IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Cater, 2012 NSPC 2

Date: January 13, 2012

Docket: 1997518 to

1997550; 2035773 to 2035784

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Kyle Cater

DECISION ON THE VALIDITY OF THE SEARCH OF KYLE CATER'S CELL PHONE

JUDGE: The Honourable Anne S. Derrick

HEARD: December 20, 21 and 22, 2011

DECISION: January 13, 2012

CHARGES: Sections 86(1) x3; 88(1) x3; 95(1) x 2; 92(1) x 2; 92(2) x 1; 100(2) x 6; 99(2) x 6; of the *Criminal Code*

COUNSEL: Richard Hartlen and Shauna MacDonald, for the Crown

DEFENCE: Elizabeth Cooper, for Kyle Cater

By the Court:

Introduction

[1] When Kyle Cater was arrested by police, his cell phone was seized from him and searched. The search was a warrantless search. Mr. Cater is challenging that search, first of all, on the basis of challenging the validity of the arrest. It is settled law that if Mr. Cater's arrest was invalid, any search incidental to that arrest was invalid.

[2] This is how Mr. Cater's submission is framed in the Brief filed by Ms. Cooper in relation to this application:

> The alleged cellular phone of Mr. Kyle Cater was seized, incident to his arrest on January 15, 2009, of gun possession charges for guns found at 80 Cavendish Road…Mr. Cater did not live at 80 Cavendish Road and did not have the necessary possession, knowledge and control of the guns seized at that address to form a legal basis for his arrest on these charges. The defence therefore submits that there was no legal basis for his arrest on these charges and therefore no legal basis for the search incident to arrest and seizure of his alleged cellular phone. (*paragraphs 1, 3 and 5, Brief filed on behalf of Kyle Cater, December 5, 2011*)

[3] Mr. Cater's Brief goes on to state that there was no basis for "the further search of the entire contents of his alleged cellular phone without a search warrant." (*paragraph 5, Brief filed on behalf of Kyle Cater, December 5, 2011*)

[4] The Crown submits that the search of Mr. Cater's cell phone was a search incident to his arrest, which is a legitimate exception to the requirement that a warrantless search must be conducted on the basis of reasonable and probable grounds. The Crown asserts that the forensic search of Mr. Cater's cell phone in the absence of a search warrant was not a violation of his section 8 rights.

Standing

[5] Before I proceed further I want to address the issue of standing. Mr. Cater cannot assert section 8 entitlements in relation to the search of the cell phone seized from him on his arrest unless he had a reasonable expectation of privacy in the phone. As her brief indicates, Ms. Cooper described the cell phone as Mr. Cater's "alleged cellular phone." On December 19, in anticipation of the hearing of

this application, Ms. Cooper indicated she was conceding that the cell phone was Mr. Cater's (most specifically that its content was Mr. Cater's as the phone was subscribed to by his mother, Barbara Cater) only for the purposes of the *Charter* voir dire but would be insisting that the Crown be held to "strict proof at the trial." This proposed approach is not tenable in my view. Mr. Cater cannot assert a reasonable expectation of privacy in the seized phone in order to advance a section 8 *Charter* claim and then deny any interest in the phone at trial. Requiring the Crown to meet the high burden of proof beyond a reasonable doubt at trial does not mean an accused is free to talk out of both sides of his mouth when it comes to asserting his constitutional entitlements. Mr. Cater has chosen to advance a challenge to the search of a cell phone seized from him at the time of his arrest. To advance such a challenge he must establish that he has standing to do so. He has standing only if he can claim a reasonable expectation of privacy in the phone. He cannot subsequently claim to have no interest in the phone. Engaging section 8 rights in a *Charter* voir dire and then at trial claiming no connection to the phone would be, to put it mildly, disingenuous.

[6] The Supreme Court of Canada addressed a similar issue in *R. v. Edwards, [1996] S.C.J. No. 11*. In his appeal to that Court, Mr. Edwards raised for the first time a right to privacy in the drugs found in his girlfriend's apartment. He had told the courts below the drugs were not his and his privacy interest lay only in the apartment. The Court had the following to say about Mr. Edward's strategy:

> **44** In the case at bar, one of the bases upon which the appellant asserted his right to privacy in Ms. Evers' apartment was his interest in the drugs. It is possible, in certain circumstances, to establish an expectation of privacy in the goods that are seized…However, this contention cannot be raised in the circumstances of this case. At trial, the appellant denied that the drugs were his and Ms. Evers testified that they might have belonged to someone else. The appellant maintained in the Court of Appeal that the drugs were not his. It was only in this Court that he acknowledged for the first time that the drugs were his. He should not now be permitted to change his position with regard to a fundamentally important aspect of the evidence in order to put forward a fresh argument which could not be considered in the courts below. The result in this appeal must turn solely on the appellant's privacy interest in Ms. Evers' apartment.

[7] On December 20, in addressing Ms. Cooper's submission from December 19, I recited the above passage in *Edwards*. I outlined Mr. Cater's options: he

could choose not to advance a section 8 challenge to the search of the phone seized from him on arrest or he could claim a reasonable expectation of privacy, argue that his rights had been breached, and seek *Charter* relief. Having chosen the latter course, he will not be permitted at trial, if the cell phone is still "in play" as evidence at that time, to distance himself from the phone.

[8] What the Crown is interested in having admitted into evidence is the cell phone's content. Should I find the content admissible it will still be necessary for the Crown to establish its relevance to the charges against Mr. Cater and meet its burden of proof beyond a reasonable doubt in order to secure convictions on those charges.

[9] It is conceded by the Crown that a reasonable expectation of privacy exists with respect to the content of a person's cell phone and that a person claiming such an expectation is entitled to assert a *Charter* protected right against unreasonable search.

The Arrest of Kyle Cater

[10] January 15, 2009 was take-down day for Operation Intrude. At a 4:30 a.m. briefing at RCMP headquarters, approximately 100 police officers were instructed on their responsibilities for the take-down. Det/Cst. Pepler of the Halifax Regional Police, was the lead investigator. Cst. Jim Bennett, also a Halifax Regional Police officer, was one of the many officers assigned specific tasks. Cst. Bennett and his partner, Cst. David Lane, were sent off with other Regional Police members to execute a search warrant at an address on MacIntosh Street.

[11] While Csts. Bennett and Lane were discharging their duties, other police officers were executing a search warrant at 80 Cavendish Road, the residence of Kyle Cater's father, Paul and his step-mother, Torina Lewis. This search located three firearms - a sawed off Cooey 84 shotgun, a Lakefield Mark II rifle, and an AA Arms Model AP 9 handgun, and ammunition. Paul Cater and Torina Lewis were taken into custody.

[12] Meanwhile, shortly after completing the search of the MacIntosh Street residence, Cst. Lane received a call from Det/Cst. Pepler advising him that Kyle Cater was arrestable for possession of a restricted firearm. In accordance with

Det/Cst. Pepler's direction, Csts. Bennett and Lane proceeded to JL Ilsley High School to arrest Mr. Cater. They permitted him to change from his gym clothes. He was handcuffed, given a quick pat down search, and verbally advised of his rights. Cst. Bennett informed Mr. Cater of the reason for his arrest. As the police officers did not want to cause a commotion at the school, they departed quickly, re-reading Mr. Cater his *Charter* rights in the car.

[13] Cst. Bennett testified that he accepted, in good faith, Det/Cst. Poplar's word that Mr. Cater was arrestable for firearms offences. He assumed something had come up since the take-down briefing. That was indeed the case as I will describe shortly.

The Reasonable and Probable Grounds for Kyle Cater's Arrest - Facts

[14] As I have noted, Cst. Bennett's arrest of Kyle Cater was animated by a direction from Det/Cst. Pepler that Mr. Cater was arrestable for weapons possession. Det/Cst. Pepler's grounds for believing that Mr. Cater was arrestable had been developing over some period of time.

[15] Kyle Cater was not on the "take-down" list for arrest on January 15, 2009. Det/Cst Pepler testified "they weren't ready" to arrest him yet. The police had other priorities. What changed Det/Cst. Pepler's back-burner approach to Kyle Cater was a series of intercepted conversations he was informed about on January 15 after the search of 80 Cavendish.

The January 15 Intercepted Calls

[16] While the take-down of Operation Intrude targets was occurring, phone calls were still being intercepted. Det/Cst. Pepler was informed by monitors about a series of calls that had been made after Torina Lewis was released from police custody on January 15 following her arrest at 80 Cavendish Road. The first of these calls was made at 06:48 a.m. from Torina Lewis to Kyle Cater. The Crown played the call during Det/Cst. Pepler's evidence on this application. Ms. Lewis describes the police descending on 80 Cavendish. She explains that she was arrested and released and speculates that Paul Cater "must have said anything that's there is mine." She says several times to Kyle that there must be a "rat" – "So somebody ratted anyway." She tells Kyle: "They knew what they were lookin'

for ‘cause they even asked me where it was at. I told them what are you talkin’ about?” Det/Cst. Pepler testified that this intercept formed the basis for his belief that there were reasonable and probable grounds to arrest Kyle Cater in relation to the firearms found at 80 Cavendish.

[17] Det/Cst. Pepler also testified about an intercepted call that was placed at 6:54 a.m. by Kyle to Ms. Lewis. Notable to Det/Cst. Pepler in that call was Kyle Cater’s comment to Ms. Lewis: “That’s like a straight…that’s…gonna be like three years.” This indicated to Det/Cst. Pepler that Kyle had knowledge of the potential sentence his father would get and what kind of firearm was involved. Ms. Lewis tells Kyle in the call that she had told Paul “the other day” to “get rid of everything ‘cause I got a feelin’.” Kyle answers with: “I said that too.” Ms. Lewis then replies: “Well, we had nowhere to put that other one” and Kyle responds: “I know, that’s fucked…” There is speculation that someone “ratted”, Ms. Lewis indicating the police didn’t mention looking for drugs, Kyle saying it would all come out in the disclosure and Ms. Lewis figuring her release from custody came about because Paul “must have claimed everything…” Kyle is surprised the police didn’t come to his house first and wonders, “what’s gonna happen now.”

[18] An 8:21 a.m. call placed from someone Det/Cst. Pepler believed to be Jeff MacDonald to Kyle Cater also contributed to Det/Cst. Pepler’s belief that Kyle was arrestable for weapons possession. MacDonald wonders if the police got anything in the search of 80 Cavendish. Kyle responds: “Yeah, I think so.” When asked what, he says: “I don’t know, the Tec, I think the Tec was there or somethin’.” Kyle then observes that his dad is “probably gonna get like five years.” Kyle tells MacDonald “it’ll come out in the disclosure anyways. They’ll say if there was informants or what not.” MacDonald’s response is to say: “Definitely the phones, bud, I’d say.” Kyle is of the view that the police executing the search at 80 Cavendish were looking for guns.

[19] At 8:26 a.m., Kyle calls Torina Lewis. This call also formed part of Det/Cst. Pepler’s belief in there being reasonable and probable grounds for his arrest. Ms. Lewis tells Kyle she believes the police found the Tec: “I know right now, I’m gonna say right over the phone. I know they found the Tec.” She goes on to say: “Because it was right there.” Kyle’s reaction is to say, “Oh man, that’s bad.” There

is speculation about who may have “ratted” and Kyle says again, “It’ll come out in the disclosure.”

[20] Det/Cst. Pepler testified that one of the firearms seized from 80 Cavendish, the AA Arms AP9 handgun, looks like another kind of automatic pistol, a Tec 9. Det/Cst Pepler noted Kyle Cater’s mention of a jail sentence in an earlier intercept, which is what possession of an automatic pistol would attract.

The December 7 Intercepted Calls

[21] The four January 15 calls involving Kyle Cater, along with previously intercepted calls from December 7 about “Tracy” which Det/Cst. Pepler believed was a reference to the automatic pistol, formed the grounds for his belief that Kyle Cater was arrestable for possession of the weapons located at 80 Cavendish. Det/Cst. Pepler knew that the search of 80 Cavendish had produced a sawed off shotgun loaded with a live shell, an automatic pistol, a loaded .22 rifle and an ammunition magazine. According to Det/Cst. Pepler the automatic pistol is a rare and valued commodity on the street.

[22] I summarized the December 7 “Tracy” calls in my decision on the search of 80 Cavendish – *R. v. Cater, Cater and Lewis, [2011] NSPC 99* at paragraphs 30 – 34. Det/Cst. Pepler confirmed that he listened to the December 7 calls and formed the belief that Paul Cater, Torina Lewis and Kyle Cater were engaged in guarded conversation about a missing firearm that is eventually located. Det/Cst. Pepler testified to his interpretation that these intercepted conversations indicated panic and urgency associated with getting the firearm back to 80 Cavendish. Det/Cst. Pepler believed the reference to “Tracy” was a reference to a firearm, likely what was referred to in subsequent calls as the Tec, and that Kyle Cater was asking why the firearm had been out and not hidden. The gun is found and Kyle Cater’s level of interest and involvement indicated to Det/Cst. Pepler that he had both knowledge of and control over it, making him arrestable for possession.

[23] Det/Cst. Pepler testified that his conclusions about the December 7 and 28 telephone intercepts were similar to those reached by Cst. John Mansvelt who swore the Information to Obtain and Affidavit for the search of 80 Cavendish. In *R. v. Cater, Cater and Lewis 2011 NSPC 99* at paragraphs 35 and 36, I reviewed Cst. Mansvelt’s beliefs about what the December 7 and 28 intercepts indicated.

[24] On this application, Det/Cst. Pepler was asked to comment on an intercepted conversation between Kyle Cater and a friend right after his last December 7 call with Torina Lewis about the firearm that, due to its apparent disappearance had caused all the alarm. Kyle refers to “somethin’ misplaced last night, and they found it, though…” The conversation that ensued was, in Det/Cst. Pepler’s opinion, a conversation about the firearm. The friend in that intercept had been at 80 Cavendish the night before and this December 7 call indicates that Kyle had called him during the night when “it” went missing.

Det/Cst. Pepler’s Belief in Kyle Cater’s Arrestability

[25] Det/Cst. Pepler testified that he listened to all 64,000 intercepts for Operation Intrude. Based on these intercepts he formed the belief that Kyle Cater was involved in possessing and trafficking in firearms. Coded language was used and Kyle Cater was intercepted in calls involving other targets of Operation Intrude including on December 4, 2008 when Det/Cst. Pepler believed him to have been discussing firearms very shortly before the attempted murder of Jimmy Melvin Jr.

[26] When asked whether on January 15, 2009 he had formed reasonable and probable grounds for believing that Kyle Cater was arrestable on weapons trafficking charges, Det/Cst. Pepler testified that based on the evidence already collected, he could have arrested Mr. Cater on January 15, 2009 on these charges but “we just weren’t ready.” He explained this to mean that the police had higher priorities at the time – suspects in attempted murders and a home invasion as well as trafficking and weapons offences. Det/Cst Pepler explained he wasn’t “in a position to prepare any kind of documentation for the court to put Kyle Cater in front of a judge and that was something we were going to do as an afterthought.” Det/Cst. Pepler indicated that the police had intended to apply for a further authorization to intercept private communications but the level of violence occurring in the Halifax Regional Municipality led them to decide the take-down of the Operation Intrude targets had to be accelerated.

The Reasonable and Probable Grounds for Kyle Cater's Arrest - Analysis

[27] The grounds for an arrest must be both subjectively and objectively reasonable. *(R. v. Storrey, [1990] S.C.J. No. 12, paragraphs 16 and 17)* In this case, the Crown, which has the burden of showing on a balance of probabilities that a warrantless search was reasonable, has established a subjective basis for Mr. Cater's arrest. Cst. Bennett testified that he believed Mr. Cater was "arrestable" based on the information he had received from Cst. Lane passing on this information from Det/Cst. Pepler, which Cst. Bennett accepted "in good faith" as reliable. Believing that Mr. Cater could be arrested for possession of firearms, Det/Cst. Pepler directed the Bennett/Lane team to effect the arrest. I am satisfied that Det/Cst. Pepler personally believed there were reasonable and probable grounds to arrest Kyle Cater and that Cst. Bennett was entitled, in making the arrest, to rely on Det/Cst. Pepler's belief. *(R. v. Debot, [1989] S.C.J. No. 118, paragraph 50; R. v. Lal, [1998] B.C.J. No. 2446, paragraph 24 (C.A.);R. v. Hall, [2006] S.J. No. 92(C.A.), paragraphs 12-14; R. v. Le, [2009] B.C.J. No. 99, paragraph 8 (C.A.);R. v. LeBlanc,[2009] N.S.J. No. 132, paragraphs 70 – 73(S.C.))*

[28] The next issue to be considered is whether Mr. Cater's arrest was justified from an objective point of view. Would a reasonable person standing in Det/Cst. Pepler's shoes have believed that reasonable and probable grounds existed to make the arrest? *(Storrey, supra, paragraph 16)*

[29] The totality of the circumstances must be assessed in determining whether the police officer (in this case, Det/Cst. Pepler) had an objectively reasonable belief that Mr. Cater was involved in the possession of a restricted firearm. *(R. v. Warford, [2001] N.J. No. 330, paragraph 15 (C.A.), referring to Wilson, J.'s judgment in Debot)* I am amply satisfied by the evidence that Det/Cst. Pepler's subjective belief in Kyle Cater's arrestability for weapons possession was objectively reasonable. The inferences Det/Cst. Pepler drew from the intercepts, supporting his belief that Kyle Cater was arrestable for possession of the firearms at 80 Cavendish, were reasonable inferences.

[30] The evidence has also satisfied me that it was objectively reasonable for Det/Cst. Pepler to have concluded that Kyle Cater was arrestable for weapons

trafficking on January 15. The fact that Det/Cst. Pepler decided Mr. Cater's arrest on weapons trafficking charges was not a take-down priority is immaterial. I find that Kyle Cater's arrest on January 15, 2009 was lawful. I also find that he could have been arrested at that time for weapons trafficking, had Det/Cst. Pepler identified that as a priority, which, as he testified, he did not.

The Search of Kyle Cater and the Seizure of His Cell Phone

[31] After arresting Mr. Cater, the officers stopped at McDonald's to get him some food. Once at Booking he was searched more thoroughly by Cst. Lane. This search involved the removal of the handcuffs, a thorough pat down, removal of items such as shoelaces and jewelry, and wanding. Neither a strip nor a cavity search was performed.

[32] During the processing of Mr. Cater in Booking, a cell phone was seized from him. It was secured by the Booking officers with the rest of Mr. Cater's property until late on January 15 when Cst. Buell collected it. Cst. Buell's assignment on January 15 was the processing of the arrestees from the Operation Intrude take-down. He confirmed in his evidence that there was no tampering with the seized cell phones while they were stored as personal property. When Cst. Buell seized the phone, he removed the battery to prevent any damage to evidence stored in the phone and knew not to view it so no evidence would be destroyed. The appropriateness of this approach was confirmed by the testimony of Cpl. (formerly, Cst.) Aaron Gallagher, a computer forensic analyst who is now the supervisor of the RCMP Integrated Technological Crime Unit based in Fredericton. Cpl. Gallagher was qualified to give opinion evidence in "computer forensic analysis and the recovery and interpretation of electronic data and data stored electronically." Cpl. Gallagher testified that the removal of cell phone batteries prevents new information being received by the phones, which could overwrite existing information stored in them.

[33] On January 16, Cst. Buell took the cell phone to Cst. Moreau at the RCMP Drug Section in Bedford. Cst. Moreau knew not to re-insert the phone's battery or view the phone's content. He sent the phone to be analyzed by the Integrated Technological Crime Unit. The requested analysis was for the phone to be examined "…for data information including incoming calls, outgoing calls, text

messages and any other information gathered." The "assistance request" indicated that Kyle Cater had been arrested for "Criminal Code offences and cell phone seized incidental to arrest." (*Exhibit 7, Assistance Request*) I will discuss the forensic analysis later in these reasons.

[34] Sgt. John Anderson, the team leader for Operation Intrude, had indicated that all cell phones would be seized from the arrested persons as part of the investigation into what had been a Part VI (intercept) operation. Det/Cst. Pepler testified that the case managers (which included him) had determined that the seizure of the arrestees' cell phones was essential to the investigation. As he explained about this decision: "…we are conducting a Part VI investigation, the majority of our evidence is captured on phones so when we arrest people and they have possession of a phone and that phone ends up being the same as the number we captured all the other evidence on it would be negligent not to seize it." It was a "known objective" of the take-down to seize phones from suspects for the purpose of locating phone numbers, contact information, text messages, and pictures that would assist in the investigation. Det/Cst. Pepler knew from experience that cell phones could provide valuable evidence in investigations. This knowledge was a factor in the case management decision to have cell phones seized from suspects as they were arrested.

[35] Cst. Buell also knew the phone's potential evidentiary value: that it could contain a significant amount of data of interest to the Operation Intrude investigators. As Cst. Moreau testified as well, any cell phone seized as part of a Part VI investigation is going to have evidentiary value.

[36] The search of Mr. Cater at Booking, which resulted in the seizure of his phone, amply qualifies as a search incidental to arrest. The evidence I heard from police officers indicated that the purposes for the search included the preservation and discovery of evidence and to avoid any evidence being destroyed. "The effectiveness of the [criminal justice] system depends in part on the ability of peace officers to collect evidence that can be used in establishing the guilt of a suspect beyond a reasonable doubt." (*Cloutier v. Langlois, [1990] 1 S.C.R. 158, paragraph 53*) In Mr. Cater's case, as the evidence establishes, the police were satisfied before the search was carried out that there was a valid purpose for the search, and the seizure of Mr. Cater's cell phone, incident to his arrest. (*R. v. Caslake, [1998] 1*

S.C.R. 51, paragraph 27) The police believed that by seizing the phone they would be protecting evidence from destruction and likely discovering evidence for use in prosecuting Mr. Cater. These are legitimate and important purposes of search incident to arrest. (*R. v. Beare, [1987] S.C.J. No. 92, paragraph 33; Caslake, paragraph 19; R. v. Nolet, [2010] S.C.J. No. 24, paragraph 49*)

[37] The police had the necessary "reason related to the arrest for conducting the search at the time the search was carried out" and their reasons for doing so were objectively reasonable. (*Caslake, paragraph 25*) The authority for searching Mr. Cater incident to his arrest, a common law power granted to police,

> …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. (*Caslake, paragraph 17*)

[38] The search of Kyle Cater and the seizure of his cell phone did not, in my view, cross any constitutional lines. I am thoroughly satisfied that Mr. Cater was lawfully arrested on January 15 for possession of a restricted firearm, that he was legitimately searched incident to his arrest and that his cell phone was lawfully seized in that search. The evidence also satisfies me that on January 15 Mr. Cater was arrestable for weapons trafficking. The essential question is whether the police were entitled to have Mr. Cater's phone subjected to a forensic analysis without first obtaining a search warrant.

The Forensic Search of Kyle Cater's Cell Phone – Facts, Law and Analysis

[39] A warrantless search is presumptively invalid and will violate section 8 of the *Charter* unless the search was authorized by law, the law itself was reasonable and the manner in which the search was carried out was reasonable. (*R. v. Collins, [1987] S.C.J. No. 15; see also, R. v. Stillman, [1997] S.C.J. No. 34, paragraph 34*) Given the facts of this case, I must focus on whether the law which authorized the search of Mr. Cater, and the seizure of his cell phone, that is, the common law of search incident to arrest, empowered the police to subject the cell phone to a forensic analysis without a warrant.

[40] Kyle Cater's cell phone was analyzed at the Technological Crime Unit by Cpl. Gallagher. The phone was not password protected. Cpl. Gallagher identified contact information and images (photographs) and used ZRT (Zippy Reporting Tool), a camera, to capture images of the phone's display screen and its record of outgoing and incoming calls, missed calls, and text messages. He accessed the metadata of the phone which included the date when images were created by the phone, i.e. dates when photographs were taken. His "Mobile Device Analysis Report" was completed on March 31, 2009.

The Nature of the Cellular Device

[41] Kyle Cater's cellular phone, a Samsung CDMA SPH U740, is, according to Cpl. Gallagher, a fairly simple device. It is not what has come to be known as a "smart" phone. In Cpl. Gallagher's opinion, it is a "dumb" phone, a description that illustrates the phone's limited functions. In other words, it is an unsophisticated device and does not function like a mini computer. Mr. Cater's cell phone provided basic services – calls, texts, the retention of contact information, and the taking of digital images. It did not have the ability to act as a personal computer, as such devices are envisioned in *R. v. Morelli, [2010] S.C.J. No. 8*:

> **105** …it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. 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.

[42] A "smart" phone is comparable to a personal computer. (*R. v. Law, [2002] S.C.J. No. 10, paragraph 25, cited in R. v. Hiscoe, [2011] N.S.J. No. 615 (P.C.), paragraph 40*) The device seized from Mr. Cater was not a miniature version of the personal computer, the "smart" phone that can contain a wealth of sensitive, personal information. It did not contain a "Vast amount of personal information…stored in data banks…", documents, images, audio files, videos and other digital representations stored on drives and organized in folders, sub-folders and files, which themselves are of various types. (*R. v. Jones, [2011] O.J. No. 4388, (C.A.), paragraph 48*) It did not offer an "electronic roadmap" with respect to the "cybernetic peregrinations" of Mr. Cater. (*Morelli, paragraph 3*) It was not "…a cellular phone containing a memory capacity akin to a computer…" (*R. v. Vu,*

[2010] B.C.J. No. 1777 (S.C.), paragraph 65; overturned on appeal although not on this point, [2011] B.C.J. No. 2487)

Reasonable Expectation of Privacy

[43] A primary purpose underlying the section 8 right against unreasonable search is the protection of a person's reasonable expectation of privacy. (*Hunter v. Southam, [1984] S.C.J. No. 36*) I have heard no evidence about Kyle Cater's expectations of privacy in the information contained in his cell phone. No evidence of any kind was called by the Defence on this application. Notwithstanding, I am prepared to accept that Mr. Cater had a reasonable expectation of privacy in the contents of his cell phone. It is logical to presume that this would be the case. (*R. v. Polius,[2009] O.J. No. 3074 (S.C.), paragraph 52; R. v. Little,[2009]O.J. No. 3278 (S.C.),paragraph 120; Hiscoe, paragraph 44*) Personal contacts, text messages and digital images of a girlfriend – all found on Mr. Cater's phone – quite reasonably attract an expectation of privacy. However I am not prepared to infer a heightened level of privacy as was held in *Hiscoe*. There too there was no testimony from the accused and no expert evidence. The *Hiscoe* cell phone was characterized as belonging to a category of such devices that "allow individuals to carry their entire personal information library with them." (*Hiscoe, paragraph 43*) The evidence in this case establishes that Mr. Cater's Samsung was no such device.

[44] In *Hiscoe,* my learned colleague Judge Tufts inferred an elevated level of privacy expectation even though the *Hiscoe* "smart" phone was not password protected. With respect, I do not regard the absence of a password as irrelevant to the issue of a reasonable expectation of privacy. In my view, employing a password indicates an amplified expectation of privacy and a determination to make the phone's contents more secure. The absence of a password is not a neutral factor in the assessment of the level of privacy to be inferred. The Samsung had no password protection.

[45] While I am satisfied to find that Kyle Cater had a reasonable expectation of privacy in the information contained in his cell phone, I cannot and do not infer an elevated level of privacy expectation as might be established by evidence from an accused who had password-protected his or her smart phone.

[46] I am unsettled on the question of what significance such evidence might have on the issue of whether a search warrant is ever required to search a cell phone properly seized incident to a lawful arrest. What is clear to me is that Mr. Cater's section 8 application must be decided on the facts of his case and my decision confined to the evidence I have before me. I am not formulating a decision that seeks to achieve a one-size-fits-all result: the facts and evidence in an "incident to arrest" cell phone search will be important and the conclusions I have reached are anchored in the facts of this case.

[47] The essence of the Defence position on this application is that once seized following his arrest, Mr. Cater's cell phone should have been off-limits to the police until they had secured a warrant to search it. I disagree. My reasons follow.

The Cursory Search Issue

[48] As a preliminary matter, I want to deal with the issue of a "cursory search" of a cell phone. A cursory search was performed by police in *Hiscoe*, a case involving possession for the purpose of trafficking in cocaine where a cell phone was seized incident to Mr. Hiscoe's arrest. The arresting officer did a search of text messages on the cell phone having concluded, reasonably in Judge Tufts' view, that there must have been some contact between Mr. Hiscoe, whom the police had under surveillance, and his contact for the exchange they witnessed. Judge Tufts found this cursory search and a later noting-down, during the evening after the arrest, of the text messages on the phone, to have been within the scope of a search incident to Mr. Hiscoe's arrest. Judge Tufts described how these two searches were conducted:

> 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…Constable Foley also testified that it is possible that information on cell phones can be deleted remotely. Because of this Constable Foley indicated 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…(*Hiscoe, paragraphs 14 and 15*)

[49] Det/Cst. Pepler testified that on January 15 everything contained in Kyle Cater's cell phone would have been of interest to police. The majority of the evidence the police had against the targets of Operation Intrude had come from the Part VI intercepts, which meant the cellular phones of the arrestees' were also very relevant to the investigation. Det/Cst. Pepler recognized that it would be possible to access the cell phone information without sending it for a forensic analysis but he knew there was the possibility of damaging evidence if the extraction of the information was not done by an expert.

[50] Cpl. Gallagher testified that the best practice standard for preserving and discovering evidence from a cell phone is a forensic examination by a qualified forensic analyst utilizing procedures and software that prevent any corruption or deletion of information. I accept this evidence as authoritative. The police officers handling Mr. Cater's phone knew not to do anything with it other than remove the battery. They did not undertake any "cursory search" and neither did Cpl. Gallagher when he received the phone. This was the correct approach. A legitimate purpose in seizing the phone was to search it for evidence that could be used in the prosecution of Mr. Cater. Given the potential for evidence being lost or degraded, the only appropriate search option was the forensic analysis conducted by Cpl. Gallagher under controlled conditions using the applicable software. In his report, Cpl. Gallagher described the procedures and software he used on the phones forwarded to him from Operation Intrude: "The electronic data stored on the cellular phones was extracted using a combination of the CellBrite and XRY forensic tools as well as the ZRT capture device."

[51] A cursory search of Kyle Cater's cell phone, incident to his arrest, would not have amounted to a violation of his section 8 rights. Courts have approved the cursory search as a way of determining the nature and significance of the information stored in a cell phone. (*Polius, paragraph 41; Hiscoe, paragraphs 80 and 82*) However I accept the evidence I have heard that such a search would have risked the loss of, or damage to, valuable evidence, thereby undermining the valid objectives of the search incident to arrest – the discovery and preservation of evidence and the prevention of its destruction. (*Cloutier v. Langlois, paragraph*

53; Caslake, paragraph 19; Beare, paragraph 33) A significant purpose of searching incident to arrest is for police to be able to secure from the accused person "…items which are very relevant if not conclusive of his involvement in the charges for which he has been arrested." (*R. v. Lim (No. 2), [1990] O.J. No. 3261 (S.C.), paragraph 31*)

[52] I am amply satisfied that police should not conduct cursory searches of cell phones seized incident to arrest where it is not urgent to do so. As a matter of interest, *R. v. Fearon, [2010] O.J. No. 5745 (S.C.)*, in paragraphs 26 and 27 details testimony from a lead investigator about the circumstances where an initial search of a seized cell phone was driven by urgency. That being said, my conclusion that in this case, a cursory search, while constitutional, would not have been advisable, does not address the question of whether the search that was conducted – the forensic analysis I have described – required a search warrant.

Assessing the Need for a Search Warrant

[53] It must be kept in mind that section 8 only protects against unreasonable searches. And furthermore, it must be remembered that the search of Mr. Cater's phone was a search conducted incident to his arrest. Does the forensic search of Mr. Cater's cell phone fall outside of the scope of what can be searched incident to arrest?

The Cell Phone as a Notebook

[54] Kyle Cater's cell phone was, I find, the technological equivalent of an unlocked briefcase containing correspondence (text messages), an address book, (contact information), and photographs (digital images). The record of incoming and outgoing calls found in a cell phone might be found in a briefcase in the form of hard copies of phone bills. A parallel can be drawn with *Fearon* where the privacy rights associated with an "ordinary cell phone" searched incident to arrest were described as follows:

> …the expectation of privacy in the information contained in a cell phone is more akin to what might be disclosed by searching a purse, a wallet, a notebook or briefcase found in the same circumstances. The evidence in this case is that the LG cell phone appears to have had the functions of cell phone operation, text messaging, photographs and contact lists. While

> certainly private, the information stored is not so connected to the dignity of the person that this court should create an exception to the police ability to search for evidence when truly incidental to arrest and carried out in a reasonable manner. (*paragraph 51*)

[55] Even analogizing to a briefcase is not entirely satisfactory on the facts of this case. Kyle Cater's cell phone has not been shown to have the properties of a briefcase in the "contemporary context [where] briefcases often house highly confidential personal and business information [and] can serve, in a practical sense, as portable offices for their owners." (*R. v. Mohamed, [2004] O.J. No. 279 (C.A.), paragraph 25*) With due respect, I do not agree with Trafford, J.'s view in *Polius* that a cell phone is necessarily "the functional equivalent of a locked briefcase in today's technologically sophisticated world." (*paragraph 47*) Had Kyle Cater kept all this same information - written messages, contact information, photographs, and records of phone calls - in a "container" such as a notebook or envelope that he had tucked into the pocket of a jacket, the police would have been entitled to seize the notebook or envelope incident to Mr. Cater's arrest and search through it without a warrant. It is likely they would have photocopied the material retrieved by their search, in order to preserve it. They would not have had to be concerned that the ordinary manner of careful retrieval would do any damage to the evidence. They would not have been required to obtain a warrant in order to search and copy the information seized. (*R. v. Brady, [1996] O.J. No. 2317(S.C.), paragraphs 14 and 16*) The search would have been comparable to "looking inside a logbook, diary, or notebook found in the same circumstances." (*R. v. Giles, [2007] B.C.J. No. 2918 (S.C.), paragraph 56*)

[56] I see a comparable case to this one in the seizure and search of a digital camera by police investigating a suspect for "video voyeurism." (*State of Rhode Island v. Gribble 2007 R.I. Super. LEXIS 149*) In *Gribble*, the Rhode Island Superior Court recognized Mr. Gribble's reasonable expectation of privacy in his digital cameras and memory cards. The police had viewed the images on the cameras at the arrest scene and subsequently downloaded the memory cards onto a police computer, viewing all the images in this format. This was found not to have violated Mr. Gribble's constitutional protections against unreasonable search and seizure. The Court concluded that the search of the defendant's digital cameras was

a valid search incident to his arrest, a recognized exception to the search warrant requirements, because,

> …the officers believed the cameras and memory cards were evidence of defendant's alleged crimes. The officers were aware of a report that defendant may have been taking unlawful pictures. When they found cameras in the bag defendant was carrying at the time of his arrest, it was reasonable that they would believe these were the cameras he allegedly had been using, and that they would contain potential evidence of the alleged crime. Since defendant was carrying the bags when he was arrested, they were clearly within his immediate control.

Adhering to the Best Practice Standard

[57] Det/Cst. Pepler's testimony indicated that the information on the Samsung could have been accessed by police without resorting to Cpl. Gallagher's expertise but the choice was made to follow best practices and ensure that evidence was not damaged or lost. To require, on the facts of this case, a search warrant in order to access the information contained in the phone but no search warrant if the police had just examined the contents at the police station by scrolling through its various options would mean that obtaining a search warrant would turn solely on whether the police chose to follow the best practice standard in dealing with the phone's potential evidence. That does not make sense to me. As I have already observed, not following best practices risks compromising the evidence which the police are entitled to search for incident to an arrest. Compromising the evidence would undermine several of the primary purposes that searching incident to arrest is intended to serve.

[58] In case what I am saying is not clear, I will try to put it simply: requiring a search warrant to search the contents of a phone like Mr. Cater's could have the effect of police searching for information without the safeguards associated with a forensic analysis. This would risk undermining the purposes for searching incident to arrest - the protecting of evidence from destruction, preserving and discovering it.

[59] I have another point I want to make in relation to the issue of following best practices in the retrieval of information from a cell phone. There is nothing in the decisions of the Supreme Court of Canada, such as *Caslake*, that limits police

search powers incident to arrest to discovery of evidence by means of a cursory search only. Cpl. Gallagher's extraction of information from the cell phone was a search incident to Mr. Cater's arrest. The delay to have the search done by an expert does not render the seizure unreasonable. (*Giles, paragraph 57; R. v. Backhouse, [2005] O.J. No. 754 (C.A.), paragraph 91*) I have already discussed why, short of exigent circumstances, cursory searching of a cell phone is to be avoided. I will also note that the loss or corruption of data in a phone, caused by a cursory search, has the potential to compromise not only inculpatory evidence but also exculpatory evidence, and in that regard, could impair an accused's ability to make a full answer and defence.

The Part VI Authorization

[60] It is also relevant to my analysis that Mr. Cater's cell phone was seized in the context of a judicially authorized wiretap investigation. The seizure of cell phones from Operation Intrude targets was directed by the lead investigators who recognized that information on the cell phones would likely be highly relevant in the prosecution of the accused. The phone seized from Kyle Cater was one of the phones intercepted pursuant to the Part VI authorization. Judicial authorization had been obtained to listen in on Mr. Cater's private communications for a sixty day period that included the day he was arrested. I have already determined that the interception did not violate Mr. Cater's section 8 rights. (*R. v. Cater, [2011] N.S.J. No. 626*) It seems illogical to me that the search of a cell phone in these circumstances would require judicial authorization to avoid being an unreasonable search.

Conceptualizing the Search Warrant Application

[61] In assessing the constitutionality of the search of Mr. Cater's cell phone, it is reasonable to ask what would the application for a warrant consist of and what would it achieve? The seizure of Mr. Cater's phone was intimately connected to his lawful arrest. He was the target of an intensive police investigation that had included the obtaining of a Part VI authorization to intercept private communications, including cell phone communications. The police were entitled to search, incident to Mr. Cater's arrest, for evidence that would assist in his prosecution. Awareness of best practice standards led them not to conduct any

cursory search of the phone. The only way to adhere to the best practice standard and search the cell phone was to have a forensic analysis done. Without a cursory search of the phone, the police would have had no information from the phone to bolster an affidavit in support of a search warrant application. To establish the reasonable and probable grounds for the warrant, they would have had to utilize the information they had from the intercepts, the same information that gave them the lawful basis for arresting Mr. Cater and searching him in the first place. The concerns raised in *Polius* about "minimization" of the ambit of information to be searched are simply not applicable in the case of Mr. Cater's Samsung. (*Polius, paragraph 57*) In *Giles*, the Court observed that no "reasonable, workable, or practical conditions" for a search warrant were advanced by Defence counsel, and proceeded to find:

> Defence counsel's general suggestion of minimization terms without concrete workable examples would simply impose an unreasonable burden on investigators in this particular case who have the common law authority to search incidental to a lawful arrest. The reasonable limits on that power have been articulated in cases such as *Caslake*: the search must be truly incidental to the arrest in the sense of being logically connected to it. I find in this case that requirement was met, and additional authority to search was not required. The search was conducted to discover and preserve evidence connected with the arrest. It was not conducted in an abusive manner. (*paragraph 71*)

[62] This passage from *Giles* is applicable to the case before me. I have nothing before me in evidence or submissions to help me understand what a judicial authorization would have accomplished in terms of *Charter*-related protections in this case.

What Would a Judicial Authorization Have Added to Existing Safeguards?

[63] Drilling down into the question of what privacy rights would have been safeguarded by a judicial authorization to search does not produce an answer favourable to the Defence position. The information retrieved forensically from Mr. Cater's Samsung could have been accessed by the same kind of cursory searches that were found to be constitutionally permissible in *Hiscoe*, *Fearon and R. v. Manley, [2011] O.J. No. 642 (C.A.), paragraph 37*. According to Cpl.

Gallagher's testimony, the exception was the date stamps on the digital images – securing that information did require his technical expertise.

[64] I am satisfied that the Crown has established that the forensic analysis - the search - of the Samsung was truly incidental to Mr. Cater's arrest and was conducted reasonably. Those requirements safeguarded the section 8 rights of Mr. Cater. Requiring a search warrant in order to achieve the purposes associated with search incident to arrest would introduce a further layer of authorization that has not previously been part of this common law power. I have not been persuaded that there was any justification for a warrant procedure for the search of the contents of Kyle Cater's Samsung. This is not the kind of search that calls for the special protections that govern the seizure of bodily samples, for example. (see, section 487.05, *Criminal Code*; *Stillman, paragraphs 43, 49*)

[65] The circumstances where judicial authorization has been required to vindicate section 8 rights, for example as were found to exist in *Morelli*, *Little*, and *Jones* cannot be said to apply here.

Conclusion on Section 8 Claim

[66] The search of Mr. Cater's cell phone by forensic analysis in the absence of a warrant did not violate Mr. Cater's section 8 rights. It was a search incidental to his arrest, delayed only by the "best practice standard" decision to have the information accessed by a forensic expert. The search was conducted in accordance with key purposes for a search incident to arrest: discovery and preservation of evidence for use in prosecuting Mr. Cater and prevention of the destruction of the evidence. It was also reasonable for the police to look for evidence related to weapons-trafficking; doing so did not violate Mr. Cater's section 8 rights. (*Nolet, paragraphs 37 and 43*) The search was executed in a wholly reasonable manner, complying with the best practices for accessing the information. Compelling concerns of human dignity were not implicated. (*Stillman, paragraph 39*) I am in agreement with the following comments from *Giles*:

> I do not find persuasive the argument that the use of technology, when searching for particular emails and other data, was such a dramatic and unreasonable invasion of privacy that the search here fell outside the scope

> of a search incidental to the arrest. This search was not an "affront to human dignity" because it was not invasive as is the taking of bodily samples. Nor was it a search of the home, a place which is highly protected. [The search by use of forensic software] did not change the character of the search from one incidental to a lawful arrest for…a very serious offence to which the items seized were logically connected, to an unlawful act by the police…(*paragraph 68*)

Section 24(2)

[67] There is a final issue I will consider. It is whether, if I am wrong about the constitutionality of the search, the cell phone evidence should be excluded from the trial.

[68] The analysis to be conducted under section 24(2) requires consideration of all the circumstances to determine if the admission of the evidence would bring the administration of justice into disrepute. The focus is on maintaining the integrity of, and public confidence in, the justice system. The issue is to be viewed objectively: "…whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute?" (*R. v. Grant, [2009] S.C.J. No. 32, paragraph 68*)

[69] As established by *Grant*, there are three factors in the section 24(2) analysis:

(1) the seriousness of the *Charter*-infringing state conduct;

(2) the impact on the accused's *Charter*-protected interests; and

(3) society's interest in the case being adjudicated on its merits.

[70] Each of these factors must be "weighed in the balance" to reach the ultimate determination of whether the administration of justice would be brought into disrepute by the admission of the evidence. This calculus is "not capable of mathematical precision." (*R. v. Harrison, [2009] S.C.J. No. 34, paragraph 36*)

Seriousness of the Charter Breach

[71] This is not a case of a serious *Charter* breach, were it to be shown that a breach had occurred. Indeed I do not know on what basis the actions of the police

could be criticized in this case. If it was concluded that Mr. Cater's rights were breached, the breach could only be described as inadvertent. Mr. Cater's phone was seized incident to his arrest in the context of a Part VI investigation. Csts. Buell and Moreau and Cpl. Gallagher all acted in good faith as did the Operation Intrude team managers who decided that the arrestees' cell phones should be seized. The officers believed they were acting appropriately according to the law governing search powers incident to arrest and that by seizing the phone and not subjecting it to a cursory search they were ensuring that any available evidence was not compromised. The June 2009 decision in *Polius*, which found in favour of police being required to obtain a warrant to search a seized-on-arrest cell phone, post-dated the seizure of Mr. Cater's phone and its analysis by Cpl. Gallagher. Unlike *Hiscoe*, the police here did not have the *Polius* case to consider. I agree with the Crown that in light of *Giles*, decided on July 31, 2007, obtaining a warrant before Cpl. Gallagher accessed the contents of the phone, would have been an unnecessarily cautious approach.

[72] This is a case where there was no deliberate flouting of *Charter* requirements and neither can it be said that the police acted imprudently. To the contrary, all the police officers involved in the seizure of the phone were careful not to conduct a search of the phone – the frequently referred to cursory search - that might have compromised its contents.

The Impact on Mr. Cater's Charter-Protected Rights

[73] The warrantless search of Mr. Cater's cell phone had a modest impact on his rights. A cursory search of the phone at the time of Mr. Cater's arrest would have discovered precisely what Cpl. Gallagher found with the exception of the metadata. In that respect, the search by Cpl. Gallagher in the absence of a warrant would have to be characterized as a technical breach (*Harrison, paragraphs 22,28*), similar to that referred to in *Nolet*: "Had the RCMP officers continued their post-midnight search incident to arrest they would have been within their rights to do so, and the subject evidence would have been readily discoverable at that time." (*paragraph 54*) As I have already discussed, Mr. Cater cannot claim a high expectation of privacy. As stated in paragraph 78 of *Grant*, "An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of

privacy or that demeans his or her dignity is more serious than one that does not." This search cannot be regarded as a serious affront to Mr. Cater's section 8 rights.

Society's Interest in an Adjudication on the Merits

[74] The evidence in the cell phone, although not dispositive of the Crown's case against Mr. Cater, was identified by Det/Cst. Pepler as valuable to the prosecution of Mr. Cater for weapons possession and weapons trafficking. It connects into evidence obtained from the Part VI investigation that led to Mr. Cater's arrest. Contact information, text messages and digital images of firearms constitute reliable and relevant evidence on the charges laid against him. The truth-seeking function of the criminal trial process is better served by the admission of the contents of the cell phone than by its exclusion. Exclusion of this relevant and reliable evidence would undermine the public's confidence in the trial's fairness, thereby bringing the administration of justice into disrepute. (*Grant, paragraph 81*)

Conclusion on Section 24(2)

[75] I am satisfied that even if it was found that a *Charter* breach had occurred because a warrant was not obtained for Cpl. Gallagher's search of the cell phone, consideration of all the circumstances leads me to the conclusion that the evidence obtained in the search should not be excluded from evidence.

[76] I have of course determined that no *Charter* breach occurred. The search of the Samsung cell phone was a search incident to Mr. Cater's lawful arrest. The contents of the phone as extracted by Cpl. Gallagher, including the metadata, are admissible at Mr. Cater's trial for weapons possession and weapons trafficking.