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Police Newsletter, July 2015

1. Supreme Court of Canada rules on the constitutionality of warrantless cell phone and other digital device search and privacy.
2. On March 30, 2015, the Ontario Court of Appeal ruled police officers infringed rights of demonstrator when required to submit to search to enter G20 Summit area.
3. How to Stay On Side, Summary on page 4.

R v Fearon

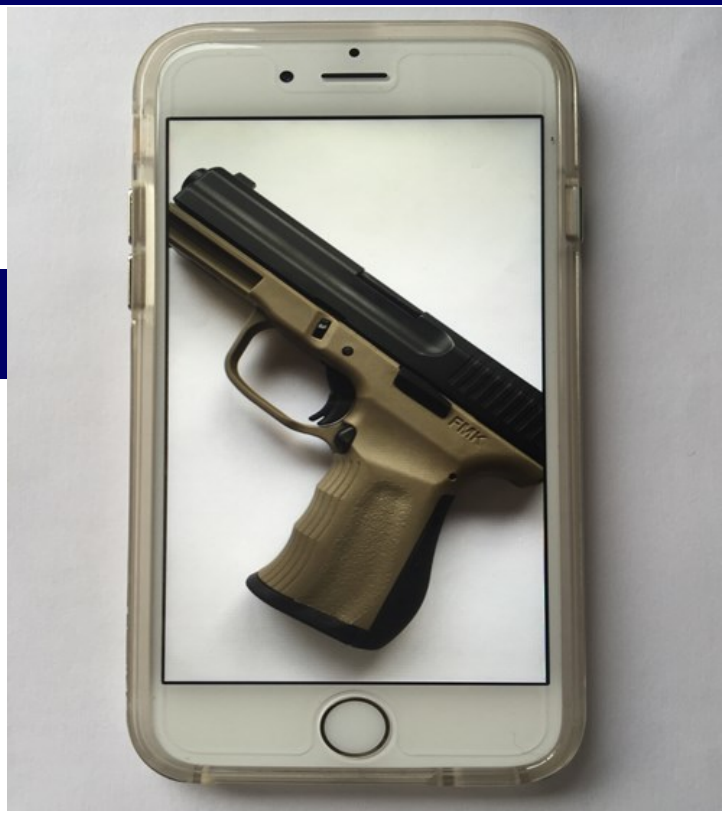
Police Search of Cell Phone

On December 11, 2014, in *R v Fearon*, the Supreme Court of Canada ("SCC") considered the circumstances under which police officers can justifiably search a cell phone or other digital device without a warrant. In doing so, the SCC added safeguards to the law concerning search of cell phones incident to arrest in order to make that power compliant with section 8 of the *Canadian Charter Rights and Freedoms ("Charter")* which provides that "everyone has the right to be secure against unreasonable search or seizure."

In *R v Fearon* the SCC attempts to strike a balance between an individual's dignity and privacy interests protected by section 8 of the *Charter* on the one hand and important law enforcement objectives served by searches incidental to arrest on the other, such as the discovery or preservation of evidence and public or police safety as well as the safety of the accused. The SCC decision delineates conditions that police must meet when conducting searches of a cell-phone or other digital device without a warrant during or after arrest.

Background

Mr. Kevin Fearon ("Fearon") and an accomplice were charged after robbing a jewelry store owner at gunpoint. Fearon and his accomplice approached the store owner, stole several bags; one bag was filled with jewellery. They then fled the scene in a black vehicle. A few hours later, the police arrested Fearon and his accomplice but had not found the stolen jewellry or the handgun used in the offence. After arresting the suspects, one of the officers conducted a pat-down search incident to the arrest of Fearon and discovered a cell phone in his pocket. The phone was not locked and an officer searched the cell phone and found a draft text message and an image of a handgun, both of which were directly relevant to the commission of the offence. At trial, Fearon contested the admissibility of the draft text message and the picture on the basis that warrantless search of the cell phone violated his *Charter* rights under section 8.



The defence took the position that nothing in the circumstances indicated the cell phone was of any relevance; therefore, it was an unjust infringement of his privacy and evidence obtained from it should be excluded. The Crown argued the handgun in question, or what looked like a handgun in any case, remained on the streets and it was reasonable for the police to assume that there might be information related to the alleged crime on Fearon's cell phone. There was a sense of urgency in the investigation because no other information on the whereabouts of the weapon was available; furthermore, it is a long-standing principle that police are permitted to search a suspect incident to arrest and their immediate surroundings. As a result, the contents of a cell phone ought to be considered a legitimate part of the search. The trial judge found that "the search of the cell phone incident to arrest had not breached Fearon's section 8 *Charter* rights and that the picture and text message were admissible. Fearon was convicted of robbery with a firearm and related offences."

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Cheadles LLP has several team members who work in the area of police law with particular focus on labour, management and governance issues. Police law is becoming increasingly complex; however, with our multi-disciplinary team of labour, human rights and litigation lawyers we can assist you in managing challenges your organization may be facing. We offer the advantage of being situated in Northwestern Ontario with a cumulative 120 years in-house experience dealing with relevant areas of law within this context.

We have experience representing management in rights and/or interest arbitration, advising on pay equity issue and complaints, collective bargaining, interpreting provincial and federal legislation with respect to policing, and in the case of First Nation Police Services, the Self-Administered and the Tripartite Policing Agreements among the Federal and Provincial Government and First Nations.

Police Search of a Cell Phone (Continued)

Given that the cell phone was neither password protected nor locked and that the police officers had grounds for reasonable belief that they might find relevant evidence in it, the Ontario Court of Appeal ("ONCA") dismissed Fearon's appeal and confirmed the trial court findings.

Issues

In *Fearon*, the issues before the SCC were whether a cell phone search incident to arrest is unreasonable and therefore contrary to section 8 of the *Charter*? If so, should the evidence be excluded under section 24 (2) of the *Charter*?

Conclusion

Ultimately, the SCC decided that the initial search was unreasonable and did breach Fearon's section 8 *Charter* rights because there was insufficient evidence by officers concerning what was searched, how and why. Despite the SCC finding that the search was unreasonable, the evidence was still admitted as the court found the officers had acted in good faith and it was in the interests of justice to do so. Though the search was unreasonable, the court found the police were acting in good faith because they believed they were acting within their powers; moreover, "when the police later learned of a case that they believed required them to obtain a warrant, they promptly applied for and obtained such a warrant. In doing so, the police made full disclosure of their prior searches of the phone."

When considering whether it is lawful or even necessary to review the contents of a suspect's cell phone or digital device, officers should be guided by the following four-part test set out in *Fearon* when considering whether wireless searches of cell phones or other digital devices will be admissible in evidence. A search will comply with section 8 of the *Charter* where:

(1) The arrest was lawful;

(2) The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that the reason is objectively reasonable. The valid law enforcement purposes in this context are:
   (a) Protecting the police, the accused, or the public;
   (b) Preserving evidence; or
   (c) Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest;

(3) The nature and the extent of the search are tailored to the purpose of the search; and

(4) The police take detailed notes of what they have examined on the device and how it was searched.

Carrying out an Effective Search

To ensure evidence obtained by searching a cell phone or device is admissible arresting officers must follow the conditions set out by the SCC in *Fearon.* The SCC recognized searching cell phones and digital devices is an "an extraordinary search power that requires neither a warrant nor reasonable and probable grounds" and is unequivocal with respect to the "obligation" on officers to keep "careful record of what is searched and how it was searched." In fact this obligation is a matter of "constitutional imperative." With that in mind police records should generally include:

i. the applications searched,
ii. the extent of the search,
iii. the time of the search,
iv. its purpose, and
v. its duration.

The SCC concluded that, "after-the-fact judicial review is especially important where, as in the case of searches incident to arrest, there is no prior authorization." Furthermore, having a clear picture of what was done is more important to the effectiveness of such review. In addition, "the record keeping requirements is likely to have the incidental effect of helping police officers focus on the question of whether their conduct in relation to the phone falls squarely within the parameters of a lawful search incident to arrest."

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Police Search of a Cell Phone (Continued)

Every investigation involving a cell phone or device search will bring about uniquely challenging circumstances; thus, it is prudent to obtain a warrant where reasonably practicable. Doing so, may increase the probability of evidence located on cell phones and other digital devices being found admissible and hence successful prosecution. Fearon makes it clear that courts will look favourably on police conduct that is carried out in good faith and conforms to the four-part test above.

Figueiras v Toronto (Police Services Board)

2015 ONCA 208

On the second day of the G20 Summit held in Toronto in June 2010, Mr. Paul Figueiras ("Mr. Figueiras") and friends went downtown to demonstrate in support of animal rights. During the demonstration a team of five police officers stopped them and informed them that they would have to submit to a search of their bags if they wanted to proceed to the summit area. On the basis such a search would violate his civil rights Mr. Figueiras refused to consent to a search of his bag demanded by the officers. Friends of Mr. Figueiras recorded his interaction with the police. Sgt. Charlebois insisted: "There's no civil rights here in this area…" Another officer told Mr. Figueiras "This ain't Canada right now?" while another said "You're in G20 land now." During this interaction Sgt. Charlebois grabbed Mr. Figueiras shirt and pulled him toward him at which time he said, "You don't get a choice." Sgt. Charlebois then pushed Mr. Figueiras away and said, "Get moving." Sgt. Charlebois then lifted up the sleeve of Mr. Figueiras's shirt and noticed a phone number written arm. He assumed it was a lawyer's phone number, which he contended was "a sign of the people…causing trouble." At this point, Mr. Figueiras backed away and left with his friends.

Mr. Figueiras applied to the Superior of Court of Justice for a declaration that the Toronto Police Services Board and Sgt. Charlebois had violated his rights under ss. 2(b) (freedom of thought, belief, opinion and expression) 2(c) (freedom of peaceful assembly), and 7 (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice of the *Charter*, and that these violations could not be justified under s. 1. He also sought a declaration that Sgt. Charlebois had committed the tort of battery by grabbing and pushing him.

Sgt. Charlebois decided on his own initiative and without instructions from his superiors that his team would "stop anyone who looked like a demonstrator and demand that they submit to a search of their belongings" if that person wished to enter the summit area. No other police team utilized this approach.

The parties to the application agreed that the officers had no statutory authority to demand Mr. Figueiras' consent to a search of his bag before crossing a public street. The issue heard by the applications judge was whether the officers' actions were authorized under the common law ancillary powers doctrine. This doctrine holds that police powers are ancillary to police duties.

Application Judge Decision

The application judge found the conduct in question fell within the officer's common law ancillary powers by applying the following two-part test in *Waterfield*:

(1) Does the police conduct in question fall within the general scope of any duty imposed on the officer by statute or common law?

(2) If so, in the circumstances of this case, did the execution of the police conduct in question involve a justifiable use of the powers associated with the engaged statutory or common law duty?

The parties agreed that the officers' conduct met the first part of the test because they were furthering the recognized police duty to preserve the peace. It was the second stage of the test that was problematic. The application judge relied on the officers' duty to preserve the peace and the power to cordon off areas in order to protect foreign dignitaries from harm as set out in *Knowlton v R*. Having found the police conduct to be lawful he concluded Mr. Figueiras rights had not been violated. Since "protecting the peace was a pressing and substantial objective, and conducting a minimally intrusive search was rationally connected to that objective" it was within a reasonable limit under section 1. Finally, Sgt. Charlebois was found not to have committed battery because the contact was minimal and as an officer exercising his powers he was immune from liability pursuant to s. 25(1) of the Criminal Code."

Main Issues on Appeal

The central issue on appeal is whether the application judge erred in his application of the *Waterfield* test and in his conclusion that the police had the common law power to restrict Mr. Figueiras's movements and right to protest. A second issue is whether the application judge erred by holding that Sgt. Charlebois had not committed battery.

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Figueiras v Toronto (Police Services Board)

2015 ONCA 208

Ontario Court of Appeal Decision

The Supreme Court of Canada ("SCC") has modified the *Waterfield* test to emphasize the importance of Charter-protected rights and continues to apply the *Waterfield* analysis to define the limits of common law police powers. The Ontario Court of Appeal ("ONCA") framed the power exercised in this case as follows: "the power of individual police officers to target demonstrators and, where no crime is being investigated or believed to be in progress, but with the intention of preventing crime, to require that they submit to a search if they wish to proceed on foot down a public street." The ONCA addressed two threshold issues. The first is to define the police power in question, which is not straightforward. A review of relevant case law demonstrates "this is not a general power; it is confined to proper circumstances, such as fires, floods, car crash sites, crime scenes, and the like." The second threshold issue involved identifying the liberty interests at stake.

The ONCA found Mr. Figueira's section 8 right to be free from unreasonable search was not triggered because there was no search carried out nor was his section 9 right not to be arbitrarily detained in question because he was free to walk away from the officers just not toward the summit area. Furthermore, Mr. Figueira's freedom of expression under s. 2(b) was the primary issue since the police conduct stopped Mr. Figueira from demonstrating as he planned, and sufficiently intimidated him to deter him from demonstrating at all. The ONCA applied the three-step test adopted in *Irwin Toy Limited. V Quebec (Attorney General)* [1989] 1 S.C.R. 927, at p. 978 which requires that:

(1) The plaintiff is engaged in expressive activity;
(2) Nothing about the method or location of the activity removes it from the scope of protected expression; and
(3) The impugned government action has either the purpose or the effect of restricting freedom of expression.

The first and second step of the test was satisfied because demonstrating is a well-established expressive activity and demonstrating around the G20 site was lawful and a reasonably expected activity. The third step of the test required the court to consider two branches under which freedom of expression could be violated: 'intent' or 'effects'. Courts should first consider the intent or purpose of the government activity. The third step was satisfied because Sgt. Charlebois admitted during cross-examination that he intended to stop "anybody that looked like they were involved in the protests [or] ... looked like they were there for the purpose of protesting" and demand that they either consent to a search or leave the area.

Both parties agree that the officers' conduct passed the first step of the *Waterfield* test because their actions fell within the scope of the police duty to preserve the peace and prevent damage to property or harm to persons. In applying the second part of the test the application judge erred both in his analysis as to whether the officers' actions were necessary to carry out their duty, and in his assessment of the rights with which the officers' actions interfered.

First, the application judge improperly "equated "minimal impairment" with minimizing the number of people affected, but did not consider whether the impact on those targeted by the police could be minimized. Second, the lower court judge accorded no weight to the words the officers and focused only on their conduct.

The ONCA concluded the police power purportedly exercised in this case does not meet the *Waterfield* test. The police did not have the power to target apparent demonstrators and require that they submit to a search in order to continue down a public street. Accordingly, Toronto Police Service Board interference with Mr. Figueiras's common law liberty and s. 2(b) Charter rights was not prescribed by law. Furthermore, s. 1 of the Charter has no application and cannot be used to justify the breaches. The ONCA also found Sgt. Charlesbois' contact with Mr. Figueiras was battery. It was more than minimal; rather, it was "unnecessary manhandling" that offends the dignity of a person and serve[s] to intimidate that person." Finally, Sgt. Charlebois could not rely on s. 25(1) of the Criminal Code which provides protection to police officers who use force while discharging their duties. This section makes clear it does not apply where an officer does not possess statutory or common law authority for his or her actions.

How to Stay on Side

Police Search of Cell Phone: R. v Fearon

Carrying Out An Effective Search

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iii. the time of the search,
iv. its purpose, and
v. its duration.

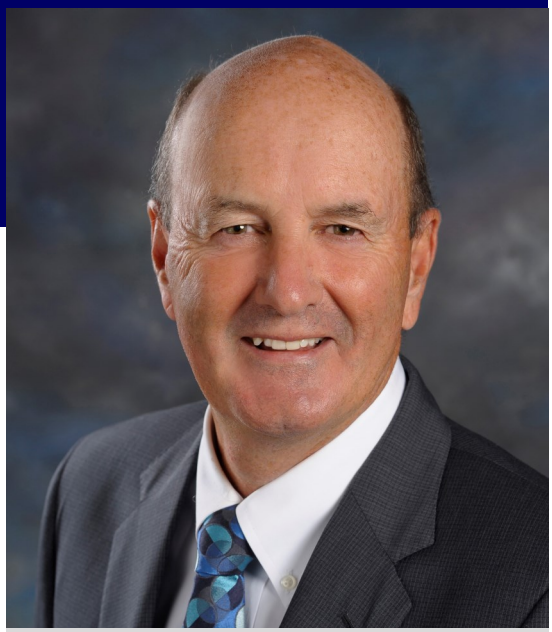
Figueiras v Toronto (Police Services Board)

To ensure police conduct falls within officer's common law ancillary powers officer's must meet the two-part test set out in *Waterfield*.

First, determine whether the police conduct in question falls within the general scope of any duty imposed on the officer by statute or common law?

If so, ask whether the execution of the police conduct in question involves a justifiable use of the powers associated with the engaged statutory or common law duty?

Officers relying on police powers under section 25 of the *Criminal Code* for protection will not be protected where there is no statutory or common law authority for the officers actions.



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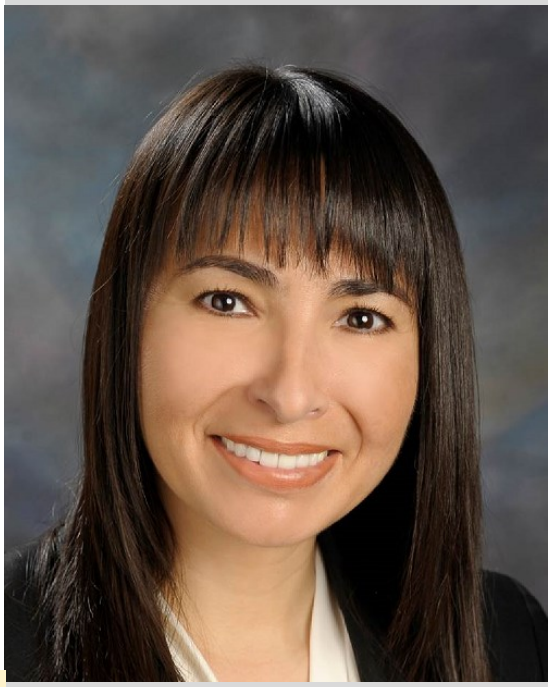

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