Court File No. 39416

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

BETWEEN:

MATTHEW STAIRS

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

FACTUM
(MATTHEW STAIRS, APPELLANT)
(Purusant to Rule 42 of the *Rules of the Supreme Court of Canada)*

EMBRY DANN LLP
116 Simcoe Street, Suite 100
Toronto, Ontario M5H 4E2

Erin Dann
Tel: (416) 868-1203
Fax: (416) 868-0269
Email: edann@edlaw.ca

COURTYARD CHAMBERS
258 Adelaide Street East, Suite 201
Toronto, Ontario M5A 1N1

Lisa Freeman
Tel: (416) 613-9668
Fax: (416) 868-0273
Email: lfreeman@courtyardchambers.ca

Counsel for the Appellant

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Appellant

PUBLIC PROSECUTION SERVICE OF CANADA
130 King Street West, Suite 2400
P.O. Box 340
Toronto, Ontario M5X 2A2

Diana Lumba
Tel: (416) 973-0026
Fax: (416) 973-8253
Email: diana.lumba@ppsc-sppc.gc.ca

PUBLIC PROSECUTION SERVICE OF CANADA
5251 Duke Street, Suite 1400
Halifax, Nova Scotia B3J 1P3

Mark Covan
Tel: (902) 426-5535
Fax: (902) 426-1351
Email: mark.covan@ppsc-sppc.gc.ca

Counsel for the Respondent

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street
12th Floor
Ottawa, Ontario K1A 0H8

François Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: francois.lacasse@ppsc-sppc.gc.ca

Agent for the Respondent

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal raises the question of when the police will be entitled to engage in a warrantless search of a home incident to a warrantless arrest within that home. The Appellant submits that the search of a residence incidental to an arrest, like warrantless entries of a residence to make an arrest, must be prohibited in all but exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within their home. A warrantless search of a residence will only be justified where the police have an objectively reasonable belief, or at very least suspicion, that their safety or the safety of the public is at risk.

2. The majority of the Court of Appeal's conclusion otherwise, and its finding that the doctrine of search incident to arrest applies without modification to safety searches within a home, is inconsistent with the jurisprudence of this Court and fails to recognize the unique privacy interests in homes. Indeed, the reasoning of the majority produces precisely the result it said must be avoided: the development of the law in a manner that allows the police to use a home entry in urgent circumstances to create the opportunity for a windfall search.

3. In the case on appeal, the police entered the Appellant's home in response to a 911 call where they had reason to believe the Appellant had, a half hour earlier, assaulted a woman while in his car. The police entered the residence, ensured the safety of the female, and arrested the Appellant. After the police had placed the Appellant face down on the floor and handcuffed him, they conducted a search of the residence. The police had no reason to believe there were any weapons or any other people in the home. They did not purport to conduct the search because they were afraid for their safety. Rather, they wanted to eliminate the possibility of some unknown hazard that might present a risk. The search yielded a plastic baggie and a Tupperware container, both of which contained the drug colloquially known as crystal meth. The police claimed the drugs were found in plain view.

4. The Appellant was charged with three offences: assault, possession of methamphetamine for the purpose of trafficking, and breach of probation. The Appellant was tried at the Superior Court of Justice where he challenged the legality of the search conducted by the police after his arrest. The trial judge dismissed the Appellant's *Charter* applications, found him guilty of all three

offences, and sentenced him to 26 months incarceration less credit for about 20 months pre-trial custody. He has finished serving that sentence. The Appellant appealed only the drug conviction to the Court of Appeal for Ontario. The primary ground of appeal was that the trial judge erred in failing to find that the police violated the Appellant's s. 8 *Charter* rights.

5. Writing for the majority at the Court of Appeal, Fairburn A.C.J.O., found that the police search of the residence after they arrested the Appellant was a valid exercise of the common law power of search incident to arrest.[1] The majority rejected the Appellant's argument that the police must have reasonable grounds to believe their safety or the safety of the public is at risk before conducting such a search.

6. Justice Nordheimer dissented. Having concluded that the Appellant's s. 8 rights had been breached, he would have excluded the drugs and acquitted the Appellant of the charge of possession for the purpose of trafficking. In Justice Nordheimer's view, the majority's approach has the potential to provide the police with a broad license to undertake warrantless searches, in a manner inconsistent with the protections guaranteed by s. 8 of the *Charter.*[2]

7. The Appellant asks this Court to find that searches of a home incidental to arrest will only be permitted where there is an objectively reasonable basis to believe, or alternatively, and at minimum, suspect that the safety of the officers, the arrestee or the public is at imminent risk. Police powers to search a home after a warrantless entry to make a warrantless arrest must be carefully constrained. Requiring the police to have some reasonable, specific and articulable basis to think they or others are in danger ensures the common law power of search incident to arrest, as it applies within a private residence, is delineated in a way that is consistent with s. 8 of the *Charter*.

8. In the circumstances of this case, the police had neither a reasonable belief nor suspicion that their safety or anyone else's was at risk. The search was unlawful and constituted a serious

---

[1] *R. v. Stairs*, 2020 ONCA 678 at para. 51, A.R. Vol. I, Tab 3, p. 115 [*Reasons of the Court of Appeal*].
[2] *Reasons of the Court of Appeal, supra,* at paras. 70–71, A.R. Vol. I, Tab 3, p. 122.

violation of the Appellant's right to privacy in his own home. As a result, the evidence ought to have been excluded and the Appellant acquitted.

B. Summary of the Facts

i) The Circumstances Leading to the 911 Call

9. On June 1, 2017, at approximately 1:00 pm, a civilian, S.B., was driving his truck in Oakville. He saw a dark grey Toyota Corolla parked on the opposite side of the street.[3] S.B. described the driver as a white male, between the ages of 25 and 30 with a buzz cut or shaved head. He saw a white female enter the car and sit in the front passenger seat. Almost immediately, the driver began hitting her. The driver then made a U-turn, which positioned him directly behind S.B.'s truck. S.B. saw the male continuing to hit the female. At one point, the Toyota pulled up beside S.B. and turned east. S.B. was able to observe the license plate and identified it as BEWN 480 or 483.[4] S.B. waited approximately fifteen minutes before calling 911.[5]

ii) The Dispatch and the Officers' Attendance at 2273 Devon Road

10. Police Constables Chris Brown, Jesse Vandervelde, and Joshua Martin were on duty when S.B. made his 911 call. Brown, who had been a police officer for five years, was training Martin.[6] Vandervelde had been an officer for two and a half years.[7] All three officers were in uniform and armed.[8]

11. The officers received information from dispatch about the 911 call and were instructed to respond.[9] Dispatch made no mention of any weapons involved in the incident, and indeed no

---

[3] By consent of counsel, S.B.'s observations were adduced through the evidence of the officers for the purposes of the *Charter* application. S.B. testified at the Appellant's trial on the charge of assault.

[4] *Evidence of P.C. Chris Brown*, Transcript of Proceedings, March 19, 2018, p. 25, l.8–p. 26, l.30 [A.R. Vol. II, pp. 29–30] [*Evidence of P.C. Brown*].
[5] *Evidence of P.C Jesse Vandervelde*, Transcript of Proceedings, March 20, 2018, p. 294, l.18–21 [A.R. Vol. III, p. 69] [*Evidence of P.C. Vandervelde*].
[6] *Evidence of P.C. Brown, supra*, p. 105, l.28–p. 106, l.3 [A.R. Vol. II, pp. 109–10].
[7] *Evidence of P.C Jesse Vandervelde*, *supra*, p. 181, l.25– 30 [A.R. Vol. II, p. 185].
[8] *Evidence of P.C. Brown, supra*, p. 163, l.7–10 [A.R. Vol. II, p. 167].
[9] *Evidence of P.C. Brown, supra,* p. 53, l.30–p. 54, l.8 [A.R. Vol. II, pp. 57–58];

weapons were involved.[10] Dispatch categorized the call as "Priority 3". Brown described the priorities as follows: Priority 1 is the highest priority and it means police assistance is required immediately. Priority 4 is the lowest priority. Priority 3 means respond as soon as possible.[11]

12. After receiving the dispatch, they drove to where the Toyota Corolla was last sighted. They found a grey Toyota Corolla with the license plate BEWN 840 parked in the driveway of 2273 Devon Road. The officers arrived at approximately 1:24 pm.[12]

13. Vandervelde ran the license plate and discovered that the car was registered to John Stairs, who was 70 years old, and lived at 2273 Devon Road. The Appellant was listed as an associated driver. Police checks revealed he was 37 years old and also resided at 2273 Devon Road. Vandervelde further discovered three cautions relating to the Appellant: an E for escape risk, a D for domestic violence and a V for violence.[13]

14. After locating the Toyota Corolla, the officers did not immediately enter the house. Rather, Brown called S.B. He wished to clarify some facts and obtain a more detailed description of the assault. He testified, however, that he would have entered the house had he not been able to speak with S.B. because he was concerned that the female victim might be in harm's way.[14]

15. Brown testified that his sole purpose in entering the home was to ensure the safety of the unknown female. Vandervelde echoed this.[15] Brown spoke with S.B., confirmed the details of the assault, confirmed his description of the occupants of the vehicle and confirmed that no weapons were involved in the assault.[16]

Evidence of P.C Vandervelde, supra, p. 188, l.12–p. 189, l.2 [A.R. Vol. II, pp. 192–93].
[10] *Evidence of P.C. Brown, supra,* p. 63, l.17–19 [A.R. Vol. II, p. 67];
Evidence of P.C. Vandervelde, supra, p. 247, l.3–8 [A.R. Vol. III, p. 22].
[11] *Evidence of P.C. Brown*, *supra,* p. 58, l.8–p. 59, l.27 [A.R. Vol. II, pp. 62–63].
[12] *Evidence of P.C. Brown, supra,* p. 67, l.24–p. 68, l.7 [A.R. Vol. II, pp. 71–72];
Evidence of P.C. Vandervelde, supra, p. 189, l.13–p. 191, l.19 [A.R. Vol. II, pp. 193–95].
[13] *Evidence of P.C. Vandervelde, supra,* p. 192, l.10–p. 195, l.12 [A.R. Vol II, pp. 196–99].
[14] *Evidence of P.C. Brown, supra,* p. 95, l.1–p. 97, l.3 [A.R. Vol. II, pp. 99–101].
[15] *Evidence of P.C. Brown, supra,* p. 103, l.26–p. 104, l.3 [A.R. Vol II, pp. 107–08];
Evidence of P.C. Vandervelde, supra, p. 294, l.3–10 [A.R. Vol. III, p. 69].
[16] *Evidence of P.C. Brown, supra,* p. 99, l.14–22 [A.R. Vol. II, p. 103].

iii) The Officers' Entry into the Appellant's Home

16. Six minutes elapsed between the phone call with S.B. and the officers' first knock on the door.[17] By the time the officers knocked on the front door, about 30 minutes had passed since the incident leading to the 911 call. The officers testified that they intended to locate the female and male who had been in the Toyota Corolla and to speak with the involved parties.[18]

17. Having received no response to his knocking, Brown walked around the side of the house to the backyard. He observed no one in the backyard. There was a door on the east side of the house with windows in it. P.C. Brown did not see anyone through the east door windows, nor did he hear any noise emanating from the house. He observed that the lights were off. He did not hear or see any signs of an ongoing assault at this point. P.C. Brown tried the side door and discovered it was unlocked. He called for Vandervelde to come and assist.[19]

18. Both Vandervelde and Brown entered the home. The side door opened up into a "kitchen area".[20] There were stairs leading from this area to the basement. At the bottom of the stairs there was a door on the left-hand side leading to a laundry/utility room. On the right-hand side was the living room area of the basement.[21]

19. Upon entering the home, the officers shouted "police", but no one answered. It was evident to the officers that no one was present on the first floor; the lights were off, no appliances were on in the kitchen, and it was quiet. They heard music coming from the basement and they saw a light on in the basement. Vandervelde remained at the top of the stairs while Brown walked through the house to open the front door for Martin.[22] Brown instructed Martin to stay in the kitchen area.

20. While Brown was walking to the front door, Vandervelde observed a male, who turned out to be the Appellant, run past the bottom of the stairs from the living room area of the basement to the laundry room. The Appellant raced into the laundry room and slammed the door behind him.

---

[17] *Evidence of P.C. Brown, supra,* p. 97, l.10–p. 98, l.22 [A.R. Vol. II, p. 101].
[18] *Evidence of P.C. Vandervelde, supra*, p. 299, l.12–27 [A.R. Vol. III, p. 74].
[19] *Evidence of P.C. Brown, supra,* p. 31, l.29–p. 33, l.12; p. 113, l.3–32 [A.R. Vol. II, pp. 35–37, 117].
[20] *Evidence of P.C. Vandervelde, supra*, p. 200, l.7–12 [A.R. Vol. II, p. 204].
[21] *Evidence of P.C Vandervelde, supra,* p. 333, l.4–12 [A.R. Vol. III, p. 108].
[22] *Evidence of P.C. Brown, supra,* p. 33, l.5–p. 34, l.17 [A.R. Vol. II, pp. 37–38].

Vandervelde shouted "contact" to indicate to Brown that he had seen someone in the home. Vandervelde then yelled "come upstairs with your hands up." At this point, a woman came from the living room area of the basement and walked up the stairs with her hands in the air. She identified herself as M.M.[23]

iv) M.M.'s Injuries

21. Both Brown and Vandervelde observed fresh injuries to M.M.'s face. The injuries consisted of scratches, bruising, swelling, and dried blood.[24]

22. After M.M. came up the stairs, Brown told her to remain in the kitchen with Martin. Martin spent approximately 20 minutes with her. During this time, Martin asked her no questions about the assault, whether there were weapons involved or whether anyone else was present in the home.[25]

23. Brown agreed that once M.M. was in the kitchen with Martin, she was safe. He added, however, that she was not 100% safe because he did not know what the Appellant was doing in the laundry room. Brown opined that the Appellant could have been getting a weapon. He agreed, however, that the Appellant was not yelling, being aggressive or making threats.[26]

24. S.B. had not reported any weapons involved in the assault. M.M. did not make any mention of the Appellant being in possession of weapons or of the Appellant being armed or dangerous. In fact, she expressed no fear for her safety. Brown and Vandervelde both testified that after securing M.M. in the kitchen, they neither heard nor saw anything which would lead them to suspect there was anyone in the house other than the Appellant and M.M. Vandervelde added that "you never know."[27] The police had no reason to believe there was anyone else involved in the assault or

---

[23] *Evidence of P.C. Brown*, *supra*, p. 33, l.28–p. 35, l.12 [A.R. Vol. II, pp. 37–39];
Evidence of P.C. Vandervelde, supra, p. 202, l.1–204, l.5 [A.R. Vol. II, pp. 206-08].
[24] *Evidence of P.C. Brown, supra,* p. 35, l.13–p. 36, l.1 [A.R. Vol. II, pp. 39–40];
Evidence of P.C. Vandervelde, supra, p. 204, l.30–p. 205, l.14 [A.R. Vol. II, pp. 208–09].
[25] *Evidence of P.C. Joshua Martin*, Transcript of Proceedings, March 21, 2018, p. 414, l.15–p. 417, l.7 [A.R. Vol. III, pp. 189-92] [*Evidence of P.C. Martin*].
[26] *Evidence of P.C. Brown, supra,* p. 135, l.28–p. 136, l.3; p. 162, l.25–p. 163, l.9 [A.R. Vol. II, pp. 139–40, 166–67].
[27] *Evidence of P.C. Brown, supra,* p. 135, l.5–14 [A.R. Vol. II, p. 139];
Evidence of P.C. Vandervelde, supra, p. 324, l.14–23 [A.R. Vol. III, p. 99].

present in the home either prior to or subsequent to arresting the Appellant. Moreover, they never attempted to elicit any information from M.M. with respect to the presence of weapons or other people in the home.

v) The Arrest of the Appellant

25. After Vandervelde and Brown had secured M.M. in the kitchen with Martin, they went downstairs to arrest the Appellant.[28]

26. In order to face the laundry room door, Brown and Vandervelde had to turn their backs to the living room area of the basement. Both officers expressed concern at having to turn their backs to a room where, theoretically, a third party could be present. Vandervelde was the first officer to descend the stairs. He scanned the living room quickly before turning his back and pointing his gun at the laundry room door. The purpose of scanning the living room area was to ensure no other persons were present. Vandervelde said that while his primary focus was on the door to the room the Appellant had entered, he also looked to the right because he was wanted to "make sure" there was nothing behind him that could jump out at him. He did not see anyone in the room.[29]

27. Similarly, Brown descended the stairs, conducted a quick scan of the living room and was sufficiently satisfied no one else was present that he turned his back to the living room and pointed his taser at the laundry room door. By way of explanation for why he did the check before the arrest, Constable Brown said: "… obviously that would not be a, not a wise move just to jump into a room and leave your back to the open."[30]

28. Both officers ordered the Appellant to exit the laundry room with his hands up. The Appellant opened the door, shrieked, and closed it again. The officers yelled again and ordered him to open the door and get down on the floor. The Appellant complied. Brown handcuffed him and placed him under arrest for assault and breach of probation. Brown conducted a search of the

---

[28] *Evidence of P.C. Vandervelde, supra,* p. 328, l.29–p. 329, l.2 [A.R. Vol. III, pp. 103–04].
[29] *Evidence of P.C. Vandervelde, supra,* p. 333, l.4–p. 334, l.25; p. 336, l.1–p. 337, l.17 [A.R. Vol. III, pp. 108–09, 111–12.
[30] *Evidence of P.C. Brown, supra,* p. 141, l.8–p. 142, l.7 [A.R. Vol. II, pp. 145–46].

Appellant incident to arrest. He found cash on the Appellant's person. Notably, he did not find weapons on the Appellant's person.[31]

29. The arrest of the Appellant took place four minutes after the officers entered his residence.[32]

vi) The Search of the Dwelling House

30. After the police had arrested, handcuffed and searched the Appellant, they could have left the residence, Appellant in tow. Instead, Vandervelde conducted a "clearing search" of the living room area in the basement. He did so only when he "felt it was safe".[33] His purported reason was "mostly just to ensure" his safety.[34] Vandervelde testified that "you never know" what hazards might be in a home.[35] He mentioned the possibility of other people and added that "you don't want to be in a basement where weapons or firearms are sitting out in [the] open."[36]

31. The living room area of the basement was messy and cluttered. There was debris everywhere, including dirty dishes, pizza boxes, electronic cords, papers and clothing.[37]

32. Vandervelde testified that he entered the living room area of the basement and saw a Tupperware container with translucent sides and a red translucent lid. Initially he testified that the Tupperware container was on the floor, a foot behind the couch. When he was confronted with pictures of the basement and saw there were too many items on the floor for the container to have been a foot behind the couch and still in plain view, he changed his testimony and said it was a little more than a foot from the couch. Vandervelde was unable to mark an "X" on the photos indicating where he had found this very important evidence.[38]

---

[31] *Evidence of P.C. Brown, supra,* p. 37, l.13–32; p. 148, l.22–28 [A.R. Vol. II, pp. 41, 152]; *Evidence of P.C. Vandervelde, supra,* p. 338, l.10–14 [A.R. Vol. III, p. 113].
[32] *Evidence of P.C. Brown, supra,* p. 39, l.7–11 [A.R. Vol. II, p. 43].
[33] *Evidence of P.C. Vandervelde, supra,* p. 208, l.29–31 [A.R. Vol. II, p. 212].
[34] *Evidence of P.C. Vandervelde, supra,* p. 225, l.23–24 [A.R. Vol. II, p. 229].
[35] *Evidence of P.C. Vandervelde, supra,* p. 324, l. 23 [A.R. Vol. III, p. 99].
[36] *Evidence of P.C. Vandervelde, supra,* p. 225, l.7–30 [A.R. Vol. II, p. 229].
[37] *Exhibits 4 and 9, Photograph of Living Room Area of Basement* [A.R. Vol. I, Tabs 22, 25, pp. 245, 251].
[38] *Evidence of P.C. Vandervelde, supra,* p. 355, l.30–p. 357, l.6 [A.R. Vol. III, pp. 130–32].

33. Vandervelde testified when he first saw the Tupperware container, he was about ten feet away. He suspected it contained crystal meth because, he testified, he could see that the contents appeared to be glass-like shards. He took a closer look at the container when he walked past and picked up the container. He testified it looked like drugs in the container.[39]

34. Vandervelde picked up the Tupperware container as soon as he determined that the basement was safe and clear. He also found a Ziploc baggie on the coffee table near a partially eaten pizza. The baggie also appeared to contain crystal meth. Vandervelde took the Tupperware container and the baggie and showed them to Brown. Vandervelde testified that the lid was on the Tupperware container when he showed it to Brown. When asked if he removed the lid, he said he did not think he had removed the lid but conceded it was possible.[40]

35. Brown testified that Vandervelde showed him the container while they were in the basement. Brown looked inside and saw what he believed was methamphetamine. Brown said he knew the lid of the container was off at some point but could not recall whether that was while they were in the basement, or back at the police station. Brown agreed in cross-examination that his testimony at the preliminary hearing suggested that the lid was off the container at the scene.[41]

C. The Decision of the Trial Judge

36. In concluding that the search of the living room area of the basement did not constitute a violation of the Appellant's s. 8 rights, the trial judge found that the search was both incident to arrest and for the purpose of ensuring officer safety:

> I also find that the search did not go beyond the immediate surroundings. The Applicant was arrested and was facedown at the entrance to the laundry room. The living room was immediately to the right of the bottom of the staircase without a door to the living room. Mr. Stairs had just ran from the living room portion of the basement, and Ms. Manriquez has exited from this side of the staircase. Brown and

---

[39] *Evidence of P.C. Vandervelde, supra,* p. 353, l.17–p. 354, l.17; p. 359, l.25–p. 360, l.23 [A.R. Vol. III, pp. 128–29, 134–35].
[40] *Evidence of P.C. Vandervelde, supra,* p. 217, l.23–32; p. 223, 1.25–p. 224, l.18; p. 363, l.3–8 [A.R. Vol. II, pp. 221, 228; Vol. III, p. 138].
[41] *Evidence of P.C. Brown, supra,* p. 154, l.5–p. 155, l.3, p. 158, l.11–p. 159, l.14 [A.R. Vol. II, pp. 158, 162–63].

> Vandervelde both testified that they had briefly looked over their shoulder as they came to the basement, but it was a quick look, and their focus was on the laundry room. They could not see all of the living room area as they came down the stairs. ***They were not satisfied that there were no more threats based on the quick look as they came down the stairs***.
>
> The search had a valid objective. Vandervelde testified that he searched to make sure no one else was there and that there were no hazards. This is reasonable. Both the male and the female had come from the living room area. Neither Brown nor Vandervelde could see fully into the living room as they descended the stairs. The quick sweep as they descended the stairs did not fully address safety concerns. As set out above, there were parts of the living room they could not see.[42]

37. The trial judge accepted the evidence of Vandervelde that he found the drugs in plain view. She concluded that Vandervelde seized and believed that the Tupperware contained drugs prior to opening its lid. The trial judge reached that conclusion despite finding the lid to the Tupperware was opened at the scene.[43]

D. The Decision of the Court of Appeal

38. The Appellant argued on appeal that the trial judge erred in failing to find a breach of s. 8 and more specifically that the search behind the couch, after the Appellant was arrested and handcuffed, was unreasonable given the officers did not have any grounds to believe their safety was at risk.

39. In rejecting that argument and upholding the trial judge's ruling, the majority of the Court of Appeal noted the trial judge's finding that the search of the basement was a search incident to arrest justified by the officers' safety concerns:

> [45] The trial judge accepted that the search was conducted for safety reasons. She concluded that this was a "valid objective," making sure that "no one else was there and that there were no other hazards." In these circumstances, the trial judge concluded that the items were simply located in plain view and could be seized.
>
> [46] I read the trial judge's reasons as effectively combining two warrantless search doctrines. First, she employed the search incident to arrest doctrine to justify the officer having entered the living room after the arrest to ensure that there were no

---

[42] *Superior Court Reasons for Ruling Re: Application to Exclude Evidence,* 2018 ONSC 3747 at paras. 281–82 [A.R. Vol. I, Tab 1, pp. 68–69] [emphasis added] [*Reasons for Ruling*].
[43] *Reasons for Ruling*, *supra,* at paras. 278–80 [A.R. Vol. I, Tab 1, pp. 67–68].

> safety hazards. Second, the trial judge employed the plain view doctrine to justify the officer having seized the methamphetamine that was sitting out in the open when the officer did a brief sweep of the room for safety purposes.[44]

40. The majority thus assessed the legality of the search in the context of the common-law framework for a search incident to arrest:

> [51] The purposes for a search incident to arrest include that the police are searching the immediate surroundings to the arrest to: (a) ensure the safety of the police, the public and the accused; (b) preserve evidence; and (c) discover evidence that may be used at trial: Cloutier, at pp. 182, 186; Caslake, at paras. 19-20. Therefore, when considering whether a search is lawful incident to arrest, the court must consider: (a) the purpose of the search; (b) whether that purpose was a valid law enforcement purpose that was connected to the arrest; and (c) whether the purpose identified for the search was objectively reasonable in the circumstances: R. v. Santana, 2020 ONCA 365, at paras. 25-26.[45]

41. The majority concluded that the trial judge made no error in finding the search in this case fell within the scope of the search incident to arrest power. While recognizing that when police are present in a residence without judicial authorization, the search incident to arrest power might be curtailed in respect of searching for evidence, Fairburn A.C.J.O concluded no such constraints existed with respect to safety searches.[46] The majority distinguished this Court's decision in *R. v. MacDonald* (which held that safety searches of a home require reasonable and probable grounds) on the basis that the search conducted in that case was done prior to rather than as an incident of MacDonald's arrest.[47] The majority nevertheless acknowledged that, "The law must not develop in a way that allows the police to use a home entry in urgent circumstances to create the opportunity for a windfall search."[48]

42. In dissent, Justice Nordheimer held that the timing of the search, pre or post arrest, adds little to the analysis of legality and cited this Court's decision in *MacDonald* for the proposition

---

[44] *Reasons of the Court of Appeal, supra,* at paras. 45–46 [A.R. Vol. I, Tab 3, p. 113].
[45] *Reasons of the Court of Appeal, supra,* at para. 51 [A.R. Vol. I, Tab 3, p. 115].
[46] *Reasons of the Court of Appeal, supra,* at para. 60 [A.R. Vol. I, Tab 3, pp. 118–19].
[47] *Reasons of the Court of Appeal, supra,* at paras. 54–56 [A.R. Vol. I, Tab 3, p. 116–17].
[48] *Reasons of the Court of Appeal, supra,* at para. 58 [A.R. Vol. I, Tab 3, p. 118].

that the police have a high hurdle to overcome in justifying safety searches conducted in private residences. Justice Nordheimer noted that *MacDonald* makes the following propositions clear:

- The power to carry out safety searches is not unbridled;
- The power may be exercised only when circumstances, viewed reasonably and objectively, show that the search is needed to address an imminent threat to the safety of the public;
- Such searches will be authorized by law only if the officer believes that his or her safety is at stake; and
- A safety search cannot be justified based on a vague concern for safety.[49]

43. Contrary to the majority, Justice Nordheimer found that the trial judge erred in failing to consider the officers' equivocation regarding the timing of the lid removal when considering the credibility of their explanation for conducting the safety search:

> [100] I will pause at this point to address another issue raised by the appellant which also tends to undermine the trial judge's conclusion that the officers acted in good faith. Contrary to the evidence of the officer who conducted the warrantless search, the trial judge concluded that he had, in fact, opened the Tupperware container (with the drugs in it) while he was still in the basement living area. I note, on this point, that both of the officers involved were extremely reluctant to admit this fact in their evidence. Instead, they testified that they could not remember whether or not the officer conducting the search removed the lid at the scene. I would also note that the searching officer is the same officer who was unable to remember, and thus unable to mark it on a photograph of the basement living area, where he actually found the Tupperware container. These failings raise serious concerns regarding the officer's conduct underlying this warrantless search. However, the trial judge fails to mention these salient facts in the course of her s. 24(2) analysis, especially as it relates to her finding that the officers acted in good faith.[50]

44. Justice Nordheimer further noted that the trial judge failed to undertake any objective analysis of the reasonableness of the officer's belief as to the need for the search.[51]

---

[49] *Reasons of the Court of Appeal, supra,* at para. 79 [A.R. Vol. I, Tab 3, p. 125].
[50] *Reasons of the Court of Appeal, supra,* at para. 100 [A.R. Vol. I, Tab 3, p. 133–34].
[51] *Reasons of the Court of Appeal, supra,* at para. 75 [A.R. Vol. I, Tab 3, p. 123].

PART II – QUESTIONS IN ISSUE

45. This appeal raises the following questions:

1. Did the majority of the Court of Appeal for Ontario err in law in upholding the trial judge's ruling that the search of the Appellant's home was lawful and did not violate his right against unreasonable search and seizure pursuant to s. 8 of the *Charter*?

   The Appellant says **yes**. In the absence of reasonable grounds to believe or suspect the safety of the officers or other individuals was in imminent risk, the search was unlawful.

2. Does the doctrine of search incident to arrest apply, without modification, to searches conducted in a home following a warrantless arrest?

   The Appellant says **no.** The common law framework for searches incident to arrest must be modified in cases of searches of private residences incident to arrest. The law must provide the arrestee with further protection against the risk of the invasion of privacy that may occur if the search of the residence is constrained only by the requirement that the arrest be lawful and the search incidental to arrest and reasonably conduct.

3. What is the standard justifying a warrantless search of a residence as an incident of an arrest?

   The Appellant says **searches of a residence incident to arrest will only be justified in exceptional circumstances where the police have a reasonable belief that there is an imminent risk to their safety or that of others**. Alternatively, the police must have, at minimum, a reasonable suspicion, based on specific and articulable facts, of a danger to the safety of the officers or of others.

PART III – STATEMENT OF ARGUMENT

E. Overview

46. The Appellant submits that the trial judge and the majority of the Court of Appeal erred in concluding that warrantless searches of residences are constrained only by the general requirements of the common law framework of search incident to arrest. The jurisprudence of this Court makes clear that, without modification, those requirements are insufficient to protect the constitutional imperative of privacy in one's home. To comply with s. 8 of the *Charter*, the police power to search a home without a warrant must be strictly circumscribed. A search of a home, beyond that inherently necessary to apprehend the arrestee, will only be lawful where the police have an objectively reasonable basis to believe their safety, or the safety of others is at imminent risk. In this case, the police had no reasonable basis to believe, or even suspect, a risk to safety when they conducted their search of the basement living room. The search of the basement for

safety purposes was not objectively reasonable in the circumstances and it yielded exactly what Fairburn A.C.J.O. cautioned against – an evidentiary windfall to which the police were not entitled.

F. The Search Incident to Arrest Power Must be Tailored to Ensure Constitutional Compliance

47. The Appellant takes no issue with the long-recognized common law police power to search an arrestee, and his immediate surroundings, incident to arrest for a purpose reasonably related to that arrest, including protecting officer and public safety. That power does not, however, permit the police to engage in an intrusive search of a residence for general safety reasons.[52]

48. This Court in *Cloutier v. Langlois* set out the general post-*Charter* framework for searches incident to arrest.[53] That framework requires only that: "(1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably."[54] Notably, the safety search found to be lawful in *Cloutier* was a non-intrusive "frisk" or pat down that lasted only a few seconds in duration. In that context, the Court concluded that the existence of reasonable and probable ground is not a prerequisite to the search power.[55]

49. The Court did not set specific spatial or temporal limits on the search power but left those to be determined on a case-by-case basis. In *R. v. Caslake*, the Court noted both the lack of readily ascertainable limits on the scope of the search incident to arrest power and the responsibility of the courts to set appropriate boundaries to strike a balance between the state's need to pursue law enforcement while "vigorously protecting individuals' right to privacy."[56]

50. In *Caslake*, the Court concluded that the power of search incident to arrest extends to vehicles because they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles.[57] Notwithstanding this, the Court clarified the requirements of a lawful search incident to arrest by stipulating that the officer must have a

---

[52] *R. v. Smith*, 2019 SKCA 126 at para. 34.
[53] *Cloutier v. Langlois*, [1990] 1 SCR 158 [*Cloutier v. Langlois*].
[54] *R. v. Saeed*, 2016 SCC 24 at para. 37 [*Saeed*].
[55] *Cloutier v. Langlois*, *supra,* p. 186.
[56] *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 15 [*Caslake*].
[57] *Ibid.*

subjective belief that the purpose of the search relates to the arrest and the belief must be reasonable.[58]

51. This Court has been repeatedly called upon to delineate the scope of the search incident to arrest power. This is hardly surprising. The common law power is extraordinary in that it requires neither a warrant nor reasonable and probable grounds.[59] While the Court has affirmed that searches conducted incident to arrest will generally be constitutionally compliant where the *Cloutier* requirements are met, certain searches will never be justified by those principles and in other circumstances, additional requirements must be met.

52. In *R. v. Stillman*, the Court held that the power does not entitle the police to conduct invasive searches of an arrestee's person with a view to obtaining hair and buccal samples and teeth impressions. In reaching this conclusion, Cory J. cautioned against "an overly aggressive resort"[60] to the search incident to arrest power:

> No matter what may be the pressing temptations to obtain evidence from a person the police believe to be guilty of a terrible crime, and no matter what the past frustrations to their investigations, the police authority to search as an incident to arrest should not be exceeded. Any other conclusion could all too easily lead to police abuses in the name of the good of society as perceived by the officers. When they are carrying out their duties as highly respected and admired agents of the state they must respect the dignity and bodily integrity of all who are arrested. The treatment meted out by agents of the state to even the least deserving individual will often indicate the treatment that all citizens of the state may ultimately expect. ***Appropriate limits to the power of search incidental to arrest must be accepted and respected***.[61]

53. In subsequent cases, the Court has held that while the police may rely on the power of search incident to arrest, the power must be tailored to ensure that the accused's heightened privacy interests receive adequate protection. "In other words, in these contexts, the common law power

---

[58] *Caslake, supra,* at para. 20.
[59] *R. v. Fearon*, 2014 SCC 77 at para. 16 and 45 [*Fearon*].
[60] *R. v. Golub*, [1997] O.J. No. 3097 at para. 33 (Ont. C.A.) (Q.L.) [*Golub*].
[61] *R. v. Stillman,* [1997] 1 S.C.R. 607 at para. 47 [emphasis added] [*Stillman*].

of search incident to arrest must be modified to permit only reasonable searches — that is, searches that are *Charter*-compliant."[62]

54. In *R. v. Golden*, for example, the Court observed that "different types of searches raise different constitutional considerations: the more intrusive the search, the greater the degree of justification and constitutional protection that is appropriate."[63] Due to the heightened privacy interests engaged during strip searches, the Court held that the police must have reasonable and probable grounds for concluding that such a search is necessary in the particular circumstances of the arrest.[64]

55. Similarly, to justify the taking of a penile swab on arrest, the police must have reasonable and probable grounds to believe such a search would reveal and preserve evidence of the offence for which the accused had been arrested.[65]

56. In *R. v. Fearon*, the Court again found a need to modify the general search incident to arrest framework for constitutional compliance, this time in relation to searches of cell phones incident to arrest. The Court noted that in assessing the legality of a search incident to arrest, an assessment of the nature and extent of the infringement of the right to privacy is required:

> [44] … In both Stillman and Golden, the Court modified the common law power in relation to particularly invasive types of searches in order to make that power consistent with s. 8 of the Charter. What is required is an assessment of the importance of the legitimate law enforcement objectives served by the search and of the nature and extent of the infringement of the detainee's reasonable expectation of privacy.[66]

G. The Standard For A Warrantless Search of a Home, Incident to Arrest

57. There is no dispute that the law has always placed a high value on the security and privacy of the home. Though not involving an invasion of bodily integrity, searches of homes nevertheless engage privacy interests at the very core of those s. 8 of the *Charter* is intended to protect. When

---

[62] *R. v. Golden,* [2001] 3 S.C.R. 679 at para. 87 [*Golden*]; *Saeed, supra,* at para. 38.
[63] *Golden, supra,* at para. 88.
[64] *Golden, supra,* at paras. 98–99.
[65] *Saeed, supra,* at para. 42.
[66] *Fearon, supra,* at para. 44.

read together with the jurisprudence cited above, this Court's decisions in *R. v. Feeney* and *MacDonald* make clear that the heightened privacy interests at stake in homes necessitate a modification of the search incident to arrest principles. More specifically, such searches will only be permitted where the police have reasonable grounds to believe their safety or the safety of others is at imminent risk.

58. Though this Court has not addressed the specific question of the applicability of the common law search power in the context of arrests that occur within a home, in *Feeney* the Court considered the related police power to enter a home incident to arrest. The Court concluded that warrantless entry into a residence, in aid of or incidental to arrest, will only be justified in exceptional circumstances. In reaching this conclusion, Sopinka J., writing for the majority, held that the pre-*Charter* test for warrantless entries into homes articulated in *R. v. Landry* no longer applied.[67]

59. The *Landry* test involved a balancing between the privacy interests of individuals in their residences on one hand, and aiding the police in the execution of their duties on the other. Justice Sopinka concluded that "the increased protection of the privacy of the home in the era of the *Charter* changes the analysis in favour of the former interest: in general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited."[68]

60. The impact of the decision in *Feeney* on the applicability of the principles articulated in *Cloutier* to searches of a home is apparent:

> If *Landry* were to be adopted in the post-*Charter* era, there would be the anomalous result that prior judicial authorization is required to intrude on an individual's privacy with respect to a search for things, but no authorization is required prior to an intrusion to make an arrest. The result becomes more anomalous when *Cloutier v. Langlois*, *supra*, is considered. *Cloutier* held that a search incidental to a lawful arrest does not violate s. 8. Putting this proposition together with the proposition that a warrantless arrest in a dwelling house is legal may lead to the conclusion that a warrantless search of a dwelling house is legal so long as it is accompanied by a

---

[67] *R. v. Feeney*, [1997] 2 SCR 13 at paras. 42–52 [*Feeney*].
[68] *Feeney*, *supra,* at para. 44.

> lawful arrest. Such a conclusion is clearly at odds with *Hunter*, which held that warrantless searches are *prima facie* unreasonable.[69]

61. The Appellant submits that the approach taken in *Feeney* must be applied here. As Justice Doherty noted in *R. v. Golub*, *Feeney* fixed the constitutional limit of the exercise of the police power to enter a home as an incident of arrest. A search of a home incident to arrest raises the same conflicting interests of personal privacy and law enforcement objectives. Accordingly, searches of a home incidental to an arrest, like entries of a home to effect an arrest, ought to be "generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home."[70]

62. In *Golub*, Justice Doherty declined to provide an exhaustive answer to the question of what would amount to exceptional circumstances justifying a warrantless search of a residence as an incident of an arrest but included the risk of physical harm to those at the scene of the arrest within that category. More specifically, Justice Doherty concluded that where the police have a reasonable suspicion (rather than an unsubstantiated hunch) that immediate action is required to secure the safety of those at the scene of an arrest, a search conducted in a manner consistent with the preservation of safety would be justified.[71]

63. In relation to the specific facts in *Golub*, Justice Doherty held that the officer's reasonable suspicion that someone other than the accused was present in the home, armed with a loaded sub-machine gun, was sufficient to justify the search.[72] Justice Doherty found support in the American jurisprudence for rejecting the reasonable grounds requirement in favour of a reasonable belief based on specific and articulable facts, falling short of probable cause.[73]

64. Thirteen years after the decisions in *Feeney* and *Golub*, a majority of this Court held that reasonable and probable grounds *are necessary* to justify a warrantless safety search of a home. In

---

[69] *Feeney, supra,* at para. 45.
[70] *Golub, supra,* at paras. 40–41.
[71] *Golub, supra,* at paras. 46–49.
[72] *Golub, supra,* at para. 48.
[73] *Golub, supra,* at para. 51.

R. v. MacDonald, Justice LeBel, writing for the majority, set out two requirements for a lawful warrantless search of a home:

i. the search must be objectively necessary to address an imminent safety threat; and

ii. the officer must have a subjective belief on reasonable grounds that there exists an imminent safety threat.[74]

65. In the Appellant's case, the majority of the Court of Appeal held that the principles articulated in *MacDonald* had no application in the arrest context. In reaching this conclusion, Fairburn A.C.J.O. noted that a person who is under lawful arrest has a lower reasonable expectation of privacy.[75] The Appellant submits that this is not a meaningful basis on which to distinguish the cases.

66. The authority for a safety search incident to arrest does not arise from the reduced expectation of privacy on the part of the arrested individual.[76] Instead, it is a pragmatic extension of the power of arrest, allowing the police to gain control over things or information in the course of the lawful exercise of their duties. Moreover, where this Court recognized the reduced expectation of personal privacy incident to arrest, it specifically distinguished the privacy violations typically associated with a search on arrest (*e.g.* the taking of fingerprints) from the more invasive nature of the search of a home:

> While a search of one's premises requires a prior authorization based on reasonable and probable grounds to believe both that the offence has been committed and that evidence will be found, the custodial fingerprinting process is entirely different. It involves none of the probing into an individual's private life and effects that mark a search.[77]

67. The Appellant, on appeal, did not dispute that the officers were acting in the lawful execution of their duty when they arrested him. The only question was whether the safety search constituted a justifiable exercise of the powers associated with that duty.[78] The principles articulated in *MacDonald* must guide that determination regardless of whether the safety search

---

[74] *R. v. MacDonald* [2014] 1 S.C.R. 37 at para. 41 [*MacDonald*].
[75] *Reasons of the Court of Appeal, supra*, at para. 56 [A.R. Vol. I, Tab 3, p. 117].
[76] *Caslake, supra,* at para. 17.
[77] *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, p. 413, para. 60.
[78] *MacDonald, supra,* at paras. 35–36.

occurs before or after the arrest. Despite its importance, the power to carry out safety searches is not unbridled. It may only be exercised where:

- The circumstances, viewed objective and reasonably, show that the search is needed to address an imminent threat to the safety of the public;
- The police subjectively believe their safety, or the safety of the public is at stake; and
- The concern for safety is not vague. The police must be acting on reasonable and specific inferences drawn from the known facts of the situation.[79]

68. The Appellant recognizes that the power to search incident to arrest is a necessary and pragmatic extension of the power of arrest. Clearly the police must be able to protect themselves from attack by an accused who has weapons concealed on his person or close at hand and protect others who might be at risk from the accused.[80] The Appellant also accepts that a warrantless entry into a home in exigent circumstances to make an arrest will necessarily involve some interference with the accused's privacy interests. The police cannot make the arrest with their eyes closed. The Appellant's position is simply that police will be justified in conducting a safety search that goes beyond what is necessary to safely apprehend the suspect, only where the police have a reasonable belief that their safety or the safety of others is at imminent risk.

H. No Reasonable Basis to Believe or Even Suspect an Imminent Risk to Safety

69. After the police had secured the safety of M.M. and arrested, searched and handcuffed the Appellant, they had no reasonable grounds to believe, or even suspect, that their safety or the safety of others was at risk. None of the police officers testified to holding a belief or suspicion, based on specific and articulable facts, that there were weapons or other individuals in the basement of the home. At its highest, their evidence expressed a vague concern about safety, rooted in the notion that "you never know" what hazards might present themselves in an unfamiliar home. As such, the purpose of the search was not objectively reasonable.

70. In conducting their search, the officers in this case were not operating on a hunch, substantiated or otherwise. They had entered the house in exigent circumstances with the express purpose of ensuring the safety of an unknown female. The officers quickly secured the female and

---

[79] *MacDonald, supra,* at para. 41.
[80] *Stillman, supra*, at para. 48.

arrested the Appellant. There was no indication that anyone else was involved, and certainly no indication that any weapons were involved in the suspected domestic assault. The moment the Appellant was arrested, the officers had completed their task and should have left the Appellant's home. Instead, they remained in the home for at least 23 minutes (from 1:35 p.m. to 1:58 p.m.) During that time, the officers conducted the search of the basement and arrested M.M. for the offence of possession for the purpose of trafficking.[81]

71. The 911 call that originated the police investigation reported what appeared to be a domestic assault between two individuals. The police officer's observations of the home, from outside and within, gave them no indication that anyone other than the Appellant and M.M. were present in the house. Police checks did not reveal that the Appellant had access to a gun or a history of gun possession. These facts stand in sharp contrast to those in *Golub* where the police "had every reason to believe that there was a loaded machine gun" in the apartment they searched.[82]

72. Both Brown and Vandervelde testified that before they turned their backs on the living room area of the basement, they conducted a quick visual scan to ensure they would not get attacked with their backs turned. After satisfying themselves that it was safe to turn their back on the living room, they both trained their weapons on the laundry room door and ordered the Appellant to come out. After the Appellant emerged and dropped to the floor, Brown handcuffed and arrested him. Brown conducted a search of the Appellant incident to arrest ***before*** Vandervelde searched the basement. Brown found no weapons on the Appellant and Vandervelde candidly acknowledged that he searched the living room area only when he felt it was safe to do so.

73. Moreover, it was evident that far from being a threat, the Appellant was afraid of the officers. First, he ran from them and hid in the laundry room. Second, when they ordered him to come out, he opened the door, shrieked, and quickly shut it.

74. The trial judge did not find that the police were at risk, or that they had any reasonable belief they were in imminent danger when they searched the basement living room. Rather, the

---

[81] *Evidence of P.C. Martin, supra,* p. 385, l.20–32; p. 417, l.3–6 [A.R. Vol. III, pp. 160, 192].
[82] *Golub, supra,* at para. 52.

trial judge concluded that their search was reasonable because the officers "were not satisfied" that there were no more threats after they had arrested the Appellant.[83]

75. This is not the correct test to apply when assessing the legality of a warrantless search of a home. The acceptance of the officers' evidence on this point does not amount to a subjective belief in the existence of *an imminent threat* to their safety. And even if it did, the trial judge was required to assess the objective reasonableness of that belief. The trial judge did not make any finding that the officers' views about possible safety concerns were objectively and reasonably based.

76. The majority of the Court of Appeal similarly made no finding that there was a reasonable basis for the officers to believe or suspect their safety or the safety of others was at imminent risk. Instead, the majority concluded that a safety search of the home was justified simply by the fact of the Appellant's arrest.

77. The approach adopted by the majority – that the search of the Appellant's home was constrained only by the standard search incident to arrest requirements – exposed the Appellant to an unreasonable invasion of privacy. Indeed, if the majority is right, it seems the police would have been justified in searching not just the basement living room but the entirety of the house for any potential safety hazards or hidden people.

78. Such a result is inconsistent with the careful limitation of the search incident to arrest power in circumstances, like this one, where the arrestee's privacy interest is particularly high. The search here was not done in aid of the Appellant's arrest and it yielded an evidentiary boon for the police, completely unrelated to the original purpose that gained them lawful entry to the Appellant's home. The police ought not to benefit from the unlawful search of an individuals' home under the guise of a safety search, which was not objectively reasonable.

I. Section 24(2) Analysis

79. Applying the three-pronged *Grant* framework, the Appellant submits that the drugs found as a direct result of the breach of s. 8 should be excluded from evidence under s. 24(2). The trial judge conducted her own s. 24(2) analysis. While such judgments with respect to the exclusion of

---

[83] *Reasons for Ruling, supra,* at para. 281 [A.R. Vol. I, Tab 1, pp. 68–69].

evidence are typically owed deference, that does not apply where an appellate court reaches a different conclusion on the existence of a *Charter* breach.[84]

i) The Seriousness of the Breach

80. This was a serious *Charter* breach. As Justice Nordheimer concluded in the court below, "It is difficult to accept that the officer acted in good faith when he proceeded to conduct a search, within a private residence, in violation of the well-established principles regarding such searches and the equally well-established high degree of privacy that exists in any person's private residence." The officers knew, or ought to have known, that they were not entitled to conduct a search without judicial authorization, especially in a home.

81. When the impugned search took place, the situation was neither dynamic nor volatile. The exigent circumstances that justified the warrantless entry of the police into the home had been resolved. The Appellant was arrested. The victim of the assault secure. When the officer felt safe, he took a look around for no permissible reason. This amounts to serious misconduct.

82. Moreover, it appears the police obfuscated in their evidence in an attempt to legitimize the warrantless search and seizure of the drugs. In her reasons on the Appellant's *Charter* application, the trial judge found as a fact that Vandervelde removed the lid from the Tupperware container while in the basement, despite his extreme reluctance to admit this fact. The trial judge concluded, however, that the removal of the lid added nothing to the officer's belief that the substance inside was methamphetamine:

> In my view, this was not an improper search in the circumstances of this case. Vandervelde had identified the substance as likely methamphetamines prior to picking up the container and prior to opening the lid. The container was transparent. The lid was slightly opaque but transparent still. Removing the lid added nothing to Vandervelde's belief. The facts are distinguishable from *Riccardi*, where the evidence was not discovered until after the search of the book and computer.[85]

---

[84] *R. v. Wong*, 2015 ONCA 657 at para. 55.
[85] *Reasons for Ruling, supra,* at para. 279 [A.R. Vol. I, Tab 1, pp. 68].

83. Despite making a significant factual finding that contradicted the testimony of the officers, the trial judge failed to consider the impact of this inconsistency on the credibility of the officers in respect of two crucial elements of their testimony: whether the purpose of the search was truly officer safety and whether the drugs were, in fact, found in plain view.

84. The trial judge's factual findings are, of course, entitled to deference. Deference, however, does not exempt such findings from all appellate scrutiny. Vandervelde's claim that while looking for hidden people and/or unsafely stored weapons, he spotted a closed Tupperware container, with a semi-transparent lid, on a cluttered floor, from a distance of 10 feet, and knew immediately that it contained illicit drugs strains credulity. The fact that the officer was unable to mark the location of the Tupperware and that, despite his protestation otherwise, he did remove the lid while in the basement ought to have figured prominently in the trial judge's assessment of his evidence. Yet the trial judge fails to mention these salient facts either in her assessment of the officer's credibility or in reaching her conclusion in the s. 24(2) analysis that the officers were acting in good faith.

ii) The Impact of the Breach on the Appellant's *Charter* Protected Interests

85. Typically, courts will find that an illegal search in a person's home has a significant impact on a person's *Charter* protected interests given the high expectation of privacy in their homes to which people are entitled. This case is no exception. Indeed, the trial judge recognized in this case that the impact of the alleged breaches "would be significant."[86]

iii) Society's Interest in an Adjudication on the Merits

86. The drugs are real and reliable evidence. The public interest in having a trial on the merits favours the admission of the evidence. However, the law is clear that where, as here, the first two *Grant* factors make a strong case for exclusion, the third factor "… will seldom, if ever, tip the balance in favour of admissibility."[87] Moreover, in balancing the factors in the s. 24(2) analysis it is important to recognize that disrepute to the administration of justice may result from "the

[86] *Reasons for Ruling, supra,* at para. 293 [A.R. Vol. I, Tab 1, pp. 71].
[87] *R. v. Davidson,* 2017 ONCA 257 at para. 53; *R. v. McGuffie,* 2016 ONCA 365 at para. 63.

admission of real, reliable evidence in circumstances that would amount to judicial acceptance of unacceptable conduct by the police."[88]

PART IV – COSTS

87. The Appellant makes no submissions on costs.

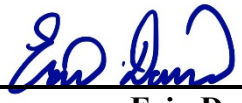
PART V – ORDER SOUGHT

88. The Appellant requests that the appeal be granted and an acquittal entered with respect to the charge of possession of a controlled substance for the purpose of trafficking.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

89. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, DATED at Toronto, this 29th day of March, 2021



Erin Dann

Lisa Freeman

[88] *R. v. Miller*, 2019 ONSC 7417 at para. 58, citing *R. v. Le,* 2019 SCC 34 at paras. 160–166.

PART VII – TABLE OF AUTHORITIES

JURISPRUDENCE	**PARAGRAPH**
Cloutier v. Langlois, [1990] 1 SCR 158	48, 51, 60
R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387	66
R. v. Caslake, [1998] 1 S.C.R. 51	49, 50, 66
R. v. Davidson, 2017 ONCA 257	86
R. v. Fearon, 2014 SCC 77	51, 56
R. v. Feeney, [1997] 2 SCR 13	57, 58, 59, 60, 61, 64
R. v. Golden, [2001] 3 S.C.R. 679	53, 54
R. v. Golub, [1997] O.J. No. 3097 (Ont. C.A.) (Q.L.)	52, 61, 62, 63, 64, 71
R. v. Le, 2019 SCC 34	89
R. v. MacDonald [2014] 1 S.C.R. 37	41, 42, 57, 64, 67
R. v. McGuffie, 2016 ONCA 365	86
R. v. Miller, 2019 ONSC 7417	89
R. v. Saeed, 2016 SCC 24	48, 53, 55
R. v. Smith, 2019 SKCA 126	47
R. v. Stillman, [1997] 1 S.C.R. 607	52, 68
R. v. Wong, 2015 ONCA 657	79