Court File Number: 39416

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

MATTHEW STAIRS

APPELLANT

- AND -

HER MAJESTY THE QUEEN

RESPONDENT

- AND -

ATTORNEY GENERAL OF ONTARIO and CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF THE CASE

1. On this appeal the Canadian Civil Liberties Association (CCLA) is concerned with the regulation of and appropriate scope of searches incident to arrest (SITAs) in homes. The police searched the Appellant's basement incident to his arrest. The majority of the Ontario Court of Appeal found that the trial judge did not err in finding that the search of the basement was lawful. Justice Nordheimer, in dissent, held that this Honourable Court's decision in *Macdonald* governed and that the police required *reasonable grounds to believe* that the search of the basement was necessary for safety purposes. In the result, Justice Nordheimer concluded that the search of the Appellant's basement violated s. 8 of the *Charter*.

PART II: POSITION ON QUESTIONS IN ISSUE

2. The CCLA respectfully submits that the exceptional nature of SITAs, the fact that these searches are particularly open to abuse, and the significant privacy interests in the home necessitate that when searching a home pursuant to a SITA the police must have *reasonable and probable grounds* to believe either that:

a. There is an imminent safety risk that requires an immediate warrantless search; or

b. Evidence is present in the home and that evidence is at risk of imminent destruction absent an immediate warrantless search.

3. Both the nature and extent of the search must be carefully circumscribed to protect privacy. There must be no other alternative capable of addressing the identified risk. Finally, this framework ought to apply to all items found in the home. *Fearon* – which concerned the search of a cell phone found in an individuals' pocket outside of a residence - should not apply to searches within homes.

PART III: ARGUMENT

A) SITA is an exceptional search power open to abuse

4. Warrantless searches are *prima facie* unreasonable. In *Hunter*, this Honourable Court held that *post facto* reviews of the constitutionality of searches are "seriously at odds with the purpose

of s. 8" of the *Charter*.[1] Prior judicial authorization, requiring *at a minimum* a showing of reasonable and probable grounds, is therefore a prerequisite for a valid search.[2]

5. SITAs are an exception to the *Hunter* rule. As this Honourable Court in *Fearon* recently highlighted, this search power is "extraordinary."[3]

6. An important consideration is that SITAs are particularly open to abuse. For many situations, judicial scrutiny of the search will be completely absent (take situations where no charges are pursued). In *Stillman,* Justice Cory sounded a general caution against an overly aggressive resort to SITA:

> "No matter what may be the pressing temptations to obtain evidence from a person the police believe to be guilty of a terrible crime, and no matter what the past frustrations to their investigations, the police authority to search as an incident to arrest should not be exceeded."[4]

B) SITA must be modified in relation to searches of homes

7. The SITA test has been modified on numerous occasions depending upon the nature of the engaged privacy interests. *Charter* compliance requires greater degrees of justification proportionate to the nature of the private zones implicated. [5] For example, the principles governing SITA have been modified in relation to searches for bodily samples,[6] strip searches, [7] penile swabs, [8] and mobile phones.[9]

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[1] *Hunter v Southam*, [1984] 2 SCR 145 at p. 160.
[2] *Ibid* at pp. 161, 162 and 168.
[3] *R. v. Fearon*, 2014 SCC 77 at paras 19, 22, 27, 45 [*Fearon*]. In order for a search incident to arrest to be valid, the following requirements must be met: the arrest must be lawful, the search must be conducted to ensure safety, preserve evidence or discover evidence, the search must be truly incidental to the arrest and the officer must have a reasonable basis for the search.
[4] *R. v. Stillman*, [1997] 1 SCR 607 at para 47 [*Stillman*].
[5] *Stillman*, *supra* note 4 at para 39
[6] *Ibid.*
[7] *R. v. Golden*, 2001 SCC 83.
[8] *R. v. Saeed*, [2016] S.C.J. No. 24.
[9] *Fearon*, *supra* note 3.

8. Protecting the privacy of one's home from the state is deeply rooted in our legal and cultural traditions. In the early seventeenth century *Semayne's Case* firmly established that "a man's home is his castle" and that even the King had no right to invade the sanctity of the home without prior authority.[10] This Honourable Court held in *Silveira* that the principle in *Semayne's Case* "is a fundamental precept of a free society"[11] and that "[t]here is no place on earth where persons can have a greater expectation of privacy than within their "dwelling houses."[12]

9. The privacy of the home has gained significant *Charter* protection. In *Feeney*, this Honourable Court prohibited warrantless entries and arrests in homes finding that, generally, privacy interests in the home will *outweigh* the interests of law enforcement.[13]

10. The permissible scope of SITA turns on several different aspects of the search, including the nature of items searched for *and* the place of search.[14] The search of an individuals' home, including items found within the home, will generally constitute a much more significant invasion of privacy than a SITA conducted at the roadside. Dwelling houses and their contents reveal intimate details about their inhabitants' interests, habits, and identity. The SITA test *must* reflect the sanctity of a person's privacy interests in their home. This includes not only individuals' territorial privacy, but privacy of their information within the home.

C) The appropriate SITA test for searches of homes

11. The exceptional nature of SITAs, the fact that these searches are particularly open to abuse, and the significant privacy interests in the home necessitate that when searching a home pursuant to a SITA the police must have *reasonable and probable grounds* to believe either that:

a. There is an imminent safety risk in the home that requires an immediate warrantless search; or

b. Evidence is present, and that evidence is at risk of imminent destruction in the home absent an immediate warrantless search.

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[10] *R. v. Silveira*, [1995] 2 SCR 297 at para 41 [*Silveira*].
[11] *Ibid.*
[12] *Ibid* at para 140.
[13] *R. v. Feeney,* [1997] 2 SCR 13 at para 44 [*Feeney*].
[14] *Fearon*, *supra* note 3 at para 13.

12. For a SITA to be justified, there can be no other less intrusive measures available to address the identified risk. Moreover, given the almost infinite amount of private information that can be discovered during a search of a person's home, both the nature and extent of the search must be circumscribed. SITA in the home cannot permit the search of a home in an unfocused and expansive manner.

13. To be *Charter* compliant, SITA in a home cannot permit the search for evidence which is at no risk of destruction and unrelated to safety. This would effectively supplant our established warrant regime. Finally, this framework ought to apply to all objects found in the home, including electronic devices.

i) Reasonable and Probable Grounds

14. This Honourable Court has already recognized this standard in *Macdonald* in relation to searches of homes:

> "Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer **believes on reasonable grounds** that his or her safety is at stake and that, as a result, it is necessary to conduct a search"[15]

15. The CCLA respectfully submits that *Macdonald* ought to apply whether the individual is arrested or not. The authority for a SITA does not result from the 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] The fact that a person is arrested does not alter the quality of person's privacy interest in their home.

16. A reasonable grounds requirement ensures that police engage in a focused and directed search, as opposed to an unregulated search of the detainee's home for any incriminating evidence of any crime. Importantly, this requirement is consistent with our protection of one's privacy interests in the home.

ii) Exigency – Imminent Safety Risk/Preservation of Evidence

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[15] *R. v. Macdonald,* 2014 SCC 3 at para 41 [*Macdonald*].
[16] *R. v. Caslake,* [1998] 1 SCR 51 at para 17.

17. Police should only be permitted to search a home incident to arrest in exigent circumstances: when there are reasonable and probable grounds to believe that there is an imminent safety risk emanating from within the home *or* that there is evidence present in the home which is at risk of imminent destruction. Conducting a warrantless search must be the only means of eliminating the risk. Requiring exigency is commensurate with the substantial privacy interests attached to the home and with this Honourable Court's approach to entrances and searches of homes in related contexts.

18. In *Feeney,* this Honourable Court prohibited warrantless entrances and arrests of individuals in their homes. However, Justice Sopinka recognized that in exceptional circumstances, such as "hot pursuits," society's interests in effective law enforcement would take precedence over privacy interests so as to permit a warrantless entry into a home.[17]

19. *Feeney* has since been codified. The Criminal Code (*Code*) permits police to enter a home to arrest someone in three situations: on warrant issued by a judge or justice, where there are reasonable grounds to believe pursuant to ss. 529(1) and 529.1[18], and without a warrant only in *exigent* circumstances pursuant to s. 529.3.[19]

20. In *Golub*, Justice Doherty found that *Feeney* "fixed the constitutional limit of the exercise of a police power to enter a home as an incident of an arrest" and therefore concluded that "searches of a home as an incident of an arrest, like entries of a home to effect an arrest, are now generally prohibited subject to exceptional circumstances."[20] Justice Doherty went on to find that "where **immediate** action is required to secure the safety of those at the scene of an arrest, a search conducted in a manner which is consistent with the preservation of the safety of those at the scene is justified" (emphasis added).[21]

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[17] *Feeney*, *supra* note 13 at para 47.
[18] *Criminal Code,* RSC 1985, c C-46 ss. 529(1) and 529.1 [*Code*].
[19] *Ibid* at s.529.3(1)-(2).
[20] *R. v. Golub,* [1997] O.J. No. 3097 at paras 40-41 [*Golub*].
[21] *Ibid* at para 46.

21. This Honourable Court adopted the same approach in *Macdonald* permitting "safety searches" within the home and explained that "such searches are driven by exigent circumstances" that deprive the police of sufficient time to obtain prior judicial authorization.[22]

22. The substantial privacy interests attaching to homes coupled with this Honourable Court's long-standing approach to protecting the privacy of homes compel the conclusion that a SITA of home can only be permitted exigent circumstances.

iii) <u>SITA of homes cannot permit the collection of evidence which is not at risk of imminent destruction</u>

23. Section 8 of the *Charter* does not permit the warrantless search of a house for evidence unless the evidence is at imminent risk of destruction and there are no other means available to secure it while a warrant is sought.

24. The collection of evidence is not an exceptional circumstance outweighing the significant privacy interest attached to the home. Justice Doherty recognized this in *Golub*: "[t]he state interest in collecting evidence may not justify a warrantless search, but the interest in protecting the safety of those at the scene may justify that same search."[23]

25. This approach is once again consistent with the *Code,* which only permits warrantless entries into dwelling houses to prevent imminent bodily harm or death of a person *or* the imminent loss or imminent destruction of evidence.[24]

26. Only police actions which are necessary should be permitted pursuant to a SITA in a home. Unless the evidence is at imminent risk of destruction and there are no means available to secure it while a warrant is sought, it is simply unnecessary for officers to search the home to discover evidence without a warrant.

iv) <u>Both the nature and extent of the search must be incidental to the arrest</u>

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[22] *Macdonald, supra* note 15 at para 32.
[23] *Golub, supra* note 20 at para 43.
[24] *Code, supra* note 18 at ss.529.3(1)-(2).

27. A search of a home may give police access to individuals' most private possessions and information. SITAs of homes must therefore be tightly constrained:

> "The test is whether the nature and extent of the search are tailored to the purpose for which the search may lawfully be conducted. To paraphrase *Caslake*, the police must be able to explain, within the permitted purposes, **what** they searched and **why**" (emphasis added).[25]

28. In other words, SITA in a home cannot permit an unfocused and expansive search. The scope of the search, including the geographical scope and *what* is searched specifically (which rooms, what storage etc.) must be circumscribed by the purpose of the search, that is, only as is necessary to address imminent safety risks and/or preservation of at-risk evidence.

v) <u>Search of Electronics in a Home</u>

29. Finally, the CCLA submits that the proposed framework must apply to all objects found in the home, including electronics. In other words, *Fearon* – which concerned the search of a cell phone found in an individuals' pocket outside of a residence - should not apply to searches within homes.

30. In *Fearon*, this Honourable Court refused to require reasonable and probable grounds *and* exigent circumstances for the search of cellphones and similar devices incident to arrest.[26] However, Justice Cromwell, writing for the majority, recognized at the outset that the scope of a SITA turns on both the nature of the items seized *and* the place searched.[27] Justice Cromwell emphasized that the sole question in *Fearon* was whether SITA "permits the particular cell phone search in issue <u>**here**</u>" (emphasis added).[28]

31. *Fearon* did not address the search for and of electronic devices found within the home. Respectfully, the privacy interests engaged when searching electronics within an individuals' home require a distinct analysis. The nature of electronic devices and the privacy calculus an individual considers when using an electronic device within a home may frequently be different than for a device an individual carries in their bag or pocket. Devices a user expects to remain

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[25] *Fearon*, *supra* note 3 at para 76.
[26] *Fearon*, *supra* note 3 at paras 66-73.
[27] *Ibid* at para 13.
[28] *Ibid* at para 14.

resident in their dwelling house may be deliberately used for tasks engaging heightened privacy sensitivity, including personal finance and professional activities. There is also a high likelihood that the home will contain the electronic devices of individuals other than the arrestee. The heightened expectation of privacy within the home is not just a legal truth, but a lived expectation and well-established social norm that influences individual's objective and subjective expectations of privacy. Imposing *Fearon* within the home risks opening the doors to excessive and multiple privacy infringements (for example, searches of a wide array of electronic devices, such as laptops, tablets, mobile phones no matter where located within the home).

32. Requiring the police to have reasonable and probable grounds in exigent circumstances as a requirement for home searches incident to arrest will foster a focused and appropriately limited search power which properly respects the substantial and enduring privacy of one's home.

PART IV AND V: COSTS AND ORDER SOUGHT

33. The CCLA takes no position on the disposition of this appeal. The CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario this 29th day of June 2021.

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PART VI: TABLE OF AUTHORITIES

Jurisprudence	**Paragraph**
Hunter, et al. v. Southam Inc., [1984] 2 SCR 145	4
R. v. Caslake, [1998] 1 SCR 51	17
R. v. Fearon, 2014 SCC 77	5, 8, 11, 29, 32
R. v. Golden, 2001 SCC 83	8
R. v. Golub, [1997] O.J. No. 3097	22, 26
R. v. Feeney, [1997] 2 SCR 13	10, 20
R. v. Macdonald, 2014 SCC 3	16, 23
R. v. Saeed, [2016] S.C.J. No. 24	8
R. v. Silveira, [1995] 2 SCR 297	9
R. v. Stillman, [1997] 1 SCR 607	6, 8
Legislation	**Paragraph**
Criminal Code, R.S.C., 1985, c. C-46 *Code criminel*, L.R.C. (1985), ch. C-46	s. 529(1), 529.1, 529.3 a. 529(1), 529.1, 529.3