Fearon’s section 8 rights were breached because “detailed evidence about precisely what was searched, how, and why” was absent from the police description, the evidence obtained should not be excluded under section 24(2).

In the decision, the court set out new requirements for the common law police power to search incident to arrest, and held that warrantless searches of cell phones and similar devices will comply with section 8 of the Charter where:

1. The arrest was lawful;
2. The search is truly incidental to arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search and that reason is

20 Golden, supra note 16.
22 Fearon, supra note 2 at paras 20, 23.
23 See R v Manley, 2011 ONCA 128, where a search of an accused’s cell phone was held to be lawful under section 8 because the search was used to determine the identity of the accused and whether the phone was stolen. See also R v Polius, [2009] OJ No 3074 at paras 49-57 [Polius], where the court ruled that privacy rights as guaranteed by section 8 not only extended to homes and computers, but also cell phones and other electronic devices. Where an arrest has been made, police officers have the ability to seize the phone to preserve its evidentiary value, but cannot search the phone until judicial authorization is granted in order to preserve the privacy interests of the accused.
24 R v Giles, 2008 BCSC 367.
27 R v Mann, 2014 BCCA 231 at para 115.
28 Fearon, supra note 2 at para 87.
29 Ibid at para 98.
30 Ibid at para 83.
objectively reasonable. The valid law enforcement purposes in this context are as follows:
   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 extent of the search are tailored to the purpose of the search; and
4. Police take detailed notes of what they examined on a device and how they did so.31

Cromwell J stated that the list was not exhaustive,32 and left open the possibility that “[t]he law enforcement and privacy concerns may be balanced in many ways” beyond those suggested in the judgment.33 Legislation “may well be desirable” in this area.34

V. ANALYSIS OF JUDGMENT

Section 8

The majority judgment acknowledged that authorizing the warrantless investigation of cell phones incident to arrest may result in significant intrusions on individual privacy. Despite this, the majority rejected three suggested modifications to the existing common law exemption for searches incident to arrest. First, the court refused a categorical ban on searches of cell phones and similar devices.35 Cromwell J determined that prompt access to cell phone data would serve law enforcement objectives and that such a search is neither a major invasion of privacy nor inherently degrading.36 Second, the court declined to adopt the “reasonable and probable grounds” standard required for strip searches.37 The court ruled that requiring this higher standard of justification would create unreasonable safety risks for the police, the accused, and the public.38 Third, the court rejected the “exigent circumstances” requirement for the authorization of cell phone searches incident to arrest. The basis for this rejection was

31 Ibid.
32 Ibid at para 84.
33 Ibid.
34 Ibid.
36 Ibid at paras 59–65.
37 Ibid at para 68.
38 Ibid.
that it would require “too much knowledge”\textsuperscript{39} on the part of police and that it is “simply not consistent with the structure of our law.”\textsuperscript{40}

In rejecting a higher standard of justification, the majority inappropriately placed more emphasis on effective law enforcement than on individual privacy interests. The judgment discounted the potential extent of the privacy invasion caused by searches of cell phones and similar devices.\textsuperscript{41} While the search of a cell phone is not a physical violation of the person, as is the case with a strip search, it does provide access to deeply personal information. Cell phones often store information about finances, family matters, scheduling, and sensitive conversations. The intrusive prospect of having one’s entire digital life exposed suggests the need for a higher justification to authorize warrantless searches.

The amended common law power for constitutionally compliant searches incident to arrest outlined in \textit{Fearon} provides minimal guidance for future courts to determine the limits of encroachment on privacy interests. \textit{Fearon} limits police searches of cell phones incident to arrest to “recently drafted e-mails, call logs, [and] text messages.”\textsuperscript{42} This raises the question of what constitutes “recently drafted.” Furthermore, while police are now required to take thorough notes of what they examined and how they did so, there is no direction as to accountability. Alternatively, searches may result in the discovery of older data that can aid an investigation or of data that relates to other crimes. The potential admissibility of such evidence is unclear. The decision in \textit{Fearon} glosses over these significant questions, and the vagueness in the amended common law power to search incident to arrest leaves open the possibility for inconsistent state action.

\textbf{Section 24}

When an individual’s section 8 rights are breached, an assessment of the admissibility of evidence under section 24(2) of the \textit{Charter} is required. Three considerations were established in \textit{R v Grant}\textsuperscript{43} to determine the admissibility of evidence: (1) the seriousness of the \textit{Charter}-infringing state conduct; (2) the impact of the breach on the \textit{Charter}-protected interests of the accused; and (3) society’s interests in the adjudication of the case on its merits.\textsuperscript{44}

In \textit{Fearon}, the court acknowledged that the appellant’s section 8 rights were breached.\textsuperscript{45} In agreement with the trial judge, it was held that the police acted in good

\textsuperscript{39} \textit{Ibid} at para 69.
\textsuperscript{40} \textit{Ibid} at para 71.
\textsuperscript{41} \textit{Ibid} at para 134.
\textsuperscript{42} \textit{Ibid} at para 76.
\textsuperscript{43} 2009 SCC 32 [\textit{Grant}].
\textsuperscript{44} \textit{Ibid} at para 71.
\textsuperscript{45} \textit{Fearon}, supra note 2 at para 88.
faith and that the evidence was admissible.\textsuperscript{46} Cromwell J analyzed the facts against the three considerations for admissibility of evidence established in \textit{Grant}. The first factor was held to favour the admission of evidence because the police simply made an “honest mistake, reasonably . . . [and it was] not state misconduct that requires exclusion of evidence.”\textsuperscript{47} Further, regardless of the section 8 breach, the court reasoned that Fearon’s rights were “going to be impacted one way or another”\textsuperscript{48} because he did not challenge the warrant that was subsequently issued for the comprehensive search of the cell phone.\textsuperscript{49} The decision stated that the lack of challenge amounted to a concession that there were reasonable and probable grounds for police to search the phone.\textsuperscript{50} Finally, in terms of society’s interest in adjudication on the merits, the SCC majority referred to the trial judge, who found that exclusion of the evidence “would undermine the truth seeking function of the justice system.”\textsuperscript{51} Cromwell J concluded that the evidence should be admitted.\textsuperscript{52}

The \textit{Fearon} decision came in spite of Canadian precedent that treated computers and laptops differently from other personal property in the context of searches incident to arrest.\textsuperscript{53} \textit{R v Morelli}\textsuperscript{54} provides relevant discussion as to the admission of evidence under section 24(2) of the \textit{Charter}. Specifically, the Court in \textit{Morelli} considered the privacy interests at stake in searches of personal and home computers. As articulated by Fish J, writing for the majority in \textit{Morelli}, “[i]t is difficult to imagine a more intrusive invasion of privacy than the search of one’s home and personal computer…Computers often contain our most intimate correspondence.”\textsuperscript{55} As a result, evidence obtained from the accused’s personal computer in \textit{Morelli} was excluded under section 24(2) of the \textit{Charter}.\textsuperscript{56} In \textit{Morelli} the court held that privacy interests outweigh law enforcement objectives under the circumstances. The SCC in \textit{Fearon} did not share this sentiment, which is unfortunate. Technology has progressed to the extent that computers and cell phones have similar data processing and storage capabilities: they perform similar functions, and both contain the type of delicate information described by Fish J. It is perplexing that the majority in \textit{Fearon} did not place more weight on the computing power of modern cell phones and similar devices.\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{46} \textit{Ibid} at para 94.
  \item \textsuperscript{47} \textit{Ibid} at para 95.
  \item \textsuperscript{48} \textit{Ibid} at para 96.
  \item \textsuperscript{49} \textit{Ibid}.
  \item \textsuperscript{50} \textit{Ibid}.
  \item \textsuperscript{51} \textit{Ibid} at para 97.
  \item \textsuperscript{52} \textit{Ibid} at para 98.
  \item \textsuperscript{53} 2010 SCC 8 at para 105 [\textit{Morelli}].
  \item \textsuperscript{54} \textit{Ibid}.
  \item \textsuperscript{55} \textit{Ibid}.
  \item \textsuperscript{56} \textit{Ibid} at para 103.
  \item \textsuperscript{57} \textit{Fearon}, supra note 2 at para 96.
\end{itemize}
Additional Considerations for Privacy

In light of the presumption at law that “those who have been lawfully arrested have a lower reasonable expectation of privacy than persons not under lawful arrest,” it could be argued that the privacy rights of an accused do not extend to protection from cell phone searches incident to arrest. This argument, however, bears a fundamental flaw: it fails to consider innocent third parties. When cell phones and similar devices are searched, the investigation does not solely affect the accused. E-mails, website links, and other personal information of numerous third parties can fall into the possession of the state. Thus, there is no clear boundary between searching the accused and concurrently intruding on the privacy interests of innocent third parties.

VI. THE DISSENT

Karakatsanis J delivered the dissenting judgment, with LeBel and Abella JJ concurring. In agreement with the majority, it was held that the search of Fearon’s cell phone incident to arrest was unconstitutional. The dissent, however, diverged from the majority in holding that evidence from this search could not be admitted under section 24(2). It was argued that the test for warrantless searches articulated by the majority affords insufficient protection of privacy interests from state interference. Karakatsanis J proposes an alternative mechanism to balance individual privacy and law enforcement, namely, the permission of warrantless searches only in exigent circumstances. “Exigent circumstances” would include situations where the safety of an officer or the public is at stake, or where a search is necessary to prevent destruction of evidence. For all other circumstances, judicial pre-authorization would be necessary. This approach places great importance on balancing the state’s law enforcement objectives and an individual’s privacy rights.

CONCLUSION

The majority judgment in Fearon verbally heeded the potential for personal data storage in cell phones and the necessity of protecting the privacy interests of individuals; however, Cromwell J concluded that searches of cell phones and similar devices incident to arrest are permitted if conducted reasonably. The vagueness inherent in the “reasonableness” standard makes it difficult for the police and the courts to determine a consistent boundary for searches considered lawful.

58 Ibid at para 56.
59 Ibid at para 105.
60 Ibid at paras 103–104.
Considering the functional comparability of computers and cell phones or similar devices, treating them differently in the context of searches incident to arrest does not make intuitive sense. The common law is not static, however. Courts are expected to make incremental changes where necessary to accommodate new circumstances and societal norms.61 It is possible that the law, after Fearon, will develop in a way that places greater emphasis on the significance of the privacy intrusion of warrantless searches of cell phones and similar devices. In view of the close split of the SCC on the Fearon decision, future decisions in this area may look to the reasoning of the dissent in the context of new and modern circumstances.

61 Ibid at para 105.