Court of Appeal File No: CA040090

COURT OF APPEAL

ON APPEAL FROM: THE CONVICTION IMPOSED BY THE HONOURABLE MR JUSTICE BERNARD OF THE SUPREME COURT OF BRITISH COLUMBIA IN VANCOUVER, ON THE 11TH DAY OF MAY 2012

B E T W E E N :

REGINA

Respondent

A N D :

RAJAN SINGH MANN

Appellant

A N D :

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenor

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OPENING STATEMENT/SYNOPSIS

1. This appeal concerns an issue that is arising with increasing frequency in the law enforcement context: the legal authority of the police to search the contents of a mobile device lawfully seized pursuant to arrest.

2. The BCCLA substantially agrees with the Appellant's submissions regarding the common law search incident to arrest power. However, the BCCLA does not with respect agree with the Appellant's suggestion that the search incident to arrest power comprises a "cursory" search of a mobile device seized during the arrest. The BCCLA submits on the contrary that the common law power of search incident to arrest does not *per se* include either a whole-sale or a "cursory" search of the contents of a mobile device. In the normal course, any such search would fail to be authorized by law.

3. Sophisticated mobile devices – storing vast quantities of data – have become a ubiquitous part of modern life.[1] Individuals have a substantial privacy interest in the data stored on these devices. Only in truly rare circumstances will the state interest in law enforcement outweigh this substantial privacy interest. A "cursory" search will only be justified in those rare circumstances.

4. *Morelli* teaches that personal computers attract a privacy interest equivalent to that traditionally accorded to the home.[2] The information stored on computers is "meaningful, intimate and touch[es] on the user's biographical core".[3] The issue in the present case can be restated as follows:

> Does qualitatively equivalent information attract lesser constitutional protection merely because it is stored on a hand-held mobile device rather than a "traditional" personal computer?

The BCCLA submits that the answer is clearly, "No." The receptacle of the information cannot be a controlling factor in assessing the scope of s 8 of the *Charter*.

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[1] *R v Vu*, 2011 BCCA 536 at para 56 [*Vu*], leave to appeal to SCC granted 2012 CanLII SCC 31579, appeal heard and judgment reserved 27 March 2013.

[2] *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253 at paras 105-106, [*Morelli*]. Also: *R v Tessling*, 2004 SCC 67 at para 22, [2004] 3 SCR 432 [*Tessling*].

[3] *R v Cole*, 2012 SCC 53, [2012] 3 SCR 34, at para 2 [*Cole*].

PART 1: STATEMENT OF FACTS

5. The BCCLA accepts the facts as stated by the learned Trial Judge.

PART 2: ISSUES ON APPEAL

6. The trial judge held that the mobile device search in this case fell within the scope of the common law search incident to arrest power. The BCCLA intervenes in respect of this issue alone.

PART 3: ARGUMENT

A. Introduction

7. Section 8 of the *Charter* guarantees the right to be free from unreasonable search and seizure.

8. The principles underlying s 8 are capable of application in varying contexts and are not inflexible. In keeping with the general purposive approach to *Charter* rights, the Court has recently noted that s 8 jurisprudence "must remain aligned with technological developments".[4] The particular technological development at issue concerns the increasing sophistication and increasing prevalence of mobile communication devices.[5] When such a device is lawfully seized in the course of an arrest, do the police enjoy a power to search the data on it under the common law search incident to arrest ("SITA")?

9. Two early *Charter* cases establish principles that shape the required analysis. First, *Hunter v Southam* holds that s 8 has a prophylactic purpose and that warrantless searches are *prima facie* violative: the party seeking to justify such a search must rebut a presumption of unreasonableness.[6] Next, *Collins* held that, to be adjudged reasonable, a warrantless search: (i) must be authorized by law, (ii) the law itself must be reasonable, and (iii) the search must be conducted in a reasonable manner.[7] The

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[4] *R v TELUS Communications Co*, 2013 SCC 16 at para 33 [*Telus*].

[5] Without limiting what might be considered a mobile communication device, these submissions contemplate any wireless mobile device capable of receiving and/or storing data – *eg* cellular phones, "smart" phones, tablets, *etc.*

[6] *Canada (Combines Investigation Branch, Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145 [*Hunter v Southam*].

[7] *R v Collins*, [1987] 1 SCR 265 at 278 [*Collins*].

BCCLA's intervention in the present case focuses on the first *Collins* requirement: *viz*, that the search be authorized by law.

B. The proper scope of SITA balances state interests and individual rights

10. The common law SITA doctrine concerns, by definition, a warrantless search. Confined to its proper scope, it is an exception to the principle expressed in *Hunter v Southam* that warrantless searches are prima facie unconstitutional.[8] However, as the Chief Justice held in *Caslake*:

> Since search incident to arrest is a common-law power, there are no readily ascertainable limits on its scope. It is therefore the courts' responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individuals' right to privacy.[9]

11. In *Cloutier v Langlois*, L'Heureux-Dubé J noted that "the common law gave the police only such powers as were consistent with the protection of individual rights. The courts have always held that a proper balance between these two fundamental components is vital".[10] In keeping with this approach, the SITA power is not a blanket power to search with limited "carve out" exceptions.[11] Its objective is to guarantee safety and to allow for effective application of the law.[12] Accordingly, its scope in any given arrest situation is determined by balancing the state interest in law enforcement against the individual right at stake.[13]

12. *Cloutier* considered a frisk search of a lawfully arrested person, which the Court noted is "a relatively non-intrusive procedure … the duration [of which] is only a few seconds."[14] Emphasizing that the SITA power is not unlimited, L'Heureux-Dubé J set

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[8] *R v Caslake*, [1998] 1 SCR 51 at para 13 [*Caslake*], citing *Cloutier v Langlois*, [1990] 1 SCR 158 [*Cloutier*].

[9] *Caslake* at para 15.

[10] *Cloutier*, at 185.

[11] See: *R v Stillman*, [1997] 1 SCR 607 [*Stillman*] [bodily substances]; *R v Golden*, 2001 SCC 83, [2001] 3 SCR 679 [*Golden*] [strip searches]; *R v Feeney*, [1997] 2 SCR 13 [*Feeney*] [dwelling places].

[12] *Cloutier* at 181, 186.

[13] See: *Cloutier* at 181; *Stillman* at 643; *Caslake* at paras 14-15; *Golden* at para 26.

[14] *Cloutier* at 186.

out three propositions: (1) there is no duty to exercise the power, and the police "must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives"; (2) the search must be for a valid objective; and (3) it must not be conducted abusively.[15]

13. Chief Justice Lamer subsequently reiterated this balancing exercise in *Caslake*:

> 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.[16]

14. The essence of any balancing exercise is the notion of calibration. In this connection, the Supreme Court has consistently affirmed that the more significant the individual right at stake, the greater the state justification for the search must be.[17]

15. *Golden* and *Stillman* illustrate limits of the SITA power, with respect to strip searches and seizure of bodily substances, respectively. Properly understood, these types of searches are not "excepted" from a broad common law power; rather, they establish that the common law power does not extend to law enforcement powers that fail the balancing process described in *Cloutier*.[18] The consistent fundamental principle is this: the greater the privacy interest, the greater the justification required.

16. When it comes to mobile communication devices, the BCCLA says that the result of this balancing exercise – in all but the truly exceptional cases – will tend to indicate that due to the high privacy interest in a mobile device, the search of its contents is

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[15] *Cloutier* at 186.

[16] *Caslake* at para 15 [emphasis added].

[17] *Golden* at para 87.

[18] This is evident in *Stillman* at para 42, where Cory J held that "[t]he invasive nature of body searches demands higher standards of justification" and in *Golden* at para 98, where Iacobucci and Arbour held that "a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity". See also: *R v Mann*, 2012 BCSC 1247 at para 50; R v Giles, 2007 BCSC 1147 [*Giles*], at para 65.

beyond the SITA power. The situation is analogous in this respect to the Court's judgment in *Feeney*, generally prohibiting warrantless arrests in dwelling houses.[19]

C. There is a high expectation of privacy in mobile communication devices

17. Canadian courts have been divided on the issue of whether searches of the contents of mobile devices are validly within the reach of SITA. However, most have been in agreement that there is a high privacy interest in mobile devices.[20] The Supreme Court of Canada's recent decisions in *Morelli*, *Cole*, and *Telus* affirm that there is a high expectation of privacy in the information of the kind stored on computers and mobile phones. This Court recognized the comparability of mobile devices and computers in respect of their informational content in *R v Vu*, in considering whether a warrant authorized the search of a computer and a mobile device found on the premises.[21]

18. The nature of the information contained in mobile devices is intensely personal. In *R v Manley*, Sharpe JA stated "[c]ell 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".[22] In *R v Polius*, Trafford J listed examples of information found on a mobile device:

- Contacts, including names, addresses, phone numbers, e-mail addresses and other personal information;
- Internet Explorer, including the history of accessing websites;
- Calendars;
- Photographs and videos;
- Text Messages;
- Voice Mail Messages;
- E-mail Messages;
- Missed Calls;
- Call Logs; and
- Call Identification.[23]

Courts have affirmed that such information attracts a high expectation of privacy.

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[19] *Feeney* at para 49.

[20] See, *eg*: *R v Hiscoe*, 2013 NSCA 48; *R v Fearon*, 2013 ONCA 106 [*Fearon*]; *R v Manley*, 2011 ONCA 128; *R v Little*, [2009] OJ No 3278 (Sup Ct J); *R v Polius,* [2009] OJ No 3074 (Sup Ct J); *R v Liew*, [2012] OJ No. 1365. But see, *contra*, *Giles*.

[21] *Vu* at paras 59-69.

[22] *Manley* at para 39.

[23] *Polius* at para 52. See also: *Manley* at para 39, *Liew* at para 102.

19. The majority in *Morelli* specifically referred to the correspondence and browser history on a personal computer in holding that the search of a personal computer is highly intrusive.[24] *Cole* affirmed this reasoning and extended it to similar information contained in work computers, with Fish J holding that "the nature of the information at stake exposes the likes, interests, thoughts, activities, ideas, and searches for information of the individual user".[25]

20. This same type of information is often stored on mobile devices. Indeed, since the Appellant's factum was filed in this case, the Court held in *Telus* that "text messaging is, in essence, an electronic conversation" which attracts the same privacy interests and corresponding protections as spoken conversations.[26] To similar effect, this Court recognized in *Caron* that digital images on smart phones "allow individuals to record personal, and sometimes, intimate aspects of their lives and those of their family and friends...Today, for some people, a digital camera may serve as an electronic journal or diary."[27] As Justice Binnie discussed in *Tessling* in respect of the home, the fact that mobile devices commonly contain information revealing "intimate details of the lifestyle and personal choices of the individual"[28] not only allows but requires assumptions as to expectations of privacy.[29]

21. The simplest mobile device is capable of storing information which has a recognized high privacy interest. More sophisticated devices can only be distinguished from personal computers or laptops on meaningless grounds. The challenge for this Court is to adapt the law in a manner which recognizes that technological developments

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[24] *Morelli*, at para 105.

[25] *Cole* at paras 2-3.

[26] *Telus* at para 5.

[27] *R v Caron*, 2011 BCCA 56 at para 60.

[28] And which, for that reason, falls within the "biographical core" of informational privacy protected by the *Charter*: *R v Plant*, [1993] 3 SCR 281 at 293; *Tessling* at para 25; *Cole* at para 2.

[29] *Tessling* at paras 22, 38.

have increased the privacy interest in the mobile devices individuals carry with them far beyond that in a notebook, a briefcase, or purse.[30]

D. The state interest is met by seizure (and preservation) of the mobile device

22. Three valid state purposes may justify a SITA: (1) to discover and secure weapons for the safety of police, the accused and the public; (2) to preserve evidence; and (3) to discover evidence of the offence for which the person has been arrested.[31]

23. In respect of mobile devices, safety will rarely be in play. The preservation of evidence will be achieved by seizing the device (and subsequently applying for a warrant to search).[32] The question then is whether the purpose of *discovering* evidence brings the search within the reach of SITA.

24. The BCCLA submits that absent exigent circumstances, the answer is, "No." To hold otherwise would involve a radical – and unjustified – expansion of the scope of the SITA power.

25. The validity of a SITA is always constrained by the fundamental principle of balance: Is the search reasonably necessary in the circumstances of the arrest? The existence of a valid purpose is necessary to bring a search for evidence within a lawful SITA, but it is not sufficient. The weight of the state purpose is evaluated in the context of the arrest itself, and must outweigh the individual's right to privacy. The onus is on the state to demonstrate that the balancing comes out in its favour.[33]

26. In *Stillman*, Cory J recognized that some appellate courts had expanded the scope of SITA beyond situations of necessity, but noted:

> It is important to recognize that these cases, which purport to expand the common law power of search incidental to arrest, involve less intrusive searches of motor vehicles and the seizure of evidence found in them ...Obviously, completely different concerns arise where the search and

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[30] *Giles* at para. 63.

[31] *Caslake* at para. 19.

[32] *Liew* at para 124.

[33] *Hunter v Southam* at 160; *Hiscoe* at para. 30.

> seizure infringes upon a person's bodily integrity, which may constitute the ultimate affront to human dignity.[34]

27. Justice Cory's comments reflect the underlying principle of SITA: the greater the privacy interest at stake, the more pressing the state purpose must be.[35]

28. In this, the state purpose is necessarily evaluated in the context of the arrest. In *Stillman*, Cory J expressly adopted the statement of the dissenting justice at the Court of Appeal below that:

> The power to search and seize incidental to an arrest is predicated on pragmatic and exigent considerations inherent to the circumstances of an arrest.[36]

29. The majority in *Golden* recognized that a search for evidence is a valid purpose, but also cautioned that "[t]he reasonableness of a search for evidence is governed by the need to preserve evidence and to prevent its disposal by the arrestee".[37]

30. Where the mobile device has been seized, neither of these considerations is any longer in play. In the context of most arrests, the remaining state objective (discovering evidence), will not be pressing.

31. This submission applies not only to so called "data dumps" of the entire contents of a mobile device, but also to what has been referred to in the case law as "cursory" searches.[38] An individual's privacy interest in the information that may be viewed by the police on a cursory search differs only in the volume, and not the nature, of the information. As MacKenzie J (as she then was) put it in *Giles*, "Volume of information is not as relevant as the nature of the information".[39]

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[34] *Stillman* at para. 39.
[35] *Stillman* at para 42.
[36] *Stillman* at para 48 [emphasis added].
[37] *Golden* at para 93.
[38] See, *eg*: *Fearon*; *Hiscoe*; *Polius*; *Liew*.
[39] *Giles* at para 63.

32. A "cursory" search does not safeguard the privacy of the highly personal information that may be contained on a mobile device. The kind of information that has been found on a "cursory" search incident to arrest includes photographs, videos, text messages, and recent calls.[40] Each of these types of information attracts a high expectation of privacy. Permitting a "cursory" search of a mobile device as a matter of course, and without requiring a specific and pressing justification, offers insufficient protection in respect of the very personal information that may be viewed. With respect, where the device has been seized, allowing a "cursory" search exalts law enforcement convenience at the expense of individual privacy.

33. It is also difficult to conceive of how a "cursory" search could be defined so as to provide helpful guidelines to the police while protecting the arrestee's privacy rights. A temporal limitation on the search would not limit the type or quality of information that may be viewed. Likewise, a limitation that restricted the police to what is readily viewable, or in "plain sight", would be inherently arbitrary given that whatever may be viewable on the mobile device at the time it is seized does not necessarily bear any relation to the individual's privacy interest. No such limitation would adequately address the privacy concerns at issue.

34. The position taken by the BCCLA is strengthened by the fact that the purpose of discovering evidence is readily met by obtaining a search warrant. A search warrant can also protect against unreasonably broad intrusions into individual privacy by establishing search parameters.[41] Further, the BCCLA expressly leaves open the possibility of the existence of circumstances which make a search of the contents of a mobile device reasonably necessary in the circumstances: it is not necessary in the facts of this case to speculate what those may be.

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[40] See: *Manley*; *Polius*; *Fearon*; *and Liew*. See also *R v Mawut*, 2013 ONSC 1011, in which text messages between the user of the device and counsel were discovered.

[41] See, *eg*: *Vu* at para 65 re: the restrictions that may be put in place on a search warrant in respect of a computer hard drive.

E. Conclusion

35. The Nova Scotia Court of Appeal held in *Hiscoe*:

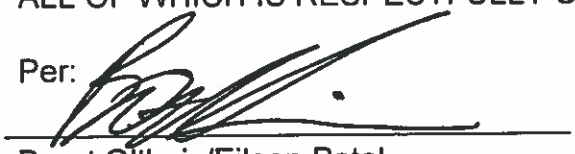
> Given the purpose of s. 8, namely protection against state intrusion upon the right to privacy, it is critical that as much as possible unjustified searches be precluded from occurring in the first place. Allowing such infringements to the right to privacy to proceed and determining afterward whether or not they were proper is most unsatisfactory. After all, the privacy of the individual cannot be fully restored.[42]

36. The present appeal concerns increasingly sophisticated and ubiquitous mobile devices, which raise pressing privacy concerns fundamentally altering the balancing exercise that determines the reach of SITA. The purpose of section 8 can only be respected if the search of a lawfully seized mobile device occurs – absent exigent circumstances – subsequent to obtaining authorization from a neutral and detached third party.

PART 4: NATURE OF ORDER SOUGHT

37. The BCCLA takes no position on the relief sought in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2013.

Per: 

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[42] *Hiscoe* at para 69.

APPENDIX: CONSTITUTIONAL PROVISIONS

Canadian Charter of Rights and Freedoms, Part I of the _Constitution Act, 1982_, being Schedule B to the _Canada Act 1982_ (UK), 1982, c 11

LEGAL RIGHTS

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Charte canadienne des droits et libertés, partie I de la _Loi constitutionnelle de 1982_, constituant l'annexe B de la _Loi de 1982 sur le Canada_ (R-U), 1982, c 11

GARANTIES JURIDIQUES

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

PART 5: LIST OF AUTHORITIES

		PARA(S)
1.	*Canada (Combines Investigation Branch Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145	9, 10, 25
2.	*Cloutier v Langlois*, [1990] 1 SCR 158	10, 11, 12, 15
3.	*R v Caron*, 2011 BCCA 56	20
4.	*R v Caslake*, [1998] 1 SCR 51	10, 11,13, 22
5.	*R v Cole*, 2012 SCC 53, [2012] 3 SCR 34	4, 19, 20
6.	*R v Collins*, [1987] 1 SCR 265	9
7.	*R v Fearon*, 2013 ONCA 106	17, 31, 32
8.	*R v Feeney*, [1997] 2 SCR 13	11, 16
9.	*R v Giles*, 2007 BCSC 1147	15, 17, 21, 31
10.	*R v Golden*, 2001 SCC 83, [2001] 3 SCR 679	11, 14, 15, 29
11.	*R v Hiscoe*, 2013 NSCA 48	17, 25, 31, 35
12.	*R v Liew*, [2012] OJ No. 1365	17, 18, 23, 31, 32
13.	*R v Little*, [2009] OJ No. 3278 (Sup Ct J)	17
14.	*R v Manley*, 2011 ONCA 128	17, 18, 32
15.	*R v Mann*, 2012 BCSC 1247	15
16.	*R v Mawut*, 2013 ONSC 1011	32
17.	*R v Morelli*, 2010 SCC 8 [2010] 1 SCR 253	4, 17, 19
18.	*R v Plant*, [1993] 3 SCR 281	20
19.	*R v Polius*, [2009] OJ No. 3074 (Sup Ct J)	17, 18, 31, 32
20.	*R v Stillman*, [1997] 1 SCR 607	11, 15, 26, 27, 28
21.	*R v TELUS Communications Co*, 2013 SCC 16	8, 20

22.	*R v Tessling*, 2004 SCC 67	4, 20
23.	*R v Vu*, 2011 BCCA 536	3, 17,34