I. INTRODUCTION

Cell phones and other similar devices can be the subject of a crime, the dispassionate recorder of a crime and the instrumentality of a crime all in one. Police blotters and news headlines are replete with cases of suspects using their cell phones to record themselves at crime scenes or while committing criminal acts, while possessing stolen or contraband property, to display the proceeds of crime, to communicate with others about their crimes or as the instrumentality of crime itself. In one recent case the accused and his girlfriend used their cell phone to photograph themselves with the mutilated body of their victim, whom they stabbed more than 80 times, and then later to record themselves washing their bloody clothing in the bath.

Cell phones are not the only devices used for these purposes. MP3 players, iPods, Palms and other digital devices are also valued by criminals for their large storage capacities and innocuous appearance as a means to conceal and transport information without detection. A 2002 New York Times article described this phenomenon in detail:

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2 See e.g. “Parolee Accused of Sexually Abusing Teens” KOLOTV (15 January 2010), online: KOLOTV <http://www.kolotv.com/news/headlines/81792132.html>. The accused, Michael Cockrell, videotaped himself with his cell phone having sex with two teenage girls he had plied with alcohol.

3 See e.g. “Camera phone pictures give suspect up” Press of Atlantic City (26 February 2005), online: Press of Atlantic City <http://www.pressofatlanticcity.com/news/atlantic/022605ring_f26.cfm>. A cell phone picture of the suspect holding an AK-47 was used to show knowledge and possession relative to shooting using the same weapon a few months earlier.

4 See e.g. “Baby photo helps jail fraudster” BBC News (22 July 2008), online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/england/lumber/7518937.stm>. The accused, Abu Bunu, was convicted of bank fraud and jailed for five years after a photo of his baby surrounded by piles of money found on his mobile phone was used as evidence against him at trial.


Drug dealers use contact lists to track buyers and suppliers, investigators say, while drug makers, like those who run clandestine methamphetamine laboratories, use memos to keep recipes and ingredient lists. Pimps use the devices to keep track of clients, revenues and expenses. Smugglers and money launderers track their transactions on spreadsheets. Stalkers have been known to store their fantasies and victims' schedules on [them]. Even spies have used them. Corporate spies have downloaded sensitive documents to their hand-helds and quietly walked off with them. Robert P. Hanssen, the F.B.I. agent who was sentenced to life in prison in May for selling secrets to Moscow, used his Palm III to keep track of his schedule to pass information to his Russian contacts.\(^8\)

The amount of information that is collected and stored on these devices has grown exponentially with advances in technology, functionality and storage capability. As such, the discovery of a cell phone or other storage device on a suspect may produce a treasure trove of material useful in the investigation and prosecution of crimes as direct, circumstantial or collateral evidence and/or as a means to identify witnesses, associates or co-conspirators. Even innocuous details contained in a device can provide useful evidence.\(^9\)

However, because electronic devices are capable of storing vast amounts of private information—from letters, journals, voice and text messages, e-mail, video, pictures, a record of incoming and outgoing calls, to address books, calendars and web browsing histories—today's digital devices may contain private information that is quantitatively and qualitatively different than has previously been the case. Nevertheless, issues of privacy are generally much more fluid in today's web-based digital world than they used to be.\(^10\) In fact, when a device is seized incident to arrest, issues of privacy are subordinated to the lawful restraint of the suspect's liberty and neither a warrant nor independent reasonable grounds are required to search the device.

While warrantless searches are presumptively unreasonable, searches conducted incident to arrest are an exception to that rule. The question is: to what extent can the police probe a device seized incident to arrest for evidence? Can they scroll through the phone directory as they might flip through an address book or wallet looking for their identification? Can they look at pictures, videos and cached Internet searches as they might look at family pictures and credit card receipts found in a wallet? Can they read incoming and outgoing e-mails as they might read a folded letter found tucked into the back of an address book or wallet? Can they seize the phone and send it for forensic analysis as they might send a suspect's shirt, seized after a murder, for DNA analysis or the sole of a suspect's shoe for its imprint to compare to a recent break and enter? Furthermore, is a search warrant even necessary where the accused has used the device to facilitate a crime in the first place and it is therefore subject to forfeiture as offence related property?

The goal of this paper is to increase awareness of this type of digital evidence and to canvass the rapidly developing area of the law regarding the search of such devices incident to arrest. As there is little jurisprudence on the subject in Canada, this paper will review the law surrounding searches incident to arrest generally, as well as surveying the growing body of case law from the United States that suggests the examination of such items may be analogous to searches of other information repositories such as wallets, backpacks, purses and cameras. Although the analogy between digital devices and other information repositories may be imperfect, the powerful capabilities of these devices to record and store information means that the power to search them incident to arrest is becoming more important for the investigation, detection and prevention of crime.

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\(^9\) See e.g. “Scott Peterson pleads not guilty to killing wife, unborn child” CNN (22 April 2003), online: CNN <http://www.cnn.com/2003/LAW/04/21/laci.peterson/index.html> where tidal charts and data relative to the bay in which his wife's body was discovered were discovered by police. See also Declan McCullagh, “Police Blotter: Google Searches Lead to Murder Conviction” CNET News (27 January 2009), online: CNET News <http://news.cnet.com/8301-13578_3-10150669-38.html?tag=mc0l> in which a number of cases are chronicled where a suspect's web browsing history provided circumstantial evidence. As most Smartphones today have web browsing capabilities and access to such programs as Google Maps or Google Earth, locating such searches on a handheld device today would not be unforeseeable. Also consider the amount of information people post about themselves on Social Networking sites, especially www.mocospace.com, which was specifically designed for use by cell phones to find friends, send instant messages, chat and send photos/videos, etc.

\(^10\) Mathew Ingram, “On social sites, your privacy has to be flexible” The Globe and Mail (16 July 2009). See also Office of the Privacy Commissioner of Canada, Focus Testing Privacy Issues and Potential Risks of Social Networking Sites, (Research Report) (Toronto: Decima Research, 2009). While these papers deal with social networking sites, they are endemic of this generation's willingness to treat privacy as a secondary concern to the free flow and exchange of information. In fact, in some cases criminals have posted details of their offences, including videos of themselves committing criminal acts, on these sites and personal blogs.
II. SEARCH INCIDENT TO ARREST

A. Setting the Stage

The power of search incident to arrest is well entrenched in the common law. As noted by Justice L’Heureux-Dubé for a unanimous Supreme Court of Canada in Cloutier v. Langlois, the historical roots of the power to search incident to arrest date back nearly 200 years to R. v. Barnett, where it was implied that police officers may seize property from an arrested person if it is connected with the charge against him.11

Justice L’Heureux-Dubé went on to reference L. H. Leigh on this point.12 According to Leigh, a constable can search a person on arrest and take into custody articles in his possession which the constable believes may:

1. be connected with the offence charged,
2. be used in evidence against him,
3. give a clue to the commission of the crime,
4. aid in the identification of the criminal, or
5. locate any weapon or implement which could enable the prisoner to commit an act of violence or effect his escape.13

It is clear from the decision in Cloutier that the existence of reasonable grounds was not a prerequisite to searching a lawfully arrested person at common law in England. As noted by Justice L’Heureux-Dubé:

the existence of reasonable grounds is not a prerequisite to the existence of a police power to search . . . [while] the British courts did not impose reasonable grounds as a prerequisite to the power to search a personal lawfully arrested, neither have they gone so far as to recognize a power to search as a simple corollary of arrest. The Canadian courts on the other hand do not seem to have hesitated in adopting this latter approach.14

While section 8 of the Charter of Rights15 regarding unreasonable searches was not invoked by either party in Cloutier, subsequent Supreme Court of Canada jurisprudence involving section 8 has continued to maintain, subject only to strip searches, that reasonable grounds are not required to search a suspect incident to arrest. For example, in R. v. Caslake Chief Justice Lamer stated for the majority:

To be clear, this is not a standard of reasonable and probable grounds . . . Here, the only requirement is that there be some reasonable basis for doing what the police officer did . . . The police have considerable leeway in the circumstances of an arrest which they do not have in other situations.16

Even Justice Bastarache for the minority stated that “the existence of reasonable grounds is precisely not a prerequisite to the existence of a police power to search incidentally to an arrest.”17

The power to search incident to arrest in the United States is also well rooted in legal tradition dating back more than 150 years. In fact, when the United States Supreme Court first considered the search incident to arrest power in U.S. v. Weeks, it also cited R. v. Barnett with approval.18

In tracing the history of the doctrine in U.S. v. Robinson, the United States Supreme Court stated:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the

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12 Ibid. at para. 28.
13 L.H. Leigh, Police Powers in England and Wales (London: Butterworth, 1975) at 50 [emphasis added]. Other cases have discussed Leigh’s work and the application of an ancillary powers doctrine that would enable the police to perform such reasonable acts as are necessary for the due execution of their duties.
14 Cloutier, supra note 11 at para. 49 [emphasis added].
17 Ibid. at para. 49 [emphasis added].
18 232 U.S. 383 (1914).
person is not only an exception to the warrant requirement under the Fourth Amendment, but is also a "reasonable" search under that Amendment. 19

Shortly after Robinson, the Court had to consider whether clothing seized from an accused after being secured in custody could later be examined and subjected to forensic analysis without warrant. The Court affirmed that property taken into custody upon arrest may be later subjected to laboratory analysis and the test results admitted at trial. 20

The principles set out in Robinson were later expanded to include objects no longer accessible by a defendant, but in the exclusive control of the arresting officers. For example, in New York v. Belton the court held that a container in the exclusive control of the police—but previously seized from the accused’s car—could be searched incident to arrest:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. 21

Similarly, in R. v. Copan the B.C. Court of Appeal also held that the police may open and examine the contents of a container seized from an accused incident to arrest. In admitting the evidence found in a sealed envelope (money from a robbery) the Court said:

The issue is one of control and whether it can be said the appellant had a reasonable expectation of privacy. The trial judge concluded the appellant had no control over these articles and that leads to the conclusion that he could not have had a reasonable expectation of privacy. I agree with the conclusion of the trial judge on this issue. With respect, I do not see how it could be said on these facts that the appellant had a reasonable expectation of privacy, the envelope and its contents being properly (search and seizure on arrest) in control of the police.

It is a significant fact here that it was open to the police to look closely at the property seized on arrest and had they done so they would have seen the marked five dollar bill, the ten dollar bill and the bag of coins. 23

Subsequent U.S. cases have held that an officer may search the contents of a container found on or near the arrestee as a search incident to arrest. However, where the closed container (e.g. a 200-pound foot locker) is "not immediately associated with the person of the arrestee to their exclusive control", it has been held that it could not be searched incident to arrest. 24

More recently, in Arizona v. Gant, the United States Supreme Court summed up the authorities regarding the power to search the contents of a vehicle incident to arrest, holding that:

1. The passenger compartment of a vehicle may be searched incident to arrest where the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or,

2. Where the arrestee can no longer access the vehicle’s passenger compartment, a search incident to arrest will be permitted “when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” 25

Although no computer cases have yet applied Arizona v. Gant, its reasoning suggests that once an accused is secured and no longer able to access the device, it can only be searched where the officer believes that evidence of the crime may be found in it. However, earlier cases have held that the search of cell phones found inside vehicles of

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20 U.S. v. Edwards, 415 U.S. 800 (1974) [Edwards]. See also State v. Olis, 993 S.W.2d 103 (Tex. Ct. Crim. App. 1999) regarding shoes and clothing taken from the accused and tested by the police against the victim’s blood without a warrant. See also State v. Steen, 536 S.E.2d 1 (N.C. S.C. 2000), cert. denied, 531 U.S. 1167 (2001) in which the defendant’s clothing was seized pursuant to a lawful arrest and examined six days for evidence of an unrelated matter. At 241 the court stated, “It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination.”
23 Ibid. at paras. 7-8. See also R. v. Abdo, 2009 ABCA 340, 464 A.R. 147 in which the Alberta Court of Appeal upheld the search of a Skittles container found on an accused arrested for impaired driving.
24 U.S. v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 at 2485 (1977) [emphasis added].
a lawfully arrested occupant could be justified incident to arrest just like the search of any other closed container found in a vehicle.\textsuperscript{26}

Nevertheless, in Canada the law is not so restrictive. For example, the “reach and grab” rule articulated in the first part of Arizona v. Gant has been dismissed in Canada. As noted by Justice Doherty (as he then was) in R. v. Lim (No. 2):

With the greatest of respect, I do not find the American view an attractive one. It has spawned a number of exceptions or qualifications (e.g., the "plain view" doctrine and the "protective sweep" rule), all of which have led to Byzantine complexity and apparently innumerable factual distinctions. More important, the American case law, in my opinion, operates under an unduly restrictive view of the legitimate police purposes attendant upon the arrest of a person . . . In my view, in Canada, the justification for a warrantless search as an incident of arrest goes beyond the preservation of evidence from destruction at the hands of the arrested person to include the prompt and effective discovery and preservation of evidence relevant to the guilt or innocence of the arrested person. The American position also fails to give sufficient weight to the reduced legitimate expectation of privacy which must accompany any arrest.\textsuperscript{27}

More recently, in R. v. Tontarelli,\textsuperscript{28} a unanimous New Brunswick Court of Appeal upheld the warrantless search of an accused’s vehicle incident to arrest, including the contents of a duffle bag found in the trunk, even after the accused had been taken into custody. Quoting from Caslake the court held that “the existence of reasonable and probable grounds is precisely not a prerequisite to the existence of a police power to search incidentally to an arrest.”\textsuperscript{29} Moreover, “the only requirement is that there be some reasonable basis for doing what the officer did.”\textsuperscript{30}

Furthermore, in Caslake the Supreme Court noted that the authority for the search does not necessarily 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. Even delay and distance do not automatically preclude a search from being incidental to arrest, so long as there is a proper explanation. The Court further held that there are four bases upon which a valid search incidental to arrest may occur:

1. to protect the police;
2. to protect the evidence;
3. to discover the evidence; or
4. some other valid purpose.\textsuperscript{31}

Although “some other valid purpose” is not defined, it could include such things as “clues to the commission of the crime” or to “aid in the identification of the criminal” as noted by L.H. Leigh.\textsuperscript{32} For this reason it is a much broader exception than is found in U.S. authorities. However, as noted by Doherty J.A. in R. v. Belnavis, the power to search incident to arrest does not extend to searches undertaken for purposes which have no connection to the reason for the arrest.\textsuperscript{33}

\textsuperscript{27} R. v. Lim (No. 2), [1990] 1 C.R.R. (2d) 136, O.J. No. 3261, (Ct. J. (Gen. Div.)) (QL) at paras. 39, 43-44 [emphasis added].
\textsuperscript{28} R. v. Tontarelli, 2009 NBCA 52, 348 N.B.R. (2d) 41.
\textsuperscript{29} Ibid. at para. 44.
\textsuperscript{31} Caslake, supra note 16 at para. 25.
\textsuperscript{32} Leigh, supra note 13.
\textsuperscript{33} R. v. Belnavis (1996), 29 O.R. (3d) 321 (Ont. C.A.), aff’d on other grounds [1997] 3 S.C.R 341 [Belnavis]. Also see Caslake, supra note 16 at para. 17 where Chief Justice Lamer subsequently emphasized that “the search is only justifiable if the purpose of the search is related to the purpose of the arrest.”
While the foundations for Canadian and American jurisprudence on search incident to arrest are based on English common law, those rules have since been codified in England. As noted by the majority in *R. v. Golden*, such statutory regimes can also offer some guidance to Canadian courts.34

For example, in *Golden* the Supreme Court considered section 32(2) of the *Police and Criminal Evidence Act 1984* (U.K.), which codified the common law with respect to police searches in England. Pursuant to this section an officer may search an individual who has been arrested for anything:

a) which he might use to assist him to escape from lawful custody; or which might be evidence relating to an offence; and

b) if the offence for which he has been arrested is an indictable, to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence.35

Section 32(9) further authorizes that a constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing:

a) that he might use it to assist him to escape from lawful custody; or

b) that it is evidence of an offence or has been obtained in consequence of the commission of an offence.36

Furthermore, sections 53 and 55 of the *Police and Criminal Evidence Act 1984* abolished the common law right to conduct intimate searches (i.e. strip searches) unless they are approved by an officer of at least the rank of Inspector. Even an electronic device seized incident to arrest cannot be “interrogated” (i.e. subjected to forensic analysis in order to download stored communications, pictures, videos, etc.) without warrant unless the offence is serious and such interference has been authorized by a ranking officer pursuant to section 93 of the *Police Act*, 1997.37

Recently, however, the Association of Chief Police Officers of England, Wales and Northern Ireland (ACPO) issued practice guidelines regarding the recovery of digital based evidence. In those guidelines ACPO recommended that mobile phones should not be searched by untrained personnel due to the potential loss or destruction of data. For all digital based evidence ACPO recommended the following principles be adhered to:

Principle 1: The data held on an exhibit must not be changed.

Principle 2: Any person accessing the exhibit must be competent to do so and explain the relevance and implications of their actions.

Principle 3: A record of all processes applied to an exhibit should be kept. This record must be repeatable by an independent third party.

Principle 4: The person in charge of the investigation has the responsibility for ensuring that the law and these principles are adhered to.38

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34 2001 SCC 83, 3 S.C.R. 679 at para. 101. However, the minority stated at para. 8, that “[a]lthough foreign legislation can be useful as a source of criteria to determine the reasonableness of a search, I think it is clearly excessive to adopt foreign legislation to reinvent the common law rule [of search incident to arrest] in Canada” [*Golden*].

35 *Police and Criminal Evidence Act 1984* (U.K.) 1984, c. 60, s. 32(2).

36 *Ibid.*, s. 32(9).

37 1997, c. 50. A serious offence is one punishable by three or more years in prison, involves violence or substantial financial gain, or which involves a criminal organization or terrorist threat.

While ACPO did not mandate getting search warrants for such devices, they did stress the importance of a properly conducted forensic analysis by trained personnel. Furthermore, searches of electronic devices in the field were to be discouraged unless exigent circumstances dictated otherwise. This is consistent with sending other types of evidence, such as DNA, trace evidence, tool marks and ballistics, away for forensic analysis by expert technicians and to avoid contamination issues.

**B. Forensic Examination**

The foregoing authorities serve as a solid foundation for the power of police to search an electronic device incident to arrest and without warrant. For example, an experienced investigator may know that such devices can often be the recorder or instrumentality of certain types of crimes and will contain direct or circumstantial evidence of that or other offences.

To date there have only been a handful of cases reported in Canada where the lawfulness of data extracted from a cell phone seized incident to arrest has been at issue. In one of those cases, *R. v. Giles*, the B.C. Supreme Court found that the memory and contents of a BlackBerry seized incident to arrest may be searched without warrant and without concern for the time lapse between the seizure of the device and the access to its contents.

Like the clothing in *U.S. v. Edwards*, in this case, the court held:

> [O]nce an item is seized for use in a criminal investigation, the police are entitled to subject it to technical analysis to determine its evidentiary significance. This often requires sending the item “off-site” to qualified experts. Neither the time nor the distance between the arrest and the analysis meant that the search of the BlackBerry fell outside the scope of the common law power to search incidental to this lawful arrest.

The court further analogized that such searches are akin to looking inside a logbook, diary, notebook or purse found in the same circumstances, and that the BlackBerry device was meaningless without its contents. Moreover, the court emphasized that the search of the BlackBerry was not unreasonably invasive, stating:

> I do not find persuasive the argument that the use of technology, when searching for particular e-mails and other data [e.g. "score sheets", telephone numbers, e-mail addresses, memos, calendar information, saved digital communications, PIN numbers, bank account numbers and passwords], 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. It was a search of a hand-held computer by use of BlackBerry software.

In reaching its decision, the court relied in part on the ruling of Justice Dunn in *R. v. Lefave*, where the police searched the accused’s apartment and arrested him after he threatened, on an Internet chat site, to rape his seven-year-old daughter and then kill himself. Incident to his arrest the police seized his laptop computer and sent it for forensic analysis to a Technical Crimes Unit. In a subsequent trial for possession of child pornography found on the computer, Justice Dunn found that the laptop was seized incidental to a lawful arrest and that the “[t]he examination of the data in the computer was a reasonable procedure to determine if there was any evidence on it to connect the accused with the crime in question.” Accordingly, there was no violation of section 8 of the *Charter*.

The decisions in *Giles* and *Lefave* were recently considered by Justice Trafford (albeit without comment or analysis) in *R. v. Polius*. In that case it was held that the inspection of a cell phone on arrest breached the accused’s section 8 rights. While Justice Trafford conceded that the primary investigator (Detective Sergeant Burks) did have,
objectively, a reasonable basis for his belief that the accused’s cell phone may have contained evidence of a murder, and that he had met the threshold required to seize the phone incident to arrest and subsequently have it examined, Detective Sergeant Burks did not arrest the accused. The arrest was carried out by Detective Correia (albeit at Burks’ direction). 50

Although Burks instructed Correia to arrest the accused on a charge of counseling to commit an indictable offence, he did not instruct him to seize any cell phones he may have had in his possession incident to arrest and he did not summarize the information he had collected about the alleged murder to facilitate a lawful seizure of the device. Consequently, Justice Trafford held that Detective Correia did not have a reasonable basis for his belief that the cell phone may have been evidence of the murder when he arrested the accused. Justice Trafford further declined to impute Detective Correia with the knowledge of Detective Sergeant Burks. 51

As Justice Trafford found that the evidence from the phone was nevertheless admissible under section 24(2) of the Charter, the ruling is unlikely to be appealed by the Crown. However, it is worth noting that Justice Trafford would have likely found that the search of the phone incident to arrest did not invoke section 8 of the Charter if it had been carried out by Detective Sergeant Burks himself or if he had summarized for Detective Correia the details of the case, and the initial search of the phone was cursory in nature to determine if there was a reasonable basis to believe it may be evidence of the offence. Nevertheless, subject to exigent circumstances, Justice Trafford felt a full forensic analysis could not be conducted incident to arrest without a warrant. 52

Considering reasonable grounds are the prerequisite for a valid arrest, it will be rare that the arresting officer does not have some basic understanding of the case or the reasons for the arrest. Furthermore, a full forensic analysis is already conducted on other items lawfully seized incident to arrest and without warrant (such as DNA analysis, GSR testing and footwear impressions); therefore, it is unlikely the courts will carve out a special niche just for handheld devices. While a number of privacy concerns are raised, those concerns are secondary to the lawful restraint of the suspect’s liberty interests as noted in the cases below.

As Justice Trafford did not cite any foreign jurisprudence in his analysis it is possible that he may have come to a different conclusion had he canvassed the growing case law on the subject in the United States. However, as there appears to be a split between the B.C. Supreme Court and the Ontario Superior Court of Justice on this issue, further review of the jurisprudence in the United States may be helpful as a guide for Canadian courts.

II. EXAMINATION OF PERSONAL PROPERTY ON ARREST

A. Wallets, Notebooks and Diaries

In Giles the court analogized that searches of handheld devices such as a Blackberry were no different than looking inside a logbook, diary, notebook or purse. While the court in Giles did not cite any cases to support this proposition, it is clear that such “information repositories” are analogous to handheld devices and may be searched incident to arrest. 53

In fact, U.S. v. Cote 54 recently came to the same conclusion, holding that the contents of a cellular phone, including its call logs, phone book, and wireless web inbox were properly searched incident to a valid arrest. The court held that searches of items such as wallets and address books, which it considered analogous to a cellular phone, have long been held valid when made incident to an arrest. 55

Two of the cases cited by the court in Cote were U.S. v. Molinaro 56 and U.S. v. Rodriguez. 57 In Molinaro a DEA agent seized the accused’s wallet incident to arrest, spread its contents out on the trunk of a car, and discovered slips

50 Ibid. at para. 37. See also R. v. Savory, (15 October 2009), unreported ruling of Justice Lederer (Ont. Sup. Ct.).
51 Ibid. at paras. 38-39.
52 Ibid. at para. 34.
53 Giles, supra note 39 at para. 56.
54 2005 WL 1323343 (N.D.Ill., 2005), aff’d on other grounds 504 F.3d 682 (7th Cir. 2007), cert. denied, 128 S. Ct. 2519 (2008) [Cote].
55 Ibid. at 6.
56 U.S. v. Molinaro, 877 F.2d 1341 (7th Cir. 1989) [Molinaro].
57 U.S. v. Rodriguez, 995 F.2d 776 (7th Cir. 1993), cert. denied, 510 U.S. 1029 at 778 [Rodriguez].
of paper containing the name and phone numbers of the accused's co-conspirators. The court rejected the accused's contention that this was not a valid search incident to arrest, noting that the Supreme Court had upheld warrantless searches of an arrestee's person, including personal property contained in his pockets, as a search incident to arrest, and that numerous courts had upheld the search of a defendant's wallet under the search incident to arrest exception to the warrant requirement.58

In Rodriguez, officers seized the accused's wallet and personal address book following his arrest and photocopied each of its pages, in the process learning that the book contained the phone number of a co-conspirator. The court upheld the search as valid incident to arrest, and upheld the photocopying of the contents of the book as a permissible attempt to preserve evidence.59 The accused tried to argue that the photocopying of the contents of the address book did not occur at the scene of the arrest; however, quoting Edwards,60 the court refused to invalidate the search because:

[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention . . . The courts of appeals have followed this same rule, holding that both the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted into evidence.61

More recently, in U.S. v. Vaneenwyk,62 the New York District Court held that the search and photocopying of a day planner was justified incident to arrest. Citing Rodriguez, the court held that the accused had no more reasonable expectation of privacy in the day planner at the police station following his arrest than he did at the time of its initial seizure by the officers when they searched the inside of his truck. The court stated:

The fact that the officers later photocopied the day planner is of no moment. Having already legitimately looked through the contents of the book, the officers' copying of it simply preserved what they had already lawfully seen.63

Furthermore, in U.S. v. Simpson,64 the Tenth Circuit Court of Appeals held that evidence obtained from a wallet searched incident to arrest, did not have to be in relation to the crime being searched for. The court held that, as a general rule, a search incident to a lawful arrest may be made of all portable personal effects in the immediate possession of the person arrested. The discovery during a search of totally unrelated objects which provide grounds for prosecution of a crime different than that which the accused was arrested for does not render the search invalid. One of the justifications advanced by the court for searching the wallet's contents was that cards and addresses may disclose names of those who may have conspired with the person searched in the commission of the crime charged.65

Mr. Justice Ritter of the Alberta Court of Appeal recently took a similar position in R. v. Chubak, where he stated:

When police search a person as part of a search incident to arrest, they are not precluded from looking at, and taking into their control and custody, anything they find on the arrested person, so long as the search is for a reason related to the arrest. For example, police may find a piece of paper on the arrested person. That piece of paper may be totally innocuous, or it may disclose that the arrested person just purchased a knife or firearm which has not yet surfaced in the search. It may also disclose that the arrested person was involved in a crime unrelated to the search. If it does, and even if the police were beginning to suspect that the arrested person was involved in such a crime, the piece of paper is admissible in evidence as a fruit of a search incident to arrest.66

More than 15 years earlier, in U.S. v. Andrews, the Fifth Circuit also took a similar position.67 In that case agents from the Drug Enforcement Agency (DEA) tracked a tugboat until it docked in Pascagoula, Mississippi.

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58 Supra, note 56 at 1346-47.
59 Supra, note 57 at 778.
60 Supra note 20.
61 Rodriguez, supra note 57 at 778.
63 Ibid. at para. 17.
64 453 F.2d 1028 (10th Cir.), cert. denied, 408 U.S. 925 (1972).
Andrews was observed waiting for the boat when it docked and surveillance was subsequently conducted on him. Three days later Andrews was observed driving erratically and he was arrested for impaired driving by the local police. A search incident to arrest located a red spiral notebook that contained diagrams inside.

The officer subsequently turned the notebook over to the DEA, who determined that one of the diagrams included the names and abbreviations of the countries Colombia, Peru, Argentina, Venezuela, and Panama. These names and abbreviations were connected to each other, and to the names of locations in Georgia and Florida, by a series of lines and arrows. At trial the government argued that the diagram depicted a marijuana distribution and importation network.68

Furthermore, one day after Andrews' arrest for impaired driving, a search conducted inside the fuel tanks of the tugboat found a hidden airtight compartment containing over four thousand pounds of marijuana, with an estimated street value of $3.6 million. One of the other diagrams in Andrews' spiral notebook depicted the fuel tanks in the tugboat and the location of the marijuana in the hidden compartment.

The issue at trial was the search of the notebook and its delivery to and subsequent use by the DEA. The seizing officer did not contend that the notebook was either contraband or the instrumentality of crime; rather, he turned it over to the DEA because he believed that the diagrams might be relevant. The defence argued that when the officer turned the notebook over to federal officials, "what began as an inventory search . . . became an excuse for 'investigatory rummaging' on behalf of Customs and DEA."69 However, the court found the argument to be without merit, holding that:

Once property has been seized with proper justification and is in plain view of governmental officials, the owner no longer has a reasonable expectation of privacy with respect to that property, and it may be seized without a warrant. When Adams turned the notebook over to federal officials and they reviewed it, it had already been seized with proper justification, pursuant to a valid inventory search.70

In R. v. Brady,71 the Ontario Superior Court also considered whether a detailed search of an address book seized from the accused incident to arrest was justified. In this case the accused was arrested after an extensive investigation into child pornography and child sexual abuse. The address book was photocopied and over the next few months an officer called most of the names and phone numbers which appeared in the book to unearth evidence of other crimes that may have been committed by the accused. He eventually located a youth who had been sexually abused among the list. This youth was the subject of the current charges against the accused.

The court concluded that the search and seizure fell within the justificatory exception of a valid search incident to arrest, holding that the doctrine had to be given sufficiently flexible scope to allow the police to use seized materials to investigate both the charged crime and other possible crimes. The court stated:

[T]he police aim was largely to use the evidence to ascertain if the accused might have committed other crimes on young people falling within the framework of the Project Guardian investigation. I remain convinced that the incident-to-arrest doctrine must be given sufficiently flexible scope to allow the police to use the seized materials to investigate both the charged crime and other possible crimes that might have been committed by the accused. Absent evidence that the police have acted in bad faith by, for example, laying the charge itself as a ruse or stratagem to conduct what otherwise would be a clearly unreasonable search.72

In Hill v. California,73 the United States Supreme Court affirmed the use of a diary seized incident to arrest that contained two pages outlining the accused's participation in a robbery in detail. As the accused could not be identified by the witnesses, the diary was the only substantial evidence against him.74

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68 Ibid. at 1333.
69 Ibid. at 1336-37.
70 Ibid. at 1338-1338.
72 Ibid. at para. 15-16.
73 401 U.S. 797 (1971).
74 Ibid. at 801. See also People v. Hill, 69 Cal.2d 550, 446 P.2d 521 at 522, note 3 (Cal. Sup. Ct. 1968). The diary narrated: "Friday I went out with Oina. Then Saturday night we went out to hold up a market, but when we got there it was closed, so we had to go to a house. We knocked on the door, and when they answered the door we ran in and I had to hit the man on the head with my gun, because he didn't get down on the floor fast enough. We only got about $60 from them. We left from there and went to TJ and scored seven keys. On the way back we pulled over at the roadblock, but they only checked the trunk of the car. We got back home about 6:00 in the morning. I went to bed. Then Dick and one of the guys that made this run with us left my apartment with Dick to go and get something to eat. This turned out to be a mistake, because they got busted for possession of grass".
While the scope of the search incident to arrest, in that case an entire apartment, has since been narrowed by *Chimel v. California,* it is still valid law in terms of searching the contents of a diary for evidence—notwithstanding that it is inherently private and contains an individual’s private thoughts.

In *Reimer v. Ontario,* a civil case alleging false arrest and imprisonment, members of the Ontario Provincial Police (OPP) seized a scrapbook Mr. Reimer carried with him and looked through it. Mr. Reimer was upset with the seizure and did not believe the OPP should have had access to it. However, Justice McKinnon stated that, while “no doubt Mr. Reimer had a reasonable expectation of privacy in his book, . . . the book was seized appropriately as an incident to arrest”.

As authority for this proposition Mr. Justice McKinnon cited *R. v. Mohamad* in which the Ontario Court of Appeal upheld the search of a briefcase in a vehicle subsequent to the accused’s arrest. Although the vehicle was stolen, the accused maintained that he had a privacy interest in the contents of his briefcase that was inside the vehicle. The court disagreed, stating:

On each occasion that Dyett opened the briefcase, he undertook his search of its contents for the purpose of discovering evidence relating to the crimes for which Jebo had been arrested. The searches were grounded in Jebo’s arrest and were carried out in a vehicle known to have been stolen.

In these circumstances, I conclude that the requirements for a valid search of the appellant’s briefcase under the search incident to arrest power were met. The search of the contents of the briefcase was not unlawful or unreasonable and, hence, the evidence obtained from that search was admissible.

However, where such material is seized in plain view (as opposed to incident to arrest), it must be ‘immediately apparent’ that what is being viewed is evidence of a crime or is otherwise subject to seizure.

**Plain View Doctrine**

In *R. v. Doyle,* the court excluded a diary located during a search warrant of the suspect’s house where the police were looking for a hunting knife and clothing. While the diary was found to contain incriminating statements, unlike the situation in *Hill,* it was not seized incident to arrest, but was only seized in “plain view” after the officer found it in a bedside table and looked through it.

The court in *Doyle* relied on three American decisions that were particularly on point. In one of those decisions, *U.S. v. Wright,* a tax evasion case, the Ninth Circuit Court of Appeals excluded evidence found in a 5 x 8 inch ledger book that was located during a police search warrant for a fake driver’s license. The court held that the government’s “plain view” justification must fail because the scope of the authorized search of the ledger was restricted to checking whether it contained the fake license, which “did not require the perusal of the ledger’s written contents.” Moreover, “[t]he incriminating nature of the ledger was not ‘immediately apparent’ . . . but was
revealed only after [the officer] carefully examined its contents.” The court went on to express its discomfort with this type of search, stating:

If it were permissible to inspect the contents of the ledger, officers acting under a search warrant for any specific item would be empowered to inspect minutely diaries, letters, films and all matter of private materials unrelated to the authorized scope of the search. To permit this type of conduct under the cloak of the plain view exception would be tantamount to enlarging the scope of any search to that of the “general warrant” abhorred by the colonists. The Constitution protects against such intrusions. We hold that the trial court erred in failing to suppress the evidence of the black ledger. 85

The Ninth Circuit came to a similar conclusion in U.S. v. Whitten, 86 where it held that the seizure of a closed notebook under the plain view rule was not permitted. Nevertheless, a yellow notepad opened to a page containing information, the nature of which was readily apparent to the agents as incriminating, was held to be admissible. As noted by the court:

[The ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. To assure that warranted searches do not result in ‘exploratory rummaging’ the plain view doctrine limits the right of seizure to items, the incriminating nature of which is immediately apparent to the searching officer.” 87

By contrast, in State v. Franklin the Missouri Court of Appeals held that the police were justified in viewing a videotape that was found to contain child pornography, where the videotape was found in plain view. 88 The officer observed the videotape in plain view while seizeing other drug paraphernalia and believed it might contain instructions on how to cook or manufacture methamphetamine as he had found other such videotapes when investigating other methamphetamine labs. As such he viewed the videotape to determine whether it contained such instructions. When he saw the images of a small child having oral and anal intercourse with an adult male it was immediately apparent that it was child pornography and was seized. 89

The plain view doctrine is similar in Canada. 90 In fact, most Canadian cases on the doctrine can trace their lineage to any number of U.S. cases, in particular Texas v. Brown, 91 Horton v. California 92 and Coolidge v. New Hampshire. 93

For example, in R. v. Belliveau 94 the New Brunswick Court of Appeal, summarizing Texas v. Brown, stated that before the plain view doctrine will permit the warrantless seizure by police of private possessions, three requirements must be satisfied:

First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Secondly, the officer must discover incriminating evidence "inadvertently", which is to say, he may not “know in advance the location of [certain] evidence and intend to seize it”, relying on the plain view doctrine only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. These requirements having been met, when the police officers lawfully engaged in an activity in a particular area perceive a suspicious object, they must seize it immediately. 95

In R. v. Law, 96 while affirming the plain view doctrine, the Supreme Court of Canada held that it could not be used to justify examining, translating and photocopying documents found in a stolen safe for use by Revenue Canada

84 Ibid. at 797.
85 Ibid. at 799.
86 U.S. v. Whitten, 706 F.2d 1000 (9th Cir. 1983).
87 Ibid. at 1013 [emphasis added].
89 Ibid. at 360. See also State v. Ridgway, 718 So. 2d 318 (Fla. App. 1998), for a similar decision where a photo album, found in a cooler was opened by officers looking for drug paraphernalia (i.e. written instructions on how to cook meth), and found to contain pictures of the accused having sex with minors.
93 403 U.S. 443 (1971).
94 Supra note 90.
95 Ibid. at para. 25.
96 2002 SCC 10, 1 S.C.R. 227.
officials. The documents were not found inadvertently and their incriminating nature was not immediately obvious to the officer. In fact the officer testified that there was nothing facially wrong with the documents and that he lacked both accounting expertise and proficiency in Chinese (the language of the documents) to have even determined there was.\textsuperscript{97}

The important question for the purpose of this paper is whether or not digital evidence residing on a handheld device or computer is properly characterized as “in plain view.” That is, if the device is lawfully seized incident to arrest, will the police always be in a lawful position to view everything on the device? Or is it more limited, so that such searches do not result in “exploratory rummaging” until something incriminating is found?

Few courts have considered the question of how the plain view doctrine applies to digital evidence. However, in \textit{U.S. v. Wong,}\textsuperscript{98} the Ninth Circuit examined the admissibility of child pornography located on the accused’s computer during a search, by the police, for evidence of the accused’s involvement in the murder of his girlfriend.

Specifically, the police were looking for documents, maps and diagrams relating to the site where the victim’s body was found, and for material related to the white supremacist movement which the police suspected the suspect had manufactured as a ruse to disguise the true motive for the murder. At his trial for possession of child pornography, the accused argued that the evidence was not related to the justification of the original search and was therefore inadmissible. However, the court found that the police were lawfully searching for evidence of murder in the graphics files when they accessed the child pornography. As such, the evidence was properly admitted under the plain view doctrine:

The child pornography seized must have been in plain view during the search for evidence of [the victim’s] murder. To satisfy the plain view doctrine: (1) the officer must be lawfully in the place where the seized item was in plain view; (2) the item’s incriminating nature was ‘immediately apparent;’ and (3) the officer had ‘a lawful right of access to the object itself.’ … While searching the graphics files for evidence of murder … [Officer] Van Alst discovered pictures of children as young as age three engaged in sexual acts. The incriminating nature of the files was immediately apparent to Van Alst. Since the police were lawfully searching for evidence of murder in the graphics files, that they had legitimately accessed and where the incriminating child pornography was located, the evidence was properly admitted under the plain view doctrine.\textsuperscript{99}

Furthermore, in \textit{U.S. v. Williams,}\textsuperscript{100} the Fourth Circuit Court of Appeals held that a search of a computer is analogous to a file cabinet containing a large number of documents and when conducting a search officers may view each file, at least cursorily, to determine its contents. To be effective, such searches should not be restricted by file name or label because such name or labels on a computer can be easily manipulated to hide their real substance. The court stated:

Surely, the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality … Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.\textsuperscript{101}

However, where there are no legitimate facts that a computer may be a repository for evidence sought in a search, conducting such a search without warrant will be unconstitutional. In \textit{U.S. v. Payton,}\textsuperscript{102} the police obtained and executed a search warrant on the accused’s residence looking for, among other things, sales ledgers and financial records of his involvement in the drug trade. While the warrant did not explicitly authorize the search of the

\textsuperscript{97} \textit{Ibid.} at para. 27.

\textsuperscript{98} 334 F. 3d 831 (9th Cir. 2003).

\textsuperscript{99} \textit{Ibid.} at 838. See also \textit{State v. Frasier}, 794 N.E. 2d 449 (Ind. Ct. App. 2003) in which the court concluded that child pornography was observed in plain view where the police were examining the computer for notes and records of drug trafficking. But see \textit{U.S. v. Carey}, 172 F.3d 1268 (10th Cir. 1999), rev'd denied, (Apr. 30, 1999), where the court held that a warrantless police search of image files on the defendant's computer was not justified under the "plain view" doctrine, and was therefore in violation of the Fourth Amendment, where a police officer was searching the computer for evidence of drug trafficking and, after noting several files with a sexually suggestive name and with a "jpg" file name extension, suggesting an image file, the officer began looking through the "jpg" files.

\textsuperscript{100} 592 F.3d 511 (4th Cir. 2010).

\textsuperscript{101} \textit{Ibid.} at 522. See also \textit{U.S. v. Mann}, 592 F.3d 779 at 782 (7th Cir. 2010); \textit{U.S. v. Hill}, 459 F.3d 966 at 978 (9th Cir. 2006) where the court stated, “[c]riminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer”; \textit{U.S. v. Gray}, 78 F. Supp. 2d 524 527 n.5 (E.D. Va. 1999), where the court stated, “computer files can be misleadingly labeled, particularly if the owner of those files is trying to conceal illegal materials.”; \textit{U.S. v. Riley}, 906 F.2d 841at 845 (2d Cir. 1990) where the court stated, “few people keep documents of their criminal transactions in a folder marked ‘drug records.’

\textsuperscript{102} 573 F.3d. 859 (9th Cir. 2009).
accused’s computer, it was searched and child pornography was located. At a subsequent trial for possession of child pornography, the evidence was excluded.\footnote{\textit{Ibid}. See also \textit{U.S. v. Kim}, WL 5185389 (S.D. Texas 2009). While the officers in Kim had obtained a warrant to search his computer for evidence of computer hacking, they opened files that were suggestive of child pornography (not hacking) such as “ForbiddenFruit” and “Illegal_Loli#”. The evidence was suppressed at a subsequent trial for possession of child pornography as the officers did in fact believe they contained child pornography (not evidence of hacking). As such it could not be said they were discovered inadvertently.}

As such, while it is possible to seize and examine a handheld device incident to arrest and justify the observation and recovery of evidence related to other crimes under the plain view doctrine, there must be some reasonable connection between examining the device and the evidence observed. For example, in \textit{People v. Bullock} the court found that the police lawfully searched a pager incident to the accused’s arrest for drug trafficking where it was held that pagers are an “instrument commonly used in selling drugs”.\footnote{\textit{People v. Bullock}, 277 Cal. Rptr. 63 at 66 (1991). Also see \textit{State v. Franklin}, supra note 88, regarding the examination of videotapes where, in the officer’s experience, such tapes may contain evidence of the crime.}

However, where there is no claim that such devices are known to be instruments or recorders of criminal activity, or where there is no rational connection between the arrest and the search, relying on the plain view doctrine might be a risky proposition for investigators and it should likely be avoided. For example, in \textit{State v. Smith} the Indiana Court of Appeals held that a warrantless search and seizure of the electronic contents of the cellular phone that had been seized from the defendant’s car was not justified under the plain view doctrine.\footnote{\textit{Smith v. State}, 713 N.E.2d 338 (Ind. Ct. App. 1999), transfer denied, 726 N.E.2d 303 (Table) (Ind. 1999). Notwithstanding the recent ruling in \textit{Arizona v. Gant}, supra note 25, searching the device incident to arrest may have been a more reasonable explanation.}

Despite these cases, in \textit{R. v. Lefave},\footnote{Supra, note 46.} there was no discussion whatsoever about the plain view doctrine when officers discovered child pornography while looking at the accused’s computer incident to arrest for threats to his daughter. Instead, the court was quite content to hold that the images were observed incident to a lawful examination of the computer seized incident to arrest. The court explained its conclusion in clear, simple terms:

It is trite law that, if the police uncover evidence of other crimes during the course of a lawful investigation or search, they can use such evidence for further charges.

In the case before me, if there had been no computer aspect to the crime being investigated, a seizure and search of the contents of the computer would probably be illegal absent a warrant.

Here, the seizure of the laptop computer was incidental to the investigation of the alleged crime of threatening or communicating. The examination of the data in the computer was a reasonable procedure to determine if there was any evidence on it to connect the accused with the crime in question. Unlike the case of \textit{R. v. Caslake}, supra, in the evidence before me, both the subjective and objective elements of the officers’ belief in searching the data of the computer were reasonable in these peculiar circumstances.

The discovery of what appeared to the officers to be examples of child pornography from the different places on the accused’s computer was incident to the examination of that data that the police were then seeking. That incident, or as it might be termed accidental discovery, of other evidence is, however, evidence that, in my view, was legally obtained by the actions of the police in the circumstances. Consequently, I find that there has been no breach of the accused’s rights under s. 8 of the Charter.

\textbf{B. Cameras and other Recording Equipment}

Many of today’s digital cameras have memory cards that far exceed those of computers in years past. They can be used to record private memories and, in recent years, they have also been added as a feature to many digital phones. As such, they also make a good analogy for the storage and retrieval of personal information contained in today’s cell phones.

In \textit{U.S. v. Ayalew},\footnote{\textit{U.S. v. Ayalew}, 563 F. Supp. 2d 409 (N.D.N.Y. 2008). Reconsideration denied 2008 WL 4104699 (N.D.N.Y. 2008).} the New York District Court held that the police were entitled to search the accused’s camera, incident to his arrest along the border, for any photographic evidence that he had in fact crossed the border. In its original decision, the court held that the camera had been lawfully taken from him and as such he could no longer expect any right of privacy with respect to its contents.\footnote{\textit{Ibid}. at 28-31.} At the motion for reconsideration, the accused argued that the examination of the camera was not truly incident to arrest, as it had been taken back to the police
station; however, the court held that a camera may more properly be considered a personal effect than a container. The court stated:

‘Personal effects’ include items that are found on a suspect’s person, including outer clothing, and the contents of his pockets, purse, or wallet. Generally, and in this case, Ayalew’s camera was carried on his person. Additionally, courts have considered photographs within the purview of personal effects. Thus, cameras are not akin to luggage, as Ayalew suggests, and are not containers that may only be opened pursuant to a warrant.

In *State v. Pancake*, the Ohio Court of Appeals held that the police were lawfully entitled to view a videotape found inside a camcorder seized from an accused that had been surreptitiously videotaping women through their windows. The court held that the police were not required to obtain a warrant to view the videotape, nor were they required to obtain a warrant before asking the complainant to view the tape. While the accused contended that listening to the tape without a warrant was, in effect, an investigatory search which violated his expectation of privacy, the court held that once the tape had been seized and was within the control of the police that they had a right to play it and were not required to get a separate search warrant.

More recently, in *State v. Gribble*, the Rhode Island Supreme Court held that a camera seized from a suspect believed to be photographing young girls was validly searched incident to arrest. In this case the police responded to a report of a man photographing young girls with a concealed camera, as the officers approached to investigate, the accused pushed an officer away, fled, and knocked down a bystander. When the police caught and arrested the accused they searched a backpack he was carrying and found two digital cameras. They viewed photos on the cameras, which were of young girls taken from below waist level.

The court held that the fact that defendant had shut the cameras off and put them into a closed backpack indicated he intended to keep the photos private; thus, he had a reasonable expectation of privacy in the cameras and memory cards. But the search of the cameras was a valid search incident to arrest. The bag had been in defendant’s control; officers looked inside it shortly after his arrest and determined that the cameras and their contents contained apparent evidence of criminal activity. The fact that the officers had to remove the cameras from the backpack, turn them on, and manipulate the cameras’ controls in order to view the images, did not render the search unlawful. Relying on the decision *U.S. v. Robinson*, the court held:

> Cell phones, pagers, and laptops are similar to a digital camera in that they all hold personal data and process digital information. Courts across the country have found that an individual does have a reasonable expectation of privacy when it comes to these personal electronic devices.

While the accused further indicated that the search of the camera was not contemporaneous with his arrest, the court held that the Fourth Amendment does not prohibit searches after a reasonable delay. The court concluded:

> The search of the cameras seized from defendant was a valid search incident to his arrest because the officers believed the cameras and memory cards were evidence of defendant’s alleged crime. 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.

In *R. v. Manley*, the Ontario Superior Court considered an application to exclude photographs of the accused holding a sawed-off shotgun found in the memory of a cell phone seized incident to his arrest. The accused was the prime suspect in several armed robberies and after his arrest the police opened a cell phone he was carrying with the intention of finding something in it that might identify the owner.

In the process of doing this the officer pushed various scroll and other buttons in order to observe the saved data in the phone, and observed pictures of the accused taking pictures of himself holding a sawed-off shotgun. These pictures were time-dated to indicate that they had been taken within twelve hours following one of the robberies he

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110 Ibid. at 2 [Internal citations omitted].
111 2003 WL 1596975 (Ohio App. 2 Dist. 2003).
112 Ibid. at paras. 31, 33.
114 Ibid. at 17.
115 Ibid. at 7.
116 Ibid. at 17.
was suspected of. As the cell phone was losing power it was given to another officer who downloaded the images to a computer out of concern that the images may have been lost if the phone lost power.118

The accused claimed the search violated his sections 7 and 8 Charter rights to be secure against unreasonable search and seizure. However the court dismissed the application as the search and seizure were justified incident to arrest in accordance with the Supreme Court of Canada’s rulings in Cloutier and Caslake for (a) safety reasons; (b) to check the ownership of any items in the accused’s possession; (c) to check for evidence and to protect it from destruction.119

C. Pagers, Cell Phones and Electronic Organizers

In State v. Gribble, the Court cited U.S. v. Chan, which held that “expectation of privacy in an electronic repository for personal data is therefore analogous to that in a personal address book or other repository for such information.”120 Chan was one of the first cases to address the issue of accessing the memory of an electronic pager incident to arrest.

In U.S. v. Chan, the police seized an electronic pager and searched it incident to the arrest. The court denied the accused’s motion to suppress the evidence, holding the search was legally conducted incident to arrest, analogizing that the information stored in the pager was similar to that of a closed container. Citing to the Supreme Court’s decision in Belton, the court held that the general requirement for a warrant prior to the search of a container (or an address book) does not apply when the container is seized incident to arrest:

Although Chan had a protected privacy interest in the contents of the pager’s memory, it is irrelevant in this case because the pager was searched incident to Chan’s arrest. When making a lawful arrest, police may conduct a warrantless search of the area within the arrestee’s immediate control ... an officer may also search the contents of a container found on or near the arrestee in a search incident to arrest.121

While Chan did not dispute the lawfulness of the seizure incident to his arrest, he argued that a separate warrant was required to search or examine the contents of the pager because of the high expectation of privacy in its contents. However, the court disagreed. While admitting that the device was not likely to produce a weapon and there was probably no threat that evidence would be destroyed, the court stated that the arrest itself destroyed the defendant’s expectation of privacy in the subsequent search.122 In reaching this conclusion the court relied on U.S. v. Holzman, a previous decision of the court, in which an address book was seized during a lawful arrest and immediately examined by the police:

As in Holzman, defendant Chan’s expectation of privacy was destroyed as a result of a valid search incident to arrest . . . [T]he general requirement for a warrant prior to the search of a container does not apply where the container is seized incident to arrest. The search conducted by activating the pager’s memory is therefore valid.123

The decision in U.S. v. Chan was subsequently endorsed by the Seventh Circuit Court of Appeals in U.S. v. Ortiz,124 which held that the activation and retrieval of information from a pager searched incident to arrest was permissible under the Fourth Amendment. In affirming the trial court’s decision, the court held:

An officer’s need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest. Because of the finite nature of a pager’s electronic memory, incoming pages may destroy currently stored telephone numbers in a pager’s memory. The contents of some pagers also can be destroyed by merely turning off the power or touching a button. Thus, it is imperative that law enforcement officers have the authority to immediately ‘search’ or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.125

118 Ibid. at para. 25.
119 Ibid. at paras. 25, 37.
122 Ibid. at 536.
123 Ibid.
124 84 F.3d 977 (7th Cir. 1996).
125 Ibid. at 984. See also People v. Bullock, supra note 104; U.S. v. Romero-Garcia, 991 F. Supp. 1223 (D. Or. 1997), holding that a search of pager information without warrant was valid due to exigency of gathering the information before it was lost or corrupted.
With reference to a pager’s finite memory, a similar argument was made in *U.S. v. Lynch*, where it was argued that the activation and retrieval of stored information in the pager was valid due to the existence of exigent circumstances. However, like the court in *Chan*, the court declined to address this issue, finding that the search was valid incident to arrest. Following the Supreme Court’s decisions in *U.S. v. Robinson* and *U.S. v. Edwards* the court held that warrantless searches of any effects found upon the accused’s person was justified incident to arrest similar to the contents of wallets and address books. The court held:

The justification for allowing such searches is not that a person does not have an expectation of privacy in such personal effects such as a wallet or address book, but that once an arrest has been made, the privacy interests of the arrestee no longer take precedence over police interest in finding a weapon or obtaining evidence. While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape and evidence.

While the accused argued that a closed, locked container could not be searched incident to arrest, citing *U.S. v. Chadwick* as authority, the court distinguished the 200-pound foot locker in that case from an item actually found on the accused’s person. The difference, noted the court, between a pager and the footlocker at issue in *Chadwick*, is that one is clearly separate from the person of the arrestee. The pager here was found on the accused’s hip and thus could be characterized as part of his personal property for purposes of a search incident to an arrest. It was an element of his clothing which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest.

A similar ruling was made by the Sixth Circuit in *U.S. v. Goree (and Carter)* respecting an electronic organizer. In that case, both accuseds were identified as possible drug traffickers upon their arrival at an airport, based on their travel profiles, which included last minute, cash-purchased tickets. They were subsequently arrested and searched after one of them was surveilled to a motel and the other one showed up. A search of Goree incident to arrest located four large baggies of cocaine wrapped with plastic to his upper torso. Goree subsequently provided a statement, which he refused to sign, saying he was carrying the drugs for Carter.

When Carter was arrested he was searched and an electronic organizer was recovered from the pocket of the jacket he had been wearing at the time of his arrest. Without requesting Carter’s consent and without first obtaining a search warrant, the police opened the organizer, turned it on, and pressed the “scroll” button. An examination of the contents revealed a listing for Goree, Goree’s mother and Goree’s pager. Several days later, the officers created a video recording that documented the contents of the electronic address book.

Both Goree and Carter were subsequently charged and convicted of conspiring to possess with the intent to distribute two kilograms of cocaine and with aiding and abetting each other in the possession of two kilograms of cocaine.

Carter subsequently appealed his conviction on the ground that the search of his organizer was unlawful. The Court of Appeal disagreed, affirming the admissibility of the evidence:

One of the delineated exceptions to the warrant requirement is for searches incident to a lawful arrest. A search incident to arrest may extend to the arrestee’s person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. While based upon the need to disarm and to discover evidence . . . the fact of the lawful arrest . . . establishes the authority to search. Accordingly, an officer need not provide proof of an additional exigency to justify a search that is incident to a lawful arrest, and the item need not still be in the defendant’s immediate control at the time of the search.

Nevertheless, a search incident to arrest is valid only if the underlying arrest is itself valid. Carter therefore alleges that at the time of his arrest the police officers lacked probable cause to arrest him. This claim is meritless. The officers, having observed both Carter’s behavior at the airport as well as his arrival at the Motel Six where Goree was staying, possessed knowledge of a “probability or substantial chance of criminal activity” on Carter’s part (probable cause decision should be evaluated from the reasoned position of a law enforcement officer with their knowledge and expertise). Hence, whether Carter’s arrest occurred at the moment he was asked to stay in the hotel lobby or after the police searched Goree, it was supported by probable cause and was therefore a lawful arrest justifying the subsequent warrantless search.

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127 Ibid. at 288.
128 Ibid. at 289. See also *U.S. v. Johnson*, 846 F.2d 279 (5th Cir. 1988), holding that the search of a briefcase was valid as incident to a lawful arrest.
129 47 Fed. Appx. 706 at 713 (6th Cir. 2002).
130 Ibid. at 713 [Internal citations omitted].
In R. v. Edwards, the police had information that the accused was trafficking narcotics and placed him under surveillance. They subsequently arrested him for driving while prohibited and just prior to his arrest they observed him talking on a cell phone. When they approached his vehicle he swallowed a cellophane wrapped object the size of a golf ball. His vehicle was towed to an impound lot and two and a half hours later (after locating cocaine in his girlfriend's apartment) it was searched and a cell phone and pager were seized. After the seizure the police monitored the telephone and pager and on ten occasions either answered the telephone or called people in response to a pager message. Several of the individuals spoken to asked for the accused and requested crack cocaine.

The Ontario Court of Appeal found that the search of the vehicle and the subsequent search and seizure of the phone and pager were lawful incident to the arrest. In addition, since the vehicle belonged to the accused's girlfriend, and had already been legally impounded, it was the girlfriend and not the accused that had standing to challenge the seizure.

Similarly, in U.S. v. Caymen, the Ninth Circuit held that the accused had no legitimate expectation of privacy in the contents of a hard drive from a computer that he obtained by fraud, and thus, lacked standing under the Fourth Amendment to challenge a search of the hard drive conducted by police. Therefore, by analogy, a suspect would have no standing to challenge the search and examination of a handheld device seized incident to arrest that had been fraudulently or otherwise illegally obtained.

Recently, in U.S. v. Park, the District Court of Northern California held that unlike the pagers of old, the capacity of cell phones to store vast amounts of information reduced the risk that data would be destroyed or overwritten by incoming calls, and that the government made no showing that the search was necessary to prevent the destruction of evidence. Furthermore, while the court did not disagree with the previous pager decisions, it felt that the current cell phone technology attracted a higher level of privacy:

This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

Ironically, notwithstanding the court's concern that the large storage capacity of current cell phones minimized the risk that evidence would be destroyed or overwritten, on May 23, 2007 (the same day the judgment was issued) U.S. Cellular announced it had launched a new cell phone application that allows users to delete cell phone memory from a remote location. The service, called "My Contacts Backup," was created to assist cell phone users in protecting their personal data, should their cell phones be lost, stolen, or destroyed. The memory can be backed up and transferred to a new handset, but it can also be destroyed. As such, any time a cell phone is seized, the owner (or an associate) can remotely delete all personal data from the phone to prevent the police from examining it.

In People v. Diaz, decided after Park and without any reference thereto, the California Court of Appeals concluded that searching a cell phone's memory was a valid search incident to arrest. The court held: "The fact that electronic devices are capable of storing vast amounts of private information does not give rise to a legitimate
heightened expectation of privacy where a defendant is subject to a lawful arrest while carrying the device on his person."

Ultimately, the court concluded: “Because the warrantless search of defendant’s cell phone was a valid search incident to arrest, his motion to suppress the fruits of the search was properly denied.”

While the Supreme Court of Canada restricted the power to search incident to arrest in two cases where there was a significant invasion of privacy, R. v. Stillman and R. v. Golden, both cases involved security of the person and bodily intrusion – not the search of physical objects carried on the person. Furthermore, in U.S. v. Arnold, the Ninth Circuit held that a border search of a computer was not analogous to a strip search or body cavity search.

Moreover, while the trial judge reasoned that “opening and viewing confidential computer files implicates dignity and privacy interests,” the Ninth Circuit reversed that decision, holding that the district court was in error to rely on cases involving the search of a person.

Moreover, in People v. Endacott, the California of Appeals followed the Ninth Circuit, countering the trial decision in U.S. v. Arnold and effectively overruled U.S. v. Park in both the state and federal district courts, holding:

Indeed, the human species has not yet, at least, become so robotic that opening a computer is similar to a strip search or body cavity search. Of course viewing confidential computer files implicates dignity and privacy interests. But no more so than opening a locked briefcase, which may contain writings describing the owner’s intimate thoughts or photographs depicting child pornography. A computer is entitled to no more protection than any other container.

The decision in U.S. v. Arnold rested primarily on the Fifth Circuit’s decision in U.S. v. Finley, a case where the police searched the call records and text messages on the accused's cell phone incident to arrest. The court found that the accused did have a reasonable expectation of privacy in the call records and text messages on the phone; however, it also found that the search was lawful, without any additional justification, to look for evidence of the arrestee's crime on his person (including in closed containers such as a cell phone) in order to preserve it for use at trial. The court held:

Although Finley has standing to challenge the retrieval of the call records and text messages from his cell phone, we conclude that the search was lawful. It is well settled that “in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person.

Effective July 16, 2009, based primarily on the reasoning in Arnold, the U.S. Customs and Border Patrol (CBP) instituted a policy that officers can “review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through or reside in the United States.” The officers may examine, in addition to documents, books and other printed material, “computers, disks, hard drives and other electronic or digital storage...”

140 Ibid. at 218.
141 Ibid. at 219.
142 [1997] 1 S.C.R. 607. This case involved the taking of hair samples, buccal swabs and teeth impressions by the police of a youth without his consent.
143 Supra note 34. This case involved the strip search of a suspected drug dealer. The court affirmed that strip searches may be conducted incident to arrest. However, because strip searches are inherently humiliating and degrading they should only be carried out where there are reasonable grounds to believe weapons or evidence of the offence will be discovered and the search is conducted in a manner that interferes with the privacy and dignity of the person being searched as little as possible.
144 533 F.3d 1003 (9th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009). Also see People v. Endacott, 164 Cal. App. 4th 1346 (C.A. 2008), and U.S. v. Romm, 455 F.3d 990 (9th Cir 2006), cert. denied, 549 U.S. 1150 (2007). Although these are Customs cases, they are analogous to searches incident to arrest - the authority to search flows from crossing the border, much like a search incident to arrest flows from the arrest. Reasonable grounds are not a prerequisite for either search.
146 Supra note 144 at 1008.
148 Ibid. at 1350.
149 U.S. v. Finley, 477 F.3d 250 at 259-60 (5th Cir. 2007), cert. denied, 549 U.S. 1353 (2007). Internal citations omitted. See also U.S. v. Curry, 2008 WL 219966 (D. Me. 2008), where the court attempted to reconcile the holdings in Finley and Park based on the fact that the search of the cell phone in Park was not “substantially contemporaneous” with his arrest whereas in Finley it was.
devices” without reasonable suspicion. They may detain documents and electronic devices, or copies thereof, “for a reasonable period of time” to perform a thorough search either “on-site or at an off-site location” and may involve third parties assisting CPB officials.150

More recently, in U.S. v. Murphy,151 the Fourth Circuit also relied on Arnold and Finley holding that officers may retrieve text messages and other information from cell phones and pagers seized incident to arrest. One of the arguments made by the accused was that officers should determine the storage capacity of the phone before accessing the contents. Presumably phones with a small storage capacity may be searched without a warrant due to the volatile nature of the information stored (similar to the old pager cases), but that a search of a cell phone with a larger storage capacity would implicate a heightened expectation of privacy and thus, would require a warrant to be issued before a search could be conducted.

While a similar argument was dismissed in U.S. v. Arnold, the court in U.S. v. Murphy found the argument problematic for several reasons, primarily because requiring police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule. As noted by the court, “it is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone.”

Outside of the decisions in U.S. v. Park152 and U.S. v. Wall,153 almost all decisions to date have upheld the search of cell phones incident to arrest.154 Nevertheless, even in U.S. v. Park, the court did not dispute the lawfulness of searches incident to arrest. However, a fine reading of the case shows that the court was troubled with the officers’ “vague” reasons for the search. For example, it did not appear that the phones were actually seized at the time of arrest (only at “booking” some 90 minutes after their arrest). Furthermore, one officer said the phones were searched for booking and inventory purposes to document and safeguard the arrestees property; another said it was for evidence because cell phones can contain evidence of drug trafficking and cultivation activities; and another (who filed an affidavit in support of a subsequent wiretap application) said the phones “were seized and surreptitiously searched … then returned to the owners.”155

IV. CONCLUSION

In Hunter v. Southam,156 Justice Dickson, speaking for a unanimous Court, stated that warrantless searches were presumptively unreasonable. However, he also stated that what is “unreasonable” must be determined according to “whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.”157

Considering reasonable grounds are not a prerequisite to a search incident to arrest and that it is the arrest itself that is the significant intrusion of state power into the privacy of one's person, if the arrest is lawful, then the

151 552 F.3d 405 (4th Cir. 2009), cert. denied, 2009 U.S. LEXIS 2858 (2009).
152 U.S. v. Murphy, supra note 151 at 411. In addition most new Smartphones such as the BlackBerry Pearl or BlackBerry Curve can be set to automatically delete text/ e-mail messages after only a few days using the “keep messages” option to avoid using excessive memory on the device. As such, notwithstanding the larger storage capacity of today’s cell phones, important messages can still be lost if this feature has been activated and the phone is not examined immediately.
153 Supra note 135.
154 Supra note 137.
156 Supra, note 133 at 14 [emphasis added].
158 Ibid. at 159-60.
individual's privacy interest is subordinated to legitimate law enforcement concerns. Those concerns include the need to:

1. protect the police;
2. protect the evidence;
3. discover the evidence; or
4. some other valid purpose.\(^{159}\)

Although electronic devices today are capable of storing vast amounts of private information such as voice and text messages, e-mail, video, pictures, records of incoming and outgoing calls, address books and calendars, courts have generally held that such devices do not give rise to a heightened expectation of privacy (like strip searches) where an accused is lawfully arrested while carrying the device on his person.

While the opening and viewing of confidential computer files implicates dignity and privacy interests, it does not implicate them more than opening a wallet, purse, diary or briefcase that may contain family photographs, bank statements, personal letters or writings describing the owner's intimate thoughts. Furthermore the right to seize also affords the right to subject the evidence to a physical or forensic examination. Once an item is seized for use in a criminal investigation, the police are entitled to subject it to technical or forensic analysis to determine its evidentiary significance. Neither the time nor the distance between the arrest and the analysis affect the scope of the common law power to search incidental to this lawful arrest.

Although the nature of the offence being investigated may determine the reasonableness of the search, the doctrine has to be given sufficiently flexible scope to allow the police to use seized materials to investigate both the charged crime and other related offences. For example there may be no reasonable basis to believe a cell phone contains any relevant evidence where the accused is arrested for a traffic violation (unless it can be clearly articulated), however the cell phone of a known gang member arrested for a serious offence could be analyzed for the purpose of locating pictures or messages about the offence, supporting criminal organization charges, identifying witnesses or co-conspirators.\(^{160}\)

While the decision in \(R. v. Giles^{161}\) did not consider any U.S. authorities, it is clear that if it had done so, there is sufficient case law to support the conclusion it reached. Similarly, the current statutory regime in England would also support this position, where a serious offence is involved and if the search is done by qualified forensic examiners.

Furthermore, considering the often overlooked fourth criteria in \(Caslake^{162}\), allowing searches of property incident to arrest for “some other valid purpose,” the law in Canada is arguably more expansive than in the United States, so long as the seizing officer can articulate his course of action. In fact, this was the problem in \(U.S. v. Park^{162}\), where the court stated “the government has not articulated any reason why it is necessary to search the contents of a cell phone in order to fulfill any of [its] legitimate governmental interests.”\(^{162}\)

\(^{159}\) \(Caslake, supra\) note 16 at para. 25.

\(^{160}\) However accessing an electronic storage device solely for intelligence gathering purposes would be going beyond the legitimate scope of a lawful search. See \(R. v. Majedi, 2009 BCCA 276, 192 C.R.R. (2d) 288\) at para. 45.

\(^{161}\) \(Supra\) note 39.

\(^{162}\) \(Supra, note\) 135 at 33.