PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hiscoe, 2011 NSPC 84

Date: 20111117
Docket: 2215503
Registry: Kentville

Between:

Her Majesty the Queen

v.

Jamie Scott Hiscoe

Judge:	The Honourable Judge Alan T. Tufts
Heard:	June 1 & October 3, 2011, in Kentville, Nova Scotia
Charge:	**s. 5(2) Controlled Drugs and Substances Act**
Counsel:	Jennifer L. Young, for the Crown David Schermbruker, for the Crown Len MacKay, for the Crown Stephen A. Mattson, Q.C., for the defence

By the Court:

Introduction

[1] The accused is charged under s. 5(2) of the *Controlled Drugs and Substances Act*. It is alleged he was in possession of cocaine for the purpose of trafficking on the 18th day of August, 2010.

[2] The accused is applying to exclude from evidence in this proceeding the contents of his cell phone which the police seized upon his arrest. He argues that the search of his phone was a breach of his s. 8 *Charter* rights and accordingly any evidence of the contents of the phone should be excluded under s. 24(2) of the *Charter*. The police did not obtain a search warrant to extract the contents of the phone. The accused argues in his written brief that the seizure of the cellphone was unlawful, although in his oral submissions he concedes that the police were legally entitled to seize the phone. I will address this further below.

[3] The Crown acknowledges that it has the burden to establish that the police had the legal authority to seize the accused's phone and search its contents. The Crown concedes that if any aspect of the police search of the phone exceeded their lawful authority then the search resulting therefrom should be excluded as evidence.

[4] Let me briefly summarize the facts for the purpose of this introduction. More details follow shortly below. The police were surveilling the accused while he was driving in his vehicle. When they saw him do an exchange with the driver of another vehicle in an empty drive-in- theatre he was arrested. The accused's cell or "smart" phone was seized and the arresting officer, Constable Foley, made a cursory observation of the text messages on the phone. Later the same evening Constable Foley wrote out the contents of the messages he saw earlier while another officer read them to him.

[5] Approximately one month later the phone was sent to the RCMP Forensic Crime Lab and the complete contents of the phone's data was downloaded – the so-called "data dump".

[6] The focus of this application is the legal scope of the police authority to search incident to arrest. The issues in this proceeding therefore are as follows:

1. What is the scope of the police authority to seize and search incident to arrest in the context of a seizure and search of a cell or smart phone?
2. Was the accused's phone lawfully seized?
3. Did the police have authority to:
    a. Do a cursory examination of the accused's cellphone at the scene,
    b. Again, examine the accused's cellphone later on the day of the arrest to record in writing the contents of the phone observed earlier, and
    c. To do a complete download of the contents of the cellphone – the so-called "data dump" a month after the arrest?

Summary of Conclusions

[7] For the reasons that follow, I have concluded that examination of the smartphone at the arrest scene to view the recent text messages and the subsequent transcribing of those messages later that same day are within the lawful scope of the police authority to search incident to the arrest of the accused for possession of a controlled substance for purposes of trafficking. That search does not violate the accused's s.8 *Charter* rights. Accordingly, the evidence retrieved by the police regarding their examination is not excluded from evidence.

[8] I have concluded, however, that the complete content download or "data dump" of the cell phone is beyond the scope of a search incident to arrest and the police did not have the legal authority to conduct such a search. That search violated the accused's s.8 *Charter* rights. The evidence from the content download is excluded from evidence pursuant to s. 24(2) of the *Charter*.

[9] I will now explain the reasons for my conclusions.

The Facts

[10] The only testimony was from Constable Foley and Constable Campbell, both of whom were involved in the investigation and were present at the arrest scene.

[11] The defence has made certain admissions. Particularly, the accused admits the police had reasonable and probable grounds to arrest him for an indictable offence "related to drugs". The accused accepts his arrest was lawful. The Crown suggested at the outset of the hearing that the accused admitted that the police "did have reasonable and probable grounds to arrest the accused for possession for the purposes of trafficking". However, after a protracted discussion with the court to determine precisely what was admitted, the accused never specifically admitted he was lawfully arrested for possession for the purposes of trafficking in a controlled substance. However, in my opinion, the police arrested the accused for that reason and had reasonable grounds to come to this conclusion. In particular Constable Foley indicated in cross-examination that he had information from another officer to the effect that the accused was "involved in trafficking of crack cocaine". This was never challenged by the accused.

[12] I recognize that what the police actually observed was the accused, it appears, purchasing drugs and therefore only in possession of cocaine. However, given the entire context of the circumstances, the "bag of cocaine" and "wad of twenties" seized, the admissions made and the unchallenged information the police had, the only reasonable inference is the police had reasonable and probable grounds to believe the accused was in possession of drugs for further sale or distribution, *ergo* trafficking. He was accordingly arrested for that offence. The accused has never challenged the validity of the arrest. I am satisfied the police lawfully arrested the accused for possession for the purposes of trafficking in a controlled substance.

[13] Prior to the arrest the police had the accused under surveillance for some time throughout the day. They had information about his alleged drug activities. They followed him into a drive-in-theatre where they witnessed an exchange between him and the driver of the second vehicle. The accused was driving the vehicle and his mother was in the passenger's front seat. When this exchange took place the accused was arrested. The police found cash in the vehicle of the other driver and a bag of cocaine on the ground between the two vehicles. During the arrest procedure Constable Foley seized the accused's cell phone which was on the seat of his car. It was described as a "smart phone like a Blackberry". It did not have a password.

[14] At the arrest scene Constable Foley opened the cell phone and reviewed a number of text messages. Constable Foley explained that he seizes cell phones in instances where persons are arrested for trafficking in drugs. He explained that cell phones often contain score sheets, records of drug debts, contacts of other persons and text messages and phone calls in the time leading up to the offence which indicate a negotiation of drug prices and amounts, meeting places and other pertinent details. He said that this information is time sensitive as it may disclose possible stash locations and locations of weapons.

[15] Constable Foley also testified that it is possible that information on cell phones can be deleted remotely. Because of this Constable Foley indicated that he reviewed the text messages and later that evening when more time was available he transcribed the messages after Constable Campbell dictated them to him. On September 21, 2010 Constable Campbell took the cellphone to the RCMP Technological Crime Unit in Dartmouth, at which time the entire contents of the phone were downloaded and placed on a DVD. It is the observations made by Constable Foley at the arrest scene, the transcribed notes of the text messages made later that evening and the DVD of the full contents of the cell phone which are the subject of the accused's application.

Review of the Law

General Principles

[16] Any discussion of s. 8 of the *Charter* must begin with the principles set out in *Hunter v. Southam Inc*[1]. This was one of the Supreme Court of Canada's earliest *Charter* decisions and emphasized, which it later said in *R v. Big M Drug Mart* [2] and other cases[3] that the *Charter* provisions, including s. 8, must be given a broad and liberal interpretation[4] and its spirit (with particular reference to s.8)

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[1] [1984] S.C.R. 145

[2] [1985] 1 S.C.R. 295 at para. 117

[3] *Manitoba (A.G.) v. Metropolitan Stores (MTS)* [1987] 1 S.C.R. 110; *IrwinToy Ltd v Quebec (A.G.)* [1989] 1 S.C.R. 927

[4] See also *R. v. Dyment, infra*

must not be constrained by narrow legalistic characteristics based on the nature of property[5]. At this time the court was clarifying that the common notion of search related to property was not to be applied to s. 8. Section 8 protected an individual's reasonable expectation of privacy.

[17] Justice Dickson explains in *Hunter v. Southam Inc, supra* that s. 8's purpose is to prevent unjustified searches before they happen. The way to guarantee this is to require a system of prior authorizations. Accordingly, not only does the state require reasonable and probable grounds to justify interference where the person's reasonable expectation of property, the state must seek authorization from an impartial and independent arbiter[6]. The entire notion of privacy would be meaningless, in my opinion, if all that was required was subsequent validation. It is difficult to have one's privacy restored once it has been violated, hence the insistence on prior authorizations to prevent interference with privacy. Otherwise it would be very easy to simply require reasonable and probable grounds to justify state interference and later scrutinize police action to see if that standard was met. However, that would not meet the purpose which s. 8 was designed to achieve.

[18] Therefore, warrantless searches are presumptively unreasonable and will violate s. 8 unless the search was authorized by law, the law itself is reasonable and the manner in which the search was carried out was reasonable[7]. Deviations from that standard set out in *Hunter v. Southam* are permitted but should be "extremely rare"[8].

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[5] *Dyment*, para. 15

[6] See *R.v. Dyment* , supra at para 23 where La Forrest, J says, *"One further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated".*

[7] *R. v. Collins*, [1987] 1 S.C.R. 265

[8] *R. v. Simmions* [1988] 2 S.C.R. 495 at para 47; *R. v. Grant* [1993] 3 S.C.R. 223 at para. 24

Search Incident to Arrest

[19] The power to search incident to arrest is an exception[9] to the principles set out in *Hunter v. Southam Inc, supra*. Therefore, searches incident to arrest do not require prior judicial authorization. Since the adoption of the *Charter* and the warrant requirement established in *Hunter* there has been debate about the scope of the powers of police to search incident to arrest.[10]

[20] In *Cloutier v. Langlois*[11], the Supreme Court of Canada considered in detail the law related to the power to search incident to arrest. In that case the issue was whether it was lawful for the police to "frisk" search an arrestee – Mr. Cloutier – when he was arrested on an outstanding warrant for an unpaid traffic fine. Justice L'Heureux-Dubé traces the common law history of the police power to search incident to arrest. She also reviewed the U.S. authorities and various scholarly writings on the subject. From this review it is clear police do not need reasonable grounds beyond the authority to arrest in order to search the arrestee. The power to search comes from the arrest itself.

[21] However, the search must be truly incident to the arrest. It must be connected with the events charged[12] . The most important justification for this power is the need to prevent suspects from destroying evidence, committing violence or attempting to escape[13] . The purpose includes locating evidence related to the charge upon which the subject has been arrested[14]. Later, at para. 53, Justice L'Heureux-Dubé focuses on the preservation of evidence where she says,

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[9] *R. v. Chehil* 2011 NSCA 82

[10] See Stanley A. Cohen, Search Incident to Arrest: How Broad an Exception to the Warrant Requirement (1988), 63 C.R. (3d) 182 where the authors argues for a limited scope defined by officer safety and the need to preserve evidence; see also Alan D. Gold, Search Incident to Arrest (1994) Alan D. Gold Collection of Criminal Law Articles; Stanley A. Cohen, Search Incident to Arrest, Vol. 32 C.L.Q 366

[11] [1990] 1 S.C.R. 158

[12] *R. v. Beare* [1988] 2 S.C.R. 387; *R. v. Rao* (1984) 12 C.C.C. (3d) 97 (Ont.C.A.)

[13] *Cloutier* para. 47

[14] *Cloutier* para. 48

> Further, the process of arrest must ensure the evidence found on the accused and in his immediate surroundings is preserved. The effectiveness of the system depends in part on the ability of police officers to collect evidence that can be used in establishing the guilt of the suspect beyond a reasonable doubt. The legitimacy of the justice system would be but a mere illusion if the person arrested were allowed to destroy evidence in his possession at the time of the arrest.

[22] Finally, at paras. 60-62, Justice L'Heureux-Dubé sets out three propositions:

> 60 1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.
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> 61 2. 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. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case for example if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.
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> 62 3. The search must not be conducted in an abusive fashion and in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.

[23] From this, it is clear the police, upon arrest, can search a subject without the requirement of reasonable grounds or reasonable and probable grounds that evidence of a crime will be found. The police, however, must search for a valid objective including discovery of evidence against the accused. The focus, in my opinion, in this regard, is the preservation of evidence. Finally, police have a discretion in conducting the search and, in my opinion, a discretion not only as to the search itself but also to the extent to which the search incident to arrest extends.

[24] In *R. v. Stillman*[15] the Supreme Court again considered the power to search upon arrest. In that case it was in the context of collecting DNA samples from an

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[15] [1997] 1 S.C.R. 607

arrestee. Justice Cory reviewed *Cloutier v. Langlois, supra* and noted that the power to search upon arrest has been extended to include the discovery of evidence beyond that which may be destroyed by the detainee[16] and not limited to searches of necessity[17] . He noted different examples but pointed out that this expansion involved less intrusive searches of motor vehicles.

[25] In *Stillman* the Court concluded that the seizure of bodily substances is beyond the scope of search incident to arrest because the interference with a person's bodily integrity is a breach of a person's privacy and an affront to human dignity and, as such, a higher standard of justification is required. Justice Cory also pointed out that the common law power cannot be so broad. He notes that there is usually no danger of bodily substances disappearing[18]. Finally, he points out that one of the limitations on the power to search incident to arrest is that it is discretionary[19]. Justice Cory also qualified Justice LaForrest's comment in *R. v. Beare, supra* where he [Justice LaForrest] said an arrested person has a reduced expectation of privacy. Justice Cory distinguished fingerprint-taking from the taking of dental impressions from a detained person because of the intrusive nature of the procedure. He also distinguished taking scalp and hair samples as well. At para. 49 he says:

> There was simply no possibility of the evidence sought being destroyed if it was not seized immediately. It should be remembered that one of the limitations to the common law power articulated in *Cloutier v. Langlois, supra*, was the discretionary aspect of the power and that it should not be abusive. The common law power of search incidental to arrest cannot be so broad as to encompass the seizure without valid statutory authority of bodily samples in the face of a refusal to provide them. If it is, then the common law rule itself is unreasonable, since it is too broad and fails to properly balance the competing rights involved.

[26] In my opinion, *Stillman* recognizes some expansion of the power to search incident to arrest but that expansion involves less intrusive measures. Where the

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[16] *Stillman,* para. 35

[17] *Stillman,* para. 37

[18] *Stillman,* para. 49

[19] As explained in *Cloutier v. Langlois, supra*

degree of privacy increases[20], in my opinion, there is less justification for expanding the power to search. The degree of privacy affected, in part, determines the extent of the scope of the power to search incident to arrest. Finally, it is clear that the power to search has a discretionary aspect.

[27] In *R. v. Caslake*[21] the Supreme Court of Canada again addressed the scope of the power to search incident to arrest. This is the leading case on the subject. In *Caslake* the police, six hours after arresting the accused for possession of narcotics, conducted an inventory search of the accused's car. Here, Justice Lamer reviews the principles set out by the Court in *Cloutier v. Langlois, supra* and the three "important limits"[22] on that power as described by Justice L'Heureux-Dubé. Justice Lamer notes that there are no ascertainable limits on the scope of this power to search. It is the role of the courts to set boundaries which allow the state to pursue its legitimate interests while "vigorously" protecting individual rights of privacy[23] . He recognizes that there are temporal limits but is reluctant to set strict timelines between the arrest and the search. Generally, searches that are truly incident to arrest will occur within a reasonable period of time after the arrest and any substantial delay may allow an inference that the search was "not sufficiently connected" to the arrest[24].

[28] The court describes the limits on search incident to arrest at para. 17:

> 17 In my view, all of the limits on search incident to arrest are derived from the justification for the common law power itself: searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, **it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy**. See the Law Reform Commission of Canada, Report 24, Search and Seizure (1984), at p. 36. (For a

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[20] The more intrusive the search the greater degree of justification is required. See.*R. v. Simmons*, supra p. 517 as quoted in *R. v. Golden* 2001 SCC 83 para.88. In *Golden* the Court set out restrictions on the police authority to conduct "strip searches" incident to arrest.

[21] [1998] 1 S.C.R. 51

[22] *Caslake,* para. 14

[23] *Caslake,* para 15

[24] *Caslake,* para. 24

> more in-depth discussion, also see Working Paper 30, Police Powers -- Search and Seizure in Criminal Law Enforcement (1983), at p. 160.) This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest. [emphasis added]

[29] Justice Lamer specifically refers to the Law Reform Commission of Canada's Working Paper 30, Police Powers – Search and Seizure in Criminal Law Enforcement (1983). Beginning at p. 166 the report makes recommendations regarding the police power to search a person who has been arrested. The focus of the recommendations and the discussion that is included in the report centre around the need for police to ensure that evidence does not disappear and denial of access to items that could endanger human safety or facilitate an escape[25]. The report makes no recommendations or includes no discussion about the police power generally to search an arrested person or his possessions for further evidence of the alleged offence beyond what is necessary to preserve evidence.

[30] In *Caslake* it is also clear that if the justification for the search is to discover evidence there must be some "reasonable prospect of securing evidence of the offence for which the accused was arrested"[26]. [emphasis added]

[31] At para. 25 the court summarizes the principles:

> 25 In summary, searches must be authorized by law. 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.

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[25] Working Paper 30 at pg. 169

[26] *Caslake,* para. 22

[32] What does *Caslake* tell us about the scope of the authority to search incident to arrest? It says, in my opinion, that arrested persons do not have a reduced expectation of privacy, however the need for the police to gain control of evidence can outweigh an individual's privacy. Where the police objective is the discovery of the evidence there must be a reasonable prospect of securing such evidence.

[33] Does the degree of privacy help to determine the limits on the scope of the authority? Does the valid objective – need to discover evidence – outweigh the individual's privacy interest in every case no matter the degree of that interest? In my opinion there must be a balance. The rationale behind the authority is that the "ends of criminal justice" outweigh an individual's privacy interest. But surely that cannot be the same in every case. Obviously the valid objective must be incidental or "connected" to the arrest, although interestingly, Justice Lamer speaks about "sufficiently connected" to the arrest, suggesting, in my opinion, that there may be a degree of connectedness such that a minimal connection, particularly when temporal issues are present, is not enough.

[34] However, this is only one side of the scale. The degree of privacy, in my opinion, must also play a part. In *Stillman* and later in *Golden*, the court set out further limitations on the power to search incident to arrest because of the particular privacy interest at stake in those cases.

[35] In my opinion, *Caslake* does not stand for the proposition that there are no limits on the police power to search upon arrest because the police are purportedly attempting to discover evidence related to the offence. In my opinion it is a balancing of the needs of the police in pursuing their objective i.e., discovering and preserving evidence, the degree of connection to the offence alleged, and the privacy interests of the arrestee.

[36] Finally, in *R. v. Nolet*[27] the Supreme Court of Canada again briefly addresses search incident to arrest. In that case the accused were arrested for possession of proceeds of crime and their vehicle was searched. The Supreme Court confirmed the principles in *Caslake* and in particular that "the discovery of evidence which can be used at the arrestee's trial is a valid objective connected to the arrest to

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[27] 2010 SCC 24

justify a search". The Court said at para. 49, "the important consideration is the link between the location and the purpose of the search and the grounds for the arrest".

[37] The Supreme Court of Canada found that the search of the truck trailer was a lawful search incident to arrest. Specifically the court rejected the trial judge's conclusion that because there were no exigent circumstances the police ought to have waited and obtained a search warrant. The court said at para. 52, "however the basis of the warrantless search was not 'exigent circumstances' but connection or relatedness, i.e., to trigger the common law authority to search for evidence of the crime to which the arrest related".[28]

[38] Much of the Appeal Court case law[29] confirms that the search for the discovery of evidence is a valid objective to justify searches incident to arrest. However these cases are mainly concerned with spatial or temporal issues many of which centers around the searches of motor vehicles.

Canadian Case Law – Search of Cell Phones Incident to Arrest

Reasonable Expectation of Privacy

[39] The Crown acknowledges that the accused had a reasonable expectation of privacy in the contents of his cellphone and that the three occasions when the police examined and retrieved information from the cellphone constituted a warrantless search which constituted a *prima facie* unreasonable search[30] for the purposes of s. 8 of the *Charter*. Having said that, in my opinion it is important to characterize the degree or level of privacy in the smart phone information and how that information is stored because, in my opinion, it is a factor in deciding the scope of the police authority to search a cellphone incident to arrest.

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[28] See also *R. v. Tontarelli* 2009 NBCA 52 at para. 44 which also makes that point that exigent circumstances are not a prerequisite to the lawful exercise of the common law power of search incident to arrest

[29] *R v. Shankar* 2007 ONCA 280; *R v. Smellie* [1994] B.C.J. No. 2850 (BCCA) *R v. Speid* [1991] O.J. No. 1558 (Ont.C.A.); see also *R v. Lim* No. 2 [1990] O.J.No. 3261 (Ont.C.J); *R. v. Asp* 2011 BCCA 433; *R v. Majedi* 2009 BCCA 276

[30] Although if the search was conducted in accordance with lawful authority and the law itself was reasonable and the manner of the search was reasonable no s.8 violation exists: *R v. Collins, supra*

[40] Here the cellphone which was seized was described as a "regular smart phone, a Blackberry sort of phone". Phones of this sort have been described as "mini computers"[31]. These phones are capable of storing dozens of gigabytes of data not unlike personal or home computers. There is a high level of privacy associated with personal computers[32]. In *R. v. Morelli*, *supra* Justice Fish said at para. 2 "It is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer". He continues at para. 3 :

> First, police officers enter your home, take possession of your computer, and carry it off for examination in a place unknown and inaccessible to you. There, without supervision or constraint, they scour the entire contents of your hard drive: your emails sent and received; accompanying attachments; your personal notes and correspondence; your meetings and appointments; your medical and financial records; and all other saved documents that you have downloaded, copied, scanned, or created. The police scrutinize as well the electronic roadmap of your cybernetic peregrinations, where you have been and what you appear to have seen on the Internet -- generally by design, but sometimes by accident.

[41] Later at para. 105 he describes the nature of information computers contain:

> Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.

Blackberrys and other smart phones function in the same way as personal computers[33].

[42] Other case authorities[34] are consistent in their conclusions that smartphone devices have the capacity to store vast amounts of sensitive and personal and

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[31] *R v Little* [2009] O.J.No. 3279 (Ont.S.C.J) para. 147

[32] *R v Jones* 2011 ONCA 632 para 51

[33] See *R. v. Law* [2002] 1 S.C.R. 227 at para. 25 where the Court distinguishes searching a passenger compartment of a stolen car from searching computer files in a laptop locked in the truck of a car

[34] *R. v. Little*, supra; *R* v *Vu* 2010 BCSC 1260; *R* v *Polius* [2009] O.J. No. 3074 (Ont.S.C.J.); *R. v. Hull* 2011 ONSC 3139 para. 38; *R v Manley, infra* para. 39; see also *R v Mohamad* [2004] O.J. No. 279 (C.A.) at para. 43; *Alberta (Minister of Justice and Attorney General) v. Petros* 2011 ABQB 541 at para. 57

private information including emails, text messages, contact lists, diaries, medical information and personal photographs as well as internet browsing histories.

[43] Given the advances in technology, these types of devices allow individuals to carry their entire personal information library with them. In my opinion, it is difficult to compare a smartphone with a notebook or briefcase one might carry or have for a specific purpose. Smartphones have several gigabytes of data storage which can store literally thousands of documents, photographs, messages or hundreds of thousands of filed data[35]. This, of course, does not take into account current technological advances regarding Cloud[36] storage and electronic and computer device sharing features which could increase the information available from a hand-held electronic device.

[44] While the accused did not testify as to the level of privacy – the Crown has admitted the accused had a reasonable expectation of privacy in the cell phone. I agree with the conclusion reached by Fuerst, J in *R. v. Little, supra*, at para. 120, that the subjective expectation of privacy can be presumed. This subjective expectation of privacy is objectively reasonable for the reasons I expressed above. Furthermore, the high level of privacy which I described can be inferred as well. In my opinion this privacy level exists irrespective of whether the phone is password protected. The lack of a password is not an invitation to view the personal contents contained in the device especially from the prying eyes of the state.

[45] Finally, I would add that like other computers, cellphones are organized in a way that separates voice messages, text messages, documents, photographs, browser history and other information. The information is not stored in one big container to use perhaps a poor analogy. It is possible to look at text messages without looking at photographs, for example. It is not necessary to examine ones voice memos to read text messages or documents.

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[35] Newhard v Borders, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009) is an example where the high degree of privacy in the phone's contents was shown. There Newhard who was a arrested for impaired driving was searched and sexual images of him and his girlfriend were retrieved from his cell phone seized and searched upon his arrest. The images were shared among the other police officers at the stationhouse.

[36] Referring to saving data to an off-site storage system maintained by a third party, i.e., iCloud, Google CloudStorage

Case Law

[46] There appears to be two leading lines of authority with respect to the search of cell phones upon arrest – one based on *R. v. Giles*[37] – a valid seizure of a cell phone is meaningless without a search of its contents, and the other case, *R. v. Polius*[38], which suggests a more constrained scope of police authority. The jurisprudence is not clear[39].

[47] Indeed, in *R. v. Manley*[40] the Ontario Court of Appeal, while declining to provide a comprehensive definition of the police power to search stored data, says at para. 39:

> … However, **I would observe it is apparent that the traditional rules defining the powers of the police to conduct a search incident to arrest have to be interpreted and applied in a manner that takes into account the facts of modern technology**. While I would not apply Polius in the particular circumstances of this case, **I am far from persuaded that Polius was wrongly decided or that it ought to be overruled**. Cell phones and other similar handheld communication devices in common use have the capacity to store vast amounts of highly sensitive personal, private and confidential information - all manner of private voice, text and e-mail communications, detailed personal contact lists, agendas, diaries and personal photographs. An open-ended power to search without a warrant all the stored data in any cell phone found in the possession of any arrested person clearly raises the spectre of a serious and significant invasion of the Charter-protected privacy interests of arrested persons. If the police have reasonable grounds to believe that the search of a cell phone seized upon arrest would yield evidence of the offence, **the prudent course is for them to obtain a warrant authorizing the search**. [emphasis added]

[48] In my view, the court there confirmed that the judicial rules associated with search incident to arrest must be interpreted having in mind the realities of modern technology, which I referred to above. In other words, the amount, nature of the

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[37] 2007 BCSC 1147

[38] *infra*

[39] See John Burchill, Stripping Matters to the [Central] Core: Searching Electronic Devices Incident to Arrest, (2009) 33(2) Man. L.J. 263 – 297 for a discussion of the recent Canadian and US case authorities

[40] 2011 ONCA 128

information and how it is stored on smart phone devices, play a role in defining the scope of the police authority to search a cellphone. In fact the court suggested the “prudent course” is for the police to obtain a warrant.

[49] In *Giles* the police arrested the accused for possession for the purposes of trafficking in cocaine and seized his Blackberry cellphone. All of the phone’s data was retrieved by the police crime lab. The trial judge relying on *R. v. Caslake*, supra found that the data retrieved was a valid search incident to arrest because the police were looking for evidence of “score sheets”, phone numbers and bank account numbers. This was a valid objective truly incident to arrest. The Court found the search was similar to looking inside a log book, diary or notebook found on an arrest person. The lawful seizure of the device would be meaningless without the ability to examine its contents[41].

[50] In *R. v. Polius*[42] the accused was arrested for the offense of counselling murder. When arrested his cell phone was seized. The Court disagreed the arresting officer had a reasonable basis for his belief that the cell phone may be evidence of the alleged murder when the accused was arrested. Accordingly the Court concluded the seizure was not lawful[43].

[51] However, Trafford, J goes further at para. 41:

> However, any examination of an item beyond a cursory examination of it is not within the scope of the power to SITA. Using other words, the evidentiary value of the item must be reasonably apparent on its face, in the context of all of the information known by the arresting officer. Where the purpose of a SITA is to find evidence of the crime, the standard governing the manner and scope of the search is a "... reasonable prospect of securing evidence ...". See *R. v. Caslake, supra*, at para. 21. The police "... must be in a position to assess the circumstances of the case so as to determine whether a search meets the underlying objectives ..." of the SITA. See *Cloutier v. Langlois, supra*, at paras. 60-62.

[52] He continues with other examples at para. 45:

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[41] See also *R. v Fearon* 2010 ONCJ 645

[42] [2009] O.J. No. 3074 (Ont.Sup.Ct J)

[43] See Emily E. Marrocco, *R v. Polius*: A Case Comment (2011) Vol. 57 C.L.Q 172

> Similarly, where a person is arrested for trafficking in cocaine and the SITA revealed the presence of a little black book in his clothing, the arresting officer may conduct a cursory inspection of the little black book to determine whether there is a reasonable basis to believe it may be evidence of trafficking in cocaine. If the cursory inspection revealed the presence of a debt list, the little black book may be lawfully seized incidental to arrest.

[53] The evidentiary value of the item seized must be reasonably apparent only after cursory search to determine this. Any search beyond this requires a search warrant. In *R. v. Finnikin*[44] this same reasoning was adopted. The court said at para. 29 "the limit [to the search incident to arrest] is in part informed by the expectation of privacy that the accused had in the thing or item seized". In that case the court concluded that the reasons for the search did not flow from the arrest and the search accordingly was not justified.

[54] In the recent case of *R. v. Burchell*[45] the accused was arrested for possession for purpose of trafficking of a controlled substance. His cell phone was seized and searched. It was argued that the accused s.8 *Charter* rights were breached. After referring extensively to *Polius* and *Manley*, the Court said at para. 55 and 56:

> In the case at bar the police officers had good reason to believe that cellular phones were being used in the commission of an offence. But that does not give them a right to conduct an in-depth analysis of the seized phone or its contents. In my view, the decisions in *Polius* and *Manley* really did not change the law as much as bring it into line with the realities of modern technology. If the police had found a sealed box of files in the applicant's vehicle, no one would credibly argue that the officers could conduct a detailed analysis of the files as part of their power to search incident to arrest. There is no reason in principle why the search of a phone should be treated any differently.
>
> The applicant had a reasonable expectation of privacy regarding the contents of the seized phone and I find that the police action in searching the contents of the phone some two months after his arrest was a violation of the applicant's section 8 *Charter* rights.

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[44] [2009] O.N.J. No.6016

[45] 2011 ONSC 6236

[55] Recently in *R. v. Jones*[46] the Ontario Court of Appeal discusses the nature of a computer search. In that case the police obtained a search warrant to search the accused's residence for evidence related to allegations involving fraud. In the course of the search the police seized the accused's computer and while examining its contents for evidence of fraud the police found evidence of child pornography. Without obtaining a further search warrant the police continued their examination. The court found that while the first images of child pornography were properly recovered by the police, the further examination exceeded the limits of the search. The case, of course, is much different than the one before me; however the Ontario Court of Appeal addressed some of the same arguments raised and approved in *Giles*, which were argued by the Crown in this case. Blair, J.A., writing for the majority, rejected the argument that the authority to seize a computer is hollow without the corresponding right to examine its contents. Specifically the court says that the right to examine the computer for evidence of a particular crime does not carry with it the "…untrampled right to rummage through the entire computer contents for evidence of another crime…". He continues at para. 43 "The focus on the type of evidence being sought, as opposed to the type of files that may be examined is helpful...".

[56] In my view what the court is saying is that a download of the complete contents of a device is not necessarily justified, rather the focus should be on the type of evidence being sought and whether the particular file folders and location of the device houses that evidence. A cursory search of folders to determine if evidence is likely found would be reasonable[47].

[57] In my view the best analogy is to a building or place with numerous rooms, all separated by different doors. It may be perfectly justifiable to enter Room A for a valid objective which may not justify entering into Room B. In short, there should be justification for each location searched, although the police would be entitled to a cursory examination to see if such justification existed.

[58] The Court in *Jones* also rejects the argument which was advanced in this case that the examination of the cellphone including the "data dump" is similar to any forensic examination of any piece of evidence seized; for example, testing

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[46] 2011 ONCA 4388

[47] *Jones, supra*, para. 44

blood on a bloody shirt worn by an arrested person. Justice Blair did not find the analogy with the computer search an apt one. At para. 46 he says,

> In my opinion, the analogy between forensic testing of a physical object and the examination of the contents of a computer is not an apt one. Unlike a physical object, it is not information generated by the physical characteristics of or adhering to the object that is the target of the search. It is the informational contents of the computer themselves that are the target of the search. This is a qualitative difference.

[59] There are other cases which specifically deal with the seizures and searches of cell phones upon arrest[48]. The cases generally turn on the issue of whether the search was sufficiently incidental to or connected with the arrest and do not examine in any detail the significance of the high degree of privacy associated with the contents of smartphones.[49]

American Case Law

[60] Like s. 8 of the Canadian *Charter of Rights and Freedoms*, the *Fourth Amendment to the U.S. Constitution* protects individuals from unreasonable searches and seizures. As in Canada the U.S. courts have held that warrantless searches are, *per se*, unreasonable subject to specifically established exceptions, including search incident to arrest.[50]

[61] The U.S. position on search incident to arrest, albeit in the context of a motor vehicle, search is succinctly described in *Arizona v. Gant*[51] where the US Supreme Court said referring to *Chimel v. California*, 395 U.S. 752 (1969) as follows:

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[48] See *R v. Groves* 2011 ONCJ 350 where the accused computer was searched incident to arrest, however the Court found that because the accused was serving a conditional sentence order he had a lower expectation of privacy and accordingly the search was lawful

[49] *R v. Otchere – Badu* [2010] O.J No.910;*Young v. Canada* [2010] N.J. No. 389 (Nfld.P.C.);*R* v *Caron* 2011 BCCA 56; *R.v. D'Annunzio* [2010] O..J. No. 4333;*R. v. LaFave* [2003] O.J. No. 3861; see also *R. v. T.O.* 2010 ONCJ 334 and *R. v. Jahrebelny* 2010 NSPC 91 where s. 489(1)(c) was considered although each differed in its application.

[50] *Katz v. United States*, 389 U.S. 347 (1967)

[51] 556 U.S. ____ (2009); 129 S. Ct. 1710 (2009)

> Under *Chimel*, police may search incident to arrest only the space within an arrestee's "'immediate control,'" meaning "the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. The safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule determine *Belton*'s scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States*, 541 U. S. 615 (2004), and following the suggestion in JUSTICE SCALIA's opinion concurring in the judgment in that case, *id.*, at 632, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

[62] Searches are permitted provided they are of the arrestee's person or an area within the arrestee's control. Within this scope no cause needs to be shown on the basis that police are permitted to ensure officer safety or preserve evidence in areas where the arrestee may have access. Beyond that further justification is required such as just cause, exigency, or application of the plain view doctrine.

[63] Like Canada the courts are divided regarding the application of searches incident to arrest in cases involving searches and seizures of cell or smartphones of suspects upon their arrest. Much has been written about this in U.S. law journals.[52] It is not my purpose to review the extensive scholarly writings in this

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[52] Joshua A. Engel, Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices; 41 U. Mem. L. Rev. 233; Nathan Alexander Sales, Run for the border: Laptop searches and the Fourth Amendment, 43 U. Rich. L. Rev. 1091; Thomas K. Clancy, The search and seizure of computers and electronic evidence: the Fourth Amendment aspects of computer searches and seizures: A perspective and a primer, 2005 75 Miss. L.J. 193; Orin S. Kerr , Searches and seizures in a digital world, 2005 119 Harv. L. Rev. 531; Jana L. Knott, Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones, 2010 35 Okla. City U.L. Rev. 445 Matthew E. Orso, Cellular phones, warrantless searches, and the new frontier of fourth amendment jurisprudence, (2009), Vol 50 Santa Clara Law review 101; Ashley B. Snyder, The Fourth Amendment and warrantless cell phone searches: When is your cell phone protected? , 2011 46 Wake Forest L. Rev. 155; Bryan Andrew Stillwagon, Bringing an end to warrantless cell phone searches, 2008 42 Ga. L. Rev. 1165; Justin M. Wolcott, Criminal Procedure: Are Smartphones Like Footlockers or Crumpled Up Cigarette Packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts (2010) 61 S.C. L. Rev. 843; James J. Tomkovicz, Divining and designing the future of the search incident to arrest doctrine: avoiding instability, irrationality, and infidelity, 2007 U. Ill. L. Rev. 1417; Marc M. Harrold, The search and seizure of computers and electronic evidence: Computer searches of probationers, (2005) 75 Miss. L.J. 273; Ben E. Stewart, Cell Phone Searches Incident to Arrest: A New Standard Based *on Arizona v. Gant, (*2010-2011) Vol 99. Kentucky Law Review 579; Orin S. Kerr, The search and seizure of computers and electronic evidence: Search warrants in an era of digital evidence, (2005), 75 Miss. L.J. 8

area[53], but simply to refer to two recent judgments which highlight the different views on the subject. The first case is *The People v. Gregory Diaz*[54]. Here the defendant was arrested for drug trafficking after police witnessed a drug sale through a wireless transmitter. The defendant's cellphone was seized and text messages were retrieved. The defendant argued that the warrantless search violated his *Fourth Amendment* rights.

[64] The Supreme Court of California upheld the validity of the search as properly within the authority of search incident to arrest. The majority of the court agreed that while remoteness in time can be an issue, in this case the search of the cellphone nine minutes after the arrest and search of the property "immediately associated with his person" because the phone was on the defendant at the time of the arrest and the search was conducted during the administrative processing of the defendant at the police station. Further, the court also rejected the view that the scope of the permissible warrantless search depends on the nature or character of those items searched or the extent of the arrestee's expectation of privacy. Finally, the court found that a warrantless search incident to arrest of a cellphone does not become unconstitutional simply because other phones may have significantly greater storage capacity. The court rejected a quantitative approach as practically impossible to apply by the police and reviewing courts, which would lead to subjective and ad hoc determinations.

[65] In *Diaz* the Court found that because the cell phone was on the arrestee's body or person it is within the scope of a search incident to arrest. There is a loss of privacy associated with the arrestee's body upon arrest and that loss of privacy extends to personal property immediately associated with the person of the arrestee[55]

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[53] For the most recent discussion on the US case authorities on searches of cell phones incident to arrest see: Adam Gerhowitz, Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?, (2011) Vol. 96 Iowa Law Review 1125 at Pg. 1135

[54] 51 Cal. 4th 84 (2011)

[55] *Diaz, supra*

[66] In the second case, *State v. Ohio*[56], a contrary conclusion was reached. There, Smith was arrested after police recorded a phone call from a person looking for drugs. His cellphone was seized and later searched to discover records of his calls to confirm it was the defendant who the drug purchaser had called. The majority of the court found the search to be unconstitutional. It rejected the "closed container" analogy relied on in other cases[57] because "...the pagers and computer memo books of the early and mid-1990s bear little resemblance to the cellphones of today". Modern cell phones have the capacity to store a wealth of digitized information. This gives their owners and users a higher level of privacy in the information they contain.

[67] The court also rejected the argument that exigent circumstances were present or that a search of the cellphone was necessary to identify the defendant, although it acknowledged that those circumstances, if established, could justify a search of the phone.

[68] The court reasoned from the principles set out in *Arizona v. Gant* [58], *supra* that a search incident to arrest exception derives from the interest in officer safety and evidence preservation that are typically implicated in arrest situations. This is a narrower view than the scope of search incident to arrest outlined in *Caslake*, which includes the discovery of evidence, or for "any other valid objective".

Conclusions on Review of the Law

[69] It is Justice Lamer's judgment in *R. v. Caslake*, *supra* based on the principles set out by Justice L'Hereux Dubé in *Cloutier v. Langlois, supra* which is the binding authority and what must be the basis of my conclusions on the law.

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[56] 124 Ohio St. 3d 163 (2009)

[57] *United States v. Finley* 477 F. 3d 250

[58] The U.S. case law on search incident to arrest was clarified in *Arizona v. Gant*, which deals with search incident to arrest related to motor vehicles. Police are entitled to search for officer safety or to preserve evidence without the need for any suspicion. There the U.S. Supreme Court held that a search of a motor vehicle's passenger compartment cannot be justified beyond reasons of officer safety and preservation of evidence. Although it is accepted that searches beyond that are lawful if further justification is present.
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[70] The law is easily stated, as done in *Caslake*, at para. 25, quoted earlier. The difficulty is that applying these principles when the police purpose for the search is the discovery of evidence as opposed to ensuring officer safety or protecting or preserving evidence. While much of the historical rationales for allowing warrantless searches upon arrest were to protect police and preserve evidence, clearly, to "discover evidence" is an equally valid objective. The challenge is to discern the limits of the police power to discover such evidence. Both *Caslake* and *Cloutier* make it clear it must be incidental to the arrest or "related to the arrest" or if the purpose of the search is related to the "purpose of the arrest". However, does this mean that a search upon arrest can be further to an "investigation" of the crime that the accused is alleged to have committed, particularly if it is one that is ongoing or, as here, where it is the accused's intent which is the main focus of the crime alleged to have been committed. What factors drive this analysis? How much or what type of "connection" to the event needs to be determined? Finally, are there temporal limits to consider?

[71] First of all, *Caslake* makes it clear that there must be some "reasonable prospect of securing evidence of the offence for which the accused is arrested". While the police do not have to have reasonable and probable grounds to believe that evidence will be found, they must have some reason for conducting the search and that reason must be objectively reasonable. In my view the reason offered must be able to justify the extent of the search as well. Here it is the extent of the search which truly is the issue.

[72] Ordinarily, this would be easy to assess. For example, if the police wanted to search an arrestee's pocket or backpack or motor vehicle or container they could easily identify the location and then proffer reason why each location was being searched and why there was a reasonable prospect of locating evidence.

[73] In my opinion, it is necessary for the police to articulate a reason related to the arrest for the particular location and explain why such search was conducted to discover evidence. In my opinion, a generalized statement, "I was looking for evidence" is not sufficient. If "some reasonable prospect of obtaining evidence" is necessary there must be some explanation of the "prospect". A rationale, "I was looking for evidence" would allow a much broader scope of search, particularly where no other compelling reasons or other valid objectives were present.

[74] I would also point out that in *Cloutier* and *Caslake* the Court talks about "discovering" evidence rather than "searching for" evidence although the Court does speak about searching to discover evidence. Discovering evidence is more consistent with the view that any search is limited to what is found at the arrest scene and does not include the authority to do a wider investigative search even for the offence for which the accused was arrested.

[75] Overarching this analysis, of course, are the *Charter* values set out in *Hunter v. Southam*, *supra* and the purpose of s. 8 – to protect against unreasonable searches and seizures, and more importantly, to prevent unwarranted intrusion into or interference with a person's privacy. Indeed, in *Caslake* Justice Lamer says that this authority arises out of a "need" which outweighs the individual's interest in privacy[59]. In my opinion the police must articulate and demonstrate that need. Furthermore, when the privacy interest increases or is heightened, in my opinion, the "need" necessarily must increase.

[76] Finally, it must be remembered that the power to search incident to arrest is a discretionary one. This limitation was relied upon in *Stillman*[60] when the Court declined to extend the power of search incident to arrest to include the retrieval of bodily substances. The police do not have to search[61]. In my opinion this further buttresses the view that the scope or extent of the search is driven by the needs of law enforcement, balanced against the privacy interests of the accused. How does this relate to the search of cellphones and smartphones? As I mentioned above ordinarily it is very easy to determine why a certain place or location on or near the accused was searched. The difficulty with searches of smartphones is that the devices house many different places or locations where different types of information are housed, some areas which could possibly house evidence related to the alleged offence and other areas which would be more difficult to justify searching. Different reasons to explain the "prospects" of evidence discovery may apply to different areas. This is unlike other areas of search simply because 1), it is information which is being sought, and 2), there are vast quantities of information, much of which can be highly personal.

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[59] *Caslake*, para. 17

[60] *Supra*, at para. 49

[61] *Cloutier v. Langlois* para. 61

[77] Part of the difficulty with a full search of the accused's smartphone is the risk that the search captures much more information than is needed or necessary. Once the digital files are downloaded the privacy interests of the accused are completely compromised, unlike a look into a briefcase or opening a family album and deciding that there is or is not any evidentiary value. With a complete download there is no way to tailor the search to areas where a search is justifiable and to separate those areas which are not. As well, a broader scope of search such as this is not subject to any conditions which may be imposed, for example, in a search warrant. Once the download is complete it is fully copied and available to the police.

[78] Finally, in my opinion, it was never contemplated that the reference to the discovery of evidence as a valid objective for justifying search upon arrest would include a justification to conduct a full investigation style search. The focus was, in this regard, to search to preserve evidence present at the arrest scene. A cell phone, in a way is a portal into the personal lives of an arrestee beyond what is related to the reasons for the arrest and unless there is some apparent connection to the arrest the police should have a warrant before going through that portal.

Application to this Case

Seizure of Cell Phone

[79] In my opinion police were authorized to seize the accused's cell phone. The phone was found near where the accused was seated when he was arrested. Constable Foley explained why the cell phone may have information related to the accused's alleged drug activities, for example score sheets, contact names and other relevant information commonly used by those in the drug trade. Clearly, the purpose of seizing the cell phone was to secure, protect and preserve the evidentiary value of this particular cell phone contents from the possibility that the information it contained would be lost. This is a valid objective incident to the accused's arrest.

Police Cursory Review of Cell Phone Contents at the Arrest Scene

[80] Constable Foley opened the phone at the arrest scene to review the recent text messages. The police had concluded that there must have been some contact between the accused, who they were following, and the other driver who the

accused met at the drive-in theatre. The police concluded that they must have been in correspondence or contact through mobile text messaging. This was a reasonable conclusion to make. Constable Foley's cursory review of the text messages on the accused's cell phone was clearly aimed at retrieving these messages and preserving that information as evidence against the accused. This search was clearly related to and closely connected to the arrest because it was evidence which explained how and why the accused met the other driver. It was reasonable to conclude text messages would be present on the accused's smart phone. In my opinion this search was properly within the scope of a search incident to arrest of the accused.

[81] Further Constable Foley explained there is "technology out there" that will enable deletion of text messages from an alternate location. While the officer never explained the basis of his knowledge whether this technology actually exists, he was never cross-examined or challenged regarding this assertion. It is the only evidence on this point. For the purposes of this proceeding, I am prepared to accept this assertion and conclude that the officer's belief in this regard is a reasonable one.

Search of Accused's Cell Phone on Evening of Arrest

[82] In my opinion, for the same reasons which justify the search of the cell phone at the arrest, the later retrieval of the information by the two officers is also within the proper scope of a search incident to arrest. The temporal gap between the arrest and the subsequent search does not alter my conclusion in this regard. The very close connection between the reasons for the search — to confirm the meeting arrangement between the accused and the driver — reduces any effect the temporal gap may have had on the relationship between the search and the arrest. Because of this strong connection, the need of the police to fulfill their law enforcement duties outweighs any privacy interest that the accused may have had in the recent text messages.

The Full Content Download of Cell phone or "Data Dump"

[83] As the Crown has recognized, the full content download or "data dump" presents a much more challenging analysis. The difficulty with the jurisprudence in this area of the law is that devices which contain such vast amounts of personal information were never contemplated, even a decade ago, to be carried on individuals. Accordingly, as the court has recognized in *R. v. Manley, supra* the

law needs to be interpreted having in mind this modern technological phenomenon.

[84] Here the Crown argues that it is reasonable to search the accused's cell phone because, as Constable Foley testified, it is not uncommon for drug traffickers to use their cell phones to do "their business". Crown counsel Mr. MacKay, in his oral submission, makes a very compelling argument that drug trafficking cases should be distinguished from other cases where the crime alleged is a single event. After all, trafficking is an ongoing offence and it is reasonable to conclude that evidence of drug activities would be present throughout — in this case on the accused's smart phone.

[85] The reason stated by the police for performing the data dump was to secure evidence of the offence for which the accused was arrested. This appears at first blush to satisfy the requirements set out in *Cloutier v. Langlois* and *R. v. Caslake*. However, in my opinion, this goes too far and is beyond the scope of a search incident to arrest. I have concluded this for the reasons which follow.

[86] First of all, the full data retrieval was performed almost a month after the arrest. While the jurisprudence is not that helpful in understanding the effect of the temporal issue, clearly the longer the period from the arrest to the search the greater the inference is that the search was not sufficiently connected or incidental to arrest. The month delay significantly reduces any connection with the arrest.

[87] Secondly, I agree with Blair, J.A. in *R. v. Jones, supra* that the analogy to analyzing seized items such as a bloody shirt is not an apt one. I agree with his conclusions, "unlike a physical object, it is not information generated by the physical characteristics of it or adhering to the object that is the target of the search. It is the informational components of the computers themselves that are the target of the search. This is a qualitative difference".

[88] Finally, and in my opinion most importantly, the full download search is simply too broad in its scope. I described the heightened expectation of privacy in cell phones above. While a smart phone or computer search does not raise the same “human dignity” issues that were referred to in *Golden* or *Stillman*, it does raise equally heightened privacy issues. After all in *Morelli* Justice Fish found it difficult to image a greater degree of privacy. Accordingly, in my view, the "needs" of law enforcement must be correspondingly greater when the privacy

interests are heightened. Like *Golden* and *Stillman* the scope of search incident to arrest for a search of a smart phone should be constrained.

[89] Further, the prospects of discovering evidence are not the same for every separate informational location housed in the smart phone. It is not a single container. Here there was no attempt to tailor the search to locations where the prospects of locating evidence was reasonable. There must be a reasonable prospect of discovering evidence. That requirement, in my opinion, applies to every separate location which the cell phone contains. This cannot be achieved in a “data-dump”.

[90] As explained in *R. v. Little*, the *Criminal Code*[62] treats computers[63] "as stand-alone search locations warranting special rules".

[91] Here the police made no effort to minimize or focus the search. Instead, the full contents of the phone was downloaded and retrieved by the police. They were searching in furtherance of their investigation, not, in my opinion, as incident to the arrest.

[92] I agree with the conclusions reached by Justice Trafford in *R. v. Polius*, albeit as *obiter dicta*, where he held that the police should not be able to search beyond a cursory review of the cellphone contents without a search warrant. Here the privacy interests of the accused outweigh the "needs" of the police. The police did not "need" to search this broadly[64]. If the police wanted to examine the full contents of the accused's cell phone they ought to have obtained a search warrant. Requiring a warrant does not in way restrict the police in fulfilling their obligation to collect and gather evidence against the accused to prove his guilt. It simply requires them to satisfy an independent and impartial arbitrator that their desire to examine a device that contains potentially very private and personal information is justified albeit to a greater degree than would be required if they were searching incident to arrest. But that is what Justice Dickson found would be an effective

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[62] S. 487 (2.1) and (2.2)

[63] See also *R. v. Mohamad*, *supra* at para. 43

[64] See *R. v. Gill* 2008 SKQB 679 at para. 83 *et seq.* where similar reasoning was applied albeit as *obiter dicta*

way to protect privacy and prevent unreasonable interferences with it, which is the purpose of s.8 of the *Charter*.

[93] The accused's s. 8 rights were violated.

Section 24(2) of the Charter

[94] The Crown has indicated that if any portion of the search related to the accused cell phone is found to violate s. 8 the Crown is "prepared to let that evidence be ruled inadmissible". Accordingly the Crown made no submissions on the accused's application under s. 24(2) to have the evidence excluded. The Crown has not chosen to simply not tender this evidence. Notwithstanding this, in my opinion, it is necessary for the Court to consider the accused's application under s. 24(2).

[95] In *R. v. Grant*[65] and *R. v. Harrison*[66] the Supreme Court of Canada remind us that the purpose of s. 24 is to maintain the good repute of the administration of justice. The administration of justice is more than investigating, charging and trying those accused of crimes. It is about maintaining the rule of law and upholding *Charter* values. It requires that the court examine the issue at hand from a long-term societal perspective in the sense of maintaining the integrity of and public confidence in the justice system. The inquiry is objective. The focus is societal. It is not about punishing the police or providing compensation to the accused. The remedy, if any, belongs to society, not the accused.

[96] It is also recognized that the violation of the *Charter* provisions has already done damage to the administration of justice. Section 24(2) endeavours to ensure that the admission of the evidence obtained does not further damage the repute of the justice system. In *R. v. Grant, supra* the Supreme Court of Canada endorses three lines of inquiry. At para. 71 the court says,

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[65] 2009 SCC 32

[66] 2009 SCC 34

> ... When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (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. ...

[97] This however, in my opinion, is not a checklist. It is not a formula or an equation. Yet there is no overriding rule. It is not an analysis with mathematical precision. The task is to consider the issue by examining these lines of inquiry to assess and balance the effect of admitting the evidence on society's confidence in the administration of justice.

The seriousness of the Charter-infringing state conduct

[98] In *Grant* the Supreme Court of Canada recognizes that police conduct sits on a continuum from minor or inadvertent violations which would only minimally undermine public confidence to more willful or reckless disregard for *Charter* rights which would inevitably negatively affect public confidence in the rule of law. Obviously, exigencies may lessen the seriousness of the police conduct and good faith would reduce the need for the court to disassociate itself from the police conduct. Clearly, ignorance of *Charter* standards is not good faith.

[99] Deliberate, willful and flagrant police conduct which is not respectful of individual rights will undoubtedly lean toward or favour exclusion of evidence. On the other hand, good faith efforts by the police to comply with *Charter* values or if the conduct is inadvertent or if extenuating circumstances are present this would have an opposite influence. However, in my opinion, it is not enough for the police to have innocent or honest intentions if their actions are deliberate and intentional. In my view the police should be expected to turn their mind, if the circumstances allow, to their legal authority to interfere with an individual's liberty and be cognizant and aware of an individual's rights under the *Charter*.

[100] In the vast majority of cases police, of course, are well-intentioned. They are doing or intending to do their duty. They are making their best efforts to enforce the law and to bring those suspected of committing crimes to justice. However, in my opinion, in doing so they must turn their minds to the *Charter* rights of the individuals they are investigating. In other words, police obviously must obey the law and respect the *Charter* rights of individuals they encounter. Failing to avert to the scope of their legal authority may not be bad faith, but it would not be, in my opinion, necessarily good faith.

[101] In this case, I recognize that the police were simply doing what was thought to be an accepted practice of retrieving the full contents of the accused's cellphone and in that sense were acting in good faith. However, it is the long term effect on the administration of justice which needs to be kept in mind.

Impact on the Charter-protected interests

[102] This inquiry focuses on the accused's protected interests. Here there was a significant impact on the accused's privacy. The types of information found on a person's smartphone, like a home computer can be highly personal. Here there were personal pictures of the accused and his family which were unrelated to the offense charged. In *Morelli*, Justice Fish found the impact of an unwarranted search of the accused's home computer was very high. In my opinion the same applies here.

Society's interest in the adjudication of the case on its merits

[103] Obviously society has an interest in seeing cases tried on their merits. This is particularly so where the evidence is reliable and where the alleged offence is serious, although this latter factor has the potential to cut both ways. Seriousness of the offence cannot trump or dominate the whole analysis. As was said in *Harrison*, we expect police to adhere to higher standards than those of alleged criminals. While clearly the seriousness of the offence is important there are no *Charter*-free zones. Even those accused of the most heinous crimes are entitled to the full protection of the *Charter*. Breaching

those rights not only affects the accused but also affects the entire reputation of the criminal justice system[67].

[104] Further, the public has an interest in a justice system that is beyond reproach[68]. Here the impugned evidence is reliable and the offence alleged is serious. However the Crown's case is not determined by this evidence. There is other evidence - the text messages retrieved by Officers Foley and Campbell, the drugs and money found at the scene and perhaps other evidence because the Crown has not argued this or any other issues under s. 24(2). The Crown, given its position, never indicated what other evidence, if any, is available.

Balancing of factors

[105] The balancing of the findings after analyzing each of the lines of inquiry is qualitative and is not capable of mathematical precision[69]. The findings must be weighed in the balance. The seriousness of the police conduct is not determinative nor is the truth-seeking interest of the criminal justice system.

[106] In *R. v. Nguyen*[70] the court pointed to the police not being knowledgeable about the scope of their authority in the improper search of the trunk of the accused's car as a contributing factor in excluding the evidence. The same was considered in *R. v. Sergalis*[71].This is not a case where any deference was shown to the accused's privacy or liberty interests, as was the case in *R. v. Crocker*[72].

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[67] *R. v. Burlingham* [1995] 2 S.C.R. 206 at para. 50

[68] *R. v. Harrison, supra*

[69] *R* v *Harrison, supra*

[70] [2009] O.J. No. 4564 (Ont. S.C.)

[71] [2009] O.J. No. 4823 (Ont. S.C.).

[72] 2009 BCCA 388

[107]I recognize that the officers in this case were acting under the impression that they were authorized to conduct the full content download of the cell phone and never addressed their minds to whether a search warrant was required. It is difficult to criticize the officer for their actions. Their duties did not include apprising themselves of the recent debate in the case law. The lack of attention to the need to obtain a search warrant is more appropriately characterized as a systemic police issue. The law is not clear that a full download is authorized and that the cautious approach is to obtain a warrant.

[108]While society's interest in adjudicating this case on its merits is important and the truth-seeking function is important it does not outweigh, in my opinion, the long-term interest in upholding the public confidence in the criminal justice system. Sometimes, where justified, exclusion of evidence is necessary and warranted by overriding considerations of justice. Justice Fish in *R. v. Bjelland* [73] at para. 65 quoted from Chief Justice Samuel Freeman of the Manitoba Court of Appeal, when he said:

> The objective of a criminal trial is justice. Is the quest of justice synonymous with the search for truth? In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony ... [T]he law makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at an unlimited cost. "Truth, like all other good things, may be loved unwisely -- may be pursued too keenly -- may cost too much.

[109]In my opinion the long-term repute of the administration of justice is better maintained by the exclusion of this evidence. I am satisfied of that on the balance of probabilities. The accused's application is granted. The full content download, excluding the text messages retrieved by Constables Foley and Campbell within the lawful authority of the police, is excluded.

Tufts, J.P.C.

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[73] 2009 SCC 38