Supreme Court Of Canada Creates New Test For Police To Search Cell Phones Without A Warrant

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Regina v. Fearon provides to the educators legal duty to maintain order

On December 11, 2014, the Supreme Court of Canada released *R. v. Fearon*, a decision that addresses when police can search a cell phone in the course of a criminal arrest, without a warrant.1 Although Fearon does not directly address cell phone searches in schools, it provides significant insight into how educators should balance their legal duty to maintain proper order and discipline with the privacy interests of students.

Issue Before the Supreme Court

In Fearon, the Supreme Court considered whether the existing power for police to search pursuant to a lawful arrest extends to cell phone searches. Police were investigating the armed robbery of a jeweler by two armed men. When Mr. Fearon was arrested and given the usual pat-down search, police found a cell phone. Police searched his cell phone at that time, without a warrant, and found a draft text message referring to jewelry containing the words “we did it” and a photo of a handgun. That handgun was later found in the getaway car, and confirmed as the handgun from the robbery.

At his criminal trial for armed robbery, Mr. Fearon argued the evidence from the cell phone search was inadmissible because police did not have a warrant. Mr. Fearon challenged the cell phone search under section 8 of the *Canadian Charter of Rights and Freedoms*, which provides as follows2 :

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

The trial judge concluded that the photos and text messages were admissible, and Mr. Fearon was convicted. Mr. Fearon’s appeal to the Ontario Court of Appeal was dismissed. His appeal to
the Supreme Court of Canada was then heard, resulting in the Supreme Court’s new test for cell phone searches.

The Supreme Court in Fearon was not unanimous in its decision. Four justices, in a majority decision written by Justice Cromwell, created a new test to permit cell phone searches without a warrant. The minority decision, written by Justice Karakatsanis, argued in favour of more restrictive conditions for cell phone searches without a warrant.

On the facts of Mr. Fearon's case, the majority of the Supreme Court decided that the cell phone search did not comply with the new test. However, the Supreme Court further concluded that the police acted reasonably and it was appropriate for public policy reasons to admit the evidence. His conviction was upheld.

New Test For Cell Phone Search

The existing common law framework for lawful search and seizure by police provides that a search incident to arrest must be:

1. founded on a lawful arrest;
2. be truly incidental to that arrest;
3. be conducted reasonably.3

The Supreme Court focused its modifications to the existing search framework on whether a cell phone search is "truly incidental" to that arrest. The Supreme Court was wary of a search that was not linked to a valid law enforcement objective; such searches could result in "routine browsing through a cell phone in an unfocussed way."4

After Fearon, the new test for lawful search and seizure of a cell phone by police is:

1. The arrest was lawful;
2. The search is truly incidental to the arrest in that the police have a reason based on a valid law enforcement purpose to conduct the search, and that reason is objectively reasonable. The valid law enforcement purposes in this context are:
    1. Protecting the police, the accused, or the public;
    2. Preserving evidence; or
    3. Discovering evidence, including locating additional suspects, in situations in which the investigation will be stymied or significantly hampered absent the ability to promptly search the cell phone incident to arrest.
3. The nature and the extent of the search are tailored to the purpose of the search; and
4. The police take detailed notes of what they have examined on the device and how it was searched.5

The Supreme Court has limited the circumstances in which a cell phone can be searched without a warrant in three ways. The limitations can be summarized as follows:

1. A valid law enforcement purpose is one where safety or evidence are at risk. Minor offences will not suffice.
2. If an investigation will not be stymied or hampered by not searching the cell phone immediately, police should wait for a warrant and act on the evidence at that time. Police will therefore need to consider and document why prompt access was critical to the investigation and law enforcement purpose.

3. The search must be tailored to the investigation. Random or blanket searches may not satisfy the new test.

Significance of the Case to Educators

Educators have a legal duty to maintain proper order and discipline in the school. This legal duty is established by statutes such as the Ontario *Education Act.*6 Investigation of alleged student misconduct increasingly involves searching for and reviewing evidence on student cell phones and similar devices.

Canadian courts have not yet directly considered cell phone searches in schools. The Supreme Court's decision in *R. v. M(MR*) 7 remains the leading case on school search and seizure. That case arose in the context of a vice-principal's search of a student's pant leg and sock for marijuana. The Supreme Court in *MRM* recognized that students have a diminished expectation of privacy:

Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may
sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished.8

The Supreme Court in MRM set a standard for searches by school administrators. Similar to its decision in Fearon, the Supreme Court recognized the need to "respond quickly and effectively to problems" and that requiring a warrant would "clearly be impractical and unworkable in the school environment."9 A search may be undertaken if there are reasonable grounds to believe a school rule has been, or is being violated, and that evidence of the violation will be found on the person searched.10

The Supreme Court's decision in Fearon reiterates many of these same principles from *MRM*; where MRM requires a "reasonable grounds" for a search, Fearon requires a "valid objective". Fearon provides specific guidance on the extent to which a cell phone can be searched in connection with a valid objective. The search is not meant to be an opportunity to view the entire contents of a cell phone, or to give an investigator unlimited access to social media and programs connected to the phone.

In light of MRM and Fearon, educators should consider three points during an investigation that involves a cell phone search:

1. Valid Objective for the Search. Educators should document how the cell phone search is incidental to a valid objective. Many examples of "valid objectives" are listed in section 310(1) of the *Education Act*, including possessing a weapon, committing assault, or trafficking in illegal drugs.11 Further, educators should consider whether an investigation would be "stymied" if the cell phone could not be immediately searched. Preservation of evidence that could identify and prevent harm to the school community would be an example of circumstances when a cell phone should be searched. School administrators may be required to delay the school investigation until the police investigation has concluded.

2. Search Must be Tailored to the Objective. The Supreme Court has not sanctioned random or blanket searches of the entire contents of a cell phone. For example, if a student's cell phone has been seized to decide whether it contains a video of an assault, the cell phone search should be limited to videos and reference to assault.
3. Make "careful records". The Supreme Court stated that records should "generally include the applications searched, the extent of the search, the time of the search, its purpose and its duration."12 Educators are already accustomed to making careful records in the course of investigating serious incidents in the school community. Such records should now include details of any cell phone search, and can be later relied upon to prove that a search was "tailored" to a "valid objective".

1 R. v. Fearon, 2014 SCC 77 [Fearon].

2 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

3 Fearon, paragraph 27.

4 Fearon, paragraph 57.

5 Fearon, paragraph 83.

6 RSO 1990, c E.2 at s. 265(1)(a) [Education Act].

7 R. v. M. (M.R.), [1998] 3 S.C.R. 393 [MRM] at paragraph 33.

8 MRM at paragraph 33.

9 MRM at paragraph 45.

10 MRM at paragraph 48.

11 Education Act, section 310(1).

12 Fearon, paragraph 82.

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