File Number: 39416

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

BETWEEN:

MATTHEW STAIRS

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO
CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT, HER MAJESTY THE QUEEN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. In 1990, this Court wrote that "[t]he gravity, indeed, the tragedy of domestic violence can hardly be overstated."[1] Thirty years later, this crime continues to be a scourge on Canadian society. It is alarmingly common,[2] particularly for Indigenous people and those living in Canada's northern communities.[3] Its "horrific impact on women from all walks of life,"[4] as well as the cost to our society, is startling.[5] Internationally, the World Health Organization has concluded that it is "a major public health problem and a violation of women's human rights."[6] The strong public interest in the effective policing and prosecution of this crime is obvious.

2. For responding police officers, these calls can be difficult and dangerous. The pathology of domestic violence[7] dictates that police officers do not have the luxury of assumptions. Weapons may be involved. Emotions may be fueled by alcohol and drugs. Victims may not cooperate; they may deny, minimize and conceal their injuries; they may cooperate only to later recant. Offenders, hearing the knock on the door, may attempt to conceal their crime, alter the crime scene, destroy

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[1] *R v Lavallee*, [1990] 1 SCR 852 at 872.
[2] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 29.
[3] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 31, citing Statistics Canada, *Victimization of Aboriginal people in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (June 28, 2016) and Statistics Canada, "*Criminal victimization in Canada, 2014*, by Samuel Perreault, Catalogue No 85-002-X.
[4] *R v Lavallee*, [1990] 1 SCR 852 at 872.
[5] A Justice Canada study estimated the cost of one type of intimate partner violence, spousal violence, on Canadian society at $7.4 billion in 2009. Department of Justice Canada, *An Estimation of the Economic Impact of Spousal Violence in Canada, 2009*, by Ting Zang, Josh Hoddenbagh, Susan McDonald, Katie Scrim.
[6] World Health Organization, *Violence Against Women*, 9 March 2021.
[7] In this factum, unless otherwise stated "domestic violence" includes all forms of family violence (violence against children, other family members, etc.) and what is referred to as Intimate Partner Violence, or IPV.

or tamper with evidence. Moreover, they may further take matters into their own hands. The unfortunate truth is that domestic violence has ended in serious injury and death.

3. The appellant says that the *Charter* requires that officers in these circumstances must have reasonable grounds to believe that their safety or the safety of others is at "imminent risk" before they may look for occupants or victims, secure and control the scene or look for evidence. This is both an unreasonable and an unwarranted limitation on the power to search incident to an arrest.

4. In a domestic violence case, the dwelling is often the crime scene. It is part of the anatomy of the domestic violence crime. Behind closed doors, it is the very privacy of the home that allows this crime to breathe. It allows the offender to constrain and control the victim and the knowledge of the violence that is occurring. To respond effectively to these crimes, incident to a lawful arrest the police must be permitted to secure a domestic violence crime scene, to determine the nature and scope of the victims and their injuries and to look for evidence. Where the circumstances reasonably support the pursuit of these purposes within a dwelling, the consequential interference with privacy interests is justified because it achieves the appropriate balance between the rights of the accused and the duties of police officers and the public interest in the effective execution of those duties.

5. As the facts of this case show, existing limitations on the power of police officers to search incident to arrest are constitutionally sufficient. Those limitations control the exercise of this search power within dwellings so that intrusions on privacy interests are minimized, while still allowing the police the ability to effectively respond to these crimes. This appeal should be dismissed.

Statement of facts

6. The appellant's statement of facts is substantially correct. However, it is incomplete. The reason for the post-arrest search of the basement was not limited to safety risks. The officers were also concerned that other occupants or victims may be located in the basement where the appellant and the victim had been observed.

A. The 911 call reporting an assault in progress

7. On June 1, 2017, at around 1:00 p.m., Santos Berlingieri was driving southbound on Ford Drive in Oakville. He observed a car that was stopped and facing northbound. The male driver was assaulting a female passenger. Mr. Berlingieri drove past the car and continued southbound. He saw the car make a U-turn and drive behind his truck, travelling in the same direction. He continued to observe the male driver assaulting the female passenger. The car was last seen travelling eastbound on Devon Road. He reported the incident to the Halton Regional Police Service approximately 15 minutes later. He provided the make, model, and colour of the car – a charcoal-gray Toyota Corolla – as well as the licence plate number "BEWN 480 or 483".[8]

8. Officers Chris Brown, Joshua Martin, and Jesse Vandervelde were dispatched at around 1:16 p.m. and a minute or so later, they headed directly to the area where the car was last seen.[9] At 1:24 p.m., Officer Vandervelde found a car matching the description at 2273 Devon Road.[10] A check of the licence plate number revealed that the car was registered to John Stairs (father of Matthew Stairs), who was born in 1947 and whose address was 2273 Devon Road. The appellant was known to drive the car as well. Three cautions were registered for him – flight risk, violence, and family violence. According to Officer Brown, who was familiar with the appellant, the appellant was well known for domestic violence offences.[11]

B. The entry into 2273 Devon Road to check on the woman's safety

9. The three officers arrived at 2273 Devon Road at around the same time, 1:24 p.m. One of the car windows was partially down and there was a purse and cell phone inside, supporting the

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[8] Testimony of Chris Brown, Transcript of Proceedings, March 19, 20 and 21, 2018 ("Testimony of Chris Brown") at p 20, ll 2-12; p 25, l 5-p 26, l 5; p 66, ll 18-26 [Appellant's Record ("AR"), Vol II, Tab 27, pp 24, 29-30, 70]; Exhibit 3, ICAD Report [AR, Vol I, Tab 21, p 237].
[9] Testimony of Chris Brown at p 19, ll 13-16; p 20, ll 20-27 [AR, Vol II, Tab 27, pp 23-24]; Testimony of Joshua Martin, Transcript of Proceedings, March 19, 20 and 21, 2018 ("Testimony of Joshua Martin") at p 374, ll 19-21; p 375, l 32-p 376, l 3 [AR, Vol III, Tab 27, pp 149-151]; Testimony of Jesse Vandervelde, Transcript of Proceedings, March 19, 20 and 21, 2018 ("Testimony of Jesse Vandervelde") at p 188, l 11-p 189, l 5 [AR, Vol II, Tab 27, pp 192-193].
[10] Testimony of Jesse Vandervelde at p 190, l 5-p 191, l 18 [AR, Vol II, Tab 27, pp 194-195] and p 238, ll 1-7 [AR, Vol III, Tab 27, p 13].
[11] Testimony of Jesse Vandervelde at p 193, l 16-p 194, l 17 [AR, Vol II, Tab 27, pp 197-198]; Testimony of Chris Brown at p 27, l 10-p 29, l 13; p 31, ll 1-5 [AR, Vol II, Tab 27, pp 31-33, 35].

officers' belief that the occupants of the car were inside the house.[12] Given a minor discrepancy in the licence plate number, Officer Brown decided to call Mr. Berlingieri to confirm his account. Mr. Berlingieri provided additional details about the assault, including that the male hit the female multiple times with "a flurry of strikes," and that he put her in a headlock and she appeared to be "turtling" to protect herself. He described the male as white, with a shaved head, and 25 to 30 years old, while the female was described as white. Officer Brown was satisfied that Mr. Berlingieri's account was reliable.[13] Based on all the information they had received, the police determined that it was necessary to enter the house to check on the female's safety.[14]

C. The formation of grounds to arrest the appellant inside the house

10. At around 1:31 p.m., Officers Vandervelde and Martin went to the front door and knocked several times, announcing "police." No one replied. Officer Brown went around the house and did not see anyone outside. He went to the side door, which was unlocked. He and Officer Vandervelde entered the house through the side door, shouting "police" loudly. Officer Brown went to the living room to let Officer Martin in.[15] While Officer Vandervelde was at the top of the stairs leading down to the basement, he could hear music coming from the basement. He saw the appellant run across the bottom of the stairwell from the right side of the basement to the left side. Officer Vandervelde yelled "police," "don't move," and "show me your hands." He and the appellant made eye contact, and the appellant "ran away once he saw me."[16]

11. Officer Vandervelde told Officer Brown that he had seen the appellant running in the basement. They continued yelling commands to "come upstairs" and "hands up." The appellant

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[12] Testimony of Jesse Vandervelde at p 191, ll 20-26 [AR, Vol II, Tab 27, p 195]; p 238, ll 1-7; p 294, ll 8-11 [AR, Vol III, Tab 27, p 13, 69]; Testimony of Chris Brown at p 21, ll 8-23; p 22, ll 17-25; p 109, ll 6-14 [AR, Vol II, Tab 27, pp 25, 26, 113]; Testimony of Joshua Martin at p 377, ll 2-25 [AR, Vol III, Tab 27, p 152].

[13] Testimony of Chris Brown at p 23, l 8-p 26, 1 8; p 30, ll 5-16 [AR, Vol II, Tab 27, pp 27-30, 34].

[14] Testimony of Chris Brown at p 32, ll 22-27; p 103, l 27-p 104, l 4 [AR, Vol II, Tab 27, pp 36-37, 107]; Testimony of Jesse Vandervelde at p 199, ll 5-11 [AR, Vol II, Tab 27, p 203].

[15] Testimony of Chris Brown at p 31, l 27-p 33, l 31 [AR, Vol II, Tab 27, pp 35-37]; Testimony of Jesse Vandervelde at p 197, l 19-p 199, l 29 [AR, Vol II, Tab 27, pp 201-203]; p 296, ll 9-17 [AR, Vol III, Tab 27, p 71].

[16] Testimony of Jesse Vandervelde at p 199, l 30-p 200, l 2; p 201, l 21-p 203, l 15; p 205, ll 24-27 [AR, Vol II, Tab 27, pp 203-207, 209]; p 309, l 26-p 310, l 2; p 312, ll 11-30 [AR, Vol III, Tab 27, pp 84-85, 87].

did not comply.[17] However, a female later identified as Marcela Manriquez emerged from the basement with visible, fresh injuries to her face, variously described as cuts, scratches, bruising, markings, and swelling.[18] Having observed the physical injuries (which were consistent with Mr. Berlingieri's information), the police believed they had reasonable grounds to arrest the appellant.[19]

12. Concerned that she may be combative, Officer Brown directed Officer Martin to stay with Ms. Manriquez.[20] Officer Brown also had ongoing safety concerns: because she was not cooperative he did not believe that Ms. Manriquez would leave the house with them, and he did not want to leave her with the appellant, who he had reasonable grounds to believe had recently assaulted her. He did not stop to talk to her because if the appellant had come out with a weapon, he would have been at a disadvantage.[21] Moreover, the appellant had a history of violence, ran away after seeing Officer Vandervelde, and refused to comply with police commands. As Officer Vandervelde put it, "we're not just going to give this person who just ran away from us time to possibly go arm himself."[22] The situation moved quickly. It was dynamic.[23] The police entered the basement in order to arrest the appellant, look for occupants or victims, ensure their safety and that of Ms. Manriquez, and secure the scene.[24]

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[17] Testimony of Jesse Vandervelde at p 203, l 16-p 204, l 2; p 205, l 30- p 206, l 3 [AR, Vol II, Tab 27, pp 207-210]; Testimony of Chris Brown at p 34, ll 28-32; p 121, l 27-p 122, l 21 [AR, Vol II, Tab 27, pp 38, 125-126].

[18] Testimony of Chris Brown at p 34, l 23-p 36, l 1; p 44, ll 20-29; p 131, l 26-p 132, l 22 [AR, Vol II, Tab 27, pp 38-40, 48, 135-136]; Testimony of Jesse Vandervelde at p 204, l 2-p 205, l 14 [AR, Vol II, Tab 27, pp 208-209].

[19] Testimony of Chris Brown at p 38, ll 15-14 [AR, Vol II, Tab 27, p 42]; Testimony of Jesse Vandervelde at p 206, ll 4-9 [AR, Vol II, Tab 27, p 210].

[20] Testimony of Chris Brown at p 36, ll 6-10; p 136, ll 22-29 [AR, Vol II, Tab 27, pp 40, 140].

[21] Testimony of Chris Brown at p 39, l 31-p 40, l 18; p 165, l 31-p 166, l 8 [AR, Vol II, Tab 27, pp 43-44, 169-170].

[22] Testimony of Jesse Vandervelde at p 205, l 30-p 206, l 3 [AR, Vol II, Tab 27, pp 209-210]; p 316, ll 7-20; p 324, l 20-p 325, l 2; p 332, ll 3-10 [AR, Vol III, Tab 27, pp 91, 99-100, 107].

[23] Testimony of Chris Brown at p 161, l 30-p 162, l 9 [AR, Vol II, Tab 27, pp 165-166]; Testimony of Jesse Vandervelde at p 206, ll 20-26 [AR, Vol II, Tab 27, p 210].

[24] Testimony of Chris Brown at p 36, ll 11-23; p 135, ll 15-21; p 137, l 27-p 138, l 28; p 162, l 25-p 166, l 8 [AR, Vol II, Tab 27, pp 40, 139, 141-142, 166-170]; Testimony of Jesse Vandervelde at p 329, ll 3-8; p 330, ll 22-25 [AR, Vol III, Tab 27, pp 104, 105].

D. The search incident to arrest and the discovery of the drugs

13. Officers Brown and Vandervelde entered the basement and did a quick scan to check for other victims, occupants or threats in the living room, which was to the right. Officer Vandervelde testified that this quick scan was insufficient, but was all that was possible because their attention had to remain focused on the actions of the appellant who had barricaded[25] himself in the laundry room, which was to the left. Standing at the bottom of the stairs, certain areas of the living room were not visible, such as underneath the table and behind the couch, boxes, TV stand, and chair.[26] Officer Vandervelde testified that he had no information about the layout of the house, and had only limited information about who lived there. He agreed that he had "no idea" who he might encounter in the basement.[27]

14. Due to the cautions registered to the appellant and the assault on Ms. Manriquez, both officers had their weapons drawn.[28] They made demands for the appellant to open the door and come out. The appellant opened the door once and then closed it immediately. The police continued their demands. The appellant eventually opened the door again and was arrested at 1:35 p.m., less than five minutes after the police entered the house.[29]

15. Once the appellant was handcuffed, Officer Vandervelde turned his attention back to the living room. He visually searched the living room. The appellant had fled from the living room area to the laundry room and the victim had emerged from the basement. Accordingly, Officer Vandervelde wanted to determine if there were other victims or persons present who may have been hiding and whether other obvious threats or hazards existed, such as weapons.[30]

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[25] Testimony of Jesse Vandervelde at p 325, ll 13-15 [AR, Vol III, Tab 27, p 100].
[26] Exhibit 4, photo of living room [AR, Vol I, Tab 22, p 245]; Exhibit 9, photo of living room [AR, Vol I, Tab 25, p 251]; Testimony of Chris Brown at p 140, l 11-p 142, l 4 [AR, Vol II, Tab 27, pp 144-146]; Testimony of Jesse Vandervelde at p 333, l 29-p 334, l 16; p 336, l 17-p 337, l 8; p 347, l 24-p 348, l 14 [AR, Vol III, Tab 27, pp 108-109, 111-112, 122-123]
[27] Testimony of Jesse Vandervelde at p 335, ll 23-32 [AR, Vol III, Tab 27, p 110]
[28] Testimony of Chris Brown at p 37, l 4-9 [AR, Vol II, Tab 27, p 41]; Testimony of Jesse Vandervelde at p 206, l 30-p 207, l 10 [AR, Vol II, Tab 27, pp 210-211].
[29] Testimony of Chris Brown at p 37, ll 4-32; p 39, ll 10-12 [AR, Vol II, Tab 27, pp 41, 43]; Testimony of Jesse Vandervelde at p 207, l 11-p 208, l 25 [AR, Vol II, Tab 27, pp 211-212]; p 337, l 18-p 338, l 1 [AR, Vol III, Tab 27, pp 112-113].
[30] Testimony of Jesse Vandervelde at p 208, l 26-p 209, l 6; p 225, ll 19-29 [AR, Vol II, Tab 27, p 212-213, 229]; p 342, l 18-p 343, l 23 [AR, Vol III, Tab 27, pp 117-118]; Testimony of Chris Brown at p 42, ll 7-10 [AR, Vol II, Tab 27, p 46].

16. This visual search of the small[31] living room was brief.[32] Doors were not opened and things were not moved.[33] As Officer Vandervelde was clearing the living room, he observed in plain view a Tupperware container with a red lid on the ground behind the couch. The sides of the container were transparent and so was the red lid. He could immediately see that it contained glass-like shards which he believed was methamphetamine.[34] He also saw in plain view a clear Ziploc bag[35] next to the coffee table which also appeared to contain methamphetamine. He seized both items. He advised Officer Brown of what he had found. He acknowledged that it was possible that he removed the lid from the container while they were in the basement, but this would have been after he had already observed the methamphetamine in plain view.[36]

17. The officers on the scene reported the drug seizure to their supervisor, Sergeant Dick. They were instructed to secure the residence. Following this step, Detective Constable Gibbons with the Drug and Morality Unit prepared an Information to Obtain and Search Warrant for the purpose of conducting "a more thorough search"[37] of the dwelling.

E. The trial judge dismissed the *Charter* application

18. The trial judge found that the police search of the living room area following the appellant's arrest was narrow, specific and focused on determining whether any other person was present and to secure the scene. She determined that their conduct, authorized by law, was reasonable in the circumstances.[38] The trial judge convicted the appellant on all counts; possession of over 90 grams of methamphetamine for the purpose of trafficking (PPT), assault on Ms. Manriquez and breach of probation.[39]

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[31] Exhibit 4, photo of living room [AR, Vol I, Tab 22, p 245]; Exhibit 9, photo of living room [AR Vol I, Tab 25, p 251].
[32] Testimony of Chris Brown at p 153, l 31-p 154 l 1 [AR, Vol II, Tab 27, pp 157-158].
[33] Testimony of Jesse Vandervelde at p 348, ll 20-26 [AR, Vol III, Tab 27, p 123].
[34] Exhibit 8a, photo of Tupperware container [AR, Vol I, Tab 23, p 247].
[35] Exhibit 8b, photo of plastic bag [AR, Vol I, Tab 24, p 249].
[36] Testimony of Jesse Vandervelde at p 213, l 4-p 214, l 31; p 217, l 14-p 218, l 4; p 223, l 5-p 224, l 18 [AR, Vol II, Tab 27, pp 217-218, 221-222, 227-228]; p 351, l 13-p 353, l 4; p 363, ll 3-8 [AR, Vol III, Tab 27, pp 126-128, 138]; Testimony of Chris Brown at p 42, ll 7-14; p 149, ll 12-31 [AR, Vol II, Tab 27, pp 46, 153].
[37] Testimony of Chris Brown at p 47, l 6-p 48, l 20 [AR, Vol II, Tab 27, pp 51-52].
[38] *R v Stairs*, 2018 ONSC 3747 at paras 281-282 [AR, Vol I, Tab 1, pp 68-69].
[39] *R v Stairs*, 2018 ONSC 3783 [AR, Vol I, Tab 2]. Only the PPT conviction was appealed.

F. The Court of Appeal was divided on the section 8 issue

19. The majority of the Court of Appeal distinguished this Court's determination in *R v MacDonald* – that safety searches in the context of a detention require reasonable grounds to believe that safety is at risk – on the basis that the appellant was under arrest. For the majority, the key consideration was not whether there exist reasonable grounds to believe, but whether the objective of the search is connected to the arrest and whether it was reasonable in the circumstances. Here, the majority determined that both thresholds were met and that the trial judge correctly found that there was no s. 8 violation. Accordingly, the majority did not address the s. 24(2) analysis and dismissed the appeal.[40]

20. In dissent, Justice Nordheimer found that the standard set forth in *R v MacDonald* applied: in order to utilize the safety exception as a justification for the warrantless search, the police must show objectively verifiable necessity. In the context of this case, this would require the police officers to have reasonable grounds to believe that there is an imminent threat to their safety. Here, he held that the trial judge erred in not applying the *MacDonald* standard. Moreover, he held, the trial evidence did not approach that standard, amounting to little more than the "vague safety concerns" that Justice LeBel cautioned against in *MacDonald*. Applying s. 24(2), he would have excluded the evidence, granted the appeal, quashed the conviction on the PPT charge and entered an acquittal.[41]

21. The appellant appeals to this Court as of right.

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[40] *R v Stairs*, 2020 ONCA 678 at paras 50-68 [AR, Vol I, Tab 3, pp 115-121].
[41] *R v Stairs*, 2020 ONCA 678 at paras 71-103 [AR, Vol I, Tab 3, pp 122-134].

PART II – ISSUES

22. The respondent's position on the appellant's issues[42] is as follows:

> 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?
>
> **No.** The majority of the Court of Appeal correctly determined that the trial judge properly interpreted and applied the law. There was no basis upon which to interfere with her findings.
>
> 2. Does the doctrine of search incident to arrest apply, without modification, to searches conducted in a home following a warrantless arrest?
>
> **Yes.** The existing framework for searches incident to an arrest provides sufficient constitutional protection. In the context of this case, any interference with privacy rights within the home was justified. Such interference was both necessary for the carrying out of a particular police duty, and reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.
>
> 3. What is the standard justifying a warrantless search of a residence as an incident of an arrest?
>
> **The police must have a valid purpose connected to the arrest.** This standard is constitutionally sufficient because 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.

23. The following submission focuses on the particular context of this case: a search incident to an arrest for a domestic violence offence following a lawful, warrantless entry into a dwelling. Therefore, we do not address other scenarios, such as where the police lawfully make a warrantless entry into a home in relation to other types of offences, or where the police make a lawful, warrantless entry following a 911 call and find evidence of other crimes unrelated to the purpose for the entry.[43] In our view, the context-specific nature of the analysis requires that the assessment of those cases be left for another day when the Court has the benefit of a full evidentiary record.

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[42] Appellant's Factum at p 13.

[43] See, for example, *R v Serban*, 2018 BCCA 382, leave to appeal ref'd, March 7, 2019, SCC No. 38402; see also *R c Cases*, 2020 QCCA 1633.

PART III – ARGUMENT

A. The analytical approach adopted in *Stillman*, *Golden* and *Fearon*

24. This appeal is resolved by following the two-step approach adopted by this Court in *R v Stillman*,[44] *R v Golden*[45] and *R v Fearon*.[46] In all three cases, as here, this Court was asked to determine the scope of the common law search power incident to arrest in a particular context. It resolved the question by asking, first, whether the search in question fell within the existing general framework of the common law power to search incident to arrest. If so, the court then went on to determine whether the framework needed to be modified so that the search power complied with s. 8 of the *Charter* in light of the particular law enforcement and privacy interests at stake in the particular context.[47]

Step 1 – The search of the basement living room was lawfully incident to arrest

25. Officer Vandervelde testified that he did not believe that he "searched" the basement living room. He maintained that this was "clearing the basement". [48] The Crown agrees that as minimal and focused as his "sweep" was, it was a search at law because it was a police activity that invaded a reasonable expectation of privacy.[49]

26. Warrantless searches are *prima facie* unreasonable under s. 8 of the *Charter*. This important s. 8 protection shoulders the Crown with the burden of showing that the search was nonetheless reasonable by demonstrating that:

1) the search was authorized by a recognized warrantless search power;
2) the law itself is reasonable; and
3) the search was conducted in a reasonable manner.[50]

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[44] *R v Stillman*, [1997] 1 SCR 607.
[45] *R v Golden*, 2001 SCC 83.
[46] *R v Fearon*, 2014 SCC 77.
[47] *R v Fearon*, 2014 SCC 77 at para 15.
[48] Testimony of Jesse Vandervelde at p 357, ll 29-30 [AR, Vol III, Tab 27, p 132].
[49] *R v Evans*, [1996] 1 SCR 8 at para 11; *R v Spencer*, 2014 SCC 43 at para 16; *R v Tessling*, 2004 SCC 67 at para 18; *R v AM*, 2008 SCC 19 at para 8.
[50] *R v Collins*, [1987] 1 SCR 265 at 278.

27. In this case, the search of the living room by Officer Vandervelde was authorized by a recognized warrantless search power, search incident to arrest. Well defined in law,[51] it is a "long-standing exception"[52] to the rule that prior authorization is a "precondition for a valid search and seizure."[53] In *Cloutier v Langlois*, this Court determined that this common law search power was reasonable, and, provided the search is conducted reasonably, the conduct of the police will be *Charter* compliant.[54]

28. To apply, the following must be proven: 1) the arrest must be lawful; 2) the search must be truly incidental to the arrest; and 3) the search must not be carried out in an abusive fashion. Each of these factors will be addressed below:

a) The arrest of the appellant was lawful

29. The trial judge correctly interpreted and applied the law in finding that the appellant was lawfully arrested.[55] Her detailed analysis contained several key factual determinations which are entitled to deference. Unanimously, the Ontario Court of Appeal agreed.[56] The appellant has not sought leave to appeal that unanimous ruling.[57]

30. There is no basis upon which to disturb the determination that the appellant was lawfully arrested. The first requirement is therefore met.

b) The search was "truly incident to arrest"

31. Having lawfully arrested the appellant for assault, Officer Vandervelde searched the living room area – the area from which the victim and the appellant had emerged. The scope of the search was defined by its narrow purpose: a visual search that took seconds, looking for other persons or victims, and for any obvious weapons that could endanger the safety of anyone present – other occupants, the victim, the appellant or the police. Either basis was "a valid purpose related to the

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[51] *Cloutier v Langlois*, [1990] 1 SCR 158 at 181-186; *R v Debot*, [1989] 2 SCR 1140 at p 1146; *R v Stillman*, [1997] 1 SCR 607 at 636.
[52] *R v Golden*, 2001 SCC 83 at para 23.
[53] *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 161.
[54] *Cloutier v Langlois*, [1990] 1 SCR 158 at 181-186.
[55] *R v Stairs*, 2018 ONSC 3747 at para 262 [AR, Vol I, Tab 1, p 62].
[56] *R v Stairs*, 2020 ONCA 678 at para 25 (*per* Fairburn, ACJO and Harvison, JA) and at para 70 (*per* Nordheimer JA) [AR, Vol I, Tab 3, pp 106, 122].
[57] Notice of Appeal and Amended Notice of Appeal [AR, Vol I, Tabs 15 and 16].

proper administration of justice."[58] Accordingly, the conduct of Officer Vandervelde was justified and the search was "truly incident to the arrest."

i) *A "valid purpose" connected to the arrest*

32. This Court has held that a search incident to an arrest will be lawful if the police are attempting to achieve some "valid purpose" connected to the arrest. There must be a "reasonable prospect" that one of the purposes underlying this common law search power is engaged.[59]

33. This language is deliberate: except in the context of strip searches incident to an arrest,[60] this Court has repeatedly rejected submissions that, in addition to having lawful grounds to make an arrest, police officers must meet the standard of "reasonable and probable grounds" before searching incident to an arrest.[61] Put differently, the *Cloutier* standard for searching incident to an arrest – a "valid purpose connected to the arrest"[62] – is an "exception" to the *Hunter* standard that a reasonable search is predicated on the existence of reasonable and probable grounds.[63]

34. This Court's reasoning in drawing this distinction is clear: upon arrest, the balance between the rights of the individual, on the one hand, and the societal interests in the effective enforcement of our laws on the other, shifts "to arm the police with adequate and reasonable powers in the investigation of crime."[64] This power "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."[65] Put differently, upon arrest the weighing of the competing interests tips away from individual privacy rights in favour of promoting the effective application of the law.[66] This is "justifiable"[67] because the interference with liberty is both necessary for the carrying out of a particular police duty, and

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[58] *R v Fearon*, 2014 SCC 77 at para 16.
[59] *R v Caslake*, [1998] 1 SCR 51 at para 22.
[60] *R v Golden*, 2001 SCC 83 at para 99.
[61] See, for example, *R v Caslake*, [1998] 1 SCR 51 at para 20; *R v Fearon*, 2014 SCC 77 at paras 66-68.
[62] *Cloutier v Langlois*, [1990] 1 SCR 158 at 185-186.
[63] *R v M. (M.R.)*, [1998] 3 SCR 393 at para 46.
[64] *R v Beare*, [1988] 2 SCR 387 at 404.
[65] *R v Caslake*, [1998] 1 SCR 51 at para 17.
[66] *Cloutier v Langlois*, [1990] 1 SCR 158 at 181.
[67] *Cloutier v Langlois*, [1990] 1 SCR 158 at 181.

reasonable having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.[68]

ii) *The objective of the search incident to arrest*

35. This Court has identified three main purposes for searching incident to an arrest:

1) police and public safety,
2) preventing the destruction of evidence, and
3) discovering evidence which may be used at trial.[69]

36. In this case, Officers Brown and Vandervelde were clear in their evidence: they entered the basement to arrest the appellant having formed reasonable grounds to believe he had assaulted Ms. Manriquez. Apart from coming up the basement stairs in compliance with the officer's commands, she did not cooperate. The officers were aware that the appellant was an escape risk and had police cautions for violence and domestic violence, but knew little else about their surroundings. Were there other occupants? Had other individuals been victimized? Were children present? On these points, the officers were equally clear: once the appellant was arrested, they intended to search the basement to determine if anyone else was present, whether anyone else required police assistance, and to look for obvious weapons in order to protect all who were present. In the minds of the officers, these "public and police safety"[70] concerns were closely tied to the arrest of the appellant.

- Cst. Brown's testimony

37. Cst. Brown testified that good police work requires that he not limit the scope of his domestic assault investigation on the basis of unproven assumptions. On cross-examination, he testified as follows:

> Q. From that would it be fair to say that part of your reasoning for believing that there were exigent circumstances was the absence of information?
>
> A. I would say fear of the unknown, yes.
>
> Q. Fear of the unknown?

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[68] *Dedman v The Queen*, [1985] 2 SCR 2 at 35.
[69] *R v Caslake*, [1998] 1 SCR 51 at para 19.
[70] *R v Caslake*, [1998] 1 SCR 51 at para 19.

A. Yeah, not knowing if someone was hurt, badly hurt…

Q. Right…

A. …laying unconscious somewhere, yes.

Q. Okay. You had not observed anything at the scene indicating that anybody was in any, in any immediate danger?

A. Nothing stood out to me, no.

Q. You're looking for one female, correct?

A. Yes, but in the policing world I'd say it's, when there's one, there could be more, so it's, I mean just because there's one female observed in the call doesn't mean that we wouldn't check and make sure there isn't anyone else that is in need of assistance.[71]

…

Q. And your purpose for entering the house that day was to ensure the safety of one female, right?

A. Yes; but like I said it's, it's also our duty to make sure there's no other parties in need of assistance. Just because there's one female observed in the car doesn't mean there isn't anyone else in need, in, in any kind of dangerous situation.[72]

- Officer Vandervelde's testimony

38. Officer Vandervelde testified that after the appellant had been arrested, he searched the basement living room. His reasons for doing so echo those of Officer Brown: to locate any other occupants and to make the scene safe for all concerned. On direct examination, he testified as follows:

Q. Okay. Then I understand after that process was complete [the arrest of the appellant], that you continued to spend a little bit more time in the basement, is that right?

A. That – so once he was in handcuffs and I felt it was safe, I proceeded through the basement, make sure there's no other obvious threats, any other people in that basement.

Q. Okay. When you say 'other obvious threats' I understand the 'people' but other obvious threats, what are you looking for specifically?

A. [You] never really know what you're looking for when you're entering a house in a

[71] Testimony of Chris Brown at p 108, ll 3-21[AR, Vol II, Tab 27, p 112].
[72] Testimony of Chris Brown at p 135, ll 14-21 [AR, Vol II, Tab 27, p 139].

> situation like this, so whether there's firearms sitting out, like I said, other people that could be in the basement.[73]

39. On cross-examination, Officer Vandervelde was pressed on this issue. Again, he testified that he entered and searched the basement to both arrest the appellant, to check for other occupants and to secure the scene for the safety of everyone present:

> Q. You were not going down there to detain him, to ask him questions, to investigate, you were going down there to arrest him, correct?
>
> A. Reasonable grounds to believe at that time that he arrest – or he assaulted the female. There's also an element of concern for safety for ourselves and people in this residence.[74]
>
> …
>
> Q. And once Mr. Stairs was securely in custody and had been searched incident to arrest, that's when you begin your clearing search of the basement, correct?
>
> A. Correct.
>
> Q. And the purpose of clearing the basement was to ensure that nobody else was there, correct?
>
> A. Nobody else, no other immediate hazards, yes.
>
> Q. And in going down to the basement you'd already checked, albeit briefly, the living room area of the basement and you hadn't seen anyone, correct?
>
> A. Very quick scan.
>
> Q. And checking the basement area, another thing you're looking for is any potential evidence with respect to what Mr., with respect to the assault, correct?
>
> A. Not so much looking for evidence of the assault, no.
>
> Q. Because again this is, was an assault but there had been no report of any weapons used, right?
>
> A. No report of any weapons used, no.
>
> Q. So you weren't looking for any weapons at that point connected to the assault?
>
> A. Not, not necessarily connected to the assault, no. You don't want to be in a

[73] Testimony of Jesse Vandervelde at p 208, l 26-p 209, l 6 [AR, Vol II, Tab 27, pp 212-213].
[74] Testimony of Jesse Vandervelde at p 329, ll 3-8 [AR, Vol III, Tab 27, p 104].

basement where weapons or firearms are sitting out in the open though.[75]

40. As this Court noted in *R v Caslake*, the assessment of whether the police were, in fact, pursuing a valid objective connected to the arrest "will depend on what the police were looking for and why."[76] The police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted – the subjective component. Additionally, the officer's belief that this purpose will be served by the search must be a reasonable one – the objective component.[77]

41. Concerning the subjective component, Officers Brown and Vandervelde were consistent in explaining their reasons for entering the basement, arresting the appellant and conducting the sweep of the basement living room where the victim and the appellant had been observed. Both officers were thoroughly cross-examined on their reasons for their actions and both stood firm: their actions were driven by the arrest of the appellant for a crime of violence and the context of that arrest. There was no evidence that the officers' actions were a pretext for some other purpose unrelated to the arrest.[78] They did not seek to embellish or expand the reasons for the search, even though they were provided with opportunities to do so.[79] The trial judge found the officers credible in their testimony.[80] There is no basis upon which to interfere with that finding. The subjective component is met.

42. Concerning the objective component of the analysis, the trial judge determined that the search of the basement was narrow and specific, not progressing beyond the immediate surroundings.[81] It was for a valid purpose – to determine if anyone else was present and to check for other hazards.[82] This is not surprising. As this Court noted in *R v Fearon*, the "law enforcement objectives served by searches incident to arrest will generally be most compelling in the course of crimes that involve, for example, crimes of violence or threats of violence…"[83]

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[75] Testimony of Jesse Vandervelde at p 342, l 18-p 343, l 9 [AR, Vol III, Tab 27, pp 117-118].
[76] *R v Caslake*, [1998] 1 SCR 51 at para 19.
[77] *R v Caslake*, [1998] 1 SCR 51 at para 19.
[78] *R v Caslake*, [1998] 1 SCR 51 at para 21.
[79] See, for example, Testimony of Jesse Vandervelde at p 342, l 18-p 343, l 9 [AR, Vol III, Tab 27, pp 117-118].
[80] *R v Stairs*, 2018 ONSC 3747 at para 185 [AR, Vol I, Tab 1, p 35].
[81] *R v Stairs*, 2018 ONSC 3747 at para 281 [AR, Vol I, Tab 1, p 68].
[82] *R v Stairs*, 2018 ONSC 3747 at para 282 [AR, Vol I, Tab 1, p 69].
[83] *R v Fearon*, 2014 SCC 77 at para 79.

43. In his dissenting judgment, Justice Nordheimer questioned the sincerity of the officers' safety concerns given that they had arrested the appellant "with their backs to that very area" that they then searched incident to arrest.[84] Respectfully, this is a misapprehension of the evidence. The evidence was clear that the officers entered the basement and briefly looked to the living room, but they remained focused on the appellant who had fled behind a closed-door due to the risk they believed he posed given his actions and history. The trial judge accepted their testimony:

> Brown and 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.
>
> [282] The search had a valid objective. Vandervelde testified that he searched to make sure no one else was there and that there were no other 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.[85] [emphasis added]

44. The majority of the Court of Appeal agreed. Justice Fairburn stated:

> [67] In the end, the police were able to articulate why they had safety concerns. That articulation made sense. They had descended into a basement where they had never been before, in a house they had never been in before. While the 9-1-1 caller said that there were two people in the car that he observed, that did not mean there were only two people in the home. Nor did it mean that there were no other safety concerns hiding around corners.
>
> [68] In particular, the police could not see behind the sofa from the doorway to the living room. It was not unreasonable to take a quick visual scan of the room in the circumstances. They had a person in handcuffs and needed to ascend the stairs, which were located right beside the living room, to safely get him out of the residence, all while the female remained on the first floor. The fact that the methamphetamine was sitting out in plain view meant that it could be seized.[86]

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[84] *R v Stairs*, 2020 ONCA 678 at para 84 [AR, Vol I, Tab 3, p 127].
[85] *R v Stairs*, 2018 ONSC 3747 at paras 281-282 [AR, Vol I, Tab 1, pp 68-69].
[86] *R v Stairs*, 2020 ONCA 678 at paras 67-68 [AR, Vol I, Tab 3, pp 120-121].

45. The majority deferred to the trial judge's factual findings[87] and went on to find that, as a matter of law, the police may validly conduct safety searches incident to an arrest. They declined to interfere with the conclusion that the basement search was reasonably conducted.[88] This raises the issue of the scope of the power to search incident to arrest.

iii) *The scope of the power to search incident to arrest*

46. The analysis of the scope of the power to search incident to an arrest is contextual. Arrests "relate to many different crimes and are made in many different circumstances."[89] This means that "the permissible scope of searches incident to arrest will be affected by the particular circumstances of the particular arrest."[90] While "there are no ascertainable limits" to the scope of this search power, the assessment typically involves an assessment of the temporal and spatial connection between the arrest and the search.[91]

- The temporal connection to the arrest

47. The temporal analysis is contextually driven[92] and, as such, there "is no need to set a firm deadline on the amount of time that may elapse before the search can no longer be said to be incidental to arrest."[93] The analysis focuses on whether the search has occurred within "a reasonable period of time after the arrest."[94]

48. Here, the search of the basement living room occurred immediately after the arrest of the appellant. Therefore, the search was temporally connected to the arrest.

- The spatial connection to the arrest

49. Like the temporal connection analysis, the spatial connection analysis is also contextually driven. Again, no hard-and-fast rules have been imposed. Instead, this Court has directed that the scope of this search power may extend to anything in the possession of the accused or their

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[87] *R v Stairs*, 2020 ONCA 678 at para 61 [AR, Vol I, Tab 3, p 119].
[88] *R v Stairs*, 2020 ONCA 678 at para 61 [AR, Vol I, Tab 3, p 119].
[89] *R v Fearon*, 2014 SCC 77 at para 13.
[90] *R v Fearon*, 2014 SCC 77 at para 13.
[91] *R v Caslake*, [1998] 1 SCR 51 at paras 15, 16.
[92] *R v Caslake*, [1998] 1 SCR 51 at paras 23, 24.
[93] *R v Caslake*, [1998] 1 SCR 51 at para 24.
[94] *R v Caslake*, [1998] 1 SCR 51 at para 24.

"immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him."[95] As this Court noted in *R v Nolet*, "[t]he important consideration is the link between the location and the purpose of the search and the grounds for the arrest."[96] In this case, both the appellant and the victim were observed in the basement living room – the area searched by Officer Vandervelde. On any reasonable measure, this area must be considered an "immediate surroundings" for purposes of the spatial scope of the power to search incident to arrest. Search of this area to secure the scene and look for other occupants or victims is clearly connected to this crime.

50. In the context of domestic violence, promptly investigating that the home is safe,[97] that the extent of the injuries is known and that everyone is accounted for[98] are each valid law enforcement objectives.[99] Indeed, police officers are bound by both common law and statutory provisions that command that they do so.[100] It is important to remember that the fact that these offences often take place within a dwelling is a function of the anatomy of this crime: the sharing of a dwelling can be a defining characteristic of the relationship between victim and aggressor.[101] Moreover, domestic violence, like any crime of violence, may involve more than one victim. Household items may become weapons and, in that regard, it is important to remember that the appellant had police cautions for both domestic violence as well as violence in general. People may seek to intervene, or may be injured collaterally to the assault. Children may hide from the violence.

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[95] *Cloutier v Langlois*, [1990] 1 SCR 158 at 180-181.
[96] *R v Nolet*, 2010 SCC 24 at para 49.
[97] *R v Lowes*, 2016 ONCA 519 at para 13
[98] It is worth noting here that the vehicle and residence were associated to the appellant's father: Testimony of Chris Brown at p 27, ll 11-14 [AR, Vol II, Tab 27, p 31]. Officer Vandervelde testified that he had limited information about who lived in the house and who might be in the basement: Testimony of Jesse Vandervelde at p 335, ll 23-32 [AR, Vol III, Tab 27, p 110].
[99] *R v Fearon*, 2014 SCC 77 at paras 16, 17, 20, 45, 46, 48; *R v Beare*, [1988] 2 SCR 387 at 404.
[100] *Dedman v The Queen*, [1985] 2 SCR 2 at 32-34; *R v Godoy*, [1999] 1 SCR 311 at para 23; *Police Services Act*, RSO 1990, c P-15, s 42.
[101] *R v Godoy*, [1999] 1 SCR 311 at para 21, where this Court noted that "[f]amilial abuse occurs within the supposed sanctity of the home."

51. Accordingly, the search of the basement living room was "truly incident" to the arrest. The purposes for the search were valid and it was temporally and spatially connected to the reasons for the arrest.

c) The search was conducted reasonably

52. The search was narrow and specific in purpose. It was a brief visual search. There was no suggestion that the appellant was improperly physically or psychologically constrained.[102] The trial judge found that the police conduct was reasonable.[103]

53. Having met all aspects of the framework for search incident to arrest, this then leads to the second question posed by the *Stillman/Golden/Fearon* analytical framework: is any modification required to make this search power *Charter* compliant?

Step 2 – In the context of this case, the existing framework is *Charter* compliant

54. As this Court noted in *R v Fearon*, to answer this question what is required is an "assessment of the importance of the legitimate law enforcement objectives served by the search and the nature and extent of the infringement of the detainee's reasonable expectation of privacy."[104] Considering the totality of the circumstances,[105] the search of the basement living room incident to the arrest of the appellant was justified.

a) Assessing the objectives

55. For the reasons discussed above, the importance of the law enforcement objectives of the search is high. Domestic violence is a "serious and ongoing concern" in Canada.[106] Internationally, the World Health Organization says that "violence against women – particularly intimate partner violence – is a major public health problem and a violation of women's human rights."[107]

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[102] *Cloutier v Langlois*, [1990] 1 SCR 158 at 186.
[103] *R v Stairs*, 2018 ONSC 3747 at para 282 [AR, Vol I, Tab 1, p 69].
[104] *R v Fearon*, 2014 SCC 77 at para 44.
[105] *R v Godoy*, [1999] 1 SCR 311 at para 23.
[106] *R v Allen*, 2019 ABPC 295 at para 18.
[107] World Health Organization, *Violence Against Women*, 9 March 2021.

56. In Canada, consistently year after year,[108] domestic violence accounts for some 30% of all police-reported crimes of violence. In 2019, this totalled some 107,810 victims.[109] More than half of victims suffer a physical injury.[110] While physical force is the primary cause of injury (72%, or 58,913 victims), an additional 15% of these victims (12,305) were assaulted with a weapon.[111] Serious injuries and deaths are not uncommon. Between 2014 and 2019, there were 497 homicides, and 80% were women.[112]

57. Regionally, in 2019 Saskatchewan and Manitoba had the highest rates of police-reported family violence among the provinces (519 and 417 instances, respectively, per 100,000 people; Ontario, by comparison, had 173). In Canada's northern regions, the rates are notably higher. Nunavut (3,398), the Northwest Territories (2,689) and Yukon (707) all have rates in excess of the provinces.[113] Canada's Indigenous peoples "are overrepresented as victims of violent crime in Canada and, more specifically, Indigenous people are over twice as likely to experience spousal violence as non-Indigenous people."[114] This is particularly true for young women and girls in the northern areas of Canada where the violent crime rate was nearly three times higher for young women and girls aged 24 and younger than in the south (3,643 versus 1,235 victims per 100,000 population).[115]

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[108] See, for example, Statistics Canada, *Family violence in Canada: A Statistical Profile, 2018*, by Shana Conroy, Marta Burczycka, and Laura Savage, Catalogue No 85-002-X, (December 12, 2019) at p 24.
[109] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 29.
[110] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 39.
[111] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 30.
[112] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 30.
[113] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 6.
[114] Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2019*, by Shana Conroy, Catalogue No 85-002-X, (March 2, 2021) at p 31, citing Statistics Canada, *Victimization of Aboriginal people in Canada, 2014*, by Jillian Boyce, Catalogue No 85-002-X (June 28, 2016) and Statistics Canada, "*Criminal victimization in Canada, 2014*, by Samuel Perreault, Catalogue No 85-002-X.
[115] Statistics Canada, *Police-reported violence against girls and young women in Canada, 2017*, Shana Conroy, Catalogue No 85-002-X, (December 17, 2018) at p 3.

58. The prevalence and seriousness of these crimes are obvious. These are dangerous calls for responding police officers.[116] Weapons are not uncommon. Alcohol may be involved.[117] Police presence may serve to escalate tensions. They enter a foreign environment[118] where an aggressive, emotional occupant searching for a weapon or some other advantage may have the upper hand. The environment is volatile and conditions can change rapidly,[119] as was the case here. The trial judge found that the police were required to form opinions and act quickly.[120]

59. Respectfully, Justice Nordheimer incorrectly described these risks, and the police duty to protect against them, as a "theoretical notion."[121] The risks are real, and "domestic dispute calls can be dangerous, even life-threatening, for individuals at the scene and the responding police officers."[122] The consequences of assuming otherwise can be significant:

> In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage

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[116] *R v Allen*, 2019 ABPC 295 at para 18; *R v Pomeranz*, [2013] QJ No 8620 at para 45.
[117] World Health Organization, *Intimate partner violence and alcohol* at p 2.
[118] Officer Vandervelde testified that he did not know the lay-out of the house: Testimony of Jesse Vandervelde at p 335, ll 23-32 [AR, Vol III, Tab 27, p 110].
[119] *R v Dodd*, 1999 CanLII 18930 (NL CA) at para 38.
[120] *R v Stairs*, 2018 ONSC 3747 at para 266 [AR, Vol I, Tab 1, p 64].
[121] *R v Stairs*, 2020 ONCA 678 at para 77 [AR, Vol I, Tab 3, p 124].
[122] Lanette Ruff, *Does Training Matter: Exploring Police Officer Response to Domestic Dispute Calls before and after Training on Intimate Partner Violence*, (2012) 85:4 Police Journal 285, at p 286. See also Canadian Domestic Homicide Prevention Initiative, *One is Too Many: Trends and Patterns in Domestic Homicides in Canada 2010-2015*, where the author discusses both intended and "collateral" victims (at pp 12-13). Canada's provinces and territories have adopted "spousal risk assessment tools." These tools assess many aspects of domestic violence response, investigations and prosecutions, including recidivism risks and safety plans for victims: Department of Justice Canada, *Inventory of Spousal Violence Risk Assessment Tools Used in Canada, 2013*, by Allison Millar, Ruth Code and Lisa Ha, Research and Statistics Division, (Updated 2013) at p 7, 18-24.

> in ex post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions.
>
> In my opinion, one cannot ask the police to place themselves in potentially dangerous situations in order to effect an arrest without, at the same time, acknowledging their authority to take reasonable steps to protect themselves from the dangers to which they are exposed. If the police cannot act to protect themselves and others when making an arrest, they will not make arrests where any danger exists and law enforcement will be significantly compromised. The frustration of the effective enforcement of the criminal law is the hallmark of the exceptional circumstances identified in Feeney.[123]

60. Domestic violence investigations are complicated by the fact that victims may not cooperate or may minimize the extent of their injuries or the actions of the aggressor, as was the case here. As this Court noted in *R v Godoy*, "[o]ne of the hallmarks of this crime is its private nature."[124] Emotional and distraught,[125] and despite showing obvious, fresh injuries, when questioned Ms. Manriquez denied she was assaulted[126] and claimed that she and the appellant had been "play fighting." Clearly, she could not be trusted to provide the police with accurate, reliable information about anything – other occupants, injuries, or weapons.[127] Although the context in *Godoy* differed (a 911 "unknown trouble call"), the same reasoning applies here: the police have a duty to investigate to determine the nature and extent of any injuries suffered at the hands of the appellant.[128] And just as in *Godoy*, the police should not base their assessment on unreliable sources of information,[129] like Ms. Manriquez's denial of the assault.

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[123] *R v Golub*, [1997] OJ No 3097 at paras 44-45.
[124] *R v Godoy*, [1999] 1 SCR 311 at para 21
[125] Testimony of Chris Brown at p 44, ll 3-6 [AR, Vol II, Tab 27, p 48].
[126] As this Court is aware, this is not uncommon in domestic violence cases. See, for example, *R v Godoy*, [1999] 1 SCR 311 at paras 3, 5.

[127] *R v Lowes*, 2016 ONCA 519 at para 12, where the Court noted that the police would be "derelict" in their duty had they accepted what the victim told them without going into the residence.

[128] *R v Godoy*, [1999] 1 SCR 311 at para 22.
[129] *R v Godoy*, [1999] 1 SCR 311 at para 21.

61. In this context, police officers have a duty and obligation to be vigilant in their assessment of the crime scene, the extent of injuries that have been incurred and whether the crime scene is safe for everyone within the home. Searches incident to arrest serve these important purposes.

b) The nature and extent of the infringement was proportionate

62. It is acknowledged that the expectation of privacy in a dwelling is high.[130] But as this Court noted in *Lyons v The Queen*, "[t]he community interest in crime detection and suppression inevitably entails intrusion on the [a person's home is their] castle concept."[131] Moreover, as this Court noted in *R v Fearon*, not all intrusions into private spaces are of equal significance,[132] and that certainly was the case here: any privacy infringement was narrow and limited, specifically targeting the purpose for the entry into the home and the crime for which the appellant was arrested.

63. The following analysis supports the reasonableness of the police conduct in this case. First, it is important to remember that the police officers had made a lawful entry into this dwelling. Their presence in the basement living room was lawful. This was not a circumstance where the police had unlawfully entered the home, or had wandered into and searched areas not connected to this assault.

64. Second, the last information that the police had received was that the assault was serious and ongoing. The victim was struck on her head, placed in a headlock. She cowered from the assault.[133] Mr. Berlingieri observed the assault on the roadside and continuing in the motor vehicle until he lost sight of it when it turned off. He then made his 911 call.

65. Third, when the police arrived at the home, they loudly and repeatedly announced their presence by yelling and banging on the door of the house. They were ignored. Concerned for the safety of the occupants, they entered the home. At this point, they knew that the appellant lived at this address and had cautions for escape, violence and domestic violence.

66. Fourth, upon entry, they again announced their presence but only heard music coming from the basement living room. They had no idea who was in the home because, again, their presence

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[130] *R v Godoy*, [1999] 1 SCR 311 at para 19; *R v Feeney*, [1997] 2 SCR 13 at para 78; *R v MacDonald*, 2014 SCC 3 at para 26.
[131] *Lyons v The Queen*, [1984] 2 SCR 633 at 657.
[132] *R v Fearon*, 2014 SCC 77 at para 54.
[133] Testimony of Chris Brown at p 25, ll 9-30 [AR, Vol II, Tab 27, p 29].

was ignored. They issued commands to "come upstairs with your hands up" but were ignored until Ms. Manriquez came up the stairs with obvious physical injuries. She later denied the assault and was otherwise not cooperative.

67. Finally, the appellant ran from the right side of the basement (where the living room is located) to the left side, seeing the police officers but ignoring their commands. He fled to a separate room and closed the door. He opened the door, seeming to assess the opposition he faced, saw two police officers, closed the door and then eventually surrendered. The circumstances were dangerous. Officer Vandervelde testified that he would not have entered the basement to arrest a known violent offender without a second police officer being present.[134] Both officers drew weapons.

68. Having just arrested the appellant for assault, the police officers then performed a visual search of the basement to look for other occupants or obvious dangers. Their narrow focus therefore informed their search technique. Officer Vandervelde did not open any doors or lift any objects. In the confines of this small basement, his visual search was brief. Put simply, there was "no less intrusive means of attaining these objectives."[135]

69. Accordingly, the infringement of the privacy interest was minimized and proportionate to the purpose for the intrusion. Put differently, when weighed against the importance of the law enforcement objective, the intrusion of the appellant's privacy interest was a reasonable limitation and was therefore compliant with s. 8 of the *Charter*. This Court stated the matter plainly in *R v Godoy*:

> Familial abuse occurs within the supposed sanctity of the home. While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household. If our society is to provide an effective means of dealing with domestic violence, it must have a form of crisis response. The 911 system provides such a response. Given the wealth of experience the police have in such matters, it is unthinkable that they would take the word of the person who answers the door without further investigation. Without making any comment on the specific facts of this case, it takes only a modicum of common sense to realize that if a person is unable to speak to a 911 dispatcher when making a call, he or she may likewise be unable to answer the door when help arrives. Should the police then take the word of the person who does answer the

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[134] Testimony of Jesse Vandervelde at p 311, ll 13-15 [AR, Vol III, Tab 27, p 86].
[135] *Cloutier v Langlois*, [1990] 1 SCR 158 at 185.

> door, who might well be an abuser and who, if so, would no doubt pronounce that all is well inside? I think not.[136]

70. In this case, the nature and extent of the infringement on the appellant's rights were proportionate.

B. Modification of the common law is not required

71. The appellant calls upon this Court for a "modification of the search incident to arrest principles" so that "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."[137] In doing so, the appellant submits that existing frameworks do not provide sufficient protection in the context of an arrest and search within a dwelling. The appellant draws heavily on this Court's ruling in *R v MacDonald*, as did Justice Nordheimer in his dissent. Further, the appellant argues that *R v Golub* applies to require "exceptional circumstances" to justify the warrantless entry and search of a dwelling incident to an arrest.

72. In assessing this issue, it is important to remember that arrests within dwellings are already tightly controlled. Arrest warrants are required because, in general, warrantless arrests in dwellings are prohibited.[138] If police officers intend to arrest an occupant and search their residence, they will typically be armed with both a *Feeney* warrant and some other form of judicial authorization, such as a s. 487 search warrant, allowing them to search the residence for evidence.

73. On the other hand, if police officers are lawfully inside a dwelling making an arrest without a *Feeney* warrant, exigent circumstances existed to justify the entry.[139] One should not pass over this point too quickly. It means that the police were required to act urgently. In many cases, the investigation will have commenced in the minutes before the entry into the dwelling and that dwelling may also be the scene of the crime. In these circumstances, the courts must grant police officers a degree of latitude in how they carry out their duties. Their decisions are often made in difficult and fluid circumstances[140] which defy precise assessment.[141] As this Court noted in *R v*

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[136] *R v Godoy*, [1999] 1 SCR 311 at para 21.
[137] Appellant's Factum at para 57.
[138] *R v Feeney*, [1997] 2 SCR 13 at para 49.
[139] *Criminal Code*, RSC 1985, c C-46, s 529.3(1).
[140] *R v Pomeranz*, [2013] QJ No 8620 at para 45.
[141] *R v Cornell*, 2010 SCC 31 at para 24.

Cornell, "[t]he role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of the suspects with the requirement of safe and effective law enforcement, not to become a Monday morning quarterback."[142] Their conduct must be assessed on what they knew, not how things turned out.[143]

74. As discussed below, the existing framework governing searches incident to arrest provide robust protection in the residential context. This framework has never been understood to provide the police with *carte blanche* to search an individual or their surroundings without reference to the arrest and the circumstances surrounding it, as Justice Nordheimer feared.[144] Moreover, neither *MacDonald* nor *Golub* assist the appellant.

a) The existing framework contains sufficient protections

75. The above analysis demonstrates that the existing analytical framework for search incident to arrest provides sufficient protection of the right against search and seizure in the residential context, incident to arrest.

76. First, it is a Crown burden to prove the lawfulness of the arrest. The arresting officer must subjectively have reasonable grounds upon which to base the arrest. In addition, those grounds must be justifiable from an objective point of view.[145] Where the arrest is unlawful, the resulting search will fall as being without lawful foundation.[146]

77. Second, the search must be "truly incident to the arrest."[147] The arrest, and the contextual matrix of that arrest, define and constrain this search power. This language, broad as it is, is a function of the innumerable variables that police officers may encounter in the execution of their duties. But it is not unbridled. The search must be temporally and spatially connected to the reasons for the arrest. The police officer must subjectively believe the search is required for one or more of the purposes identified in *Cloutier v Langlois*, and that view must be objectively reasonable.

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[142] *R v Cornell*, 2010 SCC 31 at para 24.
[143] *R v Cornell*, 2010 SCC 31 at para 23.
[144] *R v Stairs*, 2020 ONCA 678 at para 85 [AR, Vol I, Tab 3, pp 127-128].
[145] *R v Storrey*, [1990] 1 SCR 241 at 251.
[146] *R v Caslake*, [1998] 1 SCR 51 at para 13.
[147] *R v Fearon*, 2014 SCC 77 at para 16.

78. Our existing laws therefore effectively control the exercise of this search power within dwellings. Those laws set boundaries that, while flexible, provide appropriate and ascertainable limits. As this Court has directed, lower courts have proven to be "vigorous" in both defining the parameters of this search power and rooting out unwarranted searches.[148] For example, in *R v Belnavis*, the Court held that an arrest for outstanding traffic fines did not authorize the search of the trunk of a vehicle because "[t]he authority to search as an incident of the arrest does not extend to searches undertaken for purposes which have no connection to the reason for the arrest."[149] Citing this Court's ruling in *Cloutier v Langlois*, Justice Doherty put it this way: "[t]he state interests, while valid, do not, however, give the police a licence to conduct any and all searches which might advance those legitimate goals."[150]

79. The police officers in this case clearly understood the point Justice Doherty was making: as noted above, the arresting officers performed a brief, visual search of the living room. When the methamphetamine was found in plain view, the appellant was re-arrested for the drug offence. The officers did not then broaden their warrantless search of the home. Instead, recognizing the limits of the power to search incident to arrest, they stopped and consulted with their supervising officer. On Sergeant Dick's instruction, the residence was secured so that the Drug Unit could prepare a search warrant for the purpose of conducting "a more thorough search"[151] for evidence related to the drug offence.

b) R v MacDonald does not apply

80. The reasoning in *R v MacDonald* does not assist the appellant. Mr. MacDonald was not arrested when the police searched his dwelling. Accordingly, the lawful basis for the search, and the nature and extent of the permissible intrusion, differed significantly and should not be applied to the circumstances of an arrest.

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[148] *R v Caslake*, [1998] 1 SCR 51 at para 15. See, for example, *R v Frieburg*, 2013 MBCA 40 at para 52, leave to appeal ref'd, [2013] 3 SCR vii.
[149] *R v Belnavis*, [1996] OJ No 1853 at paras 49-50, aff'd without reference to this point [1997] 3 SCR 341, although see *R v Stillman*, [1997] 1 SCR 607 at 638, where this Court commented favourably on Justice Doherty's conclusion.
[150] *R v Golub*, [1997] OJ No 3097 at para 27; see also *R v Stillman*, [1997] 1 SCR 607 at 643.
[151] Testimony of Chris Brown at p 47, l 6-p 48, l 20 [AR, Vol II, Tab 27, p 51-52].

81. The facts of *R v MacDonald* are important. In responding to a noise complaint, the police attended at the dwelling of Mr. MacDonald (a condominium) and knocked on his door. Mr. MacDonald partially opened the door and was uncooperative. Mr. MacDonald was not under arrest at this point. The officer saw an object in his hand, hidden behind his leg. The officer twice asked what the object was, but received no reply. He then pushed the door open, saw a gun, struggled with Mr. MacDonald and disarmed him. Only then was Mr. MacDonald arrested.

82. Following the ruling in *R v Mann*,[152] this Court concluded that searches incident to investigative detention are authorized under the common law authority recognized in *R v Waterfield*[153] – the general police duty to protect life and safety – but added the requirement for an "imminent risk" in the context of a dwelling. This higher level of justification was a function of the fact that Mr. MacDonald was, at most, detained when the door was pushed open (which this Court determined was a search). Accordingly, the authority for the search was not the common law power of search incident to arrest. This distinction is critical.

83. This Court has repeatedly held that the common law power to search incident to an arrest has as its foundation the arrest itself. Therefore, unlike the entry and search power recognized in *R v Godoy*, the basis of the search power incident to arrest is not exigent circumstances.[154] Suspicion has been displaced by reasonable grounds to believe that a crime was or is being committed. Once arrested, an individual has a lower expectation of privacy,[155] and police powers in relation to that individual are broadened beyond those that apply in a detention because the balance between the rights of the individual and the interests of society in the effective enforcement of our laws has tipped in favour of the state.

c) R v Golub does not assist the appellant; R v Godoy applies

84. The decision in *Golub* addressed the question of whether, and on what terms, the police have authority to enter a dwelling for purposes of searching it incident to an arrest that occurred outside that dwelling. The decision followed this Court's ruling in *R v Feeney* in finding that exceptional circumstances were required to justify the warrantless entry and search of a dwelling

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[152] *R v Mann*, 2004 SCC 52.
[153] *R v Waterfield*, [1963] 3 All ER 659 (CCA).
[154] *R v Fearon*, 2014 SCC 77 at para 25; *R v Nolet*, 2010 SCC 24 at paras 51-52.
[155] *R v Fearon*, 2014 SCC 77 at para 56.

incident to an arrest. The principled basis for the *Golub* entry rule – exceptional circumstances for the protection of safety and security – was met in this case. A comparison with this Court's decision in *R v Godoy* makes this clear.

85. In both *R v Golub* and *R v Godoy*, the basis for the lawful, warrantless entry into the home was a recognition that public interest, safety and security factors override the individual's right to privacy in the home. In *Golub*, the entry was justified as it served to protect the safety and security of those at an arrest scene. In *Godoy*, it was to investigate a 911 call for assistance. While the purpose for the entry differed, the principled basis for doing so was the same: broader concerns for the safety and security of an individual, the police or the pubic generally which superseded an individual's privacy right. As Justice Doherty noted in *R v Golub*, "[t]he balancing of state and individual interests referred to in Cloutier reflect the same approach taken by the Supreme Court of Canada in previous cases involving the scope of ancillary powers."[156]

86. In this case, the police entered the dwelling under the authority of the common law ancillary powers doctrine set forth in *R v Waterfield*[157] and refined and applied[158] by this Court several times.[159] Although initially challenged by the appellant, he has agreed that this entry was justified and the Court of Appeal was unanimous in agreeing on this point.

87. Both *R v Golub* and *R v Godoy* recognize the authority for police to search a home for purposes related to the entry. In *R v Golub*, the purpose of the search was to determine if another person was present and potentially had access to a weapon. In *R v Godoy*, the purpose of the search was to investigate a 911 call and determine if anyone inside the dwelling required police assistance. In this case, it is clear that the police had lawful authority to enter the dwelling in response to Mr. Berlingieri's 911 call and having located the motor vehicle described by him. Once inside the dwelling, the police had a common law duty to protect life and safety.[160] While it is agreed that, generally speaking, "[p]olice powers and police duties are not necessarily correlative,"[161] the

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[156] *R v Golub*, [1997] OJ No 3097 at para 29.
[157] *R v Waterfield*, [1963] 3 All ER 659 (CCA).
[158] *R v Mann*, 2004 SCC 52 at para 25.
[159] See, for example, *Dedman v The Queen*, [1985] 2 SCR 2; *R v Godoy*, [1999] 1 SCR 311.
[160] *Dedman v The Queen*, [1985] 2 SCR 2 at 32; *R v Godoy*, [1999] 1 SCR 311 at para 23; *Police Services Act*, RSO 1990, c P-15, s 42.
[161] *R v Mann*, 2004 SCC 52 at para 35.

police had the ability to search the dwelling for purposes related to the reason for the intrusion.[162] That specific purpose caused the police to tailor their search so that it was conducted in a narrow and limited fashion.

88. The rights of the individual remain protected because the ability to search for the narrow and specific purposes related to the arrest does not mean that the police have "further permission to search premises or otherwise intrude on a resident's privacy or property."[163] Indeed, the analysis can be quite granular, further serving to limit state action. For example, "[t]he state interest in collecting evidence may not justify a warrantless search, but the interest in protecting the safety of those at the scene may justify that same search."[164] At the same time, greater intrusion may be justified if the circumstances provide for it. As Justice Finlayson noted in *R v Godoy*, "greater interference with the sanctity of the home could only be justified by further information; e.g., as here, the grounds for arrest for an indictable offence."[165]

89. As the above analysis has shown, the existing framework governing searches incident to an arrest provides sufficient protection of the s. 8 *Charter* right against unreasonable search and seizure where an arrest lawfully occurs within a home. At the same time, it is sufficiently flexible to be applied in the many different circumstances that police encounter. Indeed, "[g]iven their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively and flexibly to the diversity of encounters experienced daily on the front lines of policing."[166]

d) The appellant's "imminent threat" standard is unworkable

90. The appellant's proposed modification is unworkable for the same reason the "exigent circumstances" requirement was rejected by this Court in *R v Fearon*: because "that standard requires too much knowledge on the part of the police, given the very early point in an investigation at which a search incident to arrest will often occur."[167] For the same reason, this Court rejected

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[162] *R v Godoy*, [1999] 1 SCR 311 at para 22.
[163] *R v Godoy*, [1999] 1 SCR 311 at para 22.
[164] *R v Golub*, [1997] OJ No 3097 at para 43.
[165] *R v Godoy*, [1997] OJ No 1408 at para 30. Referred to by this Court without further comment: *R v Godoy*, [1999] 1 SCR 311 at para 9.
[166] *R v Mann*, 2004 SCC 52 at para 16.
[167] *R v Fearon*, 2014 SCC 77 at para 69.

the "reasonable and probable grounds" standard.[168] The same reasoning applies here, with particular force when one considers domestic violence cases. As Justice Fairburn noted, if the appellant's suggested framework was "the test to be applied in circumstances such as these, the police would often be at grave risk."[169]

91. As noted above, when the police enter a home in response to a domestic violence call there are often many unknowns.[170] For example, the police many not know who resides at a particular address or who was present at the time of the alleged assault. Are there children in the home? Elderly parents? Is alcohol or drugs involved?[171] As was the case here, the victim may not cooperate and may not provide reliable information.

92. To fulfil their statutory and common law duty to protect life and safety, the police must therefore make their own inquiries and investigate the nature and extent of the alleged assault. It is trite to say that where violence has occurred such inquiries must be made urgently. Assault victims may not be able to wait for the police to obtain a search warrant.

93. In assessing the appellant's proposed modification below, we follow the same analytical approach adopted in *R v Fearon*.

i) *Categorical prohibition*

94. Categorically prohibiting searches of dwellings incident to arrest inside a dwelling is an unreasonable limitation on police powers. It would not provide the appropriate balance between the privacy interests of the defendant and the public interest in effective enforcement of our laws. This is the reason why such an approach was rejected in *R v Fearon* and *R v Golub*: the police may need to act with dispatch to (in those cases) gather information or to secure a scene. Accordingly, important law enforcement objectives are served by the power to search the immediate surroundings of a person arrested for domestic violence, including the dwelling where the assault took place.

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[168] *R v Fearon*, 2014 SCC 77 at para 66.
[169] *R v Stairs*, 2020 ONCA 678 at para 52 [AR, Vol I, Tab 3, pp 115-116].
[170] *R v Timmons*, 2012 NSSC 154 at para 10.
[171] Officer Brown suspected that the appellant was under the influence of drugs: Testimony of Chris Brown at p 46, ll 2-8 [AR, Vol II, Tab 27, p 50].

95. This Court found that a categorical prohibition against taking bodily samples – teeth impressions, hair samples and buccal swabs – incident to arrest was appropriate in *R v Stillman* because of the significance of the privacy interest ("a violation of the sanctity of a person's body is much more serious than that of his office or even of his home"[172]) and the lack of urgency ("There was simply no possibility of the evidence sought being destroyed if it was not seized immediately"[173]). While a dwelling attracts a considerable privacy interest, it is not sufficient to completely displace the public interest in effectively policing domestic violence offences. Furthermore, as was the case here, crimes of violence – particularly 911 calls for help - often must be investigated urgently.

96. Moreover, a prohibition is not required because, as noted above, meaningful limits already exist to circumscribe searches of dwellings incident to arrest. This is demonstrated in the actions of Officer Vandervelde: his search of the basement living room incident to arrest was to look for victims, occupants and weapons. It was limited in nature and scope, achieving the appropriate balance between law enforcement objectives and the rights of the appellant.

ii) *The reasonable and probable grounds requirement*

97. Like the "imminent threat" standard, imposing a reasonable and probable grounds requirement would significantly undermine the important law enforcement objectives attendant to responding to domestic violence calls: to secure the scene and make it safe, to account for victims and other occupants, and to seize any evidence. For the same reasons noted in *R v Fearon*, such a threshold "effectively precludes prompt access to what may be very important information which is required for the immediate purposes of the unfolding investigation."[174] In responding to domestic violence calls, should the police just assume that there is only a single victim? That nobody else has been injured? That no other person requires assistance from the police? That young children did not witness or become a victim to the crime? The private nature[175] of domestic violence crimes and the unwillingness of victims to cooperate creates an information vacuum that is antithetical to proper policing. The ability to search incident to an arrest helps fill this void.

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[172] *R v Stillman*, [1997] 1 SCR 607 at 639-640, citing *R v Pohoretsky*, [1987] 1 SCR 945 at 949; see also *R v Dyment*, [1988] 2 SCR 417 at 431-432.
[173] *R v Stillman*, [1997] 1 SCR 607 at 643.
[174] *R v Fearon*, 2014 SCC 77 at para 66.
[175] *R v Godoy*, [1999] 1 SCR 311 at para 21.

Imposing a requirement that the police have "reasonable grounds to believe" before undertaking these important protective, safety and investigative steps is an "unreasonable compromise."[176]

iii) *Exigent circumstances*

98. For the reasons pointed out at the start of this section, requiring the police to identify "exigent circumstances" or to identify an "imminent threat" in the early stages of a domestic violence investigation would effectively prevent the police from fulfilling their common law and statutory duties. To impose a requirement for urgency and restricting the purposes for which the search may be conducted would "effectively gut"[177] the important law enforcement objectives served by promptly investigating a domestic violence crime scene.

C. The plain view seizure was lawful

99. In conducting the visual search of the basement, Officer Vandervelde observed the Tupperware container and baggie sitting in the open in plain view. He did not have to move anything or open any doors. Through the transparent packaging, it was obvious what he saw – it was methamphetamine, a substance that looked like shards of broken glass.[178] His seizure was justified under both the statutory[179] and common law plain view doctrine. The appellant does not address this issue in his factum.

100. The common law plain view doctrine has 4 elements: (i) the officer must be lawfully in the place where the search is being conducted ("lawfully positioned," in the language of the authorities); (ii) the nature of the evidence must be immediately apparent as constituting a criminal offence; (iii) the evidence must have been discovered inadvertently; (iv) the plain view doctrine confers a seizure power not a search power; it is limited to those items that are visible and does not permit an exploratory search to find other evidence of other crimes.[180]

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[176] *R v Fearon*, 2014 SCC 77 at para 68.
[177] *R v Fearon*, 2014 SCC 77 at para 70.
[178] Testimony of Jesse Vandervelde at p 213, ll 7-10 [AR, Vol II, Tab 27, p 217].
[179] *Criminal Code*, RSC 1985, c C-46, s 489(2).
[180] *R v Jones*, 2011 ONCA 632 at para 56; but see *R v Gill*, 2019 BCCA 260, where the Court suggests that the framework may be more nuanced.

101. Provided the police were lawfully permitted to search the living room incident to arrest, the trial judge's conclusion that requirements of the plain view seizure doctrine were met is amply supported by the evidence and should not be disturbed.[181]

D. Assuming a *Charter violation*, the evidence should not be excluded under s. 24(2)

102. The focus of the *R v Grant* three-part analysis[182] is the broad impact of admission of the evidence on the long-term repute of the justice system. As this Court held in *R v Grant*, "[s]ection 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns."[183] Applying this societal lens to the analysis, the appellant has failed to meet his burden and the evidence should not be excluded.

a) The Charter-infringing state conduct was not serious

103. This factor favours admission. *Charter*-infringing conduct is situated on a spectrum. This is because "[s]tate conduct resulting in *Charter* violations varies in seriousness."[184] The alleged breaches in this case are on the less serious end of that spectrum. The police acted honestly and reasonably based on their belief of the scope of their power to search incident to arrest at that time.

104. Where the police have relied in good faith on the state of the law as it stands at the time regarding a search power, a subsequent finding of invalidity will not render that evidence inadmissible.[185] Although the law surrounding search incident to arrest is settled, its application in

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[181] In *R v Godoy*, this Court noted in *obiter dictum*, "I specifically refrain from pronouncing on whether an entry in response to a 911 call affects the applicability of the "plain view" doctrine as it is not in issue on the facts of this case:" *R v Godoy*, [1999] 1 SCR 311 at para 22. However, in this case the police had effected a lawful arrest and were searching incident to that arrest. Accordingly, the issue that this Court flagged in *obiter* in *Godoy* does not arise and need not be addressed.

[182] *R v Grant*, 2009 SCC 32 at para 71.
[183] *R v Grant*, 2009 SCC 32 at para 70.
[184] *R v Grant*, 2009 SCC 32 at para 74.
[185] *R v Simmons*, [1988] 2 SCR 495 at 534-535; *R v Colarusso*, [1994] 1 SCR 20 at 76-77; *R v Kokesch*, [1990] 3 SCR 3 at 23.

the context of an arrest inside a residence appears to be a case of first instance for this Court. This uncertainty in the law attenuates the seriousness of the breach.[186]

105. Additionally, the conduct of the officers in relation to what they reasonably believed was lawful authority to search the living room demonstrates good faith and respect for *Charter* limits. Their conduct was progressive, measured, and entirely responsive to the circumstances in which they found themselves. It was no more intrusive than necessary to be satisfied that the police and the public were safe. It cannot be said that their conduct was part of a pattern of abuse or indifference, systemic or otherwise, towards *Charter* rights.

106. This is supported by the findings of the trial judge which are, of course, entitled to deference:[187]

> With respect to the seriousness of the *Charter*-infringing conduct, I find that the officers acted in good faith. The situation was dynamic, uncertain, and potentially dangerous once officers were inside the residence. Prior to entering the residence, the officers tried knocking on the doors first. Brown looked in the backyard. They did not use a dynamic entry. They entered an unlocked door and immediately called out and identified themselves. Brown and Vandervelde did not break down the laundry room door. They gave Mr. Stairs an opportunity to come out. The officers had weapons drawn but did not use them. Vandervelde looked around the area of the basement where Mr. Stairs and Ms. Manriquez had come from. There was no evidence of a blatant or callous disregard of the *Charter* rights by any of the three officers.[188]

107. This case may be contrasted with *R v Harrison*, where the majority described the departure from well-known *Charter* standards as "major in degree."[189]

b) The impact on the Charter-protected interests was mitigated

108. As is often the case, this factor favours exclusion because the breach would relate to the unlawful search of a residence where there is a high expectation of privacy. However, not all searches of a residence are equal in impact. In this case, the impact of the breach was mitigated by

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[186] *R v Vu*, 2013 SCC 60 at para 71.
[187] *R v Buchanan*, 2020 ONCA 245 at paras 50-54.
[188] *R v Stairs*, 2018 ONSC 3747 at para 292 [AR, Vol I, Tab 1, p 71].
[189] *R v Harrison*, 2009 SCC 34 at para 24.

the minimally intrusive nature of the search – a brief, visual search of the basement living room. In these circumstances, as in *R v Fearon*,[190] this factor favours exclusion, but only weakly.

c) The societal interest in the adjudication of the case on its merits is high

109. This factor favours admission. As the trial judge noted, the methamphetamine seized is essential to the prosecution case. Possession for the purpose of trafficking over 90 grams of methamphetamine is a serious crime. The evidence is reliable. There is a significant interest in an adjudication on the merits.

Balancing all three factors, the evidence should be admitted. Although the appellant's *Charter*-protected interests would be impacted, the police conduct falls at the less serious end of the spectrum, and the exclusion of reliable evidence would deprive society of a trial on the merits in a serious case.

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[190] *R v Fearon*, 2014 SCC 77 at para 96.

PART IV – COSTS

110. In accordance with the usual practice in criminal cases, no costs should be ordered.

PART V – ORDER REQUESTED

111. This Court should dismiss the appeal.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

112. 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 Ottawa, Ontario, the 25th day of May 2021.

Mark Covan
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Her Majesty the Queen

Diana Lumba
Counsel for the Respondent
Her Majesty the Queen

PART VII – TABLE OF AUTHORITIES