Lawyers watching as police consider powers in light of *Fearon*

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For Law Times

Against the expectations raised by recent decisions, the majority of the Supreme Court permitted the warrantless search of cellphones in its decision in *R. v. Fearon* on Dec. 11.

Both the majority and dissenting decisions emphasized that a search of a cellphone triggers significant privacy interests, but the majority found that a search "incident to a lawful arrest" doesn't require a warrant under certain conditions.

Sam Goldstein, a criminal lawyer who represented Kevin Fearon, is philosophical about the outcome. "In dealing with issues, the judges have to choose between two equally important objectives: to ensure that citizens are protected from police and that citizens are protected from criminals. Clearly in this decision, they decided they need to be protected from crime more than the police."

The Supreme Court said: "The power to search incident to arrest is extraordinary in that it permits reasonable searches when the police have neither a warrant nor reasonable and probable grounds. That the exercise of this extraordinary power has been considered in general to meet constitutional muster reflects the important law enforcement objectives which are served by searches of people who have been lawfully arrested."

There were many interveners in the case, including the Canadian Civil Liberties Association. Sukanya Pillay, general counsel and executive director of the CCLA, says her organization took the position that searching a cellphone incidental to arrest, absent exigent circumstances, requires a warrant. "Today, individuals who carry a cellphone are carrying their entire digital life with them. The amount of information contained on a cellphone really engages the right to privacy. There is a very big difference between police doing a search down at arrest who find notes or even a pile of papers.

"It is more like finding a house key and making the decision to use the key to search the house without a warrant. You can't equate it with any other physical evidence."

At the same time *Fearon* was under appeal in Canada, the U.S. Supreme Court went the opposite way. In *Riley v. California*, the court found the exception for search incident to arrest doesn't apply to cellphones. "The reasons are twofold," says Goldstein.

"In Canada, we don't have a strong constitutional history, leaving the courts to guard our constitutional rights where the U.S. courts don't need to. The peace, order, and good governance clause has penetrated our legal culture."

Goldstein believes the earlier Supreme Court decisions of *R. v. Spencer* and *R. v. Vu* clearly indicated there would be a warrant requirement in a case like *Fearon*.

"They balked at the last moment because of the timeline intersection: the intersection of state and individual rights right when the crime happened."

Going forward, Goldstein believes it's possible to distinguish the case on that point. "The key feature is the timeline. We can try to undermine and distinguish it. That's the next frontier. For instance, if there is a murder, would the limitations be the same if they get a call about gunshots at a location, police attend at the location and see someone leaving quickly, or arresting someone two or three months after the incident as part of an investigation?"

The court found prompt cellphone searches incident to arrest could "assist police to identify and mitigate risks to public safety; locate firearms or stolen goods; identify accomplices; locate and preserve evidence; prevent suspects from evading or resisting law enforcement; locate the other perpetrators; warn officers of possible impending danger; and follow leads promptly." It emphasized the element of urgency at the time of the offence.

Goldstein expects defence lawyers will try to bolster individual rights by looking at the four conditions laid down by the majority: there's a lawful arrest; the search is incidental to the arrest with a valid law enforcement purpose; police tailor or limit the search to the purpose; and officers take detailed notes on what they've examined and how they searched the phone.

Goldstein notes the minority decision also emphasized the importance of police notes and limitations.

The minority felt warrantless searches should only occur in exigent circumstances, such as when the safety of the officer or the public is at stake, or when a search is necessary to prevent the destruction of evidence. The CCLA agreed with that position. "We believe that upon weighing the state's interest for law enforcement and public safety against the privacy interests, there is a warrant required," says Pillay.

The CCLA will be monitoring the application of the decision on the ground. "The test really puts the decision in the hands of the police," says Pillay. "Weighing and balancing must occur on a case-by-case basis as to whether the law enforcement interests outweigh a potentially significant intrusion of privacy. That is an onerous burden and very concerning to us."

Surprisingly, Goldstein considers the decision to be an advancement of privacy rights. "The irony of the decision is that if they wanted to advance the interests of crime, they would have required a warrant. Searches on warrants are constantly issued, and once they are, they are very hard to overturn."

He recognizes this is a paradoxical notion. "With a warrant, a defence lawyer is left with very little to argue. This decision opens the case for limitations and opens up the evidence you can exclude." **LT**